

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 proscribed 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.¹ 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.² For four minutes or so, the two sides faced off, arguing over the demonstrators' demand that they be allowed to reach the gate.³ 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.⁴

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.⁵ 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

¹ COMM. ON EDUC. AND LABOR, THE MEMORIAL DAY INCIDENT, S. REP. NO. 46, at 7–11 (1st Sess. 1937); IRVING BERNSTEIN, THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933–1941, at 487 (1969).

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.

⁵ CAROLE QUIRKE, EYES ON LABOR: NEWS PHOTOGRAPHY AND AMERICA'S WORKING CLASS 149, 163–65, 174–75 (2012).

workforce.⁶ The demonstrators saw the right to set up a mass picket line as guaranteed to them by the National Labor Relations Act,⁷ 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.⁸ The police insisted that the demonstrators could not be allowed to protest in such fashion and that they disperse.⁹

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.¹⁰ 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.¹¹ 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-

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.

⁷ National Labor Relations Act of July 5, 1935, Pub. L. No. 74-198, 49 Stat. 449.

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.

¹¹ See COMM. ON EDUC. AND LABOR, *supra* note 1, at 4–5.

tive, and inherently disorderly act.¹² 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.¹³ In the view of the *Tribune*’s editors, the leaders of the “mob” were the “murderers.”¹⁴ 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.¹⁵ 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.¹⁶ 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.¹⁷ 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.

¹⁶ National Labor Relations Act of July 5, 1935, Pub. L. No. 74-198, § 7, 49 Stat. 449, 452. See also BERNSTEIN, *supra* note 1 *passim*; Ahmed A. White, *Industrial Terrorism and the Unmaking of New Deal Labor Law*, 11 NEV. L. J. 561, 573–96 (2010–11).

¹⁷ On uncertainty concerning the constitutionality of the Wagner Act, see JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD* 149–88 (1974). On the repression practiced by Republic and other companies during this period, see BERNSTEIN, *supra* note 1 *passim*; White, *supra* note 16, at 573–96.

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.¹⁸ 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.¹⁹ 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.²⁰ 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.²¹ 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

¹⁸ James Gray Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935–1958*, 24 L. & HIST. REV. 45, 47–58 (2006); Ahmed A. White, *The Depression Era Sit-Down Strikes and the Limits of the Liberal Labor Law*, 40 SETON HALL L. REV. 1, 10–24 (2010).

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.

²¹ NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 212–15 (2003).

the courts in undermining the effectiveness of labor rights.²² 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.²³ 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.²⁴ Even the most comprehensive treatises, practice guides, and law school casebooks devote little attention to the subject.²⁵ 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

²² See, e.g., JAMES A. GROSS, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947-1994* (1995); see also Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1529-31 (2002).

²³ Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C. L. REV. 125, 135-36 (2003); James Gray Pope, *How American Workers Lost the Right to Strike, And Other Tales*, 103 MICH. L. REV. 518, 533-34 (2004).

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.

²⁵ This tendency largely to ignore mass picketing can be seen in leading casebooks, including ARCHIBALD COX, ET AL., *LABOR LAW: CASES AND MATERIALS* 461-674 (Foundation 15th ed. 2011); and MICHAEL C. HARPER & SAM ESTREICHER, *LABOR LAW: CASES, MATERIALS, AND PROBLEMS* 451-58 (Wolters Kluwer 2011). It is evident in the leading one-volume hornbook, ROBERT A. GORMAN & MATTHEW W. FINKIN, *BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING* 289-312 (Thompson 2d ed. 2004). And it characterizes the leading practice guides, including CHARLES MORRIS ET AL., *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT* 1061-191 (1983).

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.

I. MASS PICKETING AND THE MAKING OF THE MODERN LABOR MOVEMENT: 1933–1947

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”²⁶ — 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.²⁷ 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.²⁸ 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.²⁹

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.³⁰ 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

²⁶ CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LAW AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960*, at 33 (1985).

²⁷ *See id.*

²⁸ For an overview of these methods of repression and their use against unionists in the period from 1873 to 1937, see ROBERT JUSTIN GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA FROM 1870–1976*, at 9–19 (2001). On the use of injunctions and conspiracy doctrines against labor organizations in this general period, see William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1148–89 (1989). On the use of state security statutes against unionists, particularly radicals, see WILLIAM PRESTON, JR., *ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903–33* (1963). On the use of criminal syndicalism and vagrancy laws to undermine labor rights, see generally Ahmed A. White, *A Different Kind of Labor Law: Vagrancy Law and the Regulation of Harvest Labor, 1913–1924*, 75 U. COL. L. REV. 667 (2004); and Ahmed A. White, *The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Industrial Workers of the World, 1917–1927*, 85 OR. L. REV. 649 (2007). The way these methods were used in practice can be seen in the history of particular labor organizations, especially that of the radical Industrial Workers of the World. MELVYN DUBOFSKY, *WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD* 381–82 (2000).

²⁹ *See, e.g.*, *Langenberg Hat Co. v. United Cloth Hat & Cap Makers of N. Am.*, 266 F. 127 (E.D. Mo. 1920); *Goldfield Consol. Mines Co. v. Goldfield Miners’ Union No. 220*, 159 F. 500 (C.C. Nev. 1908).

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.³¹ 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.³² 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.³³

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.³⁴ 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.³⁵ For a brief time, it appeared that unionism would, as it had done in other downturns, nearly fall into oblivion.³⁶

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

³¹ IRVING BERNSTEIN, *THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920–1933*, at 147–49, 154–56 (Houghton Mifflin 1960).

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 LIZABETH 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.³⁷ Despite their antiunion 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.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.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 Act⁴⁰ (“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.⁴¹

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, *STEELWORKERS IN AMERICA: THE NONUNION ERA* 87–91, 154, 167–68 (1960); and COHEN, *supra* note 35, at 171–83.

³⁸ COHEN, *supra* note 35, at 162–83.

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.

⁴⁰ National Industrial Recovery Act of June 16, 1933, Pub. L. No. 73-67, 48 Stat. 195 (repealed 1936). For a succinct review of how these and other factors, including the impoverishment of the working class and its frustration with capricious working conditions, influenced the resurgence of union activism, see ANTHONY J. BADGER, *THE NEW DEAL: THE DEPRESSION YEARS, 1933–1940*, at 119–40 (1989).

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.⁴² 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.⁴³

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.⁴⁴ Faced with the company’s adamant refusals, the workers struck, first in February and then again in April.⁴⁵ 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.⁴⁶ 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.⁴⁷ 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.⁴⁸ 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 ZIEGER, *supra* note 24, at 28–29.

⁴³ See BERNSTEIN, *supra* note 1, at 217–317; see also ROBERT ZIEGER, *THE CIO, 1935–1955*, at 47–49 (1995).

⁴⁴ BERNSTEIN, *supra* note 1, at 218–27; Rebecca Zeitlow & James Gray Pope, *The Toledo Auto-Lite Strike of 1934 and the Fight Against “Wage Slavery,”* 38 U. TOL. L. REV. 839, 844–49 (2007).

