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been in any way interested, they could not obtain an impartial trial before a jury composed exclusively of whites. The Supreme Court in denying their petition held that the statute was intended to protect against state action and against that alone, and that it was not intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial. This decision has resulted in a circuitry of litigation for after a conviction has been affirmed by the highest state court it may be brought to the Supreme Court on the ground that there has been a denial of the equal protection of the law as required by the Fourteenth Amendment. This occurred in one of the *Scottsboro* cases.¹⁷ If a removal to a federal court would have been allowed at the commencement of the action, upon the defendant showing the existence of local prejudice a final adjudication would have been sooner made.

The Fourteenth Amendment protects the individual from judicial or administrative as well as legislative action. In *Moore v. Dempsey*¹⁸ the Supreme Court held a "mob-dominated trial" to be void. In *Smith v. Texas*¹⁹ wherein the wording of the state statute relative to the drawing of grand jurors did not envisage racial discrimination in the drawing of grand jurors, but whereas in actual practice there was discrimination against Negroes, the conviction was reversed. Thus in both these cases which are representative of a marked trend, which has been most recently manifested in the *Ashcraft* decision,²⁰ we find that the Supreme Court has peered behind the façade of state criminal procedure and reversed convictions which were based on the shortcomings of the judicial and administrative arms of the state. It would seem that these decisions call for a re-analysis of *Virginia v. Rives*²¹ and the cases predicated thereon. The narrow construction which the courts have put upon the removal statute has been criticized.²² It is indeed so restrictive that no accused has ever been able to have his case removed from the state to the federal court and tried in the latter. Congress did not intend this to be the result of its enactment of the statute. It is submitted that it should be restored to its original purpose and a right of removal allowed on the ground of local prejudice.

THEODORE KRIEGER.

STARE DECISIS, THE NATIONAL LABOR RELATIONS ACT AND THE NORRIS-LAGUARDIA ACT

The present Justices of the United States Supreme Court are now engaged in an acerbitous struggle in hopeless disagreement over

¹⁷ *Norris v. Alabama*, 294 U. S. 587, 79 L. Ed. 1074 (1935).

¹⁸ 261 U. S. 86, 67 L. Ed. 543 (1923).

¹⁹ 311 U. S. 128, 85 L. Ed. 84 (1940).

²⁰ *Ashcraft v. Tennessee*, 322 U. S. 143, 88 L. Ed. 845 (1944).

²¹ Cited *supra* note 13.

²² Note (1941) 54 HARV. L. REV. 685.

the most basic and cherished of all our conceptions of law—the validity of the doctrine of *stare decisis*. On the one hand it is contended that the Supreme Court is not bound by precedent. On the other it is contended that its denial is the denial of the very existence of all law. This disagreement is not extrajudicial; the bases of decisions deliberately expound these divergencies. One Justice has sneered at its hoary respectability and called it anemic.¹ Another Justice has flatly declared the right of the Supreme Court to change its mind in violation of precedent whenever it saw fit to do so.² Another Justice contended that there can be no law that ignores it, since precedent is the foundation of all natural and common law.³

What is the meaning of this struggle? Is it merely the individualistic expression of ordinary difference of opinion under the rules, or, is it an all-out repudiation of fundamental rules of law projected for the benefit of labor alone, but encompassing in its sweep the destruction of all rules? The American Bar Association, through its House of Delegates, unanimously proposed a bill in protest of the prevailing conditions, which bill might curb the power of administrative bureaus and provide for a judicial review of administrative rulings⁴ contrary to decisions abdicating the judicial function in labor questions.

The National Labor Relations Act and the Norris-LaGuardia Act were passed not only in derogation of common law rights having their origin in natural law that had existed for centuries, but in direct conflict with the constitutional guaranties of those rights as well as with prior decisions of the Supreme Court of the United States which had reaffirmed those guaranties. These Acts were so revolutionary that immediately their constitutionality was challenged under the Fourteenth Amendment of the Federal Constitution. In rationalizing their implications, we are met at the threshold with questioning of fundamental definitions.

In considering the right of property and the Fourteenth Amendment, which was designed to prevent its deprivation without due process of law, the first question that presents itself is, what is property? Is the right to be free from interference by such picketing as is destructive of a man's business a right of property which can be denied him by statute and judicial construction in violation of constitutional guaranties and prior decisions? The Federal Supreme Court has not ventured to say that such a right is not a right of property; it has destroyed the right by judicial interpretation of these Acts,

¹ See Mr. Justice Holmes in "Decisional Law and *Stare Decisis*", A. B. A. J., June, 1944.

