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## Avoidance Creep

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## ARTICLE

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### AVOIDANCE CREEP

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CHARLOTTE GARDEN<sup>†</sup>

*At first glance, constitutional avoidance—the principle that courts construe statutes to avoid conflict with the Constitution when possible—appears both unremarkable and benign. But when courts engage in constitutional avoidance, they frequently construe statutory language in a manner contrary to both its plain meaning and to the underlying congressional intent. Then, successive decisions often magnify the problems of avoidance—a phenomenon I call “avoidance creep.” When a court distorts a statute in service of constitutional avoidance, a later court may amplify the distortion, incrementally changing both statutory and constitutional doctrine in ways that are unsupported by any rationale for constitutional avoidance.*

*This Article identifies the phenomenon of avoidance creep and demonstrates its wide-ranging effects by explaining how it has warped the development of labor law in two areas. First, courts have limited unions’ abilities to engage in “secondary” strikes and picketing. Second, the Supreme Court has reduced or eliminated unions’ abilities to assess dues or other fees from represented workers, culminating in the Court’s decision in *Janus v. AFSCME*. Collectively, these avoidance-driven shifts in labor law amount to a profound change in its overall character. Yet these decisions often do not result from freestanding analysis of the relevant statutes. Rather, many of these decisions flow directly from prior cases invoking constitutional avoidance as a means of reaching a decision that is dubious as a matter of statutory interpretation, constitutional analysis, or both. After documenting these problems, the Article*

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*proposes measures to promote honest examination of the role constitutional avoidance plays in doctrinal development and to mitigate its harmful consequences.*

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## INTRODUCTION

This Article seeks to answer two questions that appear at first glance to be unrelated. First, what happens over time when a line of cases is grounded on the canon of constitutional avoidance? Second, what explains the anomalous development of the law governing labor unions' First Amendment rights? These questions have the same answer: a phenomenon that I call "avoidance creep."

Constitutional avoidance occurs when a court adopts one reading of a statute over another in order to avoid answering a constitutional question.<sup>1</sup>

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<sup>1</sup> "Constitutional avoidance" refers to several different interpretive moves. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (discussing different constitutional avoidance methods). For example, a court might decide a case by resolving a non-constitutional question, avoiding the need to decide an alternative argument raising a constitutional question. But this Article focuses on the version of avoidance in which courts construe statutes to avoid having to resolve constitutional doubts. *Id.* at 348; see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 247 (2012) (discussing the constitutional-doubt canon as interpreting

Decisions based on constitutional avoidance are statutory decisions that, according to the traditional account of avoidance, are supposed to reflect values of judicial minimalism and respect for the elected branches of government.<sup>2</sup> But scholars have rightfully criticized the traditional account and continue to debate questions such as whether or not avoidance has other benefits for courts or the development of law, and the extent to which courts manipulate the doctrine to achieve their preferred results.<sup>3</sup>

This Article uses labor law as a case study to explore how courts and agencies treat precedent that relies on constitutional avoidance. It finds that avoidance decisions have tended to creep beyond their stated boundaries, as decisionmakers either treat them as if they were constitutional precedent, or extend them into new statutory contexts while disregarding key aspects of their original reasoning.

Avoidance creep in labor law has had dramatic consequences for unions, workers, and the law. The Supreme Court's answers to some of the most important and contentious questions in labor law rest on constitutional avoidance. For example, constitutional avoidance was instrumental in *International Ass'n of Machinists v. Street*, in which the Supreme Court held that labor law permits unions and employers to mandate that railway employees contribute towards union representation costs, but not other union activities, such as campaigning on behalf of candidates for political office.<sup>4</sup> *Street* went on to play a foundational role in a line of cases culminating with the recent blockbuster case *Janus v. American Federation of State, County, and*

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statutes in ways that “avoid[] placing its constitutionality in doubt”); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997) (distinguishing “modern avoidance,” in which “the Court will construe the statute to avoid such [serious constitutional] problems unless such construction is plainly contrary to the intent of Congress,” from “classical avoidance,” in which the Court uses the potential constitutional problem as a tiebreaker to choose among competing reasonable interpretations of a statute (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988))).

<sup>2</sup> See Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1288-89 (2016) (discussing one view of the constitutional avoidance canon as a method of judicial restraint, allowing the courts to save a statute by sending it back to Congress to reconsider statutory meaning in light of constitutional questions); see also generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986).

<sup>3</sup> See, e.g., Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 401 (2005) (arguing that constitutional avoidance has sometimes facilitated courts' preservation of constitutional rights in situations where a constitutional holding might impair the Court's public legitimacy); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1585 (2000) (arguing that constitutional avoidance helps to preserve underenforced constitutional norms).

<sup>4</sup> 367 U.S. 740, 771 (1961); see also *infra* Section II.A.

*Municipal Employees, Council 31* (“AFSCME”),<sup>5</sup> which held that public-sector workers cannot be required to pay agency fees. *Street* was also key to *Communications Workers of America v. Beck*, which limited mandatory union fees in the private sector to those required to fund a union’s representational activities.<sup>6</sup> One cannot know what would have happened absent *Street*’s use of avoidance and later avoidance creep—but this Article shows that avoidance creep played a major doctrinal role in getting to *Janus*.

Avoidance also grounds a line of cases in which the Supreme Court has narrowed the scope of the National Labor Relations Act’s (NLRA) prohibition on so-called “secondary”<sup>7</sup> strikes and protests.<sup>8</sup> That might sound like good news for unions—and in some ways, it is. But in another instance of avoidance creep, subsequent courts have wrongly assumed that when the Court narrowed the NLRA in some contexts, it also reaffirmed that Congress could prohibit other forms of union protest.<sup>9</sup> The result is a body of law governing union protest that is irreconcilable with modern First Amendment principles.<sup>10</sup>

The Article concludes that, overall, constitutional avoidance has negatively affected unions and the development of labor law. Avoidance creep has led the Court to articulate new legal principles, including that compelling a public employee to pay union dues implicates the First Amendment. Additionally, courts sometimes over-read earlier avoidance decisions as affirmations of the basic constitutionality of the underlying law. Finally, avoidance decisions make it more difficult for the National Labor Relations Board (NLRB) to effectively use its discretion to interpret key statutory terms, leading to a stilted understanding of key concepts, including when listeners are “coerced” by union protests.

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<sup>5</sup> 138 S.Ct. 2448, 2478 (2018) (holding that the First Amendment prohibits requiring public sector workers to pay dues to the union that represents them).

<sup>6</sup> 487 U.S. 735, 762-63 (1988) (extending *Street*’s holding to the private sector).

<sup>7</sup> A strike or boycott is “secondary” when it is aimed at an entity that does business with the employer with whom a union has a labor dispute. See Howard Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363, 1363-64 (1962) (describing the nature and purpose of secondary boycotts).

<sup>8</sup> See *infra* Section II.B; see also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575-77 (1988) (holding that consumer-facing union handbilling was not prohibited by the NLRA to avoid raising “serious constitutional concerns”); NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760, 377 U.S. 58, 71 (1964) (holding that picketing in support of a consumer boycott of a single product sold by a grocery store was not prohibited by the NLRA as it did not threaten, coerce, or restrain the secondary employer).

<sup>9</sup> See, e.g., NLRB v. Retail Store Emps. Union, Local 1001, 447 U.S. 607, 616 (1980) (holding that Congress may prohibit secondary picketing in some instances without violating the First Amendment because “[s]uch picketing spreads labor discord by coercing a neutral party to join the fray”); *Kentov v. Sheet Metal Workers’ Int’l Ass’n Local 15*, 418 F.3d 1259, 1267 (11th Cir. 2005) (holding that coercive conduct that has a secondary objective aimed at a neutral party is prohibited by the NLRA and this prohibition does not violate the First Amendment).

<sup>10</sup> See *infra* Section III.B.

Part I of this Article begins by discussing the justifications for constitutional avoidance that have been offered by courts and commentators. Academic supporters and critics of constitutional avoidance largely agree that the traditional account—that avoidance is consistent with judicial modesty because Congress would prefer to have a statute narrowed than to have it struck down—is unrealistic. In place of that account, some scholars have offered alternative justifications for constitutional avoidance to backstop the traditional judicial account, often focusing on the role that avoidance plays in protecting constitutional norms and principles.

Part II draws on examples of constitutional avoidance in labor law to show that—contrary to courts’ narratives about avoidance—its implementation in two key areas of labor law has aggrandized courts’ authority, and also warped the development of constitutional and statutory labor law through “avoidance creep.”

Finally, Part III discusses some larger consequences of constitutional avoidance (and avoidance creep) in labor law. It traces the effects of avoidance creep on labor law and constitutional law. Then, it argues that neither the traditional nor the alternative accounts of avoidance work in the labor law context, in part because labor law is designed to balance competing constitutional and quasi-constitutional rights and obligations. The article ultimately concludes that—at least as it has been deployed in labor law—the risk of avoidance creep is a significant and previously unacknowledged problem associated with constitutional avoidance.

## I. ACCOUNTS OF AVOIDANCE

This section briefly reviews courts’ and scholars’ accounts of constitutional avoidance. The Court has traditionally characterized its approach to avoidance as driven by judicial modesty and deference to congressional preferences. But many judges and legal scholars rightly find this characterization disingenuous. Still, some critics of the traditional account support for other reasons courts’ use of the avoidance canon in at least some cases; they have offered alternative justifications, which range from structural constitutional principles such as federalism and separation of powers, to pragmatic considerations regarding the potential political consequences of constitutional decisions for courts. This discussion lays the groundwork for the next section of the Article, which uses examples from labor law to illustrate the underappreciated problem of avoidance creep.

In the Supreme Court’s own telling, there are two related benefits of constitutional avoidance. The first is judicial minimalism: the Court reasons that Congress would rather have a statute construed narrowly and upheld

than construed broadly but struck down.<sup>11</sup> The second emphasizes likely congressional intent, presuming that Congress does not lightly approach the constitutional boundaries of its authority.<sup>12</sup>

Judges and scholars have convincingly argued that these justifications for avoidance are unavailing.<sup>13</sup> The Court offers no evidence to support its account of congressional preferences, and logic often suggests Congress could have precisely the opposite set of preferences. Why, for example, would Congress prefer that a court construe a statute narrowly in order to avoid answering a question that *might or might not* result in a determination of unconstitutionality?<sup>14</sup> Or, as Antonin Scalia and Bryan Garner put it, “[t]he

<sup>11</sup> See, e.g., *Jones v. United States*, 526 U.S. 227, 239 (1999) (“[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.” (quoting *United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909))); *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998) (discussing how the constitutional avoidance canon is followed out of respect for Congress, which supposedly legislates according to constitutional limitations); see also Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 457 (1989) (describing “Congress’ likely preference for validation rather than invalidation”).

<sup>12</sup> See, e.g., *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 504 (1979) (reasoning that because there was “no clear expression of . . . affirmative intention” that the NLRB should have jurisdiction over parochial schools, the NLRA should be construed not to cover those schools). Many judges and scholars have traced this reasoning in Supreme Court opinions. See, e.g., Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2110 (2015) (discussing how the Supreme Court has resolved consequential cases by construing statutes to avoid constitutional difficulties and justifying the avoidance canon as a form of judicial restraint); see also William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 837 (2001) (“The Court presumes that the legislature acts in accordance with the Constitution, and the Court has no power even to consider the possibility that the legislature has not, unless a case or controversy forces it to.”).

<sup>13</sup> See, e.g., Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) (“The practical effect of interpreting statutes to avoid raising constitutional questions is therefore to enlarge the already vast reach of constitutional prohibition . . . .”); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 74 (1995) (“[I]t is by no means clear that a strained interpretation of a federal statute that avoids a constitutional question is any less a judicial intrusion than the judicial invalidation on constitutional grounds of a less strained interpretation of the same statute.”).

<sup>14</sup> See, e.g., HENRY J. FRIENDLY, BENCHMARKS 210 (1967) (“[I]t does not seem in any way obvious, as a matter of interpretation, that the legislature would prefer a narrow construction which does not raise constitutional doubts to a broader one which does raise them.”); see also Kelley, *supra* note 12, at 846-47 (discussing how the “canon assumes that Congress never intends to depart from constitutional comfort zones unless it is absolutely clear about it” when “Congress might well intend for the law to be interpreted in a way that raises constitutional doubts”); Schauer, *supra* note 13, at 74 (1995) (“[I]n interpreting statutes so as to avoid ‘unnecessary’ constitutional decisions, the Court frequently interprets a statute in ways that its drafters did not anticipate, and, constitutional questions aside, in ways that its drafters may not have preferred.”). I have previously discussed the Court’s traditional account of constitutional avoidance and scholars’ reactions to it. See Charlotte Garden, *Religious Employers & Labor Law: Bargaining in Good Faith?*, 96 B.U. L. REV. 109, 112 (2016) (discussing that even if constitutional avoidance decisions are sometimes justified by normative preferences to protect constitutional values, they should not be impervious to congressional override as a practical matter).

modern Congress sails close to the wind all the time. Federal statutes today often all but acknowledge their questionable constitutionality . . .”<sup>15</sup> Perhaps Congress would rather that the judiciary put the most likely reading of a statute to the test by actually ruling on its constitutionality. The critique, then, is that by invoking constitutional avoidance, courts purport to act deferentially to the elected branches—but in truth, they are empowering themselves to rewrite statutes, rules, or regulations in ways that Congress never wanted or anticipated.<sup>16</sup>

These problems have been amplified in recent decades. First, the Court’s methods of engaging in constitutional avoidance have changed.<sup>17</sup> In some recent cases, the Court has applied a clear statement rule instead of more traditional tools of statutory interpretation—that is, it adopts a statutory reading that avoids a constitutional question unless Congress responds by clearly stating its intent to the contrary. When the Court does this, it usually adopts an implausible statutory interpretation, throwing the onus onto Congress to reiterate that it meant what it said the first time around.<sup>18</sup> And the Court has sometimes adopted statutory interpretations in order to avoid constitutional questions that seem insubstantial under existing law. In those situations, avoidance seems unnecessary because the chances that the Court would really invalidate the statute on constitutional grounds are slim, unless the Court is prepared to undertake a major shift in constitutional law.<sup>19</sup> Moreover, while it might be desirable for the Court and Congress to be in

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<sup>15</sup> SCALIA & GARNER, *supra* note 1, at 248 (2012); *see also* Posner, *supra* note 13, at 816 (discussing how the avoidance canon has the opposite effect of ‘judicial activism’ by enabling the courts to expand their power in relation to the other branches of government while appearing as if they are being constrained).

<sup>16</sup> *See, e.g.*, Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1409 (2002) (criticizing “activist” judges who “subscribe to in principle, and use in practice, the noxious canon of constitutional doubt”); *see also* RONALD J. KROTOSZYNSKI, JR., *THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH 176-77* (2006) (discussing, in the context of the Japanese Supreme Court, how “[o]ne could view the Supreme Court’s practice of providing limiting constructions as a form of judicial activism, rather than as the product of extreme judicial deference.”).

<sup>17</sup> *See* Vermeule, *supra* note 1, at 1949 (comparing “modern avoidance” to “classical avoidance”).

<sup>18</sup> At different times, the Supreme Court has both used and criticized this approach. *See* *Jennings v. Rodriguez*, 138 S.Ct. 830, 843 (2018) (stating that “[s]potting a constitutional issue does not give a court the authority to rewrite a statute as it pleases,” but also noting that the Court had applied the canon in a more “notably generous” fashion in previous cases). For an example of this approach, *see* *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979).

<sup>19</sup> The Court has sometimes applied the canon of constitutional avoidance aggressively. *See, e.g.*, Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance By the Roberts Court*, 2009 SUP. CT. REV. 181, 181-82 (2009) (discussing the Court’s application of constitutional avoidance in *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009)); Katyal & Schmidt, *supra* note 12, at 2117 (discussing how modern avoidance can be triggered by varying levels of constitutional doubts ranging from “any constitutional doubt, however weak and inarticulate, or only by very grave doubts”).



ongoing dialogue over the meaning of statutes,<sup>20</sup> that dialogue is unlikely in the face of legislative gridlock.<sup>21</sup>

A case from labor law—*NLRB v. Catholic Bishop*<sup>22</sup>—illustrates both the Court’s call for a “clear statement” from Congress about its intent to legislate in a way that the Court believes raises a constitutional question, and the Court’s reliance on avoidance in the face of a constitutional question that could seemingly be resolved easily and in Congress’s favor.<sup>23</sup> In *Catholic Bishop*, the Court applied a clear statement rule, holding that if Congress intended the NLRA to cover parochial high schools, it would have to say so explicitly—notwithstanding the fact that the NLRA’s definition of covered employers is already very broad.<sup>24</sup> The Court adopted this approach to avoid a constitutional question about religious freedom that the Court never defined very clearly, and that the Court could have resolved in the NLRB’s favor anyway.<sup>25</sup> The result was a decision that diverged from the statutory interpretation that most closely tracked the statutory text in order to avoid a low or nonexistent probability that the Court would otherwise uphold the parochial school’s as-applied challenge to the NLRA. Neal Katyal and Thomas Schmidt recently condemned this approach as an exercise in hypocrisy: “Avoidance decisions profess a Brandeisian reticence about the judicial power, which . . . allows the Court to renovate the Constitution with less visibility.”<sup>26</sup>

Recognizing the weakness of the Court’s insistence that constitutional avoidance reflects judicial minimalism, some scholars have devised alternative accounts. For example, some argue that avoidance protects constitutional rights by forcing Congress to be explicit if it wants to approach the outer boundaries of its legislative power.<sup>27</sup> These accounts often focus on what their proponents

<sup>20</sup> See, e.g., Ronald J. Krotoszynski Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 4 (1998) (discussing arguments for, and doctrinal barriers to, greater dialogue between judges and legislatures).

<sup>21</sup> For a discussion of the longstanding congressional logjam that has prevented labor law reform, see Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1540-44 (2002).

<sup>22</sup> 440 U.S. 490 (1979).

<sup>23</sup> See William N. Eskridge Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 599 (1992) (discussing application of modern constitutional avoidance through statutory construction in *Catholic Bishop*); Garden, *supra* note 14, at 114 (presenting *Catholic Bishop* as an example of modern avoidance).

<sup>24</sup> *Catholic Bishop*, 440 U.S. at 504.

<sup>25</sup> Garden, *supra* note 14, at 117 (“[T]he Supreme Court soon backed off the broad approach to church autonomy that *Catholic Bishop* might have previewed.”).

<sup>26</sup> Katyal & Schmidt, *supra* note 12, at 2114, 2123 (“[T]he avoidance canon allows the Court to make constitutional law . . . while deferring the institutional consequences of its decision.”).

