

AVOIDANCE CREEP

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At first glance, constitutional avoidance—the principle that courts construe statutes so as to avoid conflict with the Constitution whenever 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 existing rationale for constitutional avoidance.

This Article identifies the phenomenon of avoidance creep and explains how it has warped the development of labor law in two areas. First, in lines of cases flowing from constitutional avoidance, courts have limited unions’ abilities to engage in certain types of strikes and picketing. And second, the Supreme Court has reduced or eliminated unions’ abilities to assess dues or other fees from represented workers, culminating in last year’s Janus v. AFSCME decision. 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 the decisions limiting the power of unions and workers 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 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? And 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.¹

¹ Several different interpretive moves fall under the rubric of constitutional avoidance. *Ashwander v. Tenn. Valley Ass'n*, 297 U.S. 288, 346-48 (Brandeis, J., concurring)

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.² But scholars have rightly 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.³

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 decision-makers 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 and workers, and for 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 Association of Machinists v. Street*,⁴ in which the Supreme Court held that labor law permits unions and employers to mandate that railway employees contribute towards their union's representation costs, but

(discussing typology of constitutional avoidance methods). For example, a court might decide a case by resolving a non-constitutional question in order to obviate the need to decide an alternative argument that rests on constitutional grounds. But this Article focuses on the version of avoidance in which courts construe statutes to avoid having to resolve constitutional doubts. *Id.*; see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 247 (2012); 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 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. and Constr. Trades Council*, 485 U.S. 568, 575 (1988))).

² Eric S. Fish, *Constitutional Avoidance as Interpretation and Remedy*, 114 MICH. L. REV. 1275, 1288-89 (2016); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986).

³ See, e.g., Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000) (arguing that constitutional avoidance helps to preserve underenforced constitutional norms); 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 (2005) (arguing that constitutional avoidance allows courts flexibility to preserve constitutional rights in situations where a constitutional holding might impair the court's public legitimacy).

⁴ 367 U.S. 740 (1961).

not the union's other activities, such as campaigning on behalf of candidates for political office. Then, *Street* went on to play a foundational role in a line of cases culminating with the recent blockbuster case *Janus v. AFSCME*,⁵ which held that public-sector workers cannot be required to pay agency fees, as well as in *Beck v. Communications Workers of America*, the Court's parallel private-sector decision.⁶ One can't know what would have happened absent *Street*'s use of avoidance and later avoidance creep—but we can document 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 NLRA's prohibition on so-called "secondary"⁷ strikes and protests.⁸ That might sound like good news for unions—and it was, initially. But in another instance of avoidance creep, subsequent courts have wrongly assumed that when it narrowed the NLRA in some contexts, the court also reaffirmed that Congress could prohibit other forms of union protest.⁹ The result is a body of law governing union protest that is irreconcilable with modern First Amendment principles.¹⁰

The Article concludes that, overall, decision-makers' approach to avoidance has been bad for unions and for the development of labor law. First, 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. Second, courts sometimes over-read earlier avoidance decisions as reaffirmations of the basic constitutionality of the underlying law. Third, avoidance decisions make it more difficult for the NLRB to use effectively its discretion to interpret key statutory terms, leading to a stilted understanding of key concepts, including when listeners are "coerced" by union protests.¹¹

⁵ *Janus v. AFSCME*, 138 S.Ct. 2448, 2478 (2018) (holding that public sector workers cannot be required to pay dues to the union that represents them).

⁶ *Comm'n Workers of Am. v. Beck*, 487 U.S. 735, 762-63 (1988).

⁷ A strike or boycott is "secondary" when it is aimed at an entity that does business with an employer with whom a union has a labor dispute. See Howard Lesnick, *The Gravaman of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962).

⁸ *NLRB v. Fruit and Vegetable Packers and 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); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575-76 (1988) (holding that consumer-facing union handbilling was not prohibited by the NLRA).

⁹ See, e.g., *NLRB v. Retail Store Emps Union, Local 1001*, 447 U.S. 607, 616 (1980); *Kentov v. Sheet Metal Workers' Int'l Ass'n Local 15*, 418 F.3d 1259 (11th Cir. 2005).

¹⁰ *Infra* Part III.B.

¹¹ *DeBartolo*, 485 U.S. at 574-75 (holding that the Court's decision to use constitutional avoidance meant that the NLRB's statutory construction was not entitled to

This Article begins by discussing the justifications for constitutional avoidance that have been offered by courts and commentators. Both 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 divorced from reality. 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.”

Then, Part III discusses some larger consequences of constitutional avoidance (and avoidance creep) in labor law. It traces 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 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 find this characterization disingenuous, and some have offered alternative justifications for constitutional avoidance, ranging from fundamental constitutional principles such as federalism and separation of powers to pragmatic considerations regarding the potential political consequences of a constitutional decision. 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.¹² The second emphasizes likely congressional intent, presuming that Congress does not lightly approach the constitutional boundaries of its authority.¹³

Judges and scholars have convincingly argued that these claims regarding the benefits of avoidance are unavailing.¹⁴ In particular, the Court offers no evidence to support its account of congressional preferences, and logic often suggests precisely the opposite. 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?¹⁵ Or, as Antonin Scalia and Bryan Garner put it, “[t]he modern Congress sails close to the wind all the time. Federal statutes today often all but acknowledge their questionable constitutionality.”¹⁶ 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

¹² See, e.g., *Jones v. United States*, 526 U.S. 227, 239 (1999) (quoting *United States ex rel. Attorney General v. Del. & Hudson Co.*, 213 U.S. 366 (1909)); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); see also Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 457 (describing “Congress’ likely preference for validation rather than invalidation”).

¹³ See, e.g., *NLRB v. Catholic Bishop*, 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, 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 and Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109 (2015); see also William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 837 (2001);

¹⁴ E.g., Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 71-72; 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”).

¹⁵ 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 Schauer, *Ashwander Revisited*, *supra* note __ 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”; Kelley, *supra* note __ at 846-47. I have previously discussed the Court’s traditional account of constitutional avoidance and scholars’ reactions to it. Charlotte Garden, *Religious Employers & Labor Law: Bargaining in Good Faith?*, 96 B.U. L. REV. 109 (2016) (hereinafter *Religious Employers*).

¹⁶ Scalia & Garner, *supra* note 1 at 248 (2012); Posner, *supra* note 14.

themselves to rewrite statutes, rules, or regulations.¹⁷

These problems have been amplified in recent decades because the Court's methods of engaging in constitutional avoidance have changed in two ways.¹⁸ First, the Court sometimes applies a clear statement rule—that is, it construes the statute in a way that will not raise a potential constitutional issue unless Congress makes explicit its intention to adopt the opposite construction.¹⁹ This clear statement approach replaces more traditional tools of statutory interpretation; when the Court uses it, it usually adopts an implausible statutory interpretation.²⁰ Second, the Court has sometimes alleged a need 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 appear slim.²¹

A case from labor law—*NLRB v. Catholic Bishop*—illustrates both of these methods of avoiding constitutional questions.²² 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.²³ And the Court adopted this approach to avoid a constitutional question about religious freedom that the Court never defined very clearly, and that was likely insubstantial.²⁴ The result was a

¹⁷ See, e.g., Frank H. Easterbook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1405-06 (2002) (criticizing “activist” judges who “subscribe to in principle, and use in practice, the noxious canon of constitutional doubt”).

¹⁸ Vermeule, *supra* note 1 at 1949 (discussing “modern avoidance”).

