THE STRUGGLE FOR EQUALITY IN THE UNITED STATES.

IV

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The Courts and Public Opinion

I

MANY are disposed to take exception to popular criticism of the courts. This point of view merits consideration because it is entertained by some who are genuinely progressive in spirit as well as by reactionaries. It is the position of those who think the tyranny of the majority is our greatest menace and who look upon the courts as the bulwark not only of property, but of personal liberty. It reflects the traditional respect in which the courts are held.

It is quite generally conceded that there are certain limitations to criticizing the courts which need not be observed in the discussion of other matters. During the trial of a case, remarks which obstruct the administration of justice are clearly out of order. Neither can the expression of views well be justified which counsel resistance to the decrees of the courts after they have once been rendered. So long as the decision of a court stands as the law of the land, it should be obeyed, unless an exception be made where matters of private conscience are involved. But this in no wise precludes bringing a similar case before the court with a view to having the point at issue reargued and the decision reversed, neither does it preclude popular discussion of the grounds upon which an objectionable decision rests. *Starte decisis* is a rule which admits of exceptions. The second legal-tender case is a conspicuous example. The view expressed by the Supreme Court in the Dartmouth College case has been "substantially modified, if not abrogated altogether."[1] Those who object to any and every criticism of court decisions forget that the law is not a hard and fast thing, but is all the time in the making, changing with the prevailing sense of right, and that discussion and criticism by the laity as well as by members of the bench and bar are helpful to this end. When there is great diversity of opinion among members of the bench upon a question, the general public can not well be denied taking part in the discussion, especially when some question of governmental policy is involved in regard to

[1] Christopher G. Tiedeman, "The Unwritten Constitution of the U. S.," p. 66.

which the public is confessedly the final arbiter. Moreover, since judicial interpretation frequently either enlarges or contracts the meaning of statutes and constitutions, the courts can hardly hope to escape without criticism. And where the courts occasionally declare legislative acts unconstitutional, as they do in the United States, popular criticism is almost inevitable. There is as little reason to expect the courts to escape unscathed by the sharp wing of criticism as to expect the soldier on the firing line in time of battle to escape the risks to which he is unavoidably exposed. It is useless to try to taboo the tendency of the popular mind to criticize the judiciary. The only recourse for either party to the controversy is to assume that the other is possessed of a rational nature and to try to contradict error with truth.

In the oft-quoted words of Ex-President Taft:

> The opportunity freely and publicly to criticize judicial action is of vastly more importance to the body politic than the immunity of courts and judges from unjust aspersions and attack. Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be submitted to the intelligent scrutiny and candid criticism of their fellow-men. In the case of judges having a life tenure, indeed, their very independence makes the right freely to comment on their decisions of greater importance, because it is the only practicable and available instrument in the hands of a free people to keep such judges alive to the reasonable demands of those they serve.

These observations are especially true in a country where the springs of authority are supposed to reside in and to issue from the people. In a country where the divine right of kings is in vogue, there is a certain consistency in placing popular criticism of the courts under the ban, but such action is incongruous in a country committed to the idea of popular rule. The courts are ordained and established by man to promote the ends of justice, and since the creature can not be greater than its creator it is within the realm of the possible for the people to abridge the power of the courts and to reconstitute them on a different basis. The constitution leaves the establishment of courts inferior to the Supreme Court to the discretion of Congress. The original jurisdiction of the Supreme Court is specifically limited to cases affecting ambassadors, other public ministers and consuls, and cases in which a state is a party, and its appellate jurisdiction is subject to such exceptions and such regulations as Congress shall make. In providing for its own amendment, moreover, the constitution makes no exception of the judicial system for which it provided, but frankly admits that in this as well as in other respects it may become outgrown and require modification. Certain current writers appear to think that the framers of the constitution uttered the last word of wisdom upon the judiciary. The framers themselves did not entertain this delusion. The last Republican platform recognizes that all is not well with the courts, and accordingly favors legislation to the end of preventing "long delays and

the tedious and costly appeals which have so often amounted to a denial of justice in civil cases and to a failure to protect the public at large in criminal cases." Still more significant is the approval of "such action as may be necessary to simplify the process by which any judge who may be found to be derelict in his duty may be removed from office."

