4-1-1959

Organizational Picketing: What Is the Law?—Ought the Law to Be Changed?

William J. Isaacson

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/buffalolawreview

Part of the Labor and Employment Law Commons

Recommended Citation

Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol8/iss3/3

This Leading Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
ORGANIZATIONAL PICKETING: WHAT IS THE LAW? — OUGHT THE LAW TO BE CHANGED?

BY WILLIAM J. ISAACSON*

I. INTRODUCTION

The extent to which organizational picketing has become one of the most controversial questions in labor-management relations has been dramatically illustrated by the continuing struggle over labor legislation between the Democratic forces in the Senate, led in this instance by Senator John F. Kennedy, and the Administration forces, speaking primarily through Secretary of Labor James P. Mitchell and President Eisenhower. On April 29, 1959, four days after the Senate had passed the Labor-Management Reporting and Disclosure Bill of 1959, sponsored by Senator Kennedy, by a vote of 90 to 1, President Eisenhower commented:2

... I am very much disappointed, particularly in three fields: the secondary boycott is not dealt with properly and effectively; blackmail picketing the same way, and then the field of clarifying the relationship of states to those areas where the N.L.R.B. has refused to assert any jurisdiction. Now, in those three areas I think the bill should be strengthened, and I am very much hopeful the House will do so.

Thus, the President stood ready again to imperil the passage of major labor legislation dealing primarily with internal regulation of union affairs in order to achieve what he regards as more adequate legislation dealing with organizational picketing.3 At the preceding session of the Congress, the Kennedy-Ives Bill4—the forerunner of the current Kennedy Bill—had been sidetracked and defeated in the House of Representatives after Administration opposition, 137 Republicans voting against a motion to suspend the rules, which led to the defeat of the Kennedy-Ives proposals.5 The character of the Administration's opposition in terms of organizational picketing was the same as that expressed now.6

The importance assigned organizational picketing in the scheme of labor-management relations is not restricted to the federal government, nor is it limited to the legislative arena. Organizational picketing, to continue momentarily to use the generic term, has been the object of equally fascinated

---

*Member of the New York and Michigan Bars; Chairman, Section of Labor Relations Law, American Bar Association; A.B., Univ. Michigan, 1935; J.D., Univ. Michigan, 1937.

1. S. 1555, 86th Cong., 1st Sess. (1959), hereinafter referred to as the "Kennedy Bill".

2. N.Y. Times, Apr. 30, 1959, p. 18, col. 5; Id., p. 1, col. 1 and continued at p. 24, col. 3. (Italics added.)

3. As hereinafter discussed at text, footnotes 109-112, 118, infra, the Kennedy Bill does deal with the question of organizational picketing in the conventional sense that that term is understood as well as "blackmail picketing" (i.e., extortion).


6. Id. at 88.
attention by state legislatures, state courts, and the National Labor Relations Board.

At this point it may well be asked what is organizational picketing and what are its consequences that it should excite so much attention and concern at all levels of government. What dire consequences does it portend for labor-management relations if it is not subjected to further legislative or judicial curbs? Is the term "blackmail picketing" descriptive, or is it merely a catchword conjured up by hidden persuaders to trap the unwary legislator into closing his mind and buying a proposal?

These questions will be examined primarily in terms of the most recent administrative, judicial, and legislative developments. It is necessary, however, first, to examine into the character of organizational picketing and to differentiate it from the other forms of concerted activity engaged in in the pre-recognition stage; to determine the purpose of such activities and their need in terms of effective concerted activity and protection of conditions of employment; to examine into the effect on the employees or employer who are the object of the picketing; to inquire into whether various forms of pre-recognition activities, however manifested, have different purposes so far as the union is concerned, or different results so far as the employer and employees are concerned. Secondly, attention is directed to what is the common law dealing with these various activities at the state level. What is the existing federal statutory law relating to the question and, consequently, to what extent may the National Labor Relations Board act?

The operation of state and federal laws raises questions as to the existence of constitutional barriers and boundaries. To what extent do the free speech

---

7. See text at footnotes 19-63 inclusive, infra.
8. Out of this welter of legislative debate and judicial and administrative decision have come many analyses and comments. It is impossible to list the scores of worthwhile articles in the field dealing with organizational picketing. Two of the comments treating the problem particularly, although from different points of view, point up the considerations and policies involved in organizational picketing. Cox, Some Current Problems in Labor Law: An Appraisal, 35 L.R.R.M. 48 (1955); Meltzer, Recognition—Organizational Picketing and the Right-to-Work Laws, 9 LAB. L.J. 55 (1958).
9. A union, having achieved collective bargaining status, is still subject to many limitations both as to the terms concerning which it may bargain, the times within which it may demand terms, and the sanctions which it may impose to secure such demands. (See, for example, section 8(b)(2) of the National Labor Relations Act imposing limitations as to the character of union security clause which may be included in an agreement; also section 8(d) imposing limitations on the time when certain matter may be made the subject of demand.) Certain items are foreclosed to bargaining, and there are closed sessions during which few, if any, items may be the subject of bargaining. Moreover, the methods to be used by unions, irrespective of their bargaining status, are subject to restriction. Certainly, no union may engage in violence or threat of violence, jurisdictional dispute, or secondary boycott through strike or inducement to strike. (See sections 8(b)(1)(A), 8(b)(4)(A), 8(b)(4)(B), and 8(b)(4)(D) of the National Labor Relations Act. See also, e.g., Southern Steamship Co. v. National Labor Relations Board, 316 U.S. 31 (1942); Cox, The Right to Engage in Concerted Activities, 26 IND. L.J. 319 (1951).) By contrast, however, a union having achieved majority status and becoming entitled to recognition, is entitled to undertake a wider variety of activities than is the minority union (i.e., the proviso to section 8(b)(4) of the National Labor Relations Act).
10. In the context of this article, it must be borne in mind that the term, recognition, applies only to the union involved in the activity in question, and not to any other union on which recognition may have been conferred.
ORGANIZATIONAL PICKETING

guarantees of the constitution apply? To what extent are the state courts, or federal courts, free to act in view of existing federal labor relations legislation?

Finally, on examination of these several activities in relation to existing law, bearing in mind that the activities under discussion are peaceful and free of violence or threat of violence, is additional regulation required? If the answer is in the affirmative, should such regulation be at the federal or state level?

II. KINDS OF PRE-RECOGNITION MINORITY ACTIVITIES

To evaluate existing law in terms of its control over minority pre-recognition activity, differentiation must be made of the kinds of activities which may be used alternatively or in combination with organizational picketing. Even if it is finally determined to lump all such activities together, precise analysis of the questions requires that these activities be examined separately. Furthermore, to the extent that the existing tribunals have established lines of demarcation between the various forms of activities, the basis for such lines, irrespective of their rationality, must be recognized.

With this as the preface, examination is made of the judicial and administrative differentiation between organizational and recognition picketing. Organizational picketing is defined as picketing by a minority directed to employees in order to persuade them to become union members or to win their adherence to the union cause. Recognition picketing is picketing directed to an employer in order to compel recognition of a minority union—to bring pressure on an employer to bring pressure on the employees to join a picketing union.

As has been observed, it may be that the complexity of human motivation and the difficulty of its ascertainment make it impossible to draw a line of demarcation between recognition and organizational picketing. Moreover, assuming an ascertainable distinction, the effect of such picketing on the business enterprise may well be the same. Professors Meltzer and Cox, although in sharp disagreement concerning the social desirability of minority picketing, are in essential agreement that no rational distinction can be drawn between organizational and recognition picketing. As observed by Professor Cox, the distinction is nothing more than a "verbal distinction" which gives "verbal logic its due obeisance, puts a premium on retaining a careful attorney, and leads some judges to stultify themselves by finding a demand for recognition where in fact there was none, but which serves no useful purpose." But whether or not it serves a "useful purpose," this is the legal divider in many of the decisions in the state courts. In defense of the state courts,

12. See note 8 supra.
13. Cox, supra note 8 at 56. See also Meltzer, supra note 8 at 58, to the same effect. See also Teamsters Local v. Vogt, Inc., 354 U.S. 284 (1957), affirming a state court injunction, as an example of state court stultification. See text at footnotes 32-37 inclusive, infra.
14. See, for a classic example, Wood v. O'Grady, 307 N.Y. 532, 122 N.E.2d 386 (1954),
it must be noted that the Supreme Court of the United States itself, until recently at least, suggested that so far as the free speech guarantees of the Fourteenth Amendment were concerned, such a distinction might be meaningful. Indeed, as will be observed, the National Labor Relations Board continues to differentiate between recognition and organizational picketing.

