1965


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THE IMPLICATIONS OF THE CHANGING STATUS OF
PICKETING ON LABOR UNIONS (1827-1963)

A Dissertation
Submitted to the Graduate Faculty of the
Louisiana State University and
Agricultural and Mechanical College
in partial fulfillment of the
requirements for the degree of
Doctor of Philosophy
in
The Department of Economics

by
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January, 1965
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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>CHAPTER</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACKNOWLEDGMENTS</td>
<td></td>
</tr>
<tr>
<td>TABLE OF CASES</td>
<td></td>
</tr>
<tr>
<td>ABSTRACT</td>
<td></td>
</tr>
<tr>
<td>I. INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>The Problem</td>
<td>2</td>
</tr>
<tr>
<td>The scope and limitations</td>
<td>3</td>
</tr>
<tr>
<td>Rationale for the Study</td>
<td>4</td>
</tr>
<tr>
<td>Definitions</td>
<td>5</td>
</tr>
<tr>
<td>The Procedure</td>
<td>10</td>
</tr>
<tr>
<td>II. PICKETING AND FREE SPEECH</td>
<td>11</td>
</tr>
<tr>
<td>Picketing as a Tort</td>
<td>16</td>
</tr>
<tr>
<td>Picketing Under the Clayton Act</td>
<td>29</td>
</tr>
<tr>
<td>Picketing After the Norris-LaGuardia Act</td>
<td>43</td>
</tr>
<tr>
<td>The Thornhill Doctrine</td>
<td>53</td>
</tr>
<tr>
<td>III. THE STATUS OF PICKETING UNDER THE LMRA</td>
<td>76</td>
</tr>
<tr>
<td>The Picketing Restrictions</td>
<td>78</td>
</tr>
<tr>
<td>Interpretation of the Picketing Restrictions</td>
<td>80</td>
</tr>
<tr>
<td>Effects of Section 8(b) LMRA</td>
<td>101</td>
</tr>
<tr>
<td>The Status of Neutrals Under the LMRA</td>
<td>108</td>
</tr>
<tr>
<td>Picketing and Secondary Action</td>
<td>113</td>
</tr>
<tr>
<td>At the primary premises</td>
<td>114</td>
</tr>
<tr>
<td>At the separate neutral premises</td>
<td>116</td>
</tr>
<tr>
<td>At the ambulatory premises</td>
<td>120</td>
</tr>
<tr>
<td>CHAPTER</td>
<td>PAGE</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>At the roving premise in transportation</td>
<td>121</td>
</tr>
<tr>
<td>At the roving premise in construction</td>
<td>125</td>
</tr>
<tr>
<td>Picketing by a Minority Union</td>
<td>131</td>
</tr>
<tr>
<td>The Presumption Question</td>
<td>135</td>
</tr>
<tr>
<td>Analysis of Section 8(b) Restrictions</td>
<td>140</td>
</tr>
<tr>
<td>IV. THE STATUS OF PICKETING UNDER THE LMRDA</td>
<td>144</td>
</tr>
<tr>
<td>Interpretation of the Picketing Restrictions</td>
<td>145</td>
</tr>
<tr>
<td>Judicial Interpretation of the Picketing Restrictions</td>
<td>152</td>
</tr>
<tr>
<td>Picketing for a Nonrecognitional Motive</td>
<td>159</td>
</tr>
<tr>
<td>Restriction of Picketing Under Subsection (C)</td>
<td>171</td>
</tr>
<tr>
<td>Analysis of Section 8(b)(7) Restrictions</td>
<td>192</td>
</tr>
<tr>
<td>The Legal Status of Picketing (1963)</td>
<td>198</td>
</tr>
<tr>
<td>V. THE IMPLICATIONS OF THE CHANGING STATUS OF PICKETING ON UNIONS:</td>
<td></td>
</tr>
<tr>
<td>SUMMARY AND CONCLUSIONS</td>
<td>201</td>
</tr>
<tr>
<td>BIBLIOGRAPHY</td>
<td>218</td>
</tr>
<tr>
<td>VITA</td>
<td>221</td>
</tr>
</tbody>
</table>
# TABLE OF CASES

<table>
<thead>
<tr>
<th>NAME</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commonwealth v. Moore</td>
<td>12</td>
</tr>
<tr>
<td>Johnston Harvester Co. v. Meinhardt</td>
<td>16</td>
</tr>
<tr>
<td>Sherry v. Perkins</td>
<td>18</td>
</tr>
<tr>
<td>Vegelahn v. Gunter</td>
<td>20</td>
</tr>
<tr>
<td>Clarage v. Luphringer</td>
<td>27</td>
</tr>
<tr>
<td>Wood Mowing and Repairing Company v. Toohey</td>
<td>27</td>
</tr>
<tr>
<td>American Steel Foundries v. Tri-City Trades Council</td>
<td>30</td>
</tr>
<tr>
<td>Truax v. Corrigan</td>
<td>35</td>
</tr>
<tr>
<td>St. Louis v. Gloner</td>
<td>44</td>
</tr>
<tr>
<td>Ex Parte Stout</td>
<td>44</td>
</tr>
<tr>
<td>Walters v. Indianapolis</td>
<td>45</td>
</tr>
<tr>
<td>Exchange Bakery v. Rifkin</td>
<td>46</td>
</tr>
<tr>
<td>Stillwell Theater v. Kaplan</td>
<td>46</td>
</tr>
<tr>
<td>Kirmse v. Adler</td>
<td>47</td>
</tr>
<tr>
<td>Senn v. Tile Layers Protective Union</td>
<td>47</td>
</tr>
<tr>
<td>People v. Harriss</td>
<td>51</td>
</tr>
<tr>
<td>Ex Parte Bell</td>
<td>51</td>
</tr>
<tr>
<td>People v. Gidalyn</td>
<td>51</td>
</tr>
<tr>
<td>People v. Garcia</td>
<td>52</td>
</tr>
<tr>
<td>Ex Parte Lyons</td>
<td>52</td>
</tr>
</tbody>
</table>

1Limited to cases discussed in the text.
<table>
<thead>
<tr>
<th>NAME</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Thornhill v. Alabama</td>
<td>53</td>
</tr>
<tr>
<td>Schenck v. U.S.</td>
<td>56</td>
</tr>
<tr>
<td>Thomas v. Collins</td>
<td>56</td>
</tr>
<tr>
<td>Carson v. California</td>
<td>59</td>
</tr>
<tr>
<td>A.F.L. v. Swing</td>
<td>59</td>
</tr>
<tr>
<td>Milkwagon Drivers Union v. Meadowmoor Dairies</td>
<td>61</td>
</tr>
<tr>
<td>Bakery Drivers v. Wohl</td>
<td>67</td>
</tr>
<tr>
<td>Carpenters Union v. Ritter</td>
<td>69</td>
</tr>
<tr>
<td>Giboney v. Empire Storage Ice Co</td>
<td>82</td>
</tr>
<tr>
<td>Hughes v. Superior Court of California</td>
<td>89</td>
</tr>
<tr>
<td>Building Services Employees v. Gazzam</td>
<td>90</td>
</tr>
<tr>
<td>International Brotherhood of Teamsters v. Hanke</td>
<td>95</td>
</tr>
<tr>
<td>International Rice Milling Co</td>
<td>102</td>
</tr>
<tr>
<td>NLRB v. Denver Building and Construction Trades</td>
<td>108</td>
</tr>
<tr>
<td>Douds v. Metropolitan Federation of Architects, etc.</td>
<td>111</td>
</tr>
<tr>
<td>Wadsworth Building Co.</td>
<td>116</td>
</tr>
<tr>
<td>Oil Workers International Union v. The Pure Oil Co.</td>
<td>120</td>
</tr>
<tr>
<td>United Electrical Workers Union v. Ryan Construction Corporation</td>
<td>120</td>
</tr>
<tr>
<td>International Brotherhood of Teamsters v. Schultz Refrigerated</td>
<td></td>
</tr>
<tr>
<td>Service, Inc.</td>
<td>122</td>
</tr>
<tr>
<td>Sailor's Union of the Pacific v. Moore Dry Dock Co.</td>
<td>123</td>
</tr>
<tr>
<td>Amalgamated Meat Cutters and Butcher Workmen v. Western, Inc.</td>
<td>125</td>
</tr>
<tr>
<td>International Brotherhood of Boilermakers v. Richfield Oil</td>
<td>125</td>
</tr>
<tr>
<td>NAME</td>
<td>PAGE</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>-------</td>
</tr>
<tr>
<td>Chauffeurs, Teamsters, Warehousemen, and Helpers v. Hoosier Petroleum Co.</td>
<td>126</td>
</tr>
<tr>
<td>United Association of Journeyman Plumbers and Steamfitters v. Graham</td>
<td>128</td>
</tr>
<tr>
<td>Pappas v. Stacey</td>
<td>129</td>
</tr>
<tr>
<td>International Teamsters v. Vogt</td>
<td>130</td>
</tr>
<tr>
<td>International Brotherhood of Teamsters v. Curtis Brothers, Inc.</td>
<td>133</td>
</tr>
<tr>
<td>International Association of Machinists v. Alloy Mfg. Co.</td>
<td>134</td>
</tr>
<tr>
<td>Garner v. Teamsters Union</td>
<td>136</td>
</tr>
<tr>
<td>Farnsworth and Chambers v. Electrical Workers Local 429</td>
<td>136</td>
</tr>
<tr>
<td>UAW v. Russell</td>
<td>137</td>
</tr>
<tr>
<td>Guss v. Utah Labor Relations Board</td>
<td>138</td>
</tr>
<tr>
<td>Phillips v. International Ladies Garment Workers Union</td>
<td>147</td>
</tr>
<tr>
<td>Blinne Construction Co.</td>
<td>152</td>
</tr>
<tr>
<td>Bahia Motor Hotel</td>
<td>154</td>
</tr>
<tr>
<td>Bachman Furniture Co.</td>
<td>155</td>
</tr>
<tr>
<td>Alton Myers Brothers</td>
<td>163</td>
</tr>
<tr>
<td>Fanelli Ford Sales</td>
<td>167</td>
</tr>
<tr>
<td>Mission Valley Inn</td>
<td>168</td>
</tr>
<tr>
<td>McLeod v. Local 89 Chefs Union</td>
<td>176</td>
</tr>
<tr>
<td>Crown Cafeteria</td>
<td>178</td>
</tr>
<tr>
<td>Bartenders and Hotel and Restaurant Workers Union v. Fowler Hotel</td>
<td>182</td>
</tr>
<tr>
<td>Atlantic Maintenance Co.</td>
<td>183</td>
</tr>
<tr>
<td>Ypsilanti Press, Inc.</td>
<td>184</td>
</tr>
</tbody>
</table>
NAME

Jay Jacobs Downtown, Inc. ......................................................... 184
Martino's Home Furnishings .................................................. 185
Graham v. Retail Clerks Ass'n. .................................................. 186
Greene v. NLRB ........................................................................ 189
Penello v. Retail Store Employees .......................................... 189
ABSTRACT

This study examines the effects of the changing status of picketing on the conduct of strikes, boycotts, certification and decertification elections, and the status of union and nonunion employees. In analyzing the implications of picketing, attention is given to the historical development of the law of picketing.

Chapter II includes a review of the tort theory of picketing (Vegelahn v. Gunter) and an analysis of picketing as a form of free speech (Thornhill v. Alabama). The importance of these two periods in the law of picketing is reflected by the continuing debate as to whether picketing should be protected as a legitimate form of protest or whether picketing should be condemned as an unlawful interference with established rights. With the rejection of the idea that picketing was a form of free speech, the legal status of picketing became a due process question where the right to picket is dependent on the purpose of the picketing, the reaction of primary and secondary employees, and the economic effects of the picketing. The difficulty of developing a uniform code of picketing under these circumstances is further complicated by Section 8(b)(7) of the LMRDA which establishes new regulations limiting recognition and/or organizational picketing. Chapter III provides an analysis of the implied restrictions on picketing under Sections 8(b)(1)(A) and (B) and Sections 8(b)(4)(A) and (B) of the LMRA. These limitations on picketing produced fundamental changes in the tactics of unions and employers. The difficulty of defining the status
of neutrals, distinguishing between primary and secondary action, and the restrictions on picketing by a minority union severely jeopardized the ability of unions to engage in picketing as a form of peaceful protest.

Chapter IV presents an analysis and evaluation of the effect of Section 8(b)(7) on the status of picketing. The interpretation of whether picketing is recognition in purpose—a violation of Section 8(b)(7)—or informational in purpose—as protected by Section 8(b)(7) (C)—is of paramount significance in representation cases. The impact of Section 8(b)(7) is illustrated by the record of certification and decertification elections since 1959. The increasing percentage of certification elections lost by unions and the numerical increase in decertification petitions among unaffiliated unions have encouraged neutral employers to adopt an antiunion attitude, and have served to foster a philosophy of re-entrenchment among nonunion employers.

Chapter V evaluates the alternatives to Section 8(b)(7). From the standpoint of the judicial experience it would seem plausible either to ban all forms of picketing or to protect peaceful primary and secondary picketing. If the preservation of the right to picket is held to be preferable to a proposal outlawing picketing, it is recommended that Congress amend Section 8(b)(7) of the LMRDA (1) to enable labor unions to engage in peaceful primary or secondary picketing provided (a) that the picketing does not interfere with deliveries or (b) with the primary employees' ingress or egress to the plant or establishment, and (2) to prevent the states from establishing conflicting laws which enable state courts to enjoin picketing as a violation of public policy.
The development of a uniform code of picketing regulations would permit unions to advertise the source and reason of their dispute with employers, and it would preserve the character of open competition between unions and employers.
CHAPTER I

INTRODUCTION

On September 14, 1959, the President signed into law The Labor-Management-Reporting and Disclosure Act (LMRDA). The relevant section of the LMRDA for the purposes of this study is Section 704, Title VII. Section 704, "Boycotts and Recognition Picketing," amends the unfair labor practices section of the Labor Management Relations Act, 1947 (LMRA) (Section 8[b]). The first part of Section 704, which amends Section 8(b)(4), is an attempt to close the loopholes in the secondary boycott provisions of the LMRA. Prior to 1959 labor unions, in some cases, were able to avoid the sanctions of the secondary boycott provisions (Section 8[b]/4) by virtue of inserting a "hot-cargo" clause in their collective bargaining contracts which enabled them to participate in secondary boycotts by refusing to handle goods of nonunion employers.

In addition to the "hot-cargo" provision, Section 704 amends the LMRA by adding paragraph (7) to the unfair labor practices Section 8(b). Paragraph (7) and its provisions (A), (B), and (C) establish new federal restrictions on the right to picket by defining the limits within which a union may legally engage in organizational, recognition, and publicity picketing. Paragraph (7) provides that it shall be an unfair labor practice for a union or its agents:
(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act.

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing; Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.¹

I. THE PROBLEM

The primary test for determining the legality of picketing under Section 8(b)(7) depends upon (1) the motive behind the picketing, and (2) the reaction of primary employees, secondary employers or employees.

and consumers to the economic implications of picketing. As a result the courts are placed in the difficult position of deciding whether the picketing in question is supported by a lawful motive and whether the reaction to the picketing is sufficient to overcome the motive test. Thus, if the object of the picketing is not prescribed by paragraph (7) or its provisos and if the effect is to truthfully advertise to the public that the employer is unfair, the activity is protected by the Constitution unless a secondary employee refuses to cross the picket line. In the final analysis, therefore, the status of picketing may be determined by the lettering on the sign, the actions of the picket, and the testimony of the secondary employee.

The implications which result from the uncertain status of picketing represent a significant problem in the field of industrial relations. The implications of Section 8(b)(7) directly affect the conduct of collective bargaining, strikes, union security, and the ability of the union to place economic sanctions on the employer through the maintenance of an effective boycott.

The scope and limitations. Many other factors have been important in the changing nature of unions and the challenge facing the labor movement in the United States. This study is not directly concerned with questions dealing with the economic implications of the power of unions, but with the effects of the changing status of picketing on the activities of unions. The purpose of this study will be (1) to examine the background and the development of picketing prior to the LMRDA, and (2) to evaluate the effect of
Section 8(b)(7) on the status of picketing by analyzing the legal and economic implications of the cases on picketing since 1959. Within the scope of these objectives, attention will be given to the following questions: What was the status of picketing prior to the Clayton Act of 1914? What was the effect of the Clayton Act and the Norris-LaGuardia Act on the status of picketing? What was the effect of *Thornhill v. Alabama* on the status of picketing? What was the effect of the LMRA on the status of picketing? What has been the effect of Section 8(b)(7) of the LMRDA on the status of picketing? What effect have the picketing restrictions had on the conduct of strikes, boycotts, union security, union recognition, and the institution of collective bargaining? What steps are necessary in order to develop a positive approach to the problem?

II. RATIONALE FOR THE STUDY

The difficulty encountered in determining whether or not a particular type of picketing should be protected from legal sanctions has been a continual source of controversy since the famous case of *Thornhill v. Alabama* (1940). The decision of the Supreme Court in the Thornhill case temporarily equated picketing with the right of free speech as guaranteed by the First Amendment to the Constitution and the right of due process under the Fourteenth Amendment. The legality of the Thornhill Doctrine was debated in the legal periodicals for approximately ten years, and the issue did not subside until the Supreme Court began to limit the theory of the Thornhill Doctrine under the picketing
restrictions imposed by the LMRA (1947). The effect of Section 8(b)(7) on the status of picketing has resulted in a number of articles which discuss paragraph (7) in light of the Thornhill Doctrine as modified by the Court decisions under the LMRA. Although the discussions of the Thornhill Doctrine and the articles on the effect of paragraph (7) provide an interesting commentary on specialized aspects of picketing, these studies are inadequate as a means of interpreting the overall problem. The objective of this study, therefore, will be to conduct an extensive review of the historical status of picketing. This historical review will provide the necessary background to examine the current cases on picketing, and to determine the economic effects of the LMRA, as amended, on the status of picketing.

III. DEFINITIONS

The term picketing has been subject to a variety of
interpretations and definitions in the statutes, courts, and in scholarly studies. *Black's Law Dictionary* defines picketing as activity by members of a trade union on strike, in posting members at all approaches to the plant, "... for the purpose of observing and reporting the workmen going to or coming from the works, and of using such influence as may be in their power to prevent the workmen from accepting work there."3

Picketing, which may take a number of forms, is the most effective avenue of communication for the striking union, although the existence of a strike is not a necessary prerequisite. Without regard to circumstances of the objective, picketing is a means of publication between the employer, his employees, or third parties. Pure picketing or peaceful picketing may be defined as:

... a fact situation in which one or more individuals uttering no slanders, imprecations, or untruths, carrying a reasonably sized placard or sign and perhaps handing out throw-aways which likewise contain no untruths, walk not slowly or rapidly to and fro in front of the employer's place of business, without blocking traffic, causing any congestion, or otherwise does not coerce, and does not seek primarily to injure anyone, is not to compel anyone to break any laws or obligations and is to obtain benefits for the picketers or their principles, factually or legally, directly or indirectly.4

With some exceptions, pure picketing is protected by the courts and the Constitution. Pure picketing, however, is seldom found in fact; and it is clear from an examination of the cases on picketing that "... there is and can be no such thing as peaceful picketing, any more than there

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"can be chaste vulgarity, or peaceful mobbing, or lawful lynching."  

Primary picketing develops when the workers in a production unit patrol to and from outside the establishment and inform secondary employees and the public that the employer is unfair. "The gist of the primary picket is a dispute with the employer whose establishment is being patrolled."

Secondary picketing, which is derived from the secondary boycott, involves the patrolling of the place of business of a supplier or customer of the employer with whom the union has a dispute. Secondary picketing is sometimes referred to as stranger picketing. Stranger picketing, which is secondary in nature, may be defined as the peaceful picketing of any employer by third parties (an outside union) which represent none or only a minority of the employer's employees.

Stranger picketing is normally conducted either for organizational, recognition, or for publicity purposes. Organizational picketing consists of patrolling the employer's plant for the purpose of advertising to his employees the advantages of union membership. Recognition picketing consists of patrolling the employer's plant for the purpose of placing pressure upon the employer to recognize the union as the bargaining agent for his employees. Publicity or consumer

5 Atkinson, Topeka and Santa Fe Railway Company v. Gee, 139 F. 582 (DCIA, 1905).


7 Ibid., p. 198.
picketing, which is closely associated with organizational and recognition picketing, consists of patrolling the premises of the employer or that of his suppliers for the purpose of advertising to the public that the employer is unfair to organized labor. Publicity picketing may have the effect of placing indirect pressure on the employer through his customers to recognize the union as a bargaining agent.

Other types of picketing which may occur on occasion include fraudulent picketing, mass picketing, owner-worker picketing, and jurisdictional picketing. Fraudulent picketing exists where circumstances indicate a serious misrepresentation of fact, fraud, or the use of approbious language. Picketing of this type is not clothed with either constitutional or legislative immunity. Mass picketing exists when the pickets are so "massed as to contain elements of implicit coercion growing out of the force of numbers." The legality of mass picketing depends upon the circumstances, the number of pickets per station, and the manner of their actions. As a general rule most courts have held mass picketing to be unlawful, although others have occasionally permitted mass picketing as long as the activity remained peaceful in character. Owner-worker picketing is normally carried out for the purpose of forcing the owner-worker and his employees to join the union. Although this type of picketing is relatively insignificant, it has played an important role in the legal status of picketing since the Thornhill case.

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8 Ibid., p. 225.
Jurisdictional picketing, which results from a dispute between two or more rival unions, may be divided into two classifications: (1) picketing by rival unions contesting the right to represent an employer's employees; and (2) picketing by two or more labor organizations who are disputing installation rights on a construction project. Jurisdictional picketing of the first type is an unfair labor practice (Section 8(b)(4), LMRA) if the employer's employees are currently represented by a certified union. If the jurisdictional picketing involves a nonunion plant, the employer may petition for an election (Section 9(a), LMRA) where one or more of the individuals or unions have presented claims for recognition. However, it is not necessary to hold an election or to obtain certification by the National Labor Relations Board (NLRB) in order for the union to be legally recognized by the employer. Jurisdictional picketing for organizational or recognition purposes has been further restricted by paragraph (7) of the LMRDA, which requires an expedited election within thirty days of the initiation of picketing. If the employees vote against the unions, the parties to the original dispute lose the right to picket for organizational or recognition purposes for a period of one year.

Jurisdictional picketing, in support of a dispute over installation rights, is an unfair labor practice under Section 8(b)(4)(D), LMRA. The NLRB, however, has professed its inability to enforce this section of the LMRA. The provision has not been in conflict because construction employers and unions have established private machinery to resolve and enforce jurisdictional settlements.
IV. THE PROCEDURE

Although the major emphasis of this study will be concerned with the implications of the changing status of picketing on unions, it will be necessary as a matter of introduction to reexamine and develop the law of picketing as a corollary to the central problem. Chapter II is concerned with the status of picketing under the common law, the antitrust laws, and the attempt to equate picketing as a means of free speech during the 1940's. Chapter III examines the effects of the LMRA on the doctrine of free speech and reviews the status of picketing prior to the LMRDA of 1959. Chapter IV analyzes the effect of Section 8(b)(7) on the status of picketing. This chapter includes an examination of the cases on picketing since 1959 and a discussion of the relevant issues which evolve from the new restrictions on the right to picket. Chapter V presents a summary of the study including a synopsis of the implications of the changing status of picketing in respect to the conduct of strikes, boycotts, union security, and the overall decline of the labor movement since 1947, and presents an alternative proposal to the current regulations as prescribed under Section 8(b)(7).
CHAPTER II

PICKETING AND FREE SPEECH

For purposes of analysis the history of picketing prior to the LMRA of 1947 may be divided into two separate periods. Before 1940 the law of picketing was generally considered to be a branch of the law of torts. With few exceptions picketing was held to be a civil injury interfering with the property rights of employers or their employees. In 1940 in the case of Thornhill v. Alabama, the Supreme Court overturned the tort theory of picketing by setting aside an Alabama law prohibiting publication of a labor dispute as a denial of free speech guaranteed by the First and Fourteenth Amendments to the Constitution. Although the Thornhill Doctrine has since fallen into decay, these two periods in the history of the law of picketing have continued to play an important role in determining the status of picketing under Section 8(b)(7) of the LMRDA. Since 1959 the decisions of the courts have demonstrated a strong tendency to reapply the tort theory of picketing in labor disputes. While reserving the final decision as to what picketing restrictions will be permitted, the Supreme Court has continued to frame its decisions to allow federal and state judges an ever-increasing area of tolerance in dealing with the practical aspects of the problem.

Industrial progress in the United States achieved a relatively
high degree of specialization by the middle of the nineteenth century. The rapid development of specialization coupled with the size and geographical distribution of the market served to limit the organization of trade unions to the skilled trades. The unionization of these trades together with the broadening of the market contributed to the utilization of the strike and the boycott as important instruments in promoting the cause of labor. In this environment picketing soon became an important means of expanding the area of the work dispute. Establishment of picket lines discouraged the use of strikebreakers by the employer, and picketing served as an effective method of extending the boycott to the realm of public protest.

The first known instance of picketing in the United States occurred in 1827 in the case of Commonwealth v. Moore when a group of journeymen tailors protested the discharge of eight fellow employees. To effect their purposes the strikers assembled daily near the store of the employer and maintained a system of espionage to identify all of those who passed into and out of the establishment. "On one occasion a party of them was observed in the rear of a building reconnoitering the workshops with a telescope . . . [for the purpose of determining] . . . who the new journeymen were." Having thus identified the new hands.

1There were a number of attempts to organize the semiskilled and unskilled workers during the nineteenth century, but these organizations were unable to survive the misfortune of economic depression. The union movement, in a practical sense, was therefore limited to the skilled trades; i.e., the cordwainers, printers, tailors, and cigar makers.

they later intercepted them on their way home and in one instance "... laid violent hands on them."

In addition to picketing the employer, the tailors sought, and in some instances successfully applied, indirect pressure by forcing secondary employers not to accept work from the primary employer. In two instances they prevailed upon the journeymen of secondary employers to refrain from working on goods of their employer. The journeymen struck at both shops and one employer was forced to return the unfinished goods and the other was compelled to send the work elsewhere to be completed. To a third employer the journeymen sent a letter "... threatening to burn his house and dispose of his family unless he returned the unfinished goods." In applying the precedents of common law, the Court found little sympathy with the plight of the tailors and held them guilty of organizing and participating in a criminal conspiracy against the employer.

The employment of picketing in this case, as in other instances to follow, was recognized as a practical method of extending the labor dispute in pursuance of a common objective: the objective of economic pressure. Picketing, as it is known in the United States, is only meaningful when it serves to promote the attainment of the primary objective. The legality of picketing, therefore, should be determined by the relationship of picketing to its associated activities. In the opposite case, the legality of picketing may be determined by the

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3 Ibid., p. 111.
4 Ibid., p. 112.
conduct of picketing as a specific function independent of the strike or boycott. The legality of the separate function theory of picketing is derived from the concept of the "free market" as developed by classical economics. The characteristics of the free labor market include:

... the right to work or not to work, to hire or not to hire, to produce or not to produce, to sell or not to sell, to buy or not to buy. ... [In other words] ... it was an accepted rule of the game that an employer could hire or refuse to hire applicants for employment largely as he wished. Equally accepted was the proposition that workers could apply or refuse to apply for employment, again largely as they wished. 5

Although the free market theory includes the right to strike, 6 the right to picket is considered to be a direct interference with the guaranty of due process under the Constitution. For purposes of illustration the legality of picketing under the free market theory may be separated into three different categories. In the first instance it is conceivable to adopt the concept of the free market as a fundamental requirement and to attempt to implement the principle as a guide both in theory and practice. Second, the free market theory may be followed in principle but supplemented in fact. In this type of economic system it is an accepted maxim that real problems may require special consideration and individual adjustment within the system as a whole. Third, the free market theory may be rejected and the authority of the state substituted as an agency of central direction and control.


6Except as regulated by the LMRA.
In the above illustration the characteristics of picketing as a corollary to the free market principle necessarily eliminates consideration of the third case. In the remaining two cases the question of whether picketing should or should not be permitted depends not only on the case to which it is applied, but whether it is accepted as an integral part of the common objective or as a separate function requiring special consideration. Historically the courts, while generally accepting the free market principle as defined under case two, have set picketing aside as a special category under case one. In essence the courts, with the exception of a brief period, have applied the theory that workers who voluntarily choose to leave their jobs in concert, with the exceptions as defined under Section 8(b)(7), do not have the right to influence strikebreakers and the public through picketing.

The difficulties which result from this interpretation have important economic and legalistic ramifications. Economically the union is denied the use of one of its primary weapons for generating economic pressure. As a result the union is forced to rely on supplementary means of secondary pressure to assure the achievement of its common objective. If unions are prohibited by law from engaging in picketing, an unfortunate effect of the law may be to force unions to apply secondary pressure which is undesirable in both form and result. Thus by legal necessity, unions are compelled to engage in activities which

\[\text{7For example, see the Congressional Record of the McClellan Committee hearings.}\]
further the development of bureaucracy and control by undesirable elements outside the legitimate union movement. From a legal viewpoint the separate function theory creates serious definitional problems. The courts are placed in the difficult position of trying to determine whether the activity in question is protected under the banner of peaceful picketing or whether the activity in question is beyond the scope of nonviolent action. A review of the pattern of the decisions in picketing cases indicates that in most cases the courts have assumed the position of quasi-legislative bodies in defining the limits of peaceful picketing.

**PICKETING AS A TORT**

The status of picketing between 1827 and 1880 was interwoven with the problems of primary and secondary pressure. Picketing occurred in a number of instances in conjunction with the conduct of strikes, and several states passed antipicketing legislation. The first case in which picketing was a central element took place in New York in 1880. In *Johnston Harvester Company v. Meinhardt*, a group of iron moulders conducted a strike for higher wages against the Johnston Harvester Company. In the process of the strike, the workmen, on several occasions, had massed about the plant in such a fashion as to dissuade the non-striking workmen from entering the plant and preventing other employees from accepting jobs. The striking employees were acting under a New

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860 How. Pr. 168 (N.Y. Supreme Court, 1880).
York law which protected the right of peaceful assembly for a lawful purpose; i.e., a strike for higher wages. For the employer to obtain redress under the law it would have been necessary to show (1) that the strike was not for the purpose of improving wages, or (2) that the actions of the strikers were in some way beyond the realm of peaceful activity. In an effort to avoid the legal implications necessitated by prosecution under the statute, the employer applied for an injunction against the strikers. In reviewing the plaintiff's plea for an injunction, Judge Macomber stated that the conduct of the pickets, if not privileged by the act of 1870, was tortious in nature; that picketing when accompanied by sufficient evidence of intimidation "... is hardly distinguishable from an act which should itself injure or destroy the product ... [of labor]... It is a direct injury to property rights."9

The Court was unable to find sufficient evidence of intimidation on the part of the iron moulders and denied the motion for an injunction. In the dicta of the case Judge Macomber reviewed the duty of the courts in respect to the problem of industrialization by recognizing that the accumulations of capital, when "... directed towards the development of the resources of nature ... having all the advantages of aggregated wealth, would probably, if not certainly, have a tendency to induce laborers to combine for their own protection."10


10Ibid., p. 176.
of capital therefore leads to the creation and development of trade unions. "The combination of workingmen undoubtedly permits the development of more prolonged contests with capital than formerly; but capital, by combination also, threatens to be stronger than before.""\textsuperscript{11} In this complex and divergent opposition of interests, it is the duty of the courts to see that the controversy between the parties does not result in breaches of the peace or violation of contractual obligations. Beyond this, the courts must be content to ". . . let the law of supply and demand govern the parties."\textsuperscript{12}

The decision in the Meinhardt case established the rule that picketing by a confederation of persons is not necessarily tortious and may be protected unless evidence of intimidation is present. The question of determining the existence of intimidation, however, is not easily resolved. In some cases even peaceful picketing has been construed to carry an implied threat of intimidation. In other cases picketing has been held to be unlawful unless the patrol is accompanied by an overt act or libelous statement. The question of whether picketing is intimidatory per se was first considered in the case of Sherry v. Perkins,\textsuperscript{13} and the issue of intimidation was the central issue in Vegelahn v. Gunter.\textsuperscript{14}

In Sherry v. Perkins an association of shoe lasters employed by

\textsuperscript{11}Ibid., p. 177.
\textsuperscript{12}Ibid., p. 178.
\textsuperscript{13}147 Mass. 212 (1888).
\textsuperscript{14}167 Mass. 92 (1896).
the plaintiff (P. P. Sherry) struck for higher wages. On two different occasions the lasters engaged a boy to picket the premises of the plaintiff. On the first occasion the banner carried "... the following inscription: 'Lasters are requested to keep away from P. P. Sherry's. Per order L.P.U.'."15

After the cessation of the original dispute, the lasters' union ". . . caused another banner to be carried before the factory with the following inscription: 'Lasters on strike and lasters are requested to keep away from P. P. Sherry's until the present trouble is settled. Per order L.P.U.'."16 At the time of these occurrences the display of banners caused crowds of people to gather at the factory, and the lasters who continued to cross the picket lines were continually harassed and intimidated by the pickets.

Speaking for the Court, Justice Allen held that the actions of the lasters' union in displaying banners accompanied by threats and acts of intimidation resulted in direct injury to the plaintiff and was illegal at common law. In respect to the question of intent, the Court ruled that "... the banner was a standing menace to all who were or wished to be in the employment of the plaintiff. . . maintaining it was a continuous unlawful act, injurious to the plaintiff's business and property."17 Although it is difficult to regard the decision in Sherry v. Perkins as the first declaration that picketing is intimidatory per

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15147 Mass. 212.

