Modern Discrimination Theory and the National Labor Relations Act

Rebecca Hanner White
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INTRODUCTION

On-the-job discrimination is prohibited, on various grounds, by an ever increasing number of federal laws. The National Labor Relations Act (NLRA),¹ however, which protects employees’ rights to form, join, and assist unions, to collectively bargain with their employers, to engage in other forms of concerted activity for mutual aid or protection, and to refrain from all or any of these activities, pioneered the way.² The NLRA makes it unlawful for an employer to encourage or discourage union membership by discrimination.³ It also prohibits interference, restraint, or coercion by employers,⁴ which the United States Supreme Court tells us occurs when an employer “discriminates” against concerted activity.⁵

For forty years, the Court studied the question of employment discrimination almost exclusively through the lens of the NLRA.

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3. “It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” Id. § 158(a)(3).
4. See id. § 158(a) (“It shall be an unfair labor practice for an employer . . . (1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title.”).
It struggled with the proper role that antiunion motive or animus should play in resolving disputes under the statute and with when and how to balance employees' statutory rights against an employer's interest in managing his business.  

In the mid-1960s, things changed. Congress enacted Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment because of an employee's race, color, religion, sex, or national origin. In the thirty years since the enactment of Title VII, the Supreme Court has honed the meaning of unlawful discrimination primarily under that statute.

Today, for many lawyers, and certainly for most judges, federal employment discrimination cases comprise the bulk of "labor" cases handled, with NLRA cases a relatively small part of the employment law workload. The labor bar's and the judiciary's


9. At the Supreme Court level, for example, the Court decided only six NLRA cases in the first five years of the 1990s. See James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 961-65 (1986) (describing the decline in the Supreme Court's NLRA caseload as the Court directed its attention to Title VII and its progeny). In the years between 1970 and 1989, however, federal employment discrimination cases increased 2166%, as compared to an increase of 125% in the general civil caseload. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 985 (1991).
increased—if not frequently greater—familiarity with employment discrimination doctrine would seem to make inevitable some importation into the NLRA of the discrimination concepts developed under Title VII. After all, both statutes wrestle with how to protect employees' statutory rights, while at the same time permitting employers the managerial freedom necessary to run their businesses.

What is surprising is when this borrowing has, and has not, occurred. Although the courts have not adopted a fully unified analytical model of prohibited discrimination under these statutes, they have, at times, considered discrimination under the NLRA in distinctly Title VII-like terms. This trend has occurred most recently in cases arising under section 8(a)(1) of the NLRA. The lower courts in these recent cases have refused to find unfair labor practices to exist absent disparate treatment of union activity.

At the same time, questions of group-based discrimination under section 8(a)(3) of the NLRA continue to be resolved under the animus-based analysis developed by the Supreme Court in the 1950s and 1960s. This is so even though several of the Court's section 8(a)(3) decisions today may be seen as a primitive groping toward disparate impact analysis, a theory that finds discrimination actionable in the absence of unlawful motive. This theory of discrimination, adopted by the Court under

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10. See Brudney, supra note 9, at 947, 1023-35 (suggesting the preoccupation of the federal courts with individual rights statutes has made them less attuned to the collective rights values of the NLRA).

11. See, e.g., Cleveland Real Estate Partners v. NLRB, 95 F.3d 457 (6th Cir. 1996); Riesbeck Food Mkt., Inc. v. NLRB, Nos. 95-1766, 95-1917, 1996 WL 405224, at *1 (4th Cir. July 19, 1996); Guardian Indus. Corp. v. NLRB, 49 F.3d 317 (7th Cir. 1995); see also infra notes 78-93 and accompanying text (discussing this line of cases); cf. Lucile Salter Packard Children's Hosp. v. NLRB, 97 F.3d 583 (D.C. Cir. 1996) (enforcing a Board finding that employer enforced its ban on nonemployee solicitation in a discriminatory manner).

12. See cases cited supra note 11.

13. See, e.g., Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983); Diamond Walnut Growers, Inc. v. NLRB, 80 F.3d 485 (D.C. Cir. 1996), reh'g en banc and vacated, 88 F.3d 1064 (D.C. Cir. 1996) and reh'g en banc 113 F.3d 1259 (D.C. Cir. 1997); Eads Transfer, Inc. v. NLRB, 989 F.2d 373 (9th Cir. 1993).

Title VII in its 1971 decision in Griggs v. Duke Power,\textsuperscript{15} has not yet made its way fully into section 8(a)(3).\textsuperscript{16}

This Article explores the concept of discrimination under the NLRA.\textsuperscript{17} Specifically, it examines discrimination under that statute through the lens of Title VII, an approach that brings a fresh perspective to doctrine long considered settled. The purpose of this comparison is to explore the extent to which Title VII's discrimination concepts make sense under the NLRA. This analysis focuses on three specific areas.

First, it examines discrimination cases under section 8(a)(1), concluding that the lower courts are wrong to apply Title VII concepts and to insist that without disparate treatment of union activities, no unlawful discrimination has occurred. Title VII contains no exact counterpart to section 8(a)(1). Judicial insistence that discrimination under that section fit within Title VII's disparate treatment or disparate impact paradigms reflects an inadequate understanding of the role section 8(a)(1) plays in the NLRA's statutory scheme.

Second, the article contrasts the "animus" requirement of section 8(a)(3) with unlawful motive under Title VII. The two are

\textsuperscript{15} 401 U.S. 424 (1971). In Griggs, the Court held that an employer violated Title VII by requiring successful job applicants to have a high school diploma and/or a passing score on a standardized test when the employer could not prove that either requirement was job related and when both requirements screened out a disproportionately large number of black applicants. Despite the absence of a discriminatory purpose for adopting the requirements, the Court found a Title VII violation. \textit{See id.} at 432.

\textsuperscript{16} \textit{See infra Part IV.B} (discussing the \textit{Erie Resistor/Great Dane} line of cases that assess the degree of impact an employer's discrimination may have on concerted activity in determining a violation of the statute). The Court viewed this impact as evidencing unlawful motive but not as an alternative theory of unlawful discrimination. \textit{See id.}

\textsuperscript{17} "Discrimination," as used in this Article, refers not only to disparate treatment between workers exercising statutorily protected rights and those who do not, but also to a difference in the treatment of a particular worker, as compared to how that worker otherwise would have been treated, based on his exercise of statutorily-protected rights. \textit{See} Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); Edward G. Budd Mfg. Co. v. NLRB, 138 F.2d 86 (3d Cir. 1943); \textit{see also} Getman, \textit{supra} note 6, at 737 (analyzing \textit{Republic}'s definition of discrimination); Benjamin M. Shieber, \textit{Section 8(a)(3) of the National Labor Relations Act; A Rationale: Part I. Discrimination}, 29 LA. L. REV. 46, 56-76 (1968) (discussing congressional, Board, and judicial definitions of discrimination).
not synonymous. Frequently, employment decisions overtly based on union activities are not considered unlawfully motivated under the NLRA, even though employment decisions premised on race or gender rarely will be lawful under Title VII. The NLRA's language and structure, however, require its distinctive approach to animus, an approach inconsistent with the wording and the purposes of Title VII.

Third, the article considers "systemic" claims of discrimination under section 8(a)(3)—those involving an employer's structural decisions and its use of economic weapons. In this area, borrowing from Title VII would be useful, although it has not as yet occurred. When no animus is present, these cases should be considered under disparate impact doctrine. Indeed, the Court's section 8(a)(3) jurisprudence, a confusing and immature amalgam of treatment and impact theory, could be discarded and profitably replaced by Title VII's analytical structure.

The objective of this Article is to provide a theoretical framework for thinking about discrimination concepts under the NLRA in a way that recognizes the inevitable influence of Title VII doctrine. In lieu of the hit-or-miss borrowing from Title VII that occurs today, this Article offers a blueprint for developing a more unified and analytically coherent approach to unlawful discrimination under the NLRA.

I. DISCRIMINATION CONCEPTS AND THE NATIONAL LABOR RELATIONS ACT

For this Article's purposes, two sections of the NLRA are important. Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce his employees in the exercise of their rights under the statute.\(^18\) As explained below, discrimination against concerted activity can violate section 8(a)(1).\(^19\)

Questions of discrimination, however, arise most frequently under section 8(a)(3) of the NLRA.\(^20\) That section makes it an

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19. See infra notes 50-71 and accompanying text.
20. The most frequently filed charges under the NLRA are those alleging violations of section 8(a)(3). See 59 NLRB ANN. REP. 92 (1994) (reporting that over 50%
unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Accordingly, for a section 8(a)(3) violation to exist, there must be not only discrimination, but that discrimination must also encourage or discourage union activities. The Supreme Court has found an additional requirement in the statute: the discrimination must be for the purpose of encouraging or discouraging union activities.

The Court's analytical approach to discrimination questions under section 8(a)(1) varies from its approach under section 8(a)(3). Additionally, the Court has determined that some employer discrimination may be challenged only under section 8(a)(3), with that section's antiunion motive requirement. The


22. See id.; NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 32 (1967) (holding that section 8(a)(3) "requires specifically that the Board find a discrimination and a resulting discouragement of union membership").
23. See NLRB v. Brown, 380 U.S. 278, 286 (1965) ("The discriminatory act is not by itself unlawful unless intended to prejudice the employees' position because of their membership in the union; some element of antiunion animus is necessary."); Radio Officers' Union v. NLRB, 347 U.S. 17, 43 (1954) (finding employer's "real motive" is decisive under section 8(a)(3)); Christensen & Svanoe, supra note 6, at 1315 ("[T]he Supreme Court, contrary to the original legislative design, has established motive as the ostensibly controlling element of the violation.").
24. See infra notes 50-71, 162-220, and accompanying text.
25. See Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 269 (1965) ("Whatever may be the limits of § 8(a)(1), some employer decisions are so peculiarly matters of management prerogative that they would never constitute violations of § 8(a)(1), whether or not they involved sound business judgment, unless they also violated § 8(a)(3)."; see also American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316-17 (1965) (finding that the NLRB lacks the power under section 8(a)(1) to balance economic weapons).
distinctions between the two statutory sections and the analytical model the Court has adopted for each are explored below.

II. INTERFERENCE, RESTRAINT, OR COERCION: THE PROHIBITIONS OF SECTION 8(a)(1)

When an employer commits an unfair labor practice under any section of the NLRA, that misconduct also violates section 8(a)(1) derivatively because an unfair labor practice will interfere with, restrain, or coerce employees in the exercise of their section 7 rights. Sometimes, however, employer conduct will independently violate section 8(a)(1) without regard to whether any other section of the Act has been violated. The discussion of section 8(a)(1) that follows addresses these independent violations.

Section 8(a)(1) has its primary influence at the organizational stage. Perhaps this is so because it is at this stage of the union-employer relationship that employees are most vulnerable. For the statute's protections to be meaningful, unionization activities must be protected against even well-intentioned employer conduct that chills protected acts.

26. See Oberer, supra note 6, at 493-94. As Professor Oberer points out, relying on Darlington and American Ship Building, section 8(a)(1) has no force in these overlap cases; otherwise the more particular prohibitions would be rendered irrelevant. See id. at 492-502.

27. Professor Oberer colorfully describes this distinction as a "dog and tail" approach to section 8(a)(1): an independent section 8(a)(1) is a dog; a section 8(a)(1) that derives from the violation of some other prohibition of section 8(a) is merely a tail. See Oberer, supra note 6, at 500-01. Professor Oberer cautions that in these derivative cases, no section 8(a)(1) violation will exist unless the employer violates the more specific prohibition so as to avoid the tail wagging the dog. See id.


29. See Oberer, supra note 6, at 498-500.

30. See infra notes 109-38 and accompanying text.
counterbalance to the employer's power, and section 8(a)(1)'s protections are less needed.\(^3\)

Alternatively, it could be that section 8(a)(1)'s rather limited role is explained better by the Court's reluctance to intrude too deeply into either managerial prerogatives or economic warfare.\(^2\) Because the Court has viewed section 8(a)(1) as permitting a candid weighing of the employer's need to act,\(^3\) extending that approach to the full range of employment or bargaining decisions would give the National Labor Relations Board (the Board) and the courts unprecedented control over the employment relationship.

A. The Section 8(a)(1) Balancing Test

In deciding whether employer conduct has violated section 8(a)(1), the Court employs a balancing test.\(^4\) The Court weighs the effect of the conduct on employees' section 7 rights against the employer's legitimate interests in engaging in the conduct.

For example, in Republic Aviation Corp. v. NLRB,\(^5\) the Court held that an employer's rule prohibiting solicitation by employees during nonwork time violated section 8(a)(1).\(^6\) The Court found that banning solicitation at the workplace, a place "uniquely appropriate" for such activity,\(^7\) would dilute the section 7 right seriously.\(^8\) Permitting solicitation during nonwork

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31. See Oberer, supra note 6, at 499 ("Once the employees are organized, the right to bargain collectively does not require the same degree of affirmative protection."); see also Barron, supra note 28, at 465 (asserting that the NLRA, as construed by the Court, protects opportunity rights, not outcome rights).


33. See infra notes 34-49 and accompanying text.


35. 324 U.S. 793 (1945).

36. See id. at 805.

37. See id. at 801 n.6 (quoting with approval Republic Aviation Corp., 51 N.L.R.B. 1186, 1195 (1943)); see also NLRB v. Magnavox Co., 415 U.S. 322, 325 (1974) ("The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees.").

38. As described by the Court in Magnavox Co., 415 U.S. at 325, in which the Court upheld the Board's determination that an employer's ban on workplace distribution of literature violated section 8(a)(1):
time, moreover, would not impinge seriously on the employer's managerial interests in maintaining production and discipline. Although "working time is for work" and a rule banning solicitation by employees during working time is thus presumptively lawful, the balance tips the other way when nonwork time is at issue.

When "nonemployee union organizers," as opposed to employees, engage in solicitation or distribution on private property, the Court has employed a balancing test under section 8(a)(1) but has placed different interests on the scales. Weighed against the employees' interest in receiving organizational information from others is the employer's property right to exclude "outsiders" from its premises. Only if no reasonable alternative means of communication exist may access for solicitation or distribution by outsiders be ordered.

