Workers Disarmed: The Campaign Against Mass Picketing and the Dilemma of Liberal Labor Rights

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In the late 1930s and early 1940s, mass picketing, characterized by large numbers of workers congregating in common protest at or near their employers' establishments, emerged as a crucial weapon in a historic campaign by American workers to realize basic labor rights and build an enduring labor movement in the face of strident resistance from a powerful business community. So potent a weapon did mass picketing prove that these business interests, aided by allies at all levels of government, moved quickly to ban the tactic. From the real-world complexities of labor conflict, this coalition forged a simplistic, analytically dubious, but difficult to contest picture of mass picketing as inherently violent, oppressive, and unjustifiable, and constructed a legal regime that prescribed the tactic even when it was not accompanied by overt violence. By the late 1940s, mass picketing was effectively banned by legislatures, courts, and police. Thereafter, it ceased to serve as an effective means of labor protest. Although overlooked by labor scholars and legal historians, this successful crusade against mass picketing was a crucial event in American legal and social history. For it not only anchored a broad-ranging attack on labor rights that culminated in the 1947 enactment of the Taft-Hartley Act; it also disarmed the labor movement, leaving unions and workers unable to consolidate the rights they seized in the 1930s and 1940s and impotent against renewed attacks on labor rights that began to unfold in the 1970s and that have left the labor movement shattered. This article tells the story of mass picketing as it shaped the content of labor rights and the fortunes of organized labor from the 1930s through the present day. In so doing, the article discerns in the history of mass picketing a fundamental dilemma inherent in liberal labor rights: that liberal labor law can neither reconcile itself to the kind of working class militancy manifested in mass picketing nor survive without it.

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INTRODUCTION

Memorial Day, May 30, 1937, was a brilliant Sunday in the far southern reaches of the City of Chicago. That afternoon, a throng of union workers and supporters numbering between 1000 and 2500 and including in their ranks men, women, and a few children, began a short march from a local union headquarters down the street a few blocks and diagonally across a vacant field. They were heading to the gate of a steel mill owned by the Republic Steel Corporation. Before the demonstrators could reach the gate, they were met by over 200 heavily armed, uniformed members of the Chicago Police Department. For four minutes or so, the two sides faced off, arguing over the demonstrators' demand that they be allowed to reach the gate. With little warning, the standoff suddenly erupted in violence, as the police fired several hundred gunshots into the mass of demonstrators, who were for all practical purposes totally unarmed. As much of the crowd fled in terror and others crumbled in the grass, the police rushed forth with billy clubs and hatchet handles drawn, beating anyone they could, including women and grievously injured people, and arresting scores.

The "Memorial Day Massacre," as it came to be called, stands today as one of the most infamous episodes of labor violence in American history — all the more because much of the carnage and brutality was captured on film by a Paramount Pictures newsreel cameraman. The demonstrators' specific aim was to establish a mass picket line at the gate of the Republic Steel plant, which was one of nearly thirty mills targeted in a strike that summer by an organization affiliated with the Committee for Industrial Organization (later Congress of Industrial Organizations, or "CIO"), which was then spearheading an extraordinary campaign to unionize the country's industrial

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2 Comm. on Educ. and Labor, supra note 1, at 3, 7, 22.
3 Id. at 2, 7, 18-32.
4 Id. at 2, 18-32, 37.
The demonstrators saw the right to set up a mass picket line as guaranteed to them by the National Labor Relations Act, or Wagner Act, which the Supreme Court had just held constitutional earlier that spring, if not as a right to protest guaranteed directly by the U.S. Constitution. The police insisted that the demonstrators could not be allowed to protest in such fashion and that they disperse.

The conduct of the Chicago Police is rightly viewed as a cruel and unjustifiable crime in the service of reactionary interests, and as a stunning measure of class conflict in New Deal America. However, lost in such criticism is a fact that haunts the world of labor rights to this day. The enactment of the Wagner Act raised doubts as to whether the prerogative that police had long claimed to restrict picketing remained intact. Nevertheless, as this ambiguity was resolved, it became clear that Chicago officials likely did possess the authority to deny the Memorial Day demonstrators the right to establish a large picket line at Republic’s plant, even if the police’s methods were horrifically brutal, their biases in favor of the company obvious, and their procedures for instituting the ban dubious. Notwithstanding the Wagner Act and court cases holding that picketing in general was protected by the First Amendment, in the years following the massacre, this prerogative of authorities to ban “mass picketing” became progressively more definite such that within a decade mass picketing had become presumptively unlawful, and was rigorously proscribed at all levels and by all branches of government. For many decades, mass picketing has no longer served the labor movement as an effective means of protest.

The Memorial Day Massacre and the politics surrounding it anticipated the legal fate of mass picketing in another crucial way. The thousands of steel workers who struck in the Chicago area had peaceable intentions and had engaged in virtually no violence at all in the lead-up to the massacre. Rather, they had been the victims of other episodes of police violence earlier in the strike. Nonetheless, the violence that was inflicted on the Memorial Day demonstrators that day was turned against them and their cause. Local authorities, the steel companies, and their allies in media and government presented the bid to establish a mass picket line as an irresponsible, provoca-

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6 On the demonstrators’ aim, see Comm. on Educ. and Labor, supra note 1, at 9, 18. On the CIO’s drive to organize steel, see Bernstein, supra note 1, at 448–98. On their assertion of a right to picket, see Comm. on Educ. and Labor, supra note 1, at 9–11, 20.
8 The Court ruled that the Wagner Act was constitutional in a series of five cases decided together, the lead decision being NLRB v. Jones & Laughlin Steel, 301 U.S. 1 (1937). See also Richard Cortner, The Wagner Act Cases 106–36 (1963).
9 Comm. on Educ. and Labor, supra note 1, at 9, 18, 22.
10 On the largely successful efforts of journalists and congressional investigators to expose the conduct and motives of the police in the face of efforts by supporters of the police and the steel companies to justify events that day, see Quirke, supra note 5, at 164–78.
tive, and inherently disorderly act. The Chicago Daily Tribune led the charge with sensational and overblown stories about the “bluecoats’” courageous stand against an “attack” by an “army,” led by “outsiders” and radicals. The paper dissected the story for its readers with a detailed schematic showing how the police barely managed to defend their position. In the view of the Tribune’s editors, the leaders of the “mob” were the “murderers.” Even if the demonstrators had not intended to attack the police and assault the plant — as was also claimed — by their very presence in such large numbers, their detractors asserted, they had at least brought the massacre upon themselves. This view of mass picketing as an anticipatorily violent and therefore presumptively illegitimate form of labor protest would prove enduring and would play a central role in the ensuing campaign to ban the tactic, not least by helping the architects of this effort parry concerns about the legal rights and political claims of picketers.

The fate of mass picketing constitutes a decisive, although almost entirely overlooked, episode in the history of American labor relations. Until the mid-1930s, workers in this country enjoyed essentially nothing in the way of basic labor rights — the right to organize unions, to provoke collective bargaining, and to strike were all under a cloud of illegality and subject to vicious state- and employer-sponsored repression. The enactment of the Wagner Act in the summer of 1935, § 7 of which purported to codify these rights, initially did little to alter this condition. Courts held the statute in constitutional limbo while powerful employers like Republic Steel continued to flout the law and deny workers’ basic labor rights, often by the most violent or otherwise criminal means. Nevertheless, in an extraordinary period extending from the mid-1930s through the mid-1940s, workers finally managed to make significant inroads on this so-called “open-shop” program. The keys to their success were militant protests, in particular sit-down

12 On the events surrounding the massacre, see QUIRKE, supra note 5, at 155–63; and Carol Quirke, Reframing Chicago’s Memorial Day Massacre, May 30, 1937, 60 AM. Q. 129, 140–44 (2008).

13 See, e.g., 4 Dead, 90 Hurt in Steel Riot, CHI. DAILY TRIB., May 31, 1937, at 1; see also Chicagoans Led in Steel Strike by Outsiders, CHI. DAILY TRIB., June 1, 1937, at 2; Hunt Six Men as Instigators of Fatal Riot, CHI. DAILY TRIB., June 3, 1937, at 4; Pin Steel Riot on Red Agents; 6th Victim Dies, CHI. DAILY TRIB., June 2, 1937, at 1; Riots Blamed on Red Chiefs, CHI. DAILY TRIB., June 1, 1937, at 1; The Law Defended, CHI. DAILY TRIB., May 31, 1937, at 14.

14 Murder in South Chicago, CHI. DAILY TRIB., June 1, 1937, at 12.

15 The police themselves claimed that the demonstrators intended to “take an armed band into the Republic Steel plant for the purpose of driving out the workers who had not gone on strike,” and that they marched on the plant in “military” fashion. COMM. ON EDUC. AND LABOR, supra note 1, at 8–16; see also QUIRKE, supra note 5, at 169–72.


strikes, in which strikers occupied the workplace in defiance of their employers, and mass picketing, in which large numbers of strikers congregated near the struck businesses.

Making wide use of these tactics, workers at last were able to counter employers' enormous advantages in economic and political power, build solidarity within their ranks, and ultimately realize out of the Wagner Act a functional system of labor rights. However, in the late 1930s the sit-down strikes were declared illegal and unprotected by the labor law, and they faded as a form of labor protest. For nearly a decade, this left mass picketing as the most effective form of labor protest. It proved a very powerful weapon indeed, as unlike conventional small-scale picketing, which serves mainly to publicize labor disputes, mass picketing allowed strikers to shut down employers' businesses and prevent them from exercising their right to counter the strike with strikebreakers or replacement workers. Workers used mass picketing with great frequency to win battles with employers over contract disputes and union recognition, even as that tactic was treated with increasing hostility by police, courts, and legislatures. Indeed, mass picketing and the dramatic conflicts that surrounded it defined the state of labor relations in the 1940s, particularly in the two years following the conclusion of the Second World War. But by the end of the 1940s, the tactic had been effectively prohibited and became a relatively uncommon and very risky thing for workers to do.

Courts, including the Supreme Court, played a decisive role in this process, as they denied mass picketing the full protections of the First Amendment and shaped preemption law to allow states broad leeway in regulating the tactic. Leaving American workers without a viable mode of militant protest, this development prevented unions and workers from further consolidating the gains won in the 1930s and 1940s. More importantly, it left them unable to defend against a devastating counterattack on unions and labor rights that began to ravage the labor movement in the 1970s.

The demise of mass picketing was labor's undoing. Despite its crucial role in shaping the course of labor relations in modern America — and with this, the country's political economy and social structure — the history of mass picketing is reduced to an afterthought in labor discourse. In recent years, quite a few labor law scholars and other commentators have undertaken — with great justification — to explain the recent decline of the labor movement by exploring the role of the law and

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19 Pope, supra note 18, at 107–8; White, supra note 18, at 48–52.
20 Pope, supra note 18, at 107; White, supra note 18, at 48–52.
the courts in undermining the effectiveness of labor rights. In some instances, they have also emphasized the crucial importance of an effective right to strike to a healthy system of labor rights and a healthy labor movement, and argued that the erosion of such a right goes a long way towards explaining the labor movement's precipitous demise over the last few decades. And yet, no one has really grasped the role that the demise of mass picketing has played in rendering the right to strike so ineffective. Indeed, although occasionally discussed in relation to particular strikes, mass picketing otherwise receives almost no attention of any kind in scholarly treatments of labor rights and the labor movement. Even the most comprehensive treatises, practice guides, and law school casebooks devote little attention to the subject. In tracing the legal developments that have shaped the course of labor relations, commentators have consistently ignored the role of mass picketing in the building of the labor movement and in its demise. Mass picketing remains labor's forgotten road to victory, and its prohibition, a forgotten defeat.

The story of mass picketing teaches something else. The history and functions of mass picketing and the legal campaign against it also reveal a basic dilemma inherent in the very concept of liberal labor law. As this article will show, mass picketing is, by the lights of liberalism, an insufferable mode of labor protest. For it is at once highly effective in arming workers to challenge the interests of capitalists, and also steeped in threatening visions of unmediated class conflict and worker solidarity and charged with the prospect of violence. For these reasons, the tactic has never been much defended by liberal jurists, academics, or other commentators. As the history of its treatment at the hands of courts, legislators, police, and commentators of all kinds makes clear, mass picketing is, in a word, anathema to a liberal system of labor law and policy. And yet at the same time, the effects

24 The tendency for recent scholarship on labor relations to ignore the decisive importance of mass picketing can be seen in general histories, like PHILIP DRAY, THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR RELATIONS IN AMERICA (2010); and ROBERT H. ZIEGER, AMERICAN WORKERS, AMERICAN UNIONS, 1920–1985 (1986). It is also evident in studies of the important role that the law has played in shaping labor relations, like JAMES ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 115 (1983); and GROSS, supra note 22.
of prohibiting mass picketing reveal that liberal labor law needs mass picketing for workers to realize the rights the law purports to offer them. The only alternative would be for the state itself to assume a much more active, corporatist function in protecting those rights, which would be of its nature illiberal. By its insolubility, this dilemma raises fundamental questions of a practical sort about the viability of labor rights and the labor movement in liberal society, and about the role of violence in this context.

Part I of this article traces the history of mass picketing, including its central role in the rise of the labor movement in the 1930s and 1940s. This Part uncovers the particular advantages that mass picketing offered workers in industrial conflicts, and it highlights the key role that mass picketing played in challenging the power of employers, helping unionists achieve important victories in this period, and ultimately establishing unions as viable actors in the postwar political economy. Part II documents the counterattack on mass picketing that unfolded in the 1940s, tracing the multiple ways the tactic came to be prohibited under both federal and state laws. Part III explores how the resulting doctrines were shaped around an approach to mass picketing that, by relentlessly anticipating its violent and coercive character, effectively prohibited the tactic while not having to go so far as to ban it entirely. Part IV also shows how the resulting prohibition of mass picketing disarmed the labor movement, leaving it unable to resist the renewed offensive against unions and labor rights that began to unfold in the 1970s. The Conclusion takes critical stock of mass picketing and its fate in the legal system, focusing on the dilemma that the tactic and its history expose at the core of the liberal concept of labor rights.


In the mid-twentieth century, mass picketing became the most salient form of labor protest, not only in terms of how effective and iconic it became in the labor struggles of that time, but also in the sense that it came to highlight the central dilemma confronting any viable system of labor rights in a liberal society: how to reconcile the requirement that workers have an effective right to protest with the tendency of such a right to conflict with liberal norms regarding the prerogatives of capital, the virtues of peace and order, and the proper role of the state in labor disputes. Understanding the nature of this dilemma and how it emerged requires a closer review of the history of mass picketing.

Raucous picketing has a long pedigree in the United States. However, for decades prior to the advent of the Great Depression and the New Deal, mass picketing had little significance among attempts by workers to alter the terms of exploitation in the workplace; during this time, the labor movement
in the United States operated in a "legal twilight zone" — that is, a condition in which the most basic labor rights were so heavily encumbered by legal strictures that unionism was under a cloud of illegality. In this period marked by violent, often extralegal repression of unionists at the hands of powerful, well-connected employers, nearly all forms of labor protest were vulnerable to legal repression. Union leaders and rank-and-file members alike who involved themselves in any kind of picketing faced a host of legal strictures, including: the crime of conspiracy, which was said either to inhere in the very act of picketing (if not striking), or in its collateral effects or purposes (like shuttering the struck business); violations of the judicial injunctions that employers were readily able to obtain in strike situations; biased application of general, public order offenses, especially vagrancy, loitering, and disturbing the peace; and sometimes specialized security statutes, like the federal Espionage Act of 1917 and the criminal syndicalism laws that about half the states began adopting that same year for the purpose of routing radical unionists. Mass picketers risked persecution under every one of these doctrines. Even those courts in this period that were inclined to respect some right of picketing in general were just as keen to hold that mass picketing was illegal and subject to injunction.

Repression in these forms took its toll on workers, who struggled mightily through the late 1800s and early 1900s to establish and maintain effective unions. At the dawn of the Great Depression, the persecution of workers had combined with structural changes in the workplace — in particular a steady displacement of skilled labor — to realize what employers euphemistically called an "open-shop" program. Ostensibly, the open shop contemplated a system under which employers would allow workers the

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27 See id.
30 This story of violence and repression is a central theme in every narrative of the early history of the labor movement. See, e.g., Dray, supra note 24, at chs. 1–7.
freedom to join a union if they wanted, but would treat union and nonunion workers equally. What the open shop really represented was the successful purge of most unions and the effective neutralization of those that retained a titular presence in the workplace. While violence and legal repression were vital to the construction and defense of the open shop, other methods were also used, including company unions, espionage, and propaganda, as well as routine harassment, firings, and blacklisting of workers who supported unions. In such fashion, unions — already hampered by moribund leadership and a legacy of excluding unskilled workers, racial and ethnic minorities, and women — were held at bay despite the ardors, exploitation, and insecurity that characterized work in this period, and despite the persistent and often courageous efforts of many unionists.

The 1920s marked the pinnacle of the open-shop era. Union membership plummeted, many union locals were destroyed, and those that remained seldom struck or bargained effectively with employers. However, as that decade of lopsided prosperity and deep inequality collapsed into unprecedented economic crisis, changes began to unfold that would dramatically reshape the landscape of American labor relations, reinvigorate the labor movement, bring about reasonably effective labor laws — and bring mass picketing to the fore as both an effective tactic of labor protest and a particular object of employer repression.

A. The First New Deal Period and the Promises and Perils of Mass Picketing

Initially, the first few years of the Depression witnessed a worsening of the position of organized labor, as millions of workers were laid off or demoted, and those who held their jobs often counted themselves lucky to have work, despite a further intensification of the caprice, bullying, and exploitation they daily endured in the workplace. For a brief time, it appeared that unionism would, as it had done in other downturns, nearly fall into oblivion.