Other forms of minority activity may well be differentiated in terms of legal analysis and constitutional treatment. Distinctions may be drawn and differing treatment result on the ground that the picketing is addressed to the general public as distinguished from picketing directed to the employees sought to be organized or to employees of employers dealing with the primary employer.

If a valid distinction may rest on the difference between picketing addressed to the employees and picketing addressed to the public, other activities such as the distribution of handbills, radio broadcasts, and newspaper advertisements, even though occurring in the context of a labor controversy and part and parcel of organizational activity, may be given preferred treatment in terms of constitutional protections.

With this partial exposure to the variety of organizational activities which may be brought under court or National Labor Relations Board scrutiny, and a hint as to the kinds of problems which may be lurking in their study, attention is turned to the existing state and federal law dealing with these activities.

III. EXISTING STATE LAW

The evaluation and analysis of existing state law dealing with the question of organizational picketing and related activities is now essentially concerned with constitutional barriers that may be interposed to its exercise. First, attention is directed to the constitutional barrier interposed to such state court action by the free speech guarantees contained in the Fourteenth Amendment. Second, attention is drawn to the foreclosure of state court authority required under the preemption postulates enunciated by the Supreme Court of the United States since the passage of the Labor-Management Relations Act of 1947, the Taft-Hartley Act. The interposition of the constitutional barriers, particularly the doctrine of preemption, renders comprehensive listing and

cert. denied, 349 U.S. 939 (1955), wherein the New York Court of Appeals, by a divided court (4-3), denied an injunction on the ground the picketing constituted "organizational picketing."

15. Building Service Employees Int'l Union v. Gazzam, 339 U.S. 532, 539 (1950): "The Washington statute has not been construed by the Washington Courts in this case to prohibit picketing of workers by other workers. The construction of the statute which we are reviewing only prohibits coercion of workers by employers."

16. It is suspected, however, that the purported differentiation by the Board might well be a matter of tactic predicated on the assumption that it would be best to withhold an adverse determination concerning organizational picketing until Board holdings with reference to recognition picketing have first been sustained. See discussion of National Labor Relations Board decision dealing with organizational picketing and recognition picketing at text, notes 69-98 inclusive, infra.

17. Article VI of the Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . .
annotation of state court decisions of little more than historical interest. Accordingly, no attempt will be made to discuss the many state court decisions except insofar as they relate to the constitutional questions set forth here.

(a) Limitations Imposed on State Court Action by the Fourteenth Amendment

Without attempting a detailed survey of Supreme Court decisions dealing with picketing in light of the Fourteenth Amendment, the following analysis is submitted solely for the purpose of tracing the development of the free speech-picketing equation as it applies to organizational picketing and to create a basis on which a rational prediction may be made concerning the applicability of constitutional freedoms to it and related forms of organizing activity.\(^{18}\)

Initially, most courts held that a lawful labor dispute could exist only between an employer and his employees; “stranger picketing,” semantic fore-runner to “blackmail picketing,” was forbidden on the ground that non-employees had no interest in wages or working conditions in an unorganized shop.\(^{19}\) Courts with a broader understanding of the interplay of economic forces in our economy permitted such activity.\(^{20}\)

It was not, however, until \textit{Senn v. Tile Layers Union}\(^{21}\) that the Supreme Court in 1937 found “an aspect of communication” in “one of the aims of picketing.” Thereafter, the Supreme Court, in 1940, expressly declared in \textit{Thornhill v. Alabama}\(^{22}\) that the constitutional guarantees of free speech contained in the Fourteenth Amendment applied to workers picketing in order to organize and to promote union activities.\(^{23}\) This was quickly followed by a series of decisions striking down state court injunctions restrictive of picketing activities.\(^{24}\)

Of particular significance in the context of the discussion of organizational picketing was the Supreme Court’s opinion in the \textit{Swing} case where the Court struck down as constitutionally barred an injunction predicated on the sole ground that it involved “stranger picketing.”\(^{25}\) Mr. Justice Frankfurter, in

\(^{18}\) In view of the extended scope of preemption postulates (see text at notes 46-68 inclusive, \textit{infra}), free speech decisions, although still of some, albeit slight, importance in an understanding of state court exercise of power in the area of picketing, are of primary importance in terms of their application to proposed and existing federal law.


\(^{21}\) 301 U.S. 468 (1937).

\(^{22}\) 310 U.S. 88 (1940).

\(^{23}\) The Supreme Court had earlier held that the free speech guarantees of the First Amendment had been carried over into the Fourteenth Amendment and were to be applied in review of the regulatory activities of the several states. Gitlow v. New York, 268 U.S. 652, 666 (1928); Stromberg v. California, 283 U.S. 359, 368 (1931); Near v. Minnesota, 283 U.S. 697, 707 (1931); Lowel v. Griffin, 303 U.S. 444 (1938).

\(^{24}\) See, \textit{e.g.}, American Federation of Labor v. Swing, 312 U.S. 321 (1941); Cafeteria Employees Union v. Angeles, 320 U.S. 293 (1943).

\(^{25}\) In \textit{Swing}, the union engaged in picketing a beauty shop in order to unionize it. An Illinois court enjoined the picketing and the Supreme Court of Illinois approved because it was stranger picketing which was declared unlawful under state decision.
writing the majority opinion, spoke out with what later decisions proved to be deceptive clarity when he declared, "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and employees so small as to contain only an employer and those directly employed by him."\(^2\) The protections which the federal government had cast about the activities of workers in their efforts to organize into unions, to secure for themselves a larger share of the nation's industrial product, and to promote higher wages and improved conditions of employment had reached their apex. Organizational picketing appeared to be beyond any state court restraint.

But the principle announced in *Thornhill* and its initial progeny was soon to be qualified. It became apparent that the Supreme Court did not regard free speech and picketing as synonymous.\(^2^7\) In a concurring opinion in the *Wohl* case, but apparently referring to both *Wohl* and *Ritter*, Mr. Justice Douglas indicated that since he did not equate picketing with other forms of expression,\(^2^8\) there was an area in which the states could act in regulating the competing interests of management and labor. The new line of decisions\(^2^9\) emphasized the fact that picketing encompassed more than speech.\(^3^0\) As subsequently expressed by Mr. Justice Frankfurter, these cases recognized that "picketing, even though 'peaceful,' involved more than just communication of ideas" and therefore did "not involv[e] a curtailment of free speech in its obvious and accepted scope."\(^3^1\)

In one of the so-called "new line" cases, *Gazzam*, the Court plainly spelled out that recognition picketing, as distinguished from organizational picketing, could be the object of valid state court restraint. It also seemed apparent, however, that picketing regarded as organizational picketing, picketing of employees by employees, despite the reservation of Mr. Justice Minton who wrote the opinion of the Court in *Gazzam*, would on proper presentation meet a similar fate. Finally, in 1958, in *Teamsters Local v. Vogt, Inc.*\(^3^2\) the issue of organizational picketing was presented to the Court. Mr. Justice Frankfurter, speaking for the majority, appears to have eliminated the reservation contained in *Gaz-


\(^{2^7}\) Bakery & Pastry Drivers Union v. Wohl, 315 U.S. 769, 775 (1942): "A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual." See also Carpenters and Joiners Union v. Ritter's Cafe, 315 U.S. 722 (1942).

\(^{2^8}\) *Supra* note 27 at 776.


\(^{3^0}\) It was concluded that picketing does "exert influences, and it produces consequences, different from other modes of communication," and the responses it evokes "are unlike those flowing from appeals by the printed word." *Hughes v. Superior Court*, *supra* note 29 at 465. There is, therefore, no constitutional compulsion to place picketing "on a par" with other means of publicity. *Teamsters v. Hanke*, 339 U.S. 470, 476, 477 (1950). Perhaps most significant in terms of current legislative proposals is the Court's singling out of the printed word and "publicity" for possibly more favored treatment.

