THE JUDICIAL FUNCTION.*

It is an almost universal human characteristic to blame anything or anybody but ourselves for any condition in life which occasions serious dissatisfaction, and this quality inheres in communities and nations as well as in individuals. The ultimate responsibility for the success or failure of any particular form of government rests upon the individual citizen; yet neither he, nor any group of citizens, is ever willing to accept that responsibility, but always finds some more or less convincing reason to justify the contention that another group, or the operations of a system of laws or institutions which he or they cannot control, is the occasion of the failure to attain that Utopian state of general contentment, which is the universal dream, not only of poets, but of philosophers and economists as well.

Governments, according to the authors of the Declaration of Independence, are instituted among men to secure to them certain inalienable rights, among which are life, liberty and the pursuit of happiness. But, as William Penn shrewdly observed in the "Frame of Government for Pennsylvania," promulgated by him in 1682, "there is nothing the wits of men are more busy and divided upon" than the particular frames and models of government. "It is true," he said, "they seem to agree to the

*An address delivered before the Law Alumni Society of the University of Pennsylvania on Friday evening, May 17, 1912.
end, to wit, happiness; but, in the means, they differ, as to divine, so as to this human felicity; and the cause is much the same, not always want of light and knowledge, but want of using them rightly."¹

And, he continued, in that admirable essay on government which cannot too often be read or too earnestly considered, "Governments, like clocks, go from the motion men give them, and as governments are made and moved by men, so by them are they ruined too."

The framework and structure of government very readily occupy the attention of those who would reform society, and as it is far easier to draft constitutions and write laws than to find competent and honest men to administer them, any temporary condition of social discontent breeds a shoal of suggested amendments or alterations in the existing form of government. This was a marked characteristic of the French Revolution. Many of the mistakes of the National Assembly of 1789, as Professor H. Morse Stevens points out in his History, "arose from its belief that a good constitution would cure all the ills of France, and that if the new constitution were only thoroughly just and logical, local troubles would at once cease, and France would soon settle down to enjoy the benefits of a new and representative system of government."²

The great end of all government, to quote William Penn once more, is "to support power in reverence with the people, and to secure the people from the abuse of power; that they may be free by their just obedience, and the magistrates honorable for their just administration; for liberty without obedience is confusion, and obedience without liberty is slavery."

Therefore, the essentials to good government (that is, that form and administration of government which tends to the happiness of the greatest number of the people), are that the laws shall adequately express the moral sense of the greatest part of the community, that they be executed by a just, courageous and

³ Id., p. 3054.
impartial executive, and expounded and applied by wise and independent judges.

Governments, being established to secure the protection and happiness of all the people, any interference by a part of the people in the operations of any of the branches of government, save in conformity with its regularly established machinery, must tend to unequal and inharmonious action, and to divert its accomplishment to the undue advantage of some, and the detriment of other members of the community. The pathway of history is strewn with the record of unsuccessful efforts to protect against such invasions, and to maintain the three great co-ordinate functions of government in their allotted spheres.

The executive long dominated over the legislative branch of government, and so long as the monarchical principle is maintained, this must be the case. It is the natural tendency of all executives, and can only be held in check by the constant vigilance of the other departments of the government, as well as the whole body of citizens.

Our American independence resulted from a revolt against the aggression of the English King in overriding the legislature and the courts alike, to inflict injustice upon the colonists.

"The history of the present King of Great Britain," runs the great Declaration, "is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these States." Among the counts of the indictment against George the Third were his interferences with the law-making power, and that

"He has obstructed the administration of justice by refusing his assent to laws for establishing judiciary powers," and

"He has made judges dependent on his will alone for the tenure of their offices and the amount and payment of their salaries."

A fearless and independent judiciary has been always a stumbling block in the pathway of tyranny. Alexis de Toqueville says that in no country in Europe were the courts more independent of the government than in old France, but that judges whose position was beyond the King's reach, whom he could neither dismiss or displace, nor promote, and over whom he
had no hold either by ambition or by fear, soon proved inconvenient.

