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Rebecca White

University of Georgia School of Law, rhwhite@uga.edu

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The Statutory and Constitutional Limits of Using Protected Speech as Evidence of Unlawful Motive Under the National Labor Relations Act

REBECCA HANNER WHITE*

I. INTRODUCTION

Discerning motive is a tricky business. Yet under federal labor law, whether an act is lawful or unlawful often depends on employer motive. An employer, for example, is free to fire the most active union supporter in his plant, regardless of the effect that discharge will have on unionization, so long as the discharge is not motivated by "antiunion animus."¹

* Assistant Professor of Law, University of Georgia School of Law. I thank Dan Coenen, Paul Kurtz, and Dan White for their helpful comments on an earlier version of this Article.

¹ Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1988), makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The Supreme Court has interpreted § 8(a)(3) to make a violation dependent upon the employer's motivation. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 311 (1965); *Radio Officers' Union of the Commercial Telegraphers v. NLRB*, 347 U.S. 17, 44 (1954); see Archibold Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 21 (1947); Walter E. Oberer, *The Scierter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motives, Dogs and Tails*, 52 CORNELL L.Q. 491, 506 (1967).

This wrongful employer purpose, Professor Oberer notes, is "more accurately described in terms of motive rather than intent." *Id.* at 506. As Professor Weber further explains, "[O]rdinarily, intentions are immediate objectives, such as the intent to steal, whereas motives are more basic or underlying objectives, such as the motive to be wealthy." Mark C. Weber, *Beyond Price Waterhouse v. Hopkins: A New Approach to Mixed Motive Discrimination*, 68 N.C. L. REV. 495, 498 (1990). When an employer discriminates against a union adherent, he does so to achieve the underlying goal of encouraging or discouraging unionization and thus acts from a wrongful motive. *Id.*

Nonetheless, the terms "motive" and "intent" are used interchangeably by the National Labor Relations Board and by the courts, and therefore will be used interchangeably in this article. See Thomas G.S. Christensen & Andrea H. Svanoe, *Motive and Intent in the*

A difficulty inherent in cases under the National Labor Relations Act (NLRA), as in other areas of employment law,² is in determining why the employer acted.³ Perhaps an even harder question, and one too frequently overlooked, is what form of evidence the National Labor Relations Board (NLRB or Board) and any reviewing court properly may consider in determining motive. More specifically, can the Board take into account an employer's vigorous opposition to the union in deciding whether or not a particular action was motivated by antiunion animus? Although common sense suggests yes, several courts of appeals have said no, relying on section 8(c) of the NLRA⁴ and on the First Amendment.⁵

Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality, 77 YALE L.J. 1269, 1278 (1968); Weber, *supra*.

For a fuller discussion of the role of unlawful motive in unfair labor practice cases, see *infra* notes 21-39 and accompanying text.

² The question of employer motive or intent frequently is critical in cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et. seq. (1988) (prohibiting employment discrimination on the basis of race, sex, color, religion, or national origin); the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et. seq. (1988) (prohibiting employment discrimination on the basis of age); § 1981, 42 U.S.C. § 1981 (1988) (prohibiting discrimination on the basis of race); § 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1988) (prohibiting discrimination on the basis of non job-related handicap). Under these statutes, an employer who intentionally discriminates against an employee on the basis of the prohibited factor acts unlawfully, absent an affirmative defense. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). If the action is based on a legitimate, nondiscriminatory reason, however, no violation occurs. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); see 1 CHARLES SULLIVAN ET AL., *EMPLOYMENT DISCRIMINATION* Ch. 5, 245-80 (2d ed. 1988). Thus, in determining whether an employment action is unlawful, the Court, in these disparate treatment cases, must determine the intent underlying the employment action, an inquiry similar to that in § 8(a)(3) cases. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); Charles A. Edwards, *Direct Evidence of Discriminatory Intent and the Burden of Proof: An Analysis and Critique*, 43 WASH. & LEE L. REV. 1, 4-5 (1986); Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 521 n.220 (1990); Weber, *supra* note 1, at 498.

³ See, e.g., *NLRB v. Universal Camera Corp.*, 190 F.2d 429, 431 (2d Cir. 1951), *remanded*, 340 U.S. 474 (1950) ("Nothing is more difficult than to disentangle the motives of another's conduct—motives frequently unknown even to the actor himself."); Cox, *supra* note 1, at 21 (noting the difficulties that arise in identifying an unlawful motive, because motive "is an elusive subject of inquiry").

⁴ See, e.g., *Holo-Krome Co. v. NLRB*, 907 F.2d 1343 (2d Cir. 1990); *NLRB v. Colvert Dairy Prod. Co.*, 317 F.2d 44 (10th Cir. 1963); *Indiana Metal Prod. v. NLRB*, 202 F.2d 613 (7th Cir. 1953).

Section 8(c) of the NLRA, 29 U.S.C. § 158(c) (1988), states as follows:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence

Both section 8(c) and the First Amendment protect an employer's right to campaign against the union.⁶ While coercive speech and conduct by an employer are prohibited by the NLRA,⁷ the expression of noncoercive views, arguments, and opinions for and against unionization cannot be held unlawful.⁸ Section 8(c), moreover, provides that such protected speech shall not *be evidence of* an unfair labor practice.⁹ Relying on section 8(c), which has been interpreted as "merely implementing" the First Amendment,¹⁰ some reviewing courts have refused to allow the Board to consider an employer's antiunion stance when assessing motivation.¹¹ This interpretation denies consideration of what often may be probative evidence of employer motive. If section 8(c) does preclude any use of protected speech as evidence of unlawful motive, it marks

of an unfair labor practice under any of the provisions of this Subchapter, if such expression contains no threat or reprisal or force or promise of benefit.

As Professors Getman and Pogrebin have observed, a literal reading of § 8(c) results in the exclusion of relevant evidence:

Employer speeches and statements are a measure of its opposition to unionism and therefore an indication of its willingness to take action. The point becomes clearer if one imagines two employers, one that conducted no campaign and the other that has conducted a vigorous one. It is natural to assume that the employer that has not conducted a campaign is less likely to have violated section 8(a)(3) than the one that has. Suppose an employer characterizes union supporters as "incompetents and free riders." Such a statement would be an expression of his right of free speech, but it also would cast some possible light on his motive if a group of union supporters were discharged shortly thereafter. The problem is that 8(c) announces a standard at odds with common sense.

JULIUS GETMAN & BERTRAND B. POGREBIN, *LABOR RELATIONS* 66 (1988).

While this article agrees with Professors Getman and Pogrebin that employer speech is relevant to the question of employer motive, it disagrees with their assumption that § 8(c) mandates exclusion of this evidence. *See infra* notes 98–142 and accompanying text.

⁵ *See cases cited supra* note 4.

⁶ *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969); *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469 (1941). For a discussion of employers' First Amendment rights under the NLRA, *see infra* notes 40–64 and accompanying text.

⁷ Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1) (1988), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their rights protected by the Act. Employer speech that constitutes either a threat of reprisal or force or a promise of a benefit has been deemed coercive and thus an unfair labor practice and also outside the protection of the First Amendment. *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969); *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

⁸ *Gissel*, 395 U.S. at 617; *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 477 (1941). For further discussion of this point, *see infra* notes 40–53 and accompanying text.

⁹ 29 U.S.C. § 158(c)(1988). The text of § 8(c) is set forth *supra* note 4.

¹⁰ *Gissel*, 395 U.S. at 617.

¹¹ *See cases cited supra* note 4.

for labor cases a significant change in the law of evidence, as what people say frequently is used to determine why they acted.¹²

Perhaps more important is the suggestion that it is not simply section 8(c) but the First Amendment that requires exclusion of this evidence. The notion that the First Amendment prohibits any reliance on "protected"¹³ employer speech to establish unlawful conduct is a startling one, with implications for other statutory claims, such as Title VII or the ADEA, with their similar focus on employer motivation or intent.¹⁴

This Article explores the extent to which protected employer speech under the NLRA may be used to establish unlawful motivation. It does so in the context of a particular category of unfair labor practice cases—those involving the allegedly discriminatory discipline or discharge of union adherents. This category of cases is not only the most common and critical one under the Act,¹⁵ but it also presents questions of employer motive that are not unique to the NLRA.¹⁶

An examination of the problem leads to two basic conclusions. First, section 8(c) should not be construed to exclude evidence of protected speech.¹⁷ An employer's antiunion position is relevant circumstantial evidence that should be admissible before the Board in determining whether an employer's

¹² See, e.g., Cox, *supra* note 1, at 19–20, noting that expressions of desire and opinion "will often indicate the motive of otherwise ambiguous acts, and normal rules of evidence permit proof of the actor's declarations to show his state of mind." Professor Cox criticizes § 8(c) for reversing the normal rules of evidence and thereby making proof of antiunion conduct unduly difficult. *Id.*; see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989), in which the Court noted that while stereotyped remarks do not inevitably prove sex was a motivating factor in an employment decision, they are relevant evidence of an employer's motive.

¹³ As used in this article, the term "protected speech" refers to speech that both § 8(c) and the First Amendment protect from being held unlawful. That speech consists of views, arguments and opinions that contain no threat of reprisal or force or promise of benefit. See *Gissel*, 395 U.S. at 617; 29 U.S.C. § 158(c) (1988).

¹⁴ See the discussion *supra* note 2.

Whether use of speech as evidence in other statutory discrimination cases would ever violate the First Amendment is beyond the scope of this article. As explained, *infra* notes 150–56 and accompanying text, whether the First Amendment requires exclusion of evidence can be determined only by identifying whether the regulation is a direct or an indirect abridgement of speech and then balancing the speech interests against the governmental interests involved. While this article performs this analysis for discrimination cases under the NLRA, it does not purport to do so for any other statutory claim.

Nonetheless, recognition of the need to engage in a First Amendment analysis in these NLRA cases does suggest that First Amendment concerns may exist under other discrimination statutes. See *infra* notes 190–93 and accompanying text.

¹⁵ See Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1778–81 (1983).

¹⁶ See *supra* note 2 and accompanying text.

¹⁷ See *infra* notes 98–128 and accompanying text.

actions were unlawfully motivated. Section 8(c), particularly in light of its legislative history, may be construed simply to prohibit the Board from finding a discharge unlawful when protected speech is the exclusive or primary evidence of illegal motive.¹⁸ Second, this Article concludes that the First Amendment poses no barrier to consideration of protected speech in an unfair labor practice proceeding.¹⁹ Rather, the First Amendment, like section 8(c), prevents the Board only from relying exclusively or primarily on protected speech to prove an employer's actions were unlawfully motivated.

The First Amendment limits on using protected speech as evidence of unlawful motive is an issue that until now has not been fully explored. First Amendment defenses by employers will grow, however, fueled by court decisions excluding "protected speech" as evidence.²⁰ The statutory and constitutional issues present in the evidentiary use of protected speech must now be forthrightly confronted and resolved.

II. THE ROLE OF EMPLOYER MOTIVE UNDER THE NATIONAL LABOR RELATIONS ACT

The NLRA grants employees the right to organize and to join unions, to collectively bargain with their employers, and to engage in other concerted activities for mutual aid or protection.²¹ It also declares certain actions by

¹⁸ See *infra* notes 129–42 and accompanying text.

¹⁹ See *infra* notes 143–78 and accompanying text.

²⁰ See, e.g., *Holo-Krome Co. v. NLRB*, 907 F.2d 1343 (1990).

Employers' use of the First Amendment as a shield in unfair labor practice cases is perhaps but part of what Professor Balkin has described as "ideological drift—the means by which the libertarian theory of the First Amendment increasingly is turned to serve conservative social interests." J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 423. Professor Balkin notes that the First Amendment concerns posed by racial or sexual harassment claims under Title VII have not been confronted by the courts but suggests "any sum of money for harms caused by speech surely raises First Amendment concerns." *Id.* at 422. He predicts an increasing number of First Amendment defenses in employment discrimination cases in the future. *Id.* at 421–23.

To date, however, using protected speech as evidence of unlawful motive or intent appears not to have been raised under employment discrimination statutes other than the NLRA. See Ellen E. Lange, *Racist Speech on Campus: A Title VII Solution to a First Amendment Problem*, 64 S. CAL. L. REV. 105, 120 n.93 (1990) ("As of this writing, no Title VII claims have been defended on First Amendment free speech grounds."); see also Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); Mary Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1 (1990) (analyzing the First Amendment issues involved in regulating sexual harassment).

²¹ 29 U.S.C. § 157 (1988). These rights are collectively referred to as employees' "Section 7" rights.

employers or unions to be unfair labor practices, to be remedied by the NLRB.²²

Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights under the Act.²³ A violation is not dependent upon a finding of improper motive; actions concededly taken by an employer for legitimate business reasons can be a violation of section 8(a)(1) if the interference with employees' concerted activities outweighs the employer's business reasons for its actions.²⁴

Section 8(a)(3) declares it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."²⁵ This provision of the Act was designed to "insulate employees' jobs from their organizational rights."²⁶ It makes clear that an employer may not demote or fire an employee because of his union activities.

Whenever a union supporter is fired in the midst of an organizing campaign, there necessarily will be an interference with or chilling of employees' organizational rights, no matter the employer's motivation.²⁷ If the

²² 29 U.S.C. § 158(a), (b) (1988).

Unfair labor practice are prosecuted by the NLRB's General Counsel and are tried before an administrative law judge. The ALJ's recommended decision and order is reviewed by the NLRB and is either accepted, rejected, or modified. The Board may enter a cease and desist order, back-pay, and reinstatement when a worker is illegally discharged. 29 U.S.C. § 160(a)-(c) (1988).

The Board's orders are not self-enforcing, and the circuit courts of appeals have authority to review Board orders, either on a petition by the Board to enforce the order or on a petition by the losing party to set the order aside. 29 U.S.C. § 160(e)-(f) (1988). The reviewing court must accept the Board's findings of fact if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(f) (1988).

²³ 29 U.S.C. § 158(a)(1) (1988).

²⁴ *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965). "It is only when the interference with § 7 rights outweighs the business justification for the employer's action that § 8(a)(1) is violated. . . . A violation of § 8(a)(1) alone therefore presupposes an act which is unlawful even absent a discriminatory motive." *Id.* at 269; *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) (employer's antisolicitation rule violates § 8(a)(1) even though rule was adopted and enforced free from antiunion animus).

For a discussion of § 8(a)(1), see Christensen and Svanoe, *supra* note 1, at 1322-25. The authors note that for most unfair labor cases, including those under section 8(a)(1), motive is irrelevant. *Id.* at 1271.

²⁵ 29 U.S.C. § 158(a)(3) (1988).

²⁶ *Radio Officers' Union of the Commercial Telegraphers v. NLRB*, 347 U.S. 17, 40 (1954).

²⁷ *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 311 (1965) (noting that whenever a union leader is discharged, regardless of the employer's motive for the firing, "[i]t is likely that the discharge will naturally tend to discourage union membership . . . because of the loss of union leadership and the employees' suspicion of the

discharge were analyzed under section 8(a)(1), which requires no finding of unlawful purpose or motive, the Board would simply balance the employer's business reasons for the termination against the anticipated effect on concerted activities. If the interference were deemed to outweigh the employer's reason for the termination, an unfair labor practice would be found.²⁸

Such employment actions, however, have not been analyzed under section 8(a)(1).²⁹ Instead, they have been considered under the more specific provisions of section 8(a)(3), which has consistently been interpreted by the Supreme Court to require a finding of unlawful, i.e., "antiunion," purpose.³⁰

In the seminal case of *NLRB v. Jones & Laughlin Steel Corp.*,³¹ the Court found the NLRA did not interfere with the "normal exercise" of an employer's right to hire and fire. Only if the "true purpose" for the action was to

employer's true intention."); see also A. COX ET AL. *CASES ON LABOR LAW* 229 (11th Ed. 1990) (pointing out that the discharge of an active union organizer will slow the momentum of the organizing campaign, no matter what the employer's motive for the discharge was).

²⁸ See COX et al., *supra* note 27, at 230.

²⁹ *Id.*; see also Christensen and Svanoe, *supra* note 1, at 1322; Julius G. Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735 (1965).