¹⁹ E.g., *Catholic Bishop*, 440 U.S. at 504.

²⁰ 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).

²¹ For a discussion of some of the Court's more aggressive applications of constitutional avoidance see, e.g., Katyal & Schmidt, *supra* note 13 at 2117; Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance By the Roberts Court*, 2009 SUP. CT. REV. 181, 181-82 (2009) (discussing *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009)).

²² Garden, *Religious Employers*, *supra* note 15 at 114; 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 in *Catholic Bishop*).

²³ *Catholic Bishop*, 440 U.S. at 504.

²⁴ Garden, *Religious Employers*, *supra* note 15 at 116-17 (“the Supreme Court soon backed off the broad approach to church autonomy that *Catholic Bishop* might have previewed”).

statutory interpretation that diverged from the “best” or most-likely-to-be-accurate statutory interpretation in order to avoid a low or nonexistent probability that the statute would otherwise conflict with the Constitution. 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.”²⁵

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.²⁶ These accounts often focus on what their proponents 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.”²⁷ Others have proposed that courts may engage in avoidance to preserve their own legitimacy while protecting litigants’ rights in highly charged cases;²⁸ Philip Frickey’s account of the Court’s approach to protecting the rights of dissidents in certain cold-war era cases is a noteworthy example of this approach.²⁹

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.³⁰ To scholarly defenders of constitutional avoidance,

²⁵ Katyal & Schmidt, *supra* note 13 at 2123 (“the avoidance canon allows the Court to make constitutional law . . . while deferring the institutional consequences of its decision”).

²⁶ Scalia & Garner, *supra* note 15 at 249; *see also* Young, *supra* note 3 at 1598-99; Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000); William N. Eskridge, Jr. & Phillip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 76 (1994) (discussing “super-strong clear statement rules” that protect federalism norms).

²⁷ *Supra* note 1 at 249 (emphasis in original).

²⁸ 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”).

²⁹ Frickey, *Getting from Joe to Gene (McCarthy)*, *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”).

³⁰ Katyal & Schmidt, *supra* note 13 at 2119-20; *see also* Alexander M. Bickel & Harry

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.

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 those costs is particularly overlooked: that avoidance decisions distort or inhibit later cases that rely on avoidance decisions as precedent.³¹ The next Part offers a detailed look at one such area: labor law.

II. HOW AVOIDANCE CREEPS

Constitutional avoidance permeates labor law. The most important constitutional avoidance case in the labor law canon is surely *NLRB v. Jones & Laughlin Steel Corp.*, where 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."³² 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, without having to address whether Congress could also regulate smaller enterprises with purely intra-state operational footprints.

Many other areas of labor law have also been profoundly shaped by application of constitutional avoidance. 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,³³ and picketing,³⁴ and bad-faith petitioning.³⁵ Courts engage in

H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 34 (1957) ("To raise constitutional doubt is to inhibit legislative action.").

³¹ While this Article focuses on labor law, other substantive areas suffer from over-assertive invocation of constitutional avoidance. Consider, for example, the doctrine of qualified immunity, which, according to many scholars, 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*, 91 B.U. L. REV. 405 (2012).

³² 301 U.S. 1, 32 (1937). That narrow construction allowed the Court an easier path to its constitutional holding that it was within the scope of Congress's authority under the commerce clause to regulate collective bargaining among industries "affect[ing] commerce."

³³ See Part II.C.

³⁴ *Id.*

³⁵ *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").

constitutional avoidance—sometimes explicitly and sometimes implicitly—in determining the scope of the NLRA’s statutory prohibition on using the expression of “views, argument, or opinion” as evidence in an unfair labor practice proceeding,³⁶ and cases about whether unions have a right to access employers’ property for organizing purposes.³⁷ 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,³⁸ 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 that come into view only once one considers how future courts manipulate avoidance-based precedent.

A. Avoidance And Union Dues

When a court decides a case by relying on an ill-considered or under-explained avoidance rationale, that rationale or under-explanation often infects the case’s progeny. For example, 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 the already broad 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 concern. The Court’s case law regarding union dues and fees³⁹—much of which traces back to the

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

³⁷ *See* James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 551 (2004) (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”).

³⁸ *See* Part II.B.

³⁹ 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

avoidance decision *International Association of Machinists v. Street*⁴⁰—exemplifies both of these versions of avoidance creep.

While *Street* is the main focus of this section, the Supreme Court’s case law on union fees actually begins with *Railway Employees Dep’t v. Hanson*,⁴¹ a case involving a 1951 amendment to the federal Railway Labor Act (RLA) that allowed unions and employers to “make agreements, requiring . . . all employees shall become members of the labor organization representing their craft or class.”⁴² 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.⁴³ 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.⁴⁴ 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. Accordingly, Congress’s 1951 amendment reflected the policy that “those who enjoy the fruits and benefits of the unions should make a fair contribution to the support of the unions.”⁴⁵

The plaintiffs in *Hanson* argued that the RLA-authorized union security clauses in their collective bargaining agreements violated the First

in its work as the bargaining agent for a group of workers.

⁴⁰ 367 U.S. 740 (1961).

⁴¹ 351 U.S. 225 (1956).

⁴² 45 U.S.C. § 152, Eleventh; *Hanson*, 351 U.S. at 227. 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).

⁴³ *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.

⁴⁴ *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944).

⁴⁵ *Id.* (quoting Senator Hill, 96 Cong. Rec. Pt. 12, 16279).

Amendment by requiring them to join (and pay dues to) the union elected to represent them. 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, reasoning that “the federal statute is the source of the power and authority by which any private rights are lost or sacrificed.”⁴⁶ 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.⁴⁷

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 face violate the First Amendment in light of the public policy reasons to allow them.⁴⁸ 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.”⁴⁹

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.⁵⁰ 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.”⁵¹ If we take as given the Court’s conclusion that state action was present, it is self-evident why the first two categories of

⁴⁶ *Id.* at 232.

⁴⁷ Scholars sometimes refer to the landmark case *Shelley v. Kraemer* 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.46 (2006). 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 (2017).

⁴⁸ *Id.* at 233 & 238 (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”).

⁴⁹ *Id.*

⁵⁰ *Id.* at 236 n.8.

⁵¹ *Id.*

membership conditions and rules would then violate represented workers' First Amendment rights. The third example is less obvious, but it refers to a practice, described at length in Hanson's Supreme Court briefing, 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 neither "work[] in the interest of any organization or cause which is detrimental to, or opposed to" the union, nor circulate certain political materials.⁵²

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 potentially significant because it was well known at the time (including to the *Hanson* Court) that unions used member dues to finance their own lobbying and politicking.⁵³

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.⁵⁴ 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 to whom [the plaintiffs] were opposed."⁵⁵ The plaintiffs won their case in Georgia state court, which then broadly 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.⁵⁶

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

⁵² Brief of Robert L. Hanson at 14-15, *Ry. Emps. Dep't v. Hanson*, 351 U.S. 225, (1956) (No. 451).

⁵³ 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).

⁵⁴ 367 U.S. 740 (1961).

⁵⁵ *Id.* at 744.

⁵⁶ *Int'l Ass'n of Machinists v. Street*, 215 Ga. 27 (1959).

not to pay fees that were later used for union political speech.⁵⁷ 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 money should be free, despite that employee's objection, to spend his money for political causes which he opposes.⁵⁸

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 Court in *Street* concluded that the entirely different constitutional question presented in *Street* was a serious or difficult one.⁵⁹ 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.