II

The current tendency to criticize the courts is nothing new. It has existed ever since the foundation of the government. Jefferson denounced the decision of the Supreme Court in Marbury *v.* Madison. Jackson vetoed a bill renewing the charter of the United States Bank on the ground that it was unconstitutional, although the Supreme Court had pronounced a similar bill constitutional, and Lincoln strongly dissented from the Dred Scott decision. Moreover, in at least three instances the President has gone so far as openly to disregard an order or a decision of the Supreme Court. Jefferson refused to answer to a subpœna issued by Marshall for his appearance as a witness at the trial of Burr. Jackson's celebrated remark, "John Marshall has rendered his decision, now let him enforce it," will probably never be forgotten. Lincoln ignored the opinion of Chief-Justice Taney that the suspension of the writ of habeas corpus by presidential proclamation was unconstitutional. States have also refused to obey the decisions of the court.

Criticism of the courts is especially rife at present and promises to become still more common. First, the readiness with which injunctions are issued at the behests of employers in controversies between capital and labor irritates the working classes. Blanket restraining orders issued now and then without the parties enjoined having a chance to be heard in court and occasional instances in which peaceful persuasion is placed under the ban stir up bad blood and create the impression that the courts are the tools of the employing class. Amendment number twenty-two submitted to the voters of Ohio in 1912 contained the following:

> No order of injunction shall issue in any controversy involving the employment of labor, except to preserve physical property from injury or destruction; and all persons charged in contempt proceedings with the violation of an injunction issued in such controversies shall, upon demand, be granted a trial by jury as in criminal cases.

This amendment failed to carry. Nevertheless, the large vote which it received indicates much dissatisfaction with the manner in which the courts at present issue injunctions and punish for contempt in labor cases. This amendment received 240,896 votes as compared with 257,302 cast against it, though in limiting the injunction to the preservation of physical property it forbade its use to protect the good-will of a business or the lives of the community from intimidation and acts of violence.

In the second place, the courts have become the targets of adverse criticism by declaring social legislation unconstitutional. One has but to recall the popular disapproval aroused in recent years by the decisions of the New York Court of Appeals. Laws that prevented the manufacture of tobacco in tenement-houses, safeguarded life against dangerous machinery, limited the hours of labor of women in factories to ten hours a day for six days in the week, and the Workingmen's Compensation Act have been held unconstitutional. These decisions have done much to provoke the belief that the courts are unsympathetic with humanitarian measures and that they unwarrantedly interfere with legislative discretion.

> The people believe in their courts, they admire and love many of their judges, yet they feel, vaguely, perhaps, but persistently, that something is wrong about a judicial system under which a few men obstruct the will and the needs of the many on matters which seem to involve no question of substantial right at all, so far as individuals are concerned, but only divergences of view as to what is expedient and proper so far as society, as a whole, is concerned.[2]

A third fact, and one often emphasized by Ex-President Taft, concerns the almost interminable delay incidental to judicial procedure in many parts of the United States, the practically endless opportunity for appeal, the frequency with which the outcome of litigation turns upon some technicality of the law and not upon justice, and the fact that the winner in a lawsuit is often the man with the longest purse and not the man with a just cause. The legal profession is prone to procrastinate. Compliance with the forms of law instils the habit of delay. To postpone action until an important witness for the opposing side moves away or dies, or until some other desired event happens, is a favorite device. A banker of long experience tells me that the average business man takes considerably less time to settle an estate than the average lawyer. In the state of New York since 1848, three out of every five cases have been decided upon some point in procedure in place of being decided upon their merits. In other words, the doing of justice has been subordinated to the enforcement of technical rules. The plaintiff in a divorce case failed to secure a decree because the words, "Action for divorce," were written on the back in place of on the face of the summons to her husband, as required by the statutory code. If the action had been to recover a penalty, the "general reference to the statute" should have been placed upon the back of the summons.[3] Failure to do justice, consequently, is sometimes due to the fact that the statutory codes governing procedure leave the courts no discretion. When one considers how much the usefulness of the Interstate Commerce Commission was for years impaired by judicial obstruction, it is

[2] William L. Ransom, "Majority Rule and the Judiciary," p. 36.

[3] George W. Alger, "Swift and Cheap Justice," *The World's Work*, Vol. 27, 1913, pp. 56–57.

apparent how frequently the law's delay in the case of the ordinary man must defeat the ends of justice. So uncertain and expensive is justice secured at the hands of lawyers and courts that many men of affairs settle their controversies by arbitration. The ordinary man, unless of a contentious nature, often finds the cost of justice prohibitory. One result is to encourage aggression by wrongdoers. In trials before Justices of the Peace, the defendant frequently permits judgment to be rendered by default, and a year or two may elapse before the case is tried in a higher court. Needless appeals and retrials may result in the lapse of a much longer time before the case is finally decided. "Litigation for the sake of litigation ought to be discouraged. But this is the only form of petty litigation which survives the discouragements involved in American judicial organization and procedure."[4] Moreover, many members of the legal profession to their discredit are averse to changing a system which inures to their personal advantage. It is little wonder, consequently, that among the well-established planks in the platforms of the Socialist party is the demand for free justice. To the end of remedying the existing condition the people of Ohio, in 1912, provided for one trial and one review by amending the state constitution.