16 Ibid., p. 213.

17 Ibid.
The decision was an important prelude to the landmark case of Vegelahn v. Gunter.

Vegelahn v. Gunter was first considered by Justice Holmes of the Massachusetts Supreme Court. The lower court had issued a preliminary injunction ordering the defendants to cease and desist from picketing the premises of the employer. According to the facts of the case presented at the preliminary hearing, Justice Holmes found that the defendant (Gunter and others) had "... established a patrol of two men in front of the plaintiff's factory ..." for the purpose of forcing the plaintiff (Vegalahn) to accept a list of prices submitted by the union. It appeared from the evidence that the number of pickets varied from time to time and that the patrol at times showed some "... inclination to stop at the plaintiff's door." After considering the evidence, Holmes modified the original injunction holding "... that the employment of these means for the said purpose was lawful ... except wherein the ... means for accomplishing the desired ends ... included ... threats of personal injury or unlawful harm ... conduct of this kind should be enjoined." Holmes' order was thereafter reported for consideration of the full court, and the majority of the court with Justice Allen writing the opinion eliminated Holmes' modifications and restored the full

18 167 Mass. 96.
19 Ibid.
20 Ibid., pp. 95-96.
injunction. Judge Allen was principally concerned with the question of ". . . whether the defendants should be enjoined against maintaining the patrol."21 The right of the union to engage in picketing, Allen argued, depends upon the degree of interference with the right of the employer and the rights of his employees.

An employer has a right to engage all persons who are willing to work for him at such prices as may be mutually agreed upon; and persons employed or seeking employment have a corresponding right to enter into or remain in the employment of any person or corporation willing to employ them. These rights are secured by the Constitution.22

The essential issue in determining the permissible degree of interference with these rights depends upon the element of intimidation or force which is involved. The prescribed form of ". . . intimidation is not limited to threats of violence or of physical injury to person or property."23 The maintenance of a patrol contains elements of intimidation which constitute an unlawful interference with the rights of the employer and which constitute a private nuisance. The contention of the defendant union that the patrol was justifiable for the reason of obtaining an improved wage schedule did not, in the opinion of Judge Allen, provide a sufficient motive to permit the defendants to commit injurious acts against the plaintiff; nor was the area of permissible conduct limited to those who were under some contractual obligation to

21 Ibid., p. 97.

22 Ibid.

23 Ibid., p. 98.
A conspiracy to interfere with the plaintiff's business . . . by maintaining a patrol in front of his premises in order to prevent persons from entering his employment, or in order to prevent persons who are in his employment from continuing therein, is unlawful even though such persons are not bound by contract to enter into or to continue in his employment.24

According to Judge Allen's interpretation, the maintenance of a patrol was not a corollary to the right to buy, the right to sell, and the right to strike, but was a form of intimidation which served to nullify the rights of the free market doctrine. By its very nature picketing must be treated in a category separate from other types of economic coercion. The idea that picketing might be privileged under specific conditions was incompatible with Judge Allen's view of the common law. Picketing was nothing more or nothing less than an attempt to interfere with a body of privileged rights and was therefore inherently intimidating.

There were two dissents written by Chief Justice Field and Justice Holmes to the majority opinion. Both Field and Holmes disagreed with the majority's position that picketing was intimidatory per se. Justice Field objected to the implicit assumption that the acts of picketing necessarily amounted to intimidation. The rule of the majority opinion would seem to convey that the maintenance of a patrol is actionable whether or not such action is accompanied by malice on the part of the pickets. The legal difficulty in picketing cases depends on the

24Ibid., pp. 99-100.
determination of "... what constitutes justifiable cause?"\(^{25}\)

Justice Field was particularly concerned with the theory that

- the legality of picketing was dependent on the question of malice. It seems evident that when persuasion consists of threats and libelous statements, the activity may be proscribed unless somehow privileged; but when persuasion consists of an attempt to dissuade an employee from entering the place of employment by a display of banners supported by truthful statements concerning the employer or his business, the question of implied intimidation seems irrelevant.

In the present case, if the establishment of a patrol is using

- intimidation or force, or force within the meaning of our statutes, it is illegal and criminal; if it does not amount to intimidation or force, but is carried to such a degree as to interfere with the use by the plaintiff of his property, it may be illegal and actionable, but something more is necessary to justify issuing an injunction

... if it is merely a peaceful mode of finding out the persons who intend to go to the plaintiff's premises to apply for work, and of informing them of the actual facts of the case in order to induce them not to enter into the plaintiff's employment. In the absence of any statute relating to the subject I doubt if it is illegal.\(^{25}\)

Holmes agreed with Field's dissent that picketing was not inherently intimidatory, but the theory behind Holmes' reasoning was quite apart from that of Chief Justice Field. Holmes' general theory of

- torts as spelled out in a treatise prior to the Vegelahn case held:

... that the intentional infliction of temporal damage, or the doing of an act manifestly likely to inflict such damage and inflicting it, is actionable if done without just cause. ... \(\sqrt{If}\) the conduct is permitted, the court must find just cause.\(^{25}\)

\(^{25}\)Ibid., p. 102.

\(^{26}\)Ibid., p. 103.
There are various justifications . . .

But whether, and how far, a privilege shall be allowed is a question of policy. Questions of policy are legislative questions and judges are shy of reasoning on such grounds. . . .

When the question of policy is faced it will be seen to be one which cannot be answered by generalities, but must be determined by the particular character of the case, even if everybody agrees what the answer should be. . . . Therefore the conclusion will vary and will depend on different reasons according to the nature of the affair.27

The theory of torts as defined by Holmes would prohibit the intentional infliction of temporal damage except in those cases where the action may be justifiable. The determination of the grounds for justification is a legislative function; if the legislative branch does not provide a remedy, the courts are required to determine the basis of measurement.

In the Vegelahn case Holmes objected to the majority's construction as applied to the threats which accompanied the conduct of the patrol.

. . . The words and "threats" is often used as if, when it appeared that threats had been made, it appeared that unlawful conduct had begun. But it depends on what you threaten. As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do, that is give warning to your intention to do in that event, and thus allow the other person the chance of avoiding the consequences. So as to "compulsion," it depends on how you "compel." . . . So as to "annoyance" or "intimidation."28

While Justice Holmes' reasoning on the question of intimidation was similar to that of Justice Field, Holmes' principal objection was to the consequences of the majority decision. Justice Allen's


interpretation that picketing is intimidatory left the result that individuals who engaged in a form of group protest against unfavorable policies were necessarily unlawful combinations if they took part in any form of activity other than a refusal to work. Holmes concluded that as a matter of public policy and as a basis of justification that:

... it is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world now going on so fast, means an ever increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed.

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services ... Combination on the one side is potent and powerful, combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way. ...

If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that when combined they have the same liberty that combined capital has to support their interests by argument, persuasion and the bestowal or refusal of those advantages which they otherwise lawfully control. ... The fact, that the immediate object of the act by which the benefit to themselves is to be gained is to injure the antagonist, does not necessarily make it unlawful. ... 29

The words of Holmes, written at the close of the nineteenth century, may in retrospect seem prophetic to the present state of development of combinations on both sides of the market. Holmes' dissent served as a timely warning to the vested interests of the nineteenth century that tradition, custom, and precedent are weak supports against the interest of

labor which has an equal right to participate in the division of economic wealth. Holmes foresaw the necessity of providing a framework for insuring the successful maintenance of free competition continually threatened by conflicting interests. Holmes was concerned with establishing a means of justification which would permit the opposing interests to resolve their differences without resorting to violence.

Holmes' dissent in the Vegelahn case that peaceful picketing is a permissible interference with property rights has been criticized on the grounds that it is inconsistent with the nature of picketing. It has been argued that it would have been more logical for Holmes to maintain that picketing, although intimidatory, is a justifiable injury at common law. This criticism evolves from the legal status of picketing after the Vegelahn case which adopted the theory that peaceful picketing is a legal fiction. By its character picketing is considered to be an intimidatory act. Any attempt, therefore, to separate peaceful picketing; i.e., informational, peaceful persuasion, or consumer picketing from violent picketing; i.e., overt acts of assault, intimidation, or libelous statements, would seem to be logically inconsistent. Although it is difficult to defend Holmes' dissent against the criticism of implied inconsistency, a careful reading of Holmes' opinion indicates that he was interested in establishing a satisfactory method of resolving conflicting economic pressure and not with questions of

definition.

The decision of the Massachusetts Supreme Court in *Vegelahn v. Gunter* codified the legal status of picketing at common law. After the Vegelahn case, decisions of state and federal courts either declared picketing to be illegal or held that the legality of picketing was dependent upon the conduct of the pickets. Under the latter theory, "peaceful picketing" was usually permitted; but the determination of what constituted peaceful picketing was an extremely delicate task. While the majority of the courts rejected the concept that picketing was inherently intimidatory, the final result was to effectively limit the employment of picketing to that of a nominal variety. In *Clarage v. Luphringer*, a Michigan case where the employer's plant had been picketed without threats or acts of intimidation, the court held that "... it is the duress and not the persuasion that should be prohibited..." and if evidence of duress exists the activity is proscribed.

A New York court in *Wood Mowing and Repairing Company v. Toohey*, noting the problem of defining the word persuasion, said:

> If, then, it is the law in this state that strikers on picket duty may use "persuasion," what is persuasion? What language is permitted? What is prohibited? The nomenclature of the strike is not the language of the parlor. Men become earnest and excited and

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31 168 N.W. 440 (1918).

32 *ibid*.

33 Compare the result in *Lyons and Healy v. Piano Workers Union*, 124 N.E. 443 (1919).

34 186 N.Y. Supp. 95 (1921).
vigorous at such times. A vital principle is at stake. It is not within the limits of human nature to remain calm and gentle under such circumstances. The furor of the argument is upon them; the stimulus of the battle. They forget etiquette and grammar. They employ strong language. Sometimes they go beyond the borders of decorum. But so do men in all walks of life. Instigated by emotion and impelled by deep conviction men always employ strong words. This happens during political campaigns, and on election day and even in the courtroom while lawyers are addressing the bench. Men gesticulate on such occasions, and become excited and demonstrative.

Must laboring men be held down to a more stringent rule? Must they be under constant restraint? Are they forced to be placed in the hour of contention? It is well, perhaps, to be so, but does the law demand it? I think not. Strikers talk their own language: the plain, common, strong, everyday language of the laboring man.\textsuperscript{35}

Throughout the first three decades of the twentieth century, the trend in picketing cases continued to follow the rule of the Vegalahn case which sanctioned the conduct of picketing in name only. Occasionally, as in Wood v. Toohy, the courts would depart from the majority opinion, but these instances were isolated and had little effect.

The legal restrictions on picketing proved to be a serious handicap to union organizing, campaigns for employee recognition, and the conduct of strikes and boycotts. In an effort to remove the burden of legal restraint, the American Federation of Labor (AFL) and allied political interests of the progressive era lobbied in Congress and in the states in support of legislation which would recognize the collective rights of employees. Samuel Gompers, president of the AFL, was especially concerned with the nullifying effect of court injunctions on picketing and boycotting activities. Gompers protested against the

\textsuperscript{35}\textit{Id}. p. 98.
common law assumption that picketing was intimidatory per se, stating that "...[en]do form picket lines for persuasive purposes as well as for the purpose of gathering and conveying information about strikes to those in charge of them. It is not true that strikes follow picketing as night follows day."36

PICKETING UNDER THE CLAYTON ACT

The era of popular protest against restrictive construction of the Sherman Act by the Supreme Court in the Danberry Hatters case37 and the issuance of injunctions by state and federal courts restraining the conduct of a strike when supported by picket lines culminated in the passage of the Clayton Act38 in 1914. The Clayton Act, while avoiding specific reference to picketing, was intended to restrict use of the injunction. Section 20 of the Clayton Act provided in part:

... no ... restraining order or injunction shall prohibit any person ... from terminating any relation of employment, or from ceasing to perform any work of labor, or from recommending, advising, or persuading others by peaceful means to do so; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working, or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising or persuading others by peaceful and lawful means so to do ... 39

36 American Federation of Labor, XIII (1906), 28.
37 408 U.S. 274 (1908).
39 Ibid., p. 738.
The ambiguous wording of Section 20 served to disguise the intent of the law; however, a careful reading of the section seems to suggest that the activity which consists of "recommending, advising or persuading others" is entirely privileged if the means does not exceed the limitation of a lawful object. As a general rule the definition of a lawful object depends upon the words and actions of the parties. As a result the courts were able to avoid the intent of the Clayton Act by restricting the definition of a lawful object.

The meaning of a "peaceful and lawful object" under Section 20 was first considered in American Steel Foundries v. Tri-City Trades Council, and the implications of this decision regarding state anti-injunction statutes was decided in a companion case Truax v. Corrigan. The Tri-City case resulted from a dispute between the defendant (Tri-City Trades Council) and the plaintiff over the imposition of wage cuts to certain skilled employees who were recalled after a general shutdown of the plant. The company had sought to reemploy 350 men out of a work force of 1600. In opposition to these wage cuts, the union established a picket line to discourage employees from entering the plant. The picketing was peaceful in nature with the normal amount of threats and counterthreats on both sides. Several witnesses for the plaintiff testified that they were threatened and assaulted by the pickets, and

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\(^{40}\)257 U.S. 184 (1921).

\(^{41}\)257 U.S. 321 (1921).
the pickets testified "... that strikebreakers attempted to shoot the striking employees, and were urged to do so by representatives of ... [the] ... plaintiff." 42 The purpose of the picketing was apparently successful and the employer instituted a suit against the Trades Council alleging potential injury and destruction to its business in the amount of $1,000,000.

The initial hearing took place in May, 1914, and the District Court granted a preliminary order enjoining the picketing in support of the dispute. The Tri-City Trades Council appealed the ruling of the District Court to the Circuit Court of Appeals which reviewed the case in December, 1916. Although the Circuit Court did not mention the Clayton Act in its opinion, the ambiguity of Section 20 was apparently sufficient to cause the Court to reverse the action of the District Court. The unanimous opinion written by Judge Evans observed that the purpose of the lower court's restraining order was "... to prevent all picketing by the defendants or others similarly interested and to prevent these parties from persuading their fellow employees to join them in their effort ...." 43 The Court gave particular attention to the question of duress as a condition separate from persuasion resulting from the picketing. The problem of determining whether or not the activity should be prohibited depends upon whether the picketing is designed to communicate with the new employees. If duress is used in

42 238 F. 730.
43 Ibid., p. 731.
the process of this communication, it is the duress which should be restrained and not persuasion by picketing which is a lawful interference with the rights of the employer. Judge Evans was careful to point out that while the injunction did not:

... prohibit picketing per se ... the effect was to prevent the defendant from engaging in a conspiracy to destroy the plaintiff's business; that in order to prevent the defendants from accomplishing the unlawful objective of the conspiracy it was necessary ... to restrain the defendants from picketing ... 44

The objection of the Circuit Court, therefore, was not so much to the theory of the injunction as to its effect on the lawful purpose of the defendant. In the words of the Court it would be impractical to contend that the act of picketing and persuasion does not interfere with the employer's business. It would be equally foolish to maintain that the strike does not constitute a similar form of interference. The legality of the picketing or of the strike "... cannot be tested by ... [its] incidental effect. ... The laborer may be strictly within his rights, although he obstructs 'the free and unrestrained control and operation of the employer's business.'" 45

The right to picket and the right to strike if carried to successful implementation must by necessity interfere with the conduct of the employer's business. The fault of the restraining order is that it fails to distinguish between the lawful and unlawful means which are available to the defendant union. The actions of the union may be

44 Ibid., p. 732.
harmful to the employer, but the pursuance of these activities is necessarily protected "... because such methods are incidental to the right of the employee, which right should be and is recognized as equal to the right of the employer." Although the decision of the Circuit Court did not refer directly to the Clayton Act, the recognition of the principle that employees may have rights in a combination equal to those of employers amounted to an implied acceptance of the philosophy of Section 20.

The ruling of the Circuit Court of Appeals in the Tri-City case was first considered by the Supreme Court in January, 1919, and the decision was not handed down until December, 1921, some seven years after the passage of the Clayton Act. The plaintiff in error appealed on the basis that the picketing by the Trades Council consisted of threats and unlawful intimidation and could not be construed as a means of legitimate persuasion. The Supreme Court, with Chief Justice Taft writing the opinion, accepted the reasoning of the plaintiff's advocate and held that Section 20 of the Clayton Act did not prohibit the employment of a restraining order if the conduct of the pickets exceeded the scope of a lawful object. While the Court did not wish to prohibit the right to picket, Justice Taft held that if the methods adopted by labor "... however lawful in their announced purpose inevitably led to intimidation and obstruction, then it is the court's duty ... to limit

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46Ibid.
"what the propagandists do as to time, manner and place..." If the duty of the Court is to ascertain whether the persuasion amounts to unlawful intimidation, to what extent may pickets go without violating the boundary of legitimate persuasion? In an unusual prescription of legal rights, Justice Taft stated that "In going to and from work, men have a right to as free passage without obstruction as the streets afford..." In terms of picketing, the right to interfere with the passage of another or fellow employee is to be permitted if the picket confines his remarks to an informational character. The conditions under which this type of picketing would be permitted were outlined by the Court.

We think that the strikers and their sympathizers... should be limited to one representative for each point of ingress and egress in the plant or place of business and that all others be enjoined from congregating or loitering at the plant or in the neighboring streets by which access is had to the plant, that such representatives should have the right of observation, communication and persuasion but with special admonition that their communication, arguments and appeals shall not be abusive, libelous or threatening, and that they shall not approach individuals together but singly, and shall not in their single efforts at communication or persuasion obstruct an unwilling listener by importunate following or dogging his steps.

Surprisingly enough, after defining this uniform code of free competition for employees, Justice Taft sanctioned a form of stranger picketing by suggesting that unions, in seeking to establish effective combinations,

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47 U.S. 203-204.
48 Ibid., p. 204.
49 Ibid., pp. 206-207.
may extend them:

... beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in competition between employers they are bound to be affected by the standard of wages in their trade in the neighborhood. Therefore, they may use all propaganda to enlarge their membership especially among those whose labor at lower wages will injure their whole guild. 50

The test of the standard established by the Supreme Court in the Tri-City case was first applied by the Court in Truax v. Corrigan. The Truax case arose from a strike by the employees of the plaintiff (Truax) over terms and conditions of employment in the plaintiff's restaurant, the "English Kitchen." Truax refused to concede to the employees' demand, and the trades assembly called a strike against him. The strike was supported by mass picketing accompanied by a "display of banners" and "circulation of handbills" containing statements libelous to the character of the plaintiff. 51 The banners carried by the pickets contained charges that Truax "... was tyrannical with his help and chased them down the street with a butcher knife ..." 52 Handbills were distributed to potential customers with such expressions as '"All ye who enter here leave all hope behind,' and 'Don't be a traitor to humanity.'" 53

Truax v. Corrigan was initially tried under an Arizona anti-injunction law similar to the Clayton Act which withheld the right to

50 Ibid., p. 209.
51 257 U.S. 321.
52 Ibid., p. 326.
53 Ibid.
issue injunctions in those areas where the union employed peaceful means for a lawful purpose. The Supreme Court of Arizona interpreted the act as a ban against all previous "unlawful acts":

... it is quite clear that the statute recognizes the right of striking employees to carry on a campaign of picketing... under the statute the employer... is required to set forth facts sufficient to constitute such acts as amount to unlawful acts and sustain such... by substantial evidence.54

Although the picketing in the Truax case was characterized by abusive language and libelous statements, the conduct of the patrol did not produce any acts of violence. Consequently, the plaintiff's appeal to the Supreme Court was limited to the question of whether picketing which interferes with the employer's customers constitutes an infringement on the due process clause of the Fourteenth Amendment. Justice Taft, speaking for the majority, directed his attention to the conduct of the pickets.

The patrolling of the defendants immediately in front of the restaurant... continuously during business hours... the attendance by the picketers at the entrance to the restaurant and their insistent and loud appeals all day long, the constant circulation by them of the libels and epithets applied to employees, plaintiffs and customers, and threats of injurious consequences to future customers, all linked together in a campaign, were an unlawful annoyance and a hurtful nuisance in respect to free access to the plaintiff's place of business.55

The legitimacy of picketing, regardless of its lawful purpose, cannot overcome the inequity wrought by acts of coercion and implied threats. The obstruction carried on by the defendants was a conspiracy

54176 P. 570, 572 (1918).
55257 U.S. 327.
intended to inflict substantial injury on the plaintiff. The law of the State of Arizona which operates to protect acts by the defendants which would otherwise be unlawful leaves the employer without an adequate remedy at law. The question, therefore, is whether "... the state may withdraw all protection to a property right by civil or criminal action for its wrongful injury if the injury is not caused by violence." 56

Under these circumstances the solution depends upon the extent to which the state shall be permitted to regulate the protection of property rights. While the legislative power of the state may be exercised with considerable discretion in regulating the use of police powers, the power "... can only be exerted in subordination to the fundamental principles of the right of justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve ..." 57 The protection of due process under the Fourteenth Amendment is not concerned with the object of the legislation or the area of jurisdiction, but it only requires that all persons shall be treated equal at law. The state will not be permitted to enact legislation establishing such limitations and classification on rights of individuals at law, restricting the protection of the due process clause as though it was a "rope of sand."

The majority opinion that the legislative power of a state to regulate the use and enjoyment of property is subordinate to the Fourteenth Amendment was vigorously contested by the minority, resulting in

56 Ibid., p. 329.
57 Ibid.
three separate dissenting opinions by Justices Holmes, Brandeis, and Pitney with Justice Clark concurring with the dissent of Justice Pitney. Justice Holmes objected to the classification of business in the same category as that of land, which results in the conclusion that a state cannot successfully restrict preexisting rights. The association of a business with a definite object creates the illusion that it is somehow beyond the scope of regulation, that any attempt to restrict "property rights" must meet the test of the due process clause which ultimately limits "... the making of social experiments that are an important part of the community desires ... even though the experiments may seem futile or even noxious ..."58

Justices Brandeis and Pitney objected to Justice Taft's construction of the due process clause that all men must be treated equal before the law regardless of class or classification or direction of the public interest. Brandeis disagreed with Taft's reasoning that the Fourteenth Amendment is intended to preserve and protect the body of personal rights and property rights from legislative encroachment.

This right to carry on business—be it called liberty or property—has value; and, he who interferes with the right without cause renders himself liable. But for cause the right may be interfered with and even be destroyed. Such cause exists when, in the pursuit of an equal right to further their several interests, his competitors make inroads upon his trade, or when suppliers of merchandise or of labor make inroads on his profits. What methods and means are permissible in this struggle of contending forces is determined in part by decisions of the courts, in part by acts of legislatures.

58 Ibid., p. 344.
The rules governing the contest necessarily change from time to time. For conditions change; and furthermore, the rules evolved, being merely experiments in government, must be discarded when they prove to be failures. 59

The due process clause is not intended to strike down legislation just because the law in question "... may involve interference with the existing liberty or property ..." 60 but only if the effect is arbitrary or if there is no corresponding relation to a permissible end.

Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary, can ordinarily be determined by a consideration of the contemporary conditions, social, industrial and political, of the community to be affected thereby. Resort to such facts is necessary, among other things, in order to appreciate evils sought to be remedied and the possible effects of the remedy proposed. 61

A survey of prior legislation and court decisions illustrates the process of continuing social experiment to develop a body of laws which will be adaptable to the public needs versus private rights. The history of labor unions serves as a dramatic illustration of this struggle for public and legal recognition. The right to organize, the right to strike, and the right to bargain are representative of the achievements of organized labor in its continuing competition with the forces of capital. Each of these established rights were at one time or another considered to be violations of liberty or property and were held to be a conspiracy in criminal law or illegal and actionable in tort.

60 Ibid., p. 355.
61 Ibid., pp. 356-357.
The process of judicial and legislative determination is unfortunately slow and may exhibit tendencies to proceed in the opposite direction, but the weight of public opinion and the pressure of economic and social conditions will eventually persuade the courts to interpret the temper and spirit of the legislation without the necessity of exercising authority as a quasi-legislative body.

The Supreme Court of Arizona, having . . . determined . . . that the picketing was peaceful and, hence, legal under statute whether or not it was at common law necessarily denied the injunction . . . for it seems . . . clear that the refusal of an equitable remedy for a tort is not necessarily a denial of due process of law . . . It is for the legislature to say—within the broad limits of discretion which it possesses—whether or not the remedy for a wrong shall be both criminal and civil and whether or not it shall be both at law and in equity.62

Justice Pitney's dissent objected to Taft's contention that the decision of the Supreme Court of Arizona restricted the equality requirements of the Fourteenth Amendment.

Examination shows that it . . . the Arizona law . . . does not discriminate against the class to which plaintiffs belong in favor of any other . . . the effect of the majority opinion . . . is to transform the provision of the Fourteenth Amendment from guaranty of the "protection of equal laws" into an insistence upon laws complete, perfect and symmetrical.63

The determination of the right to issue an injunction is within the police power of the State of Arizona. Just as the state has the power to regulate the issuance of injunctions it may properly single out a form of persuasion for appropriate treatment as long as the remedy or

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62 Ibid., pp. 372-373.

63 Ibid., pp. 349-351.
protection is "... consistent with the due process of law."®

The dissents of Justices Holmes, Brandeis, and Pitney in the Truax case objected to the majority opinion on different grounds. Holmes and Pitney rejected the philosophy that the Arizona law was an interference with the due process clause as guaranteed under the Fourteenth Amendment holding that the state has the right to establish special categories of rights and obligations at law. Brandeis, while accepting this argument, recognized the necessity of establishing sufficient grounds for justifying the right of employees to engage in picketing. Brandeis sought to show by historical precedent and judicial reasoning that the preservation of the right to strike and the right to picket was a necessary prerequisite to the maintenance of the balance of power in a continuing social experiment; and that picketing as a means of advertisement and public notice should be and must be protected from the process of judicial restraint.

The decision of the Supreme Court in the Tri-City case and in Truax v. Corrigan served to codify the law of picketing in two respects: (1) that picketing was protected in name only, i.e., as peaceful picketing; and (2) that the states could not establish laws whose provisions were more restrictive than those of the Clayton Act. The Supreme Court refused to relinquish the right to function as a quasi-legislative body in restricting the legal status of picketing. Although a few courts refused to conform to the rulings of the Supreme Court, the exceptions

®Ibid., p. 353.
were a definite minority and the majority continued to apply the philosophy of the Vegelahn case that picketing is intimidatory per se. The legality of peaceful picketing, therefore, continued to be protected in name only.

With the exception of the Norris-LaGuardia Act\(^\text{65}\) the legal status of picketing as established in *Vegelahn v. Gunter* remained undisturbed until the decision of the Supreme Court in *Senn v. Tile Layers Protective Union*.\(^\text{66}\) The Norris-LaGuardia Act passed by Congress in 1932 was intended to severely restrict the issuance of injunctions by state and district courts and federal courts of appeal. Since its introduction during the latter half of the nineteenth century, the injunction had become an effective union busting instrument. Employers could secure an injunction from a court\(^\text{67}\) which would prohibit the union from engaging in concerted activities (strikes, picketing, and boycotts) until such time as the court could ascertain the true merits of the case. The timely interference by the court was particularly advantageous to employers and served to destroy the opportunity of the union to press its advantage against the employer. The employment of this powerful device was widely abused by the courts, and the injunction became the ultimate weapon in nullifying the economic pressure of picketing. The

\(^{65}\text{Stat. } 70 (1932).\)

\(^{66}\text{301 U.S. 468 (1937).}\)

\(^{67}\text{Most of the injunctions were usually drafted by the employer's counsel and in some cases were issued without benefit of legal counsel for the defendant union.}\)
Clayton Act attempted to restrict the scope of the blanket injunction, but the wording of Section 20 was too vague, limiting the issuance of injunctions to those cases where the means were "unlawful." Cognizant of the failure of Section 20 of the Clayton Act, the authors of the Norris-LaGuardia Act defined a labor dispute to include those who might be "... engaged in the same industry, trade, craft, or occupation ... or having ... a direct or indirect interest therein ... ." Peaceful picketing as previously defined was protected by Section 4(e) which prohibited courts from issuing restraining orders in any case where the participants were engaged in:

... giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud and violence ... /that no court shall restrain picketing accompanied by threats and similar disorders, except after findings of fact it is evident that/ ... greater injury will be inflicted upon complainant by the denial of the relief than will be inflicted upon defendants by the granting of relief ... and ... That the public officers charged with duty to protect complainant's property are unable or unwilling to furnish adequate protection.

PICKETING AFTER THE NORRIS-LAGUARDIA ACT

The passage of the Norris-LaGuardia Act served to restrict judicial abuse of the injunction, but the law of peaceful picketing continued to follow the ruling of the Truax case. If the maintenance of the patrol exceeded the stricture of "peaceful" conduct, the activity

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68 47 Stat. 73.
69 Ibid., p. 71.
was a violation of the due process clause and could be enjoined.
Although a majority of the courts accepted the theory that picketing was a violation of due process, a minority subscribed to the theory that picketing, even though intimidatory, may be protected by the Constitution. The vigorous dissent of Justice Brandeis in *Truax v. Corrigan* was foreshadowed in several decisions before 1921 and was adopted by a minority of state courts in the early 1930's.

In the usual situation the cases under consideration resulted from picketing in violation of a city ordinance or a state law prohibiting all forms of picketing. This form of legislation was considered to be an encroachment on the freedom of speech and was generally held unconstitutional by the courts if the activity was not otherwise unlawful. The question in these cases was whether the statute violated the right to engage in peaceful protest as guaranteed by the Constitution. In *St. Louis v. Olenker*70 the picketing was in violation of a city ordinance prohibiting lounging or loitering as a misdemeanor. Upon appeal of the picketing conviction the court held that while the city had the right to regulate the use of its streets, the right of restriction may not be construed to deny "... the right of personal liberty guaranteed to every citizen ..."71 In *Ex Parte Stout*,72 a Texas case, the State Court of Criminal Appeals upheld a conviction for picketing in

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70 109 S.W. 30 (1908).
72 198 S.W. 967 (1917).
violation of a city ordinance on the grounds that picketing was designed to create disorder, and the instigators were not entitled to use the public conveyance as a means of constitutional expression.

The ruling of the Texas court was supported by the Indiana Supreme Court in Walters v. Indianapolis. The appellant (Walters) was convicted of violating an ordinance by walking up and down in front of a barber shop wearing a shirt bearing the inscription "Barber Shop Unfair to Organized Labor." The Indiana Supreme Court upheld the conviction, ruling that while the ordinance did not restrict "... the right of free interchange of thought and opinion or the right to speak, write or print freely ... this does not mean that ... the appellant ... may do as he pleases on a public street ..." Although the decisions in Walters v. Indianapolis and in Ex Parte Stout were in conflict with the decisions of the Missouri Supreme Court in St. Louis v. Gloner, these courts did not deny "... the association of picketing with free speech." The association of picketing with free speech which later provided a partial basis for the Thornhill Doctrine may be traced to two decisions of the New York Court of Appeals, Exchange Bakery v.

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73 134 N.E. 482 (1922).

74 Ibid., p. 483.

75 Ibid.

Mifflin and Stillwell Theater v. Kaplan. In the Exchange Bakery case, a waitresses union had been enjoined from picketing a local bakery. The picketing consisted of two women walking in the street near the restaurant wearing placards "Waitresses Strike Picket." The picketing was nonviolent and there was no evidence of intimidation. Speaking for the court, Judge Andrews stated that:

Economic organization today is not based on the single shop . . . the union . . . may call a strike and picket the premises of the employer with the intent of inducing him to employ only union labor. Picketing without a strike is no more unlawful than a strike without picketing. Both are based on a lawful purpose. Resulting injury is incidental and must be endured.

Five years later in the Stillwell case, which also involved nonviolent picketing, Justice Pound held that:

The fact that such action may result in incidental injury to the employer does not in itself constitute a justification for issuing an injunction against such acts. The interests of capital and labor are at times inimical and the courts may not decide controversies between parties so long as neither resorts to violence, deceit, or misrepresentation to bring about desired results. . . . Acts must be legal but they may be legal or illegal according to the circumstances.

The gradual shift in judicial opinion as illustrated in these two cases amounted to an acceptance by the courts that picketing was a permissible exercise of collective rights designed to reinforce the process of economic pressure. With the passage of the Norris LaGuardia Act

77157 N.E. 130 (1927).
78182 N.E. 63 (1932).
79157 N.E. 132-133.
80182 N.E. 65.
and the National Labor Relations Act, the courts began to look past the
formalistic design of the law to the practical aspects of the circum-
stances in an effort to protect the right of public protest. In *Kirmse
v. Adler*\(^{81}\) the Supreme Court of Pennsylvania extended the association
between picketing and free speech by inferring that peaceful picketing
is "... secured to the citizen by the constitutional provision that:
[Art. 1, Section 7] 'The free communication of thoughts and opinions is
one of the invaluable rights of man, and every citizen may freely speak,
write and print on any subject..."\(^{82}\)

The equation of picketing with free speech by the Pennsylvania
Supreme Court was formalized by Justice Brandeis in *Senn v. Tile Layers
Protective Union* and resulted in a doctrine of constitutional protection
in *Thornhill v. Alabama*.\(^{83}\) When the Senn case reached the Supreme Court
in 1937, the constitutionality of the Norris-LaGuardia Act and the
Wagner Act was still undecided and the Court had only recently refused
to sanction the N.I.R.A. The test of the Senn case therefore came at a
time of considerable social and economic unrest which undoubtedly pro-
duced a measurable effect on the interpretation of the Court. The Senn
case arose under a Wisconsin anti-injunction statute which provided that
peaceful picketing was lawful as well as nonenjoinable. Senn, a tile
contractor who usually worked as a part time contractor and tile layer,

\(^{81}\) 166 Atl. 566 (1933).
\(^{82}\) *Ibid.*., p. 569.
\(^{83}\) 310 U.S. 88.
was requested by the Tile Layers Union to sign an agreement requiring
Senn to be a union contractor and to employ union tile layers. Senn
consented to sign the contract if the provision requiring all union tile
layers was eliminated. The union would not eliminate this clause from
the contract and Senn refused to sign; consequently, the union estab-
lished picket lines around Senn's place of business. The picketing was
peaceful without intimidation or other unlawful acts, and Senn applied
for an injunction on the grounds that the Wisconsin statute "... controve-
nes the guaranty of the Fourteenth Amendment against the depre-
vation of property without due process." The Supreme Court of
Wisconsin refused to enjoin the picketing holding that the picketing of
a nonunion employer was within the lawful right of the union to inform
the public that the employer was unfair.