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 BERNSTEIN, *supra* note 1, at 221–22; 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.

⁵⁴ *Riots Bring Order from Labor Board for End of Strike*, N.Y. TIMES, May 23, 1934, at 1. On the scale of the conflict preceding the battle, see *25,000 Join Strike; Riot in Minneapolis*, N.Y. TIMES, May 22, 1934, at 1.

⁵⁵ BERNSTEIN, *supra* note 1, at 238–39.

⁵⁶ See Charles B. Cheney, *Renewed Warfare Due in Minneapolis*, N.Y. TIMES, July 15, 1934, at E6; *Twin City Drivers Riot*, N.Y. TIMES, July 21, 1934, at 1.

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; *Truck Strike Ends in Minneapolis*, N.Y. TIMES, Aug. 22, 1934, at 2; see also BERNSTEIN, *supra* note 1, at 250–51.

⁵⁸ See BRUCE NELSON, *WORKERS ON THE WATERFRONT: SEAMEN, LONGSHOREMEN, AND UNIONISM IN THE 1930S*, at 128–29, 132–33 (1990).

and vigilantes.⁵⁹ 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.⁶⁰ 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.⁶¹

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 1934.⁶² 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.⁶³ 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.⁶⁴

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.⁶⁵ In the summer of 1935, for example, police in Omaha, Nebraska, resorted to their own “flying squadrons” to thwart mass picketing by car workers.⁶⁶ Mass picketing was also a fixture in a lengthy strike at New York Shipbuilding in Camden, New Jersey.⁶⁷ 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-

⁵⁹ *Id.* at 128–33.

⁶⁰ *Id.* at 137, 149.

⁶¹ BERNSTEIN, *supra* note 1, at 295–98.

⁶² On the full story of this conflict, see generally JANET IRONS, *TESTING THE NEW DEAL: THE GENERAL TEXTILE STRIKE OF 1934 IN THE AMERICAN SOUTH* (2000).

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.

⁶⁵ See, e.g., *Mass Picket Line Planned in Strike*, N.Y. TIMES, Sept. 3, 1935, at 4.

⁶⁶ *Hold Two Miners After Blasting of Power Plant*, CHI. DAILY TRIB., Aug. 27, 1935, at 11.

⁶⁷ *Look to U.S. to End Shipyard Strike*, N.Y. TIMES, July 28, 1935, at N8; *Strikers Protest Shipyard Opening*, N.Y. TIMES, July 29, 1935, at 29.

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.

⁶⁹ *Acting N.Y. Police Head Holds Comment on Picketing Order*, CHI. DAILY TRIB., Aug. 19, 1934, at 9.

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.

⁷³ See, e.g., *2 Newark Pickets Seized*, N.Y. TIMES, Aug. 20, 1935, at 24; *8 Theatre Pickets Seized in New Clash*, N.Y. TIMES, Mar. 29, 1935, at 26; *12 Dye Company Pickets Held*, N.Y. TIMES, Oct. 15, 1935, at 24; *Mercury Pickets Freed*, N.Y. TIMES, June 21, 1935, at 14; *Strikers Protest Shipyard Opening*, N.Y. TIMES, July 29, 1935, at 29.

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.⁷⁴ 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.⁷⁵ Section 8 of the Act established a range of civil violations — unfair labor practices — that could be charged against employers who flouted these rights.⁷⁶ And § 3 set up an independent agency, the National Labor Relations Board (the “NLRB,” or “Board”) to administer the Act.⁷⁷ 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.⁷⁸ As we shall see shortly, this

⁷⁴ ZIEGER, *supra* note 43, at 19.

⁷⁵ National Labor Relations Act of July 5, 1935, Pub. L. No. 74-198, §§ 7, 13, 49 Stat. 449, 452, 457.

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.⁷⁹ 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.⁸⁰ 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.⁸¹

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.⁸² 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.⁸³ 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.⁸⁴ With great regularity, unionists were shot, beaten, spied upon, kid-

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).

⁸⁴ See, e.g., Ford Motor Co., 14 N.L.R.B. 346, 354–56 (1939); Republic Steel, 9 N.L.R.B. 219, 267 (1938); Jones & Laughlin Steel Corp., 1 N.L.R.B. 503, 509, 516 (1936).

napped, tarred-and-feathered, run out of town, fired and blacklisted, and threatened in all sorts of ways by company police and other operatives.⁸⁵

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.⁸⁶ 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.⁸⁷ 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.⁸⁸

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*.⁸⁹ *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

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. Gitt eds., 1969); White, *supra* note 16.

⁸⁶ SIDNEY FINE, *SIT-DOWN: THE GENERAL MOTORS STRIKE OF 1936–1937*, at 1–13 (1969).

⁸⁷ See Pope, *supra* note 18, at 74–75; White, *supra* note 16 *passim*.

⁸⁸ See Pope, *supra* note 18, at 46, 107; see also Ahmed A. White, *The Sit-Down Strikes and the Limits of Liberal Labor Law*, 40 *SETON HALL L. REV.* 1, 11–15 (2010).

⁸⁹ 301 U.S. 1, 49 (1937).

for New Deal candidates),⁹⁰ 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.⁹¹

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.⁹² 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").⁹³ 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.⁹⁴ 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.⁹⁵ Initially, however, *Jones & Laughlin* refused to follow U.S. Steel down this path.⁹⁶ 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.⁹⁷ 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.

⁹³ See BERNSTEIN, *supra* note 1, at 474–76; Kenneth Casebeer, *Aliquippa: The Company Town and Contested Power in the Construction of Law*, 43 BUFF. L. REV. 617, 667–72 (1995).

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.⁹⁸ 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.⁹⁹ 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.¹⁰⁰ 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.¹⁰¹ 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.¹⁰² 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.¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵

⁹⁸ *Id.* at 673.

⁹⁹ *Id.* at 673–75.

¹⁰⁰ BERNSTEIN, *supra* note 1, at 478; Casebeer, *supra* note 93, at 673.

¹⁰¹ *See, e.g., G.M. Head Rejects Conference Call: Refuses to Negotiate Further with the Union as Long as Its Members Hold Plants*, DAILY BOS. GLOBE, Jan. 26, 1937, at 1; *Mass Picket Curb Is Sought by G.M.*, N.Y. TIMES, Feb. 7, 1937, at 37; *Office Workers Denied Entrance to Plants, Says Knudsen*, DAILY BOS. GLOBE, Jan. 19, 1937, at 14; *Strikers Seek to Close G.M. Plants in St. Louis*, DAILY BOS. GLOBE, Jan. 18, 1937, at 11.

¹⁰² *See, e.g., Strike Pickets Add to Forces at Illinois Plant*, WASH. POST, July 26, 1936, at M4.

¹⁰³ BERNSTEIN, *supra* note 1, at 473–74.