\(^{3^1}\) *Teamsters Local v. Vogt, Inc.*, *supra* note 13 at 289 and 294.

\(^{3^2}\) *Supra* note 13. As the Court observed, its dismissal of appeal, 330 U.S. 870 (1955), in *Pappas v. Stacey*, 151 Me. 36, 116 A.2d 497 (1955), three years earlier, forecast the *Vogt* decision. See *Vogt*, *supra* note 13 at 294.
In any event, it was decided that organizational picketing could be brought under ban by the state courts, insofar as the guarantees of the Fourteenth Amendment were concerned, by the simple expedient of the state appellate court denoting the activity as directed to bringing pressure upon the employer to compel recognition. Mr. Justice Frankfurter, however, goes to some pains to explain otherwise. In Vogt, he explains, "[T]he circumstances set forth in the opinion of the Wisconsin Supreme Court afford a rational basis for the inference it drew concerning the purpose of the picketing. . . . [T]he injunction . . . terms must be read in the light of the opinion of the Wisconsin Supreme Court, which justified it on the ground that the picketing was for the purpose of coercing the employer to coerce his employees." In the gloomy observation of the dissent, "The state court's characterization of the picketers' 'purpose' has been made well-nigh conclusive." In the Vogt case, this observation appears to be more than the hyperbole of a dissent.

But even if it is concluded, as it was in the dissent, that the findings of the state court are "well-nigh conclusive," and organizational picketing is rendered subject to restraint by mere characterization as an attempt to bring pressure upon the employer, what of the other related organizational activities such as the "consumer picket" line and the "unfair list" in terms of free speech? As explained in Vogt, the various cases permitting state court restraint were cases "not involving a curtailment of free speech in its obvious and accepted scope." Are the foregoing activities speech in its "obvious and accepted scope"?

Significantly, in terms of the extent of appropriate legislative authority, either at the state or federal level, all of the decisions of the Supreme Court

33. See note 13 supra.
34. Teamsters Local v. Vogt, Inc., supra note 13 at 295. In the earlier part of the opinion, in setting forth the facts, Justice Frankfurter concluded, as to the Supreme Court of Wisconsin's holding, that "it canvassed the whole circumstances surrounding the picketing and held that 'one would be credulous, indeed, to believe under the circumstances that the union had no thought of coercing the employer to interfere with its employees in their right to join or refuse to join the defendant union.' Such picketing, the court held was for 'an unlawful purpose,' since Wis. Stat. 111.06(2) (b) made it an unfair labor practice for an employee individually or in concert with others to 'coerce, intimidate or induce any employer to interfere with any of his employees in the enjoyment of their legal rights.' (354 U.S. at 286.) Still further in the opinion, Justice Frankfurter again declares, "As in Stacey, the highest state court drew the inference from the facts that the picketing was to coerce the employer to put pressure on the employees to join the union, in violation of the declared policy of the State." (354 U.S. at 294.) Justice Frankfurter's preoccupation with the state court's cardinal finding and the constant repetition of the formula for upholding the state court may betoken some doubts in even his mind concerning the wisdom of reposing essentially unreviewed power in the state courts. On the other hand, this emphasis may arise from the fact that the finding of fact in issue had been made by the appellate state court and not by the trial court.
36. The preemption postulates hereinafter discussed did not come into play in the Vogt case, since Vogt was not presented as a case involving interstate commerce and therefore was not within the purview of the National Labor Relations Act.
38. See Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 292 (1941); Hughes
from Senn to Vogt recognize that there is an aspect of communication in picketing—"a phase of the constitutional right of free utterance." Moreover, as noted in the majority opinion in Ritter, "restriction of picketing to the area of the industry within which a labor dispute arises leaves open . . . other traditional modes of communication."  

Furthermore, that Thornhill may have a significance which transcends sterile reiteration is suggested by the Supreme Court action in granting certiorari and reversing per curiam the Supreme Court of Kansas in Teamsters v. Newell. Obviously, too much cannot be safely read into an abbreviated per curiam opinion, except to note that the Court chose to rest its reversal explicitly and exclusively on Thornhill. The Newell case, according to the state court, involved intrastate commerce and therefore, like Vogt, was not within the purview of the National Labor Relations Act. In Newell, also, the union represented a majority. Nevertheless, in the light of this unsuspected vitality so recently accorded Thornhill, it is permissible to speculate that other minority activities customarily resorted to, such as "consumer picketing," may be accorded favored treatment under the Fourteenth Amendment or, if involving a federal statute, under the First Amendment. Legislative repression of consumer picketing or circulation of unfair lists, communications directed to non-employees, may not survive the free speech guarantees contained in the First and Fourteenth Amendments.

However one may regard organizational picketing, "consumer picketing" may well be deemed nothing more than a means of communication, "free speech in its obvious and accepted scope." It has no economic sanction; it may not even have the sanction which sometimes derives from the union as an institution. The consumer or prospective consumer is wholly free to walk in and to buy in ignorance of the picket and his plea. To the extent that the picket constitutes an effective instrumentality for the exertion of moral compulsion, does it not lie within the area of expression entitled to constitutional protection? To withdraw the constitutional protection of picketing because of "the ingredients in it that differentiate it from speech" does not permit the withdrawal from other forms of picketing which do not possess these "ingredients."

The mere fact that consumer picketing is carried on with the same purpose as organizational picketing or recognition picketing does not assimilate it to

v. Superior Court, supra note 29 at 464-65, 468; Teamsters Union v. Hanke, supra note 30 at 479; Building Service Employees v. Gazzam, supra note 29 at 536-37.
40. Id. at 726. See also reference to Hughes (supra note 29) and Hanke (supra note 30).
42. See National Labor Relations Board v. Machinists, Lodge 942 (Metal Alloy), 263 F.2d 796 (9th Cir. 1959).
45. Hughes v. Superior Court, supra note 29 at 465.
such picketing. The foregoing observations apply with even greater force to the circularization of union leaflets, "do not patronize lists," and newspaper or radio advertisement. These certainly have all the characteristics customarily associated with the written or spoken word.

The fact that all of these activities have as their aim economic injury to the employer or to the particular employees should not debase these activities in the scale of constitutional values. Their ultimate purpose is, of course, to further the aims and needs of the unionized employees.

(b) Application of Federal Preemption as a Bar to Exercise of State Court Authority over Organizational Picketing and Related Activities

As the Supreme Court loosened the bonds of the Fourteenth Amendment on state court exercise of police power, the Court began to fashion what now appears to be even more effective restraints. With the full development and application of the preemption doctrine in relation to union activities, the restraints on state court exercise of authority over peaceful picketing have never been tighter. Indeed, state court power in the area of peaceful organizational activities is, as of the conclusion of the 1958 Term of the Supreme Court, no longer of significance. At this past Term, the Court issued two decisions which for all practical purposes have withdrawn organizational picketing and related activities from the ambit of the state courts and made them matters exclusively of federal concern. The cases which have thus rendered the state courts impotent in this area are Hotel Employees Union v. Sax Enterprises, Inc.46 and San Diego Building Trades Council v. Garmon.47

In order that these cases may be seen in perspective, however, it is essential that there be a summary account of the development of preemption postulates and their application to labor-management relations and union activities.

It is not the purpose here to engage in an elaborate discussion of preemption since passage of the Taft-Hartley Act.48 Aside from the great mass of material which has been written concerning preemption, such detailed discussion is also rendered redundant in terms of peaceful picketing, whatever its purpose, by the very sweep of the decisions of the Supreme Court of the United States to which reference has been made.

With the passage of the Taft-Hartley Act in 1947,49 large areas of industrial relations in businesses affecting interstate commerce50 were withdrawn

---

47. 79 S. Ct. 773 (1959).
50. The term "affecting interstate commerce" undoubtedly has theoretical limitations.
from state regulation and control. The legislative history of Taft-Hartley shows that Congress, canvassing vast areas of labor-management relations, considered proposals which covered almost every practice and problem that had arisen in these areas.\(^5\) Adopting some proposals, modifying others, but rejecting still more, Congress finally formulated a definition of rights, duties, liabilities, and immunities; it selected what it considered to be the appropriate remedies and forums for their vindication. Congress formulated a comprehensive code of conduct which, in addition to protecting the rights of employees to organize and engage in concerted activity, outlawed certain aspects of labor union activity by introducing a series of unfair labor practices against unions.