However, the Depression years eventually proved different. By 1932, as the downturn reached its absolute nadir, there soon were definite signs of

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32 Id. at 148-51.
33 See id. at 146-56; Zieger, supra note 24, at 4-10, 19-25.
34 Bernstein, supra note 31, at 83-143; Zieger, supra note 24, at 4-10.
35 On the continued deterioration of the labor movement, see Bernstein, supra note 31, at 335-57. On the deterioration of working conditions, see id. at 505-07; John Bodnar, Workers' World: Kinship, Community, and Protest in an Industrial Society, 1900-1940, at 145-52 (1982); and Liz Cohen, Making a New Deal: Industrial Workers in Chicago, 1919-1939, at 214-17 (2nd ed. 2009).
36 On the shortcomings of the labor movement during this period, see Bernstein, supra note 31, at 345-57; and Zieger, supra note 24, at 19-25.
an upsurge in union activism. Although an explanation for why this occurred defies simplistic reasoning, several factors played an especially prominent role, including the collapse of the many "employee welfare" programs and "employee representation plans" that industrial employers had built up over the preceding decades as bulwarks against unionism.\textsuperscript{37} Despite their antionion purposes, these programs had done much to legitimize the idea of union representation and the notion that employers owed workers decent wages and work experiences; their collapse left workers clamoring for effective ways of realizing these aims.\textsuperscript{38} Also influential were the workers themselves. Their minds stoked by radical critiques of the economic and social order, often propagated by Communists and other radicals in their midst, many workers flouted the risks and embraced unionism with an explicit intent to challenge a status quo that had become utterly intolerable.\textsuperscript{39} Yet another factor was political. The election in November 1932, of Franklin Roosevelt and a host of liberals and progressives in Congress led the following spring to the enactment of an extraordinary suite of legislation — the so-called First 100 Days, capped by passage of the National Industrial Recovery Act\textsuperscript{40} ("NIRA"). While all of these political changes were important in suggesting to workers that perhaps a new political and legal regime was in the offing vis-à-vis labor rights, the most critical in this regard was the NIRA. For among the statute’s intricate and far-flung agendas, mostly devoted to a corporatist reorganization of the national economy, was a provision, § 7(a), which purported to endorse workers’ rights to form and join unions and to engage in meaningful collective bargaining without being fired, beaten, blacklisted, or otherwise coerced by their employers.\textsuperscript{41}

\textsuperscript{37} Employee welfare programs entailed an array of benefit plans, from health insurance to stock ownership schemes, that employers used to cultivate dependency and loyalty on the part of employees. Employee representation plans were, in essence, company-sponsored unions that were used in large part to preempt genuine, independent union representation. On the character of both of these, see BERNSTEIN, supra note 31, at 156–57; DAVID BRODY, STEEL-WORKERS IN AMERICA: THE NONUNION ERA 87–91, 154, 167–68 (1960); and COHEN, supra note 35, at 171–83.

\textsuperscript{38} COHEN, supra note 35, at 162–83.

\textsuperscript{39} On the influence of overall social conditions in the rise of labor activism, see BERNSTEIN, supra note 1, at 217–18; and COHEN, supra note 35, at 252–53. On the role of Communists and communist ideology, see COHEN, supra note 35, at 261–67; and DRAY, supra note 24, at 421–26.


\textsuperscript{41} National Industrial Recovery Act § 7(a) provided that:

(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join
Section 7(a) was poorly conceived as a vehicle for labor rights, was under-enforced, and did little to protect workers or their unions from employer repression. Nevertheless, its inspirational effect was strong. By the end of 1933, the passage of § 7(a) had helped to spur a genuine upsurge in union organizing efforts, including in industries that had been notoriously effective in defending the open shop. By 1934, this effort had reached an apogee, with tens and sometimes hundreds of thousands of workers, mostly led by rank-and-filers or local organizers, building labor organizations in industries like maritime and truck transport and automobile, office-machine, glass, rubber, and steel production.

Mass picketing figured prominently in this upsurge, including in several large and tumultuous strikes that defined this period of labor history. In the spring of 1934, an assortment of Marxists and other radicals entered a confederation with American Federation of Labor ("AFL") unionists who were seeking recognition and better terms from Toledo's large automobile parts supplier, Electric Auto-Lite. Faced with the company's adamant refusals, the workers struck, first in February and then again in April. In an effort to build morale and block the movement of strikebreakers, the unionists mobilized thousands of workers and unemployed people into mass picket lines at the gates to the company's plant. The strikers repeatedly and blatantly defied a judicial injunction ordering that the mass picketing be discontinued, that no more than twenty-five picketers patrol each gate, and that radical organizations not participate at all in the picketing. Local authorities responded by arresting dozens, including a large contingent of union leaders. Undaunted, the picketers succeeded in closing off access to the plant, stranding over 1000 strikebreakers inside. The conflict reached its climax in late May, when for several days running as many as 10,000 strikers armed with bricks and rocks battled heavily armed National Guardsmen for control of access to the plant. The "Battle of Toledo" left two people dead, shot by Guardsmen, and dozens seriously injured. With reinforcements of men and arms, the Guardsmen eventually succeeded in reopening

any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing. Id.

42 BERNSTEIN, supra note 1, at 37; see also ZIEGERT, supra note 24, at 28-29.
45 Zeitlow & Pope, supra note 44, at 844.
46 BERNSTEIN, supra note 1, at 221-22; Zeitlow & Pope, supra note 44, at 844-46.
47 Zeitlow & Pope, supra note 44, at 844-46.
48 Zeitlow & Pope, supra note 44, at 845. On these clashes, see Chesly Manly, 6,000 Renew Toledo Rioting, CHI. DAILY TRIB., May 25, 1934, at 1; Soldiers Fire on Toledo Mob in New Rioting, CHI. DAILY TRIB., May 27, 1934, at 1; Troops in Toledo to Check Rioting: Workers Besieged, N.Y. TIMES, May 24, 1934, at 1; Truce is Rejected in Toledo Strike; Officer Wounded, N.Y. TIMES, May 26, 1934, at 1; Two Slain, Score Injured as National Guard Fires on Toledo Strike Rioters, N.Y. TIMES, May 25, 1934, at 1.
the plant. However, hamstrung by the protests, Auto-Lite was prompted to recognize and begin bargaining with the union, which eventually resulted in the union securing a favorable contract.49

Mass picketing also featured in the Minneapolis teamsters’ strike, which began in earnest in mid-May 1934.50 Organized well by a contingent of Trotskyites, and supported by throngs of other workers, several thousand picketers set up roadblocks barring passage to strikebreakers.51 After several days, the trucking companies took the offensive. Mobilizing police, special deputies, and a menacing “Citizens’ Army,” they sought to push aside the picketers and reclaim free passage for their trucks.52 The unionists, whose ranks were quite diverse, in turn mobilized picketers by the thousands to confront the pro-employer forces.53 The result was a series of street fights, culminating on May 22 in an enormous battle that eventually spread through much of the city center and ended in a complete rout of the police and the Citizens’ Army.54 The “Battle of Deputies Run” led the governor to press for further negotiation, an admonition he backed by threatening to send in the National Guard.55 However, an agreement reached by the parties unraveled, leading to another strike in mid-July, which led to more serious bloodshed, as police abandoned their earlier antipathy to using firearms against the strikers.56 The ensuing mayhem prompted the mobilization of the Guards, followed by further efforts at negotiation and another, somewhat more lasting agreement.57

The conflict over labor rights followed a similar pattern elsewhere, including in other big strikes. Mass picketing was prominent in the 1934 waterfront strike in San Francisco.58 Over a several week period in the late spring and early summer, as many as one thousand men picketed strategic parts of the waterfront district in shifts, using their numbers to successfully block the loading and unloading of ships and the transport of cargoes from the waterfront by truck. As the struggle grew into the “Big Strike,” as it was called, mass picketers fought pitched battles with police, strikebreakers,

49 Bernstein, supra note 1, at 225–29; Zeitlow & Pope, supra note 44, at 846.
50 Bernstein, supra note 1, at 234–35.
51 Id. at 235–36.
52 Id. at 236–37.
53 Id. at 237–38.
55 Bernstein, supra note 1, at 238–39.
57 Lauren D. Lyman, Two Pickets Shot Stopping a Truck, N.Y. Times, Aug. 5, 1934, at 20; Minneapolis Is Put Under Martial Law, N.Y. Times, July 27, 1934, at 1; Truce is Declared in Minneapolis; Troops Go to City, N.Y. Times, July 22, 1934, at 1; Track Strike Ends in Minneapolis, N.Y. Times, Aug. 22, 1934, at 2; see also Bernstein, supra note 1, at 250–51.
and vigilantes. On July 5, "Bloody Thursday," two workers were killed and dozens of people injured in a huge clash. In the wake of Bloody Thursday, strike leaders were able to organize a brief general strike, which paralyzed the city. Their success in choking off commerce, combined with the mayhem surrounding the strike, prompted a negotiated settlement modestly favorable to the strikers, which included the establishment of a longshoreman's mediation board.

Mass picketing also featured in the largest strike of the First New Deal Period, the sweeping and violent textile strike that extended the full length of Appalachia in the late summer and fall of 1934. At its height, the strike entailed nearly 400,000 workers who relied on mass pickets, including on occasion some organized around mobile "flying squadrons" — select groups of picketers in automobiles and with radio communication who could be deployed quickly where most needed — not only to close the far-flung plants but to protect strikers from the ample risks they faced at the hands of hundreds of company police, corrupted public police, and vigilantes who roamed the industrial battlefield. However, in proof that mass picketing was no panacea, unlike the strikes in Minneapolis and San Francisco, the textile strike ended in a general defeat for the workers, as strikers struggled with poverty and strike leaders pulled back the picket lines in the face of increasingly violent and confrontational tactics on the part of the companies and their allies.

Nor was mass picketing found only in these big strikes. In the period between mid-1933 and mid-1935, the tactic defined countless strikes, large and small, many of them caused by the categorical refusal of employers to accept union demands for recognition, regardless of how many workers supported unionization. In the summer of 1935, for example, police in Omaha, Nebraska, resorted to their own "flying squadrons" to thwart mass picketing by car workers. Mass picketing was also a fixture in a lengthy strike at New York Shipbuilding in Camden, New Jersey. Mass picketing featured in a succession of strikes in heavily unionized Cleveland, leading conservative elements there to suggest that the problem was that union peo-

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59 Id. at 128–33.
60 Id. at 137, 149.
61 Bernstein, supra note 1, at 295–98.
63 See Bernstein, supra note 1, at 312–13; Irons, supra note 62, at 120–39; see also Dye Workers Plan to Extend Strike, N.Y. Times, Oct. 30, 1934, at 37; First Clash at Trion, Ga., N.Y. Times, Sept. 6, 1934, at 1; Johnson Asked to Quit by 35 Labor Groups, N.Y. Times, Sept. 17, 1934, at 2.
64 On these and other reasons for the failure of the strikes, see Bernstein, supra note 1, at 313–14; Irons, supra note 62, at 120–53.
ple wielded too much political power and that this had caused local authorities to suffer such protests.68

Whatever the truth of things in Cleveland, the fact is that some officials did accommodate mass picketing. New York Mayor Fiorello La Guardia issued an order the previous summer upholding the right of workers in his city to engage in peaceful mass picketing.69 La Guardia’s position, taken just as the uprising among textile workers took hold at knitting-goods operations in the city, was anomalous. More commonly, mass picketing was met, if not with deadly force, then at least with threats, provocations, and a torrent of employer-generated propaganda that equated the workers’ demands and methods with radicalism and violence. Not a year after his order protecting mass picketing, even La Guardia backtracked, allowing police to make arrests for mass picketing in a theatre strike in the city.70

Whatever kind of picketing strikers relied on, only in rare cases did this labor “eruption,” as historian Irving Bernstein describes this tumultuous time, produce truly lasting results, at least in terms of unions being recognized by their employers and able to enter effective bargaining relationships with them.71 Even the limited successes realized in Minneapolis and San Francisco were exceptions. When workers brought their demands that employers recognize or bargain with their unions before the various government boards created to enforce § 7(a), the companies simply tied up the proceedings with lawsuits and other delaying tactics, or otherwise flouted the boards’ authority.72 Taking advantage of this, employers continued to repress workers, harassing, assaulting, and firing union organizers and stalwarts, and using force to rout small groups of picketers. Although it showed promise as a means of overcoming these tactics, even mass picketing was usually inadequate to defeat open-shop employers, who eventually could count on building up some combination of private police, public police, and militia to put the picketers to flight, reopen their businesses, and proceed with their repression of the unionists. Often, these measures were fully justified either by the simple expedient of obtaining judicial injunctions or by invoking local and state laws, at the time constitutionally untested, that more or less explicitly criminalized mass picketing.73 More ominous for the workers who engaged in mass picketing was the frequency with which, even

68 George Tagge, Mayor Linked with Riotings in Cleveland, CHI. DAILY TRIB., May 27, 1935, at 6.
70 La Guardia Acts to Halt Mass Picketing of Film Theaters, CHI. DAILY TRIB., June 23, 1935, at 7; see also 8 Theatre Pickets Seized in New Clash, N.Y. TIMES, Mar. 29, 1935, at 26.
71 Bernstein, supra note 1, at 217–317.
72 Gross, supra note 17, at 37–39; see also Bernstein, supra note 1, at 177–78, 303–04.
if effective, the tactic resulted in a level of violence, both implicit and overt, that not only irritated powerful employers, but was difficult to reconcile with liberal conceptions of social order and the proper bounds of class struggle and labor relations.

The difficulties that workers encountered in developing an effective program of labor protest from mass picketing and other forms of militancy converged with long standing weaknesses in the structure of the labor movement to guarantee that unionists would be unable to take advantage of the promising upsurges in organizing and union activism that occurred in 1933 and 1934. By mid-1935, the hundreds of local unions that had either been created from whole cloth or seen their numbers bolstered in the previous two years were either collapsing or rapidly hemorrhaging members. However, the eruption had not occurred for naught. It had primed workers for another organizing upsurge, which would soon occur, catalyzed by two events: the passage in early summer of the Wagner Act, and the formation of the CIO that fall.

B. Mass Picketing in the Second New Deal Period and the War Years

Unlike § 7(a), the Wagner Act was a comprehensive and focused attempt to codify basic labor rights and to establish machinery for administering and enforcing them. Sections 7 and 13 of the new statute established the right to form unions, to engage in collective bargaining, and to hold strikes and other forms of protest. Section 8 of the Act established a range of civil violations — unfair labor practices — that could be charged against employers who flouted these rights. And § 3 set up an independent agency, the National Labor Relations Board (the “NLRB,” or “Board”) to administer the Act. The enactment of the Wagner Act may have convinced workers who had been disillusioned by the failure of § 7(a) that the federal government might yet play a role in meaningfully protecting labor rights. It certainly created an opportunity for the government to play such a role, even though, significantly, the Wagner Act was signed into law little over a month after the Supreme Court held the key substantive title of the NIRA, which contained § 7(a), unconstitutional — and did so in a fashion suggesting the same fate was in store for the Wagner Act. As we shall see shortly, this

74 ZIEGER, supra note 43, at 19.
76 Id. § 8.
77 Id. § 3.
78 Key provisions of the NIRA were held unconstitutional in Schechter Poultry v. United States, 295 U.S. 495 (1935), which held that the statute exceeded Congress' authority under the Commerce Clause. Id. at 550. Because the Wagner Act was grounded on a similar assertion of authority, it was widely thought that the Court would also invalidate that legislation. GROSS, supra note 17, at 149. In fact, as James Pope put it, in early 1937 "virtually no one expected the Supreme Court to uphold the Wagner Act." Pope, supra note 18, at 82.
uncertainty set the stage for a new round of conflict in which mass picketing would show its full relevance.

A critical development in this period was the formation of the CIO, the likes of which had been threatening to emerge for years. Under the leadership of John L. Lewis, the United Mine Workers' ("UMW") charismatic president, a dissident faction coalesced in the mid-1930s within the main labor federation, the AFL. Lewis and other founders of the CIO had several quarrels with the AFL, including the older federation's antipathy to industrial unionism, its entrenched social and political conservatism, and its hostility to hosting radicals within its ranks and among its organizers. However, an even more fundamental axis of disagreement concerned the AFL's mystifying refusal to conduct aggressive, broad-ranging organizing of any kind, notwithstanding the opportunities presented by the Depression and New Deal, or even to support the most energetic and promising outbreaks of worker militancy during this time.

By 1936, the CIO was either initiating or assuming leadership of a number of important organizing drives aimed at installing something approaching industrial unionism among millions of workers who were effectively without union representation of any kind. Like the upsurge of a couple of years earlier, this effort was focused on mass production industries, basic industry, mining, and transportation. As before, employers targeted in these drives resisted to the utmost. They flouted the authority of the NLRB and the Wagner Act, often with extraordinary contempt for the law. Backed by the Chamber of Commerce and the National Association of Manufacturers ("NAM"), they expended enormous sums tying up the new law in the courts and working to have it declared unconstitutional. Workers and organizers who participated in these organizing drives confronted a range of repressive techniques that were so extensive and applied with such aggression that the NLRB saw fit to describe them as examples of terrorism. With great regularity, unionists were shot, beaten, spied upon, kid-

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79 On the role of Lewis and other AFL figures in the creation of the CIO, see Bernstein, supra note 1, at 355–404.
80 Id. at 353–60, 368–86, 781–83. On the important role that Communists played in the CIO, and on the AFL's hostility to such radicals, see also Fraser M. Ottanelli, The Communist Party of the United States: From the Depression to World War II, at 137–57 (1991).
81 Zieger, supra note 43, at 17–21.
82 Id. at 29–65.
83 Bernstein, supra note 1, at 646–47; Gross, supra note 17, at 171–88. On the extent of organized opposition to the Wagner Act by these and related groups, see also U.S. Senate, S. Rep. No. 6-76, at 88–89, 99–142 (1939).
napped, tarred-and-feathered, run out of town, fired and blacklisted, and threatened in all sorts of ways by company police and other operatives.  

Arguably, in this context, the fates of both the CIO’s drive and the constitutionality of the Wagner Act (and with it, much of the Second New Deal), not only hung in the balance, they were intertwined. For if the CIO’s campaign foundered, the Supreme Court would likely feel much more empowered to invalidate the Wagner Act, as the Act would be reduced to a dead letter and its main constituency — the workers themselves — left without any institutional means of translating their displeasure with the Court into effective political action. Moreover, if the Act were invalidated, open-shop employers would then be free to repulse the CIO with no fear at all that their methods would ever be held in violation of federal law. Even the support of staunch New Dealers could not be guaranteed if things unfolded in this way.

This set the stage for a monumental struggle that reached its climax early in 1937. That winter, CIO unionists at General Motors ("GM") staged what is perhaps the most remarkable event in American labor history when they seized and held several of the company’s plants in Flint, Michigan. Defying judicial injunctions as well as an assault by the police, and overcoming considerable organizational challenges, the sit-down strikers with the CIO’s United Automobile Workers ("UAW") managed to hold the plants for six weeks. This bold gambit eventually shut down the company — then the largest in the country — and forced it to abandon its categorical opposition to unions and to treat with the workers. The GM sit-down was only the most prominent — and the most inspiring — of a huge wave of hundreds of sit-down strikes, which crested that spring and brought many other erstwhile open-shop employers to finally acknowledge their workers’ basic labor rights.