The relevant RLA text refers broadly to "membership" and "dues" without any apparent restrictions on their use.⁶⁰ 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.⁶¹ 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

⁵⁷ Br. for the Appellants, *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961) (No. 59-534).

⁵⁸ *Street*, 367 U.S. at 749.

⁵⁹ 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." However, Justice Douglas wrote only for himself.

⁶⁰ 45 U.S.C. § 152 (Eleventh).

⁶¹ *Id.* 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).

Congress also meant . . . to provide unions with a means for forcing employees, over their objection, to support political causes which they oppose.”⁶² 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 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*; there is no reason in the RLA’s text to construe its language as the Court did. As a result of such avoidance, the Court held 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. That is, unions and employers may require represented workers to pay “agency fees,” but not full union dues. The result is a warped version of what Congress likely intended. 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.”⁶³

One might expect that *Street*’s use in future cases would be limited, as it neither represents the most natural 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 non-precedential, 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 show that the precise opposite can be true. As the next two sub-parts discuss, those cases rely on *Street* both as though it was a

⁶² *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 767. But those two observations just as easily cut against the majority’s reading of the RLA, because they show Congress was aware of the potential problem of unions using dues for political purposes, but still did not impose any limits on what dues could be collected.

⁶³ *Id.* at 785. Justice Black would have held that mandatory fees violated the First Amendment rights of objecting workers. *Id.* at 791.

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*⁶⁴ not only relied heavily on *Street*, but reached the same outcome, holding public sector employees can be required to contribute towards a union’s representation costs, but not its other expenses.

The Court began its analysis by writing that *Hanson* and *Street* “on their face go far toward resolving this issue.”⁶⁵ But *Hanson*’s role in the analysis that followed was quite limited. Instead, the Court turned mainly to *Street*, beginning with that Court’s statement that the use of union fees for politics triggered “questions of the utmost gravity.”⁶⁶ But while the *Street* Court did write that to explain its decision to use, the Court offered no analysis of why those questions were grave rather than trivial—or even what the questions were. Thus, it may be the case 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?” present 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—a construct that it also attributed to *Street*: “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.”⁶⁷ 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.⁶⁸

⁶⁴ 431 U.S. 209 (1977).

⁶⁵ *Id.* at 217.

⁶⁶ *Id.* at 219-20 (quoting *Street*, 367 U.S. at 749-50).

⁶⁷ *Id.* at 222.

⁶⁸ 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: An Exploration of Constitutional Salience*, 117 HARV.

To be clear, neither the *Hanson* nor the *Street* Court 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.⁶⁹ 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*. Instead, the *Street* Court assumed only that a plausible constitutional question arises when mandatory union dues go towards union politics. Then, its 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.

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.⁷⁰ From there, it was an easy step to reach the same outcome regarding another set of workers.⁷¹

Today, we think of the principle that compelled subsidization of a third party’s speech implicates the First Amendment as having begun with *Abood*.⁷² Remarkably, though, the *Abood* Court seemed to think that principle came from *Hanson* and *Street*. 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.

L. REV. 1765, 1769 (2004).

⁶⁹ 431 U.S. at 238.

⁷⁰ Alternatively, it may be that the *Abood* majority overlooked that the *Street* plaintiffs’ case centered on only 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”

⁷¹ *Abood*, 431 U.S. 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”).

⁷² See *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471 (1997).

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 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.⁷³ 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.⁷⁴ 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.⁷⁵

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. In *Harris v. Quinn*,⁷⁶ 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 *Hanson* and *Street* on much the same ground that I have here,⁷⁷ but took the wrong lesson from it.

Specifically, the *Harris* majority—quoting *Street*’s “grave questions” language—criticized *Abood* for relying on *Street*, which was “not a constitutional decision at all,”⁷⁸ to reach the conclusion that the impingement on First Amendment rights caused by agency fees could be

⁷³ Br. of Profs. Eugene Volokh & William Baude as Amicus Curiae in Support of Respondents, *Janus v. AFSCME*, No. 16-1466 (Jan. 19, 2018); 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.”).

⁷⁴ Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 HARV. L. REV. 1046, 1048 (2018).

⁷⁵ See, e.g., Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800 (2012); Robert Post, *Compelled Subsidization of Speech: Johanns v. Livestock Marketing Ass’n*, 2005 SUP. CT. REV. 195 (2005).

⁷⁶ 134 S.Ct. 2618 (2014).

⁷⁷ *Id.* at 2630-31.

⁷⁸ *Id.* at 2632.

supported by a government interest in labor peace.⁷⁹ That is, the *Harris* majority thought that *Street* was insufficiently protective of workers' First Amendment rights and too accepting of the "labor peace" rationale. But the logic of constitutional avoidance should have led the *Harris* Court to exactly the opposite conclusion: *Street* at least potentially over-protected objecting workers by avoiding questions about their constitutional rights that might have ultimately been resolved against them, and then imported the labor peace rationale only as a way to *limit* union fees, rather than to justify them. Again, that 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*.⁸⁰ 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, but wrong when it held that it was appropriate to apply rest of the analysis from *Street*—again, the opposite of what *Street* itself purported to do.⁸¹

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 ways that at least potentially alter the course of constitutional law.

2. *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*,⁸² which held that private sector employees cannot be required to pay full union dues under contracts governed by the NLRA—rather, like in the RLA context, they can be require to pay only agency fees. *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.⁸³ Accordingly, the *Beck* Court

⁷⁹ *Id.* at

⁸⁰ 138 S.Ct. 2448 (2018).

⁸¹ *Id.* at 2479-80.

⁸² 487 U.S. 735 (1988).

⁸³ 29 U.S.C. § 158(a)(3) (making it an unfair labor practice for employers to discriminate based on union membership, except under a contract "to require as a condition

viewed *Street* 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.”⁸⁴

But there are two related reasons to doubt the logic of importing *Street* into the NLRA context. 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,⁸⁵ and so *Hanson* provides no basis to assume that NLRA-governed contracts involve state action. Moreover, § 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 pointed out (similar to 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.”⁸⁶

The foregoing section shows how a single decision built on constitutional avoidance can shape-shift to 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

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

⁸⁴ *Beck*, 487 U.S. at 745.

⁸⁵ 29 U.S.C. § 164.

⁸⁶ *Beck*, 487 U.S. at 763. Similarly, scholars have argued that *Beck*’s interpretation of 8(a)(3) is inconsistent with the NLRA’s structure and text. See Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 IRVINE L. REV. 857, 861-62 (2014).

sector—a remarkable (and troubling) reach for a statutory decision that on its face affected only unionized railroad workers.

B. Avoidance And Doctrinal Stagnation

It is an article of faith among many labor lawyers and law professors that the National Labor Relations Act’s secondary boycott provision, which bars unions from engaging in some types of picketing, strikes, and other advocacy, is unconstitutional. Yet the Supreme Court and federal appellate courts have repeatedly affirmed the secondary boycott provision’s constitutionality against First Amendment challenges, even as the First Amendment has become increasingly protective of similar advocacy in other areas. In this section, I suggest this persistence is also attributable in part to constitutional avoidance.

This section begins with a short primer on the law of secondary activity and its modern-day significance. It then discusses 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 with consequences for the evolution of both labor law and the First Amendment.

