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HAS A PERSON THE CONSTITUTIONAL RIGHT TO
ABSTAIN FROM WORK?*

By William F. Keefer.**

At first blush it would seem preposterous that, in a free country like ours, a person might be required to work whether he willed to do so or not. But, upon more mature reflection, we discover that it is difficult, indeed, to find in our Constitutions any guaranty of the right— if I may be permitted herein to use the expression— of the right to loaf.

Most of the American states have adopted the common law of England as modified by such statutes as Parliament had enacted up to the time of the separation from the "mother country," as the "law of the land." But they have also made their constitutions supreme, and the common law to give way to enactments of the legislatures. And the legislatures have been left comparatively unshackled. The few and limited restrictions imposed by the Constitution of the United States upon the legislatures of the States were only such as were essential to the existence of a centralized national government. The genius of our laws is such that, unless the legislatures are denied the right to enact a law depriving persons of their right to loaf, it may reasonably be assumed that they may do so.2

The common law of England, as adopted in our country, imposed no affirmative duties on a person as such. Its policy was to en-

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* The James F. Brown Prize Thesis, 1921-1922. In 1919 the late James F. Brown, of the Class of 1873, gave $5,000.00 to the University, the proceeds to be invested by it and the income used as a prize for the best essay each year on the subject of the individual liberties of the citizen as guaranteed by the Constitution. Any senior or any graduate of any college of the University, within one year after receiving any bachelor's degree, may compete for this prize. This was the second award of this prize.

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1 See, for instance, Constitution W. Va. Art. 8, § 21.

2 See 1 BLACKSTONE, Commentaries, *150, where it is said: "The power and jurisdiction of parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds . . . . It hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal . . . . It can, in short, do everything that is not naturally impossible . . . ." Cf. 39 CoL. L. Rev. 458 et seq.
courage activity, but there was no positive requirement that a person perform any affirmative acts. So long as a person could support himself and his family, or was supported by some friend or relative, so that he was not a charge on society, or the state, the law let him alone. He was allowed to loaf.

Any law which requires a person to work, places upon him an affirmative duty. Such a law, therefore, cannot be a part of the so-called common law. If it exists at all, it must be by legislative enactment.

Let us suppose that a law be enacted providing that every able-bodied male person, and every able-bodied unmarried female person, between the ages of eighteen and sixty, except bona-fide students during school term, persons temporarily unemployed by reason of differences with their employers, and persons fitting themselves to engage in trade or industrial pursuits, must engage in some useful or lawful occupation, employment, trade, business, profession or calling, for at least thirty-six hours a week, and that any person who fails to comply with the provisions of this act shall, regardless of his ability or inability to support himself and his dependents be considered a vagrant and punishable as such. That is, let us suppose the enactment of a law of this kind free from every objection except the one in question, viz., that it deprives a person of his "constitutional right" to loaf. For the want of a better name and for the sake of brevity, a law of this general nature will hereinafter be referred to as an industry law.

In the United States, persons, with a few exceptions, are subject to two legislatures: (1) the Congress of the United States, and (2) the legislature of the State wherein they reside. If, then, a person is to be required to work, it must be the result of an enactment of one or both of these legislatures.

I. FEDERAL LEGISLATION.

First, let us consider the power of the federal legislature to pass an industry law. The government of the United States, being one of delegated powers, Congress can enact no law unless power to do so is granted, either expressly or impliedly, by the Constitution. In inquiring whether Congress has power to pass an in-

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3 Cf. the so-called Council of Defense Acts, e.g., Acts of W. Va., 1917, c 12, § 2. It is submitted that a statute of this kind is essentially different from the English statutes of labourers of 1349, 1350 and 1562, for the reason that these statutes "required able-bodied persons not having means of their own to accept service when offered, on pain of imprisonment, and to take the customary wages, or . . . wages fixed by justices of the peace." FREUND, POLICE POWER, § 448. Under the law proposed, a person might work for himself.

4 U. S. CONST., AMENDMENT X.
dustry law, it will probably be well, inasmuch as the powers of Congress in times of war are almost immeasurably enlarged over those which it possesses in times of peace, to consider the power in each of these two cases separately.

If Congress may, in times of peace, enact an industry law, the power would probably have to be derived from the "common defense and general welfare" clause. It will probably not be seriously contended that Congress has any such power, especially with reference to persons living within one of the States. However, under the clause giving Congress power to legislate for the District of Columbia and for the territories, it could probably enact any laws that a State could enact for its own people. The extent to which this might be done, therefore, will be treated hereinafter, in conjunction with the same power of the various States.