"That led to the denial of their jurisdiction over cases to which the administration was a party, and to the establishment of another class of courts"—administrative tribunals—"less independent, which presented to the subjects' eye a semblance of justice, without involving for the monarch any risk of its reality."

"Very few," he says, "of the royal edicts and declarations, or of the orders in council, issued during the last century of the old monarchy, were unprovided with a clause stating that all disputes that might arise, and law suits that might grow out of them, must be referred to the intendents and the council. The ordinary form of words was, 'His Majesty ordains that all disputes which may arise concerning the execution of the present decree, its accessories and corollaries, shall be tried before the Intendent, and decided by him, subject to appeal to the Council. We forbid our courts and tribunals to take cognizance of any such disputes.'"

One of the reasons assigned by an intendent for issuing a writ taking jurisdiction from the courts is not without peculiar interest today. "Ordinary judges," he said, "are bound by rule to repress illegal acts; but the council can always overstep rules for a salutary purpose."4

Of course, once such a system was introduced, it spread rapidly, and the issue of orders in council forbidding the judges to proceed with cases, and referring them to Commissioners named in the orders, came to be matters of daily occurrence.5 What wonder that the entire administration of justice was broken down and the way paved for the revolution!

But interference by the people collectively with the administration of justice, other than by the establishment of an appropriate judicial system, the enactment of laws, and the choosing of judges with a tenure of office permanent enough to make them independent of momentary excitement and popular clamor, is as destructive of freedom and happiness as the aggression of the executive power.

Lord Acton, writing of revolutionary France, says:

* Toqueville, p. 78.
"The country that had been so proud of its Kings, of its nobles, and of its chains, could not learn without teaching, that popular power may be tainted with the same poison as personal power." 6

The errors, he says, that ruined the work of the States General, "may be reduced to one."

"Having put the nation in the place of the Crown, they invested it with the same unlicensed power, raising no security, and no remedy against oppression from below, assuming or believing, that a government truly representing the people could do no wrong. They acted as if authority duly constituted required no check, and as if no barriers are needed against the nation." 7

The framers of the Constitution of the United States indulged in no such illusions. They felt and expressed the absolute need of barriers against undue action by any branch of the government against another, as well as against hasty, ill-considered action by the people themselves against any part of their government.

"The independence of the judges," wrote the author of the 78th number of The Federalist, "is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

"Though I trust the friends of the proposed constitution will never concur with its enemies in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established constitution whenever they find it inconsistent with their happiness, yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body."

The judicial power of the United States was by the Constitution vested in one Supreme Court and in such inferior courts

---

6 The French Revolution, Acton, p. 108.
7 The French Revolution, Acton, p. 199.
as the Congress may from time to time establish; and the judges of both Supreme and inferior courts were to hold office during good behavior, and to receive a compensation which should not be diminished during their continuance in office. In like manner, by the Pennsylvania Constitution of 1790, the judicial power of the Commonwealth was vested in a Supreme and certain designated inferior courts, the judges holding office by a tenure similar to that of the Federal judiciary; and like provisions were embodied in the organic laws of most of the original States.

The ordinance for the government of the Northwestern Territory contained similar provisions with respect to the territorial judges. Yet the very first State (Ohio) which was carved out of the Northwest Territory in 1805, provided for an elective judiciary with a tenure of six years, and as other new States were formed, the constitutions of almost every one provided for a short-term elective judiciary, with small salaries, while nearly all the original States during the first forty years of the nineteenth century, amended their constitutions so as to conform to that general principle. New York abandoned the life tenure of the judiciary in 1821, and Pennsylvania in 1838. Despite Hamilton's opinion that in a government in which the different departments of power are separated from each other, "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them," the people have generally regarded the judiciary with some jealousy, and they have in most States made the office elective, the terms short and the emoluments slender. In some of the States the Constitution has so restricted the power of the judges as to reduce them to a position little more important than that of a moderator at a meeting where the rights of the parties are debated before and decided by the jury.