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 US.⁸⁷ 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. Several days later, a group of Yemeni bodega owners adapted the NYTWA strategy, and also struck in protest of the travel ban, closing their stores for part of a day and gathering in Brooklyn to protest the ban.⁸⁸

From a labor law perspective, it is important that neither the NYTWA nor the group of bodega owners were labor unions (or in NLRA parlance, “labor organizations”).⁸⁹ Instead, the NYTWA is an “alt-labor” group, because while it advocates for better working conditions for taxi and other for-hire drivers, it mostly represents independent contractors, and does not

⁸⁷ Executive Order: Protecting the Nation From Foreign Terrorist Entry Into the US (Jan. 27, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>.

⁸⁸ 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/>.

⁸⁹ 29 U.S.C. 152(5) (defining “labor organization”).

engage in traditional collective bargaining.⁹⁰

This matters because the Taxi Workers' strike was a "secondary strike," in which the strikers were withholding 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 Company*,⁹¹ involved an NAACP-organized secondary consumer boycott of Mississippi businesses to protest segregationist government policies.⁹² 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."⁹³

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 tactics—including some picketing in support of secondary consumer boycotts—and the Supreme Court has repeatedly upheld these limitations.⁹⁴ This means that if the NYTWA had been a bona fide labor organization, it would have risked being sued for damages,⁹⁵ and the NLRB's general counsel would have been obligated to take rapid steps to attempt to obtain

⁹⁰ See generally <http://www.nytw.org/campaigns/> (last visited March 26, 2017) (describing NYTWA's work).

⁹¹ 458 U.S. 886 (1982).

⁹² *Id.* at 892.

⁹³ *Id.* at 907 (quoting *Citizens Against Rent Control Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 295 (1981)).

⁹⁴ See, e.g., *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982); *NLRB v. Retail Store Emps. Union, Local 1001*, 444 U.S. 1011 (1980). For discussions of 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 Ill. L. Rev. 1791 (2015); Charlotte Garden, *Citizens United & Citizens United: The Future of Labor Speech Rights?*, 53 Wm. & Mary L. Rev. 1, 17 (2011); 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); Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 Yale L.J. 938 (1982).

⁹⁵ 29 U.S.C. § 187(b).

an injunction against the NYTWA's strike.⁹⁶ 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.⁹⁷

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,”⁹⁸ 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.”⁹⁹ 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 “threatens, coerces, or restrains any person engaged in commerce.” 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. (The second of these goals—forcing a person to cease doing business with someone else¹⁰⁰—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.¹⁰¹ Activities that would qualify

⁹⁶ 29 U.S.C. § 160(l).

⁹⁷ The discussion that follows is focused mainly on section 8(b)(4) of the NLRA, which prohibits certain secondary striking and picketing. It also briefly discusses section 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).

⁹⁸ NLRB, Secondary Boycotts (Section 8(b)(4)) (describing the “mind-numbing” of 8(b)(4)).

⁹⁹ *Bhd. of RR Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 386 (1969).

¹⁰⁰ 29 U.S.C. § 158(b)(4)(ii)(B).

¹⁰¹ *See* 520 S. Mich. Ave. Associates, Ltd. v. Unite Here Local 1, 760 F.3d 708, 733

as “coercion” of the neutral business would include bringing the 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.¹⁰²

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,¹⁰³ but what qualifies as picketing? And what about activity other than picketing, such as the common union tactic of stationing a giant inflatable rat balloon outside a neutral employer’s establishment?¹⁰⁴ 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 section 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 section describes the role of constitutional avoidance in key Supreme Court cases and sets up the discussion in the next section of how avoidance has shaped the development of labor and First Amendment law.

(2014).

¹⁰² For a useful overview and synthesis of what qualifies as secondary activity, *see generally* Lesnick, *supra* note 7.

¹⁰³ 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 fact might lead to the conclusion that the negative implication of these provisos is that the statute does forbid secondary picketing that advises the public of a labor dispute. Further, the legislative history of the Taft-Hartley Act reveals that Congress was preoccupied with picketing in particular. *See, e.g.*, H. Rep. No. 245 at 44 [335] (stating that “[t]here is obviously no justification for picketing a place of business at which no labor dispute exists”).

¹⁰⁴ Hassan Kanu, *Death to Scabby: Trump Labor Counsel Wants Protest Icon Deflated* (Jan. 22, 2019), <https://news.bloomberglaw.com/daily-labor-report/death-to-scabby-trump-labor-counsel-wants-protest-icon-deflated>.

The Supreme Court first addressed the meaning of section 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.¹⁰⁵ The Court rejected that argument with little discussion, suggesting that future First 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.”¹⁰⁶ 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 section have been concerned.¹⁰⁷

Electrical Workers was the first Supreme Court case to hold that § 8(b)(4) did not violate the First Amendment. However, constitutional

¹⁰⁵ *Int’l Bhd. Of Elec. Workers, Local 501 v. NLRB*, 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 when the Court decided *Electrical Workers*, in another labor case. Two years earlier, the Court had upheld an injunction against a union’s picketing of an ice dealer, where union was demanding that the dealer commit an antitrust violation by refusing to sell to non-union peddlers. The Court wrote that it “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, while 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).

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. *US v. Evelyn Sineneng-Smith*, 910 F.3d 461, 467-68 (9th Cir. 2018) (holding that 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.

¹⁰⁶ *Id.* at 705.

¹⁰⁷ 61 Stat. 140-141, 29 U.S.C. § 158(b)(4)(A) (1947).

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, Chauffeurs, Helpers Local Union 639* (“*Drivers*”).¹⁰⁸ 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.¹⁰⁹ 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, Brennan began by observing that unions had a “right” to “use all lawful propaganda to enlarge their membership.”¹¹⁰ 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.” Moreover, Brennan noted that although Congress had prohibited certain strikes and boycotts, it had also explicitly protected primary strikes.¹¹¹ These features of the NLRA, 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.¹¹²

Justice Brennan’s legislative history and constitutional avoidance-driven approach to construing NLRA picketing restrictions soon re-appeared, this time in a § 8(b)(4) case. In *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760* (“*Tree Fruits*”),¹¹³ 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

¹⁰⁸ 362 U.S. 274 (1960).

¹⁰⁹ 29 U.S.C. § 158(b)(1) (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 *NLRB v. Drivers* occurred.

¹¹⁰ 362 U.S. at 280 (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 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.’”).

¹¹¹ *Id.* at 281 & n.9.

¹¹² *Id.* at 284.

¹¹³ 377 U.S. 58 (1964) (holding that “[t]he prohibition of inducement or encouragement of secondary pressure by § 8(b)(4)(i) carries no unconstitutional abridgment of free speech”).

the grocery store, where the union was clear that it was not calling for a boycott of the store as a whole.¹¹⁴

The NLRB's view was that even this limited conduct qualified as threatening, coercive, or restraining, in violation of 8(b)(4)(ii)(B).¹¹⁵ 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.¹¹⁶

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. 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."¹¹⁷ 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 an "appeal to reason."¹¹⁸ 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. 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

¹¹⁴ *Id.* at 59. 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.

¹¹⁵ *Fruit & Vegetable Packers, Local 760*, 132 NLRB No. 102 *5 (1961).

¹¹⁶ *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.")

¹¹⁷ 339 U.S. 460, 465 (1950).

¹¹⁸ *Id.*

statutory prohibition.”¹¹⁹ 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. 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.”¹²⁰ 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.¹²¹

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. 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 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)*.¹²² *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.¹²³

¹¹⁹ 377 U.S. at 71.

¹²⁰ *Id.* at 63.

¹²¹ *Id.* at 72.