In times of war, however, Congress has power "to raise and support armies" and "to provide and maintain a navy." The limit of the powers of Congress under these clauses, like most of its constitutional powers, has not been, and probably never will be, definitely defined. That the war power of Congress is almost limitless is generally conceded. Certainly it warrants Congress in enacting any law necessary for carrying to successful completion any war in which the United States may become engaged; and at the present time, and in the future when wars consist and will consist, not of a series of engagements between army and army, but of one continuous struggle between nation and nation, involving not only the man-power, but also the physical wealth of the entire nation, it seems that Congress would be warranted, under the war power, in enacting any law necessary to increase the national wealth. That a law requiring the individual to do some useful work is a law which would contribute to the production of national wealth, is too clear for argument. And that the entire wealth of the nation must be subject to call in times of war, in order "to support armies" and "to maintain a navy" of the magnitude of those which must be called into existence in modern warfare, is a fact of which the last decade furnishes ample proof.

Unless, therefore, the Constitution imposes upon Congress some limitation, it seems that it should be held warranted in enacting a law of the kind in question. If there is any such limitation upon
the power of Congress, it is probably to be found only in the Fifth and Thirteenth Amendments. The only clause in the Fifth Amendment which, it might be argued, limits the power is that “no person shall . . . . be deprived of life, liberty or property without due process of law . . . .”

That such a law would not be a deprivation “of life” is clear. That provision is intended to secure a person against execution “without due process of law,” that is, without having been first indicted, tried by a competent tribunal, including a jury of his peers, and convicted of some crime for which an execution is the proper punishment.9

But is it a deprivation “of liberty . . . without due process of law?” This question might be thought to involve two questions, viz., (1) whether there is a deprivation of liberty, and (2) whether there is due process of law. But the latter often, indeed generally, depends upon the nature of the “right” of which the person is alleged to have been deprived without due process of law. These two questions, therefore, should be considered together.

That legislative acts have been held to be a denial of due process in proper cases has long been established.10 But many statutes which encroach upon some of the “inalienable rights” of “all”11 men have been held not to be a violation of due process.12 Whether or not, then, a certain statute is a denial of due process of law depends largely upon the nature of the alleged right to secure which the protection of this clause is invoked.

The word “liberty,” as used in the Constitution, is a term of “convenient vagueness”13—of changing significance. Like “due

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9 See Hurtado v. California, 110 U. S. 516 (1884). See also 1 BLACKSTONE, Commentaries, 133-134.
11 See Hurtado v. California, 110 U. S. 516 (1884). See also 1 BLACKSTONE, Commentaries, 133-134.
12 See Hurtado v. California, 110 U. S. 516 (1884). See also 1 BLACKSTONE, Commentaries, 133-134.
13 Charles N. Hough, in an article entitled “Due Process of Law—Today,” 32 Iowa L. Rev. 216, says: “My excuse for this address is a belief that the ancient words do not (various courts to the contrary, notwithstanding) speak to us with the same voice, or connote the same mental assumptions, or suggest the same backgrounds, political and social, as they did two generations ago, or even when my generation at the bar took the professional oath. . . .”
14 “. . . the phrase is of convenient vagueness; forty years ago our highest courts said that it could not be defined, or at all events definition was declined, because it was better to ascertain meaning in each case by a process of judicial inclusion and exclusion. . . .”
15 It is putting the same thought in another way to say that the historical test is not final, nor even to hold that what was once due process must always remain so; would stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.”
process of law," it depends for its definition largely upon the time, the place and the prevailing public opinion where it is asserted. The liberties which our forefathers who framed the Constitution might claim are not necessarily the same as those which we claim today.  That was a different time from the present. Vast and unthought-of changes have taken place since then. The country then was new and undeveloped; today it is developed beyond many countries which have been inhabited by civilized peoples for much longer periods. The population has increased immensely. The relative extent of their rights and ours might be compared to the "rights" of a man standing on a large platform. While he is there alone he may swing his arms wildly and engage in all kinds of gymnastic "stunts"—we say he has a "right" to do so; but let the platform become crowded with others, then his "rights" to engage in such pranks are necessarily restricted in order that the rights of others may not be infringed. Indeed, his right to do anything is restricted by the intervention of the corresponding rights of others, occupants of the platform, and he must then be careful even where he steps lest he tread upon the toes of his neighbor. Just so it is today. And has not the prevailing public opinion of what constitutes "liberty" changed in proportion as the population of the country has grown? As one example of the change of public opinion, consider the case of Block v. Hirsch, in which the Supreme Court, which is even influenced at times by prevailing public opinion, decided that privately owned houses within the city of Washington were impressed with a sufficient social interest to justify governmental regulation of the letting thereof, and the price which the owner might charge as rent. That such a decision would have been unthinkable one hundred fifty years ago will no doubt be universally conceded. Yet coming, as it did, in the year 1921, it hardly created a stir except among a few fossilized legal minds of the old school which is rapidly "crossing the bar." Thus it seems that one's liberties today are not necessarily what they were a century and a half ago. Especially must our vaunted "liberties" give