In April, in a stunning departure from its own precedents, the Supreme Court upheld the Wagner Act in the case of *NLRB v. Jones & Laughlin Steel*. *Jones & Laughlin Steel* is rightly regarded as a landmark case that not only enabled the Wagner Act and the NLRB to emerge as arbiters of a functional system of labor rights but also set the stage politically and jurisprudentially for a realignment of the American political economy. Although other factors, like the landslide electoral victories of Roosevelt and other New Deal politicians the previous fall played a role (developments much aided by CIO activism, as the federation was the main financial supporter of the Democratic Party in 1936 and used its organization to actively campaign

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85 *Philip Taft & Philip Ross, American Labor Violence: Its Causes, Character, and Outcome in Violence in America: Historical and Comparative Perspective* 281-319 (Hugh D. Graham & Ted R. Gurr eds., 1969); White, *supra* note 16.
87 See Pope, *supra* note 18, at 74-75; White, *supra* note 16 passim.
89 301 U.S. 1, 49 (1937).
for New Deal candidates), the sit-down strikes were instrumental to the Jones & Laughlin decision. For the strikes pressed the Justices to consider what might happen if the Court continued to adhere to its jurisprudential opposition to the New Deal Congress' efforts to regulate the national economy. As James Pope has argued, had the Court struck down the Wagner Act, it would have invited employers to continue to resist unionism and left "CIO leaders with no choice but to continue supporting factory occupations," while also giving impetus to President Roosevelt's Court-packing scheme.

The sit-down strikes were vital to the remarkable success that the CIO realized organizing workers in automobile production and other industries in this period; the strikes spearheaded the CIO's success in eroding the open shop and extending union representation to millions of industrial workers. But mass picketing also played a key role during this formative period, which was evident to the company in the caption of the Supreme Court's case: Jones & Laughlin itself. Jones & Laughlin was a large firm in an industry, basic steel, dominated by even larger players. Since the previous summer, the company had been the target of an industry-wide CIO organizing drive, led by the CIO's Steel Workers Organizing Committee ("SWOC"). All the companies in steel vigorously resisted the drive, frequently by violent means. However, in March 1937, U.S. Steel, which was the industry's largest firm, unexpectedly signed a contract with the SWOC. The agreement was influenced by U.S. Steel's perception of the sit-down strikes and the costs that might be entailed in continuing to resist the organizing drive. Initially, however, Jones & Laughlin refused to follow U.S. Steel down this path. By May, however, with the Supreme Court having rejected its argument that the Wagner Act was unconstitutional, and faced with a deteriorating financial situation, the company seemed prepared to negotiate towards a limited, "member's only" agreement with the SWOC. The unionists, however, had other ideas: they sought the company's recognition of the SWOC as the exclusive representative of all the company's pro-

90 On the role of the CIO in Roosevelt's victory, see Bernstein, supra note 1, at 449-50. On the influence of that victory on the Court, see James Gray Pope, The Thirteenth Amendment and the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957, 102 Colum. L. Rev. 1, 72-73, 95 (2002).
91 Pope, supra note 18, at 95-96. At the same time, by upholding the Act, Pope argues, the Court not only "undercut employer resistance" but also discouraged further militancy by unionists. Id.; see also Pope, supra note 90, at 91, 95-96.
92 This interpretation is widely embraced by historians and commentators. See, e.g., Bernstein, supra note 1, at 499-501; Dray, supra note 24, at 467; Lichtenstein, supra note 21, at 51.
94 Bernstein, supra note 1, at 476.
95 See id. at 467-70; Fine, supra note 86, at 329-30; Zieger, supra note 43, at 58-59.
96 Casebeer, supra note 93, at 670-72.
97 Id. at 672-73.
duction workers. On May 12, SWOC activists launched a strike against the company. At Aliquippa, a company town called “Little Siberia” in grim tribute to its tradition of labor repression, the picketers turned out in the thousands, fighting police and strikebreakers, and by their massive numbers, effectively quarantining the sprawling plant. After three days, the company, fearing it might be driven out of business, capitulated. It agreed to an NLRB-sponsored election that less than two weeks later the union won in a rout, setting the stage for a comprehensive contract between the company and the SWOC. The company’s relative weakness aside, the Jones & Laughlin strike was a stunning display of the potency of mass picketing in overcoming entrenched employer resistance.

Although remembered for the sit-down strikes, the CIO’s campaign against GM also featured mass picketing at several plants, including those seized by the sit-down strikers. After GM’s concession and the Supreme Court’s Jones & Laughlin decision, CIO unionists continued to employ mass picketing in what became a frantic effort to sustain the momentum achieved in the spring of 1937. The CIO’s campaign to organize steel, which underlay the conflict at Jones & Laughlin, featured mass picketing at other steel companies as well. This was particularly true when the drive, which began the previous summer, came to a head later in the spring and summer of 1937 at Republic Steel and other so-called “Little Steel” companies — a term used to distinguish these giant firms from the colossal U.S. Steel. Besides giving rise to the Memorial Day Massacre mentioned at the outset of this article, clashes between SWOC picketers and police, company agents, and National Guardsmen left at least six (and possibly eight) unionists dead and well over 300 people injured in Michigan, Ohio, and Pennsylvania. By July, the Little Steel Strike was broken, and it would be years before the companies finally yielded to the workers’ demands and the authority of the NLRB. In the meantime, the companies were able, by skillfully blaming all of the violence of the strike on the unionists, to blunt the effectiveness of the union’s tactics, including mass picketing.

98 Id. at 673.
99 Id. at 673–75.
100 Bernstein, supra note 1, at 478; Casebeer, supra note 93, at 673.
103 Bernstein, supra note 1, at 473–74.
105 White, supra note 17, at 597, 602.
Mass picketing figured in many other important struggles in 1936 and 1937, including an effort by about 6000 workers affiliated with the AFL to organize the large office equipment manufacturer, Remington Rand, whose operations were centered in upstate New York. Under the control of a pompous and deeply reactionary individual named James Rand, the company met the union with a sophisticated program of antiunion repression, eventually dubbed the "Mohawk Valley Formula" after the location of one of the company's plants. By effective use of the formula's main elements — propaganda, provocation, and physical intimidation and assaults — the company was eventually able to overcome the workers' attempt to use mass picket lines to shut its plants. All of these elements were calculated to bring the strikers into disrepute and legitimize repressive moves by local courts and police. In a portentous indication of the politics that define the use of the tactic, and in line with the formula, the company was able to enjoin the strikers and mobilize police against them by successfully presenting the mass picketing as evidence of the strikers' irresponsibility and the violent threat to public safety, law, and order that they posed — never mind the company's role in provoking violence or even directly authoring it.

Unionists faced more immediate problems than this. Within months of the CIO's sensational victory at GM, it was evident that officials' tolerance of sit-down strikes, which in many cases had been considerable, was diminishing. Moreover, in 1939, the U.S. Supreme Court unequivocally held that the sit-down strikes in which workers defiantly occupied the employer's property were unlawful, not only in the sense that local authorities could end them by force, which was never really in doubt, but also in the sense that the NLRB could not lawfully protect workers who engaged in such strikes from discharge and other types of employer retaliation. Even before the Court declared the sit-down strikes illegal in this way, the strikes had been deemed acts of criminal and civil trespass, subject to injunction and arrest of participants. Increasingly, police were marshaling their forces and ousting such

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106 On the origins of the Mohawk Valley Formula, see Bernstein, supra note 1, at 478-79; and White, supra note 17, at 574-76. Rand, who vigorously opposed the Wagner Act, was uncensored in his condemnation of the NLRB. He courted contempt charges for his indifference to the NLRB's authority. And he was charged with violating federal law for his use of strikebreakers in the course of the dispute described here. Remington Rand, Inc., 2 N.L.R.B. 626, 628 (1937); White, supra note 17, at 577.

107 On the elements of Rand's formula, see Remington Rand, Inc., 2 N.L.R.B. at 664-66 (1937). On the way Rand deployed the formula, see White, supra note 17, at 574-77.

108 White, supra note 17, at 574-77.

109 See Remington Rand, Inc., 2 N.L.R.B. at 648-737 (1937); White, supra note 17, at 575-77.

110 See Pope, supra note 18, at 98-99.

111 See NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 242-44 (1939). The Court ruled against the NLRB's attempt to order the company to reinstate sit-down strikers whom the employer had fired after the strike came to an end, despite the fact that the strike was provoked by the employer's flagrant violations of the strikers' rights under the Wagner Act. Id. at 252-57.
During this period, the sit-down strikes had also come under sustained political attack by major employers and other elites. Although small, brief sit-downs continued to be found especially among the hundreds of "wildcat strikes" — strikes undertaken without the approval of union leaders — that occurred in the late 1930s and early 1940, large sit-downs of extended duration became almost unheard of by 1940 and by the mid-1940s in particular.

Even more worrying for the CIO was that, in the wake of the big sit-down strikes of 1936 and 1937, its support in political circles and among the public seemed to be diminishing and its organizing momentum seemed at risk of collapsing. And yet many employers, especially in basic industry and mass production, remained entrenched in their opposition to the rights that workers sought to assert under the Wagner Act. In this climate, mass picketing took on increasing importance as a means of sustaining the federation's effort to organize the industrial workforce. Mass picketing differed from a sit-down strike in that it did not involve a defiant occupation of the employer's property. Its defining feature was the size of the picket line, which virtually always occurred on a street or public right of way near, but not within, the employer's property. This distinction was critical, because it seemed to place mass picketing outside of the domain of conduct that the Supreme Court condemned in its 1939 ruling on sit-down strikes.

Between the summer of 1937 and America's entry into the Second World War, mass picketing continued to play an important role in labor disputes, even as sit-down strikes faded and as employers and their allies began to ramp up efforts to restrain mass picketing. Nowhere was its value more evident than in the CIO's eventual victory over Ford Motor, whose army of over 3000 thuggish "service men" had kept the UAW at bay for several

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112 Pope, supra note 18, at 98-99.
113 White, supra note 18, at 52-56.
114 See Pope, supra note 18, at 107-08; White, supra note 18, at 48.
116 This opposition manifested not only in continued confrontations with workers and unions and a continued unwillingness of some employers to recognize unions, but also in an escalating political campaign against the Wagner Act, the NLRB, and the CIO. See Bernstein, supra note 1, at 663-65; James A. Gross, The Reshaping of the National Labor Relations Board: National Labor Policy in Transition 1937-1947, at 73-75 (1981).
117 Although the Court's decision in NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) did invoke the "force and violence" of the sit-down strike as a reason to deny workers the protections of the Wagner Act, the decision focused throughout on the fact that these workers had "seized and held" the employer's buildings. See id. at 252-54. In other words, while Fansteel certainly portended the Court's intolerance of some aspects of mass picketing, and would be cited for this proposition in later cases, the decision did not mandate that the NLRB or the lower courts condemn mass picketing in the way they were instructed to condemn sit-down strikes.
years. In the late spring of 1941, UAW activists used an enormous mass picket line set back from the plant’s boundaries to effectively shut down the company’s huge River Rouge complex in Dearborn, Michigan — the largest industrial plant in the world. After several days, the company capitulated, eventually entering an agreement with the UAW more favorable than the union’s contracts with either GM or Chrysler.

Mass picketing also factored in the CIO’s renewed attempt to complete its organization of basic steel after its defeat in the Little Steel Strike. In the late winter and spring of 1941, local union leaders and rank-and-file elements led several strikes at Bethlehem Steel’s plants in Lackawanna, New York, and Bethlehem, Pennsylvania. The strike at Lackawanna was particularly significant. Inspired by continued frustration over the company’s refusal to treat with the CIO and to address grievances about working conditions, the strike quickly ballooned into a huge affair, with several thousand workers cordoning the plant and successfully fighting police and company men to prevent the movement of loyal employees into the plant. Within a few days, the company, prompted by government mediators, agreed to negotiations. The Lackawanna strike and later action at the company’s Bethlehem plant did not lead to the company’s recognition of the CIO. That would only occur once production controls instituted during the Second World War had made continued adherence to the open shop considerably more costly for companies like Bethlehem.

Other examples underscore just how common mass picketing was in this period. In the summer of 1938, hundreds of CIO workers in New York battled police, strikebreakers, and court injunctions, in trying to close the pencil factory where they were striking. The following summer, UAW strikers responded to an effort by GM to reopen one of its struck factories in Cleveland by mobilizing some 8000 picketers who impeded access to the factories and fought pitched battles with police who attempted to push them

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119 See Bernstein, supra note 1, at 735–51.

120 Lichtenstein, supra note 115, at 46.


aside. Nor did only industrial workers use the tactic. White collar and service sector workers also established mass picket lines. In the summer of 1937, hundreds of teachers in New York picketed city hall as well as the governor’s home in protest of a policy proposal that would have undermined the merit system under which they worked. Newspaper workers engaged in mass picketing. Restaurant workers also resorted to mass picketing, as did department store workers, who on numerous occasions established mass picket lines at retail stores and warehouses. The tactic likewise prevailed at chemical and oil refineries, manufacturing plants, and shipyards.

The Second World War brought about a dramatic increase in union membership, as a vastly improved industrial economy allowed CIO (and to a considerable degree AFL) unions to build membership in the toeholds they had secured in the previous few years, and as the federal government set about attaching conditions to wartime production contracts that effectively induced union recognition. The war also diminished the incidence of mass picketing, along with strikes generally, as both the AFL and the CIO subscribed to no-strike pledges. Nevertheless, even if this wartime regime presaged a system of postwar labor relations in which collective bargaining was normalized but labor militancy discouraged, as scholars like Nelson Lichtenstein have argued, the war did not suspend class conflict. Small, wildcat strikes remained commonplace. Moreover, some independent unions continued to strike in large numbers and, on occasion, to establish large picket lines. So did some CIO unions, including the United Rubber Workers, whose members in Akron launched a particularly large and vigorous strike against Goodyear and Firestone in May 1943. The following year, mass picketing featured in a lengthy and far-flung strike against mail-order retailer, Montgomery Ward.

These episodes of mass picketing were significant in several ways. They showed how potent the tactic could be, particularly as employers became less inclined or less able in the late 1930s and early 1940s to rout
picketers with overwhelming force. This display of the power of mass picketing was a clear invitation to workers and unions to make even greater use of the tactic. But the potency of mass picketing in these struggles also anticipated a looming struggle over its legitimacy, one that another great wave of labor militancy about to sweep the country would shape.

C. The Heyday of Mass Picketing: 1945–1947

The end of the war brought a huge resurgence of open labor conflict. Indeed, "[d]uring no period in the history of the United States have the scope and intensity of labor-management conflicts matched those recorded in the 12 months following VJ-day, August 14, 1945."138 During a one-year period that formed the core of "American labor's greatest upsurge,"139 there were over 4600 strikes involving some five million workers.140 The most immediate reason for this veritable explosion of class conflict was the end of the war itself, as demobilization and the dramatic falloff in military production immediately threatened wartime labor standards and the return of Depression-era unemployment. Amidst these risky developments, both CIO and AFL unions were keen to defend Depression-era and wartime gains in membership and labor standards.141 Other factors were at work as well. Major employers, now freed from wartime labor regulations, began again to aggressively challenge, if not union representation itself, then at least the claims unions made in collective bargaining.142 Employers may also have hoped to use the millions of demobilized servicemen as strikebreakers.143

As the war drew to a close, conflicts quickly escalated surrounding wages, which had been frozen during the war years; working conditions, which were often deeply alienating and unsatisfying; union security agreements — so-called "closed-shop" agreements; as well as organizing efforts in heretofore unorganized places.144 On a broader level, CIO leaders, now backed by an organization with millions of members, were also intent on reshaping the political economy around a social democratic program in which the state would play an active role in managing the terms of labor conflict. At the same time, powerful employers and their trade associations were equally eager, in most cases, to deregulate the economy.145 More fun-
damentally, the war set the stage for an unprecedented consolidation of a
new political economy in which big business, its economic might expanded
by the war, drew increasingly on the state for financial support and the spon-
sorship of industrial peace. In the context of this emerging regime of “cor-
porate liberal power,” workers founds themselves “forced . . . to explore
their own resources via mass demonstrations and strikes” in pursuit of their
interests and visions. Although in most instances, the labor disputes born
of these conflicts were actually resolved without strikes, the total number of
strikes soared to numbers not seen since the end of the First World War.

If the period of American labor relations encompassing 1936 and 1937
can be described as the era of the sit-down strike, 1945 to 1947 can be fairly
described as the era of mass picketing. In this span there were thousands of
episodes of mass picketing in strikes both large and small, as the tactic
emerged as the signature form of labor militancy. Mass picketing assumed
the place earlier occupied by sit-down strikes as organized labor’s best hope
to check the considerable advantages that employers brought to bear in con-
tentious labor disputes. Indeed, workers assumed it to be their prerogative to
strike in this fashion, and so the tactic flourished. Episodes of mass picket-
ing were frequently the leading story in national news. The tactic became
a prominent topic of public discourse, including, as will be seen shortly,
rapidly intensifying debates about whether mass picketing was lawful or
morally acceptable.