<sup>27</sup> SCALIA & GARNER, *supra* note 1, at 249; see also William N. Eskridge Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 76 (1994) (discussing “super-strong clear statement rules” that protect federalism norms); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI.

see as “underenforced” constitutional norms. For example, Scalia and Garner argue that avoidance “represents judicial policy—a judgment that statutes *ought not* to tread on questionable constitutional grounds unless they do so clearly.”<sup>28</sup> Others have proposed that courts may engage in avoidance to preserve their own legitimacy while protecting litigants’ rights in highly charged cases; Philip Frickey’s account of the Court’s approach to protecting the rights of dissidents in certain Cold War-era cases highlights this approach.<sup>29</sup>

These scholarly accounts recast avoidance as constitutional law-lite. They shift the focus away from the Supreme Court’s claimed deference to Congress in statutory interpretation and instead emphasize the importance of fidelity to the Constitution in difficult cases. This approach makes a virtue of the fact that Congress rarely overrides the Supreme Court’s avoidance decisions.<sup>30</sup> To scholarly defenders of constitutional avoidance, congressional inaction is a sign that the Court’s use of avoidance has successfully served its purpose, rather than a signal that there has been a breakdown in the “conversation” between the courts and Congress.<sup>31</sup>

Yet neither the Court’s own account of constitutional avoidance nor the reasoning of its scholarly defenders adequately grapples with the many costs of constitutional avoidance. One of these overlooked costs is that avoidance

L. REV. 315, 331 (2000) (“[C]onstitutionally sensitive questions . . . will not be permitted to arise unless the constitutionally designated lawmaker has deliberately and expressly chosen to raise them.”); Young, *supra* note 3, at 1598 (suggesting that avoidance protects constitutional rights by ensuring Congress has enough political support for clear restrictions of those rights).

<sup>28</sup> SCALIA & GARNER, *supra* note 1, at 249 (emphasis in original).

<sup>29</sup> Frickey, *supra* note 3, at 401, 455 (2005) (discussing the use of avoidance in the context of “underenforced” constitutional norms and writing that “[b]y generally deciding these cases at the subconstitutional level through the rules of avoidance, the Court used techniques that might defuse political opposition while incrementally adjusting public law to better respect individual liberty”); see also Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 516 (2005) (reasoning that “judicial political capital is not infinite. Courts routinely striking down legislative enactments might quickly lose favor with the body politic . . .”).

<sup>30</sup> See Katyal & Schmidt, *supra* note 12, at 2119 (discussing the difficulty of fixing a law once it is rewritten by the Court); see also Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 34 (1957) (“To raise constitutional doubts is to inhibit future legislative action.”).

<sup>31</sup> Scholars have documented myriad reasons for congressional inaction, both specifically on the topic of labor law, and more generally. See, e.g., Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 440-43 (2012) (discussing, in the context of contests between Congress and the executive branch, impediments to congressional action, including “veto-gates” in Congress at which legislative proposals . . . can be defeated,” as well as “substantial collective action problems,” and competing incentives that act as opposing forces on members of Congress); Estlund, *supra* note 21, at 1540-41 (arguing that Congress’s inability to enact labor law reform “stems primarily from the fact that, for many decades, both organized labor and especially employers have had enough support in Congress to block any significant amendment that either group strongly opposes”).

decisions distort or inhibit the development of substantive law.<sup>32</sup> The next Part uses labor law to demonstrate how this happens.

## II. HOW AVOIDANCE CREEPS

Constitutional avoidance is recurrent in labor law.<sup>33</sup> In addition to the *Catholic Bishop* decision discussed in Part I, avoidance has also influenced decisions concerning union and employer organizing tactics, including “secondary” strikes,<sup>34</sup> picketing,<sup>35</sup> petitioning,<sup>36</sup> and sit-down strikes.<sup>37</sup> Courts also engage in constitutional avoidance when applying the NLRA’s prohibition on using the expression of “views, argument, or opinion” as evidence in an unfair labor practice proceeding,<sup>38</sup> and cases about whether

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<sup>32</sup> This Article focuses on constitutional avoidance, but scholars have also charged that other court-created decisional rules can distort substantive doctrine. Consider, for example, the doctrine of qualified immunity, which some scholars argue has stunted development of the law across a wide range of constitutional rights by allowing courts to refuse to answer questions they find difficult or demanding. *See, e.g.,* Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 432-33 (2012) (arguing that “qualified immunity suppresses lawmaking in a couple of ways”).

<sup>33</sup> The most prominent constitutional avoidance case in the labor law canon might be thought to be *NLRB v. Jones & Laughlin Steel Corp.*, in which the Court famously held that Congress could regulate labor relations under the Commerce Clause, in part because “the [NLRA] may be construed so as to operate within the sphere of constitutional authority.” 301 U.S. 1, 30 (1937).

One story to tell about *Jones & Laughlin* is that by choosing to construe the NLRA narrowly, the Court moderated a major constitutional shift, holding only that Congress could regulate large businesses with operations that spanned multiple states. But on the same day, the Supreme Court also upheld the application of the NLRA to a smaller employer—a clothing manufacturer that operated a single plant. *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937). This employer operated within an interstate supply chain (it purchased raw materials from out-of-state and sold its finished products out of state) and it had out-of-state competitors, but its manufacturing operation was contained within Virginia. *Id.* at 59, 72-78. Nonetheless, the Court held that the NLRA could constitutionally be applied, “[f]or the reasons stated in” *Jones & Laughlin*. *Id.* at 75. I am grateful to James Gray Pope for the observation that *Friedman-Harry Marks Clothing* implies that there was more going on in *Jones & Laughlin* than met the eye.

<sup>34</sup> *See infra* Section II.B.

<sup>35</sup> *See infra* Section II.B.

<sup>36</sup> *See* *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 518-19 (2002) (holding that the NLRA “need not be read so broadly as to reach the entire class of cases the Board has deemed retaliatory”).

<sup>37</sup> *See* *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 255 (1939) (holding that sit-down strikers lost both their status as “employees” and the protection of the NLRA and therefore could not be ordered reinstated, even though their sit-down strike was in response to an unfair labor practice by their employer, and stating that “[a]part from the question of the constitutional validity [of a statute that protected sit-down strikes] it is enough to say that such a legislative intention should be found in some definite and unmistakable expression”); *see also* James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 521-22 (2004) (discussing the role of constitutional avoidance in *Fansteel*).

<sup>38</sup> 29 U.S.C. § 158(c) (2018); *see also* *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 386 (1998) (writing that this NLRA provision “merely implements the First Amendment”).

unions have a right to access employers' property for organizing purposes.<sup>39</sup> And the Court relied on avoidance in holding that unions governed by the Railway Labor Act could not require represented workers to do anything more than pay their share of the union's representation costs, before extending that rule to both the NLRA context and the public sector,<sup>40</sup> where it continues to generate conflict.

This Part traces the influence of constitutional avoidance on the development of labor law in two areas: union dues and fees; and secondary boycotts. A careful examination of these areas reveals detrimental consequences of constitutional avoidance, which are attributable to later courts' misinterpretation or manipulation of earlier courts' avoidance-based decisions.

### A. Avoidance and Doctrinal Evolution

Ill-considered or under-explained avoidance rationales can infect later cases in two ways. First, once a court has stated that a statute raises a constitutional question, a future court may assume that the statute would have been struck down as unconstitutional had it been interpreted in a broader fashion. This assumption can lead courts to expand or reify the broad constitutional reasoning that is typical of modern avoidance decisions. Or, after a court interprets a statute in an unconventional way in order to avoid a constitutional question—such as by applying a clear statement rule—a future court confronted with a similar statutory interpretation question may assume that its case should come out the same way as the avoidance case, even if the later case presents no constitutional question. The Court's case law regarding union dues and fees<sup>41</sup>—much of which traces back to the avoidance decision *International Ass'n of Machinists v. Street*<sup>42</sup>—exemplifies both of these versions of avoidance creep.

Although *Street* is the main focus of this section, the Supreme Court's case law on union fees actually begins with *Railway Employees' Department v.*

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<sup>39</sup> See Pope, *supra* note 37, at 551 (showing how, in a series of cases involving clashes between employer common law rights and the NLRA, “[s]tate common law rights of property and contract were elevated above federal statutory rights of self-organization and collective action through *Lochner*-era notions of economic due process and interstate commerce”).

<sup>40</sup> See *infra* subsections II.A.1–3.

<sup>41</sup> Workers who opt to become union members pay membership dues. Non-members do not pay dues, but represented workers who decline union membership can sometimes be required to contribute towards their share of the union's representational costs. This is called an “agency fee,” because it represents a pro rata share of the costs the union incurs in its work as the bargaining agent for a group of workers. See e.g., COMM'NS WORKERS OF AMERICA, UNION OPERATING PROCEDURES MANUAL (describing the difference between union dues and agency fees); see also *infra* note 45 (discussing the requirement that the union members in *Hanson* were required to pay union dues).

<sup>42</sup> 367 U.S. 740 (1961).

*Hanson*,<sup>43</sup> a case involving a 1951 amendment to the federal Railway Labor Act (RLA) that allowed unions and employers to “make agreements, requiring [that] . . . all employees shall become members of the labor organization representing their craft or class.”<sup>44</sup> This authorization reversed the RLA’s earlier language prohibiting what are known as “union security” or “union shop” agreements, which meant unions had to rely on represented workers to choose to join the union in sufficient numbers to support its activities.<sup>45</sup> The problem with this “open shop” model was its interaction with another part of labor law: namely, the Supreme Court’s 1944 ruling in *Steele v. Louisville & Nashville Railroad* that unions must fairly represent each worker in a given bargaining unit.<sup>46</sup> The *Steele* rule was adopted to prohibit race discrimination by unions, but an incidental effect was to create a free-rider problem: once a union was elected as the exclusive representative of a group of workers, it would be required to give fair and equal treatment to each of them, whether or not they paid union dues.<sup>47</sup> Accordingly, Congress’s 1951 amendment reflected the policy that “those who enjoy the fruits and the benefits of the unions should make a fair contribution to the support of the unions.”<sup>48</sup>

The plaintiffs in *Hanson* argued that the RLA-authorized union security clauses in their collective bargaining agreements violated the First Amendment by requiring them to join (and pay dues to) the union elected to represent them.<sup>49</sup> Thus, their first hurdle was to establish that a clause in an agreement bargained and signed by a union and a railway employer—both private entities—involved state action. Remarkably, the Court agreed that it did,

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<sup>43</sup> 351 U.S. 225 (1956).

<sup>44</sup> 45 U.S.C. § 152, Eleventh (2018). The relevant provision of the RLA states that “any carrier . . . and a labor organization . . . duly designated and authorized to represent employees . . . shall be permitted . . . to make agreements, requiring, as a condition of continued employment, that . . . all employees shall become members of the labor organization representing their craft or class,” as long as the union provides membership on equal terms to each employee and does not terminate membership “for any reason other than the failure of the employee” to pay dues. *Id.* See also *Hanson*, 351 U.S. at 229 n.2 (referencing the same Code language).

<sup>45</sup> *Hanson*, 351 U.S. at 231. In labor law, “union security” and “union shop” are not interchangeable phrases, although the Court sometimes treats them as though they are. A “union shop” clause is a variety of union security clause in which represented workers are required to join the union that represents them within some number of days of being hired. Other types of union security clauses include the “closed shop,” which requires workers to be union members before they are hired; the “agency shop,” which requires workers to pay their share of the union’s representation costs; and “open shop,” which does not require workers to join or pay money to the union that represents them. SETH D. HARRIS, ET AL., MODERN LABOR LAW IN THE PUBLIC AND PRIVATE SECTORS 1142 (2d ed. 2016).

<sup>46</sup> 323 U.S. 192, 200 (1944).

<sup>47</sup> For a discussion of the free rider problem, see Martin H. Malin & Catherine Fisk, *After Janus* 107 CALIF. L. REV. 1821, 1826-29 (2019).

<sup>48</sup> See *Hanson*, 351 U.S. at 231 (quoting Senator Hill, 96 CONG. REC. 16279 (1950)).

<sup>49</sup> *Id.* at 236.

reasoning that “the federal statute is the source of the power and authority by which any private rights are lost or sacrificed.”<sup>50</sup> In other words, the Court concluded that the First Amendment’s state action requirement was satisfied because the RLA preempted a state right-to-work law that would have otherwise prohibited the union membership clause that the plaintiffs were challenging.<sup>51</sup>

Despite having sided with the plaintiffs on what must have seemed at the outset like the largest of their doctrinal hurdles, the Court concluded that “union shop” clauses did not, on their faces, violate the First Amendment in light of the public policy reasons to allow them.<sup>52</sup> Still, the Court left the door open to future cases in which plaintiffs could show that “compulsory [union] membership will be used to impair freedom of expression.”<sup>53</sup>

The Court then listed in a lengthy footnote some union practices that it presumably thought might impair workers’ freedom of expression, and that it might strike down in a future as-applied challenge.<sup>54</sup> Those practices fell into three categories: disqualification from union membership (and therefore from employment) of workers who held certain political beliefs or associations; prohibitions on workers taking political positions contrary to the unions’ positions; and the use of union dues to “finance union insurance and death benefit plans.”<sup>55</sup> If one accepts the Court’s conclusion that state action was present, it is self-evident why the first two categories of membership conditions and rules would then violate represented workers’ First Amendment rights. The third example is less obvious. It refers to a practice, described at length in Hanson’s Supreme Court brief, wherein a union would require workers to buy into a union insurance fund while also threatening that workers would lose accrued benefits if they violated union rules, which in turn required that the worker not “work[] in the interest of any

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<sup>50</sup> *Id.* at 232.

<sup>51</sup> Scholars sometimes refer to the landmark case *Shelley v. Kraemer*, 334 U.S. 1 (1948), as the high-water mark in the Court’s willingness to find state action in connection with private contracts. See, e.g., Margaret Jane Radin, *A Comment on Information Propertization and its Legal Milieu*, 54 CLEV. ST. L. REV. 23, 37 n.48 (2006) (positing that *Shelley v. Kraemer* was the high-water mark of expansive state action doctrine). However, as this discussion shows, *Hanson* actually went beyond (and relied on) *Shelley*. See Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 850 (2012) (observing that *Hanson* was “decided at the apex of the Court’s willingness to find state action implicated in private conduct”). For a discussion of the Court’s “puzzling” state action holding in *Hanson*, see generally Joseph E. Slater, *Will Labor Law Prompt Conservative Justices to Adopt a Radical Theory of State Action?*, 96 NEB. L. REV. 62, 77 (2017).

<sup>52</sup> See *Hanson*, 351 U.S. at 233 (reasoning that “[i]ndustrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained”).

<sup>53</sup> *Id.* at 238.

<sup>54</sup> *Id.* at 236 n.8.

<sup>55</sup> *Id.*

organization or cause which is detrimental to, or opposed to” the union, nor circulate certain political materials.<sup>56</sup>

Thus, each of the Court’s examples of union practices that might yield a successful as-applied challenge involved the union leveraging a union shop clause to limit workers’ own political activity. The negative implication is that the Court did not think workers’ First Amendment rights were implicated by what the *union* did with dues after it received them. This is significant because it was known at the time (and the *Hanson* Court was presumably aware) that unions used member dues to finance their own lobbying and politicking.<sup>57</sup>

Five years later, the Court in *Street* took up the question reserved in *Hanson* in the context of a challenge to a union’s use of member dues for its own political speech.<sup>58</sup> The *Street* plaintiffs argued that their contractual obligation to pay union representation fees violated the First Amendment because the union used a portion of that money “to finance the campaigns of candidates for federal and state offices whom [the plaintiffs] opposed.”<sup>59</sup> The plaintiffs won their case in Georgia state court, which then enjoined the railroad and union from enforcing their contractual union shop clause, or collecting any dues from the plaintiffs, and the Georgia Supreme Court later upheld that order.<sup>60</sup>

Before the Supreme Court, the union made two main arguments: first, that the state action rule from *Hanson* did not apply because Georgia did not have an applicable right-to-work law, and therefore there was nothing for the RLA to preempt; and second, that there was no First Amendment right not to pay fees that were later used for union political speech.<sup>61</sup> Each of those arguments had at least implicit support from *Hanson*.

However, the *Street* Court did not address either argument head on. Instead, it invoked avoidance:

The record in this case is adequate squarely to present the constitutional questions reserved in *Hanson*. . . . However, the restraints against unnecessary constitutional decisions counsel against their determination unless we must conclude that Congress, in authorizing a union shop under [the RLA], also meant that the labor organization receiving an employee’s

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<sup>56</sup> Brief of Respondent at 14-15, *Ry. Emps. Dep’t v. Hanson*, 351 U.S. 225 (1956) (No. 451).

<sup>57</sup> See Harry H. Wellington, *Machinists v. Street: Statutory Interpretation and the Avoidance of Constitutional Issues*, 1961 SUP. CT. REV. 49, 51-52 (1961) (observing that general information about unions’ participation in politics was before the *Hanson* Court, and concluding that most observers after *Hanson* would have assumed that the Court would not find that unions’ use of dues to fund their own political activities poses a First Amendment problem).

<sup>58</sup> *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740 (1961).

<sup>59</sup> *Id.* at 744.

<sup>60</sup> *Int’l Ass’n of Machinists v. Street*, 108 S.E.2d 796, 809 (Ga. 1959).

<sup>61</sup> Brief of Appellants at 22, 44, *Street*, 367 U.S. 740 (No. 258).

money should be free, despite that employee's objection, to spend his money for political causes which he opposes.<sup>62</sup>

In other words, because *Hanson* reserved the question whether workers might bring a successful as-applied constitutional challenge to a union security clause that restrained *their own* political advocacy, the *Street* Court concluded that the entirely different constitutional question presented in that case was a serious or difficult one.<sup>63</sup> Then, without any more analysis of that question, the Court turned to whether the RLA could be construed to prohibit unions and employers from requiring represented workers to pay union fees that went towards the union's political advocacy.<sup>64</sup>

The relevant RLA text refers broadly to "membership" and "dues" without any restrictions on their use.<sup>65</sup> However, the *Street* Court paid only glancing attention to that language, instead turning to the purpose of the 1951 RLA amendment as reflected in its legislative history: to ensure that unions had enough money to represent workers competently and fairly.<sup>66</sup> In the Court's view, that purpose could be accomplished even if mandatory fees were limited to union representation costs, such as bargaining and processing worker grievances. But then the Court subtly shifted its inquiry. Instead of attempting to discern the meaning of the language that Congress did use, it "look[ed] in vain for any suggestion that Congress also meant . . . to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose."<sup>67</sup> That is, to avoid constitutional questions that the *Street* majority said would be raised if mandatory fees could go to union politicking, the Court adopted a clear statement approach to interpreting the RLA: if Congress meant to authorize union security clauses that required represented workers to pay full union dues (including the

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<sup>62</sup> *Street*, 367 U.S. at 749.

<sup>63</sup> *Id.* Concurring, Justice Douglas addressed the First Amendment question (but not the state action question) head on, writing that "use of union funds for political purposes subordinates the individual's First Amendment rights to the views of the majority. I do not see how that can be done," though he also observed that the "furtherance of the common cause leaves some leeway for the leadership of the group." *Id.* at 778 (Douglas, J., concurring). No other Justice joined this opinion.

<sup>64</sup> *Id.* at 749.

<sup>65</sup> 45 U.S.C. § 152, Eleventh (2018).

<sup>66</sup> *Street*, 367 U.S. at 760-61 (observing that a union's representation duties "entail[] the expenditure of considerable funds" in part because of the duty of fair representation).

<sup>67</sup> *Id.* at 764. Later in *Street*, the majority also observed that the legislative history of the 1951 amendment revealed "congressional concern over possible impingements on the interests of individual [union] dissenters" and that "Congress was also fully conversant with the long history of intensive involvement of the railroad unions in political activities." *Id.* at 766-67. But those two observations just as easily cut against the majority's reading of the RLA, because they suggest Congress was aware that unions used dues for political purposes but still did not impose clear limits on the purposes to which mandatory dues could be put.



portion that went to union expenses that were not germane to collective bargaining), it would have to say so explicitly.