The powers which the states had exercised in the field of industrial relations had to give way to the overriding need that interstate industrial enterprises be subject to the uniform administration of a uniform law of labor relations, that a single expert tribunal designated by Congress, the National Labor Relations Board, be given exclusive authority. The Supreme Court in a series of decisions handed down since the passage of the Taft-Hartley Act, particularly beginning with the Court's decision in *Garner v. Teamsters Union*,\(^5\) has proceeded to draw a line of demarcation between the broad area in which only the National Labor Relations Board may operate and the area in which the state is still free to operate. In the course of this litigation, which has not always been elucidating, it has at last become clear that the area over which Congress had exercised its legislative power is wide indeed and, correspondingly, the area within which the states may continue to operate very narrowly drawn.

As of this past April 20th, in *Garmon*,\(^5\) the Supreme Court has made it

---

51. See text at footnotes 84-90 inclusive, *infra*, for a discussion of the legislative history of section 8(b)(1) and the extent to which Congress examined into organizational picketing and related organizing activities.

52. 346 U.S. 485 (1953).

53. San Diego Building Trades Council v. Garmon, *supra* note 49. The litigation in *Garmon*, which has been long and complex, is summarized in the majority opinion of the Supreme Court (*supra* note 49 at 775-76). Initially, the California Supreme Court held that since the National Labor Relations Board had declined to exercise its jurisdiction because the amount of interstate commerce involved did not meet the Board's monetary standards, the California courts had power to enjoin picketing and to award damages. The trial court found that the unions peacefully picketed and exerted pressure on customers and suppliers in order to persuade them to stop dealing with the picketed employer and thereby compel the execution of a contract requiring union membership. The Supreme Court granted certiorari [351 U.S. 923 (1956)] and vacated with a remand [353 U.S. 26 (1957)], together with a reversal in *Guss v. Utah Labor Board*, 353 U.S. 1 (1957) and in *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, 353 U.S. 20 (1957). The Court concluded that the refusal of the Board to assert jurisdiction did not confer jurisdiction upon the states which they would not otherwise have had because of preemption. The *Garmon* case was remanded, however, as to the judgment of damages, since it was not clear to the Court whether the damages would be sustained under California law. The preemption
clear that the regulatory power of the states over conduct falling within the jurisdiction of the National Labor Relations Board is narrowly limited to regulation of acts of "violence, overt threats of violence, and mass picketing," irrespective of what relief the state is requested to provide or what power or precept the state chooses to apply. This small residue of state power, as decisively enunciated in *Garmon*, derives solely from the states' "historic powers over such traditionally local matters as public safety and order and the use of streets and highways." Exclusion of the states is complete as to all activity "arguably" within the province of the Labor Board as either protected under section 7 or prohibited under section 8 of the Labor Act, irrespective of whether the remedy sought is an injunction or an award in damages, and the Labor Board must, in the first instance at least, determine where the activity falls.

The majority in *Garmon* examined the previous decisions of the Supreme Court in *United Automobile Workers v. Russell* and *United Construction Workers v. Laburnum Construction Corp.*, both of which allowed damages even though the activities involved unfair labor practices. The Court pointed out that these cases involved "violence and imminent threats to the public order" and that this was the true ground on which the Court acted, rather than on the basis of any distinction between injunctive relief and damages. It is not the mode of state court regulation or the character of the relief sought which determines the existence of concurrent jurisdiction. Concurrence exists only if the activity falls within the narrow area now reserved to the states, namely, if there is violence or a variant thereof.

*Garmon*, coupled with the Supreme Court's ruling earlier in the past Term in the *Hotel Employees* case, concluding that organizational picketing was either a protected or a proscribed activity and, in either event, a matter for Labor Board determination in the first instance, conclusively withdraws from state court jurisdiction for all purposes any question involving peaceful organizational picketing or related activities.

The effect of the *Hotel Employees* case has been almost immediate in the state courts. In two recent cases, both the Ohio Supreme Court and the

---

59. It is to be expected that state court findings of "violence" or "threat of violence" will not be "well-nigh conclusive" in this area as they have been regarded in the fixing of purpose of union activity. (See text at note 35 *supra*. ) In this connection, see *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1958), in which there is some indication that the Supreme Court will take a hard look at state court findings. In short, preemption doctrines may not be as easily circumvented as the Fourteenth Amendment has proved to be.
60. Richman Brothers Company v. Amalgamated Clothing Workers of America, 168
Appellate Court of Illinois, Third District, affirmed that state courts are without jurisdiction over organizational or recognition picketing unless it is violent or mass picketing. Both cases referred to the Hotel Employees case as supporting, if not compelling, this result. In the Illinois decision, the state court concluded, "In short—whether picketing is considered recognitional or organizational, whether the activities of a union are condemned by the federal statute as an unfair labor practice or by it protected as permissible conduct—state courts may not exercise jurisdiction."\(^6\)

The concurrence of Mr. Justice Harlan, speaking for four members of the Supreme Court in Garmon, may be of even greater significance in terms of organizational picketing than that of the majority. Garmon, as noted above, involved peaceful picketing and pressure on suppliers and customers in order to persuade them to stop dealing with the employer picketed in order "to compel the execution of the proposed contract."\(^6\) In speaking for the four concurring justices, Justice Harlan declared, "I concur in the result upon the narrow ground that the Union's activities for which the State has awarded damages may fairly be considered protected under the Taft-Hartley Act, and that therefore state action is precluded..."\(^6\)

The foregoing statement by Mr. Justice Harlan points up the repeated statements in both the majority and concurring opinions in Garmon that until the National Labor Relations Board has adjudicated the status of the activity, the "activity is arguably within the compass of § 7 or § 8 of the Act, [and] the State's jurisdiction is displaced."\(^6\) Thus, if the Supreme Court should conclude in the case now awaiting briefs and argument before it\(^6\) that recognition picketing by a minority union is not an unfair labor practice within the compass of section 8 the activity may still be protected activity within the compass of section 7 and, whether it is, is a question exclusively for Labor Board determination. The status of the activity may turn on the purpose ascribed to it. For example, if recognition, the Labor Board may conclude one way; if organizational, another. The Board may differentiate in ultimate terms between activity directed to employees as distinguished from activity directed to consumers. The matter of the union's numerical status, majority or minority, may be in issue. These questions are but illustrative. All of these underlying ques-


61. Jersey County Motor Company, Inc. v. Local Union 525, Int'l Brotherhood of Teamsters, supra note 60, 156 N.E.2d at 636.
63. Id. at 782. Is this a straw in the organizational and recognitional wind whirling up through the federal courts to the Supreme Court for decision as to the meaning of the National Labor Relations Act insofar as it applies to such picketing activities? Is the activity protected even though it involves pressure on the employer to commit an unfair labor practice, to enter into an invalid exclusive agreement with a minority union or to include in such an agreement an illegal union security clause? Or is the point simply that, whatever the answers to the legal questions, the underlying factual questions are for Board determination?
64. San Diego Building Trades Council v. Garmon, supra note 49 at 780.
65. See text at footnote 95, infra.

356
ORGANIZATIONAL PICKETING

tions, as well as many others, must first go to the Labor Board for initial determination.

Before concluding this phase of the discussion, it must also be borne in mind that even if the Labor Board were to conclude that the activity in question was neither protected nor prohibited, it would not necessarily answer the question of state court authority. The entire conceptual analysis hereinabove undertaken may in a sense be an empty exercise since, as Mr. Justice Frankfurter pointed out in Garmon, if "the Board may decide that an activity is neither protected nor prohibited, [it] thereby raise[s] the question whether such activity may be regulated by the States." As was first pointed out in Garner, "the detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the national Labor-Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions." If Congress, which in 1947 had canvassed the entire field of activity with reference to strikes and picketing, left certain phases of that activity free of statutory ban or protection, it may be concluded that Congress intended that such peaceful phases of picketing and strike activity should be free of both federal and state regulation and control. They were to continue to be permissible weapons in the economic contest, and resultant injury endured.

