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Politics Not as Usual: Inherently Destructive Conduct, Institutional Collegiality, and the National Labor Relations Board

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POLITICS NOT AS USUAL: INHERENTLY
DESTRUCTIVE CONDUCT, INSTITUTIONAL
COLLEGIALITY, AND THE NATIONAL LABOR
RELATIONS BOARD

PAUL M. SECUNDA*

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Judgment which bends with the political winds cannot command much confidence in the Court, nor are claims of industrial experience and expertise under such circumstances given full faith and credit.¹

I. INTRODUCTION

The National Labor Relations Board (NLRB or “Board”) is a collegial administrative body whose adjudications are not significantly tainted by the blight of political bias. Nonetheless, most commentators assume that the Board engages in politically motivated decisionmaking because of the natural affinity between conservative Republican Board Members and employers on the one hand, and liberal Democratic Board Members and unions and individual employees on the other.²

Yet, this Article’s empirical study of agency adjudication³ at the NLRB—involving a comprehensive examination of all Board cases implementing the highly indeterminate inherently-destructive-

1. Clyde Summers, *Labor Law in the Supreme Court: 1964 Term*, 75 YALE L.J. 59, 86 (1965) (referring to the National Labor Relations Board).

2. See, e.g., Joan Flynn, “Expertness For What?": *The Gould Years at the NLRB and the Irrepressible Myth of the “Independent” Agency*, 52 ADMIN. L. REV. 465, 474-77 (2000) [hereinafter Flynn, *Expertness For What*] (arguing that it is difficult for Board Members who have usually made their careers representing either labor or management to render unbiased opinions on issues of national labor policy, especially since they will be returning to their former practices after they have completed their Board stints); Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L.J. 1361, 1398 (2000) [hereinafter Flynn, *Quiet Revolution*] (maintaining that partisan Board appointments have become the norm at the NLRB over the last thirty years); William Priest, *Collective Bargaining for Nurses Under the National Labor Relations Act: A Look at the Future*, 16 J. LEGAL MED. 277, 299 (1995) (maintaining that the NLRB engages in politically biased adjudications); Note, *The NLRB and Supervisory Status: An Explanation of Inconsistent Results*, 94 HARV. L. REV. 1713, 1724-25 (1981) (same).

3. Administrative agencies set policy in one of two ways: through adjudication of individual disputes or through the promulgation of regulations through notice and comment procedures. See generally RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 402 (2d ed. 1994) (discussing the legislative and adjudicatory models of administrative agency decisionmaking). Although politics can and do properly play a significant role in the promulgation of regulations by administrative agencies, see *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 864-66 (1984), impartiality is supposed to be one of the bedrock principles of agency adjudication. See Administrative Procedures Act, 5 U.S.C. § 556(b) (2000).

conduct standard⁴—convincingly suggests otherwise. Instead, it appears that Board Members are able to overcome their ideological biases and arrive at a surprising number of consistent decisions in order to foster the institutional integrity of their organization.⁵ This Article posits that the concept of institutional collegiality, developed by Judge Harry T. Edwards in the domain of federal appellate court decisionmaking,⁶ helps best explain how this counterintuitive result is possible in the midst of a purportedly partisan agency environment⁷ and under circumstances where amorphous legal standards⁸ would appear to permit the most aggressive forms of political adjudication.⁹

The ramifications of these empirical findings are at least threefold. First, if Board Members do not consider their own political interests in making inherently-destructive-conduct determinations, the Board gains stature not only in the eyes of the Supreme Court and other reviewing courts, as Professor Summers has observed,¹⁰ but

4. See *infra* notes 119-26 and accompanying text.

5. See *infra* Part V.D.

6. See generally Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1358-62 (1998); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003) [hereinafter Edwards, *Effects of Collegiality*]; Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 852-59 (1991). As will be explored in more depth below, by collegiality, Judge Edwards does not mean that all judges must be friends; rather, these judges attempt to get the law right by communicating with, listening to, and ultimately influencing one another to push their ideological preferences to the side for the sake of their common interest in maintaining the integrity of their institution. Edwards, *Effects of Collegiality*, *supra*, at 1644-45.

7. Recent studies of Board Member voting behavior by Professor Joan Flynn indicate that certain Board Members had perfect, or near perfect, pro-management or pro-union voting records in cases where at least one Member dissented. See Flynn, *Expertness For What*, *supra* note 2, at 484 (noting that Member Hurtgen, in cases in which at least one Board Member dissented, had a perfect 61-0 pro-management voting record and that Member Browning had a 97-2 pro-union voting record in similar cases). For a critique of these studies, see *infra* note 261.

8. But see Joan Flynn, *The Costs and Benefits of "Hiding The Ball": NLRB Policy-making and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 393-99 (1995) [hereinafter Flynn, *Hiding The Ball*] (arguing that there are a number of Board legal standards that sound flexible, but which the Board applies in a rigid, near absolute fashion).

9. See Edwards, *Effects of Collegiality*, *supra* note 6, at 1640-41. Most prior theoretical expositions of the inherently-destructive-conduct standard have narrowly focused on this legal standard in a vacuum without such understandings being grounded in the reality of how the Board has actually applied the inherently-destructive-conduct standard in practice. See Michael H. LeRoy, *Institutional Signals and Implicit Bargains in the ULP Strike Doctrine: Empirical Evidence of Law as Equilibrium*, 51 HASTINGS L.J. 171, 173 (1999) [hereinafter LeRoy, *Institutional Signals*] (observing that most scholarly legal literature "makes no use of empirical data to test conclusions" and is "limited by its tendency to reach conclusions based on a textual reading of lead cases"); see also Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M. L. REV. 325, 325 (2001) ("There has been little empirical research in tax law about judges, and none that explains how they interpret the code." (footnotes omitted)).

10. See Summers, *supra* note 1, at 86.

also increases its credibility in the eyes of labor and management groups that appear before it.¹¹ Second, such consistent adjudicative outcomes assist parties in planning their future conduct and predicting the legality of their conduct,¹² thereby fostering a more constructive labor relations environment throughout the country. Third, and perhaps most significantly, this empirical study suggests that institutional collegiality is playing a central and pivotal role in administrative agency adjudications.¹³ And although one study should not be interpreted too broadly, by establishing that Board Members are successfully able to act in a collegial manner by separating their political ideologies from their institutional roles and by seeking to get the law right, this Article confirms that agency adjudication can indeed play a valuable role in protecting the increasing number of individuals who seek vindication of their rights in front of these administrative tribunals.

This Article is divided into six parts. Part II lays out the doctrinal framework surrounding the inherently-destructive-conduct standard. Part III sets forth the methodology utilized in the empirical analysis of the Board's inherently-destructive-conduct decisions. Part IV reports the relevant findings of this empirical analysis. Part V advances four primary conclusions based upon the findings of the empirical analysis; most importantly, that institutional collegiality plays a central role in explaining the dynamics of administrative agency adjudication. Part VI provides a short conclusion.

11. Board decisions driven by political considerations negate the Board's claim of superiority in deciding labor disputes based on industrial experience and expertise and compromise its stature as a neutral independent agency. See JAMES A. GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION, 1937-1947*, at 262 (1981) ("The integrity and legitimacy of the NLRB are dependent upon maintenance of a proper balance of quasi-judicial independence, public accountability, and administrative responsiveness to the changing realities of industrial and labor relations."). Indeed, if parties do not believe they can receive impartial justice from the NLRB, they might not even bother with the NLRB. See Paul Alan Levy, *The Unidimensional Perspective of the Reagan Labor Board*, 16 RUTGERS L.J. 269, 390 n.620 (1985) (observing that as a result of the right-wing character of the Reagan Board, many labor officials and lawyers issued a call to avoid the NLRB and even advocated repealing the National Labor Relations Act altogether).

12. See Robert Douglas Brownstone, Note, *The National Labor Relations Board at 50: Politicization Creates Crisis*, 52 BROOK. L. REV. 229, 244 (1986).

13. Like Judge Edwards, this Article does not argue that collegiality is the "holy grail" of Board decisionmaking; rather, it maintains that such collegiality assists in one's understanding of how the Board, and other adjudicative agencies, are able to achieve decisional consistency in highly partisan environments. See Edwards, *Effects of Collegiality*, *supra* note 6, at 1643.

II. THE DOCTRINAL FRAMEWORK

A. *The Wagner Act of 1935*

In response to the growing disparity in economic power between management and labor, which became especially apparent during the Depression, Congress enacted the National Labor Relations Act of 1935 (NLRA or “Act”).¹⁴ Also called the Wagner Act after its chief congressional sponsor, Senator Robert Wagner of New York,¹⁵ the Act was intended to support employee rights to organize and to engage in the process of collective bargaining through representatives of their own choosing.¹⁶ Congress found that the denial of these organizational and collective bargaining rights in the past had led to industrial strife, the obstruction of interstate commerce, and the depression of wage rates and the purchasing power of workers.¹⁷

The heart of the National Labor Relations Act is section 7, which grants all employees the following rights: “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”¹⁸ These rights enumerated in section 7 were considered crucial to establish a balance of bargaining power between employees and their employers.¹⁹

To protect these newly promulgated section 7 rights, Congress prohibited certain employer practices as unfair labor practices under section 8 of the Act.²⁰ The enforcement of these unfair labor practice provisions was placed in a newly formed independent administrative

14. The National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2000)). *See generally* 1 THE DEVELOPING LABOR LAW 24-26 (Patrick Hardin & John E. Higgins, Jr. eds., 4th ed. 2001) [hereinafter DEVELOPING LABOR LAW].

15. Although he faced almost overwhelming opposition by industry to the NLRA and lukewarm support by the President, Senator Wagner has been credited with single-handedly “deliver[ing] modern American labor law” in the form of the NLRA. *See* DEVELOPING LABOR LAW, *supra* note 14, at 26.

16. *See* 29 U.S.C. § 151; *see also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937) (“The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel.”).

17. 29 U.S.C. § 151; *see also* Jones & Laughlin, 301 U.S. at 42.

18. 29 U.S.C. § 157.

19. *See* NLRB v. United Rubber Workers, 269 F.2d 694, 697 (4th Cir. 1959) (“The basic purpose of the National Labor Relations Act of 1935, as shown by the preamble contained in § 1, was to protect the right of employees to organize for the purpose of collective bargaining so that they might have equal bargaining powers with their employers . . .”), *rev’d on other grounds*, 362 U.S. 329 (1960).

20. Unfair labor practices are those employer practices that impede employee organizational efforts or interfere with a union’s ability to represent the interests of its members. *See* 29 U.S.C. § 158; Republic Aviation Corp. v. NLRB, 324 U.S. 793, 799 (1945).

agency, the National Labor Relations Board.²¹ By placing the enforcement mechanism of the Act within the NLRB, Congress expected that experienced officials with an adequate appreciation of the complexities surrounding industrial relations would make the decisions that would shape national labor policy.²²

Two unfair labor practice provisions in particular are of significance in relation to the inherently destructive standard: section 8(a)(1) and section 8(a)(3).²³ Unfair labor practice cases under section 8(a)(1) are decided on the basis of whether employer conduct impermissibly interferes with, coerces, or restrains employees in the exercise of their section 7 rights.²⁴ Generally, in these cases, the Board weighs an employer's economic interests in running its business as it sees fit against employees' statutory interests protected under section 7, such as the right to organize and to determine whether the employer's conduct impermissibly interferes with employees' rights under the Act.²⁵ Importantly, employer intent plays no role in section 8(a)(1) cases.²⁶

On the other hand, intent is central to the discrimination provisions under section 8(a)(3).²⁷ In section 8(a)(3) cases, the NLRB is required to find an act of employer discrimination which has been motivated²⁸ by anti-union intent²⁹ and has a foreseeable effect of either

21. Sections 3 through 6 of the Act describe the structure and the powers of the NLRB. See 29 U.S.C. §§ 153-156. In addition, section 10(a) of the Act states in pertinent part: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce." *Id.* § 160(a); see also *Republic Aviation*, 324 U.S. at 798.

22. See *Republic Aviation*, 324 U.S. at 800; see also Flynn, *Hiding the Ball*, *supra* note 8, at 416.

23. 29 U.S.C. § 158(a)(1), (3). Although under the Wagner Act the interference provisions were initially codified as section 8(1) and the discrimination provisions as section 8(3), the Taft-Hartley Amendments in 1947 recodified these sections as sections 8(a)(1) and 8(a)(3). The language of section 8(1) and 8(a)(1), and of section 8(3) and 8(a)(3), is identical in all pertinent respects, and therefore these sections are referred to as 8(a)(1) and 8(a)(3) for convenience throughout this Article. See *Radio Officers' Union v. NLRB*, 347 U.S. 17, 44 (1954).

24. 29 U.S.C. § 158(a)(1).

25. See, e.g., *Republic Aviation*, 324 U.S. at 803 (balancing the property interest of employers against the organizational interests of employees to distribute union literature on the employer's premises during nonwork hours and in nonwork areas and finding section 8(a)(1) violations because employee interests outweighed employer interests).

26. See *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965) ("A violation of § 8(a)(1) alone . . . presupposes an act which is unlawful even absent a discriminatory motive.")

27. 29 U.S.C. § 158(a)(3).

28. Following the practice of other commentators, the terms "motive" and "intent," although distinguishable under some circumstances, will be used interchangeably throughout this Article. See Thomas G.S. Christensen & Andrea H. Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269, 1271 n.4 (1968); Walter E. Oberer, *The Scierter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails*, 52 CORNELL

encouraging or discouraging union membership in any labor organization.³⁰ Anti-union intent in section 8(a)(3) cases may be established in one of two ways: through specific evidence of unlawful intent³¹ or through inference resulting from the very nature of the conduct itself.³² As will be discussed in more detail below, the United States Supreme Court has subsequently characterized indicia of unlawful intent as “inherently destructive conduct,” and specific evidence of intent is not required.³³

By mechanistically insisting on intent playing a role in inherently-destructive-conduct cases, the Supreme Court has placed the Board in the difficult analytical position of having to characterize the employer’s state of mind, never an easy task in any area of the law. Indeed, Board Members appear to be granted almost unlimited discretion to divine the intent behind an employer’s actions.³⁴ The following brief narrative describes the route by which the Supreme Court arrived at this unfortunate doctrinal “Alice in Wonderland.”³⁵

L.Q. 491, 504-05 (1967); Rebecca Hanner White, *Modern Discrimination Theory and the National Labor Relations Act*, 39 WM. & MARY L. REV. 99, 140 n.229 (1997).

29. See *Radio Officers’ Union v. NLRB*, 347 U.S. 17, 43 (1954) (“The relevance of the motivation of the employer in such discrimination has been consistently recognized under both § 8(a)(3) and its predecessor.”).

30. See *id.* at 42-43.

The language of § 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.

Id. The Supreme Court has made clear that the phrase “membership in any labor organization” in the statutory language also more generally includes discouraging or encouraging participation in union activities. See *id.* at 39-40.

31. This Article does not deal with the vast majority of section 8(a)(3) cases decided based on specific evidence, either direct or circumstantial, establishing anti-union motivation on the part of the employer. These cases, generally decided under the Board’s decision in *Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), do not involve employer conduct which is inherently destructive of employer rights (for example, cases involving the hiring or firing of individual employees). As a result, these cases require an affirmative showing of anti-union purpose on the employer’s part. See DEVELOPING LABOR LAW, *supra* note 14, at 250.

32. See *Radio Officers’ Union*, 347 U.S. at 44-45 (“[S]pecific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of § 8(a)(3). . . . Both the Board and the courts have recognized that proof of certain types of discrimination satisfies the intent requirement.”).

33. Inherently-destructive-conduct cases generally involve employer conduct in response to concerted union activity. See, e.g., *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228 (1963).

34. Characterizing the employer’s state of mind in these cases has been criticized as a needless “fictive formality.” *Radio Officers’ Union*, 347 U.S. at 56 (Frankfurter, J., concurring); see also Joan Baker, *NLRA Section 8(a)(3) and the Search for a National Labor Policy*, 7 HOFSTRA LAB. L.J. 71, 97 (1989); Christensen & Svano, *supra* note 28, at 1327.

35. See generally LEWIS CARROLL, ALICE’S ADVENTURES IN WONDERLAND (Selwyn H. Goodacre ed., 1982).

B. Section 8(a)(3) Cases Under the Wagner Act

1. NLRB v. Jones & Laughlin Steel Corp.

Almost immediately after its enactment, the NLRA was challenged on constitutional grounds in the United States Supreme Court in *NLRB v. Jones & Laughlin Steel Corp.*³⁶ After upholding the constitutionality of the NLRA under a liberal reading of Congress's Commerce Clause power,³⁷ the Court considered the discrimination aspects of the case under section 8(a)(3).³⁸

In finding a violation under section 8(a)(3) of the Act, the Supreme Court observed that although "[t]he Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them," nevertheless, "[t]he employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation."³⁹ In other words, "[t]he true purpose [of the employer] is the subject of [the] investigation."⁴⁰ Because the Supreme Court determined that the true purpose of the employer's actions against the employees in *Jones & Laughlin* was to discourage union membership, the employer was found to have committed an unfair labor practice under section 8(a)(3).⁴¹

2. NLRB v. Mackay Radio & Telegraph Co.

The following year, the Supreme Court again considered section 8(a)(3) in the well-known case of *NLRB v. Mackay Radio & Telegraph Co.*⁴² In *Mackay Radio*, the company responded to strike activity on the part of its employees by replacing them during the strike with new employees and then by refusing to displace these replacements once the strike had ended.⁴³ The employer maintained that it

36. 301 U.S. 1 (1937). The evidence presented at the Board hearing established that the employer, a large steel company, had fired ten active union members for attempting to organize its Aliquippa, Pennsylvania facility. *Id.* at 28.

37. *Id.* at 41-43.

38. The complaint also alleged a violation of section 8(a)(1). Nonetheless, "it has been universally recognized that any violation of [Section 8(a)(3)] must also, automatically, constitute a violation of Section 8(a)(1)." Christensen & Svanoe, *supra* note 28, at 1324; see also White, *supra* note 28, at 105 ("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.").

39. *Jones & Laughlin*, 301 U.S. at 45-46.

40. *Id.* at 46.

41. *Id.*

42. 304 U.S. 333 (1938).

43. See *id.* at 338-39. Additionally, even after the replacement workers vacated their positions so that those positions became available, the company refused to reinstate the five strikers who were the most active union members. *Id.* at 339. In this regard, and consistent with *Jones & Laughlin*, the Supreme Court found that because the employer's true purpose was to discourage union membership by failing to rehire the five most active union

had permanently replaced the strikers not for any anti-union reasons, but for the legitimate reason of continuing its business operations during the strike.⁴⁴

Mackay Radio, therefore, represented a classic case of union discouragement without specific evidence of discrimination.⁴⁵ At this point in the doctrinal development of section 8(a)(3), however, the Court was unable, or perhaps unwilling, to infer the necessary unlawful intent from the sheer colossal effect such action had on the strikers and their union.⁴⁶ The problem for the Court was that in the absence of specific evidence of anti-union intent, it was extremely difficult to determine which motivation played the dominant role in determining the employer's conduct vis-à-vis its striking workers.⁴⁷

Apparently reluctant to engage in this intricate analytical exercise, the Supreme Court avoided the issue lurking in *Mackay Radio* and instead was contented to assume there was no unlawful discrimination under section 8(a)(3) based on the employer's mere protestations of innocence.⁴⁸ Inferring anti-union intent from the injurious consequences of employer conduct on employee rights under the Act would have to wait another day.

3. Republic Aviation Corp. v. NLRB

Indeed, it was not until seven years later, in *Republic Aviation Corp. v. NLRB*,⁴⁹ that the Court appeared tentatively to take this next step and find a section 8(a)(3) violation in a case where specific evidence of unlawful employer intent was lacking. In *Republic Aviation*, there were two instances of employees being terminated for engaging in union solicitation activities in violation of two different companies' strictly enforced no-solicitation policies.⁵⁰ Having found that the companies' no-solicitation policies violated section 8(a)(1) by impermissibly interfering with employees' section 7 rights to organ-

members, such actions amounted to an unfair labor practice under section 8(a)(3). *Id.* at 347.

44. *Id.* at 337.

45. See Bernard D. Meltzer, *The Lockout Cases*, 1965 SUP. CT. REV. 87, 91 (1965).

46. Professor Meltzer has pointed out that the difference between replacing a striking employee and discharging him is artificial at best. For the employee, "the critical fact is the loss of a job as a result of engaging in protected activities. That loss, whether brought on by an unlawful act of discharge or by a lawful replacement, might substantially discourage employees from exercising their right to strike in the future." *Id.*

47. See *id.* at 92. ("[I]t would be a heroic task to determine whether, from the employer's point of view, the dominant significance of replacements was their impact on production or their impact on bargaining and on the union's representative status."). Moreover, compounding the dilemma of intent is the fact "the employer's interest in solving [operational] problems [caused by a strike] coincides with his interest in blunting the effectiveness of union bargaining pressures." *Id.*

48. See *Mackay Radio*, 304 U.S. at 345-46.

49. 324 U.S. 793 (1945).

50. See *id.* at 794-97.

ize,⁵¹ the Court then found “that if a rule against solicitation is invalid as to union solicitation on the employer’s premises during the employee’s own time, a discharge because of violation of that rule discriminates within the meaning of Section 8(a)(3) in that it discourages membership in a labor organization.”⁵²

Republic Aviation’s innovation was that there could be an unfair labor practice under section 8(a)(3) in the absence of specific evidence of employer anti-union intent. As a Supreme Court Justice explained in a subsequent section 8(a)(3) case: “A finding of [employer] motivation [in *Republic Aviation*] . . . [was] unnecessary because there was no employer showing of a nondiscriminatory purpose for applying the rule to union solicitation during the employees’ free time.”⁵³ The seeds of the inherently destructive standard had thus been sown.⁵⁴

C. *The Taft-Hartley Amendments of 1947*

In the midst of the development of section 8(a)(3) jurisprudence, Congress enacted the Labor Management Relations Act of 1947 (also known as the Taft-Hartley Amendments).⁵⁵ Responding to concerns that the Wagner Act’s statutory scheme was tilted too far in favor of unions,⁵⁶ Congress amended key sections of the National Labor Relations Act with the passage of Taft-Hartley.⁵⁷ The federal government made a clear shift in labor relations policy with Taft-Hartley by in-

51. See *supra* note 25.

52. *Republic Aviation*, 324 U.S. at 805. The District of Columbia Circuit Court of Appeals has recently read *Republic Aviation* as an anomalous case, “stand[ing] for the limited proposition that if an employer adopts an illegal rule . . . and then fires an employee for [violating] the rule, it[s] conduct automatically violates [section] 8(a)(3) even though it adopted the rule for [nondiscriminatory] reasons.” *Contractors’ Labor Pool, Inc. v. NLRB*, 323 F.3d 1051, 1059 (D.C. Cir. 2003).