¹⁰⁴ On the course of the Little Steel Strike, see U.S. SENATE COMM. ON EDUC. AND LABOR, LABOR POLICES OF THE EMPLOYER ASSOCIATIONS: PART IV: THE “LITTLE STEEL” COMPANIES, S. Rep. No. 151, at 1–8 (1st Sess. 1941); see also BERNSTEIN, *supra* note 1, at 483–97, 727–31; and White, *supra* note 17, at 596–605.

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.¹⁰⁶ 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.¹⁰⁷ All of these elements were calculated to bring the strikers into disrepute and legitimize repressive moves by local courts and police.¹⁰⁸ 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.¹⁰⁹

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.¹¹⁰ 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.¹¹¹ 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

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.

strikers.¹¹² During this period, the sit-down strikes had also come under sustained political attack by major employers and other elites.¹¹³ 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.¹¹⁴

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.¹¹⁵ 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.¹¹⁶ 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.¹¹⁷

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

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.

¹¹⁵ A number of CIO unions struggled in the late 1930s to maintain their viability. NELSON LICHTENSTEIN, *LABOR’S WAR AT HOME: THE CIO IN WORLD WAR II*, at 13–14 (1982). Evidence that the strikes of 1936 and 1937 cost the CIO support with the public can be found in surveys conducted by Gallup, which showed a reduction in favorable views about unions and increased support for government repression of strikes. George H. Gallup, *THE GALLUP POLL: PUBLIC OPINION, VOLUME I: 1935–1971*, at 31, 49, 52, 55, 62–63 (1972).

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.¹¹⁸ 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.¹¹⁹

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.¹²⁰ 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.¹²¹ Within a few days, the company, prompted by government mediators, agreed to negotiations.¹²² The Lackawanna strike and later action at the company's Bethlehem plant did not lead to the company's recognition of the CIO.¹²³ 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.¹²⁴

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.¹²⁵ 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

¹¹⁸ On the number and character of Ford's service men, see Robert P. Weiss, *Private Detective Agencies and Labour Discipline in the United States, 1855–1946*, 29 *HIST. J.* 87, 105 (1986); see also BERNSTEIN, *supra* note 1, at 570–71.

¹¹⁹ See BERNSTEIN, *supra* note 1, at 735–51.

¹²⁰ LICHTENSTEIN, *supra* note 115, at 46.

¹²¹ *C.I.O. Man Warns of Steel Walkouts*, N.Y. TIMES, Feb. 25, 1941, at 16; *Steel Strike Vote Continues*, N.Y. TIMES, Feb. 22, 1941, at 9; *Tie-Up Threatened in Bethlehem Jobs*, N.Y. TIMES, Feb. 20, 1941, at 11; *Union Votes Strike in Bethlehem Unit*, N.Y. TIMES, Feb. 26, 1941, at 1.

¹²² LICHTENSTEIN, *supra* note 115, at 48; Alfred Friendly, *Bethlehem Strike Put Off for Two Days*, WASH. POST, Feb. 26, 1941, at 1; *Mediation Plans are Pushed*, N.Y. TIMES, Feb. 26, 1941, at 13; *OPM Offers Steel Plan*, N.Y. TIMES, Feb. 28, 1941, at 10; A.H. Raskin, *OPM Moves to End Bethlehem's Strike; Terms Suit Union*, N.Y. TIMES, Feb. 28, 1941, at 1; Louis Stark, *Concern in Capital*, N.Y. TIMES, Feb. 27, 1941, at 1.

¹²³ LICHTENSTEIN, *supra* note 115, at 44–48.

¹²⁴ JAMES B. ATLESON, *LABOR AND THE WARTIME STATE: LABOR RELATIONS AND LAW DURING WORLD WAR II*, at 22–24, 29 (1998).

¹²⁵ See *2 Hurt in Battle at Struck Plant*, N.Y. TIMES, June 21, 1938, at 42; *Writ Sets Limits on Pencil Pickets*, N.Y. TIMES, July 1, 1938, at 28.

aside.¹²⁶ 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.¹²⁷ Newspaper workers engaged in mass picketing.¹²⁸ 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.¹²⁹ The tactic likewise prevailed at chemical and oil refineries,¹³⁰ manufacturing plants,¹³¹ and shipyards.¹³²

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.¹³³ 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 pre-saged 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.¹³⁴ Small, wildcat strikes remained commonplace. Moreover, some independent unions continued to strike in large numbers and, on occasion, to establish large picket lines.¹³⁵ 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 1943.¹³⁶ The following year, mass picketing featured in a lengthy and far-flung strike against mail-order retailer, Montgomery Ward.¹³⁷

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

¹²⁶ See Louis Stark, *46 Hurt as Pickets of Auto Union Fight Cleveland Police*, N.Y. TIMES, Aug. 1, 1939, at 1.

¹²⁷ See *Teachers Picket Lehman Home Here*, N.Y. TIMES, June 6, 1937, at 28.

¹²⁸ See, e.g., *L.I. Press Suspends in Guild Dispute*, N.Y. TIMES, May 1, 1937, at 4.

¹²⁹ See, e.g., *9 Pickets Arrested in Gimbel Strike*, N.Y. TIMES, Aug. 20, 1941, at 21; *Mass Pickets Dispersed*, N.Y. TIMES, July 26, 1941, at 29.

¹³⁰ See *Mid-Continent Petroleum*, 54 N.L.R.B. 912, 954 (1944); *Solvay Process Co.*, 47 N.L.R.B. 1113, 1120 (1943); *Lone Star Gas Co.*, 18 N.L.R.B. 420, 446-47 (1939).

¹³¹ See, e.g., *Precision Casting Co.*, 48 N.L.R.B. 870, 884 (1943).

¹³² See, e.g., *Sun Shipbuilding and Dry Dock*, 38 N.L.R.B. 234, 239 (1943).

¹³³ See ATLESON, *supra* note 124, at 22-24; ZIEGER, *supra* note 24, at 84, 87-89.

¹³⁴ See LICHTENSTEIN, *supra* note 115, at 47-51, 121-23, 133-35.

¹³⁵ See, e.g., *Massed Pickets Bar Men from Bearing Plants*, CHI. DAILY TRIB., Sept. 2, 1933, at 17.

¹³⁶ See *Rubber Picket Lines Cripple 3 More Plants*, CHI. DAILY TRIB., May 25, 1943, at 1.

¹³⁷ See *Chicago Pickets Curbed*, N.Y. TIMES, Apr. 15, 1944, at 13; *Ward Asks Court to Stop Violence*, N.Y. TIMES, Dec. 17, 1944, at 29; see also *Ward Strike Sent to Roosevelt by WLB*, N.Y. TIMES, Apr. 14, 1944, at 13.

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-

¹³⁸ *Postwar Work Stoppages Caused by Labor-Management Disputes*, 63 MONTHLY LAB. REV. 872, 872 (1946).

¹³⁹ ART PREIS, *LABOR’S GIANT STEP* 257 (1964).

¹⁴⁰ *Postwar Work Stoppages Caused by Labor-Management Disputes*, *supra* note 138, at 872.