¹²² 447 U.S. 607 (1980).

¹²³ *Id.* at 609.

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).¹²⁴ 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, 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’”¹²⁵ (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.¹²⁶) But, of course, Powell’s reading of *Tree Fruits* was wrong: it 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 expression and neutral employers.¹²⁷ 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.”¹²⁸

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—to this day, we know only that the answer falls somewhere between “a *de minimis* amount” and “substantially all.”

The *Tree Fruits/Safeco* rule is specific to picketing, and several years after *Safeco*, the Supreme Court decided a case about handbilling; again,

¹²⁴ *Id.* at 614-15.

¹²⁵ *Id.* at 616.

¹²⁶ *Id.* (citing *American Radio Assn. v. Mobile S. S. Assn.*, 419 U.S. 215, 229-231 (1974); *Teamsters v. Vogt, Inc.*, 354 U.S. 284 (1957)).

¹²⁷ *Id.* at 617.

¹²⁸ *Id.* at 619.

constitutional avoidance was key to the outcome. In *DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*,¹²⁹ 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.¹³⁰

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.”¹³¹ Further, 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 congressionally created administrative agency, we will presume the constitutionality of the Act we administer.”¹³²

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.”¹³³ However, while 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 followed:

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

¹²⁹ 485 U.S. 568 (1988).

¹³⁰ *Id.* at 570-71.

¹³¹ *Florida Bldg. Trades Council*, 273 NLRB No. 172 *3 & n.6 (1985).

¹³² *Id.*

¹³³ *Id.* at 576.

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.¹³⁴

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."¹³⁵ One of the most important words in that sentence turns out to be "independently" – in other words, as a result of its decision to apply constitutional avoidance, the Court dispensed with *Chevron* deference, which it acknowledged would ordinarily apply.¹³⁶ (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. 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."¹³⁷

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

¹³⁴ *Id.* at 576.

¹³⁵ *Id.* at 577.

¹³⁶ *Id.* at 574-75.

¹³⁷ *Id.* at 577-78.

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. These consequences are significant: under the guise of avoiding constitutional questions, the Court has restricted unions' main funding mechanism; stymied the development of the law of secondary strikes and boycotts, thereby stifling one of labor's most powerful tools; and siloed aspects of labor law away from the developing First Amendment. Finally, the Article comes full-circle, 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. In the union fees context, the story is straightforward: if not for the Court's holding in *Street*, the Court almost certainly would not have decided *Beck* as it did.¹³⁸ 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.

That means even if we set aside the public sector, avoidance has had a significant 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.¹³⁹ As a result, some unions engage in costly “internal organizing”

¹³⁸ *Infra* Part II.A.2.

¹³⁹ 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. 29 U.S.C. § 164(b). *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

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.¹⁴⁰ Likewise, unions must implement a set of detailed procedures designed to ensure that represented workers' fees are not used for impermissible purposes.¹⁴¹

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.¹⁴² While not exactly 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 they 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.¹⁴³

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*. That view might find some support in the relatively modest version of avoidance that the Court practiced in those cases—the constitutional questions that the Court avoided were substantial, and the

share of enforcing collective bargaining agreements).

¹⁴⁰ *United Nurses and Allied Professionals (Kent Hospital)*, 367 NLRB No. 94 (2019) (holding that represented workers could not be required to pay for union lobbying on bills related to represented workers’ working conditions).

¹⁴¹ *California Saw & Knife Works*, 320 NLRB 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).

¹⁴² 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/>.

¹⁴³ 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 candidates in presidential elections. Alex Hertel-Fernandez, James Feigenbaum & Vanessa Williamson, *The Enduring Consequences of Right to Work Laws in the U.S. States* (2018) (working paper); see also James Feigenbaum, Alexander Hertel-Fernandez & Vanessa Williamson, *Right-to-Work Laws Have Devastated Unions – and Democrats*, NY TIMES (March 8, 2018), <https://www.nytimes.com/2018/03/08/opinion/conor-lamb-unions-pennsylvania.html>. It stands to reason that reducing the amount of fees that unions can require represented workers to pay would have a similar effect, though perhaps to a smaller magnitude.

Court's interpretation of the statute was at least plausible. Add to that the probability that at least some readers will prefer the outcomes in those cases, and 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 Part, 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 Part 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. In addition, the Court's explanations of the outcomes in the two cases were 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 the Court will have defeated the stated purposes of avoidance and maybe even verged into advisory opinion territory.¹⁴⁴ 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

¹⁴⁴ See Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1283 (2016) (showing that the "principal justification for the shift to modern avoidance was that it prevents a court from issuing advisory opinions").

the first situation, a later court takes the fact that an earlier court avoided a constitutional question as an indication that the 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 Section 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*,¹⁴⁵ the Court engaged in “cursory analysis” to conclude that constitutional questions called for a narrow interpretation of the statute.¹⁴⁶ Then, in *Shelby County v. Holder*, the Court relied on the constitutional analysis from *Northwest Austin* to strike down Section 5—treating *Northwest Austin* as having resolved constitutional questions instead of just raising them.¹⁴⁷

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.¹⁴⁸ 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.¹⁴⁹ These decisions treat *Tree Fruits* and *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.¹⁵⁰ (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

¹⁴⁵ 557 U.S. 193 (2009).

¹⁴⁶ Katyal & Schmidt, *supra* note 13 at 2133.

¹⁴⁷ *Id.* (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).

¹⁴⁸ *Supra* note 125 and accompanying text.

¹⁴⁹ *See, e.g.,* *Kentov v. Sheet Metal Workers’ Int’l Ass’n*, 418 F.3d 1259 (11th Cir. 2005); *Warshawsky & Co. v. NLRB*, 182 F.3d 948, 953 (D.C. Cir. 1999) (“[t]he 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”).

¹⁵⁰ *Id.* at 574-75.

administers.¹⁵¹) In other words, where ambiguous statutory language implicates constitutional questions, courts need not defer to agency expertise in interpreting that language. This leads to troubling consequences in the § 8(b)(4) context: the statutory language calls out for expert interpretation in light of changing circumstances, but courts will often review the Board's § 8(b)(4) decisions *de novo* because they could implicate constitutional questions—which in turn gives 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 and the NLRB argued violated § 8(b)(4).¹⁵² That charge was based on the fact that the hospital was a secondary target; the primaries were two companies that used non-union labor for a construction project at the hospital.¹⁵³ A district court temporarily enjoined the union's activity, and the union appealed to the Eleventh Circuit.¹⁵⁴ 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.

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. Above all, the union's activities were peaceful; as the DC Circuit noted during the next stage of the litigation, the protestors did not even jaywalk.¹⁵⁵ Yet, the Eleventh Circuit upheld the injunction—and it did so mainly based on *DeBartolo*.¹⁵⁶ 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

¹⁵¹ *E.g.*, *Univ. of Great Falls*, 278 F.3d 1335, 1341 (holding that NLRB not entitled to deference were “[t]he application of *Catholic Bishop* to the facts of this case is thus an interpretation of precedent, rather than a statute”); *see also* Robin Kundis Craig, *Agencies Interpreting Courts Interpreting Statutes: The Deference Conundrum of a Divided Supreme Court*, 61 EMORY L.J. 1, 10 (2011).

¹⁵² *Kentov*, 418 F.3d at 1261.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Sheet Metal Workers' Int'l Ass'n, Local 15 v. NLRB*, 491 F.3d 429, 439 (D.C. Cir. 2007).