53. See *Local 357, Int’l Bhd. of Teamsters v. NLRB*, 365 U.S. 667, 680 (1961) (Harlan, J., concurring); see also Oberer, *supra* note 28, at 507 (interpreting *Republic Aviation* to hold that employer conduct can carry its own indicia of unlawful intent “where the employer has no significant legitimate business reason[s] for [its] actions which undercut the section 7 rights of its employees”).

54. But see *Contractors’ Labor Pool*, 323 F.3d at 1059 (finding the rationale of *Republic Aviation* to be inconsistent with latter inherently-destructive-conduct cases).

55. The Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-144, 172-187 (2000)).

56. See Levy, *supra* note 11, at 274 (“[T]he claim of one-sidedness on the part of the Board prompted Congress in 1947 to enact a law designed to equalize the relationship between corporations and unions, the Taft-Hartley Act.”); see also Note, *The Unanswered Questions of American Ship*, 64 MICH. L. REV. 910, 910 (1966) (observing that Congress placed the emphasis on equality of bargaining pressure in enacting Taft-Hartley).

57. Taft-Hartley also amended, or added to, many other provisions in the Wagner Act. For instance, Taft-Hartley added provisions increasing Board membership from three members to five members, making the Office of General Counsel an independent office separate from the Board, and increasing employers’ free speech rights in section 8(c). See DEVELOPING LABOR LAW, *supra* note 14, at 41-45.

roducing the concept of government neutrality into labor relations⁵⁸ and by recognizing that both employers and individual employees needed to be protected against union excesses by being afforded certain freedoms of speech and conduct.⁵⁹

This new orientation in governmental philosophy toward labor relations found expression in various new theories espoused by the Justices of the Supreme Court in the years following the enactment of Taft-Hartley. In the context of section 8(a)(3) cases in which there was an absence of specific evidence of anti-union intent, the business justifications for employer conduct in response to concerted union activities would slowly begin to play a larger role.⁶⁰ Eventually, and as illustrated by the discussion of the development of the inherently-destructive-conduct standard below, the legitimacy and substantiality of the employer's justification for its actions in these cases would become of paramount importance.⁶¹

D. Inferential Section 8(a)(3) Cases Since Taft-Hartley

1. Radio Officers' Union v. NLRB

After enactment of the Taft-Hartley Amendments, the Supreme Court turned its attention to reexamine a question left open by the *Republic Aviation* decision: Under what other circumstances may a violation of section 8(a)(3) be found in the absence of specific evidence of employer anti-union intent? In 1954, the Supreme Court sought to clarify this issue in *Radio Officers' Union v. NLRB*,⁶² a case in which, pursuant to a collective bargaining agreement, a company had agreed to grant retroactive wage increases and vacation payments to union members, but not to nonunion members.⁶³ Harkening back to

58. See Michael H. LeRoy, *Lockouts Involving Replacement Workers: An Empirical Public Policy Analysis and Proposal To Balance Economic Weapons Under the NLRA*, 74 WASH. U. L.Q. 981, 983-84 (1996) ("Federal labor law envisioned that the free play of economic forces—sometimes favoring workers, sometimes favoring employers—would determine the provisions of collective bargaining agreements. Government would merely be a referee in this economic struggle.")

59. See DEVELOPING LABOR LAW, *supra* note 14, at 39-40. For instance, not only were employees granted protection in engaging in certain concerted activities, but now they were given equal protection in refraining from participating in such activities. See 29 U.S.C. § 157 (as amended by the Taft-Hartley Amendments of 1947).

60. See *infra* Part II.D.

61. See *infra* notes 112-21 and accompanying text.

62. 347 U.S. 17 (1954). Although the Court granted certiorari in three separate cases in *Radio Officers' Union*, only that aspect of the case concerning *Gaynor News* concerns a discrimination issue under section 8(a)(3). The other two cases, *Teamsters* and *Radio Officers*, concerned alleged union unfair labor practices under section 8(b)(1)(A) and section 8(b)(2) and are not discussed here. See *id.* at 24-33.

63. The employer chose not to make the retroactive payments to nonunion members because "it was not contractually bound to do so and, in its business judgment, did not choose to do so." *Id.* at 35-36 (footnote omitted). Whereas previous cases had considered

Jones & Laughlin's "true purpose" language, the Court stated that the relevance of the motivation of the employer has been consistently recognized in section 8(a)(3) cases⁶⁴ and that it was clear that "Congress intended the employer's purpose in discriminating to be controlling."⁶⁵ Nevertheless, the Court, relying in part on *Republic Aviation*, also commented that "specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of § 8(a)(3),"⁶⁶ and that the mere proof of certain types of discriminatory conduct satisfies the intent requirement.⁶⁷ In other words, some employer conduct so inherently encourages or discourages union membership that specific proof of intent is unnecessary and intent is presumed.⁶⁸

According to the Court, this was not a novel concept, but "an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct."⁶⁹ When the "natural" consequence of an employer's conduct is to discourage or encourage union activity, an employer's response that it was not its "true purpose" to interfere with its employees' section 7 rights will be unavailing.⁷⁰ In *Radio Officers' Union (Gaynor News)*, the employer was found to have committed an unfair labor practice under section 8(a)(3) because in the Court's judgment the employer's discriminatory action of

situations where discriminatory conduct had allegedly discouraged union membership, this case for the first time addressed the opposite situation covered by section 8(a)(3): discriminatory employer conduct which allegedly encouraged union membership. *Id.* at 39.

64. *Id.* at 43.

65. *Id.* at 44. This statement by Justice Reed in *Radio Officers' Union* has been criticized as having no precedential foundation. Christensen & Svanoie, *supra* note 28, at 1317 ("It is apparent in retrospect . . . that when, in *Radio Officers' Union*, Justice Reed posited a 'purpose' to encourage or discourage union membership as a 'controlling' factor in employer discrimination cases, his assertion was not justified by a careful reading of either the statute or existing precedent.").

66. *Radio Officers' Union*, 347 U.S. at 44.

67. *See id.* at 45. The Court did not articulate its reasoning for the assumption that some acts by their very nature reflect bad intent on the part of the employer. *See Meltzer, supra* note 45, at 90. Indeed, one commentator has described this doctrine as the labor law version of the *res ipsa loquitur* doctrine. *See* Barbara J. Fick, *Inherently Discriminatory Conduct Revisited: Do We Know It When We See It?*, 8 HOFSTRA LAB. L.J. 275, 276 (1991).

68. *Radio Officers' Union*, 347 U.S. at 45. Interestingly, and as Professor White has observed, this "conduct-speaks-for-itself" approach has been abandoned in other discrimination contexts under other employment discrimination laws. *See* White, *supra* note 28, at 146 (arguing that the Supreme Court, after its decision in *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), now "reject[s] an analysis that would equate the natural and probable consequences of employer action with an intent to achieve those consequences").

69. *Radio Officers' Union*, 347 U.S. at 45. Christensen and Svanoie believe that the introduction of inference into section 8(a)(3) cases was made necessary once the Supreme Court had established in *Radio Officers' Union* that employer purpose to encourage or discourage union membership was a controlling factor. Previous cases, such as *Republic Aviation*, which did not appear to rest on this intent foundation, had to be accommodated by supplying "the missing or rebutted motive by inference." *See* Christensen & Svanoie, *supra* note 28, at 1317.

70. *Radio Officers' Union*, 347 U.S. at 45.

granting better benefits to union members inevitably caused the encouragement of union membership; that is, unlawful intent could be inferred based on the foreseeable consequences of such conduct on employees' rights under the Act.⁷¹

Although the *Radio Officers' Union* Court reaffirmed the general rule that anti-union motivation must be proven in a section 8(a)(3) case, it recognized an exception to this general rule on the basis of the foreseeable consequences that employer conduct could have on employee rights under the Act.⁷² In cases involving the exception, illicit motivation could be inferred from the destructive impact of such conduct on employee rights under the Act.⁷³ As made apparent by subsequent inferential section 8(a)(3) cases, the problem introduced by this conduct-speaks-for-itself formulation is that it is not always clear what the foreseeable consequences of employer conduct are.⁷⁴ Nailing down the "natural" or "foreseeable" consequences of an employer's action is far from a straightforward exercise; it is fraught

71. *Id.* at 46. The Supreme Court observed in this regard:

[T]he desire of employees to unionize is directly proportional to the advantages thought to be obtained from such action. No more striking example of discrimination so foreseeably causing employee response as to obviate the need for any other proof of intent is apparent than the payment of different wages to union employees doing a job than to nonunion employees doing the same job.

Id.

72. See 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, 86 (1970).

73. Focusing on the impact of such conduct, Professor White has compared the "conduct-speaks-for-itself" doctrine to an immature type of disparate impact analysis, a type of employment discrimination recognized under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2000). See White, *supra* note 28, at 103 (arguing for the use of disparate impact analysis in systemic section 8(a)(3) discrimination cases involving employer structural decisions and its use of economic weapons). Professor White correctly recognizes, however, that current Supreme Court case law considers this inferential theory of proof just another method of proving unlawful intent in section 8(a)(3) cases, not an alternative theory of discrimination under the NLRA. See *id.* at 102 n.16. In any event, it appears that a disparate impact model of discrimination based on notions of employee equality is incongruent with the animus model of discrimination established under the NLRA. See *Contractors' Labor Pool, Inc. v. NLRB*, 323 F.3d 1051, 1059-60 (D.C. Cir. 2003) (finding that the Board cannot base its inherently-destructive-conduct decision on disparate impact line of cases under Title VII).

74. See Christensen & Svanoe, *supra* note 28, at 1288 ("Justice Reed did not indicate with any clarity what 'types' of discrimination supplied their own proof of motivation nor, among other matters, whether the intent so established was always, never, or sometimes rebuttable."); Julius G. Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735, 745 (1965) ("The Court did not explain what it meant by conduct which 'inherently encourages or discourages union membership' nor did it explain the basis for the assumption that such conduct inevitably reflects improper motive."); Meltzer, *supra* note 45, at 90 (observing that the Court did not set forth any criteria for determining which conduct inherently encourages or discourages union membership).

with all kinds of subjective decisions about cause and effect.⁷⁵ In any event, *Radio Officers' Union* explicitly recognized the validity of inferential section 8(a)(3) cases for the first time and unmistakably laid the analytical foundation for the inherently-destructive-conduct standard.

2. NLRB v. Erie Resistor Corp.

Consistent with the neutral orientation of the federal government's labor relations policy after the enactment of Taft-Hartley, subsequent inferential cases under section 8(a)(3) not only focused on the impact of employer conduct on employee rights under the Act, but also considered the reasons for the employer conduct. In *NLRB v. Erie Resistor Corp.*,⁷⁶ the Supreme Court explored the relationship between an employer's business justifications and "conduct which spoke for itself" in the context of an employer's plan to extend a twenty-year super-seniority credit to strike replacement workers and strike breakers.⁷⁷ In order to lure replacement workers and encourage union employees to cross the picket line, the company offered a one-time seniority credit to ensure the permanency of the jobs of replacement workers and strike breakers once the strike ended and striking employees returned to work.⁷⁸

Recognizing that there were two interests at stake—the right of the employer to run its business during the strike⁷⁹ and the right of the employees to exercise their section 7 rights—the *Erie Resistor* Court incorporated a balancing test into the existing inferential section 8(a)(3) calculus.⁸⁰ More specifically, to determine whether the employer's use of the super-seniority plan during the strike impermissibly discouraged employees from engaging in protected concerted activity, the Court found that the Board should undertake the delicate task

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

75. See Christensen & Svanoie, *supra* note 28, at 1318 ("One of [*Radio Officers' Union's*] most significant effects has been to force the Board to make largely artificial judgments in many labor dispute situations.").

76. 373 U.S. 221 (1963).

77. See *id.* at 222-23. Although the company attempted to meet production demand by utilizing non unit employees during the strike, it was not able to keep up with demand. *Id.*

78. See *id.* at 223.

79. This employer right was recognized twenty-five years earlier in *Mackay Radio* by the Supreme Court. See *supra* notes 42-48 and accompanying text.

80. Until this time, the Board primarily engaged in a balancing of employer and employee rights in section 8(a)(1) cases. See *supra* note 25. *Erie Resistor* therefore represents one of the Court's first attempts to utilize the same balancing approach with respect to section 8(a)(3) cases. See Meltzer, *supra* note 45, at 115.

the intended consequences upon employee rights against the business ends to be served by the employer's conduct.⁸¹

Because the Board concluded that the employees' interest in engaging in concerted activities was paramount,⁸² the Court deferred to the Board's determination that the super-seniority plan "inherently discriminated"⁸³ between strikers and nonstrikers in the terms of their employment and had the effect of discouraging union membership, all in violation of section 8(a)(3).⁸⁴

Erie Resistor therefore appears to "constitute[] . . . an attempted reconciliation of the hostile-motive requirement and the balancing test in 8(a)(3) cases. The balancing process [became] a means for establishing motive, for 'preferring one motive to another.'"⁸⁵ By requiring the Board to balance conflicting, legitimate employer and employee interests before permitting the Board to infer unlawful motive, *Erie Resistor* suggested that there were some limits to the Board's power to infer unlawful intent from the conduct of the employer.⁸⁶

3. American Ship Building Co. v. NLRB

The Supreme Court next considered the inherently-destructive-conduct standard two years later in the case of *American Ship Build-*

81. *Erie Resistor*, 373 U.S. at 228-29.

82. The Court observed in this regard that the Board made a "detailed assessment" of super-seniority and the devastating consequences such plans visited on employees' rights to engage in concerted strike activity. *Id.* at 230. Such devastating consequences included the fact that such plans: (1) affect the tenure of all strikers; (2) treat nonstrikers better than strikers; (3) induce individual strikers to abandon the strike; (4) deal a crippling blow to any strike effort; and (5) render future collective bargaining difficult because of the lasting effects of the super-seniority plan. *Id.* at 230-31. The Court also noted the preeminent position given to the right to strike under section 13 of the Act as an instrument "which in great measure implements and supports the principles of the collective bargaining system." *Id.* at 234.

83. For the first time, the Court referred to "conduct which speaks for itself" as "inherently discriminatory or destructive." *Id.* at 228. At least one commentator has argued that "inherently destructive conduct is a subset of the inherently discriminatory doctrine." Fick, *supra* note 67, at 276 n.5. Be that as it may, since the Board and most courts use the "inherently destructive" label for these types of cases, this Article follows their example.

84. Although the Board's decisions are not immune from judicial review, if its findings are supported by substantial evidence, "its explication is not inadequate, irrational or arbitrary," and it "[does] not exceed its powers or venture into an area barred by the statute," the Court will recognize the special function of the Board in "applying the general provisions of the Act to the complexities of industrial life" and defer to its judgment. *Erie Resistor*, 373 U.S. at 236 (citations omitted).

85. Oberer, *supra* note 28, at 504 (quoting in part *Erie Resistor*, 373 U.S. at 228). *But see* White, *supra* note 28, at 132 (arguing that *Erie Resistor* makes motive essentially irrelevant in systemic, as compared to individual, section 8(a)(3) discrimination cases).

86. Other commentators have viewed the incorporation of the balancing test into section 8(a)(3) cases as a further erosion of the intent requirement in such cases. *See, e.g.*, Janofsky, *supra* note 72, at 86-87.

ing Co. v. NLRB,⁸⁷ in which it examined the legality of an employer's use of a bargaining lockout.⁸⁸ This time a decidedly more employer-friendly approach to the inherently-destructive-conduct standard was adopted by the Court than the balancing-of-interests approach developed in *Erie Resistor*.⁸⁹ The Court stated the inherently-destructive-conduct test as whether the employer practices "are inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other antiunion animus is required."⁹⁰

This formulation of the inherently-destructive-conduct standard appeared to significantly limit the Board's ability to infer anti-union intent in most section 8(a)(3) cases, as only those instances involving the most extreme forms of employer conduct would satisfy the Court's standard and permit an inference of unlawful intent.⁹¹ Because the bargaining lockout involved in the case was supported by legitimate business reasons⁹² and did not represent an extreme form of employer conduct, the Court was easily able to find that unlawful intent could not be inferred from the employer's conduct.⁹³

At the same time, the Court chastised the Board for engaging in an improper balancing exercise.⁹⁴ Although the Court appeared will-

87. 380 U.S. 300 (1965).

88. Bargaining lockouts, or offensive lockouts as they are sometimes called, involve situations where an employer locks out its employees not to avoid substantial economic loss (a defensive lockout), but in order to bring economic pressure to bear on the union during collective bargaining negotiations. See Note, *supra* note 56, at 910-11. The employer in question had a long history of collective bargaining with the union, but had locked out its employees in order to exert economic pressure after extensive collective negotiations had proven fruitless. See *Am. Ship Bldg.*, 380 U.S. at 302-05.

89. See *Am. Ship Bldg.*, 380 U.S. at 340 (Goldberg, J., concurring). For a view that Justice Stewart's opinion for the majority represented an "extreme" view of when conduct may be considered to carry its own indicia of unlawful intent, see Oberer, *supra* note 28, at 507 n.55; see also White, *supra* note 28, at 133 (arguing that *American Ship Building*, and its companion case *Brown*, essentially rejected *Erie Resistor's* balancing approach to motive).

90. *Am. Ship Bldg.*, 380 U.S. at 311.

91. See *id.* at 340 (Goldberg, J., concurring); see also Oberer, *supra* note 28, at 507 ("The new definition [under *American Ship Building*] requires, simply, that the scales be more out of balance than was necessary under the old balancing test, sufficiently so that an inference of hostile motive is more solidly based.")

92. See *Am. Ship Bldg.*, 380 U.S. at 313. The Court also noted that the employer had a substantial reason for engaging in the lockout because of the highly seasonal nature of the employer's business, which made it crucial for the employer to determine the timing and duration of any work stoppage. See *id.* at 305, 310.

93. See *id.* at 312.

94. See *id.* at 310 ("[T]he Act's provisions are not indefinitely elastic, content-free forms to be shaped in whatever manner the Board might think best conforms to the proper balance of bargaining power."); see also Meltzer, *supra* note 45, at 95 (citing *NLRB v. Insurance Agents*, 361 U.S. 477, 497 (1960), for the proposition that the Board does not have power to regulate economic weapons of the parties because such authority is inconsistent with the fundamental premise of the Act that the parties may use whatever economic weapons are at their disposal during collective bargaining negotiations).

ing to permit the Board to intervene in labor disputes where employer conduct was inherently destructive of the process of collective bargaining,⁹⁵ it was unwilling to condone the use of the inherently-destructive-conduct standard where the employer was merely deploying its economic weapons within a given bargaining dispute to bring economic pressure to bear on the union.⁹⁶ Because the Court believed the Board had ruled in favor of the union on the basis of its belief that the lockout weapon gave the employer too much power, the Court found the Board had exceeded the scope of its authority by involving itself improperly in the substantive aspects of the bargaining process.⁹⁷

American Ship Building thus represents a much more conservative approach to the enterprise of inferring unlawful intent on the part of employers. On one hand, as long as the employer had some economic justification for its actions, the Board, it seemed, was precluded from inferring unlawful intent based on the impact that the employer's actions had on employee rights.⁹⁸ On the other hand, the Supreme Court severely limited the manner in which the Board could balance employer and employee competing interests to infer unlawful intent in section 8(a)(3) cases.⁹⁹

4. NLRB v. Brown

To make matters even more confusing, another inferential section 8(a)(3) case concerning an employer lockout scenario was decided by the Supreme Court on the very same day as *American Ship Building*. Yet this case, *NLRB v. Brown*,¹⁰⁰ set forth a standard for the inher-

95. See Charles C. Jackson & Jeffrey S. Heller, *The Irrelevance of the Wright Line Debate: Returning to the Realism of Erie Resistor in Unfair Labor Practice Cases*, 77 NW. U. L. REV. 737, 769 (1983) (“[T]he Board’s balancing process is not based on the relative economic power of the parties, but on the relative importance of employee and employer rights expressly or implicitly recognized in the Act.” (footnote omitted)).

96. *Am. Ship Bldg.*, 380 U.S. at 317; see also Meltzer, *supra* note 45, at 95 (arguing that this delegation to the Board of the power to balance employer and employee interests is tantamount to sanctioning the impermissible regulation of bargaining weapons by the Board).

97. See *Am. Ship Bldg.*, 380 U.S. at 310.

98. The balancing approach of *Erie Resistor* became irrelevant under *American Ship Building*, which seemed to suggest “that the employer’s right to use the lockout as a bargaining weapon [would always] outweigh[] [any] infringement on the employees’ right to strike.” See Note, *supra* note 56, at 912 n.23.

99. At least one commentator has argued that this distinction between the employer’s intent to affect the outcome of bargaining (not subject to Board balancing) and its intent to discourage union activities (subject to Board balancing) is patently artificial: “The desired consequences are manifestly interdependent; the employer’s discouragement of union activity (adherence to union demands) is the means by which the employer seeks to improve his bargain.” See Meltzer, *supra* note 45, at 99.

100. 380 U.S. 278 (1965).

ently-destructive-conduct determination with some important differences.