Constitutional avoidance appears to have been the but-for cause of the result in *Street*, that RLA-governed unions and employers may require represented workers to pay union dues and fees only to the extent they go towards collective bargaining and other representation costs.<sup>68</sup> That is because the RLA's text did not limit the uses to which unions could put dues. Indeed, Justice Black dissented, excoriating the majority for "distort[ing] this statute so as to deprive unions of rights I think Congress tried to give them," deeming the majority's approach "wholly unfair to the unions as well as to Congress."<sup>69</sup>

One might expect that *Street* would be only of limited importance in future cases, as it neither represents the most straightforward reading of the RLA, nor purports to answer any of the constitutional questions about how unions may use worker dues and fees. This is not to say that future courts should have treated *Street* (or any other avoidance decision) as nonprecedential, but rather that future courts should have been attentive to two limits of avoidance decisions: first, they are not constitutional decisions; and second, they may construe statutory language contrary to its most likely meaning or to Congress's most likely intent. However, the Court's post-*Street* union fees cases do not bear out this intuition. As the next two subparts discuss, those cases rely on *Street* both as though it were a constitutional decision, and as though it reflects the "best" reading of the RLA, with significant consequences for unions and represented workers.

### 1. *Street* as Constitutional Law

In 1977, more than fifteen years after *Street*, the Court addressed the constitutionality of union security in the public sector. The resulting decision in *Abood v. Detroit Board of Education* not only relied heavily on *Street*, but reached the same functional outcome, holding as a matter of constitutional law that public sector employees can be required to contribute towards a union's representation costs, but not its other expenses.<sup>70</sup>

The Court began its analysis by writing that *Hanson* and *Street* "on their face go far toward resolving the issue."<sup>71</sup> But *Hanson's* role in the analysis that followed was quite limited. Instead, the Court turned mainly to *Street*,

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<sup>68</sup> *Id.* at 764.

<sup>69</sup> *Id.* at 785, 786 (Black, J., dissenting). Justice Black would have held that mandatory fees violated the First Amendment rights of objecting workers. *Id.* at 791.

<sup>70</sup> 431 U.S. 209, 219, 232, 240 (1977) (characterizing the *Street* case as involving a "similar question"; concluding that *Hanson* and *Street* were "controlling in the present case insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes"; and writing that the same remedy that was awarded in *Street* was appropriate).

<sup>71</sup> *Id.* at 217.

beginning with that Court's statement that the use of union fees for politics triggered "questions of the utmost gravity."<sup>72</sup> But although the *Street* Court wrote that to explain its decision to use avoidance, it offered no analysis of why those questions were grave rather than trivial—or even what the questions were. It could be that the *Street* Court thought questions such as "Do mandatory union fees trigger First Amendment scrutiny at all?" or "Is there state action present when the RLA applies in a state without an applicable right to work law?" presented difficult or even "grave" issues. But *Abood* simply assumed that the answer to that first question was "yes," and then turned to a discussion of why public sector agency fees were justified by a government interest in labor peace. The interest in labor peace was a construct that *Abood* also attributed to *Street*, writing that "the judgment clearly made in *Hanson* and *Street* is that such interference [with represented workers' First Amendment rights] as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress."<sup>73</sup> In other words, *Abood* (mis)attributed to *Hanson* and *Street* both that how a union spends workers' dues implicates workers' First Amendment rights, and that agency fees were sufficiently justified under some (unspecified) level of scrutiny by the government's interest in stable labor relations.<sup>74</sup>

To be clear, neither *Hanson* nor *Street* actually held either of these things. First, *Hanson* simply held that required "periodic dues, initiation fees, and assessments" did not violate the First Amendment, without saying whether that was because the First Amendment did not cover mandatory union dues or because there was a sufficient government interest to justify the intrusion on First Amendment interests.<sup>75</sup> And in *Street*, the plaintiffs challenged only the portion of union dues that went to union politics, and the Court did not provide a more detailed account of the First Amendment holding in *Hanson*.<sup>76</sup> Instead, the *Street* Court assumed only that a plausible constitutional question arises when mandatory union dues go towards union politics.<sup>77</sup> Then, its

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<sup>72</sup> *Id.* at 219-20 (quoting *Street*, 367 U.S. at 749-50).

<sup>73</sup> *Id.* at 222. The Court also noted that "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests." *Id.*

<sup>74</sup> For a discussion of the distinction between First Amendment coverage (the idea that the First Amendment is applicable to speech or conduct in the first place), and First Amendment protection (the idea that government regulation of particular speech is unconstitutional under the applicable First Amendment test), see Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769-74 (2004).

<sup>75</sup> *Ry. Emps. Dep't v. Hanson*, 351 U.S. 225, 238 (1956).

<sup>76</sup> *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 746-49 (1961) (explaining *Hanson*).

<sup>77</sup> The Court noted that

the restraints against unnecessary constitutional decisions counsel against their determination unless we must conclude that Congress, in authorizing a union shop

entire discussion of the link between agency fees and the government's interest in labor peace was connected with its *statutory* holding limiting the RLA's union shop authorization.<sup>78</sup>

Thus, it appears that the *Abood* Court conflated the constitutional holding in *Hanson* and the statutory holding in *Street*, and then treated *Street*'s outcome—agency fees are permissible under the RLA, but full union dues are not—as though it was the result of First Amendment balancing.<sup>79</sup> From there, it was an easy step to reach the same outcome regarding another set of workers.<sup>80</sup>

Today, we think of the principle that compelled subsidization of a third party's speech implicates the First Amendment as having begun with *Abood*.<sup>81</sup> Remarkably, though, the *Abood* Court seemed to think that principle came from *Hanson* and *Street*.<sup>82</sup> Thus, the careful consideration that a significant expansion of First Amendment coverage normally merits simply was not present—instead, that conclusion was smuggled in by way of reliance on *Street*'s use of avoidance.

This is not to say that the Supreme Court could not have reached the same conclusion in *Abood* without misapplying *Hanson* and *Street*—perhaps it would have. But at the same time, *Abood*'s result was not inevitable. For example, Professors Eugene Volokh and William Baude persuasively argued in an amicus

under § 2, Eleventh, also meant that the labor organization receiving an employee's money should be free, despite that employee's objection, to spend his money for political causes which he opposes.

*Id.* at 749.

<sup>78</sup> *Id.* at 768 (discussing the congressional purpose for union security clauses).

<sup>79</sup> Alternatively, it may be that the *Abood* majority overlooked that the *Street* plaintiffs' case centered on the portion of their union assessment that went towards politics, and therefore assumed that *Street* involved both a constitutional holding allowing agency fees in the RLA context and a statutory holding construing the RLA to disallow mandatory union dues for political purposes. But that account of the *Abood* Court's reading of *Street* would still be consistent with my argument that the *Abood* majority imported *Street*'s discussion of "the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977).

<sup>80</sup> *Id.* at 229 (writing, following a discussion of *Street*, that the "remaining constitutional inquiry . . . is whether a public employee has a weightier First Amendment interest than a private employee in not being compelled to contribute to the costs of exclusive union representation. We think he does not.").

<sup>81</sup> See *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471 (1997) (quoting *Wileman Bros & Elliott, Inc. v. Espy*, 58 F.3d 1367, 1377 (9th Cir. 1995)) (citing to *Abood* for the assertion that "just as the First Amendment prohibits compelled speech, it prohibits . . . compelling an individual to 'render financial support for others' speech").

<sup>82</sup> *Abood*, 431 U.S. at 217, 222 (writing that "whether an agency-shop provision" is "constitutionally valid must begin with two cases in this Court that on their face go far toward resolving the issue," and citing *Hanson* and *Street*; and then analyzing those cases before writing without additional citation that "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests").

brief and a follow-up law review article that *Abood* erred in treating compelled payments as covered by the First Amendment at all, particularly in light of the myriad ways in which Americans are routinely compelled to subsidize others' speech, including through their taxes.<sup>83</sup> Professor Benjamin Sachs reached the same conclusion for a different reason, writing that we should think of agency fees as being paid by employers rather than employees for First Amendment purposes.<sup>84</sup> Other scholars have pointed out that compelled subsidization issues arise frequently both in and out of the context of public employment, but that only a small subset of those situations are routinely treated by courts as raising First Amendment issues—perhaps there exists a principle that would separate wheat from chaff, but *Abood* did not provide it.<sup>85</sup>

## 2. *Street* as Mixed Constitutional and Statutory Law

The consequences of *Abood*'s treatment of *Street* are now fully apparent, due to a new round of First Amendment lawsuits challenging public sector agency fees.<sup>86</sup> In *Harris v. Quinn*,<sup>87</sup> the Court struck down on First Amendment grounds mandatory agency fees for certain home healthcare workers who were paid by the government, but whose work was directed by individual private clients. The *Harris* Court criticized *Abood*'s reading of

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<sup>83</sup> See Brief of Professors Eugene Volokh & William Baude as Amici Curiae in Support of Respondents at \*5-6, *Janus v. AFSCME*, 138 S.Ct. 2448 (2018) (No. 16-1466); Eugene Volokh & William Baude, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 171 (2018) (“The better view, we think, is that requiring people only to pay money, whether to private organizations or to the government, is not a First Amendment problem at all.”).

<sup>84</sup> Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 HARV. L. REV. 1046, 1048 (2018) (explaining that the NLRA and subsequent state public sectors laws prohibited employers from paying unions directly, leading to an accounting fiction wherein the employers “pay” their employees money earmarked for and passed through to the unions).

<sup>85</sup> See, e.g., Robert Post, *Compelled Subsidization of Speech: Johanns v. Livestock Marketing Association*, 2005 SUP. CT. REV. 195, 213-14 (2005) (listing circumstances in which individuals are required to convey certain messages, but which are not thought to implicate the First Amendment right against compelled speech); Sachs, *supra* note 51, at 827 (drawing parallels between agency fees and other situations in which “economic power to control access to significant economic opportunities is deployed to secure political support for the economic actor’s political agenda”).

<sup>86</sup> Between *Abood* and the cases discussed in this subsection, the Court decided several cases regarding the conditions under which public sector unions could collect agency fees. Like *Abood*, some of these cases also rely on *Hanson* and *Street* in order to answer constitutional questions about the scope of represented workers’ rights to opt out of union dues and fees in the public sector. For example, in *Lehnert v. Ferris Faculty Ass’n*, the Court delineated several categories of expenses that were or were not chargeable to represented public sector workers. 500 U.S. 507, 519-24 (1991). In *Lehnert*, the Court relied extensively on *Street*, observing that while *Street* was a statutory case, the fact that it involved constitutional avoidance meant that it would “necessarily provide some guidance regarding what the First Amendment will countenance in the realm of union support of political activities through mandatory assessments.” *Id.* at 516.

<sup>87</sup> 573 U.S. 616 (2014).

*Hanson* and *Street* on much the same ground that I have here,<sup>88</sup> but drew the wrong conclusion from that criticism.

Specifically, the *Harris* majority—quoting *Street*’s “grave questions” language—criticized *Abood* for relying on *Street*, which was “not a constitutional decision at all,”<sup>89</sup> to reach the conclusion that the impingement on First Amendment rights caused by agency fees could be supported by a government interest in labor peace.<sup>90</sup> That is, the *Harris* majority thought that because *Street* was a statutory decision, it was insufficiently protective of workers’ First Amendment rights and too accepting of the “labor peace” rationale.<sup>91</sup> But the opposite is true: because *Street* relied on constitutional avoidance, it might have over-protected objecting workers by narrowing the RLA to avoid questions about objectors’ constitutional rights that would have ultimately been resolved against them. Then, *Street* imported the labor peace rationale only as a way to *limit* union fees, rather than to justify them, in order to avoid deciding whether it would be constitutional to require union members to pay fees that a union ultimately spends on politics—with the implication that the *Street* Court thought it was not even arguably a constitutional problem to require union-represented workers to pay agency fees. This misreading of *Street* is significant because it apparently led the *Harris* Court to disregard *Street* and *Hanson* as precedent supporting the constitutionality of agency fees, based on the *Harris* Court’s belief that *Street* and *Hanson* were mere statutory decisions. That in turn helped the *Harris* Court (and, as discussed below, the *Janus* Court) paint *Abood* as an isolated, anomalous decision that should be overturned.

This insight does not on its own resolve the constitutionality of agency fees—but the point is that if one traces *Harris* back to *Hanson*, one finds over-readings of precedent all the way down—where earlier Courts left questions, later Courts saw answers.

Four years later, the Court overturned *Abood* in *Janus v. AFSCME*.<sup>92</sup> The majority opinions in *Harris* and *Janus* were both written by Justice Alito, and so it is unsurprising that the two decisions treated *Street* and *Abood* similarly. In *Janus*, as in *Harris*, the Court majority assumed that *Abood* was right when it read *Street* as holding that compelled subsidization of speech implicates the First Amendment,<sup>93</sup> but wrong when it held that it was appropriate to apply

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<sup>88</sup> *Id.* at 633-38.

<sup>89</sup> *Id.* at 635.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 633-35.

<sup>92</sup> 138 S.Ct. 2448, 2478 (2018).

<sup>93</sup> *Id.* at 2464 (stating that “[c]ompelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns [as compelling a person to speak],” and citing *Abood* and later cases that relied on *Abood*).

the rest of the analysis from *Street*—getting *Street*'s constitutional implications backwards.<sup>94</sup> For example, the *Janus* Court wrote that “neither *Hanson* nor *Street* gave careful consideration to the First Amendment . . . For its part, *Street* was decided as a matter of statutory construction, and so did not reach any constitutional issue.”<sup>95</sup> This statement is literally correct, but the *Janus* majority drew the wrong conclusion from it: implicit in the logic of *Street*'s constitutional avoidance is that union fees that go towards politics might (or might not) violate workers' First Amendment rights, and union fees that go towards representation costs presumably do not. In other words, the *Janus* Court's view that *Street* should be discounted as just a statutory decision, and that the *Abood* Court was wrong to rely on *Street* as relevant precedent,<sup>96</sup> was based on an apparent misreading of *Street*.

What, if anything, does this line of cases show about avoidance more generally? It is not inevitable that courts will over-read avoidance decisions, morphing statutory analysis into constitutional principles over time. But the *Hanson-Street-Abood-Harris-Janus* progression shows how later courts can get avoidance decisions wrong in multiple ways: whereas *Abood* erred by treating *Street* as having resolved questions that it only avoided, *Harris* and *Janus* erred in a different way by treating *Street* as a statutory decision that did not consider constitutional questions at all. And although it is possible that none of these errors were dispositive, there is also the possibility that they altered the course of constitutional law regarding compelled subsidization of speech.

### 3. *Street* as Statutory Interpretation.

In addition to its influence in constitutional cases, *Street* also drove the Court's decision in *Communications Workers of America v. Beck*,<sup>97</sup> which held that private sector employees cannot be required to pay full union dues under contracts governed by the NLRA—instead, like in the RLA context, they can be required to pay only agency fees.<sup>98</sup> *Beck* was similar to *Street* in two key ways: first, the nature of the challenge was similar; and second, the statutory provision at issue, § 8(a)(3) of the NLRA, is substantially identical to the RLA's union security provision.<sup>99</sup> Accordingly, the *Beck* Court viewed *Street*

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<sup>94</sup> *Id.* at 2465, 2479-80 (criticizing *Abood* for failing to cite “evidence that the pandemonium it imagined would result if agency fees were not allowed,” and for “fail[ing] to appreciate that a very different First Amendment question arises when a State *requires* its employees to pay agency fees,” in its reliance on *Street*).

<sup>95</sup> *Id.* at 2479.

<sup>96</sup> *Id.* at 2479 (criticizing “*Abood*'s unwarranted reliance on *Hanson* and *Street*”).

<sup>97</sup> 487 U.S. 735 (1988).

<sup>98</sup> *Id.* at 762-63.

<sup>99</sup> See 29 U.S.C. § 158(a)(3) (2018) (making it an unfair labor practice for employers to discriminate based on union membership, except under a contract “to require as a condition of

as the beginning and end of its analysis, writing that “[o]ur decision in *Street* . . . is far more than merely instructive here: we believe it is controlling, for § 8(a)(3) and [the RLA] are in all material respects identical.”<sup>100</sup>

But there are two related reasons to doubt the logic of importing *Street* into the NLRA context, as the *Beck* dissenters explained. First, there is no obvious reason for the *Beck* Court to have invoked avoidance independently—unlike the RLA, the NLRA does not preempt state right-to-work laws,<sup>101</sup> and so *Hanson* provides no basis to assume that NLRA-governed contracts involve state action.<sup>102</sup> Moreover, it was nonsensical for the *Beck* Court to assume that a judicial interpretation of the RLA should control in the NLRA context because § 8(a)(3) predates not just *Street* but also the existence of RLA’s union security provision itself; § 8(a)(3) was the basis for the 1951 RLA amendment, rather than vice versa. This means Congress neither could have foreseen the chain of events that eventually led to *Street* when it enacted § 8(a)(3), nor would have intended § 8(a)(3) to be interpreted like its (as-yet nonexistent) RLA analogue. Thus, even if it is sometimes reasonable to assume that Congress legislated with knowledge of how the Court has interpreted (or is likely to interpret) similar statutory language, this is not such a situation. Instead, one imagines that the 1947 Congress that enacted § 8(a)(3) would have been quite surprised to learn that the impetus behind the Court’s eventual interpretation of its work would turn out to be a desire not to decide whether railroad workers could constitutionally be required to pay union dues. Second, neither the text of § 8(a)(3) nor its legislative history suggests an independent basis upon which the *Beck* Court could reasonably have decided that case in the same way. As the *Beck* dissenters observed—echoing Justice Black’s dissent in *Street*—“[o]ur accepted mode of resolving statutory questions would not lead to a construction of § 8(a)(3) so foreign to that section’s express language and legislative history.”<sup>103</sup>

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employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement”).

<sup>100</sup> *Beck*, 487 U.S. at 745.

<sup>101</sup> 29 U.S.C. § 164(b) (2018).

<sup>102</sup> The NLRA permits states to adopt what are colloquially known as “right to work” laws, which prohibit employers and unions from requiring union membership as a condition of employment. *Id.* *Beck* has also influenced the relatively broad construction of this statutory provision to permit laws that prohibit employers and unions from requiring represented workers for paying anything towards the cost of union representation. *Cf.* Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 U.C. IRVINE L. REV. 857, 864-65 (2014) (discussing *Beck* and arguing that a proper reading of § 164(b) does not cover laws allowing workers to opt out of paying their share of enforcing collective bargaining agreements).

<sup>103</sup> *Beck*, 487 U.S. at 763 (Blackmun, J., concurring in part dissenting in part). Similarly, scholars have argued that *Beck*’s interpretation of 8(a)(3) is inconsistent with the NLRA’s structure and text. *See* Fisk & Sachs, *supra* note 102, at 861-62.

The foregoing Section shows how a single decision built on constitutional avoidance can shape-shift into other areas of both constitutional and statutory law, even when that decision's reliance on avoidance should undermine its uses in those other contexts. Yet *Street* is entirely responsible for the treatment of union security clauses in the NLRA context, and at least partially responsible for their treatment in the public sector—a remarkable (and troubling) reach for a statutory decision that on its face affected only unionized railroad workers.