In the fourth place, the courts are not organized on a business basis. The records which disclose the comparative amounts of work done by the different members of the bench are usually sadly deficient. The Municipal Court of Chicago "is the only court, as yet, which is so organized as to be able to furnish adequate statistics of judicial administration."[5] There is too much piecemeal dealing with cases by judges whose jurisdictions overlap. As many as twenty-two different justices have heard different proceedings in a single cause.[6] There is a lack of supervising officers whose duty it should be to place the several members of the bench where they can do the most effective work. The judges in the circuit and superior courts of Chicago "draw lots to see who shall hear chancery cases. There is no possibility of specialization. They do their work in the criminal court for a year at a time in rotation." The Courts of Common Pleas in Philadelphia "are split up into five air-tight compartments, each an absolutely distinct court," with no possibility of transferring cases from one court to the other. In some courts the time of lawyers and litigants is needlessly wasted by calling cases from day to day that are too far down the list to stand any chance of trial.[7] Another mistake lies in depending upon incompetent tribunals to dispense justice in petty cases, such as those presided over by the ordinary Justice of the Peace. Individual judges of the same court

[4] Professor Roscoe Pound, "The Administration of Justice in the Modern City," *Harvard Law Review*, Vol. 26, 1913, p. 320.

[5] *Ibid.*, p. 315.

[6] *Ibid.*, p. 314.

[7] George W. Alger, *op. cit.*, Vol. 26, 1913, pp. 658, 662 and 663.

occasionally block each other. In the history of the Erie Railway, the interference of some of the Supreme Court judges of New York with each other assumed scandalous proportions. The contending parties instituted proceedings before competing judges friendly to their respective interests.[8] The popular impression that the courts are organized to give business to lawyers and to afford jobs to place-hunters rather than to promote the ends of justice is by no means groundless. The cost of our judicial system to litigants plus the excessive cost saddled upon the taxpayers will sooner or later attract the scrutiny of the public. Social legislation that calls for increased expenditures and upon which men have set their hearts will compel economy in our judicial expenditures.

Recent events, however, afford ground for hope. The efficient organization of the Chicago Municipal Court shows what can be done. Municipal Courts are gradually taking the place of those over which Justices of the Peace preside in other cities. The Police Magistrate's Court in New York City has been reorganized in two divisions each of which has a directing head. The dominant note of the reports and proceedings of The American Bar Association manifests less pride in the courts and is more given to criticizing the law and its administration. The courts are suffering the consequences of too much veneration. They need the stimulating effect of a more critical public opinion. "The law needs perennially an infusion of ideas from outside professional circles."[9]

In the fifth place, the seat of authority is gradually shifting toward the popular mind. This is a fact of fundamental importance and is one with which it is as useless to quarrel as with the tides. Socialism and trade-unionism are redistributing the center of authority. Our educational system, the railroad, the steamship, the telephone and telegraph, the postal system, the newspaper and cheap magazine, in short, all the facilities which quicken the popular intelligence, are opposed to making a fetish of the constitution and of the courts. Judicial infallibility as well as infallibility in the matter of religion is out of keeping with the spirit of the times. It is too late to return to the theory of dependence according to which

> the lot of the poor, in all things which affect them collectively, should be regulated *for* them, not *by* them. . . . The poor have come out of leading-strings, and can not any longer be governed or treated like children.[10]

Sixth, the demands made upon the courts are becoming more exacting. A keener conception of justice is spreading throughout society. Busi-

[8] Charles F. Adams, Jr., and Henry Adams, "Chapters of Erie and other Essays," pp. 1–99 passim. Pages 18–24 are especially illuminating.

[9] Professor Roscoe Pound, *op. cit.*, p. 319.

[10] John Stuart Mill, "Principles of Political Economy," edited by W. J. Ashley, pp. 753 and 757.

ness conduct once in perfectly good standing is being called in question. Are sweatshop conditions just and right? is a question asked on every hand. The American people are waking up to the fact that an abundance of free land rather than the excellence of their institutions has been the secret of much of the success which they have achieved, and that the disappearance of the former renders reliance upon a happy-go-lucky system of dispensing justice no longer prudent. Moreover, justice has ceased to dwell among the clouds and a larger measure of it is within the grasp of the ordinary man if he but asks for it. People are demanding justice here and now and can no longer be put off with promises of bliss in the hereafter.