In *Brown*, the Court considered whether an employer member of a multiemployer bargaining unit faced with a whipsaw strike¹⁰¹ could lock out its employees and temporarily hire replacement workers until the strike ended.¹⁰² As in *American Ship Building*, there was no specific evidence of unlawful intent, so the Court had to consider whether unlawful intent could be inferred from the impact of the employer's conduct on employee rights under the Act.¹⁰³

The *Brown* Court set forth the applicable inherently-destructive-conduct standard in the following manner: "[W]hen an employer practice is inherently destructive of employee rights and is not justified by the service of important business ends, no specific evidence of intent to discourage union membership is necessary to establish a violation of § 8(a)(3)."¹⁰⁴ In such instances, the Court found that inherently destructive conduct "could not be saved from illegality by an asserted overriding business purpose pursued in good faith."¹⁰⁵ However, where "the tendency to discourage union membership is comparatively slight, and the employers' conduct is reasonably adapted to achieve legitimate business ends," the Court required improper motivation on the part of the employer to be established by independent evidence.¹⁰⁶ Applying these standards, the Court found the use of a lockout with temporary replacements in the context of a whipsaw strike to have only a comparatively slight tendency to discourage union membership.¹⁰⁷ In other words, the preservation of the

101. A whipsaw strike is a strike in which the union attempts to undermine the cohesiveness of a multiemployer bargaining unit by striking individually each member of the unit consecutively. Because the other unstruck members of the multiemployer bargaining unit gain a resultant unfair advantage as a consequence of the union's tactic, the struck member is forced to give in to the union's terms in derogation of its commitment to the multiemployer bargaining unit. See generally *NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linen)*, 353 U.S. 87, 89-91 (1957).

102. See *Brown*, 380 U.S. at 279-81. Previously, the Supreme Court had held that a lockout in response to a whipsaw strike in the multiemployer bargaining unit context was a lawful practice under the Act, reasoning that a balancing of interests favored the employers' right to preserve their multiemployer bargaining unit over the union's right to strike. See *Buffalo Linen*, 353 U.S. at 96-97. The issue in *Brown* was whether the additional step of using temporary replacements during the lockout to continue business converted the employer conduct into unlawful conduct under section 8(a)(3). See *Brown*, 380 U.S. at 280.

103. See *Brown*, 380 U.S. at 282.

104. *Id.* at 287.

105. *Id.*

106. *Id.* at 287-88.

107. See *id.* at 288. The Court pointed to three factors to support this conclusion: (1) "the replacements were expressly used for the duration of the labor dispute only"; (2) the union could end the dispute when it wanted; and (3) the union-security provision meant that union members had nothing to gain by quitting the union. *Id.* at 288-89. Specifically, the Court declared: "[W]e do not see how the continued operations of [the employers] and their use of temporary replacements imply hostile motivation any more than the lockout

multiemployer bargaining unit was a “legitimate business end” which was not unlawful under the Act because the action only had a comparatively slight impact on employee rights under the Act. Under these circumstances, the Court required specific evidence of anti-union intent before it would characterize employer action as an unfair labor practice.¹⁰⁸ Finding no such intent, the Court held that the employer had not committed an unfair labor practice.¹⁰⁹

The *Brown* decision for the first time expressly divided employer conduct having a discriminatory effect on employee rights under the Act into two groups: conduct which had an inherently destructive impact on employee rights and conduct which had a comparatively slight impact on employee rights. Although the Court explained its comparatively-slight-impact conclusion in *Brown*,¹¹⁰ there was no attempt by the Court to establish prospective rules for making this distinction in the future.¹¹¹ The decision in *Brown* also seemed to solidify the importance of an employer’s business reasons for its action as part of the inherently-destructive-conduct test, although it was still unclear which party had the burden of showing that such legitimate business ends existed or how substantial the showing had to be for the employer’s reasons to be immune from attack.

E. Great Dane and the Inherently Destructive Standard

On June 12, 1967, the Supreme Court decided *NLRB v. Great Dane Trailers, Inc.*,¹¹² once and for all hoping to close the book on the

itself; nor do we see how they are inherently more destructive of employee rights.” *Id.* at 284.

108. *See id.* at 289.

109. *See id.* at 290. The Court again chastised the Board for balancing the economic power of the parties in order to infer unlawful intent. *See id.* at 292 (“Congress has not given the Board untrammelled authority to catalogue which economic devices shall be deemed freighted with indicia of unlawful intent.”) (citing *NLRB v. Ins. Agents Int’l Union*, 361 U.S. 477, 498 (1960)).

110. *See supra* note 107. *But see* Summers, *supra* note 1, at 71-72 (“[T]he Court’s formulation fails even to explain *Brown* itself. When an employee who offers to continue working on his employer’s terms is temporarily replaced solely because he is represented by the union, why is the injury to his rights ‘comparatively slight’? . . . We know it is so only because the Court says it is so.”).

111. *See Brown*, 380 U.S. at 298 (White, J., dissenting).

[I]t is difficult to fathom the logic or industrial experience which on the one hand dictates that a guarantee to strike replacements that they will not be laid off after a strike is ‘inherently destructive of employee interests,’ although based on a legitimate and important business justification, and yet at the same time dictates that the dismissal of and refusal to hire non striking union members, who desire to work, because other union members working for a different employer have struck, have but a slight unimportant inhibiting effect on the affiliation with the union and on concerted activities.

Id. (White, J., dissenting) (citation omitted).

112. 388 U.S. 26 (1967).

proper test to apply in inferential section 8(a)(3) cases.¹¹³ Rejecting outright the business-friendly inherently-destructive-conduct standard enunciated in *American Ship Building*, the Court in *Great Dane* embraced the “inherently destructive”/“comparatively slight” dichotomy set forth in *Brown*, but with an important twist.¹¹⁴

Great Dane involved a case in which an employer refused to pay striking employees vacation benefits which had accrued under the terms of the expired collective bargaining agreement, while simultaneously announcing its intention to pay these same vacation “benefits to striker replacements, returning strikers, and nonstrikers who had been at work on a certain date during the strike.”¹¹⁵ Because there was no specific evidence that the employer’s actions against the strikers were motivated by anti-union intent, the Court again considered whether such intent could be inferred based on the impact the conduct had on employee rights under the Act.¹¹⁶ Synthesizing the holdings of previous inferential section 8(a)(3) cases, the Court divided all inferential cases into two categories:

First, if it can reasonably be concluded that the employer’s discriminatory conduct was “inherently destructive” of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations.¹¹⁷

Second, if the adverse effect of the discriminatory conduct on employee rights is “comparatively slight,” an antiunion motivation must be proved to sustain the charge *if* the employer has come

113. At the time of the *Great Dane* decision, a clarification of the inherently-destructive-conduct standard was necessary to alleviate the tension in the Court’s balancing approach to motive in *Erie Resistor* and the Court’s statements in *American Ship Building* and *Brown* which appeared to sharply limit the Board’s ability to balance competing interests. See White, *supra* note 28, at 134.

114. Although *Great Dane* is clearly more congruent with the analysis in *Brown*, Chief Justice Warren, the author of the majority opinion in *Great Dane*, appears to go out of his way to cite *American Ship Building* to suggest that this analysis is consistent with both cases. See *Great Dane*, 388 U.S. at 34.

115. *Id.* at 27.

116. See *id.* at 33.

117. *Id.* at 34. Even if conduct is found to be inherently destructive, the Supreme Court clarified in a later case that the Board must still “strike the proper balance between the asserted business justifications and the invasion of employee rights” in order to determine whether the employer has committed an unfair labor practice. See *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 703 (1983) (quoting *Great Dane*, 388 U.S. at 33-34). Nevertheless, finding employer conduct to be inherently destructive has inevitably led to finding an unfair labor practice against the employer. See *Int’l Bhd. of Boilermakers, Local 88 v. NLRB*, 858 F.2d 756, 762 n.2 (D.C. Cir. 1988) (“We are not aware of any case, however, in which either the Board or a court has found an employer’s action to be inherently destructive of employee rights, and then, after balancing the interests at stake, has nevertheless found the conduct to be lawful under the Labor Act.”).

forward with evidence of legitimate and substantial business justifications for the conduct.¹¹⁸

The important twist came in the seemingly innocuous concluding sentence of the same paragraph of the Court's decision:

Thus, *in either situation*, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.¹¹⁹

Because the Court concluded in *Great Dane* that the employer had not met its initial burden of proving that it had legitimate and substantial reasons for treating strikers differently than other workers in their eligibility for vacation benefits, "it [was] not necessary for [the Court] to decide the degree to which the challenged conduct might have affected employee rights."¹²⁰ Instead, the Court found a violation of section 8(a)(3) based on the fact that the necessary anti-union intent could be inferred from employer conduct which "carr[ie]d a potential for adverse effect upon employee rights" and which was not supported by any "evidence of a proper motivation . . . in the record."¹²¹

Thus, on one hand, the Supreme Court in *Great Dane* appeared to divide the universe of employer discriminatory conduct in inferential section 8(a)(3) cases into either inherently destructive or comparatively slight conduct; there was no undistributed middle.¹²² On the other hand, placing the initial burden on the employer to prove that it had legitimate and substantial justifications for its conduct clearly made the "inherently destructive"/"comparatively slight" characterization unnecessary in some inferential cases.¹²³ *Great Dane* was one

118. *Great Dane*, 388 U.S. at 34. Put differently, if the conduct has a comparatively slight impact on employee rights and serves an employer's substantial and legitimate business end, "an affirmative showing of improper motivation must be made" since under such circumstances the employer's conduct is *prima facie* lawful. *Id.*

119. *Id.* (first emphasis added). Interestingly, the Court only refers to an employer needing "legitimate objectives" in this last sentence and not "legitimate and substantial business justifications," as in the previous sentence. Nevertheless, the Board has since found that a "substantial" business justification means only that the employer's reason be "nonfrivolous," which appears to only require the employer to show legitimate reasons for its conduct. See *Harter Equip., Inc.*, 280 N.L.R.B. 597, 599 (1986).

120. *Great Dane*, 388 U.S. at 34.

121. *Id.* at 35.

122. *Int'l Bhd. of Boilermakers*, 858 F.2d at 761-62 ("[C]omparatively slight' simply means 'less than inherently destructive.'").

123. Placing the burden of proof on the employer to prove that it was motivated by legitimate and substantial business purposes regardless of the impact of its conduct was criticized by the dissent and has also been criticized by some commentators as a concept novel to *Great Dane*. See *Great Dane*, 388 U.S. at 38-39 (Harlan, J., dissenting).

Under today's formulation, the Board is required to find independent evidence of the employer's antiunion motive only when the employer has overcome the

such case, and its precedent, as will be demonstrated below, certainly offered a clear guidepost for the Board and other courts to follow in future inherently-destructive-conduct decisions.¹²⁴

F. *The Aftermath of Great Dane*

1. *Subsequent Supreme Court and Appellate Cases Applying the Inherently Destructive Standard*

To this day, the Supreme Court has still not supplied clear prospective rules for deciding when employer conduct has an inherently destructive impact versus a comparatively slight impact.¹²⁵ In *NLRB v. Fleetwood Trailer Co.*,¹²⁶ the Court's first inferential section 8(a)(3) case after *Great Dane*, the Court avoided the inherently-destructive-conduct determination in much the same manner as the *Great Dane* Court. Having found that refusing to reinstate replaced strikers had "some" discriminatory effect on employee rights, the *Fleetwood Trailer* Court searched the record in vain for legitimate and substantial reasons for the employer not to reinstate the former strikers.¹²⁷ Finding none, the Court was able under the *Great Dane* framework to infer anti-union intent in violation of section 8(a)(3) without needing to categorize the conduct as inherently destructive or comparatively slight.¹²⁸ Therefore, *Fleetwood Trailer* shed no further light on the logic behind the "inherently destructive"/"comparatively slight" dichotomy.

presumption of unlawful motive which the Court raises. This alteration of the burden in § 8(a)(3) cases may either be a rule of convenience important to the resolution of this case alone or may, more unfortunately, portend an important shift in the manner of deciding employer unfair labor practice cases under § 8(a)(3). In either event, I believe it is unwise.

Id. (Harlan, J., dissenting); Janofsky, *supra* note 72, at 81 ("Strikingly enough, the Court had thus announced a rule not only without support in existing case law, but in fact contrary to established lines of decision.").

124. *See, e.g.*, Nat'l Football League Mgmt. Council, 309 N.L.R.B. 78, 81 (1992) ("We need not decide whether, as the General Counsel contends, the Respondents' conduct was inherently destructive of employee rights. Even assuming that the impact on employee rights of the Wednesday deadline rule for strikers was 'comparatively slight,' the burden still rests with the Respondents to establish 'legitimate and substantial business justifications' for the rule."); *Texaco, Inc.*, 285 N.L.R.B. 241, 247 (1987) (holding that if the employer fails to prove a nondiscriminatory business justification for withholding terminal benefits, it is unnecessary to pass on whether the employer's conduct was inherently destructive of employee rights).

125. *See White, supra* note 28, at 136 ("The *Great Dane* test continues to guide section 8(a)(3) analysis today in systemic discrimination cases. . . . The Court has not explained how the Board is to make that determination without engaging in the forbidden balancing process.").

126. 389 U.S. 375 (1967).

127. *See id.* at 380.

128. *See id.*

In the only other Supreme Court case to discuss an inferential section 8(a)(3) scenario since *Fleetwood Trailer*,¹²⁹ *Metropolitan Edison Co. v. NLRB*,¹³⁰ the Court found an employer's selective discipline of union officers to be inherently destructive of employee rights under the Act and, therefore, violative of section 8(a)(3) of the Act.¹³¹ In doing so, however, the Court merely affirmed the Board's conclusions and failed to shed any more light on how the inherently-destructive-conduct determination should be made.¹³²

Because the Supreme Court has not established clear-cut standards for determining when employer conduct reaches the inherently-destructive-conduct threshold, appellate courts reviewing Board decisions¹³³ have been left to fend for themselves in these types of cases.¹³⁴ In the resulting analytical vacuum, reviewing courts have had to analogize to the relatively few cases where the Supreme Court has found conduct to be inherently destructive¹³⁵ and have employed

129. The Supreme Court also considered the inherently-destructive-conduct standard under the Railway Labor Act (RLA), 45 U.S.C. §§ 151-163 (2000). In *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426 (1989), the Court held that an employer's conduct was not inherently destructive under the RLA where it refused to lay off junior crossovers in order to reinstate more senior full-term strikers at the conclusion of a strike. *See id.* at 432. Although the federal common labor law developed under the NLRA has been found helpful in deciding cases under the RLA, *see id.*, at least part of the Court's conclusion about whether the conduct was inherently destructive appeared to be based on considerations applicable only to the RLA. *See id.* at 442.

130. 460 U.S. 693 (1983).

131. *See id.* at 703. The Court's analysis was less than clear concerning whether the employer had established legitimate and substantial justifications for its actions. *See id.* at 703-04. Another plausible reading of *Metropolitan Edison* is that the Court's decision was based on a finding that there was no legitimate and substantial reason for disciplining union officers disparately and, therefore, the inherently-destructive-conduct determination was superfluous.

132. *See id.* at 704.

133. Board orders are not self-enforcing; an appellate court must enforce a Board's order for it to have legal effect. *See* 29 U.S.C. § 160(e) (2000).

134. *See, e.g., Loomis Courier Serv., Inc. v. NLRB*, 595 F.2d 491, 495 (9th Cir. 1979) ("The phrase 'inherently destructive' is not easily defined and cases finding violations under this standard are relatively rare."); *Inter-Collegiate Press, Graphic Arts Div. v. NLRB*, 486 F.2d 837, 844-45 (8th Cir. 1973) ("The phrase 'inherently destructive' is not easily susceptible of precise definition."); *Allied Indus. Workers, Local 289 v. NLRB*, 476 F.2d 868, 878 (D.C. Cir. 1973) (noting that it must "tread the uneasy path between 'inherently destructive' and 'comparatively slight' discrimination").

135. *See Int'l Bhd. of Boilermakers, Local 88 v. NLRB*, 858 F.2d 756, 762 (D.C. Cir. 1988) ("Additional illumination [of the inherently destructive standard] comes from a review of the cases in which an employer's action has been found to be on the wrong side of the 'inherently destructive' foul line."). According to the *International Brotherhood of Boilermakers* Court, there are Supreme Court cases that, to one degree or another, have found employer conduct to be inherently destructive. The *International Brotherhood of Boilermakers* Court noted:

In [*Radio Officers' Union*] the Court viewed as inherently destructive "discharges and suspensions of employees under company 'no solicitation' rules for soliciting union membership"; in a *dictum* in *American Ship Building* it suggested that "permanently discharg[ing] unionized staff and replac[ing] them with employees known to be possessed of a violent antiunion animus" would

different standards for making the inherently-destructive-conduct determination.¹³⁶ Under this ad hoc approach, it is hardly surprising that different appellate courts have come to inconsistent conclusions when reviewing a Board's determination that certain employer conduct is inherently destructive.¹³⁷

2. *The Board's Application of the Inherently-Destructive-Conduct Standard*

Since *Great Dane*, the Board has also struggled in determining the contours of inherently destructive employer conduct.¹³⁸ Nevertheless, the Board appears to have most frequently (though far from al-

also fall into that category; and in *Erie Resistor*, the Court held that the grant of 20 years' super-seniority to strike replacements and to strikers who returned to work was also inherently destructive of protected employee rights.

Id. at 762-63 (alterations in original) (citations omitted). Interestingly absent from this list is the situation in which an employer selectively disciplines union officers for failure to prevent union members from violating the terms of a no-strike clause. This omission may lend credence to the reading of *Metropolitan Edison* that suggests that an inherently-destructive-conduct finding was not made in that case. *See supra* note 131.

136. *See, e.g., Int'l Bhd. of Boilermakers*, 858 F.2d at 763 (relying on a process-oriented approach which asks whether the employer is hostile to the process of collective bargaining); *Portland Willamette Co. v. NLRB*, 534 F.2d 1331, 1334 (9th Cir. 1976) (noting the inherently-destructive-conduct cases are those "involving conduct with far reaching effects which would hinder future bargaining, or conduct which discriminates solely upon the basis of participation in strikes or union activity"); *Inter-Collegiate Press*, 486 F.2d at 845 (noting that one commentator found "inherently destructive' [to be] that which creates visible and continuing obstacles to the future exercise of employee rights"). One commentator has noted:

When the harm suffered by employees is the loss of a valuable employment benefit and the harm suffered is long-lasting in effect, the conduct is inherently destructive. When the impact on statutory rights is such that the right is rendered nugatory (the strike collapsed) or the ability to exercise the right is severely hampered (future bargaining rendered difficult or deterrence to the right to hold union office) then the conduct is inherently destructive.

Fick, *supra* note 67, at 310-11 (footnote omitted).

137. *Compare Inland Trucking Co. v. NLRB*, 440 F.2d 562, 565 (7th Cir. 1971) (finding that employer's bargaining lockout with temporary replacements was inherently destructive of employee rights under the Act in violation of section 8(a)(3)), *with Inter-Collegiate Press*, 486 F.2d at 841 ("[W]e are not prepared to say absolutely that a lockout plus the hiring of temporary replacements is conduct so 'inherently destructive' of employee rights . . ."). *See also Note, Labor Law—An Offensive Lockout Accompanied by Continued Operations with Temporary Replacement Labor is Per Se an Unfair Labor Practice in Violation of the National Labor Relations Act*. *Inland Trucking Co. v. NLRB*, 440 F.2d 562 (7th Cir. 1971), 50 TEX. L. REV. 552, 558 (1972) (observing that reliance on the inherently-destructive-conduct standard has led to illogical results, including the fact that the Supreme Court has not found the permanent replacement of strikers to be inherently destructive, while other courts have found the more innocuous conduct of temporarily replacing locked-out employees to be inherently destructive).

138. Indeed, the uncertainty surrounding the *Great Dane* standard has led the Board and the appellate courts to often disagree on what employer conduct constitutes inherently destructive conduct. *See White, supra* note 28, at 149 n.276 (citing appellate court cases where the appellate court and the Board have disagreed on the application of the *Great Dane* test).

ways) found conduct to be inherently destructive in cases in which the employer's actions distinguish among workers based on participation in protected activities,¹³⁹ and where employer actions discourage the process of collective bargaining by making it appear to be a futile exercise in the eyes of employees.¹⁴⁰ On the other hand, the Board has generally found employer conduct to have a comparatively slight impact on employee rights in cases in which employers have locked out their employees and used temporary replacement workers.¹⁴¹ Additionally, many Board decisions, mimicking the *Great Dane* decision itself, do not even reach the inherently-destructive-conduct determination. Such cases involve fact patterns where there have been changes in the work force during a strike and striker reinstatement rights are at issue¹⁴² and where there has been a withholding of accrued benefits from employees during a labor dispute.¹⁴³

Recently, the Board has attempted to formulate standards for the inherently-destructive-conduct determination by distilling several fundamental guiding principles based on past Supreme Court inferential section 8(a)(3) cases.¹⁴⁴ In *International Paper Co.*,¹⁴⁵ the Board considered whether permanently subcontracting out bargaining unit work during a lockout constituted inherently destructive conduct.¹⁴⁶

139. See, e.g., *Action Temp. Employment*, 337 N.L.R.B. 268 (2001) (denial of reinstatement to unfair labor practice strikers); *Freeman Decorating Co.*, 336 N.L.R.B. 1 (2001) (termination of workers based solely on worker's union affiliation), *enforcement denied sub nom.* *Int'l Alliance of Theatrical & Stage Employees v. NLRB*, 334 F.3d 27 (D.C. Cir. 2003); *W.D.D.W. Commercial Sys. & Invs., Inc.*, 335 N.L.R.B. 260 (2001) (policy of refusing to hire applicants whose recent wages were thirty percent higher or lower than its starting wages), *enforcement denied in relevant part sub nom.* *Contractors' Labor Pool, Inc. v. NLRB*, 323 F.3d 1051 (D.C. Cir. 2003).