¹⁴¹ See DRAY, *supra* note 24, at 492–93.

¹⁴² See GROSS, *supra* note 116, at 251–52.

¹⁴³ PREIS, *supra* note 139, at 272.

¹⁴⁴ See generally GEORGE LIPSITZ, *CLASS AND CULTURE IN COLD WAR AMERICA* (1981).

¹⁴⁵ See HOWELL JOHN HARRIS, *THE RIGHT TO MANAGE: INDUSTRIAL RELATIONS POLICES OF AMERICAN BUSINESS IN THE 1940s*, at 93–98, 118–20, 154, 198 (1982); see also LICHTENSTEIN, *supra* note 115, at 207, 216–17.

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 sponsorship of industrial peace. In the context of this emerging regime of "corporate liberal power," workers found themselves "forced . . . to explore their own resources via mass demonstrations and strikes" in pursuit of their interests and visions.¹⁴⁶ 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.¹⁴⁷

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 contentious labor disputes. Indeed, workers assumed it to be their prerogative to strike in this fashion, and so the tactic flourished. Episodes of mass picketing were frequently the leading story in national news.¹⁴⁸ 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 prominent 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 Westinghouse Electric over concerns about job security and pay. Although the parties 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.¹⁴⁹ For weeks, the strikers maintained the mass picket lines in defiance of police and court orders.¹⁵⁰ 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 Picketing 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-Swinging 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.¹⁵¹

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.¹⁵² 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.¹⁵³ However, the dispute was eventually complicated by the emergence of a rival union with more conservative politics and the active support of the company.¹⁵⁴ 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.¹⁵⁵ 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.¹⁵⁶

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;¹⁵⁷ a long and violent dispute in Hollywood, which involved ten studios and manifested in two major strikes between 1945 and 1946;¹⁵⁸ sympathy strikes, responding to the Hollywood dispute, by actors, aircraft plant

TIMES, Feb. 26, 1946, at 18; *Massed Pickets Defy Pennsylvania Court*, N.Y. TIMES, Mar. 16, 1946, at 14; *Pickets Defy Court*, N.Y. TIMES, Feb. 19, 1946, at 1; A.H. Raskin, *Clash in GE Strike Brings 19 Arrests*, N.Y. TIMES, Feb. 22, 1946, at 17.

¹⁵¹ See, e.g., Lawrence Resner, *Court Puts Curb on Steel Pickets*, N.Y. TIMES, Feb. 3, 1946, at 1; Lawrence Resner, *Marooned 12 Days in Steel Plants*, N.Y. TIMES, Feb. 2, 1946, at 8.

¹⁵² See STEPHEN MEYER, *STALIN OVER WISCONSIN: THE MAKING AND UNMAKING OF MILITANT UNIONISM, 1900-1950*, at 7 (1992).

¹⁵³ *Id.* at 78-82, 157-61.

¹⁵⁴ *Id.* at 193-97.

¹⁵⁵ *Id.* at 179-83, 189-90, 208-10.

¹⁵⁶ *Id.* at 193-213.

¹⁵⁷ See, e.g., *Dozen Injured in Melee at Warners' Entrance; Union Leader Arrested*, *supra* note 148, at 1; Lawrence Resner, *End of Sea Strike Likely as Union Back Wage Award*, N.Y. TIMES, Sept. 20, 1946, at 1; *Tie-up of Shipping to Spread Today*, N.Y. TIMES, July 12, 1946, at 38; see also Lawrence Resner, *Tension Eases on the Docks as CIO Limits Picketing*, N.Y. TIMES, Sept. 18, 1946, at 1.

¹⁵⁸ See, e.g., *Fists Fly, Many Injured in Film Fight*, L.A. TIMES, Oct. 9, 1945, at 1; *Peace Talks in Film Strike Assigned to Eric Johnston*, L.A. TIMES, Oct. 16, 1945, at 1; *Strike at 10 Major Film Studios Ends*, L.A. TIMES, July 3, 1945, at 1.

workers, and maritime workers, which resulted in mass arrests;¹⁵⁹ the UE's strike against GM, which resulted in mass picketing at the company's Los Angeles plant and led to clashes and arrests;¹⁶⁰ and the CIO's 1946 strike against basic steel, which involved a number of steel-fabricating plants in and around Los Angeles.¹⁶¹

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);¹⁶² 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;¹⁶³ 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.¹⁶⁴

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.¹⁶⁵ On a few occasions, mass picketers would literally be read the Riot Act before being routed and arrested by police.¹⁶⁶

¹⁵⁹ *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.

¹⁶⁰ *Violence Breaks Out in L.A. Strike*, L.A. TIMES, Jan. 18, 1946, at 1.

¹⁶¹ *Steel Pickets Plan Mass Show Today*, L.A. TIMES, Jan. 23, 1946, at 1.

¹⁶² 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.

¹⁶³ LIPSITZ, *supra* note 144, at 62–69.

¹⁶⁴ *Id.* at 81–84.

¹⁶⁵ 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.

¹⁶⁶ 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.

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.¹⁶⁷ 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.¹⁶⁸ 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.”¹⁶⁹ 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 strike-breakers or replacement workers in the course of a strike.¹⁷⁰ 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.¹⁷¹ In other words, mass picketing offered strikers a way of pressuring the employer while guarding

¹⁶⁷ See, e.g., *Bars Mass Picketing at 16 GE Ohio Plants*, N.Y. TIMES, Feb. 1, 1946, at 17; *Carnegie-Illinois Asks Picket Curbs*, N.Y. TIMES, Jan. 29, 1946, at 14; *Court Limits Steel Pickets to 10 at Gate*, CHI. DAILY TRIB., Feb. 3, 1946, at 4; *Jersey Court Backs Mass Picketing Ban*, N.Y. TIMES, Dec. 6, 1946, at 4; *Limit of 21 Pickets at Plant Ordered in Writ Against Union*, CHI. DAILY TRIB., Oct. 22, 1946, at 2; *Mass Picketing Ended by Court, Plant Reopens*, CHI. DAILY TRIB., Oct. 24, 1946, at 13; *Phone Strikers Banned from Mass Picketing*, CHI. DAILY TRIB., APR. 16, 1947, at 7; *Police Accuse CIO Pickets in Injunction Suit*, CHI. DAILY TRIB., Oct. 12, 1946, at 8, 13; *Strikers Restrained*, N.Y. TIMES, Jan. 31, 1946, at 15. On cases where unionists defied mass picketing injunctions and faced contempt prosecution, see, for example, *5 Will Face Court in Mass Picketing*, N.Y. TIMES, Feb. 17, 1946, at 5; *Allis Strike Quiet, 14 Pickets in Court*, N.Y. TIMES, Nov. 27, 1946, at 4; *Allis Unionists Get Jail*, N.Y. TIMES, Dec. 25, 1947, at 42; *Massed Pickets Defy Pennsylvania Court*, N.Y. TIMES, Mar. 16, 1946, at 14; *Picket Line Increases Despite Injunction*, N.Y. TIMES, Feb. 14, 1946, at 2; and *Union Heads Indicted in GE Mass Picketing*, N.Y. TIMES, Apr. 6, 1946, at 9.