² *Smith v. Allwright*, 319 U. S. 738, 63 Sup. Ct. 1325 (1943).

³ See Mr. Justice Roberts' dissent in *Smith v. Allwright*, *cit. supra* note 2. See also Mr. Justice Roberts' dissenting opinion in *Mahnich v. Gutenberger*, S. S. Co., 320 U. S. 725, 64 Sup. Ct. 455 (1944). See also "Improvement of Judicial Administration" by Roscoe Pound, A. B. A. J., December, 1942.

⁴ "House of Delegates Offers a Bill," A. B. A. J., April, 1944, 181.

holding that the right of labor to picket is based upon the natural and common law and constitutional right of free speech, and that when one right conflicts with another, the paramount right must prevail even though it destroys the subordinate right.⁵ Which is paramount and which is subordinate raises a secondary question. We concede the right of free speech embodied in the Constitution and having its origin in natural and common law. The simple question then presents itself, is picketing a right of free speech when its only purpose and effect is to destroy the right of property? The Supreme Court has answered the question in the affirmative, from which there is no appeal except to reason.⁶ If that decision be contrary to natural law and reason, so fused into the common law, as well as to an existing constitutional right in affirmation of the common law, how do we justify its existence? The Constitution does not say one right protected by it may be destroyed by another created by statute and affirmed by judicial construction violative of its previous decisions, even though the second right be also a constitutional right. Such a system would end in chaos.⁷ Whence, then, comes the power of the legislature and of the Supreme Court to override the Constitution, the one by statute and the other by invoking a theory of construction? Is the Constitution what the Judges say it is, or is it self-sustaining? Should we hold with one Judge who said that law is the will of the Judges, or should we hold with his colleague who said, "By no means; it is the rule of right"?⁸

Is this a clash between sovereign fiat and sovereign fiat (one constitutional guarantee arrayed against another), or does it present the antinomy of reason and fiat (between common law and statute)? If the rule of reason is the basis for all law, there can be no conflict, for opposing laws, one in consonance with right and the other in violation of right, cannot exist in reason.⁹

Stare decisis is not a rule of law, it is a rule for the ascertainment of law; decisions can have the force of law only if they expound the law truly. Not every decision, therefore, can compel blind adherence to its pronouncements. "Reason is the life of the law; nay, the common law itself is nothing else but reason," said Coke. Blackstone also declared that precedent must be observed "to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion." Yet neither Coke nor Blackstone had originated this thought. It was Marcus Tullius Cicero who put the thought in immortal words when he commented upon the incorporation of *Jus Naturalis* into the Roman laws. That same feeling then was reiter-

⁵ *Thornhill v. Alabama*, 310 U. S. 88, 60 Sup. Ct. 736 (1940).

⁶ *Thornhill v. Alabama*, cited *supra* note 5.

⁷ *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. 277 (1908); *Gibbons v. Ogden*, 9 Wheat. 1, 196 (U. S. 1824); *Lottery Case*, 188 U. S. 321, 47 L. Ed. 492 (1903).

⁸ *Langbridge's Case*, Y. B. 19 Ed. 3, 375 (1345).

⁹ Prof. Lon L. Fuller (Harvard), "Reason and Fiat in Case Laws" (1943).

ated by Professor Beale, who stated: "It must be obvious that neither by legislative nor judicial legislation can the basic system of law be changed."¹⁰

What, then, are the substantive rights founded in natural law or common law or statute which have been destroyed by these new statutes and their construction? Was the change justified by reason and due to the demand for change in fundamental concepts of right? Chief Justice Marshall, in *Ogden v. Saunders*¹¹ had under consideration Article I, Section 10 of the Constitution: "No state . . . shall pass any . . . law impairing the obligation of contracts." His analysis of the property right and its incident, the right of contract, is the most profound and illuminating to be found in the books. These, he views as rights independent of, and superior to, recognition and affirmation by man-made law. The property right is a right founded in natural law which governments may not destroy either by unreasonable conditions to its creation, or by failure to provide coercive aids to its enforcement.

Until the enactment of the statutes under consideration and until their construction by the United States Supreme Court, those principles had never been questioned. Down to 1932 the history of labor is a history of enlightened progress. The Clayton Act of 1914 had been limited in its application by judicial construction to *bona fide* labor disputes.¹² From 1932 on, however, conflicting decisional law construing the new statutes has thrown the status of labor into utter confusion, permitted the destruction of private property without due process, and denied the right of the employer to freely contract for labor.