14 Hurtado v. California, supra.
16 41 Sup. Ct. 458, 65 L. Ed. 531 (1921).
17 Cf. Noble State Bank v. Haskell, 219 U. S. 104 (1911), in which the "right" to conduct a banking business as the banker pleased was restricted for the public good; The Pipe Line Cases, 234 U. S. 548 (1914), in which the "right" of the pipe line companies to refuse to transport oil for others was ruthlessly trampled upon; State v. Howatt, 196 Pac. 686 (Kans. 1921), in which the "right" of coal miners to strike pending an investigation was denied; People v. United Mine Workers of America, 201 Pac. 54 (Colo. 1921), to the same effect.
way to the exigencies of national self-preservation in great crises like modern warfare.

What is a deprivation of liberty without due process of law, then, should depend upon the time, the place and the prevailing public opinion. Whether the prevailing public opinion in the United States at the present time, if the government should become involved in another war, would sanction a law of the kind in question may be debatable. It seems, however, that consistently with other holdings along the same line, the Supreme Court could do naught but sustain it. Under the war power the Supreme Court has found justification for the Federal Selective Draft law, calling to the defense of the nation all the able-bodied male citizens between the ages of eighteen and forty-five. The draft law required these men to leave their homes, to give to their country their entire time for twenty-four hours a day, if need be, with what compensation the government saw fit to allow them. It took them from their homes, transported them to other parts of the country, placed them in training camps which they were forbidden to leave without permission. It transported them to a foreign country, whether against their will or not. Could there be a greater deprivation of the citizen's sacred "inalienable" right of "liberty"? Yet our Supreme Court upheld the right of Congress, under the war power, to do all this. Could it, then, consistently with reason, right and justice, deny to that same tribunal, in times of war, the power to require those who remain at home—who reap practically all the benefits of war and bear practically none of the burdens—to engage for a certain reasonable number, say thirty-six, not one hundred and sixty-eight as in the case of the soldier, of hours a week in some useful occupation in order to "support" the army and to "maintain" the navy, regardless of the number of dollars (which in times of war may be unavailable to feed an army or navy) that he may possess? Would not the Court rather uphold the power of Congress to pass such a law, stating as it stated in the Selective Draft Cases, that an attempt to deny its power "would seem to be too frivolous for further notice?"

We come, now to the Thirteenth Amendment, which provides that "neither slavery nor involuntary servitude . . . . shall exist

18 E. g., Selective Draft Cases, 245 U. S. 366 (1918).
19 See BARNES FEDERAL CODE, 1919, §§ 10221-10247.
20 Selective Draft Cases, supra. See also United States v. Sugar, 245 Fed. 423 (1917); Story v. Perkins, 245 Fed. 937 (1917); Angelus v. Sullivan, 246 Fed. 54 (1917); Claudius v. Davies, 175 Cal. 205, 165 Pac. 689 (1917); Jones v. Perkins, 246 U. S. 390 (1918). And see 4 FA. L. BULL. 122.
within the United States . . .". This provision places a restriction upon the federal government as well as upon the States. But would it preclude the passage, by Congress, in times of war, of such a law as that in question? If the service required is "slavery" or "involuntary servitude," it would; otherwise not.

That such a law would not enslave any one is too clear for words. Slavery necessarily implies that there is a master who gets the benefit of the labor of the slave without according to him any return, except such as from the goodness of his heart he sees fit to give. Such a law as that in question places no person under the authority of another against his will. Every man is left free to work for whomsoever he will, or to work for himself, just so he works. Nor is anybody but himself entitled to the rewards of his labor—they accrue to him entirely. It does not deny a person the right to change his employment when and as often as he may wish. Surely no one would seriously contend that a person under such a law would be a slave within the meaning of the term "slavery" as used in the Thirteenth Amendment.