140. See, e.g., *Int'l Paper Co.*, 319 N.L.R.B. 1253 (1995) (engaging in permanent subcontract after locking out employees), *enforcement denied*, 115 F.3d 1045 (D.C. Cir. 1997); *D & S Leasing, Inc.*, 299 N.L.R.B. 658 (1990) (employer terminated contract and laid off employees to avoid bargaining obligations), *enforced sub nom.* *NLRB v. Centra, Inc.*, 954 F.2d 366 (6th Cir. 1992); *Swift Indep. Corp.*, 289 N.L.R.B. 423 (1988) (unlawful plan to close and then reopen plants for the purpose of evading application of collective bargaining agreement), *enforcement denied sub nom.* *Esmark, Inc. v. NLRB*, 887 F.2d 739 (7th Cir. 1989).

141. See, e.g., *Marquette Co.*, 285 N.L.R.B. 774 (1987); *Birkenwald Distrib. Co.*, 282 N.L.R.B. 954 (1987); *B-Bar-B, Inc.*, 281 N.L.R.B. 250 (1986); *Harter Equip., Inc.*, 280 N.L.R.B. 597 (1986).

142. See, e.g., *Pirelli Cable Corp.*, 331 N.L.R.B. 1538 (2000); *Towne Ford, Inc.*, 327 N.L.R.B. 193 (1998); *Circuit-Wise, Inc.*, 309 N.L.R.B. 905 (1992); *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969).

143. See, e.g., *Lourdes Health Sys., Inc.*, 316 N.L.R.B. 284 (1995), *order modified*, 320 N.L.R.B. 97 (1995); *Jim Walter Res., Inc.*, 289 N.L.R.B. 1441 (1988); *Youngstown Steel Door Co.*, 288 N.L.R.B. 949 (1988); *Texaco, Inc.*, 285 N.L.R.B. 241 (1987).

144. Many, if not all of these factors, appear to derive from Professor Fick's analysis of the "inherently discriminatory" doctrine. See *supra* note 136.

145. 319 N.L.R.B. 1253 (1995), *enforcement denied*, 115 F.3d 1045 (D.C. Cir. 1997).

146. The employer maintained that its use of a permanent subcontractor during the lockout was required because of its "business goal of reducing its maintenance costs both during the lockout and in the long term." *Id.* at 1263.

The Board applied four “guiding principles” to make this determination:

1. The severity of the harm suffered by employees as well as the severity of the impact on the statutory right being exercised;¹⁴⁷
2. The temporal nature of the conduct in question;¹⁴⁸
3. Whether the employer’s conduct demonstrated hostility to the process of collective bargaining as opposed to a simple intention to support its bargaining position as to compensation and other matters;¹⁴⁹ and
4. Whether employer conduct “discourage[d] collective bargaining in the sense of making it seem a futile exercise in the eyes of employees.”¹⁵⁰

Applying these four guiding principles to the permanent subcontracting scenario under review, the Board concluded that the conduct in question had an inherently destructive impact on employee rights because all four of these guiding principles were violated by the employer’s conduct.¹⁵¹

Nevertheless, *International Paper* fails to clarify what conduct has an inherently destructive impact and what conduct has a comparatively slight impact. The guiding principles set forth in *International Paper* appear redundant to a large extent and do little more than put in one place Supreme Court reasoning that had existed prior to the Board’s decision. Just as there was little guidance as to what conduct constituted inherently destructive conduct prior to *International Pa-*

147. The Board observed that an employer’s policy, like the super-seniority policy in *Erie Resistor*, which directly attaches penalties to participation in protected union activities, is inherently destructive of the employee’s statutory right to engage in those activities. *Id.* at 1269.

148. Whether employer conduct is inherently destructive hinges on the “distinction between conduct which merely influences the outcome of a particular dispute and that which is potentially disruptive of the opportunity for future employee organization and concerted activity.” Note, *Lockouts—Employer’s Lockout with Temporary Replacements Is an Unfair Labor Practice*, 85 HARV. L. REV. 680, 686 (1972). In this same vein, Professor Estreicher has advanced the principle of “bounded conflict,” which is based on the idea that, “while economic conflict is an essential, legitimate feature of our collective bargaining system, a strike should ordinarily not provide an occasion for terminating the bargaining relationship. The strike is a means of resolving a dispute, not destroying the underlying bargaining structure.” See Samuel Estreicher, *Strikers and Replacements*, 38 LAB. L.J. 287, 288 (1987).

149. See *Int’l Paper*, 319 N.L.R.B. at 1269 (citing *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 309 (1965)).

150. *Int’l Bhd. of Boilermakers, Local 88 v. NLRB*, 858 F.2d 756, 764 (D.C. Cir. 1988).

151. See *Int’l Paper*, 319 N.L.R.B. at 1270. The Board made clear, however, that conduct need not exhibit all four characteristics in order to be considered inherently destructive. *Id.* at 1275.

per, those questions appear no more resolved merely because the Board combined all the various Supreme Court rationales.¹⁵²

Moreover, the Board's *International Paper* decision appears to make the all-too-common mistake of characterizing employer conduct as inherently destructive, even though there was no finding that the employer had a legitimate and substantial justification for its conduct.¹⁵³ *Great Dane*, however, makes abundantly clear that once some discriminatory effect on employee rights has been found and no legitimate and substantial justification for the employer's conduct can be located in the record, unlawful intent can be inferred to support a section 8(a)(3) violation without the conduct having to be further labeled inherently destructive or comparatively slight.¹⁵⁴

3. *Remaining Issues Surrounding the Inherently-Destructive-Conduct Standard*

Having examined in extensive detail the doctrinal framework surrounding the inherently-destructive-conduct standard in inferential section 8(a)(3) cases, the primary problem with its current iteration under *Great Dane* seems clear. The inherently-destructive-conduct standard would appear, even under *International Paper's* guiding principles, to give unguided discretion to Board Members to determine whether discriminatory intent should be inferred from employer conduct.¹⁵⁵ It is anyone's guess what conduct is, and what con-

152. As if to underline the unsatisfactory resolution of the inherently-destructive-standard conundrum by the Board in *International Paper*, the District of Columbia Circuit Court of Appeals looked at the same conduct as the Board in *International Paper* and came to the opposite conclusion—certainly an inauspicious start for a supposedly fresh approach to this intractable issue. See *Int'l Paper Co. v. NLRB*, 115 F.3d 1045, 1049-51 (D.C. Cir. 1997) (finding that implementation of a permanent subcontract during a lockout was not inherently destructive of employee rights because such action was similar to hiring permanent replacements, did not create unit divisiveness, and did not convey the futility of bargaining).

153. See *Int'l Paper*, 319 N.L.R.B at 1273 (“The [employer] introduced no evidence, however, that such a cost reduction—even assuming that it represented a significant reduction of costs below those incurred under the temporary subcontract with BEK—was essential to continuing its operations during the lockout.”). On the other hand, given some of the Board's other language, it may have found the conduct in question supported by legitimate and substantial reasons, but it nevertheless found that the inherently destructive character of the conduct outweighed such justifications. *Id.* at 1266 (holding that the employer “conduct is unlawful under section 8(a)(3) of the National Labor Relations Act because it is inherently destructive of employees’ section 7 rights and because the [employer]’s asserted business justification for its conduct does not outweigh the harm to those important employee rights”).

154. See *supra* notes 120-24 and accompanying text.

155. See Fick, *supra* note 67, at 276 (“While the Supreme Court has developed this doctrine, it has not precisely defined its contours, leaving the Board, the Courts of Appeal, and even the Supreme Court itself to struggle with the applicability of the doctrine to specific employer conduct on a case-by-case basis.”); Susan J. Cole, Note, *Discriminatory Discipline of Union Representatives for Breach of Their “Higher Duty” in Illegal Strikes*, 1982 DUKE L.J. 900, 914 (1982) (“The *Great Dane* test is difficult and confusing to apply, and the lower

duct is not, “inherently destructive”; you might as well ask a Great Dane.

One commentator has even suggested that Board Members in these cases are often left to defend their decisions with no more than an unpersuasive “I know it when I see it” rejoinder.¹⁵⁶ Indeed, without knowing anything more about these cases, there is every reason to assume that Republican Board Members will be less likely to infer unlawful intent on the part of employers, while Democratic Board Members may be more likely to do so—the end consequence being “[j]udgment which bends with the political winds.”¹⁵⁷ In short, these inherently-destructive-conduct cases appear to present ample opportunity for Board Members to base the “inherently destructive”/“comparatively slight” distinction on their personal political preferences, rather than on the merits of the case.¹⁵⁸

Whether the Board is really applying the inherently-destructive-conduct standard in a blatantly political manner can only be discerned through empirical study of the Board’s inherently-destructive-conduct cases. Such a study will help clarify exactly how this highly indeterminate standard has been applied in practice by the Board. Empirical findings that indicate the Board is implementing this standard in a consistent, nonpartisan basis will no doubt bolster the Board’s credibility by reassuring both management and labor that industrial justice may still be obtained at the NLRB.¹⁵⁹

III. THE INHERENTLY-DESTRUCTIVE-CONDUCT EMPIRICAL ANALYSIS

A number of commentators have discussed and analyzed the theories behind the inherently-destructive-conduct analysis conducted

courts have been left to determine for themselves the meaning of the phrases ‘inherently destructive’ and ‘comparatively slight’ and to create a standard of weights for the balancing test.” (footnote omitted)).

156. See Fick, *supra* note 67, at 276-77 (“One is often left with the feeling that attempts to define inherently discriminatory conduct, like attempts to define obscenity, may never be completely successful, but that experienced labor lawyers know it when they see it.”) (citing *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

157. See Summers, *supra* note 1, at 86.

158. This wiggle room provided to Board Members is potentially significant as characterization of the impact that the employer conduct has on employee rights is generally tantamount to deciding whether the conduct is lawful or unlawful. See Janofsky, *supra* note 72, at 97-98 (“The applicable category can . . . be crucial, since in a slight harm case where there is business justification, the General Counsel must prove by independent evidence the existence of anti-union motivation. On the other hand, in a severe harm case, justification may be of no avail.”); White, *supra* note 28, at 136 (“The classification of conduct as inherently destructive or comparatively slight . . . frequently determines the outcome.”).

159. See Charles B. Craver, *The Clinton Labor Board: Continuing a Tradition of Moderation and Excellence*, 16 LAB. LAW. 123, 126 (2000) (noting the importance of both labor and management representatives being equally convinced of the independence and judicialness of the Board).

under section 8(a)(3).¹⁶⁰ Theory alone, however, cannot shed light on how the inherently-destructive-conduct standard is being applied by the National Labor Relations Board. It is necessary to get one's hands analytically dirty by actually examining Board cases in which the inherently-destructive-conduct standard has been applied under the *Great Dane* framework.¹⁶¹

This Article therefore provides the first empirical investigation of inherently-destructive-conduct case trends from June 1967 (when the seminal *Great Dane* case was decided) to the present (February 2004). It examines whether there is in fact a correlation between a Board's political composition and whether employer conduct is found to have an inherently destructive impact on employee rights under the Act. The results of this analysis will not only shed light on how the Board attempts to decide these difficult cases, but will also add an important contribution to the debate over whether the Board, and other administrative agency adjudicators in general, has the capacity to engage in collegial decisionmaking in the midst of highly charged political environments.

A. *Method by Which the Board's Inherently-Destructive-Conduct Decisions Were Selected for the Empirical Analysis*

In order to analyze the Board's application of the inherently-destructive-conduct standard in section 8(a)(3) cases under the NLRA, a query was run in Westlaw's "FLB-NLRBDEC" database,¹⁶² seeking all Board cases that mentioned in any way the terms "Great Dane," "inherently destructive," or "comparatively slight."¹⁶³ This

160. See generally Christensen & Svano, *supra* note 28; Fick, *supra* note 67; Janofsky, *supra* note 72; Meltzer, *supra* note 45; White, *supra* note 28.

161. See *supra* note 9; see also *infra* notes 185-94 and accompanying text (discussing the methodology utilized for this analysis).

162. "FLB-NLRBDEC" is short for "Federal Labor & Employment—National Labor Relations Board—Board Decisions." Westlaw describes this database in the following manner:

The FLB-NLRBDEC database contains documents released by the National Labor Relations Board (NLRB). A document is an adjudicative decision reached by the NLRB, and may be the formal conclusion of an adversarial hearing that reviews exceptions filed to an Administrative Law Judge's decision, an order, an advisory opinion, or other materials released by the NLRB. Many documents include the earlier findings and recommendations of an Administrative Law Judge; however, uncontested ALJ decisions are not included in this database.

This database includes documents released for publication in Decisions and Orders of the National Labor Relations Board . . . and slip copy decisions as they are released by the NLRB prior to publication in the official reports.

See Contents of Westlaw's FLB-NLRBDEC database, at http://web2.westlaw.com/scope/default.wl?RS=WLW4.06&VR=2.0&FN=_top&SV=Split&MT=Westlaw&RP=%2fscope%fdfault.wl&DB=FLB-NLRBDEC (last visited Sept. 21, 2004).

163. Adding the terms "inherently discriminatory" and "inherent discrimination" expanded the list of results to 927 cases, but did not add any additional relevant *Great Dane*-

query returned 835 Board cases having one of these phrases in the text of the document.¹⁶⁴ The list of relevant cases was then reduced to 825 cases, as the last ten case results were decided prior to the Supreme Court's decision in *Great Dane*.

Thereafter, the list of inherently-destructive-conduct cases was reduced to 140 cases by placing primary emphasis on decisions in which the Board actually applied the *Great Dane* framework to the facts of the case.¹⁶⁵ For instance, if the court mentioned *Great Dane* or employed inherently-destructive-conduct language, but nevertheless concluded that there was not some discriminatory effect on employee rights caused by the employer's conduct, the case was excluded from empirical study on the grounds that the Board's decision did not properly fall under the *Great Dane* framework.¹⁶⁶ Similarly, if a case involved specific evidence of anti-union intent or utilized a *Wright Line* analysis, the case was disqualified from the study.¹⁶⁷ Furthermore, cases that utilized inherently-destructive-conduct language in a conclusory manner without attempting to apply the *Great Dane* analysis,¹⁶⁸ or which appeared to implicate *Great Dane* issues

type cases to the empirical list. Adding the term, "Erie Resistor," expanded the list further to 1064 case results, but again did not lead to the discovery of additionally relevant *Great Dane*-type cases.

164. This query was last run on February 11, 2004.

165. A list of these cases, and their relevant case characteristics, is attached to this Article as Appendix A.

166. See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967) (*Great Dane* analysis only applies to cases in which the "employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent."). A number of cases were therefore excluded from the list because even though inherently destructive conduct may have been discussed, there was no discriminatory effect on employee rights. See, e.g., *NYP Acquisition Corp.*, 332 N.L.R.B. 1041 (2000), *enforced sub nom.* Newspaper Guild, Local No. 3 v. NLRB, 261 F.3d 291 (2d Cir. 2001); *Nuclear Fuel Serv., Inc.*, 290 N.L.R.B. 309 (1988); *Aztec Bus Lines, Inc.*, 289 N.L.R.B. 1021 (1988); *Sherwin-Williams Co.*, 269 N.L.R.B. 678 (1984); *Knuth Bros., Inc.*, 229 N.L.R.B. 1204 (1977), *enforced*, 584 F.2d 813 (7th Cir. 1978); *Jubilee Mfg. Co.*, 202 N.L.R.B. 272 (1973), *enforced*, 504 F.2d 271 (D.C. Cir. 1974).

167. The crucial difference between *Wright Line*-type cases and *Great Dane* cases is that the former requires specific evidence of anti-union intent, whether through direct or indirect (pretextual) evidence, while the latter allows such anti-union intent to be inferred from the impact of employer conduct on employees' section 7 rights. See *supra* notes 31-33 and accompanying text. Thus, if a case in the database used inherently-destructive-conduct language, but concluded that there was specific evidence of anti-union intent, the Board decision was excluded from the empirical study. See, e.g., *Raytheon Missile Sys. Div.*, 279 N.L.R.B. 245 (1986); *Medallion Kitchens, Inc.*, 275 N.L.R.B. 58 (1985), *enforced*, 806 F.2d 185 (8th Cir. 1986); *Kelly-Goodwin Hardwood Co.*, 269 N.L.R.B. 33 (1984), *enforced*, 762 F.2d 1018 (9th Cir. 1985); *Spencer Foods, Inc.*, 268 N.L.R.B. 1483 (1984), *affirmed in part and reversed in part sub nom.* United Food & Commercial Workers Int'l Union, Local 152 v. NLRB, 768 F.2d 1463 (D.C. Cir. 1985); *Stokely-Van Camp, Inc.*, 259 N.L.R.B. 961 (1982), *enforcement denied*, 722 F.2d 1324 (7th Cir. 1983); *Bridgford Distrib. Co.*, 229 N.L.R.B. 678 (1977); *Elec. Fittings Corp.*, 216 N.L.R.B. 1076 (1975); *Barwise Sheet Metal Co.*, 199 N.L.R.B. 372 (1972).

168. Although some might argue that inherently-destructive-conduct cases decided in a conclusory manner are pregnant with decisionmaker bias rather than reason and, there-

but failed to use the language of *Great Dane* or apply its framework, were also removed from the empirical list.¹⁶⁹

Another group of cases were rendered ineligible for the analysis stemming from the fact that Board decisions, both in the official Board reporter and on Westlaw, include both the Board's decision as well as the decision of the Administrative Law Judge ("ALJ") under the Board's review.¹⁷⁰ Because the emphasis of this empirical study is on how the *Board* applies the inherently-destructive-conduct doctrine, not how ALJs apply this standard, documents containing a *Great Dane* analysis performed only by the ALJ were excluded. Consequently, cases where the Board merely affirmed the ALJ's conclusions without comment,¹⁷¹ decisions where the Board relied upon an

fore, should be included in the empirical study, because the decisionmakers have not explained their thought process through the *Great Dane* framework, it is not possible to speculate on what basis the Board decided these cases. As a result, it is necessary to exclude these conclusory cases from the analysis. *See, e.g.*, Walton & Co., 334 N.L.R.B. 780 (2001); Nat'l Fuel Gas Distrib. Corp., 308 N.L.R.B. 841 (1992); Conoco, Inc., 265 N.L.R.B. 819 (1982), *enforced*, 740 F.2d 811 (10th Cir. 1984); Milwaukee Spring Div., 265 N.L.R.B. 206 (1982), *remanded*, 718 F.2d 1102 (7th Cir. 1983); Lutheran Home, 264 N.L.R.B. 525 (1982); A.P.A. Transp. Corp., 239 N.L.R.B. 1407 (1979); Bridgford Distrib. Co., 229 N.L.R.B. 678 (1977); Abex Corp., 215 N.L.R.B. 665 (1974), *enforcement denied*, 543 F.2d 719 (9th Cir. 1976). Nevertheless, if a conclusory decision had a reasoned dissent, that dissent was included for limited purposes. *See infra* note 175 and accompanying text.

169. *See, e.g.*, Am. Fed'n of Gov't Employees, 278 N.L.R.B. 378 (1986); Gulton Electro-Voice, Inc., 266 N.L.R.B. 406 (1983), *enforced sub nom.* Local 900, Int'l Union of Elec. Workers, v. NLRB, 727 F.2d 1184 (D.C. Cir. 1984); Miller Brewing Co., 254 N.L.R.B. 266 (1981), *enforced sub nom.* Szewczuga v. NLRB, 686 F.2d 962 (D.C. Cir. 1982); Vesuvius Crucible Co., 252 N.L.R.B. 1279 (1980), *enforcement denied*, 668 F.2d 162 (3d Cir. 1981); Fort Pitt Steel Casting Div., 244 N.L.R.B. 970 (1979), *enforcement denied*, 649 F.2d 859 (3d Cir. 1981); W. Steel Casting Co., 233 N.L.R.B. 870 (1977); Dairylea Inc., 219 N.L.R.B. 656 (1975), *enforced sub nom.* NLRB v. Milk Drivers & Dairy Employees, Local 338, 531 F.2d 1162 (2d Cir. 1976).

170. *See* Flynn, *Hiding The Ball*, *supra* note 8, at 414.

171. This category is by far the largest category of excluded cases because it is common practice for the Board to affirm an ALJ's decision without comment. *See* WILLIAM B. GOULD IV, LABORED RELATIONS: LAW, POLITICS, AND THE NLRB—A MEMOIR 69 (2000) ("All too frequently, the Board's decision simply affirms the rather lengthy opinion of an administrative law judge and does not provide the parties or the public with guidance on how they should conduct themselves in comparable circumstances so as to avoid litigation."). And although such summary affirmances are precedential (to the extent that any Board decision is precedential) and one could conceivably argue that these cases imply that the Board has adopted the ALJ *Great Dane* analysis in toto, because it is not possible to speculate about the reasoning behind the Board's affirmances without a proper *Great Dane* analysis being performed by the Board, these cases could not be properly categorized and had to be excluded from the analysis. *Accord* James J. Brudney et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1696 n.78 (1999) (excluding court decisions that were summary affirmances from empirical analysis). For examples of such excluded cases, see Catalytic Indus. Maint. Co., 301 N.L.R.B. 342 (1991), *enforced*, 964 F.2d 513 (5th Cir. 1992); Waterbury Hosp., 300 N.L.R.B. 992 (1990), *enforced*, 950 F.2d 849 (2d Cir. 1991); Sun Oil Co., 245 N.L.R.B. 59 (1979); L.A. Marine Hardware Co., 235 N.L.R.B. 720 (1978), *enforced*, 602 F.2d 1302 (9th Cir. 1979); Allied Supermarkets, Inc., 233 N.L.R.B. 535 (1977); Sargent-Welch Scientific Co., 208 N.L.R.B. 811 (1974); Texaco Inc., 179 N.L.R.B. 989 (1969).

alternative theory to the ALJ's *Great Dane* theory,¹⁷² and cases where the ALJ was chastised for relying on a *Great Dane* analysis without it being alleged or litigated¹⁷³ were disqualified from the empirical list. Furthermore, because the focus of this empirical study is only on the employer discrimination provisions of section 8(a)(3), cases that applied the *Great Dane* analysis and the inherently-destructive-conduct terminology to other unfair labor practice provisions, including sections 8(a)(1), 8(a)(5), 8(b)(1)(A), and 8(b)(2), were also excluded.¹⁷⁴

Last, a more difficult determination had to be made as to whether or not to include Board cases that only had the *Great Dane* analysis in a concurring or dissenting Board Member's opinion.¹⁷⁵ In the end, this dilemma was resolved by including such cases in statistics concerning the number of individual inherently-destructive-conduct decisions made, or not made, by Board Members, but excluding these decisions from statistics involving the overall number of Board or panel inherently-destructive-conduct decisions.