The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees. So long as the distribution is by employees to employees and so long as the in-plant solicitation is on nonworking time, banning of that solicitation might seriously dilute § 7 rights.

Id.

39. See Republic Aviation, 324 U.S. at 803 n.10 (quoting Peyton Packing Co., 49 N.L.R.B. 828, 843-44 (1943)).

40. See id.

41. The Court coined this term in NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 106 (1956), and later applied it in Lechmere, Inc. v. NLRB, 502 U.S. 527, 529 (1992), to distinguish the employees of the Babcock & Wilcox Company from the union representatives seeking to organize them. Those union representatives, however, would themselves seem to be statutory employees of the union under section 2(3) of the NLRA. See NLRB v. Town & Country Elec., Inc., 116 S. Ct. 450, 455-56 (1995); JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 61-62 (1983); Cynthia L. Estlund, Labor, Property, and Sovereignty After Lechmere, 46 STAN. L. REV. 305, 326-30 (1994). The Court failed to confront the statutory definition of employee in either Babcock & Wilcox or Lechmere.

42. In both Lechmere and Babcock & Wilcox, the Court recognized that employees' "right of self-organization depends in some measure on [their] ability . . . to learn the advantages of self-organization from others." Lechmere, 502 U.S. at 532 (quoting Babcock & Wilcox, 351 U.S. at 113). The Court stated that section 7 applies to the nonemployee union organizers "only derivatively." Lechmere, 502 U.S. at 533.

43. See Lechmere, 502 U.S. at 537-38; Babcock & Wilcox 351 U.S. at 112. In Babcock & Wilcox and in Lechmere, the Court balanced the employer's property right to exclude trespassers, rather than the employer's need to maintain production and discipline. See Lechmere, 502 U.S. at 537-38; Babcock & Wilcox, 351 U.S. at 112.

44. In Lechmere, the Court construed Babcock & Wilcox to hold such reasonable
Similarly, in regulating employer speech during organizational campaigns, the Court in *NLRB v. Gissel Packing Co.* balanced the employees' right to decide on unionization free from the coercive influence of the employer against the employer's right to express its views freely on the union. An employer may predict adverse consequences of unionization, but it may do so only if those predictions are based on objective facts and convey a belief as to demonstrably probable consequences beyond the employer's control. These limits on employer speech, said the Court, are necessary to safeguard employee free choice, given the employer's economic power over its employees. Nor, said the Court, may an employer grant benefits during an organizational campaign unless it can demonstrate a business purpose for its timing that outweighs the coercive effect of the "fist inside the velvet glove."

alternative means exist unless "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them." *Lechmere*, 502 U.S. at 539 (quoting *Babcock & Wilcox*, 351 U.S. at 113). The Court in *Lechmere*, moreover, read *Babcock & Wilcox* as holding that no balancing of section 7 rights against property rights may occur unless it can be demonstrated that access is infeasible. See id. at 540. This broad reading of *Babcock & Wilcox*, a reading at odds with the Board's interpretation and application of that case, has been criticized heavily. See Estlund, supra note 41 (arguing against a broad interpretation of *Lechmere*); Robert A. Gorman, *Union Access to Private Property: A Critical Assessment of Lechmere, Inc. v. NLRB*, 9 HOFSTRA LAB. L.J. 1 (1991); Rebecca Hanner White, *The Stare Decisis "Exception" to the Chevron Deference Rule*, 44 FLA. L. REV. 723, 762-65 (1992).


46. Both the First Amendment to the U.S. Constitution and section 8(c) of the NLRA recognize an employer's right to provide his employees with his noncoercive views, arguments, and opinions about unionization. See U.S. CONST. amend. I; 29 U.S.C. § 158(c) (1994); *Gissel Packing*, 395 U.S. at 616-20; NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 477 (1941).


48. *See id.* at 617.


The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

B. Discrimination and Section 8(a)(1)

In Republic Aviation, the employer violated section 8(a)(1) despite the employer's evenhanded application of its no solicitation rules to union and nonunion activity alike. Moreover, it was uncontested that the employer had adopted the rule long before union activity began and for reasons that had nothing to do with union activity. The Court, however, was not persuaded by the absence of "anti-union animus" for the rule's adoption. Republic Aviation thus established that neither disparate treatment nor antiunion motive is necessary for a violation of section 8(a)(1).

The Court, over the years, has adhered to this approach. For example, an employer's "sincere belief" concerning the consequences of unionization will not entitle him to confide those beliefs to his employees, unless the Gissel Packing safeguards are satisfied. Nor is the lawful purpose of influencing voters sufficient to permit a promise of benefits to the electorate.

Although neither animus nor disparate application is a requisite for a section 8(a)(1) violation, their presence can render otherwise lawful conduct unlawful. In NLRB v. Babcock & Wilcox Co., the Court stated that applying an otherwise valid no-distribution rule in a discriminatory manner can violate section 8(a)(1). The Board consistently has interpreted this lan-

50. See Republic Aviation Corp. v. NLRB, 324 U.S. 793, 805 (1945).
51. See id.
52. Id.
53. The decision has been so understood by the Court. See Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 269 (1965); NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 23 (1964); Oberer, supra note 6, at 497.
55. See NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964). At first glance, Exchange Parts, with its focus on whether the employer's purpose was to influence the election, looks like an unlawful motive case, in the sense that the grant or promise will be unlawful if granted for the purpose of influencing the election. Careful reflection, however, reveals otherwise. After all, a purpose to influence the election is not, of itself, improper. See 29 U.S.C. § 158(c) (1994). What Exchange Parts teaches is that the lawful purpose of influencing the election is insufficient to outweigh the coercive impact of a well-timed promise or grant of benefits. Other purposes, however, such as an established past practice, may outweigh the timing's coercive effect. See Exchange Parts, 375 U.S. at 410.
56. 351 U.S. 105, 112 (1956); see also Sears, Roebuck & Co. v. San Diego County
guage in Babcock & Wilcox to mean that an employer will violate section 8(a)(1) if it bans solicitation by union organizers while permitting solicitation by other outsiders.67

The foundation for the Babcock & Wilcox Court's "discrimination" avenue to liability under section 8(a)(1) has never been explained fully. It could be that "discrimination" violates section 8(a)(1) because it reveals the hidden animus motivating an otherwise lawful rule.58 Alternatively, it could be, as the Board has concluded, that banning union solicitation or distribution while permitting other forms of solicitation violates the statute regardless of whether that discrimination reflects a forbidden motive for the rule's adoption.59

Dist. Council of Carpenters, 436 U.S. 180, 205 (1978) ("[T]he union has the burden of showing that . . . the employer's access rules discriminate against union solicitation."); NLRB v. Stowe Spinning Co., 336 U.S. 226, 232-33 (1949) (finding a section 8(a)(1) violation when the employer allowed others to use hall but not union); Estlund, supra note 41, at 322 ("[T]he Board has indeed ordered nonemployee access to employer property in several cases because of the employer's discriminatory exclusion practices.").

57. The Board, however, has found that an employer may permit isolated "beneficent acts" without running afoul of section 8(a)(1). For example, permitting solicitation on behalf of the United Way will not, of itself, require the employer to permit solicitation on behalf of the union. See Hammary Mfg. Corp., 265 N.L.R.B. 57, 57 (1982), vacating in part 258 N.L.R.B. 1319 (1981). Moreover, solicitation for purposes directly related to the employer's business, such as a blood drive by a hospital, will not be viewed as a discriminatory application when union solicitation is prohibited. See Rochester Gen. Hosp., 234 N.L.R.B. 253, 259 (1978). Absent these narrow exceptions, however, the Board considers permitting solicitation or distribution for purposes other than the union, while denying it for the union, a section 8(a)(1) violation. See NLRB v. Methodist Hosp., 733 F.2d 43, 45-46 (7th Cir. 1984); Union Carbide Corp. v. NLRB, 714 F.2d 657, 663-64 (6th Cir. 1983); Hammary Mfg., 265 N.L.R.B. at 59 (Jenkins, Member, dissenting) (listing cases in which the courts and the Board held that a section 8(a)(1) violation occurred when an exception to the no solicitation rule was made for various worthy causes).


59. See Guardian Indus. Corp. v. NLRB, 49 F.3d 317, 318-19 (7th Cir. 1995) (overturning a Board decision that held that forbidding union notices on "swap-n-shop" board constituted a section 8(1)(a) violation); Riesbeck Food Mkts. Inc., 315 N.L.R.B. 940, 941 (1994), rev'd, 91 F.3d 132 (4th Cir. 1996) (overturning Board finding that allowing charitable organizations to solicit on premises while excluding the union was impermissible); Honeywell, Inc., 262 N.L.R.B. 1402, 1403 (1982), aff'd, 722 F.2d 405 (8th Cir. 1983) (refusing to allow union notices on a bulletin board used for nonemployment purposes was impermissible).
Properly understood, the discrimination approach to section 8(a)(1) does not include an animus requirement. The disparate application of a no-solicitation policy does not violate section 8(a)(1) because a prohibited motive caused the disparate application. It violates section 8(a)(1) because it weakens the employer's asserted justification for the rule. Under a section 8(a)(1) balancing approach, an employer that permits solicitation by employees during working time for nonunion activities is hard-pressed to stand on its managerial interests in production and discipline when the working time solicitation is on behalf of the union.

Treating the discrimination element as part of the balancing process, rather than as evidence of a necessary animus requirement, can matter in many cases. Certainly, if the employer prohibits union solicitation because of animus toward the union, that action would violate section 8(a)(1), as well as section 8(a)(3). An employer scarcely could expect the Board or a reviewing court to find that its animus toward the union outweighs the impact that animus has on section 7 rights. Employer discrimination, moreover, can be powerful evidence of the prohibited animus and, in that sense, is relevant.

Employer discrimination without animus still would violate section 8(a)(1) in most cases, although it would not violate section 8(a)(3). An employer that permits employee solicitation for the Little League, the Girl Scouts, and the PTA but that prohibits employee solicitation for the union may have adopted and applied its rule out of a desire to aid kid-friendly fund drives, not

60. See Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724, 729 (5th Cir. 1970).
61. See Hammary Mfg., 265 N.L.R.B. at 57 n.4; Montgomery Ward & Co., 202 N.L.R.B. 978, 980 (1973); Cox, supra note 58, at 172 (acknowledging this as the generally accepted explanation for rule).
62. See Hammary Mfg., 265 N.L.R.B. at 59 n.4; Montgomery Ward, 202 N.L.R.B. at 980. As noted by the Eighth Circuit, an employer's decision to allow other workplace solicitation "minimize[s] its managerial concerns." Honeywell, 722 F.2d at 407.
63. See Oberer, supra note 6, at 493-94.
64. In other words, disparate application can suggest the "real reason" for the prohibition is not production and discipline, raising the inference that the real reason was the prohibited one of antiunion animus. See Radio Officers' Union v. NLRB, 347 U.S. 17, 43 (1954).
out of animus toward the union. An employer, however, that tolerates these solicitations on working time should expect his claim that "working time is for work" to be given short shrift in the balancing process.65

When the court weighs the employer's property rights, as in Babcock & Wilcox, the discrimination wing of section 8(a)(1) analysis becomes more troublesome. The employer's property right to exclude outsiders includes a right to decide which outsiders may enter private property and for what purposes.66 A property owner, for example, could decide for legitimate business reasons not to permit solicitation or distribution by any outside group urging a product boycott, while otherwise allowing solicitation and distribution. So long as it applied its rule to dolphin lovers urging consumers not to purchase tuna or fashion mavens boycotting polyester, the employer could contend that it is not discriminating against the union when it bans union representatives urging a consumer boycott; rather it is exercising its property right to determine how its premises may be used by strangers.67 Yet, the Board has held,68 and the Supreme Court has suggested strongly, that this rule would violate section 8(a)(1).69

This result cannot be explained on animus grounds. It can be explained by a ranking of property rights that views the employer's property right to determine what forms of solicitation may take place on its property as a weaker property right than

65. See Hammary Mfg., 265 N.L.R.B. at 59 n.4; Montgomery Ward, 202 N.L.R.B. at 980.
66. See Estlund, supra note 41, at 322 n.111.

As Professor Estlund notes, "court[s] interpreting Lechmere as supporting expansive property rights might apply the discrimination exception only to employers that regularly permit advocacy groups or other potentially controversial speakers to solicit support on their property, thus making the exception narrow indeed and of limited use to unions." Estlund, supra note 41, at 322 n.112. Professor Estlund's prediction has proven true. See infra notes 78-90 and accompanying text.
68. See Riesbeck Food Mkts., 315 N.L.R.B. at 943.
the right to exclude outsiders from soliciting or distributing on its property. The Court has recognized that not all property rights, or section 7 rights, are of equal strength.\(^7\) When balanced against section 7 rights,\(^7\) this property right to control the content of solicitation is found wanting, and for that reason, as explored below, the "discriminatory" application of the rule constitutes a violation of section 8(a)(1).

### III. COMPARING SECTION 8(a)(1) DISCRIMINATION WITH TITLE VII'S DISCRIMINATION THEORIES

The Supreme Court's *Lechmere, Inc. v. NLRB\(^7\)* decision has moved the discrimination wing of section 8(a)(1) to center stage. Under *Lechmere*, unions rarely will be granted access to private property, unless the employer's denial of access is discriminatory.\(^7\) Discrimination, accordingly, has become the focal point in many of these access cases.