Among the industries in which mass picketing was particularly promi-
nent in this period were manufacturing (particularly automobiles, electrical
machinery, rubber, steel, and farm equipment), oil refining, mining, meat
packing, transportation, newspapers, electronic communications, and motion
pictures. For example, in mid-January 1946, at least 200,000 members of
the CIO’s United Electrical, Radio and Machine Workers of America
(“UE”) struck 79 plants of General Electric, General Motors, and Westing-
house Electric over concerns about job security and pay. Although the par-
ties had agreed on procedures for the entry of white collar and plant
maintenance personnel into struck plants, mass picket lines were established
from the outset at many of the plants and numerous clashes with police and
company loyalists followed. For weeks, the strikers maintained the mass
picket lines in defiance of police and court orders. Although postwar la-

146 Lipsitz, supra note 144, at 10.
147 See, e.g., Harry A. Millis & Emily Clark Brown, From the Wagner Act to
Taft-Hartley, A Study of National Labor Policy and Labor Relations 298-302
(1950).
148 See, e.g., Complete Port Tieup Here Seen; Mass Picketing Ordered Today, Daily Bos.
Globe, Oct. 19, 1946, at 1; Dozen Injured in Melee at Warners’ Entrance; Union Leader
Arrested, L.A. Times, Oct. 6, 1945, at 1; A.H. Raskin, 200,000 Quit in 16 States; Mass Picket-
ing Started, N.Y. Times, Jan. 16, 1946, at 1.
149 Raskin, supra note 148, at 1.
150 See, e.g., H. Walton Cloke, Massed Philadelphia Pickets Routed by 1,000 Club-Swing-
ing Policemen, N.Y. Times, Feb. 28, 1946, at 1; Electrical Strike Brings Ultimatum, N.Y.
bor relations in steel were nowhere near as violent as they had been before the war, a strike against all the companies in basic steel early in 1946 featured mass picketing, which in some instances effectively trapped maintenance personnel in the mills.\footnote{See, e.g., Lawrence Resner, \textit{Court Puts Curb on Steel Pickets}, \textit{N.Y. Times}, Feb. 3, 1946, at 1; Lawrence Resner, \textit{Marooned 12 Days in Steel Plants}, \textit{N.Y. Times}, Feb. 2, 1946, at 8.}

One of the lengthiest and most contentious disputes of this period was centered in West Allis, a suburb of Milwaukee, and involved Allis-Chalmers, manufacturer of tractors, turbines, and other heavy machinery.\footnote{See \textit{Stephen Meyer}, \textit{Stalin Over Wisconsin: The Making and Unmaking of Militant Unionism}, 1900–1950, at 7 (1992).} Long a bastion of left-wing unionists, UAW Local 248 at West Allis called the strike at the end of April 1946, primarily in pursuit of a wage increase, a closed-shop clause, and greater union control of the grievance machinery.\footnote{Id. at 78–82, 157–61.} However, the dispute was eventually complicated by the emergence of a rival union with more conservative politics and the active support of the company.\footnote{Id. at 193–97.} In September, Local 248 began regularly deploying mass picket lines in a bid to prevent the company from bringing in replacement workers to demoralize the strikers and restore production. By October, there were repeated clashes, some of them quite intense, between huge assemblies of mass picketers and large contingents of police.\footnote{Id. at 179–83, 189–90, 208–10.} Punctuated by such contests, the bitter struggle lasted nearly a year before it collapsed. Over the first few months of 1947, the workers gradually abandoned the picket lines, and the national union and the employer both set out to purge Local 248 of its radical and militant elements.\footnote{Id. at 193–213.}

In addition to the Allis-Chalmers dispute, the wide range of major labor disputes involving mass picketing during this period include: a contentious and far-ranging conflict between AFL and CIO maritime unionists that resulted in mass picketing of ships and dock facilities all along the nation’s coasts;\footnote{See, e.g., \textit{Dozen Injured in Melee at Warners’ Entrance; Union Leader Arrested}, supra note 148, at 1; Lawrence Resner, \textit{End of Sea Strike Likely as Union Back Wage Award}, \textit{N.Y. Times}, Sept. 20, 1946, at 1; \textit{Tie-up of Shipping to Spread Today}, \textit{N.Y. Times}, July 12, 1946, at 38; see also \textit{Lawrence Resner}, \textit{Tension Eases on the Docks as CIO Limits Picketing}, \textit{N.Y. Times}, Sept. 18, 1946, at 1.} a long and violent dispute in Hollywood, which involved ten studios and manifested in two major strikes between 1945 and 1946;\footnote{See, e.g., \textit{Fists Fly, Many Injured in Film Fight}, \textit{L.A. Times}, Oct. 9, 1945, at 1; \textit{Peace Talks in Film Strike Assigned to Eric Johnston}, \textit{L.A. Times}, Oct. 16, 1945, at 1; \textit{Strike at 10 Major Film Studios Ends}, \textit{L.A. Times}, July 3, 1945, at 1.} sympathy strikes, responding to the Hollywood dispute, by actors, aircraft plant
workers, and maritime workers, which resulted in mass arrests;\textsuperscript{59} the UE's strike against GM, which resulted in mass picketing at the company's Los Angeles plant and led to clashes and arrests;\textsuperscript{60} and the CIO's 1946 strike against basic steel, which involved a number of steel-fabricating plants in and around Los Angeles.\textsuperscript{61}

Important episodes of mass picketing also occurred in smaller, more regional or local disputes, such as: mass picketing of the lock maker Yale & Towne Company in Stamford, Connecticut for weeks in late 1945, during which picketers battled to prevent company officials and loyalists from entering, and which provoked a general strike in that city in early 1946 after state police broke the picket lines (the case settled favorably that spring);\textsuperscript{62} a strike involving mass picketing of the Lancaster, Pennsylvania, public transit company, which featured clashes with police and also ended with a favorable settlement after provoking a general strike;\textsuperscript{63} and mass picketing of Oakland, California department stores, which precipitated a remarkable display of spontaneous solidarity, marked by mass demonstrations and a walkout by as many as 100,000 area workers.\textsuperscript{64}

Although obviously extremely commonplace, it is impossible to say how many episodes of mass picketing occurred in the immediate postwar years given that there was no mechanism in place to document every instance. The only accessible evidence of the frequency of mass picketing events is reportage in newspapers. It is equally difficult to say how often during this period before mass picketing was subjected to aggressive regulation workers got away with it. Probably, this was typical, although there were many exceptions. As we have already seen, workers engaged in mass picketing were often arrested for assault, disorderly conduct, and other crimes against public order.\textsuperscript{165} On a few occasions, mass picketers would literally be read the Riot Act before being routed and arrested by police.\textsuperscript{166}

\begin{footnotes}
\item[59] 679 Pickets Seized in Film Strike After 1,500 Protest Injunctions, N.Y. TIMES, Nov. 16, 1946, at 1; 700 Film Strike Pickets Arrested, L.A. TIMES, Nov. 16, 1946, at 1; 10,000 May Picket Film Studio Today, L.A. TIMES, Oct. 11, 1945, at 1; Actors Vote to Observe Picket Lines, L.A. TIMES, Oct. 15, 1945, at 1.
\item[62] LIPSITZ, supra note 144, at 57–62; City-Wide Strike Looms in Stamford, N.Y. TIMES, Dec. 29, 1945, at 3; Lawrence Resner, General Strike in Stamford Today to Protest Use of the State Police, N.Y. TIMES, Jan. 3, 1946, at 1; Lawrence Resner, Stamford Tied Up 3 Hours in Demonstration by Labor, N.Y. TIMES, Jan. 4, 1946, at 1; Stamford Pickets Halted by Police, N.Y. TIMES, Dec. 28, 1945, at 19.
\item[63] LIPSITZ, supra note 144, at 62–69.
\item[64] Id. at 81–84.
\item[65] See, e.g., 32 Pickets Seized in Camden Strike, N.Y. TIMES, Nov. 23, 1946, at 4; Film Worker Held on Assault Suspect Charge, L.A. TIMES, Nov. 10, 1946, at A1; Union Organizer Guilty, N.Y. TIMES, May 14, 1946, at 14; Vet is Slugged at Plant, CHI. DAILY TRIB., Feb. 27, 1946, at 7.
\item[66] See, e.g., Jersey Riot Act Invoked on Pickets, N.Y. TIMES, Mar. 2, 1946, at 1; H. Walton Cloke, Massed Philadelphia Pickets Routed by 1,000 Club-Swinging Policemen, N.Y. TIMES, Feb. 28, 1946, at 1.
\end{footnotes}
Moreover, petitioned by employers, courts often enjoined episodes of mass picketing, subjecting union officials and rank-and-file picketers to contempt charges if, as was not uncommon, they defied the injunctions. And although the tactic seems to have seldom resulted in judgments paid, in some cases unions and their officers and members faced damage suits for both actual damage to company property and lost business revenues occasioned by mass picketing. But the bottom line, as journalist Art Preis wrote of this period, was that “The American industrial workers had learned a thing or two since their first great awakening in the Thirties. In 1946 there were few would-be scabs — and very few of them got through the picket lines.” What is not so clear is how well these workers appreciated the degree to which mass picketing ran afoul of liberal norms about labor relations and what this would mean for the future of labor rights.

II. THE LEGAL COUNTERATTACK ON MASS PICKETING

Mass picketing proliferated in this period primarily because it offered American workers the unprecedented promise of an effective strike weapon, one that challenged the massive advantages in economic and political power that employers otherwise enjoy in labor conflicts. Much more so than conventional, small-scale picketing, which did little more than publicize the workers’ grievances, mass picketing afforded strikers a way to close off an employer’s business to customers and, even more importantly, prevent the employer from making use of its prerogative — explicitly protected by the NLRB and the courts via their readings of the labor law — to hire strikebreakers or replacement workers in the course of a strike. So effective was mass picketing in this respect that it led most employers to shelve their right to use replacement workers for the time being. In other words, mass picketing offered strikers a way of pressuring the employer while guarding


169 PREIS, supra note 139, at 276–77.


171 Pope, supra note 23, at 533–34.
their jobs. The business community understood this to be a major function of mass picketing, and from their standpoint the most immediately vexatious, as it allowed workers to defy "the true market value of their services" and to establish a "special privilege as against other workers."172

More than conventional picketing, the tactic offered picketing workers a defense against being physically routed by strikebreakers, company guards, or police, which was a common fate of small, vulnerable groups of picketers through the 1930s. True, mass picketing often resulted in violence, as strikebreakers, company loyalists, and police often tried to force their way past the picketers. And, as we shall see, such violence formed the bases of legal and political attacks on mass picketing. Nevertheless, in these picket-line clashes, the mass picketers often got the better of their adversaries. And in many instances, the strength of their numbers deterred any effort to get through their lines in the first place. Moreover, even the eventuality of large-scale violence could pay off by inspiring government intervention to mediate the union's underlying grievance. At the same time, the tactic afforded picketers a less definite but important advantage in that it offered unionists a potent means of stoking the morale of striking workers and displaying the union's relative power and vitality. Mass picketing was, among other things, a powerful engine of labor unity.173

Of course, mass picketing was not foolproof. As we have seen several times already, unions that resorted to mass picketing could be defeated. Nor was the postwar strike wave itself uniformly successful, as many of the settlements unions achieved were only marginally favorable, especially with respect to unions' bids to participate in management.174 Still, backed by mass picketing, the strikers were for employers an ominous display of the disruptive power of organized labor.

Mass picketing was thus confirmed as a key target in a sustained counterattack on labor rights spearheaded by powerful employers, industry groups, and their political allies. Prosecuted over a decade-long period, this campaign was born soon after the Supreme Court's validation of the Wagner Act in 1937. Accompanied by increasingly loud agitation against the practice, the campaign to ban mass picketing played out in the state legislatures, in the courts, and in the Congress, where it featured as both a focal point of statutory change, and politically, as one of several phenomena that were propagandized to justify comprehensive reforms to the labor law. Significantly, although this campaign was rooted very much in the naked class interests of the business class, it also reflected a broader and more funda-

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172 See, e.g., Henry Hazlitt, Workers Can't Eat Dollars, 34 Nation's Bus. 37 (1946).


174 ZIEGER, supra note 24, at 107–08.
mental conflict between the realities of mass picketing and the appropriate boundaries of class protest in liberal society.

A. Taft-Hartley and Mass Picketing

The most important attack on mass picketing occurred with the passage of the Taft-Hartley Act in 1947.\textsuperscript{175} The culmination of an effort to adapt the labor law to “the new challenges posed by rank and file militance,” Taft-Hartley had deep roots, running back to 1937.\textsuperscript{176} In the summer after the Jones \& Laughlin decision, while the Little Steel Strike raged, open-shop employers began to retreat from their crusade to have the Wagner Act invalidated by the courts or repealed altogether. Instead, aided by the NAM and Chamber of Commerce, which supplied both propaganda and lobbying services, the business community now embarked on a new program aimed at getting Congress to radically amend the Act.\textsuperscript{177} This program was further abetted by the 1938 election, which increased the number of antiunion conservatives in both houses.\textsuperscript{178} By 1939, Congress had instituted two separate investigations of the NLRB and the Wagner Act, one by the Senate Committee on Education and Labor, the other by a Special Committee of the House, which had considerable bearing on the legal fate of mass picketing.\textsuperscript{179}

The House and Senate committees collected voluminous evidence purporting to show that the NLRB was generally biased against employers and nonunion employees.\textsuperscript{180} Committee leaders and staff also sought to demonstrate that the NLRB and the Wagner Act were unfairly biased in favor of CIO unions and against AFL unions, and, most damagingly, that they systematically tolerated and excused coercion and violence sponsored by CIO unions. Of the two committees, the more aggressive was the House committee, chaired by a reactionary and opportunistic representative from Virginia named Howard Smith.\textsuperscript{181} The “Smith Committee” went to great lengths to indict the NLRB and the Wagner Act, mining cases and case files for any information that might cast the agency, the statute, or elements of the CIO in unfavorable light. A particular focus of these efforts was the Board’s handling of cases involving sit-down strikes, which lent themselves to sensational (if largely unfounded) claims that the NLRB was too tolerant of strike violence and too cozy with CIO unions, and needed to be reined in by

\textsuperscript{176} LIPSITZ, supra note 144, at 112; see also MILLIS \& BROWN, supra note 147, at 363.
\textsuperscript{177} MILLIS \& BROWN, supra note 147, at 281–85.
\textsuperscript{178} GROSS, supra note 17, at 68–74.
\textsuperscript{179} Id. at 85, 151–54.
\textsuperscript{180} On the broad contours of this campaign against the NLRB, see id. at 158–86.
\textsuperscript{181} Id. at 153. Besides being a strong opponent of the New Deal and an ardent anticommunist, Smith was a confirmed racist who stridently opposed civil rights legislation intended to benefit blacks. John T. McQuiston, Ex-Rep. Smith Dies at Home in Virginia, N.Y. TIMES, Oct. 4, 1976, at 24.
amendments to the labor law. But the committee also focused on more traditional strikes, including some, like the strikes at Little Steel and Remington Rand, which involved mass picketing. Indeed, the violence and other abuses of the rights of employers and employees said to inhere in mass picketing were invoked numerous times to demonstrate an urgent need to change the law.

Neither the Smith Committee nor the Senate Labor Committee was successful in convincing Congress to amend the Wagner Act. However, the investigations did generate considerable negative publicity about the NLRB, the Wagner Act, and the CIO, and they also influenced the Roosevelt administration to make important changes in Board personnel, which in turn reshaped agency policy. Moreover, the Smith Committee produced legislation, which cleared the House before dying in the Senate, and which would form an important template for the legislation that would comprise Taft-Hartley. Significantly, this early legislation to amend the Wagner Act hewed to the idea, which would resurface with Taft-Hartley, that a major defect in the Wagner Act was its failure to condemn union-sponsored coercion and violence in the picketing context, as it made no provision for penalizing culpable unions and gave the NLRB too much discretion to order employers to reinstate workers implicated in such violence.

Between 1937 and 1947, 230 bills to reform the labor law were introduced in Congress, many of them also concerned with limiting strikes and picketing. During the war years, none of this legislation — except for one bill aimed at wartime strikes — was successfully enacted, as the war diverted political attentions and Roosevelt and his party remained relatively strongly positioned and uninterested in statutory reforms. However, as the war came to an end, the situation rapidly changed.

In April 1945, Truman succeeded Roosevelt, and after the 1946 elections, Republicans, backed by conservative Democrats, dominated both houses of Congress. Partly responsible for this change in Congress in the first place, a powerful coalition of business groups redoubled its efforts to fundamentally change the Wagner Act. Although this coalition’s bid to secure statutory changes was initially blocked, by early 1947 it was poised to succeed in amending the Wagner Act. Making full use of the intensity of the postwar strike wave, the coalition embarked on a vigorous propaganda

182 White, supra note 18, at 54–55.
185 Id. at 252–55.
188 Gross, supra note 116, at 210–11, 251; Millis & Brown, supra note 147, at 354–56.
189 Millis & Brown, supra note 147, at 290–91.
190 Id. at 356–62.
campaign that, among other things, presented the bid to reform the Wagner Act as an effort not to eviscerate labor rights, but to make the system more "fair" and "equal" as between workers and employers, less tolerant of and conducive to violence, and less burdensome to the public. It proposed to accomplish this by enacting a host of provisions that would restructure the NLRB, restrict closed-shop agreements, outlaw a variety of "coercive" union practices, exclude some categories of workers entirely from the labor law's protections, purge radicals from the labor movement, and — most importantly as far as mass picketing is concerned — limit the circumstances and conduct of strikes and picketing, as well as the authority of the NLRB to reinstate workers fired for strike-related "misconduct." In the meantime, a public outcry against mass picketing had also been raised, not least by elite editorialists. In February 1946, the New York Times declared mass picketing an act of "seizure" that "is by its very nature illegal, because it infringes both individual and property rights." That same month, the L.A. Times excoriated a California judge for dissolving an injunction against peaceful mass picketing on grounds that such picketing was a valid exercise in solidarity. For the paper's editors, there was really no such thing as peaceful mass picketing, as the absence of violence merely showed that employers and employees wishing to go to work had been successfully deterred from testing the strikers. The paper's editors argued that "many peaceful citizens rather than risk violence at the hands of massed pickets will not attempt to buck such lines on the chance that the lines will part and they will be allowed to pass through peacefully." Only a few months earlier, the Chicago Tribune railed that "[m]any strikes are successful only because local authorities tolerate what is called mass picketing and in fact is organized terror." But the public, it said, should not and would not tolerate such interference with the right of a "citizen" to "go about his business." During the postwar strike wave, these and other papers, including equally prominent publications like the Washington Post and Wall Street Journal as well as countless local papers, ran numerous editorials condemning mass picketing, condemning local authorities for their perceived tolerance of the tactic, and urging that steps be taken by the states or by Congress to rein it in. Nor were these the only contexts in which elites inveighed against mass picketing. In a piece in the American Bar Association Journal, an

191 Id. at 286–90.
192 Id. at 288–91.
195 Id.
197 Id.
Indiana lawyer named George Rose held that "when picketing becomes mass picketing, it ceases to be peaceful, even when there may be no actual violence," and went on to disparage the tactic as one of several forms of union speech that are "fatal to our democracy." Even the American Civil Liberties Union, historically a friend of organized labor, weighed in. The organization declared mass picketing, when accompanied by violence, an abuse of the constitutional right of free speech. This wide-ranging condemnation of mass picketing could only be construed as an ominous sign of a growing contradiction between mass picketing and liberalism. Perhaps even worse for the labor movement was the fact that no prominent figures or groups outside the labor movement moved to defend the practice.

Led by Ohio's Robert Taft in the Senate and New Jersey's Fred Hartley in the House, Congressional conservatives moved quickly. In late January and early February 1947, the Senate Committee on Labor and Public Welfare and the House Committee on Labor and Education, chaired by Taft and Hartley respectively, opened hearings aimed at priming both the Congress and the public for reforms by exposing supposed defects in the labor law and the structure and practices of the NLRB. Like the earlier Smith Committee, whose work strongly influenced this new bid for reform, the central theme of both committees' efforts was to expose problems of union-sponsored violence and coercion in the course of strikes. Although the specter of sit-down strikes was repeatedly invoked for this purpose, with that tactic long in disuse and mass picketing still raging across the industrial landscape, a greater emphasis ultimately fell on mass picketing.