172. See, e.g., *Interstate Builders, Inc.*, 334 N.L.R.B. 835 (2001); *Laidlaw Waste Sys., Inc.*, 313 N.L.R.B. 680 (1994); *Fluor Daniel, Inc.*, 304 N.L.R.B. 970 (1991), *enforced*, 976 F.2d 744 (11th Cir. 1992); *Jumbo Produce, Inc.*, 294 N.L.R.B. 998 (1989), *enforced*, 931 F.2d 887 (4th Cir. 1991); *Empire Pac. Indus., Inc.*, 257 N.L.R.B. 1425 (1981); *Ethyl Corp.*, 231 N.L.R.B. 431 (1977); *Pilot Freight Carriers, Inc.*, 221 N.L.R.B. 1026 (1975), *enforcement denied*, 558 F.2d 205 (4th Cir. 1977).

173. See, e.g., *Ken Maddox Heating & Air Conditioning, Inc.*, 340 N.L.R.B. 1 (2003); *Barry-Wehmiller Co.*, 271 N.L.R.B. 471 (1984); *Lee Norse Co.*, 247 N.L.R.B. 801 (1980).

174. Because *Great Dane* was specifically decided in the section 8(a)(3) context, in which establishing intent is key to the outcome of the case, it is unlikely that application of the doctrine to most other unfair labor practices is proper. *But see* Int'l Bhd. of Boilermakers, *Local 88 v. NLRB*, 858 F.2d 756, 761 n.1 (D.C. Cir. 1988) (finding, unconvincingly, that the Supreme Court determined in *Fleetwood Trailer* that the *Great Dane* analysis applied to section 8(a)(1) cases). For examples of cases where the analysis was applied to different unfair labor practice provisions, see *Mainline Contracting Corp.*, 334 N.L.R.B. 922 (2001) (section 8(a)(1) interference case); *H.B. Zachry Co.*, 319 N.L.R.B. 967 (1995) (section 8(a)(1) interference case), *enforcement granted in part sub nom.* Int'l Bhd. of Boilermakers v. NLRB, 127 F.3d 1300 (11th Cir. 1997); *Daily News of Los Angeles*, 315 N.L.R.B. 1236 (1994) (section 8(a)(5) duty-to-bargain case), *enforced*, 73 F.3d 406 (D.C. Cir. 1996); *Martiki Coal Corp.*, 315 N.L.R.B. 476 (1994) (section 8(a)(1) interference case); *Alaska Pulp Corp.*, 300 N.L.R.B. 232 (1990) (section 8(a)(1) interference case), *enforced*, 944 F.2d 909 (9th Cir. 1991); *Oil Workers Int'l Union, Local 5-114*, 295 N.L.R.B. 742 (1989) (section 8(b)(1)(A) union interference case), *supplemented*, 304 N.L.R.B. 167 (1991); *C. F. Martin & Co.*, 252 N.L.R.B. 1192 (1980) (section 8(a)(5) duty-to-bargain case); *Thorwin Mfg. Co.*, 243 N.L.R.B. 620 (1979) (section 8(a)(1) interference case); *Int'l Org. of Masters*, 219 N.L.R.B. 26 (1975) (section 8(b)(1)(a) union interference case). Although inferring intent is also at issue in a section 8(b)(2) case in which the union is charged with causing an employer to discriminate against an employee, see 29 U.S.C. § 158(b)(2) (2000), because the focus of this study is on unlawful employer conduct, not unlawful union conduct, the few section 8(b)(2) cases involving an inherently-destructive-conduct analysis have also been excluded. See, e.g., *Phila. Typographical Union No. 2*, 189 N.L.R.B. 829 (1971).

175. See, e.g., *TNS, Inc.*, 329 N.L.R.B. 602, 612 (1999) (Member Hurtgen, dissenting), *vacated by* 296 F.3d 384 (6th Cir. 2002), *cert. denied*, 537 U.S. 1106 (2003); *G. C. Murphy Co.*, 207 N.L.R.B. 579, 579 (1973) (Member Fanning, dissenting).

Others, of course, may disagree with both the Board decisions excluded from, and included in, this empirical analysis. Given that the Board's decisions in these inherently-destructive-conduct cases are analytically inconsistent and that many difficult determinations had to be made concerning which decisions to include in the study,¹⁷⁶ it is unlikely that any empirical list would satisfy all.¹⁷⁷ Nonetheless, the remaining cases on the list have at least the following important common denominator: they all involve the Board grappling with how to apply the *Great Dane* framework in practice.

B. Criteria by Which the Board's Inherently-Destructive-Conduct Decisions Were Analyzed

Having settled upon 140 Board cases to include in the empirical analysis of the inherently-destructive-conduct standard, there remained two key issues to consider. First, what type of analysis should be employed to adequately capture the Board's approach to inherently destructive conduct in these cases? Second, how should these Board decisions be categorized?

On the first issue, this Article utilizes a decidedly qualitative analysis.¹⁷⁸ Although the trend in recent legal scholarship has been to apply social science-based statistical techniques,¹⁷⁹ such as logistic regressions,¹⁸⁰ this Article focuses on the doctrinal legal reasoning

176. See White, *supra* note 28, at 138 (“The Court’s *Great Dane* test is an analytical mess.”).

177. Indeed, some might argue that any such empirical list is hopelessly flawed because of the large number of unfair labor practice cases, including inherently-destructive-conduct cases, that do not even reach the Board for resolution. See Brudney et al., *supra* note 171, at 1698. However, because this study seeks to examine the manner in which the Board decides cases which actually reach it and not to track the success or failure of all potential inherently-destructive-conduct cases, this limitation should not fundamentally affect the legitimacy of this study’s findings. See *id.*

178. “Qualitative analysis,” as used in this Article, refers to a study that places primary emphasis on doctrinal legal reasoning as a means for explaining a particular case outcome, as opposed to emphasizing a decisionmaker’s social background as an explanatory device for his or her decisions. See Schneider, *supra* note 9, at 330; see also Edwards, *Effects of Collegiality*, *supra* note 6, at 1653 (“Qualitative variables [include] what the law requires, the parties’ arguments, the actual content of judges’ deliberations, and the nuances of opinions . . .”). In particular, Judge Edwards has argued that collegiality is a type of qualitative variable. See *id.* at 1656.

179. There are two primary models that social scientists employ to explain how judges decide cases: the attitudinal model (which claims “that judges decide cases on the basis of their personal policy preferences and political ideologies”) and the strategic model (which views judges as responsive to their colleagues and “focuses on panel composition and presumed interactions among judges”). See Edwards, *Effects of Collegiality*, *supra* note 6, at 1652. Both of these models excessively rely on quantitative data to assess the dynamics of decisionmaking. See *id.* at 1653.

180. See, e.g., Brudney et al., *supra* note 171, at 1682; Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991); Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and*

that informs the outcomes of the Board's inherently-destructive-conduct cases.¹⁸¹ Rather than focusing on either the gross number of cases deemed "inherently destructive" versus "comparatively slight"¹⁸² or the personal characteristics of the Board Members deciding these cases (with the notable exception of the Board Member's political affiliation),¹⁸³ this Article emphasizes *how* each of these cases were decided by placing the Board's inherently-destructive-conduct decisions into four different analytical scenarios.

Consequently, not only is each of the 140 inherently-destructive-conduct Board cases scrutinized on the basis of such characteristics as the date of decision, the presence or absence of concurrences or dissents, procedural history, and political composition of the Board panel hearing the case,¹⁸⁴ but more importantly, this Article establishes an analytical framework for deciphering the different decisional approaches Board Members take in inherently-destructive-conduct cases. Specifically, the *Great Dane* framework permits cases to be decided in accordance with one of four possible analytical scenarios.

First, if the employer conduct causes some discriminatory effect on employee rights under the Act, and if the employer cannot meet its burden of proving a legitimate and substantial business reason for its actions against the union, impermissible motive is implied ("Sce-

Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation, 59 U. CHI. L. REV. 1073 (1992).

181. Thus, this empirical analysis focuses on how Board Members qualitatively decide cases by relying on precedents, rules, reasoning, and argument. See Edwards, *Effects of Collegiality*, *supra* note 6, at 1653.

182. As the Fourth Circuit has stated in the slightly different context of analyzing an ALJ's decision, a decisionmaker should not be "rate[d] . . . by the percentage of times he or she rules on a given side of a case. To evaluate [his or her] impartiality in this way amounts to judging his [or her] record by mere result or reputation. In reality, such statistics tell us little or nothing." See *Fieldcrest Cannon, Inc. v. NLRB*, 97 F.3d 65, 69 (4th Cir. 1996); *accord Eldeco, Inc. v. NLRB*, 132 F.3d 1007, 1010 (4th Cir. 1997). Significantly, such statistics "do not tell us whether the ALJ decided individual cases correctly." See *Fieldcrest Cannon*, 97 F.3d at 69; see also Richard L. Revesz, *A Defense of Empirical Legal Scholarship*, 69 U. CHI. L. REV. 169, 177 (2002).

183. This Article does not attempt to predict Board Member decisional behavior by inquiring into the Member's personal characteristics such as socioeconomic background, education, or sex. See Schneider, *supra* note 9, at 325 (discussing a lawyer's approach to analyzing judicial decisionmaking versus a social scientist's approach). For examples of articles employing the social background model, see Brudney et al., *supra* note 171, at 1679; William N. Cooke et al., *The Determinants of NLRB Decision-Making Revisited*, 48 INDUS. & LAB. REL. REV. 237, 254-55 (1995). "An obvious criticism of attempting to link judges' social backgrounds and their decisions is that it undervalues 'legal doctrine, in particular [by] failing to appreciate how judges develop that doctrine primarily through reasoned elaboration of language and precedent in written decisions, not through subconscious infiltration of life experiences.'" Schneider, *supra* note 9, at 331 (alteration in original) (quoting, in part, Brudney et al., *supra* note 171, at 1682); see also Revesz, *supra* note 182, at 177 ("The possible constraining effects of law are taken far more seriously in law schools than in social science departments.").

184. See *infra* Appendix A.

nario 1”).¹⁸⁵ In Scenario 1 cases, there is no need to determine whether the impact on employee rights is inherently destructive or comparatively slight if the employer does not meet its initial burden of proof.¹⁸⁶

If the employer can come forward with legitimate and substantial business justifications for its actions, the Board must then decide if the impact of the conduct is inherently destructive or comparatively slight.¹⁸⁷ If the conduct is found to be inherently destructive, even though the Board must still conduct a balancing of employer and employee interests,¹⁸⁸ it is inevitable that an illicit employer motive will be implied and the conduct held to be illegal as a result of the severe impact the employer conduct has on employee rights (“Scenario 2”).¹⁸⁹ On the other hand, if the conduct is deemed to have a comparatively slight impact on employee rights, the same balance will inexorably come out in favor of the employer since the balancing

185. Unlawful motive is implied in such circumstances because in weighing the competing employer and employee interests, there is “*nothing* of significance in the way of justification [which] appears on the employer’s side of the scales.” See Oberer, *supra* note 28, at 508. Scenario 1 cases are still different from *Wright Line* pretext cases, however, because in Scenario 1 cases there is still no specific evidence of anti-union evidence, whether proven directly or indirectly (pretextually). Instead, unlawful motive is implied from the conduct itself in the absence of the employer alleging a legitimate and substantial reason for its conduct. Pretext, on the other hand, is based on a disbelief of the employer’s alleged business reasons.

186. See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 35 (1967) (“Since discriminatory conduct carrying a potential for adverse effect upon employee rights was proved and no evidence of a proper motivation appeared in the record, the Board’s conclusions [finding a section 8(a)(3) violation] were supported by substantial evidence.”). But see *Laidlaw Corp.*, 171 N.L.R.B. 1366, 1369 (1968) (“As Respondent brought forward no evidence of business justification for refusing to reinstate these experienced employees while continuing to advertise for and hire new unskilled employees, we find such conduct was inherently destructive of employee rights.”), *enforced*, 414 F.2d 99 (7th Cir. 1969). As argued below, equating a lack of business justification with inherently destructive conduct, as in *Laidlaw*, is clearly contrary to the teachings of *Great Dane*. See Janofsky, *supra* note 72, at 94; see also *infra* note 214 and accompanying text.

187. There is some confusion as to whether the employer conduct should itself be categorized as inherently destructive or comparatively slight, or whether the employer’s interest in engaging in the conduct should be weighed against employees’ rights under the Act as an initial matter in order to determine the proper categorization. See Janofsky, *supra* note 72, at 99.

188. See *supra* note 117.

189. See *Cent. Ill. Pub. Serv. Co.*, 326 N.L.R.B. 928, 930 n.13 (1998).

In *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), the Court revised the first *Great Dane* test by requiring the Board, even in circumstances where employer conduct is found to be inherently destructive, to weigh any asserted business justifications against the invasion of employee rights in order to determine whether an unfair labor practice has been committed. This burden has been described as “heavy . . . if not impossible,” *International Paper Co. v. NLRB*, 115 F.3d 1045, 1048 (D.C. Cir. 1997), and there is no Board or court case in which employer conduct analyzed under this revised standard has been found to be lawful.

Id.; see also *Jackson & Heller*, *supra* note 95, at 774; Oberer, *supra* note 28, at 508; White, *supra* note 28, at 136-37.

of interests will only include a slight impact on employee rights under the Act and at least a legitimate interest on the side of the employer (“Scenario 3”).¹⁹⁰

Last, even if the employer has established a substantial and legitimate business interest and the impact of the conduct is comparatively slight, the union can still prevail on its unfair labor practice claim if it can prove a violation by coming forward with specific evidence of unlawful motive (“Scenario 4”).¹⁹¹ This last category appears to be a legal empty set.¹⁹² Section 8(a)(3) cases appear to be analyzed under *Great Dane* only when there is an absence of specific evidence of anti-union intent.¹⁹³ It therefore makes no sense to say the union may still prevail once a comparatively-slight-impact determination has been made by the Board if there is specific evidence of anti-union intent when there is *never* specific evidence of intent in inferential cases. In other words, Scenario 4 cases only exist outside the inferential world of *Great Dane*.¹⁹⁴

As illustrated below, categorizing inherently-destructive-conduct cases using this analytical framework brings much needed clarity to examining how the Board manages to achieve decisional consistency in this area of labor law even in the face of a highly indeterminate—almost meaningless—standard.

190. See Christensen & Svanoë, *supra* note 28, at 1328.

If legitimate and substantial interests are set forth in the record [and the impact is deemed comparatively slight], the determination made will plainly be a balancing of respective interests—statutory versus economic. In such instances, the injury to statutory interests being admittedly slight, the balance presumably will always be struck on the side of the economic interests.

Id.; see also Cole, *supra* note 155, at 914.

191. Specific evidence of employer anti-union purpose is required in Scenario 4 cases because a finding that the conduct in question is comparatively slight “undermines the inference of hostile motive” on the part of the employer. See Fick, *supra* note 67, at 334.

192. Indeed, the empirical analysis conducted below establishes that none of the Board’s 140 inherently-destructive-conduct cases include a Scenario 4 case. See *infra* note 207 and accompanying text.

193. See *supra* note 167.

194. Perhaps the Scenario 4 cases are nothing more than specific evidence of anti-union intent cases. Yet it is not at all clear that the *Great Dane* framework even applies to all section 8(a)(3) cases. See Janofsky, *supra* note 72, at 96.

Another question in this area arises with respect to the common Section 8(a)(3) case where an employer discharges an employee allegedly for “cause” and is met with a complaint charging that the discharge was for union activity. How, if at all, do the rules of *Great Dane* apply in such a case? There is no express statement in the *Great Dane* decision exempting such cases from the rules established therein.

Id. But see White, *supra* note 28, at 136 (suggesting that the *Great Dane* analysis only applies to systemic cases under section 8(a)(3)).

IV. FINDINGS OF THE INHERENTLY-DESTRUCTIVE-CONDUCT EMPIRICAL ANALYSIS¹⁹⁵

Although, as determined by the analysis conducted above, there are 140 Board cases¹⁹⁶ in which the Board applied the *Great Dane* framework to determine whether anti-union intent could be inferred from employer responses to union concerted activity, there are in reality 144 inherently-destructive-conduct *decisions* since four of the cases analyzed had two separate inherently-destructive-conduct findings.¹⁹⁷ As *Great Dane* was decided over thirty-six years ago, the overall number of decisions indicates that the Board on average¹⁹⁸ made four inherently-destructive-conduct decisions a year.¹⁹⁹

Thirty-four different NLRB Members, including fifteen Democratic Members and nineteen Republican Members, applied the *Great Dane* framework.²⁰⁰ On an individual Board Member basis, there

195. Appendix B contains case statistics from the inherently-destructive-conduct empirical analysis.

196. The Term “Board cases,” refers to decisions of either a panel of the Board (three Members participating) or the full Board (four or five Members of the Board generally), depending on whether a panel or the full Board heard a given case. Generally, only the more important decisions are heard by the full Board. See Cooke et al., *supra* note 183, at 240. The full Board currently (as of May 31, 2004) consists of three Republicans (Chairman Battista and Members Schaumber and Meisburg) and two Democrats (Members Liebman and Walsh). National Labor Relations Board, National Labor Relations Board Members, at <http://www.nlr.gov/nlr/about/structure/fbmembers.asp> (last visited Sept. 22, 2004).

197. See *infra* Appendix A; Cent. Ill. Pub. Serv. Co., 326 N.L.R.B. 928 (1998) (both Scenario 1 and 3 decisions); Texaco, Inc., 291 N.L.R.B. 508 (1988) (both Scenario 1 and 3 decisions); Salinas Valley Ford Sales, Inc., 279 N.L.R.B. 679 (1986) (both Scenario 1 and 3 decisions); Johns-Manville Prods. Corp., 223 N.L.R.B. 1317 (1976) (both Scenario 2 and 3 decisions), *enforcement denied*, 557 F.2d 1126 (5th Cir. 1977).

198. Some years had as many as fifteen inherently-destructive-conduct decisions (1987), while some years had none (2002). See *infra* Appendix A.

199. Given that there have been nearly 12,000 section 8(a)(3) charges filed against employers in a given year and the Board decides approximately 300 section 8(a)(3) cases per year, this empirical data makes clear that inferential section 8(a)(3) cases are indeed very rare, even if the previously excluded categories of cases, such as summary affirmances of ALJ decisions, are taken into account. See Michael J. Hayes, *Has Wright Line Gone Wrong? Why Pretext Can Be Sufficient To Prove Discrimination Under The National Labor Relations Act*, 65 MO. L. REV. 883, 886 n.6 (2000) (noting that inherently-destructive-conduct cases are considered “unusual” in comparison to cases which require a showing of anti-union purpose on the part of the employer); see also Cooke et al., *supra* note 183, at 238-39 (stating that the Board decided only about 2.5% of all ULP cases closed in fiscal year 1990); Charles J. Morris, *Deterring 8(a)(3) Discharges with 10(J) Injunctions: Professor Morris’ Comments on the Katz et al. Commentary*, 4 EMPLOYEE RTS. & EMPLOYMENT POLICY J. 75, 83 (2000) (“It can thus be reported that during FY98 a total of 311 ALJ decisions involving all cases containing Section 8(a)(3) issues were decided after evidentiary hearings.”).

200. Member Zimmerman, who served from 1980 to 1984, is listed on the Board’s website as an Independent. National Labor Relations Board, National Labor Relations Board Members, <http://www.nlr.gov/nlr/about/structure/fbmembers.asp> (last visited June 12, 2004). Traditionally, the Board at any given time has three Members from the President’s political party and two Members from the other party. David A. Morand, *Questioning the Preemption Doctrine: Opportunities for State-Level Labor Law Initiatives*, 5 WIDENER J. PUB. L. 35, 79-80 (1995). Member Zimmerman, during his tenure, filled one of the Democ-

were 467 inherently-destructive-conduct decisions, including 243 (52%) Republican Board Member decisions and 224 (48%) Democratic Board Member decisions.²⁰¹ On a decisional basis, Republican-majority panels of the Board decided seventy-nine (55%) inherently-destructive-conduct decisions, while Democratic-majority panels decided sixty-two (43%) of these decisions.²⁰² The remaining three (2%) inherently-destructive-conduct decisions were decided by nonmajority panels of the Board.²⁰³

These statistics make clear that each political party contributed almost equally to the decisions made in these inherently-destructive-conduct cases; that is, Board Members of one political party were no less likely to apply the inherently-destructive-conduct analysis developed under *Great Dane* than members of the opposing political party.²⁰⁴ Nevertheless, inherently-destructive-conduct cases proved to be somewhat contentious among Board Members²⁰⁵ and also between the Board and reviewing appellate courts in general.²⁰⁶

ratic seats and, therefore, is treated as a Democrat for purposes of this analysis. Board Members deciding inherently-destructive-conduct cases (with the number of inherently-destructive-conduct individual decisions in parentheses) include Democratic Members Liebman (12), Walsh (5), Truesdale (18), Fox (4), Gould (10), Browning (4), Devaney (12), Cracraft (16), Babson (27), Dennis (8), Zimmerman (11), Fanning (50), Penello (32), Brown (10), and McCulloch (5), and Republican Members Battista (2), Schaumber (1), Hurtgen (9), Brame (1), Higgins (2), Cohen (3), Stephens (40), Raudabaugh (8), Oviatt (6), Johansen (42), Dotson (26), Hunter (7), Jenkins (48), Van de Water (2), Murphy (14), Walther (3), Kennedy (11), Miller (14), and Zagoria (4). *See infra* Appendix A.