Modern civilization is imposing heavier burdens upon the courts in still another way. The growing complexity of the environment has greatly increased the sum total of human relations and changed the character of many old ones. The relations between employer and employee when the two worked side by side bore little resemblance to what they are to-day in connection with a trunk-line railway or gigantic trust. The staple necessaries of life which every community once produced for itself are now supplied through the portals of the world market. Producer and consumer have ceased to be neighbors and the personal relations which once obtained between them have ceased to exist. The problem of regulating the relations which exist between the public on the one hand and the railways, trusts and labor organizations on the other baffles the keenest minds.

Again, we have become less exultant as a people, less confident of our future, less disposed to leave our destiny as a nation to drift without a guiding hand and purpose. There is a growing sense that a

> better future, just in so far as it is better, will have to be planned and constructed rather than fulfilled of its own momentum. . . . The way to realize a purpose is, not to leave it to chance, but to keep it loyally in mind, and adopt means proper to the importance and the difficulty of the task.[11]

The suspicion is growing that the self-interest of the individual is not at one with the public welfare. There is misgiving lest barriers arise to obstruct the process whereby men of ability, no matter how humbly born, have hitherto risen to positions of trust and leadership in the community. There is fear lest a system of caste get such a foothold that young men of promise will cease to aspire and rest content with the stations in life in which they happen to be born. There is a keener sense of social responsibility and less of a disposition to hold the individual responsible for human failure. Poverty is not regarded as a condition to which large numbers of men are hopelessly condemned. In short, an atmosphere of seriousness has swept over the nation and imposed more difficult tasks upon the courts.

[11] Herbert Croly, "The Promise of American Life," pp. 6 and 24.

A democratic ideal makes the social problem inevitable and its attempted solution indispensable.[12]

Seventhly, the popular suspicion that judicial decisions unduly favor the interests of corporate wealth is apparently increasing. The reasons are not far to seek. The road to a judgeship often lies through an attorneyship for some great corporation, and an unconscious if not a conscious bias is believed to follow a man when he ascends the bench. Association with the comfortable and well-to-do is thought to exert a similar influence. The indiscretion of certain prominent jurists in accepting Pullman and other railway passes, and in going on junkets as the guests of railway attorneys whose clients either have or some day may have cases in court naturally arouses suspicion. Active participation in politics by members of the bench, nepotism in the appointment of railway receivers and the distribution of other choice plums, the auctioning off of judicial nominations to the highest bidder, promotions to judgeships as a reward for services rendered political machines closely allied with corporate interests,—these and other infractions of the law of fair play have lessened the prestige of the courts. Fortunately, however, instances of corruption on the bench are still believed to be the exception and not the rule.

In the eighth place, the most common criticism of the courts does not concern their integrity, but "the comparative inflexibility of the judicial mind, a certain blindness to the changing social and economic order, an exaggerated veneration for ancient principles of law, established under conditions which no longer apply."[13] Tradition and precedent are all well enough as guides in a stationary environment, but they lose much of their utility amid shifting conditions. It is worthy of note that some of the courts are less frequently the target of adverse criticism than others, and the Supreme Court probably least of all. More or less florid rhetoric is occasionally employed in denouncing the decisions of that body, but I do not recall any decision within a lifetime against which the taint of dishonor has been brought by any one entitled to belief. Moreover, partly because long years of service on the bench make for a public rather than a private point of view, and partly because climatic, geographical and economic conditions in the United States are more diverse than in any one state, the decisions of the Supreme Court are relatively flexible.[14]

The legal precedents which have arisen amid rural conditions may prove a misfit in a large city. The reasons are apparent. The rural mind inclines to a minimum of public control. It is jealous of authority. It emphasizes the rights of the individual rather than the social interest. It explains the presence of Bills of Rights in the con-

[12] *Ibid.*, p. 25.

[13] Walter E. Weyl, *op. cit.*, p. 112.

[14] Frank J. Goodnow, "Social Reform and the Constitution," pp. 330–331.

stitutions of the several states. It also accounts for our system of checks and balances. A modern urban community, if left to itself, would hardly shackle its power to act by such devices. The Kentucky mountaineer who carries his individualism to the point of taking the law into his own hands in place of relying upon the regularly constituted authorities is the forerunner of the present rural point of view. Moreover, the farmer is less familiar with social and economic changes than people who live in cities. Agriculture is less subject to revolutionary changes in machine production than manufactures. Tradition is more potent in the country than in the city. The opportunity for keeping public opinion abreast of the times by publicity and discussion is better where population is dense than where it is sparse. The vote on the forty-two amendments to the constitution of Ohio submitted to the voters in 1912 illustrates the condition of the rural mind. Of the thirty-four amendments adopted, all, save woman suffrage, carried in the twelve leading urban counties of the state. Nineteen of these amendments would have been defeated without the vote of the urban counties. Seven amendments were defeatd "in spite of the favorable majorities cast by the cities."[14a] The urban counties contain less than half the population of the state. Nevertheless, "every amendment that passed received its heaviest majority in the cities."[14b]