A somewhat anomalous case is *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964). There, an employee was fired because his employer mistakenly, but in good faith, believed he had been engaged in picket line misconduct. The Court upheld the Board's finding that § 8(a)(1) was violated, resolving the case under that section rather than under § 8(a)(3). As discussed by Professor Oberer, *Burnup & Sims* was resolved under § 8(a)(1) because the discharge was not purported to further any legitimate employer interest. Thus, it was unnecessary to use § 8(a)(3)'s motive analysis, which is protective of the employer's managerial prerogatives, because the employer had put forward no business reason for the discharge. Oberer, *supra* note 1, at 509-10.

³⁰ See, e.g., *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965); *American Ship Bldg. v. NLRB*, 380 U.S. 300 (1965). No proof of antiunion animus is needed, however, if the discriminatory conduct is "inherently destructive" of employee rights. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); see *NLRB v. Erie Resistor Co.*, 373 U.S. 221 (1963) (grant of "super-seniority" to strike replacements "inherently destructive" of employee rights).

For a general discussion and critique of the Court's focus on employer motive, see Christensen and Svanoe, *supra* note 1. The authors criticize the Court for using motive as the ostensibly controlling element for a § 8(a)(3) violation, a focus that "separates 8(a)(3) from other violations." *Id.* at 1315. This focus on employer motive, say the authors, makes the NLRA look like a "thought control" statute. *Id.* at 1326-27. They advocate a focus on the injury to the employee, rather than on the motivation of the employer. See also 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 (1983), who suggest using a balancing process in individual discrimination cases under § 8(a)(3) and who contend a "bad" motive should not make a discharge unlawful if the employer's business reasons outweigh the employee's rights.

³¹ 301 U.S. 1 (1937).

intimidate or to coerce employees would an unfair labor practice occur.³² Subsequently, in *Radio Officers' Union of the Commercial Telegraphers v. NLRB*, the Court stated "that Congress intended the employer's purpose in discriminating to be controlling is clear."³³ Only if an employer acts out of antiunion animus will a violation of section 8(a)(3) be found. This interpretation protects the employer's managerial prerogatives. The employer may make employment decisions for good reasons or for foolish ones; it simply may not take action against an employee because of antiunion animus.³⁴

It has been estimated that up to 10,000 employees a year are fired because of their involvement in union campaigns.³⁵ Not surprisingly, charges of discriminatory conduct based on union activities are the most common charges filed with the NLRB.³⁶ In each contested case, the Board must determine what motive or motives caused the employer to take the disciplinary action at issue, because whether the discipline was lawful depends on the employer's intent.³⁷

³² *Id.* at 45-46. For a discussion of *Jones & Laughlin Steel Corp.*, see Christensen & Svanoe, *supra* note 1, at 1275.

³³ 347 U.S. 17, 44 (1954).

³⁴ See *NLRB v. C.J.R. Transfer Inc.*, 936 F.2d 279 (6th Cir. 1991); *NLRB v. McGahey*, 233 F.2d 406 (5th Cir. 1956); *Oberer*, *supra* note 1, at 516 ("The purpose of the hostile-motive requirement is two-fold: (1) to protect the employer's prerogative 'to select, discharge, lay-off, transfer, promote or demote his employees for any reasons other than those proscribed by the Act'; (2) to keep the Board's thumb off the bargaining scales in order to preserve free collective bargaining."); see also *Getman*, *supra* note 29, at 735 (viewing § 8(a)(3)'s motive requirement as a compromise between the employee's § 7 rights and the employer's interest in running his business).

As Professor Getman points out, it sometimes is difficult to distinguish a "valid" business reason from antiunion animus. For example, when an employer takes action, such as closing down part of his business, because of the increased costs a union will bring, some courts have regarded that reason as a "legitimate one" and not an antiunion one. See *NLRB v. Lassing*, 284 F.2d 781 (6th Cir. 1960), *cert. denied*, 366 U.S. 909 (1961); *NLRB v. Adkins Transfer Co.*, 226 F.2d 324 (6th Cir. 1955). Professor Getman recognizes that these cases were wrongly decided because antiunion animus generally is based on economic considerations, and thus economically-based animus cannot be disregarded. *Getman*, *supra* note 29, at 738-39, 743; see *NLRB v. C.J.R. Transfer*, 936 F.2d 279 (6th Cir. 1991).

But as Professor Getman also notes, "[t]he typical 8(a)(3) case involves the discharge or discipline of an employee active in union activities. The employer defends on the grounds that the discharge was not based on union activity, but on poor work or misconduct." *Id.* at 743. In these cases, he says, focus on motive is appropriate because it preserves the employer's right to run his business.

³⁵ *Weiler*, *supra* note 15, at 1780-81 n.35, further estimates that the odds are 1 in 20 that a union supporter will be fired for exercising his § 7 rights.

³⁶ *Id.* at 1780.

³⁷ See *supra* notes 29-34 and accompanying text.

In making this determination, the Board, in the usual case, necessarily must rely on circumstantial evidence.³⁸ Such facts as the employer's awareness of the employee's union activities, the strength of the employer's asserted reason for the discharge, the employer's treatment of similar infractions, and the employer's "degree of opposition" to the union, all have routinely been considered by the Board in determining whether a particular disciplinary action was taken because of the employee's protected activity or for some other, and accordingly lawful, reason.³⁹

The question examined here is whether the Board errs when it considers the employer's degree of opposition to the union in determining whether a violation of section 8(a)(3) has occurred. This issue must be confronted when the opposition is expressed through "protected" speech.

III. PROTECTED EMPLOYER SPEECH UNDER THE NATIONAL LABOR RELATIONS ACT

Employers have free speech rights the National Labor Relations Act cannot abridge. Although this may seem self-evident today, the Board originally took the opposite view. In its early administration of the Wagner Act, the Board determined that an employer was not entitled to express his views on unionization and had to remain neutral to avoid committing an unfair labor practice.⁴⁰ This approach is not without considerable policy support. Any communications by an employer, for or against the union, may influence workers to vote in a manner inconsistent with their actual beliefs.⁴¹ Thus,

³⁸ See *NLRB v. Eastern Smelting & Refinery Corp.*, 598 F.2d 666, 670 (1st Cir. 1979) ("On rare occasions an employer may even admit to unlawful motivation . . . but the usual case of independent proof is by showing other acts apart from the discharge that indicate unlawful anti-union animus."); see also Weiler, *supra* note 15, at 1802, noting that the legality of a discharge is "always open" to dispute and requires "delicate inference from a mosaic of circumstantial evidence."

³⁹ Weiler, *supra* note 15, at 1802. Professor Weiler describes the Board's reliance on the employer's opposition to the union without mentioning § 8(c); see also *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292 (6th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986) (describing a similar list of factors to be considered in determining whether animus motivated an employer).

⁴⁰ See *In re Southern Colo. Power Co.*, 13 N.L.R.B. 699 (1939), *enf'd*, 111 F.2d 539 (10th Cir. 1940); *In re Hilgartner Marble Co.*, 13 N.L.R.B. 1200 (1939); see also Maurice Shams, *Employer Free Speech in Union Organizing Campaigns*, 15 U. FLA. L. REV. 231 (1962-63) (hereinafter *Employer Free Speech*); Note, *Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections*, 127 U. PA. L. REV. 755, 757 (1979) (hereinafter *Labor Law Reform*).

⁴¹ *Southern Colo. Power Co.*, 13 N.L.R.B. at 711; see COX et al., *supra* note 27, at 143 ("Any argument which discloses the speaker's strong wishes is not wholly an appeal to reason if the listener is in the speaker's power. In a southern mill town where a textile concern is the only large employer and its owners dominate the whole community, even a

mandating employer silence helps ensure that election results actually reflect employee desires. Moreover, the decision of whether or not to be represented by a union is a matter for employee determination; the employer has no vote.

In *NLRB v. Virginia Electric & Power Company*,⁴² however, the Supreme Court rejected the "strict neutrality" doctrine. The employer in *Virginia Electric* had waged an aggressive antiunion campaign, and it contended the Board had found the campaign to be an unfair labor practice.⁴³ It further claimed the Board's position was at odds with the First Amendment.⁴⁴ The Supreme Court held the NLRA did not preclude an employer from taking a position on unionization; noncoercive speech could not be deemed an unfair labor practice.⁴⁵ While the Court did not directly address the First Amendment claim, "the importance of the Court's decision was clear: 'Yes, Virginia,' there is a freedom of speech which extends to employers."⁴⁶

The Court itself later expressly acknowledged what *Virginia Electric* implied: noncoercive employer speech is entitled to First Amendment protection.⁴⁷ Informed discussion concerning labor relations was recognized as necessary for "effective and intelligent" self-government.⁴⁸ "Accordingly, [the] decision here has recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty."⁴⁹

If the employer speech is coercive, however, there is no constitutional barrier to prohibiting it.⁵⁰ In *NLRB v. Gissel Packing Co., Inc.*,⁵¹ the Court

dispassionate expression of the company's opinion will make the ordinary employee think twice about openly supporting a labor union distasteful to the employer."); Robert F. Koretz, *Employer Interference with Union Organization Versus Employer Free Speech*, 29 GEO. WASH. L. REV. 399, 401 (1960-61) (the strict neutrality doctrine was based on employer's superior economic power that employees would be afraid to thwart).

⁴² 314 U.S. 469 (1941).

⁴³ *Id.* at 470-75.

⁴⁴ *Id.* at 477.

⁴⁵ *Id.*

⁴⁶ Thomas G.S. Christensen, *Free Speech, Propaganda and the National Labor Relations Act*, 38 N.Y.U. L. REV. 243, 256 (1963).

Virginia Electric has been viewed as establishing three essential principles: (1) An employer has the right to express his views on labor policy; (2) the Board is required to look at the employer's total conduct in determining whether speech is coercive; and (3) the Board can consider speech in determining whether conduct was coercive. Note, *Labor Law Reform*, *supra* note 40, at 759. For further discussion of this latter point, see *infra* notes 161-78 and accompanying text.

⁴⁷ *Thomas v. Collins*, 323 U.S. 516, 537-38 (1945).

⁴⁸ *Id.* at 532; see also *Thornhill v. Alabama*, 310 U.S. 88, 102-03 (1940).

⁴⁹ *Thomas*, 323 U.S. at 537 (citing *Virginia Electric*).

⁵⁰ Coercive speech generally has been considered outside the First Amendment's protection. *Thomas*, 323 U.S. at 537; see Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L.

attempted to draw the line between coercive speech, which is without First Amendment protection, and noncoercive speech, which may not be restrained by the Board. Recognizing employees' economic dependence on their employers, the Court was willing to find only a narrow category of employer speech entitled to First Amendment protection. As the Court stated, "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'"⁵² The Court went on to distinguish threats from predictions, requiring that any predictions be based on objective facts regarding consequences beyond the employer's control.⁵³

Distinguishing protected from unprotected employer speech has not been easy. Because "coercive" speech is unprotected by the First Amendment and unlawful under section 8(a)(1), the Board and reviewing courts must determine whether employer statements are merely communications about unionization or whether instead they are unlawful threats or promises.⁵⁴ Various commentators have criticized the Court's willingness to restrict labor speech and have urged

REV. 38, 69 (1964) (recognizing coercive employer speech "hardly contributes to the exchange of views that the Constitution seeks to promote").

⁵¹ 395 U.S. 575 (1969).

⁵² *Id.* at 618.

⁵³

[T]he prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

Id. (citation omitted).

These restrictions on employer speech were justified by the Court on the basis of employees' economic dependence on their employers. *Id.* at 617. As Professor Getman has observed, the Court has been unwilling in areas outside the labor context to apply such a liberal definition of "coerciveness" to speech. Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4, 10 (1984).

⁵⁴ Compare *NLRB v. Village IX, Inc.*, 723 F.2d 1360 (7th Cir. 1983) with *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

Historically, the Board has tended to view employer speech more restrictively than have the reviewing courts. Employer statements regarding potential economic or other "serious harms" from unionization, for example, have frequently been found unlawful by the Board but protected by the courts. For a thorough discussion of this point and for a collection of relevant cases, see Beth Z. Margulies, *NLRB v. Gissel Packing Co.: A Standard Without a Following (The Need for Reappraisal of Employer Free Speech Rights in the Organizing Campaign)*, 22 WILLAMETTE L. REV. 459 (1986).

broadier First Amendment protection.⁵⁵ Recently, the Court put forward the “tantalizing”⁵⁶ suggestion that perhaps labor speech is entitled to greater protection than previously believed.⁵⁷ But whatever future expansions may occur, it presently is clear that at least noncoercive employer speech is entitled to First Amendment protection.

It is not only the First Amendment but section 8(c) of the NLRA that protects such speech. Under section 8(c), “[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of [the Act], if such expression contains no threat of reprisal or force or promise of benefit.”⁵⁸ Section 8(c) has been regarded as merely restating constitutional protections.⁵⁹ As the Court observed in *Gissel*, section 8(c) “merely implements the First Amendment.”⁶⁰ The Court in *Gissel* used the “threats and promises” language of section 8(c) to establish the parameters of protected speech for First Amendment purposes.⁶¹ Accordingly, in determining whether or not particular employer speech is or is not coercive and a violation of section 8(a)(1), the inquiries under section 8(c) and the First Amendment have been coextensive.⁶²

While the Board and courts have found that section 8(c) “merely implements” the First Amendment for purposes of determining whether speech

⁵⁵ See Getman, *supra* note 53; Margulies, *supra* note 54; James G. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189 (1984); Sylvia G. Eaves, Note, *Employer Free Speech During Representation Elections*, 35 S.C. L. REV. 617 (1983-84); see also Bok, *supra* note 50, at 68 (equating union election campaigns with political contests and suggesting that union election results may be of more importance to employees’ lives than the results of many political elections).

⁵⁶ Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Discourse and the Problem of DeBartolo*, 1990 WIS. L. REV. 149, 173.

⁵⁷ *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-76 (1988). Heightened First Amendment protection for labor speech could mean that *Gissel*’s willingness to view employer speech as coercive would be suspect, thereby expanding the type of employer speech that would be deemed noncoercive and entitled to First Amendment protection. See Kohler, *supra* note 56, at 199.

⁵⁸ 29 U.S.C. § 158(c) (1988).

⁵⁹ See Christensen, *supra* note 46, at 265 (“To the extent that a consensus has been reached, it is in favor of regarding section 8(c) as a restatement of the constitutional guarantee.”); see also James W. Wimberly, Jr., & Martin H. Steckel, *NLRB Campaign Laboratory Conditions Doctrine and Free Speech Revisited*, 32 MERCER L. REV. 535, 547 (1981).

⁶⁰ 395 U.S. at 617 (1969).

⁶¹ *Id.*

⁶² *Stokely-Van Camp, Inc. v. NLRB*, 722 F.2d 1324 (7th Cir. 1983); *Dow Chem. Co., Texas Div. v. NLRB*, 660 F.2d 637 (5th Cir. 1981); see Margulies, *supra* note 54, at 468, 496-500.

is coercive,⁶³ there has been little attention paid to the question of whether section 8(c)'s prohibition on the use of noncoercive speech as evidence of an unfair labor practice also "merely implements" First Amendment protections. Those courts addressing the issue have appeared to assume it does.⁶⁴ These decisions raise fundamental issues concerning the extent to which evidentiary use of protected speech is prohibited by section 8(c) and whether those prohibitions are mandated by the First Amendment.

IV. SECTION 8(C) OF THE NLRA

Section 8(c) was part of the Taft-Hartley amendments to the NLRA that on the whole were designed to counterbalance the Wagner Act's pronoun stance.⁶⁵ Taft-Hartley, for example, added to the protections of section 7 the right to refrain from engaging in concerted activities.⁶⁶ It also added a list of unfair union labor practices.⁶⁷ Most important for present purposes, it added section 8(c), which affirmatively protects employer speech.⁶⁸

As set forth above, the Board had interpreted the Wagner Act to require neutrality on the part of employers.⁶⁹ Although the Supreme Court in *Virginia Electric* disagreed with the Board's interpretation and confirmed an employer's

⁶³ See *supra* notes 58–62 and accompanying text.

⁶⁴ See, e.g., *Holo-Krome Co. v. NLRB*, 907 F.2d 1343 (2d Cir. 1990); *NLRB v. General Elec. Co.*, 418 F.2d 736, 774 (2d Cir. 1969) (Friendly, J., concurring and dissenting), *cert. denied*, 397 U.S. 965 (1970); *NLRB v. Colvert Dairy Prods. Co.*, 317 F.2d 44 (10th Cir. 1963); *NLRB v. Rockwell Mfg. Co.*, 271 F.2d 109 (3d Cir. 1959).