This preoccupation with mass picketing reflected the extent to which the business community and their allies in Congress actually feared the tactic's effectiveness and its prevalence, and desired, therefore, to see it banned in the labor law. As we shall see shortly, this mood was very much reflected in the legislative history. But the focus on mass picketing probably also betrayed the reformers' calculation that, if properly handled, the issue might provide them with especially compelling stories of union-sponsored violence and persecution of businesses and nonunion workers. These could then be used more generically, to cultivate in Congress and among the public support for the larger program of statutory reform, including the attempt to restructure the NLRB, change its procedures, protect "minority" workers who did not support unions, and find a way to purge the labor movement of radicals. To be sure, as the reformers would point out, mass picketing often featured violence. But it is hard to credit the claim that this was the reformers' primary concern, given the role of many leading employers in this
movement in initiating more serious acts of violence against unionists just a few years earlier. Nor was the violence associated with mass picketing at this point especially serious. In comparison with labor struggles in the 1930s, in which scores, perhaps hundreds, of people, most of them workers, were killed and untold thousands injured, during the postwar strike wave only a handful of people, mostly unionists, lost their lives.204

The committees' chairs and their allies in both houses adduced testimony carefully tailored to advance both their narrow ambition to justify new limits on picketing and their broader goals of discrediting the whole system of labor law and undermining labor militancy and radicalism. The strategy was to expose episodes of mass picketing as not only contemptible in themselves but also reflective of the abusive character of the labor movement and indicative of more fundamental defects in the law. For instance, the treasurer and part-owner of a small Connecticut dairy testified to the House committee how when ten of the company’s teamsters went out on strike in late 1946, the union set up a picket line composed of 200 to 300 picketers, many of the “big strong thugs and goons, mostly imported from New York State,” who proceeded to rough up some of the company’s loyal employees and damage their trucks.205 Furthermore, the businessman claimed, the union had prolonged the strike by eschewing all attempts at settlement. Even worse, while the police had arrested a number of union men, the state, he implied, had shown no desire to see the prosecutions through.206

Similarly, Hartley’s committee heard from Edgar Ailes, a representative of Detroit Steel Products, a medium-size automobile parts producer. Ailes claimed that a UAW strike in April 1946 began with “literally hundreds of pickets parading in front of the factory gates and blocking access not only to the factory, but to the office.”207 Even though, Ailes maintained, the company told the union it had no intention to run the plant during the strike, “the union continued for weeks to mass hundreds of pickets” at times employing what he understood to be a “meat chopper” formation, whereby two lines of picketers continuously moved in opposite direction “thereby effectually barring entrance to the plant.”208 A couple of weeks into the strike, Ailes was shocked to receive word from home that “a large number of men”— sixty-three, it turned out—were picketing his house, “calling me vile, insulting

204 On violence during the postwar strike wave, see TAFT & ROSS, supra note 85, at 363–67; and 2 Strikers Killed by Train Guards, N.Y. TIMES, Feb. 7, 1946, at 1. For a comparison to overall levels of labor violence in the 1930s, see generally SIDNEY LENS, THE LABOR WARS: FROM THE MOLLY MAGUIRES TO THE SITDOWNS 273 (1st ed. 1973).
208 Id. at 426–27.
209 Id. at 446.
and despicable names, such as "horse thief" and 'Nazi.'” Although the police arrived and took the situation in hand, eventually charging the picketers with trespass and disturbing the peace, Ailes nonetheless found among the committee's members considerable support for the view that the picketers were abetted by weak enforcement of the criminal law and the lack of adequate sanctions in the labor law.

Another witness before Hartley's committee was an employee at Timken Roller Bearing's plant in Columbus, Ohio, named Arthur Thorne. Thorne claimed that he had joined with other workers in trying to form an independent union to preempt the CIO, which, in his estimation, had brought "strikes and trouble" wherever it took hold. When the CIO union, the United Steelworkers of America ("USW," the successor to the SWOC) called a nation-wide strike in 1945, Thorne claimed he was prevented from getting to work by "too many pickets massed before the gates." Later, after Thorne and other loyal employees organized themselves to march into the plant, they were met by "600 to 700" pickets. "Plenty of fights started" and the police arrested people on both sides while making "no effort to clear the entrance." The problem as Thorne saw it was that unions believed "American ideas" of "majority rule[ ]" gave them the right to "run the whole place" and that unions forced people like himself to join their organizations.

The committee also heard from J.L. Waddleton, one of several officials with Allis-Chalmers to testify about labor unrest at the company’s plant in West Allis, Wisconsin. Waddleton began his testimony by accusing the union, UAW Local 248, of repeatedly resorting to "shoulder to shoulder" and "belly to back" mass picketing at the gates of the company’s huge plant during the first five months of 1946. Waddleton recounted several occasions when the picketing descended into violence and, like the other witnesses, was at pains to show that the local authorities were unwilling or unable to end the picketing or the disorder accompanying it. Waddleton joined other Allis-Chalmers officials in laying the blame for the strike, and indeed all the unrest between the union and the company, at the feet of Local 248. Waddleton charged the union, unfairly, with being the sole cause of the trouble as well as being Communist controlled.

209 Id. On the events at Ailes' home, see Picket Home of Firm's Official; 62 Are Arrested, CHI. DAILY TRIB., May 10, 1946, at 7.
210 House Taft-Hartley Hearings, supra note 205 at 448–74.
211 Id. at 983.
212 Id.
213 Id. at 984–85.
214 Id. at 985.
215 Id. at 985.
216 Id. at 985.
217 For the full range of testimony concerning Allis-Chalmers, see id. at 1335–1487.
218 Id. at 1356–1487.
219 Id. at 1357–61.
John Buchannan, the manager of a Borg-Warner plant in Michigan, testified that in 1945, the four gates of his plant were besieged by 800 strikers in a wage dispute, forcing him to push his way past them just to enter the place.  

Finally, Hartley's committee heard from the president of a lumber company in Northern California whose complaint was a localized teamsters strike. According to the man, Fentress Hill, the strike "had been prosecuted by mass picketing, violence," and a practice of picketing all the businesses where deliveries were handled, including Hill's own operation. Hill claimed that, in addition to being ubiquitous, the pickets sometimes included from "200 to 300 men and women." Like the other witnesses, Hill was eager to paint the union and its tactics as the main impediment to a settlement of the underlying labor dispute, and to present the law as "one-sided" and complicit in the events.

Not surprisingly, given their role in initiating the whole program to reform the Wagner Act, representatives from the Chamber of Commerce, the NAM, various industry trade organizations, and individual businesses all played a prominent role in the House hearings. These industry representatives, who outnumbered witnesses from labor by two to one, comprised nearly half of all the witnesses to appear in the House hearings. While they supported all of the aims that would define the new law, a concern for union-sponsored coercion and violence figured prominently in their testimony, as did pleas to prohibit mass picketing. Revealing in this regard are dozens of letters, solicited by the Small Business Men's Association from its members and put into the record. Asked to express their opinion on whether the Wagner Act should be revised, the letter writers repeatedly mentioned mass picketing as something that the labor law should prohibit.

Despite a generally more temperate atmosphere, the overall thrust of the Senate's investigation of these supposed problems with the prevailing regime of labor law was identical to that in the House, including on the question of mass picketing. As in the House, witnesses in favor of reforms to the Wagner Act found themselves on friendly ground, led along by Taft or other conservative committee members who supported their conclusions and shared in the premises of their testimony. As in the House, too, the most prominent group of witnesses to testify before the Senate committee were representatives of the business community, backed by a corps of corporate lawyers. Among the latter was Raymond Smethurst, legal counsel for the NAM, who complained that the Wagner Act had given workers "job secur-

220 Id. at 1004–06, 1011.
221 Id. at 2143.
222 Id. at 2144–70.
223 Id. at 2166.
224 Id. at 2144–70.
225 MILLIS & BROWN supra, note 147, at 366–67.
226 See, e.g., House Taft-Hartley Hearings, supra note 205, at 2177, 2530.
227 Id. at 3792–3818.
228 MILLIS & BROWN, supra note 147, at 375.
ity" while on strike — which was basically true, but only if the strikers could deter the use of replacement workers and avoid arrest — and that the right to strike had come to entail a right to use "violence, force, intimidation, or mass picketing," while leaving employers with no remedies at all.\footnote{Labor Relations Program: Hearings on S. 55 and S.J. Res. Before the S. Comm. on Labor and Pub. Welfare, 80th Cong. 1785 (1947) [hereinafter Senate Taft-Hartley Hearings] (statement of Raymond Smethurst, Legal Counsel for the NAM).} Smethurst urged that the pending legislation more explicitly prohibit mass picketing.\footnote{See id. at 1787 (statement of Raymond Smethurst, Legal Counsel for the NAM).} In fact, Smethurst was only one of numerous witnesses to argue that any reform to the labor law must not only sanction unions and their members for manifest acts of violence, but also outlaw mass picketing regardless of whether it actually featured violence. Such witnesses consistently presented mass picketing as if it were essentially tantamount to violence — regardless of the actual conduct of the picketers.\footnote{See id., e.g., id. at 966-67, 1636, 1716, 1719.} To this end, W. Homer Hartz, president of a railway equipment company who appeared on behalf of the Chamber of Commerce, strongly "wish[ed] to condemn . . . the evil of mass picketing."\footnote{Id. at 525, 549 (statement of W. Homer Hartz, President of Modern Frog & Crossing Works, on behalf of Chamber of Commerce of the United States).} Mass picketing for him was "any picketing that prevents free access to an egress from anyone's property. That does not mean that anybody necessarily has to stand out there with their fists up ready to hit somebody in order to keep you from going in."\footnote{Id. at 549 (statement of W. Homer Hartz, President of Modern Frog & Crossing Works, on behalf of Chamber of Commerce of the United States).}

To underscore the point, witnesses before the Senate committee, including Fentress Hill, the lumber man who also testified before the House committee, regaled the body with the same kind of lurid tales of strikes in which threatening mobs of mass picketers assaulted loyal employees, prevented them from entering businesses, and even caused extensive property damage, as in one case when CIO miners supposedly sacked the homes of men who defied a strike to maintain critical safety equipment.\footnote{See id. at 443-50 (statement of Charles E. Wilson, Chairman of General Motors Corp).} Charlie Wilson, president of General Motors, testified at length about the numerous episodes of mass picketing at the company's plants, and offered a written statement purporting to back up his claims.\footnote{See generally id. at 819-73 (statement of Harold W. Story, Vice President of Allis-Chalmers Manufacturing Co.).} Officials with Allis-Chalmers told their story to the Senate committee, too. Vice President Harold Story testified at great length and with the obvious sympathy of a majority of the committee about the wrongs allegedly inflicted on that company by Local 248 in the course of its struggle with the company.\footnote{See, e.g., id. at 966-67, 1636, 1716, 1719.}
The Taft-Hartley legislation was rooted, in part, in a smoldering conflict between bigger, more monopolistic firms that were somewhat more easily reconciled to a postwar reality of unionization and government regulation (if not the specific demands of unions), and smaller, more competitive businesses that were desperate to shed all the costs associated with collective bargaining.\footnote{237} Consistent with this, one of the refrains in the Taft-Hartley Congress' push to ban mass picketing was that the tactic was particularly injurious to smaller businesses, especially when the picketing was prosecuted by large industrial unions that could overwhelm a small business with huge numbers of picketers. The hearings therefore featured self-declared representatives of "small business," at least of a sort, including the president of a metal fabrication company from Chicago with 350 employees, who railed before the Senate committee about the costs of "compulsory unionism" and the inability of a company like his to resist union demands in the face of the threat of mass picketing.\footnote{238} Another witness, the famous Hollywood director and producer Cecil B. De Mille, also described himself as a "small businessman."\footnote{239} De Mille claimed, improbably, to have once spent two months "barricaded in a plant where I was working" — meaning, apparently, a movie studio — because of mass picketing in one of the motion picture strikes of 1945 or 1946.\footnote{240} Although De Mille's testimony probably added nothing to the effort to couch the reforms in the interests of "small businessmen," it was no doubt useful to the committee's purposes in highlighting another supposed injustice associated with mass picketing — the frequency with which its use in jurisdictional disputes between unions supposedly implicated innocent employers.\footnote{241} In fact, employers were seldom truly innocent, as they often either caused or inflamed these jurisdictional disputes by playing one union against another.\footnote{242}

Although implicit in the testimony of a number of witnesses, including assertions about the job security that it conveyed to strikers, the idea that mass picketing was simply too potent a weapon to allow unions to wield was occasionally stated explicitly. One person to say as much was labor lawyer Theodore Iserman, who behind the scenes had actually written much of the

\footnote{237} See Lipsitz, supra note 144, at 114–17.  
\footnote{238} See Senate Taft-Hartley Hearings, supra note 229, at 892–95 (statement of Charles E. Gambill, President of The Globe Co.).  
\footnote{239} Id. at 796, 808 (statement of Cecil B. De Mille).  
\footnote{240} Id. at 813 (statement of Cecil B. De Mille).  
\footnote{242} This very point was made to the Senate committee in a statement by the International Longshoreman and Warehouse Workers Union, which opposed the inclusion of restrictions on jurisdictional strikes in the Taft-Hartley legislation. Senate Taft-Hartley Hearings, supra note 229, at 1221, 1225. The Hollywood strike that so vexed De Mille was indeed a jurisdictional conflict, but as Gerald Horne has pointed out, it was shaped by vigorous class conflict and persistent favoritism on the part of the film studios and their allies in media; the film studios relentlessly attempted to tar one of the unions as a redoubt of communism. Gerald Horne, CLASS STRUGGLE IN HOLLYWOOD: 1930–1950, at 14–15, 21–22 (2001).}
lead House bill, H.R. 3020. Iserman offered the Senate committee the view, immediately endorsed by Senator Joseph Ball of Minnesota, that with such tactics as mass picketing at their disposal, unions simply had not, and could not, lose a strike in postwar America. "Why shouldn’t they strike?" he asked. This, we know, was an exaggeration, but not entirely unfounded.

Ira Mosher of the NAM provided the Senate committee a prepared statement, containing a very revealing passage about mass picketing in which he correctly alluded to the link between the bygone sit-down strikes and proliferation of mass picketing in the postwar period:

When the Supreme Court declared that the sit-down strikes were illegal, it made a great stride forward in the direction of orderly procedure and the protection of the rights we all hold dear. Mass picketing which prevents employees, executives, or the public from entering a plant or place of business is just as much a denial of access to property as is a sit-down strike. Think of the mob violence which has characterized the Yale & Towne strike, the Westinghouse strike, the Allis-Chalmers strike, and the jurisdictional disputes in Hollywood.

Mosher’s statement then went on to sound another theme commonly invoked before both houses in the push to ban mass picketing and turn outrage about it toward the broader goal of reform: the notion that the tactic, which was so effective at deterring strikebreakers or replacement workers, was therefore antithetical to the “right to work.” “No individual should be deprived of his right to work at an available job,” the statement proclaimed. Nor should he be allowed to come to harm “at work, or elsewhere.” Therefore, it concluded, “Mass picketing and any other form of coercion or intimidation should be prohibited.” A similar complaint, one that also appealed to the notion that the tactic impinged on the rights of innocent workers, was that mass picketing was a tool of agitation used by “outsiders” to the labor disputes, especially radicals, to stir up trouble and fabricate strikes in the absence of genuine rank-and-file support.

A revealing exchange unfolded when UAW president Walter Reuther appeared before the Senate committee to testify against the proposed reforms. When Reuther pointed out that his union had forged its way to prom-

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243 Millis & Brown, supra note 147, at 367.
244 Senate Taft-Hartley Hearings, supra note 229, at 126.
245 Id. at 126–27.
246 Id. at 967.
247 Id.
248 Id.
249 Id.
250 For example, this charge was central to the complaints of officials with Allis-Chalmers that they were being victimized by communists. House Taft-Hartley Hearings, supra note 205, at 1357, 1365–1446.
inence in the 1930s in the face of a "reign of terror," Senator Ball attempted to turn the issue back on Reuther. Ball asked rhetorically, "was it not your union that ran the sit-down strikes in the thirties and went in for mass picketing and all that sort of thing?" Unfazed, Reuther responded quite rightly that such measures were the only thing that made companies like GM abandon their absolute — and thoroughly unlawful — refusal to abide the workers' basic labor rights. When Ball asked whether Reuther then thought "that seizure of property and that mass picketing are perfectly alright," the exchange became testy, with each man repeatedly interrupting the other, until finally Reuther spoke his piece: "I said that when free men have to weigh on the scales of justice whether human rights transcend the interest of property rights, human rights in my opinion will always come first. And I stand on that."

Reuther was one of a number of labor leaders who testified against the developing scheme to amend the Wagner Act. Like Reuther, the other labor leaders were repeatedly pressed by hostile congressmen. A commonly used foil was mass picketing, and for understandable reasons. The congressmen sought to exploit not only the disruptive and often-violent character of mass picketing, but the ambiguity of the concept, in order to present any objections the witnesses might raise to their proposals to limit the practice — objections such as the well-founded fear that the measures being sought would ban peaceful picketing, or that changes to the labor law were unnecessary in light of existing state restrictions — as awkward endorsements of union-sponsored violence. A. F. Whitney, president of the Brotherhood of Trainmen; William Green, president of the AFL; George Meaney, secretary-treasurer of the AFL; Russ Nixon, a representative of the UE; and Robert Buse, president of UAW Local 248, the union involved in the Allis-Chalmers strike, were all made to run this tricky gauntlet.

Perhaps betraying a measure of their own frustration with rank-and-file militancy as well as their desire to appease the congressmen, these labor leaders and most others who testified consistently disclaimed any support for mass picketing if it involved violence. However, not every representative of labor was quite so concessionary. Van Bittner of the USW told the House committee pointedly that he supported mass picketing, although he qualified this by rejecting the assumption that an endorsement of mass picketing was tantamount to an endorsement of the violence that sometimes accompanied such picketing.

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251 Senate Taft-Hartley Hearings, supra note 229, at 1276.
252 Id.
253 Id.
254 Id. at 1276–77.
255 MILLIS & BROWN, supra note 147, at 366–67.
bear on the practice, Bittner maintained that when violence did occur, state measures were more than adequate to deal with it. "There is no justification for any such Federal usurpation of power that properly belongs with the local communities or States," said Bittner.259 Further, he added, the committee's preoccupation with union-sponsored violence was misplaced, as the majority of picket-line violence had been caused by the companies and their agents.260

More trenchant than Bittner's or Reuther's testimony was that of Joseph Beirne, of the National Federation of Telephone Workers, an independent union (later to evolve into the Communications Workers of America) whose members were then involved in a bitter contract dispute with the Bell phone companies.261 Rather than take the bait and concede that, because mass picketing and violence were linked, support for the former implied an endorsement of the latter, Beirne attacked the argument on the most fundamental level. When House committee members asked if he was opposed to mass picketing, Beirne responded: "No; I am not opposed to mass picketing."262 Indeed, he thought it an important tool in labor's arsenal. Asked next if he condemned the practice when it featured violence, Beirne challenged the notion that the picketers were truly responsible for the violence that mass picketing generated. For him, the true offender in such a situation was the scab, the replacement worker, the person who defied the greater good — like someone who refused to obey traffic signals in his own best interests, Beirne argued — and provoked the picketers by attempting to penetrate their lines.263 Such a person drove the picketers to "protect themselves" with violence that was, unless disproportionate, entirely justifiable.264 Needless to say, Beirne's arguments did not win the day. However, as we shall see, they anticipated important points that can still be raised in defense of the practice.