Justice Brandeis, speaking for the majority of the Supreme Court
in a five to four decision, rejected Senn's appeal stating that:

... picketing and publicity ... are not prohibited by the Four-
teenth Amendment. Members of a union might, without special
statutory authorization by a state, make known the facts of a labor
dispute, for freedom of speech is protected by the Federal Constitu-
tion. The state may, in the exercise of its police power regulate
the methods and means of publicity ... Brandeis distinguished the Truax case on the basis that the picketing by
the Trades Council was tortious in nature and exceeded the concept of
peaceful protest. If the picketing is peaceful, the state may regulate

84 Id., p. 469.
85 Ibid., p. 478.
the conduct of the pickets through its police powers and such regulation is not a violation of due process guaranteed under the Constitution. Justice Butler, for the minority, adhered to the argument of Chief Justice Taft in *Truax v. Corrigan* holding that "... the Fourteenth Amendment ... forbids the state ... from taking actions which will take ... from the individual the right to engage in common occupations of life." The legislative power of the state may not be exercised in such a way as to interfere with "... the guarantees of the due process and equal protection clauses of the Fourteenth Amendment." While one may assume that peaceful picketing might be lawfully used as a means of protesting a labor dispute, the legality of the means depends upon the subject. "The object being unlawful, the means and ends are condemned alike."

The majority decision in the Senn case represents a considerable departure from the position of the Court in *Truax v. Corrigan*. Previously the Court had been unwilling to permit the states to erect social and economic legislation which did not coincide with the Court's conception of right and wrong. Beginning with Senn's case, the Court, in a series of decisions, began to permit a broader conception of what might be regulated without incurring a violation of due process. While the exact effect of Justice Brandeis' equation between picketing and free

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speech left much in doubt, it soon became clear that the Court, at least for a period of time, was willing to allow state legislatures and courts to establish a code of protection apart from that of the Truax decision. The question of whether picketing was equal to free speech, was a form of free speech, or a right limited to judicial consideration remained undetermined. The dicta of the majority opinion in the Senn case failed to spell out the conditions under which picketing might be protected as free speech, and Justice Brandeis did not distinguish the ends for which the employment of picketing might be protected. The decision in the Senn case led to more confusion than enlightenment and at the same time produced a new era in the legal status of picketing.

Although the result in the Senn case was not entirely unanticipated, the effect of the majority's opinion created considerable dismay and astonishment in the state courts and among legal writers. Beginning with the Vegelahn case, the lower courts gradually established a body of procedural rights governing the conduct of picketing cases. This set of procedural rights was recognized at common law and founded on established judicial precedent: protection of the free market doctrine. Any international interference with this body of rights, such as picketing, unless otherwise privileged, was tortious in nature and actionable at common law.

The decision in the Senn case questioned the validity of the tort theory of picketing, stating by implication that picketing

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contained an element of free speech. As a consequence of the Senn
decision, the question before state legislatures and state courts was
whether the states could prohibit picketing by limiting the ends for
which picketing might be undertaken or whether there were constitutional
limits on the power of the states to regulate picketing.

Between the Senn decision (1937) and the case of Thorhill v.
Alabama (1940), a number of state and federal courts attempted to formu­
late a basis which might be substituted for the principles of the
Vegelahn case. In People v. Harriss90 the Supreme Court of Colorado,
recognizing the dictum in the Senn case, stated that "where a law . . .
under consideration, impairs freedom of speech . . . we have no doubt
that it constitutes an invasion of constitutional guarantees . . . pro­
hibiting . . . laws impairing the freedom of speech."91 In Ex Parte
Bell92 the District Court of Appeals sustained a California ordinance
which outlawed only violent picketing.

There is no doubt that picketing is recognized as lawful under the
Fourteenth Amendment. . . . The right to picket by lawful means
. . . may be enjoyed by all individuals. . . . It is . . . a lawful
excise of the constitutional guaranty of freedom of speech, press
and assemblage.93

In People v. Gidaly94 the California Superior Court expanded

9091 P. 2d. 989 (1939).
91Ibid., p. 994.
92100 P. 2d. 339 (1940).
93Ibid., p. 340.
9435 Cal. App. 2. 758 (1939).
Brandeis' free speech dictum by declaring a Los Angeles city ordinance restricting picketing to "bona fide" employees who had been employed at least thirty days to be a denial of a fundamental constitutional right. In People v. Garcia, a companion case under the same ordinance, the court nullified a provision of the act, restricting pickets from displaying placards "... containing any words, lettering or design ..." which were other than informational in character. The placards carried by the pickets did not conform precisely to the limitations of the ordinance and the pickets supplemented the sign by saying, "This place is on strike. Don't work here." Speaking for the court, Judge Shauer held that "the language that was displayed by the defendants ... does not constitute a clear and present danger to government and is not otherwise objectionable. ... The carrying of the sign is a manner of exercising freedom of speech ... a publication of ideas ..."

In Ex Parte Lyons, another California case, the District Court interpreted the dictum of the Senn case as providing protection for stranger as well as primary picketing.

We cannot see how the right to peacefully picket, under the guaranty of free speech, could be confined to cases in which there exists a

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95 Ibid., p. 267.
96 Ibid., p. 268.
97 Ibid., p. 270.
98 Ibid., p. 266 (1939).
99 Ibid., p. 190 (1938).
dispute between an employer and organized labor over hours or conditions of employment. . . . The guaranty of the right of free speech is general and extends to every class or group of citizens.\textsuperscript{100}

Courts in some jurisdictions, however, refused to uphold picketing which did not conform to their conception of right and wrong. As a general rule the majority of state courts viewed the free speech doctrine as a qualified right which must be equated to other rights established at law. In most of these cases the test depended on whether the picketing was in pursuance of a lawful purpose. If the purpose of the picketing was not acceptable to the court, the activity was considered to be an infringement on the right to acquire and possess property. A minority of state courts refused to follow the implied rule of the Senn case and continued to enjoin all forms of picketing except those of a nominal variety.

In retrospect the dictum of the Senn case proved to be a confusing guide for determining the constitutional status of picketing. If the rule of Senn's case was to be effective, it was quite obvious, in view of the conflicting decisions, that it would be necessary for the United States Supreme Court to develop a body of rules which would permit the lower courts to dispense with picketing cases in a consistent manner.

\textbf{THE THORNHILL DOCTRINE}

In November, 1937, Bryon Thornhill was convicted by the Circuit Court of Appeals of violating an Alabama state law prohibiting picketing

\textsuperscript{100}Ibid., p. 193.
in any form. The Alabama Supreme Court upheld the Circuit Court's ruling, and Thornhill petitioned on constitutional grounds to the United States Supreme Court. According to the facts of the case, Thornhill was one of several pickets who had patrolled the entrance to the employer's plant in support of a strike by the employee's union. Since the day of the strike the union had maintained a picket line of six to eight men around the plant for twenty-four hours a day. Thornhill and the other pickets informed those who wished to return to work that "... they were on strike and did not want anybody to go up there to work." In communicating this information Thornhill and his fellow pickets made no threats or any attempts to intimidate the other employees. Thornhill was arrested and subsequently convicted on the grounds that he willfully engaged in picketing with the intent of injuring the employer. The counsel for the State of Alabama adopted the rule of the Vegelahn case, arguing that peaceful picketing is tortious in nature and constitutes an interference with property rights.

In an eight to one decision with Justice McReynolds dissenting, the Supreme Court reversed the lower court's decision declaring the state law unconstitutional. Justice Murphy, speaking for the majority, chose to follow the dictum of the Semn case holding that:

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101 U.S. 94.

102 Justice McReynolds was the only surviving justice of the four man minority in Semn's case.

103 Justice Murphy was one of the new appointments to the Supreme Court by President Roosevelt. The Justice was a former governor of Michigan and was considered to be pro-labor in his views.
Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. . . . We concur in the observation of Mr. Justice Brandeis . . . in Semn's case . . . [that . . .] . . . freedom of speech is guaranteed by the Federal Constitution. 104

While the state may regulate economic affairs, Justice Murphy argued, it does not necessarily follow that the state may unduly restrict the right of public protest. The penal code of the State of Alabama prohibits nearly every practical means of communicating the nature and cause of an industrial dispute. Under the operation of this statute the public is prevented from securing information which may be indispensable to the formation of an educated public opinion. As a public entity it is the duty of the state to safeguard those means which are essential to the preservation of a democratic society, and the state must continually guard against private interests that seek to use the authority of the state to suppress:

. . . peaceful and truthful discussion of matters of public interest merely on the showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. 105

The language of the Court that picketing could be restricted if it constituted a "clear danger" caused many authorities to believe that the Court intended to ban all restrictions against picketing. The right to

104 310 U.S. 103.
105 Supra, pp. 104-105.
picket was apparently accepted as a means of public protest protected by the First and Fourteenth Amendments to the Constitution.

The equality of picketing with free speech in the Thornhill case embraced the clear and present danger test first enunciated by Justice Holmes in Schenck v. U.S.\(^{106}\) Schenck, a socialist, was convicted of distributing pamphlets through the mails designed to obstruct the recruiting and enlistment of personnel in the military forces. In denying Schenck's appeal Holmes stated that "the question . . . is whether the words used are . . . of such a nature as to create a clear and present danger that will bring about substantive evils. . . . It is a question of proximity and degree."\(^{107}\) Under the test of the Schenck case the constitutional status of picketing could not be restricted by federal or state legislation unless the conduct of the pickets creates a danger which results in "substantive evils." In a later case Thomas v. Collins\(^ {108}\) the Court defined the broad aspects of the clear and present danger test by ruling a Texas state law requiring the registration of labor organizers to be an unconstitutional exercise of the police powers of the state.

If the exercise of the rights of free speech and free assembly cannot be made a crime . . . [said the Court] . . . we do not think that this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a

\(^{106}\) 249 U.S. 47 (1919).
\(^{107}\) Ibid., p. 52.
\(^{108}\) 323 U.S. 516 (1944).
condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. 109

The difficulty of implementing the clear and present danger test results from the determination of what constitutes a substantive evil. Although the decisions of the Court have not followed a consistent pattern, it may be inferred that existence of substantive evil constitutes an interference with the right of sovereignty. If the act of the offender is such to violate or seriously threaten the preservation of public order, it is considered to be evil in itself.

Interference with the public peace . . . includes not only violent acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot . . . . When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order, appears, the power of the state to prevent or punish is obvious. 110

The Court, therefore, was willing to condone certain limitations on the right of free speech which could serve to restrict the status of picketing as a form of speech. Though the right of free speech is carefully protected under the Constitution, there are certain classes of speech which by their very nature " . . . incite an immediate breach of the peace." 111 It is apparent that such forms of speech are obnoxious per se and require no code of constitutional protection. However, this proscription should not be interpreted as a strict limitation on the

109 Ibid., p. 540.
right to engage in debate and dispute. The right to debate public differences must be jealously protected, and it is the existence of this right "... that sets us apart from totalitarian regimes."\textsuperscript{112} The protection of free speech is essential to our very existence, indeed free communication of ideas is a prerequisite to a stable democracy. The free flow of debate augments the discussion of rival proposals establishing a basis for public interpretation and synthesis. The resulting conclusion thus becomes a settling influence and provides a framework for public acceptance. Restrictions on the right of free speech must be carefully guarded "... for the alternative to ... \[\text{free debate}\] ... would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."\textsuperscript{113}

Despite the aforementioned decisions of the Supreme Court in defining the limitations of clear and present danger, the application of this principle as a means of determining the legal status of picketing was a difficult and trying process. In the majority of the cases it was necessary for the Supreme Court to rule whether the facts constituted a clear and present danger to public order. Clear and present danger proved to be just as intangible as the determination of a lawful means under the Clayton Act. In addition to these problems the basic philosophy of the Thornhill case was vigorously protested by the states as an unprecedented invasion of their police power, and within the space

\textsuperscript{112}Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

\textsuperscript{113}Ibid.
of two years the early promise of the Thornhill Doctrine became encumbered with numerous legal restrictions which served to limit its effectiveness.

On the same day as the decision in the Thornhill case, the Court issued a ruling in a companion case Carson v. California.114 In that case Carson was convicted of violating a California ordinance which made picketing unlawful. The counsel for the State of California sought to distinguish the Carson case from the Thornhill case on the grounds that the ordinance operated only against picketing as a specific type of conduct which "... in its very nature is inimical to the public welfare..."115 The Court refused to accept the argument of the appellee, holding that:

The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern ... publicizing the facts of a labor dispute in a peaceful way through appropriate means ... must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a State.116

In February, 1941, the Supreme Court supplemented the dictum of the Thornhill case in two separate picketing decisions. In A.F.L. v. Swing117 a beauticians' union had resorted to nonemployee picketing of a beauty shop owned by the defendant. Swing obtained an injunction

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114310 U.S. 106 (1940).
115Ibid., p. 107.
116Ibid., pp. 112-113.
117310 U.S. 312 (1941).
against the picketing on the basis that the activity of the pickets was a violation of the due process clause. Justice Frankfurter, speaking for the Court, stated that "a state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers so small as to contain only an employer and those directly employed by him." In the exercise of its police power a state may not limit the right of public protest in order to bar the union from publicizing a work dispute. The economic interests of employers and employees are so closely drawn that an undue regulation by the state will serve to disrupt the pattern of industrial communication. The right to picket is protected by the Federal Constitution, and this right may not be interfered with unless a clear danger exists.

Without benefit of subsequent reflection, the Swing decision seemed to represent a considerable extension of the Thornhill Doctrine. In the Thornhill case the Supreme Court invalidated a state law which outlawed all forms of picketing, ruling that the state cannot prohibit picketing per se. In the Swing case the Court held that a state may not prohibit picketing even in the absence of a dispute between the parties. This is to say that stranger picketing does not necessarily constitute a substantive evil to the sovereignty of the state. Aside from its

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118 12 U.S. 321.

119 It seems apparent from the facts of the Swing case that Justice Frankfurter did not consider the picketing to be either a clear or present danger.
endorsement of stranger picketing the broad aspects of the Swing decision left some loose ends in the law of picketing. From the dictum of the opinion it appears that the Court did not necessarily intend to sanction all forms of stranger picketing, i.e., picketing in support of an unlawful purpose. As a consequence of this loophole in the free speech doctrine, state and federal courts were thereafter able to enjoin even peaceful picketing if the object was in conflict with state or federal laws. Secondly, the rule of the Swing case was limited by the terminology of the majority opinion that the state may not draw the circle "so small as to" limit the scope of picketing. The obvious intent of the Court was to permit the states to draw a circle large enough to restrict picketing "outside" the sphere of industrial competition. This legal ambiguity left the possibility that state courts could circumvent the Thornhill Doctrine on the basis that the picketing was not a part of the labor dispute.

In Swing's companion case handed down the same day, Milkwagon Drivers Union v. Meadowmoor Dairies, the Court restricted the rule of the Thornhill case by upholding an injunction restraining the employment of picketing in support of a labor dispute. The decision in the Milkwagon Drivers' case, which sired some strong dissents by Justices Black and Reed with Justice Douglas concurring, was the first indication that the Thornhill Doctrine might not constitute a blanket endorsement of picketing as free speech.

120312 U.S. 287 (1941).
The majority opinion of the Supreme Court found the conduct of the drivers' union to be beyond the scope of constitutional protection. The facts of the case showed "... that there had been violence on a considerable scale."121 Windows were smashed, explosive bombs and stench bombs were thrown, trucks were upset, burned and driven into the river. Nonunion drivers were stopped at gun point and invited "to join the union"; carloads of pickets pursued the nonunion drivers and attempted to disrupt delivery by threatening and beating up the drivers "... and in one instance shot at the truck and driver."122

Mr. Justice Frankfurter, speaking for the majority (which included Justice Murphy), formulated the question of law as "... whether a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct which is concededly outlawed."123 In answering this question Justice Frankfurter reviewed the evolution of the legal status of picketing beginning with Thornhill's case. Freedom of speech, Frankfurter argued, implies a code of reasonable conduct. The Constitution is not an absolute guarantee against all forms of conduct, i.e., "a man who shouts fire in a crowded theater" may not rely on the Bill of Rights. The same code of reasonable conduct must be applied to those forms of communication which serve as a means of public protest. The

121Ibid., p. 291.
122Ibid., p. 292.
123Ibid.
right to picket is limited by the same rule of reason; picketing which lies beyond the scope of justifiable conduct cannot be protected.

"Peaceful picketing is the workingman's means of communication but . . . the use of picketing . . . in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution."124 The picket line is constitutionally protected as long as the process of informing the public is conducted in a reasonable manner. Picketing as a form of free speech is qualified by the right of the state to prevent continuing threats of violence and misconduct. The state, however, must exercise reasonable care in the employment of its police powers; e.g., "... the right of free speech cannot be denied by drawing from a trivial rough incident . . . Nor may a state enjoin peaceful picketing merely because it may provoke violence in others."125

Noting the contention of the minority that the decision in this case made serious inroads on the law of picketing as established in the Thornhill and Carlson decisions, Justice Frankfurter reaffirmed the free speech doctrine, pointing out that the prior cases involved statutes which outlawed all picketing "... and therefore we struck them down."126 Just as the Fourteenth Amendment restricts the state in the exercise of its authority, the same amendment permits the state to

124 Ibid., p. 293.
125 Ibid., pp. 293-296.
126 Ibid., p. 297.
control "... circumstances ... which might result in7 ... imminent and aggravated danger ... " 127

The dissenting justices Black and Reed objected to the majority's opinion on the grounds that it imposed a severe restriction on the Thornhill Doctrine. Justice Black emphasized that Frankfurter's opinion denied the right of protest to the majority of the union members who were in no way connected with the violence. In the proceedings of the trial the union maintained that a minority of its members was responsible for the violence, and the union's counsel indicated that there would be no objection to a decree controlling the violent aspects of the picketing. But the scope of the restraining order upheld by the majority, argued Justice Black, is unlimited in its effect. The element of violence was considered to be controlling and has resulted in an order which restrains the injunction and therefore restricts any and all publication of the dispute. In comparing:

... the language of the statutes in the Thornhill and Carlson cases with that of the injunction ... In this case it becomes apparent that there is little difference in the scope of the restriction/... .

<table>
<thead>
<tr>
<th>Thornhill Statute</th>
<th>Meadowmoor Injunction</th>
<th>Carlson Statute</th>
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<tr>
<td>&quot;going/ing&quot; near to or loitering/about the premises or place of business ...; influencing ... persons not to trade the works or place</td>
<td>&quot;walking up and down in front of said stores; discouraging; chasing ...; interfering, hindering, or diverting ...&quot;</td>
<td>&quot;loitering/ing&quot; in front of ... any place of business ...; influencing ... any person to refrain from purchasing ...; intimidating, threatening or coercing ...</td>
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127 Ibid.
The decision of the majority has the effect of imposing a sweeping
decree on the right of free speech which acts as a sanction of prior
censorship on all of those who desire to express their views. The
censorship, however, is limited to those who desire to protest a cutrate
method of distribution. There is no comparable limitation on those who
wish to encourage this form of distribution. While there is some evi-
dence that a few union members participated in the violence, there was
no testimony that these individuals were following orders of union
officials. As a matter of record, there is evidence that the display of
violence was in direct conflict with the instructions given to the
pickets by the union. While the state may properly punish those who are
guilty of lawless conduct, it does not necessarily follow that the court
may issue an injunction so comprehensive in its scope that it destroys
rights guaranteed by the Constitution. Even those who have been con-
victed of a criminal offense are permitted to engage in public protest.

Justice Reed's dissent objected to the majority's opinion on the
grounds that evidence of past violence does not necessarily imply repi-
tition of this pattern in the future. "If the fear engendered by past
misconduct coerces storekeepers during peaceful picketing, the remedy

128Ibid., p. 309.
"lies in maintenance of order, not in denial of free speech." There was no evidence that the union engaged in a criminal plot to disrupt competition. In fact, the findings indicate that the violence resulted from a series of sporadic and unrelated occurrences between some pickets and strikes of farmers who wished to stop the flow of milk. The investigation by the Master revealed that the acts of violence arose under conditions not wholly anticipated and in a character not unlike similar disputes between the forces of industrial competition. Industrial and commercial competition, although comparable in theory, are spawned in quite opposite climates and may on occasion exhibit peculiar characteristics. If the result of this competition is detrimental to the public good, special regulations may be required to protect and preserve public order. "In the last analysis we must ask ourselves whether this protection . . . is sufficient to justify the suspension of the constitutional guarantee of free speech."130

The decision in Meadowmoor's case which substituted the rule of reason for the clear and present danger test, and the implication in Swing's case that some forms of picketing might be outside the scope of a labor dispute, caused some state and federal courts to cast doubts on the validity of the Thornhill Doctrine. Within a year after the Meadowmoor and Swing decisions, a series of antipicketing injunctions were issued restricting the limits of the Thornhill decision. Two such

129Ibid., p. 319.
130Ibid., p. 320.
cases Bakery Drivers v. Wohl 131 and Carpenters Union v. Ritter, 132 which were representative of the new trend in the law of picketing, were reviewed by the Supreme Court in March, 1942. Wohl, a New York case, arose out of a dispute between a bakery wagon drivers' union and a group of nonunion peddlers. The bakery union was engaged in negotiating and securing collective bargaining contracts in New York City. Five years prior to the beginning of the dispute there were approximately fifty so-called nonunion peddlers in New York City. With the imposition of the social security and unemployment compensation laws in the New York area, the number of peddlers gradually increased to about 500 at the time of the dispute. As a result of the competition of nonunion drivers, the bakery companies notified the union that they would no longer employ union drivers but the drivers might continue to distribute the goods as "independent contractors." In the interest of avoiding further deterioration of the terms of employment, the union tried to persuade the peddlers to become union members. When the peddlers failed to join, the union began to picket the premises of the bakers who sold products to the nonunion drivers. In response to the picketing, Wohl, a peddler, sought an injunction to restrain the picketing as an invasion of due process of law. Upon hearing the evidence the trial court issued a restraining order holding that the controversy did not conform to the requirements of a labor dispute under New York law. The trial court's decision was

131 315 U.S. 769 (1942).

subsequently affirmed by the Court of Appeals. Accepting the case on appeal, the United States Supreme Court reversed the decision of the appellate courts holding that "we ... can perceive no substantial evil of such magnitude as to mark a limit to the right of free speech . . ." as exercised by the union drivers. The curious part of the Wohl decision was the implied ruling of the majority that the test of whether a state may regulate a labor dispute depends on the effectiveness of the picketing. Justice Jackson, speaking for the Court, said, "A state is not required to tolerate in all places and in all circumstances even peaceful picketing . . . [the legality] . . . depends on the means employed and the effect or . . . repercussions upon the interests of strangers to the issue." The concurring justices in Wohl's case objected to the implications of the majority ruling stating in a separate opinion, "If the opinion . . . means that a state can prohibit picketing when it is effective but may not prohibit when it is ineffective, then . . . we have made a basic departure from Thornhill v. Alabama." The concurring justices objected to the implication that the state as a function of due process might draw an arbitrary line which would enable the state "... to accomplish indirectly what it may not accomplish directly."

133 U.S. 775.
134 Ibid.
135 Ibid.
136 Ibid., p. 777.
The implied controversy in the Wohl case was carried over to **Carpenters Union v. Ritter**, a Texas case, where the Supreme Court by a five to four decision upheld an injunction enjoining the picketing of Ritter's Cafe. In this case Ritter and one Plaster entered into a contract in which Plaster agreed to construct a building for Ritter. Plaster refused to employ union labor in the construction of the building. In order to force Ritter to bring pressure against Plaster to employ union labor, the carpenters began to picket Ritter's Cafe which was approximately a mile and a half away from the construction site. In a demonstration of their sympathy with the plight of the carpenters, the restaurant workers called a strike and union truck drivers refused to cross the picket line to deliver supplies to the restaurant. Ritter filed a complaint with the Texas Court of Civil Appeals, and the Court enjoined the picketing as a violation of the state antitrust law. The carpenters' union appealed to the United States Supreme Court on constitutional grounds, alleging that the injunction was a violation of due process guaranteed by the Fourteenth Amendment. Mr. Justice Frankfurter delivered the majority opinion of the Court, affirming the injunction of the Court of Appeals. Reviewing the status of the law of picketing since Thornhill's case, Justice Frankfurter adopted the spirit of Justice Holmes' dissent in **Vegelahn v. Gunter** that it is necessary in a democratic society for the Court to balance the conflicting interests. In the absence of legislation, argued Justice Frankfurter, it is the duty of the judicial branch to determine whether the public welfare will be adversely affected by the contemplated activity. In seeking to
balance the opposing interests the Court must determine whether the state in restricting the right of protest "... has violated 'the essential attributes of ... liberty.'"\textsuperscript{137} The right to picket is guaranteed by the Constitution (\textit{Thornhill v. Alabama}), but the pursuance of this right is subject to limitations. In every case the Court must determine whether the Fourteenth Amendment prohibits the state from "... confining the area of unrestricted industrial warfare ... The line drawn by Texas is not the line drawn by New York in the Wohl case."\textsuperscript{138} In the latter case the pickets were pursuing a legitimate interest: in the present case the picketing is incidental to the primary dispute. The genius of the dispute is with the contractor, and it is not beyond the power of the state "... to confine the sphere of communication to that directly related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication."\textsuperscript{139}

The majority decision in the Ritter case represented a significant departure from the spirit of the Thornhill Doctrine. In the Thornhill case the picketing was accorded constitutional protection because it was a result of a labor dispute. Picketing was held to be a privileged right of communication which guaranteed to workers the right

\textsuperscript{137}15 U.S. 726.

\textsuperscript{138}\textit{Ibid.}, pp. 726-727.

\textsuperscript{139}\textit{Ibid.}, pp. 727-728.
to communicate their grievances. In Ritter's case the picketing was enjoining because it was incidental to the primary dispute. This abrupt reversal in judicial construction is exemplified by the words of Justice Frankfurter that the restrictions on picketing in the Ritter case still "... leaves open ... other traditional modes of communication." In Thornhill's case picketing which resulted from a labor dispute was found to be a "traditional" and privileged mode of communication. There was no suggestion in Justice Murphy's opinion that picketing was a secondary means of communication, and the right to picket was extended a full partnership under the Bill of Rights. Picketing was a full-fledged member of the free speech family so necessary in fact that it was afforded constitutional protection as a privileged form of communication. In the Ritter case the privileged position of picketing assumes an illegitimate status. Picketing is a foster child of free speech which may be enjoined if its relation to the dispute is outside the sphere of privileged communication.

The importance of the Ritter case as a departure from the principles of the Thornhill Doctrine was emphasized by both dissenting justices. Justice Black objected to the injunction as an undue restriction on the right of free speech. Referring to the Thornhill case, Justice Black said:

Whatever injury the respondent suffered here resulted from the peaceful and truthful statements made to the public that he had employed a non-union contractor to erect a building. This

140Mr. Justice Douglas and Mr. Justice Murphy, the author of the Thornhill Doctrine, concurred with the dissent of Justice Black.
information, under the Thornhill case, the petitioners were privileged to impart and the public was entitled to receive. It is one thing for a state to regulate the use of its streets and highways so as to keep them open . . .; or to pass general regulations as to their use in the interest of public safety . . .; or to protect its citizens from violence and breaches of peace . . . It is quite another thing, however, to "abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature." . . . The Court below . . . barred the petitioners from using the streets to convey information to the public; because of the particular type of information they wished to convey. In so doing, it directly restricted the petitioners' rights to express themselves publicly concerning an issue which we recognised in the Thornhill case to be of public importance. It imposed the restriction for the reason that the public's response to such information would result in injury to a particular person's business, a reason which we said in the Thornhill case was insufficient to justify curtailment of free expression. 141

Justice Reed reviewed the facts of the Ritter case in light of the Thornhill Doctrine concluding:

Until today, orderly, regulated picketing has been within the protection of the Fourteenth Amendment . . . In balancing social advantages it has been felt that the preservation of free speech in labor disputes was more important than the freedom of enterprise from the picket line. It was a limitation on state power to deal as it pleased with labor disputes; a limitation consented to by the state when it became a part of the nation, and one of precisely the same quality as those enforced in Carlson, Thornhill and Swing.

We are not here forced, as the Court assumes, to support a constitutional interpretation that peaceful picketing "must be wholly immune from regulation by the community in order to protect the general interest." We do not doubt the right of the state to impose not only some but many restrictions upon peaceful picketing. Reasonable numbers, quietness, truthful placards, open ingress and egress, suitable hours or other proper limitations, not destructive of the right to tell of labor difficulties, may be required . . . 142

In addition to their objections to the desertion of the Thornhill Doctrine by the majority, both Justices Reed and Black took

141 315 U.S. 731.

142 Ibid., pp. 738-739.
exception to the description by Justice Frankfurter that Ritter was a "neutral." Commenting on the neutrality issue Mr. Justice Reed held that:

By this decision a state rule is upheld which forbids peaceful picketing of businesses by strangers to the business and the industry of which it is a part. . . . This rule is applied, in this case, even though the picketers are publicizing a labor dispute arising from a contract to which the sole owner of the business picketed is a party. Even if the construction contract covered an attached addition to the restaurant the Court's opinion would not permit picketing directed against the restaurant. To construe this Texas decision as within state powers and the Wohl decision as outside their boundaries, plainly discloses the inadequacy of the test presumably employed, that is, the supposed lack of economic "interdependence" between the pickets and the picketed.143

In comparison to Justice Reed's discussion of neutrality, Mr. Justice Black said:

Whether members or non-members of the building trades unions are employed . . . [is in a very real way] . . . influenced by those with whom they do business . . .

Whatever injury the respondent suffered here resulted from peaceful and truthful statements made to the public that he had employed a non-union contractor to erect a building. This information, under the Thornhill case, the petitioners were privileged to impart and the public was entitled to receive.144

The decision in the Ritter case marks a turning point in the legal status of picketing as constituted under the Thornhill Doctrine. The majority opinion in the Ritter case substituted the "rule of reason" for the clear and present danger test of Thornhill's case. The legality of picketing in the Ritter case was not dependent on its association


with a labor dispute but whether the picketing was considered to be a justifiable means of extending the scope of a labor dispute. Labor's right to inform the public was limited to those means which were within the circle of protection. If the object of the picketing is outside the area of reasonable conflict, the picketing might be enjoined by the state. Picketing's privileged status under the Thornhill Doctrine as a traditional mode of communication was demoted in the Ritter case to a position of inferior rank. The bar of the clear and present danger test was thrust aside as a momentary lapse in judicial reasoning. The doctrine of a lawful object and a reasonable means was held to be more consistent with the judicial equation of right and wrong.

The implications of this abrupt shift in judicial reasoning established the basis of competition between unions and industry until the passage of the LMRDA in 1959. The restrictions of the Ritter decision invited those state courts who were opposed to the philosophy of the Thornhill Doctrine to define a labor dispute in such a way as to exclude peaceful picketing. If the "purpose or object" of the picketing was found to be inconsistent with the continuance of a labor dispute, the picketing was enjoined as an unlawful object. By virtue of the Ritter decision, unions and union members were placed on the defensive side of the issue, and it became necessary for the unions to show that the picketing was a direct result of a primary dispute. If the direct incidence could not be established to the satisfaction of the court, the activity was considered to be unlawful. Employers were encouraged to seek injunctions against peaceful picketing if there was a possibility
that the picketing might be construed as being outside the circle of competition. The Ritter case became an open invitation to circumvent the spirit of the Thornhill case by means of legal technicalities. With the decay of the Thornhill Doctrine, the limitations on the right to picket forced the unions to adopt other measures of economic pressure. In most cases these measures were objectionable to the public and not in keeping with the traditional philosophy of the American labor movement. The culmination of these practices in combination with the wave of strikes in 1946 soon led to the LMRA of 1947 which provided a new set of implications and restrictions on the legal status of picketing.
CHAPTER III

THE STATUS OF PICKETING UNDER THE LMRA

Partially as a result of state agitation and national industrial unrest and principally due to the presence of a political climate unfavorable to labor unions, Congress in 1947 passed the LMRA which established the first statutory restrictions on the law of picketing. Although the Act did not directly refer to picketing, the implied restrictions on picketing in Section 8(b) were destined to become a center of legal controversy for the National Labor Relations Board (NLRB) and the state and federal courts.

The most controversial section of the new labor law was the so-called unfair labor practices provision, Section 8(b). The twelve year period between the NLRA of 1935 and the LMRA of 1947 was characterized by an unusual amount of industrial conflict. The passage of the NLRA in 1935 signified the beginning of a new era in labor relations. For the first time in the history of the United States, the power of the federal government was joined with the forces of labor against the collective interests of employers. The preamble of the NLRA declared that it should:

... be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions, when they have occurred
by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. ¹

With the new found support of the federal government coupled with the favorable conditions of the depression, labor unions experienced a dramatic increase in membership. New unions were spawned in the heretofore unorganized mass production industries; e.g., steel, automobiles, electronics, rubber, and similar industries. Under the leadership of John L. Lewis, these new unions soon broke with the Executive Board of the American Federation of Labor and formed a separate federation, the Congress of Industrial Organizations. With the breakup of the previous center of power, the two federations were thrust into a continuing struggle for control of the labor movement. As this struggle for power widened the split in the ranks of labor, it was almost inevitable that unions would engage in unpopular practices and policies. Strikes in support of the closed shop, strikes for higher wages during the war, the unpopular clashes between John L. Lewis' miners and the Roosevelt administration, and the numerous work stoppages and strikes after VJ Day produced a dramatic shift in public opinion. The swing in public opinion was keenly manifest in the preamble of the LMRA which states that industrial experience since the NLRA has "... demonstrated that certain practices by some labor organizations ... have ... the

"effect of . . . obstructing commerce . . . The elimination of such practices is necessary . . ."\(^2\) for the guarantee of the rights established by this Act.

THE PICKETING RESTRICTIONS

In respect to strikes, picketing, and secondary boycotts, the LMRRA regulated these activities by forbidding all conduct whose purpose was to achieve those objects declared to be unlawful by Section 8(b) of the Act. Section 8(b)(1)(A) made it unlawful "... to restrain or coerce employees in the exercise of their rights . . ."\(^3\) guaranteed by violence or threats. Section 8(b)(1)(B) forbids activity whose object is to influence the employer in the selection of an agent for purposes of collective bargaining. Section 8(b)(2) prohibits activity to cause an employer to discriminate against employees in regard to their employment for the purpose of encouraging or discouraging union membership. Section 8(b)(4) prohibits any activity which induces or encourages "... the employees of any employer to engage in ..."\(^4\) or sympathize with a strike or refusal to work\(^7\) . . . where an object thereof is (A) forcing or requiring any employer or self-employed person to join . . ."\(^4\) a labor organization. The second part of Section 8(b)(4)(A)

\(^2\)Tbid., LXI, Part I, 137.