As explored below, lower courts have borrowed improperly from Title VII in analyzing these claims. By insisting that section 8(a)(1) discrimination claims follow Title VII's disparate treatment paradigm, these courts have failed to appreciate important

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71. Some lower courts have questioned whether section 7 even protects a union's handbilling of consumers. See Cleveland Real Estate Partners v. NLRB, 95 F.3d 457, 463-64 (6th Cir. 1996); United Food and Commercial Workers, Local No. 880 v. NLRB, 74 F.3d 292, 295 (D.C. Cir.), cert. denied, 117 S. Ct. 52 (1996); see also Riesbeck Food Mkts., 91 F.3d at 132 (refusing enforcement of a Board ruling to allow union distribution of materials). These courts reason that *Lechmere's* distinction between "employees" and "nonemployee union organizers" forecloses the union from asserting a section 7 right. As the Board and other courts have recognized, however, section 7 protects this direct exercise of concerted activity that is not based derivatively on the interests of the employer's employees but instead on the handbillers' own interests as employees. See O'Neill's Mkts. v. United Food and Commercial Workers' Union, Meatcutters Local 88, 95 F.3d 733, 737 (8th Cir. 1996); Metropolitan Dist. Council v. NLRB, 68 F.3d 71, 74-75 (3d. Cir. 1995); Galleria Joint Venture, 317 N.L.R.B. 1147, 1149 (1995); Leslie Homes, Inc., 316 N.L.R.B. 123, 127-28 (1995); see also Estlund, supra note 41, at 350-51. Although it has not addressed the issue squarely, the Supreme Court's decisions implicitly recognize the presence of a protected interest. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 583-84 (1988); Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 205 (1978).


73. See id. at 533-34.
distinctions between the statutes, distinctions that sometimes mandate preferential treatment for concerted activities.

A. Section 8(a)(1) Discrimination and Disparate Treatment Theory

The approach to discrimination under section 8(a)(1), as described above, varies from the classic disparate treatment analysis employed under Title VII. Disparate treatment, the Supreme Court tells us, is:

the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.74

For a claim of disparate treatment to exist, the court must find intentional discrimination. This intent to discriminate is present when an employer makes an employment decision because of the employee's race or sex, whether any hatred, animus, or ill will exists.75

Suppose an African American employee claimed his employer violated Title VII when it refused to allow him to engage in workplace solicitation on behalf of his softball team while permitting workplace solicitation by white co-workers on behalf of the Little League, the Girl Scouts, and the PTA. The employer's explanation, if credited, that it permitted solicitation for children's activities but not for others would suffice to dispose of the Title VII claim.76 This racially neutral basis for the rule's application makes it lawful.77

76. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 508-09 (1993). Indeed, if the plaintiff is unable to convince the factfinder that the real reason for the denial was a racially discriminatory one, the employer will succeed even if the fact finder rejects the employer's explanation. See id. at 509-10.
77. See id. Of course, Title VII protects employees, not outside organizations favored by employees. See 42 U.S.C. § 2000e-2(a)(1) (1994). Unless the employee can prove that the employer denied him the right to solicit because he was black, he
Recently, several circuits mistakenly have imported Title VII's disparate treatment approach into section 8(a)(1). For example, in **Guardian Industries Corp. v. NLRB**, an employer that had permitted employees to post "swap and shop" notices on an employee bulletin board had forbidden the posting of union meeting announcements. The Board found the employer had violated section 8(a)(1), but the Seventh Circuit refused to enforce the Board's order. Borrowing concepts of discrimination developed outside the NLRA context, the court found no disparate treatment because union meeting announcements were not comparable to the "for sale" notices permitted by the employer. Because the rule could be explained on a "union neutral" basis—the employer permitted the posting of for sale notices but not meeting announcements—the court found no antiunion animus and thus no section 8(a)(1) violation.

Similarly, the Fourth and Sixth Circuits have rejected the Board's conclusion that an employer violates section 8(a)(1) when it bans union handbillers from its premises while permitting solicitation and distribution by civic and charitable organizations. In **Riesbeck Food Markets, Inc. v. NLRB**, the Fourth Circuit found no unfair labor practice when the employer prohibited union handbilling, despite the property owner's toleration of "significant amounts of charitable solicitation[]." Discrimination claims, said the Fourth Circuit, "inherently require a finding that the employer treated similar conduct differently." Finding that the charitable groups, unlike the union, did not promote a consumer boycott and further finding the employer would have

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78. 49 F.3d 317 (7th Cir. 1995).
79. See id. at 318.
80. See id. at 319.
81. See id. at 318-21. As the court stated: "A person making a claim of discrimination must identify another case that has been treated differently and explain why that case is 'the same' in the respects the law deems relevant or permissible as grounds of action." Id. at 319.
82. See id. at 319 (finding no evidence that the employer designed the policy to undermine unions).
84. Id. at *2.
85. Id. at *3 (quoting NLRB v. Southern Md. Hosp. Ctr., 916 F.2d 932, 937 (4th Cir. 1990) (per curiam)).
prohibited any consumer boycott, the Fourth Circuit found no "discrimination" and thus no section 8(a)(1) violation.\(^8\)

The Sixth Circuit in *Cleveland Real Estate Partners v. NLRB*\(^8\) went a step further. Rejecting the Board's interpretation of *Babcock & Wilcox's* "discrimination" language,\(^8\) the appellate court interpreted "discrimination" to reach only the "favoring [of] one union over another, or allowing employer-related information while barring similar union-related information."\(^8\) Permitting Girl Scout cookie sales and school fund drives while outlawing union solicitation was thus not discriminatory in the eyes of the court.\(^9\)

This application of disparate treatment analysis by the Fourth, Sixth, and Seventh Circuits, although wrong, is understandable. The lower courts routinely review disparate treatment claims under Title VII, section 1981, section 1983, and the Age Discrimination in Employment Act (ADEA).\(^9\) Questions of discrimination under section 8(a)(1) appear far less frequently before the appellate courts. As the court in *Cleveland Real Estate Partners* noted, it had "found no published court of appeals

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86. See id. at *3-*4 (finding "legally significant differences between the charitable solicitation which Riesbeck allowed and the union's 'do not patronize' solicitation which Riesbeck prohibited" and further finding "no evidence suggesting that Riesbeck was attempting to target union literature for special adverse treatment.").

87. 95 F.3d 457 (6th Cir. 1996).

88. See id. at 464-65. The Sixth Circuit found the Board's interpretation of *Babcock & Wilcox* deserving of no deference. See id. at 462. As I have argued elsewhere, this is erroneous. Because the Supreme Court's opinions construing the NLRA, in essence, become a part of the statute, the agency's interpretations of ambiguous language in those opinions deserves deference under the rationale of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). See White, supra note 44, at 758.

89. *Cleveland Real Estate Partners*, 95 F.3d at 465. The court neglected to recognize that an employer's favoring of "employer-related information" has been found protected by the Court. See *NLRB v. United Steel Workers*, 357 U.S. 357, 363 (1958). An employer itself may engage in solicitation and distribution against the union on working time without becoming obligated to give the union equal time or access. See id. Thus, an example relied upon by the Sixth Circuit as evidencing prohibited discrimination is one the Supreme Court has recognized expressly as permitted, given the NLRA's protection of the employer's right to voice its views, arguments, and opinions. See 29 U.S.C. § 158(c) (1994).

90. See *Cleveland Real Estate Partners*, 95 F.3d at 465.

91. See Brudney, supra note 9, at 1026-27 (noting federal courts increased familiarity with the individual rights model of employment discrimination statutes).
cases addressing the significance of 'discrimination' in this context." It thus is not surprising that these courts would draw on their understanding of disparate treatment theory in defining discrimination under section 8(a)(1).

Yet, these courts are incorrect in so doing. Disparate treatment theory is founded on an intent to discriminate, with disparate application of a neutral rule evidencing the forbidden motive. Although these courts may be right when they asserted that the discrimination by Guardian Industries, Reisbeck, and Cleveland Real Estate Partners did not reflect an antiunion motive because the union handbilling was not similar in kind to the solicitations permitted, section 8(a)(1) does not require animus for a violation. The question instead is one of balancing employee rights against employer interests. An employer that has opened a channel of communication within the workplace for some purposes has a more difficult time explaining how using that channel for organizational activity adversely affects its managerial or property interests. In such a case, the balance tips in favor of the employees' section 7 right to communicate, not because of animus but because the employer—by his own acts—has shown that the employer's interests being balanced are less weighty.

92. Cleveland Real Estate Partners, 95 F.3d at 465.

93. As the Seventh Circuit observed in Guardian Industries, "[l]abor law is only one of the many bodies of federal doctrine implementing an antidiscrimination principle. . . . The Board asks us to accept an understanding of 'discrimination' that has been considered, and found wanting, in every other part of the law that employs that word." Guardian Indus. Corp. v. NLRB, 49 F.3d 317, 319-20 (7th Cir. 1995).

Earlier commentators feared that section 8(a)(3)'s motive analysis would work its way, improperly, into section 8(a)(1). See Getman, supra note 6, at 760-61; Oberer, supra note 6, at 497. Although a motive analysis is creeping into section 8(a)(1), its source appears to be outside the NLRA. As Professor Brudney has observed generally, appellate courts are "altering settled meaning" of the NLRA to conform the NLRA to employment discrimination theory. See Brudney, supra note 9, at 1032-35.


Moreover, to permit an employer to avoid a section 8(a)(1) violation so long as it bans only "union-like" activities is to countenance the chilling effect section 8(a)(1) seeks to avoid. The impact of these more narrowly drawn bans often falls more heavily on protected activity. After all, although the employer in Reisbeck professed its intent to ban all consumer boycotts, in fact the only such boycotters to appear were union representatives.\textsuperscript{97} Although the ban hypothetically affected others, in reality it banned the union.\textsuperscript{98} In that sense, the ban was discriminatory in its effect. The discriminatory impact of a rule that permits much solicitation but forbids that which encompasses union activity is properly viewed as the interference section 8(a)(1) is designed to guard against.

\textbf{B. Section 8(a)(1) Discrimination and Disparate Impact Theory}

Because the the impact of a neutral rule on union activities may be viewed as unlawful interference under section 8(a)(1), section 8(a)(1) balancing at times has been likened to Title VII’s disparate impact analysis.\textsuperscript{99} Disparate impact claims “involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive... is not required under a disparate-impact theory.”\textsuperscript{100} Disparate impact theory recognizes the harms of even nonpurposeful discrimination.\textsuperscript{101}

Important similarities exist between disparate impact analysis and section 8(a)(1). Significantly, neither disparate impact nor section 8(a)(1) balancing requires animus or an intent to discrimi-


\textsuperscript{98} See id. at *2-*3.

\textsuperscript{99} See, e.g., Guardian Indus. Corp. v. NLRB, 49 F.3d 317, 320 (7th Cir. 1995) (recognizing the "disproportionate effect" of a rule on union activity could violate section 8(a)(1) but finding the Board had not concluded any such effect existed and that the Board had relied on a "disparate treatment," not an impact, theory).

\textsuperscript{100} International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977) (citation omitted).

\textsuperscript{101} See Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) ("Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.").
As explained above, "innocent" employer action may undermine statutorily protected rights and thus may be viewed as "discriminatory." An adverse impact or effect on the protected right constitutes the harm, even assuming the absence of an employer's intent to achieve the harm.

At the same time, important differences exist between section 8(a)(1) analysis and disparate impact theory. Under section 8(a)(1), the Board may presume the impact or effect of a facially neutral policy; it need not be proven, as it must under Title VII. This is an important distinction between the two approaches because a disproportionate effect of a neutral rule on union activities may sometimes be difficult to show.

Moreover, section 8(a)(1) openly permits a balancing of the respective interests at issue, something disparate impact analysis does not encompass. Although it is unlikely that a section 8(a)(1) violation would be found when a practice is job-related for the position in question and consistent with business necessity,

102. See supra notes 50-53 and accompanying text.

103. See Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 (1945). In a sense, the major controversy before the Court in Republic Aviation was the Board's ability to presume interference without any showing that interference in fact had occurred. See id. at 798-99, 803; see also NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 23 (1964) (holding that employer's conduct "would or might" have a deterrent effect and thus was a section 8(a)(1) violation).


105. This is particularly true under section 8(a)(1), in which rules that apply across the board to numerous persons or situations are frequently at issue. See Burnup & Sims, 379 U.S. at 23; Republic Aviation, 324 U.S. at 804-05. For example, the employer in Republic Aviation presumably could have shown numerous prior applications of its rule to nonunion solicitation, and thus a disproportionate effect on union activity was likely not provable. The Board nonetheless could presume the existence of an adverse effect, whether that impact was disparate or disproportionate. See Republic Aviation, 324 U.S. at 804-05.

In section 8(a)(3) cases, in contrast, a disproportionate effect should be required in cases using a disparate impact approach, as advocated herein. In those cases, however, the action being challenged often is facially discriminatory, not facially neutral. See infra notes 269-73 and accompanying text.

106. Under Title VII, once an employee proves an employment practice has a disparate impact, an employer may prevail by showing the challenged practice is "job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). A court does not balance the degree of impact against the employer's need for the practice but simply determines whether each party made the required showing. See id. § 2000e-2(k).
that is so only because such strong business reasons are likely to outweigh a rule's coercive effects. Ultimately, however, it is the Board that must strike the balance.\footnote{107} The employer does not automatically prevail merely by proving such reasons exist.\footnote{108}

Discrimination claims under section 8(a)(1) thus may have disparate impact overtones, but they are not disparate impact claims. Instead, they are more akin to claims requiring an employer to reasonably accommodate his employees' statutory rights, as explored in the following section.

C. Section 8(a)(1) and Accommodation Theory

The approach advocated above for section 8(a)(1) discrimination claims gives unionization activity favored status in the workplace, a result courts have been reluctant to accept. But favored status for union-related conduct should not be surprising under a statute that affirmatively protects concerted activities.\footnote{109} An employer must grant employees solicitation rights on behalf of the union during nonwork time,\footnote{110} even if it denies such rights to solicitation on behalf of the local Little League. Organizational activity is protected by federal law;\footnote{111} Little League candy sales are not.

This result admittedly is at odds with traditional disparate treatment analysis under Title VII. An employer is under no obligation (and ordinarily is not permitted) to treat minorities more favorably than it treats similarly situated nonminority co-workers.\footnote{112} The courts' resistance to preferential treatment of organizational activities under section 8(a)(1) follows Title VII's disparate treatment approach.

\footnote{107} See supra notes 34-49 and accompanying text.
Section 8(a)(1), however, is not a disparate treatment statute, as *Republic Aviation* teaches. Instead, it is a statute that often requires an employer to treat union activity more favorably than similar, but unprotected, conduct. *NLRB v. Burnup & Sims*, a 1964 Supreme Court decision that fits somewhat awkwardly with the Court's section 8(a)(3) decisions, also usefully demonstrates this point.