In April, the main House bill, H.R. 3020 was passed by a nearly three-to-one majority; less than a month later, the Senate passed its version, S. 1126, by a similar margin.265 Despite having comparable overall programs, the two bills were actually quite different in a number of respects, including their approach to mass picketing.266 While the Senate bill made no specific reference to mass picketing at all, the legislation emanating from the House squarely confronted the practice. The House majority report on H.R. 3020 presented employers as tragic victims of an unjust legal regime that endowed union workers with far too many rights. "[The employer] has had to stand helplessly by while employees desiring to enter his plant to work have been

259 Id. at 2367; see also id. at 2418.
260 Id. at 2426.
261 On the dispute between the union and the phone companies, see Don Q. Crowther & Ann J. Herlihy, Work Stoppages During 1947, 66 MONTHLY LAB. REV. 479, 481 (1948).
262 House Taft-Hartley Hearings, supra note 205, at 2243.
263 Id. at 2243–44.
264 Id. at 2243–45.
265 MILLIS & BROWN, supra note 147, at 380.
266 For a comparison of these differences, see id. at 383–84.
obstructed by mass picketing, violence, and general rowdyism,” said the report.267 Therefore, the House bill “outlaw[ed] mass picketing and other forms of violence designed to prevent individuals from entering or leaving a place of employment.”268 Specifically, the bill proposed to amend § 7 of the Wagner Act to deny workers guilty of “unlawful concerted activities” the protections of the statute, rendering them subject to discharge without the possibility of being reinstated by the NLRB.269 Section 12 of the bill defined “unlawful concerted activity” to include not only “the use of force, violence, physical obstruction, or threats thereof” to prevent people entering or leaving an employer’s premises, but also “picketing an employer’s place of business in numbers or in a manner otherwise than is reasonably required to give notice of the existence of a labor dispute at such place of business.” It also outlawed picketing “the home of any individual in connection with any labor dispute.”270

The bills were sent to a conference committee to work out their various inconsistencies, where conferees produced a statute that largely hewed to the text of the Senate bill.271 On June 20, President Truman — in a cynical political move, as he actually supported many of its provisions — vetoed the law only to have the veto overridden within a few days.272 In line with the Senate bill, the Taft-Hartley Act approached the issue of mass picketing obliquely, but effectively. The most germane provision was § 8(b)(1)(A), which made it an unfair labor practice for a “labor organization or its agents” to “restrain or coerce employees in the exercise” of their basic labor rights, including, by dint of other amendatory provisions of Taft-Hartley, the right embodied in § 7 to “refrain from any or all” union activities, including union membership and strike participation.273 Supporters of § 8(b)(1)(A) made clear in debates as well as in the conference report that they intended this provision to restrict mass picketing.274 One of several unfair labor practices chargeable to unions that Taft-Hartley inserted into the labor law, § 8(b)(1)(A) was designed to be enforced by cease and desist orders, which would be enforceable, in turn, by judicial injunctions and the prospect of contempt liability.275 On the face of things, it might seem that the proscription of mass picketing would only implicate the striking union itself or its agents, and not workers on their own, and that individual workers would face no liability. For this is how the system of unfair labor practice liability

267 HR. REP. No. 80-245, at 5 (1947).
268 Id. at 6.
269 H.R. 3020, 80th Cong. § 7(a) (1947).
270 Id. § 12(a)(1).
271 MILLIS & BROWN, supra note 147, at 382–88.
272 GROSS, supra note 17, at 258–59; MILLIS & BROWN, supra note 147, at 388–92.
274 MILLIS & BROWN, supra note 147, at 445–46; H.R. REP. No. 80-510, at 38–39, 42 (1947); S. REP. No. 80-105, at 50 (1947).
275 Labor Relations Management Act, § 10(e), 61 Stat. at 144–45.
was set up. Again, though, Taft-Hartley’s sponsors contemplated something different. Section 10(c) of the Wagner Act gave the NLRB the authority to remedy unfair labor practices committed by employers by ordering reinstatement or back pay.  

However, embracing language from the House bill, Taft-Hartley amended § 10(c), limiting the agency’s prerogative to order reinstatement or back pay in circumstances where the employer had “cause” to discharge or discipline workers. Taft-Hartley’s sponsors made clear they intended that workers whose actions contravened the spirit of § 8(b)(1)(A) could be fired for “cause” and thereby disqualified from reinstatement or back pay, regardless of whether they acted as the union’s agent in committing an unfair labor practice, or indeed regardless of whether anyone had ever filed an unfair labor practice charge. In this way, Taft-Hartley not only made mass picketing subject to injunction, but also left workers who participated in mass picketing “unprotected” from retaliatory discipline or discharge by their employer.

In a series of cases decided shortly after Taft-Hartley, the Board made clear that it fully embraced these readings of the statute. In a 1948 decision involving events that occurred only a few months after the statute went into effect, the Board concluded that an episode of mass picketing in the course of a rancorous strike “patently involved restraint and coercion of employees attempting to go to work” and was therefore grounds for a § 8(b)(1)(A) violation. In a 1949 decision involving whether two demonstrations, one of several hundred workers and the other of over one thousand, constituted violations of § 8(b)(1)(A), the Board ruled that Congress’ intent was clearly to proscribe mass picketing. Further, the Board concluded actual violence was not necessary; nor was Congress’ failure to provide a numerical definition of the concept decisive, as the statute simply charged the Board with determining “whether picketing as conducted in a given situation, whether or not accompanied by violence, ‘restrained’ or ‘coerced’ employees in the exercise of their rights guaranteed under the Act, and, if so, to

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277 Labor Relations Management Act, § 10(c), 61 Stat. at 147 (providing that “No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.”).
279 In addition to this, mass picketing was also considered grounds for setting aside a union victory in an election conducted under the auspices of the statute. See, e.g., ARA Living Centers Co., 300 N.L.R.B. 888 (1990).
280 In a 1948 decision, Socony Vacuum Oil Co., 78 N.L.R.B. 1185 (1948), which actually involved conduct that occurred before Taft-Hartley was enacted, the Board ruled that workers who engaged in a mass demonstration of 125 to 150 against a company’s attempt to assign work to another employer were unprotected from discharge, even though there was no actual violence or evidence of a plan to commit violence, as their actions “constituted an effective implied threat of bodily harm” to employees attempting to enter the plant. 78 N.L.R.B. at 1186.
enjoin such conduct.”

Critically, the Board continued, “In these circumstances, the number of pickets has relevance only as it tends to establish the potential or calculated restraining or coercive effect of massed pickets to bar nonstriking employees from entering or leaving the plant.”

With some nudging from the courts, the Board also made clear its agreement with the notion that workers involved in such strikes who were fired by their employers for this reason would have no right of reinstatement. As we shall see below, the Board and the courts occasionally had to grapple with the potential for such applications of the law to conflict with strikers’ constitutional rights. But the essential principles embodied in these decisions have remained the law ever since.

B. The Legislative Assault on Mass Picketing in the States

Witnesses who testified against Taft-Hartley were correct when they claimed that by the mid-1940s the states already had in place a plethora of laws that could be brought to bear against mass picketing. Many of these were criminal laws of a general nature — assault, disorderly conduct, breach of the peace, trespass, unlawful assembly, parading without a permit, even littering — which could easily, if not always equitably, be applied in cases of mass picketing. And they were. Indeed, as long as there have been unions in America, such laws were used, often very aggressively, to break up mass picketing and to punish those involved in it. More interesting, and more relevant to the concern in this article, is the emergence of state laws expressly dealing with mass picketing and providing for its prohibition even in cases not involving much if anything in the way of overt violence, disorder, or trespass.

In the years immediately following the Supreme Court decision upholding the Wagner Act, observers thought that many states would, in this time before the contours of federal preemption doctrine were set, enact omnibus labor laws very similar to the Wagner Act — “Baby Wagner Acts” as they were called, that would put states in the business of protecting basic labor rights. In fact, only a few states enacted such legislation. Instead, following a very different trend then taking shape, a growing number of states (and a few major cities) adopted laws that actually defied the Wagner Act and restricted the rights of labor. In substantive ways that often anticipated the

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282 Local #1150, 84 N.L.R.B. 972, 976-77 (1949).
283 Id.
284 On the courts’ tendency to push the Board to disqualify mass picketers from reinstatement, even when they did not block access to a plant, see, for example, W.T. Rawleigh Co. v. NLRB, 190 F.2d 832 (7th Cir. 1951). See also NLRB v. Perfect Circle Co., 162 F.2d 566 (7th Cir. 1947); Bishop, 108 N.L.R.B. 1145 (1954).
285 On the range of laws brought to bear in such cases, see, for example, Enforcement of the Right of Access, supra note 173, at 117-19.
286 MILLIS & BROWN, supra note 147, at 317.
287 Id. at 318-29.
Taft-Hartley Act, these statutes limited closed-shop agreements, imposed unfair labor practice liability on unions,regulated the internal affairs of unions, and restricted the rights to strike and picket.288

The restrictions on striking and picketing, which concern us here, ran the gamut, particularly in how they dealt with mass picketing. In their mildest form, the new laws only reiterated the prerogative of state authorities to prosecute and enjoin overtly violent conduct, whatever form it might take—something that was never especially controversial.289 But a number of states confronted the issue of mass picketing more directly and controversially.290 Wisconsin’s “Employment Peace Act,” enacted in 1939 and quite influential with other states, created a state labor board empowered to enforce unfair labor practices against employers, unions, and union members. Among the unfair labor practices was a provision forbidding an employee

[t]o hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance.291

Simultaneous to Wisconsin, Minnesota adopted a similar law.292 Soon afterwards, several other states, including Michigan, also adopted unfair labor practices regimes, administered by state labor boards or commissions, which barred mass picketing.293

Other states took an even more direct approach to the problem. In 1941, Texas adopted a law that made it a felony to engage in mass picketing.294 Styled as a limitation on labor unrest, the statute proscribed the “use of force or violence, or threat of... force or violence, to prevent or to attempt to prevent any person from engaging in any lawful vocation.” It also made it a crime for “one or more... persons to assemble at or near any place where a ‘labor dispute’ exists and by force or violence prevent or attempt to prevent any person from engaging in any lawful vocation” — or for anyone “by himself, or as a member of any group or organization” to “promote, encourage, or aid any such unlawful assemblage.”295 The penalty for

288 Id.
289 See SANFORD COHEN, STATE LABOR LEGISLATION 1937–1947, at 23 (1948). Oregon adopted a referendum prohibiting strikes and picketing except over wages, hours, and similar conditions of employment, which apparently “had considerable effect” limiting labor protest before it was invalidated by the Oregon Supreme Court. MILLIS & BROWN, supra note 147, at 319.
290 MILLIS & BROWN, supra note 147, at 320–21, 330; see also 1941 Minn. Sess. Laws Serv., ch. 624, § 4 (West).
291 1939 Wis. Laws, ch. 57, § 111.06(2)(f).
292 1939 Minn. Laws, ch. 440, § 11.
293 MILLIS & BROWN, supra note 147, at 320–21.
295 Id.
violating the act was set at one to two years in the state penitentiary.296 Within a few years, the Texas law had been copied by several other southern states, including Alabama, Arkansas, and Mississippi.297 In 1946, Louisiana and Virginia also enacted similar legislation making mass picketing a misdemeanor and expressly subject to injunction.298 Altogether, by 1947, thirteen states — in addition to those mentioned, Colorado, Delaware, Florida, Georgia, Kansas, Nebraska, South Dakota, and Utah — had specifically banned mass picketing.299 A number of states, including some that legislated against mass picketing specifically, also adopted other restrictions on labor protests that inevitably touched mass picketing, including generic proscriptions on picket-line violence, requirements that picketing be approved in advance by a majority of affected workers, and restrictions on picketing by “uninterested” parties.300 The result was a labyrinth of restrictions of mass picketing, positioned between provisions in the federal law and the authority that courts claimed to limit the practice.

C. The Courts and the Regulation of Mass Picketing

The judiciary's role in the regulation of mass picketing followed several distinct, and in some ways conflicting, courses. The period between the Wagner and Taft-Hartley Acts was marked by the Court's first clear endorsement of the notion that the First Amendment constitutionally protected picketing.301 However, courts in this period also strongly affirmed the authority, which they had freely exercised for years prior to the Wagner Act, to enjoin picketing, including mass picketing, and to do so even in those cases where the picketing was entirely peaceful.302 At the same time that these developments played out, the judiciary also had to confront an increasing number of conflicts between federal and state laws in the labor context, including of course the statutes on mass picketing that we just reviewed, as well as state court injunctions. Central to this question about the boundaries of federal preemption, as the issue came to be understood, was the attempt to regulate picketing, whose features were in turn shaped by the emerging law in this field.

The constitutional law of picketing in general is actually deeply entwined with the question of mass picketing. In the late nineteenth and early twentieth centuries, many courts, both state and federal, viewed all forms of
picketing as inherently violent — as well as unlawful on other grounds — and therefore beyond the purview of constitutional protection. However, in 1940, in a landmark decision, *Thornhill v. Alabama*, the U.S. Supreme Court ruled that an Alabama law prohibiting essentially any forms of labor picketing violated the First Amendment. Although *Thornhill* recognized the right to picket in broad terms — and in the balance considerably expanded the purview of First Amendment protections — the Court did note in support of its ruling that “We are not now concerned with picketing, *en masse* or otherwise conducted which might occasion such imminent and aggravated danger to these interests [in public safety] as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger.”

Although in the next two years the Supreme Court affirmed the broad thrust of *Thornhill*, notably in limiting the reach of state bans on “stranger” picketing, the Court was equally quick to endorse *Thornhill*’s implication that violent and disorderly picketing, and even mass picketing in the absence of manifest violence, might be restricted without violating the Constitution. In *Milk Wagon Drivers Union v. Meadowmoor Dairies*, a 1941 case in which the underlying labor dispute featured both violent and peaceful picketing, the Court upheld an injunction on all picketing, ruling that the picketing was so “enmeshed with contemporaneously violent conduct” that “it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful.”

*Meadowmoor Dairies* highlighted the Court’s reluctance to expand the protections of the First Amendment over picketing, as well as openness to the regulation of picketing based on an anticipation of how violent it might be. The case also made clear that state court injunctions, which had been commonplace prior to the Wagner Act, remained appropriate devices for regulating at least some forms of picketing. In fact, in the years immediately following the passage of the Wagner Act, state courts had continued to use their equitable authority to intervene in labor disputes, enjoining violent and disorderly picketing and, on occasion, peaceful mass picketing. In theory, this jurisprudence should have been curtailed at least somewhat by the enact-

303 In 1905, a federal district court declared that “There . . . can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching.” *Atchison*, 139 F. at 584. On the tendency of many courts to condemn picketing on such grounds, see *Cohen*, supra note 289, at 72.

304 310 U.S. 88.
305 Id. at 101–03.
306 Id. at 105. See also the companion to *Thornhill*, *Carlson v. California*, 310 U.S. 106, 111–13 (1940).
308 312 U.S. 287 (1941).
309 Id. at 292, 294.
ment in roughly half of all states of so-called "Little Norris-LaGuardia Acts" — statutes that paralleled the federal Norris-LaGuardia Act (1932) in limiting the authority of state courts to intervene in labor disputes unless strictly necessary to preserve the peace and only if stringent procedural requirements were followed.\textsuperscript{311} In fact, as several scholars have shown, from the time they were enacted, courts freely maneuvered around these statutes, mainly by taking expansive views of the exceptions prescribed.\textsuperscript{312}

The year after Meadowmoor Dairies, the Supreme Court returned to the issue of preemption and picketing in Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board.\textsuperscript{313} The case involved a bitter strike by the UE local at an equipment manufacturing company during which, according to Wisconsin's Employment Relations Board, the union resorted to mass picketing, obstruction of entry and egress from the plant, picketing of non-strikers' homes, and threats of injury to their persons.\textsuperscript{314} The question for the Court was whether the state board possessed the authority to sanction the union and the workers involved in the strike, or whether, as argued by the union's lawyers, the state's action was preempted by the Wagner Act.\textsuperscript{315} The Court ruled against the union. It held that the Wagner Act did not relieve the states of their traditional police powers in the realm of industrial conflicts or prevent them from enacting legislation to deal with disorders in labor disputes, not least because there was no evidence that Congress had intended to exclude the states in this way.\textsuperscript{316} Moreover, the Court made clear that "we fail to see how the inability to utilize mass picketing, threats, violence, and . . . other devices which were here employed impairs, dilutes, qualifies, or in any respect subtracts from any of the rights guaranteed and protected by the federal Act."\textsuperscript{317}

As much as they affirmed the general validity of both state and federal limitations on mass picketing, these cases left a number of issues unresolved, particularly whether mass picketing could be prohibited in the absence of any threat of violence at all, and whether the supremacy of federal authority under the Wagner Act imposed any limits on the authority of state courts,


\textsuperscript{313} 315 U.S. 740 (1942).

\textsuperscript{314} Id. at 743–45.

\textsuperscript{315} Id. at 741, 745–51.

\textsuperscript{316} Id. at 748–51.

\textsuperscript{317} Id. at 750–51.
legislatures, and police in this realm. It would take the courts another decade or more to answer these questions.

Allen-Bradley invited states to assert jurisdiction, not merely over issues within their traditional province to keep the peace, but also those squarely regulated by the federal labor law. A number of states then assumed "concurrent jurisdiction" with the federal law, taking the position that they enjoyed jurisdiction over matters otherwise covered by the federal law at least until such time as the NLRB might actually assert its jurisdiction. Indeed, the whole idea of setting up state labor boards to administer unfair labor practices embodied this kind of jurisdictional claim. After several moves in this direction in the late 1940s, in 1953, in a case called Garner v. Teamsters Union, which involved a Pennsylvania court's injunction against peaceful "stranger" picketing, the Supreme Court finally made clear that such assertions of state jurisdiction were at least presumptively unconstitutional, whether they prohibited activity that the federal law protected or that it prohibited. Garner was not the Court's final word on preemption, as the Court would continue for a number of years to further elaborate (and mainly restrict) the permissible boundaries of state jurisdiction in subsequent cases. But the case established a framework that has governed this area of law ever since.