⁶⁵ The National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449 (1936), recognized and protected employees' rights to organize and to bargain collectively with their employers. It was amended by the Labor Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 80-101, 61 Stat. 136 (1948). For discussion of the Taft-Hartley amendments, see HARRY A. MILLIS & EMILY CLARK BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY* (1950); G. VAN ARKLE, *AN ANALYSIS OF THE LABOR MANAGEMENT RELATIONS ACT* (1947); Cox, *supra* note 1; John A. Perkins, *Basic Labor Issues Under the Taft-Hartley Act*, 27 B.U. L. REV. 371 (1947).

⁶⁶ 29 U.S.C. § 157 (1988). Prior to Taft-Hartley, the NLRA only protected the right to organize and to bargain; the Taft-Hartley amendments, by guaranteeing the right to refrain from such activities, moved the government from actively encouraging unionization to a position of neutrality. See A. COX et al., *supra* note 27, at 195.

⁶⁷ 29 U.S.C. § 158(b) (1988). Under the Wagner Act, only employers' unfair labor practices were outlawed. The perceived need to limit union power resulted in § 8(b), which prohibits various union activities, such as secondary boycotts, refusals to bargain, and strikes to compel an employer to commit an unfair labor practice.

⁶⁸ Section 8(c) frequently has been referred to as the "employer free speech" provision of the NLRA. See, e.g., Norman F. Burke, *Employer Free Speech*, 26 FORDHAM L. REV. 266 (1957).

⁶⁹ See *supra* notes 40–41 and accompanying text.

right to speak out against unions, the Board had responded to *Virginia Electric* by giving only grudging respect to employers' free speech rights.⁷⁰

Both the House and Senate were in agreement on the need for language protecting employer "free speech."⁷¹ But there was disagreement on the scope of protection that should be provided.⁷² After extensive debate, the final version of section 8(c) contained language, originating in the House, that provided that noncoercive speech not only would not constitute but could not be evidence of an unfair labor practice.⁷³

⁷⁰ After *Virginia Electric*, for example, the Board had found it unlawful for an employer to address its employees during working time, making these so-called "captive audience" speeches an unfair labor practice. See *Clark Bros.*, 70 N.L.R.B. 802 (1946), *enfd in part*, 163 F.2d 373 (2d Cir. 1947). As one court observed, it was *Virginia Electric* and "the Board's halting response to it" that gave rise to § 8(c). *NLRB v. Golub Corp.*, 388 F.2d 921, 926 (2d Cir. 1967).

⁷¹ Versions of § 8(c) were passed by both houses. See H.R. 3020, 80th Cong., 1st Sess., § 8(d)(1) (1947); S. 1126, 80th Cong., 1st Sess., § 8(c) (1947).

The legislative history of both versions reflects a desire to secure employer free speech. See, e.g., H.R. No. 245, 80th Cong., 1st Sess. (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 1947, at 324 (1985); 93 CONG. REC. § 3834 (daily ed. Apr. 23, 1947) (statement of Sen. Taft); see also *Wimberly & Steckel*, *supra* note 59, at 547, and *infra* notes 124-25, 135-36 and accompanying text.

Section 8(c) assures not only employers but unions their free speech rights. A discussion of union free speech, however, is outside the scope of this article. For a discussion of union free speech rights, see Getman, *supra* note 53; Kohler, *supra* note 56; Theodore J. St. Antoine, *Free Speech or Economic Weapon? The Persisting Problem of Picketing*, 16 SUFFOLK U. L. REV. 883 (1982).

⁷² Much of the debate centered on the extent to which surrounding circumstances could be considered in determining whether facially benign speech was coercive. The House bill protected all speech that "by its own express terms" did not contain a threat. H.R. 3020, 80th Cong., 1st Sess., § 8(d)(1) (1947). The Senate, in contrast, protected speech that "under all the circumstances" contained no threat. S. 1126, 80th Cong., 1st Sess., § 8(c) (1947). The final version of § 8(c) eliminated both the "by its own express terms" and "under all the circumstances" language, leaving open the extent to which context may be used to give meaning to words. The Supreme Court in *Gissel*, however, read § 8(c) as permitting the Board to consider context in determining whether speech is coercive. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

For discussion of the background of § 8(c), see *NLRB v. Golub Corp.*, 388 F.2d 921 (2d Cir. 1967); Robert J. Berghel & David J. Dempsey, *Section 8(c) of the NLRA: Giving It Meaning*, 32 MERCER L. REV. 575 (1981); Frank Elkouri, *Employer Free Speech*, 4 LAB. L.J. 78 (1953); Koretz, *supra* note 41; *Wimberly & Steckel*, *supra* note 59; Note, *Free Speech and Free Choice in Representation Elections: Effect of Taft-Hartley Act Section 8(c)*, 58 YALE L.J. 165 (1948). Much of this writing focuses on the extent to which § 8(c) does or should permit consideration of the "totality of the circumstances" in determining whether speech is coercive.

⁷³ For discussion of the legislative history on this portion of the statute, see *infra* notes 108-25 and accompanying text.

Academic reaction to this aspect of section 8(c) was to read it literally and to chafe at its restrictions.⁷⁴ Professor Cox, for example, assumed that section 8(c) would prevent the Board from considering an employer's opposition to the union in deciding whether the discharge of a union supporter was for the purpose of discouraging unionization.⁷⁵ He criticized this result, observing that it would make protecting organizational rights too difficult.⁷⁶ Similarly, Professor Van Arkle said section 8(c) "seems clear on its face that 'views, arguments or opinions' are not to be received as evidence in labor Board cases," and specifically noted such expression could not be used to determine the motive underlying a discharge, although he, too, criticized the provision as "absurd."⁷⁷

The Board also originally accepted this reading of section 8(c). In its 1948 Annual Report, the NLRB noted that prior to section 8(c), "noncoercive antiunion remarks of an employer, although themselves privileged, were admissible to show an employer's motive where that fact was in issue. In view of the language of section 8(c), however, the Board found in several cases that privileged expressions of opinion were not admissible to show motive."⁷⁸

It was not long before the Board altered its approach to section 8(c).⁷⁹ No longer would noncoercive, antiunion statements, such as leaflets and/or

⁷⁴ GEITMAN & POGREBIN, *supra* note 4, at 66; VAN ARKLE, *supra* note 65, at 23-26; Cox, *supra* note 1, at 19-21; Elkouri, *supra* note 72, at 81-84; Note, *supra* note 72, at 170-76.

⁷⁵ Cox, *supra* note 1, at 19.

⁷⁶ *Id.* at 45.

⁷⁷ VAN ARKLE, *supra* note 65, at 25-26; *see also* Note, *supra* note 72, at 176, where the author, accepting that § 8(c) precludes any consideration of noncoercive speech, found that § 8(c), "by placing blinders upon the Board, has hindered its effectiveness in translating the guarantee of uncoerced elections into reality."

⁷⁸ 13 NLRB ANN. REP. 50 (1948).

While the Board and commentators too readily conceded that § 8(c) precludes any use of protected speech as evidence of an unfair labor practice, they each recognized this restriction to be beyond the protections afforded by the First Amendment. They did so, however, without benefit of explanation. *See* VAN ARKLE, *supra* note 65, at 26 ("clearly, this protection is much wider than the constitutional guarantee of free speech"); Elkouri, *supra* note 72, at 79 (Section 8(c) "grants immunity beyond that accorded by the First Amendment"); Note, *supra* note 72, at 170 n.22 ("the Section appears to restrict a use against which there is no constitutional inhibition."); 13 NLRB ANN. REP. 49 (1948) (Section 8(c) "appears . . . to grant immunity beyond that contemplated by the free speech guarantees of the [First Amendment]").

⁷⁹ *See* Edwards Bros., Inc., 95 N.L.R.B. 1451 (1951); Southern Desk Co., 116 N.L.R.B. 1168 (1956), *enforced*, 246 F.2d 53 (4th Cir. 1957); Smith's Transfer Corp., 162 N.L.R.B. 143 (1966); Sun Hardware Co., Inc., 173 N.L.R.B. 973 (1968), *enforced*, 422 F.2d 1296 (9th Cir. 1970); General Battery Corp., 241 N.L.R.B. 1166 (1979); Active Transport, 296 N.L.R.B. No. 58 (1989), *enforced*, 1991 U.S. App. Lexis 1603 (6th Cir. 1991); Mark Industries, Inc., 296 N.L.R.B. No. 64 (1989).

campaign speeches urging employees to "vote no," be excluded from the record when an employer was charged with discrimination. Rather, the Board began using such statements, in its words, not as "evidence" of an unfair labor practice but as "background" from which motive could be determined.⁸⁰ Of course, such semantics cannot disguise what is happening: the Board is using antiunion speech as evidence to determine whether or not the employer acted for an unlawful purpose.⁸¹ It does so because of the difficulties inherent in determining motive and because an employer's antiunion statements are probative in determining whether a discharge was motivated by antiunion animus.⁸²

The Board's formal position has been consistent over the last 40 years.⁸³ Under the Board's approach, evidence of antiunion animus continues to be considered as circumstantial, "background" evidence to determine whether an employer acted for an unlawful purpose. But antiunion animus is to be used only as part of the overall picture and not as the exclusive proof of a section 8(a)(3) violation.⁸⁴

For the most part, the reviewing courts have accepted the Board's position, perhaps because it is so firmly grounded in common sense. Using protected statements or speeches to place acts in context or to draw the background of a controversy has been approved, often with recognition of the difficulty of ascertaining motive.⁸⁵ The courts, however, have provided little serious

⁸⁰ See, e.g., *Smith's Transfer Corp.*, 162 N.L.R.B. 143, 161 (1966) ("The General Counsel argues that he has not charged that the wording of the leaflets or their dissemination constitute either an unfair labor practice or evidence on which was predicated the commission of an unfair labor practice, but that the statements do provide a background from which another action, alleged to have been an unfair labor practice discharge, may be shown or inferred to have had an anti-union motive. The leaflets were offered and received in evidence for that purpose.").

⁸¹ See *GETMAN & POGREBIN*, *supra* note 4, at 66, charging that the Board's consideration of the speech as "background" "merely masks the inconsistency with Section 8(c)," but explaining the Board's approach as an understandable response to what the authors regard as the strictures of § 8(c).

⁸² See, e.g., *Smith's Transfer Corp.*, 162 N.L.R.B. 143, 164 (1966) ("Examination of the total circumstances, including speech, is therefore essential to fair judgment of motive, and Section 8(c) presents no bar to such examination.").

⁸³ See cases cited *supra* note 79; *GETMAN & POGREBIN*, *supra* note 4, at 65-66.

⁸⁴ *Id.* On occasion, however, the reviewing courts have accused the Board of straying from this standard and of basing a finding of antiunion animus solely on the employer's protected speech. See, e.g., *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666 (1st Cir. 1979); *Florida Steel Corp. v. NLRB*, 587 F.2d 735 (5th Cir. 1979). In these cases, the courts have refused to enforce the Board's order. For detailed discussion of this point, see *infra* notes 206-11 and accompanying text.

⁸⁵ See *NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *Darlington Mfg. Co. v. NLRB*, 397 F.2d 760 (4th Cir. 1968) (en banc), *cert.*

analysis of section 8(c). Rather, they have offered conclusory assertions that section 8(c) was not intended to require exclusion of this "background" evidence.⁸⁶ In other cases, courts have found antiunion bias "highly significant" without any discussion of section 8(c) at all.⁸⁷

But the reviewing courts have not been unanimous. In *NLRB v. Colvert Dairy Products Co.*,⁸⁸ for example, the Tenth Circuit rejected the Board's use of protected speech as "background evidence" to establish an unfair labor practice. In language that implies a strong First Amendment concern, the court stated:

To allow the privileged communications to become an instrument of destruction by indirection is to frustrate the right of free speech and the privilege of persuasion. Management cannot effectively attempt lawful persuasion if by so doing there is an ever-present penalty of "anti-union animus" for inherent in every campaign that is strenuously but lawfully waged is the expressed resistance to the views and claims of the opponent. . . . The right of management to freely express its views in opposition to unionization cannot be burdened by indirection and thus destroyed through technical rationalization.⁸⁹

More recently, the Second Circuit reiterated this rationale. In *Holo-Krome Co. v. NLRB*,⁹⁰ the court refused enforcement of a Board order that found two workers had not been hired because of their union activities. The court rejected the Board's determination because the Board had used the employer's lawful antiunion campaign as background evidence of unlawful motive.⁹¹

In faulting the Board for permitting the introduction of this evidence, the court noted an employer's "free speech" rights to express his views on unionization cannot be infringed by the Board.⁹² The court pointed to *Gissel's*

denied, 393 U.S. 1023 (1969); *NLRB v. Lipman Bros., Inc.*, 355 F.2d 15 (1st Cir. 1966); *Angwell Curtain Co. v. NLRB*, 192 F.2d 899 (7th Cir. 1951).

⁸⁶ See *NLRB v. General Elec. Co.*, 418 F.2d 736, 760-61 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970); *Sonoco Prods. Co.*, 399 F.2d 835, 838 (9th Cir. 1968); *Darlington Mfg. Co. v. NLRB*, 397 F.2d 760, 769 (4th Cir. 1968) (en banc), *cert. denied*, 393 U.S. 1023 (1969); *International Union v. NLRB*, 363 F.2d 702, 707 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 973 (1966); *Hendrix Mfg. Co. v. NLRB*, 321 F.2d 100, 103-04 (5th Cir. 1963).

⁸⁷ See *Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 251 n.3 (D.C. Cir. 1991); *Chromalloy Mining & Minerals, Alaska Div., Chromalloy Am. Corp. v. NLRB*, 620 F.2d 1120 (5th Cir. 1980); *NLRB v. Louisiana Mfg. Co.*, 374 F.2d 696 (8th Cir. 1967); *NLRB v. Lipman Bros., Inc.*, 355 F.2d 15 (1st Cir. 1966).

⁸⁸ 317 F.2d 44 (10th Cir. 1963).

⁸⁹ *Id.* at 46-47.

⁹⁰ 907 F.2d 1343 (2d Cir. 1990).

⁹¹ *Id.* at 1347.

⁹² *Id.* at 1345.

statement that section 8(c) "implements" the First Amendment, although it recognized the Supreme Court has yet to construe section 8(c)'s requirement that noncoercive speech not be used as evidence of an unfair labor practice.⁹³

The court went on to examine section 8(c) and concluded it bars any reliance on protected speech to support a finding of unlawful motive.⁹⁴ Pointing to the legislative history of the section, it found a clear congressional intent to exclude any use of protected speech.⁹⁵ As the court stated, "[i]n striking the balance between protecting employees from coercion and permitting all opinions regarding labor disputes to be presented, Congress chose to prevent chilling lawful employer speech by preventing the Board from using antiunion statements, not independently prohibited by the Act, as evidence of unlawful motivation."⁹⁶ In remanding the case, the court directed the Board to reconsider the evidence without regard to *Holo-Krome's* protected statements.⁹⁷

This Second Circuit decision is the most detailed judicial analysis of section 8(c)'s prohibition on the use of protected speech as evidence of an unfair labor practice. That it rejects any use of these statements as evidence is likely to trigger more frequent and vigorous employer attacks on the Board's approach. Moreover, because its construction of section 8(c) appears guided by constitutional concerns, it presents the question of whether using noncoercive speech as evidence of an unfair labor practice would violate the First Amendment.

A. *The Proper Role of the Courts in Interpreting Section 8(c)*

The Second Circuit read section 8(c) as follows: the expressing of noncoercive views, argument, or opinion shall not be introduced as evidence, whether background or primary, that an employer acted with wrongful

⁹³ *Id.*, citing *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 501 (1951), in which the Supreme Court stated it was "express[ing] no opinion on the possible effect of § 8(c) of the Taft-Hartley Act." (citation omitted).

⁹⁴ 907 F.2d at 1346-47.

⁹⁵ *Id.* As the court noted, the House, but not the Senate, version of § 8(c) contained the "be evidence of" language. That the compromise version contained the language was viewed by the court as persuasive that protected speech was inadmissible as evidence of unlawful motive. Moreover, the court pointed to criticisms of the language voiced in the House Minority Report and in President Truman's veto, criticisms that read § 8(c) as precluding any use of protected speech.