In *Burnup & Sims*, an employer fired two employees, active in the organization of their co-workers, out of a good faith but mistaken belief that they had made dynamiting threats during the organizing process. The Court found the discharges to violate section 8(a)(1), despite the absence of an antiunion motive. Generally speaking, an employer may fire workers on the basis of a good faith but mistaken belief of wrongdoing. When the allegations arise out of protected activity, however, the Court found that the need to immunize section 7 rights outweighed any employer interest in upholding the discipline.

This preferential approach to concerted activity under section 8(a)(1), although at odds with classic disparate treatment analysis, does have parallels in other areas of employment discrimination law. For example, in cases alleging retaliation under Title VII or similar statutes, lower courts have refused to permit an employer to take adverse action against an employee in re-

114. See infra note 161 (discussing section 8(a)(3) and *Burnup & Sims*).
115. See *Burnup & Sims*, 379 U.S. at 21-22.
116. See id. at 23.
117. Under the employment-at-will doctrine, the common law backdrop against which the NLRA operates, an employer can fire an employee for a good reason, a bad reason, or even a morally wrong reason. See *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 519-20 (1884). The NLRA worked a change in the at-will doctrine by limiting the employer's right of termination. The Court addressed whether the NLRA abridged the employer's termination right on the facts presented in *Burnup & Sims*. See *Burnup & Sims*, 379 U.S. at 22-24.
118. As the Court stated:
   
   Union activity often engenders strong emotions and gives rise to active rumors. A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith. It is the tendency of those discharges to weaken or destroy the § 8(a)(1) right that is controlling.

sponse to protected conduct, even in the absence of animus.\textsuperscript{120} Balancing the need to protect the conduct against the employer's legitimate, good faith reasons for acting results in a rule that often favors the protected conduct.\textsuperscript{121}

Similarly, an employer has a duty under Title VII to reasonably accommodate its employees' religious practices and beliefs,\textsuperscript{122} and the Americans with Disabilities Act (ADA) requires an employer to reasonably accommodate qualified individuals with disabilities.\textsuperscript{123} Both of these statutes essentially require an employer to treat a protected employee better than it treats similarly situated co-workers.\textsuperscript{124} An employer, for example, may fire an employee for wearing a baseball cap to work but must reasonably accommodate an employee wearing a yarmulke, unless that accommodation would pose an undue hardship.\textsuperscript{125} An employer may fire a non-disabled employee for her inability to perform a nonessential job function but not her disabled co-worker who cannot perform the function because of a disability.\textsuperscript{126}

\textsuperscript{120} See EEOC v. Board of Governors, 957 F.2d 424, 430-31 (7th Cir. 1992); Armstrong v. Index Journal Co., 647 F.2d 441 (4th Cir. 1981); Barela v. United Nuclear Corp., 462 F.2d 149 (10th Cir. 1972); Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969).

\textsuperscript{121} But this is not always the case. See O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 763 (9th Cir. 1994); Smith v. Texas Dep't of Water Resources, 818 F.2d 363 (5th Cir. 1987); Jeffries v. Harris County Community Action Ass'n, 615 F.2d 1025 (5th Cir. 1980). Although these courts applied a balancing test, they found the employers' interests of greater weight.

\textsuperscript{122} See § 701(j), 42 U.S.C. § 2000e(j).

\textsuperscript{123} See 42 U.S.C. § 12,112.

\textsuperscript{124} See id.; § 701(j).

\textsuperscript{125} See EEOC v. Arlington Transit Mix, Inc., 957 F.2d 219 (6th Cir. 1991) (requiring accommodation of employee's religious beliefs); United States v. Board of Educ., 911 F.2d 882 (3d Cir. 1990) (permitting teacher to wear religious garb posed undue hardship); EEOC v. Ithaca Indus., Inc., 849 F.2d 116 (4th Cir. 1988) (finding that an employee's refusal to work on the Sabbath was not beyond reasonable accommodation); EEOC v. Townley Eng'g & Mfg., 859 F.2d 610 (9th Cir. 1988) (allowing an employee to be excused from mandatory devotions).

\textsuperscript{126} See Buckingham v. United States, 998 F.2d 735 (9th Cir. 1993) (finding that a requested transfer of an AIDS victim was reasonable); McWright v. Alexander, 982 F.2d 222 (7th Cir. 1992) (holding that the failure to grant childcare for infertile adoptive mother was unreasonable); Arneson v. Sullivan, 946 F.2d 90 (8th Cir. 1991) (requiring that an employee with apraxia must be accommodated by a less distracting environment); Johnson v. Sullivan, 824 F. Supp. 1146 (D. Md. 1991), rev'd on other grounds, 991 F.2d 126 (4th Cir. 1993) (qualifying disabled employee's request for flexible schedule as reasonable). But see Daugherty v. City of El Paso, 56 F.3d
The requirement of reasonable accommodation involves balancing the employee's statutory rights against the employer's legitimate interests in maintaining production and discipline without undue hardship.\(^{127}\) In that respect, reasonable accommodation is similar to the Board's and the Court's section 8(a)(1) analysis.

The concept of reasonable accommodation, like section 8(a)(1)'s balancing approach, recognizes that a prohibition against disparate treatment sometimes is insufficient protection for statutory rights. It was for this reason that the Court in *Republic Aviation* and in *Burnup & Sims* found employers to have acted unlawfully, even though they had not treated union activity less favorably than other similar conduct. Preferential treatment, the Court recognized, is sometimes what section 8(a)(1) requires.\(^{128}\) If courts considering questions of discrimination under section 8(a)(1) look to employment discrimination statutes for guidance, as some inevitably will, it is accommodation analysis, not the intent-laden approach of disparate treatment or the proof of adverse effect approach of disparate impact, that better conforms to the policies underlying section 8(a)(1).

Confronting a question left open by the Supreme Court in its 1995 term can assist in understanding the application of this analysis of section 8(a)(1). In *NLRB v. Town & Country Electric, Inc.*\(^ {129}\), the Court held that a paid union organizer seeking employment for organizational purposes is a statutory employ-

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695 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1263 (1996); (holding that no duty exists to treat a disabled employee more favorably); *Harris v. Polk County*, 103 F.3d 696, 697 (8th Cir. 1995) (standing for the same proposition).

127. Although both Title VII and the ADA use identical language, it is clear that the terms "reasonable accommodation" and "undue hardship" have different meanings under the statutes. The employer's duty of reasonable accommodation under Title VII is relatively light, as construed by the Court in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). In contrast, Congress envisioned something more demanding under the ADA. *See* 42 U.S.C. § 12,111(9), (10) (1994) (defining terms).

This discussion does not propose that section 8(a)(1) balancing imposes a burden on employers that is precisely equivalent to the duty of reasonable accommodation required by Title VII or the ADA. Instead, the point is to rebut the notion raised by the Court in *Guardian Industries* that preferential treatment for protected activities or status is unique to the NLRA. *See Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 318-19 (7th Cir. 1995).


The Court did not resolve, however, whether an employer that declines to hire or who fires the "salt" under a neutral policy prohibiting moonlighting violates the statute.\textsuperscript{131}

Under section 8(a)(1), the Board must balance the section 7 interest at issue, the right to organize one's co-workers, against the employer's managerial interests in production and discipline.\textsuperscript{132} That the employer adopted its "no moonlighting" rule without a thought to union organizing and has applied it to persons with part-time employment unrelated to a union will not be, standing alone, enough to save the rule when applied to a "salt."\textsuperscript{133} The Board could conclude the presumptive harm to organizational efforts posed by such a rule outweighs employer interests in a well-rested workforce free from the demands of other employers, or it could conclude the contrary. The point is that this balancing process, not a search for unlawful motive, should drive the section 8(a)(1) analysis.\textsuperscript{134} And if the rule is unlawful under section 8(a)(1), it will have the result of forcing the employer to permit moonlighting by "salts," even though employees working part-time at Burger King could still be denied employment.

Suppose, moreover, that an employer applied its "no moonlighting" rule only to employment by "advocacy organizations," permitting outside employment at McDonald's, Wal-Mart, and Burger King but precluding employment by the union. Absent special circumstances, the Board would find such a rule unlawful. The traditional justifications for banning moonlighting, justifications the Board might otherwise accept, would be undercut strongly by allowing some moonlighting to occur. That the rule precluded outside employment by Common Cause, the La Leche League, or the John Birch Society may be enough to show that

\textsuperscript{130} See id. at 453-54.
\textsuperscript{131} See id. at 457.
\textsuperscript{132} See supra notes 34-49 and accompanying text.
\textsuperscript{133} See supra notes 50-55 and accompanying text. But see Architectural Glass & Metal Co., Inc. v. NLRB, 107 F.3d 426, 432-33 (6th Cir. 1997) (applying disparate treatment analysis to uphold such a rule).
\textsuperscript{134} Of course, a finding of a purpose to restrict union activity, evidenced by disparate application of a rule or the timing of its adoption, would violate the statute. See Tualatin Elec., Inc., 319 N.L.R.B. 1237, 1237 (1995).
animus did not motivate the rule, but the absence of animus is not a justification for the policy. Absent an explanation for the narrowly drawn rule sufficient to outweigh its impact on section 7 rights, the rule would be unlawful.

It is perhaps this balancing aspect of section 8(a)(1) that has led to its relatively limited role under the NLRA. The Court could have adopted an approach to the statute that engaged in this balancing across the spectrum of unfair labor practice charges but did not. In a trio of cases decided on March 29, 1965, after the passage of the Civil Rights Act of 1964 but before it became effective, the Court took section 8(a)(1) out of the picture in cases involving either the use of economic weapons or decisions "peculiarly matters of management prerogative." In such cases, an unfair labor practice may be found only if the employer's action was "discriminatorily motivated." Those cases, therefore, are analyzed not under section 8(a)(1), with its balancing approach, but under section 8(a)(3), with its motivation inquiry.

IV. DISCRIMINATION, DISCOURAGEMENT, AND MOTIVE: THE ELEMENTS OF SECTION 8(a)(3)

The clear majority of section 8(a)(3) cases involve allegations that an employer disciplined or discharged an employee because of the employee's union activities. Typically, the employer

135. See supra notes 52-55 and accompanying text.
136. See generally Christensen & Svane, supra note 6, at 1329 (arguing that the weighing process is at the heart of "non-motive discrimination cases"); Getman, supra note 6, at 735 (advocating a balancing approach to section 8(a)(3)).
139. See Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984) (holding that an employer committed an unfair labor practice by reporting illegal alien employees to the Immigration and Naturalization Service in retaliation for union activities); NLRB v. Transportation Management Corp., 462 U.S. 393, 404 (1983) (holding that an unlawful discharge occurred when an employer departed from its usual practice of not disciplining employees when a union employee violated a workplace rule); Asarco, Inc. v. NLRB, 86 F.3d 1401, 1409-11 (5th Cir. 1996) (upholding employer's discharge of a
denies the employee's protected conduct played any role in the disciplinary action. In such cases, the question becomes one of motive: why did the employer do what it did? In some cases, the employer acts for multiple reasons, one of which the law prohibits, and the question then is whether the employer would have taken the action regardless of the employee's union activities. These disciplinary cases closely resemble individual disparate treatment claims under Title VII.

In other cases, an employer takes action that will affect employees as a group, either in response to unionization, the costs associated therewith, or as an economic weapon. If antiunion

union president after the union president threw water-filled sandwich bags at fellow employees); Harper Collins San Francisco v. NLRB, 79 F.3d 1324 (2d Cir. 1996) (finding that an employer discriminated against a union organizer by reassigning him to a smaller work area); Getman, supra note 6, at 743.

See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46 (1937) (holding that discipline or discharge violates section 8(a)(3) if unlawfully motivated); Getman, supra note 6, at 743.

The burdens of production and proof for individual disparate treatment claims under section 8(a)(3) and Title VII should be similar, and, in large part, they are. See Southwest Merchandising Corp. v. NLRB, 53 F.3d 1334, 1340 (D.C. Cir. 1995).

It is uncertain whether the NLRB will embrace the reasoning of St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), in which the Supreme Court held that the determination that the employer's articulated reason was pretextual did not compel a finding of unlawful discrimination. See id. at 509-11. The Board should embrace Hicks. As Professor Michael Zimmer has noted, the Court has applied a "uniform structure of [individual disparate treatment discrimination] law, . . . disregarding the statutory source of any particular case." Michael J. Zimmer, The Emerging Uniform Structure of Disparate Treatment Litigation, 30 GA. L. REV. 563, 622 (1996). The ultimate question in these cases—whether an unlawful motive exists—is the same, and a parallel proof scheme should govern.

Similarly, the Board should embrace Title VII's proof scheme for mixed motive cases. See § 703(m), 42 U.S.C. § 2000e-2(m) (1994) (overruling Price Waterhouse). The Supreme Court in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983), recognized the Board's authority to adopt such an approach. See id. at 400-01. As Board Chairman William Gould has advocated, the Board should follow Congress's lead. See Paper Mart, 319 N.L.R.B. 9, 10 (1995).

See infra notes 145-220 and accompanying text (discussing section 8(a)(3) analysis in these cases); Getman, supra note 6, at 743-44 (recognizing that two lines of
animus motivates the decision, then the action will violate section 8(a)(3); otherwise it is lawful, even when it is facially discriminatory. 144

In the following section, this article explores the development of discrimination and motive analysis under section 8(a)(3). It then contrasts that analysis with Title VII doctrine. Based on that comparison, the article offers recommendations for a new approach to section 8(a)(3).

A. Section 8(a)(3) and Individual Disparate Treatment

When an employer fires an employee because of his union activities, that action violates section 8(a)(3). 145 The discharge of a union activist for reasons having nothing to do with his protected conduct, however, does not violate the NLRA, regardless of the impact the discharge may have on concerted activities. 146

Were section 8(a)(1) to apply, no motive analysis would be necessary. Instead, the Board simply would balance the effect of the termination on employees' protected activities against the employer's business reasons for the termination. 147 For example, discharging a "Norma Rae," the most visible and vocal union supporter, undeniably would chill other employees' interest in supporting the union. 148 If her employer credibly testified that it fired Norma Rae not for her union activities but for wearing green, a silly but not unlawful reason for firing someone, the Board would weigh that business reason for the termination against the impact on protected conduct.

section 8(a)(3) cases exist but contending that improper motive is a requisite element only for individual disparate treatment claims). Professor Getman's article preceded the Court's 1964 term, in which the Court insisted that animus is always an element for a section 8(a)(3) violation. See infra notes 182-95 and accompanying text.