It is recognized that the courts in several of the states, particularly in New York, have heretofore, despite prior pronouncement of the Supreme Court regarding preemption, cavalierly ignored these pronouncements. But, as has been pointed out, the confusion in the state courts may have had its antecedents in the confusion and conflict between and, indeed, within earlier Supreme Court decisions. But whatever justification for state court failure to observe pre-emption principles in the past, such justification does not now exist with regard to peaceful picketing, whatever its purpose, whatever the status of the picketing union, or whatever the remedy requested. The area of peaceful picketing is closed to state regulation.

In sum, as the Supreme Court relaxed the restraints imposed on the states by the Fourteenth Amendment and permitted their re-entry into the area of regulation of peaceful picketing, it has withdrawn the area from state court regulation by application of the Supremacy Clause.

66. San Diego Building Trades Council v. Garmon, supra note 49 at 780. See also Isaacson, supra note 48 at 395.
68. Hays, State Courts and Federal Preemption, 23 Mo. L. Rev. 373 (1958). This explanation does not apply to such incursions in the forbidden domain as the decision of the New York Court of Appeals majority in Pleasant Valley Packing Co. v. Talarico [5 N.Y.2d 40, 177 N.Y.S.2d 473 (1958), reversing 5 A.D.2d 943, 172 N.Y.S.2d 268 (3d Dep't 1958)], where the majority, proceeding in disregard of preemption postulates, arrogated unto themselves complete interpretative powers regarding the National Labor Relations Act. The case involved picketing in defiance of a Board certification of another union. It is almost beside the point to note that the majority's interpretation of section 8(b)(4)(C), as prohibiting only strikes in defiance of existing certification, was incorrect.
IV. EXISTING FEDERAL LAW

With the states foreclosed as a forum for the resolution of questions dealing with minority picketing, such questions must come up for determination under the Taft-Hartley Act.

In examining that statute in an effort to find whether it applies to such picketing, the Board, and subsequently the federal courts, have been compelled to look into several interrelated provisions, all dealing with picketing and strike activity and the governing statutory protections, prohibitions, and limitations.

Taft-Hartley, because of its numerous cross-references, has proved to be a most difficult statute to administer. In seeking to codify and incorporate the decisional experience under the predecessor Wagner Act, Taft-Hartley embroiled its administration in a process which involves the need for painstakingly relating apparently unrelated or diverse provisions and their respective legislative histories.

Thus, involved in any determination of the legality of organizational picketing is an analysis of sections 7, 8(b)(1)(A), 8(b)(4)(C), 8(c), and 13.60

Under section 7, the keystone of the statute, it is provided:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.... [Italics added].

The italicized portion was added by the Taft-Hartley amendments of 1947.

Section 8(a), providing for employer unfair labor practices, and section 8(b), providing for union unfair labor practices, are the proliferation of these rights. Section 8(c), the so-called “free speech” proviso of the statute, imposes a limit on the Board beyond which it may not proceed in finding employer or union unfair labor practices. By section 13, Congress has made it clear that “all... parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union’s traditional right to strike, may be so read only if such interference, impediment or diminution is ‘specifically provided for’ in the Act.”70

While the Board has left open the question of organizational picketing,71

---

69. The foregoing sections of the statute appear in the Code as follows:

Section 7 29 U.S.C. §157
Section 8(b)(1)(A) 29 U.S.C. §158(b)(1)(A)
Section 8(b)(4)(C) 29 U.S.C. §158(b)(4)(C)
Section 8(c) 29 U.S.C. §158(c)
Section 13 29 U.S.C. §163


it has in the past year and a half spoken repeatedly on the question of recognition picketing. In late 1957, after more than ten years of interpreting the Taft-Hartley Act and after several specific tests of the extent of section 8(b) (1)(A) so far as peaceful picketing for organizational or recognition purposes by minority unions was concerned, a majority of the National Labor Relations Board, former Board member Murdock dissenting, struck down as illegal under section 8(b)(1)(A) economic pressure on an employer by a minority union, albeit peaceful, for purposes which were inconsistent with the Act. A majority of the Board held that picketing by a minority union for the purpose of compelling an employer to grant exclusive recognition violates section 8(b)(1)(A). The case grew out of a long and bitter dispute between an employer and a union. The union, which had previously been certified, had struck over an impasse in the contract bargaining. The strikers were replaced, and the following year the company, questioning the union’s status, petitioned and secured an NLRB election which the union lost—the strikers not voting. When the union continued to picket, the company filed an unfair labor practice charge under section 8(b)(1)(A).

Section 8(b)(1)(A) provides:

It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . .

In the view of the majority, such picketing as was engaged in in Curtis was inherently coercive since, if used for the stated purposes, it coerced and restrained employees in their exercise of the statutory right to select or reject a bargaining representative. In concluding that picketing was a form of union pressure within the provisions of section 8(b)(1)(A), the majority of the Board pointed out that picketing is coercive in an economic sense both as to the employer and the employees who continue to work. The Board concluded that even though the pressure was directly applied to the employer, whereas the statute protects employee rights from unlawful coercion or restraint, it constituted an unfair labor practice. The Board found that the employer's economic duress was conveyed to the employees as a threat of loss of employment and reduced earnings and, accordingly, was violative of section 8(b)(1)(A).
The Board thereupon extended the *Curtis* rule to the *Alloy* case\(^{76}\) where it held that section 8(b)(1)(A) was similarly violated where a minority union sought to advance the same objectives by appeals to customers not to do business with the employer and by placing the employer on a “We Do Not Patronize List.” This case also involved picketing following an election which the union had lost. Rejecting the union’s contention that their techniques were within the free speech protections of section 8(c), the majority stated that the union in resorting to these activities was not exercising its rights of free speech, but was utilizing its economic power to force the employer to recognize it as an exclusive bargaining agent “in utter disregard of the employees’ statutory right to select their own bargaining representative,” citing *Giboney v. Empire Storage & Ice Company.*\(^{76}\)

The sweep of the Board’s new-found doctrine is further demonstrated in its more recent decisions. In November 1958, the Board held that the doctrine applied to bar a striking union’s picketing and consumer boycott campaign against a company.\(^{77}\) Here, as in *Curtis,* the union had lost a representation election after an economic strike against the company, again the strikers not voting. The Board said that these tactics, like picketing, “are concededly aimed at hurting the employer economically by blacklisting him.”

The Board’s newly established doctrine has, however, met with disfavor in the courts. In both *Curtis* and *Alloy,* the respective Courts of Appeals overturned the Board’s decisions, finding them without statutory warrant.

In *Curtis,*\(^{78}\) a majority of a panel of the Court of Appeals for the District of Columbia reversed the Board’s decision, holding that section 8(b)(1)(A) is inapplicable “to peaceful picketing, whether ‘organizational’ or ‘recognitional’ in nature, subject always to the limitations of § 8(b)(4)(C).”\(^{79}\) This conclusion, the Court stated, was necessitated “by the impact which § 8(b)(1)(A) would have upon other provisions of the Act,” more particularly section 13, which prohibits any interference with the right to strike except those specifically provided for elsewhere in the Act, and section 8(b)(4)(C), which expressly makes it unlawful for a union to picket for recognition where another union already has been certified as the bargaining representative. The Court concluded that section 13 would “effectively be expunged” from the Act if the Board’s interpretation of 8(b)(1)(A) were accepted. As the Court noted,\(^{80}\) the protection of the right to strike in section 13 has been construed to apply to picketing as well. Similarly, the Court concluded that section 8(b)(4)(C)

\(^{75}\) Machinists Lodge 942 (Metal Alloy), 119 N.L.R.B. 307, 308 (1957).

\(^{76}\) Id. at 310. *Giboney v. Empire Storage & Ice Co., supra* note 29 at 502.

\(^{77}\) Rubber Worker’s Union (O’Sullivan Rubber Corp.), 121 N.L.R.B. No. 185 (1958) [pending appeal (4th Cir. No. 7781)]. See also Machinists Local No. 311 (Machinery Overhaul, Inc.), 121 N.L.R.B. No. 153 (1958) [pending appeal (D.C. Cir. No. 14818)].