For further discussion of § 8(c)'s legislative history and a critique of the *Holo-Krome* view, see *infra* notes 95-142 and accompanying text.

⁹⁶ 907 F.2d at 1347.

⁹⁷ *Id.* On remand, the Board reaffirmed its finding that § 8(a)(3) violations had been committed but did so without regard to the protected speech. *Holo-Krome*, 302 N.L.R.B. No. 71 (1991); see *infra* notes 200-05 and accompanying text.

motive.⁹⁸ This holding is wrong. Courts that have rejected the agency's interpretation and read section 8(c) to preclude any consideration of protected speech have overstepped the limits of judicial authority.

*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁹⁹ establishes a two-step process for review of an agency's interpretation of its enabling statute. Under step one, the court must determine whether Congress has directly spoken to the precise issue with a clear intent.¹⁰⁰ The reviewing court is free to use "the traditional tools of statutory construction," including resort to legislative history, to determine whether a clear and unambiguous congressional intent is present.¹⁰¹ If there is, the matter is at an end; the clear and unambiguous congressional intent controls.¹⁰² But if there is no clear and unambiguous intent, the court cannot independently interpret the statute but must accept the agency's view, so long as the agency's reading is based on a permissible construction of the statute.¹⁰³

The Second Circuit's position is that section 8(c) clearly and unambiguously precludes any evidentiary use of protected speech in unfair labor practice proceedings. As set forth below, there is no such clear and unambiguous congressional intent.

First, although the Supreme Court has yet to confront the issue discussed herein, it has rejected a "literal" reading of section 8(c). In *International*

⁹⁸ See *supra* notes 91-97 and accompanying text. The second circuit is not the only court to interpret the statute in this fashion; it simply is the most recent. See cases cited *supra* note 4.

⁹⁹ 467 U.S. 837 (1984).

¹⁰⁰ *Id.* at 842-43. For discussion of the *Chevron* "two-step" approach, see, e.g., Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); Kenneth W. Starr et al., *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353 (1987); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987).

¹⁰¹ *Chevron U.S.A., Inc.*, 467 U.S. at 843 n.9. That resort to legislative history is proper at step one of the *Chevron* analysis is demonstrated by *Chevron* itself. *Id.* at 845; see also *American Hosp. Ass'n v. NLRB*, 111 S.Ct. 1539 (1991); *NLRB v. United Food & Comm'l Workers Union*, 484 U.S. 112, 124-25 (1987). But see *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 172 (1989) ("In view of our interpretation of the plain statutory language of the subterfuge requirement, . . . reliance on legislative history is misplaced"); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 521 (discussing his own preference for a "plain meaning" approach to statutory construction that avoids consideration of legislative history).

¹⁰² *Chevron U.S.A., Inc.*, 467 U.S. at 842-43.

¹⁰³ "If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Brotherhood of Electrical Workers v. NLRB,¹⁰⁴ the Court found section 8(c) did not immunize peaceful speech or picketing in furtherance of an unfair labor practice, ruling that the general speech protections of section 8(c) must give way to the more specific provisions of section 8(b)(4), which outlaws secondary boycotts. Thus, when speech is an integral component of the unfair labor practice, section 8(c) does not bar its use as evidence, notwithstanding the literal wording of the statute.¹⁰⁵

Second, the Court's decision in *IBEW v. NLRB* not only recognizes section 8(c) is not to be read literally, but also acknowledges it should be read in harmony with other sections of the Act. Accordingly, a construction of section 8(c) at odds with the statute's goal of protecting employees from discrimination is suspect.¹⁰⁶

Third, the legislative history does not reveal a clear congressional intent that section 8(c) be read literally.¹⁰⁷ Unlike most questions of statutory construction under the NLRA,¹⁰⁸ the construction of section 8(c) need not proceed in the face of congressional silence. The extent to which section 8(c) prohibits the use of "protected speech" as evidence of unlawful motive was debated vigorously and demonstrates the absence of any clear congressional intent to wholly exclude consideration of protected speech.¹⁰⁹

¹⁰⁴ 341 U.S. 694 (1951).

¹⁰⁵ *Id.*; see *Smith's Transfer Corp.*, 162 N.L.R.B. 143, 162 (1966); Christensen, *supra* note 46, at 265.

¹⁰⁶ See *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988) (looking to the design of the statute as a whole to determine a term's meaning); see also *The Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) ("It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.").

¹⁰⁷ That an examination of the legislative history of § 8(c) is necessary and appropriate in determining whether it reflects a clear and unambiguous congressional intent has been recognized by both the Board and the reviewing courts. See, e.g., *Holo-Krome Co. v. NLRB*, 907 F.2d 1343 (2d Cir. 1990); *Smith's Transfer*, 162 N.L.R.B. 143 (1966).

¹⁰⁸ The NLRA is purposely broad and ambiguous in many respects. See, e.g., *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S.Ct. 1542, 1549 (1990); Ralph K. Winter, Jr., *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 56-57 (1968); Rebecca H. White, *Time for a New Approach: Why the Judiciary Should Disregard the 'Law of the Circuit' When Confronting Nonacquiescence by the National Labor Relations Board*, 69 N.C. L. REV. 639, 651-52 (1991).

¹⁰⁹ See H.R. Rep. No. 245, 80th Cong., 1st Sess., reprinted in LEGISLATIVE HISTORY, *supra* note 71, at 324; H.R. Min. Rep. No. 245, 80th Cong., 1st Sess., reprinted in LEGISLATIVE HISTORY, *supra* note 71, at 375-76; S. Rep. No. 105, 80th Cong., 1st Sess., reprinted in LEGISLATIVE HISTORY, *supra* note 71, at 114; H.R. Rep. No. 510, 80th Cong., 1st Sess., reprinted in LEGISLATIVE HISTORY, *supra* note 71, at 549; 93 CONG. REC. H6385, 80th Cong., 1st Sess. (daily ed. June 4, 1947) (remarks of Rep. Madden); 93 CONG. REC. H6436, 80th Cong., 1st Sess. (daily ed. June 5, 1947) (Labor Management Conference Report—remarks of Senator Taft; remarks of Senators Pepper and Morse); 93 CONG. REC. S4587, 80th Cong., 1st Sess. (daily ed. May 6, 1947) (remarks of Senator

Section 8(c) was aimed at overturning the Board's restrictive approach to employer speech under the Wagner Act. Not only had the Board originally found the NLRA to require employer neutrality, after *Virginia Electric* it had found unfair labor practices based on the time and place or surrounding circumstances, as opposed to the content, of employer speech.¹¹⁰ These Board decisions were of particular concern to Congress in enacting section 8(c).¹¹¹

But the Board also had engaged in another practice that Congress was intent on banning through section 8(c). In cases where a union supporter had been fired after the employer had conducted an antiunion campaign, the Board had found the employer speech to be conclusive evidence of unlawful motivation.¹¹² As further discussion will show, section 8(c) is susceptible to a reading that it is only these decisions Congress intended to address through the "be evidence of" language of section 8(c).¹¹³

Certainly, the contrary construction of section 8(c) employed in *Holo-Krome* has support in the legislative history. Opponents of the language "shall not . . . be evidence of" read this language literally and argued it would require

Murray); 93 CONG. REC. S6858, 80th Cong., 1st Sess. (daily ed. June 12, 1947) (remarks of Senator Taft).

¹¹⁰ See *supra* note 70 and accompanying text.

¹¹¹ See Elkouri, *supra* note 72, at 82 ("Legislative history of the Taft-Hartley amendments indicates that § 8(c) was intended, among other things, to abolish all aspects of the captive-audience doctrine . . ."); Koretz, *supra* note 41, at 403 ("[I]t is reasonably clear that Congress was concerned mainly with revising two aspects of prior NLRB rulings: (1) the 'compulsory audience' doctrine; (2) an alleged abuse of the 'course of conduct' doctrine, that is, the tendency of the Board to hold that an employer's speech, in itself privileged, was coercive merely because the employer had committed some severable and unrelated unfair labor practice."); Wimberly & Steckel, *supra* note 59, at 538-39 (§ 8(c) "intended to alter NLRB misuse of the 'course of conduct' doctrine. . .").

¹¹² See, e.g., *Interlake Iron Corp. v. NLRB*, 131 F.2d 129 (7th Cir. 1942); *NLRB v. Goodyear Tire & Rubber Co.*, 129 F.2d 661 (5th Cir. 1942); *NLRB v. Riverside Mfg. Co.*, 119 F.2d 302 (5th Cir. 1941); *Weyerhaeuser Timber Co. Clemons Branch*, 35 N.L.R.B. 810 (1941); *Luxuray, Inc.*, 16 N.L.R.B. 37 (1939), *modified*, 123 F.2d 106 (2d Cir. 1941); see also Christensen & Svanoe, *supra* note 1, at 1274 (Early on, "[p]roof of an overall anti-union animus was, in many instances, considered sufficient to demonstrate that the reason (i.e., "motive") for a termination or demotion was union activity rather than some other, independent cause for discipline.").

The extent to which the Board actually engaged in this practice is debatable. But whether or not based in reality, the perception was that the Board routinely was basing unfair labor practice findings solely on employers' opposition to unionization. See Cox, *supra* note 1, at 19 (recognizing this Board practice as a motivation for 8(c)); Theodore R. Iserman, *Free Speech and the N.L.R.A.*, N. Y. U. 7TH ANNUAL CONF. ON LABOR 301 (1954) (describing Board's conclusive reliance on employer speech and contending § 8(c) was intended to overrule these decisions).

¹¹³ See 1 CHARLES J. MORRIS, *THE DEVELOPING LABOR LAW* 193 (2d ed. 1983) (reading § 8(c) to mean protected speech cannot be "determinative" but can be admissible to show animus); *infra* notes 129-42 and accompanying text.

wholesale exclusion of antiunion statements in cases involving the discharge of a union supporter. They forcefully criticized this result. Senator Morse, for example, regarded the phrase "as one of the most objectionable and destructive provisions in the bill," because, in his view, it required the Board and courts to

close their eyes to the plain implications of speech, and . . . disregard clear and probative evidence of motive, or prejudice, or bias. If an employee were discharged for union activities, for example, the Board could not use as evidence of the employer's purpose, any expressions which were not in themselves coercive, no matter how revealing they might be of the employer's true reasons for the discharge.¹¹⁴

In his veto message, moreover, President Truman reflected a similar interpretation of section 8(c). In his view, "[a]n antiunion statement by an employer, for example, could not be considered as evidence of motive, unless it contained an explicit threat of reprisal or force or promise of benefit."¹¹⁵ Taft-Hartley was passed over this presidential veto.

Thus, this literal interpretation of section 8(c) was before Congress when it enacted the bill. Importantly, however, it was rejected by one of the bill's chief sponsors, Senator Taft, who answered these criticisms of section 8(c) on behalf of the conference committee.¹¹⁶

In his report to the Senate, Taft, in response to claims that section 8(c) would require the exclusion of evidence relevant to motive, emphatically stated that section 8(c) "does not make incompetent, evidence which would ordinarily be deemed relevant and admissible in courts of law."¹¹⁷

¹¹⁴ 93 CONG. REC. 6453 (1947). Senator Morse regarded this as an "astounding proposition," noting that in other areas of the law, particularly criminal law, speech regularly is used as evidence of motive.

Senator Morse was not alone in his criticisms of § 8(c). The House Minority Report, for example, made precisely the same criticisms voiced by Senator Morse. H.R. MIN. REP. No. 245, 80th Cong. 84 1st Sess., Rule 13.7(b), *reprinted in* LEGISLATIVE HISTORY *supra* note 71, at 375 ("By saying that statements are not to be considered as evidence, they insist that the Board and the courts close their eyes to the plain implications of speech and disregard clear and probative evidence. In no field of law are a man's statements excluded as evidence of an illegal intention."); *see also* 93 CONG. REC. 6385 (1947) (remarks of Rep. Madden) ("In no other field of law are a man's statements excluded as evidence of an illegal intention."); 93 CONG. REC. 6503 (1947) (remarks of Senator Murray) (The sweeping character of the prohibition is such that, if enacted into law, it will seriously circumscribe the Board in the prevention of the unfair practices proscribed by the bill.).

¹¹⁵ 93 CONG. REC. 7487 (1947).

¹¹⁶ There is no Senate conference report on the Taft-Hartley amendments, but Senator Taft, the Senate's chief sponsor of the bill, placed a memorandum into the record "to make clear the legislative intent." 93 CONG. REC. 6441, 6858 (1947).

¹¹⁷ 93 CONG. REC. 6444 (1947). This statement has been specifically relied upon by the Board in interpreting § 8(c) to permit the use of protected speech as background

In response to Taft's report and during debate on the bill, Senator Pepper pointedly asked the question at issue here: If an employer criticized unions on Monday, could that statement be used as evidence if on Thursday he fired a union supporter for allegedly discriminatory reasons?¹¹⁸ Taft responded that consideration of the statement would be proper, assuming there were other circumstances to tie the statement in with the employer's action.¹¹⁹

In response to further criticisms from Senators Pepper, Morse, and others, Taft later clarified the reach of section 8(c) in terms that suggest it was meant only to prevent the Board from using protected speech as the exclusive or primary evidence of unlawful action. Taft stated:

There have also been a number of decisions by the Board in which discharges of employees, *even though there was no evidence in the surrounding circumstances of discrimination*, have been deemed unfair labor practices *simply because* at one time or another the employer has expressed [sic] himself as not in favor of unionization of his employees. *The object of this section, therefore, is to make it clear that decisions of this sort cannot be made under the conference bill.*¹²⁰

The House Conference Report, moreover, expressed a similar point of view, suggesting it was the Board's over reliance on protected speech that section 8(c) was intended to prohibit. In explaining the need for section 8(c), the House Conference Report criticized the Board for finding an employer had acted for an illegal purpose on the basis of its speeches and publications.¹²¹

evidence of motive. *See* Smith's Transfer Corp., 162 N.L.R.B. 143, 162 (1966). *But see* VAN ARKLE, *supra* note 65, at 23.

Senator Taft's statement, however, can be read as distinguishing "views, arguments, and opinions" from "instructions, directions or other statements which might be deemed admissions under ordinary rules of evidence," for he pointed out it was only the former speech that would fall within § 8(c). Thus, an employer's statements, "I am firing you because you are in the union," or his instruction to a subordinate to "get rid of Joe; he's a union man," would be outside the ambit of § 8(c). It is possible this was Taft's only point. In view of his overall remarks, however, this is unlikely.

¹¹⁸ 93 CONG. REC. 6446 (1947) (remarks of Senator Pepper).

¹¹⁹ 93 CONG. REC. 6446 (1947) (remarks of Senator Taft). Taft went on, however, to inconsistently declare that noncoercive speech could *not* be considered as evidence. *Id.*; *see* VAN ARKLE, *supra* note 65, at 25-26 (noting the confusing and contradictory nature of Taft's remarks).

¹²⁰ 93 CONG. REC. 6860 (1947) (emphasis added).

Professor Van Arkle read Taft's remarks as indicating the Board is *not* to accept protected speech as evidence. VAN ARKLE, *supra* note 65, at 25. This is a misreading of Taft's statement. Taft was not stating all such speech must be excluded but that § 8(c) precluded the Board from relying on speech to establish motive when there was no other evidence of discrimination.

¹²¹ H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 45 (1947), *reprinted in* LEGISLATIVE HISTORY, *supra* note 71, at 549; *see* Cox, *supra* note 1, at 19 ("Another

Admittedly, however, there is confusion in the debates, with Taft himself at times suggesting that noncoercive views, arguments, or opinions may *not* be used as evidence.¹²² But whatever the contradictions in Taft's remarks, one thing appears relatively clear: the conference committee did not intend that section 8(c) be given the literal reading ascribed to it by Senators Pepper, Morse, and others. While no definitive alternative reading was clearly expressed, the view that section 8(c) would wholly bar any use of protected speech was repeatedly rejected.¹²³

Moreover, it appears the conference committee's view of section 8(c) was premised on the First Amendment. The committee apparently did not intend section 8(c) to be construed to provide protections broader than those contained in the constitution.¹²⁴ Nor was there any intent for section 8(c) to alter the normal rules of evidence.¹²⁵

This confusing and contradictory debate over the meaning of section 8(c), coupled with the Supreme Court's rejection of a literal reading,¹²⁶ establishes a statutory ambiguity in the phrase "be evidence of."¹²⁷ More precisely, there is no clear and unambiguous congressional intent to exclude protected speech as evidence of unlawful motive.