### B. *Avoidance and Doctrinal Stagnation*

This Section turns to another example of how constitutional avoidance has shaped labor law: the law of secondary strikes and boycotts.<sup>104</sup> It begins with a short primer on the law of secondary activity and its modern-day significance, before discussing the relevant constitutional avoidance decisions. Finally, it argues that the Court's use of constitutional avoidance in this area has, as a practical matter, stymied the law's development. That is, constitutional avoidance has contributed to courts' failures to directly confront the increasing divergence between the NLRA's secondary boycott provision and increasingly speech-protective First Amendment law.

#### 1. Secondary Activity under the NLRA: An Overview

On January 27, 2017, President Trump announced the first iteration of his controversial travel ban, barring citizens of seven Muslim-majority countries from entering the United States.<sup>105</sup> The next day, the New York Taxi Workers Alliance (NYTWA) called for a one-hour strike at JFK airport in protest, garnering significant media attention about the effects of the travel ban.<sup>106</sup> Several days later, a group of Yemeni bodega owners adapted the NYTWA

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<sup>104</sup> "Strike" refers to a coordinated cessation of work by employees. See *Strike*, BLACK'S LAW DICTIONARY (10th ed. 2014). In labor law, the term "boycott" is sometimes used to refer to a strike, and sometimes to a refusal by consumers to buy a product or patronize a business. This Article generally refers to the latter as a "consumer boycott." (The use of "boycott" to refer to a strike in the relevant statutory language is discussed in more detail below.) This section also discusses "handbilling," which involves passing short pamphlets or other written material to passers-by in order to persuade them to take (or not take) certain actions; and picketing, which "generally involves persons carrying picket signs and patrolling back and forth before an entrance to a business or worksite." *In re United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 355 N.L.R.B. 797, 802 (2010). As the Section discusses, the precise legal definition of "picketing" is a significant issue in labor law.

<sup>105</sup> Exec. Order No. 13780, 82 Fed. Reg. 13,209 (Mar. 9, 2017).

<sup>106</sup> Eli Blumenthal, *The Scene at JFK as Taxi Drivers Strike Following Trump's Immigration Ban*, USA TODAY (Jan. 28, 2017, 8:15 PM), <https://www.usatoday.com/story/news/2017/01/28/taxi-drivers-strike-jfk-airport-following-trumps-immigration-ban/97198818/> [<https://perma.cc/KR8N-QL79>].



strategy, also striking in protest of the travel ban, closing their stores for part of a day and gathering in Brooklyn to object to the ban.<sup>107</sup>

From a labor law perspective, it is important that neither the NYTWA nor the group of bodega owners was a labor union (or in NLRA parlance, “labor organizations”).<sup>108</sup> Instead, the NYTWA is an “alt-labor” group,<sup>109</sup> because although it advocates for better working conditions for taxi and other for-hire drivers, it mostly represents independent contractors, and does not engage in traditional collective bargaining.<sup>110</sup>

This distinction matters because the Taxi Workers’ strike was a “secondary strike,” in which the strikers withheld their labor from the enterprise for which they worked (the “primary”) in order to influence the behavior of another enterprise (the “secondary”)—here, the government. Calling secondary strikes and boycotts to protest government policy is a time-tested tactic that the Supreme Court has recognized as core political advocacy. For example, the events that gave rise to the landmark case *NAACP v. Claiborne Hardware Co.*,<sup>111</sup> involved an NAACP-organized secondary consumer boycott of Mississippi businesses to protest segregationist government policies.<sup>112</sup> Reversing a state court decision finding the NAACP liable for malicious interference with the affected businesses, as well as for violations of state statutory law, the Supreme Court observed that “the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.”<sup>113</sup>

Moving from the political to the labor context, it is easy to see how secondary strikes and boycotts are a useful tool for unions: workers hoping to influence a primary employer could increase both their leverage and the visibility of their cause by calling on sympathizers to strike and/or picket the premises of organizations that do business with their employer. Yet, as discussed in more detail below, the NLRA forecloses labor unions from these

<sup>107</sup> Adam Chandler, *The Yemeni Bodega Strike*, THE ATLANTIC (Feb. 4, 2017), <https://www.theatlantic.com/business/archive/2017/02/yemen-bodega-brooklyn-immigration-ban/515670/> [<https://perma.cc/QM7X-CZ3X>].

<sup>108</sup> 29 U.S.C. 152(5) (2018) (defining “labor organization”).

<sup>109</sup> “Alt-labor” is an umbrella term for organizations that advocate for workers, but that are not “labor organizations” as defined by the National Labor Relations Act, 29 U.S.C. § 152(5). For a discussion of the practical and legal implications of whether or not a worker advocacy group is a statutory labor organization, see generally Michael C. Duff, *Alt-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain*, 63 CATH. U. L. REV. 837 (2014).

<sup>110</sup> See generally N.Y.C. TAXI WORKERS ALLIANCE, *New York Taxi Workers Alliance Mission & History*, <http://www.nytwa.org/mission-and-history> [<https://perma.cc/QT7D-9Y4Z>] (last visited Oct. 5, 2019) (describing NYTWA’s mission).

<sup>111</sup> 458 U.S. 886 (1982).

<sup>112</sup> *Id.* at 892.

<sup>113</sup> *Id.* at 907 (quoting *Citizens Against Rent Control/Coal. for Fair Hous. v. Berkeley*, 454 U.S. 290, 294 (1981)).

tactics—including some picketing in support of secondary consumer boycotts—and the Supreme Court has repeatedly upheld these limitations.<sup>114</sup> This means that if the NYTWA had been a bona fide labor organization, it would have risked being sued for damages,<sup>115</sup> and the NLRB’s general counsel would have been obligated to take rapid steps to attempt to obtain an injunction against the NYTWA’s strike.<sup>116</sup> The same would have been true even if the NYTWA had changed tactics and—rather than striking—marched in front of the airport with picket signs calling on would-be passengers to boycott all flights until the Executive Order was repealed. Ironically, then, labor unions are barred from engaging in some forms of the very tactics that are probably most closely associated with them: strikes and picketing.<sup>117</sup>

The text of the NLRA’s secondary boycott provision, § 8(b)(4), is notoriously difficult to parse; the NLRB’s website calls it “mind-numbing,”<sup>118</sup> and the Supreme Court has lamented that labor law “has created no concept more elusive than that of ‘secondary’ conduct; it has drawn no lines more arbitrary, tenuous, and shifting than those separating ‘primary’ from ‘secondary’ activities.”<sup>119</sup> However, at bottom, § 8(b)(4) covers labor organizations’ use of two tactics: first, secondary strikes, as well as behavior that “induce[s] or encourage[s]” the employees of a neutral employer to strike; and second, other activity that “threaten[s], coerce[s], or restrain[s]

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<sup>114</sup> See, e.g., *Int’l Longshoremen’s Ass’n v. Allied Int’l, Inc.*, 456 U.S. 212, 227 (1982) (upholding application of labor law’s prohibition on secondary strikes to a protest of the Russian invasion of Afghanistan); *NLRB v. Retail Store Emps. Union, Local 1001*, 447 U.S. 607, 616 (1980) (holding that the prohibition on secondary activity covers picketing in support of a consumer boycott of a struck product when the picketing occurs in front of a neutral employer whose business mainly consists of selling the struck product). Many scholars have highlighted the Supreme Court’s treatment of labor unions as compared to other types of advocacy groups in First Amendment cases involving boycotts and picketing. See, e.g., Marion Crain & John Inazu, *Re-Assembling Labor*, 2015 U. ILL. L. REV. 1791, 1797-99 (2015) (discussing the connection between the First Amendment’s right of assembly and contemporary protections for labor unionism); Charlotte Garden, *Citizens, United & Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 17 (2011) (arguing that *Citizens United* undermined limits on First Amendment protection applicable to labor-related speech, such as picketing, boycotting, and striking); James G. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189, 191 (1984) (exploring the doctrinal structure underlying restrictions on the First Amendment protections for labor unions); Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938, 938 (1982) (arguing that “consumer picketing that does not coerce the listener is expression entitled to First Amendment protection”).

<sup>115</sup> 29 U.S.C. § 187(b) (2018).

<sup>116</sup> 29 U.S.C. § 160(l) (2018).

<sup>117</sup> The following discussion focuses mainly on § 8(b)(4) of the NLRA, which prohibits certain secondary striking and picketing. It also briefly discusses § 8(b)(7), which prohibits certain “recognitional” picketing, which urges an employer to recognize a union as the lawful representative of its employees. 29 U.S.C. § 158(b)(7) (2018).

<sup>118</sup> *Secondary Boycotts (Section 8(b)(4))*, NLRB, <https://www.nlr.gov/rights-we-protect/whats-law/unions/secondary-boycotts-section-8b4> [<https://perma.cc/R63F-4LLN>] (last visited Oct. 16, 2019).

<sup>119</sup> *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 386-87 (1969).

any [neutral] person engaged in commerce.”<sup>120</sup> It then links those tactics to four prohibited goals: forcing an employer to join a union or promise not to handle struck goods; forcing any person to stop doing business with anyone else; forcing an employer to bargain with a union when another union has already been certified as the representative of the employer’s employees; and forcing an employer to assign work to employees belonging to a certain union.<sup>121</sup> (The second of these goals—forcing a person to cease doing business with someone else<sup>122</sup>—is the most important for the remainder of this section.)

Putting together the forbidden tactics with the forbidden goals, unions may not engage in or even encourage secondary strikes in pursuit of any prohibited goal; and they may not “threaten, coerce, or restrain” anyone engaged in commerce in pursuit of the prohibited goals. This means a union may make a polite request of a manager of a neutral business to stop doing business with a struck business, but it could not “coerce” the neutral business into dropping the struck business.<sup>123</sup> Activities that would violate the statute would include bringing a neutral’s employees out on strike, but also picketing in support of a consumer boycott of the neutral. Finally, the statute includes three “provisos,” which add the following: first, § 8(b)(4) does not reach primary strikes or picketing; second, workers may refuse to cross primary picket lines; and third, the statute does not prohibit “publicity, other than picketing” that advises the public of the existence of a labor dispute in some circumstances.<sup>124</sup>

This statutory language leaves much interpretation to the NLRB and the courts. For example, the key term “coerce” is undefined in the NLRA, so those bodies must determine when union demands that a neutral employer stop dealing with a struck employer rises to the level of coercion. Here, it is apparent from both the statutory language of the picketing proviso and the legislative history that Congress viewed at least some picketing as inherently coercive,<sup>125</sup> but what qualifies as picketing? And what about activity other

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<sup>120</sup> 29 U.S.C. § 158(b)(4).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* § 158(b)(4)(ii)(B).

<sup>123</sup> See *NLRB v. Servette, Inc.*, 377 U.S. 46, 50-51 (1964) (explaining that unions may make noncoercive appeals to managers to request that they stop doing business with a struck employer); *520 S. Mich. Ave. Assocs. v. Unite Here Local 1*, 760 F.3d 708, 733 (7th Cir. 2014) (discussing noncoercive appeals to secondary organizations to join the union’s cause).

<sup>124</sup> For a useful overview and synthesis of what qualifies as secondary activity, see generally Lesnick, *supra* note 7.

<sup>125</sup> Section 8(b)(4) refers to picketing only in its provisos, which specify that the section does not reach “any . . . primary picketing,” or “publicity, other than picketing,” that advises the public about the existence of a labor dispute. As is discussed below, this might suggest by negative implication that the statute forbids secondary picketing that advises the public of a labor dispute. Further, the legislative

than picketing, such as the common union tactic of stationing a giant inflatable rat balloon outside a neutral employer's establishment?<sup>126</sup> Further, given that § 8(b)(4) regulates speech and other expressive activity, does the First Amendment limit its application? Many of these questions remain unanswered, or only partially answered, as the next subsection discusses.

## 2. Labor Picketing, the First Amendment, and Constitutional Avoidance at the Supreme Court

Constitutional avoidance has played a significant role in how the courts have interpreted the NLRA's restrictions on union secondary activity. This subsection describes the role of constitutional avoidance in key Supreme Court cases and sets up the discussion in the next Part of how avoidance has shaped the development of labor and First Amendment law.

The Supreme Court first addressed the meaning of § 8(b)(4) and related statutory provisions in a trio of cases decided in 1951. In one of those cases, *International Brotherhood of Electrical Workers, Local 501 v. NLRB (Electrical Workers)*, a union argued that it had a First Amendment right to picket during a dispute with a construction subcontractor, even though the picketing had prompted the employees of another, neutral subcontractor, to strike.<sup>127</sup> The Court rejected that argument with little discussion, suggesting that future First

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history of the Taft-Hartley Act reveals that Congress was preoccupied with picketing in particular. *See, e.g.*, H.R. REP. NO. 80-245, at 44 (1947) (stating that “[t]here obviously is no justification for picketing a place of business at which no labor dispute exists”).

<sup>126</sup> Hassan Kanu, *Death to Scabby: Trump Labor Counsel Wants Protest Icon Deflated*, BLOOMBERGLAW (Jan. 22, 2019), <https://news.bloomberglaw.com/daily-labor-report/death-to-scabby-trump-labor-counsel-wants-protest-icon-deflated> [<https://perma.cc/ZE2X-TRCA>] (describing a case in which NLRB attorneys are arguing that deployment of an inflatable rat should be treated as picketing, or as otherwise coercive, when it is used for a secondary purpose).

<sup>127</sup> 341 U.S. 694 (1951). The Court's reasoning—that Congress was free to prohibit unions from conducting secondary strikes, and so it must also have been free to prohibit or regulate speech soliciting others to engage in that prohibited activity—was already established in another labor case. Two years earlier, the Court had upheld an injunction against a union's picketing of an ice dealer, where the union was demanding that the dealer commit an antitrust violation by refusing to sell to non-union peddlers. The Court wrote that “[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.” *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). And, although the Court has since narrowed the rule from *Giboney*, it still exists in modern free speech jurisprudence. *See generally* Eugene Volokh, *The “Speech Integral to Criminal Conduct” Exception*, 101 CORNELL L. REV. 981 (2016) (tracing the evolution of “speech integral to illegal conduct” since *Giboney*).

However, none of this is to imply that there are no situations in which § 8(b)(4) might violate the First Amendment, either on its face or when applied to speech that merely encourages neutral employees to strike. *Cf. United States v. Sineneng-Smith*, 910 F.3d 461, 467-68 (9th Cir. 2018), *cert. granted*, 2019 WL 4889927 (Oct. 4, 2019) (holding that a criminal statute covering any person who “encourages or induces an alien to come to, enter, or reside in the United States” was “overbroad in violation of the First Amendment”). I am grateful to Jessica Rutter for alerting me to the *Sineneng-Smith* case.

Amendment challenges to § 8(b)(4) would be equally fruitless: “The substantive evil condemned by Congress in § 8(b)(4) is the secondary boycott and we recently have recognized the constitutional right of states to proscribe picketing in furtherance of comparably unlawful objectives.”<sup>128</sup> To be clear, the Court’s reference to “secondary boycotts” actually referred only to secondary strikes, and not consumer boycotts; when the Court decided *Electrical Workers*, § 8(b)(4) covered only secondary strikes, plus expression that encouraged or induced a secondary strike. It did not yet reach other threatening, coercive, or restraining behavior, including (some) calls for secondary consumer boycotts. That consumer-facing conduct was not made an unfair labor practice until § 8(b)(4) was amended in 1959, and it is this conduct with which many of the other cases discussed in this subsection have been concerned.<sup>129</sup>

*Electrical Workers* was the first Supreme Court case to hold that § 8(b)(4) did not violate the First Amendment. However, constitutional questions about NLRA restrictions on union speech remained. The Court first used constitutional avoidance to answer one of these questions—construing the NLRA as it relates to picketing—in the 1960 case, *NLRB v. Drivers Local Union 639 (Drivers)*.<sup>130</sup> The issue in *Drivers* was whether a union’s peaceful picketing demanding that an employer recognize the union as its employees’ representative coerced non-union employees in violation of their NLRA right to engage in or refrain from protected concerted activity.<sup>131</sup> Holding that it did not, Justice Brennan advanced a method of reading the NLRA that was informed by constitutional concerns. Though he did not use the words “First Amendment” or “constitutional avoidance” anywhere in the opinion, Justice Brennan began by observing that unions had a “right” to “use all lawful propaganda to enlarge their membership.”<sup>132</sup> He then described an approach in which courts would construe § 8(b)(4) narrowly, guided by its legislative history: “[i]n the sensitive area of peaceful picketing Congress has dealt explicitly with isolated evils which experience has established flow from such picketing.”<sup>133</sup> Moreover, Justice Brennan noted that although Congress had

<sup>128</sup> *Electrical Workers*, 341 U.S. at 705.

<sup>129</sup> Labor-Management Relations Act, ch. 120, sec. 101, § 8(b)(4), 61 Stat. 140–141 (1947) (codified at 29 U.S.C. § 158(b)(4) (1959)).

<sup>130</sup> 362 U.S. 274 (1960).

<sup>131</sup> *Id.* at 275; see also 29 U.S.C. § 158(b)(1) (2018) (making it an unfair labor practice for a union to “restrain or coerce” employees in the exercise of their right to engage in protected concerted activity). Section 8(b)(7), which places a set of limits on unions’ recognitional picketing, was enacted after the events giving rise to *Drivers* occurred.

<sup>132</sup> 362 U.S. at 279 (quoting *Am. Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921)); see also Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. EMP. & LAB. L. 277, 294–95 (2015) (describing Justice Brennan’s opinion in *Drivers* as “an encomium to the long history of constitutional protection of a right in unions to use all lawful propaganda to enlarge their membership”).

<sup>133</sup> *Drivers*, 362 U.S. at 284.

prohibited certain strikes and boycotts, it had also explicitly protected primary strikes.<sup>134</sup> These features of the NLRA, Justice Brennan concluded, meant that courts and the Board should not interfere with peaceful labor picketing “unless there is the clearest indication in the legislative history” of congressional desire to outlaw the particular tactic.<sup>135</sup>

Justice Brennan’s legislative history and constitutional avoidance-driven approach to construing NLRA picketing restrictions soon reappeared, this time in a § 8(b)(4) case. In *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (“Tree Fruits”)*,<sup>136</sup> the Court considered whether § 8(b)(4) prohibited union picketing in support of a call for consumers not to buy a specific product (struck Washington state apples) when shopping at the grocery store, where the union was clear that it was not calling for a boycott of the store as a whole.<sup>137</sup>

The NLRB’s view was that even this limited conduct qualified as threatening, coercive, or restraining, in violation of § 8(b)(4)(ii)(B).<sup>138</sup> The agency’s reasoning was only one paragraph long, and did not discuss why this was so; instead, the Board seemed to assume that union picketing was necessarily coercive, and instead considered it necessary to analyze only whether the union had a prohibited goal.<sup>139</sup>

Before the Supreme Court, the Board (through Solicitor General Archibald Cox) made that argument explicit, urging that picketing was inherently coercive under the Court’s own cases.<sup>140</sup> This was a reasonable enough position, considering that in *Hughes v. Superior Court*, the Supreme Court had written that “the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication.”<sup>141</sup> In *Hughes*, the Court upheld a state court injunction against picketers calling for a consumer boycott of a department store that refused to hire African American employees in numbers that reflected local demographics, reasoning that picketing was fundamentally different than other modes of communication because it was not

<sup>134</sup> *Id.* at 281 & n.9.

<sup>135</sup> *Id.* at 284.

<sup>136</sup> 377 U.S. 58 (1964).