201. *See infra* Appendix B. By “Republican Board Member decisions,” and “Democratic Board Member decisions,” I am not referring to the composition of the panel or the composition of the Board at the time of the decision, but individual decisions made by Board Members in a given case.

202. *Infra* Appendix B.

203. Nonmajority decisions occur when Board vacancies are to be filled.

204. Interestingly, however, there were many more inherently-destructive-conduct decisions by the Board in past decades than in more recent decades. Of the 144 decisions, sixty-two (or 43%) were decided in the 1980s and forty-two (or 29%) were decided in the 1970s. In comparison, only twenty-five inherently-destructive-conduct decisions were made in the 1990s, and only nine decisions have been made in the first four years of this decade. *See infra* Appendix B. This, of course, could be related to the declining number of unions and union members in recent years.

205. Overall, there were fifty-one cases (36% of all cases) that either contained a dissent or a concurrence. Out of the 140 inherently-destructive-conduct cases, there were thirty-nine cases with dissents, representing 28% of cases. Republicans were responsible for twenty-eight dissents, while Democrats authored sixteen dissents. *See infra* Appendix B.

206. Fifty-eight cases (41%) were appealed. Fifty-three percent of Democratic-majority inherently-destructive-conduct decisions were appealed, while 30% of Republican-majority inherently-destructive-conduct decisions were appealed. *See infra* Appendix B. Of these appeals, thirty-five Board decisions (60%) were enforced or review was denied, while twenty-three Board decisions (40%) were denied enforcement or vacated. *See infra* Appendix B. Sixty-four percent of Democratic-majority Board decisions appeals were enforced, while 54% of Republican-majority Board decisions were enforced. *See infra* Appendix B. Of the cases examined, some Board cases were only enforced in part. In those circumstances, the case was analyzed in detail to determine whether the Board’s order was enforced on

In order to place in perspective the manner in which Board Members from both parties analyzed inherently-destructive-conduct decisions, as discussed in Part III of this Article, each decision was placed into one of four potential analytical case scenarios. Of the 144 inherently-destructive-conduct decisions analyzed, there were sixty-nine (48%) Scenario 1 decisions, twenty-seven (19%) Scenario 2 decisions, forty-eight (33%) Scenario 3 decisions, and zero Scenario 4 decisions.²⁰⁷ The specific findings relating to each type of case scenario are discussed in turn below.²⁰⁸

A. Scenario 1 Case Statistics

Almost 50% of the inherently-destructive-conduct decisions were Scenario 1 cases, resolved in a fashion similar to the *Great Dane* case itself; that is, because there were no legitimate and substantial business reasons, there was no need for an inherently-destructive-conduct determination.²⁰⁹ Republican and Democratic Boards were surprisingly similar in their willingness to engage in Scenario 1-type analyses.²¹⁰ For instance, 43% of Republican-majority Board decisions could be described as Scenario 1, while the same could be said of 56% of Democratic-majority Board decisions. Similarly, on an individual Board Member basis, Scenario 1 decisions represented 109 (49%) of all individual decisions made by Democratic Board Members, while their Republican counterparts made 100 (41%) Scenario 1 decisions.

Interestingly, a sizable majority of Scenario 1 decisions involved comparable types of cases.²¹¹ Specifically, there were two types of Scenario 1 inherently-destructive-conduct cases that occurred re-

the inherently-destructive-conduct issue. If so, it was counted as an enforcement for statistical purposes.

207. On an individual Board Member basis, out of 467 individual decisions, 209 (or 45%) were Scenario 1, 88 (or 19%) were Scenario 2, 165 (or 35%) were Scenario 3, and zero were Scenario 4. *See infra* Appendix B.

208. Because there were no Scenario 4 cases, a separate statistical analysis of Scenario 4 cases was unnecessary.

209. *See NLRB v. Great Dane Trailers*, 388 U.S. 26, 34-35 (1967).

210. Because this Article starts with the assumption that Republican Board Members will vote in favor of employers and Democratic Board Members will do the opposite in inherently-destructive-conduct cases as a consequence of highly indeterminate standards being at play, the relative closeness of these percentages suggests another factor is leading to this unexpected amount of decisional consistency. *See infra* Part V.D.

211. This is not to say that the fact patterns in these cases were identical or even substantially similar and, therefore, required the Board to follow a clear line of precedent; to the contrary, the factual scenarios in these cases represent a wide array of different types of employer conduct. By saying there were “comparable types of cases,” I only mean to identify the recurring nature of certain groups of cases (that is, those involving striker reinstatement rights, those involving striker benefit rights, and so on). Moreover, and importantly, the Board does not appear to strictly follow principles of *stare decisis*. *See infra* note 268 and accompanying text.

peatedly: those concerning the reinstatement of economic strikers after a vacancy and an unconditional offer to return to work (*Laidlaw* cases)²¹² and those concerning the denial of accrued benefits to striking workers (*Texaco* cases).²¹³ In each type of case, a violation of section 8(a)(3) could be found if the employer did not establish legitimate and substantial business reasons for taking the actions in question. In either situation, once such justifications were found lacking, there was no need to continue the analysis to characterize the degree of impact such conduct had on employee rights as inherently destructive or comparatively slight.²¹⁴

212. See *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969). *Laidlaw* is a prototypical Scenario 1 case because in *Laidlaw*,

the Court pointed out that by virtue of Section 2(3) of the Act, an individual whose work ceases due to a labor dispute remains an employee if he has not obtained other regular or substantially equivalent employment, and that an employer refusing to reinstate strikers must show that the action was due to legitimate and substantial business justification.

Id. at 1368. Although there are some recognized legitimate and substantial reasons that meet the *Laidlaw* standard, see *infra* notes 254-55 and accompanying text, generally most employers who fail to reinstate such strikers are found to be in violation of section 8(a)(3) without proof of anti-union intent. Indeed, in thirty-six out of forty-one *Laidlaw* cases, or 88% of these cases, an employer was found to have violated section 8(a)(3) by failing to reinstate permanently replaced economic strikers. In all, thirty-six out of seventy-one Scenario 1 cases, constituting 51% of Scenario 1 cases, were *Laidlaw* reinstatement cases. See *infra* Appendix B.

213. See *Texaco, Inc.*, 285 N.L.R.B. 241 (1987). Under *Texaco*, “the General Counsel bears the prima facie burden of proving at least some adverse effect of the benefit denial on employee rights. The General Counsel can meet this burden by showing that (1) the benefit was accrued and (2) the benefit was withheld on the apparent basis of a strike.” *Id.* at 245. “Once the General Counsel makes a prima facie showing of at least some adverse effect on employee rights the burden under *Great Dane* then shifts to the employer to come forward with proof of a legitimate and substantial business justification for its cessation of benefits.” *Id.* at 246. Again, although there are some well-recognized legitimate and substantial reasons for denial of accrued benefits, see *infra* note 257 and accompanying text, if such reasons are not established by the employer, a violation of section 8(a)(3) is made out without an inherently-destructive-conduct determination being made. *Id.* at 247 (“In the absence of [legitimate and substantial business justifications], and in accord with *Great Dane*, we find it unnecessary to decide whether the [employer]’s conduct was ‘inherently destructive’ of employee rights.”). In twenty-two out of thirty-nine *Texaco* cases, or 56% of such cases, no legitimate and substantial justification was found and there was a section 8(a)(3) violation. In all, twenty-two out of seventy-one Scenario 1 cases, constituting 31% of Scenario 1 cases, were *Texaco* denial-of-benefit cases. See *infra* Appendix B.

214. Part of the reason that the Board may be coming to these unnecessary conclusions in *Laidlaw* cases is that in *Laidlaw* itself the Board improperly read *Great Dane* and *Fleetwood Trailers* as equating a finding of no legitimate and substantial business reasons with a finding of inherently destructive conduct. See *Laidlaw*, 171 N.L.R.B. at 1369 (“As [the employer] brought forward no evidence of business justification for refusing to reinstate these experienced employees while continuing to advertise for and hire new unskilled employees, we find such conduct was inherently destructive of employee rights.”). On the other hand, the Board’s decision in *Texaco* properly concluded that when the employer is unable to establish a legitimate and substantial business reason for its actions, it is unnecessary for the degree of impact of the decision on employee rights to be determined. See *Texaco*, 285 N.L.R.B. at 247 (1987).

We conclude therefore, that the [employer] has failed to prove a legitimate and substantial business justification for its suspension of A&S benefits and of

Remarkably, *Laidlaw* and *Texaco* cases made up 82% of all Scenario 1 cases (fifty-eight out of seventy-one decisions).²¹⁵ Equally noteworthy is the fact that there were more Republican-majority Board decisions coming to Scenario 1 outcomes in these cases (thirty-two decisions) than Democratic-majority Board decisions (twenty-six decisions). Republican Scenario 1 *Laidlaw* and *Texaco* decisions represented 41% of all Republican-majority Board inherently-destructive-conduct decisions, while Democratic *Laidlaw* and *Texaco* Scenario 1 decisions represented 42% of all Democratic-majority Board decisions.

B. Scenario 2 Case Statistics

Roughly one out of five of the inherently-destructive-conduct decisions involved a Scenario 2 circumstance in which the Board determined that the conduct engaged in by the employer was inherently destructive of employee rights under the Act and, therefore, violative of section 8(a)(3). Democratic Boards were almost three times more likely than Republican Boards (29% versus 11%) to find employer conduct inherently destructive. On an individual basis, 25% of Democrat Board Member decisions fell within Scenario 2, while only 13% of Republican Board Member decisions were Scenario 2.

This apparent disparity between Republican and Democratic Board decisions in Scenario 2-type cases is misleading, however, because both Republican and Democratic Board Members repeatedly misapplied the analytical model established by *Great Dane* for inherently-destructive-conduct cases.²¹⁶ Properly applied, Scenario 2 decisions should have only involved determinations where there was both a finding that the employer had legitimate and substantial business justifications for its conduct *and* that such conduct had an

Turner's pension credit. In the absence of such proof, and in accord with *Great Dane*, we find it unnecessary to decide whether the [employer]'s conduct was 'inherently destructive' of employee rights.

Id.

215. See *infra* Appendix B. There were two cases in which there were both Scenario 1 *Laidlaw* and *Texaco* findings. See *Dayton Newspapers, Inc.*, 339 N.L.R.B. 79 (2003); *Nat'l Football League Mgmt. Council*, 309 N.L.R.B. 78 (1992). For purposes of analysis, these decisions were counted once in both the *Laidlaw* and *Texaco* ledgers. Consequently, there was a total of seventy-one Scenario 1 decisions when the cases were categorized in this manner.

216. An argument can be made that decisionmakers who are acting in a biased manner would be likely to purposely misapply the *Great Dane* analysis to promote their outcome-driven agenda. Although there is certainly a possibility that this is what is motivating certain Board Members to decide these cases in this manner, the fact that so many of these cases were decided inconsistently with *Great Dane* suggests less biased decisionmaking and more unfamiliarity with the teachings of *Great Dane*. Moreover, if Democratic Board Members were truly interested in misapplying the analysis in order to support unions, one would think there would be more than just 25% of Democratic-majority decisions making inherently-destructive-conduct determinations.

inherently destructive impact on employee rights under the Act.²¹⁷ Indeed only two such Scenario 2 cases were observed in this empirical study.²¹⁸

Other putative Scenario 2 cases demonstrate that the Board made the inherently-destructive-conduct determination improperly or unnecessarily in at least four different ways: (1) by making the inherently-destructive-conduct characterization first and then circling back to conclude that the employer also had no legitimate and substantial reasons for its conduct;²¹⁹ (2) by making the inherently-destructive-conduct determination after the Board concluded that the employer did not have legitimate and substantial reasons for its actions;²²⁰ (3) by making the inherently-destructive-conduct determination in a conclusory manner without even considering the employer's reasons for its conduct;²²¹ and (4) by making the inherently-

217. See *supra* notes 187-89 and accompanying text.

218. Both were Democratic-majority Board decisions. See *W.D.D.W. Commercial Sys. & Invs., Inc.*, 335 N.L.R.B. 260 (2001) (finding hiring policy based on 30% rule supported by legitimate and substantial business justifications, but also finding it had an inherently destructive impact on employee rights under the Act), *enforcement denied in relevant part sub nom. Contractors' Labor Pool, Inc. v. NLRB*, 323 F.3d 1051 (D.C. Cir. 2003); *Swift Serv. Stores, Inc.*, 169 N.L.R.B. 359 (1968) (finding clause in bonus plan disqualifying striking employees had an inherently destructive impact even if it were assumed that the employer conduct was supported by legitimate and substantial business reasons). Although two cases represent too small a statistical sample to derive many meaningful conclusions, one important conclusion that can be made is that neither Republican nor Democratic Board Members are using the *Great Dane* framework to invalidate employer responses to union concerted activity by characterizing them as inherently destructive. See *infra* Part V.A.

219. See, e.g., *Freeman Decorating Co.*, 336 N.L.R.B. 1 (2001), *enforcement denied sub nom. Int'l Alliance of Theatrical & Stage Employees v. NLRB*, 334 F.3d 27 (D.C. Cir. 2003); *Honeywell, Inc.*, 318 N.L.R.B. 637 (1995); *Sierra Realty Corp.*, 317 N.L.R.B. 832 (1995), *enforcement denied*, 82 F.3d 494 (D.C. Cir. 1996); *Swift Indep. Corp.*, 289 N.L.R.B. 423 (1988), *enforcement denied sub nom. Esmark, Inc. v. NLRB*, 887 F.2d 739 (7th Cir. 1989); *Interstate Paper Supply Co.*, 251 N.L.R.B. 1423 (1980); *Borden, Inc.*, 235 N.L.R.B. 982 (1978), *enforced in relevant part*, 600 F.2d 313 (1st Cir. 1979), *and enforced after remand*, 645 F.2d 87 (1st Cir. 1981); *Portland Willamette Co.*, 212 N.L.R.B. 272 (1974), *enforcement denied*, 534 F.2d 1331 (9th Cir. 1976); *Rushton & Mercier Woodworking Co.*, 203 N.L.R.B. 123 (1973), *enforced*, 502 F.2d 1160 (1st Cir. 1974); *Austin & Wolfe Refrigeration, Air Conditioning & Heating, Inc.*, 202 N.L.R.B. 135 (1973).

220. See, e.g., *Moore Bus. Forms, Inc.*, 224 N.L.R.B. 393 (1976), *supplemented by* 226 N.L.R.B. 688 (1976), *enforced in relevant part*, 574 F.2d 835 (5th Cir. 1978); *Cutten Supermarket*, 220 N.L.R.B. 507 (1975). On the other hand, if the Board merely equated a lack of legitimate and substantial justifications with being inherently destructive without doing two separate analyses, these cases were labeled as Scenario 1. See, e.g., *Electro Vector, Inc.*, 220 N.L.R.B. 445 (1975) (finding that because employer conduct was not supported by legitimate and substantial business justifications that conduct was therefore inherently destructive), *enforcement denied*, 539 F.2d 35 (9th Cir. 1976); *Ross Sand Co.*, 219 N.L.R.B. 915 (1975).

221. See, e.g., *Handi-Bag Co.*, 267 N.L.R.B. 221 (1983); *Consolidation Coal Co.*, 263 N.L.R.B. 1306 (1982); *Burlington Homes, Inc.*, 246 N.L.R.B. 1029 (1979); *Wallace Metal Prods., Inc.*, 244 N.L.R.B. 41 (1979); *Brown Co.*, 243 N.L.R.B. 769 (1979); *Westinghouse Elec. Corp.*, 237 N.L.R.B. 1209 (1978), *enforced as modified*, 603 F.2d 610 (7th Cir. 1978);

destructive-conduct determination even though the Board had already found specific evidence of anti-union intent.²²² If one subtracts these analytically inappropriate findings from the Scenario 2 ledger and either relabels these cases as Scenario 1 cases or eliminates them from the empirical analysis altogether as non-*Great Dane* cases, this leaves only two (1%) decisions left which properly fit within the Scenario 2 category.

C. Scenario 3 Case Statistics

Scenario 3 cases, in which the employer has been found to have a legitimate and substantial reason for its actions and where such actions have been found to have a comparatively slight impact on employee rights, represent approximately one out of every three inherently-destructive-conduct decisions. In this regard, Republican-majority Boards were three times more likely than Democratic-majority Boards (46% of Republican-majority Board decisions versus 15% of Democratic-majority Board decisions) to find employer conduct to have a comparatively slight impact on employee rights under the Act.²²³

Nevertheless, and consistent with findings made in conjunction with Scenario 1 and Scenario 2 cases, most of the differences between Republican and Democratic Board Members concerning Scenario 3 cases do not appear to hinge on the characterization of employer conduct as comparatively slight versus inherently destructive. Instead, in almost all of these cases, Board Members appear to be disagreeing over whether an employer had a legitimate and substantial business

Crawford Container, Inc., 234 N.L.R.B. 851 (1978); Pittsburgh Press Co., 234 N.L.R.B. 408 (1978); Fla. Steel Corp., 231 N.L.R.B. 923 (1977).

222. A finding of both specific anti-union intent on the part of the employer and a finding of inherently destructive conduct on the part of the employer in the same case have been found to be superfluous by at least one Board Member. See *D & S Leasing, Inc.*, 299 N.L.R.B. 658, 661 n.13 (1990), *enforced sub nom.* *N.L.R.B. v. Centra, Inc.*, 954 F.2d 366 (6th Cir. 1994).

Because, as explained below, the record supports a finding of actual antiunion motive in the termination of the D & S employees and their subsequent treatment by Central (refusing to rehire some of them and hiring others as “new” employees), Chairman Stephens finds it unnecessary to make an ‘inherently destructive’ finding pursuant to the analysis set out in *Great Dane*.

Id. Nevertheless, the Board made both findings in a number of cases. See, e.g., *Freeman Decorating*, 336 N.L.R.B. 1; *Honeywell*, 318 N.L.R.B. 637; *Interstate Paper*, 251 N.L.R.B. 1423; *Wallace Metal*, 244 N.L.R.B. 41; *Crawford Container*, 234 N.L.R.B. 851. At worst, the Board completely confused the analysis in these cases; at best, the Board made gratuitous findings as a hedge against being overturned by a reviewing appellate court.

223. On an individual Board Member basis, Republican Board Members made 107 Scenario 3 decisions, constituting 44% of all individual decisions made by Republican Board Members, while Democratic Board Members made fifty-eight Scenario 3 decisions, constituting 26% of all individual decisions made by Democratic Board Members. See *infra* Appendix B.

justification for its conduct.²²⁴ If no such justification was found, the conduct fell under Scenario 1 without the Board making an inherently-destructive-conduct determination. On the other hand, if such justifications were found, although it was conceivable that the conduct could still be found inherently destructive, in fact only two decisions in thirty-six years resulted in such a Scenario 2 outcome.²²⁵ In other words, in almost all cases where the Board found that an employer's conduct was supported by a legitimate and substantial business justification, regardless of whether a Republican-majority panel or Democratic-majority panel was involved, it inexorably followed that the impact of such conduct was considered comparatively slight and thus, such cases are classified as Scenario 3 cases.²²⁶

Overall, 81% of inherently-destructive-conduct decisions were either Scenario 1 or Scenario 3 decisions in which the Board focused on an employer's legitimate and substantial business justifications.²²⁷ If one recategorizes the Scenario 2 cases which should have been categorized as Scenario 1 cases or as specific evidence cases (all but two decisions), 99% of inherently-destructive-conduct cases were decided on the basis of whether an employer had legitimate and substantial justifications for its response to union concerted activity.²²⁸

Additionally, like Scenario 1 decisions, most Scenario 3 decisions can fit into specific types of recurring cases.²²⁹ Unlike Scenario 1 cases, however, there are three, not two, types of specific Scenario 3 cases. In addition to *Laidlaw* and *Texaco* cases, there is also a recurring pattern of cases involving an employer lockout of its employees with the use of temporary replacement workers (*Harter* cases).²³⁰ *Harter*, *Laidlaw*, and *Texaco* Scenario 3 cases combined to make up 73% of all Scenario 3 cases, with Republican-majority Boards being responsible for 89% of these decisions.²³¹ Thirty-nine percent of Re-

224. Although a partisan split over the legitimate and substantial business justification component of the *Great Dane* analysis is, on its face, just as disturbing as a partisan split on the inherently-destructive-conduct question, the Board has developed presumptions to determine how the legitimate and substantial business justification should be analyzed, and these presumptions substantially constrain Board Member discretion. See *infra* Part V.C.

225. See *supra* note 218 and accompanying text.

226. See *supra* note 190.

227. See *infra* Appendix B.

228. See *infra* Appendix B.

229. See *supra* note 211.

230. See *Harter Equip., Inc.*, 280 N.L.R.B. 597 (1986). *Harter* involved a Board determination that employers have a legitimate and substantial reason in most cases for using temporary replacements in lockout situations and that the use of temporary replacements has no more than a comparatively slight impact on the section 7 rights of locked-out employees. See *id.* at 600. Consequently, specific evidence of anti-union intent is required in these cases in order for a section 8(a)(3) violation to be found. *Id.*

231. See *infra* Appendix B. Although it is conceded that this statistic would appear to support the political nature of this determination, in reality Democratic and Republican Board Members are really just differing over whether the employer has a legitimate and

publican-majority Board decisions were *Harter*, *Laidlaw*, or *Texaco* Scenario 3 decisions, while 6% of Democratic-majority decisions were *Harter*, *Laidlaw*, or *Texaco* Scenario 3 decisions.²³²

Combining all *Laidlaw*, *Texaco*, and *Harter* cases under Scenario 1 and Scenario 3, these cases make up almost two out of three (65%) of every inherently-destructive-conduct decision the Board has decided since *Great Dane*.²³³ Sixty-two percent of these decisions are Scenario 1 cases (ULP finding) and 38% of these decisions are Scenario 3 cases (no ULP finding).²³⁴ Eighty percent of all Republican-majority Board inherently-destructive-conduct decisions are *Harter*, *Laidlaw*, or *Texaco* cases, while 48% of Democratic-majority Board inherently-destructive-conduct decisions are *Harter*, *Laidlaw*, or *Texaco* decisions.²³⁵

V. CONCLUSIONS BASED ON THE FINDINGS OF THE INHERENTLY-DESTRUCTIVE-CONDUCT EMPIRICAL ANALYSIS

Based on the findings from the empirical analysis of the Board's inherently-destructive-conduct cases under section 8(a)(3) described above, four important conclusions come to the fore.