Nevertheless, the office of the judge has been dignified in the eyes of a majority of the people, and the judicial function honored by the community. Honor and respect has been almost universally paid to the Supreme Court of the United States,

*Federalist, No. 78.
THE JUDICIAL FUNCTION

despite occasional spasms of jealousy or resentment, such as was exhibited by Andrew Jackson in 1831, when he scornfully refused to aid in the enforcement of the decree of the Supreme Court in the case of Cherokee Nation v. State of Georgia, saying: "John Marshall has pronounced his judgment; let him enforce it if he can"; or, as was exhibited by Congress, when, in 1868, it repealed the statute giving appellate jurisdiction to the Supreme Court in habeas corpus proceedings, after a case involving the constitutionality of the reconstruction act had been argued and submitted to and was under advisement in that court, so as to prevent the court from passing upon that important question. As lately as 1900, Mr. Bryce, in the third edition of his "American Commonwealth," recorded what was undoubtedly the deliberate judgment, not only of all foreign students of our institutions, but certainly of all the educated portion of our own people, when he said:

"Few American institutions are better worth studying than this intricate judicial machinery; few deserve more admiration for the smoothness of their working; few have more contributed to the peace and well being of the country."

Until a recent date the blame for failures of government was in general visited upon the legislatures, or the executive, or upon the "bosses," who, availing of party political machinery, exercised an undue control over both. But very recently the principal attack upon the established order of things has been directed against the judicial establishment, and the discharge of the judicial function, and the current and force of this criticism has assumed the character of a propaganda which has more or less affected all political parties, and now threatens seriously to impair what all students of government have ever considered as, and which all recorded history demonstrates to be, essential to the maintenance of social order, and of that equality before the law which has been the boasted ideal of Anglo-Saxon civilization.

It cannot, therefore, be inappropriate, in this presence, to

---

5 Peters, 1.
6 Ex parte McCordle, 7 Wall. 507; "The Impeachment and Trial of Andrew Johnson," by D. M. DeWitt, p. 403; Messages and Papers, Vol. VI, p. 646.
indulge in a brief consideration of the nature of the judicial function, the character of the burdens imposed upon the judiciary, and wherein it has failed—if it has failed—to sustain those burdens, and what gains may reasonably be anticipated to society by the modifications in our judicial system which have been proposed by those who would change it, in so far as they have made any definite, intelligible suggestions.

"Judges," says Lord Bacon, "should remember that their office is *jus dicere* and not *jus dare*; to interpret law, but not to make law or give law." Yet the nature of our system of jurisprudence is such that in practice a nice adherence to this precept is often difficult, if not impossible. In the development of our institutions our laws are derived from two sources; one, the body of unwritten laws, or immemorial usages and customs; the other, written laws embodying the expressed will of the legislative branch of the government, enacted in conformity with constitutional grants of power or regulations. That our ancestors brought with them from England, as a part of their birthright, the unwritten or common law of England, or so much of it as was applicable to their situation, has been recognized and declared by the uniform course of judicial decision ever since the establishment of our independence, and is expressly declared by the Constitutions of several of the States. But, save as restricted by constitutional provisions, the common law, as is declared in the New York Constitution of 1777, is "subject to such alterations and provisions as the legislature of the State shall from time to time make concerning the same," and a vast volume of statute law has been enacted in the various States, as well as by the National Congress, altering, amending and supplementing the rules of the common law, as well as regulating an infinite variety of matters with which the law did not attempt to deal. The heaviest burdens laid upon the judiciary have resulted from these multifarious and voluminous enactments. Nearly three-quarters of a century ago, Henry Hallam, in his "view of the State of Europe During the Middle Ages," spoke of the vast extent and multiplicity of the English laws, which, he said,

\[\text{e.g. Const. New York, 1777, Art. XXXV, Morris's Lessees c. Vanderen, } 1 \text{ Dallas, 67; Bucher v. Railroad Co., 125 U. S. 555-583.}\]
"have become a practical evil of serious importance, and an evil which, between the timidity of the legislature on the one hand, and the selfish views of practitioners on the other, is likely to reach, in no long period, an intolerable excess. Deterred by an interested clamor against innovation from abrogating what is useless, simplifying what is complex, or determining what is doubtful, and always more inclined to stave off an immediate difficulty by some patchwork scheme of modifications and suspensions, than to consult for posterity in the comprehensive spirit of legal philosophy, we accumulate statute upon statute, and precedent upon precedent, till no industry can acquire, nor any intellect digest the mass of learning that grows upon the panting student; and our jurisprudence seems not unlikely to be simplified in the worst and least honourable manner, a tacit agreement of ignorance among its professors." 12