<sup>137</sup> *Id.* at 59-60. The Court treated the sandwich boards, worn by union members at Safeway stores in Seattle, WA, as pickets. They read “To the Consumer: Non-Union Washington State apples are being sold at this store. Please do not purchase such apples. Thank you. Teamsters Local 760, Yakima, Washington.” *Id.* at 60 n.3.

<sup>138</sup> *Fruit & Vegetable Packers, Local 760*, 132 N.L.R.B. N1172, N1177-78 (1961).

<sup>139</sup> *Id.* (concluding that “[t]he natural and foreseeable result of such picketing, if successful, would be to force or require Safeway to reduce or to discontinue altogether its purchases of such apples from the struck employers”).

<sup>140</sup> Brief of Petitioner-Appellant at 7-8, *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58 (1964) (No. 88), 1963 WL 105942, at \*7-8.

<sup>141</sup> 339 U.S. 460, 465 (1950).

merely an “appeal to reason.”<sup>142</sup> Instead, the Court implied, the protestors’ picket line would prompt unthinking responses, whether driven by labor solidarity, embarrassment, or conflict aversion. Beyond that, the Board’s other argument at the Supreme Court focused on the language of § 8(b)(4)’s publicity proviso, which protects “publicity, other than picketing” that advises the public of a labor dispute.<sup>143</sup> It reasoned that the negative implication of that language—particularly when coupled with the Court’s own view about the nature of picketing—was that picketing that advised the public of a labor dispute was prohibited.

However, the Supreme Court’s decision in *Tree Fruits* did not closely track either of these arguments. Justice Brennan’s opinion for the majority acknowledged that the union’s conduct likely fell “literally within the statutory prohibition.”<sup>144</sup> However, citing potential First Amendment concerns, Justice Brennan then applied something approaching a clear statement rule, seeking specific confirmation from the relevant legislative history that Congress intended § 8(b)(4) to reach product-specific picketing in support of a consumer boycott.<sup>145</sup> The majority suggested this approach had been directed by Congress—here, the Court quoted the “isolated evils” language from *Drivers*—reasoning that “[b]oth the congressional policy [of targeting picketing restrictions narrowly] and our adherence to this principle of interpretation reflect concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment.”<sup>146</sup> Then, upon finding that the legislative history was silent or ambiguous, the Court held that picketing in support of a consumer boycott of a struck product was not categorically prohibited.<sup>147</sup>

The Court’s focus on legislative history meant that it did not revisit *Hughes*’s approach to analyzing First Amendment protections for picketing, and its opinion gave no hint whether Congress could choose to outlaw picketing in support of a product boycott. In fact, the majority opinion hardly discussed the First Amendment at all, beyond observing that constitutional questions existed in the case.<sup>148</sup> This fact stands out when one considers the other opinions in the case: a concurrence by Justice Black concluding that the union’s conduct did violate the statute, but that the statute violated the First Amendment; and a dissent by Justice Harlan concluding both that the union’s

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<sup>142</sup> *Id.* at 468.

<sup>143</sup> Brief of Petitioner-Appellants, *supra* note 140, at \*8-9.

<sup>144</sup> *NLRB v. Tree Fruits*, 377 U.S. 58, 71 (1964).

<sup>145</sup> *Id.* at 63.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 71-72.

<sup>148</sup> *Id.* at 63 (suggesting a “broad ban against peaceful picketing” may conflict with First Amendment guarantees).

conduct violated the statute, and that the statute was constitutional based on the Court's previous decisions upholding restrictions on picketing.

The *Tree Fruits* Court did not say union picketing in support of a struck product boycott could *never* qualify as coercive—indeed, the question of how to assess whether union conduct coerced a neutral business received little attention at all in light of the Court's legislative history-driven approach. But, nearly fifteen years later, that issue reached the Court in *NLRB v. Retail Store Employees Union, Local 1001* (“*Safeco*”).<sup>149</sup> *Safeco* involved a fact pattern that was very similar to *Tree Fruits*, except that whereas the struck apples in *Tree Fruits* constituted a tiny fraction of Safeway's business, the struck product in *Safeco* (Safeco title insurance policies) constituted “substantially all” of the business of one of the picketed title companies.<sup>150</sup>

This time, the majority did not look for a clear indication in the legislative history that Congress intended to reach this type of picketing. Instead, it focused on the potential harm to the neutral employer, reasoning that “[p]roduct picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss simply does not square with the language or the purpose” of § 8(b)(4).<sup>151</sup> This conclusion required the Court to confront the First Amendment question directly, resulting in agreement by six Justices that the statute did not violate the First Amendment, but without a controlling opinion.

Justice Powell's opinion involved avoidance creep, but not in the same way that *Abood* did. Writing for himself and three justices, Justice Powell relied primarily on *Tree Fruits*, claiming that it “left no doubt that Congress may prohibit secondary picketing calculated ‘to persuade the customers of the secondary employer to cease trading with him . . . .’”<sup>152</sup> (He also cited *Electrical Workers*, which, as discussed above, concerned picketing related to a secondary strike rather than a consumer boycott, and two cases upholding picketing restrictions based on the reasoning that picketing was fundamentally different from other forms of expression.<sup>153</sup>) But, of course, Justice Powell's reading of *Tree Fruits* was wrong: that case did not hold that § 8(b)(4) was consistent with the First Amendment; instead, it bracketed that question by reading the statute not to cover certain consumer-facing picketing.

Justice Blackmun concurred, writing that he was “reluctant to hold unconstitutional Congress' striking of the delicate balance” between union

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<sup>149</sup> 447 U.S. 607 (1980).

<sup>150</sup> *Id.* at 609-10.

<sup>151</sup> *Id.* at 614-15.

<sup>152</sup> *Id.* at 616 (citing *Tree Fruits*, 377 U.S. at 63).

<sup>153</sup> *Id.* (citing *Am. Radio Ass'n v. Mobile S.S. Ass'n*, 419 U.S. 215, 229-31 (1974); *Teamsters v. Vogt, Inc.*, 354 U.S. 284 (1957)).



expression and neutral employers.<sup>154</sup> And Justice Stevens gave a full-throated defense of the *Hughes* view of picketing, writing that “[t]he statutory ban in this case affects only that aspect of the union’s efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea.”<sup>155</sup>

After *Tree Fruits* and *Safeco*, unions may picket a neutral company in support of a consumer boycott of a struck product—but only if the product doesn’t comprise too large an amount of the neutral’s business. What qualifies as too large is unclear—the answer falls somewhere between “a *de minimis* amount” and “substantially all.”<sup>156</sup>

The *Tree Fruits/Safeco* rule is specific to picketing, but several years after *Safeco*, the Supreme Court decided a case about handbilling; again, constitutional avoidance was key to the outcome. In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*,<sup>157</sup> the Court considered whether § 8(b)(4) prohibited a building trades union from distributing handbills to mall customers asking them to boycott the entire mall in reaction to a department store’s decision to employ non-union contractors. In addition, the handbills made a case for why consumers should boycott: the contractor paid sub-standard wages, and this failure to adhere to area standards would ultimately hurt the community as a whole by driving down wages and purchasing power.<sup>158</sup>

Thus, the question was whether this consumer handbilling coerced or restrained the mall or its tenants, who would in turn be forced to pressure the department store to fire the non-union contractor. Two years after *Claiborne Hardware*, the NLRB held that “the statute’s literal language and the applicable case law require that we find a violation,” because calls for secondary consumer boycotts “constitute ‘economic retaliation’ and are therefore a form of coercion.”<sup>159</sup> The agency refused to consider the union’s First Amendment defense (and apparently did not view the First Amendment as a reason to construe the statute narrowly) because “as a

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<sup>154</sup> *Id.* at 617 (Blackmun, J., concurring).

<sup>155</sup> *Id.* at 619 (Stevens, J., concurring).

<sup>156</sup> The difficulty of applying *Tree Fruits* and *Safeco* is illustrated by cases involving the “merged product rule.” For example, when a union picketed a restaurant that sold struck bread, the NLRB concluded that the picketing fell on the *Safeco* side of the line because the bread “had become so integrated into the food served that to cease purchasing [it] would almost amount to customers stopping all trade with the secondary employer.” *Am. Bread Co. v. NLRB*, 411 F.2d 147, 154 (6th Cir. 1969); see also *Kroger Co. v. NLRB*, 647 F.2d 634, 636 (6th Cir. 1980) (denying enforcement to Board decision that the union was covered by the *Tree Fruits* exception when it asked grocery store customers to refrain from using struck paper bags, because “[w]e are also unable to find evidence in the record that any other meaningful alternatives to paper bags exist”).

<sup>157</sup> 485 U.S. 568 (1988).

<sup>158</sup> *Id.* at 570-71.

<sup>159</sup> *Fla. Bldg. Trades Council*, 273 N.L.R.B. 1431, 1432 & n.6 (1985).

congressionally created administrative agency, we will presume the constitutionality of the Act we administer.”<sup>160</sup>

The Supreme Court reversed the Board. It began by observing that a (potential) prohibition on handbilling raises First Amendment concerns: “Had the union simply been leafleting the public generally . . . there is little doubt that the legislative proscription of such leaflets would pose a substantial issue of validity under the First Amendment.”<sup>161</sup> Although more substantial than the discussion in *Tree Fruits*, the Court’s discussion of the First Amendment issues in the case was still quite circumscribed. In fact, it was limited to about one-and-one-half paragraphs, the bulk of which went as follows:

That a labor union is the leafletter and that a labor dispute was involved does not foreclose this [First Amendment] analysis. We do not suggest that communications by labor unions are never of the commercial speech variety and thereby entitled to a lesser degree of constitutional protection. The handbills involved here, however, do not appear to be typical commercial speech such as advertising the price of a product or arguing its merits, for they pressed the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace. Of course, commercial speech itself is protected by the First Amendment . . . however these handbills are to be classified, the Court of Appeals was plainly correct in holding that the Board’s construction would require deciding serious constitutional issues.<sup>162</sup>

Reading that paragraph, one would be left with, at minimum, the following questions. First, are there any situations where the fact that a labor union is the speaker makes a difference to the First Amendment analysis? Second, if so, what are they, and in which direction does the difference run? Third, when, if ever, is union speech commercial speech? Fourth, is an “area standards” campaign atypical commercial speech, political speech, or something else entirely? Fifth, if something else, then what, and does that category receive greater or lesser protection than typical commercial speech?

The *DeBartolo* Court offered no answers. Instead, it pivoted to statutory analysis: “we must independently inquire whether there is another interpretation, not raising these serious constitutional concerns.”<sup>163</sup> One of the most important words in that sentence turns out to be “independently”—as a result of its decision to apply constitutional avoidance, the Court dispensed with *Chevron* deference, which it acknowledged would ordinarily

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<sup>160</sup> *Id.* at 1432.

<sup>161</sup> *DeBartolo*, 485 U.S. at 576.

<sup>162</sup> *Id.* at 576.

<sup>163</sup> *Id.* at 577.

apply.<sup>164</sup> (As is discussed in more detail below, the principle that constitutional avoidance trumps *Chevron* is a major legacy of *DeBartolo*.)

Having decided to interpret 8(b)(4) *de novo*, the Court again cited *NLRB v. Drivers* for the proposition that the “clearest indication in the legislative history” was required to adopt a reading of § 8(b)(4) that would raise constitutional questions.<sup>165</sup> Not finding any such indication, the Court concluded that the “section is open to a construction that obviates deciding whether a congressional prohibition of handbilling on the facts of this case would violate the First Amendment.”<sup>166</sup>

*DeBartolo* is the Supreme Court’s most recent word on the scope of § 8(b)(4). The next Part explains how *DeBartolo*, along with *Tree Fruits* and *Safeco*, effectively maintain what are likely unconstitutional limits on unions’ rights to protest.

### III. THE HARMS OF AVOIDANCE CREEP IN LABOR LAW

This Part draws on the labor law examples from Part II to demonstrate that, in many instances, constitutional avoidance not only fails to work as advertised, but has the opposite of its intended effect. Constitutional avoidance is supposed to protect constitutional rights and norms, promote reasoned development of law in Congress, agencies, and the courts, and preserve congressional authority. But sometimes it degrades constitutional rights, stymies the development of law, and effectively erodes congressional and agency authority.

This Part begins by discussing the real-world consequences of constitutional avoidance for both labor law and constitutional law and then closes by discussing the extent to which the avoidance decisions discussed in the previous Part comport either with Congress’s expectations or desires, or with the alternative accounts of constitutional avoidance discussed in Part I.

#### A. Constitutional Avoidance’s Effects on Labor Law

The previous Part showed how the law of union fees and the law of secondary activity each reflect avoidance creep; this Section discusses some practical consequences of that creep for labor unions, and doctrinal consequences for labor law.

In the context of private sector union dues and fees, the avoidance creep story is straightforward: if not for the Court’s holding in *Street*, the Court

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<sup>164</sup> *Id.* at 574-75.

<sup>165</sup> *Id.* at 577 (quoting *NLRB v. Drivers*, 362 U.S. 274, 284 (1960)).

<sup>166</sup> *Id.* at 577-78.

almost certainly would not have decided *Beck* as it did.<sup>167</sup> And it is at least possible (though not certain) that the outcome in *Abood* and later public sector union dues cases also would have been different without *Street*; at minimum, *Abood*'s reasoning would have been different. For example, even if the *Abood* Court had still decided that compelled subsidization of speech by a private entity implicates the First Amendment, it presumably would have offered a more thorough explanation for that conclusion if it had not relied so heavily on *Street*.

That means even if we set aside the public sector, avoidance has had some effect on union operations. Unions get most of their revenue from dues, but *Beck* means that represented workers can be required to pay only the costs of union representation, and not the union's other activities. As a result, some unions engage in costly "internal organizing" to convince represented workers that they should voluntarily pay more than is required, and support union activities such as organizing new workplaces and engaging in the political arena.<sup>168</sup> Likewise, unions must implement a set of detailed procedures designed to ensure that represented workers' fees are not used for impermissible purposes.<sup>169</sup>

Perhaps these results are desirable from a policy perspective. For example, some union supporters lauded as necessary to revitalizing the labor movement the "internal organizing" that public sector unions undertook in the lead-up to the Supreme Court's *Janus* decision.<sup>170</sup> Although not celebrating *Janus* itself, these commentators saw *Janus* as the impetus for unions to do something that they should have been doing all along—but that some neglected while represented workers could be required to pay agency fees. Still, it is likely that an effect of *Beck* was to decrease private sector unions' political muscle, with consequences for both unions themselves and the political landscape.<sup>171</sup>

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<sup>167</sup> *Supra* subsection II.A.2.

<sup>168</sup> See *United Nurses and Allied Prof'ls (Kent Hosp.)*, 367 N.L.R.B. No. 94, at 1 (2019) (holding that represented workers could not be required to pay for union lobbying on bills related to represented workers' working conditions).

<sup>169</sup> See *Cal. Saw & Knife Works*, 320 N.L.R.B. 224, 233 (1995) (holding that unions must provide represented workers with information about how agency fees were calculated and what activities they fund, and a process to challenge that calculation).

<sup>170</sup> E.g., Gabriel Winant, *Will 'Janus' Prove to Be the Fatal Blow That Unions Have Long Feared?*, THE NATION (June 27, 2018), <https://www.thenation.com/article/will-janus-prove-fatal-blow-unions-long-feared/> [<https://perma.cc/6LCB-AZ9D>].

<sup>171</sup> It is beyond the scope of this paper to speculate about exactly how the country would be different if private sector unions could require represented workers to pay full dues. But research by a trio of political scientists shows that an effect of right-to-work laws (which prohibit unions from collecting any dues or fees) depress the vote for Democratic Party candidates in presidential elections. See James Feigenbaum, Alex Hertel-Fernandez & Vanessa Williamson, *From the Bargaining Table to the Ballot Box: Political Effects of Right to Work Laws* (Nat'l Bureau of Econ. Research, Working Paper No. 24259, 2018),

The story about secondary activity is more complicated, and requires teasing apart separate aspects of the Court's use of avoidance. One might assume there is little daylight between an outcome that rests on avoidance, and an outcome that rests on the Constitution in cases like *Tree Fruits* and *DeBartolo*. Particularly for readers who prefer the outcomes in those cases, perhaps the Court's use of avoidance will seem like a neutral-to-positive development. That reasoning has some force—but a more complete picture suggests that avoidance creep stemming from these decisions has prevented labor law from keeping pace with either developing First Amendment law or the on-the-ground reality of union picketing and other secondary activity.

Unlike the next subsection, which discusses how constitutional law might have developed differently if not for the Court's reliance on avoidance, this Part mostly avoids counterfactuals and tries to isolate the real-world consequences of the Supreme Court's use of avoidance in *Tree Fruits* and *DeBartolo*. Those consequences come from two aspects of avoidance: first, avoidance decisions are usually sparsely explained; and second, avoidance displaces the deference that courts would usually give agency interpretations of ambiguous statutory terms. The result is a worst-of-both-worlds scenario in which the boundaries of the Supreme Court's decisions are left undefined, but the NLRB's ability to respond to real world developments while interpreting and applying § 8(b)(4) is also limited. In practical terms, this means a patchwork of decisions that focus on interpreting what the Supreme Court meant in *DeBartolo* and other cases, rather than on more fundamental questions about whether secondary activity really "coerces" listeners, sometimes to the detriment of union speakers.

#### 1. Avoidance Decisions in the Courts

As subsection II.B.2 discussed, the decisions in *Tree Fruits* and *DeBartolo* were narrow; they did not announce broadly applicable principles for deciding secondary activity cases. The Court's explanations of the outcomes in the two cases were also minimal. The latter is in part because of the nature of constitutional avoidance. At least under the traditional account of avoidance, it is a virtue for a court to give only a brief—one might say cursory—account of the avoided constitutional questions. Say too much, and

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<https://www.nber.org/papers/w24259> [<https://perma.cc/BF9B-6WK4>]; see also James Feigenbaum, Alexander Hertel-Fernandez & Vanessa Williamson, *Right-to-Work Laws Have Devastated Unions—and Democrats*, N.Y. TIMES (Mar. 8, 2018), <https://www.nytimes.com/2018/03/08/opinion/conor-lamb-unions-pennsylvania.html> [<https://perma.cc/VG6T-AZ6T>] (noting that "[w]e have quantified the electoral effects of one kind of anti-union law, commonly called 'right to work' legislation . . . . The results [of the bills] are ugly for Democrats and for the working class."). It stands to reason that reducing the amount of fees that unions can require represented workers to pay would have a similar effect, though likely to a smaller magnitude.

the Court will have defeated the stated purposes of avoidance and maybe even verged into advisory opinion territory.<sup>172</sup> But saying too little means avoidance decisions will be underdetermined, leaving more than the usual level of uncertainty about how they will apply in future cases.