The average farmer can have little conception of the problems which confront the modern city. Rural constituencies are proverbially conservative on questions outside of their experience. In a law-abiding country community, a suit for damages may prove an adequate remedy for occasional infractions of the law, but in an urban environment far more latitude should be given administrative officers, such as factory, tenement-house and meat inspectors, to prevent anti-social practices. The modern city is mainly a development of the last fifty years. It is not surprising, therefore, that the judicial mind steeped mainly in the old traditions of the law sometimes fails to do justice. The Court of Appeals in New York has usually been made up almost entirely of what are called "up-state" judges. The Supreme Court of Illinois consists of seven judges elected from as many districts. The seventh district includes the city of Chicago and comprises 46.4 per cent. of the population of the state. Courts constituted in this way may easily blunder in deciding cases that affect the metropolis.

Professor Roscoe Pound, of the Harvard Law School, says:

> Almost all of the backwardness of American courts with respect to social problems and social legislation has been backwardness with respect to social problems of our cities and social legislation for our cities. Is it not obvious what a difference it would have made if the every-day social relations of the judges of our highest courts had been in New York instead of Albany, Chicago

[14a] Robert E. Cushman, "Voting Organic Law," *Political Science Quarterly*, Vol. 28, 1913, p. 222.

[14b] *Ibid.*, p. 220.

instead of Springfield, St. Louis instead of Jefferson City, and so on? Is it likely that a court sitting in New York City would have gone wrong in construing tenement-house legislation? Questions may well seem abstract and academic in Albany or Springfield that are concrete and practical in New York or Chicago. Judges there may well fail to appreciate the practical aspects of legislation which a court sitting in the metropolis, whose judges met and talked with social workers in the ordinary intercourse of society, would perceive. Our rural capitals are not a little to be blamed if the course of justice in our highest court with respect to urban problems has been guided largely by judges who looked at them through rural spectacles.[15]

Finally, the difficulty of amending the constitution of certain states, and especially the federal constitution, is bringing the judiciary into disfavor. When the nation consisted of a homogeneous population confined to the Atlantic states, the amendment of the constitution offered no insuperable difficulty. The framers of the constitution could not have intended to provide the country with an inflexible instrument, for "they were trying to escape from the restraints of a still more rigid constitution."[16] None the less, with the growth of slavery, the admission of new states, the development of manufacturing, mining and commerce, and the consequent emergence of sectional differences, the difficulty of amendment has increased until vetoes interposed by the courts have become less and less suspensory and more and more absolute in character. Nearly eighteen years were required to restore to Congress the power to levy an income tax, though it was generally supposed that Congress possessed this power until the adverse decision of the Supreme Court in 1895. As a matter of fact, Congress imposed an income tax in 1861 and the Supreme Court held it constitutional.[17] For more than two generations there was an increasing demand for the election of United States senators by popular vote, but so difficult did formally amending the constitution prove in this case that years before it was accomplished election by the legislature became a mere form and was superseded by direct primaries in many states. No other important country is operating under such a rigid constitution. Amendment by interpretation is occasionally practised by the courts, but too infrequently to afford an adequate remedy. Besides, as with religious creeds, forced construction sometimes makes a laughing-stock both of the constitution and the courts. The result is that the American people are barred from passing measures which many other countries deem necessary to their well-being. Among such measures are "pensions or public insurance in case of old age, accident or sickness where the recipient of the pension or insurance is not actually a pauper and where the fund from which such pension or insurance is obtained is derived from taxation; the regulation of the hours of adult male labor in any but the

[15] *Op. cit.*, pp. 325–326.

[16] Professor Monroe Smith, *North American Review*, Vol. 194, 1911, p. 658.

[17] Israel Ward Andrews, "Manual of the Constitution," revised in 1892, p. 83.

evidently most dangerous trades; effective regulation of the use of urban land; and the use of the powers of taxation and eminent domain for the purpose of furthering schemes to provide aid for the needy classes."[18]

III

Current discussion during the last presidential campaign centered a good deal about the recall of judges and "the recall of judicial decisions." Many high-minded and conscientious men strenuously object to both of these proposals. But whether they mark so radical a departure from the present order as to be wholly out of the question is more than doubtful. Every advance in popular government has excited the fears of many God-fearing men. The abolishment of the property and religious qualifications for the suffrage meant to many the speedy downfall of our institutions. An electoral college merely registering the will of the people seemed the height of folly to most of the fathers. But a short time ago, the limitation of the veto power of the lords in England seemed impracticable. These facts suggest that the recall of judges and "the recall of judicial decisions" are matters which a rational being may at least dispassionately consider.