¹⁵⁶ *Kentov*, 418 F.3d at 1264.

Board can regulate union secondary picketing” under § 8(b)(4).¹⁵⁷ 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. 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—amazingly, based on its reading of *DeBartolo*.¹⁵⁸

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,¹⁵⁹ and the union appealed to the DC Circuit.¹⁶⁰ 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.”¹⁶¹ Crucially, the court then turned to whether the mock funeral was “coercive,”¹⁶² writing that [t]hat question must be answered consistent with developments in the Supreme Court’s [F]irst [A]mendment jurisprudence.”¹⁶³ As one would expect, once the Court juxtaposed the union’s orderly mock funeral with abortion clinic protests, or the Westboro Baptist 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.”¹⁶⁴

The difference between the two courts’ approaches is key. The Eleventh Circuit over-read *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 a reflection of the otherwise fairly obvious proposition that § 8(b)(4) is in tension with the First Amendment. Accordingly, its analysis

¹⁵⁷ *Id.* at 1265.

¹⁵⁸ *Id.*

¹⁵⁹ Sheet Metal Workers Int’l Ass’n, 346 NLRB 199, 206-07 (2006)

¹⁶⁰ Sheet Metal Workers’ Int’l Ass’n, Local 15, 491 F.3d at 429.

¹⁶¹ *Id.* at 437.

¹⁶² *Id.* at 438.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

centered the application of modern First Amendment cases to the union's street theater.

Finally, it is telling that courts 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.¹⁶⁵ Then, he continued: “The rats are the traditional union picketers’ signs writ large.”¹⁶⁶ But for Judge Posner, the analogy between picket signs and rats was 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.¹⁶⁷

To be clear, none of this is meant to suggest that courts *always* over-read 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* over-read avoidance decisions that we should ask why. One likely culprit is mentioned above—that 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 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.¹⁶⁸ Recently, the

¹⁶⁵ *Constr. & Gen. Laborers’ Local Union No. 33 v. Town of Grand Chute*, 834 F.3d 745 (7th Cir. 2016) (Posner, J., concurring and dissenting).

¹⁶⁶ *Id.*

¹⁶⁷ *Tucker v. City of Fairfield*, 398 F.3d 457 (6th Cir. 2005).

¹⁶⁸ *See Chevron USA, Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (where statutory language is unclear, courts should accept reasonable agency

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, while majority-Republican boards interpret it more broadly. But Democratic and Republican Board members are united in their view that their understanding of § 8(b)(4) is the one demanded by *DeBartolo*, along with *Tree Fruits* and *Safeco*.

For example, consider a handful of decisions decided by the Obama NLRB about the use of stationary banners and large inflatable rats in secondary protests. First, in a case known as *Eliason & Knuth of Arizona*, the Board considered a union's placement of large stationary banners on public sidewalks, close to employers that had hired a struck construction company.¹⁶⁹ 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"; another banner asked the public not to patronize one of the secondary employers.¹⁷⁰ 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. The companies 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) the union had a primary labor dispute with the secondary companies.

The Board rejected these arguments in a 3-2 decision that itself relied in part on constitutional avoidance, concluding that the banners did not qualify either as "pickets" or as non-picketing coercive activity under section 8(b)(4).¹⁷¹ It began by acknowledging the case's obvious free speech implications: "categorizing peaceful, expressive activity at a purely secondary site as picketing renders it unlawful without any showing of actual threats, coercion or restraint, unless it falls into the narrow exception

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 (arguing that "Congress' implicit delegation of lawmaking power through the use of ambiguous statutory language . . . requires the Board to make policy decision, and in doing so to consider the impact on actual labor relations").

¹⁶⁹ United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506 & Eliason & Knuth of AZ, Inc., 355 NLRB 797, 798 (2010).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

for consumer product picketing defined in *Tree Fruits*.¹⁷² Then, the Board turned to the statutory text, relying on legislative history and the Supreme Court's discussion of § 8(b)(4) in *DeBartolo*. That discussion also focused on whether union members holding a stationary banner were like labor picketers, creating "a physical or, at least, a symbolic confrontation between the picketers and those entering the worksite,"¹⁷³ and suggested that the key question in defining union picketing is whether passers-by would be able to freely ignore the union's activity.¹⁷⁴ Finally, the Board relied on post-*DeBartolo* First Amendment cases such as *Virginia v. Black*¹⁷⁵ to conclude that union members holding a banner are also 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*.¹⁷⁶ 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.¹⁷⁷

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.¹⁷⁸ Further, the dissenters discounted the relevance of First Amendment cases arising outside of the labor context, citing the "disruptive effect on local economic conditions" that could result from even a "nonviolent and totally voluntary boycott," and reasoning that the Court had authorized economic regulation that entailed "some

¹⁷² *Id.* at 801.

¹⁷³ *Id.* at 802.

¹⁷⁴ This definition of picketing sets the scope of permissible union conduct under other parts of the NLRA as well. For example, section 8(g) requires unions to give notice before "engaging in any strike, picketing, or other concerted refusal to work at any health care institution." A recent General Counsel advice memorandum applied *Eliason & Knuth* to reach the conclusion that a union that held signs 100 feet from a health care facility entrance was not picketing, and so was not obligated to give notice under that 8(g). United Food & Commercial Workers, Local 1445, Case No. 01-CG-164974 (March 2, 2016) 2016 WL 1533867.

¹⁷⁵ 538 U.S. 343 (2003) (holding that burning cross is "symbolic expression" that could nonetheless be banned as a particularly threatening forms of intimidation).

¹⁷⁶ *Id.* at 808.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* ("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.") (emphasis in original).

constraints on First Amendment freedoms.”¹⁷⁹ *DeBartolo*, the dissent declared, did not “even hint[] that the Supreme Court intended to change the Board’s longstanding and flexible definition of picketing, or the well-established understanding the posting an individual at a neutral[employer’s] premises” is coercive in violation of § 8(b)(4).¹⁸⁰

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*.¹⁸¹ In a case known as *Galencare*,¹⁸² the Board dismissed a § 8(b)(4) 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.¹⁸³

Reprising its approach from *Eliason*, 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 they did not.¹⁸⁴ Then, the rat and banner display cleared the final hurdle when the Board concluded the union’s activity could not have directly caused or been expected to directly cause “disruption of the secondary’s operations.”¹⁸⁵ The Board also observed that its conclusion was “strongly supported by ‘constitutional avoidance’ doctrine,”¹⁸⁶ particularly in light of the Court’s then-recent decision in *Snyder v. Phelps*.¹⁸⁷

The dissent in *Galencare* saw the inflatable rat differently, stating

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 818.

¹⁸¹ See, e.g., Local Union No. 1827, Utd. Bhd. of Carpenters & Joiners of Am., 357 NLRB 415 (2011).

¹⁸² Sheet Metal Workers Int’l Ass’n, Local 15, 356 NLRB 1290 (2011). This case involved another aspect of the same union activity that gave rise to the *Kentov* decision in the Eleventh Circuit 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 *Galencare* Board decided.

¹⁸³ Sheet Metal Workers Int’l Ass’n, 356 NLRB 1290 (2011).

¹⁸⁴ *Id.* at 1291 (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”).

¹⁸⁵ *Id.* at 1292.

¹⁸⁶ *Id.* at 1293.

¹⁸⁷ *Id.* (citing *Snyder v. Phelps*, 562 U.S. 443 (2011)).