\(^3\)Tbid., p. 141.

\(^4\)Tbid. This section of the LMRDA has since been construed to forbid so-called owner-worker picketing where the object is to force the owner-worker to join a labor union as, for example, in the Senn case.
(the secondary boycott provision) forbids activity whose object is to force "... any employer or any other person to cease ..." doing business with another employer. Section 8(b)(4)(B) forbids activity (picketing) whose object is to persuade an employer to bargain with an organization which has not been certified by the NLRA. Section 8(b)(4)(C) prohibits activity to force an employer to bargain with one union when another union has already been certified by the NLRA. Section 8(b)(4)(D) prohibits activity whose object is to further the cause of a labor organization engaged in a jurisdictional dispute with another labor organization.

It seemed clear from the legislative history of the LMRA that Congress intended to prohibit all activity— including picketing— which sought to achieve ends which were declared unlawful in Section 8(b). There was apparently no attempt or intent on the part of Congress to distinguish between secondary or primary action if the purpose of the action was to achieve an unlawful object. On the other hand, it was apparent that Congress did not wish to place any restrictions on primary action as protected by Section 7 of the NLRA if the object did not constitute a violation of Section 8(b).

5Ibid.

6This section was designed to forbid sympathetic strikes and boycotts in support of a union demanding recognition and bargaining rights as proscribed under Section 9 of the Act.
INTERPRETATION OF THE PICKETING RESTRICTIONS

The difficulty presented by the unfair labor provisions of the Act arises from the different interpretations which may be drawn from Section 8(b)(4)(A). Much of the confusion surrounding the meaning of this subsection can be traced to the legislative debate over the substitution of the words "an object" for "the purpose" which appeared in the original draft of the Senate bill. An examination of the congressional record reveals that the proponents of the bill, including Senator Taft, were concerned about the effects of strikes and picketing on "neutrals" in a labor dispute.\(^7\) In an effort to protect these innocent parties, the supporters of the bill became fearful that "the purpose" was too restrictive and substituted "an object" which would seemingly preclude the possibility of placing a narrow construction on the word "purpose"; i.e., that the courts might construe the activity as being the "sole purpose." The unfortunate result of this substitution was to provide the possibility of judicial sanctions against primary action. It was soon recognized by the opponents of the Thornhill Doctrine that it was readily possible to construe "an object" in such a way as to restrict primary conduct if the object of the strike or picketing was to curtail the business operation of the primary employer by interfering with the distribution of products or the receipt of supplies. Thus the substitution of "an object" for "the purpose"

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\(^7\) 793 Cong. Rec. 4198.
left the NLRB and the courts in the difficult position of deciding whether to adopt a narrow construction of Section 8(b)(4)(A), which would place severe limits on the right to strike and the right to picket, or to adopt the broader construction that Section 8(b)(4)(A) was intended to restrict secondary activity against neutrals.

A secondary problem which evolves from these two alternative elections under Section 8(b)(4)(A) is whether Congress intended to place an all-inclusive ban on the "means" of achieving a particular object or whether Congress intended to prohibit a particular means of achieving a given object. Although the term secondary boycott is difficult to define, the alternative methods of accomplishing a conscription of neutrals to a dispute is primarily limited to (1) picketing to encourage union members to refuse to handle goods or perform services for a particular employer because he persists in doing business with an employer who for some reason is said to be unfair, or (2) picketing which urges the public (including union members) not to purchase goods from an employer who is unfair to the union's point of view. With some restrictions it may be assumed the Congress intended to limit legitimate secondary activity under Section 8(b)(4)(A) to that described in (1) above. But this implied congressional intent is conditioned by the

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8 This type of picketing is sometimes referred to as signal picketing, where the placard carried by the picket is intended to be a signal to other unions not to cross the picket line. The effectiveness of this form of picketing is determined by the relationship between the unions concerned. The decision to cross or not to cross a picket line depends on the local's interest in the primary issue.
problem of deciding where primary activity ends and secondary activity begins and the further difficulty of determining whether the injured party is a neutral to the dispute. In summary, while Section 8(b) of the LMRA outlawed conduct whose purpose was held to be unlawful, Section 8(b)(4)(A) created two equally formidable problems: (1) whether the phrase "an object" would be interpreted in accordance with the narrow or broad construction, and (2) whether the restriction on secondary boycotts was intended to proscribe both signal and consumer picketing. If Congress intended to ban both of these general forms of picketing, it was evident that such a restriction would be in conflict with the free speech guarantee of the Thornhill Doctrine, thus raising constitutional doubts as to the validity of the LMRA. Consequently, the United States Supreme Court could either declare the LMRA unconstitutional as an abridgment of free speech or restrict the application of the Thornhill Doctrine by allowing state and federal courts to enjoin picketing if "an object" of the picketing was in conflict with the implicit limitations of Section 8(b).

The first test of the constitutionality of the LMRA to reach the Supreme Court was Giboney v. Empire Storage Ice Company. The facts of this case present an interesting parallel to the case of Bakery and Pastry Drivers v. Wohl which was decided by the Supreme Court in 1942.

9336 U.S. 490 (1949). This was not the first picketing case under the LMRA, but it was the first representative case accepted by the Supreme Court.
As in the Wohl case where the bakery drivers' union sought to compel the nonunion peddlers to hire union helpers, the union drivers in the Giboney case were attempting to force the nonunion coal and ice peddlers to accept union membership with an object of improving working conditions. These two cases are representative of numerous situations where employers, due to depressed economic conditions, were forced to layoff their drivers and helpers and to convert the delivery process into an independent operation. The employers were:

... thereby ... able to reduce overhead ... and they could also cut costs in two direct ways. First, they eliminated any possibility of idle time for which the employees would have to be paid; and second, the independent contractors who replaced the employees—they were often the same individuals—worked longer hours for a smaller income than had the employees.10

The immediate effect of this practice was to hamper the operations of those employers who continued to employ union drivers, resulting in conditions which would eventually "undermine labor standards."11 The union drivers in the Wohl case attempted to stop this depreciating situation by picketing the bakeries in an effort to bring pressure on the nonunion drivers. In the Giboney case the union obtained agreements from all the wholesale distributors in Kansas City, with the exception


of Empire, to the effect that they would not sell ice to the nonunion peddlers. When Empire refused to acquiesce to the union's demands, the drivers established picket lines protesting the "... sale of ice to non-union peddlers."12 As a consequence of the picketing, Empire's business was reduced approximately 85 percent, and Empire brought a suit under a 1939 Missouri antitrust statute which forbade agreements in restraint of trade. The trial court issued a preliminary order holding that the picketing was intended to obtain an unlawful purpose and that an injunction against an unlawful act "... did not contravene ... the union's ... right of free speech."13 The Supreme Court of Missouri affirmed the decision of the trial court and the union appealed, contending that "... the primary objective ... of the picketing ... was to improve wage and working conditions ... and that their violation of the state ... law was ... incidental to this lawful purpose."14

The facts of this case presented the Supreme Court with a clear question: whether to extend constitutional protection to peaceful and truthful secondary picketing or to protect the employers' rights to engage in unrestricted competition free from peaceful economic reprisals. In a unanimous decision Mr. Justice Black, speaking for the Court, held

12 336 U.S. 492.
13 Ibid., p. 494.
14 Ibid.
Neither *Thornhill v. Alabama* nor *Carlson v. California* ... the contention that conduct otherwise unlawful is always immune from state regulation because an integral part of that conduct is carried on by display of placards by peaceful picketers. In both these cases ... struck down statutes which banned all dissemination of information by people adjacent to certain premises, pointing out that statutes were so broad that they could not only be utilized to punish conduct plainly illegal but could also be applied to ban all truthful publications of the facts of a labor controversy.\(^{15}\)

In applying the test of the Thornhill Doctrine, Justice Black emphasized that courts must be careful not to restrict the police power of the state so as to substantially impair the power of the state in its administration of industrial disputes. In permitting the state to exercise its police powers the Court is mindful of the importance of protecting freedom of speech. But picketing "... to effectuate the purposes of an unlawful combination ..."\(^{16}\) cannot be protected under the theory that it is a legal pursuance of an unlawful object.

By the same token Justice Black sought to distinguish between the facts of this case and those of the Wohl decision which upheld picketing as a right of free speech. In justification of the departure from the reasoning of the Wohl case, Justice Black said that it seems:

\[ \ldots \] clear that appellants were doing more than exercising a right of free speech or press [*Bakery Drivers Local v. Wohl*; Citations Omitted]. They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than

\[^{15}\text{Ibid.}, \text{pp. 498-499.}\]

\[^{16}\text{Ibid.}, \text{p. 502.}\]
by state regulation of trade.17

In summary, Justice Black's decision in the Giboney case limited the rule of the Thornhill Doctrine by allowing the states to enjoin picketing if the state law prohibited picketing provided the statute in question did not establish broad restrictions on the right of speech. Thus peaceful picketing might be enjoined by the states if the object constituted a violation of the restrictions in Section 8(b) of the LMRA. The Giboney decision exhibits a careful but graceful retreat from the position of equality with free speech. In this decision the means employed and the objective sought by the picketing provided the test for determining the legality of the state law. Under this test the objectives sought in the Senn, Swing, Wohl, and Ritter cases would be illegal, but the Swing decision was unequivocally equated to free speech.

The shift in judicial interpretation between the Wohl decision in 1942 and the Giboney decision in 1948 presents some interesting conclusions.

<table>
<thead>
<tr>
<th>Object</th>
<th>Injured Party</th>
<th>Source of Injury</th>
<th>Method of Injury</th>
<th>Source of Dispute</th>
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</thead>
<tbody>
<tr>
<td>Wohl</td>
<td>Improvement of working conditions</td>
<td>Business enterprise</td>
<td>Union drivers</td>
<td>Picketing</td>
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<tr>
<td>Giboney</td>
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17Ibid., p. 503.
As illustrated by the foregoing comparison, the injury, object, parties, source, and method of injury are the same in both cases. Moreover, the injury in the Giboney case is not substantially different from the type of injury in the cases immediately prior to the LMRA. Any distinction, therefore, between the Giboney case and prior decisions must be derived from the result of the injury itself, i.e., because the intent in both Giboney and Wohl was to force the nonunion drivers to adopt policies favorable to the union drivers. In the Wohl case the effect of the injury, other things equal, was probably an increase in costs with higher prices to consumers. Although the pattern in the Giboney case would probably have followed the same course of events, the union sought to effectuate its purpose by using the other wholesale dealers as allies in support of the picketing. The Supreme Court viewed this result as a dangerous threat since it is well-known, at least in judicial circles, that combinations are inherently evil because they reduce competition, drive up prices, and injure the public. This form of economic coercion cannot be tolerated in a free market system; and it is the right of the state, in the words of Justice Black, to determine the public interest and to regulate unions for the purpose of keeping "... the channels of trade wholly free and open." While Justice Black was reluctant to

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18Even if other things should be equal, it is dangerous to assume that an increase in costs via increased wages would necessarily cause an increase in prices. For an extensive examination of this problem see Gordon F. Bloom and Herbert R. Northrup, Economics of Labor Relations (Third Edition; Homewood: Richard D. Irwin, Inc., 1958), Chapter 13.

19336 U.S. 497.
maintain that the injury affects the entire public, he was willing to enjoin the picketing on the grounds that it might possibly affect the public even though the immediate purpose was to force Empire to cease selling ice to nonunion drivers.

The difficulty in defending Justice Black's position stems from the fact that his opinion permitted a reluctant wholesaler to combine with nonunion peddlers to defeat the apparent legitimate purpose of the union drivers. Thus the legislature of the State of Missouri was able to regulate the dispute by default. Although there may be some basis for justifying immunity of state laws from judicial attack, the theory of the Thornhill case was not formulated on these grounds. On the contrary, the object in Thornhill's case was to strike down laws which have the effect of preventing peaceful dissemination of the facts of a labor dispute. This is not to say that the state was denied the right of regulating violence or breaches of the peace which are in conflict with public interest, but to say that the facts of the Giboney case constitute a clear and present danger would seemingly stretch the test beyond its intended result. While Justice Black attempted to justify the Giboney ruling that the picketing constituted a violation of Missouri law representing a clear and imminent danger to the prosecution of that statute, an analysis of the decision indicates that clear and present danger was a dead letter at law. Nevertheless, the Court continued to pay homage to the clear and present danger test even though
the practical application of the doctrine had long since been discarded in favor of the unlawful object test as first formulated in *Carpenters Union v. Ritter*.

In the following term the Court reviewed three cases which expanded the limitations of the Giboney ruling. In the first of these cases, *Hughes v. Superior Court of California*, the California Supreme Court enjoined the plaintiff from picketing certain grocery stores for the purpose of forcing the stores to employ negroes in the same ratio (50%) as their negro customers. Speaking for a unanimous Court, Justice Frankfurter outlined the philosophy of the Ritter and Giboney decisions stating that:

> It is amply recognized that picketing, not being the equivalent of free speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a state if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance . . .

In commenting on the importance of judicial decisions as doctrines of public policy, Justice Frankfurter rejected the claim that the policy pronouncements of the courts are not equivalent to legislative statutes. The state may, as a process of law, allow the courts to formulate the method and the scope of the law. The court is the practical instrument of the state and in the course of its duty it may devise

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21. Hughes and others were not members of a labor union.

solutions which are "rough accommodations" and unscientific in nature.

A state is not required to exercise its intervention on the basis of abstract reasoning. The Constitution commands neither logical symmetry nor exhaustion of principle . . . Law making is essentially empirical and tentative, and in adjudication as in legislation the Constitution does not forbid "cautious advance, step by step, and the distrust of generalities." 23

Justice Frankfurter, by argument and implication, was suggesting that the terminology of the Thornhill Doctrine and its companion cases was an unfortunate grouping of "generalities" which by necessity require interpretation and practical implementation. The philosophy of the Thornhill case, although acceptable in spirit, must be supplemented by a "rule of reason" which will permit the courts to effectively regulate industrial disputes.

The unusual demonstration of judicial harmony in the Giboney and Hughes decisions 24 lasted for one additional picketing case, Building Services Employees v. Gazzam. 25 In the Gazzam case the Washington Supreme Court had affirmed an injunction of a state court restraining the plaintiff (union) from picketing the defendant (Gazzam). At the time of the dispute, Gazzam operated a small hotel in Bremerton, Washington. On May 1, 1946, the union petitioned Gazzam for the right to organize his employees and requested Gazzam to sign a union shop

23 Ibid., pp. 468-469.

24 The decisions in the Giboney, Hughes, and Gazzam cases were unanimous with the exception of a concurring opinion by Justice Black that he believed that the facts of Hughes and Gazzam were controlled by the ruling of the Giboney case. Apparently Justice Black was of the opinion that his terminology in the Giboney case was more to the point.

contract. Gazzam indicated that he had no objection to the union's request and that he would permit the union representatives to solicit membership from his employees. The next day the union again requested Gazzam to sign a union shop agreement advising the defendant that the union might place his business on a "We Do Not Patronize" list. Gazzam refused to sign the contract and the union countered with a request to meet with his employees. The organizational meeting took place on May 10; and, after the union representatives had presented their case, the employees by secret ballot voted against the union by a nine to one margin. The one favorable vote was cast by a bellboy "... whose membership the union did not desire."26 A few days after the vote the defendant was placed on the "Do Not Patronize" list and pickets patrolled in front of the establishment carrying "... a sign reading: 'Enetai Inn—Unfair to Organized Labor.' The picketing was carried on by a single picket at ... time and was intermittent and peaceful."27 Thereafter, the union again called on the defendant and offered to withdraw the picket if Gazzam would sign an open shop agreement with a provision requiring new employees to join the union within fifteen days. Gazzam refused to sign this agreement and subsequently brought a suit against the union, alleging that the intent of the union's offer was to coerce him into signing a contract in violation of a state law. The State of Washington had a labor law which provided

26 Ibid., p. 534.
27 Ibid., pp. 534-535.
that no injunction could be issued in a "labor dispute"—the interpretation in this case being that no "labor dispute" existed and that the picketing was in violation of "... public policy against the employer: coercion of employees' choice of ... \[\square\] ... bargaining representative ..." 28

The issue in this case—whether a state court may issue an injunction restraining picketing as protected by the free speech clause of the Constitution—presented a direct challenge to the LMRA and provided an interesting comparison to the Swing case in which the Court refused to endorse a similar order. In sustaining the injunction in the Gazzam case, Mr. Justice Minton gave attention to the evolution of the free speech guarantees since the Thornhill case. Significant in this review of the status of picketing was Justice Minton's rejection of the petitioner's claim that the Swing case was controlling. Justice Minton distinguished the result in Swing's case on the basis that the State of Illinois had enjoined picketing of Swing's Beauty Parlor in the absence of a labor dispute. The injunction in the Swing decision was interpreted as drawing the circle of competition so small as to limit picketing to the primary employers' employees. The picketing by "strangers" was enjoined as a violation of the due process of law. The effect of this injunction was to prevent the workingmen from exercising their right of communication under the Constitution. In the Gazzam case the law was not construed by the Court in such a way as to "... prohibit

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28 ibid., p. 536.
"picketing of workers by other workers. The construction of the statute ... [in this case] ... only prohibits coercion of workers by employers." 29 The effect of the statute (as interpreted here) does not enjoin "... picketing per se but only that picketing which has as its purpose violation of the policy of the state." 30 Although picketing is more than free speech, it contains elements of free speech which require constitutional protection unless the object of the picketing is in conflict with an established state policy. The injunction granted by the state court was tailored to prevent a violation of a state law. The purpose of this Act "... was to prevent unreasonable judicial interference with legitimate objectives of workers. But abuse by workers ... of declared public policy ..." 31 cannot be condoned any more than violations through judicial interference.

The conflict between the Swing and Gazzam decisions is representative of the shift in judicial philosophy between 1942 and 1948. This transition in judicial opinion, which permitted employers to restrict the broad aspects of the Swing case, was due in part to unpopular practices of unions, the shift in public and legislative sentiment, and the change in the composition of the Supreme Court. Although it is difficult to dismiss the latter element, the first two factors played an important role in changing the opinion of those members of the Court who

29 Ibid., p. 539.
30 Ibid.
31 Ibid., p. 541.
participated in both the Swing and Gazzam decisions. Thus it was not strange to find Justice Frankfurter, the author of the majority opinion in Swing's case, voting with the unanimous majority in the Gazzam case. The change in position by Justice Frankfurter is indicative of the attempt by the Court to formulate the process of judicial opinion on an empirical basis which encourages a "... cautious advance, step by step, and the distrust of generalities." The general rule of the Swing case will no longer suffice; it must be supplemented by specific decisions which will regulate picketing whose purpose has been declared unlawful by federal or state law. The states were therefore encouraged to draw their statutes by defining those objects which were considered to be in conflict with the state's announced public policy. As a result, unions were forced to wage legislative struggles as well as economic conflicts with the employer. The success of union organizing campaigns was thus placed at a decided disadvantage in the agricultural states whose legislatures were typically antiunion. The implications of the Gazzam decision shifted the pendulum of economic and political pressure to the management side of the bargaining table. The consequence of this decision becomes more significant when it is considered in the light of the continuing struggle between unions and management on the industrial frontier. For it is here that the real issues are won and lost. The ability of the union movement to retain or advance its institutional power is essentially dependent on the right of the union to engage in

32339 U.S. 469, extract from Justice Frankfurter's majority opinion in Hughes v. Superior Court of California.
peaceful stranger picketing. The right to picket in the United States has attained a status considerably apart from other countries. Picketing is a reflection of the individual character of the American labor movement: a symbol of the right to protest against practices which are held to be unfair to the future labor movement. When the right to picket is encumbered by the burden of political strife, the future of the labor movement is placed in jeopardy. The institution of market competition, desirable in its impact, has been thrust aside for a political-economic complex which reduces the argument on both sides to a series of unanswerable questions—object, intent, and purpose—resulting in a continuing era of confusion. If the future of industrial competition is dependent on the institutional balance between labor and management, the federal courts should not continually unbalance this equation by issuing opinions which fail to consider the competitive aspects of the market.

The last of the four cases testing the legality of Section 8(b) in regard to picketing was *International Brotherhood of Teamsters v. Hanke.* As in the three previous cases decided during the 1949 term, the Hanke case involved the issue of conflict of interest between the purpose of the picketing and the question of public policy. In this case Hanke and his three sons operated a combination automobile repair shop and used car lot in Seattle, Washington. Although Hanke belonged to Local 309 and displayed the union shop card in his window, he refused

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to comply with a request by Local 882 to close his lot at "... 6 P.M. on weekdays and all day Saturday and Sunday ..."\(^{34}\) The Hankes did not belong to this association and it was their practice to remain open during the periods referred to in the contract. At first, Local 882 attempted to compete with the Hankes, but "in January of 1948, representatives of both locals called upon the Hankes to urge them to respect the limitation on business hours ... or give up their union shop card."\(^{35}\) The Hankes refused to consent to this request and Local 309 established a single picket who carried "... a 'sandwich sign' with the words 'Union People Look for the Union Shop Card' ... As a result of the picketing the Hankes' business fell off heavily and drivers for supply houses refused to deliver parts and other needed materials."\(^{36}\) In response to the union's action the Hankes brought suit, seeking an injunction against the picketing and recovery of money damages. The trial court made an award of $250 in damages and granted a permanent injunction against the picketing. This judgment was later affirmed by the Supreme Court of Washington and the union (Local 309) appealed to the United States Supreme Court alleging that the injunction constituted an "... infringement of the right of freedom of speech ..."\(^{37}\)

In a five to three decision with Justices Minton, Clark, and

\(^{34}\textit{Ibid.},\ p.\ 472.\)
\(^{35}\textit{Ibid.}\)
\(^{36}\textit{Ibid.}\)
\(^{37}\textit{Ibid.},\ p.\ 474.\)
Black dissenting, the Supreme Court affirmed the lower court's injunction. The task before Justice Frankfurter, author of the majority opinion, was quite different from the problems as presented by the Giboney, Hughes, and Cassam cases. In these cases the Court had been asked to determine the legality of picketing in conflict with an announced public policy. In affirming these decisions the Supreme Court adhered to the rule of Thornhill's case by permitting state courts to enjoin picketing where the object was in direct conflict with a state law. The trend of decisions beginning with Ritter's Cafe reflected the new approach that picketing was a hybrid and could not be dogmatically equated with the constitutional protection accorded to speech. But in each of these cases the Court repeatedly indicated that the injunction banning the picketing must be worded in such a way as to restrict the activity as a violation of state law or of the doctrine of public policy as formulated by the courts.

But in Hanke's case, the Washington court had done neither. It did not enjoin the picketing because its objective was to induce action in violation of public policy, nor because state policy excluded self-employers from the area of allowable economic conflict. Rather, picketing was prevented because its consequences in the particular case were considered to contravene the community's best interests. This rationale might be termed the "community interest" rule.38

Thus, under the facts of Hanke's case, Justice Frankfurter was faced with the delicate problem of formulating an opinion which would permit the states to restrict picketing held to be in conflict with established

community interest and which, on the other hand, would protect picketing as a secondary means of communication. In accepting this task Justice Frankfurter stated that the Court must "... strike a balance between the constitutional protection of the element of communication in picketing and the 'power of the state to set the limits of permissible contest open to industrial combatants'—Thornhill v. Alabama--citations omitted." In pursuance of this goal the state's judgment regarding social and economic factors must be respected by the judiciary. It is for the state to govern and establish standards which reflect its judgment. If the state decides to regulate the interplay of competition between employers and unions, the Court must weigh the interest of the state as well as those of the separate economic units. In developing its public policy the state is subject to a process of continual change. In the area of labor-management relations "there are no sure answers and the best available solution is likely to be experimental and tentative, and always subject to the control of the popular will." While the state is always subject to the restrictions of the Fourteenth Amendment, the limitations therein do not prevent the state from establishing a labor policy which seeks to interfere with labor-management relations. The decision to interfere or to pursue a "hands-off" policy is a matter of public policy and is not of judicial concern. As in the Senn case where a Wisconsin court denied injunctive relief to Senn, "... this

39339 U.S. 474.

40 Ibid., pp. 475-476.
"Court held that it lay in the domain of policy for Wisconsin to permit...
or to enjoin... the picketing." The wisdom behind this state law is not subject to judicial interference and may only be interpreted by the state in the construction of its public policy. The facts of the Hanke case, because of the lack of agreement, divergency of opinion, and the importance of the issue in question, present a problem which is in the domain of public policy.

This clash of fact and opinion should be resolved by the democratic process and not by judicial sword. While...

It is not for us to pass judgment on cases not now before us. But when one considers that issues not unlike those that are here have been similarly viewed by other states, and by the Congress of the United States (Section 8(b)(4)(A) of the LMRA) we cannot conclude that Washington, in holding the picketing in these cases to be for an unlawful object, has struck a balance so inconsistent with rooted traditions of a free people that it must be found an unconstitutional choice. Mindful as we are that a phase of picketing is communication, we cannot find that Washington has offended the Constitution.

Of the dissenting justices, only Justice Minton submitted a written dissent. Justice Black dissented on the basis of his opinion in Ritter's Cafe, and Justice Reed concurred with Justice Minton's dissent. Justice Minton objected to the majority opinion on the grounds that the picketing enjoined in the Meadowmoor case and similar decisions was of a variety quite apart from the picketing in the present case. The picketing of Hanke's car lot was peaceful and truthful and was not in violation of any statutory restriction or public policy pronouncement. All

\[41\text{Ibid., p. 476.}\]
\[42\text{Ibid., pp. 478-479.}\]
of the aspects of this case, argued Justice Minton, are in keeping with the free speech doctrine as implied by Justice Brandeis in the Senn case. In that case picketing was accorded a privileged position—publication of a labor dispute—the action of the State of Wisconsin—refusing to interfere with the picketing amounted to a sanction of free speech under the Constitution. "But because Wisconsin could permit picketing, and not thereby encroach upon freedom of speech, it does not follow that it could forbid like picketing . . . ."[43] This Court, contended Justice Minton, has expended considerable effort since the Senn case to establish a system of procedural rules which would permit protection of legitimate picketing and forbid the pursuit of illegitimate or "abusive" picketing which contravenes a statutory law or announced public policy. Since the Court has so painstakingly wrought the doctrine of protection—of legitimate picketing—the State of Washington should not be permitted to upset the natural course of these decisions by outlawing peaceful picketing on the basis that it is in conflict with the best interest of the state.

In analysis of the legal status of picketing between Ritter's Cafe (1942) and the Hanke case (1949), it is evident that the Court abandoned the free speech doctrine in favor of a more restrictive standard which treated picketing as a means of communication rather than as publicity per se. For example, in the Hanke case Justice Frankfurter stated that picketing contains ". . . an ingredient of communication

[43] Ibid., p. 483.
"... a review of... Our decisions reflect recognition that picketing is indeed a hybrid."\(^{44}\) This position disregards the clear and present danger test of the Thornhill and Carlson decisions, substituting the rule of reason as applied in the Gazzam and Hanke cases. In the latter instance picketing is defined as a means or method of publicity and is subsequently treated as a due process of law question wherein the test is reasonableness. Under this theory a state could regulate picketing by statutory law or by public policy as long as the means of regulation was not considered to be in conflict with federal law or the implied restrictions of the free speech doctrine. This summation is supported by the dicta of the Hanke opinion that the State of Washington might intervene and regulate picketing as a matter of policy if the picketing was in conflict with the interest of the community.

The theory which emerged from this case and similar decisions held that the states might regulate picketing if the law or policy in question provided a reasonable test controlling disorder, coercion, or in protecting the general welfare.

**EFFECTS OF SECTION 8(b) LMRA**

The decision of the United States Supreme Court in the Hanke case, with some limitations, was accepted as the controlling decision governing the legal status of picketing until the passage of the LMRDA of 1959. Before considering this period in the legal status of

picketing,\textsuperscript{45} it is necessary to give attention to the consequences of Section 8(b) of the LMRA on the status of picketing. As a brief synopsis of this problem, Section 8(b)(4)(A) conferred on the National Labor Relations Board\textsuperscript{(NLRB)} the immediate and significant authority of determining how the provisions of the subsection should be interpreted and applied to disputes which contained elements of both primary and secondary action. The first test of Section 8(b)(4)(A) under the jurisdiction of the Board arose in the case of \textit{International Rice Milling Company v. NLRB}.\textsuperscript{46} This case resulted from an unfair labor practice complaint brought by the International Rice Milling Company of Crowley, Louisiana.\textsuperscript{47} The respondent union (Local 201 of the International Brotherhood of Teamsters) was attempting to organize the employees of the milling companies in question. In the course of these negotiations the union had several conferences with representatives of the milling companies, but the companies never "... recognized the respondent as the collective bargaining representatives of their employees."\textsuperscript{48} Approximately six months thereafter in September, 1947,\textsuperscript{49}

\textsuperscript{45}The 1949-1959 period is generally referred to as the declining phase of the Thornhill Doctrine.

\textsuperscript{46}\textit{NLRB} 360 (1949).

\textsuperscript{47}The other milling companies affected by this decision were located in Abbeville, Rayne, and Kaplan, Louisiana.

\textsuperscript{48}\textit{NLRB} 366.

\textsuperscript{49}The picket line was established eleven days after the LMRA became law.
the union called a strike against International and the American Rice Milling Company and Louisiana State Rice Milling Company at the Crowley mill. Within the next three days the strike was extended to Rayne and Abbeville, Louisiana. To enforce the strike the union established picket lines at the struck mills which "... extended across the tracks of the Missouri and Southern Pacific ... the pickets carried placards ... bearing ... the following legends ... 

This is a picket line. Respect it. Do not cross it.
This job is unfair to Local 201 ... This job is unfair to organized labor.
High cost low pay blues."50

At first the railroad employees did not respect the picket lines and continued with their normal switching operations. The pickets did make some attempt to interfere by "... clustering on the railroad track ..."51 but when the engine approached they dispersed. A few days later the railroad conductor received a series of phone calls threatening to fire at the railroad employees with buckshot and "... if our pickets won't stop you, dynamite will."52 As a result of these threats, the conductor instructed his crew that each individual "... should use his own discretion in determining whether it was safe to cross the picket lines."53 On October 15, the union intensified its picketing

50 84 NLRB 367.
51 Tbid., p. 368.
52 Tbid., p. 369.
53 Tbid.
operations, and the train crews honored the picket lines and continued to do so until the district court issued an order enjoining the picketing. Thereafter, the pickets were withdrawn from the railroad tracks, but the union continued to picket the mills until the end of 1947. The picketing during this period was peaceful with the exception of one instance when a truck attempting to enter the mill was stoned by the pickets. With the continuance of the picketing, the milling companies petitioned the NLRB charging that the union was violating Section 8(b) (4)(A) of the LMRA by encouraging secondary employers to participate in and support a secondary boycott. At the hearing the union contended that the "... definitions of the terms 'employer' and 'employee' specifically excluded from the scope of the Act, any person subject to the Railway Labor Act ...". In respect to this contention, Senator Taft stated:

I want to point out that railway labor has never been covered by—the Railway Labor Act, which provides a somewhat different procedure. We see no reason to change that situation, because there were no abuses which had arisen in connection with the operation of the Railway Labor Act.

The Trial Examiner rejected the contention of the union, holding that to exclude the railroad and its employees from the term employer and employee under the Act "... would remove from the ambit of Section 8(b), subsections (4)(A) and (4)(B), the industry possibly most directly and extensively concerned with commerce ..." and would violate

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54 Ibid., p. 373.
5593 Cong. Rec. 6658.
"the clear intent of Congress ..."56 namely, that the broad usage of "any employer or other person" in 8(b)(4)(A) was intended to include the railroads and their employees.

The Trial Examiner's report ordering the union to cease and desist from the described activities was reviewed by the NLRB in June of 1949. The NLRB dismissed the complaint and the prior order stating that:

In view of the clear language of the ... Act ... we must conclude that none of the Respondent's ... activities induced or encouraged employees of an employer to engage in a secondary boycott, within the meaning of the ... Act ... 57

The milling companies appealed the decision of the NLRB to the Circuit Court of Appeals. With Judge Edwin Holmes presiding, the Circuit Court set aside the NLRB's order holding that:

A close reading of the language used in Section 8(b)(4) convinces us that by the use of the words "any employer" Congress intended to extend the section to any and all situations relative to the one we have before us. ... In construing a statute, it is necessary that every word be given significance and effect, and every part of the statute must be construed in connection with the whole, so as to make all parts harmonize. ... The words "any employer" as used in Section 8(b)(4) appear to us to refer to the same employer as described in Section 8(b)(4)(A) by the words "any employer or other person." Thus we see the use of the words "any employer or any other person" being used to amplify and explain the words any employer. ... Noscitur a' sociis: the meaning of a word may be ascertained by reference to the meaning of words associated with it.58

In respect to the NLRB's order holding that the picketing related to the

56 84 NLRB 375.
57 ibid., p. 361.
58 183 F. 2d. 21, 25.
stomping of the truck was a case of primary picketing and thus protected by the Act, the Court said the Board's decision:

... attempts to draw a fine distinction between primary and secondary action. . . .