The avowed purpose of the Norris-LaGuardia Act¹³ was to outlaw any contract made by an employer with his employee which made it a condition of employment that the employee promise not to join or remain a member of any labor organization, or that the employee withdraw from an employment relation in the event that he joins or remains a member of any labor organization. It was designed to override the decision of the United States Supreme Court in the *Adair* case¹⁴ which had declared a similar statute unconstitutional, as a law impairing the obligation of contracts and as a deprivation of property without due process of law. The direct effect of the Act was to force the infiltration of industry with union labor through the open shop. Once labor gained a foothold, however weak, the union was permitted to make any demand upon the employer, whether or

¹⁰ Prof. Beale (Harvard), "Conflict of Laws," *The Causes of Change in the Unwritten Law*, § 4.7, p. 39 (1935).

¹¹ 12 Wheat. 213 (U. S. 1827).

¹² *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 42 Sup. Ct. 72 (1921); *Duplex Printing Co. v. Deering*, 254 U. S. 443, 41 Sup. Ct. 172 (1921).

¹³ 47 STAT. § 70, 29 U. S. C. A. §§ 101-115 (1932).

¹⁴ *Adair v. United States*, cited *supra* note 7.

not there was a controversy between the employer and his employees or any relations between the union and the employer or employees, and to coerce the employer to submit to an unwilling contract in the absence of union representation, or suffer the destruction of his property by strike, picketing and boycott. Even where there were no union employees, the courts have justified union demands as constituting a labor dispute, and the courts in upholding the constitutionality of the Act, have rationalized the strike weapon where there was no labor controversy as freedom of action and the right to work or not to work, while picketing was justified as the right of free speech which does not depend upon a labor dispute for its exercise even though its only purpose is one of coercion through the destruction of property.¹⁵

The remedy of injunction by exclusory conditions was denied to the employer for union abuses through the use of these weapons, except in the case of threatened continuing violence; even there the remedy was rarely granted. Where there existed threats of continued violence, the remedy of injunction was denied if the employer refused to arbitrate demands made upon him by a union having no right of representation, and where there existed no controversy between the employer and his employees. The courts have generally upheld these provisions upon the theory of the existence of a labor dispute by the bare assertion of a union demand without representation and without controversy because the Act arbitrarily defines a labor dispute as any demand made by a union upon an employer where no controversy exists. The Act does use the words "collective bargaining", but it could not in reason be said that these methods, in the absence of a controversy and in the absence of representation, spell collective bargaining growing out of a labor dispute.¹⁶

The Act was limited in its operation to the courts of the United States, and the states were not therefore precluded from assuming jurisdiction in labor cases. The confusion created by the refusal of the states to follow the extreme implications of the Act led to the adoption of the National Labor Relations Act¹⁷ which was designed as an instrumentality to grant affirmative remedy to labor's demands and to make more effective the provisions of the Norris-LaGuardia Act. The reason advanced for its enactment, that it was in furtherance of the regulation of commerce, was the same reason advanced for the enactment of the law that the *Adair* case declared unconstitutional, despite a declaration in the *Adair* case that the question of union or non-union labor had nothing to do with commerce. A Su-

¹⁵ *Thornhill v. Alabama*, cited *supra* notes 5, 6.

¹⁶ *Fur Workers Union, Local No. 72 v. Fur Workers Union No. 31238*, 308 U. S. 522, 60 Sup. Ct. 292 (1939); *Senn v. Tile Layers Protective Union*, 301 U. S. 468, 57 Sup. Ct. 857 (1937); *American Furniture Co. v. Local 200*, 222 Wis. 338, 268 N. W. 250 (1936); *Levering & Garrigues Co. v. Morrin*, 71 F. (2d) 284 (C. C. A. 2d), 293 U. S. 595, 55 Sup. Ct. 110 (1934).

¹⁷ 49 STAT. §§ 449-457, 29 U. S. C. A. §§ 151-165 (1935).

preme Court in sympathy with the political philosophy of the moment then declared the law constitutional and overruled all earlier decisions to the contrary, but the decisions in order to give full force to the Act did not stop at that; they preempted the states or jurisdiction in labor matters by injecting constitutional questions,¹⁸ and by extending the power of Congress under the commerce clause to almost all commerce of an intrastate nature having even a remote influence on interstate commerce.¹⁹ Can a "declared policy" override natural rights and constitutional guaranties? The Supreme Court has said it can.