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.”¹⁸⁸ Likewise, the union member holding out a leaflet also “plainly was picketing.”¹⁸⁹ Beyond that, the dissent viewed the occupational context—the rat balloon and handbill display took place in front of a hospital—was relevant to whether the union’s secondary conduct was coercive.¹⁹⁰ Although the dissent did not precisely spell out how the vulnerability of patients or visitors connected to whether the *hospital* was coerced by the rat or handbill display, its reasoning was presumably that the hospital would be motivated to accede to the union’s demands in order to prevent its patients or visitors from having to pass either display during their visit.

The Board’s holdings in these and other cases¹⁹¹ 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 Trump NLRB is beginning to crack down on union secondary picketing and other protest, and may soon reverse *Eliason & Knuth* and *Galencare*.

In August 2019, the Trump NLRB decided *Preferred Building Services Inc.*,¹⁹² 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.

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.¹⁹³ This means that the union’s picketing of the cleaning

¹⁸⁸ *Id.* at 1296.

¹⁸⁹ *Id.* at 1297.

¹⁹⁰ *Id.* (“Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day’s activity, and where the patient and his family — irrespective of whether that patient and that family are labor or management oriented — need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed”) (quoting *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979)).

¹⁹¹ See, e.g., *Southwest Region of Carpenters*, 356 NLRB 613 (2011) (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).

¹⁹² 366 NLRB No. 159 (2018).

¹⁹³ *Sailors’ Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547 (1950).

company while it was at the office building would have been allowed under the NLRA 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.¹⁹⁴ The NLRB held that the union's picketing fell short of this requirement: although its picket signs were clear that the dispute was with the cleaning company, its leaflets "requested that [a building tenant] ensure that 'their' janitors obtain better working conditions."¹⁹⁵ 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.¹⁹⁶ 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).¹⁹⁷

And the Board may go further. Reportedly at the NLRB General Counsel's direction,¹⁹⁸ an NLRB lawyer recently sought to enjoin a union from deploying an inflatable rat against a secondary employer.¹⁹⁹ 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*.²⁰⁰ In addition, the regional director relied on *DeBartolo* to distinguish picketing from other forms of protest.²⁰¹

These cases are illustrative of the NLRB's more general approach in § 8(b)(4) cases; as Professor Michael Oswalt put it, "instead of measuring the coerciveness of a protest directly, analysis often centers on where conduct falls along a continuum from picketing (coercive), to the

¹⁹⁴ *Id.*

¹⁹⁵ Preferred Building Servs., 366 NLRB No. 159 at *5.

¹⁹⁶ *Id.* at *6.

¹⁹⁷ *Id.* at *6 n.20.

¹⁹⁸ Hassan A. Kanu, *Death to Scabby: Trump Labor Counsel Wants Protest Icon Deflated*, BLOOMBERG LAW (Jan. 22, 2019), <https://news.bloomberglaw.com/daily-labor-report/death-to-scabby-trump-labor-counsel-wants-protest-icon-deflated> (quoting 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").

¹⁹⁹ Petition for Preliminary Injunction Under Section 10(l) of the National Labor Relations Act, *Ohr v. Int'l Union of Operating Engineers, Local 150*, Case No. 1:18-cv-08414 (Dec. 21, 2018).

²⁰⁰ Reply in Further Support of Petition for Preliminary Injunction Under Section 10(l) of the National Labor Relations Act, *Ohr v. Int'l Union of Operating Engineers, Local 150*, Case No. 1:18-cv-08414 (Jan. 8, 2019).

²⁰¹ *Id.*

‘functional equivalent of picketing’ (also coercive), to hand-billing.’²⁰² That is, the Board and the courts often try to group cases into *DeBartolo* or not-*DeBartolo*, but this is a different question either than whether the statutory language of § 8(b)(4) covers particular union activity, or than whether regulation of that union activity is foreclosed by the First Amendment.²⁰³

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.²⁰⁴ 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.²⁰⁵ 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,²⁰⁶ and that courts would then have deferred to the Board’s standards.²⁰⁷

Importantly, those standards could also take into account 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. In fact, the secondary boycott ban’s

²⁰² Michael M. Oswalt, *The Content of Coercion*, 52 U.C. DAVIS L. REV. 1585, 1615-16 (2019).

²⁰³ 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.” NLRB, *Recognitional Picketing (Section 8(b)(7))*, <https://www.nlr.gov/rights-we-protect/whats-law/unions/recognitional-picketing-section-8b7>, last accessed Jan. 2, 2018.

²⁰⁴ Cf. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

²⁰⁵ Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2095 (1990) (discussing importance of agency expertise in interpreting statutes); see also Note, *The Two Faces of Chevron*, 120 HARV. L. REV. 1562 (2007) (finding that “in the circuit courts, [agency] expertise plays a more central role in the deference decision”).

²⁰⁶ 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 of objective analysis. *Supra* note 202 at 1590.

²⁰⁷ But see James J. Brudney, *Chevron and Skidmore in the Workplace: Unhappy Together*, 83 FORDHAM L. REV. 497, 498 (2014) (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*”).

legislative history suggests that the measure was inspired by incidents that have very 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.”²⁰⁸ 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.”²⁰⁹ 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.²¹⁰

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,”²¹¹ as *Preferred Building Services* reflects. Fissuring refers 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 needs to much smaller businesses.²¹² 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.²¹³ They 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

²⁰⁸ *Extension of Remarks of Hon. Gerald W. Landis*, 93 Cong. Rec. A1295 (daily ed. March 24, 1947), reprinted in 1 NLRB, LEGIS. HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 583.

²⁰⁹ 93 Cong. Rec. H3534 (daily ed. Apr. 15, 1947), reprinted in 1 NLRB, LEGIS. HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 614.

²¹⁰ E.g., S. Rep. 86-187, at 2382 (1959) (discussing use of secondary boycotts by the Teamsters Union under the leadership of Jimmy Hoffa).

²¹¹ David Weil, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2017).

²¹² *Id.* at 189-90.

²¹³ 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 CA*, 362 NLRB No 186 (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.

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 large 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,²¹⁴ and whether signs locked away in parked cars can qualify as picketing.²¹⁵ 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 a flier, its like they’re saying ‘here, you throw this away.’”²¹⁶

While this Part's focus has been on the consequences of avoidance for labor law, the next Part 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 Part 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

²¹⁴ *E.g.*, *Southwest Region of Carpenters*, 356 NLRB 613 (2011).

²¹⁵ *Verizon New England, Inc. v. NLRB*, 826 F.3d 480 (D.C. Cir. 2016) (discussing whether signs locked in parked cars violated the “no picketing” term in the operative collective bargaining agreement).

²¹⁶ Mitch Hedberg, [YOUTUBE.COM, https://www.youtube.com/watch?v=4PNZSgVVgJo](https://www.youtube.com/watch?v=4PNZSgVVgJo) (last visited March 5, 2019).

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*.²¹⁷ 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.²¹⁸ In *Snyder v. Phelps*,²¹⁹ 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 the First Amendment, writing that "picketing peacefully on matters of public concern . . . occupies a 'special position in terms of First Amendment protection.'"²²⁰ Later, in *McCullen v. Coakley*,²²¹ 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.²²² 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.²²³

But *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.²²⁴ The same is true of the parties' briefs and the amicus briefs in

²¹⁷ *Supra* note 94.

²¹⁸ See, e.g., *Snyder v. Phelps*, 562 U.S. 443 (2011); *McCullen v. Coakley*, 134 S.Ct. 2518 (2014) (holding that 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).