The statute clearly provides a remedy for the type of conduct engaged in by the union, without resort to any distinction between primary and secondary activities. If the union's activities come within the language of the statute, they constitute an unfair labor practice. . . . We do not think the ends of justice will be best served by if we allow the Board to overturn . . . /the Trial Examiner's/ . . . finding merely because it considers all the activities to be primary instead of secondary. . . . The fact . . . /that the picketing in question/ . . . occurred near the struck employer's plant is not enough to draw the distinction . . . /that the picketing was primary and not within the Act/ . . . The graveness of the offense prohibited by the statute is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some neutral employer who has no concern in the dispute, and its aim is to compel him to stop business with the employer in the hope that the employer will be induced to submit to the demands of the strikers. To allow the Board to rule such activity as prohibited by the statute not to be a violation thereof, simply because it occurred in the vicinity of the struck employer's plant, would render the section ineffective and insufficient. 59

If the distinction by the Board that the picketing was primary because it occurred in the vicinity of the employer's plant was, in the words of the Circuit Court, on technical grounds, the Court's contention that the railroad company was a "neutral" is in similar jeopardy. In every industrial dispute one certain object of strikes or picketing is to prevent outsiders from aiding the employer. In the instant case if the union could not prevent the sales houses in question from transporting rice from the struck plants, the picketing would have been to no avail. The holding of the Circuit Court clothing the sales house with

59 ibid., pp. 26-27.
the shroud of neutrality sets aside the essential purpose of the law. It seems clear that Congress did not intend that Section 8(b)(4) should be construed by the courts as a means of restricting primary picketing but as a ban against secondary boycotts where the activity in question is outside the primary situs and against a true neutral. In this situation the employer is justified in seeking an injunction to restrain the union from soliciting aid from disinterested parties, but the facts of the Rice Milling case do not apply to this form of legitimate intervention. The denial of the right of protest in this case places the employees at a serious disadvantage. Picketing as a means of publication and economic reprisal is the most significant and, in the majority of cases, the only formidable weapon available to unorganized employees. The consequences of the Circuit Court's ruling in the Rice Milling case imposed an arbitrary sanction on the rights of employees and effectively limited their struggle to improve working conditions. Although the opinion of the Circuit Court was subsequently overturned, the lapse of time between the decision of the Circuit Court and that of the United States Supreme Court served as an effective barrier on the union's ability to develop an organized front for purposes of collective bargaining.

The Rice Milling case was argued before the United States Supreme Court in February, 1951, and was decided in June, 1951. In a unanimous decision, with Justice Burton writing the opinion, the Court set aside the ruling of the Circuit Court holding that there was no intent in the Act, or by virtue of its legislative history to interfere
with the union's traditional rights. "The union's picketing and its encouragement of the men on the truck . . . [in question] . . . did not amount to such inducement or encouragement to 'concerted activity as . . . [Section 8(b)(4)] . . . prescribes.'"60 At the same time the Court took special emphasis to assert that each case must be considered on its merits holding that since the complaint in the present case was limited to a single incident there is no need ". . . to determine the specific objects toward which a union's encouragement of concerted conduct must be directed in order to amount to an unfair labor practice under subsection (A) or (B) of Section 8(b)(4)."61

THE STATUS OF NEUTRALS UNDER THE LMRA

On the same day as the decision in the Rice Milling case, the Supreme Court affirmed three decisions in which the NLRB had found violations of Section 8(b)(4)(A).62 In one of these cases, NLRB v. Denver Building and Construction Trades, the Supreme Court considered the question of whether 8(b)(4)(A) was applicable to a situation involving both primary and secondary action. In the Denver case a building trades council had protested the employment of nonunion men by a subcontractor on a construction project. When the general contractor refused to order

61 Ibid., p. 671.
the nonunion workers off the job, the union placed a single picket at
the entrance to the project. All of the union employees honored the
picket line, and the construction of the building was brought to a
virtual standstill. Thereafter, when the union requested the general
contractor to order the nonunion men off the job, he complied with the
request and the union men returned to the project. As a result of these
actions the subcontractor filed charges with the NLRB alleging that the
picketing was intended "... to force the general contractor to cease
doing business. ..." with them. The NLRB accepted the subcontractor's plea holding that picketing for the purposes of forcing A to exert
pressure against B to either employ union men or give up his contract was
proscribed by Section 8(b)(4)(A) of the LMRA as an unfair labor practice.
The union appealed the NLRB's decision to the United States Court of
Appeals which set aside the Board's order on the grounds that the action
was primary and not secondary in nature and therefore did not meet the
test of Section 8(b)(4)(A). In accepting jurisdiction in this case,
Justice Burton, speaking for the United States Supreme Court, phrased
the pertinent question of law as:

We must determine whether the strike ... here ... had a pro-
scribed object. The conduct which the Board here condemned is
readily distinguishable from that which it declined to condemn in
the Rice Milling case [citations omitted]. There the accused union
sought merely to obtain its own recognition by the operator of the
mill, and the union's pickets near the mill sought to influence two

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63 341 U.S. 680.

64 186 F. 2d. 326, 337.
employees of a customer of the mill not to cross a picket line. In that case we supported the Board in its conclusion that such conduct was no more than was traditional and permissible in a primary strike. The union did not engage in a strike against the customer. It did not encourage concerted action by the customer's employees to force the customer to boycott the mill. It did not commit any unfair labor practice proscribed by Section 8(b)(4). 65

In the Denver case, however, the object was to force a neutral, the general contractor, to stop doing business with the subcontractor. This type of activity is unlawful under the LMRA since it meets the test of 8(b)(4)(A), which makes a secondary boycott an unfair labor practice. Thus Justice Burton concluded that the decision of the Board conforms "... with the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." 66

The Board's interpretation that Section 8(b)(4)(A) was not intended as a ban against lawful primary action raised a secondary issue of establishing a suitable criteria for determining the status of neutrals to the primary dispute. In light of the decision in the Rice Milling case it became quite obvious that if the employer in question was a regular customer of the primary employer the union might escape or substantially limit the restrictions of Section 8(b)(4)(A), the theory being that a regular customer of the primary employer could not overcome the neutrality requirement. The Board, however, refused to accept this

65341 U.S. 687-688.

66Ibid., p. 692.
reasoning holding that employers in the course of their everyday affairs are, by virtue of the competitive pressures, forced to do business with a myriad of independent contractors. The relations between these firms are independent of employer-employee relations, and the normal course of business is not sufficient to bind employers and their employees together as a common unit.\(^67\) The only exception to this definition has been in the application of Section 8(b)(4)(A) to special circumstances where business of the employers is said to be so that the "neutral" in effect is an "ally" of the primary employer. In *Douds v. Metropolitan Federation of Architects, etc.*\(^68\) the union picketed another engineering firm with whom the primary employer (Ebasco) subcontracted a considerable amount of business. The subcontractor Project Engineering Company had been organized about one year prior to the strike at Ebasco. Although entirely independent of Ebasco, Project's business was identical to that of Ebasco, and a few months after its organization Project began to perform an appreciable percentage of Ebasco's work. This percentage continued to increase until the time of the strike, when "... about 75% of ... [Project's] ... work was Ebasco's."\(^69\) The integration between Project and Ebasco eventually became so complete that Ebasco advertised its services as including engineers who were employed

\(^67\)See Schenley Distillers Corporation, 78 NLRB 504 (1948); Climax Machinery Company, 86 NLRB 1243 (1949); Ira A. Watson Company, 80 NLRB 533 (1948); and the Denver Building case (footnote 62).

\(^68\)75 F. Supp. 672 (1948). The picketing was the result of a dispute over a new contract between the primary employer and his employees.

\(^69\)Ibid., p. 674.
by Project. As a further testimony of their relationship the companies
normally exchanged time sheets, and Ebasco's "... supervisory
personnel made regular visits to Project to oversee the work on
subcontracts."\(^{70}\)

With the continuation of the picketing at Project,\(^{71}\) the NLRB
petitioned the district court for an injunction to enjoin the union from
picketing the secondary employer. Upon review of the case the court
refused to grant the injunction holding that Project was not "doing
business" with Ebasco within the meaning of the Act.

To suggest ... \(\text{said the Court}^{72}\) ... that Project had no interest
in the dispute between Ebasco and its employees is to look at the
form and remain blind to substance. In every meaningful sense it
had made itself a party to the contest. Manifestly it was not an
innocent bystander, nor a neutral. It was firmly allied to Ebasco
and it was its conduct as ally of Ebasco which directly provoked the
union's action ... The economic effect upon Ebasco's employees
was precisely that which would flow from Ebasco's hiring strike-
breakers to work on its own premises. The conduct of the union in
inducing Project's employees to strike is not different in kind from
its conduct in inducing Ebasco's employees to strike if the latter
is not amendable to judicial restraint neither is the former.\(^{72}\)

Since the Metropolitan Federation case the NLRB has shown some
inclination to accept the reasoning of the district court protecting
picketing of some "neutrals." However, the Board has refused to extend
the application of the ally doctrine to cases whose characteristics do
not conform to the special facts of the Metropolitan decision. In

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\(^{70}\)Ibid.

\(^{71}\)The initial complaint was submitted by the Project Company.

\(^{72}\)Ibid., pp. 676-677.
summary of the economic alliance cases, the NLRB has consistently refused to accept complaints if the "neutral" employer has received goods-in-process from the struck employer. The Board has also refused to accept petitions in those industries characterized by a high degree of integration between the general contractor and the subcontractors.

This experience has recently received further attention under the second proviso of the LMRDA of 1959 which exempts the application of Section 8(b)(4)(B) from the garment industry.

PICKETING AND SECONDARY ACTION

In addition to the issues of protecting primary picketing, determining the status of neutrals, and the limitations of the ally doctrine, the question of what constituted secondary action under Section 8(b)(4)(A) proved to be an equally technical question for the NLRB. Even if the secondary employer is entirely neutral to the dispute and

73Since 1948 the NLRB has refused to issue complaints in the Climax Machinery case (footnote 67), the Ira A. Watson Company case (footnote 67), and IBW v. NLRB (footnote 62). In contrast, the "ally doctrine" was adopted by the Court of Appeals in NLRB v. Business Machines and Office Machine Mechanics, 228 F. 2d. 553 (1955); and by the NLRB in International Die Sinkers Conference, San Jacinto Die Sinkers Lodge 410, and General Metals Corporation, 120 NLRB 1227 (1958).

74See the statement of George J. Batt, General Counsel, NLRB, before the Committee on Labor and Public Welfare of the United States Senate, April 28, 1958.

7584 NLRB 360.

76341 U.S. 675.

7775 F. Supp. 672.
not an ally of the primary employer, it does not necessarily follow that
picketing designed to restrict the normal flow of business between the
employers in question will be proscribed by Section 8(b)(4)(A). The
legality of such activity depends on whether the picketing is held to be
primary or secondary action. Unfortunately, the legislative history of
the Act did not provide sufficient documentation to adequately define
the meanings of these terms, and it was necessary for the NLRB and the
courts to formulate a definition through case experience. In developing
a working definition of primary versus secondary action, the Board has
given special consideration to the location of the activity in ques-
tion. The situs of the dispute is of particular importance in those
cases in which two or more employers customarily utilize the facilities
in question. In order to pursue the evolution of this special problem,
it is quite helpful to separate the cases in accordance with the loca-
tion of the activity; i.e., at the primary premises, at the separate
neutral premises, at the ambulatory premises, at the roving premise in
(a) transportation and (b) construction.78

At the primary premises. Because of the phrase in Section 8(b)
(4) that it shall be an unfair labor practice to:

78 For a more explicit discussion of this procedure see Donald
H. Wollett and Benjamin Aaron's Labor Relations and the Law (Second
Edition; Boston: Little Brown & Co., 1960), pp. 305-320; also see Sidney
Sherman's "Primary Strikes and Secondary Boycotts," Labor Law Journal,
... induce or encourage the employees of any employer to engage in ... a concerted refusal ... to use ... transport, or otherwise handle ... where an object thereof is:

(A) forcing ... any employer ... to cease using ... handling, transporting, or otherwise dealing with the manufacturer ...

Many writers believed that picketing which induced employees of "neutrals" to engage in a "concerted refusal" would be a violation of the LMRA. In interpreting the so-called secondary boycott clause the NLRB has attempted to protect the traditional right to strike and the right to picket from attacks through the concerted refusal clause of Section 8(b)(4)(A). In developing this basis of interpretation the Board has upheld the right to picket if the union could establish that the picketing is primary in character as well as in purpose. An important factor in the formulation of this principle has been the location of the picketing. Thus, if the picketing takes place at the premises solely occupied by the primary employer, the NLRB and the United States Supreme Court have held that activity which causes secondary employees to take part in a labor dispute does not violate Section 8(b)(4)(A). In the Santa Ana Lumber Co. case the Board held that the picketing which occurred at the primary employer's yard or the practice of following the company's trucks to the delivery point "... was traditional


80 84 NLRB 360.

81 87 NLRB 937 (1949).
"primary action which is not outlawed by Section 8(b)(4)(A)."\textsuperscript{82}

At the separate neutral premises. When the picketing takes place at the premises which are solely occupied by the neutral, the NLRB has held the activity to be a violation of the secondary boycott provision, the theory being that the intended injury is too remote from the source of the original dispute. In the Wadsworth Building Company case\textsuperscript{83} the carpenters' and joiners' union had picketed a building project with the object of inducing the employees of secondary suppliers to refuse to deliver materials to the project to cause the general contractor "... to cease doing business with Wadsworth."\textsuperscript{84} The Board held that the picketing in this instance could not escape the proscription of Section 8(b)(4)(A). The object of the unions to unionize the building project regardless of its merit is immaterial to the process of law. This type of product boycott, argued the Board, is "... one of the precise evils that...\textsuperscript{75} provision was designed to curb."\textsuperscript{85} In reference to the legislative debate on this question, Senator Taft testified that:

... this provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned with the disagreement between an employer and his employees.

\textsuperscript{82}Ibid., p. 940. Also see D. Giorgio Fruit Corporation v. NLRB, 191 F. 2d. 642 (1951), cert. den., 342 U.S. 869 (1951).

\textsuperscript{83}81 NLRB 802 (1949), cert. den., 341 U.S. 947.

\textsuperscript{84}Ibid., p. 803.

\textsuperscript{85}Ibid., p. 806.
It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between the different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice. 86

In summarizing the debate over the meaning of Section 8(b)(4)(A) regarding picketing of a neutral situs, the Board held that "... Section 8(b)(4)(A) prohibit[ed] peaceful picketing, as well as other peaceful means of inducement and encouragement ... and that Section 8(c) does not immunize such conduct." 87 The majority's decision that Congress intended to strike down secondary boycotts as a legitimate means of economic pressure drew vigorous dissents from members Huston and Murdock. The dissenting members objected to the majority's assumption that peaceful picketing was prescribed by the words "induce or encourage" in Section 8(b)(4)(A) and that Section 8(c) would not protect peaceful picketing from the proscription of the secondary boycott clause. The interpretation by the majority that Section 8(c) could not act as a means of protecting peaceful picketing at the separate premises of the neutral has the effect of inserting "... an exception to the express language in Section 8(c) guaranteeing freedom of expression to all concerned under the Act, 'regardless of any other provision.'" 88

According to the majority's analysis of the congressional intent. Section

87 81 NLRB 815. Section 8(c) provided that peaceful protest should not constitute evidence of an unfair labor practice.
88 Ibid., p. 823.
8(c) "... would read ... 'under any provisions of this Act, except Section 8(b)(4)." 89

In reviewing the legislative history of Section 8(c) and Section 8(b)(4)(A), members Huston and Murdock contended that there was no evidence that Senator Taft or the members of his committee intended that the terms "induce or encourage" should act as a bar to peaceful picketing as protected by Section 8(c). Although there seems to be some confusion in the series of legislative debates which took place between Senator Taft and Senator Pepper, who was extremely critical of the broad language of Section 8(b)(4)(A), Senator Taft believed that the section would outlaw strikes leading to secondary boycotts but not peaceful picketing; for if Section 8(b)(4)(A) forbids peaceful picketing as a form of inducement, the exception under Section 8(c) becomes a dead letter. The only plausible answer to this dilemma in interpretation is to assume that Congress intended to outlaw secondary boycotts and, at the same time, protect peaceful expression as a constitutional right. In defense of this position Senator Taft stated that "Subsection (c) of Section 8 relating to the right of employers, employees, and labor organizations to express opinions and views ... conforms with the House version and is intended to insure the exercise of constitutional rights." 90 Senator McClellan, who supported the conference version of the Bill in the Senate, interpreted the purpose of Section 8(c) by  

89 Ibid.

90 93 Cong. Rec. 6601 (June 5, 1947).
emphasizing that:

... whether the court knows it or not, whether administrative offices will know it or not, every other citizen with common understanding and who can read the language will know that it was not the intent of the Congress to deprive any citizen, either employer or employee of a right guaranteed under the Constitution.91

As further evidence of the intent of Congress to exempt peaceful picketing from the secondary boycott clause, it is significant to note that "... the original House version of the Bill ... specifically proscribed three types of picketing ... 92 Significantly ... all references to picketing, whether peaceful or otherwise, were omitted from the conference version of the Bill."93 Although there may be some question of interpretation, the Bill was apparently a compromise between the opponents of secondary boycotts and the proponents of peaceful picketing. The Board and the courts were thus left with the dilemma of determining whether to adopt a broad or narrow application of Section 8 (b)(4)(A). The decision to accept a broad interpretation of the secondary boycott clause served to limit the ability of employees to protest the labor movement and subsequently practices unfair to labor, and became a significant economic restraint on their ability to generate sufficient pressure to withstand the collective strength of employers.94

91 Ibid., pp. 5094-5095 (May 9, 1947).
92 Section 12(a) of H.R. 3020 forbade picketing whose intent was to induce secondary employees to engage in a concerted refusal.
93 81 NLRB 825-826.
94 See NLRB v. Service Trade Chauffeurs, 191 F. 2d. 65 (1951); Sealright Pacific Ltd., 82 NLRB 271 (1949); and Armco Drainage and Metal Products, Inc., 93 NLRB 751 (1951).
At the ambulatory premises. The problem of applying the Board's test that Section 8(b)(4)(A) outlaws peaceful picketing if the picketing occurs at premises other than those of the primary employer is further complicated when the premises in question are occupied by the primary employer as well as "neutrals" to the dispute. In constructing an acceptable basis for resolving cases in this area, the Board and the courts have permitted unions to picket the common premises if the picketing was "incidental" to the union's primary purpose. This test, however, raises a further problem of determining what is incidental. In the case of Oil Workers International Union v. The Pure Oil Company\textsuperscript{95} where the union picketed a dock owned by the primary employer which was leased to The Pure Oil Company, the Board held the activity to be primary in nature and not in violation of the LMRA. In a similar case United Electrical Workers Union v. Ryan Construction Corporation\textsuperscript{96} the union had picketed a gate of the primary employer in an effort to induce employees of Ryan to participate in their strike against Bucyrus (the primary employer). In comparing the facts of this case with the legislative intent in Section 8(b)(4)(A), the Board held "... that the picketing of Bucyrus premises ... did not lose its ... primary ... character and become 'secondary' at the so-called Ryan Gate because the Ryan employees were the only employees regularly entering Bucyrus premises at that gate.\textsuperscript{97}

\textsuperscript{95} NLRB 315 (1949).
\textsuperscript{96} NLRB 417 (1949).
\textsuperscript{97} Ibid., p. 418.
In comparison to this line of decisions, the Board has refused to permit picketing at premises used by both primary and neutral employers under the theory that the activity is concerted in nature and not incidental to the dispute. In the majority of these cases the picketing in question occurred at construction sites controlled by the primary employer. In the usual case the purpose of the picketing was to encourage the employees of the "neutral" subcontractors to honor the picket lines which in turn would force the general contractor to acquiesce to the union's demands. As in the Denver Building case where the union resorted to picketing in protest of the employment of nonunion men on the construction site, both the NLRB and the United States Supreme Court found the picketing to be secondary in nature and subject to the restriction of Section 8(b)(4)(A) of the LMRRA. The immediate result of this form of decision was to place restrictive limitations on the most effective method of union protest in the construction industry. Partially as a result of the numerous complaints against these decisions and for other reasons mysteriously unknown, the NLRB subsequently established a different criteria for determining the status of peaceful picketing under Section 8(b)(4)(A).

At the roving premise in transportation. The first example of the Board's reinterpretation of the secondary boycott provision was set

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forth in the case of *International Brotherhood of Teamsters v. Schultz Refrigerated Service, Inc.*99 The Schultz Corporation was engaged in transporting perishable products between several states and in the New York City area. Prior to the beginning of the dispute with the respondent union, the union members had been:

... employed by Schultz to make deliveries to and pickups from various business concerns located in New York City. The dispute between the Respondent and Schultz arose when Schultz removed its terminal to Slackwood, New Jersey... and thereafter refused to ... [employ the union's drivers]... Schultz... continued to operate its... business in New York City... [but]... employed members of a New Jersey local to... [take the place of the Respondent's drivers].100

In protest of this action the union picketed Schultz by establishing a patrol around Schultz's trucks while they were loading or unloading goods at the premises of their customers. The picketing was peaceful and was specifically limited to the locations of Schultz's trucks. The company filed a complaint with the NLRB charging that picketing by the union amounted to an inducement of a secondary boycott and was a violation of Section 8(b)(4)(A). The Trial Examiner accepted the company's complaint, but the Board refused to enforce the order holding that the Trial Examiner had relied on "the literal language" of the section in reaching a result inconsistent with the prior decisions under the Act. It was not the intent of Congress in Section 8(b)(4)(A), contended the Board, to outlaw primary action. A union which is involved in a dispute

99 87 NLRB 502 (1949).
100 *bid.*, p. 503.
with its employer must be permitted to voice its protest. In this case
the union adhered to the rules of primary conduct; i.e., they limited
their picketing to the location and immediate vicinity of Schultz's
trucks. This was the only means available by which the union could
give notice of its dispute with the employer. In picketing the employ­
er's trucks the union:

... was acting in a manner traditional to employers in all other
industries, who choose to stand before their place of employment and
point out their replacements to the public as strike-breakers, and
their employer as unfair. Such picketing, virtually synonymous with
the right to strike, is an exercise of a historic right thought
necessary to the effectiveness of a strike.101

Thus peaceful picketing, even though it may induce and encourage neutrals to support a work dispute, must be protected from the implicit
sanctions of Section 8(b)(4)(A) provided the pickets do not trespass
beyond the traditional boundary of primary activity.

The exact location of where primary activity ends and secondary
activity begins was first announced by the Board in the dispute of
Sailor's Union of the Pacific v. Moore Dry Dock Co.102 In this case
the union picketed the entrance to a secondary employer's shipyard
where a ship belonging to the primary employer was being repaired. In
reviewing the judicial record under Section 8(b)(4)(A) the NLRB observed
that the section was intended to outlaw secondary activity and not
legitimate primary action.

101 Ibid., p. 507.

102 192 NLRB 547 (1950).
In the usual case, the situs of a labor dispute is the premises of the primary employer. . . . But in some cases the situs of the dispute may not be limited to a fixed location it may be ambulatory. . . .

When the situs is ambulatory, it may come to rest temporarily at the premises of another employer. The perplexing question is: Does the right to picket follow the situs while it is stationed at the premises of a secondary employer, when the only way to picket that situs is in front of the secondary employer's premises? . . . Essentially the problem is one of balancing the right of a union to picket at the site of its dispute as against the right of a secondary employer to be free of picketing in a controversy in which it is not directly involved.

When a secondary employer is harboring the situs of a dispute between a union and a primary employer, the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute. The enmeshing of premises and situs qualifies both rights. In the kind of situation that exists in this case, we believe that picketing of the premises of a secondary employer is primary if it meets the following conditions:

(a) The picketing is strictly limited to times when the situs of dispute is located on the secondary employer's premises;

(b) at the time of the picketing the primary employer is engaged in its normal business at the situs;

(c) the picketing is limited to places reasonably close to the location of the situs; and

(d) the picketing discloses clearly that the dispute is with the primary employer.103

With the statement of the principles under which a union might picket a primary employer at the ambulatory situs, the Board reached a compromise between the broad and narrow interpretations of Section 8(b) (4)(A). Since this case, the Board has refused to issue complaints in cases which do not meet the criteria as set forth in the Moore Dry Dock

103Ibid., p. 549.
formula. In the *Amalgamated Meat Cutters and Butcher Workmen v. Western, Inc.* case, the Board refused to apply the Moore Dry Dock formula where the picketing by the union of the primary employer's trucks was considered to be in support of a dispute at the primary employer's plant. In a circumstance similar to that of the Schultz case, the Board held picketing which encompassed the truck and other premises to be in violation of Section 8(b)(4)(A).  

At the roving premise in construction. With the compromise in the Moore Dry Dock case, it was only a question of time before the Board was forced to adopt a similar solution in the construction industry. In *International Brotherhood of Boilermakers v. Richfield Oil Corporation* the union picketed the entrance to the primary employer's gate at a secondary employer's plant. The primary employer (Superior) was engaged in installing equipment on the premises of the secondary employer (Richfield). In applying the standards of the Moore Dry Dock case the Board held that the picketing did not meet the third test of the doctrine—that the picketing failed to disclose that the dispute was with Superior and not Richfield. There was evidence in the case that the

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105 *Service Truck Chauffeurs*, 97 NLRB 123 (1951), and *Sterling Beverages, Inc.*, 90 NLRB 401 (1950).

106 95 NLRB 1191 (1951). This case was reviewed by the Board eight months after the decision in the Moore Dry Dock case.
picketing on occasion had interfered by implication and evasive replies with goods intended for Richfield. Although the Board failed to approve the method of picketing in the Richfield case, the analysis of the picketing was subjected to the rule of the Moore Dry Dock case. Approximately two years later the Board upheld this interpretation by enjoining picketing at a common situs used by both the primary and secondary employers. In the Chauffeurs, Teamsters, Warehousemen, and Helpers v. Hoosier Petroleum Co. cases, the union picketed a filling station which was used in the regular course of business by the primary employer (Jesse Floyd). Floyd was in the business of transporting gas and oil for the Hoosier Petroleum Co. which operated several filling stations. As a part of the process of transporting the defendant's products, Floyd maintained a regular place of business at one of the Hoosier Pete stations. In the interest of securing recognition from Floyd, the union resorted to picketing the station where Floyd maintained his business. In the course of this activity the pickets attempted to attract the attention of truckers and customers who were using the premises by waving signs and shouting at them when they came into the station. On the basis of these facts the Board held that the picketing, though primary in nature, was secondary in intent since the acts of the pickets revealed that the picketing was "... directed not against Floyd only but ... [was] ... deliberately intended to extend the area of the dispute to neutral employers and thereby force Hoosier Pete to cease

107. 106 NLRB 649 (1953).
"doing business with Floyd and to force Floyd to recognize the Respondent as the bargaining agent of his employees." With the application of the Moore Dry Dock formula in the Hoosier case, the Board reaffirmed its intent to develop a policy which would provide a means of comparison in cases under the secondary boycott clause. The legality of picketing which had previously depended on such arbitrary factors as degree of incidence was thereafter subjected to a specific set of uniform standards. This means of classifying picketing as primary or secondary enabled the Board to balance the rights of the parties. By virtue of the value of practical experience the Board could weigh the potential injury to the neutrals against the potential injury to the employees. In this process of industrial adjudication the terms primary and secondary lose their formal character and become ad hoc judgments of the competing interests. This process of weighing rights and injuries is of particular value in picketing cases where the activity occurs at a common situs or in cases whose facts are complicated by the existence of a roving premise. In cases of this type the Board is faced with the extremely delicate task of balancing a group of competing interests. In evaluating these potential rights and injuries the Board has sought to avoid rigid definitions in favor of a flexible policy which will enable unions to resort to picketing under carefully proscribed standards. This procedure of ad hoc deliberation and application has played an important role in determining the legal status of picketing under the

\textsuperscript{108}Ibid., p. 633.
LMRA and must be regarded as a commendable achievement by the Board in interpreting Section 8(b)(4)(A).

With the establishment of the Moore Dry Dock formula, the trend of picketing decisions between the Giboney case (1949) and the enactment of the LMRDA (1959) continued to follow the telescoping pattern of limiting constitutional protection of picketing as a form of free speech with the exception of preempts, in specific cases, state remedies that were held to be in conflict with the LMRA. In the case of United Association of Journeyman Plumbers and Steamfitters v. Graham109 the union picketed a general contractor who was employing nonunion labor. The state court enjoined the picketing as an attempt to interfere and obstruct enforcement of a state right-to-work-law. On the basis of prior decisions110 the Supreme Court upheld the construction of the Virginia Statute as being within the domain of state jurisdiction consistent with Section 14(b) of the LMRA which established the legal basis for state right-to-work-laws. The dissenting justices Black and Douglas objected to the majority's interpretation that peaceful picketing of a nonunion contractor constituted a degree of economic coercion sufficient to seriously jeopardize the enforcement of a state law. While it is within the province of the state to regulate industrial relations under its police powers, the state may not restrict activity which advertises "... to union men and union sympathizers that non-union men ..."

109345 U.S. 192 (1953).

110A·F·L· v. American Sash and Door Company, 335 U.S. 525 (1949).
"[are] . . . employed on the job. . . ." The protection of picketing is essential to the continuance of the union movement, and the state and the courts should not be permitted to obstruct the dissemination of publicity which relates the facts of industrial life.

In 1955, the Supreme Court refused to accept an appeal to review a lower court decision enjoining peaceful picketing as a violation of a state law protecting workers in the selection of their collective bargaining representatives. Three of the employer's twenty employees had picketed his restaurant--Theodore's Lobster House--for the sole purpose of attempting to organize the other employees. The Supreme Court of Maine upheld the injunction stating that a "... strike by the three union employees for organizational purposes is . . . unlawful . . . [and] . . . picketing in support of such a strike, although peaceful, is likewise unlawful and may be enjoined." By refusing to review this decision the United States Supreme Court overruled by implication Justice Black's opinion in the Giboney case that a state court may not enjoin peaceful picketing unless the continuance of the activity poses a serious danger, imminent and immediate, to the power of the state.

The implication in Pappas v. Stacey that the constitutional status of picketing was a product of legal fiction was formally

111 345 U.S. 203.
concluded by the Supreme Court in *International Teamsters v. Vogt*. The defendant (Vogt) operated a gravel pit which employed fifteen to twenty men. The union sought to organize the Vogt Company and began picketing the entrance to the excavation pit. The drivers of other firms refused to cross the picket lines, and Vogt sought a court order to enjoin the picketing. The restraining order was upheld by the Supreme Court of Wisconsin and the United States Supreme Court granted certiorari to clarify the constitutional status of picketing under the LMRAct. Justice Frankfurter delivered the majority opinion holding that the broad pronouncements equating picketing with free speech must "... yield 'to the impact of facts unforeseen' (*People v. Schweinler Press*, 214 N.Y. 395)." Reviewing the evolving legal status of picketing beginning with the Senn case, Justice Frankfurter concluded that the series of decisions between 1937 and 1957 has produced a policy which permits the state to employ wide discretion in formulating its internal policies. The status of picketing has been so carefully examined and regulated by the state and federal courts that there is no longer any substantial question that the state may enjoin even peaceful picketing if the activity is held to be in violation of a state law or public policy pronouncement. Justice Frankfurter's official benediction to the demise of the Thornhill Doctrine drew a vigorous dissent from Justice

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Douglas.\textsuperscript{116} Referring to the rule of the Thornhill case—equating picketing with free speech—Justice Douglas stated that:

The Court has now come full circle. . . . Today, the Court signs a formal surrender. State courts and state legislatures cannot fashion blanket prohibitions on all picketing. But for practical purposes the situation now is as it was when \textit{Senn v. Tile Layers Union} . . . was decided. State courts and state legislatures are free to decide whether to permit or suppress any particular picket line for any reason other than a blanket policy against all picketing. I would adhere to the principle announced in Thornhill. I would adhere to the result reached in Swing. I would return to the test enunciated in Giboney—that this form of expression can be regulated or prohibited only to the extent that it forms an essential part of a course of conduct which the state can regulate or prohibit.\textsuperscript{117}

The majority opinion, argued Justice Douglas, denies the right of the union to engage in peaceful protest against employer discrimination. The protection of speech is the relevant issue in this case. There is no evidence of any violence, coercion, or disorders—only the statements by the union that the employer was unfair to organized labor. To conclude that picketing in this form constitutes a clear and imminent danger to the power of the state is to abandon the pursuit of logical reasoning for the principles of legal fiction.

PICKETING BY A MINORITY UNION

With the decision of the Supreme Court in the Vogt case, the legal status of picketing under the LMRA was resolved with the

\textsuperscript{116}Chief Justice Warren and Justice Black concurred in Douglas' dissent.

\textsuperscript{117}354 U.S. 295-297.
exception of two separate issues: (1) organizational picketing by a minority union and (2) the preemption question. The legal status of organizational picketing by a union which seeks to represent the employers' employees or by a union which has recently lost a representation election is regulated by Section 8(b)(1) of the LMRA which provides in part:

(b) 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...

Section 7 of the amended Act protects the rights of employers to organize or to assist labor organizations for purposes of collective bargaining and guarantees the right of employees to refrain from such activities if they so elect.119

The determination of the legal status of picketing by a minority union has proved to be a difficult problem for the NLRB and the state and federal courts as well.120 It is evident, by reference to the industrial scene, that the ability of the union to picket for organizational and/or recognition purposes is essential to the protection of union membership and security. By the same argument it is apparent that the continuation of picketing after the loss of a representation election imposes unfair hardships on the employer. The presence of a picket


119 Ibid., p. 140.

120 The debate over this issue was carried over to Section 8(b)(7) of the LMRDA (1959).
line in front of a retail outlet or at the entrance of the employer's establishment or at the gate of the primary employer represents a continual source of interference and is an expensive nuisance. But such is the hard facts of industrial competition, and the final result is costly and unfair to both participants. While the employer would certainly prefer to be free from the economic pressures of picketing, the freedom of the employer does improve or promote the cause of unionization. A blanket prescription outlawing all picketing or a doctrine protecting both primary and secondary picketing jeopardizes the result for either side. Complete victory is an impossible goal in an industrial democracy. The result must seek to comprise the either/or solution, substituting a standard which will enable both sides to participate in the benefits of industrial freedom.