\(^{79}\) Id., 43 LAB. REL. REP. (43 L.R.R.M.) at 2157.

\(^{80}\) Ibid.
would be "entirely redundant" if the Board's decision were to stand.\textsuperscript{81} The Court also adverted to the legislative history of the statute and the fact that the Board itself had for ten years since the statute's enactment "adhered to the interpretation which this Court now adopts."\textsuperscript{82}

The dissenting judge, with somewhat obvious references to the "Hoffa labor organization" deemed the majority's interpretation "an invitation to labor racketeers and hoodlums to use its processes for unlawful purposes."\textsuperscript{83}

Section 8(b)(1)(A), rejected in Senate Committee, was proposed on the floor of the Senate as an amendment to the reported committee bill\textsuperscript{84} and was passed by the Senate. Both the majority and dissent can find some support in the legislative history. Quantitatively, however, it appears from the legislative history that section 8(b)(1)(A), unlike section 8(b)(4)(C), is concerned with means and not ends. Its purpose, so far as purpose can ever be divined from legislative history, appears to have been to prohibit unions from picketing by coercive means. The most forceful evidence of this view contained in the legislative history is a colloquy on the Senate floor between Senator Taft, the principal proponent of the legislation, and Senator Saltonstall. Senator Taft concluded:

The Board may say, "You can persuade them; you can put up signs; you can conduct any form of propaganda you want to in order to persuade them, but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work." As I see it that is the effect of the amendment [section 8(b)(1)(A)].\textsuperscript{85}

Those who urge that 8(b)(1)(A) be given the wide application enunciated by the Board in \textit{Curtis} point to the fact that the proponents of the "amendment" sought to parallel section 8(1) of the Wagner Act or section 8(a)(1) in the Taft-Hartley Act.\textsuperscript{86} Senator Taft's words, at still another point in the Senate debate, are pointed to as the most persuasive support for this extended application of 8(b)(1)(A).\textsuperscript{87}

\textsuperscript{81} \textit{Id.}, 43 LAB. REL. REP. (43 L.R.R.M.) at 2158.
\textsuperscript{82} \textit{Ibid.} See, e.g., Perry Norvell Co., 80 N.L.R.B. 22 (1948); National Maritime Union (The Texas Co.), 78 N.L.R.B. 971, 982, 986 (1948), enforcement granted, 175 F.2d 686 (2d Cir. 1949), cert. denied, 338 U.S. 954 (1950); Local 74, United Brotherhood of Carpenters (Watson Specialty Co.), 80 N.L.R.B. 533 (1948), enforcement granted, 181 F.2d 126 (6th Cir. 1950), \textit{aff'd}, 341 U.S. 707 (1951); District 50, United Mine Workers (Tungsten Mining Corp.), 106 N.L.R.B. 903 (1953).
\textsuperscript{83} Drivers, Chauffeurs & Helpers Local No. 639 v. National Labor Relations Board, \textit{supra} note 78, 43 LAB. REL. REP. (43 L.R.R.M.) at 2158. The dissent apparently invokes a dubious rule of judicial notice since the record is singularly free of any such suggestion. More significantly, the question raised by \textit{Curtis} did not involve use of the Board processes by the Teamsters, but whether the sanctions of the Board were applicable to the Teamster conduct in issue.
\textsuperscript{85} 93 CONG. REC. 4435-4436 (1947). See also, for full development of \textsuperscript{88}(b)(1)(A), S.R. Doc. No. 105, 80th Cong., 1st Sess. 50, \textit{supra} note 84; 93 CONG. REC. 4016-4025, 4430, 4431 (1947).
\textsuperscript{87} 93 CONG. REC. 4144 (daily ed. Apr. 25, 1947), 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 1029-30 (1947).
But if post-legislative history has any weight whatever, that weight is all in support of the view that 8(b)(1)(A) as originally enacted was limited to coercive means as distinguished from ends. The Joint Committee on Labor-Management Relations, in the discharge of its function to study and investigate "the administration and operation of existing Federal laws relating to labor relations," reported concerning strikes for recognition and recognized and endorsed the view of 8(b)(1)(A) previously taken by the Board in the *Perry Norvel* case. As stated in the report, "Present law in no way limits the primary strike for recognition except in the face of another union's certification" and "A labor organization may lose an election in which it was the only union on the ballot and the next day call a legal strike to force the employer to recognize it. . . ."

Moreover, if the view expressed by the Board majority in *Curtis* were correct, the legislative controversy which is now being carried on in the Congress regarding further curbs to organizational and recognition picketing would be moot. Congress has obviously assumed that the existing legislation carries no such curbs as were set forth in *Curtis*.

In *Alloy*, the Court was procedurally precluded from passing on the validity of the Board's holding with reference to the picketing. The Court, both by virtue of prior union consent and the union's failure to file exceptions to the trial examiner's report before the Board "had no other choice than to sustain the order of the Board as far as it respects picketing."

As to the balance of the activities, the circulation of an unfair list and the solicitation of customers, the Court adopted both the holding and the language of the trial examiner, as follows:

"Because their employer's business may be affected by such a choice it follows that the employees themselves have an economic stake in the reaction of customers to their designation of a bargaining representative or refusal to do so. So it may well be said that the selection of a union representative is often or perhaps always made in a climate not entirely free from elements which have a coercive quality. These elements are a part of the very fabric of industrial and commercial life quite beyond the reach of any conceivable statutory remedy. I do not doubt the right of the [union] to publicize by appropriate means the fact that Alloy's employees are not represented by a union and even to persuade others by peaceful and truthful propaganda not to patronize Alloy for that reason if the persuasion is attempted to be accomplished by no more than the expression of 'views, argument or opinion'." [The footnote quoted the "free speech proviso" of the statute, section 8(c).]

90. See note 82, *supra*.
91. National Labor Relations Board v. Machinists, Lodge 942 (Metal Alloy), *supra* note 42.
92. *Id.* at 799.
ORGANIZATIONAL PICKETING

The Court thereupon added to the reasoning of the trial examiner: "We consider the conduct of Union of listing and persuasion, excepting picketing, to be within the general area of protection of the 1st amendment guarantying freedom of speech. These aspects are more protected than picketing..." But the Court, concluding that the statute did not support the Board's ruling, found it unnecessary to decide the constitutional question.

Since the Curtis and Alloy cases, the Board has issued a number of similar decisions, ignoring the courts' rulings pending an opinion from the Supreme Court. As the Board noted in its recent request for review by the Supreme Court of Curtis, it has applied the Curtis doctrine in about fourteen cases, six of which are pending enforcement or review by various Courts of Appeals.

The matter of the applicability of 8(b)(1)(A) to recognition picketing now rests squarely with the Supreme Court. On April 20, 1959, the Supreme Court granted review in Curtis.

It is difficult to conceive, in light of the character of the objections on which the Court of Appeals for the District of Columbia predicated its reversal, that the Supreme Court will reach a different conclusion so far as the statutory interpretation is concerned. Assuming that the Supreme Court sustains the Court of Appeals' majority, the broad questions dealing with peaceful picketing in the pre-recognition stage will remain open for legislative consideration. On this predicted posture, the constitutional questions would not come into play.

Moreover, no matter what the Supreme Court decision is, it probably will not explicitly rule out organizational picketing. The Board in Curtis distinguished picketing for organizational purposes as "in words, at least... within the statutory 'right to self-organization' set out in Section 7 of the Act" and "not tainted, on its face."

If judgment were to be rendered concerning the Board's action solely from the point of view of what might be regarded as sound administrative policy, it must be concluded that the Board's current joust against recognition picketing was not only foolhardy but administratively unsound. Where, as here, the Congress has been stalemated, an administrative agency takes on too great a burden when it seeks to act in Congress' stead. As was observed concerning administrative shifts in policy during the early years of the Eisenhower Labor Board, "so basic a problem of change should in any scheme of things, be made not by an administrative agency but by Congress."