In his first annual message to Congress (December 3, 1861), President Lincoln called the attention of that body to the then present condition of the statute laws of the United States, and expressed the hope that Congress would be able to find an easy remedy for many of the inconveniences and evils which constantly embarrassed those engaged in the practical administration of those laws:

"Since the organization of the government," he said, "Congress has enacted some five thousand acts and joint resolutions, which fill more than six thousand closely printed pages, and are scattered through many volumes. Many of these acts have been drawn in haste and without sufficient caution, so that their provisions are often obscure in themselves, or in conflict with each other, or at least so doubtful as to render it very difficult for even the best informed persons to ascertain precisely what the statute law really is."

He, therefore, recommended that the statute law should be made as plain and intelligible as possible

"and reduced to as small a compass as may be consistent with the fulness and precision of the will of the legislator and the perspicuity of his language." 13

It was not until 1874 that these recommendations were acted upon; but the revision of the statutes of the United States

published in 1878, useful as it is, was but a brief halting place in the steadily expanding stream of complex, often obscure, constantly conflicting and contradictory national legislation.

England has heeded the warning of Hallam and those who followed him in calling attention to the evil of unbridled legislation, and has gradually revised and simplified her statute law, and checked and improved the character of her new legislation, so that Mr. Bryce, in an address before the New York State Bar Association, in 1908, was able to state that only fifty-eight laws of a public nature had passed the British Parliament in the previous year. But at that same meeting of the New York Bar Association, Mr. Joseph H. Choate stated that twenty-five thousand laws had been passed in the United States during the preceding two years; and the president of the American Bar Association, in his Annual Report for 1911, is reported as saying that nine thousand laws had been passed in the United States during the then current year; and the appendix to his report, setting forth the barest description, by title or subject, of the laws enacted during that year, fills forty-five printed octavo pages.

Out of all this welter of legislation, it is the judicial function to extract what we please to call the legislative will and intention, and to ascertain and declare what is the law. This is essentially the judicial function, for, as Judge Cooley says:

"The legislature may interpret the law by a declaratory statute, but, in America, where the legislative and judicial functions are separate and confided to different departments, the declaratory statute will have the effect to determine the meaning of the law in its application to future transactions only, and not to bind the courts in their application of the law to transactions which have taken place previously. To declare what the law is or has been is the province of the judiciary; to prescribe what it shall be in the future belongs to the legislature." ¹⁴ ¹⁵

If, as Lord Acton says,

"The confusion of the Common Law taught the people that their best safeguard was the independence and the integrity of the judges." ¹⁶

¹⁵Essays on Liberty, p. 59.
how much more should the confusion of the statute law teach the people that their best safeguard is the independence and integrity of the judges? And how much more should any criticism of the judiciary for its dealing with this written law be directed rather against those responsible for the great mass of confused, conflicting, slipshod and often unintelligible legislation!

But the American judiciary is not only burdened with the interpretation of this phantasmagoria of customs and statutes; it is also charged with the interpretation of the written constitutions of government, in the States and the nation respectively. In the constitutions of almost all of the States, as in that of the nation, the powers of the legislature are defined and limited, the difference being that the State legislatures possess all legislative powers not expressly withheld, while Congress enjoys only those expressly granted, and, as Chief Justice Marshall said in *Marbury v. Madison*,\(^4\)

"that those limits may not be mistaken or forgotten, the Constitution is written."

"To what purpose," he asked, "are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation."\(^5\)

For this reason, he concluded that it was a proposition

"too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act."