The landmark case on the status of minority picketing, which has carried over to the LMRDA (1959), was International Brotherhood of Teamsters v. Curtis Brothers, Inc. The union (Local 639) was certified by the Board as the bargaining agent for Curtis Brothers' employees in 1953. The parties were unable to arrive at an initial agreement and the union began picketing the company's premises in 1954. The company subsequently petitioned the Board for a new election in which the union lost its majority status. When the union continued to picket the plant, the company filed a petition with the Board charging a violation of Section 8(b)(1)(A) of the LMRRA. The Trial Examiner

\[121\] 119 NLRB 232 (1957).
refused to accept the complaint, but the Board overruled this interpretation holding that the plain intent of the aforementioned section was to prohibit the type of picketing described in this case. Referring to statements by Senator Taft and other supporters of the Bill, the NLRB concluded the picketing was intended to reduce the earnings of the employer and to threaten the jobs of the employees which would coerce rights guaranteed under Section 7 to refrain from joining a union.\footnote{122}

The Board's opinion in the Curtis decision was later applied in the case of \textit{International Association of Machinists v. Alloy Mfg. Co.}\footnote{123} As in the prior case the union had lost a representation election and stationed a picket who carried a banner stating that the "... employees ... were 'Non-Union' or 'Unfair.'"\footnote{124} The Board refused to accept the Trial Examiner's ruling that the picketing did not constitute an unfair labor practice holding that "... as stated in the Curtis Brothers' decision, 'coercion' exists in the fact that 'the union seeks to cause economic loss to the business ... and to ... the employees. ...'"\footnote{125}

The Curtis Brothers doctrine as interpreted in the Alloy decision was considered by the Court of Appeals for the District of Columbia in 1958. The Court refused to endorse the Board's decision

\footnotesize{\textsuperscript{122}Ibid., p. 243.}\\\textsuperscript{123}119 NLRB 307 (1957).}\\\textsuperscript{124}Ibid., p. 317.}\\\textsuperscript{125}Ibid., p. 309.}
holding that "... peaceful picketing, whether 'organizational' or 'recognitional,' in nature ..." is not proscribed by Section 8(b)(1)(A) of the Act. The reversal of the Board's opinion was reviewed by the United States Supreme Court in March of 1960. In upholding the decision of the Court of Appeals—that Section 8(b)(1)(A) did not proscribe picketing by a minority union—the Court took special notice of Section 8(b)(7) of the LMRDA (1959) which established new provisions restricting the right to picket. In discussing the possible effects of the new section, the Court forewarned the NLRB that it should thoroughly reexamine its position on the legal status of minority picketing before issuing any new decisions restricting or regulating this form of picketing.

THE PREEMPTION QUESTION

Prior to 1947 the United States Supreme Court was primarily concerned with the legal implications of state ordinances restricting the right to picket and limitations by the states on freedom of speech. The passage of the LMRDA added to the difficulty of defining the legal status of picketing by establishing restrictions in Section 8(b) which were in conflict with state law regulating strikes and/or picketing in labor disputes. This area of federal versus state conflict was complicated by

126 274 F. 2d. 551, 552 (1958).
128 This problem will receive further attention in Chapter IV.
the refusal of the NLRB to extend its jurisdiction beyond certain recognized limits as established in a case by case definition.\textsuperscript{129} The development of this policy resulted in numerous conflicts between the state courts and the NLRB, and it became necessary for the United States Supreme Court to establish guide lines encouraging a consistent approach to the no-man's land question.\textsuperscript{130}

The landmark picketing case on the question of preemption was \textit{Garner v. Teamsters Union}.\textsuperscript{131} In a unanimous decision the Supreme Court reversed a lower court ruling enjoining organizational picketing which violated state law. In those cases in which the employer is engaged in interstate commerce, the Court held that a state may not regulate activity which is governed by federal law. In a state right-to-work-law case (\textit{Farnsworth and Chambers v. Electrical Workers Local 429}), the Supreme Court extended the principle of the Garner case by refusing to allow an injunction against a union which was picketing for the purpose of forcing an employee to join the union. In a subsequent ruling the Supreme Court reversed the trend of its initial policy on preemption as

\footnotesize{\textsuperscript{129}See \textit{NLRB v. Denver Building and Construction Trades Council}, 341 U.S. 675.}

\footnotesize{\textsuperscript{130}In \textit{Office Employees Union v. NLRB}, 353 U.S. 313 (1957) and \textit{Hotel Employees Union v. Leedom}, 353 U.S. 1 (1957), the United States Supreme Court held that the NLRB could not refuse to assert jurisdiction over an entire category of employers.}

\footnotesize{\textsuperscript{131}46 U.S. 485 (1953).}

\footnotesize{\textsuperscript{132}353 U.S. 969 (1957).}
established in the Garner and Farnsworth cases. In UAW v. Russell, the Court upheld a recovery of actual and punitive damages to a nonunion employee who was denied entrance to the plant by the presence of a picket line supporting an economic strike. The union's counsel argued that the jury's award should be set aside on the grounds that the picketing was regulated by the LMRA. The majority of the Supreme Court refused to accept this instruction stating that:

There is nothing inconsistent in holding that an employee may recover lost wages as damages in tort action under state law, and also holding that the award of such damages is not necessary to effectuate the purposes of the Federal Act... Any other ruling would... 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.

The dissenting justices, Chief Justice Warren and Justice Douglas, objected to the majority's opinion on the grounds that the decision of the lower court was preempted from the field by the existence of federal legislation. Chief Justice Warren contended that since the employer was operating in interstate commerce and the union was the lawful agent (as designated by the NLRB) of the employees engaging in a legal strike, it would appear that the case falls under federal and not state jurisdiction. The purpose of the LMRA of 1947 was to establish uniform regulations and to balance the competing interests in industrial competition. The verdict of the majority would permit the states to upset this balance by establishing duplicating and conflicting awards.

134 Ibid., p. 645.
The Supreme Court, argued the Chief Justice, should not uphold decisions which will encourage the states to devise remedies which are inconsistent with the basic purpose of the Federal Act.

One purpose of the Wagner and Taft-Hartley Acts is to promote industrial peace. Consistent with that aim Congress created tribunals, procedures and remedies calculated to bring labor disputes to a speedy conclusion. Because of the availability of a state damage action discourages resort to the curative features of the pertinent federal labor law, it conflicts with the aims of that legislation and acts as a means of disrupting the uniform process of labor law.

The no-man's land issue was temporarily resolved by the United States Supreme Court in the case of Guss v. Utah Labor Relations Board in which the Supreme Court held that Section 10(a) of the LMRDA was controlling in problems involving state and federal jurisdiction. The Court expressed the judgment that while Congress might, by legislative enactment, change the regulation as provided in Section 10(a) the Board could either reassert its jurisdiction or cede jurisdiction to the states. The impasse reached in the Guss case was continued until 1958 when the NLRB published a revised set of standards which permitted the Board to accept jurisdiction in about twenty per cent of the cases previously rejected.

The dispute between the NLRB and the courts over the preemption question carried over to the legislative hearings on the LMRDA in 1959.

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135Ibid., p. 653.

136353 U.S. 1 (1957).

The issue was finally resolved by legislative compromise between federal and state proponents in Section 701 of the LMRDA which amends Section 14 of the LMRA (1947). Section 701 provides in part that:

(C)(1) The Board, in its discretion, may, by rule of decision or by publishing rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction; Provided, that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

In view of the legislative history and the current trend of the NLRB and court decisions, Section 701 will apparently permit the states and state courts to accept jurisdiction in those cases declined by the NLRB. The Board's jurisdiction, however, may not be narrowed and representation cases may be delegated to regional directors. The important question which remains undecided is whether or not a given case will fall within the Board's jurisdictional standards. The ultimate answer to this question will depend on the rules and regulations as established by the Board to determine the basis for applying its standards. In an effort to resolve this issue, the NLRB has recently published a set of new rules which permit declaration of an advisory opinion regarding the

Board's jurisdiction. The parties to an agency or court proceeding may petition the Board for a ruling on jurisdiction without the necessity of binding the parties, the Board, or the General Counsel.

Although it is unlikely that Section 701 will be able to resolve the preemption problem, it apparently provides a basis which will permit the parties to evolve an acceptable solution. It may be expected that the states will continue to contest the authority of the Board especially in those areas in which the issue of unionism is still in doubt. However, the fact that the states do not have uniform labor laws is a continuing problem, and it may be necessary for the NLRB to broaden its jurisdiction to assure a uniform result. In this connection the late President of the United States John F. Kennedy (then United States Senator) pointed out that:

... we must bear in mind that 35 of the states have no adequate labor laws. In that connection ... I shall watch very carefully what actions are taken by these various states, because if any effort is made to use this provision (Section 701) as an opportunity to limit rights which all of us believe all American working people and employers in these states have, then it will be very easy under this provision for the National Labor Relations Board ... to assume ... fuller jurisdiction.139

ANALYSIS OF SECTION 8(b) RESTRICTIONS

In reviewing the interpretation of the Section 8(b) restrictions on the right to picket by the NLRB and the courts between 1947 and 1957, it is clear that the majority of cases severely limited the ability of

unions to preserve and retain their bargaining status. The right to picket in a peaceful manner assures public notification of the controversy and provides a direct form of economic reprisal against the employer. When the right to picket is restricted or forbidden by a court order, the union and its membership are subjected to the naked power of the corporate entity. Under these conditions the employer is free to press his temporary advantage against the union. Restriction of the right to picket upsets the competitive balance between the employer and the union. Thus the union which is seeking to protect an established bargaining unit or attempting to organize a nonunion employer is left at a decided disadvantage.

The importance of judicial restrictions on the right to picket under the LMRA is significantly demonstrated by the overall decline in percentage of collective bargaining elections won by unions between 1947 and 1955 (see Table I). In 1947, the year prior to the enactment of the LMRA, unions were victorious in 75 per cent of the elections certified by the NLRB. This percentage decreased to 70.5 per cent in 1949; and, except for a brief recovery during the Korean hostilities, the overall percentage continued to decline throughout the 1947-1957 period. The marked decrease in certification elections from 75 per cent in 1947 to 63 per cent in 1957 took place despite a continued growth in the size of the labor force and a rising real national income—a combination of factors which is normally conducive to growth in union affiliation and bargaining power. Although it is difficult to assign the full weight of this failure to maintain or increase the institutional power of unions
TABLE I

COLLECTIVE-BARGAINING ELECTIONS¹ BY AFFILIATION
AND BY PARTICIPATING UNIONS

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Elections</th>
<th>A. F. of L. Affiliates</th>
<th>Number</th>
<th>Percent</th>
<th>CIO Affiliates</th>
<th>Number</th>
<th>Percent</th>
<th>Unaffiliated</th>
<th>Number</th>
<th>Percent</th>
<th>No Union</th>
<th>Number</th>
<th>Percent</th>
<th>Total</th>
<th>Percent</th>
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<tr>
<td>1947</td>
<td>6,920</td>
<td>2,196</td>
<td>31.7</td>
<td></td>
<td>2,138</td>
<td>30.9</td>
<td></td>
<td>860</td>
<td>12.4</td>
<td></td>
<td>1,726</td>
<td>24.9</td>
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<td>75.0</td>
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<tr>
<td>1948</td>
<td>3,222</td>
<td>1,188</td>
<td>36.9</td>
<td></td>
<td>532</td>
<td>16.5</td>
<td></td>
<td>617</td>
<td>19.1</td>
<td></td>
<td>885</td>
<td>27.4</td>
<td></td>
<td>72.5</td>
<td></td>
</tr>
<tr>
<td>1949</td>
<td>5,514</td>
<td>2,092</td>
<td>37.9</td>
<td></td>
<td>858</td>
<td>15.6</td>
<td></td>
<td>939</td>
<td>17.0</td>
<td></td>
<td>1,625</td>
<td>27.6</td>
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<td>70.5</td>
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<td>5,619</td>
<td>2,101</td>
<td>37.4</td>
<td></td>
<td>1,199</td>
<td>21.3</td>
<td></td>
<td>886</td>
<td>15.8</td>
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<td>1,433</td>
<td>25.5</td>
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<td>2,520</td>
<td>41.2</td>
<td></td>
<td>1,375</td>
<td>21.4</td>
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<td>733</td>
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<td>1,674</td>
<td>26.0</td>
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<td>45.4</td>
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<td>1,394</td>
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<td>1,832</td>
<td>27.1</td>
<td></td>
<td>72.9</td>
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<td>1,700</td>
<td>28.1</td>
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<td>4,663</td>
<td>1,925</td>
<td>41.3</td>
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<td></td>
<td>355</td>
<td>7.6</td>
<td></td>
<td>1,603</td>
<td>34.4</td>
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<td>65.6</td>
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</tr>
<tr>
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<td>4,215</td>
<td>1,721</td>
<td>41.0</td>
<td></td>
<td>804</td>
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<td>7.7</td>
<td></td>
<td>1,366</td>
<td>32.4</td>
<td></td>
<td>67.6</td>
<td></td>
</tr>
</tbody>
</table>

¹First year of NLRA.

²The term "collective bargaining" election is used to cover representation elections requested by a union or other candidate for employee representation or by the employer.

The NLRA adjusted the basis for reporting collective-bargaining elections in 1956; therefore, the data for 1956 and 1957 is not included in Table I. The total percentage for 1957 was 63 percent.

to the judicial restrictions on the right to picket, it is apparent that these limitations have played an important role in restricting the ability of the unions to resist the tactics of employers.
CHAPTER IV

THE STATUS OF PICKETING UNDER THE LMRDA

The LMRDA (1959) represents the first comprehensive attempt by the federal government to regulate the limits of permissible conduct in respect to picketing. The LMRDA amends the LMRA (1947) by adding Section 8(b)(7) which establishes restrictive limitations on the right of an uncertified union to publicize a labor dispute by engaging in recognition and/or organizational picketing. Section 8(b)(7) is divided into two parts: a preamble which explains the type of union activity comprehended, and three separate subsections which prohibit picketing under specific conditions.

Preamble

It shall be an unfair labor practice:

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under Section 9(c) of this Act.

(B) where within the preceding twelve months a valid election under Section 9(c) of this Act has been conducted, or
(C) where such picketing has been conducted without a petition under Section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing; Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of Section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof; Provided further, That nothing in this Subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.¹

INTERPRETATION OF THE PICKETING RESTRICTIONS

Significant within the preamble is the direct reference to the term picketing. Although picketing was regulated by the NLRB and the courts under the LMRA (1947), the Act did not contain any reference to the term picketing per se. Without the benefit of previous statutory definition, Congress apparently intended that Section 8(b)(7) would regulate picketing in the traditional sense; i.e., picketing by employees or nonemployees in protest of practices unfair to the labor movement. This definition would include appeals to consumers--publicity picketing--but would not encompass other forms of publicity which do not conform to the traditional meaning of picketing. The exclusion of other forms of publicity from the picketing regulations is supported by the history

¹ 173 U.S. Stat. 519, 544.
of the legislative debate over Section 8(b)(7)² and by the reference in the second proviso of Section 8(b)(4) to "publicity other than picketing."

Although this definition of picketing is narrow in scope, i.e., requiring the presence of a union picket near the situs of the dispute, it conforms to the intent of Congress to regulate a specific type of activity. Both the advocates and the opponents of Section 8(b)(7) were concerned about the effects of particular forms of picketing. Senator McClellan, who unsuccessfully urged the Senate to adopt a stricter version in preference to Section 8(b)(7), consistently referred to the "undesirable forms of picketing" rather than the object of the picketing. In replying to a criticism of his amendment by President Kennedy (then Junior Senator from Massachusetts) that (Senator McClellan) tended to overemphasize the racketeering element in labor unions and organizing campaigns, Senator McClellan stated:

The conditions which exist need remedying. I do not want to deny the workers their rights when a majority of them want a union. I do not want to deny them freedom of speech. I want them to have freedom of speech. . . .

But I am opposed to blackmail picketing. I am opposed to shake-down picketing. I am opposed to top down organizing. . . . if these practices are not corrected, there will be a continuation . . . of activities . . . by gangsters and racketeers who have been exploiting employees in all sections of the country.³


³Ibid., p. 1182.
Senator Goldwater, who could hardly be called a "friend of labor," was equally disturbed about the effect of organizational and/or recognition picketing on the employee as well as his employer. Even with the restriction of these forms of picketing, argued Senator Goldwater, the union may still resort to ". . . the use of handbills, meetings, home visits and so forth."4

Thus it would seem from the statements of Senator McClellan and Senator Goldwater as well as the comments of Senator Kennedy—who was interested in protecting the right of employees to engage in so-called sweat shop picketing—that Congress intended to regulate picketing in the traditional sense. Therefore, publicity which does not conform to this historical standard is apparently without remedy under Section 8(b)(7); e.g., the decision by a district court in Phillips v. International Ladies Garment Workers Union5 is seemingly in conflict with the traditional definition of picketing. In this case the court held that the placing of signs on posters normally carried by pickets was a form of picketing similar to ambulatory picketing and was proscribed by Section 8(b)(7) of the LMRDA.

By the terminology of the statute and by virtue of its legislative history, Section 8(b)(7) restricts picketing as an unfair labor practice if the object of the picketing is to force either the employer or his employees to recognize the union as the bargaining agent. This

4 Ibid., p. 1191.
restriction on recognitional picketing is further defined in Subsections (A), (B), and (C). By imposing specific restrictions on the right to picket, Congress intended to protect the employee and his employer from situations in which (1) the union was (according to Senator McClellan) attempting to force its wishes on the majority of employees who preferred to retain their nonunion status, or (2) in the situation where the employer and the union were attempting to coerce suppliers and their employees to cease delivering products to the nonunion employer. In addition to these two basic areas, Congress established restrictions which would curb the activities of racketeers and professional gangsters in industrial relations.

From a legalistic point of view, while Section 8(b)(7) does not prohibit picketing by a certified union in support of an economic strike, it does not necessarily follow that employees may picket in protest of so-called sweat shop conditions as, for example, in the garment industry. The essential question of law as to whether the picketing is prohibited or protected under Section 8(b)(7) depends on the object or the purpose of the picketing: i.e., (1) if the object or the purpose of the picketing is proscribed by the terms of Section 8(b)(7), the picketing may be enjoined as an unfair labor practice; however, (2) if the object is not specifically proscribed by Section 8(b)(7), the picketing may escape the unfair label even though the actual result may be the same in both cases. The final result under Section 8(b)(7) depends upon the court's interpretation of the object and the conditions under which the picketing took place. It is quite possible, therefore, for picketing
under one set of conditions to be an unfair labor practice and under a
different set of circumstances to be a legitimate exercise of free
speech.

Subsection (A) of Section 8(b)(7) reflects the desire of Congress to prevent picketing by a rival union where the employer is already legitimately bargaining with a union previously designated to represent his employees. This section is designed to curb picketing falling under the NLRB contract bar rule, i.e., that a rival union may not picket an employer who has signed a contract with another union. The contract will act as a bar against this form of picketing. The difficulty of interpreting Subsection (A) evolves from the problem of deciding what constitutes a contract; e.g., the prohibition of picketing by a rival (legitimate) union under Subsection (A) serves as an inducement to antiunion employers to sign a sweetheart contract with a bargain basement union. In recognition of this possibility the NLRB has held, in formulating its contract bar rule, that a contract for purposes of recognizing the union which contained "... a no-strike, no-lockout clause, and insurance and pension plans ..." is insufficient reason for invoking the contract as a bar to peaceful persuasion. The acts of recognition which would meet the test of Subsection (A) are the signing of a contract and certification of the representative union by the NLRB. Certification by the NLRB bans recognitional picketing by a rival union

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695 NLRB 1508 (1951).

7Ibid., p. 1510.
for one year and signing of a legitimate contract bans recognition
pickup for two years.

Subsection (B) of Section 8(b)(7) is intended to restrict
picketing in those instances where the employees in question have
rejected the union in a representation election. After the loss of a
representation election the union as well as rival unions are prohibited
from picketing the employer's place of business for a period of one
year. The economic effects of this provision, which were bitterly con-
tested in the legislative hearings on the LMRDA, placed a direct limita-
tion on the right of self-organization by encouraging employers to adopt
an antiunion attitude, and acts as a detriment to the advance of indus-
trial democracy by restricting the institution of collective bargaining.

The argument by Senator McClellan and other sponsors of the Bill
was that Subsection (B) freed the employer and his employees from the
nuisance of recognition picketing after the loss of a representation
election. The interference of picketing, according to Senator McClellan,
is an expensive liability to the employer and represents an attempt to
c coerce the employees into accepting a union which they do not want.

The effect of this provision, however, goes considerably farther
than the elimination of an expensive and burdensome nuisance; i.e., it
prohibits the union from exercising an established right of peaceful
protest thus weakening the internal security of unionism, and it gives
the employer a free hand in controlling the affairs of his employees.
Furthermore, this barrier of lawful protection implicitly assumes that
the employer is in a better position to manage the protest of his
employees against arbitrary practices in respect to disciplinary actions, transfers, layoffs, seniority rights, health plans, pension agreements, etc. than a union which would seek to protect the employees from administrative interpretations which may result in inappropriate punishment and even dismissal. It is a well-known fact that one out of every three cases to reach the terminal step of the grievance procedure—i.e., voluntary arbitration—involve employee discipline or discharge. The established fact of industrial relations as evidenced by collective bargaining contracts, the development of grievance procedures, and the process of industrial arbitration is that employers cannot be expected to successfully manage the protest of their employees. The essential question, therefore, is whether the legislative system (on the federal and state level) will devise laws which will permit a democratic solution to these problems, or whether the legislative bodies will continue to erect legal barriers which will preserve the ability of employers to evolve solutions which are formulated under the guise of personal democracy.

Under Subsections (A) and (B) the employer is protected from recognitional picketing in the following situations: (1) where the employer signs a contract with a certified union, (2) where a union wins a certification election, and (3) where the employees reject a union in a certification election. Although the limitation of the NLRB's contract bar rule may discourage employers from negotiating so-called sweetheart contracts, the loss of a certification election has been and will continue to be an effective union busting device. Even in the case of a
fraudulent election a legitimate union may file an unfair labor practice complaint, but the ensuing litigation may be drawn out from one to three years.

JUDICIAL INTERPRETATION OF THE PICKETING RESTRICTIONS

The disagreement in Congress over the interpretation of Subsection (B) has carried over to the decisions of the NLRB and the courts. While the majority report on the Bill as approved by Congress seemed to conclude that the subsection banned all picketing by an uncertified union for twelve months after the loss of a representation election, the litigation of this subsection has produced varied results. In test cases reviewed by the NLRB, Bachman Furniture Company,8 Blinne Construction Co.,9 and Crown Cafeteria,10 the Board has held that picketing which is purely informational in character does not fall within the restrictions of Subsection (B). In the dicta of the Blinne case the NLRB reviewed the intent of Congress in Section 8(b)(7) holding that while Congress clearly intended to establish a vigorous code governing organizational or recognitional picketing it also sought to protect legitimate picketing from unreasonable interference.11 "In other words . . . the thrust of all the Section 8(b)(7)

8134 NLRB 670 (1961).
9135 NLRB 1153 (1962).
10135 NLRB 1183 (1962).
11For example, see the NLRB's attempt to regulate picketing by a minority union under the Curtis Doctrine.
"provisions is only upon picketing for an object of recognition or organization, and not upon picketing for other objects."

The attempt by the NLRB and the courts to distinguish between the immediate and ultimate object of the picketing or to discover the true purpose of the picketing has led to a series of cases which may be referred to as examples of "protest picketing." In each of these cases the union's counsel has maintained that the purpose of the picketing was in protest of some practice unfair to the union and not for one of the prescribed objects. The analysis of picketing in terms of protest may be separated into three categories: (1) protest against employer unfair labor practice, (2) protest against discharge of economic strikers, and (3) protest against substandard wages or working conditions.

Though there was an attempt in the Senate debate over Section 8 (b)(7) to establish a defense against a Section 8(b)(7) complaint where the employer was engaging in or had committed an unfair labor practice, the exemptions under Section 10(1) do not provide for this form of exception. However, this does not prevent a union from protesting an unfair labor practice by picketing. The test as to whether the picketing is in violation of Section 8(b)(7) depends on the motive behind the picketing. If the union's true motive, as determined by the weight of the evidence, is to protest a violation of the law by the employer, the picketing may escape the restrictions of Section 8(b)(7). On the other hand, if the true motive of the picketing is organizational in nature.

12135 NLRB 1159.
picketing in protest of an unfair labor practice will not act as a defense. In the two cases on this point the Board has split its decisions holding in Bahia Motor Hotel\(^{13}\) that picketing in protest of an unfair labor practice was a subterfuge to protect the union's real motive—to organize the employer which is a violation of Section 8(b) (7). By contrast, in the Bachman Furniture Company case\(^{14}\) the Board adopted the Trial Examiner's ruling that the picketing in protest of an unfair labor practice did not have an "immediate" recognition motive and therefore was a legitimate exercise of union rights under the law.

In the Bahia case the union had engaged in pre-election picketing for the object of organizing the employer's employees. After the loss of the certification election the union continued to picket the employer for a period of fifteen days before any change was made in the legend on the picket signs. Thereafter, the pickets carried signs reading:

WE PROTEST MULTIPLE UNFAIR LABOR PRACTICES OF BAHIA. LOCAL JOINT EXECUTIVE BOARD LOCALS 402-500.

On the reverse side, the new signs stated:

IN THE LAST 3 YEARS BAHIA HAS:

1. FORMED A FRAUDULENT LABOR UNION;
2. SPIED ON ITS EMPLOYEES;
3. DISCRIMINATED AGAINST UNION MEMBERS.\(^{15}\)

\(^{13}\) 32 NLRB 737 (1961).

\(^{14}\) 34 NLRB 670.

\(^{15}\) 32 NLRB 740.
The counsel for the union maintained that the change in the legend of the picket signs and the submission of written notice to the employer disclaiming any intent to represent his employees was sufficient evidence that the union was solely protesting the conduct of the employer. The Board refused to accept this contention holding that:

The fact that the asserted object of the picketing after December 15 related to such an obsolete matter as the remedied unfair labor practice, convinces us that the union chose the alternative of concealment and that the true object of the picketing as before December 15, 1960, was to force Evans to recognize or bargain with the union... it... was... apparent... that the union had little to gain... short of recognition.16

In the Bachman case the Trial Examiner filed a preliminary report holding that picketing by the union was not in violation of Section 8(b)(7). This report was appealed to the United States District Court, and the Court set aside the Trial Examiner's ruling holding that the picketing, regardless of its alleged intentions, was recognition in nature and in violation of the law. Thereafter, the Board reviewed the conflicting decisions of the District Court and the Trial Examiner, and adopted the opinion of the Trial Examiner.17

According to the facts of the case as presented in the proceedings before the District Court on March 24, 1960, the union presented a formal request to the employer to represent his employees for purposes of collective bargaining. The employer agreed to a consent election.

16Ibid., p. 741.

17The Board did not issue a separate opinion.
which proved inconclusive,\textsuperscript{18} and the union objected to the results on the basis of an unfair labor practice charge. The union alleged that between the signing of the consent agreement on April 8 and the election of April 15 the employer had "interviewed" his employees "... promising ... a 30-cent per hour increase, if they voted against the union."\textsuperscript{19}

The Regional Director refused to accept the union's complaint because the ". . . misconduct with one exception occurred before April 8. . . . The exception in question consisted of an unsworn statement by an employee to the effect that he had a 'discussion' . . . with one of the employers\textsuperscript{7} . . . 'sometime around April 8.'\textsuperscript{20} The Regional Director also ordered that two of the three disputed ballots be opened, and the final tally was three votes for the union and four against.

Approximately one month after the issuance of the report dismissing the unfair labor practice charge, the union began picketing the employer's premises for the first time.

The picket sign read on one side:

\textbf{BACCHMAN ADMITS UNFAIR LABOR PRACTICES}

and on the other:

\begin{itemize}
  \item \textsuperscript{18}The proposed bargaining unit consisted of seven employees; two voted for the union, three against, and three ballots were challenged.
  \item \textsuperscript{19}134 NLRB 675.
  \item \textsuperscript{20}\textit{Ibid.} The unsworn statement was considered to be too indefinite to support an unfair labor practice charge.
\end{itemize}
UNFAIR LABOR PRACTICES
VIOLATE FEDERAL LAW. 21

The union's business representative testified that this was the second occasion on which this employer had engaged in questionable activities, and the union's purpose in picketing was "... to achieve 'the satisfaction' in a 'labor-conscious community,' of 'letting people know' about Bachman's activities, even though 'it wouldn't further the Local's end to do so.'" 22

The difficulty of applying Subsection (B) to the fact situation in this case is evidenced by the conflicting opinions of the Trial Examiner and the District Court. In analyzing the legality of the picketing, the Court placed considerable emphasis on the sequence of events as a guide for determining the reasonable objective of the union. In concluding that recognition was the immediate as well as the ultimate objective, the Court said that:

The evidence is overwhelmingly clear that recognition was the Union's objective ... at the time of the consent petition and at the time of the election ... . . . It also appears that ... [the union as late as June 7] 23 was interested in recognition as witnessed ... by ... [the] ... signing ... of ... the Revised Tally of Ballots. We are satisfied ... that the recognition demand did not go into orbit in the cosmos but remained on a very down to earth plane, and employees, employer and the union ... [Thus] / we can form no other conclusion from the totality of the Union's acts within the relevant period ... but that ...
The union... has had for an objective and its principal objec-
tive the recognition of the Union.24

In rejecting the conclusion of the Court, the Trial Examiner
refused to accept the position that the facts of the Bachman case are
governed by the Curtis Doctrine as supported by Section 8(b)(7). In the
Curtis case the Board held that post election picketing by the union was
a violation of Section 8(b)(1)(A) of the LMRA, but the facts of this
case are substantially different from those of the present dispute. In
the Curtis case the employer originally sought a certification election
and the picketing prior to and after the election was admittedly organi-
zational in nature. "The union... therefore... had... mani-
fested a pre-existing disposition to resort to that economically
coercive device...[picketing]... in order to force recognition."25

The final decision in that case turned on a question of legal fact: the
motive behind the picketing was not a point of dispute. In the Bachman
case there was no evidence of economic pressure before the election; and
the union, as a further testimony of good faith and willingness to
submit to accepted procedure, initiated the consent petition. They did
not choose to protest the actions of the employer until thirty days
after the date of the election. If recognition was the "real" motive
behind the picketing, it would have been more practical for the union to
picket:


25134 NLRB 670, 679.
... the other firm at which the Union had recently lost an election ... [than to picket Bachman]. The fact that the Union was limiting the expense of picketing to this employer would tend to lend evidence to its assertion that it was saving its file for the employer against whom it felt the greater resentment. 26

Therefore, if it is assumed by examination of the evidence that the immediate objective was not recognitionl in nature, the important issue is whether an ultimate goal of recognition picketing is banned by Section 8(b)(7) during the one year period. If this question is "... answered in the affirmative, the result, for all practical purposes, would be to ban all picketing, even of a purely informational character, during the one year period ..." 27

PICKETING FOR A NONRECOGNITION MOTIVE

It does not appear from a reading of the legislative history that Congress intended to ban all forms of picketing during the twelve month period as defined by Subsection (A) and Subsection (B). In a comparison of the majority and minority views on this point, Senator Kennedy stated in the report of the Bill before the Senate that "Paragraphs (A) and (B) ... prohibit picketing for union organization or recognition. ... In both cases the prohibitions relate only to picketing in an effort to organize employees or secure recognition in a bargaining unit covered by the existing contract or the prior

26 Ibd., p. 681.
27 Ibd., p. 682.
In urging the adoption of the conference report of the Joint House and Senate Committee, Senator Goldwater said:

In the field of recognition and organizational picketing the Senate Bill prohibited picketing for these purposes for 9 months after an election or when another union had been certified or lawfully recognized. This was all. The Landrum-Griffin bill went further—it restricted picketing unless the union could show a 30 percent interest among the employees and then allowed it [recognition picketing] only for a reasonable period of time, not exceeding 30 days. The conferees adopted the substance of the House provisions except for the 30 percent showing of interest requirements.

While the conferees were in agreement on the effect of the law as applied to organizational and recognition picketing there was some confusion over the right of the union to engage in "protest picketing" during the twelve month period. In referring to this problem Senator Goldwater said:

The impact of this charge . . . in labor law is particularly serious in view of the fact that such picketing is prohibited if an object is recognition or organization. Few instances of picketing will be found where at least a remote objective of the union cannot be found to be related to recognition. The result of this departure from existing labor policy could well be upsetting to the balance between the rights of employees and unions and the rights of employers. In addition in the absence of clear legislative history to show that a contrary intention, this provision might make it an unfair labor practice to picket against an employer's unfair labor practice in many instances, since frequently it may be found that organization is also an object.

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29 Ibid., p. 1437. The final version of the Bill as approved by the Joint Committee banned organizational and recognition picketing for a period of twelve months.

30 Existing policy prior to 1959 would have permitted peaceful picketing in protest of a condition held to be unfair.

The failure of the conference Bill to provide any direct statement on the legality of picketing other than for a recognitional motive caused Senator Morse to state:

The House conferees insisted that a picket line protesting unfair labor practices would not be in violation of the antipicketing provisions of their bill. But why did they refuse to say so in their bill? Everyone knows that protest picketing when the union has not gained recognition contains at least a substantial motive of promoting organization.32

In conclusion to these statements on whether Subsections (A) and (B) banned all forms of picketing during the period in question, the Trial Examiner in the Bachman case stated:

Why, in putting a ban on post election (and "contract bar" period) picketing, did Congress expressly qualify it in the manner it did, if it thought that all picketing during such periods was for an object as stated in the qualification? The fair conclusion then would be that Congress in enacting the prohibition of 8(b)(7) was not concerned with residual or long range goal inherent in even protest picketing, but intended to reach picketing during such periods, which had recognition as a "reasonably immediate goal."33

In adopting the opinion of the Trial Examiner in the Bachman case the Board took the position that the legality of "nonrecognitional" picketing during the period in question would depend on the motive of the union, the context of the proceeding, and other circumstances which would either prove or disprove the denial by the union that it was picketing in mere protest.

As a result of this and similar decisions, unions have been forced to devote careful attention to written as well as verbal

32Ibid., p. 1429.

33134 NLRB 670, 684.
communications which may be considered as evidence that the union's true motive was recognition and in violation of the law. The ultimate effect of this process may be to overlook the important issues in favor of some legal phraseology which will permit the union to continue its protest without interruption.

A second form of picketing which received considerable attention both during the debates over the Bill in Congress and more recently before the Board and the courts is picketing in protest of substandard or sweat shop conditions. The question of whether a union may engage in picketing in protest of substandard wages and working conditions was referred to by Senator Kennedy in the conference report on the Bill before the United States Senate.

Under the Landrum-Griffin Bill [in its original form] it would have been impossible for a union to the customers of a secondary employer that that employer or store was selling goods which were made under racket conditions or sweat shop conditions. . . . We were not able to persuade the House conferees to permit picketing in front of a secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing . . . in front of a secondary site. 34

The dilemma before the NLRB and the courts in this regard is whether the union should be permitted to engage in "informational picketing" in front of the primary situs. In the decisions dealing with this form of picketing, the Board has taken the general position that picketing after loss of a recognition election does not necessarily imply a

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34 Legislative History of the LMRDA (1959), p. 1432.
recognitional objective. The final determination in regard to the legality of the picketing under Subsection (B) must depend upon the facts and circumstances of each case.