93. Ibid.
94. Supra note 72.
95. Supra note 78.
96. But see the majority opinion in Vogt where Justice Frankfurter seems to equate "section 8" with the Wisconsin statute relied upon by the state court. See also Garner v. Teamsters, supra note 55 at 489.
97. Drivers, Chauffeurs & Helpers Local 639, supra note 72 at 239.
BUFFALO LAW REVIEW

V. PROPOSED LEGISLATION

(a) Competing Values

As the foregoing analysis of existing state and federal law demonstrates, the issue of organizational picketing and related forms of concerted activity becomes squarely a matter of federal legislative consideration.

On the assumption that whatever the solution, it should be a solution expressed at the federal level and that the Board is best qualified to act, we come to grips with the key questions. Should existing federal legislation be altered, and, if it should be altered, how? What are the positive values of organizational picketing and related activities which demand protection or, at a minimum, freedom from restraint? Conversely, what are the competing values which require their restraint or prohibition? In the last analysis, the legislative determination which the Congress is now called upon to make, involves a balancing of these conflicting values. Here we are in a nebulous area and one on which there is not, nor can there be, uniform conviction. In balancing these values, however, care must be exercised to take into consideration only those factors which under our system of free enterprise are entitled to weight.

Fundamentally, justification for unions' continued freedom to organize through picketing and the other forms of concerted activities discussed above, rests on two basic assumptions, the second of which stems from the first. These are:

First, the interest of the great mass of unionized employees requires that this activity be permitted.

Secondly, the resultant injury is an essential concomitant of a free enterprise economy. Our society and economy are predicated on the concept of free enterprise, freedom of competition, and in that society, a group may, in furtherance of legitimate self-interests (e.g., protection of the unionized employees) inflict economic injury upon others.

As to the first—the cardinal assumption—the entire structure of trade unionism has been created in order first to secure and second to maintain what is regarded as a fair distribution of the goods of our economy. To achieve this primary goal organization is required. Such organization, if it is to survive, must be free to compete and advance its interests. It has been recognized that "unions obviously are concerned not to have union standards undermined by non-union shop." For union organization to be "at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure the whole guild." Indeed, the policy

ORGANIZATIONAL PICKETING

of the National Labor Relations Act is based on explicit recognition of the fact that the statute is directed to the "stabilization of competitive wage rates and working conditions within and between industries."\(^{101}\)

So long as employees are unorganized and work at lower wages and standards than those which apply in the unionized portion of the industry, growth of the unionized portion of the industry is impeded and, more significantly in this context, the standards of the unionized sector are threatened with serious impairment. Co-existence of unions and substantial non-union sections of an industry may well be an impossibility. Over a period of time, the non-union section brings about destruction of the unionized section. But, assuming that competition between them can be continued, the existence of the non-union employers and employees operates as a drag upon the unionized section. In establishing and securing bargaining demands, the unionized portion of the industry must always take into account the competitive thrust of the non-union elements. Union wage scales and standards are thereby limited. The unorganized act as an industry inhibitor; the extent of the inhibition is in direct proportion to the size of the non-union force.

Therefore, it is beyond argument that the organized employees have a legitimate interest in protecting their wages, standards, and conditions from unorganized groups of employees and employers. Moreover, at the present high level of union development and organization, the issue or controversy is usually one between an organized majority and an unorganized minority. This arithmetical factor takes on significance in terms of the statutory values and objectives implicit in the protections accorded employees under section 7 of the Act to join unions of their own choosing or to refrain from so doing.

The question thus becomes, may the organized group, albeit a majority, struggle and compete with the unorganized employer and employees, where a consequence thereof is the infliction of economic injury. This brings into play the second of the above assumptions.

In order to shape our society and secure for the great mass of our citizens the greatest aggregate value in goods and services, we have adopted freedom of competition as the mainspring. In the historic phrase of Justice Holmes, while sitting on the Supreme Judicial Court of Massachusetts, "free competition is worth more to society than it costs, and . . . on this ground the infliction of the damage is privileged. . . . Certainly the policy is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests."\(^{102}\) In any event, if organizational picketing is viewed as employee competing with employee, it fits within the classic definition of competition.

While the employer is free to reject a demand for union recognition and the employees are free to reject union solicitation, the union is free to convey

---

102. Vegelahn v. Gunter, supra note 20, 44 N.E. at 1080, 1081.
its message to the consuming public or to other employees (presumably unionized) of employers dealing with the non-union employer. Thus, the fact that a particular group of employees and employers may suffer as a consequence of the picket line or circularization of leaflet or compilation of unfair list, does not convert legitimate goals into illegitimate goals or legitimate activity into illegitimate activity.

In this framework, it obviously does not derogate from the legitimacy of the picketing to characterize it as an instrument of economic pressure upon the employer or upon the employees. Nor does it alter the legal consequence to characterize the picketing as coercive as long as the coercion or compulsion does not "detract from its peaceful nature [and] so long as [it] constitute[s] only economic, moral, or social pressure and not the pressure of violence." 103

In these terms, the fact that the picket line is of long duration or that it takes place after an election in which the union has lost to a "non-union" vote or to another union is irrelevant. The issue is not whether the employer is subject to economic pressure or whether the employees in a particular unit have made an adverse determination to a union; the issue is what is the union's interest, in extent and depth among the employees of other employers in the same industry. Are the standards of the great mass of unionized employees in a particular industry superseded by the rights of a non-union unorganized minority? The unit of competition is obviously much broader than the unit which may be determined as appropriate for collective bargaining purposes. Here, the majority and greater good are viewed in terms of an overall industry, not a particular employer or particular group of employees.

It has also been urged in support of organizational picketing, that picketing is essential as a counter-pressure to employer pressure. Inherent in this suggestion is the fact that since Board proceedings are painfully slow, self-help in this limited sense is essential to balance the immediate economic forces and give the employees an opportunity to make a relatively rational choice. 104 Moreover, it may well be that the employer may limit himself to activity which, although not illegal, nevertheless poisons the wellsprings of free choice. Under such circumstances, it is urged that counter-economic or -moral compulsion should be permitted as an antidote. As observed by one of the commentators, the expression of opinion which follows a campaign in which unions are free to picket may be more reliable than an expression made without competing pressures. 105

The foregoing would suggest that it is the unusual employer who is caught in a dilemma, faced on the one hand with the hard choice of capitulating to union pressure and violating the Taft-Hartley Act or operating with continuing economic losses. Normally, employers regard an organizational campaign as a

104. See Wood v. O'Grady, supra note 14.
105. Cox, supra note 8 at 56.
ORGANIZATIONAL PICKETING

contest for their employees' favor, with union rejection as the terms of the victory. As a contestant, the employer is carrying on an active campaign in opposition to the union. Such an employer obviously has an alternative, when faced with union pressure through a picket line, discontinuance of the anti-union campaign. Thus, that which the employer may be permitted under the law collides with that which the union is permitted under the law. While neither of these rights can be set forth as an absolute, in terms of the scale of values expressed in the concept of collective bargaining the right of the organized employees to protect their interests through picketing would rise higher than the employer's right to campaign in opposition to the union.

In the absence of statutory principles of freedom of choice and majority rule and appropriate election machinery for ascertaining the employees' uncoerced wishes in an appropriate unit, there would be no competing value which could properly be asserted in opposition to the arguments stressed above. But with the Wagner Act, certain competing values did come into being. As urged by Professor Cox, "Once an employer was forbidden to discriminate for or against labor organizations in hire or tenure of employees, the law was bound to forbid union activities aimed at compelling him to engage in discrimination." Once the Wagner Act made it the employer's duty to bargain collectively with a certified representative, the law was bound to forbid minority strikes or picketing against a certification. But Congress, in the enactment of Taft-Hartley, struck a balance between these competing values. What need, if any, has been demonstrated for Congress to strike a different balance now?

(b) Current Proposals for Alteration of the Federal Law of Picketing

In the light of the competing values discussed above, the major legislative proposals advanced at the current session of the Congress are examined and measured. The main proposals to date have been the "Administration Bill" and the "Kennedy Bill." Attention is first directed to the Kennedy Bill.