The Constitution of the United States being, as its context declares, the Supreme Law of the Land, anything in the constitution or laws of any State to the contrary notwithstanding, the duty of the Federal courts to declare any enactment made in violation of the Constitution to be void and not a law at all, when the question arises in a case at law or in equity coming

---

\(^4\) *1 Cranch, 176.*

before it, was recognized by the framers of the Constitution, and by those who advocated its adoption, as essential to the maintenance of the government. For, as Hamilton said, quoting Montesque (L'Esprit des Lois),

"there is no liberty if the power of judging be not separate from the legislative and executive powers."\(^{18}\)

That it was so separate, and was vested in the Federal courts, was declared in one of the earliest decisions by the Supreme Court (Marbury v. Madison, *supra*), and has since been universally so maintained by that tribunal.

Chief Justice Marshall pointed out in *Cohens v. Virginia*,\(^{19}\) that the judiciary cannot, as the legislative may, avoid a question because it approaches the confines of the Constitution.

"We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."

The remedy in cases where, in the performance of this duty, the court puts a construction upon a constitutional provision which is unacceptable to the people, is for the people to amend the Constitution. This was the method employed when, in *Chisholm v. Georgia*,\(^{20}\) the court construed the Constitution as conferring upon the Federal judiciary jurisdiction of a suit brought by a citizen of one State against another State. This interpretation was objectionable to so great a majority of the people in the respective States, that they procured the adoption of the Eleventh Amendment to the Constitution, which declared:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State."

---

18 Federalist, No. 78.
19 6 Wheat. 264-404.
20 2 Dall. 419.
But this remedy can only be invoked when the ruling of the court is unsatisfactory to so large a proportion of the people that that dissatisfaction shall find expression in the adoption by two-thirds of the several States of an amendment to the Constitution which shall alter it, and, therefore, the remedy is not satisfactory to those persons who wish to carry out their own views of government without the delay incident to convincing the citizens of two-thirds of all the States that they should be adopted.

The Constitution is, however, the tangible expression of the will of the whole people of the United States, and, though a faction may be dissatisfied with its provisions as interpreted by the Supreme Court, unless that number shall be so great as to find expression in the method provided in the Fifth Article of the Constitution itself, it must be accepted as the will of the people, pursuant to the principles of majority rule, which are at the foundation of stable popular government, and which have thus far preserved us from the constant disturbances, which have attended the progress of other republics in this hemisphere.

Of course, it is always open to citizens dissatisfied with a constitutional construction adopted by the Supreme Court, to endeavor to persuade the court that it has fallen into error and to correct or modify the conclusions reached. This was the course proposed by Mr. Lincoln with respect to the principles embodied in the decision in the Dred Scott case.

In his speech at Chicago, July 10, 1858, Lincoln said:

"We let this property abide by this decision, but we will try to reverse that decision. * * *

"What are the uses of decisions of Courts? They have two uses. As rules of property they have two uses. First—they decide upon the question before the court. They decide in this case that Dred Scott is a slave. Nobody resists that. Not only that, but they say to everybody else, that persons standing just as Dred Scott stands, are as he is. That is, they say that when a question comes up upon another person, it will be so decided again, unless the court decides in another way, unless the court overrules its decision. Well, we mean to do what we can to have the court decide the other way." 21

---

In his speech at Quincy, Illinois, October 13, 1858, he further explained his position in language too plain for misunderstanding:

"We oppose the Dred Scott decision in a certain way, upon which I ought perhaps to address you a few words. We do not propose that when Dred Scott has been decided to be a slave by the court, we as a mob, will decide him to be free. We do not propose that, when any other one, or one thousand, shall be decided by that court to be slaves, we will in any violent way disturb the rights of property thus settled; but we nevertheless do oppose that decision as a political rule which shall be binding on the voter to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision. We do not propose to be bound by it as a political rule in that way, because we think it lays the foundation, not merely of enlarging and spreading out what we consider an evil, but it lays the foundation for spreading that evil into the States themselves. We propose so resisting it as to have it reversed if we can, and a new judicial rule established upon this subject." 22

Most of the recent specific criticism of the judiciary has arisen out of decisions concerning the constitutionality, under State or Federal constitutions, of legislation passed in the exercise of the police power, for the real or ostensible purpose of protecting the health and safety of the people, or of correcting social and economic injustice.