The adoption of this line of reasoning is exhibited by the opinion of the Board in Alton Myers Brothers. In this case the union had picketed the premises of the primary employer for the purpose of organizing the employer's employees. After the loss of the recognitional election the union continued to picket the employer, advising:

... the Regional Director [of the NLRB] that it was maintaining its picket line in an effort to organize the Company's employees. Approximately five months thereafter, however, the Local abandoned its efforts to organize the Company's employees, and by its continued picketing after that date sought merely to enlist public support against the Company's non-union standards.

During the period of protest picketing, the union sent out "a circular letter to other unions" making reference to the prior organizational picketing and stating that the union had been unable to obtain advertising space in the local newspaper to reply to a statement by the company urging public support of its position. The union continued to picket the employer during the remaining months of 1959, and when the LMRDA amendments became effective on November 13, 1959, the company filed an unfair labor practice petition in accordance with the provisions as set

36136 NLRB 1270 (1962).
37Ibid., pp. 1271-1272.
forth in Section 8(b)(7).

The pertinent issue in this case as stated by the Board "... is whether the respondent's picketing on and after November 13, 1959, was for the proscribed objective of recognition, bargaining, or organization. For absent such a finding there is no basis for invoking the provisions of Section 8(b)(7)." In rejecting the contention of the General Counsel that the picketing prior to and after June, 1959, was recognition in character as well as in fact, the Board held that the:

... circular letter of September 29 was not substantial independent evidence ... that the picketing was for the object of recognition. But rather was simply, as it purported to be, an appeal to consumers not to patronize a company whose wages and other conditions of employment were considered to be substandard for the area.

Members Rogers and Leedom, dissenting from the majority opinion, objected to the interpretation that the letters in question did not constitute prima facie evidence of a recognition motive.

Whether prefatory or not, the letters candidly admit that the Local was interested in organizing the employer.

The letters also complained about the "unfairness" of the Company's "non-union standards." In context of the Local's continuous picketing and its organizational campaign this characterization of the Company's employment standards as "unfair" has the same force and effect as placing the Company's name on an "unfair" list. Such action on the part of a union at the time it is picketing an employer constitutes an attempt to obtain conditions and concessions which normally result from collective bargaining, and thus amounts to a claim for recognition.

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38 Ibid., p. 1272.
39 Ibid., p. 1273.
40 Ibid., pp. 1274-1275.
As characterized by the facts and opinions in this case, it is quite possible for reasonable men to have legitimate differences over whether the union has abandoned its recognitional motives. While the failure of the LMRDA to spell out the circumstances under which this form of picketing would be a legitimate exercise of union rights is certainly deplorable, criticism of Section 8(b)(7) will not solve this difficult issue. It is equally unfair to dismiss the importance of the right to picket in protest of substandard conditions as a legal technicality. If the Board desires to devise a workable solution to this problem, it will be necessary to establish practical rules which will enable the litigants to resolve the issue. In discussing the legal and economic aspects of this problem, Professor Archibald Cox has stated that:

Banning organizational picketing after an NLRB election partially rejects the free struggle for life, for it prefers the nonunion employees' interest in self determination over the union's interest in spreading its organization as a means of protecting its wage scale and labor standards. Suppose, however, that a union were to picket for the avowed purpose of publicizing the low wages paid in an establishment, without becoming the bargaining agent, in order to compel the owner to raise his wages to the union scale or else to prevent the distribution of the low-cost, nonunion goods in direct competition with the products of union labor... Since Section 8(b)(7) prohibits picketing where the object is recognition, picketing for the object... of eliminating... competition based upon differences in labor standards... could be conceivably... accomplished without interfering with the decision concerning union representation. The danger in distinguishing picketing to protest substandard wages or working conditions from picketing for union recognition or organization is that it may encourage evasions.

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41 Professor Cox acted as an adviser to Senator Kennedy during the consideration of the LMRDA.
through distinguishable phrasing of the pickets' placards and the union's demands. The best solution would be to treat the union's object as a question of fact. Normally recognition or union organization are objectives of any picketing of an unorganized shop, but the force of this presumption, based on experience, can be dissipated by proof that the labor conditions of which the union complains are presently such a substantial threat to existing union standards in other shops as to support a finding that the union has a genuine interest in compelling the improvement of the labor conditions or eliminating the competition, even though the union does not become the bargaining representative. 42

Although Professor Cox's suggestion may be incompatible to those critics who would brand all picketing as recognitional—refusing to distinguish between immediate and ultimate objectives—the proposal is preferable to the Board's approach since it would require the union to prove that labor conditions are such as to pose a serious threat to the labor movement. After the loss of a representation election, analysis of picketing under this framework would protect the decision of the employees concerning representation and it would enable the union to inform the public of substandard conditions. Employment of this criteria would be a positive step in solving the current dilemma and it would offer a preferable alternative to the nigh impossible task of determining the union's true motive.

A secondary form of protest picketing which is similar to picketing against nonunion standards is picketing for reinstatement of economic strikers. Prior to the enactment of the LMRDA the Board held in the

Lewis Food Company case\textsuperscript{43} that picketing of the employer's plant for the dual objective of forcing the employer to recognize the union and to force the employer to reinstate employees who were adherents of the union could not be separated in law and must be considered for the sole object of recognition. It is not conceivable, said the Board, that the picketing for reinstatement "... was merely the 'adjust of a grievance.' Such a finding ignores the fact that recognition and bargaining are essential elements of this objective without which it would be impossible for the Respondent to satisfactorily settle its specific dispute."\textsuperscript{44}

In two of the cases since 1959 the Board has held that picketing for reinstatement may not be a violation of Subsection (B) unless there is evidence of a broader objective.\textsuperscript{45} While "... picketing for an employee's reinstatement may in some circumstances be used as a pretext for attaining recognition ... [there must be] ... an affirmative showing of such object."\textsuperscript{46} In distinguishing the Lewis Food case from \textit{Fanelli Ford Sales}, the Board held that picketing in the former case was co-determinous with the object of recognition while the picketing in the latter case "... would have ceased if the employer, without

\textsuperscript{43}115 NLRB 890 (1956).
\textsuperscript{44}Ibid., p. 893.
\textsuperscript{45}Fanelli Ford Sales, 133 NLRB 1468 (1961).
\textsuperscript{46}Ibid., p. 1469.
"recognizing or, indeed, exchanging a word with the Respondent, had reinstated . . . [the employee in question]."47

In a recent case which combined the dual problem of protesting an employer's unfair labor practice and a subsequent protest of the employer's refusal to rehire economic strikers, the Board held that the change in the legends was a satisfactory disavowal of the recognition objective.48 Under the facts of this case the union had for several years represented certain employees of the Mission Valley Inn. Prior to the expiration of their contract the union notified the employer of its intent to negotiate a new agreement covering all of the employers. Between the termination of the contract and the representation election necessitated by the new contract, the employer allegedly engaged in certain unfair labor practices. The union filed an unfair labor practice and called a strike in protest of the employer's action. The strike was supported by "... picket signs reading:

'WE PROTEST UNFAIR LABOR PRACTICES OF MISSION VALLEY INN' --

'WE PROTEST EMPLOYER'S INTERROGATION OF EMPLOYEES' --
'MVI SAYS IT WILL REFUSE TO BARGAIN IN GOOD FAITH IF UNION WINS ELECTION.'"49

An investigation of the charges revealed that the employer had engaged in unfair labor practices and, by agreement with the Regional Director,

47 Ibid.

48 Mission Valley Inn, 140 NLRB 433 (1963).

49 Ibid., p. 435.
the company reinstated some of the employees. The union was not a party to this agreement and filed a protest appealing the dismissal of the charges. When the appeal was denied the union "... changed its picket signs to read on one side:

'WE PROTEST
MISSION VALLEY INN'S REFUSAL TO REHIRE
ALL UNFAIR LABOR PRACTICE STRIKERS'

and on the other side:

'22 EMPLOYEES STRUCK BECAUSE
MISSION VALLEY INN
ENGAGED IN UNFAIR LABOR PRACTICES
MVI NOW WILL TAKE BACK ONLY
PART OF EMPLOYEES
MVI IS REAPING BENEFIT OF UNFAIR LABOR
PRACTICE WITHOUT RECTIFYING SITUATION.' 50

The union continued to picket the employer prior to and after the representation election. The picketing was peaceful and was conducted at the employer's main entrance which was used by employees, guests, and deliverymen. After the validity of the election was established, the employer petitioned the district court to enjoin the picketing as a violation of Section 8(b)(7)(B) -- picketing for a recognitional object after the loss of a representation election. The union denied any recognitional motive and asserted that picketing was "... solely in protest ... [of the employer's] ... unfair labor practices ..." 51

The court refused to accept the union's interpretation of its

50 Ib id., p. 436.
51 Ib id., p. 437.
activities and the union appealed to the NLRB. In reviewing the facts of this case the Board cited its decision in Blinne Construction Company\(^{52}\) that "... the thrust of Section 8(b)(7) is to deal with recognition and organization picketing."\(^{53}\) It is clear from the construction of Section 8(b)(7) and the legislative history of the Act that picketing for an object other than "... recognition, bargaining, or organization ... falls plainly outside ... [the proscription in] ... Section 8(b)(7)."\(^{54}\) Although the union in the present case continued to picket in protest of an unfair labor practice after the initial complaint had been remedied, to construe a recognitional objective to this form of picketing would be inconsistent with established practice. The intent of the law was to proscribe picketing for a recognitional motive. "The existence of the proscribed object ... is a critical element of affirmative proof which is a prerequisite to a finding of the violation ... alleged ... [this proof] ... cannot be supplied by merely disproving the existence of a different object."\(^{55}\)

The refusal of the employer to reinstate all of the strikers as the unions demand to have them reinstated was a fact of the case. The union was not a party to the unilateral agreement between the Regional

\(^{52}\) 135 NLRB 1153 (1962).

\(^{53}\) ibid., p. 1155.

\(^{54}\) 140 NLRB 437.

\(^{55}\) ibid., p. 438.
Director and Mission Valley which resolved the unfair labor practices. The disappearance of this object in a legal sense does not resolve its economic implications. The union's demand to reinstate all of the strikers was a legitimate and proper objective and the continued protest cannot be regarded as "... a pretext to mask a covert demand for recognition and bargaining." 56

RESTRICTION OF PICKETING UNDER SUBSECTION (C)

The most controversial part of the new restrictions on the law of picketing is contained in Section 8(b)(7)(C) of the LMRDA (1959). This subsection was designed to protect publicity or consumer picketing which limited its appeal to employees to join the union or to the public to discontinue patronage of the employer's establishment. The original Bill as passed by the House and Senate did not make any provision in respect to so-called publicity picketing. Subsection (C) as enacted was drafted by the Joint Conference on the House and Senate versions of the Bill. The subsection was a product of compromise, and the subsequent division among the members of the NLRB and the courts over the intent of the subsection may be traced to the conflicting interests who were responsible for the initial draft of the Bill. In analyzing the implications of Subsection (C) Senator Kennedy stated that "... picketing would be permitted to continue without a petition if it appealed only to the employees to join the union or the public not to patronize the

56 ibid., p. 441.
"non-union establishment without causing truckers or the employees of other employers to refuse to cross the picket line."\(^{57}\) Regarding the broad implication of Section 8(b)(7) in reference to Subsection (C) Senator Kennedy stated that "in other words, we say, in effect: 'You can start picketing with anything you have, with any members you have; but if the picketing results in stopping deliveries or service employees from entering the premises, then there must be an immediate election.'\(^{58}\)

In comparison to Senator Kennedy's comments on the effect of the picketing regulations, Professor Cox has stated that:

Picketing before a union election . . . is divided . . . into two categories: (1) Picketing which halts pick-ups or deliveries by independent trucking concerns or the rendition of services by employees of other employers, and (2) which appeals only to the establishment and members of the public . . .

Congress placed no limitation upon the period for which a union may engage in publicity picketing. Signal picketing—(a signal to organized economic action backed by group discipline)—is treated as a legitimate organizing tactic until the election is held . . . but after the election, all picketing, signal or publicity, is forbidden. . . .\(^{59}\)

While Senator Kennedy and Professor Cox disagreed concerning the legality of publicity picketing after a representation election, they were in agreement that the union could picket in absence of a contract or an election if the effect of such picketing did not disrupt or interfere

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\(^{57}\) *Legislative History of the LMRDA (1959)*, p. 1384.


\(^{59}\) Cox, pp. 267-268.
with "pick-ups or deliveries."\textsuperscript{60}

In contrast to Senator Kennedy's interpretation, Congressman Griffin, co-author of the law as enacted, stated that:

The second proviso to the subsection makes an exception of picketing or other publicity which is for limited purposes and which does not have the effect of inducing employees of others to refuse to cross the picket line to make pick-ups or deliveries and to perform services. Any type of publicity including picketing, which has this effect is not protected by the proviso. The proviso pertains to Subsection (C) only and therefore consumer appeals for organizational or recognition purposes are banned after an election.\textsuperscript{61}

Congressman Griffin's analysis of the picketing provisions was supported in the debate in the upper house by Senator Goldwater and Senator Dirksen.\textsuperscript{62} Speaking to the Senate on the day the Bill was signed into law, Senator Goldwater stated that the situation of prohibited picketing:

\ldots simply means \ldots A union may not picket for recognition or for organizational purposes for more than a reasonable period which may be less than 30 days if the Board so determines, but may not be longer, without petition for a representation election being filed with the Board. If no such petition is filed \ldots \lbrack by the \rbrack \ldots 31st day from its commencement, such picketing, if continued or resumed, becomes unfair labor practice.

\ldots where the union engages in picketing or other publicity for the sole purpose of truthfully advising the public that an employer does not employ members or have a contract with a labor union. In those circumstances, such picketing may be carried on indefinitely. However, if one of the effects of such exempted picketing is to induce any individual employed by any other person--other than the

\textsuperscript{60}Both Senator Kennedy and Professor Cox preferred to define picketing as signal or publicity since they were aware of the difficulties in determining the true "motive" behind the picketing.

\textsuperscript{61}\textit{Legislative History of the LMRDA (1959)}, p. 1812.

\textsuperscript{62}\textit{Ibid.}, p. 1823.
picketed employer— in the course of his employment, not to pick up, deliver, or transport any goods or not to perform any services . . . the employer may . . . petition . . . [for a representation election].

In comparing these two interpretations, Senator Goldwater and Congressman Griffin took the position that Section 8(b)(7) regulated recognitional and organizational picketing by calling for an election within thirty days, and that any evidence of a recognitional motive after the election would automatically preclude the continuation of this form of protest. Senator Kennedy and Professor Cox, on the other hand, adopted the contention that a union could picket for recognition (except as regulated by Section 8(b)(7)) if the picketing in question did not interfere with or disrupt the employer's business. As a result of this explicit difference of opinion between the two representative contingents responsible for drafting Section 8(b)(7), it became apparent that the NLRA and the courts might elect one of three possible interpretations: (1) that Subsection (C) would exempt only truthful informational picketing whose sole purpose was to inform the public that the employer is unfair, (2) that Subsection (C) would exempt all forms of picketing regardless of motive, provided such picketing does not have a secondary effect, or (3) that Subsection (C) would exempt all picketing without restriction in respect to motive or effect if the union could show by the weight of the evidence that its purpose was to inform the public that the employer was unfair.

63Ibid., pp. 1858-1859.
The potential implications of the first interpretation on the status of picketing was illustrated in the case of Phillips v. International Ladies Garment Workers. In this case the union picketed the employer for the purpose of organizing the cutting room employees. The "picketing"—which consisted of posting signs on public property—was "peaceful," and there was no evidence that the picketing induced secondary employers to refuse "... to pick up, deliver or transport any goods or not to perform any services ..." for the employer. Despite the nature of the picketing and the absence of secondary effects, the court took the position that the motive—recognition and organization—was within the preamble and therefore was prohibited by Section 8(b)(7).

The adoption of this interpretation by the United States District Court emphasized the question of purpose with the specific inference that the purpose, as defined in the preamble, means "sole purpose" to the exclusion of other motives. The court's opinion in the Phillips case would seem to restrict the legal status of picketing even beyond that of the Goldwater-Griffin analysis. Both Senator Goldwater and Congressman Griffin were concerned with the effect of recognitional picketing—commonly known as blackmail picketing—because of its intent to force the employer and his employees into an unwanted relationship which

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64 L.R.R.M. 2363 (1959).
65 Ibid., p. 2364.
66 See Legislative History of the LMRDA (1959), p. 1859, remarks by Senator Goldwater before the United States Senate.
places:

... the legitimate trade union movement... in jeopardy. The honest and forthright union organizer cannot hope to compete with the organizer who uses such methods. When the weapons of coercion and force are taken away from the blackmail organizer, the legitimate union movement can grow and expand in a healthy and wholesome way.67

It seems unlikely that the form of picketing in the Phillips case could have any resemblance to the weapons of coercion and force described by Congressman Griffin or Senator Goldwater. It is quite conceivable that peaceful recognitional picketing may be the only feasible means of communicating with the employees in question. Condemnation of this form of protest as an unfair labor practice is a direct contradiction of congressional intent.

The implicit danger of the court's opinion in the Phillips case is the inherent possibility that truthful consumer picketing could be, under given circumstances, construed as a demand for recognition. This problem was subsequently illustrated by the case of McLeod v. Local 89, Chefs Union.68 In this case the union had been picketing the employer, The Stork Club, since 1957. One of the admitted purposes of the picketing was organization of the employer, and after the passage of the LMRDA the unions were informed that they would not be permitted to continue to picket for recognition. Thereafter, the union advised the NLRB that

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67105 Cong. Rec. 14195 (August 11, 1959), remarks by Congressman Griffin.

68280 F. 2d. 760 (1960).
they were withdrawing "... demands for recognition but would continue to picket ... for the purposes of advising the public. [The] ... signs were ... also changed ... to carry the following inscriptions:

'TO THE PUBLIC
THE STORK CLUB
DISCHARGED EMPLOYEES
BECAUSE THEY JOINED
CHEFS, COOKS, PASTRY COOKS
& ASST'S UNION
LOCAL 89 AFL-CIO'

'STORK CLUB
EMPLOYEES
DO NOT
ENJOY
UNION WAGES,
HOURS &
WORKING CONDITIONS'

'TO THE PUBLIC
THE STORK CLUB
DOES NOT HAVE A
CONTRACT WITH
CHEFS, COOKS
PASTRY COOKS
& ASST'S UNION
LOCAL 89 AFL-CIO'"69

In analyzing the union's attempts to comply with the letter of the law, Judge Dawson of the United States District Court held that the wording on the picket sign that "The Stork Club does not have a contract with the union" implied that the union still sought recognition. Reviewing the case on appeal, the Federal Circuit Court refused to enforce the ruling of the District Court holding that there was no reason to believe

69Ibid., p. 762.
that the union was pursuing a recognition motive.

To say . . . [argued the Court] . . . that the carrying of signs stating that the employer has no contract with the union is proof of recognition picketing is to ignore the letter, and we think the spirit of the statute . . . [In determining the legality of picketing] . . . the statute requires a determination . . . [of] . . . whether the picketing had as an objective, one of forcing or requiring the employer to bargain with or recognize the union.\textsuperscript{70}

In arriving at this determination the Court held that courts should not rely entirely on the lettering of the signs; for other factors, i.e., actions of the pickets, correspondence of the union, and reaction of secondary employees should receive equal consideration. Any of these activities considered separately could, under given conditions, become the basis of an unfair labor practice charge, but the Congress did not intend such a result. To enjoin all picketing on the basis of one refusal of delivery or some other separate violation would be a miscarriage of justice. A blanket injunction is a disruptive force, and should be relegated to those occasions when nothing will remedy but total compliance. In cases involving minor infractions the injunction device should be tailored to preclude the illegal activity, for to enjoin all picketing would deny the opportunity to truthfully inform the public. Such a ruling " . . . would seem to carry the scope of the injunction beyond . . . [The] . . . contemplation of the Act."\textsuperscript{71}

The first important case to come before the NLRB under Subsection (C) was \textit{Crown Cafeteria}. In this case the union's business agent

\textsuperscript{70}Ibid., pp. 763-764.

\textsuperscript{71}Ibid., p. 764.
contacted one of the partners prior to the opening of a new branch of Crown Cafeteria, Inc. The business agent's request that union employees be employed in the new establishment was refused, and the union pickets began to patrol the premises carrying a sign reading:

"NOTICE TO MEMBERS OF ORGANIZED LABOR AND THEIR FRIENDS
THIS
ESTABLISHMENT
IS
NON-UNION
PLEASE DO NOT PATRONIZE." 72

During the initial period of the picketing, Crown experienced some difficulty in getting supplies and found it necessary to pick up their own requirements and bring them to the cafeteria. However, when the picketing was thereafter reduced to conform with normal business hours "... Crown was able to get supplies by specifying that deliveries were to be made before 11 A.M." 73 The picketing continued on an eight hour day basis from May until December of 1959 when the pickets were withdrawn pursuant to an agreement between the Regional Director and the union. In reporting the case to the General Counsel, the Trial Examiner adopted the Kennedy-Cox interpretation holding "... that the picketing even though for an object of recognition ... [that the activity] 7 ... fell within the protection of the publicity proviso to Section 8(b)(7) (C) because it did not have the effect of inducing any stoppage of goods

72 130 NLRB 570, 581 (1961).
73 Ibid., p. 582.
The Board refused to accept the Trial Examiner's:

... unduly narrow construction of the Act. Congress in Section 8 (b)(7) expressed the general objective of prohibiting picketing by uncertified labor organizations where an object was recognition ... even though the picketing may also have had other objects as well. ... 

"We regard the Trial Examiner's and our dissenting colleagues' construction of the Act as undermining the carefully worked out program established by Congress. ... We cannot believe that Congress meant to permit recognition picketing merely because the picketing also takes the form of truthfully advising the public that the employer is nonunion. ... 

"We are satisfied that Congress added the proviso only to make clear that purely information picketing, which publicizes the lack of a union contract or the lack of union organization and which has no present object of recognition, should not be curtailed."75

The two dissenting members, Jenkins and Fanning, objected to the majority opinion on the theory that the practical result was to render Subparagraph (C) "... wholly ineffectual as if indeed Congress had inserted mere language intended to serve as a useless appendage in an academic vacuum."76 An analysis of Subparagraph (C) does not support the majority's interpretation for "... it seems clear that Congress intended to permit a kind of picketing which, but for the proviso, would have come within the prohibition of the Section."77 Under the proviso, unions might engage in so-called recognitional picketing if the purpose of the picketing was to truthfully advertise to the public and if the

74Ibid., p. 571.
75Ibid., pp. 571-572.
76Ibid., p. 575.
77Ibid.
picketing was not secondary in effect. "This reading of the proviso, argued the dissenting members . . . gives life to its language. In comparison /The interpretation our colleagues give it makes it, for all practical purposes, ineffectual and superfluous." 78

The dissenting opinion in the Crown Cafeteria case took an added significance when a subsequent change in the membership of the Board resulted in a reversal of the initial ruling with the adoption of the original dissent by the new majority of the Board. 79 The new dissenters in the supplemental decision attempted to clarify their position stating that Subsection (C):

(1) . . . exempted such so-called informational picketing from a general prohibition applicable to all recognition or organizational picketing . . . ;

(2) / that picketing / . . . to advise the public that an employer does not employ . . . / union members; that . . . recognition . . . is necessarily an object of that so-called informational picketing . . . ;

(3) that in order to bring picketing within the purview of Section 8(b)(7) recognition . . . need only be an object, whereas to bring picketing within the exception created by the proviso, it must be for the purpose of advising the public . . .; and

(4) / therefore, the dissenters concluded / . . . Congress intended that so-called informational picketing may be conducted only when there is no independent evidence of an unlawful object and where such picketing does not have an object of inducing a work stoppage. 80

The switch in the majority and dissenting opinions in the

78 Ibid.

79 135 NLRB 1183 (1962).

80 Ibid., p. 1186.
supplemental decision to the original order in Crown Cafeteria has played an important role in recent cases reviewed by the NLRB. In the case of Bartenders and Hotel and Restaurant Workers Union v. Fowler Hotel the union had negotiated a contract with the prior owner of the hotel and restaurant, but when the new owner took over the operation of the hotel he refused to recognize the union as bargaining agent for the employees. In response to this refusal the union called a strike, and the strike was supported by picketing "... with a banner bearing the following legend:

ON STRIKE
FOR RENEWAL OF OUR
UNION CONTRACT
EMPLOYEES OF FOWLER HOTEL." When

Upon investigation of a petition filed by the hotel to enjoin the picketing, the Trial Examiner held that the picketing was in violation of Section 8(b)(7), reasoning that the object of the picketing was to force recognition and not to truthfully advise the public that the hotel was unfair. Citing the revised decision in Crown Cafeteria, the majority of the Board held that Congress intended by the proviso to "... permit picketing which truthfully advised the public that the employer did not have a contract with the union." Although the picketing in this case was admittedly recognition, the picketing was informational and is

81138 NLRB 1315 (1962).
82Ibid., p. 1320.
83Ibid., p. 1316.
within the proviso. The dissenting members, Rodgers and Leedom, objected to the majority's opinion on the grounds that the decision represented an extension of the Crown Cafeteria decision. It is difficult to see, contended the minority, "... how a picket sign, which on its face states that the purpose of picketing is to secure renewal of a union contract, can be deemed limited to the purpose of advising the public that the employer does not have a union contract." The actions and the purpose of the union was clearly recognition-al--such conduct is banned by Section 8(b)(7). To allow such activity on the theory that it is privileged by the legend "to the public" is a gross misinterpretation of the publicity proviso.

In the cases arising under Subsection (C) since the Crown decision, the majority of the Board has continued to follow the principles expressed in the Crown case with the minor exception that publicity picketing must be directed to the public and not to the employees of the picketed employer. In Atlantic Maintenance Company the Board took the position that the union's picketing of the only entrance used by employees with signs advising the public as well as the employees was in violation of the LMRDA.

Picketing for an organizational, recognitional or bargaining objective is nonetheless protected if it complies with the second proviso to Section 8(b)(7)(C), that is if it is "for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of or have a contract with, a labor

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84 Tid., p. 1317.

85 136 NLRB 1104 (1962).
"organization. However, where picketing, though ostensibly directed at the public, is transparently not for that purpose, circumvention of the statutory prohibition . . . will not be tolerated." 86

In *Ypsilanti Press, Inc.* 87 the Board applied the rule of Atlantic Maintenance Company. In this case the union picketed the entrances and parking lots used by employees. The pickets carried signs reading:

"OUR DEMANDS ARE JUSTIFIED, NOT UNREASONABLE YPSILANTI DAILY PRESS UNFAIR TO LOCAL UNION 154." 88

The picketing was supported by letters to the employer encouraging settlement of the strike for recognition. In adopting the ruling of the Trial Examiner, the Board held that the clear intent of the union's actions was to force the employer, via his employees, to recognize the union. Such action is a violation of Section 8(b)(7), and it cannot be saved by self-serving claims that the information was intended for the public.

In two recent decisions *Jay Jacobs Downtown, Inc.* 89 and *Martino's Home Furnishings* 90 involving Subsection (C) petitions, the Board held that the picketing was not in violation of the second proviso. In *Jay Jacobs Downtown* the pickets carried signs reading:

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86 *ibid.*, p. 1105.
87 137 NLRB 1116 (1962).
88 *ibid.*, p. 1119.
89 140 NLRB 1344 (1963).
90 141 NLRB 503 (1963).
In refusing to adopt the Trial Examiner's opinion that the picketing was in violation of Section 8(b)(7), the Board stated that an analysis of the facts reveals that:

The pickets were instructed to picket only at the customer entrances to the store... Jacob's employees were never picketed; the signs were solely to the public and the legends on the sign embodies in substance the language of the publicity proviso. It is thus clear... that the picketing was informational in character and protected by the publicity proviso.92

In Martino's Complete Home Furnishings the Board agreed with the Trial Examiner's conclusions that the picketing was recognition in scope; but it does not follow, contended the Board, that recognition picketing per se is a violation of the Act. To invoke the ban of Section 8(b)(7) the picketing must be directed towards the employees of the picketed employer. If the picketing is to truthfully advise the public that the employer does not employ union members or does not have a union contract, such activity is protected by Subsection (C).

While the Board has adopted a modified version of the Kennedy-Cox interpretation of Subsection (C), the courts as a general rule have followed a legalistic approach in line with the Goldwater-Griffin

9140 NLRB 1345.
92Ibid., p. 1346.
interpretation. In *Graham v. Retail Clerks Ass'n* 93 the retail clerk's union had picketed the employer's retail outlet prior to a representation election for the purpose of organizing and representing the employer's employees at a recognized negotiation session. The union held numerous conferences prior to the initial picketing and submitted a proposed bargaining contract to the store manager. Upon failure of the initial negotiation the union began picketing the store on February 9, 1960. The picket sign read:

"THIS RESTED STORE
HAS NO
CLERK'S UNION CONTRACT
AND
NON-UNION CLERKS PATRONIZE
UNION CLERKS." 94

The picketing continued without incident until a few days before the election on March 18 "when the union forgot about organizing." The picketing was peaceful and there was evidence that other employees refused to cross the picket line on two occasions. After the election in which the employees voted unanimously against the respondent union, the picketing ceased until May 6, 1960, at which time it was resumed. The new picket sign read:

"RESTED HAS NO
CLERK'S UNION CONTRACT
AND
NON-UNION CLERKS." 95

94 *ibid.*, p. 851.
95 *ibid.*, p. 857.
Prior to the resumption of the picketing the respondent's attorney stated in a letter to the Cascade County Trade Assembly that Hested did not have a union contract and that:

... in the near future these unions intend to picket ... for informational purposes only ... [secondly] the intent [of the picketing is not] to stop deliveries ... [at the store, but] ... to influence the public and the friends of organized labor not to make purchases from Hested's store ... We hope the members of your association will not patronize non-union clerks or waitresses at Hested's store.96

The question before the court in this case was whether the informational picketing carried on after the representation election was for organizational and recognition purposes. The petitioner contended that the exception under Section 8(b)(7)(C) (truthful consumer picketing) was not applicable to an action under 8(b)(7)(B) and that the picketing was for organizational purposes and was secondary in effect. In support of this position the petitioner cited Penello v. Retail Store Employees.97

In this case the court limited informational picketing to Subparagraph (C). In the Graham case, however, the court pointed out that the Penello decision recognized that picketing which is purely informational in nature may be permitted under Section 8(b)(7)(B) if it does not have an object of forcing or requiring recognition or organization. Evidence regarding the secondary effects of the picketing disclosed two occasions where persons refused to make delivery by reason of the picketing. On May 18, a driver in the normal course of his activities refused to make

96 Ibid.
delivery of paper cups because of the picketing. On June 13, a mechanic, after talking with a picket, refused to cross the picket line and returned to his shop without notifying the store manager that his automobile would not be ready on schedule. Regarding the organizational question an employee of Hested testified that a picket Joe Conway told him that the picketing would continue until "we" joined up. Under examination Conway admitted the disclosure but said he was only joking.

Reviewing the evidence and the reasonable intent of the parties' action, the court refused to grant the injunction against the picketing holding that it is the duty of the courts under Section 3(b)(7)(B)

"... to determine the intent of the party charged ... [the test]

... is that of our inquiry into [the reasonable] immediate objective of the union ... and there is no way to determine intent or objective except through inferences to be drawn from the actions of the parties."98

In order to ascertain the objective of the picketing, it is necessary to distinguish between the immediate objective and the ultimate objective.

In this case the court determined that:

... while the initial picketing had an object of forcing or requiring recognition and organization, that object was abandoned by the respondent ... [and the evidence of the union activities since May 27 ... is insufficient to show a reasonable immediate object of forcing or requiring recognition or organization, but rather manifests an intent to inform the public that Hested does not have a union contract and employs non-union clerks.99

The court distinguished the Graham case from the Penello decision on the


99Tbid., p. 858.
facts that the union withdrew from the election, the absence of communication between the union and the employer after the election, the change in the picket legend, and the failure of the petitioner to show substantial secondary effects.

In the case of Greene v. NLRB\textsuperscript{100} the union was engaged in picketing Blinstrub's Village and Grille, Inc. for the purpose of organizing the employees and to force Blinstrub's to bargain with the union. The picketing took place nine months after the union lost a certification election in which the employees by a vote of ninety-three to seven rejected the union. In view of the evidence disclosing the immediate and ultimate intent of the picketing, the court held that the union engaged in an unfair labor practice within the meaning of Section 8(b)(7)(B) of the Act.\textsuperscript{101}

The case of Penello v. Retail Store Employees upheld by the United States Court of Appeals in March, 1961, presents an interesting contrast to the Graham and Greene decisions. In the Penello case the union in February, 1960, began conducting a campaign to organize Irvins' employees. This activity consisted of distributing leaflets and obtaining employee signatures. Between February and May the union continued its organizing activity, and both the union and the employer accused each other of violations under the Act. During this period the union

\textsuperscript{100}186 F. Supp. 630 (1960).

\textsuperscript{101}Compare Cavers v. Teamsters General Local 200, 188 F. Supp. 184 (1960).
picketed Irvins' stores carrying signs which read:

"IRVINS REFUSED TO RECOGNIZE
LOCAL 1692
RETAIL STORE EMPLOYEES UNION R.C.I.A.
AFL-CIO."102

As a result of the picketing, Irvins filed a charge alleging that the picketing was being conducted without support of a petition. The union subsequently filed a petition for an expedited election which was held on August 18, 1960. The employees voted against the union and the results were uncontested. On August 19, the union notified Irvins by letter withdrawing its demands for recognition but giving notice that it would inform the labor movement and the City of Baltimore of the employees' antiunion position by advertising to the public the reprehensible conduct of "... your supervisors, agents and representatives threatening, coercing and intimidating your employees ... labor hating and labor baiting are things of the past."103 The union continued its picketing after the election changing the legend on the signs to read:

"THIS IS A
NON-UNION STORE
IRVINS
OPPOSED UNION
FOR ITS EMPLOYEES
PLEASE
DO NOT PATRONIZE
RETAIL STORE EMPLOYEES UNION
LOCAL 692 R.C.I.A., AFL-CIO."104

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102188 F. Supp. 196.
103Ibid.
104Ibid., p. 197.
and the union modified the hours of picketing in order to avoid direct contact with the employees. The number of pickets was reduced to one at each store and the conduct of the picketing was peaceful and was without secondary effects.