There are two ways that courts might over-read avoidance decisions. In the first situation, a later court takes the fact that an earlier court avoided a constitutional question as an indication that a statute at issue is, in fact, unconstitutional. That is similar to what happened in the union dues context; it has also happened outside of labor law, and scholars have criticized the Court for using avoidance to bootstrap its way to a constitutional holding striking down a disfavored statute. The leading example here involves § 5 of the Voting Rights Act, which required certain jurisdictions to “preclear” changes to their voting practices. First, in *Northwest Austin Municipal Utility District Number One v. Holder*,<sup>173</sup> the Court engaged in “ cursory analysis” to conclude that constitutional questions called for a narrow interpretation of the statute.<sup>174</sup> Then, in *Shelby County v. Holder*,<sup>175</sup> the Court relied on the constitutional analysis from *Northwest Austin* to strike down § 5—treating *Northwest Austin* as having resolved constitutional questions instead of just raising them.<sup>176</sup>

But courts can also over-read avoidance decisions in the opposite way—by treating an avoided question as evidence that the underlying statute is constitutional. This is what happened in *Safeco*, when Justice Powell cited *Tree Fruits* for the proposition that 8(b)(4) is constitutional.<sup>177</sup> And this example is not isolated; circuit courts have made the same mistake by treating *DeBartolo* as dispositive that 8(b)(4) is constitutional as applied to secondary activity other than handbilling.<sup>178</sup> These decisions treat *Tree Fruits* and

<sup>172</sup> See Fish, *supra* note 2, at 1283 (stating that the “principal justification for the shift to modern avoidance was that it prevents a court from issuing advisory opinions”).

<sup>173</sup> 557 U.S. 193 (2009).

<sup>174</sup> Katyal & Schmidt, *supra* note 12, at 2133.

<sup>175</sup> 570 U.S. 529 (2013).

<sup>176</sup> *Id.* at 2135 (writing that in *Shelby County*, the Court’s reasoning from *Northwest Austin* reached “full flower”); see also Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 722-23 (2014) (noting that “[t]he structure of the *Shelby County* majority opinion mirrors the constitutional portion of the [*Northwest Austin*] decision, in essence, treating [*Northwest Austin*] as though it offered binding holdings on the constitutional questions rather than merely raising the constitutional doubts about the statute for purposes of applying the avoidance canon.”).

<sup>177</sup> *NLRB v. Retail Store Emps. Union, Local 1001*, 447 U.S. 607, 616 (1980).

<sup>178</sup> See, e.g., *Kentov v. Sheet Metal Workers’ Int’l Ass’n Local 15*, 418 F.3d 1259, 1265 (11th Cir. 2005) (“*DeBartolo* reaffirmed longstanding Supreme Court precedent that the Board can regulate union secondary picketing under Section 8(b)(4)(ii)(B) without implicating the First Amendment.”); *Warshawsky & Co. v. NLRB*, 182 F.3d 948, 953 (D.C. Cir. 1999) (“The obvious implication of *DeBartolo*, consistent with the Court’s prior precedent, is that an appeal limited to employees of a neutral employer which reasonably could be found to be an inducement to engage in a secondary strike is quite another matter; it does not raise any constitutional problems.”).

*DeBartolo* as though they delineate the full scope of the constitutional protection for secondary activity, rather than holding that § 8(b)(4) does not cover at least some factual scenarios.

Additionally, *DeBartolo* stands for the proposition that constitutional avoidance displaces *Chevron* deference because agencies do not have particular expertise in constitutional interpretation.<sup>179</sup> (For the same reason, courts do not defer to agencies' interpretation or application of court decisions, even when those decisions concern a statute the agency administers.<sup>180</sup>) In other words, where ambiguous statutory language implicates constitutional questions—such as whether particular union conduct is “coercive” under the statute—courts need not defer to agency expertise in interpreting that language. This leads to troubling consequences in the § 8(b)(4) context: to the extent the statutory language is not unconstitutional, it calls out for expert interpretation in light of changing circumstances.<sup>181</sup> But courts will often review the Board's § 8(b)(4) decisions *de novo* because they could implicate constitutional questions—which, as the following paragraphs detail, can give the NLRB an incentive to decide § 8(b)(4) cases using methods of statutory interpretation that are familiar to courts rather than applying substantive expertise.

To see how this cycle arises, consider two circuit court decisions arising out of the same union activity: staging a mock funeral procession outside a hospital, accompanied by union handbilling, which the hospital argued (and the NLRB agreed) violated § 8(b)(4).<sup>182</sup> The hospital was a secondary target; the primaries were two companies that used non-union labor for a construction project at the hospital.<sup>183</sup> A district court temporarily enjoined the union's activity, and the union appealed to the Eleventh Circuit.<sup>184</sup> Arguing against the injunction, the union relied in part on *DeBartolo* to argue that the injunction should be reversed if the court thought that continuing it might violate the union's First Amendment rights.<sup>185</sup>

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<sup>179</sup> *Edward J. DeBartolo Corp v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988).

<sup>180</sup> *E.g.*, *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (2002) (holding that the NLRB is not entitled to deference where “[t]he application of *Catholic Bishop* to the facts of th[e] case is thus an interpretation of precedent, rather than a statute”).

<sup>181</sup> A study by Professor James J. Brudney reflects that courts frequently overturn NLRB decisions despite *Chevron*. James J. Brudney, *Chevron and Skidmore in the Workplace: Unhappy Together*, 83 *FORDHAM L. REV.* 497, 498 (2014). This finding suggests that constitutional avoidance is not the only obstacle to judicial deference to NLRB decisions.

<sup>182</sup> *Kentov*, 418 F.3d at 1261-62.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 1264.

From the perspective of contemporary First Amendment law, the union's argument had considerable force. After all, the injunction was a prior restraint against protest activity taking place on a public sidewalk, in compliance with state and local law; moreover, § 8(b)(4) is in relevant part content, speaker, and even viewpoint discriminatory. And the union's activities were peaceful; as the D.C. Circuit noted during the next stage of the litigation, the protestors did not even jaywalk.<sup>186</sup> In other words, the argument that it would be unconstitutional to treat the union's conduct as an unfair labor practice is as near a slam-dunk as any First Amendment argument could be. Yet, the Eleventh Circuit upheld the injunction—and it did so mainly based on *DeBartolo*.<sup>187</sup> The Eleventh Circuit took the fact that *DeBartolo* “carefully distinguished peaceful expressive handbilling from picketing and patrolling” as an indication that the decision “reaffirmed longstanding Supreme Court precedent that the Board can regulate union secondary picketing” under § 8(b)(4).<sup>188</sup> Then, the Eleventh Circuit reasoned that the mock funeral was similar to “picketing and patrolling,” basing that conclusion entirely on reasoning by analogy to *DeBartolo*, rather than on any empirical analysis of the attributes or effects of picketing as compared to mock funerals.<sup>189</sup> Thus, for the Eleventh Circuit, the injunction not only did not violate the union's First Amendment rights, it did not even raise constitutional questions to be avoided.<sup>190</sup>

Later, the NLRB concluded the mock funeral did violate § 8(b)(4), employing similar reasoning to the Eleventh Circuit to find that the mock funeral was tantamount to coercive picketing,<sup>191</sup> and the union appealed to the DC Circuit.<sup>192</sup> This time, the union succeeded, largely because the court went beyond *DeBartolo* to consider other First Amendment caselaw. First, the court (correctly) observed that neither *Safeco* nor *DeBartolo* addressed street theater, which the court thought was “neither picketing nor handbilling but has elements of each.”<sup>193</sup> Crucially, the court then turned to whether the mock funeral was “coercive,”<sup>194</sup> writing “[t]hat question must be answered consistent with developments in the Supreme Court's [F]irst [A]mendment jurisprudence.”<sup>195</sup> As one would expect, once the Court juxtaposed the union's orderly mock funeral with abortion clinic protests, or the Westboro Baptist

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<sup>186</sup> Sheet Metal Workers' Int'l Ass'n, Local 15 v. NLRB, 491 F.3d 429, 439 (D.C. Cir. 2007).

<sup>187</sup> *Kentov*, 418 F.3d at 1264-67.

<sup>188</sup> *Id.* at 1264-65.

<sup>189</sup> *Id.* at 1265.

<sup>190</sup> *Id.*

<sup>191</sup> Sheet Metal Workers Int'l Ass'n, 346 N.L.R.B. 199, 206-07 (2006).

<sup>192</sup> Sheet Metal Workers' Int'l Ass'n, Local 15 v. NLRB, 491 F.3d 429, 429 (D.C. Cir. 2007).

<sup>193</sup> *Id.* at 437.

<sup>194</sup> *Id.* at 438.

<sup>195</sup> *Id.*



Church's anti-gay picketing at military funerals, it concluded that "nothing [the union] did can realistically be deemed coercive, threatening, restraining, or intimidating as those terms are ordinarily understood—quite apart, that is, from any special understanding necessary to avoid infringing upon the Union members' right of free speech."<sup>196</sup>

The difference between the two courts' approaches is key. The Eleventh Circuit overread *DeBartolo* as an affirmation that a ban on picketing and other union secondary activity (aside from handbilling) was consistent with the First Amendment. Therefore, the main question was whether a mock funeral qualified as picketing; if it did, then the court was at the end of its analysis and the union violated § 8(b)(4). But the DC Circuit correctly saw *DeBartolo* as reflecting the obvious proposition that § 8(b)(4) is in tension with the First Amendment. Accordingly, its analysis centered the application of modern First Amendment cases to the union's street theater.

Finally, it is telling that judges addressing the regulation of inflatable rats or banners *outside* of the § 8(b)(4) context—unencumbered by *DeBartolo* and the rest of the Court's § 8(b)(4) decisions—seem to find the issue far more straightforward than either the *Kentov* or the *Sheet Metal Workers* courts. For example, Judge Posner recently wrote that "[t]here is no doubt that the large inflated rubber rats widely used by labor unions to dramatize their struggles with employers are forms of expression protected by the First Amendment."<sup>197</sup> Then, he continued: "The rats are the traditional union picketers' signs writ large."<sup>198</sup> But for Judge Posner, the analogy between picket signs and rats was—rightly—a reason to find that application of a municipal sign code to Scabby the rat was *inconsistent* with the First Amendment, whereas the opposite is true in the NLRB context—in part because of Justice Powell's reading of *Tree Fruits* in *Safeco*. The Sixth Circuit easily reached the same conclusion in a similar case involving application of another sign code to another rat balloon.<sup>199</sup>

None of this is meant to suggest that courts *always* overread avoidance decisions—the DC Circuit's careful handling of *DeBartolo* in *Sheet Metal Workers* is proof to the contrary. But there are enough examples in which courts *do* overread avoidance decisions that we should ask why. One likely culprit is mentioned above—courts that base their rulings on avoidance tend to write short opinions that are light on explanation. Later lawyers, agencies, and judges attempting to interpret and apply these decisions will be able to

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<sup>196</sup> *Id.* at 439.

<sup>197</sup> *Constr. & Gen. Laborers' Local Union No. 33 v. Town of Grand Chute*, 834 F.3d 745, 751 (7th Cir. 2016) (Posner, J., concurring and dissenting).

<sup>198</sup> *Id.*

<sup>199</sup> *Tucker v. City of Fairfield*, 398 F.3d 457, 462 (6th Cir. 2005).

wring a range of conflicting principles from them, resulting in a pro-union speech opinion like *DeBartolo* being deployed to restrict union speech in later cases. One result—discussed further in Part III.C—is that even if avoidance decisions themselves are meant to preserve courts’ reputations or legitimacy, their deployment in later cases can seem capricious or results-oriented.

## 2. Avoidance Decisions at the NLRB

The same set of difficulties can arise when the NLRB attempts to apply avoidance decisions, but with the added wrinkle that avoidance limits the Board’s ability to interpret and apply ambiguous terms in the NLRA in light of changing circumstances, as it otherwise would do.<sup>200</sup> Recently, the NLRB has decided a handful of cases involving secondary union activity other than picketing, such as posting large stationary banners and inflatable rats. Again, *DeBartolo* plays a significant and unexpected role.

The NLRB is famous for policy oscillation, and majority-Democratic boards tend to interpret § 8(b)(4) narrowly, whereas majority-Republican boards interpret it more broadly. But Democratic and Republican Board members are united in their view that their respective understandings of § 8(b)(4) are required by *DeBartolo*, along with *Tree Fruits* and *Safeco*.

For example, consider a handful of decisions by the NLRB during the Obama administration about the use of stationary banners and large inflatable rats in secondary protests. First, in a case known as *Eliason & Knuth*, the Board considered a union’s placement of large stationary banners on public sidewalks, close to employers that had hired a struck construction company.<sup>201</sup> The employers argued that the banners qualified as “coercive” under § 8(b)(4), either because they constituted “pickets” that did not fall under the *Tree Fruits* exception, or because they were phrased in a manner that would lead the public to conclude (wrongly) that the union had a primary labor dispute with the secondary companies.<sup>202</sup>

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<sup>200</sup> See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (holding that where statutory language is unclear, courts should accept reasonable agency constructions); Michael C. Harper, *Judicial Control of the National Labor Relations Board’s Lawmaking in the Age of Chevron and Brand X*, 89 B.U. L. REV. 189, 213-14 (2009) (“Congress’ implicit delegation of lawmaking power through the use of ambiguous statutory language . . . requires the Board to make policy decisions, and in doing so to consider the impact on actual labor relations.”).

<sup>201</sup> *United Bhd. of Carpenters, Local Union No. 1506 (“Eliason & Knuth”)*, 355 N.L.R.B. 797, 798-99 (2010). These banners did not block the sidewalks on which they were stationed, and they displayed sentiments such as “SHAME ON [secondary employer]” and “Labor dispute.” *Id.* at 798 (alteration in original). Another banner asked the public not to patronize one of the secondary employers. Alongside the banners, the union gave out handbills that contained more detailed information about the labor dispute, and an appeal to the public arguing that the secondary companies were undermining area labor standards by hiring the construction companies.

<sup>202</sup> *Id.* at 799.

The Board rejected these arguments in a 3-2 decision that itself relied in part on constitutional avoidance, concluding that the banners were neither pickets nor coercive.<sup>203</sup> The Board discussed *DeBartolo*, and also considered post-*DeBartolo* First Amendment cases such as *Virginia v. Black*<sup>204</sup> in concluding that union members holding a banner are engaged in “actual speech or, at the very least, symbolic or expressive conduct,” meaning that the same conditions that triggered avoidance in *DeBartolo* were present in *Eliason & Knuth*.<sup>205</sup> Accordingly, the Board stated that it was possible—and therefore desirable—to read § 8(b)(4) to permit secondary consumer-facing banners because they do not necessarily “threaten, coerce, or restrain” anyone.<sup>206</sup>

For their part, the two dissenting Board members articulated a very narrow vision of either statutory or First Amendment protection for secondary union speech, reasoning that the differences between picketing and bannering were “legally insignificant,” in part because the banner in question was not very informative.<sup>207</sup> They discounted the relevance of First Amendment cases arising outside of the labor context, reasoning that the Court had authorized economic regulation that entailed “some constraints on First Amendment freedoms.”<sup>208</sup> *DeBartolo*, the dissent declared, did not “even hint[] that the Supreme Court intended to change the Board’s longstanding and flexible definition of picketing.”<sup>209</sup>

After *Eliason & Knuth*, the Board considered a series of other cases involving secondary protest tactics; many of these cases also involved banners, but a couple of them had aspects that required the Board to go beyond *Eliason & Knuth*.<sup>210</sup> In a case known as *Brandon II*,<sup>211</sup> the Board dismissed a § 8(b)(4)

<sup>203</sup> *Id.* at 801-811.

<sup>204</sup> 538 U.S. 343, 360 (2003) (holding that the burning of a cross is “symbolic expression” that could nonetheless be banned as a particularly threatening form of intimidation).

<sup>205</sup> *Eliason & Knuth*, 355 N.L.R.B. at 808-09.

<sup>206</sup> *Id.* at 810.

<sup>207</sup> The Court noted that

Clearly, both bannering *and* picketing involve elements of speech. However, the expressive element represented by the brief, obtuse, and misleading written message on a union banner—such as ‘Don’t Eat RA Sushi’ in one of the cases before us—is less than the expressive element in picket signs, usually accompanied by vocal protests, and it is certainly less than in handbills.

*Id.* at 821.

<sup>208</sup> *Id.* at 820.

<sup>209</sup> *Id.* at 818.

<sup>210</sup> See, e.g., Local Union No. 1827, United Bhd. of Carpenters, 357 N.L.R.B. 415, 416-20 (2011) (finding that, although a labor organization and a union member described an activity as “picketing,” and although the banners at issue were closer to the entrance of the employers, the activity was not unlawful picketing).

<sup>211</sup> Sheet Metal Workers Int’l Ass’n, Local 15, 356 N.L.R.B. 1290 (2011). This case involved another aspect of the same union activity that gave rise to the *Kentov* decision in the Eleventh Circuit

charge involving two tactics: the placement of a 16-foot tall inflatable rat balloon near a hospital that had hired a struck construction company; and the posting of a union member, holding at arms length a leaflet that explained the labor dispute, near the hospital's vehicle entrance.<sup>212</sup>

Reprising its approach from *Eliason & Knuth*, the Board first observed that neither the rat nor the leaflet display involved coercive violence or disruption. Accordingly, the Board went on to consider whether the rat or the display nonetheless constituted "picketing," concluding that they did not.<sup>213</sup> Then, the rat and banner display cleared the final hurdle when the Board concluded that the union's activity could not have directly caused or been expected to directly cause "disruption of the secondary's operations."<sup>214</sup> The Board also observed that its conclusion was "strongly supported by application of the 'constitutional avoidance' doctrine,"<sup>215</sup> particularly in light of the Court's then-recent decision in *Snyder v. Phelps*.<sup>216</sup> Again, the two Republican Board members dissented.<sup>217</sup>

The Board's holdings in these and other cases<sup>218</sup> that stationary banners, inflatable rats, and variations on handbilling are not "coercive" should be obvious and non-controversial. Yet each of the NLRB cases described above drew a dissent. Further, it appears that the NLRB under the Trump administration is beginning to crack down on union secondary picketing and other protest, and may soon reverse *Eliason & Knuth* and *Brandon II*.

In August 2019, the Trump NLRB decided *Preferred Building Services Inc.*,<sup>219</sup> a case about union picketing outside a San Francisco office building. The union's primary dispute was with a subcontractor hired to clean office space in the building; several cleaners working for the company alleged that they had been sexually harassed by their supervisor, that the company violated the city's paid sick leave law, and that they were underpaid.

and the *Sheet Metal Workers* decision in the DC Circuit. Neither those cases, nor the underlying Board decisions that they reviewed, addressed the issues that the *Brandon II* Board decided.

<sup>212</sup> *Id.* at 1290.

<sup>213</sup> *Id.* at 1292 (relying on the fact that neither tactic involved confrontation; they "were stationary and located at sufficient distances from the vehicle and building entrances to the hospital that visitors were not confronted by an actual or symbolic barrier as they arrived at, or departed from, the hospital," and they did not "physically or verbally accost[] hospital patrons").

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 1293.

<sup>216</sup> *Id.* (citing *Snyder v. Phelps*, 562 U.S. 443 (2011)).

<sup>217</sup> The dissent in *Brandon II* saw the inflatable rat differently, stating without citation that "[f]or pedestrians or occupants of cars passing in the shadow of a rat balloon . . . the message is unmistakably confrontational and coercive." *Id.* at 1296. Likewise, the union member holding out a leaflet also "plainly was picketing." *Id.* at 1297.

<sup>218</sup> *See, e.g.*, Sw. Reg'l Council of Carpenters, 356 N.L.R.B. 613, 614 (2011) (holding that a union banner did not violate § 8(b)(4)'s prohibition on "induc[ing] or encourage[ing]" a secondary strike where the only evidence in support of the charge was that the union posted banners and distributed handbills that would be seen by employees of the secondary employer).