It might seem that this framework would preclude any attempt by the states to regulate mass picketing, given Congress' regulation of the practice via the Taft-Hartley amendments. But in fact this is not so, as courts have taken the view that mass picketing is among a handful of concerns so "deeply rooted in local feeling and responsibility" that states should retain the authority to regulate it, notwithstanding the implications of preemption doctrine. Indeed, in Garner itself, the Supreme Court, citing back to Allen-Bradley, implied that if the facts before the Court had actually featured mass picketing, Pennsylvania's assertion of jurisdiction might have survived review. Moreover, only a year after Garner, the Court made clear that, notwithstanding the logic of Garner, the mere fact that conduct prohibited by a state is also an unfair labor practice under federal law will not automati-

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318 In at least two other cases decided in the year prior to Allen-Bradley, both also from Wisconsin, the Court seemed to anticipate a relatively broad purview of state intervention in labor disputes. See Hotel & Rest. Emps.' Int'l Alliance, Local No. 122 v. Wis. Emp't Relations Bd., 315 U.S. 437, 440-42 (1942); Senn v. Tile Layers Protective Union, 301 U.S. 468, 476-82 (1937). In another 1942 decision, the Court upheld a state court injunction of picketing that violated the state's antitrust laws. Carpenters Union, Local No. 213 v. Ritter's Cafe, 315 U.S. 722, 724, 728 (1942).

319 In fact, in 1943, just after Allen-Bradley was decided, there was a flurry of "restrictive" state labor legislation. See, e.g., Cohen, supra note 289, at 45; Millis & Brown, supra note 147, at 322.


321 See id. at 488-91.


323 Id. at 244.

324 See Garner, 346 U.S. at 488.
cally result in preemption.\textsuperscript{325} Just a few years later, in \textit{International Union, United Automobile, Aircraft and Agriculture Implement Workers (UAW-CIO) v. Russell},\textsuperscript{326} the Court affirmed Garner's implication that state regulations of mass picketing were generally not preempted.\textsuperscript{327} \textit{Russell} involved a tort action in Alabama against the union and its agents, stemming from a strike in 1952 in which the respondent and plaintiff in the tort suit, Paul Russell, claimed he was prevented by mass pickets from getting to work. In upholding compensatory and punitive damages awarded Russell, the Court reasoned that if the action under Alabama law were preempted, "that would in effect grant to unions a substantial immunity from the consequences of mass picketing or coercion such as was employed during the strike in the present case."\textsuperscript{328} Similarly, a few years later in \textit{UAW v. Wisconsin Employment Relations Board}\textsuperscript{329} (the \textit{Kohler} decision), the Court ruled that in a case involving mass picketing, the fact that the NLRB could have asserted jurisdiction under § 8(b)(1)(A) was no bar to the Wisconsin Labor Board asserting its jurisdiction.\textsuperscript{330} Despite the general thrust of its preemption cases, the Court said, "The dominant interests of the State in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern."\textsuperscript{331} State courts and lower federal courts have embraced the Supreme Court's position, viewing mass picketing as an exception to the normal rule that conduct governed by the federal statute may not also fall under the jurisdiction of state officials.\textsuperscript{332} State labor boards continued to regulate mass picketing into at least the 1970s.\textsuperscript{333} In fact, the Court's endorsement of regulations on mass picketing extends not only to laws or judicial orders that are specifically concerned with mass picketing, but also, it should be empha-

\textsuperscript{326} 356 U.S. 634 (1958).
\textsuperscript{327} Id. at 644–45.
\textsuperscript{328} Id. at 645.
\textsuperscript{329} 351 U.S. 266 (1956) [hereinafter \textit{Kohler}].
\textsuperscript{330} Id. at 270, 274.
\textsuperscript{331} Id. at 274.
\textsuperscript{332} See, e.g., Dow Chem. Co. v. Dist. 50 Allied & Technical Workers, 315 F.Supp. 427 (D. Colo. 1970) (citing \textit{Kohler} to deny removal of injunction action to federal court); Miss. Gulf Coast Bldg. & Const. Trades Council v. Brown & Root, Inc., 417 So. 2d 564, 566–67 (Miss. 1982); City Line Open Hearth, Inc. v. Hotel Union Local No. 568, 197 A.2d 614, 620–21 (Pa. 1964); Int'l Bhd. of Elec. Workers Local Union 479 v. Becon Const. Co., 104 S.W.3d 239, 242 (Tex. App. 2003) (denying temporary injunction on other grounds). One important departure from this trend involves cases where a state has attempted to enjoin conduct as mass picketing but the NLRB has ruled that the conduct does not constitute an unfair labor practice under the federal statute. In such circumstances, the Supreme Court has ruled an injunction preempted. Weber v. Anheuser Busch, 348 U.S. 468, 481 (1955).
\textsuperscript{333} See, e.g., Lacrosse Tel. Corp. v. Int'l Bhd. of Elec. Workers Local No. 990, Wis. Emp't Relations Bd., Dec. No. 13294-A (Jan. 27, 1976) (holding that mass picketers committed an unfair labor practice under state law).
sized, the enforcement of laws of general application, like assault or riot in mass picketing cases.\textsuperscript{334}

The other ambiguity to surface after Thornhill concerns the extent of the First Amendment's bearing on laws or court injunctions that limit peaceful mass picketing. Prior to Thornhill, courts often took the view that all picketing was inherently violent and threatening and therefore could be proscribed on those grounds without any showing of actual or imminent violence or disorder. Typical of the attitude underlying this approach is a passage from a 1905 decision in which a federal judge declared, "There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching."\textsuperscript{335} Sixteen years later, a New York court declared that "picketing, unaccompanied by threats and intimidation, is a useless weapon"; the "very essence" of effective picketing, the court said, is "in the terror it excites."\textsuperscript{336} Of course, these courts' view that all picketing is necessarily violent is clearly exaggerated for political purposes — picketing, even mass picketing, often occurs without any violence or "terror" at all. Nevertheless, the New York court's assertion that threats and intimidation are essential to effective picketing anticipates an important point about the nature of mass picketing and the conflicts surrounding it, which is that it can easily be couched as something inherently violent. Also typical of courts' hostility to picketing is the 1921 case of Truax v. Corrigan,\textsuperscript{337} in which a narrow majority of the Supreme Court declared unconstitutional, as an exercise of "class legislation" that violated the Equal Protection Clause, an Arizona statute that sought to insulate peaceful picketing — including, by its terms, peaceful mass picketing — from injunction.\textsuperscript{338} However, even before the New Deal era, the Court had softened its stance a bit. In the same term as Truax, in a case called American Steel Foundries v. Tri-City Central Trades Council,\textsuperscript{339} the Court accepted that there were some limits to a court's or legislature's authority to limit peaceful picketing — even if the Court did not yet couch the right in specific constitutional terms and also implied that mass picketing, with its inherent intimations of violence, intimidation, and coercion, fell outside this category.\textsuperscript{340} This latter qualification resurfaced in Thornhill and subsequent cases, albeit saddled with some uncertainty regarding the reasoning behind


\textsuperscript{335} Atchison Co. v. Gee, 139 F. 582, 584 (C.C.S.D. Iowa 1905).


\textsuperscript{337} 257 U.S. 312 (1921).

\textsuperscript{338} Id. at 331-40.

\textsuperscript{339} 257 U.S. 184 (1921).

\textsuperscript{340} Id. at 205 ("Our conclusion is that picketing thus instituted is unlawful and can not be peaceable and may be properly enjoined by the specific term because its meaning is clearly understood in the sphere of the controversy by those who are parties to it.").
the rule. Was mass picketing so inherently linked to violence that it could be prohibited with no further inquiry into whether violence or the threat of violence actually characterized a particular case, as was perhaps implied in *Meadowmoor Dairies*? Or, was a particularized determination necessary?

This ambiguity has never been fully resolved — in part, ironically, because courts have actually been keen to decide particular cases on their facts while, like Congress and most state legislatures, declining to define in a transcendent way just what mass picketing means. However, in *Youngdahl v. Rainfair, Inc.*, decided in 1957, the Supreme Court ruled in a case involving raucous, occasionally violent, but largely peaceful picketing, that a lower court order banning all picketing was preempted by the federal labor law, which reflected Congress' intent to protect such activity from undue restriction. Citing this concern, as well as First Amendment interests, courts have since purported to require something more than the mere fact of large numbers of picketers to justify injunctions or the application of state anti-mass picketing statutes — but with some important qualifications.

In 1942, the Court upheld a state's restrictions on mass picketing on the grounds that the restrictions served government interests in regulating the course of labor relations, particularly those claimed by Congress via the labor law. In other words, the Court reasoned that picketing could be limited not only because of the unlawful — for example, violent — means of picketing employed, but because of the unlawfulness of the ends or purposes of the picketing. It would be on this ground that other key provisions of Taft-Hartley, like its regulation of picketing incidental to secondary boycotts, passed constitutional muster. The doctrine seems to have opened the door for a complete ban on mass picketing, at least by the Congress. Fortunately for unions and their supporters, however, the Taft-Hartley Act failed to explicitly bar mass picketing as such. Instead, as we saw earlier, it appears to bar such picketing only when it is violent, coercive, or intimidating. And so, backed by the federal appeals courts, the NLRB has expressed a certain reticence to impose unfair labor practice liability, or to deny workers' reinstatement, in cases involving purely peaceful mass picketing. Nor is it clear that an agency or court could embrace a rigid ban on mass picketing,

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341 355 U.S. 131 (1957).
342 Id. at 139.
343 An early example of this is the 1942 Supreme Court decision, *Carpenters Union, Local 213 v. Ritter's Cafe*, 315 U.S. 722 (1942) in which the Court upheld the use of a Texas law to restrict picketing to locations germane to the union's principal dispute. Id. at 728. Later, the Court used similar reasoning to uphold provisions of the labor law added by Taft-Hartley that restricted picketing under that law. Int'l Bhd. of Elec. Workers, Local 501 v. NLRB, 341 U.S. 694, 703–04 (1951); Int'l Org. of Mates v. NLRB, 575 F.2d 896, 905 (D.C. Cir. 1978). This doctrine can also be understood in terms of the idea that picketing may be restricted, not only because the means of carrying it out are unlawful, but also because its purpose is unlawful.
345 See *Oak Harbor Freight Lines, Inc.*, 358 N.L.R.B. 1, 26 (2012); *Pratt Tower Inc.*, 338 N.L.R.B. 61 (2002); Hotel Roanoke, 293 N.L.R.B. 182, 207 (1989); United Steel Workers, 137
given a problem raised by early opponents of attempts to regulate the practice: the inherent difficulty in defining what constitutes mass picketing in the first place. The problem has constitutional implications, as restrictions on mass picketing that have attempted a clear definition, notably measures from Texas and Nebraska prescribing a priori limits on the number of picketers who may be stationed at each gate of an establishment, have been declared unconstitutionally overbroad.\(^{346}\) Of course, the lack of any strict, numerical definition of mass picketing is a double-edged sword, as it also means that no picketing formation is inherently too small to be regulated on grounds that it is offensive in the fashion of mass picketing.

The courts' forays in this area prevented the various legal strictures on mass picketing from coalescing into an absolute ban on the practice. It is not the case, as some casual commentators have assumed, that mass picketing is simply illegal under all circumstances.\(^{347}\) But it is equally important to stress that courts have by no means freed the practice from significant constraint. Their approach to mass picketing reflects a deep-seated ambivalence not only about mass picketing, but about the role of labor militancy more generally in a legal and regulatory culture ostensibly committed at once to an effective system of labor rights and to liberal notions of private property and public order. As the next part of this article shows, the courts' considered and apparently balanced pronouncements in this field belie a different reality, in which mass picketing is aggressively regulated, to the point that, doctrinal subtleties aside, even peaceful mass picketing has been almost completely banished by law from the fields of modern labor conflict.

### III. Violent by Anticipation: Mass Picketing Prohibited

In October 1955, strikers at Westinghouse Electric in Lester, Pennsylvania, formed mass picket lines of 300 or so workers who were said to have stood "shoulder to shoulder . . . many rows deep" in front of the main gate at the company's plant.\(^{348}\) Westinghouse obtained an injunction, which a lower court promptly dissolved, finding that for an injunction to properly issue under Pennsylvania's "Little Norris-LaGuardia" law — and the U.S. Constitution — the picketers must be shown to have actually blocked access to the plant.\(^{349}\) And this, the lower court found, could only be properly tested if someone had actually tried to get through their lines, which had not oc-

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\(^{346}\) Howard Gault Co. v. Tex. Rural Legal Aid, Inc., 848 F.2d 544, 561 (5th Cir. 1988); United Food & Commercial Workers Int'l Union v. IBP, Inc., 857 F.2d 422, 430-31 (8th Cir. 1988).

\(^{347}\) See, e.g., THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK 52 (2004).


\(^{349}\) Id. at 180-82.
curred. Not so, said the Pennsylvania Supreme Court. In a brief but decisive opinion, the court rejected the lower court’s reasoning and reinstated the injunction. The mere prevention of access in the abstract, as it were, was illegal and enjoinable.350

Far from an aberration, the *Westinghouse Electric Corp. v. United Electrical, Radio & Machine Workers*351 case typifies the way the legal prerogative to enjoin mass picketing has been construed through the postwar period and into the present day and how courts have managed to prohibit the tactic, even where peaceful and despite the outward implications of the case law. Instead of the actual presence of violence and disorder describing the line between lawful and unlawful mass picketing, for many courts the test turns on a conjectural judgment about whether violence and disorder would be apt to occur were the picket line to be tested; or, with the same implication, whether the picketers deny the employer or her customers or employees “free access” to the business.352 For instance, in a case where unionists standing on a railroad track deterred a locomotive crew from entering a steel plant during a strike, the picketing was deemed enjoinable, even though the picketers had actually conversed with the crew in convincing them to turn back.353 Likewise, the lack of violence was no bar to an injunction in a case involving picketers’ similar communication with truck drivers.354 In other cases, courts have invoked the concept of “implied” threat of violence to justify injunctions in the absence of either actual violence or an overt threat of violence.355 Equally revealing is the grammar courts have employed in parsing this problem. Rather than defining enjoinable picketing as that which is both en masse *and* violent, some courts have implied that picketing may be enjoined if it is either violent, disorderly, *or* an instance of mass picketing.356 The upshot for many courts, including another Pennsylvania court in a dispute from the early 1980s, is simply that “Mass picketing, with

350 Id. at 181.
351 118 A.2d 180 (Pa. Super. Ct.).
or without violence or damage to property, constitutes a seizure of the employer's plant, and as such, is unlawful."

In line with this reasoning, both federal and state courts routinely enjoin picketing conducted by large numbers of unionists, often prospectively, in very broad language, and with no requirement that the picketing has actually degenerated into violence. Following the Supreme Court's decision in Russell, courts also continue to uphold tort damages, including punitive damages, against unions engaged in mass picketing, and again with no apparent requirement of manifest violence, only that access has been anticipatorily impeded.

Equally revealing of how limits on the prohibition of mass picketing have been compromised is the way courts have understood violence in the mass picketing context. As the cases just described indicate, for many courts, the occurrence of violence is both proof that mass picketing should be enjoinable in general and grounds for injunction in the particular case — regardless of actual provocation, let alone the larger equities in play. In this respect, judicial reasoning embraces the same superficial but convenient understanding of mass picketing that underlay Congress' push to prohibit it in the 1940s. On the surface, the reasoning may seem sound: where there is violence surrounding mass picketing it is almost always true that the violence would not have occurred but for the picketing. And yet, this reasoning only makes sense if one assumes that mass picketing has no legitimate purposes that do not instigate violence, that there is no way for picketers' adversaries to negotiate the situation without violence, and that picketers' adversaries can share no blame for enflaming the situation and should not pay part of the price for doing so. These are essentially the points Van Bittner and Joseph Beirne unsuccessfully challenged the Taft-Hartley Congress to explain.

The refusal of courts to take account of provocation in mass picketing cases also harkens to another point raised by Beirne in his testimony. Beirne, it will be recalled, insisted that the violence that affected mass picketing was the fault, not of the picketers, but the strikebreakers or company loyalists who insisted on defying the solidarity of their fellow workers — like the person who ignores traffic laws ostensibly for her own benefit. Beirne's point is easy to dismiss on the grounds of the dissident worker's "right to work," but only if, critically, one not only takes that right for granted but places it on par with the right of the striking workers to mount an

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359 See, e.g., Rainbow Tours, Inc. v. Haw. Joint Council of Teamsters, 704 F.2d 1443, 1447 (9th Cir. 1983).

360 See supra notes 258–265 and accompanying text.
effective protest in defense of their interests. For what the controversies surrounding mass picketing show, if anything, is that these two rights — the right to work and the right to effective protest — are indeed mutually antagonistic. To support the former necessarily derogates the latter — which is exactly what Beirne was so keen to expose in Congress’ agenda.

The NLRB has followed a similar path in dealing with mass picketing. Outwardly, the agency’s decisions are clear: mass picketing, as such, does not constitute an unfair labor practice, nor does participating in it automatically disqualify participating workers from reinstatement. But like the courts, the agency has not required much else in order to trigger these consequences. Because the statutory basis for regulating mass picketing is § 8(b)(1)(A), the test of whether it runs afoul of the law is actually whether the picketing restrains or coerces other employees in their right not to support the picketing workers or their cause. In this sense, the employer’s rights against mass picketing under the statute are derivative of its workers’ rights. The problem for would-be mass picketers is that the Board has read the language about restraint or coercion to proscribe picketing that is not manifestly violent. As the Board sees it, its charge is to determine, regardless of the number of picketers, whether the picketing “tends to establish the potential or calculated restraining or coercive effect of massed pickets to bar nonstriking employees from entering or leaving the plant.”

Although cited in recent cases, this passage reflects a construction of § 8(b)(1)(A) developed soon after the passage of Taft-Hartley. In 1948, the Board deemed an instance when picketers blocked nonstriking employees from entering a plant an “interposition of passive force to prevent employees from going to work” and therefore “a form of restraint proscribed by Section 8(b)(1)(A).”

While brief, incidental interferences with other workers’ ingress or egress do not necessarily trigger the statute’s prohibitions, the Board and the courts have made clear that even a short delay of workers trying to enter or leave will provide grounds for an unfair labor practice prosecution and/or forfeiture of reinstatement rights. Moreover, while an intention to use

361 See supra notes 263–265 and accompanying text.
363 Thus, violence or threats of violence directed by agents of the union against company personnel who are not employees within the meaning of the National Labor Relations Act only contravene § 8(b)(1)(A) if they are somehow communicated to those workers who are covered by the Act. See, e.g., Lumber Prod. & Indus. Workers Local 3171, 274 N.L.R.B. 809, 814–815 (1985); District 20, United Mine Workers, 192 N.L.R.B. 565, 566–68 (1971); Taxi-Drivers Union, 74 N.L.R.B. 1, 3 (1969).
364 See supra notes 263–265 and accompanying text.
Workers Disarmed

mass picketing to restrain or coerce other employees is essentially disposi-
tive of culpability, clear evidence of such intent is not a prerequisite to offend the statute. Rather, the threshold of liability is defined objectively, by the reasonable tendency of the picketing to restrain or coerce other employees. Threats of violence are, of course, a basis for finding a violation even where not consummated. And when violence or threats of violence are present in connection with mass picketing, not much is required to render the picketing illegal and enjoinable, and the workers involved subject to dis-

charge by their employer.