²¹⁹ 562 U.S. 443 (2011).

²²⁰ *Id.* at 456 (quoting *US v. Grace*, 461 U.S. 171 (1983)).

²²¹ 573 U.S. 464 (2014).

²²² *Id.* at 477.

²²³ 538 U.S. 343, 365 (2003).

²²⁴ The opinion in *McCullen* quotes *Perry Educ. 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 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.

both cases, with a single exception. That exception is the AFL-CIO's amicus brief in *McCullen*, which 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.”²²⁵

One result has been the development of what I have previous called the “First Amendment of labor law,”²²⁶ and Professor James Gray Pope has called the “black hole” of labor speech,²²⁷ 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.²²⁸
- 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 via picket.²²⁹
- A public message that contains relatively little detail may be regulated more robustly than one that contains a lot of detail.²³⁰
- A misleading (but technically accurate) public message can be regulated more robustly than a more evenhanded one.²³¹

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

460 (2009) (quoting *Perry Educ. Ass’n*). The public forum doctrine traces back to a foundational First Amendment case, *Hague v. Comm. v. Indus. Orgs.*, 307 U.S. 496 (1939).

²²⁵ Brief of the Am. Fed. of Labor and Congress of Indus. Orgs in Support of Pet’rs, *McCullen v. Coakley*, 573 U.S. 464 (No. 12-1168) at *1 note 2.

²²⁶ Charlotte Garden, *Citizens United and the First Amendment of Labor Law*, 43 STETSON L. REV. 571 (2014); *see also* Charlotte Garden, *Citizens, United*, *supra* note 94.

²²⁷ *Supra* note 94.

²²⁸ *Cf. Phelps*, 562 U.S. at 456.

²²⁹ *Cf. John Doe No. 1 v. Reed*, 561 U.S. 186, 200-01 (2010) (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. at 932-33 (tort liability arising from consumer boycott enforced by “watchers” and accompanied by a handful of violent incidents was inconsistent with First Amendment).

²³⁰ *Cf. Phelps*, 562 at 454 (placards with messages such as “Thank God for Dead Soldiers” “plainly relate[] to broad issues of interest to society at large”).

²³¹ *Cf. US v. Alvarez*, 567 U.S. 709, 751 (2012).

board or 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 at all possible. (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.²³²) But if the NLRB decides a case on statutory grounds, reviewing circuit courts will generally avoid the constitutional issue by affirming on statutory grounds if possible. 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.²³³ So, while counterfactuals have their 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. That decision 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. But their significance for constitutional law may have been more muted, given that such a decision likely would have been broadly consistent with a raft of other pro-speech, pro-protest First Amendment cases.

²³² See, e.g., Charging Party Serv. Emps. Int’l Union Local 87’s Motion for Reconsideration, Preferred Building Services, 366 NLRB No. 159 (No. 20-CA-149353).

²³³ Leong, *supra* note 31 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 (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”).

The more interesting possibility is the opposite one: perhaps the Court would have decided that the NLRA's prohibitions on struck-product 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.²³⁴

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's 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.”²³⁵ 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.

1. In General

While avoidance's defenders generally agree that the traditional account does not reflect reality,²³⁶ 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 Section 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.”²³⁷) 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

²³⁴ John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223 (2015) (empirical analysis finding that the First Amendment is increasingly used by businesses for deregulatory purposes); Amanda Shanor, *The New Lochner*, 2016 WISC. L. REV. 133, 133 (2016) (arguing that the “First Amendment has emerged as a powerful deregulatory engine”).

²³⁵ *Supra* note 1 at 249 (emphasis in original).

²³⁶ *Supra* Part I.

²³⁷ 29 U.S.C. § 163; *Drivers*, 362 U.S. at 281 & n.9.

picketing at all. That is, the Court was right not to read the Act's general prohibition on union interference with employees' right not to 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.²³⁸ 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.

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.²³⁹ These are 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.”²⁴⁰ 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

²³⁸ The legislative history of section 13 is scant, but it does not bolster the idea that section 13 reflects congressional concern that courts might read 8(b)(4) too broadly. The House version of what ultimately became Section 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 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. Rep. No. 245 on H.R. 3020 at 62 [353]. 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 Section 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 on S. 1126 at 28 [434]. The House Conference Report reflects that the conference included the Senate version of this provision in the final bill because it “recognize[ed] that the right to strike is not an unlimited and unqualified right.” H. Conf. Rep., No. 510 on H.R. 3023 at 59 [563].

²³⁹ See *supra* Part I.

²⁴⁰ *Supra* note 3 at 1603.

interest,²⁴¹ 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.²⁴²

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.²⁴³ 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 while 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' disadvantage. Perhaps this is because “judges don't like labor unions.”²⁴⁴ 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.”²⁴⁵ 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

²⁴¹ *Supra* note ____.

²⁴² The labor case most closely associated with a judicial legitimacy crisis is surely *Jones & Laughlin*, 301 U.S. 1 (1937). There, the Court used constitutional avoidance – but still broke with precedent to hold that the National Labor Relations Act was within Congress's Commerce Clause power. 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); Mark Tushnet, *The New Deal Constitutional Revolution: Law, Politics, or What?*, 66 U. CHI. L. REV. 1061, 1063-64 (1999) (discussing criticism of the “switch in time” account).

²⁴³ Hasen, *supra* note 21; Katyal & Schmidt, *supra* note 13.

²⁴⁴ See *It's Simple: Judges Don't Like Labor Unions*, 30 CONN. L. REV. 1365 (1988).

²⁴⁵ 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, 1 (1996).

approach in First Amendment cases, which demands “breathing space” for speakers,²⁴⁶ a concept that is operationalized by doctrines like vagueness and overbreadth.²⁴⁷ 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 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 people.”²⁴⁸ Perhaps it is clear *ex ante* what qualifies as “taunting” or “massing,” but reasonable people could differ on what constitutes a “symbolic” barrier, particularly as distinguished from speech that effectively persuades customers to take their business elsewhere.

Second, the labor context, and especially the dues and fees 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.²⁴⁹ 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.²⁵⁰

²⁴⁶ See, e.g., *Alvarez*, 567 U.S. at 751 (while “false statements of fact do not merit First Amendment protection for their own sake,” “it is sometimes necessary to extend 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).

²⁴⁷ *Coates v. City of Cincinnati*, 402 U.S. 611, 613-14 (1971).

²⁴⁸ 355 NLRB at 810.

²⁴⁹ See *Garden*, *Citizens*, *United*, *supra* note 94 at 40-41.

²⁵⁰ See *Posner*, *supra* note 14 at 816 (discussing the relationship between constitutional avoidance and the rule of lenity); see also *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001)

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.”²⁵¹

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 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 simply 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.²⁵² Thus, in those cases, the traditional account of avoidance is especially inapt. Instead, a rational legislator would plainly prefer to the Court to give § 8(b)(4) its most natural reading, and

(holding, as matter of constitutional avoidance, that 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”).

²⁵¹ *Garden, Religious Employers*, *supra* note 15 at 133.

²⁵² *Tree Fruits*, 377 U.S. at 72 ([w]e 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); *DeBartolo*, 485 U.S. at 577-78 (stating that is 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).

then decide whether or not that reading comported 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 will develop at length in future work. First, courts should both state more clearly which constitutional questions they are avoiding, and give an careful explanation of why the Court believes the case raises those questions. 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 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.

While 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.