Accordingly, under *Chevron*,¹²⁸ the courts are not to decide which reading of the statute, in view of the legislative history and the background of Board practices against which it was adopted, is the better one. Instead, under *Chevron*'s step two, the courts must determine whether the Board's construction is permissible.

source of support for [8(c)] was the view expressed in the conference report that the Board too often based findings of unfair labor practices upon an employer's published dislike of unions, instead of requiring proof that he had engaged in improper activities.").

¹²² 93 CONG. REC. 6446 (1947); 93 CONG. REC. 6859 (1947); see VAN ARKLE, *supra* note 65, at 26.

¹²³ *Id.*

¹²⁴ H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 45 (1947), reprinted in LEGISLATIVE HISTORY, *supra* note 71, at 549. 93 CONG. REC. 6859 (1947). While Taft and his committee may have been wrong concerning the First Amendment limits on using speech as evidence, they apparently intended § 8(c) and the First Amendment to coincide.

¹²⁵ *Id.*

¹²⁶ See *supra* notes 104-05 and accompanying text.

¹²⁷ The disagreement among the reviewing courts on the proper meaning of § 8(c) further demonstrates the ambiguity of that section. See *supra* note 64, 85-86; see also Christensen, *supra* note 46, at 264 (discussing the "revealing and confusing" nature of § 8(c)'s legislative history); Koretz, *supra* note 41, at 403, 411 (describing the legislative history of § 8(c) as confusing and acknowledging it is not clear Congress intended to legislate the extremes that might follow from a literal reading of § 8(c)); Wimberly & Steckel, *supra* note 59, at 538-39 (noting that the legislative history of § 8(c) is unclear).

¹²⁸ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

B. *The Board's Construction of Section 8(c)*

Section 8(c) could be read to exclude any evidentiary use of protected speech or only to preclude the Board's using protected speech as the exclusive or primary evidence of discrimination.¹²⁹ The Board has read section 8(c) to permit the use of protected speech as "background" but not primary evidence to establish unlawful motivation.¹³⁰ As set forth below, this is a permissible construction of an ambiguous statutory provision.

First, one must consider that a literal reading of section 8(c) would conflict with a specific statutory goal—the elimination of discrimination against employees based on union activities. Precluding the Board from considering noncoercive employer speech would handicap the Board in its search for employer motive.¹³¹ A reading of section 8(c) that harmonizes it with other provisions of the NLRA is a reasonable one.¹³²

Furthermore, the legislative history supports a view that the real purpose of section 8(c) was not to prohibit all use of antiunion statements as circumstantial evidence to show motive but was to preclude the Board from substituting antiunion statements for proof of causation in a particular case.¹³³ The conferees were concerned with the Board's practice of finding an employer guilty of a section 8(a)(3) violation "simply because" the employer had expressed opposition to unions.¹³⁴ A conclusion that it was this Board practice toward which section 8(c)'s "be evidence of" language was directed is a reasonable interpretation of the statute.

Moreover, the legislative history of section 8(c) demonstrates the purpose of that section was to clarify Congress' intent not to tamper with First

¹²⁹ See *supra* notes 107–28 and accompanying text.

¹³⁰ See *supra* notes 79–84 and accompanying text; see also *General Elec. Co.*, 150 N.L.R.B. 192, 280 (1964) (rejecting an "absolutist view" of § 8(c) as "at odds with the legislative history.")

¹³¹ See *id.* at 280–81; Norman F. Burke, *Employer Free Speech*, 26 *FORDHAM L. REV.* 266, 274 (1957) (noting a literal reading of § 8(c) "would certainly stultify the inquiry into employer's motive by denying the Board the use of an important source of evidence. Consideration of an employer's remarks in most cases would not be conclusive of an issue but they certainly would be influential in making any intelligent judgment."); see also *supra* notes 12, 85.

¹³² See *NLRB v. General Elec. Co.*, 418 F.2d 736, 760–61 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970); *International Bhd. of Elec. Workers v. NLRB*, 341 U.S. 694 (1951); *Smith's Transfer Corp.*, 162 N.L.R.B. 143, 162 (1966).

¹³³ See *supra* notes 116–25 and accompanying text; see also Christensen & Svano, *supra* note 1, at 1284 ("In the course of debates on the 1947 amendments, Congress indicated its concern that the Board was too frequently translating general animus into specific causation of a particular action."). But see Bok, *supra* note 50, at 103 n.179 (suggesting Congress' intent in passing § 8(c) was to keep the Board from using employer speech as evidence of unlawful motive).

¹³⁴ See *supra* notes 120–21 and accompanying text.

Amendment rights.¹³⁵ Acknowledging no statute need codify what the constitution protects, legislators nonetheless wanted to “send a message” that Congress intended no infringement of constitutionally protected speech.¹³⁶

Those congressmen reading section 8(c) to prohibit any use of protected speech as evidence of an unfair labor practice were quick to point out this restriction was beyond the reach of the First Amendment.¹³⁷ As set forth in the following section, they were correct,¹³⁸ a reading that lends support to the Board’s interpretation of the statute. Because Congress meant only to codify First Amendment protections and because the First Amendment would not preclude using noncoercive speech as evidence of an unfair labor practice, section 8(c) may reasonably be read to permit use of this evidence to establish unlawful motivation.¹³⁹

At the same time, however, section 8(c) does preclude using protected speech as *the basis* for an unfair labor practice finding. The legislative history reflects a concern over the Board’s use of noncoercive, antiunion speech as its exclusive or primary proof that an employer acted with an unlawful motive.¹⁴⁰

¹³⁵ See *supra* note 71 and accompanying text.

¹³⁶ See H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 45 (1947) (purpose of section 8(c)’s “be evidence of” is “to protect the right of free speech”), *reprinted in* LEGISLATIVE HISTORY *supra* note 71, at 549; see, e.g., 93 CONG. REC. 4832 (1947); Koretz, *supra* note 41, at 403; Margulies, *supra* note 54, at 460; George Rose, *Is the NLRB Tampering with Freedom of Speech?* 15 U. PITT. L. REV. 462, 469 (1954); Wimberly & Steckel, *supra* note 59, at 547.

¹³⁷ See *supra* note 114 and accompanying text.

¹³⁸ See *infra* notes 150–78 and accompanying text.

¹³⁹ The Board has recognized this point. See, e.g., *Smith’s Transfer Corp.*, 162 N.L.R.B. 143, 162 n.36 (1966); see also Christensen, *supra* note 46, at 265 (recognizing that § 8(c) should be read only as restating, not extending, constitutional guarantees). But see *supra* note 78 (contending § 8(c) conferred immunity beyond that provided by the First Amendment).

Moreover, the Court confirmed that neither § 8(c) nor the First Amendment precludes consideration of the totality of the circumstances in determining whether speech is coercive. In doing so, the Court read § 8(c) as coextensive with the First Amendment, despite conflicting legislative history on this point. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); see *supra* note 72 and accompanying text. This interpretation of § 8(c) supports the Board’s First Amendment-driven reading of § 8(c).

¹⁴⁰ See *supra* notes 120–21 and accompanying text.

There is some indication that the Supreme Court regards this as an appropriate reading of § 8(c). See *Linn v. Plant Guard Workers*, 383 U.S. 53, 62 n.5 (1966) (“It is more likely that Congress adopted this section for a narrower purpose, *i.e.*, to prevent the Board from attributing anti-union motive to an employer *on the basis* of his past statements.”) (emphasis added); *Old Dominion Branch No. 496, National Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 276 (1974) (same quotation). But see *NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 370 (1958) (Warren, C.J., dissenting and concurring) (Noncoercive employer speech is protected by § 8(c) and “so cannot be used to show that the contemporaneous enforcement of the no-distribution rule was an unfair labor practice.”).

The Board has accepted this limit of section 8(c), acknowledging protected speech may be used only as “background” evidence against which motive may be assessed.¹⁴¹

From time to time, however, reviewing courts have accused the Board of relying too heavily on protected speech. When the reviewing courts have found the evidence of unlawful motive consists primarily of protected speech, they have properly relied on section 8(c) to refuse enforcement of the Board’s order.¹⁴² While the Board may disagree with the courts’ assessment of the evidence in those cases, it has yet to disagree with this view of the statute, which presumably mirrors its own.

Left unexplored to date, however, is whether this prohibition is constitutionally mandated. The suggestion that the First Amendment both permits and limits the evidentiary use of protected speech, a suggestion with which Congress ostensibly was in agreement when it passed section 8(c), is discussed in the remaining sections.

V. DOES THE FIRST AMENDMENT LIMIT THE USE OF PROTECTED SPEECH AS EVIDENCE OF AN UNFAIR LABOR PRACTICE?

The notion that the First Amendment prohibits the use of protected speech as evidence of an unlawful act is novel. Speech the First Amendment would protect from outright prohibition routinely is used as evidence of civil or criminal culpability in other contexts, without First Amendment objections.¹⁴³

Some lower courts, moreover, have interpreted § 8(c) as permitting protected speech to be used as background evidence of unlawful motive, further supporting the reasonableness of the Board’s construction. As stated by the court in *NLRB v. General Elec. Co.*, “The objective of section 8(c) then, was to impose a rule of relevancy on the Board in evaluating the legality of statements by parties to a labor dispute. Its purpose was hardly to eliminate *all* communication from the Board’s purview, for to do so would be to emasculate a statute whose structure depends heavily on evaluation of motive and intent.” 418 F.2d 736, 760–61 (2d Cir. 1969) (emphasis added), *cert. denied*, 397 U.S. 965 (1970). *See also supra* note 85; MORRIS, *supra* note 113, at 193.

¹⁴¹ *See supra* notes 80–84 and accompanying text.

¹⁴² *See, e.g., NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666 (1st Cir. 1979) (criticizing the Board for viewing all evidence against an employer once it is concluded that an employer is opposed to unions); *Florida Steel Corp. v. NLRB*, 587 F.2d 735 (5th Cir. 1979) (“The Board cannot find unlawful motive based solely on the general bias or anti-union attitude of the employer.”).

¹⁴³ This was the point made by Senators Pepper and Morse, among others, when literally reading and criticizing § 8(c). *See supra* notes 114–18; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (“[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, *evidenced*, or carried out by means of language, either spoken, written or printed.”) (emphasis added).

That such objections have been raised in the context of labor speech, moreover, is ironic, given the relatively low First Amendment protection labor speech traditionally has been afforded.¹⁴⁴ No doubt it is section 8(c), with its language restricting the evidentiary uses of protected speech, that has forced awareness of First Amendment concerns in labor cases.

Because the First Amendment and section 8(c) protect an employer's right to voice an opinion on unions and even to mount an antiunion campaign, courts have reasoned that allowing the Board to use that speech against the employer in any way is an impermissible back door assault on First Amendment freedoms.¹⁴⁵ Using the speech against the employer, in the eyes of the these courts, puts a "bait and switch" gloss on the First Amendment: employers have the "right" to speak out against a union, but if they grab the bait, they have set themselves up for unfair labor practice charges when they thereafter take managerial actions.¹⁴⁶

The problem with this argument is that it expands First Amendment protections too far. Using speech as evidence of unlawful motive is not the same thing as directly banning the speech. The speech itself is not outlawed. An independent act is needed for liability. Moreover, when liability turns on a defendant's motive or intent, speech quite often is probative evidence of state of mind.¹⁴⁷ To exclude such evidence from the record deprives the decisionmaker of facts necessary to reach a fully informed and just decision. The First Amendment has never been construed by the Supreme Court to demand this result.¹⁴⁸

See also Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981). Professor Schauer recognizes the obvious point that speech frequently is used as evidence of or an element for liability in various contexts, such as prosecutions for extortion, perjury or threats or in civil litigation for breach of contract or price-fixing. *Id.* at 268-74. He suggests, however, that perhaps such speech should not be covered by the First Amendment at all. *Id.* at 273; see also Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645 (1980) (noting speech frequently is used to establish criminal intent without First Amendment objections).

¹⁴⁴ See *supra* note 55 and accompanying text.

¹⁴⁵ See, e.g., *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666, 670 (1st Cir. 1979) ("To use protected expression to build a case would seem to make the Act a trap."); *NLRB v. General Elec. Co.*, 418 F.2d 736, 774 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970) (Friendly, J., concurring and dissenting) (using protected speech against an employer "constitutes a serious indentation of § 8(c) and (d), if not, indeed, of the First Amendment."); *NLRB v. Colvert Dairy Prods. Co.*, 317 F.2d 44, 46 (10th Cir. 1963) ("To allow the privileged communications to become an instrument of destruction by indirection is to frustrate the right of free speech and the privilege of persuasion.").

¹⁴⁶ *Id.*; see also Iserman, *supra* note 112, at 303.

¹⁴⁷ See *supra* notes 82, 85, 131 and accompanying text.

¹⁴⁸ But see *Street v. New York*, 394 U.S. 576, 615 n.3 (1969) (White, J., dissenting). In *Street*, the Court overturned a flag burning conviction because of the possibility that the defendant was convicted for his speech, as opposed to his act, when the statute in question

At the same time, these courts are correct to question whether the First Amendment places some limits on the use of protected speech as evidence against employers. There is a First Amendment interest present that must be balanced against the need for the evidence. What the courts have failed to recognize is that the question is one of degree. To allow the Board to take the employer's antiunion stance into account when considering whether a particular action was motivated by antiunion animus is different from allowing the Board to find an employer discriminated against a particular employee *simply because* the employer opposed unionization. If employers know they will be found guilty of section 8(a)(3) violations simply because they have opposed unions, the First Amendment right to speak out has been no less impermissibly chilled than if the speech itself were made unlawful.¹⁴⁹

A. The First Amendment Does Not Require the Exclusion of Protected Speech as Evidence of an Unfair Labor Practice

Most First Amendment cases involve laws that directly restrict speech.¹⁵⁰ It is well recognized, however, that abridgment of First Amendment rights can occur indirectly as well.¹⁵¹ Thus, just because speech is not being directly prohibited, as it would be, for example, were the NLRA construed to prohibit any antiunion statements by an employer, does not mean that no First Amendment issue exists.

When the government directly restricts speech, the regulation receives what Professor Laurence Tribe describes as "Track One" analysis, and the regulation is presumptively unconstitutional.¹⁵² To be sustained, it must fall

made speaking "contemptuous" words, as well as committing contemptuous acts, an offense. Justice White argued the Court's decision essentially precluded using speech to prove intent, since such a conviction would be based in part on speech. The majority, however, disavowed that reading of its decision. For further discussion of *Street*, see *infra* note 158 and accompanying text.

¹⁴⁹ See *infra* notes 179-231 and accompanying text.

¹⁵⁰ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

¹⁵¹ *United States v. O'Brien*, 391 U.S. 367 (1968); *NAACP v. Button*, 371 U.S. 415 (1963); see LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2 (2d ed. 1988). But see *Barnes v. Glen Theatre, Inc.*, 59 U.S.L.W. 4745, 4748 (1991) (Scalia, J., concurring). Justice Scalia would not recognize a First Amendment issue when a law is not directed at expression.

¹⁵² TRIBE, *supra* note 151; see John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1484 (1975). The Tribe/Ely approach distinguishes between regulations aimed at the communicative impact of speech and those that are not aimed at ideas or information but which nonetheless abridge speech. Professor Nimmer follows a similar approach, dividing speech restrictions into "anti-speech," similar to Tribe's Track One restrictions, and "non-

within certain narrow exceptions to First Amendment protections or be justified by a compelling state interest.¹⁵³

But when the law at issue is not one directly restricting speech, the First Amendment analysis proceeds on "Track Two."¹⁵⁴ Under Track Two, the Court uses a "relatively lenient" balancing approach to determine whether the infringement occurring is outweighed by the governmental interests served by the regulation.¹⁵⁵ When a government regulation "is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest," the First Amendment challenge will be rejected.¹⁵⁶ This balancing

speech," which are analogous to Track Two. MELVILLE B. NIMMER ON FREEDOM OF SPEECH § 2.04 (1984).

Professor Tribe's approach has been criticized by various commentators. *See, e.g.*, MARTIN H. REDISH, FREEDOM OF EXPRESSION 87-126 (1984); Thomas T. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422, 470-74 (1980); Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980). Moreover, various alternative structures have been suggested. *See, e.g.*, Emerson, *supra* (distinguishing between expression and action); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987) (distinguishing between content-based and content-neutral restrictions).