146. See American Ship Bldg., 380 U.S. at 311.

147. See supra notes 34-49 and accompanying text (describing this balancing process).

148. See American Ship Bldg., 380 U.S. at 311; Getman, supra note 6, at 735 (noting effect on participation in union activities).
Such cases, however, are analyzed under section 8(a)(3), not under section 8(a)(1). Additionally, section 8(a)(3), according to the Supreme Court, requires a finding of antiunion motive for its violation.149

The Court's first NLRA case, *NLRB v. Jones & Laughlin Steel Corp.*,150 established this principle. The NLRA, stated the Court, "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them."151 An employer's act violates the NLRA only when the "true purpose" for the act is to intimidate or coerce employees with respect to their section 7 rights.152

This result, while consistent with, is not commanded by the statute's wording. Section 8(a)(3) prohibits discrimination to encourage or to discourage union activity.153 As noted elsewhere, this language could be read to prohibit discrimination that has the effect of encouraging or discouraging protected conduct, regardless of whether the employer intended that effect.154 But at least in the context of disciplinary decisions, the Court's reading was in keeping with the statute's legislative history and with the Board's understanding of section 8(a)(3).155

Until 1965, however, the Court never attempted to explain why section 8(a)(1) balancing could not also apply to discharge decisions, regardless of whether a section 8(a)(3) violation was pres-

149. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937).
150. Id.
151. Id. at 45.
152. See id. at 46.
154. See Christensen & Svanoe, *supra* note 6, at 1273. As those authors explain: "Briefly, the statutory language may be interpreted as requiring (a) an effect of encouragement or discouragement; (b) an intention to achieve that effect; (c) both effect and intent; or (d) either effect or intent." Id.; see Chester C. Ward, "Discrimination Under the National Labor Relations Act," 48 YALE L.J. 1152, 1156 (1939); Comment, Discrimination and the NLRB: The Scope of Board Power Under Sections 8(a)(3) and 8(b)(2), 32 U. CHI. L. REV. 124, 129 (1964-65).
ent. In Textile Workers Union v. Darlington,\(^{156}\) an employer closed a textile mill because its employees voted for the union.\(^{167}\) The union contended the closing should be analyzed under section 8(a)(1), balancing the coercive effect of the action against the employer’s business reasons for closing the plant.\(^{155}\) The Supreme Court disagreed. Section 8(a)(1), noted the Court, “presupposes an act which is unlawful even absent a discriminatory motive. Whatever may be the limits of § 8(a)(1), some employer decisions are so peculiarly matters of management prerogative that they would never constitute violations of § 8(a)(1), whether or not they involved sound business judgment, unless they also violated § 8(a)(3).”\(^{159}\) Regardless of how great the impact on concerted activities, no violation occurs unless such actions are “discriminatorily motivated.”\(^{160}\)

*Jones & Laughlin* and *Darlington*, read together, explain that hiring, firing, and other disciplinary decisions, along with decisions such as plant closings, are “peculiarly matters of management prerogative” that generally are not amenable to section 8(a)(1) balancing.\(^{161}\) The question instead is one of discriminatory motive.

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156. 380 U.S. 263 (1965).
158. See *Darlington*, 380 U.S. at 269.
159. Id. The Board agreed that section 8(a)(1) was not violated by the employer’s action. See id. at 266-65.
160. See id. at 269. But see Benjamin M. Shieber & Shelby H. Moore, Jr., *Section 8(a)(3) of the National Labor Relations Act: A Rationale — Part II*, 33 LA. L. REV. 1, 18 (1972-73) (contending the Court actually employed a balancing test in *Darlington* and concluded that the right to go out of business outweighed an impact on section 7 rights).
161. How, then, does one explain *Burnup & Sims*, in which a discharge violated section 8(a)(1)? Some have argued that *Darlington* undercut *Burnup & Sims*, but that is incorrect. See Oberer, * supra* note 6, at 500, 509. In *Burnup & Sims*, the discharge admittedly arose out of protected concerted activity; there was no need to determine why the employer had fired the workers. See Shieber & Moore, * supra* note 160, at 40, 50. Similarly, were an employer to fire an employee for outside employment as a union organizer, a section 8(a)(1) violation may exist, without inquiry into the issue of animus. Protection of organizational activities may require preferential treatment under section 8(a)(1). See * supra* notes 109-38 and accompanying text.

On the other hand, when an employer denies basing its decision on the protected conduct, an inquiry into motive must be made to ensure the employer’s managerial prerogatives are not infringed. That is the message of *Darlington*, a message that likely was intended to limit the reach of *Burnup & Sims*, particularly in light
B. Section 8(a)(3) and Systemic Claims

Systemic claims under section 8(a)(3) involve conduct that overtly discriminates between employees based on concerted activity. These claims typically come in one of two forms. Either they involve the employer's use of an economic weapon, such as conduct taken against bargaining unit employees in order to achieve employer aims in the bargaining process, or they involve entrepreneurial changes, such as subcontracting, relocations, or plant closings in which the employees' unionization, or the costs associated therewith, prompted the employer action.

Prior to 1965, the Court waffled on the question of whether motive was an indispensable ingredient for a section 8(a)(3) systemic charge. In Radio Officers' Union v. NLRB, the Court did not require specific evidence of an intent to encourage or discourage union membership but said a finding that such an intent existed was essential for a section 8(a)(3) charge. The Court further stated that when an employer's discriminatory conduct "inherently encourages or discourages union member-

of Congress's passage of Title VII. See Summers, supra note 157, at 67. In other words, section 8(a)(3) preserves the employer's right to make hiring or firing decisions that may be irrational or that may deter organizational activities, but section 8(a)(1) precludes the employer from basing its hiring and firing decisions on the organizational activities unless the employer's business justifications outweigh the impact on concerted activity. Finally, when an employer acts on the basis of protected conduct and the decisionmaker concludes it was for the purpose of discouraging union activity, that violates section 8(a)(3).

162. See Duross, supra note 155, at 1117; Getman, supra note 6, at 743-44. These claims also involve decisions not amenable to balancing under section 8(a)(1). See American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311 (1965); NLRB v. Brown, 380 U.S. 278, 286 (1965); Darlington, 390 U.S. at 269.


165. For an excellent discussion of these cases, see Christensen & Svanoe, supra note 6, at 1276-300.

166. See id. at 43-44 (1954).
ship, the discrimination alone satisfies the intent requirement. Employers, said the Court, may be presumed to intend the natural and foreseeable consequences of their conduct. The statutorily required unlawful motive would be presumed upon proof of discriminatory conduct resulting in a strong impact on unionization.

Three years later, the Court appeared to retreat from this approach. In *NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linen)*, the Court upheld the Board's determination that a temporary defensive lockout by nonstruck employers in a multiemployer bargaining unit was permissible. Although the conduct was facially discriminatory and would adversely impact the union, it was lawful, absent "independent evidence of antiunion motivation." The ultimate problem in such cases, said the Court, "is the balancing of conflicting legitimate interests," a task Congress committed to the Board. The Court thus deferred to the Board's conclusion that the balance should be struck in favor of the employers. The Court in *Buffalo Linen* seemed to move away from a motive analysis to a balancing test, akin to that employed under section 8(a)(1).

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168. *Id.* at 45.
169. *See id.*
170. As the Court explained:
Both the Board and the courts have recognized that proof of certain types of discrimination satisfies the intent requirement. This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct. Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage is sufficiently established.

*Id.* (citations omitted).

It is unclear from *Radio Officers*, however, whether such proof was conclusive or merely sufficient.
172. *See id.* at 95-97.
173. *Id.* at 91 (citations omitted).
174. *Id.* at 96.
NLRB v. Erie Resistor Corp., 175 decided six years later in 1963, appeared to confirm this shift. In Erie Resistor, the employer’s response to a strike was to offer strike replacements and crossovers twenty years of “super-seniority.” 176 The trial examiner found that the employer offered the extra seniority credit for legitimate business reasons: the employer needed to offer superseniority in order to attract replacements and withstand the strike. 177 The Board found the conduct to violate section 8(a)(3), and the Court agreed. 178

Although acknowledging that unlawful motive is an ingredient of a section 8(a)(3) claim, the Court held that

preferring one motive to another is in reality the far more delicate task, reflected in part in decisions of this Court, of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer’s conduct. 179

That balancing process, said the Court, was for the Board to perform. 180

Erie Resistor thus established the following method for resolving systemic claims under section 8(a)(3): Once an employer makes a distinction between employees, based upon their engaging (or refraining from engaging) in union activity, the Board may find the discrimination unlawful if it determines the impact on unionization outweighs the employer’s need to take the action. This open balancing of interests was quite similar to the approach earlier developed under section 8(a)(1). The Court in Erie Resister rendered motive essentially irrelevant in these systemic claims. 181

175. 373 U.S. 221 (1963).
176. See id. at 222.
177. See id. at 224-25.
178. See id. at 226-27.
179. Id. at 228-29.
180. See id. at 236.
181. See Christensen & Svanoe, supra note 6, at 1300, 1325 (asserting that real basis of judgment is a weighing of conflicting interests); Getman, supra note 6, at 750 (praising Erie Resister for subordinating a motive inquiry to a balancing pro-
In 1965, however, the Court rejected *Erie Resistor*’s approach. A violation of section 8(a)(3), said the Court, depends upon a finding of unlawful motive. That motive is one that involves a discriminatory purpose “designed to frustrate organizational efforts, to destroy or undermine bargaining representation, or to evade the duty to bargain.” Such a motive involves a decision “to chill unionism,” “motivated more by spite against the union than by business reasons,” or in other words, motivated by “hostility” or “reprisal.” Employer action that forseeably will discourage concerted activity does not violate section 8(a)(3) unless it is “aimed at achieving the prohibited effect.” Moreover, the Board may not use a balancing process as a substitute for this motive analysis. “[A]ctual subjective intent is determinative.”

The Court squelched any notion that the Board could engage openly in balancing under section 8(a)(3) in *American Ship Building Co. v. NLRB* and *NLRB v. Brown,* both cases in which the Board had found an employer's lockout activity to violate section 8(a)(3). The Court distinguished *Erie Resistor* as a case in which the “employer’s conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer’s protestations of innocent purpose.” Thus, as construed by the Court in 1965, *Erie Resistor* was a motive case. Although the Court deemed a motive to exert economic pressure or to settle a strike on favorable terms to be a lawful purpose, it was appropriate for the Board in *Erie Resistor* to believe the employer's true motivation was “hostility” toward the union because of the destructive impact the conduct would have on union member-

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184. *Id.* at 275.
185. *Id.* at 272.
187. *Darlington,* 380 U.S. at 276; *see Brown,* 380 U.S. at 286. (“[T]he added element of unlawful intent is also required.”).
189. 380 U.S. 300 (1965).
190. 380 U.S. 278.
ship. The Court declared this “animus,” not the adverse impact of the discriminatory action, to be the gravamen of section 8(a)(3).

By rejecting a balancing approach and insisting that hostility toward the union be found before employer action to support its bargaining position be outlawed, the Court in American Ship Building effectively denied section 8(a)(1) any independent role in economic weapon cases. The Court viewed use of economic weapons, as it had viewed plant closings and discipline and discharge decisions, as “peculiarly matters of management prerogative” that are lawful “unless discriminatorily motivated.” Section 8(a)(3), not section 8(a)(1), would govern resolution of these cases.

Section 8(a)(3) analysis was in a state of confusion after 1965. The tension between Erie Resistor, which permitted the Board to determine “motive” by balancing the impact of an employer’s discriminatory act against its need to take that action, and American Ship Building, Brown, and Darlington, which expressly denied the Board that power, was confronted by the Court three years later in NLRB v. Great Dane Trailers, Inc.

192. See id.
193. See Christensen & Svanoe, supra note 6, at 1299-314 (discussing and critiquing the Court's analysis of Erie Resistor in American Ship Building, Brown, and Darlington).
194. See American Ship Bldg., 380 U.S. at 310; see also NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960) (holding that the Board was not empowered to balance economic weapons).
195. In other words, the Court recognized discrimination against unionized employees as a legitimate economic weapon. See American Ship Bldg., 380 U.S. at 312. The distinction, as explained by the Board, is between an intent to support a bargaining position and one hostile to the bargaining process. See International Paper Co., 319 N.L.R.B. 1253, 1275 (1995); Samuel Estreicher, Strikers and Replacements, 3 LAB. L. 897, 898-99 (1987).
In *Great Dane*, the Court attempted to resolve when a section 8(a)(3) violation could be established without specific proof of antiunion motivation by the employer. In that case, the employer awarded accrued vacation pay only to employees working on a particular day during an economic strike. The employer did not introduce any evidence of a lawful business purpose for the act, but neither was any evidence of antiunion hostility introduced by the General Counsel of the Board. The Court began by repeating what it had explained numerous times before: section 8(a)(3) requires both "a discrimination and a resulting discouragement of union membership." The Court found "discrimination in its simplest form" between strikers and nonstrikers. It further acknowledged the discrimination "was capable of discouraging membership in a labor organization within the meaning of the statute." The question, as stated by the Court, was whether the discrimination was aimed at achieving that discouragement.