In the current race to labor union reform legislation, Senator Kennedy has sprung to an early lead. He not only has been first in the field with a major bill, but his bill has moved farthest along the legislative course. On January 20, 1959, he introduced S. 505, entitled the "Labor-Management Reporting and Disclosure Act of 1959," Senator Ervin acting as a co-sponsor. As the name implies and as Senator Kennedy explained, "This is primarily a labor-management reform bill, dealing with the problems of dishonest racketeering—it is not a bill on industrial relations, dealing with the problems of collective bargaining and economic power." He promised that broad Taft-Hartley revisions, including such items as picketing, would be brought up later in the Session.

106. Id. at 54.
107. Section 8(b)(2), making it an unfair labor practice for a union to cause or attempt to cause an employer to discriminate, and section 8(b)(4)(C), making it an unfair labor practice for a union to picket against a certified union, represented Taft-Hartley's balancing of the competing considerations.
108. See text at note 1 supra.
110. Statement of Senator Kennedy on the floor of the Senate upon the introduction
In Title VII, however, the Kennedy Bill contained several minor amendments to the Taft-Hartley Act, amendments considered as ameliorative from labor's point of view. In addition, in section 213, as originally reported out of committee, the Kennedy Bill dealt with extortion picketing by making it unlawful to engage in picketing "for the purpose of, or as part of any conspiracy or in furtherance of any plan or purpose for, the personal profit or enrichment of any individual (except a bona fide increase in wages or other employee benefits) by taking or obtaining any money or other thing of value from such employer against his will or with his consent." This was intended to make it "an unfair labor practice for a labor organization to conduct 'shakedown' picketing, i.e., picketing with no legitimate purpose but which is to force an employer to buy off the union official involved." 111

Despite the foregoing provision of the Kennedy Bill, Secretary Mitchell, in speaking for the Administration, still attacked the bill for its stated failure to come to grips with "blackmail picketing." 112

On January 28th, the Administration introduced the second major entry in the legislative sweepstakes. Its bill, entitled the "Labor-Management Practices Act of 1959," with an accompanying message from President Eisenhower, 113 rejected the Kennedy two-package approach to labor legislation, first reform and then Taft-Hartley amendments. It specifically dealt with minority picketing. As the President explained in his accompanying message to Congress: 114

It would be made an unfair labor practice, subject to mandatory injunction [provided in section 10(1) of the statute], for a union to picket in order to coerce an employer to recognize it as bargaining representative of his employees or such employees to accept or designate it where: the employer has recognized another union in accordance with law, a representation election has been conducted within the preceding 12 months, it cannot be shown that there is a sufficient showing of interest on the part of the employers [sic] to be represented by such union, or picketing has continued for a long period of time without a representation election. 115

In further explanation of the Administration's position, Senator Goldwater explained the inclusion of a provision dealing with minority picketing on the ground that it was a matter "so closely related to corruption." 116 So, too, Secretary Mitchell in discussing the "must" items in the Administration Bill con-

111. Analysis of S. 505 (Kennedy Bill), 43 LAB. REL. REP. (43 L.R.R.M.) 260, 266 (1959). The entire statement is contained at 43 LAB. REL. REP. (43 L.R.R.M.) 256-66. This part of the bill had been clarified to make certain it would not ban picketing for legitimate purposes. See 43 LAB. REL. REP. (43 L.R.R.M.) 124.
113. The full text of the bill is contained at 43 LAB. REL. REP. (43 L.R.R.M.) 339-60 (1959), and the President's message at 43 LAB. REL. REP. (43 L.R.R.M.) 316-26.
115. For the provisions referred to in the President's message, see S. 748, 86th Cong., 1st Sess. §504 (1959), reproduced at 43 LAB. REL. REP. (43 L.R.R.M.) 358-58 (1959).
continued to refer to minority picketing as “blackmail picketing.” One of the foremost industry spokesmen, however, speaking before the Senate Labor Subcommittee, regarded the Administration Bill as “defective” in this regard, permitting “wider use of recognition picketing than has been permitted by some of the recent decisions of the NLRB.”\textsuperscript{117}

These are the main proposals to date. In the case of the Kennedy Bill, it was passed by the Senate on April 25, 1959. The Kennedy Bill, which in its progress through the Senate had become S. 1555, thus passed the legislative halfway point.

The Kennedy Bill had been amended on the Senate floor to curb minority picketing.\textsuperscript{118} The Bill, as it finally passed the Senate, would make minority picketing a union unfair labor practice where it was carried out or “threatened” “with the object of forcing or requiring an employer to recognize” a labor union, “or forcing or requiring the employees of an employer to accept or select such labor organization” in two situations: (1) where an employer has recognized another labor organization and the grant of recognition has not been challenged as an unfair labor practice before the National Labor Relations Board and a petition for an election would be untimely under the Labor Board’s contract bar rules, or (2) where the union picketing or threatening to picket has lost an NLRB election in the plant involved in the previous nine months. Picketing would be allowed before the end of the nine months only if the union were able to show that it had signed up a majority of the employees.

To meet a Justice Department objection, the penalty for shakedown or extortion picketing was raised to a $10,000 fine and a maximum twenty years in prison. The penalty now provided for extortion picketing is the same as that provided in the Hobbs Anti-Racketeering Act.

As of the writing of this article, the Kennedy Bill rests with a Labor Subcommittee in the House of Representatives. One of the main hurdles to its passage is the controversy over organizational picketing. Labor opposes the provision as unduly restrictive, management as not restrictive enough.

\textbf{Conclusion}

Viewing the current spate of legislative proposals in terms of the competing values discussed above, certain conclusions may be drawn.

To the extent that proposed legislation strikes down extortion picketing, picketing which clearly merits the designation “blackmail picketing,” no one takes issue. No one opposes such a provision since those who practice extortion are justly without champions. But actually, extortion picketing has not been the target of those who complain of “blackmail picketing.” It is not the misuse of minority picketing, extortion picketing, which motivates the proponents of an all-inclusive ban, but its traditional trade union usage as described above.


\textsuperscript{118} See note 3, supra.
The Administration Bill and similar efforts to curtail organizational and recognition picketing overlook the essential values of such picketing and their relationship to the well-being of organized workers generally. Viewing the problem solely in terms of a "distressed employer" and the rights of particular employees to refrain from unionization, the proponents of a total ban reach what is for them the only logical result. This over-simplification results from the Administration's deliberate refusal to look at the real issue from an overall perspective.

The Kennedy Bill, as amended on the Senate floor, is illogical both in terms of the employers and employees who desire to be rid of all union pressures and the mass of unionized employees in whose behalf the union pressure is applied.

In terms of the needs of the organized majority of an industry, the fact that the employees in a particular employment unit have chosen another union or have chosen to be unrepresented, is not determinative. Presumably, a union's lack of majority is either known or admitted and requires no secret ballot to establish that fact. The threat to the organized majority's wages and standards obviously survives the election test and the negative vote against the union.

Moreover, the Kennedy Bill, as amended, may result in insulating the collusive employer-union contract (i.e., the so-called "sweetheart contract") from all effective external pressure since it leaves the captive employees no alternative but a protracted Labor Board unfair labor practice proceeding. Thus, in the anxiety to curb "blackmail picketing" and to thwart the extortionist, the proposed legislation might well have a directly opposite effect.

With the passage of the Taft-Hartley Act, Congress, fully aware of the competing needs of employers and unorganized employees and unionized employees, established a set of rules recognizing what Congress regarded as the minimal needs of both. Assuming that the Supreme Court will conclude that proper interpretation of the Taft-Hartley legislative rules permits the continuation of recognition and organizational picketing for traditional trade union purposes, it is submitted that a case has not now been made out by those who advocate a change. There has been no proper showing that the needs of the organized in relation to the unorganized have diminished, or, conversely, that the needs of the unorganized require greater protection of their right to refrain from unionization.

In the interplay of economic forces in our free society, unionized employees should continue to have the rights now accorded them to protect their group interests by resort to peaceful picketing and other traditional channels of communication. So too, freedom for the interchange of ideas remains a basic value in our economic sphere as well as in our political sphere. To draw the line about union activities more tightly than is presently the case and to deny unionized employees their traditional means of communication is inconsistent with the constitutional guarantees of freedom of expression.