Nonetheless, criticisms directed toward Professor Tribe's approach have been acknowledged to be more accurately directed toward the Court itself, because the Tribe/Ely "two-track" approach, whatever its theoretical merit, reflects the Court's treatment of First Amendment issues. As Professor Emerson admits, "All in all, Tribe's doctrinal structure comes closer to describing the present state of First Amendment theory than providing a coherent and effective substitute." Emerson, *supra* at 474.

¹⁵³ TRIBE, *supra* note 151. Direct abridgements have been upheld when the speech constitutes a "clear and present danger," is a defamatory falsehood, or is obscene.

¹⁵⁴ *Id.* Professor Emerson has criticized this "two-track" approach, in part because he says there is no meaningful distinction between the two tracks. Almost all regulations, he says, are directed at the harms caused by speech and not at the speech itself and thus could be characterized as indirect. Also, and perhaps accordingly, he sees no reason to give Track Two regulations less stringent scrutiny. Emerson, *supra* note 152, at 472-74. *See also* Redish, *supra* note 152, at 102-26.

¹⁵⁵ *Texas v. Johnson*, 491 U.S. 397 (1989). *See* David S. Day, *The Incidental Regulation of Free Speech*, 42 U. MIAMI L. REV. 491 (1988).

¹⁵⁶ *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The *O'Brien* test applies to government regulation that incidentally or indirectly infringes on speech. *Texas v. Johnson*, 491 U.S. 397 (1989). While *O'Brien* was a "speech as conduct" case involving the burning of a draft card, its balancing test is not limited to "speech as conduct" but properly applies whenever freedom of expression conflicts with the government's expression-unrelated interests. *See, e.g.*, *United States v. Albertini*, 472 U.S. 675 (1985); *Kovacs v. Cooper*, 336 U.S. 77 (1949); Ely, *supra* note 152, at 1484; *see also* Day, *supra* note 155; Keith Werhan, *The O'Briening of Free Speech Methodology*, 19 ARIZ. ST. L.J. 635 (1987). Moreover, at least one commentator has recognized that the *O'Brien* balancing test is appropriate for

between the values of free speech and the government's regulatory interest must be struck on a case-by-case basis, with the government interest prevailing so long as speech is not unduly stifled.¹⁵⁷

Accordingly, it cannot be seriously contended that any speech the First Amendment protects from being outlawed is thereby protected from any incidental infringement by the government. That speech is protected in the sense that it may not be regarded as a section 8(a)(1) violation does not mean it is protected from use as evidence of another unfair labor practice, *if* that evidentiary use is only an indirect regulation of the speech.

There is some support for an argument that public, ideological speech should be wholly inadmissible as evidence of improper motive.¹⁵⁸ Relying on

determining whether using speech as evidence violates the First Amendment. Note, *Conspiracy and the First Amendment*, 79 YALE L.J. 872 (1970).

¹⁵⁷ TRIBE, *supra* note 151.

Professor Redish agrees that a balancing process, in which the judiciary should accommodate free speech with competing governmental interests, must occur, but he would subject *all* government regulation of speech, whether direct or indirect, to a compelling interest analysis. REDISH, *supra* note 152, at 116-25; *see also* Emerson, *supra* note 152, at 472-74.

¹⁵⁸ The Supreme Court has not directly confronted this issue but has flirted with it from time to time. The Court overturned a flag burning conviction because it may have been based in whole or in part on protected speech. *Street v. New York*, 394 U.S. 576 (1969). Although the majority denied it had done so, Justice White contended the Court had effectively precluded the use of speech to prove an element of a crime. He stated,

Arguably, under today's decision any conviction for flag burning where the defendant's words are critical to proving intent or some other element of the crime would be invalid since the conviction would be based in part on speech. The Court disclaims this result, but without explaining why it would not reverse a conviction for burning where words spoken at the time are necessarily used to prove a case and yet reverse burning convictions on precisely the same evidence simply because on that evidence the defendant might have been convicted for speaking. The Court's seemingly narrow holding may be of potentially broader application

394 U.S. at 615 n.3 (White, J., dissenting).

The previous year, dissenting from a denial of certiorari, Justice Douglas urged the Court to determine whether activities protected by the First Amendment can be used as overt acts to establish a conspiracy. *Epton v. New York*, 390 U.S. 29, 32 (1968) (Douglas, J., dissenting). He asked the Court to determine whether speech must first be found constitutionally unprotected before it may be relied upon as an element of a crime. The Court declined the invitation. *See also* *Bond v. Floyd*, 385 U.S. 116 (1966) (state could not disqualify legislator from membership based on statements protected by the First Amendment).

At least one commentator has relied on these statements to argue constitutionally protected speech should be inadmissible to prove conspiracy. Note, *supra* note 156. According to the author, using protected speech as evidence results in the same chilling

United States v. Johnson,¹⁵⁹ Professor Greenawalt urges as a constitutional rule that public communication not facially demonstrating a wrongful intent be inadmissible to prove intent.¹⁶⁰ Professor Greenawalt, however, fails to distinguish between direct and indirect regulation of speech, apparently assuming any evidentiary usage of "high value speech" would be subject to strict constitutional scrutiny.

Using protected speech as background evidence to establish unlawful motive is an indirect regulation of speech. The rules of evidence that let in this evidence extend to all types of relevant proof, not simply to protected speech. Moreover, the governmental interest in admitting all such relevant evidence in order to facilitate a fair and fully informed determination of the employer's motive and thereby to ensure that unlawful discrimination does not go unsanctioned is both important and unrelated to the suppression of free expression. Employers remain free to express their views on unions; they simply cannot discriminate against employees because of antiunion animus.¹⁶¹

As Professor Ely observes, it is essential to distinguish the government's ultimate objective from the causal connection asserted by the state, because the

effect posed by a prosecution for the speech itself. *Id.* at 894. The author urges total exclusion of this evidence. *Id.* at 895.

This Note has been criticized for advocating too broad a rule, in that it fails to distinguish between various categories of speech. *See* Greenawalt, *supra* note 143, at 777. Professor Greenawalt argues that when the protected speech is private and not of public concern, barring its admission into evidence would be "ludicrous." *Id.* However, when the speech is public and ideological, Professor Greenawalt would agree it should be excluded. *See infra* notes 159-60 and accompanying text.

¹⁵⁹ 383 U.S. 169 (1966). At issue in *United States v. Johnson* was whether congressional speech protected by the speech and debate clause could be used as an overt act in a conspiracy prosecution. The Court held the protected speech could not be relied upon to establish conspiracy but carefully limited its holding to speech on the floor of Congress.

¹⁶⁰ Greenawalt, *supra* note 143, at 778 ("An appropriate constitutional rule would perhaps be that communication, or at least public communication, may not be introduced to prove intent, or be considered an overt act, unless on its face it clearly shows criminal intent (as a statement about one's future criminal acts) or is plainly a step in a criminal plan (as the account of bank security would be if the author were not also writing an article on bank security for some journal).").

In a later writing, Professor Greenawalt appears to have retreated somewhat from this position, although his previous conclusions are not disavowed. He recently has argued that nonideological speech, whether public or private, can be used as evidence but contends that ideological speech cannot be used as an overt act. K. GREENAWALT, *SPEECH, CRIMES AND THE USES OF LANGUAGE* 245-46 (1989).

Professor Greenawalt further recognizes that constitutional limits on speech should be the same for civil and criminal penalties, observing that the specter of civil penalties often can be as deterring as criminal ones. Greenawalt, *supra* note 143, at 780.

¹⁶¹ *See supra* notes 32-34 and accompanying text.

ultimate objective “always will be unrelated to expression.”¹⁶² Here, however, both the ultimate objective, avoiding discrimination on the basis of union activity, and the causal connection, determining whether an unlawful reason motivated a particular action, are unrelated to expression. In determining motive, the Board takes into account not only antiunion speech but evidence “favorable to the [employer] regarding its union relationships.”¹⁶³ This use of speech is content neutral and is aimed at determining motive, not at restricting speech. Use of the more lenient balancing approach reserved for incidental regulation of speech is thus appropriate when the speech is not the exclusive or primary proof of wrongdoing.¹⁶⁴

The remaining inquiry boils down to whether use of protected speech as circumstantial, background evidence to prove unlawful motive “is no greater than is essential to the furtherance” of the government’s interest in a nondiscriminatory workplace.¹⁶⁵ When the protected speech is considered along with other proof of unlawful motive, it meets this test.

The Supreme Court has never held protected speech may not be used as evidence of unlawful motive. Instructive, moreover, is the Court’s *Virginia*

¹⁶² Ely, *supra* note 152, at 1497.

¹⁶³ Smith’s Transfer Corp., 162 N.L.R.B. 143, 164 n.43 (1966).

¹⁶⁴ See *infra* notes 179–232 and accompanying text; see also Lange, *supra* note 20, at 133 (contending that Title VII’s restrictions on free speech pose only “incidental burdens” on First Amendment rights).

¹⁶⁵ See *United States v. O’Brien*, 391 U.S. 367, 377 (1968); see also TRIBE, *supra* note 151, at §§ 12-2, 12-23 (discussing the need for a case-by-case balancing when confronting indirect regulation of speech).

It is important that this final prong have some teeth in it. As Professor Ely observes, a weak formulation of this prong would insufficiently protect First Amendment interests. Thus, Ely contends the proper inquiry is whether there is a “less restrictive alternative,” which requires a “serious balancing of interests.” Ely, *supra* note 152, at 1484–86. Professor Ely suggests the Court will engage in a serious balancing of interests when “traditional means of expression, such as pamphlets, pickets, public speeches and rallies,” are being incidentally abridged. *Id.* at 1488. Professor Tribe would require the balancing to be performed with a “thumb on the scale” in favor of free expression. TRIBE, *supra* note 151, at § 12-2; see also Day, *supra* note 155, at 529–30 (criticizing the Court for recently reducing its level of scrutiny in incidental regulation cases).

The Court found this final prong is satisfied when the regulation “promotes a substantial governmental interest that would be achieved less effectively absent the regulation.” *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). But it recognized this standard of review, although highly deferential to the government, will not permit the government to “regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.” *Ward*, 491 U.S. at 799.

It bears noting the expression being infringed in *Ward* was not the traditional form of expression Professor Ely suggests will receive closer scrutiny by the Court. In any event, the Court will not uphold an indirect abridgement that is substantially broader than necessary to meet the government’s expression-unrelated interests.

Electric decision, which established an employer's First Amendment right to speak out against unions.¹⁶⁶ In *Virginia Electric*, the Court held an employer's noncoercive, antiunion speech could not be regarded as an unfair labor practice.¹⁶⁷ At the same time, however, the Court approved a "totality of the circumstances" standard for assessing the legality of employer speech and actions.¹⁶⁸

At issue in *Virginia Electric* was whether facially protected speech could be deemed unprotected when considered against the totality of the employer's conduct.¹⁶⁹ But the "'totality-of-conduct and (use of noncoercive statements as evidence) concepts are as the two sides of a coin."¹⁷⁰ As Professor Elkouri has observed, "Use of background circumstances to give meaning to words, and use of background words to give meaning to acts, are techniques of similar essence, . . . that is, use of background to reveal latent meaning. The ultimate objective in each case is to determine whether the employer was unfair *in the light of the entire picture*. . . ."¹⁷¹

Permitting the Board to consider protected speech as part of the totality of the circumstances surrounding a particular employment action ensures that the Board and reviewing courts are not unduly hampered in ferreting out unlawful motive. There is a strong governmental interest in ensuring that employees are not punished because of union activities.¹⁷² Determining an employer's state-

¹⁶⁶ 314 U.S. 469 (1941).

¹⁶⁷ *Id.* at 477; see *supra* notes 42-46 and accompanying text for a discussion of *Virginia Electric*.

¹⁶⁸ 314 U.S. at 477; see Note, *Labor Law Reform*, *supra* note 40, at 759.

¹⁶⁹ The question in *Virginia Electric* was whether the speech itself could be prohibited, *i.e.*, considered to be coercive and thus a § 8(a)(1) violation. The Court was not directly resolving the question of whether noncoercive speech could be used to establish unlawful conduct.

¹⁷⁰ Elkouri, *supra* note 72, at 81 n.20.

¹⁷¹ *Id.* (emphasis added). Elkouri's point is demonstrated by the Court's reasoning in *Virginia Electric*, in which it relied on the need to use language to prove unlawful conduct in discussing why it was permissible to look at acts to give meaning to words. As the Court stated, "conduct, though evidenced in part by speech, may amount . . . to coercion within the meaning of the Act." 314 U.S. at 477. The Court affirmed the Board's right to look at what an employer said, not simply what it did, in determining whether there has been unlawful interference. "The mere fact that language merges into a course of conduct does not put that whole course without the range of otherwise applicable administrative power." *Id.* at 478.

See also *Herbert v. Lando*, 441 U.S. 153 (1979), in which the Court approved, in a defamation case, discovery inquiries into reporters' editorial processes in order to establish actual malice. The Court noted that prohibiting discovery would substantially interfere with the plaintiff's ability to establish liability and would inhibit obtaining accurate results. *Id.* at 170.

¹⁷² See *Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17 (1954); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

of-mind, moreover, is a difficult task, as employers rarely concede they acted for unlawful reasons.¹⁷³ When motive is an essential element of a claim and when motive is evidenced by speech, fair resolution of the claim demands this relevant evidence be placed before the trier of fact.¹⁷⁴ Allowing the Board to consider all of the surrounding facts and circumstances, including the employer's antiunion stance, helps ensure that correct determinations are made.¹⁷⁵ Creating a First Amendment evidentiary privilege would unduly burden the governmental interest in assuring a nondiscriminatory workplace.

At the same time, the lawful speech is being used only as background, circumstantial evidence to assist in determining motive,¹⁷⁶ and thus does not overreach in achieving the governmental interest. Any chilling effect from this use of protected speech, moreover, is slight. In the last forty years, there is no suggestion employers have refrained from lawful speech because their speech could be used as evidence in unfair labor practice proceedings. Employers have actively campaigned against unions in the face of the Board's practice of

¹⁷³ *NLRB v. South Shore Hosp.*, 571 F.2d 677, 682 (1st Cir. 1978). As the Board has observed, state of mind usually can be established only by circumstantial evidence. *General Elec. Co.*, 150 N.L.R.B. 192, 281 (1964); see *Burke*, *supra* note 131, at 274 (recognizing that denying the Board use of employer speech would "stultify" the inquiry into motive); *Cox*, *supra* note 1, at 19, 21 (noting motive is an elusive subject of inquiry and that "[i]n such cases, expression of desire or opinion will often indicate the motive of otherwise ambiguous acts"); *Weiler*, *supra* note 15, at 1802 ("The judgment whether an employer acted with discriminatory motive requires delicate inference from a mosaic of circumstantial evidence," including anti-union speech.). See *supra* notes 82, 85, 131 and accompanying text for a discussion of the difficulties involved in establishing motive.

¹⁷⁴ See *Herbert v. Lando*, 441 U.S. 153, 159-75 (1979).

A lower court noted that protected statements "do lend a significance to otherwise ambiguous events when the question is whether a given course of conduct was actuated by anti-union animus.' The incidents cited, whether lawful or not, do not prove [the employee] was discharged because of his union activity. But they do show that the company knew of his activity and was displeased by it; they thus provide a relevant background for analyzing the circumstances of the discharge."

NLRB v. Wright Line, 662 F.2d 899, 907 n.14 (1st Cir. 1981) (quoting *NLRB v. Lowell Sun Publishing Co.*, 320 F.2d 835 (1st Cir. 1963)), *cert. denied*, 455 U.S. 989 (1982); see also *Price-Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989); *NLRB v. General Elec. Co.*, 418 F.2d 736, 760-61 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970); *K. Greenawalt*, *supra* note 160 at 245.

¹⁷⁵ *Id.* Cf. Rosney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 186 (1990) (contending there is no First Amendment problem in using speech to identify racist or sexist behavior in the workplace because workplace speech is transactional and thus entitled to low protection).