In describing how that improper purpose could be established, the Court attempted to reconcile *Erie Resistor* and *American Ship Building* by creating two categories of cases. Discriminatory conduct that is "inherently destructive" can violate section 8(a)(3) without further proof of unlawful motive. The Board may infer motive from the conduct and its foreseeable consequences, even when the employer comes forward with evidence of lawful motivation. The Board viewed *Erie Resistor* as exemplifying such conduct. If, however, the adverse effect of the

200. See id. at 27.
201. See id. at 31.
202. Id. at 32.
203. Id. Strictly speaking, however, the employer's conduct was not facially discriminatory. The employer denied pay to all persons not working on a particular day during the strike. See id. at 27. Presumably, this would have penalized not only strikers but others absent for reasons not connected with the strike. Nonetheless, all strikers would be penalized by the rule, so its discriminatory impact was obvious.
204. Id. at 32.
205. "The statutory language 'discrimination . . . to . . . discourage' means that the finding of a violation normally turns on whether the discriminatory conduct was motivated by an antiunion purpose." *Great Dane*, 388 U.S. at 33 (emphasis added) (quoting 29 U.S.C. § 158(a)(3)).
206. See id. at 34.
207. See id. at 33.
discriminatory conduct is only "comparatively slight," then there must be independent proof of antiunion motive if the employer presents evidence of "legitimate and substantial business justifications for the conduct." The discrimination and its adverse effect on union membership alone will not be sufficient. American Ship Building was placed into this category of cases. The Great Dane test continues to guide section 8(a)(3) analysis today in systemic discrimination cases. When faced with discriminatory conduct capable of encouraging or discouraging union membership, the Board must determine whether that conduct is inherently destructive or instead is comparatively slight. The Court has not explained how the Board is to make that determination without engaging in the forbidden balancing process. In a very real sense, this power to categorize and to weigh the employer's justification gives the Board the kind of balancing power the Court purported so adamantly to withhold.

The classification of conduct as inherently destructive or comparatively slight moreover, frequently determines the outcome. Rarely will conduct deemed inherently destructive be found

208. Id. at 34.
209. See id.
211. In making this determination, the Board looks at the following factors: severity of harm to section 7 rights; whether the impact of the conduct is temporal; hostility to the collective bargaining process; and whether the conduct would make bargaining seem futile. See International Paper Co., 319 N.L.R.B. at 1269-70; see also Barbara J. Fick, Inherently Discriminatory Conduct Revisited: Do We Know It When We See It? 8 HOFSTRA LAB. L.J. 275 (1990-91) (tracing the development of the "inherently destructive" doctrine).
212. Additionally, once the Board classifies the conduct as inherently destructive, Great Dane directs the Board to weigh the employer's business justifications against the harm to employee rights. See Great Dane, 388 U.S. at 33. The Board has followed this approach. See International Paper, 319 N.L.R.B. at 1267.
But how is this determination made? As Professor Summers noted, the harm to employees in Brown, for example, is comparatively slight "only because the Court says it is so," leaving unclear when and how these determinations are to be made. Summers, supra note 157, at 71-72. He observed that the cases involve balancing economic weapons, despite the Court's claims to the contrary. See id.
213. See Christensen & Svanoe, supra note 6, at 1321.
lawful, even in the face of an employer's proof that legitimate justifications motivated its conduct. Yet, when the adverse effect of discriminatory conduct is comparatively slight, the employer, more often than not, is exonerated by presenting evidence of legitimate and substantial reasons for its openly discriminatory conduct.

When the effects of discriminatory conduct are comparatively slight, disagreement exists over whether the employer's burden of proving legitimate and substantial business reasons is one of production or of persuasion. However, Great Dane suggests the burden is one of production. Under Great Dane, once the employer presents evidence of a legitimate and substantial business justification for the discrimination, the General Counsel of the Board has the obligation to prove that animus motivated the discrimination. Obviously, both parties cannot bear the burden of proving why the employer acted. Because Great Dane teaches that motive is an indispensable element when the effects of discrimination are comparatively slight, it makes little sense to require the employer to prove a defense that ultimately will not carry the day.

214. See, e.g., Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 702-03 (1983) (punishing union officers more severely than other employees was inherently destructive); NLRB v. Erie Resistor Corp., 373 U.S. 221, 230, 236-37 (1963) (holding that seniority system was inherently destructive); International Paper, 319 N.L.R.B. at 1273-76, enforcement denied, 115 F.3d 1045 (D.C. Cir. 1997); Eads Transfer Inc., 304 N.L.R.B. 711, 712-13 (1993), enforced, 989 F.2d 373 (9th Cir. 1993).

215. As observed by the Board, the “substantial business justification requirement” imposed by Great Dane means only that the employer's business reason be “nonfrivolous.” Harter Equip., Inc., 280 N.L.R.B. 597, 600 n.9 (1986).

216. See Great Dane, 388 U.S. at 38 (Harlan, J., dissenting) (questioning whether employer's burden was one of production or persuasion); NLRB v. Rockwood & Co., 834 F.2d 837, 840-41 (9th Cir. 1987); Local 1384, UAW v. NLRB, 756 F.2d 482, 488 (7th Cir. 1985); Fick, supra note 211, at 301 n.156; Leonard S. Janofsky, New Concepts in Interference and Discrimination Under the NLRA: The Legacy of American Ship Building and Great Dane Trailers, 70 COLUM. L. REV. 81 (1970). Compare Great Dane, 388 U.S. 26, 34 (holding that once it is proved that the employer engaged in discriminatory conduct, the employer has the burden of "establish[ing]" a legitimate objective), with NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967) (holding that the employer has the burden of proving a proper justification).

217. See Great Dane, 388 U.S. at 34.

218. See id.

219. Professor Fick agrees with the suggestion that the employer's burden in a comparatively slight case is one of production. She reasons that inherently discrimi-
Although *Erie Resistor*, *American Ship Building*, and *Great Dane* all arose in the context of economic warfare, the section 8(a)(3) motive analysis refined in those cases applies to other systemic claims as well. In particular, overtly discriminatory conduct capable of encouraging or discouraging union membership will not violate the statute if the employer establishes evidence of a legitimate business reason for the discrimination, unless proof exists that hostility toward unionization motivated the discrimination or unless the discrimination is inherently destructive.\(^{220}\)

V. COMPARING SECTION 8(a)(3) SYSTEMIC DISCRIMINATION WITH SYSTEMIC DISCRIMINATION CONCEPTS DEVELOPED UNDER TITLE VII

The Court's *Great Dane* test is an analytical mess. Under *Great Dane*, the adverse effects of discriminatory conduct on section 7 rights are often ignored if the decisionmaker characterizes those effects as "comparatively slight."\(^{221}\) Conversely, "inherently destructive" impact is equated under *Great Dane* to unlawful animus, a result that other statutes that employ a motive analysis reject as improper.\(^{222}\) Moreover, the Court's fail-

\(^{220}\) See *Fick*, supra note 211, at 301 n.156 (citing *UAW*, 756 F.2d at 488). Yet, in cases of inherently destructive conduct, the employer would bear the burden of proving a justification for its conduct. See id.

\(^{221}\) See, e.g., NLRB v. Adkins Transfer Co., 226 F.2d 324, 327-28 (6th Cir. 1955).

\(^{222}\) Under section 1983 and Title VII, for example, the disparate impact of a practice may be powerful evidence of its discriminatory purpose, but if the factfinder believes the employer genuinely adopted the practice for a nondiscriminatory reason, the practice is not unlawful under a disparate treatment analysis, despite an overwhelming adverse impact on the protected group. See *Personnel Adm'r v. Feeney*, 442 U.S. 256, 278-80 (1979); EEOC v. Consolidated Serv. Sys., 989 F.2d 233, 236 (7th Cir. 1993).
ure to determine when impact crosses the line from comparatively slight to inherently destructive not only breeds uncertainty but invites in through the back door the balancing the Court consistently has refused to embrace under section 8(a)(3).

Great Dane's approach to section 8(a)(3) should be discarded and replaced with the disparate treatment and disparate impact theories of discrimination developed under Title VII. Unlike section 8(a)(1), section 8(a)(3) specifically prohibits unlawful discrimination; thus, lessons from Title VII apply more usefully under section 8(a)(3). The Court's twenty-five years of experience developing discrimination theory under Title VII provides a more sophisticated way of thinking about what it means to discriminate unlawfully against a protected classification.

An important distinction exists, however, between disparate treatment actionable under Title VII and disparate treatment actionable under section 8(a)(3). Disparate treatment under Title VII requires a finding of an intent to discriminate, and that requirement is properly imposed on section 8(a)(3) claims that rely on a disparate treatment approach. Intentional discrimination under section 8(a)(3), however, necessarily encompasses a finding of animus, something intentional discrimination under Title VII does not require. The NLRA recognizes the legitimacy

223. Although some quip that inherently destructive conduct is like obscenity: "experienced labor lawyers know it when they see it," Fick, supra note 211, at 276-77, the Board and courts frequently disagree on the classification of conduct as inherently destructive. See, e.g., International Paper Co. v. NLRB, 115 F.3d 1045 (D.C. Cir. 1997); NLRB v. American Olean Tile Co., 826 F.2d 1496, 1500, 1502 (6th Cir. 1987); NLRB v. Harrison Ready Mix Concrete, 770 F.2d 78, 80-81 (6th Cir. 1985); Randall, Div. of Textron, Inc. v. NLRB, 687 F.2d 1240, 1250 (8th Cir. 1982); Indiana & Mich. Elec. Co. v. NLRB, 595 F.2d 227, 228 (7th Cir. 1979); Loomis Courier Serv., Inc. v. NLRB, 595 F.2d 491, 499-500 (9th Cir. 1979); NLRB v. Martin A. Gleason, Inc., 534 F.2d 466, 483 (2d Cir. 1976).


226. See supra notes 74-75 and accompanying text.
of employer opposition to the union and the employer’s right to take action in response to unionization or bargaining demands. Viewing the NLRA as a whole explains why the Court correctly has required a finding of animus when talking about unlawful purpose under section 8(a)(3). Only when animus motivates an employer’s discriminatory act should a disparate treatment claim under section 8(a)(3) be established.227

Disparate treatment, however, with its search for unlawful animus, should be viewed as only one route, not the exclusive one, to establishing a section 8(a)(3) violation. In the absence of animus, or proof thereof, a section 8(a)(3) claim should be action-able under a disparate impact theory. This route to liability is particularly important under section 8(a)(3), given that disparate treatment will be found only when animus, as opposed to different treatment based on union status, is present. The relatively narrow role for disparate treatment under the NLRA makes many, if not most, section 8(a)(3) systemic claims in reality claims of disparate impact.

In a sense, the Court’s decisions from Erie Resistor through Great Dane resemble an effort to structure something that looks a lot like disparate impact while keeping the fiction of motive in play.228 Preferable is abandonment of Great Dane and formal replacement of it with the dual discrimination theories of disparate treatment and disparate impact.

A. Disparate Treatment Theory: Comparing Intent to Animus

Both disparate treatment claims under Title VII and section 8(a)(3) claims under the NLRA require a finding of an unlawful intent or motive.229 Although Title VII cases frequently use the

227. See infra notes 229-50 and accompanying text.
228. See Christensen & Svance, supra note 6 (criticizing aptly the Court’s insistence on motive as a “fictive formality”); see also Estreicher, supra note 195, at 899-900 (describing the Erie Resistor line of cases as involving impact, not motive).
229. See supra notes 20-23, 74-75, and accompanying text.

The terms “motive” and “intent” are not synonymous. “Ordinarily, intentions are immediate objectives, such as the intent to steal, whereas motives are more basic or underlying objectives, such as the motive to be wealthy.” Mark C. Weber, Beyond Price Waterhouse v. Hopkins: A New Approach to Mixed Motive Discrimination, 68 N.C. L. REV. 495, 498 (1990); see D. Don Welch, Removing Discriminatory Barriers:
word "animus" to describe this unlawful intent, as do cases under the NLRA, "animus" is not actually an element of a Title VII disparate treatment claim. It is, however, a requisite under section 8(a)(3).

An employment decision made because of an employee's race or sex violates Title VII. Title VII does not require a showing of hostility or hatred by the employer toward the employee's race or sex. Unlawful motive, in the Title VII sense, means a decision based on race, sex, religion, or national origin, whether or not that decision is economically rational.

For example, an employer that refuses to hire women with young children, based on a statistical showing that women with young children miss more work than other workers, violates Title VII. Even if the majority of the employer's workforce are women, reflecting no hostility toward women workers, and even though the employment decision is economically rational, the employer has done what the statute, as construed by the Court, forbids. The employer has made a decision "because of" the employee's sex, at least when men with young children are employed. In short, if a worker would have been hired were she
a man, that is intentional discrimination within the meaning of Title VII.

In contrast, no unlawful motive exists when an employer decides to subcontract or to relocate its operations because of high union wage rates or to lockout bargaining unit employees during contract negotiations while permitting all others to work. Certainly, in those cases, discrimination capable of discouraging union membership exists. Unless that discrimination was done for the purpose of discouraging union activity, however, it is lawful. An economic justification permits an employer to treat union workers differently.

Many have criticized this approach to motive analysis under section 8(a)(3). Economic considerations, after all, are at the heart of much employer resistance to unions, just as economics can explain at least some race or sex discrimination.

\[\text{id. According to Christensen & Svane, supra note 6, at 1276, this was the interpretation originally given section 8(a)(3) by the Supreme Court.}\]

\[234. \text{See Manhart, 435 U.S. at 711; Martin Marietta, 400 U.S. at 544.}\]

\[235. \text{See Fiberboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964); NLRB v. Lassing, 284 F.2d 781, 783 (6th Cir. 1960); NLRB v. Adkins Transfer Co., 226 F.2d 324, 327 (6th Cir. 1955); Milwaukee Spring Div. of Ill. Coil Spring Co., 268 N.L.R.B. 601, 604 (1984), aff'd, 765 F.2d 175 (D.C. Cir. 1985); see also Cynthia L. Estlund, Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act, 71 Tex. L. Rev. 921, 938-42 (1993) (discussing and criticizing these cases).}\]

\[236. \text{See American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311 (1965); Estreicher, supra note 195, at 898-99.}\]

\[237. \text{See American Ship Bldg., 380 U.S. at 309; Adkins Transfer, 226 F.2d at 326 (distinguishing opposition to union wage rates from opposition to unionization).}\]

\[238. \text{See Estlund, supra note 235, at 941-42 (discussing economic motivations to avoid unionization); Jackson & Heller, supra note 225, at 758 (discussing business justifications of antiunion actions).}\]

\[239. \text{The most elaborate criticism is contained in Estlund, supra note 235. Professor Estlund advocates, for capital allocation decisions, a new standard that would compare the "expected conduct of a hypothetical nondiscriminatory employer" to the conduct of the employer at issue to determine whether unlawful union avoidance has occurred. Id. at 981. In contrast, my suggestion is that rather than inventing yet another test, disparate treatment and disparate impact theory be used to determine whether unlawful activity occurred.}\]

\[240. \text{As Professor Estlund asserts, "[a]nti-union animus is not fundamentally an ideological prejudice that gets in the way of good business judgment," and she criticizes the law for viewing it that way. Id. at 928-27. Rather, "[a]n employer's anti-union conduct is often, at its core, economically rational." Id. at 927; see ARCHIBALD COX ET AL., CASES & MATERIALS ON LABOR LAW 242 (12th ed. 1996).}\]

\[241. \text{See Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 708-10}\]
Were a Title VII approach employed under section 8(a)(3), an employer that treated union workers differently than it would have treated them had they not engaged in collective activity would be engaging in unlawful discrimination, even if it had good business reasons for discriminating.