¹⁶⁸ See, e.g., *Foundry Firm Sues to Halt Union Violence*, CHI. DAILY TRIB., Feb. 24, 1946, at 11; *Mills Sue Union Over a Strike*, N.Y. TIMES, Apr. 24, 1947, at 16; *Striking Steel Union Sued for \$2,000,000*, DAILY BOS. GLOBE, Oct. 25, 1945, at 4.

¹⁶⁹ PREIS, *supra* note 139, at 276–77.

¹⁷⁰ See *NLRB v. Mackay Radios*, 304 N.L.R.B. 333, 345–46 (1938).

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-

¹⁷² See, e.g., Henry Hazlitt, *Workers Can’t Eat Dollars*, 34 NATION’S BUS. 37 (1946).

¹⁷³ On the motivations behind mass picketing, see Note, *The Enforcement of the Right of Access in Mass Picketing Situations*, 113 U. PA. L. REV. 111, 114–16 (1965) [hereinafter *Enforcement of the Right of Access*].

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 1947.¹⁷⁵ 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 1937.¹⁷⁶ 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.¹⁷⁷ This program was further abetted by the 1938 election, which increased the number of antiunion conservatives in both houses.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.¹⁷⁹

The House and Senate committees collected voluminous evidence purporting to show that the NLRB was generally biased against employers and nonunion employees.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.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

¹⁷⁵ Labor Relations Management Act, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 401–531 (2006)).

¹⁷⁶ LIPSITZ, *supra* note 144, at 112; *see also* MILLIS & BROWN, *supra* note 147, at 363.

¹⁷⁷ MILLIS & BROWN, *supra* note 147, at 281–85.

¹⁷⁸ GROSS, *supra* note 17, at 68–74.

¹⁷⁹ *Id.* at 85, 151–54.

¹⁸⁰ On the broad contours of this campaign against the NLRB, *see id.* at 158–86.

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.¹⁸² 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.¹⁸³

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.¹⁸⁴ 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.¹⁸⁵ 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.¹⁸⁶

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.¹⁸⁷ 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.¹⁸⁸ 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.¹⁸⁹ Although this coalition's bid to secure statutory changes was initially blocked,¹⁹⁰ 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.

¹⁸³ *National Labor Relations Act and Proposed Amendments: Hearings on S. 1000, S. 1264, S. 1392, S. 1550, S. 1580 and S. 2123 Before the S. Comm. on Educ. and Labor, 76th Cong.*, 64, 83, 1517, 1521, 2425 (1939).

¹⁸⁴ GROSS, *supra* note 116, at 225, 227–28, 238–40.

¹⁸⁵ *Id.* at 252–55.

¹⁸⁶ MILLIS & BROWN, *supra* note 147, at 347–53; White, *supra* note 16, at 615–20.

¹⁸⁷ MILLIS & BROWN, *supra* note 147, at 333, 337–39.

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.¹⁹¹ 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.”¹⁹²

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.”¹⁹³ 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.¹⁹⁴ 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.”¹⁹⁵ 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.”¹⁹⁶ But the public, it said, should not and would not tolerate such interference with the right of a “citizen” to “go about his business.”¹⁹⁷ 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.¹⁹⁸ 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.

¹⁹³ *Mass Picketing*, N.Y. TIMES, Feb. 28, 1946, at 18.

¹⁹⁴ *A Case of Short Memory?*, L.A. TIMES, Feb. 1, 1946, at A4.

¹⁹⁵ *Id.*

¹⁹⁶ *The Plague of Strikes*, CHI. DAILY TRIB., Sept. 26, 1945, at 14.

¹⁹⁷ *Id.*

¹⁹⁸ See, e.g., *Another Example of ‘Peaceful’ Picketing*, L.A. TIMES, Oct. 10, 1946, at A4; *Ballots Before Strikes*, WASH. POST, Feb. 11, 1947, at 1; *Doing it the Hard Way*, CHI. DAILY TRIB., Dec. 6, 1945, at 18; *Limits of Lawful Picketing*, L.A. TIMES, Jan. 24, 1946, at A4; *Pickets and Police*, WALL ST. J., Feb. 19, 1947, at 4.

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.”¹⁹⁹ 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.²⁰⁰ 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.²⁰¹ 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.²⁰² 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.²⁰³

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

¹⁹⁹ George Rose, *Labor Relations: Freedom of Speech for Employer and Employee*, 35 A.B.A.J. 637, 709, 710 (1949).

²⁰⁰ *Pickets Criticized by Liberties Union*, N.Y. TIMES, Jan. 21, 1946, at 8.

²⁰¹ MILLIS & BROWN, *supra* note 147, at 364.

²⁰² *Id.* at 378–79.

²⁰³ On the emphasis on sit-down strikes, see White, *supra* note 18, at 57–59.

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).

²⁰⁵ *Amendments to the National Labor Relations Act: Hearings on H.R. 8, 725, 880, 1095 and 1096 Before the H. Comm. on Educ. and Labor*, 80th Cong. 422–27 (1947) [hereinafter *House Taft-Hartley Hearings*].

²⁰⁶ *Id.* at 426–27.

²⁰⁷ *Id.* at 446.

²⁰⁸ *Id.*

and despicable names, such as ‘horse thief’ and ‘Nazi.’”²⁰⁹ 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.²¹⁰

Another witness before Hartley’s committee was an employee at Timken Roller Bearing’s plant in Columbus, Ohio, named Arthur Thorne.²¹¹ 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.”²¹² 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.”²¹³ 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.²¹⁴

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.²¹⁵ 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 1946.²¹⁶ 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.²¹⁷ 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 248.²¹⁸ Waddleton charged the union, unfairly, with being the sole cause of the trouble as well as being Communist controlled.²¹⁹

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 For the full range of testimony concerning Allis-Chalmers, see *id.* at 1335–1487.

²¹⁶ *Id.* at 1356.

²¹⁷ *Id.* at 1357–61.

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.²²⁰ Finally, Hartley's committee heard from the president of a lumber company in Northern California whose complaint was a localized teamsters strike.²²¹ According to the man, Fentress Hill, the strike "ha[d] been prosecuted by mass picketing, violence," and a practice of picketing all the businesses where deliveries were handled, including Hill's own operation.²²² Hill claimed that, in addition to being ubiquitous, the pickets sometimes included from "200 to 300 men and women."²²³ 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.²²⁴

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.²²⁵ 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.²²⁶ 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.²²⁷

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.²²⁸ 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.²²⁹ Smethurst urged that the pending legislation more explicitly prohibit mass picketing.²³⁰ 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.²³¹ 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.”²³² 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.”²³³

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.²³⁴ 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.²³⁵ 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.²³⁶

²²⁹ *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).

²³⁰ *See id.* at 1787 (statement of Raymond Smethurst, Legal Counsel for the NAM).