First, there is little correlation between the political composition of the Board, or a panel of the Board, and the frequency of inherently-destructive-conduct determinations. Second, this lack of correlation between political party and frequency of inherently-destructive-conduct determinations derives from the Board's strategy of calculated avoidance, in which it perhaps purposefully chooses to focus its attention on the more easily discernible inquiry concerning the presence or absence of legitimate and substantial business justifications for employer conduct.²³⁶ Third, although the Board is doing nothing less than engaging in a discretionary section 8(a)(1) balancing exercise in these inherently-destructive-conduct cases, the Board in fact is able to achieve a considerable amount of decisional consistency across party lines through the use of presumptions, which constrain discretion, for specific types of inherently-destructive-conduct cases. Finally, the findings of this empirical study suggest that Board

substantial business justification for its response to union concerted activity. And although this determination could be a similarly political determination as much as the "inherently destructive"/"comparative slight" determination, the evidence suggests that Board Members have utilized the same presumptions to constrain their discretion and have come to similar outcomes in these cases across party lines. See *infra* Part V.C.

232. See *infra* Appendix B.

233. See *Infra* Appendix B.

234. See *Infra* Appendix B.

235. See *Infra* Appendix B.

236. The basis for the argument that the legitimate-and-substantial-business-justification inquiry is an easier one than the inherently-destructive-conduct determination is discussed in detail *infra* Part V.C.

decisions may not be as politically motivated as historically thought; rather, the effects of collegiality, a factor previously neglected, may play a significant role in explaining these counterintuitive results.

A. *Conclusion #1: Political Composition of the Board Is Not
Predictive of Whether the Board Will Find Conduct
Inherently Destructive*

Initially, the suspicion that served as the impetus for this Article was that an inherently meaningless standard could not be consistently applied by a partisan Board constantly struggling to grasp its meaning. It was assumed, based on the findings of previous studies, that Democratic Board Members would support union claims of discrimination by inferring intent from employer conduct whenever possible, while Republican Board Members would do just the opposite in seeking to protect employers from unfair labor practice charges.²³⁷

The results of this Article's empirical analysis have turned previous understandings concerning the dynamics of Board Member decisionmaking on their head. With regard to inherently-destructive-conduct determinations (as opposed to whether there exists an unfair labor practice at all),²³⁸ there is a surprising amount of decisional consistency in how Board Members from different parties resolve these cases. In short, regardless of party, and even under the most liberal analysis of what constitutes a Scenario 2 case, inherently-destructive-conduct determinations are sparse. Republican-majority Boards made seventy-nine inherently-destructive-conduct decisions, of which only nine (11%) involved characterization of conduct as inherently destructive.²³⁹

Although that result cannot be considered unusual given Republican Board Members' natural sympathies for employer interests, Democratic-majority Boards made only slightly more inherently-destructive-conduct determinations. Even under the most liberal view of what constitutes a Scenario 2 case, out of sixty-two inherently-destructive-conduct Democratic Board decisions, only eighteen (29%) represented Scenario 2 outcomes.²⁴⁰ Even though Republican Boards exhibited a slightly less pronounced propensity to label employer conduct inherently destructive (11%), the relative closeness in

237. See *supra* note 7.

238. A finding that Republican and Democratic Boards are both unlikely to label conduct as inherently destructive does not answer the question as to whether there is consistency across party lines in finding unfair labor practices in these cases. As explained above, an unfair labor practice may still be found in a Scenario 1 case where there is some discriminatory effect on employee rights and an employer has no legitimate and substantial justification for its conduct. Whether decisional consistency extends to case outcomes is discussed *infra* Parts V.D and VI.

239. See *infra* Appendix B.

240. See *infra* Appendix B.

outcome between Democratic and Republican Board decisions in these cases is quite remarkable given previous notions of the Board's inherent political bias.

Furthermore, if one takes a more strict view as to what properly can be characterized as a Scenario 2 case, the lack of political bias in making these determinations becomes even starker. As explained in Part IV, there are only two decisions that are truly Scenario 2 decisions; that is, decisions in which the employer has been found to have legitimate and substantial reasons for its conduct and where the impact of such conduct is considered inherently destructive of employee rights.²⁴¹ All other Scenario 2 inherently-destructive-conduct findings represent an amalgam of inappropriate, unnecessary, or inconsistent findings.²⁴²

Thus, neither Republican nor Democratic Boards were likely to find conduct to be inherently destructive once they determined an employer had legitimate and substantial business justifications for its actions. Only 3% of Democratic Board inherently-destructive-conduct decisions come out this way and there are no such Republican Board decisions. In short, regardless of party, Board Members are avoiding, perhaps purposefully, making the inherently-destructive-conduct characterization in these inferential section 8(a)(3) cases. There is clearly something else at work that is keeping Board Members of both political parties from making these characterizations, even though they appear to be free to make such politically motivated decisions if they so desire.

B. Conclusion #2: The Legitimate and Substantial Business Justification Test Is at the Heart of the Inherently-Destructive-Conduct Determination

The Board has appeared to achieve consistency across party lines in not labeling most employer conduct inherently destructive. This was achieved by engaging in a strategy of calculated avoidance, which permits the Board to evade the inherently destructive/comparatively slight determination altogether. The Board accomplishes this tactic by taking advantage of the doctrinal innovation introduced by the *Great Dane* case.

As discussed above, as long as there is some discriminatory effect on employee rights caused by the employer conduct, the burden is on the employer to prove that it had legitimate and substantial reasons for engaging in that conduct, because such proof of motivation is most accessible to the employer.²⁴³ If the employer cannot meet this

241. See *supra* note 218.

242. See *supra* notes 219-22 and accompanying text.

243. See *supra* note 119 and accompanying text.

burden, there is simply no need to go further and characterize the degree of impact such conduct has on employee rights, as a section 8(a)(3) violation may be found without more based on inferred anti-union intent.²⁴⁴ Moreover, and as illustrated in Part IV.C in conjunction with the discussion on Scenario 3 case statistics, a finding that the employer does have legitimate and substantial justifications is normally tantamount to a finding that the conduct only has a comparatively slight impact, and that no unfair labor practice has been committed under section 8(a)(3).²⁴⁵ Consequently, the sufficiency of the business reason for an employer's conduct drives the determination of whether there is an unfair labor practice in these cases.²⁴⁶ Indeed, even under the most relaxed view of what constitutes a Scenario 2 case, 81% of inherently-destructive-conduct cases analyzed were Scenario 1 or Scenario 3 cases where the result of the case turned on the business justifications offered for the employer conduct.²⁴⁷

Yet, even though a determination based on the balancing of employer and employee interests would seem to permit as much decisional discretion as the inherently-destructive-conduct determination itself, there is still a surprising amount of decisional consistency in these cases from the standpoint of whether Republican versus Democratic boards found that an employer committed an unfair labor practice under section 8(a)(3). Combining Scenario 1 and 2 cases (cases in which section 8(a)(3) violations were found), Republican Board majorities found unfair labor practices in 54% of their inherently-destructive-conduct cases.²⁴⁸ On the other hand, Democratic-majority Board cases making Scenario 1 or 2 findings (and therefore finding unfair labor practices) accounted for 85% of their inherently-destructive-conduct cases.²⁴⁹

244. See *supra* notes 120-21 and accompanying text.

245. See *supra* notes 224-26 and accompanying text.

246. In essence, by focusing on the legitimate and substantial justifications for employer conduct, the Board appears to be engaged in a *sub rosa* weighing of employer interests against employee interests. This is exactly the approach taken in section 8(a)(1) cases where the focus of the Board is not on the intent of the employer but on whether the employer's conduct impermissibly interferes with the section 7 rights of employees. See *supra* note 25 and accompanying text. What is less clear is whether this is the type of impermissible balancing of bargaining power for which the Board has been chastised by the Supreme Court or the permissible balancing of employer economic interests against employee statutory interests. See *supra* notes 94-97 and accompanying text; see also White, *supra* note 28, at 139 (explaining that the resultant lack of guidance from the Supreme Court "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)").

247. See *infra* Appendix B. If one imposes analytical consistency on the Board's inherently-destructive-conduct decisions, 99% of inherently-destructive-conduct cases turn on the business justification determination. See *supra* notes 217-22 and accompanying text.

248. See *infra* Appendix B.

249. See *infra* Appendix B.

Although Democratic Boards were more likely to find unfair labor practices in these cases, the fact that Republican Boards found unfair labor practices in a majority of these inherently-destructive-conduct cases is more remarkable and significant. One would have expected Republican Board Members to use the flexibility imparted by this legal standard to find in favor of employers whenever possible if previous understandings of politically motivated Board decisionmaking were accurate.²⁵⁰ Instead, the fact that Republican Boards still found unfair labor practices in a majority of these cases suggests that Board Member discretion is constrained by something else, whatever it is, which permits a large degree of decisional consistency even when balancing usually permits a large degree of unconstrained and unstructured discretion.²⁵¹

C. Conclusion #3: Presumptions for Specific Types of Inherently-Destructive-Conduct Cases Help Constrain Board Member Discretion

The Board has appeared to achieve even greater doctrinal consistency in these cases by utilizing a series of fixed balancing approaches, or presumptions, for deciding specific types of inherently-destructive-conduct cases. In doing so, the Board has not sought to do the impossible by eliminating Member's decisional discretion; rather, it has sought to structure and confine that discretion.²⁵² In particular, *Laidlaw* reinstatement cases, *Texaco* denial-of-benefit cases, and

250. The argument may be made that because only a small percentage of the thousands of unfair labor practice charges actually make it to the Board for resolution, since the General Counsel has to first find there has been a violation, it is not surprising that the Board, composed of both Democratic and Republican Board Members, finds a large number of violations in these cases. However, given the highly indeterminate nature of the inherently-destructive-conduct legal standard, a Republican Board Member would seem to have a large degree of latitude in manipulating this standard to find the employer conduct not violative of the Act, even in situations where the General Counsel is a Republican. Yet, this is not the case. Therefore, I believe the better explanation for decisional consistency in these cases is the use of presumptions, which by extension support the notion that there is an overarching collegiality that pervades the Board's decisionmaking process. See *infra* Part V.D.

251. See Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 420 (1996) (maintaining that balancing in the employment discrimination arena is inappropriate "because of the danger that decision maker bias may affect the outcome"); see also White, *supra* note 28, at 151 n.284 (arguing that in NLRA context, balancing gives a decisionmaker considerable leeway). Professor Grover makes an interesting observation when she states, "[r]egardless of the caliber and good faith of decisionmakers, problems of bias are likely to occur whenever matters focus on race, sex, or other bases of discrimination." Grover, *supra*, at 423. Being affiliated with the union would appear to be another "form of difference" that "heightens the significance of 'tension between formal, predictable rules and individualized judgments under discretionary standards.'" See Grover, *supra*, at 423 (quoting Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 26 (1987)).

252. See Calvin William Sharpe, "By Any Means Necessary"—*Unprotected Conduct and Decisional Discretion Under the National Labor Relations Act*, 20 BERKELEY J. EMP. & LAB. L. 203, 243 (1999).

Harter lockout cases are all cases in which Board Member discretion is structured and confined. These cases represent approximately two out of every three inherently-destructive-conduct decisions. Over time, the Board has decided which types of evidence would lead to an employer's business reasons being deemed legitimate and substantial.

For instance, in the *Laidlaw* reinstatement context, once an economic striker has unconditionally offered to return to work, the employer must reinstate the employee unless there are legitimate and substantial reasons for not doing so.²⁵³ After many decisions in this area of law, it is now clear that there are a limited number of circumstances where the employer can refuse reinstatement to the economic striker. Such circumstances include instances in which the position to which the employee wishes to be reinstated has been eliminated or the nature of the position has been significantly modified by the employer,²⁵⁴ or where the employee seeks a position which is neither his or her former job nor a substantially equivalent job.²⁵⁵ Absent these circumstances, Board Members from both parties generally agree that the employer has violated section 8(a)(3).

Indeed, the statistics surrounding *Laidlaw*-type cases bear out this conclusion regarding the consistent manner in which these cases are decided. Republican Boards found section 8(a)(3) violations in 76% of the *Laidlaw* cases they considered, while Democratic Boards found violations in 100% of *Laidlaw* cases. Although Democratic Boards always have found unfair labor practice violations in these cases, more surprisingly, Republican Boards have also found violations in more than three out of every four of these cases. Thus, although one would think that Republican Board Members would utilize their discretion in balancing the respective interests to favor employers when deciding whether employers had met their burden in *Laidlaw* cases, in fact the presumptions have significantly confined any such discretion.

253. See *supra* note 212 and accompanying text.

254. The *Fleetwood Trailer* court observed that the burden of proving a legitimate and substantial justification for not reinstating former economic strikers could be met in cases in which there is "the need to adapt to changes in business conditions or to improve efficiency." See *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 379 (1967); see also *Cal. Distribution Ctrs., Inc.*, 308 N.L.R.B. 64, 64 (1992) ("We conclude that the [employer] did not violate the Act in [not reinstating employees] because we agree with the [employer] that it had legitimate and substantial business justifications for eliminating warehousemen positions."); *Salinas Valley Ford Sales, Inc.*, 279 N.L.R.B. 679, 680-81 (1986) (dealing with employer refusal to reinstate former striker supported by legitimate and substantial business reasons where employee no longer qualified for the position because of the changed nature of its engine repair operations).

255. See *Rose Printing Co.*, 304 N.L.R.B. 1076, 1077 (1991) (framing issue as whether "strikers are entitled to any jobs for which they are qualified or whether the reinstatement obligation extends only to their former jobs or substantially equivalent jobs" and finding that employer had legitimate and substantial reasons for not reinstating strikers).

Similarly, in *Texaco* denial-of-benefit cases, there are only a limited number of legitimate and substantial business reasons why an employer can deny accrued benefits to striking employees.²⁵⁶ These reasons involve cases where there exists a strike settlement agreement waiving the rights of strikers to such benefits or cases in which the employer has demonstrated reliance on a nondiscriminatory contract interpretation that is “reasonable and . . . arguably correct.”²⁵⁷ Republican Boards found section 8(a)(3) violations in 53% of *Texaco*-type cases, while Democratic Boards found violations in 67% of *Texaco*-type cases. This significant degree of decisional consistency across party lines in these cases results from the fact that Members from both parties recognize the same limited types of reasons that justify an employer denying accrued benefits to striking employees.

Last, similar decisional consistency exists in *Harter* lockout cases, but perhaps for slightly different reasons. In *Harter*, the Board determined as a matter of law that an employer who locks out its employees to exert pressure in support of its bargaining position has legitimate and substantial business justifications for hiring temporary replacements during the lockout and that the hiring of such temporary replacements only has a comparatively slight impact on employee rights under the Act.²⁵⁸ Indeed, in all cases presenting the *Harter*-type scenario the Board found no unfair labor practice on the part of the employer, even though Board Members might have disagreed as an initial matter over whether such conduct was supported by a sufficient business justification or had an inherently destructive impact on employee rights under the Act.²⁵⁹

256. See *supra* note 213 and accompanying text.

257. See *Texaco, Inc.*, 285 N.L.R.B. 241, 246 (1987).

The employer may meet this burden by proving that a collective-bargaining representative has clearly and unmistakably waived its employees' statutory right to be free of such discrimination or coercion. Waiver will not be inferred, but must be explicit. If the employer does not seek to prove waiver, it may still contest the disabled employee's continued entitlement to benefits by demonstrating reliance on a *nondiscriminatory* contract interpretation that is “reasonable and . . . arguably correct,” and thus sufficient to constitute a legitimate and substantial business justification for its conduct.

Id. (footnotes omitted); see also *Noel Foods Div. of the Noel Corp.*, 315 N.L.R.B. 905, 912 (1994) (refusal to pay vacation pay to strikers was supported by reasonable and arguably correct contract interpretation and, therefore, employer found to have met its burden of proving legitimate and substantial reasons for not granting striking employees benefits), *enforced in part*, 82 F.3d 1113 (D.C. Cir. 1996); *Texaco, Inc.*, 291 N.L.R.B. 325, 326 (1988) (reasoning that denial of benefits to strikers was supported by legitimate and substantial business reasons because of strike settlement agreement waiving strikers' rights to benefits).

258. See *supra* note 230.

259. Because most of these *Harter*-type cases occurred in the 1970s and 1980s when there were mostly Republican-majority Boards, all such *Harter* decisions have been made by Republican-majority or nonmajority Boards. Initially, Democratic Board Members dissented in many of these cases, see, e.g., *Ottawa Silica Co.*, 197 N.L.R.B. 449 (1972) (Member Fanning, dissenting), *enforced*, 482 F.2d 945 (6th Cir. 1973), but it appears that at

In short, these presumptions, present in 64% of all inherently-destructive-conduct decisions analyzed, permit a significant degree of decisional consistency in the outcome of these cases even though a balancing approach like the one adopted in inherently-destructive-conduct cases would seem to permit otherwise. This outcome would appear to be consistent with how the Board has achieved decisional consistency in other section 8(a)(1) contexts, such as in the solicitation and distribution context, where similar presumptions have been set up so that the weighing of employer and employee interests in such cases occurs in a consistent, predictable, and fair manner.²⁶⁰

*D. Conclusion #4: Institutional Collegiality Helps Explain
Decisional Consistency in Partisan, Adjudicative
Agencies like the NLRB*

Because of the lack of correlation between the political composition of the Board and the inherently-destructive-conduct determination, and because even the discretionary aspects of the legitimate and substantial justification standards are structured by presumptions, the end result is that Board inherently-destructive-conduct decisions are not nearly as politically motivated as historically thought.²⁶¹ This outcome is clearly counterintuitive given the highly indeterminate

least some Democratic Board Members are now willing to follow *Harter's* rationale without objection. See *Int'l Paper Co.*, 319 N.L.R.B. 1253, 1266 (1995) (Chairman Gould, a Democrat, acknowledged that an employer may "lawfully lock[] out its bargaining unit employees and lawfully subcontract[] their work on a temporary basis"), *enforcement denied*, 115 F.3d 1045 (D.C. Cir. 1997).

260. One need only consider the use of the *Peyton Packing* presumption in solicitation and distribution cases to see how Board Member discretion in balancing cases may be appropriately confined. See *generally* *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). These same cases also demonstrate that just because discretion is confined does not mean that it is eliminated. Compare *Lechmere*, 502 U.S. at 537-41 (striking section 8(a)(1) balance in favor of employer), with *Republic Aviation*, 324 U.S. at 802-05 (striking section 8(a)(1) balance in favor of employees and union).

261. Indeed, these findings of decisional consistency across party lines are at odds with Professor Flynn's findings that Board Members with management backgrounds (generally Republicans) vote decidedly more pro-management, while Members with labor backgrounds (generally Democrats) do just the opposite. See *supra* note 7. However, Professor Flynn's findings are based on an analysis of cases in which at least one Board Member dissented. See *supra* note 7. Although Professor Flynn appears to defend her reliance on these statistics based on the assumption that more controversial cases are more important for analyzing Board voting behavior, see Flynn, *Quiet Revolution*, *supra* note 2, at 1413 n.198, this approach understates the amount of decisional consistency that actually exists across party lines and between Members with labor backgrounds and management backgrounds. For instance, if similar case statistics to those relied on by Professor Flynn were utilized for inherently-destructive-conduct cases, only 27% of these cases would actually be analyzed and an inaccurate, overly polarized view of the Board's decisionmaking in this area would result. By relying only on divided Board decisions to draw larger conclusions about the highly polarized nature of the Board, Professor Flynn has essentially put the rabbit in the hat.

nature of the inherently-destructive-conduct standard which would appear to permit political bias to infect the decisions made by decisionmakers ensconced in a politically charged agency environment.²⁶²

It is this decisional consistency in Board inherently-destructive-conduct cases which strongly suggests an abiding institutional collegiality among Board Members.²⁶³ Such collegiality helps maintain the impartiality of the Board.²⁶⁴ In other words, the Members of the NLRB are able to separate their political and institutional roles and do what is best for national labor policy.²⁶⁵ Specifically, Board Members have been able to overcome their political biases in the inherently-destructive-conduct context and have agreed (perhaps implicitly) to utilize presumptions and other discretion-constraining ana-

262. The manner in which the Board applies the inherently-destructive-conduct standard is consistent with Professor Flynn's observation that "there is often a significant disparity between the Board's articulated adjudicative standard and its application of that standard." See Flynn, *Hiding the Ball*, *supra* note 8, at 393. Professor Flynn refers to this dichotomy as "the *de jure/de facto* gap," and it "is typified by a test that sounds flexible, but that the Board applies in a rigid, near-absolute fashion." See Flynn, *Hiding the Ball*, *supra* note 8, at 393-94. Although the Board does not apply its inherently-destructive-conduct approach in a rigid, near absolute fashion, nonetheless, the presumptions adopted in these cases do appear to lead to decisional consistency across party lines. By engaging in this type of analysis, not only is individual Board Member decisional latitude constrained, but the Board is able to shield its policy decisions from effective judicial and congressional oversight. See Flynn, *Hiding the Ball*, *supra* note 8, at 399. Indeed, because the Board has already been instructed by the Supreme Court to avoid balancing the relative importance of employer and employee economic interests in these types of cases, see *supra* notes 94-97 and accompanying text, this *de jure/de facto* approach may in fact permit the Board to engage in such an analysis in a roundabout way in order to achieve specific policy goals. Flynn, *Hiding the Ball*, *supra* note 8, at 399; see also White, *supra* note 28, at 139.

263. See *supra* note 6.

264. See Edwards, *Effects of Collegiality*, *supra* note 6, at 1649 ("The goal is to find the best answer (not the best 'partisan' answer) to the issues raised.").