<sup>219</sup> 366 N.L.R.B. No. 159 (2018).

Labor law allows union picketing of a primary employer while it is operating on the premises of another employer, but only if the union meets certain conditions.<sup>220</sup> This means that the union's picketing of the cleaning company while it was at the office building would have been allowed as long as the union took certain steps to immunize the building and its tenants from the effects of the picketing, including that the union clearly state on its picket signs that its dispute was with only the cleaning company, and the picketing was otherwise non-coercive.<sup>221</sup> The NLRB held that the union's picketing fell short of meeting these requirements: although its picket signs clearly indicated that the dispute was with the cleaning company, its leaflets "requested that [a building tenant] ensure that 'their' janitors obtain better working conditions."<sup>222</sup> Further, and as a separate basis to find that the union had engaged in unlawful secondary activity, the Board relied on the fact that the union told a building manager that it would "keep showing up [on the picket line]" until the manager influenced the cleaning company to raise wages.<sup>223</sup> The First Amendment did not appear at all in the opinion—but the Board cited *DeBartolo* for the proposition that the union's picketing violated § 8(b)(4).<sup>224</sup> This case is currently pending on appeal before the Ninth Circuit Court of Appeals.<sup>225</sup>

And the Board may go further. Reportedly at the NLRB General Counsel's direction,<sup>226</sup> an NLRB lawyer recently sought to enjoin a union from deploying an inflatable rat against a secondary employer.<sup>227</sup> In the reply brief in support of the injunction, the regional director stated bluntly that "First Amendment concerns are not implicated, inasmuch as it is settled law that the First Amendment does not shield unlawful secondary picketing"—and cited *DeBartolo* and *Safeco*.<sup>228</sup> In addition, the regional director relied on *DeBartolo* to distinguish picketing from other forms of protest.<sup>229</sup>

In one respect, these cases are illustrative of the NLRB's more general approach in § 8(b)(4) cases. As Professor Michael Oswalt put it, "instead of

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<sup>220</sup> *Sailors' Union of the Pacific*, 92 N.L.R.B. 547, 548 (1950). The conditions described in this case are generally known as the "Moore Dry Dock" requirements.

<sup>221</sup> *Id.* at 549.

<sup>222</sup> *Preferred Bldg. Servs.*, 366 N.L.R.B. No. 159 at \*5.

<sup>223</sup> *Id.* at \*2.

<sup>224</sup> *Id.* at \*6 n.20.

<sup>225</sup> *Serv. Emps. Int'l Union v. NLRB*, No. 19-70334 (9th Cir. filed Feb. 7, 2019). I am co-author of an amicus brief arguing that the Ninth Circuit should reverse the NLRB's decision.

<sup>226</sup> Kanu, *supra* note 126 (quoting a NLRB official as stating that the Board's General Counsel "hates the rat," and "wants to find it unlawful to picket, strike or handbill with the rat present").

<sup>227</sup> Petition for Preliminary Injunction Under Section 10(l) of the National Labor Relations Act at 6, *Ohr v. Int'l Union of Operating Eng'rs, Local 150*, No. 1:18-cv-08414 (N.D. Ill. Dec. 21, 2018).

<sup>228</sup> Reply in Further Support of Petition for Preliminary Injunction Under Section 10(l) of the National Labor Relations Act at 10, *Ohr*, (No. 1:18-cv-08414).

<sup>229</sup> *Id.* at 8.

measuring the coerciveness of a protest directly, analysis often centers on where conduct falls along a continuum from picketing (coercive), to ‘the functional equivalent of picketing’ (also coercive), to hand-billing . . . .”<sup>230</sup> That is, the Board and the courts often try to group cases into *DeBartolo* or not-*DeBartolo*, but this is a different question than whether the statutory language of § 8(b)(4) covers particular union activity, or whether regulation of that union activity is foreclosed by the First Amendment.<sup>231</sup>

Consider the following thought experiment: Imagine an alternate universe in which § 8(b)(4) was not thought to raise constitutional questions at all, and Supreme Court cases narrowing its application did not exist. In that scenario, the NLRB would still have to decide what union activity was encompassed within vague statutory terms like “coerce” or “encourage.” It is possible that the NLRB’s approach would still have the “I know it when I see it” ring to it that it does today.<sup>232</sup> But then again, the agency deference framework developed in *Chevron* and other cases encourages agencies to develop and deploy substantive expertise to define the scope of vague terms.<sup>233</sup> It is at least possible that the Board would have developed useful, evidence-based standards based on evolving social psychology to distinguish coercive from non-coercive labor protest,<sup>234</sup> and that courts would then have deferred to the Board’s standards.<sup>235</sup>

Importantly, those standards could also account for changed social circumstances. It may have been the case in 1947 or 1959 that some union secondary activity would make target businesses or passersby afraid for their safety, but today’s picket lines (and arguable picket-line equivalents) are nearly always calm affairs. Moreover, as Professor Catherine Fisk has explained, Congress might reasonably have viewed unions’ calls for secondary strikes as

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<sup>230</sup> Michael M. Oswalt, *The Content of Coercion*, 52 U.C. DAVIS L. REV. 1585, 1615-16 (2019).

<sup>231</sup> For example, the informational portion of the NLRB’s website informs readers that “[m]ere handbilling, without more, is not ‘picketing.’” This principle is of course traceable to *DeBartolo*. The NLRB then continues: “handbilling may constitute ‘picketing’ under certain circumstances.” *Recognitional Picketing (Section 8(b)(7))*, NLRB, <https://www.nlr.gov/rights-we-protect/whats-law/unions/recognitional-picketing-section-8b7> [<https://perma.cc/7SN4-CQGA>] (last visited Jan. 2, 2018).

<sup>232</sup> *Cf.* *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (indicating that courts had used an “I know it when I see it” approach).

<sup>233</sup> See Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2095 (1990) (discussing the importance of agency expertise in interpreting statutes); see also Note, *The Two Faces of Chevron*, 120 HARV. L. REV. 1562, 1563 (2007) (finding that “in the circuit courts, [agency] expertise plays a more central role in the deference decision”).

<sup>234</sup> For example, in *The Content of Coercion*, Professor Oswalt argues that modern emotion science suggests that coercion occurs when people feel both fear and a lack of control, and that these concepts are measurable and amenable to an objective analysis. Oswalt, *supra* note 230, at 1590.

<sup>235</sup> But see Brudney, *supra* note 181, at 498 (finding, based on empirical analysis, that in NLRB cases, “[t]he Court’s reliance on agency deference in comparison to other interpretive resources is no greater since 1984 than it was before *Chevron*”).

coercive when it was true that “[c]rossing a picket line could result in a worker losing union membership and, consequently, the ability to work in a densely unionized industry.”<sup>236</sup> But today (and for the last few decades), union density is considerably lower than it was when Congress adopted § 8(b)(4), and in any event, “[n]o worker can lawfully be prevented from working for crossing a picket line or refusing to serve picket duty.”<sup>237</sup> Instead, today’s union picket lines depend far more on the moral persuasiveness of their messages about labor standards, fair treatment, and respect at work.

In fact, the secondary boycott ban’s legislative history suggests that the measure was inspired by incidents that have little in common with stationary rat balloons, mock funerals that respect jaywalking laws, or much other activity that today risks secondary boycott liability. For example, one member of Congress who supported Taft-Hartley in 1947 cited a secondary strike that culminated with “20,000 gallons of ‘hot milk’ . . . dumped one morning in front of the city hall of Los Angeles.”<sup>238</sup> Congressman Fred Hartley, after whom Taft-Hartley was named, emphasized that the Act’s secondary boycott provisions would reach secondary boycotts that led either to very small businesses shutting down, or to violent mass picketing that resulted in “heads [being] bashed in, bones broken, and all that sort of thing . . . .”<sup>239</sup> And the 1959 amendments to § 8(b)(4) reflect that Congress’s main concerns were with “shakedown” or “blackmail” picketing, and with the influence of corrupt leadership within some unions.<sup>240</sup>

Today’s secondary boycotts are different in substance as well as form. Rather than targeting (and potentially putting out of business) very small employers, today’s unions often want to use secondary pressure to respond to workplace “fissuring,”<sup>241</sup> as *Preferred Building Services* reflects. Fissuring refers to a list of business practices that devolve responsibility for complying with labor and employment law obligations from bigger to smaller firms, such as when large and financially well-off enterprises subcontract their cleaning

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<sup>236</sup> Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2081 (2018).

<sup>237</sup> *Id.*

<sup>238</sup> 93 CONG. REC. A1295 (daily ed. Mar. 24, 1947) (extension of remarks of Rep. Landis), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 583 (1959).

<sup>239</sup> 93 CONG. REC. H3534 (daily ed. Apr. 15, 1947) (statement of Rep. Hartley), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 614 (1959).

<sup>240</sup> *E.g.*, S. REP. NO. 86-187, at 78 (1959), reprinted in 1959 U.S.C.C.A.N. 2318, 2422 (discussing the use of secondary boycotts by the Teamsters Union under the leadership of Jimmy Hoffa).

<sup>241</sup> See generally DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014).

needs to much smaller businesses.<sup>242</sup> These smaller businesses are often poorly capitalized, and they can be wholly dependent on a handful of large clients to stay operational. In this scenario, the large clients—secondary employers in labor law terms—effectively hold all the cards.<sup>243</sup>

Larger companies are also often more vulnerable to the social pressure that comes with picketing than the small employers they contract with. In these circumstances, collective action aimed at the small employer is likely to be fruitless; even if that employer is aware of and inclined to comply with labor and employment law, it will often be powerless to give employees what they want, as it is also being squeezed by its clients. In other words, pressuring a nominally secondary employer can be a union's best chance of winning better treatment for a group of employees who have had their workplace fissured.

In addition to the modern-day realities of the fissured workplace, it is worth considering the types of tactics that could violate § 8(b)(4). Whereas Congressman Hartley was apparently worried about bashed heads and broken bones, the NLRB and the courts today focus on questions such as whether union *handbilling* can violate the provision of § 8(b)(4) that covers inducing or encouraging secondary strikes,<sup>244</sup> and whether signs locked away in parked cars can qualify as picketing.<sup>245</sup> It is hard to see these questions as reflecting anything but a break between the law of secondary activity and reality: as the comedian Mitch Hedberg observed, “when someone tries to hand me out a flier, it’s kind of like they’re saying ‘here, you throw this away.’”<sup>246</sup>

A related consequence of the Board's approach to § 8(b)(4) is that it tends to center lawyers who understand the vagaries of the law of secondary boycotts, and who might intervene in workers' protests, sapping their momentum. For example, in *Preferred Building Services, Inc.*, whether or not the OJS employees were entitled to the “Moore Dry Dock” presumption apparently turned on their use of the pronoun “their”; perhaps if they had

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<sup>242</sup> *Id.* at 189-90. Fissuring also includes other business arrangements such as supply-chain management and franchising. NLRA limits on secondary activity can also affect employees' abilities to respond to working conditions that arise in these arrangements.

<sup>243</sup> Sometimes these enterprises will qualify as “joint employers” of the employees; when that is the case, strikes or pickets of the larger employer would qualify as primary activity. *See* Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. No. 186 at 1600 (2015) (discussing the scope of joint employment liability). But where the larger enterprise is a contractor or client rather than a joint employer, unions risk § 8(b)(4) liability.

<sup>244</sup> *E.g.*, Sw. Reg'l Council of Carpenters, 356 N.L.R.B. 613, 614 (2011) (addressing the question of whether displaying banners seeking to shame secondary employers constituted a violation of § 8(b)(4)).

<sup>245</sup> *Verizon New England Inc. v. NLRB*, 826 F.3d 480, 482-83 (D.C. Cir. 2016) (discussing whether signs locked in parked cars violated the “no picketing” term in the operative collective bargaining agreement).

<sup>246</sup> Mitch Hedberg, *Here, You Throw This Away*, YOUTUBE, (Aug. 6, 2013), <https://www.youtube.com/watch?v=4PNZSgVVgJo> [<https://perma.cc/QE4L-M2XM>].



requested that the building tenant take steps to ensure that “Preferred’s” janitors received higher wages, the Board would have found the presumption applied.<sup>247</sup> But this kind of post-hoc flyspecking by the NLRB chills workers’ and unions’ collective action by making it very difficult for them to predict what activities the NLRB will ultimately deem to violate § 8(b)(4).

This subsection’s focus has been on the consequences of avoidance for labor law; the next subsection turns to how constitutional avoidance in labor law may have affected the development of constitutional law.

### B. *Constitutional Avoidance’s Effects on Constitutional Law*

The Court’s reliance on constitutional avoidance in labor law cases has also had consequences for First Amendment law. This is because statutory decisions based on constitutional avoidance are generally not in conversation with constitutional decisions, so developments in one context often do not translate into the other. This subsection explores some of those consequences; it focuses mainly on union secondary activity, although it would be possible to construct a similar story regarding union dues and fees.

A result of the Court’s use of avoidance is that its § 8(b)(4) decisions tend to sit like rocks in the stream of developing First Amendment law. Of course, there are no guarantees that unions would have won if the Court had decided cases like *Tree Fruits* or *Safeco* or *Street* on constitutional grounds instead of avoidance grounds—but win or lose, constitutional decisions are routinely placed in juxtaposition with other constitutional decisions by lawyers and judges, making it less likely that labor law’s trajectory would have evolved so differently from other First Amendment contexts.

Many scholars, myself included, have argued that labor law’s ban on secondary activity is flatly inconsistent with modern First Amendment doctrine, despite the Court’s decisions in *Tree Fruits* and *DeBartolo*.<sup>248</sup> Without reprising that argument here, the inconsistency between § 8(b)(4) and the First Amendment is readily apparent in light of a series of recent (non-labor law) decisions holding that picketing and other methods of communication enjoy robust First Amendment protection.<sup>249</sup> In *Snyder v. Phelps*, eight justices agreed that the Westboro Baptist Church’s highly offensive picketing at a soldier’s funeral was pure speech at the very heart of

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<sup>247</sup> 366 N.L.R.B. No. 159 (2018); *see also supra* note 220.

<sup>248</sup> *See generally supra* note 114 and accompanying text.

<sup>249</sup> *See, e.g., McCullen v. Coakley*, 537 U.S. 464, 496-97 (2014) (holding that a Massachusetts statute that criminalized standing on a public way or sidewalk within 35 feet of an entrance to a facility where abortions were performed was unconstitutional because it burdened more speech than necessary); *Snyder v. Phelps*, 562 U.S. 443, 456 (2011) (holding that picketing at the funeral of a soldier cannot be subject to tort liability because of the First Amendment).

the First Amendment, writing that “picketing peacefully on matters of public concern . . . occupies a ‘special position in terms of First Amendment protection.’”<sup>250</sup> And in *Virginia v. Black*, the Court wrote that even cross-burning could qualify as “core political speech,” although it also allowed that states could criminalize cross burning with an intent to intimidate.<sup>251</sup>

Later, in *McCullen v. Coakley*, the Court emphasized that the government’s authority to regulate protests in traditional public fora, including sidewalks, was “very limited,” and that laws that regulated protest based on its content or viewpoint should be subject to strict scrutiny.<sup>252</sup> And in recent cases, the Court has emphasized that discrimination based on a speaker’s viewpoint, the content of a speaker’s message, or a speaker’s own identity all presumptively violate the First Amendment.<sup>253</sup> Section 8(b)(4) violates all these proscriptions,<sup>254</sup> and should therefore be held constitutional only if it can satisfy strict scrutiny—a test that a prohibition that applies to peaceful sidewalk picketing should not be able to meet.

*Snyder* and other more recent First Amendment cases generally do not cite recent labor picketing cases either in the decisions or in briefing—a fact that is unsurprising when one considers that the § 8(b)(4) cases in which the union wins are statutory cases premised on avoidance, and the § 8(b)(4) cases in which the union loses are in likely irreconcilable tension with more recent First Amendment cases. For example, neither the opinion in *Phelps* nor the opinion in *McCullen* cites any modern case about labor protest.<sup>255</sup> And I am aware of

<sup>250</sup> *Snyder*, 562 U.S. at 456 (quoting *United States v. Grace*, 461 U.S. 171, 180 (1983)).

<sup>251</sup> 538 U.S. 343, 365 (2003) (plurality opinion of O’Connor, J.).

<sup>252</sup> 573 U.S. 464, 477 (2014).

<sup>253</sup> See *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995)) (stating that speaker and viewpoint discrimination is “presumptively unconstitutional”); *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226 (2015) (“[c]ontent based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests”); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) (“In the ordinary case it is all but dispositive to conclude that a law is content based and, in practice, viewpoint discriminatory.”).

<sup>254</sup> James Gray Pope, *The First Amendment, The Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941, 950-51 (1999). Pope explains § 8(b)(4)’s viewpoint, content, and speaker discrimination with a hypothetical involving three people holding picket signs outside a store: the first two signs bear nearly identical messages, asking customers to boycott the store because it sells a toy produced by non-union labor in exploitative working conditions—but one sign is held by a union organizer, and the other by a human rights activist. The third sign, carried by a store employee, urges customers to buy the toy by advertising its low price—a price that is likely possible because of the exploitative working conditions. In this situation, only the unionist risks liability under § 8(b)(4); the human rights activist has engaged in core First Amendment activity similar to that in *Claiborne Hardware*, and the store employee’s sign is protected under the Court’s commercial speech doctrine.

<sup>255</sup> The opinion in *McCullen* quotes *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983), regarding the public forum doctrine. *Perry* concerns whether a union that does not

only one brief in either of those cases that cites labor picketing cases: the AFL-CIO's amicus brief in *McCullen* cites both *DeBartolo* and *Tree Fruits*—ironically, as an example of the “Court’s leading First Amendment decisions involv[ing] the efforts of union members to engage in . . . expressive activities.”<sup>256</sup>

One result has been the development of what I have previously called the “First Amendment of labor law,”<sup>257</sup> and Professor James Gray Pope has called the “black hole” of labor speech,<sup>258</sup> in which the following related principles hold:

- Picketing can be more strictly regulated than other types of expression, so whether a style of expression qualifies as “picketing” is a critical question in litigation.<sup>259</sup>
- Speech can be regulated when it is “coercive,” but the definition of “coercion” can include potential listener discomfort, potential marketplace losses, or the mere fact that the speech conveyed was via picket.<sup>260</sup>
- A public message that contains relatively little detail may be regulated more robustly than one that contains a lot of detail.<sup>261</sup>
- A misleading (but technically accurate) public message can be regulated more robustly than a more evenhanded one.<sup>262</sup>

Of course, it is within the Court’s power, in an appropriate case, to align the First Amendment of labor law more closely with the First Amendment as it exists elsewhere. Perhaps one reason the Court has not done this is that so many § 8(b)(4) cases are statutory cases that appear to turn on the vagaries of the location of an inflatable rat, or whether wearing a sandwich board or

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represent teachers may nonetheless distribute literature in their school mailboxes. *McCullen*, 473 U.S. at 476 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009)). The public forum doctrine traces back to a foundational First Amendment case. See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

<sup>256</sup> Brief of the Am. Fed’n of Labor and Cong. of Indus. Orgs in Support of Petitioners at 1, n.2, *McCullen v. Coakley*, 573 U.S. 464 (2014) (No. 12-1168).

<sup>257</sup> Charlotte Garden, *Citizens United and the First Amendment of Labor Law*, 43 STETSON L. REV. 571, 573 (2014); see also Garden, *supra* note 114.