²³¹ *See, e.g., id.* at 966–67, 1636, 1716, 1719.

²³² *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).

²³³ *Id.* at 549 (statement of W. Homer Hartz, President of Modern Frog & Crossing Works, on behalf of Chamber of Commerce of the United States).

²³⁴ *See id.* at 691–92 (statement of Charles R. Kuzell representing American Mining Congress) (quoting Roy H. Glover, Western General Counsel of the Anaconda Copper Mining Co.); *id.* at 1716–18 (statement of Fentress Hill, President of Northern Redwood Lumber Co.).

²³⁵ *See id.* at 443–50 (statement of Charles E. Wilson, Chairman of General Motors Corp).

²³⁶ *See generally id.* at 819–73 (statement of Harold W. Story, Vice President of Allis-Chalmers Manufacturing Co.).

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.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.²³⁸ Another witness, the famous Hollywood director and producer Cecil B. De Mille, also described himself as a "small businessman."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 1946.²⁴⁰ 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.²⁴¹ In fact, employers were seldom truly innocent, as they often either caused or inflamed these jurisdictional disputes by playing one union against another.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

²³⁷ See LIPSITZ, *supra* note 144, at 114–17.

²³⁸ See *Senate Taft-Hartley Hearings*, *supra* note 229, at 892–95 (statement of Charles E. Gambill, President of The Globe Co.).

²³⁹ *Id.* at 796, 808 (statement of Cecil B. De Mille).

²⁴⁰ *Id.* at 813 (statement of Cecil B. De Mille).

²⁴¹ Don Q. Crowther, *Work Stoppages Caused by Labor-Management Disputes in 1946*, 64 MONTHLY LAB. REV. 780, 795–96 (1947).

²⁴² This very point was made to the Senate committee in a statement by the International Longshoremen 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. 3020.²⁴³ 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.²⁴⁴ “Why shouldn’t they strike?” he asked.²⁴⁵ 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.²⁴⁶

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.²⁴⁷ Nor should he be allowed to come to harm “at work, or elsewhere.”²⁴⁸ Therefore, it concluded, “Mass picketing and any other form of coercion or intimidation should be prohibited.”²⁴⁹ 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.²⁵⁰

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-

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.²⁵¹ 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?”²⁵² 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.²⁵³ 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.”²⁵⁴

Reuther was one of a number of labor leaders who testified against the developing scheme to amend the Wagner Act.²⁵⁵ 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.²⁵⁶

Perhaps betraying a measure of their own frustration with rank-and-file militancy as well as their desire to appease the congressmen,²⁵⁷ 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.²⁵⁸ Like other opponents of the attempt to bring federal law to

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.

²⁵⁶ *House Taft-Hartley Hearings*, *supra* note 205, at 1598, 1681, 1713, 1735–36, 1738, 1979–80, 2023, 3542, 3564–77.

²⁵⁷ LIPSITZ, *supra* note 144, at 126–31.

²⁵⁸ *House Taft-Hartley Hearings*, *supra* note 205, at 2392–94, 2403, 2418, 2438.

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.

²⁷³ Labor Relations Management Act, Pub. L. No. 80-101, §§ 7, 8(b)(1)(A), 61 Stat. 136, 140–41 (codified as amended at 29 U.S.C. §§ 401–531 (2006)).

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.²⁷⁶ 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.²⁷⁷ 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.²⁷⁸ 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.²⁷⁹

In a series of cases decided shortly after Taft-Hartley, the Board made clear that it fully embraced these readings of the statute.²⁸⁰ 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.²⁸¹ 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

²⁷⁶ National Labor Relations Act, Pub. L. No. 74-198, § 10(c), 49 Stat. 449, 454 (codified as amended at 29 U.S.C. §§ 151-169 (2006)).

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.").

²⁷⁸ H.R. REP. NO. 80-510, at 39, 55 (1947) (Conf. Rep.).

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.

²⁸¹ Longshoremen Local 6, 79 N.L.R.B. 1487, 1506-07 (1948).

enjoin such conduct.”²⁸² 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.”²⁸³ 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.²⁸⁴ 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.²⁸⁵ 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.²⁸⁶ 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.²⁸⁷ In substantive ways that often anticipated the

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.

²⁹⁴ 1941 Tex. Laws, 47th Regular Sess., Anti-Strike Law-Labor Disputes, ch. 100, § 2.

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

²⁹⁶ *Id.*

²⁹⁷ MILLIS & BROWN, *supra* note 147 at 321, 324–25; Charles F. Sharkey & Marlon L. Mel, *State Labor Regulation in the South*, 63 MONTHLY LAB. REV. 535, 550 (1946).

²⁹⁸ MILLIS & BROWN, *supra* note 147, at 327; Alfred Acce, Note, *State Labor Legislation in 1946*, 63 MONTHLY LAB. REV. 754, 756–57 (1946).

²⁹⁹ MILLIS & BROWN, *supra* note 147, at 330.

³⁰⁰ *Id.* at 318–29.

³⁰¹ *Thornhill v. Alabama*, 310 U.S. 88, 100–03 (1940).

³⁰² *Cf., e.g., Atchison, T. & S.F. Ry. Co. v. Gee*, 139 F. 582, 584 (C.C.S.D. Iowa 1905) (enjoining conduct described by defendants as entirely nonviolent).

picketing as inherently violent — as well as unlawful on other grounds — and therefore beyond the purview of constitutional protection.³⁰³ However, in 1940, in a landmark decision, *Thornhill v. Alabama*,³⁰⁴ the U.S. Supreme Court ruled that an Alabama law prohibiting essentially any forms of labor picketing violated the First Amendment.³⁰⁵ 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.”³⁰⁶

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,³⁰⁷ 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*,³⁰⁸ 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.”³⁰⁹

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.³¹⁰ 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).

³⁰⁷ See, e.g., *Am. Fed. of Labor v. Swing*, 312 U.S. 321, 326 (1941) (invalidating ban on “stranger” picketing).

³⁰⁸ 312 U.S. 287 (1941).

³⁰⁹ *Id.* at 292, 294.

³¹⁰ Comment, *Current Legislative and Judicial Restrictions on State Labor Injunction Acts*, 53 YALE L.J. 553, 562–69 (1944).

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.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.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*.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.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.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.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.”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,

³¹¹ *Id.* at 553–54. The actual Norris-LaGuardia Act has continued since its passage to bar federal courts from issuing injunctions in cases of peaceful mass picketing, at least. *See, e.g.,* *Wilson & Co. v. Birl*, 105 F.2d 948, 952–53 (3rd Cir. 1939); *Westinghouse Elec. Corp. v. Local 456, of Int’l Union of Elec. & Radio, Mach. Workers*, 135 F.Supp. 499, 502 (D.N.J. 1955).