As with the courts, this covertly expansive view of what mass picketing is and when it may be proscribed reflects the Board's tendency to view the legitimate purposes of picketing in terms of publicity alone, and to regard large gatherings of workers as either inherently violent or verging on that, and presumptively illegitimate. This sense is clearly evident in a Board de-
cision from the mid-1980s in which the Board first defined mass picketing as "the congregating of a large group of individuals at a particular site out of proportion to the number that would be reasonable in making known to the public and employees involved the nature of the Union's dispute at the site" and then deemed it an activity which "tends to place employees in fear of penetrating through the group to enter or leave their workplace."

These moves by the Board and the courts ensured as a practical matter that mass picketing would be effectively prohibited, the implications of which are explored in the Part of this article that follows. But they also reflect something else central to the thesis of this article, which is the degree to which mass picketing cannot be reconciled with the legal system's com-

mitments to the prerogatives of capital and a system of labor relations free of organized, worker-sponsored violence, even of the most implicit sort.

IV. WORKERS DISARMED

The postwar strike wave faded with the passage of Taft-Hartley and the subsidence of some of the more acute grounds of class conflict that moti-
vated it in the first place. Although unions continued to resort to mass pick-
eting during the 1950s and 1960s, and the business community continued to complain that the practice was too coercive and that the laws regulating it

occasional reticence of the Board to deny reinstatement in marginal cases, see, for example, Coronet Casuals, Inc., 207 N.L.R.B. 304 (1973).


were not sufficiently well enforced, mass picketing did not occur nearly as frequently or with as much intensity as in the preceding decades. It might seem useful to conjecture how labor relations would have evolved had the tactic remained at labor’s ready disposal — to ask whether a more robust tradition of labor militancy might have taken root, or whether the labor movement itself would have become stronger, for example. However, the value of such speculation is complicated by the very thing that makes it tempting to do in the first place — the fact that the 1950s and 1960s were relatively quiet times characterized not only by less militant protest but also by unprecedented growth and prosperity in the overall American economy and stability in labor relations. Moreover, when workers did strike, few employers bothered to challenge their picket lines with replacement workers anyway. These years simply did not feature the kind of challenge to workers rights that could best show what the prohibition of mass picketing had really cost American labor.

The true test of where labor and labor rights stood would arrive in the 1970s, with the advent of deep crisis and structural change. Not only did workers and unions face a national economy buffeted by inflation, deep recessions, escalating deindustrialization, and intensifying international competition, but they also had to contend with a changing political climate, characterized by internal challenges from women, minorities, and younger workers as well as a rapid erosion of labor’s once seemingly inviolable alliance with the Democratic Party. The most immediate threat was a renewed aggressiveness on the part of business community, marked by its abrogation of the so-called “Treaty of Detroit,” a 1950 agreement between the UAW and the “Big Three” automobile manufacturers that set the pattern for two decades of stable labor relations and steady advances in union wages and benefits throughout much of the economy. By the mid-1980s, the labor movement’s inability to negotiate this changing landscape left it struggling to stanch a steady hemorrhaging of members, an erosion of labor standards, and a relentless diminution of bargaining power and political influence.

372 See, e.g., Do They Have a “Right” to Strike?, 57 NATION’S BUS. 78 (1967); States Move on Union Abuses, 47 NATION’S BUS. 36 (1959); Where Unions Get Power, 48 NATION’S BUS. 36 (1960).
373 As Nelson Lichtenstein points out, the 1950s and 1960s were not devoid of conflict and featured a slow erosion of the union ideal. LICHTENSTEIN, supra note 21, at 98–177. Nevertheless, union membership and bargaining power remained steady and most employers seemed, at least for the time being, resigned to dealing with unions. On the relative stability of labor relations in this period, see ZIEGER, supra note 24, at 137–67.
374 POPE, supra note 23, at 533–34.
375 LICHTENSTEIN, supra note 21, at 212–34.
377 On this chapter in American labor history and its various dynamics, see generally JEFFERSON COWIE, STAYIN’ ALIVE: THE 1970s AND THE LAST DAYS OF THE WORKINGS CLASS (2012); LICHTENSTEIN, supra note 21, at 212–45; KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE
Although the overall trajectory of labor's decline is well known and many of its causes have been studied and debated for years, not every facet of the story has been fully explored. Left out of efforts to explain labor's demise, including by many who focus broadly on the corrosive effects of unions' retreat from striking and militancy in general, is an appreciation of how the effective prohibition of mass picketing crippled the labor movement during this key period. Unions met the crisis that enveloped them with a fair degree of militancy. The early 1970s especially witnessed a tremendous wave of strikes — 424 involving over one thousand workers each in 1974 alone — that fell off dramatically in the 1980s as mass layoffs, a worsening political environment, and employers' increasing use of their prerogative to displace strikers with permanent replacements began to take their toll. Although often hard-fought and bitter, these strikes were, in the end, simply ineffective. Cumulatively, they did little to sustain labor standards, reinvigorate members' morale, or rebuild the labor movement's political strength. As with the larger question of labor's demise, the reason that strikes lost their potency is complicated. Their ineffectiveness reflected, in part, the deteriorating circumstances of the workers who participated in them — including their worsening chances of securing alternative employment — as well as the growing determination of many employers to break their unions and the increasing ease with which they could effectuate their determination to use replacement workers in a weakened labor market. But an important factor was the inability of workers to successfully employ the tactics they used so well in earlier decades.

Although quite a number of strikes in the early and mid-1970s did feature mass picketing, the efforts repeatedly succumbed to police action, injunctions, and Board decisions that enjoined the strikes and left picketers unprotected from discharge. Barred from making effective use of mass picketing, the efforts repeatedly succumbed to police action, injunctions, and Board decisions that enjoined the strikes and left picketers unprotected from discharge.

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378 For concise overviews of the decline of the labor movement and the debates surrounding it, see JULIUS G. GETMAN, RESTORING THE POWER OF UNIONS: IT TAKES A MOVEMENT, 16-22 (2010); and LICHTENSTEIN, supra note 21, at 212-45.

379 To their credit, some critics have pointed to specific restrictions on picketing as one of the reasons for the decline of the labor movement beginning in the 1970s, although without focusing on mass picketing. See, e.g., GETMAN, supra note 378, at 236-40. James Pope has discussed the relationship between mass picketing and the use of replacement workers by employers, which increased dramatically in the 1970s, albeit with a critical emphasis on the legal doctrine allowing the use of replacement workers rather than the demise of mass picketing. POPE, supra note 23, at 528-34.


382 The peak of the strike wave that occurred in the 1970s is littered with circumstances in which workers sought to mobilize mass picketing, only to be reined in by injunctions and arrests. This was particularly true during the peak of the strike wave that occurred in the mid-
picketing, striking workers found themselves unable to prevent employers from outlasting them or replacing them with strikebreakers, to buck up the morale of hard-pressed unionists, or to rebuild a culture of solidarity reminiscent of what had won the day in the 1930s and 1940s.

In fact, when workers did resort to mass picketing, the consequences of doing so revealed far more about the dearth of any other effective weapons at labor’s disposal, and the degree to which mass picketing was no longer a viable protest strategy, than the tactic’s transcendent functionality.

Come the 1980s and 1990s, this was particularly evident. One example can be found in a bitter strike in Austin, Minnesota, in 1985 and 1986, which pitted a dissident local of the United Food and Commercial Workers Union against the meatpacker, Hormel. In the course of the conflict, strikers and their supporters several times employed mass picketing in a futile effort to prevent the company from restarting production with replacement workers and workers who crossed the picket lines. After the tactic caused the company some initial problems, it secured injunctions and the services of National Guards and state police, who arrested several hundred unionists and facilitated the plant’s reopening. Unlike many occasions when mass picketing was used in the 1930s and 1940s, the picketers simply could not overcome the concentrated forces of law and order and failed to stop production at the company’s plant. Although strike supporters claimed that mass picketing was central to sustaining strikers’ morale, the strike ultimately settled on terms considerably less favorable than what the strikers had demanded, and with no provision made for rehiring hundreds of strikers who had been permanently replaced and essentially lost their jobs.

A few years later, UMW strikers and their supporters employed mass picketing in a strike against Pittston Coal in 1989 and 1990. Early on in the 1970s. In the spring of 1974, dozens of mass picketers were arrested in strikes at Dow Chemical in Michigan. In early 1976, striking pressmen were enjoined from picketing the Washington Post. Post Goes to Court Over Picket Action, WASH. POST, Jan. 8, 1976, at C2. In the summer of 1976, thirty-four mass picketers were arrested and “received suspended jail sentences” in a strike against Goodyear in Ohio. Rubber Strikers Sentenced, N.Y. TIMES, Aug. 3, 1976, at 57. Mass picketing, and an accompanying cycle of arrests, also featured in a grinding effort in the early 1970s to organize men’s clothing workers, as well as a bitter dispute between shipyard workers and General Dynamics in Quincy, Massachusetts that flared in 1974 and again in 1977. See, e.g., David C. Berliner, Men’s Wear Workers on Strike, WASH. POST, Jun. 4, 1974, at A10 (describing a strike involving 110,000 men’s clothing industry workers); Homer Bigart, Classic Labor-Organizing Drive Splits El Paso, N.Y. TIMES, Sept. 11, 1972, at 57 (describing a strike involving more than 2000 members of the Amalgamated Clothing Workers Union). On NLRB actions against mass picketers during this period, see, Service Emps. Int’l Union, Local No. 254, 218 N.L.R.B. 1399 (1975); and Local 275, Laborers Int’l Union, 209 N.L.R.B. 279 (1974).


385 Id. at 65–66, 85–86, 123. On the course of the strike, see also DRAY, supra note 24, at 644–49.

that dispute, a court enjoined picketers from congregating in large numbers at the approaches to the coal company’s property, and from making threatening or coercive gestures. In the spring of 1989, backed by hundreds of supporters, the strikers defied these injunctions with a series of large-scale “sit-ins” inside company property and blockades — mainly, mass, sit-down picketing — of mine entrances. Authorities responded by arresting several thousand unionists, including more than 1500 on one day, imposing fines on union members running into the thousands of dollars, and imposing millions of dollars in fines and bonds on the UMW. After less than four months of this, the union was compelled to partially suspend the mass demonstrations. Although unionists again claimed that the demonstrations and the arrests made by the authorities and fines actually inspired the strikers, even radicalized them, and might have played a hand in the union eventually securing a favorable settlement, the over 2300 arrests also illustrated the lengths to which authorities were prepared to go in enforcing limitations on mass picketing. As a means of stanching production, the tactic played essentially no role in the strike.

The Detroit news strike in the mid-1990s, which grew out of a conflict between several unions and the Detroit Daily News, the Detroit Free Press, and the production and distribution company jointly used by both papers, followed a similar trajectory. In the fall of 1995, strikers and strike supporters repeatedly mustered mass pickets at the main production facility, intending to impede delivery of the newspapers. On occasion, the demonstrators’ ranks swelled into the thousands. The pickets were periodically able to disrupt printing and distribution operations, at one point forcing papers to be taken from the press by helicopter. However, the police, working with company lawyers and armed with injunctions, repeatedly broke up the pickets and arrested the picketers, charging some with felony unlawful assembly. Faced with the prospect of contempt citations, mass arrests, and loss of strikers’ jobs, union leaders suspended the picketing at the production facility, paving the way for unimpeded publication of the struck papers. Picketing continued in smaller numbers at other locations, but it never again threatened the ability of the companies to get the papers out. Moreover, early in 1996, the coalition of unions involved in the strike was compelled to enter an agreement with the NLRB in which the unions

387 *Id.* at 148–50.
388 *Id.* at 155–63.
389 *Id.* at 157–59, 164–68.
390 *Id.* at 169.
391 *Id.* at 2, 188–89, 238–39.
393 *Id.* at 170–73.
394 *Id.* at 171.
395 *Id.* at 172–76.
396 *Id.* at 176.
foreswore mass picketing and other forms of picket-line misconduct. In less than a month, the NLRB disavowed the agreement, citing continued misconduct, and began unfair labor practice proceedings against the unions. Faced with the possibility that the agency would also seek an injunction, the unions then entered a binding agreement to control picket-line misconduct, and renounced those episodes of raucous picketing that continued to spring up. Eventually, the strike was settled on unfavorable terms for the workers.

Although better publicized than most, these strikes were not aberrations. Rendered ineffective by legal prohibitions, since the early 1980s, mass picketing has faded almost completely from the landscape of labor protests. As a consequence, the strike itself has lost almost all power to influence employers. With depressing frequency, workers who have gone out on strike over the last several decades have found themselves totally unable to stanch the use of permanent replacement workers and the resulting demoralization (and frequent impoverishment) of their ranks. In strike after strike since the early 1980s, including major contests at Caterpillar, Phelps Dodge, and Greyhound, workers have simply been crushed. Where once, at the height of the postwar strike wave, employers complained that strikers, armed with mass picketing, could not lose, now the opposite is true: strikers can hardly win. Fully attuned to this and ruefully aware that the labor law is designed such that all of the basic rights it purports to offer workers, including the right to effective representation and meaningful collective bargaining, depend upon an effective right to strike, workers have simply stopped striking, even as inequality soars and labor standards deteriorate. From 1947 through 1981, several hundred strikes of one thousand or more workers typically occurred each year. But in no year since then has there been more than one hundred; between 2000 and 2011, there were on average fewer than twenty such strikes per year.

V. CONCLUSION: MASS PICKETING AND THE DILEMMA OF LIBERAL LABOR RIGHTS

The Memorial Day demonstrators who were shot down and beaten by the Chicago Police intended that day, by demonstrating in large numbers at Republic Steel, to somehow prevent the company from running the mill with about one thousand loyal employees who had defied the strike call and remained inside the plant. Whether violence would eventually have resulted

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397 Id. at 214.
398 Id.
399 Id. at 214–17.
400 Id. at 255–56.
401 LICHTENSTEIN, supra note 21, at 17, 249.
402 Bureau of Labor Statistics, supra note 380, at 3. These data refer to "work stoppages," meaning both strikes and lockouts.
had the police allowed the demonstrators to proceed with their plan simply cannot be known. Maybe they wished to block access to the plant; or maybe, as the La Follette Committee concluded, they intended simply to demonstrate "the strength of the union to those workers who remained within the plant." What is clear is that the unionists' inability to set up a large picket line at the plant left them at the mercy of the company and its economic might, for the labor law did nothing to prevent the company from running the plant despite the fact that it provoked the strike by unlawful means. Within six weeks, the Little Steel Strike was broken, not only in Chicago but nationwide.

Nowadays, would-be mass picketers are no longer shot down in droves by police or crudely assaulted by private militias. But they do not have to be, not when the law, backed by extraordinarily potent means of law enforcement, so thoroughly and so effectively bars mass picketers from the industrial battlefields. And not when, to invoke a concept from criminology, a dominant "culture of control" so completely and with so little controversy proscribes workers' use of violence, or even the potential for violence, as an arbiter of labor rights. In this is a challenge to the liberal antipathy to violence. A dangerous thing to fetishize, to be sure, violence nonetheless has always been crucial to the expansion of labor rights. This is evident, of course, in the single greatest advance of labor freedom in this country's history — the Civil War and the triumph over chattel slavery. And violence was likewise central to the second greatest victory in this realm, the advancement of labor rights in the 1930s and 1940s, achieved in large part by means of sit-down strikes and mass picketing. To invoke nonviolence in either of these contexts was necessarily to spurn the claims of labor and to sanction employers' consolidation of their domination of workers. So it remains today, as the critique of mass picketing has operated not merely as an appeal to social order, but as a denial of an effective right to strike and a sacrifice of all the rights purportedly conveyed by the labor law.

This state of affairs reflects something quite fundamental — indeed, nothing less than a dilemma inherent in the very aspiration to realize effective labor rights and a viable labor movement in liberal society. The nature of the dilemma is this: mass picketing is in multiple ways anathema to the bedrock commitments of a system of liberal labor law characterized by the ideal of achieving a meaningful balance between a respect for private property and the prerogatives of capital, on the one hand, and a commitment to meaningful rights of worker self-organization, protest, and collective bargaining, on the other. For mass picketing is highly effective in arming work-
ers to challenge the interests of capitalists, steeped in threatening visions of unmediated class conflict and solidarity, and, most problematic of all, charged with the prospect of inducing violence — violence, it should be emphasized, of the very sort that the labor law was explicitly dedicated by Congress and the Supreme Court to preventing. As we have seen, these concerns permeated the campaign against mass picketing in the courts, Congress, and among elite commentators. The same sentiment underlies consistent condemnation of mass picketing by legal academics. And yet, as the prohibition of mass picketing reveals in practice, liberal labor law needs mass picketing (if not something yet more militant and therefore more intolerable to its liberal commitments) so that workers may actually realize the rights the law purports to offer them. The modes of labor protest that are compatible with the law's liberal commitments, including conventional picketing in small numbers and the withholding of labor that inheres in every strike, are simply not effective enough to give real substance to labor rights in this day and age. Armed with only these weapons, workers stand no chance.

Of course, the state could address the absence of an effective and normatively tolerable mode of labor protest by preempting the need for workers to employ such a weapon in the first place. This was proposed, for example, in the first-contract arbitration provisions of the ill-fated Employee Free Choice Act of a few years past. Or, the state could strengthen labor rights by more directly and artificially buttressing the right to strike, as was contemplated by statutory reform efforts in the early 1990s that would have limited employers' use of replacement workers in economic strikes. But besides being politically unviable, such solutions by their very nature repudiate the liberal orientation of labor law. Instead, with their explicit intrusion of state power into the contest between labor and capital, they contemplate a corporatist approach more in line with the premises of continental labor law and, for what it is worth, those of twentieth century fascist regimes. For better or worse, the adoption of such corporatist measures would entail a fundamental change in the essential nature of American labor law, with the promise of beneficent treatment under the new regime purchased at the price of labor's deeper commitment to social peace, a further surrender of its au-

408 Striker Replacement Bill, S. 55, 103rd Cong., § 2 (1993); Cesar Chavez Workplace Fairness Act, H.R. 5, 103rd Cong. § 2 (1993).
409 On the essential features of corporatist labor relations, see generally Howard J. Wiarda, Corporatism and Comparative Politics: The Other Great "ism" 102–21 (1997); and Philippe C. Schmitter, Still the Century of Corporatism?, 36 Rev. of Pol. 85 (1974).
tonomy, and a narrowing of labor rights by a range of concomitant duties. In the meantime, the system of liberal labor law erected by the Wagner Act and the Taft-Hartley Act lingers in place, even as the rights the acts purport to advance and the future of the labor movement both teeter on the edge of extinction.