265. See Edwards, *Effects of Collegiality*, *supra* note 6, at 1645. Indeed, there is some additional empirical evidence that current Board Members are seeking to aspire to this concept of collegiality. See Audio tape: A Dialogue with the NLRB, presented by the American Bar Association Section on Labor and Employment Law and the Center for Continuing Legal Education (Aug. 10, 2003) (on file with author) [hereinafter Dialogue with NLRB]. Board Member Liebman commented that really,

the biggest challenge is learning to form the personal associations with your colleagues, so that we can work together to try to see old things new ways

That really is the biggest challenge: How do we learn to listen to each other and learn from each other and how do we figure out how to apply this law and enforce this law in a way that makes sense?

Id. (comments of Member Liebman). Former Board Member Acosta commented:

On the Supreme Court, even though you have some vigorous disagreements, there is a great deal of collegiality because they know they have to work together and do work together This is . . . something that the Board works on, but something that I think the Board needs to continue to work on and in the big picture sense, knowing the role of Members is probably the biggest challenge.

Id. (comments of Member Acosta). Chairman Battista stated that "while we are getting to know one another, I think we've been collegial; that has been a goal of ours and to date, we've disagreed, but we haven't been disagreeable in doing it." *Id.* (comments of Chairman Battista).

lytical devices to help achieve decisional consistency in this highly indeterminate area of labor law and, thereby, support the institutional integrity of the Board. And there is reason to believe that if collegiality assists the Board in obtaining a good amount of decisional consistency in this area of labor law, those same collegial impulses should animate Board decisionmaking in other areas as well.²⁶⁶

Some may suggest that the Board is just giving structure to vague standards and then treating like cases alike, and that this is not a sign of collegiality at all, but rather responsible decisionmakers applying well-known principles of *stare decisis* in the agency environment. Yet, the Board, as is apparent by its constant policy flip-flops over the years,²⁶⁷ has never expressly embraced the concept of *stare decisis*.²⁶⁸ In any event, the highly indeterminate nature of the inherently-destructive-conduct standard would appear to permit the most partisan Board Members plenty of wiggle room to justify outcomes consistent with their personal policy preferences if something else were not constraining their discretion. The results of this empirical study suggest that institutional concerns better explain why the Board is able to achieve decisional consistency in an area of labor law ripe for political factionalism.²⁶⁹

Nevertheless, in order to more concretely establish that Board Members and other agency adjudicators are engaging in collegial decisionmaking, further empirical studies of other seemingly malleable legal standards are needed.²⁷⁰ The broader implications of such stud-

266. For example, the same impulses appear to exist in the solicitation and distribution context. *See supra* note 260.

267. *See* Dialogue with NLRB, *supra* note 265 (“Flip-flopping in Board precedent . . . is something that just happens; it is part of the statutory scheme; it is part of what happens with the appointment process and precedent has flipped-flopped over the years.” (comments of Member Liebman)).

268. *See* Dialogue with NLRB, *supra* note 265. Board Member Liebman stated that, “We should really stop asking the question about *stare decisis* and we should stop asking that until we are prepared to issue a decision which says that even though we don’t like this precedent we are going to adhere to it because of *stare decisis*. And if the [sic] labor and management are really as interested in *stare decisis* because of the stability it brings to the parties, then they should stop asking us to revisit precedent every time the politics change.

Id. (comments of Member Liebman); *see also* Sarah Pawlicki, *Levitz Furniture Co.: The End of Celanese and the Good-Faith Doubt Standard for Withdrawing Recognition of Incumbent Unions*, 78 CHI.-KENT L. REV. 381, 403 (2003).

269. *See* Edwards, *Effects of Collegiality*, *supra* note 6, at 1645; Dialogue with NLRB, *supra* note 265. Although there are certainly differences in the way that appellate judges and agency decisionmakers decide cases, there appears to be enough similarity between the two to make Judge Edwards’ conception of collegiality meaningful for agency adjudicators, like the Members of the NLRB. Nonetheless, further study of this analogy is necessary to determine whether it is in fact appropriate to apply Judge Edwards’ theory of appellate court collegiality to quasi-judicial administrative agencies.

270. At least one other empirical analysis, conducted by Professor LeRoy, has found similar decisional consistency in Board adjudications in the midst of flexible standards. *See*

ies could be far-reaching. Nothing less than the conception of administrative agencies as governmental bodies festering with Machiavelian intrigue could be at stake. Perhaps more significantly, if future studies of agency adjudication similarly point to institutional collegiality playing a significant role in how agency cases are decided, these findings would have the happy effect of bolstering the credibility of administrative agencies, like the NLRB, in the eyes of those who seek impartial justice from their pronouncements.²⁷¹ From this author's perspective, such a conception of administrative agencies, striving to get the law right in highly partisan environments, is long overdue.²⁷²

VI. CONCLUSION

This Article's empirical analysis of the National Labor Relations Board's inherently-destructive-conduct decisions strongly suggests that the Board is less politically motivated in adjudicating labor disputes than previous commentators have suspected. These findings indicate that such decisional consistency results from the effect of institutional collegiality, which permits Board Members from all ideological perspectives to decide cases solely on their legal merits and with the sole goal of getting the law right. Further empirical analyses of both National Labor Relations Board and other adjudicative administrative agency's decisionmaking should be conducted both to

LeRoy, *Institutional Signals*, *supra* note 9, at 222 (finding through empirical study a phenomenally stable rate of unfair labor practice strike rulings over a fifty year-time period); *cf.* Brudney et al., *supra* note 171, at 1738 (finding that political party was not monolithic in predicting how appellate judges would vote in labor law cases). Not only are further studies of agency adjudication required in the context of the NLRB, but similar empirical studies should also be conducted for other federal administrative agencies that engage in policymaking through adjudication and also operate in highly partisan atmospheres. The Federal Communications Commission, the Federal Trade Commission, the Bureau of Immigration Appeals, and the Federal Election Commission are four such federal agencies for whom findings of collegial decisionmaking could have beneficial effects.

271. See Craver, *supra* note 159, at 126 ("As long as individuals who are as knowledgeable and fair-minded as these persons [on the Clinton Board] continue to occupy Board positions, labor and management representatives and individual employees can be confident of the independence and judiciousness of that agency."); *see also* Brownstone, *supra* note 12, at 244.

272. See Edwards, *Effects of Collegiality*, *supra* note 6, at 1679.

Getting the law right is the mission of a truly collegial court. . . . In due course, new judges on a truly collegial court come to appreciate that judges all have a common interest, as members of the institution of the judiciary, in getting the law right, and that, as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect.

Id. Although this Article maintains that the analogy between appellate judges and agency adjudicators is an apt one as far as institutional collegiality is concerned, it is clear that the Members of the Board have not always treated one another with civility and respect. See generally GOULD, *supra* note 171. Perhaps, an increased recognition among Board Members of the underlying collegiality that informs their decisionmaking will lead to an atmosphere of increased civility and respect.

substantiate the role of collegiality in agency adjudications and, perhaps more importantly, to bolster the public's confidence in the integrity of the administrative state and its processes.

APPENDIX B

CASE STATISTICS DERIVED FROM
INHERENTLY-DESTRUCTIVE-CONDUCT EMPIRICAL ANALYSIS*Legend*

L/S - legitimate and substantial business justifications

ID - inherently destructive impact

CS - comparatively slight impact

WL - *Wright Line*/specific evidence case

ULP – unfair labor practice

1. Overall Number of Cases with ID Analysis: 140
 - * Number of ID Decisions is 144 because 4 cases have more than one scenario represented (see footnote 197 and accompanying text).
2. Average Number of ID Decisions Per Year Since Great Dane: 4 decisions
3. Number and Percentages of Different Types of Scenarios in ID Decisions:
 - Scenario 1: 69 (48%)
 - Scenario 2: 27 (19%)
 - Scenario 3: 48 (33%)
 - Scenario 4: 0 (0%)
4. Number and Percentages of Political Party Decisions:
 - Republican Board Majority ID decisions: 79 (55% of all cases)
 - Scenario 1: 34 (43%)
 - Scenario 2: 9 (11%)
 - Scenario 3: 36 (46%)
 - Democratic Board Majority ID decisions: 62 (43% of all cases)
 - Scenario 1: 35 (56%)
 - Scenario 2: 18 (29%)
 - Scenario 3: 9 (15%)
 - Non-majority ID decisions (2-2 split): 3 (2% of all cases)
 - Scenario 1: 0 (0%)
 - Scenario 2: 0 (0%)
 - Scenario 3: 3 (100%)
5. Specific Types of Scenario 1 Decisions (71 Decisions):
 - Laidlaw-Type Reinstatement Decisions: 36 (51%)
 - Republican Decisions: 16 (44%)
 - Democrat Decisions: 20 (56%)
 - Texaco-Type Denial of Benefit Decisions: 22 (31%)
 - Republican Decisions: 16 (73%)
 - Democrat Decisions: 6 (27%)
 - Neither *Laidlaw*, *Texaco* or *Harter* Decisions: 13 (18%)
 - Scenario 1 *Laidlaw* and *Texaco* Decisions as Percentage of Overall Decisions: 58 out of 144 decisions (40%)
 - Republican Decisions: 32 out of 79 (41%)
 - Democrat Decisions: 26 out of 62 (42%)
 - * There were 2 cases where there was both a Scenario 1 *Laidlaw* and *Texaco* finding. For purposes of analysis, these decisions were counted once each as both *Texaco* and *Laidlaw* cases. This explains why there are a total of 71 Scenario 1 decisions, rather than 69 decisions when the decisions are grouped in this manner (see footnote 215 and accompanying text).

6. *Specific Types of Scenario 3 Decisions (48 Decisions):*
Laidlaw-Type Reinstatement Decisions: 5 (11%)
 Republican Decisions: 5 (100%)
 Democrat Decisions: 0 (0%)
Texaco-Type Denial of Benefit Decisions: 17 (35%)
 Republican Decisions: 14 (82%)
 Democrat Decisions: 3 (18%)
Harter-Type Lock Out Decisions: 13 (27%)
 Republican Decisions: 12 (92%)
 Democrat Decisions: 1 (8%)
 Neither *Laidlaw*, *Texaco* or *Harter* Decisions: 13 (27%)
 Scenario 3 *Laidlaw*, *Texaco*, and *Harter* Decisions as Percentage of Overall Decisions: 35 out of 144 decisions (24%)
 Republican Decisions: 31 out of 79 decisions (39%)
 Democrat Decisions: 4 out of 62 decisions (6%)
 * *Only 2 cases were both L/S and ID. In all remaining cases where a L/S reason was found, the conduct was found to be CS (see footnotes 218, 225 and accompanying text).*
7. *Overall Laidlaw and Texaco Case-By-Case Scenario:*
Laidlaw Cases (41 cases overall):
 Scenario 1: 36 (88%)
 Scenario 3: 5 (12%)
Texaco Cases (39 cases overall):
 Scenario 1: 22 (56%)
 Scenario 3: 17 (44%)
8. *Overall Laidlaw, Texaco, and Harter as Percentage of Overall Cases:* 93 out of 144 decisions (65%)
 Republican Decisions: 63 out of 79 decisions (80%)
 Democrat Decisions: 30 out of 62 decisions (48%)
9. *Specific Types of Scenario 2 Decisions (27 Decisions):*
 Conclusory ID Findings or No L/S Analysis: 10 (37%) (overall - 7%)
 Both ID and No L/S in Same Opinion: 12 (44%) (overall - 8%)
 Both Anti-Union Intent and ID Finding (Hedge): 6 (22%) (overall - 4%)
 Both L/S found and ID found: 2 (7%) (overall - 1%)
 * *Some Scenario 2 decisions are in more than one category.*
10. *Overall Case Outcomes by Political Party (ULP or no ULP):*
 ULP Found (Scenario 1 + Scenario 2): 96 out of 144 decisions (67%)
 Republican Decisions: 43 out of 79 decisions (54%)
 Democrat Decisions: 53 out of 62 decisions (85%)
 ULP Not Found (Scenario 3): 48 out of 144 decisions (33%)
 Republican Decisions: 36 out of 79 decisions (46%)
 Democrat Decisions: 9 out of 62 decisions (15%)
11. *Board ID Cases Without Unanimity (Concurrences and Dissents):* 51 (36%)

12. *Statistics Concerning Number of Dissents:*
 Board ID Cases with Dissents: 39 (28%)
 Republican Dissents: 28 (20%)
 Scenario 1: 6 (22%) (overall - 4%)
 Scenario 2: 11 (39%) (overall - 8%)
 Scenario 3: 11 (39%) (overall - 8%)
 Democrat Dissents: 16 (11%)
 Scenario 1: 2 (12.5%) (overall - 1%)
 Scenario 2: 2 (12.5%) (overall - 1%)
 Scenario 3: 12 (75%) (overall - 9%)
13. *Statistics Concerning Number of Concurrences:*
 Board ID Cases with Concurrences: 17 (12%)
 Republican Concurrences: 11 (8%)
 Scenario 1: 4 (36%) (overall - 3%)
 Scenario 2: 2 (18%) (overall - 1%)
 Scenario 3: 5 (46%) (overall - 4%)
 Democrat Concurrences: 7 (5%)
 Scenario 1: 3 (42%) (overall - 2%)
 Scenario 2: 2 (29%) (overall - 1%)
 Scenario 3: 2 (29%) (overall - 1%)
 * *More combined Republican and Democrat concurrences than total number of concurrence cases because some cases have both Republican and Democrats concurring.*
14. *Overall Number of Appeals From Board ID Cases:* 58 (41%)
15. *Statistics Concerning Number of Board ID Cases Enforced or Review Denied:*
 Board ID Cases Enforced or Review Denied: 35 (60%) (overall - 25%)
 Democrat Majority Enforced: 21 (60%) (overall - 15%)
 Scenario 1: 12 (57%) (overall - 8%)
 Scenario 2: 6 (29%) (overall - 4%)
 Scenario 3: 3 (14%) (overall - 2%)
 Republican Majority Enforced: 13 (37%) (overall - 9%)
 Scenario 1: 8 (62%) (overall - 6%)
 Scenario 2: 0 (0%) (overall - 0%)
 Scenario 3: 5 (38%) (overall - 4%)
 No Majority: 1 (3%) (overall - 1%)
 Scenario 3: 1 (100%) (overall - 1%)
16. *Statistics Concerning Number of Board ID Cases Denied Enforcement or Vacated:*
 Board ID Cases Denied Enforcement or Vacated: 23 (40%) (overall - 16%)
 Democrat Majority Not Enforced: 12 (52%) (overall - 9%)
 Scenario 1: 6 (50%) (overall - 4%)
 Scenario 2: 4 (33%) (overall - 3%)
 Scenario 3: 2 (17%) (overall - 1%)
 Republican Majority Not Enforced: 11 (48%) (overall - 8%)
 Scenario 1: 3 (27%) (overall - 2%)
 Scenario 2: 4 (36.5%) (overall - 3%)
 Scenario 3: 4 (36.5%) (overall - 3%)

17. *Individual Board Member Statistics:*

Overall Individual ID Decisions: 467 decisions (1 - 209 (45%); 2 - 88 (19%); 3 - 165 (35%); 4 - 0 (0%); other - 5 (1%))

Total Board Members Deciding ID Cases: 34 members

Democrat Board Members: 15 (44%) - Member Zimmerman counted as Democrat even though listed as an Independent (see note 200).

1. Liebman: 12 decisions (1 - 8 (67%); 2 - 3 (25%); 3 - 1 (8%))
2. Walsh: 5 decisions (1 - 2 (40%); 2 - 3 (60%); 3 - 0 (0%))
3. Truesdale: 18 decisions (1 - 7 (39%); 2 - 8 (44%); 3 - 3 (17%))
4. Fox: 4 decisions (1 - 4 (100%); 2 - 0 (0%); 3 - 0 (0%))
5. Gould: 10 decisions (1 - 4 (40%); 2 - 3 (30%); 3 - 2 (20%); other (WL case) - 1 (10%))
6. Browning: 4 decisions (1 - 2 (50%); 2 - 2 (50%); 3 - 0 (0%))
7. Devaney: 12 decisions (1 - 5 (42%); 2 - 1 (8%); 3 - 6 (50%))
8. Cracraft: 16 decisions (1 - 8 (50%); 2 - 1 (6%); 3 - 7 (44%))
9. Babson: 27 decisions (1 - 9 (33%); 2 - 1 (4%); 3 - 17 (63%))
10. Dennis: 8 decisions (1 - 5 (62.5%); 2 - 1 (12.5%); 3 - 2 (25%))
11. Zimmerman (I): 11 decisions (1 - 8 (73%); 2 - 2 (18%); 3 - 1 (9%))
12. Fanning: 50 decisions (1 - 28 (56%); 2 - 18 (36%); 3 - 4 (8%))
13. Penello: 32 decisions (1 - 10 (31%); 2 - 10 (31%); 3 - 12 (38%))
14. Brown: 10 decisions (1 - 6 (60%); 2 - 2 (20%); 3 - 2 (20%))
15. McCulloch: 5 decisions (1 - 3 (60%); 2 - 1 (20%); 3 - 1 (20%))

Overall Democratic Individual ID Decisions: 224 (48%); (1 - 109 (49%); 2 - 56 (25%); 3 - 58 (26%); other - 1 (0%))

Republican Board Members: 19 (56%)

1. Battista: 2 decisions (1 - 2 (100%); 2 - 0 (0%); 3 - 0 (0%))
2. Schaumber: 1 decision (1 - 1 (100%); 2 - 0 (0%); 3 - 0 (0%))
3. Hurtgen: 9 decisions (1 - 2 (22%); 2 - 0 (0%); 3 - 6 (67%); other (no discrimination) - 1 (11%))
4. Brame: 1 decision (1 - 0 (0%); 2 - 0 (0%); 3 - 1 (100%))
5. Higgins: 2 decisions (1 - 1 (50%); 2 - 0 (0%); 3 - 1 (50%))
6. Cohen: 3 decisions (1 - 1 (33%); 2 - 0 (0%); 3 - 1 (33%); other (WL case) - 1 (33%))
7. Stephens: 40 decisions (1 - 19 (48%); 2 - 3 (8%); 3 - 17 (43%); other - 1 (1%))
8. Raudabaugh: 8 decisions (1 - 3 (37.5%); 2 - 0 (0%); 3 - 4 (50%); other - 1 (12.5%))
9. Oviatt: 6 decisions (1 - 4 (67%); 2 - 0 (0%); 3 - 2 (33%))
10. Johansen: 42 decisions (1 - 19 (45%); 2 - 1 (2%); 3 - 22 (52%))
11. Dotson: 26 decisions (1 - 10 (38%); 2 - 0 (0%); 3 - 16 (62%))
12. Hunter: 7 decisions (1 - 1 (14%); 2 - 0 (0%); 3 - 6 (86%))
13. Jenkins: 48 decisions (1 - 25 (52%); 2 - 20 (42%); 3 - 3 (6%))
14. Van de Water: 2 decisions (1 - 0 (0%); 2 - 0 (0%); 3 - 2 (100%))
15. Murphy: 14 decisions (1 - 4 (28%); 2 - 5 (36%); 3 - 5 (36%))
16. Walther: 3 decisions (1 - 0 (0%); 2 - 0 (0%); 3 - 3 (100%))
17. Kennedy: 11 decisions (1 - 2 (18%); 2 - 2 (18%); 3 - 7 (64%))
18. Miller: 14 decisions (1 - 4 (28%); 2 - 0 (0%); 3 - 10 (72%))
19. Zagoria: 4 decisions (1 - 2 (50%); 2 - 1 (25%); 3 - 1 (25%))

Overall Republican Individual ID Decisions: 243 (52%); (1 - 100 (41%); 2 - 32 (13%); 3 - 107 (44%); other - 4 (2%))

* *These calculations take into account individual decisions in dissent (see footnote 175 and accompanying text).*

18. *Chronological Statistics (By Decade and Board):**By Decade*

- a. *2000s Decisions*: 9 decisions (6%) (1 - 4 (44%); 2 - 3 (33%); 3 - 2 (23%))
- b. *1990s Decisions*: 25 decisions (17%) (1 - 13 (52%); 2 - 4 (16%); 3 - 8 (32%))
- c. *1980s Decisions*: 62 decisions (43%) (1 - 32 (52%); 2 - 4 (6%); 3 - 26 (42%))
- d. *1970s Decisions*: 42 decisions (29%) (1 - 17 (40%); 2 - 15 (36%); 3 - 10 (24%))
- e. *1960s Decisions*: 6 decisions (4%) (1- 3 (50%); 2 - 1 (17%); 3 - 2 (33%))

By Board

- a. *Bush Jr. Board* (Jan. 2001 - Oct. 2003): 7 decisions (5%) (1 - 3 (43%); 2 - 3 (43%); 3 - 1 (14%))
- b. *Clinton Board* (Jan. 1993 - Dec. 2000): 16 decisions (11%) (1 - 8 (50%); 2 - 3 (19%); 3 - 5 (31%))
- c. *Bush Sr. Board* (Jan. 1989 - Dec. 1992): 17 decisions (12%) (1 - 11 (65%); 2 - 1 (6%); 3 - 5 (29%))
- d. *Reagan Board* (Jan. 1981 - Dec. 1988): 50 decisions (35%) (1 - 22 (44%); 2 - 3 (6%); 3 - 25 (50%))
- e. *Carter Board* (Jan. 1977 - Dec. 1980): 23 decisions (16%) (1 - 11 (48%); 2 - 10 (43%); 3 - 2 (9%))
- f. *Ford Board* (Aug. 1974 - Dec. 1976): 6 decisions (4%) (1 - 2 (33%); 2 - 3 (50%); 3 - 1 (17%))
- g. *Nixon Board* (Jan. 1969 - July 1974): 19 decisions (13%) (1 - 9 (47%); 2 - 3 (16%); 3 - 7 (37%))
- h. *Johnson Board* (Jun. 1967 - Dec. 1968): 6 decisions (4%) (1 - 3 (50%); 2 - 1 (17%); 3 - 2 (33%))

* *Johnson Board is only considered from time of Great Dane decision (June 12, 1967) and forward.*