The recall of judges by legislative address already exists in several of the states, but it is rarely exercised. Moreover, in the states where the judges are elected and are subject to reelection at the end of their term of office, one would expect to find numerous and glaring examples of the evils like those which the judicial recall is supposed to invite, and yet I am not aware of a popular movement in any one of these states which looks towards electing judges for life or substituting an appointive for an elective judiciary.[19] On the contrary, in some of these very states there is a formidable movement for the judicial recall. It is true that the public has now and then foolishly dispensed with the services of an eminent jurist for one that is grossly incompetent. The loss of Judge Cooley to the Supreme Court of Michigan is a conspicuous instance. But then again, Judge Gary who presided at the trial of the Chicago anarchists was repeatedly reelected. The disadvantages which attend an elective judiciary are apparently more than offset in the popular mind by the advantages. The actual working of the judicial recall would manifestly depend very largely upon the safeguards thrown around its operation. After all, the stronghold of the judiciary does not lie in its technical independence, but in the traditional respect in which it is held. So great is this respect that it is probable the recall would rarely be applied to judges save on the ground of malfeasance in office. Probably no state can boast of a more independent and upright judiciary than Massachusetts, where judges can be removed by the governor and

[18] Goodnow, *op. cit.*, p. 332.

[19] In 1905, judges were elected by popular vote in thirty-three states. See Goodnow, *op. cit.*, p. 340.

council without a hearing and without assigning the ground for removal upon the address of a bare majority of the legislature.[20]

The issue is not between those who want a judiciary that is subject to the passing whims of the hour and those who do not. Every right-minded man wants a fearless and upright judiciary, and the only question is how to secure one that is not at the same time the slave of precedent. Mr. Roosevelt's remedy for this state of mind is "the recall of judicial decisions," limited, however, to the recall of decisions rendered by state courts. This would require amending the constitutions of the several states so that a legislative act involving the exercise of the police power, if held unconstitutional by the supreme court of a state, could be submitted to the people and the decision of the court either upheld or reversed. Or the right of recall might be limited to instances where an act is held unconstitutional by a state court on the ground that it deprives one of life, liberty and property without due process of law in contravention of the state constitution. If the decision of the court were reversed, the legislative act would thereafter be excepted from the constitutional prohibition. "This," Judge Grosscup points out, "would be amendment and not construction, the exercise of legislative and not of judicial functions by the people."[21] Strictly speaking, therefore, the proposal is not a recall of judicial decisions at all, but a plan for amending the constitutions of the several states. In other words, a decision handed down in any particular case prior to the time "the recall" or amendment took effect would be *res adjudicata,* but in similar cases arising thereafter the state courts would be obliged to uphold the constitutionality of the statute. The state constitutions as amended in accordance with this plan would be subject to all of the guaranties of the federal constitution just as they are at present.

It is difficult to see why any one should be either wildly enthusiastic or vindictively opposed to such a plan. It involves no new principle. It assumes that the sovereign power rests in the people and that constitutions rightly emanate from and embody the deliberate will of the majority, assumptions that are fundamental to the American constitutional system. There is no more reason why it would result in hasty and ill-considered changes in the constitutions of the several states, or why it would enable a majority to ride rough-shod over the rights of a minority, than is possible under the method of amendment now in vogue. It preserves the tradition in accordance with which the courts declare legislative acts unconstitutional. It would permit the decision of a court to be reversed only in the sense that the eleventh and sixteenth amendments to the constitution reversed the decisions of the Supreme Court. A mode of amending the state constitutions that meets with the approval of a jurist of such well-known conservative tendencies as ex-

[20] William L. Ransom, *op. cit.*, pp. 85–86.

[21] Charles H. Hamill, "Constitutional Chaos," *The Forum*, July, 1912, p. 50.

Judge Grosscup can hardly be ultra-radical. As compared with the "constitutional initiative" which exists in California, where an amendment may be initiated by the people without prior formulation by the legislature, Mr. Roosevelt's proposal is conservatism itself.