The function of the judiciary with respect to such laws seems to be strangely misunderstood and grievously misrepresented.

Certainly, law books will be searched in vain to establish the contention recently promulgated that the courts have power to declare such laws unconstitutional, "not only when they violate specific clauses of the State Constitution, but also when members of the court regard the act as contrary to their ideas of social justice."

One of the complaints made against the Royal Courts of Justice, or Parliaments, of France at the time of the revolution was that justice was not administered by them according to the

principles of equity which had been derived from the works of the modern philosophers,\textsuperscript{23} and it is certainly a strange development that the right and duty to so administer law should be asserted in twentieth century America.

The only power which courts of a State have or have ever claimed in this country over such laws, is to determine whether or not they conflict with provisions in the State or Federal Constitution. Almost all the State constitutions embody a declaration of those fundamental rights to life, liberty and the pursuit of happiness, and against deprivation of property without due process of law, which are found in Magna Charta, the Bill of Rights, and the Declaration of Independence.

Where statutes intended for the benefit or advantage of one class of persons are found by the courts to invade the rights secured to others by these constitutional provisions, it is the duty of the courts to declare them void. This is the extent and limit of their function. If a large number of the people are dissatisfied with any such decisions, the method of amendment of almost all the State constitutions is easy enough to give expression to their views in an orderly way in a reasonably short time.

The Federal courts come into the consideration of such questions as these in a somewhat different way.

After the Civil War, and moved especially by the desire and purpose to protect the colored citizens of the United States in the exercise of their newly established freedom and citizenship, the Fourteenth Amendment to the Constitution of the United States was adopted, in terms broad enough to protect all citizens, black or white, alike, declaring, among other things:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The liberty mentioned in this provision means, as was pointed out by Mr. Justice Peckham in \textit{Allgeyer v. Louisiana},\textsuperscript{24}  

\textsuperscript{23} H. Morse Stevens, I French Revolution, p. 284.  
\textsuperscript{24} 165 U. S. at p. 589.
“not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.”

“It is true,” says Mr. Justice McKenna in Shevlin-Carpenter Co. v. Minnesota,24a “that the police power of a State is the least limitable of its powers, but even it may not transcend the prohibition of the Constitution of the United States.”

Therefore, the consideration by the Federal courts of any State statute attempting to confer any especial benefit or advantage upon a certain portion of the community, involves the determination of the question whether or not it abridges the privileges or immunities of citizens of the United States or otherwise invades the rights secured to them by the Fourteenth Amendment.

Mayor Gaynor, of New York, is reported to have said in a recent address before the Yale Law School, that the words “liberty” and “property” in these constitutional provisions were, until very recently—until about 1870—always understood as referring only to physical interference with a man’s liberty by arrest or imprisonment, or some physical restraint; and that to take a man’s property meant the actual taking of his ox, his ass or his house; that the inclusion of the liberty to work within the meaning of the word “liberty” in these Constitutional provisions was never dreamt of until the present years; that in about the year 1870 somebody saw that the word liberty might be stretched to mean liberty in every respect—liberty to work all night if you saw fit, or to make any kind of contract;—that once the thing got started, this Constitutional exegesis was rapid, one court after another refined upon it, until it has finally come to pass that courts are declaring unconstitutional and void the statutes passed for the social and economic welfare, all over the land.