After reviewing the Sections 8(b)(7)(A), (B), and (C), the Federal Circuit Court held that the picketing was in violation of the LMRDA. The Court's decision gave attention to congressional intent in the Landrum-Griffin Act referring to Congressman Griffin's statement that the second proviso "... pertains to Subsection (C) only and therefore consumer appeals for organizational and recognition purposes are banned after an election."\(^{105}\) The Court pointed out that the union's picket legend "... told no one that the store had committed unfair labor practices, the union's present justification for picketing. It only told readers that the union had not been recognized."\(^{106}\) On this basis and on the union agent's testimony that in order to secure the removal of the pickets, Irvins would have to inform its employees that it would not interfere with their free choice of a bargaining agent, but that Irvins would also have to allow the appellants to address such meeting of the employees. The Court concluded that the picketing was organizational as well as informational in purpose. In determining the reasonable intent of the picketing, the Court held that it was not required:

\(^{105}\text{Cong. Rec. A7915.}\)

\(^{106}\text{188 F. Supp. 201.}\)
... to accept at face value the self-serving statements made by either side ... The prior objective should be considered, (as well as other evidence) in deciding whether picketing has had as an object forcing the employer to recognize and bargain with the union --not in the far distant future, not immediately, but within a reasonable time, before or shortly after the expiration of one year.107

Referring to the respondent's contention that picketing in the instant case is protected by the Constitution under the rule of A.F.L. v. Swing, the Court held that although Congress could not properly ban picketing in every situation it may ban picketing which defeats public policy. Picketing involves more than just publication and the public policy embodied in the LMRDA "... is that the employer and his employees should be free for a reasonable time after an election from recognition and organizational picketing."108 While this analysis of court decisions does not provide a real insight into the final result in respect to Subsection (C), it does give some indication of the difficulty of balancing the competing interests and the problem of trying to develop a consistent body of procedural rights which will permit the parties to protect themselves from each other as well as from the state.

ANALYSIS OF SECTION 8(b)(7) RESTRICTIONS

Although the implications of Section 8(b)(7) on the status of

107 Ibid.

recognizational and/or organizational picketing have not been spelled out in every conceivable case, it is possible to ascertain the relevant effects of these regulations on the status of picketing. Before analyzing these effects, however, it is important to recognize that Section 8(b)(7) applies to a special case—recognizational picketing—and to a specific sector of the trade union movement. Section 8(b)(7) represents an attempt to limit the ability of trade unions to picket for recognition unless the purpose of such picketing is to truthfully advise the public that the employer is unfair. Under these circumstances Congress intended that Section 8(b)(7) should act as a safeguard—protecting the employer from the secondary effects of picketing, i.e., interference with deliveries and appeals to his employees. Section 8(b)(7), therefore, regulates the ability of the union to picket under given circumstances unless the union is able to demonstrate an absence of a recognitional motive. While the regulations under Section 8(b)(7) are universal in intent, they are not universal in practice. The regulations only affect the union if it is seeking to represent the employer's employees. The right to picket in support of a legitimate strike is otherwise unaffected by Section 8(b)(7). But by limiting the impact of the regulations to the presence of a recognitional motive, Section 8(b)(7) destroys the most significant means of power available to the trade union. The trade union in this instance is either seeking to protect its existence (loss of a decertification election) or to extend its influence through a certification election. In both cases the existence of the local as well as the future of the trade union movement is at
stake. The effect of Section 8(b)(7) has been to disavow the economics of picketing in favor of a legalistic solution. The result has been to confuse the primary parties regarding the current status of picketing. Neither unions nor employers may be certain about the legality of the union's picketing in a given case, but the economic consequences of the right to picket or the restriction of picketing cannot be overlooked by the parties. The economic pressure of picketing forces the employer to either bargain with the union or to seek an injunction against the picketing.

Section 8(b)(7) assumes that the employer should be free of recognition of picketing, and the employer is encouraged to resist until such time as the court may intervene. In view of the preemption of the boycott (Section 704) and the regulation against secondary picketing (Moore Dry Dock), the restriction on primary picketing (Section 8(b)(7)) effectively eliminates the only remaining means of countervailing power in the hands of the union. Thus in this critical area (organization of new unions) Section 8(b)(7) removes the last vestige of union power against the employer. The immediate consequences of the Section 8(b)(7) restrictions on recognition of picketing are illustrated by the record of representation election petitions since 1959 (see Table II). In 1959, the year preceding the enactment of Section 8(b)(7), there were 5,428 representation elections conducted by the NLRB. Unions (both affiliated and unaffiliated) were victorious in 62.8 per cent of the elections held. In 1960, the total percentage decreased to 58.6 per cent and the overall percentage fell to 56.1 per cent in 1961. While the average percentage
### TABLE II

**COLLECTIVE-BARGAINING ELECTIONS**$^1$ **BY AFFILIATION OF PARTICIPATING UNIONS**

<table>
<thead>
<tr>
<th>Year</th>
<th>Union Affiliation</th>
<th>Total</th>
<th>Won</th>
<th>Percent Won</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>1959</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>5,428</td>
<td>3,410</td>
<td>62.8</td>
</tr>
<tr>
<td></td>
<td>AFL-CIO</td>
<td>3,970</td>
<td>2,302</td>
<td>58.0</td>
</tr>
<tr>
<td></td>
<td>Unaffiliated</td>
<td>2,030</td>
<td>1,108</td>
<td>54.6</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1960</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>6,380</td>
<td>3,740</td>
<td>58.6</td>
</tr>
<tr>
<td></td>
<td>AFL-CIO</td>
<td>4,504</td>
<td>2,400</td>
<td>53.3</td>
</tr>
<tr>
<td></td>
<td>Unaffiliated</td>
<td>2,522</td>
<td>1,340</td>
<td>53.1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1961</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>6,354</td>
<td>3,563</td>
<td>56.1</td>
</tr>
<tr>
<td></td>
<td>AFL-CIO</td>
<td>4,287</td>
<td>2,170</td>
<td>50.6</td>
</tr>
<tr>
<td></td>
<td>Unaffiliated</td>
<td>2,714</td>
<td>1,393</td>
<td>51.3</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1962</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>7,355</td>
<td>4,305</td>
<td>58.5</td>
</tr>
<tr>
<td></td>
<td>AFL-CIO</td>
<td>5,049</td>
<td>2,708</td>
<td>53.6</td>
</tr>
<tr>
<td></td>
<td>Unaffiliated</td>
<td>3,014</td>
<td>1,597</td>
<td>53.0</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1963</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>6,871</td>
<td>4,052</td>
<td>59.0</td>
</tr>
<tr>
<td></td>
<td>AFL-CIO</td>
<td>4,749</td>
<td>2,565</td>
<td>54.0</td>
</tr>
<tr>
<td></td>
<td>Unaffiliated</td>
<td>2,768</td>
<td>1,487</td>
<td>53.7</td>
</tr>
</tbody>
</table>

$^1$The term "collective bargaining" election is used to cover representation elections requested by a union or other candidate for employee representation or by the employer.

$^2$Elections involving two unions of different affiliations are counted under each affiliation, but only once in the total. Therefore, the total is less than the sum of the figures of the two groupings by affiliation.

increased to 58.5 per cent for 1962 and to 59 per cent for 1963, the initial decrease of six and one-half per cent between June of 1959 and June of 1962 emphasizes the initial impact of Section 8(b)(7) on certification elections.

Since the enactment of the LMRDA unions have experienced increasing difficulty in maintaining recognition status. This is demonstrated by the record of decertification petitions since 1959 (see Table III). Of the two hundred sixteen decertification elections conducted by the Board in 1959, unions lost their legal status in 65.7 per cent of the total. In 1960, the total percentage of decertifications increased to 68.8 per cent. Although the total percentage decreased to 66.8 per cent in 1961, the percentage for unaffiliated unions increased to 73.4 per cent. Significant within these figures is the increase in the number of decertification petitions for unaffiliated unions. In 1959 there were forty-nine decertification petitions; this number increased to seventy-five in 1960 and to seventy-nine in 1961 or an increase of sixty-two per cent in two years. In comparison the number of petitions for unions affiliated with the AFL-CIO decreased from one hundred sixty-seven in 1959 to one hundred sixty-two in 1961.

The overall increase in decertification petitions among unaffiliated unions strongly supports the hypothesis of this study that Section 8(b)(7) has encouraged "neutral" employers to adopt an antiunion attitude. This change in attitude has fostered the development of a new philosophy of re-entrenchment among nonunion employers comparable to that of the 1920's. The enactment of Section 8(b)(7) has made it
### TABLE III

**DECERTIFICATION ELECTIONS BY AFFILIATION OF PARTICIPATING UNIONS**

<table>
<thead>
<tr>
<th>Year</th>
<th>Union</th>
<th>Total</th>
<th>Elections Participated in</th>
<th>Resulting in</th>
<th>Resulting in</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Certification</td>
<td>Decertification</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Number</td>
<td>Number</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Percent</td>
<td>Percent</td>
</tr>
<tr>
<td>Year</td>
<td>Affiliation</td>
<td>Total</td>
<td></td>
<td>Percent</td>
<td>of total</td>
</tr>
<tr>
<td>------</td>
<td>---------------</td>
<td>-------</td>
<td>---------------------------</td>
<td>--------------</td>
<td>--------------</td>
</tr>
<tr>
<td>1959</td>
<td>Total . . . . 216</td>
<td>74</td>
<td>34.3</td>
<td>142</td>
<td>65.7</td>
</tr>
<tr>
<td></td>
<td>AFL-CIO . . . 167</td>
<td>60</td>
<td>35.9</td>
<td>107</td>
<td>64.1</td>
</tr>
<tr>
<td></td>
<td>Unaffiliated . 49</td>
<td>14</td>
<td>28.6</td>
<td>35</td>
<td>71.4</td>
</tr>
<tr>
<td>1960</td>
<td>Total . . . . 237</td>
<td>74</td>
<td>31.2</td>
<td>163</td>
<td>68.8</td>
</tr>
<tr>
<td></td>
<td>AFL-CIO . . . 162</td>
<td>51</td>
<td>31.5</td>
<td>111</td>
<td>68.5</td>
</tr>
<tr>
<td></td>
<td>Unaffiliated . 75</td>
<td>23</td>
<td>30.7</td>
<td>52</td>
<td>69.3</td>
</tr>
<tr>
<td>1961</td>
<td>Total . . . . 241</td>
<td>80</td>
<td>33.2</td>
<td>161</td>
<td>66.8</td>
</tr>
<tr>
<td></td>
<td>AFL-CIO . . . 162</td>
<td>59</td>
<td>36.4</td>
<td>103</td>
<td>63.6</td>
</tr>
<tr>
<td></td>
<td>Unaffiliated . 79</td>
<td>21</td>
<td>26.6</td>
<td>58</td>
<td>73.4</td>
</tr>
<tr>
<td>1962</td>
<td>Total . . . . 285</td>
<td>99</td>
<td>34.7</td>
<td>186</td>
<td>65.3</td>
</tr>
<tr>
<td></td>
<td>AFL-CIO . . . 192</td>
<td>72</td>
<td>37.5</td>
<td>120</td>
<td>62.5</td>
</tr>
<tr>
<td></td>
<td>Unaffiliated . 93</td>
<td>27</td>
<td>29.0</td>
<td>66</td>
<td>71.0</td>
</tr>
<tr>
<td>1963</td>
<td>Total . . . . 225</td>
<td>60</td>
<td>26.7</td>
<td>165</td>
<td>73.3</td>
</tr>
<tr>
<td></td>
<td>AFL-CIO . . . 139</td>
<td>37</td>
<td>26.6</td>
<td>102</td>
<td>73.4</td>
</tr>
<tr>
<td></td>
<td>Unaffiliated . 76</td>
<td>15</td>
<td>19.7</td>
<td>61</td>
<td>80.3</td>
</tr>
<tr>
<td></td>
<td>AFL-CIO v. Unaffiliated . 10</td>
<td>8</td>
<td>80.0</td>
<td>2</td>
<td>20.0</td>
</tr>
</tbody>
</table>

increasingly difficult for unions on the frontier of the labor movement
to develop satisfactory means of opposing the actions of employers.
The continued application of the tort philosophy of picketing by the
courts has encouraged employers to seek remedies under Section 8(b)(7)
to evict unions from their plants.

THE LEGAL STATUS OF PICKETING (1963)

The legal status of picketing has traveled the "full circle"
from equality with free speech to a current position of restricted scope
entangled by the objective test and the due process clause of the Four-
teenth Amendment. 109 Within this circle of adjustment the legal status
has been subject to a variety of interpretations, reinterpretations,
and new approaches. The most recent approach, or the objective test,
exhibits considerable promise as a continuing source of judicial contro-
versy. The problem of realistically determining the precise object of
the picketing, e.g., which established the test for allowing or dis-
allowing the publication of a labor dispute, provides a seemingly
unsolvable question. The future legal status of picketing may degenerate
to a case by case examination with emphasis on congressional intent,
practice of the parties, present objectives, and past objectives within
a carefully defined time period.

In surveying the legal status of picketing, it is clear that
some forms of picketing are illegal regardless of the objective, that

109 Samoff, loc. cit.
some types are exempt from restrictions, and that other types may or may not be illegal depending on the fact situation. The types of picketing which are illegal regardless of circumstances are (1) picketing in support of a secondary boycott, (2) jurisdictional picketing, (3) picketing for the purpose of displacing a certified union, (4) picketing in support of a strike under a contract containing a no-strike clause, (5) picketing for the purpose of demanding a closed shop, (6) picketing which constitutes a breach of notification procedure under Section 8(d) of the Taft-Hartley Act, (7) picketing of an employer in violation of a state antitrust law within intrastate commerce, (8) picketing in support of an economic dispute against a public utility or an industry affecting the national welfare, (9) picketing in support of a wildcat strike, and (10) picketing in violation of a state public policy statute which is not preempted by federal jurisdiction.

The forms of picketing which are exempt from federal and state regulations are (1) picketing by primary employees in support of a strike against their employer at (a) the primary situs or (b) at the common situs where the picketing does not interfere with the activities of secondary employees, (2) picketing by a minority union for the purpose of organizing a nonunion employer's employees prior to a certification election, (3) picketing for the purpose of advertising to the public and to the employees that an employer is continuing to engage in an unfair labor practice for the purpose of discrediting the union, (4) truthful publicity picketing for the purpose of informing the public that the employer does not have a union contract (a) where the picketing is not
secondary in effect and (b) provided the picketing does not take place within a twelve month period after a certification election, and (5) picketing for the purpose of establishing a union shop where the state does not have a state right-to-work law.

The forms of picketing which may or may not be legal, depending on the court's interpretation of the objective of the picketing, are (1) picketing for the purpose of advertising to the public that the employer has negotiated a sweetheart contract with a bogus union, and (2) truthful publicity picketing which takes place within a twelve month period after a certification election (a) where there is "evidence" that the union may or may not have abandoned prior organizational and recognition objectives (b) provided there is no substantial secondary effects, and (c) where the time period between the election and the resumption of the picketing is reasonable.

The future legal status of picketing will depend upon the trend of court interpretations within the aforementioned classifications. Whether the Board and the courts will elect to adopt a quasi-legal or legalistic interpretation of Section 8(b)(7) of the LMRDA will depend upon the interaction of economic and social pressure, the attitude of the courts, the trend of state legislation, and the courts' philosophical approach to labor disputes. The final course of picketing, however, is destined to play a significant role within the scope of current and future labor-management relations.
CHAPTER V

THE IMPLICATIONS OF THE CHANGING STATUS OF PICKETING

ON UNIONS: SUMMARY AND CONCLUSIONS

As illustrated by the decreasing percentage of certification elections won\(^1\) by unions and the increasing percentage of decertification elections lost\(^2\) by unions, the legalistic restrictions on the right to picket—Section 8(b)(4) and Section 8(b)(7)—have assumed an increasingly important role in labor-management relations. The restrictions on the right to picket have placed effective limits on the right to strike, where the strike is held to be secondary in effect. In addition, the picketing restrictions have so effectively circumscribed the right of protest in certification and decertification cases that unions are limited to picketing on technical grounds, i.e., consumer picketing. Thus the legality of the right to picket has evolved from the motive test (\textit{Vegelahn v. Gunter}) to constitutional protection as free speech (\textit{Thornhill v. Alabama}) and back to the motive test (Section 8(b)(7), LMRDA).

\(^1\)See Table I, p. 142, and Table II, p. 195.

\(^2\)See Table III, p. 197.
The significance of this change in the status of picketing from restriction to protection and back to restriction necessitates a reexamination of the legal basis of picketing.\(^3\) The legality of picketing as a tort depends upon the form and conduct of the activity as a separate function. Picketing is considered to be a means to an end whose legality must be judged as a separate issue and not as a part of the overall relationship. While it may be justifiable to determine the legality of strikes and boycotts by this theory (means to a given end), can the same result be applied to picketing? Is the potential of picketing in terms of economic power equal to that of the strike or of a boycott? Or is picketing an extension of a legitimate dispute which acts as a means of conveying information?

The argument in behalf of the tort theory holds that picketing is more than an extension of a labor dispute. The critics\(^4\) of the Thornhill Doctrine (picketing as free speech) have contended that picketing is more than speech—it is a form of intimidation intended to create the fear of reprisal in the mind of the viewer. The element of


intimidation or coercion\(^5\) in picketing is that part of the picketing process which makes peaceful picketing a legal fiction. Coercion in any form (picketing or blackmail) is a serious violation of human rights and must either be restricted or regulated by reasonable doctrines. The element of intimidation or coercion in picketing as described by Justice Frankfurter (speaking for the majority in *Hughes v. Superior Court*) "... is to exert influences and it produces consequences, different from other modes of communication. The loyalties and responses evoked ... are unlike those flowing from appeals by printed word."\(^6\)

It is, therefore, the coercive element which has subjected picketing to the law of torts. But is picketing coercive per se or is this a legal fiction resulting from decades of judicial interpretation. In order to answer this question it is necessary to examine that part of peaceful picketing which allegedly destroys its legality. The meaning of coercion conveys the idea that the individual or institution has been forced to commit an act or adopt a position contrary to their own will "... where coercion ... exists\(^7\) ... there is no volition. There is no intention nor purpose, but to yield to moral pressure."\(^7\) While there was considerable evidence of violence, libel, and coercion in

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\(^5\)Contemporary judicial decisions have tended to substitute coercion for the idea of intimidation as expounded in *Vegelahn v. Gunter*.

\(^6\)339 U.S. 460.

selected picketing cases both prior to and during the Thornhill era, this form of picketing is an exception rather than the rule in current cases. Despite the disappearance of the coercive element in picketing, the NLRB and the courts have persisted in their condemnation of picketing as an act or form of coercion.

Does it necessarily follow, however, that picketing is coercive? The answer to this problem cannot be satisfied by a simple yes or no but must be considered from the point of view of the object—the prospective viewer of the picket line. The effect of the picketing or "the purpose" of the picketing as interpreted by Section 8(b)(7) of the LMRDA depends upon the reaction in the mind of the viewer. When the viewer refuses to cross the picket line, does it mean that he is the victim of coercion or some stratagem of the picket, or has the legend conveyed a signal to the viewer? In the normal case when the viewer refuses to cross the picket line the picket legend acts as a signal that the employer is unfair—not that the viewer has been coerced by a grim look or an evil eye. If, on the other hand, the viewer ignores the picket, the picketing, however coercive, fails its immediate purpose. Any element of coercion in picketing, therefore, must derive from the first case where the picketing succeeds in changing the mind of the viewer or at least in changing his attitude. In the typical situation picketing results in one of

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8 For example, see Truax v. Corrigan, 257 U.S. 321, and Milkwagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287.

9 A change of attitude could be considered an "intellectual victory."
several possibilities: (1) the viewer simply ignores the picket, (2) the viewer refuses to cross the picket line, (3) the viewer ignores the picket and crosses the line, and (4) the viewer refuses to cross the picket out of fear of personal or economic retaliation. It is, therefore, quite unrealistic to maintain that all picketing contains an element of coercion.

The analysis of the viewer's reaction to a picket line gains additional perspective when the recipient's allegiance is determined. The reaction in this case would depend on whether the viewer is (1) a member of the same union, (2) a member of a rival union, (3) a nonunion deliveryman, or (4) an innocent consumer. The only possibility of coercion would be in situations (3) and (4), and it is probable that self-interest—the interest of the viewer—will be more dominant than any fear of coercion.

Subsection (C) of the LMRDA (the publicity proviso) implicitly assumes that any element of coercion is absent from truthful consumer picketing. Consumer picketing is designed to appeal to the self-interest of the viewer in an attempt to persuade him to accept the union's position. If the consumer or secondary employee acquiesces to the union's legend, does this constitute coercion of the picketed employer? To answer this question it is necessary to consider the total relationship. What is the ultimate goal of the picketing? With few exceptions picketing is a study in economic pressure—pressure via secondary employees or via consumers which, if the picketing is successful, will be transferred to the employer. Does this transferral of
pressure by appealing to the self-interest of the viewer result in coercion? Or does this pressure or process of persuasion produce the same kind of pressure which results from advertising the superiority of a new product, or that which results from price cutting, or pressure against suppliers, or retail outlets or pressure in political circles? Are these instances a study in coercion, a study in persuasion, a study in economic pressure, or do they constitute a legitimate appeal to self-interest? In each case it is a question of semantics, but is the appeal of peaceful picketing so different from other forms of competition that it must be regulated by federal and state codes of permissible conduct? Why must labor unions be subjected to restrictive picketing legislation while employers remain relatively free in their struggle against unions?  

Although it is not the purpose of this study to inquire into the social values of the free enterprise system, it is sufficient to recognize the similarity between pressure through picketing and pressure in similar forms of competition. In the process of establishing checks on the competitive process a democratic society should refrain from regulating legitimate means of pressure which develop in response to the existence of original market power. Peaceful picketing as a form of countervailing power should be protected as a means of keeping the employer in a state of uncertainty regarding the intentions.

10 For a list of employer unfair labor practices see the NLRB, as amended, U.S. Stat. XLIX, 449.
of the union.\footnote{For an explicit discussion of the concept of countervailing power, see John K. Galbraith, \textit{American Capitalism} (Boston: Houghton Mifflin Company, 1952).}

The necessity of protecting the right to picket has assumed additional importance with the enactment of Section 704 of the LMRDA which restricts the employment of "hot cargo" provisions in labor contracts. For a period of time after the passage of the LMRA (1947) unions were able to avoid the sanction of the labor injunction by including "hot cargo" clauses in collective bargaining contracts. Unions could thus engage in a form of secondary pressure by refusing to handle goods of nonunion employers. The refusal to handle nonunion goods became an important source of economic pressure in the hands of transportation and construction unions. With the outlawing of "hot cargo" clauses by Section 704, the right to picket against nonunion goods or employers is the only remaining form of open competition available in these industries. It is therefore implicit that the right to picket even in a restricted form should be protected as a means of counteracting the market power of employers.

Apart from the legal consequences of the problem, what effect has the changing status of picketing had on the conduct of strikes, the stabilization of union membership, and the subsequent loss in bargaining power? As a result of these questions, what are the probable implications in terms of consumer welfare, government participation in labor relations, and the future of trade unions. The economic aspects of the
changing status of picketing are important historically as well as in contemporary analysis. For a brief period of time, picketing—as a means of protest—enjoyed an equality with free speech as protected by the Constitution. Although the tort or separate function thesis soon reasserted its dominance over the law of picketing, the Thornhill era strongly demonstrated the economic consequences of picketing. The emergence of picketing as an extension of a labor dispute coincided with the rise of the contemporary labor movement. In the period following the enactment of the Norris-LaGuardia Act, the NLRA, and the Fair Labor Standards Act, picketing under the Thornhill Doctrine became a significant force for the restive locals of the newly organized Congress of Industrial Organization and the revitalized American Federation of Labor. The destructive power of the strike when supported by unregulated picketing is exemplified by Milkwagon Drivers Union v. Meadowmoor Dairies.\textsuperscript{12} It was thus evident that picketing under given conditions could foster undesirable actions which were in conflict with government policy and public opinion. The subsequent regulation of picketing by the LMRA (1947), Section 8(b)(4), and by Section 8(b)(7) of the LMRDA raised some perplexing problems regarding the conditions under which picketing was considered to be an unfair labor practice. The difficulty of evaluating these two sections has been complicated by the resurgence of the tort theory of picketing and by the proliferation of state legislation seeking to place severe sanctions on the right to picket.

\textsuperscript{12} 312 U.S. 287.
The consequences of this period of reinterpretation in the law of picketing can be seen in (1) the decline in bargaining strength of unions, (2) the stabilization of union membership, (3) the ineffectiveness of strikes, and (4) the difficulty of winning representation elections and the inability to protest the loss of a decertification election. While the decline in the bargaining strength of unions and the stabilization of union membership have certainly been affected by other factors; i.e., that union membership is not as important as it was in the 1930's, the disappearance of the tradition of idealism, the relative period of prosperity since 1945, etc., the restrictions on the right to picket have played a significant role in those industrial and geographical areas where the future of unionism is at stake.  

The effects of the restrictions on picketing as applied to strikes or other disputes and in representation elections may be seen through the guise of a hypothetical union. For example, by considering Local 300 of the International Brotherhood of Watchmakers representing the employees of the Fulton Watch Corporation, it is possible to visualize those situations in which Local 300 would be affected by the picketing regulations. If Local 300, for example, is a mature union with a union shop contract, the picketing regulations would only be effective if the Local should propose to organize a bargaining unit in

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another watch corporation. But it seems unlikely that Local 300 would encounter any serious problems in extending its jurisdiction to an unorganized corporation unless the corporation in question should choose to resist the organizing petition of the watchmakers. Even if Local 300 encounters resistance it is probable that the Local would be able to enroll a majority of the employer's employees. Thus, in a situation of a mature union in an identifiable craft, it is extremely doubtful that the picketing regulations would have any economic effects on the bargaining ability of Local 300. These conclusions would also apply if Local 300 was an affiliated member of the International Brotherhood of Teamsters or even if Local 300 was independent of the national union.

If, instead of a union shop contract, Local 300 has a one year open shop agreement with the Fulton Watch Corporation, it is quite probable that the economic effects of the picketing regulations would have important reflections on the future of Local 300. If Local 300 and the Fulton Corporation are unable to reach a new agreement and a strike ensues, the right to picket is tantamount to the conduct of a successful strike. For the strike to be effective, Local 300 must advertise its dispute to Fulton's strikebreakers, Fulton's suppliers, and to the consuming public. The right to engage in peaceful picketing in these instances is an indispensable form of economic competition which should strike a responsive chord in Fulton's financial position. Although it may be unfair to close Fulton down, it is equally unfair to close the union down. While the picketing regulations under the LMRA as amended by Section 8(b)(7) would not in the normal course of events restrict the
right to picket in support of an economic strike, the picketing could become an unfair labor practice if it is secondary in effect, i.e., picketing at a situs other than that of the primary employer\(^\text{14}\) or picketing at a common situs.\(^\text{15}\) While the economic consequences of limiting the right to picket in these cases has certainly been detrimental to unions in the construction industry and the transportation industry, the statement of principles announced by the NLRB in the Moore Dry Dock case\(^\text{16}\) presents an equitable solution to this controversial issue.

If Local 300 is unable to settle its differences with the Fulton Corporation and the Corporation petitions for a decertification election to test the majority status of the watchmakers, what are the economic consequences of this action? Prior to 1959 the loss of majority status would have precluded Local 300 from picketing for a period of one year. Section 8(b)(7) does not change this result unless the union can demonstrate evidence of a nonrecognitional motive. Although the law establishes the possibility of consumer picketing, it would be extremely difficult for the union to establish evidence of a nonrecognitional motive under these circumstances. In either case the loss of the right to picket for a period of one year seriously limits the ability of the union in maintaining contact with the employees. The exclusion of the


\(^{16}\)See Chapter III, p.123.
union leaves the employer relatively free to establish his own formula of industrial democracy. The assumption that the employer is in a better position to manage the protest of his employees against arbitrary practices (disciplinary transfers, seniority rights, etc.) is not supported by analysis of industrial relations. It is improbable to expect the employer to anticipate and equitably resolve disputes which normally require tri-party adjudication between the employer, the unions, and the government. Continual resort to the nineteenth-century brand of personal democracy cannot be expected to suffice in current industrial relations. The industrial and political spheres must seek to develop a system of regulations which will enable unions and employers to devise equitable solutions to their mutual problems.

Although it is impossible to scientifically resolve the question of employer democracy versus union democracy, it is questionable whether the union should be legally restricted from picketing during this crucial period. If there was some real evidence of "coercion," restrictions on the right to picket could be justified; but in the absence of coercion, should the employer be given a period of twelve months to solidify his position while the union is excluded from the realm of competition? Is this situation somehow different from that of price wars, pricing agreements, or mutual friendships? To deny the right of peaceful protest after the loss of a decertification election temporarily settles the issue in favor of the employer, and it reinforces the market power of the employer against the countervailing power of picketing. This result is detrimental to both the union and ultimate consumers
because it gives a further advantage to the employer.

If Local 300 has recently won a certification election at the Fulton Corporation, the effects of the picketing restrictions would not substantially differ from the consequences of picketing in support of an economic strike. The union could continue to picket until the successful negotiation of a contract with the Fulton Corporation or until such period as the Corporation should file a decertification petition. The economic significance, however, is to encourage antiunion employers to continue to bargain with the union with the hope of eventually imposing the picketing restrictions.

If Local 300 were a minority union, the right to picket prior to a representation election is restricted to thirty days by Section 8(b) (7), and the right to picket after the loss of an election or in the absence of an election petition depends on the NLRB or the courts' interpretation of the intent or motive of the picketing. Thus, in this crucial area, the fate of picketing as a form of economic reprisal depends on a legal technicality—interpretation of the motive. Although the final course of this issue is yet undetermined, it is probable that the lower courts will elect to restrict minority picketing to a nominal form.17

In summary, the effects of the picketing restrictions under the LMRA (1947) and the LMRDA (1959) played a significant role (1) in

17 For example, see Phillips v. International Ladies Garment Workers Union, 45 L.R.R.M. 2263.
limiting the right to picket in support of an economic strike (a) at the secondary situs and (b) at the common situs, (2) in restricting the right to picket prior to and after a representation election and after the loss of a decertification election, and (3) by limiting the right to picket where the union is a minority. These restrictions on the right to picket have played an important role in reducing the economic effectiveness of strikes in those industries directly affected by secondary relationships, and they have decisively reduced the possibility of winning representation elections and the ability to resist decertification petitions.

The significance of these developments in the law of picketing as supported by the record of certification and decertification elections has caused both labor economists and responsible union leaders to express the fear that unions may eventually cease to function as an effective force in industrial society. Although it is impossible to accurately anticipate the future, it is sufficient to state that the present trend is a justifiable cause for alarm in the trade union movement. The implications of this shift in institutional power suggest the possibility of an eventual choice between the present tri-party economy (unions, management, and the public) and that of a bi-polar society (management and the public). The decline of trade unions as a participating force in an industrial society can only serve to complicate the problems of distribution. The disappearance of trade unions would necessitate the substitution of government regulations controlling the distribution of power and wealth currently administered by unions.
While it is doubtful that such a substitution would enhance consumer welfare, it is apparent that it would result in price and wage controls which are the antitheses of a market economy.

In view of the effects of Section 8(b)(7) on the status of picketing, what are the alternatives to these regulations? From the standpoint of the judicial experience of Section 8(b)(7) it would seem plausible to either (1) ban all forms of picketing except picketing in support of a legitimate strike, or (2) permit picketing by a minority union without restrictions in respect to time or circumstance if the picketing did not interfere with deliveries or disrupt the normal routine of the employer's business. Banning of all picketing except that in support of an economic strike amounts to an implicit acceptance of the theory that picketing is coercive per se. Or in the same sense it assumes that picketing is an undesirable form of economic pressure which by some means places the self-interest of the nonunion employee or the secondary employee in jeopardy. While it is difficult to conceive of situations in which the self-interest of individuals might be intimidated by picketing, it is not difficult to evaluate the effect of this prohibition on trade unions. Although this ban would not appreciably affect the established unions, such a restriction would severely limit those unions who are attempting to extend the industrial frontier. By limiting picketing to the support of economic strikes, minority unions would be forced to resort to other tactics in bringing economic pressure to bear on employers. In the final analysis the preservation of the right to picket as a means of competition seems preferable to the
development of other forms of economic pressure. The protection of the right to picket even in a regulated sense "... should be an occasion for mild rejoicing in the conservative press."18

If the right to picket is upheld in preference to a proposal outlawing picketing, is it conceivable to devise a regulation which will avoid the complications of Section 8(b)(7)? The complications of Section 8(b)(7) could be overcome by either (1) adopting Professor Cox's proposal that unions be required to prove that the picketing is informational in nature, or (2) by accepting the Kennedy-Cox interpretation of Section 8(b)(7) that the union may picket in the absence of a certification petition if the picketing does not interfere with deliveries or with the employer's employees. Of these two proposals the latter would avoid the complication of determining whether the picketing is recognition or informational, or whether the picketing was in protest of an employer unfair labor practice or protest of the employer's refusal to rehire economic strikers, or some other form of protest. This proposal would thus overcome the "interpretation" problem of Section 8(b)(7) while retaining the "rule of reason" that legitimate picketing must be peaceful in scope as well as in conduct. At the same time the federal government should amend the NLRA to preclude the possibility of the states fashioning regulations which suppress the right to picket as a violation of public policy, state law, or community interest.

18Galbraith, p. 133.
The effect of state regulation on picketing as illustrated by *International Teamsters v. Vogt* has been to allow the states "... to decide whether to permit or suppress any particular picket line ..."19

Thus unions under state jurisdiction have been forced to wage legislative as well as economic battles in order to retain the right to picket. The protection of peaceful picketing by federal statute would permit unions to advertise the source and reason of their dispute with the employer, and it would preserve the character of open competition between unions and employers. The adoption of this amendment in respect to picketing could become the first of a series of steps which might lead to other constructive improvements in the body of labor law.

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19354 U.S. 297, minority opinion of Justice Douglas.
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VITA

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