Moreover, it is conservative in another respect. It is customary at present to abrogate completely the "due process" clause of a state constitution in such states as New York, so far as legislation to safeguard the lives, health or safety of employees is concerned, to enable the legislature to pass a workingmen's compensation law that will stand fire in the courts. That is, the state constitution is amended so as to give the legislature *carte blanche* in enacting such a law. Beyond doubt, a plan of amendment which enables a particular statute to be validated and leaves the "due process" clause of the state constitution stand against radically different legislation upon the same subject is the more cautious going. A discriminating advocate of the "recall of judicial decisions" aptly says:

> We do not wish to take down *all* constitutional restrictions on an entire class or category of legislation, good or bad, merely to take one sound, wise law out from under the ban. The people do not seek a safety-valve like the whistle on the Mississippi River steamboat described by Lincoln, which stopped the boat whenever the whistle was blown, nor do they want the safety valve of orderly progress in legislation "*tied down*" beyond the power of the people to utilize when needed. A method of dealing only with the specific statute when the need arises, rather than framing broad generalizations to take all similar statutes out of the prohibition pronounced by the court, has much to commend it to the conservative common-sense of our citizens. . . . Is it not better that the people should pass . . . upon the public necessity and social justice of a *particular law* which some court may reject, than that, in advance and for all time, broad and paralyzing terms of general exemption should be written into our historic guaranties? Why break out a window, instead of merely raising it, for ventilation?[22]

"The recall of judicial decisions" has been rejected by many on the ground that it is too radical. So far as I am aware, Colorado is the only state thus far to adopt it.[22a] In the long run, it may be rejected because it is not radical enough. Many have erroneously supposed that it contemplates submitting to popular vote the issues in a case that has already been tried in court, whereas it merely provides a method for determining the rules that shall govern the trial of similar cases in the future. If adopted, the courts could declare unconstitutional every material increase in a piece of social legislation and necessitate a referendum. In no event, could the people of a state do more than bring the interpretation of the "due process" clause of their fundamental law abreast of the views of the Supreme Court, and they could not do even this if the highest court of a state held a legislative act contrary to the

[22] William L. Ransom, *op. cit.*, pp. xv–xvi.

[22a] A. Lawrence Lowell, Public Opinion and Popular Government, Appendix B, p. 374.

same clause in the federal constitution. For the federal judiciary act makes no provision for the review by the Supreme Court of such an adverse decision, and it therefore stands as the supreme law of a state beyond the power of its people to recall. If the New York Court of Appeals, for example, held an act contrary to the "due process" clause of the state constitution, the people of the state could reverse the decision, but if the same court held the act contrary to the same clause in the federal constitution the decision could not be "recalled" by the people.[23]

The recall of judges and "the recall of judicial decisions" are not so absurd as to be impossible. Three states have already adopted the former, and the failure of public opinion thus far to take up with the latter may be due partly to the novelty of the proposition and the fact that it became the football of heated controversy during the last presidential campaign. The extraordinary power of the courts to declare legislative acts unconstitutional should not be forgotten. When so level-headed an organ as *The Survey* says that the decisions of the New York Court of Appeals overthrowing the workingmen's compensation and two other acts "should be held up to the reprobation and scorn which they deserve,"[24] surely it is time for every one to give heed. If members of the bar opposed to "the recall of decisions" are wise, they will not content themselves with resolutions of condemnation. They will propose other remedies that are more appropriate. They will try to lessen the abuses which attend the issue of injunctions, and to expedite the trial of cases. They will do everything possible to free the bench from corporate and other sinister influences and to elevate its character. They will use their influence to amend the Judiciary Act so that state laws held contrary to the constitution by the highest courts of the several states may be reviewed by the Supreme Court. They will strive to have the courts try as hard to find laws constitutional as they sometimes appear to try to hold them invalid. They will endeavor to make it more easy to amend the constitution and the constitutions of such states as Pennsylvania and Illinois. They will duly consider requiring more than a mere majority of a court to declare a law unconstitutional. If a legislative act should be presumed constitutional until the contrary is proved beyond a reasonable doubt, something approaching unanimity among the members of a court may well be required to declare it unconstitutional. It is noteworthy that the people of Ohio in amending their constitution in 1912 adopted a provision to this effect. Amendment number nineteen includes the following:

> No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in affirmance of a judgment of the court of appeals declaring a law unconstitutional and void.

[23] W. F. Dodd, *Political Science Quarterly*, Vol. 23, 1913, pp. 7–10.

[24] Vol. 27, 1912, p. 1895.

IV

In interpreting the "specific clauses" of our organic law, the courts experience comparatively little difficulty, but in interpreting the "general clauses" there is a fair chance that they may go astray. The constitutional prohibition that no state shall grant letters of marque and reprisal, coin money, etc., is not easily misunderstood, but the words of the fourteenth amendment which prohibit the states from depriving any one of property without "due process of law" has a good deal of flexibility of meaning. In a general way, it means that no one shall be deprived of property without a hearing or without compensation unless "the general interests of the community" demand it. The interpretation of such a clause necessarily involves the exercise of legislative discretion.