24a 218 U. S. 57, 69.
This is an amazing statement to come from a man of the judicial experience and learning of Mr. Gaynor. As has already been shown, from Magna Charta down through all the State constitutions, the right to life, liberty and the pursuit of happiness has been declared to be that of every free man. Freedom of labor is specified as one of the rights of the citizen secured by the Pennsylvania Constitution of 1790, which declared that among "the general, great and essential principles of liberty and free government are—"

"That all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing his own happiness." 25

Adam Smith, in "The Wealth of Nations," asserted that "The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable." 26

The French economists of the 18th Century asserted that:

"A man's most sacred property is his labour. It is anterior even to the right of property, for it is the possession of those who own nothing else. Therefore, he must be free to make the best use of it he can. The interference of one man with another, of society with its members, of the state with the subject, must be brought down to the lowest dimension. Power intervenes only to restrict intervention, to guard the individual from oppression, that is from regulation in an interest not his own. Free labour and its derivative free trade are the first conditions of legitimate government. Let things fall into their natural order, let society govern itself, and the sovereign function of the State will be to protect nature in the execution of her own law." 27

The fact is, that the right of every man to his own labor was one of the most cherished of those rights which our ancestors

---

25 "It is a right of which he cannot be deprived by law and which he cannot relinquish voluntarily." See Slagle, J., in Brace Bros. v. Evans, 5 Pa. C. C. R., p. 166. "It is now a well established principle of constitutional law that every citizen has the right, subject to reasonable police regulations, to follow any honest and innocent industrial pursuit which he may see proper to adopt." Brittain's Application, 5 Pa. C. C. R. 318.
26 Book I, ch. 10.
27 French Revolution, Acton, pp. 11-12.
endeavored to secure to themselves and their posterity. It was the antithesis of the doctrine established under the Kings of France that

"The right to labour is a royal right which the Prince may sell and subjects can buy." 29

Herbert Spencer tells us that, under the feudal régime in France, the governmental authority extended over rural laborers, as well as tradesmen in the towns—so that the right to exercise a trade had to be purchased from the feudal superior.

"When after centuries of struggle, feudal governments were subordinated by a central government, the head of the State assumed an equally absolute control of production, distribution and exchange. How unlimited was the control, we see in the fact that, just as in despotically governed ancient Mexico, the 'permission of the chiefs' was requisite before anyone could commence a trade, unless by way of succession, so in monarchical France there was established the doctrine that 'the right to labor is a royal right which the prince may sell and subjects should buy.'" 29

The doctrine of the right of secession, and the war of the Rebellion, resulted from the conflict between the right to slave labor and the principle of the freedom of every human being in his own labor. This principle was sought to be forever protected from further question by the provisions of the fourteenth amendment, and also of the thirteenth amendment to the Constitution, which declared

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

The Supreme Court, in the earliest cases arising under the fourteenth amendment, recognized the fact that the rights secured by it were the same that had been declared by the Declaration of Independence to be "inalienable."

"The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have

29 Spencer Principles of Sociology II-3, p. 418.
20 Spencer Principles of Sociology II-3, p. 418.
been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions," declared the Supreme Court, speaking by Mr. Justice Field, in *Butchers' Union Co. v. Crescent City Co.* And, he added, "The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright."

In the exercise by the Supreme Court of the delicate function of measuring legislative enactments passed by States in pursuance of the police power, with the prohibitions of the Federal Constitution, every possible presumption, to use the language of Chief Justice Waite, in the *Sinking Fund Cases* is indulged "in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt."

And it is held that where it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts; that it is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions.

"The power which the legislature has to promote the general welfare," declared Mr. Justice Harlan, "is very great, and the discretion which that department of the government has, in the employment of the means to that end, is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property, and while, according to the principles upon which our institutions rest, 'the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where

---

*3* U. S. 746, 757.

*99* U. S. 700, 716.
freedom prevails, as being the essence of slavery itself; yet, 'in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of public opinion or by means of the suffrage.'

An examination of the cases decided by the Supreme Court under the fourteenth amendment, as was stated by Mr. Justice Brown in *Holden v. Hardy*,

"will demonstrate that, in passing upon the validity of state legislation under that amendment, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the States methods of procedure, which at the time the Constitution was adopted were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests; while, upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to be in need of additional protection."