Nevertheless, the Title VII approach to motive should not be applied to section 8(a)(3), or vice versa. First, the language of the statutes supports the divergent approaches taken. "Discrimination... because of" race or sex literally encompasses any decision based on the employee's race or sex, regardless of whether there are good business reasons for basing the decision on race or sex. On the contrary, "discrimination... to encourage or discourage membership in any labor organization," at least as applied to intentional discrimination, proscribes only an intent aimed at encouraging or discouraging union activities.

Viewing economically based discrimination as not unlawful per se also makes sense under the NLRA. An employer is entitled to oppose the union and to persuade his employees to reject
union representation.\textsuperscript{245} Opposing the union, in and of itself, does not offend the statute. What section 8(a)(3) forbids is using discrimination as a tool to achieve nonunion status.\textsuperscript{246} At the same time, discrimination on the basis of union status, standing alone, does not violate section 8(a)(3).\textsuperscript{247} A section 8(a)(3) analysis that would find unlawful any disparate treatment of union workers cannot be reconciled with a statutory scheme that includes collective bargaining and economic warfare as integral parts.\textsuperscript{248}

When an employer discriminates between and among his employees and when he does so for the purpose of destroying, harming, or avoiding the union, he has violated section 8(a)(3)\textsuperscript{249} The Court correctly recognizes that when both elements are present, an employer commits a section 8(a)(3) violation.\textsuperscript{250} Congress intended to prohibit employers from using the powerful tool of discrimination as a means of discouraging or encouraging union membership. This disparate treatment approach to section 8(a)(3), with its comparatively narrow approach to unlawful motive, is appropriate.

B. Disparate Treatment Theory: The Animus Requirement in Operation Under the NLRA

When a section 8(a)(3) claim is based on a disparate treatment analysis, a finding of unlawful motive should be required. As the Court has recognized in individual disparate treatment claims under section 8(a)(3),\textsuperscript{251} and as is consistently recog-

\begin{footnotes}
\textsuperscript{246} See Radio Officers' Union v. NLRB, 347 U.S. 17, 43 (1954).
\textsuperscript{248} See American Ship Bldg., 380 U.S. at 309-12; Brown, 380 U.S. at 286; Estreicher, supra note 195, at 898-99.
\textsuperscript{249} See Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 270 (1965). An exception to this rule, carved out in the Darlington case, is a decision to close an entire business. See id. Even if done out of spite, an employer's decision to go out of business will not violate the statute. See id.
\textsuperscript{250} See Brown, 380 U.S. at 278; American Ship Bldg., 380 U.S. at 300; Darlington, 380 U.S. at 263; Fick, supra note 211, at 283.
\textsuperscript{251} See American Ship Bldg., 380 U.S. at 311; NLRB v. Jones & Laughlin Steel
\end{footnotes}
nized under other employment discrimination statutes, foreseeable adverse effects of discrimination may be powerful evidence of unlawful animus, but those effects are simply circumstantial evidence of that motive, not conclusive proof it exists. No reason exists to treat systemic section 8(a)(3) claims differently under a disparate treatment theory. The Board should be required to find the employer acted because of, not in spite of, the encouragement or discouragement that occurred. A finding that the employer acted for economic reasons would relieve it of section 8(a)(3) liability under a disparate treatment approach with its narrowly focused motive inquiry.

Under a disparate treatment approach to motive, Erie Resistor was wrongly, and American Ship Building was rightly, decided. In Erie Resistor, the Court essentially declared that motive need not be established when the adverse impact of discrimination is substantial. An employer could be held to intend the natural and probable consequences of his discrimination, even in the face of credited testimony that he in fact acted for lawful reasons. Although Erie Resistor's balancing approach to section

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253. This is most apparent in individual disparate treatment cases, as discussed supra in notes 145-55 and accompanying text. In those cases, the Board has not attempted to use proof of adverse effects as conclusive proof of motive.
254. Cf. Feeney, 442 U.S. at 273-74 (finding that overwhelmingly adverse impact on women of defendant's hiring policy does not conclusively establish intent to discriminate under the Equal Protection Clause of the Fourteenth Amendment); International Bhd. of Teamsters v. United States, 431 U.S. 324, 353 (1977) (describing the "inexorable zero" of minority line drivers as merely circumstantial evidence of an intent to discriminate under the Civil Rights Act of 1964); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 312-13 (1977) (holding that statistical analysis of defendant's hiring practices can establish rebuttable inference of race discrimination under Civil Rights Act of 1964). The adverse impact of an employer's hiring practices in these cases was strong evidence of an unlawful motive, but the Court required a finding that race or sex actually motivated the employer.
255. See supra notes 235-38 and accompanying text (discussing unlawful motive under section 8(a)(3)).
257. See supra notes 175-81 and accompanying text. The Court in Erie Resistor could have viewed impact as evidence of motive, as some have asserted. See Estreicher, supra note 195, at 899. In Erie Resistor, however, the trial examiner's finding, left undisturbed, was that the employer acted without animus. See WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS
8(a)(3) was subsequently disavowed, its equating of "inherently destructive" impact with motive was revived in *Great Dane*.258

Interestingly, while the Court in *Great Dane* embraced *Erie Resistor*’s approach to establishing unlawful motive, the Court rejected it twelve years later in *Personnel Administrator v. Feeney*,259 a section 1983 decision whose reasoning has been followed for disparate treatment cases under other employment discrimination laws.260 The Court in *Feeney*, without mention of *Erie Resistor*, rejected an analysis that would equate the natural and probable consequences of employer action with an intent to achieve those consequences.261 There must instead be a finding that the unlawful purpose actually motivated the employer.262 The overwhelming impact of an action, while evidence of unlawful purpose, does not, as a matter of law, establish animus.263

*Erie Resistor*’s approach to establishing animus under the NLRA is puzzling. The Court never explained why animus may be inferred conclusively from consequences under section 8(a)(3) but not under other disparate treatment statutes. Perhaps the explanation is that *Erie Resistor* and *Great Dane* are better conceptualized as disparate impact, not disparate treatment, cases.264 A search for motive in many of these cases is, as colorful-

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258. See supra notes 196-209 and accompanying text. As stated by the Board:
Application of the *Great Dane* principle does not, of course, eliminate the requirement of finding unlawful motive or intent in determining that Sec. 8(a)(3) is violated. *Great Dane* simply states that certain employer actions are so manifestly discriminatory against employees engaging in union activities that the unlawful motive will be presumed.

261. See *Feeney*, 442 U.S. at 278-79. *Feeney* involved a challenge to a Massachusetts law that gave veterans an absolute preference for state jobs. See *id.* at 259. Because the overwhelming majority of veterans were men, the plaintiff argued that the state, through its law, had discriminated intentionally against women. See *id.* at 259-61. The Supreme Court disagreed. See *id.* at 280-81.
262. See *id.* at 278-79.
263. See *id.*
264. This is so because it is the destructive impact of the employer's actions that
ly described years ago, no more than a "fictive formality." The Court rejected this fictitious approach to motive under Title VII when it pioneered the disparate impact theory in *Griggs v. Duke Power*.266

Ascertaining motive is frequently difficult, as both *Erie Resistor* and the disparate impact doctrine recognize, and thus a motive requirement too often will be underprotective of statutory rights. Disparate impact doctrine responds to this concern by serving as a means for catching well-hidden motives.267 More importantly, disparate impact doctrine recognizes the harms of nonpurposeful discrimination. The adverse impact of even well-intentioned employer conduct can have a devastating effect on statutory rights. At their essence, *Erie Resistor* and *Great Dane* grasp this latter concept. Viewing *Erie Resistor* and *Great Dane*, in retrospect, as disparate impact cases makes far more sense than insisting on unlawful motive.268

C. Disparate Impact and Section 8(a)(3)

Applying disparate impact analysis to section 8(a)(3) claims provides a straightforward method for analyzing these cases. Rather than asking whether the effect of discrimination is inherently destructive or comparatively slight and whether a legiti-
mate and substantial business justification has been shown, the question simply becomes whether the employer has demonstrated a business necessity for its action that adversely impacts union activities.\textsuperscript{269} If so, the employer should prevail.\textsuperscript{270}

As a practical matter, the existence of impact should rarely be at issue under section 8(a)(3) because the impact of a facially discriminatory classification will be obvious.\textsuperscript{271} A decision to lockout persons represented by the union adversely impacts unionized workers. Although such classifications would be unlawful disparate treatment under Title VII,\textsuperscript{272} they are not unlawfully motivated per se under the NLRA, given the more narrow approach to animus described above.\textsuperscript{273} Nonetheless, the

\textsuperscript{269} The Civil Rights Act of 1991 amended Title VII to codify Griggs' disparate impact theory. \textit{See} 42 U.S.C. § 2000e-2(k) (1994). Under Title VII, the employer's burden is to prove that a practice causing a disparate impact "is job-related for the position in question and consistent with business necessity." \textit{Id.}

By no means is determining whether this defense exists simple; it is not. The courts presently are struggling with what showing an employer must make to meet Title VII's requirements. \textit{See} Susan S. Grover, \textit{The Business Necessity Defense in Disparate Impact Discrimination Cases}, 30 GA. L. REV. 387 (1996). The point is that when liability for discrimination relies on the adverse impact of employer action, whether under the NLRA or Title VII, it is sensible to think about the concept of disparate impact in a unified way.

\textsuperscript{270} Under Title VII, an employer may be liable under a disparate impact theory if it refuses to adopt an "alternative employment practice." 42 U.S.C. § 2000e-2(k)(1)(A)(i). The meaning of this provision is unclear, but if Title VII's disparate impact theory should be imported into the NLRA, as I advocate, then this aspect of that theory should be imported as well, to be developed and refined under both statutes. I anticipate it to be of little consequence under the NLRA, given the minor role it has played under the \textit{Griggs} line of cases.

\textsuperscript{271} Although impact is apparent in some Title VII cases, \textit{see} Dothard v. Rawlinson, 433 U.S. 321, 328-32 (1977) (holding that height and weight requirements that have a discriminatory impact on women violate Title VII unless an employer demonstrates a manifest relationship to the position), the existence of impact is a source of contention in many others. \textit{See} Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (determining impact through statistics). Establishing impact under section 8(a)(3) of the NLRA, however, should pose few problems. The "impact" in these cases frequently arises from a practice that on its face distinguishes among workers based on union activity or, while "neutral," will have an obvious effect. For example, granting benefits to persons working during a strike may be "neutral" in the sense that persons absent for reasons not strike-related will also be affected. Nonetheless, the impact on strikers may be shown easily.

\textsuperscript{272} \textit{See} Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 708-10 (1978).

\textsuperscript{273} \textit{See supra} notes 235-38 and accompanying text.
adverse impact is inherent in the classification. The question then becomes one of employer defense.

The burdens of persuasion established for impact claims under Title VII should apply under the NLRA as well. Once impact has been established, the employer should bear the burden of persuasion on the question of business necessity. The employer has discriminated and that discrimination has adversely impacted statutorily protected rights. The employer, better positioned to demonstrate why its action was necessary, should bear the burden of production and proof. \[274\]

This approach has several advantages, not the least of which involves bringing some analytical unity to labor and employment law. Federal appellate judges, who review section 8(a)(3) claims, are accustomed to evaluating discrimination under disparate treatment and disparate impact theories. Using these analytical models enhances effective judicial review. Instead of trying to apply a fictitious motive analysis that has no parallel outside the NLRA, courts would apply a model of discrimination with which they are far more familiar. \[275\] This has the added benefit of reducing friction between the appellate courts and the Board in the interpretation and application of a national statute, the uniform application of which is of particular importance. \[276\] Fi-

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275. See Brudney, supra note 9, at 1027 (noting federal court expertise in employment discrimination statutes). Of course, Board members and their staffs are not necessarily familiar with Title VII concepts. Requiring them to think in terms of disparate treatment and disparate impact, rather than in terms of inherently destructive and comparatively slight, will impose a cost on the Board. How great a cost is debatable, given that many labor lawyers, who after all comprise the Board, have experience outside the Board in the Title VII arena. Few labor lawyers' practices consist these days solely of NLRA work. Instead, a "labor lawyer" is today more likely than not a labor and employment lawyer, whose practice encompasses a range of employment matters, including discrimination claims. Not only the Board, but the lawyers practicing before it, are likely familiar with Title VII's approach to discrimination.

276. The Board and reviewing courts frequently have disagreed on the application of the Great Dane test, in part because of the uncertainty inherent in that test. See Diamond Walnut Growers, Inc. v. NLRB, 80 F.3d 485 (D.C. Cir.), rek'g en banc and
nally, it allows the Board and courts to base their decisions openly on impact, rather than on a frequently unconvincing or underprotective motive analysis.277

This approach makes sense, however, only if disparate impact is a viable theory under the NLRA. After all, the Court has rejected it for constitutional claims278 and for claims under section 1981,279 and its availability under the ADEA is an issue on which the lower courts are split.280 Although the language of the statute is susceptible to impact analysis,281 the Court’s focus on motive in its NLRA decisions could be read as rejecting disparate impact as a theory under section 8(a)(3).