¹⁷⁶ See *supra* notes 80-84 and accompanying text.

considering those lawful campaigns as background evidence to determine unlawful motive.¹⁷⁷

In summary, the Board's practice of using protected speech to assist in identifying unlawful conduct is constitutional.¹⁷⁸ Any infringement on the employer's First Amendment interest in speaking out against unions is no greater than is essential to further the government's interest in protecting employees from unlawful discrimination.

B. *First Amendment Limits on the Use of Protected Speech*

Having concluded wholesale exclusion of protected speech is not required by the First Amendment, the question becomes whether any First Amendment limits on the evidentiary use of protected speech exist. They do. While it is permissible to use protected speech as evidence of unlawful motive, the Board cannot use protected speech as the exclusive or primary proof that a union supporter was fired because of the employer's antiunion animus. When the protected speech is in essence the government's case, its use is a direct abridgement of speech, and the chilling effect on the speech outweighs the government's interest in using it to prove unlawful conduct.¹⁷⁹

In practical effect, using protected speech as the exclusive or primary evidence of unlawful motive differs little from a direct prohibition against the speech. When the principal evidence of unlawfulness is protected speech, the employer is being penalized for his speech, not for his actions. This governmental use of the evidence is not an incidental regulation of speech but is direct and therefore deserving of stringent Track One analysis.¹⁸⁰

¹⁷⁷ Employer campaigns actually have increased in recent years. See PAUL C. WEILER, *GOVERNING THE WORKPLACE* 108-13 (1990).

Professor Stone contends that when the "content-neutral" restriction poses little interference with the ability to communicate views, it gets a very deferential level of scrutiny. Stone, *supra* note 152, at 111-14. Here, because very little interference is occurring, the government's burden for justifying the use of speech is relatively light.

¹⁷⁸ But see Note, *supra* note 156, at 895 n.105 (contending that any evidentiary use of protected speech is unconstitutional, because the danger is too great the conviction may have been based primarily on the protected speech).

This argument gives insufficient weight to the difficulties inherent in establishing motive. It also gives too little credit to courts' ability to distinguish between convictions or liability based *primarily* on protected speech and those that are not. See *infra* notes 197-211 and accompanying text.

¹⁷⁹ See *infra* notes 181-82 and accompanying text.

¹⁸⁰ See Ely, *supra* note 152, at 1497 (discussing the need to identify whether an ostensibly non-speech-related regulation in fact is directed toward speech); TRIBE, *supra* note 151, at § 12-3 (discussing when a regulation should be placed on "Track One"); see also Stone, *supra* note 152, at 48. Professor Stone's position is that when "high value" speech is at issue and the restriction is content-based, the restriction is unconstitutional because it will be unable to withstand strict scrutiny.

As Professor Tribe hypothesizes, a statute making it a misdemeanor to wear or hold a United States flag while speaking critically of the United States is a direct regulation of speech; it restricts speech based on its viewpoint and will receive strict scrutiny.¹⁸¹ Making protected speech the exclusive evidence of a section 8(a)(3) violation is no different. Such a rule essentially makes it unlawful for an employer to fire a union adherent while speaking critically about unions. Only the most compelling governmental interest could support this restriction.¹⁸²

Alternatively, if one views this usage as only an indirect abridgement of speech, the balancing process required under Track Two must be struck in favor of the speech. Using the protected speech as the exclusive or primary evidence of discrimination increases the likelihood that lawful speech will be chilled,¹⁸³ while at the same time decreasing the chances that a just and fully

¹⁸¹ TRIBE, *supra* note 151, at § 12-3; see *Bond v. Floyd*, 385 U.S. 116 (1966) (State cannot disqualify a legislator under color of a proper standard when the disqualification in fact is based on statements protected by the First Amendment); see also *United States v. Johnson*, 383 U.S. 169 (1966), in which speech was used as an overt act to establish liability. The Court considered this a direct abridgement of speech.

Also illustrative is Professor Schauer's hypothetical based on *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). In *Brandenburg*, the Court struck down a prosecution based on an inflammatory racist speech, holding a prosecution could be maintained only where advocacy is directed toward and likely to produce imminent lawless action. Professor Schauer hypothesizes that if one of Brandenburg's listeners had then committed an unlawful battery on a minority group member, the victim could not sue Brandenburg for negligently causing her injury because Brandenburg would have a First Amendment defense. Frederick Schauer, *Mrs. Palsgraf and the First Amendment*, 47 WASH. & LEE L. REV. 161, 162-63 (1990).

Professor Schauer uses his illustration to distinguish speech within the First Amendment's protection from speech without it. See *infra* notes 190-91 and accompanying text. But his hypothetical First Amendment defense depends not only on the character of the speech but on the direct abridgement that is occurring through its use. His hypothetical cause of action is based on the protected speech, and thus the regulation will receive strict scrutiny. See *Hercey v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); *Walt Disney Prods. v. Shannon*, 276 S.E.2d 580 (Ga. 1981).

See also Strauss, *supra* note 20 (using a "compelling interest" analysis in determining whether sexual harassment laws violate the First Amendment).

¹⁸² TRIBE, *supra* note 151, at § 12-3. As Professor Tribe notes, the government, ironically, may be better off adopting a *more* restrictive means. *Id.* For example, were Congress to outlaw *any* firings of workers during a union campaign, no matter the employer's motive, on the theory that such terminations are inherently coercive, the statute presumably would be upheld. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); Christensen & Svanoe, *supra* note 1, at 1326-27; see also *supra* notes 27-29 and accompanying text.

¹⁸³ See Stone, *supra* note 152, at 113-14, who recognizes the level of scrutiny of a "content neutral" restriction should increase in accordance with the chilling effect on speech.

informed decision on employer motivation will be made.¹⁸⁴ The government's regulation thus would be burdening speech in a manner that does not advance the government's goals.¹⁸⁵

Because protected antiunion speech is not direct proof that discrimination occurred,¹⁸⁶ there is no compelling or even substantial governmental interest in permitting the government to rely exclusively on the constitutionally protected speech to establish unlawful motivation. Direct evidence is evidence that, if believed, allows the trier of fact to make only one inference.¹⁸⁷ For example, a statement by an employer that he fired *A* because he was a union supporter is direct evidence of discrimination.¹⁸⁸ If the trier of fact believes the employer, there is only one inference to be drawn—that *A* was fired because of his union activities.¹⁸⁹

This speech, however, may be viewed as *unprotected* antiunion speech under either section 8(c) or the First Amendment, as it involves no statement of views, arguments or opinions and/or because it is coercive.¹⁹⁰ The Board could

¹⁸⁴ See *infra* notes 186–94 and accompanying text.

¹⁸⁵ See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

¹⁸⁶ See *infra* notes 187–89 and accompanying text.

¹⁸⁷ See Lyman R. Patterson, *The Types of Evidence: An Analysis*, 19 VAND. L. REV. 1, 4–5 (1965). As Professor Patterson explains, direct evidence is evidence that is consistent “only with either the proposed conclusion or its contradictory.” His example is the statement “I saw *D* kill *H*.” If believed by the trier of fact, there is only one inference to be made—that *D* killed *H*. “The inferential process is so simple that the presence of the inference is not apparent.”

See also *Randle v. LaSalle Communications*, 697 F. Supp. 1474, 1479 n.3 (N.D. Ill. 1988), *aff'd*, 876 F.2d 563 (7th Cir. 1989).

¹⁸⁸ See *Rollins v. Tech South Inc.*, 833 F.2d 1525, 1529 n.6 (11th Cir. 1987). For a detailed discussion of direct versus circumstantial evidence in the employment discrimination context, see Edwards, *supra* note 2.

¹⁸⁹ Edwards, *supra* note 2, at 13; Patterson, *supra* note 187, at 4–5.

¹⁹⁰ That the speech is not covered by § 8(c) is clear, as that statute shelters only “views, argument or opinion” and does not protect other speech, such as admissions, directions or instructions. This point was emphasized by Senator Taft on several occasions. See *supra* note 117 and accompanying text.

The speech also is not protected by the First Amendment, in the sense that the Board could constitutionally prohibit the speech. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Court read § 8(c) as coextensive with the First Amendment, at least for purposes of determining whether speech could be held unlawful. The Board, for example, properly could view this speech as coercive.

Some commentators, moreover, have urged that “performative” or “transactional” speech deserves no or low First Amendment protection. See Greenawalt, *supra* note 143; K. GREENAWALT, *supra* note 160; NIMMER ON FREEDOM OF SPEECH, *supra* note 152, at 3–36; Schauer, *supra* note 143; Smolla, *supra* note 175; Cass Sunstein, *Pornography and the First Amendment*, 1986 DUKE L. J. 589.

As Professor Schauer states,

base its case exclusively or primarily on such speech without confronting any First Amendment limitation.¹⁹¹

However, when an employer engages in protected labor speech, as he does when he urges his employees to vote against the union,¹⁹² the speech does not independently compel a finding that discrimination occurred. While the speech is direct evidence that the employer wants his employees to vote against the union, it does not directly establish that the employer discriminated against any particular employee.¹⁹³ Instead, the trier of fact must make a further

When an act of communication is directed at a private transaction and not at social change, when it is delivered face to face or individually rather than at the world at large, when it seeks to convey information and not argument, and when it pertains only to topics well beyond the range of topics perceived to involve the values of the First Amendment, then with the convergence of all four of these factors, there does not seem to be any reason to convert what would otherwise be a pure tort action into anything else. Conversely, when the communication involved is aimed at issues of public concern, is directed to a large audience, has normative content and pertains to the kinds of speech that the First Amendment intends to protect, then the fact that an action nominally sounds in traditional tort language is no mandate for concluding that the First Amendment does not provide the driving engine in the analysis.

Schauer, *supra* note 181, at 169. Under the approaches of these commentators, statements correctly viewed as direct evidence of discrimination would be entitled to little or no First Amendment protection.

But protected labor speech, *i.e.*, noncoercive statements of views, argument and opinion, would be "high value" speech. It is aimed at an issue of public concern, usually is directed toward a large audience, seeks to influence or persuade, and pertains to a topic, workplace governance, that involves values the First Amendment seeks to protect. See *Thomas v. Collins*, 323 U.S. 516 (1945); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

¹⁹¹ See *supra* notes 50–62 and accompanying text. Even if the speech were protected, there would be a compelling governmental interest in permitting its use and in permitting a liability finding based on such speech because it would be highly probative evidence of unlawful discrimination.

¹⁹² *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469 (1941).

¹⁹³ See *NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982) (Board must not only show animus but a causal link between the animus and the discharge); *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666 (1st Cir. 1979) (dislike of unions not enough to establish discrimination); *Florida Steel Corp. v. NLRB*, 587 F.2d 735 (5th Cir. 1979) (proof of anti-union animus is not enough for a § 8(a)(3) violation; a causal connection between the animus and the discharge must be shown).

For a discussion of this point in the analogous Title VII context, see *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (stereotyped remarks do not "inevitably prove" gender was a motivating factor in decision); *Smith v. Firestone Tire & Rubber Co.*, 875 F.2d 1325 (7th Cir. 1989) (statements of racial prejudice insufficient to establish nexus between race and demotion); *Rollins v. Tech South Inc.*, 833 F.2d 1525 (11th Cir. 1987) (statements by supervisor that he did not like working with older women was not direct evidence, because any discrimination must be inferred); *Crader v. Concordia College*, 724 F. Supp. 558 (N.D. Ill. 1989) (evidence that decisionmaker had a "deep-rooted" prejudice against blacks

inference—that the antiunion animus of the employer led him to discriminate against the employee.¹⁹⁴

Accordingly, requiring the Board to come forward with additional evidence to support the second inference and thus to prove unlawful motive insures that an employer is not being punished “simply because” of his protected speech.¹⁹⁵ The government’s interest is in prohibiting discrimination, and that interest is not furthered by undue reliance on inconclusive evidence.

The Board and reviewing courts must be sensitive to this First Amendment concern, which underlies and coincides with section 8(c), when assessing evidence of unlawful motive. Using protected speech as part of the “totality of the circumstances” is permissible,¹⁹⁶ but using it as the principal evidence to support a finding of discrimination is statutorily and constitutionally improper.

No “bright line” rule can be drawn for determining when protected speech predominates in a particular case.¹⁹⁷ Undoubtedly, there will be close questions

was not direct evidence that racial bias motivated the particular decision at issue); *Randle v. LaSalle Communications*, 697 F. Supp. 1474 (N.D. Ill. 1987), *aff’d*, 876 F.2d 563 (7th Cir. 1989) (direct evidence of racial bias is not direct evidence that defendant discriminated against plaintiff); *Spanier v. Morrison’s Management Services*, 611 F. Supp. 642 (D. Ala. 1985), *aff’d in part and rev’d in part*, 822 F.2d 975 (11th Cir. 1987) (credible proof of a sexual bias is not tantamount to proof the defendant acted with a discriminatory motive); *see also* *Edwards*, *supra* note 2, at 26. *But see* *EEOC v. Alton Packing Corp.*, 901 F.2d 920 (11th Cir. 1990) (racial slurs direct evidence plaintiff was not promoted because of race); *Senello v. Reserve Life Ins. Co.*, 872 F.2d 393 (11th Cir. 1989) (discriminatory comments by supervisor direct proof discrimination occurred).

While these Title VII cases help demonstrate the proper evidentiary use of speech, any First Amendment question raised by the use of this evidence is *not* identical to that posed in § 8(a)(3) cases. Racial slurs, for example, unlike antiunion campaign speech, arguably may be entitled to little or no First Amendment protection. *See* Charles Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989); Smolla, *supra* note 175. *But see* Nadine Strassen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L.J. 484; Toni Massero, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 218 (1991).

Also, the governmental interest in combatting race or sex discrimination should be viewed as more compelling than discrimination on the basis of union activities. *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938); *See* William B. Gould, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TUL. L. REV. 1485, 1502 (1990). *But see* *Price Waterhouse v. Hopkins*, 490 U.S. 228, 254 (1989).

¹⁹⁴ *See* sources cited *supra* note 193.

¹⁹⁵ *See* Note, *supra* note 156 at 895 (“If the only evidence of a defendant’s specific intent is constitutionally protected speech, the danger is too great that an individual will be punished merely for his ideas and his association with a controversial group.”).

¹⁹⁶ *See supra* notes 161–78 and accompanying text.

¹⁹⁷ As Professor Ely has observed, in a somewhat analogous context, the absence of a “bright line” test is not overly problematic: “[A]t least the question is intelligible, and it

in many cases. But this determination should occur with full recognition of the constitutional interests present and of the competing difficulties inherent in establishing motive.¹⁹⁸

Analysis of the *Holo-Krome* case helps flesh out this standard. In *Holo-Krome v. NLRB*, protected speech opposing unionization originally was relied upon by the Board in finding that an employer's refusal to hire union supporters was motivated by antiunion animus. But the protected speech was only a small part of the overall evidence of unlawful motive. Other evidence supporting the finding of unlawful motive included the employer's knowledge of the employees' active role in the union campaign, unprotected employer speech, inconsistent employer responses to the employees' requests to return to work, and the employer's failure to provide a credible explanation for its acts.¹⁹⁹ Thus, the Board acted properly when it used the protected speech as circumstantial evidence of unlawful motive. The court's decision mandating exclusion of the evidence was erroneous.

On remand, the Board reaffirmed its finding of discrimination after excluding the protected speech from consideration,²⁰⁰ but the Second Circuit denied enforcement.²⁰¹ The court acknowledged the employer's conduct could "be interpreted either as lawful or unlawful," but it refused to permit the Board to assess that conduct against the employer's opposition to unionization.²⁰² Accordingly, without the antiunion speech to place the employer's actions in perspective, it found the evidence insufficient to establish a *prima facie* violation of the Act.

The court's decision demonstrates the Board's need to rely on protected speech in determining unlawful motive.²⁰³ The antiunion backdrop against

does not seem much harder than others courts answer in this and other contexts." Ely, *supra* note 152, at 1490.

¹⁹⁸ In his article criticizing § 8(c), which he read literally to exclude all evidentiary use of protected speech, Professor Cox observed that the evil of the Board's undue reliance on protected speech could be better prevented by careful judicial review to ensure there was substantial evidence on the record as a whole of unlawful motive. Cox, *supra* note 1, at 20.

In fact, the Board has found this is what Congress intended, and, as this article notes, what the First Amendment demands. The speech may be used as evidence, but the Board and judiciary must ensure that the evidence as a whole supports a finding of unlawful motive.

¹⁹⁹ 907 F.2d 1343 (2d Cir. 1990).