³¹² *See* Benjamin Aaron, *Labor Injunctions in the State Court — Part II: A Critique*, 50 VA. L. REV. 1147, 1159–60 (1964); Benjamin Aaron & William Levin, *Labor Injunctions in Action: A Five-Year Survey in Los Angeles County*, 39 CAL. L. REV. 42 (1951); *Current Legislative and Judicial Restrictions on State Labor Injunction Acts*, *supra* note 310, at 558–71; Eileen Silverstein, *Collective Action, Property Rights and Law Reform: The Story of the Labor Injunction*, 11 HOFSTRA LAB. L.J. 97, 122–138 (1994).

³¹³ 315 U.S. 740 (1942).

³¹⁴ *Id.* at 743–45.

³¹⁵ *Id.* at 741, 745–51.

³¹⁶ *Id.* at 748–51.

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.³¹⁸ 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.³¹⁹ 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*,³²⁰ 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.³²¹ *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.³²² 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.³²³ 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.³²⁴ 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-

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.

³²⁰ 346 U.S. 485 (1953).

³²¹ See *id.* at 488–91.

³²² See, e.g., *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 241–48 (1959).

³²³ *Id.* at 244.

³²⁴ See *Garner*, 346 U.S. at 488.

cally result in preemption.³²⁵ Just a few years later, in *International Union, United Automobile, Aircraft and Agriculture Implement Workers (UAW-CIO) v. Russell*,³²⁶ the Court affirmed *Garner*'s implication that state regulations of mass picketing were generally not preempted.³²⁷ *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."³²⁸ Similarly, a few years later in *UAW v. Wisconsin Employment Relations Board*³²⁹ (the *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.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."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.³³² State labor boards continued to regulate mass picketing into at least the 1970s.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-

³²⁵ See *United Const. Workers v. Laburnum Const. Corp.*, 347 U.S. 656, 665–69 (1954).

³²⁶ 356 U.S. 634 (1958).

³²⁷ *Id.* at 644–45.

³²⁸ *Id.* at 645.

³²⁹ 351 U.S. 266 (1956) [hereinafter *Kohler*].

³³⁰ *Id.* at 270, 274.

³³¹ *Id.* at 274.

³³² See, e.g., *Dow Chem. Co. v. Dist. 50 Allied & Technical Workers*, 315 F.Supp. 427 (D. Colo. 1970) (citing *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).

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.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."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."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*,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.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*,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.³⁴⁰ This latter qualification resurfaced in *Thornhill* and subsequent cases, albeit saddled with some uncertainty regarding the reasoning behind

³³⁴ See, e.g., *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180 (1978) (holding that enforcement of state trespass laws against peaceful picketing is not preempted).

³³⁵ *Atchison Co. v. Gee*, 139 F. 582, 584 (C.C.S.D. Iowa 1905).

³³⁶ *Pre' Catelan, Inc., v. Int'l Fed'n of Workers in the Hotel, Rest., Lunch Room, Club & Catering Indus.*, 188 N.Y.S. 29, 33 (N.Y. Special Term 1921).

³³⁷ 257 U.S. 312 (1921).

³³⁸ *Id.* at 331–40.

³³⁹ 257 U.S. 184 (1921).

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.*,³⁴¹ 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.³⁴² 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.³⁴³ 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.³⁴⁴ 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.³⁴⁵ Nor is it clear that an agency or court could embrace a rigid ban on mass picketing,

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.

³⁴⁴ See, e.g., *NLRB v. Retail Store Emps. Union, Local 1001*, 447 U.S. 607, 616 (1980); *Int'l Bhd. of Teamsters, Local 695*, 354 U.S. 284, 294–95 (1957).

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-

N.L.R.B. 95, 98 (1962); *United Elec., Radio & Mach. Workers*, 85 N.L.R.B. 417, 433–34 (1949).

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).

³⁴⁸ *Westinghouse Elec. Corp. v. United Elec., Radio & Mach. Workers*, 118 A.2d 180, 181 (Pa. Super. Ct. 1955).

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 enjoined.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 enjoined, 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 enjoined 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.).

³⁵² *See, e.g.,* Giant Eagle v. United Food & Commercial Workers Union, Local 23, 652 A.2d 1286, 1292 (Pa. 1995).

³⁵³ U.S. Steel v. United Steel Workers Int'l, 44 Pa. D. & C.3d 276 (Pa. Ct. C. P. 1986).

³⁵⁴ Neshaminy Constr., Inc. v. Phila., Pa. Bldg. & Const. Trades Council, 449 A.2d 1389, 1391 (Pa. Super. Ct. 1982).

³⁵⁵ *See, e.g.,* Westinghouse Elec. Corp. v. Int'l Union of Elec., Radio & Mach. Workers, 396 A.2d 772, 774 (Pa. Super. Ct. 1978).

³⁵⁶ *See, e.g.,* Local Union No. 1101, Laborers Int'l Union, v. Davis, 213 So. 2d 890, 892 (Fla. Dist. Ct. App. 1968) ("Basically . . . the state's power in labor relations matters is confined to a prevention of mass picketing, acts of violence and threats of violence"); Kennecott Copper Corp., Chino Mines Div. v. Emp't Sec. Comm'n, 469 P.2d 511, 513 (N.M. 1970); Carpenters Local Union No. 1097 v. Hampton, 457 S.W.2d 299, 301 (Tex. App. 1970) (quoting Wood, Wire & Metal Lathers Int'l Union Local No. 345 v. Babcock Co., 132 So. 2d 16 (Fla. Dist. Ct. App. 1961)) (implying that picketing is lawful if there was "no violence, mass picketing, trespass, nor . . . evidence of obscenity or profanity or threats of violence at any time"); United Maint. & Mfg. Co., Inc. v. United Steelworkers, 204 S.E.2d 76, 80-81 (W. Va. 1974) (describing the law as, at a minimum, allowing restraints on "violence, mass picketing, or other extreme negative action").

or without violence or damage to property, constitutes a seizure of the employer's plant, and as such, is unlawful."³⁵⁷

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.³⁵⁸ 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.³⁵⁹

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 enjoined 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 Bitterner and Joseph Beirne unsuccessfully challenged the Taft-Hartley Congress to explain.³⁶⁰

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

³⁵⁷ *M Rest., Inc. v. S.F. Local Joint Exec. Bd. of Culinary Workers*, 177 Cal. Rptr. 690, 701 (Cal. Ct. App. 1981); *Westinghouse Air Brake Div. v. United Elec. Radio & Mach. Workers, Local 610*, 440 A.2d 529, 534 (Pa. Super. Ct. 1982).

³⁵⁸ *See, e.g., Frye v. Dist. 1199, Health Care & Soc. Serv. Union*, 996 F.2d 141, 145 (6th Cir. 1993). *But see Brookdale Univ. Hosp. & Med. Ctr. v. 1199 SEIU United Healthcare Workers E.*, 31 Misc. 3d 1233(A) (N.Y. Sup. Ct. 2011) (denying a preliminary injunction).

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.³⁶¹ 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.³⁶² 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.³⁶³ 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."³⁶⁴ 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)."³⁶⁵

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.³⁶⁶ Moreover, while an intention to use

³⁶¹ See *supra* notes 263–265 and accompanying text.