<sup>258</sup> See Pope, *supra* note 114.

<sup>259</sup> Cf. *Snyder v. Phelps*, 562 U.S. 443, 456 (2011) (noting that “time, place or manner” restrictions can be placed on picketing).

<sup>260</sup> Cf. *Doe v. Reed*, 561 U.S. 186, 200-01 (2010) (holding that plaintiffs seeking to avoid forced disclosure of their signatures under the First Amendment must show specific danger of “threats, harassment, or reprisals”); *NAACP v. Claiborne Hardware*, 458 U.S. 886, 932-33 (1982) (tort liability arising from consumer boycott enforced by “watchers” and accompanied by a handful of violent incidents was inconsistent with First Amendment).

<sup>261</sup> Cf. *Snyder*, 562 U.S. at 454 (placards with messages such as “Thank God for Dead Soldiers” “plainly relate[] to broad issues of interest to society at large”).

<sup>262</sup> Cf. *United States v. Alvarez*, 567 U.S. 709, 718 (2012) (observing that there is no “general exception to the First Amendment for false statements” because “some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation”).

dressing in a rat costume is like “picketing.” These fact-bound issues would likely not meet the criteria for certiorari, especially if the Court believes the outcome in these cases was correct. Litigation strategies could also play a role, as union litigants will reasonably argue that their cases fit within the bounds of *DeBartolo* and *Tree Fruits* if such an argument is available. (Of course, unions may then make alternative arguments—such as that § 8(b)(4) should be construed not to cover that conduct in order to avoid constitutional questions.<sup>263</sup>) And if the NLRB decides a case on statutory grounds, reviewing circuit courts will often also avoid the constitutional issue by affirming on statutory grounds. These dynamics not only entrench *DeBartolo*, *Safeco*, and *Tree Fruits*, but also facilitate their creep, as litigants attempt to stretch them to reach new situations.

But is it likely that First Amendment law would be different if it included more cases involving union picketing and other secondary activity? The intuitive answer is yes: Adding these cases to the mix of First Amendment law could have shifted the path of developing First Amendment law. Research supports this intuition, as scholars have used a variety of methods that show context matters to the development of law.<sup>264</sup> So, although counterfactuals have obvious limitations, it is worth briefly considering how things might have played out if the Court had answered the First Amendment questions in cases like *Tree Fruits* or *DeBartolo* instead of avoiding them.

One possibility is that the Court would have reached the same outcome in those two cases, but for constitutional rather than statutory reasons. These decisions could have been broad, striking down § 8(b)(4) altogether, or (more likely) narrow, holding that the statute could not constitutionally be applied to the union conduct at issue in the cases. Such decisions certainly would have been significant for unions and for labor law; among other reasons, they would not be subject to the avoidance creep described above, so that *Safeco* might not have followed *Tree Fruits*. But their significance for constitutional law may have been more muted, given that such decisions likely would have been broadly consistent with a raft of other pro-speech, pro-protest First Amendment cases discussed earlier in this Part.

The more interesting possibility is the opposite one: perhaps the Court would have decided that the NLRA’s prohibitions on struck-product

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<sup>263</sup> See, e.g., Charging Party Serv. Emps. Int’l Union Local 87’s Motion for Reconsideration, Preferred Building Services, 366 N.L.R.B. No. 159 (No. 20-CA-149353).

<sup>264</sup> Leong, *supra* note 32, at 462 (arguing that “[w]hen rights-making occurs in a single context, the characteristics of that context begin to distort the law”); Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 918 (2006) (arguing with respect to common-law decisionmaking that “when we combine the lessons of at least one strand of Legal Realism with some of the lessons of modern social science, we see as well that real events, real parties, real controversies, and real consequences may have distorting effects as well as illuminating ones”).

picketing and consumer handbilling were consistent with the First Amendment. The Court's rationale in such a case would then have influenced the development of future First Amendment cases, perhaps moderating the Court's emerging deregulatory First Amendment doctrine.<sup>265</sup> It is beyond the scope of this article to construct an alternate-universe First Amendment, but one can imagine that cases like *Sorrell v. IMS Health*,<sup>266</sup> in which the Court struck down a Vermont law prohibiting the use of certain information about doctors' prescribing practices in pharmaceutical advertising, might have come out differently. In *Sorrell*, the Court wrote that Vermont's law could not survive strict scrutiny in part because the state could not prove that advertising harmed patient outcomes: "[t]hat the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers."<sup>267</sup> But § 8(b)(4) also rests on unproven predictions about how businesses and consumers might react to labor protest, and it also reflects a legislative desire to shape the marketplace. Thus, whereas I argued above that § 8(b)(4) should be struck down in light of *Sorrell* and related cases, one can also imagine a world in which Vermont's law was upheld, with the Court majority applying *Safeco* in support of its reasoning.

Whereas this Part has focused on the development of law in the courts and before the NLRB, the next section turns back to Congress, asking what the examples I have discussed so far mean for accounts of legislative intent and avoidance.

### C. Congressional Intent, Constitutional Avoidance, and Labor Law

As discussed in Part I, avoidance critics and defenders alike agree that the traditional account of avoidance—that Congress generally aims to avoid drafting statutes that raise constitutional questions—is of doubtful empirical validity. Instead, avoidance defenders offer alternative reasons to use the canon, such as Scalia and Garner's admonition that avoidance reflects a "judicial policy" that statutes "ought not . . . tread on questionable constitutional grounds unless they do so clearly . . ."<sup>268</sup> This Part discusses the extent to which the traditional or alternative accounts of avoidance fit well with the labor law examples discussed above. It concludes that they do not, and that avoidance creep worsens the fit problems.

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<sup>265</sup> John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 248-51 (2015) (describing an empirical analysis finding that the First Amendment is increasingly used by businesses for deregulatory purposes); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 133 (arguing that the "First Amendment has emerged as a powerful deregulatory engine").

<sup>266</sup> 564 U.S. 552 (2011).

<sup>267</sup> *Id.* at 578.

<sup>268</sup> SCALIA & GARNER, *supra* note 1, at 249.

## 1. In General

Avoidance defenders generally agree that the traditional account does not reflect reality,<sup>269</sup> but it is possible that the NLRA's prohibition on secondary activity is an exception. That is, in enacting and amending § 8(b)(4), Congress may have wanted the Court to interpret the statute narrowly to avoid encroaching on unions' First Amendment rights. After all, the *Drivers* Court suggested that Congress actually baked this preference into the statutory language by including in the Act § 13's limiting provision. (That provision states that “[n]othing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.”<sup>270</sup>) And in fact, that reasoning was convincing in *Drivers*, because the Court was interpreting a provision of the NLRA that did not “specifically” discuss strikes or picketing at all.<sup>271</sup> That is, the Court was right not to read the Act's general prohibition on union interference with employees' right to not engage in collective action as encompassing Congress's later enactment of a specific provision forbidding recognitional picketing. But that argument does not translate neatly to the § 8(b)(4) context, which *does* specifically address secondary activity, making it hard to see how § 13 calls for the court to read § 8(b)(4) narrowly—an issue that the *Tree Fruits* Court ignored altogether when it incorporated the *Drivers* approach.<sup>272</sup> Thus, the idea that the NLRA itself directs courts (and the Board) to interpret § 8(b)(4) narrowly seems to be a stretch at best.

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<sup>269</sup> See *supra* Part I.

<sup>270</sup> 29 U.S.C. § 163 (2018); see also *NLRB v. Drivers, Local Union No. 639*, 362 U.S. 274, 281 n.9 (1960).

<sup>271</sup> *Drivers*, 362 U.S. at 281-84.

<sup>272</sup> The legislative history of § 13 is scant, but it does not bolster the idea that § 13 reflects congressional concern that courts might read § 8(b)(4) too broadly. The House version of what ultimately became § 13 read as follows:

Except as specifically provided in this section, nothing in this Act shall be construed to diminish the right of employees to strike or to engage in other lawful concerted activities. No provision of this Act, and no order of any court issued hereunder, shall be construed to require any individual to perform labor or service without his consent.

H.R. REP. NO. 245, at 62 (1947).

The House committee report does not explain this provision, but it appears to be aimed, in part, at limiting the remedies available to neutral employers of striking employees. In contrast, the Senate version included the limiting language that was included in the final bill (specifying that Taft-Hartley did not affect “limitations or qualifications” on the right to strike), with the Senate report clarifying that § 13 was intended to “diminish[] the right to strike only to the extent specifically provided” but also to ensure that courts did not view Taft-Hartley as overriding a number of Board and Court precedents that limited employees' right to strike, including by permitting employers to permanently replace strikers. S. REP. NO. 105, at 28 (1947). The House Conference Report reflects that the conference included the Senate version of this provision in the final bill

This leaves only the alternative accounts offered by scholars to justify the use of avoidance in as-applied cases, such as that avoidance protects under-enforced constitutional norms, or preserves judicial legitimacy in charged cases.<sup>273</sup> These benefits are real in some types of cases—but context matters, and these rationales are not convincing in the labor-picketing context. For example, Ernest Young writes that “resistance norms” are appropriate in cases that “are plagued by line-drawing problems” and that arise in “fields in which we can expect *political* safeguards to play the primary role in protecting the underlying constitutional values.”<sup>274</sup> It goes nearly without saying that First Amendment issues—including both union picketing and agency fees—will fall squarely outside these guidelines. And, in contrast to Cold War-era cases concerning members of the Communist Party that captured Philip Frickey’s interest,<sup>275</sup> there is no reason to believe that the Court would have faced a legitimacy crisis if it had held that § 8(b)(4) was unconstitutional.<sup>276</sup>

Conversely, there are at least two additional reasons that militate against the Court’s use of constitutional avoidance in these cases. The first is that the use of constitutional avoidance—and especially the use of aggressive forms of avoidance, where the Court applies a clear statement rule or resolves an insubstantial constitutional question—can appear strategic or results-oriented. Scholars, including Richard Hasen, have criticized the Court’s selective use or nonuse of avoidance in other cases on precisely this ground.<sup>277</sup> This Article’s account of avoidance creep highlights this risk: even a principled use of avoidance could be indirectly subject to this criticism if it is used by later courts in unexpected or illegitimate ways. For example, a reader inclined towards cynicism might observe that although avoidance creep in the dues/fees context looks different than avoidance creep in the union picketing context, they do have one thing in common: both versions ultimately work to unions’

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because it “recognize[d] that the right to strike is not an unlimited and unqualified right.” H.R. REP. NO. 510, at 59 (1947) (Conf. Rep.).

<sup>273</sup> See *supra* Part I.

<sup>274</sup> Young, *supra* note 3, at 1603.

<sup>275</sup> See generally Frickey, *supra* note 3 (discussing how the Warren Court used constitutional avoidance in an era of political unrest about Communism).

<sup>276</sup> The labor case most closely associated with a judicial legitimacy crisis is surely *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). There, the Court at least purported to use constitutional avoidance, but still broke with precedent to hold that the National Labor Relations Act was within Congress’s Commerce Clause power. *Id.* at 30, see also *supra* note 33 and accompanying text. This decision is sometimes referred to as the “switch in time.” See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 458 (1989) (describing the “switch in time”); Mark Tushnet, *The New Deal Constitutional Revolution: Law, Politics, or What?*, 66 U. CHI. L. REV. 1061, 1063-64 (1999) (reviewing BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* (1998)) (discussing criticism of the “switch in time” account).

<sup>277</sup> Hasen, *supra* note 19; see also Katyal & Schmidt, *supra* note 12.

disadvantage. Perhaps this is because “judges don’t like labor unions.”<sup>278</sup> But even if that isn’t the reason, courts risk at least the appearance of partiality.

Second, the Court’s use of constitutional avoidance in First Amendment cases involving labor is a poor fit with other important and longstanding constitutional values. This is true of both picketing cases and dues/fees cases, but for somewhat different reasons.

First, as Lisa Kloppenberg has observed, “when it employs the avoidance canon, the Court sidesteps its ‘lawsaying’ responsibility that requires it to directly address constitutional rights and values.”<sup>279</sup> In other words, and as the Court’s picketing cases amply illustrate, constitutional avoidance unnecessarily leaves parties in the dark about the scope of their First Amendment rights. But contrast that approach to the Court’s usual approach in First Amendment cases, which demands “breathing space” for speakers,<sup>280</sup> a concept that is operationalized by doctrines like vagueness and overbreadth.<sup>281</sup> Do cases like *Tree Fruits* and *Safeco* contain the same breathing space? Perhaps: if the Court ultimately would have concluded that there is no First Amendment right to picket a struck product, then *Tree Fruits* gives speakers extra protection to which they are not “entitled” under the First Amendment. But that outcome seems very unlikely in light of the Court’s other recent First Amendment cases. If, instead, the union would have won under the First Amendment, then *Tree Fruits* and *Safeco* cut very narrowly. For example, they allow would-be speakers’ rights to turn on factual information to which they may not have access: the percentage of the neutral enterprise’s business derived from sales of the struck product. Thus, instead of leaving ample breathing space for union speakers, § 8(b)(4) cases cut narrowly, leaving would-be speakers unsure about whether their speech will run afoul of that statute. Similarly, in *Eliason & Knuth*, the Board majority approvingly cited a Ninth Circuit case suggesting that consumer-facing secondary activity was coercive only when it involved the creation of “a symbolic barrier’ through patrolling or other conduct” near a building’s entrance, the “taunting of passersby,” or “the massing of a large group of

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<sup>278</sup> See generally George Schatzki, *It’s Simple: Judges Don’t Like Labor Unions*, 30 CONN. L. REV. 1365 (1998).

<sup>279</sup> Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court’s Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 6 (1996).

<sup>280</sup> See, e.g., *United States v. Alvarez*, 567 U.S. 709, 750 (2012) (Alito, J., dissenting) (writing that although “false statements of fact do not merit First Amendment protection for their own sake . . . it is sometimes necessary to exten[d] a measure of strategic protection to these statements in order to ensure sufficient breathing space for protected speech”) (internal quotation marks omitted); *NAACP v. Button*, 371 U.S. 415, 433 (1963) (“First Amendment freedoms need breathing space to survive . . .”).

<sup>281</sup> See *Coates v. City of Cincinnati*, 402 U.S. 611, 613-14 (1971) (striking down an ordinance for being “unconstitutionally vague” and “unconstitutionally broad”).



people.”<sup>282</sup> Even if one thinks it is clear *ex ante* what qualifies as “taunting” or “massing,” reasonable people could at minimum differ on what constitutes a “symbolic” barrier, particularly as distinguished from speech that persuades customers to take their business elsewhere.

Second, the labor context involves multiple First Amendment interests that are in tension with each other. Workers who object to their union’s political positions have an interest in not funding those positions (though perhaps that interest should not be actionable under the First Amendment), but unions and union members have their own interests in engaging in political speech without having to first fund objectors’ bargaining costs.<sup>283</sup> This fact differentiates the dues/fees context from contexts such as criminal or immigration law, in which avoidance functions essentially as a version of the rule of lenity, protecting individuals from certain government-inflicted consequences.<sup>284</sup> The difference is that in the immigration or criminal law context, avoidance works in one predictable direction and in a way that is consistent with other constitutional values. But an avoidance decision that over-protects the speech or association interests of one group of workers in the dues/fees context necessarily works to the detriment of other workers with their own speech or association interests. Then, avoidance creep risks exacerbating imbalances that result from the original application of avoidance.

## 2. In As-Applied Challenges

The cases discussed in this Article include both facial and as-applied challenges, and the Court has not distinguished between those two contexts in its use of avoidance. But, as I have previously argued, there is a significant difference. That is, whereas it is at least theoretically possible that Congress might have preferred the court to use constitutional avoidance to avoid the risk of constitutional invalidation of the statute, it is illogical to suggest that Congress might prefer a narrow construction of a statute “when the only possible effect is to increase the chance that the as-applied challenge will succeed.”<sup>285</sup>

Other critiques of the traditional judicial account of constitutional avoidance have missed that courts apply avoidance in both facial and as-applied challenges, and that this fact has implications for the premise that Congress is risk-averse about the possibility of judicial invalidation. Even

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<sup>282</sup> United Bhd. of Carpenters, Local Union No. 1506, 355 N.L.R.B. No. 159, 810 (2010).

<sup>283</sup> See Garden, *supra* note 114, at 40-41.

<sup>284</sup> See Posner, *supra* note 13, at 816 (discussing the relationship between constitutional avoidance and the rule of lenity); see also *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (holding, as matter of constitutional avoidance, that an immigration statute “limits an alien’s post-removal-period detention to a period reasonably necessary to bring about that alien’s removal from the United States.”).

<sup>285</sup> Garden, *supra* note 14, at 133.

assuming the traditional judicial account accurately reflects congressional preferences, that preference is not implicated by as-applied challenges. That is because the stated alternative to constitutional avoidance—the risk that the court will strike down the statute altogether—is absent when a plaintiff challenges only the application of a statute to him or herself. Instead, the only effect of avoidance in as-applied cases is to make it more likely that the challenger will win. And indeed, the key avoidance decisions in the labor picketing context—*Drivers*, *DeBartolo*, and *Tree Fruits*—all involved as-applied challenges.<sup>286</sup> Thus, in those cases, the traditional account of avoidance is especially inapt. Instead, a rational legislator would plainly prefer the Court to give § 8(b)(4) its most natural reading, and then decide whether or not that reading comports with the Constitution.

#### CONCLUSION: AVOIDING AVOIDANCE CREEP

This Article has argued that avoidance creep renders constitutional avoidance both less benign and less useful than advertised. Still, it is unlikely that either the NLRB or the Courts will abandon it in the near future. But courts could and should take steps to minimize the risks of avoidance creep.

I offer here a few suggestions, which I plan to develop at length in future work. First, courts should both state clearly which constitutional questions they are avoiding, and give a careful explanation of why the Court believes the case raises those questions. Relatedly, courts should articulate a reasonable basis for reading a statute in a way they believe avoids a constitutional question, eschewing reliance on clear statement rules. Second, given the realistic possibility that future courts may, perversely, view an avoidance decision as affirming the underlying statute's constitutionality or unconstitutionality, courts applying avoidance could more forcefully declare that they do not intend readers to draw such an inference. Third, courts considering whether to use the avoidance canon in reviewing an agency decision should more explicitly weigh the costs and benefits of overriding agency deference. Finally, and more ambitiously, courts could revisit the rationale for avoidance. But, at a minimum, they should use avoidance only if its implementation would be at least minimally consistent with the doctrine's stated rationale—a low standard that courts nonetheless currently fail to meet when they use avoidance to resolve as-applied challenges.

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<sup>286</sup> See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 578 (1988) (stating that § 8(b)(4) is “open to a construction that obviates deciding whether a congressional prohibition of handbilling *on the facts of this case* would violate the First Amendment”) (emphasis added); *NLRB v. Tree Fruits*, 377 U.S. 58, 72 (1964) (“We disagree therefore with the Court of Appeals that the test of ‘to threaten, coerce, or restrain’ *for the purposes of this case* is whether Safeway suffered or was likely to suffer economic loss.”) (emphasis in original);

Although constitutional avoidance is an established component of our interpretive canon, we need not accept its effects as a given. Exposing avoidance creep is the first step in confronting avoidance's problematic role in the development of labor law and beyond. By untangling the principle of avoidance from its later influence over substantive law, we can begin to both identify and avoid avoidance creep.