²⁰⁰ *Holo-Krome*, 302 N.L.R.B. No. 71 (1991).

²⁰¹ *Holo-Krome Co. v. NLRB*, 947 F.2d 588 (2d Cir. 1991).

²⁰² *Id.* at 592.

²⁰³ See *NLRB v. Universal Camera Corp.*, 190 F.2d 429, 431 (2d Cir. 1951), *remanded*, 340 U.S. 474 (1951) (*quoted* in *Smith's Transfer Corp.*, 162 N.L.R.B. 143, 164 (1966)), discussing the difficulties involved in establishing motive.

See *United States v. Albertini*, 472 U.S. 675 (1985), in which the Court refused to find a First Amendment violation, even when no important government interest would be implicated in the particular case at hand, based on the need for a general rule.

which transfer requests are refused or similarly situated employees are treated differently, or the strength of the proffered reason for a discharge, assist the Board in determining what motives in fact were present in a particular case.²⁰⁴ As the balancing in the previous section demonstrates, the Board can use this protected speech to assist it in placing conduct in perspective, in helping it to determine whether, in view of the totality of the circumstances, conduct was unlawful.²⁰⁵ The *Holo-Krome* court should have permitted consideration of the protected speech, which was used only as a backdrop against which to assess other evidence of motive.

In contrast, *Florida Steel Corp. v. NLRB* illustrates the Board's improper use of protected speech.²⁰⁶ Missing from the record was any proof of a causal connection between the employer's antiunion stance and the discharges.²⁰⁷ Overturning the Board's finding of a section 8(a)(3) violation, the court refused to permit the Board to find unlawful motive "based solely on the general bias or anti-union attitude of the employer."²⁰⁸ Similarly, in *NLRB v. Eastern Smelting & Refining Corp.*,²⁰⁹ the court recognized that both section 8(c) and the First Amendment preclude the Board from finding a discharge unlawfully motivated simply because the employer had opposed unionization.²¹⁰ The court

²⁰⁴ See *supra* notes 82, 85 and accompanying text.

²⁰⁵ See *supra* notes 161-78 and accompanying text.

²⁰⁶ 587 F.2d 735 (5th Cir. 1979).

²⁰⁷ *Id.* at 742; ("[T]he fact that anti-union animus existed on the part of the employer does not make the discharge unlawful unless the General Counsel proves a causal connection between the anti-union attitude of the employer and the discharge.")

²⁰⁸ *Id.* at 744. The animus in *Florida Steel* was reflected through both protected and unprotected, *i.e.*, coercive, speech. The Board's reliance on coercive speech as exclusive proof of unlawful motive, while improper as a matter of law because the speech demonstrated no causal connection with the employment decision, poses no First Amendment problem, because the speech is unprotected. See, *e.g.*, *Stokely-Van Camp v. NLRB*, 722 F.2d 1324 (7th Cir. 1983) (because evidence of animus was solely speech, court had to determine whether protected or unprotected; if unprotected, the speech could be relied upon without consideration of § 8(c) or First Amendment); *J.P. Stevens & Co. v. NLRB*, 638 F.2d 676, 680 (4th Cir. 1980) (company's "unrivaled willingness to violate the law in the past" is material to the question of wrongful motive).

²⁰⁹ 598 F.2d 666 (1st Cir. 1979).

²¹⁰ *Id.* at 670. The court carefully scrutinized the record to ensure the protected speech had not played a primary role in the Board's determination, criticizing the Board for too often using the protected speech as a prism through which actions are viewed. As the court stated, "[o]nce it is concluded that an employer is opposed to unions, everything fits," leading the Board, in the court's eyes, to ignore or to discredit relevant evidence. *Id.* at 676 n.21.

This searching inquiry of the record to ensure a case is not based solely or primarily on protected speech is what is required by § 8(c) and the First Amendment.

In *Holo-Krome II*, there is a suggestion the court similarly was faulting the Board for over-reliance on protected speech. If that *had* been what the Board had done, refusing enforcement of the Board's order would have been proper. But in *Holo-Krome*, the court

reprimanded the Board for viewing all evidence against an employer once it concludes the employer opposes unions, because such an approach gives undue prominence to the lawful speech. Yet in neither of these cases did the courts fault the Board for *considering* the speech.²¹¹ They instead recognized that the Board could not point to the protected speech as carrying its burden of proof.

More troubling are so-called "mixed motive" cases. When the Board finds an employer had two or more motives for a particular act, only one of which is unlawful, there is not automatically an unfair labor practice.²¹² Instead, the employer bears the burden of proving he would have reached the same decision anyway, had he not had an unlawful motive.²¹³ If the Board uses protected speech exclusively or primarily to conclude one of the motives was unlawful, thereby shifting the burden of proof to the employer, have the employer's First Amendment rights been infringed?²¹⁴

refused to allow the Board to give any consideration to the protected speech. Moreover, there was considerable evidence of animus apart from the protected speech. *See Holo-Krome*, 302 N.L.R.B. No. 71 (1991). The court denied enforcement based on its view that the Board had continued, despite the court's instructions to the contrary, to take the protected speech into account. 947 F.2d 588 (1991).

²¹¹ The courts appeared to acknowledge the Board's right to take the employers' anti-union stance into account; they simply faulted the Board for overweighting it. Thus, *Holo-Krome v. NLRB*'s reliance on these cases for the proposition that § 8(c) demands wholesale exclusion of protected speech, *see* 907 F.2d 1343, 1345 (2d Cir. 1990), is misplaced.

²¹² *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Wright Line*, 251 N.L.R.B. 1083 (1980), *enfd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). *Wright Line* was derived from the Supreme Court's opinion in *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977), in which the Court applied a burden shifting technique to a case involving alleged violation of First Amendment rights. Mr. Doyle, a high school teacher, was fired for a number of reasons, one of which was his protected activity. The lower court determined that because his protected conduct had played a part in his discharge, Mr. Doyle must prevail. Reasoning that Mr. Doyle should not be better off for exercising his First Amendment rights than he would have been had he remained silent, the Court remanded the case to give the school board the opportunity to prove it would have fired Mr. Doyle even had he not engaged in protected conduct.

More recently the Court followed *Mt. Healthy* and *Transportation Management* in construing Title VII, applying the same burden shifting devices to a claim of sex discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

²¹³ *See* sources cited *supra* note 212.

²¹⁴ Section 8(a)(3) is violated even if the anti-union motive is not the sole basis for the employer's action, so long as it is a motivating factor. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-400 (1983). The General Counsel, however, retains the burden of proving that the antiunion animus was a motivating factor. *Id.* at 400. The question presented here is whether that burden may be carried exclusively or primarily by protected speech.

This issue has arisen infrequently because of the Board's recognition that protected speech can play only a background role in proving unlawful motive. *See supra* notes 80-84 and accompanying text; *see also* Edwards, *supra* note 2, at 7, noting the Board's reluctance to regard speech as a burden-shifting technique.

In these cases, the Board is not imposing liability on the employer based on the protected speech but is requiring the employer to prove what in effect is an affirmative defense.²¹⁵ If the employer can prove he would have taken the same action even if no unlawful motive had been present, the employer escapes liability.²¹⁶ But when this burden is imposed on the employer simply because he engaged in protected speech, the First Amendment is violated.

The placement of the burden of proof frequently is outcome determinative.²¹⁷ In *NLRB v. Transportation Management Corp.*, the Supreme Court justified the Board's shifting of the burden of persuasion to the employer in "mixed motive" cases because in those cases,

the employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.²¹⁸

However, the Supreme Court may have increased the temptation for the Board to rely more heavily on protected speech. In her concurrence in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Justice O'Connor suggested it was only "direct evidence" that could justify shifting onto the employer the burden of proof. *Id.* at 276-77. In the aftermath of *Price Waterhouse*, at least in the Title VII context, heavier reliance has been placed on employer speech, whether or not it may properly be characterized as direct. *See e.g.*, *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990); *Edwards*, *supra* note 2, at 26.

The Board, of course, is constrained by § 8(c) from giving undue weight to protected speech. Nor is the *Price Waterhouse* decision binding on the Board. But *Price Waterhouse's* emphasis on "speech" as evidence may influence the Board's treatment of speech in the future, thus highlighting the need for a full understanding of the role protected employer speech may permissibly play in § 8(a)(3) cases.

²¹⁵ *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400-01 (1983). As the Court noted, an employer commits no violation of the NLRA if any animus it may have does not contribute to a discharge. *Id.* at 398. At the same time, a discharge motivated in part by antiunion animus may be held unlawful. *Id.* The Board's *Wright Line* approach does not alter the elements of the offense but rather shifts the burden of proof. Once the General Counsel proves animus played a part in the discharge, he does not have to go further and prove the action would not have been taken but for the antiunion animus. Rather, the burden of production and proof shifts to the employer to prove it would have made the same decision anyway.

²¹⁶ The Court "assumed" the Board *could* have held the NLRA is violated whenever antiunion animus plays a motivating part in a discharge, without regard to whether the action would have been taken anyway, or could have construed the statute to require the General Counsel to prove the discharge would not have taken place independent of the protected conduct. *Id.* at 401-02. But it upheld the Board's *Wright Line* approach as a "not impermissible construction of the Act." *Id.* at 402.

²¹⁷ *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 776 (1986); *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964); *Speiser v. Randall*, 357 U.S. 513, 525 (1958); *Behring Int'l v. NLRB*, 714 F.2d 291 (3d Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984).

²¹⁸ 462 U.S. at 403.

The Court thus upheld the shifting of the burden of proof based on its view that an employer whose actions are motivated even in part by unlawful reasons has done something wrong. When the basis for a finding of “wrongdoing,” however, is protected speech, the employer has been saddled with both a legally imposed stigma and an evidentiary burden he would not have borne had he not exercised his First Amendment rights. Because this burden is substantial enough to “chill” an employer’s speech, it cannot be shifted to the employer simply because of the protected speech.²¹⁹

On a number of occasions, in the First Amendment context, the Supreme Court has recognized that placement of burdens of proof can impermissibly chill First Amendment rights.²²⁰ In *Speiser v. Randall*, the Court found unconstitutional a requirement that a taxpayer who refused to sign an oath bore the burden of proving his eligibility for a tax exemption, when those taxpayers signing the oath were presumed eligible for the exemption.²²¹ As the Court explained:

In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the state must bear these burdens It can only result in a deterrence of speech which the Constitution makes free.²²²

Similarly, in *New York Times v. Sullivan*, the Court rejected a rule that would require a defendant accused of libeling a public figure to prove the truth of his speech.²²³ The Court recognized that placing the burden of proof on defendants may deter even true criticism of public officials “because of doubt whether it can be proved in court or fear of the expense of having to do so.”²²⁴ This chilling effect was held inconsistent with the First Amendment.²²⁵

The same may be said of a rule that switches to an employer the burden of proving the lawfulness of his employment actions when he chooses to engage

²¹⁹ “Chilling means the inhibition of socially useful activities on account of the actor’s fear of possible adverse consequences. . . . In the First Amendment area of freedom of expression it usually refers to self-censorship, that is, needless self-repression of expression.” Note, *infra* note 220, at 1465 n.39. This Note recognizes, in a related context, that a shift in the burden of persuasion can “chill” protected speech. *Id.* at 1469, 1475.

²²⁰ See *Smith v. California*, 361 U.S. 147, 153 (1959); Note, *Title VII and Congressional Employees: The ‘Chilling Effect’ and the Speech and Debate Clause*, 90 YALE L.J. 1458, 1475–80 (1981); see also cases cited *supra* note 217.

²²¹ 357 U.S. 513 (1958).

²²² *Id.* at 525–26; see also *Smith v. California*, 361 U.S. 147, 153 (1959).

²²³ 376 U.S. 254, 279 (1964).

²²⁴ *Id.*

²²⁵ *Id.*; see *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 776 (1986).

in protected speech.²²⁶ An employer forced to shoulder the burden of proving the lawfulness of its conduct, a burden the Court has acknowledged will often be a difficult one to meet,²²⁷ may well deter employers from speaking, whether or not they intended to act out of animus. Doubts over the ability to prove the lawfulness of their conduct and fears of the expense of having to do so may lead employers to censor themselves by refraining from opposing unionization.²²⁸

In summary, the role protected speech is permitted to play in unfair labor practice proceedings will determine how great a chilling effect is present. When protected speech is used only as circumstantial or background evidence to assist the trier of fact in determining motive, an employer has little to fear. Unless there is other evidence to support the claim of unlawful motive, the employer will not be found guilty of an unfair labor practice.²²⁹ But were the Board permitted to allow protected speech to take center stage, either in finding a section 8(a)(3) violation or in placing the burden of proof on an employer, an employer may well be deterred from speaking out.²³⁰

When the protected speech is the only evidence or the principal evidence of unlawful motive, the Board is doing covertly what *Virginia Electric* and *Gissel* held cannot be done overtly—it is penalizing an employer for engaging in protected speech.²³¹ Moreover, because protected speech is not highly probative evidence that unlawful discrimination occurred, there is no

²²⁶ See Note, *supra* note 220, at 1469–81. In that Note, the author questions whether applying Title VII to congressional employees would conflict with the speech and debate clause and urges an adjustment of evidentiary requirements to guard against chilling protected speech. Specifically, the Note urges placing on plaintiff the burden of proving intentional discrimination by clear and convincing evidence.

The Note accepts as a given that speech protected by the speech and debate clause could not be used to show intent, relying on *United States v. Johnson*, 383 U.S. 169 (1966). See *supra* note 159 and accompanying text.

²²⁷ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 248–50, 252 (1989).

²²⁸ See sources cited *supra* note 217.

²²⁹ See *supra* notes 80–84 and accompanying text.

²³⁰ Often, no concrete evidence of a chilling effect may be found because such evidence frequently is difficult, if not impossible, to come by.

Chilling effect is, by its very nature, difficult to establish in concrete and quantitative terms; the absence of any direct actions against individuals assertedly subject to a chill can be viewed as much as proof of the success of the chill as of evidence of the absence of any need for concern.

Community-Service Broadcasting, Etc. v. FCC, 593 F.2d 1102, 1118 (D.C. Cir. 1978); see Note, *supra* note 220, at 1470.

²³¹ See *supra* notes 179–82 and accompanying text.

compelling governmental interest in permitting the Board to base its case on the protected speech.²³²

VI. CONCLUSION

In 1947, Congress was cognizant of the First Amendment problems in using protected speech to establish unlawful conduct. It responded by drafting a statute that reasonably may be read as coinciding with the First Amendment's guarantees, assuring employers of congressional intent to preserve, not expand or infringe upon, First Amendment rights.²³³

Accordingly, courts err when they read section 8(c) to prohibit any reliance on protected speech to establish unlawful motive. Section 8(c) may permissibly be read only to preclude the Board from finding an employer acted for a discriminatory reason "simply because" of his protected speech.

Whether section 8(c)'s protections of speech are constitutionally compelled raises complex questions of when speech may be used to establish unlawful action. Certainly, no wholesale exclusion of all speech is demanded by the First Amendment. Rather, the evidentiary role speech is assigned to play must be considered in determining whether a First Amendment problem exists in using speech as evidence.

When protected speech is used as background evidence to determine motive, there is no direct abridgement of speech. Moreover, under the lenient balancing process applied to indirect abridgement, the evidentiary use of the speech is not barred by the First Amendment.

When the protected speech, however, becomes the exclusive or primary evidence of unlawful motive, the abridgement is direct. Because it serves no compelling governmental interest, this evidentiary use of the speech is unconstitutional. Alternatively, because primary reliance on protected speech inhibits lawful expression in a manner more restrictive than necessary to serve the government's interest in determining unlawful motive, the abridgement, even if viewed as indirect, violates the First Amendment.

²³² As set forth previously, using protected speech as the exclusive or primary proof of an unfair labor practice and imposing liability is a direct abridgement of speech subject to Track One analysis. *See supra* notes 179–82 and accompanying text. When the Board uses the speech merely to shift the burden of proof, the restraint also is direct. Employers who remained silent or who spoke in favor of unions do not bear the burden of proving they acted lawfully; employers who oppose unions must shoulder the risk and expense of litigation. Because the burden only shifts based on the content of the employer's speech, the restraint is direct. *See supra* notes 212–19 and accompanying text.

²³³ *See supra* notes 98–140 and accompanying text.