While the Norris-LaGuardia Act immunized labor against coercion and abuse committed by labor in the absence of any relations with the employer or his employees under the theory that any demand by labor is a labor dispute, the courts could not compel the employer to accede to its demands, it could only deny the employer a remedy. The Labor Act was then passed to effectuate the coercive purpose of the Norris-LaGuardia Act by enforcing labor's demands when labor had through such immunity obtained a majority representation. And the coercive power of the Labor Act under the pseudonym of "collective bargaining" is shown in a long line of decisions of the Labor Board declaring it an unfair labor practice for the employer to refuse to bargain with representation procured through these methods. Even the failure to then agree has been construed to be an unfair labor practice.²⁰ The Supreme Court has in general upheld the Labor Board and, abdicating its judicial function, has held that it lacked jurisdiction to review an administrative board's findings of fact.²¹

Two cases clearly demonstrate that prevention of disturbance of interstate commerce as the reason advanced for the seizing of national legislative control over the activities of labor for their benefit in what had theretofore been the jurisdiction of the states over torts, was not the real reason for the enactment.²² The Clayton Act, the National Labor Relations Act and the Norris-LaGuardia Act were deliberately designed to protect and exclude labor alone from the consequence of all conduct obstructing the "free flow" of commerce. These Acts were not intended to act both ways; they were expressly passed in the interest of labor alone. The *Hutcheson* case so holds. The *Thornhill* case held that picketing is a right of free speech and is not

¹⁸ *Thornhill v. Alabama*, cited *supra* notes 5, 6, 14.

¹⁹ *J. L. Brandeis & Sons v. National Labor Relations Board*, 142 F. (2d) 977 (C. C. A. 8th, 1944); *Wickard v. Filburn*, 317 U. S. 111, 63 Sup. Ct. 82 (1942); *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, 63 Sup. Ct. 125 (1942); *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 59 Sup. Ct. 206 (1938).

²⁰ *H. J. Heinz Co. v. National Labor Relations Board*, 311 U. S. 514, 61 Sup. Ct. 320 (1941).

²¹ *National Labor Relations Board v. Waterman S. S. Co.*, 309 U. S. 206, 60 Sup. Ct. 493 (1940); *National Labor Relations Board v. International Brotherhood of Electrical Workers*, 308 U. S. 413, 60 Sup. Ct. 306 (1940).

²² *United States v. Hutcheson*, 312 U. S. 219, 61 Sup. Ct. 463 (1941); *Apex Hosiery Co. v. Leader et al.*, 310 U. S. 469, 60 Sup. Ct. 982 (1940).

dependent on a labor dispute for its exercise,²³ even though its only effect is to destroy property. The *Swing* case reaffirmed that doctrine,²⁴ and by its sweeping pronouncements, the decision in the *Swing* case intruded upon and virtually transformed the common law of the several states. By injecting the constitutional question of free speech it preempted the states of their jurisdiction over the common law tort. The *Senn* case so stated,²⁵ but the states refused to fall in line and injunctions issued despite the *Swing* and *Senn* decisions where there existed no labor controversy. The *Ritter* case seemed to have indicated a reversal or modification of the conclusiveness of the prior decisions,²⁷ but the Supreme Court in November, 1943,²⁸ reaffirmed its earlier decisions in the *Senn* and *Swing* cases when it overruled the New York Court of Appeals' decision that picketing was unlawful in the absence of a labor dispute.

The basic nature of the controversy leaves no room for compromise, and the diverse opinions are intense, obdurate and implacable.²⁹

Are these extreme decisions merely the temporary swing of the pendulum from right to left, the general ebb and flow of judicial opinion, or are they an attempt to make permanent the ephemeral political philosophy of a transient political administration by repudiating the fundamental law? Time alone will tell. But this is true: We cannot build a new order of *stare decisis* upon the ruins of a principle which we have repudiated merely by piling up mountains of decisions, Pelion on Olympus and Ossa on Pelion, through the very confusion which the statutes and decisions themselves have created.

LOUIS GRANAT.

²³ Thornhill v. Alabama, cited *supra* notes 5, 6, 14, 16.

²⁴ A. F. of L. v. Swing, 312 U. S. 321, 61 Sup. Ct. 568 (1941).

²⁵ Senn v. Tile Layers Union, cited *supra* note 15.

²⁶ Opera on Tour, Inc. v. Weber, 314 U. S. 615, 62 Sup. Ct. 96 (1941); J. H. & S. Theatre v. Fay, 260 N. Y. 315, 183 N. E. 509 (1932); Nann v. Rainmist, 255 N. Y. 307, 174 N. E. 690 (1931).

²⁷ Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe, 315 U. S. 722, 62 Sup. Ct. 807 (1942).

²⁸ Cafeteria Employees Union *etc.* v. Angelos *et al.*, and Same v. Tsakires, 320 U. S. 293, 64 Sup. Ct. 126 (1943).

²⁹ Mahnich v. Southern S. S. Co., cited *supra* note 3.