³⁶² See, e.g., Pratt Towers, Inc., 338 N.L.R.B. 61, 98 (2002); Va. Holding Corp., 293 N.L.R.B. 182, 207 (1989).

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 Local #1150, United Elec., Radio & Mach. Workers, 84 N.L.R.B. 972, 977 (1949).

³⁶⁵ Int'l Longshoremen's Union, 79 N.L.R.B. 1487, 1506 (1948) (emphasis added).

³⁶⁶ Comcast Cablevision of New Haven, Inc., 325 N.L.R.B. 833, 836–37 (1998). See also Serv. Emps. Int'l Union, Local No. 254, 218 N.L.R.B. 1399, 1401–02 (1975); Metal Polishers Int'l Union, Local 67, 200 N.L.R.B. 335, 336 (1972); Lithographers Int'l Union, 193 N.L.R.B. 11, 12, 15–22 (1971); Central Mass. Joint Bd., 123 N.L.R.B. 590, 591–92 (1959). On the

mass picketing to restrain or coerce other employees is essentially dispositive of culpability,³⁶⁷ 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.³⁶⁸ Threats of violence are, of course, a basis for finding a violation even where not consummated.³⁶⁹ And when violence or threats of violence are present in connection with mass picketing, not much is required to render the picketing illegal and enjoynable, and the workers involved subject to discharge by their employer.³⁷⁰

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 decision 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."³⁷¹

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 commitments 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 motivated it in the first place. Although unions continued to resort to mass picketing 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).

³⁶⁷ See, e.g., *Local 761, Int'l Union of Elec., Radio & Mach. Workers*, 126 N.L.R.B. 123, 125-26 (1960).

³⁶⁸ *Gen. Teamsters Union, Local 890*, 335 N.L.R.B. 686 (2001).

³⁶⁹ *HADCO Aluminum & Metal Corp.*, 331 N.L.R.B. 518, 521-22 (2000); *Alto-Shaam, Inc.*, 307 N.L.R.B. 1466, 1467 (1992).

³⁷⁰ See *Local 3, Int'l Bhd. of Elec. Workers*, 312 N.L.R.B. 487, 489-92 (1993); *Big Horn Coal Co.*, 309 N.L.R.B. 255, 258-60 (1992).

³⁷¹ *Metro Dist. Council*, 281 N.L.R.B. 493, 498 (1986); see also *Local 275, Laborers Int'l Union*, 209 N.L.R.B. 279, 286-88 (1974); *United Mine Workers*, 174 N.L.R.B. 344, 347-50 (1969).

were not sufficiently well enforced,³⁷² 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.³⁷³ Moreover, when workers did strike, few employers bothered to challenge their picket lines with replacement workers anyway.³⁷⁴ 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.³⁷⁵ 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.³⁷⁶ 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.³⁷⁷

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.

³⁷⁶ On the "Treaty of Detroit," see, for example, JOHN BARNARD, WALTER REUTHER AND THE RISE OF THE UNITED AUTO WORKERS 142–43 (1983).

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 WORKING 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.³⁷⁸ 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.³⁷⁹ 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.³⁸⁰ 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.³⁸¹ 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.³⁸² Barred from making effective use of mass

BUSINESSMEN'S CRUSADE AGAINST THE NEW DEAL (2009); and JUDITH STEIN, PIVOTAL DECADE: HOW THE UNITED STATES TRADED FACTORIES FOR FINANCE IN THE SEVENTIES (2010).

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.

³⁸⁰ On the declining frequency of strikes over this period, see Bureau of Labor Statistics, Major Work Stoppages in 2011, Table 1, p.3 (Feb. 8, 2012, 10:00 AM), available at http://www.bls.gov/news.release/archives/wkstp_02082012.pdf, archived at <http://www.perma.cc/0cNpt61cWeU>.

³⁸¹ COWIE, *supra* note 377, at 230–35, 301; LICHTENSTEIN, *supra* note 21, at 215–25, 238–45.

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.³⁸³ 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.³⁸⁴ 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.³⁸⁵

A few years later, UMW strikers and their supporters employed mass picketing in a strike against Pittston Coal in 1989 and 1990.³⁸⁶ Early on in

1970s. In the spring of 1974, dozens of mass picketers were arrested in strikes at Dow Chemical in Michigan. *50 Pickets at Dow Held*, N.Y. TIMES, Apr. 2, 1974, at 30. 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).

³⁸³ DRAY, *supra* note 24, at 643-49; PETER RACHLEFF, *HARD PRESSED IN THE HEARTLAND: THE HORMEL STRIKE AND THE FUTURE OF THE LABOR MOVEMENT* 3 (1999).

³⁸⁴ RACHLEFF, *supra* note 383, at 66-68, 118-20.

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

³⁸⁶ RICHARD A. BRISBIN, JR., *A STRIKE LIKE NO OTHER STRIKE: LAW & RESISTANCE DURING THE PITTSSTON COAL STRIKE OF 1989-1990*, at 1, 148 (2002).

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.³⁸⁷ 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.³⁸⁸ 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.³⁸⁹ After less than four months of this, the union was compelled to partially suspend the mass demonstrations.³⁹⁰ 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.³⁹¹ 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.³⁹² 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.³⁹³ On occasion, the demonstrators' ranks swelled into the thousands.³⁹⁴ 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.³⁹⁵ 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.³⁹⁶ 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.

³⁹² CHRIS RHOMBERG, *THE BROKEN TABLE: THE DETROIT NEWSPAPER STRIKE AND THE STATE OF AMERICAN LABOR 169–76* (2012).

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.³⁹⁷ In less than a month, the NLRB disavowed the agreement, citing continued misconduct, and began unfair labor practice proceedings against the unions.³⁹⁸ 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.³⁹⁹ Eventually, the strike was settled on unfavorable terms for the workers.⁴⁰⁰

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.⁴⁰¹ 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.⁴⁰²

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

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.”⁴⁰³ 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.⁴⁰⁴

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.⁴⁰⁵

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-

⁴⁰³ COMM. ON EDUC. AND LABOR, *supra* note 1, at 18.

⁴⁰⁴ BERNSTEIN, *supra* note 1, at 490–97.

⁴⁰⁵ See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 3–6, 12–20, 193–95 (2002).

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.⁴⁰⁶ 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.⁴⁰⁷ 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.⁴⁰⁸ 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.⁴⁰⁹ 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-

⁴⁰⁶ See, e.g., Lawrence M. Kearnes, *Injunctions Against Mass Picketing — A Gap in the Preemption Doctrine*, 3 BOS. C. INDUS. & COM. L. REV. 157 (1962); Frank A. Stewart & Robert J. Townsend, *Strike Violence: The Need for Federal Injunctions*, 114 U. PA. L. REV. 459 (1966); Nicholas Unkovic, *Mass Picketing Law in Pennsylvania*, 64 DICK. L. REV. 111 (1960).

⁴⁰⁷ Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. § 3 (2009); Employee Free Choice Act of 2009, S. 560, 111th Cong. § 3 (2009).

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.