The decisions, however, should not be read so restrictively. Rather, today, twenty-five years after Griggs, both Erie Resistor and Great Dane may be read as an early attempt by the Court at developing a disparate impact approach. Erie Resistor downplayed the importance of motive in the face of an over-

\[\textit{vacated}, 88 \text{ F.3d} 1064 (D.C. Cir. 1996), and reh'g en banc 113 F.3d 1259 (D.C. Cir. 1997); EEOC v. Consolidated Serv. Sys., 989 F.2d 233 (7th Cir. 1993); Forest Prods. Co. v. NLRB, 888 F.2d 72 (10th Cir. 1989); NLRB v. American Olean Tile Co., 826 F.2d 1496 (6th Cir. 1987); NLRB v. Harrison Ready Mix Concrete, 770 F.2d 78 (6th Cir. 1985); Randall, Div. of Textron, Inc. v. NLRB, 687 F.2d 1240 (8th Cir. 1982); Vesuvius Crucible Co. v. NLRB, 668 F.2d 162 (3d Cir. 1981); Indiana & Mich. Elec. Co. v. NLRB, 599 F.2d 227 (7th Cir. 1979); Loomis Courier Serv., Inc. v. NLRB, 595 F.2d 491 (9th Cir. 1979); NLRB v. Martin A. Gleason, Inc., 534 F.2d 466 (2d Cir. 1976). Although, in my view, the reviewing courts too often fail to give the Board the deference it is due, criticizing the courts does not eliminate the problem. Applying disparate impact theory to the NLRA would hold both the Board and the reviewing courts to a more certain, and ultimately more predictable, standard.

277. See Christensen & Svanoe, supra note 6, at 1315-32 (criticizing motive analysis as “warp[ing]” the decisionmaking process); Estreicher, supra note 195, at 899 (“[I]f impact is what we are talking about, it is better for all concerned to require the Board to honestly convey and defend the grounds for its rulings.”).


280. Compare Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980) (allowing ADEA disparate impact claim), with Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir. 1996), cert. denied, 116 S. Ct. 2500 (1996) (denying disparate impact under ADEA), and EEOC v. Francis W. Parker Sch., 41 F.3d 1073 (7th Cir. 1994) (reaching the same conclusion as Ellis).

281. "Strictly construed, the statutory prohibition is directed against any encouragement or discouragement of membership which is accomplished by discrimination; it plainly does not proscribe only such discrimination as is intended to create that effect." Christensen & Svanoe, supra note 6, at 1316; see supra notes 153-54 and accompanying text.
whelming impact of the employer's conduct on the right to strike. Although *Darlington, American Ship Building,* and *Brown* subsequently emphasized the importance of motive, they did so in the context of rejecting the *Erie Resistor* balancing approach to section 8(a)(3), an approach that essentially would have permitted the Board to use a section 8(a)(1) analysis in situations when the Court felt balancing was beyond the Board's power. Disparate impact analysis, however, as developed under Title VII, is not akin to the balancing accepted in *Erie Resistor* but rejected in *Brown* and *American Ship Building.* Nor is it the equivalent of the *Great Dane* test. Rather, disparate impact, as applied to section 8(a)(3), would require the employer to assume the burden of proving a need to discriminate when it engages in overtly discriminatory conduct.

Disparate impact puts some needed teeth into the *Great Dane* test. First, it makes clear that it is the employer that bears the burden of persuasion once impact has been established. Second, it requires a showing of a necessity to discriminate, not simply a legitimate business reason for doing so.

282. In *NLRB v. Brown,* 380 U.S. 278, 282 (1965), for example, the Court expressed concern that the Board used section 8(a)(3) to serve as an arbiter of what economic weapons should be available to employers and union and thus insisted on a motive analysis. See id.

283. See *Getman,* supra note 6, at 750. Praising *Erie Resistor,* Professor Getman observed: "There is no reason why an employer who penalizes his employees for engaging in union activity should be exonerated solely because he was not motivated by the desire to discourage union membership or activity." *Id.*

284. See *Grover,* supra note 269, at 387, 415-27. Balancing, as Professor Grover asserts, runs the risk that decisionmaker bias will influence how the balance is struck. See *id.* at 418-24. She criticizes balancing under Title VII as too employer-friendly, reasoning that judges will more readily identify with employers. See *id.* This concern would seem to apply with at least equal force to judicial review under the NLRA. See *Brudney,* supra note 9, at 1019 (arguing that courts are deferential to employers).

Whether Professor Grover is correct in her belief as to how judges would strike the balance, balancing undeniably allows a decisionmaker considerable leeway. Concern over entrusting this power to the Board, or distrust of the Board, led the Court to reject the *Erie Resistor* approach.

285. Whether the employer bears this burden under *Great Dane* is uncertain. See supra notes 216-19 and accompanying text.

286. Although the precise parameters of the showing demanded of the employer under Title VII are unclear, Congress apparently intended the employer to prove more than that the practice "serves, in a significant way, the legitimate employment
This disparate impact alternative is particularly important under the NLRA because of the restrictive approach to motive, with its animus requirement, that applies to section 8(a)(3) under a disparate treatment approach. Unlike under Title VII, much discrimination on the basis of concerted activity is considered lawfully motivated conduct under the NLRA.\textsuperscript{287} An approach that requires an employer to show why such discrimination is necessary for its business allows the employer the freedom to make the decisions it needs to make, while ensuring that employees' rights to unionize, to bargain, and to strike are not needlessly impacted.

How would this Title VII-like approach apply in the NLRA context? Imagine \textit{Erie Resistor} being decided today. The decision to grant superseniority to strikebreakers is discriminatory. Persons on strike do not receive the extra seniority credit; those who work during the strike do. Moreover, this discrimination is likely to discourage union membership, or at least strike activity.\textsuperscript{288} The employer's act, however, could not be unlawful dispa-

goals of the employer." Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989). This showing, formulated by the Court in \textit{Wards Cove}, was a major impetus for the enactment of the Civil Rights Act of 1991. See Donald O. Johnson, Comment, \textit{The Civil Rights Act of 1991 and Disparate Impact: The Response to Factionalism}, 47 U. MIAMI L. REV. 469, 494 (1992). Although the height of an employer's hurdle for a required showing under Title VII is uncertain, it is higher than that established in \textit{Wards Cove}. The hurdle also appears significantly higher than the "legitimate and substantial business justifications" test outlined in \textit{Great Dane}, see NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967), which the Board construed as a "nonfrivolous" employer purpose, see Harter Equip., Inc., 280 N.L.R.B. 597, 600 n.9 (1986), particularly as applied by the lower courts. See, e.g., Diamond Walnut Growers, Inc. v. NLRB, 80 F.3d 485 (D.C. Cir.) (holding that the risk of unrest and confrontation and possibility of sabotage are legitimate reasons for not returning employees to positions held prior to a strike), \textit{reh'g granted, vacated}, 88 F.3d 1064 (D.C. Cir. 1996), \textit{petition granted}, 113 F.3d 1259 (D.C. Cir. 1997); Forest Prods. Co., Inc. v. NLRB, 888 F.2d 72 (10th Cir. 1988) (holding that a program's provision denying funds to those not working on the disbursement date was a legitimate reason for denying matching funds for Christmas savings to strikers); Midstate Tel. Corp. v. NLRB, 706 F.2d 401 (2d Cir. 1983) (holding that a concern with employer's public image was a legitimate reason to ban t-shirts); Vesuvius Crucible Co. v. NLRB, 668 F.2d 162 (3d Cir. 1981) (holding that a good faith, but possibly mistaken, interpretation of a contract was a legitimate reason for refusing to pay vacation benefits accrued before a strike).

\textsuperscript{287} See supra notes 235-38 and accompanying text.

rate treatment unless it was done for the purpose of harming the union, i.e., with animus. In the face of credited testimony that the employer acted to maintain operations during the strike, its action would be lawful under a disparate treatment theory, regardless of the impact superseniority would have on union membership.

Yet, the failure to establish an unlawful motive would not end the case. Because this classification discriminates between those on strike and those not on strike, the impact on strikers is obvious. The employer would thus have the burden of demonstrating the business necessity of granting superseniority. If it could meet that burden, then superseniority would be permitted, unless the General Counsel could present an alternative that would meet the employer's needs with less impact on the strikers.

In cases involving what would be characterized as "inherently destructive" conduct under Great Dane, application of Title VII's disparate impact approach is more protective of employer prerogatives because it gives the Board less freedom to balance economic weapons. The disparate impact approach, therefore, is more in keeping with the Court's repeated declarations that the Board lacks such power.

Disparate impact analysis is also more protective of concerted activity than is the Great Dane test. Discriminatory conduct that adversely impacts collective activity, even if not "inherently destructive," must still be justified under the business necessity test. An employer's decision to withhold vacation pay from strikers, although presumably not inherently destructive, would be unlawful unless it were a business necessity.

A revisiting of Great Dane, in light of the Court's experience under Title VII, is long overdue. Using the disparate treatment

289. See id. at 230.
290. In other words, if the employer could prove superseniority was "essential to the continued viability of the business," to quote Professor Grover's description of the defendant's burden in an impact case, the employer would prevail. Grover, supra note 269, at 387. The employer could not merely show that superseniority made it easier to attract replacements or that the employer would suffer minor economic loss.
and impact analyses developed under Title VII gives the Board and courts a method of applying section 8(a)(3) that serves the statute's purposes and that helps bring some coherence to the increasingly complex area of labor and employment law.

One important case, however, deserves mention. In *NLRB v. Mackay Radio & Telegraph Co.*, the Supreme Court approved an employer's right to hire permanent replacements for economic strikers. Although not unlawful under a disparate treatment theory, absent evidence of animus, permanently replacing economic strikers is facially discriminatory and would have an obvious adverse impact on protected conduct. Under the analysis advocated here, the Court should have required the employer to prove the business necessity for hiring permanent replacements. In fact, numerous commentators and at least one Supreme Court justice have called for such a showing.

Frankly, if the Court were deciding *Mackay* for the first time today, in the wake of *Griggs*, it would likely require a showing of business necessity. *Mackay*, however, for better or for worse, has become part of the NLRA's fabric, with the Court consistently refusing to overrule the decision despite its inconsistency with later decisions such as *Erie Resistor* and *Great Dane*.

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292. 304 U.S. 333 (1938).
293. See id. at 345.
295. As one commentator observed, "[i]t is simply too late in the day to reopen *Mackay Radio.*" Estreicher, supra note 195, at 900; see Trans World Airlines, 489 U.S. at 433. Congressional efforts to overturn *Mackay* have also failed. See The Cesar Chavez Workplace Fairness Act, S. 55, 103d Cong. (1993); The Workplace Fairness Act, H.R. 5, 102d Cong. (1991). So, too, have presidential efforts to weaken *Mackay*. See Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996) (holding that the NLRA preempts executive order precluding the use of replacements).

Professor Estreicher views *Mackay* as consistent with what he terms the "bounded conflict" principle. Section 8(a)(3) prohibits action that will have "an enduring, poisonous impact on the parties' bargaining relationship," without evidence of animus. Estreicher, supra note 195, at 902.
Applying disparate impact analysis to other facially discriminatory acts that adversely affect protected conduct, while exempting permanent replacement of economic strikers from that analysis, is doctrinally inconsistent. So too, however, is Mackay's exemption from the inherently destructive/comparatively slight analysis of Great Dane.\textsuperscript{296} The anomalous posture of Mackay should not deter the Board, the courts, lawyers, or academics from thinking about the appropriate analytical structure for section 8(a)(3) systemic claims.

\section*{VI. CONCLUSION}

Comparativists long have recognized that examining another country's approach to a common problem can yield new insights or ways of thinking about our own legal system.\textsuperscript{297} Sometimes these new ideas generate productive changes in our own system. Other times, they convince us of the superiority of our own approach, but only after we have examined our system from a fresh and different perspective.\textsuperscript{298} As comparative law scholars are quick to warn us, borrowing for its own sake is bad,\textsuperscript{299} but studying our system through the eyes of another can teach us a lot about its strengths and weaknesses and can suggest ideas for improvement.\textsuperscript{300}

For too long, many viewed labor law as its own "country," an esoteric area of law understood and practiced by only a few. In a sense, federal judges reviewing discrimination claims under section 8(a)(1) have become our newest labor law comparativists.\textsuperscript{301}

\textsuperscript{296} Even if one viewed Mackay under Great Dane as employer conduct having only a "comparatively slight" effect on union activities, a difficult view to endorse, the employer still would be required to show a legitimate and substantial business justification for hiring permanent replacements. See Samuel Estreicher, Essay, \textit{Collective Bargaining or "Collective Begging": Reflections on Anti-strike Breaker Legislation}, 93 Mich. L. Rev. 577, 582 (1994); Estreicher, supra note 195, at 900. Mackay does not require such a showing. See Atleson, supra note 41, at 28.


\textsuperscript{298} See supra note 297.

\textsuperscript{299} See Summers, supra note 297, at 222.

\textsuperscript{300} See id. at 233-60; Bok, supra note 297, at 1394.

\textsuperscript{301} See supra notes 91-93 and accompanying text.
They rightly have compared the NLRA's landscape with the new frontier of Title VII, forcing us to examine whether Title VII's concepts of discrimination—concepts that are the product of sustained judicial, administrative, and congressional study over the last thirty years—should also apply to discrimination under section 8(a)(1) of the NLRA.

Although these courts are correct to think about and to examine labor law more globally, they have made the mistake of indiscriminately borrowing Title VII's disparate treatment theory and imposing it on section 8(a)(1), where it assumes a poor and awkward fit. Although there are apt and useful comparisons between section 8(a)(1) and Title VII, they lie in the realm of accommodation analysis, not disparate treatment. When conceptualized as accommodation cases, these "discrimination" cases make more sense under both statutes.

At the same time, the comparative analysis these courts have brought to section 8(a)(1) may be employed productively under section 8(a)(3), a statute that, like Title VII, is aimed squarely at eliminating discrimination for prohibited purposes. Examining section 8(a)(3) analysis, as developed years ago by the Supreme Court, against the modern theories of discrimination developed under Title VII, highlights the difficulties in the Court's motive-based analysis under the NLRA. This comparison provides a useful and ultimately more coherent model for identifying unlawful discrimination against union activity.