In the very recent decision of *Railway Company v. McGuire*, in upholding the constitutionality of a statute of the State of Iowa, which made illegal a relief or insurance plan adopted by a railroad company for the benefit of its employes, the court, by Mr. Justice Hughes, enumerates, with some particularity, a long list of statutes of States adopted for the maintenance of peace and security, and the promotion of the health, safety, morals and welfare of those subject to their jurisdiction, which have been sustained by the Federal courts, and says:

"The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review."

---

84 169 U. S. 366, 385.
85 219 U. S. 549, 569.
And, he adds:

"In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. What differences, as to the extent of this power, may exist with respect to particular employments, and how far that which may be authorized as to one department of activity may appear to be arbitrary in another, must be determined as cases are presented for decision. But it is well established that so far as its regulations are valid, not being arbitrary or unrelated to a proper purpose, the legislature undoubtedly may prevent them from being nullified by prohibiting contracts which by modification or waiver would alter or impair the obligation imposed."

It must be apparent that one of the highest of the judicial functions is to determine whether, under the Constitution of a State, or within the rights safeguarded to the citizens by the Constitution of the United States, acts of the legislature, passed in pursuance of well-meaning—sometimes wise and sometimes unwise—efforts to benefit that portion of the community who, by numbers or by organization, can most vociferously make known their needs, are in fact reasonably related to a purpose which it is competent for the government to effect—or on the other hand, constitute arbitrary and unreasonable legislation, exacting from the citizens not directly benefited by it a relinquishment of that freedom which our State and national governments are established to secure.

The question presented for the consideration of every citizen today is whether this delicate function, upon the right management of which is dependent the continued enjoyment of all that makes for the security of the life, liberty and property of every citizen, can best be entrusted to the judiciary, to be exercised in the future as in the past; or whether the Constitutional barriers shall be prostrated before an unrestrained popular electorate.

Mistakes have been made by the judiciary, cases have been wrongly decided, and the extension of legal principles to meet new conditions under judicial interpretation and construction has often been slower than impatient reformers, desirous of im-
mediate results would wish. Yet no candid critic can say that, on the whole, the history of the American judiciary does not furnish as high, if not a higher, example of adequate results than that of any other branch of the government.

"The people," said Chief Justice Marshall, "made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make or to unmake, resides only in the whole body of the people; not in any subdivision of them." 35

That the rights of all the people can be advanced by destroying the independence of the judiciary, making their already brief tenure subject to the uncertainty of momentary popular favor, and subjecting the decisions resulting from the careful consideration of nice questions of relative public and private welfare, in the light of constitutional provisions, to the arbitration of popular election, is one of those strange delusions which it is difficult for any student of law and history to comprehend.

It is the manifestation of a spirit embodied in a quatrain from the Rubaiyat of Omar Khayyam—

"*** Could you and I conspire
To grasp this sorry scheme of things entire,
Would we not shatter it to bits—and then
Remould it nearer to the Heart's Desire?"

It is the spirit of the impatient social reformer; the spirit of the French Revolution; not the spirit of Anglo-Saxon freedom, which advocates these strange departures from our national traditions and our national institutions.

The best hope and the greatest security of all the people—rich and poor—lies in the preservation of the essential principles of our judicial establishments, and the continued performance by them of the true judicial functions. For as Mr. Phelps so eloquently said in his address at the One Hundredth Anniversary of the adoption of the Federal Constitution:

"***, by the inexorable logic of sound, constitutional principles, it has been brought to pass, that the rights of the people

*Cohens v. Virginia, 6 Wheat. 389.*
find their last and best security, not in the popular assembly, nor in any agency of its creation, but in that institution of government, which is furtherest of all beyond the popular reach, which is made as far as any institution can be, independent of public feeling, and invulnerable to the attack of majorities. Having its origin in the sovereignty of the people, it is the bulwark of the people against their own unadvised action, their own uninstructed will. It saves them, not merely from their enemies; it saves them from themselves. And so it perpetuates the sovereignty from which it sprang; and which has been provided for its own supremacy, by the surrender of a power it was dangerous to retain."

George W. Wickersham.