> Under the constitutional system as developed in this country the political philosophy of the judges is a matter of vital importance. They are policy determining officers, because they have power to declare null and void "on principles of constitutional law which are scarcely more than general moral precepts," laws enacted by the legislative authority. It is this function of declaring laws unconstitutional, especially as violative of broad and undefinable guaranties that "no one shall be deprived of life, liberty or property without due process of law," which has made the courts in this country essentially law making bodies, determining in the end what legislative policies shall or shall not be adopted. . . . There are under this clause no fixed or definite standards for determining what laws are constitutional and what are unconstitutional. Judges are thus exercising political functions, without corresponding political responsibility; and inasmuch as such functions are being exercised in a manner opposed to public sentiment, popular criticism of the courts is a necessary consequence.[25]

What is necessary to the public health, safety and morals is a question which should be determined in the light of the particular facts and circumstances existing at a given time and place. These are matters which "the prevailing morality or the strong and preponderant opinion" of society should properly control.

> A tenement-house act might seem absurd in Arizona, a statute regulating the grazing of sheep might seem absurd in Greater New York. . . . A law regulating the hours of labor in canneries would have been laughed out of the legislature or the courts seventy years ago, for the housewife did her own canning in the wholesome conditions of her own kitchen; yet such a statute may be very necessary under the conditions now obtaining, for example, in the fruit-growing regions of central New York.[26]

A *laissez-faire* philosophy may have answered the needs of our grandparents, but it has little place amid the conditions of modern life. The political philosophy which holds that "that country is governed best which is governed least" may have been all well enough on the frontier, but it is out of date in an age of cities. When man's relations with his fellows were few and far between, comparatively few restraints upon the individual answered every purpose, but in the crowded center and in a time when the railway, the telephone and the telegraph have vastly

[25] W. F. Dodd, *op. cit.*, pp. 3–4 [26] William L. Ransom, *op. cit.*, p. 135.

multiplied social relations a new social creed is demanded. A social philosophy that originated in the age of homespun does not fit the needs of a factory age.

There is no reason why the legal precedents adapted to conserving the welfare of society amid the simple conditions of the past should determine what is permissible amid the complex conditions of to-day.

> We can not regulate modern gas and electrical corporations by decisions rendered in the days of the tallow dip; we can not adequately control four-track steam railroads merely by the law of the stage-coach and the public inn; we can not be content to have our labor legislation forever checked and thwarted by the decisions of a few men out of the many, and those few, not men of to-day, accountable in any way to their fellows, but dead men, who lived in the days when manufacture was carried on only in wholesome towns and villages, on a small scale and without modern "division of labor"—in fact, when few persons even *cared* whether women worked long hours, or little children toiled in mines, or workers breathed deadly fumes as they worked. . . . Of course, if we try to find in 1770 precedents to sustain 1912 legislation as to "sweat-shops" or "underground bakeries" we shall not find any, for there were no "sweat-shops" or "underground bakeries" then, and no one would have cared or tried to pass laws about them then if there were.[27]

To require the courts to decide questions of legislative policy necessarily exposes them to attack, and few things would contribute more to maintain their hold on the good-will of the public than to relieve them from this responsibility. Either a more complete separation of legislative and judicial functions is necessary, or the courts should be kept better informed concerning the seasoned opinion of the community. The opponents of "the recall of judicial decisions" should consequently welcome any and every educational process that helps to keep the courts informed and thoroughly in sympathy with the progressive thought of the age. Well-intended criticism should not be frowned upon, but encouraged. Along with everything else that is human, the courts are likely to err, and criticism is the great corrective of judicial as well as of other error. There is no good and sufficient reason why substantially the same law should be held consistent with "the due process" clause of the constitution of one state and inconsistent with the same clause in the constitution of another state, especially when the law is more urgently needed in the latter and when the Supreme Court upholds its constitutionality. The unqualified manner in which a large portion of the press denounced the clause on the judiciary in the democratic platform of 1896 was most unfortunate. The worst enemies of the courts are those unqualifiedly opposed to calling them to account. Such an attitude suggests that our judicial system will not stand the light of criticism, tends to bring it under suspicion and to undermine its authority. To dam up the free expression of grievances real or imaginary forces people to nurse their wrongs, prevents the orderly correction of injustice, and creates the conditions of a social conflagration.

[27] William L. Ransom, *op. cit.*, pp. 132–133.