Nor would such a law impose "involuntary servitude" upon a person. That term has much the same meaning as "slavery." This amendment made peonage, as well as slavery, unlawful. Yet peonage, and all other forms of involuntary servitude that are not properly considered slavery, are like slavery in many respects. They imply that there is a master to whom one is bound, whether for pay or not. The law in question would not bind any one to serve any other. It would, therefore, be free from the imputation of such an objection. It would be much less involuntary servitude than is service, in many cases, under a seaman's contract of service. Yet the seaman is not discharged from his obligation to work for the master of the vessel, on the plea that he no longer desires to do so. It would, indeed, impose much less slavery or involuntary servitude upon a person than was imposed upon some

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22 See Ex parte Milligan, 4 Wallace 2, (U. S. 1866).
23 See In re Sah Quah, 21 Ped. 327 (1880). "All understand by these terms [slavery and involuntary servitude] a condition of enforced compulsory service of one to another." Hodges v. United States, 203 U. S. 1, 16 (1905). (Italics ours.) "Slavery implies the relation of two persons in the character of master and slave . . ." De Lacy v. Antoine, 7 Leigh 438, 445 (Va. 1858). See also Bailey v. Alabama, 219 U. S. 219 (1911), in which Mr. Justice Hughes, speaking for the Court, said (p. 241), "The plain intention [of the Thirteenth Amendment] was to abolish slavery of whatever name and form, with all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude." (Italics ours.)
24 See note 71, post.
25 Peonage Cases, 123 Fed. 471 (1903); Clyatt v. United States 197 U. S. 207 (1905); Earp v. Alabama, 219 U. S. 219 (1911); United States v. Reynolds, 224 U. S. 133 (1914); Goode v. Nelson, 73 Fla. 29, 74 So. 17 (1917); State v. Oliva, 144 La. 51, 80 So. 195 (1918); Shaw v. Fisher, 102 S. E. 325 (S. C. 1920).
by the Selective Draft Law.\textsuperscript{27} In the Selective Draft Cases,\textsuperscript{28} Mr. Chief Justice White, speaking of the contention that the law violated the Thirteenth Amendment, said, "... we are constrained to the conclusion that the contention to that effect is refuted by its mere statement."\textsuperscript{29} Reasoning by analogy, then, which in this connection is the best we can do, it seems that the Supreme Court could not consistently with reason do aught but uphold the power of Congress to enact, in times of war, legislation of this character.

II. STATE LEGISLATION.

Since all the legislative power existed originally in the States, it is not necessary with respect to them, as it is with respect to the Federal government, to find power or authority under the Constitution to enact legislation of the kind in question. The States possessed the power inherently; and that power is generally called the police power.\textsuperscript{30} All we need to consider, then, in this connection, is whether the Constitution contains any limitations upon that power. And inasmuch as a State, as well as the Federal government, may be justified in times of war in passing laws which it might not be justified in enacting in times of peace, we shall consider the latter aspect of the problem first.

The police power of the State, like due process of law, has never been, and probably never will be, definitely defined. It is broadly spoken of as:

"... that inherent sovereignty which it is the right and duty of the government or its agents to exercise whenever public policy, in a broad sense, demands, for the benefit of society at large, regulations to guard its morals, safety, health, order, or to insure in any respect such economic conditions as an advancing civilization of a highly complex character requires."\textsuperscript{31}

"... the general power of governing its people and dominions belonging to every sovereignty."\textsuperscript{32}

The Supreme Court has defined the police power of the States to be the power

\textsuperscript{27} Ante, note 19.
\textsuperscript{28} Ante, note 20.
\textsuperscript{29} 245 U. S. 366, 380 (1918).
\textsuperscript{30} See Freund, POLICE POWER, 4 2 et seq.
\textsuperscript{31} See Stettler v. O'Hara, 69 Ore. 519, 531, 139 Pac. 743, 747 (1914). (Italics ours.)
\textsuperscript{32} See Allyn's App., 81 Conn. 534, 538, 71 Atl. 734, 736 (1909).
In other words, it is the power of a State to do whatever it deems necessary or desirable for the general welfare—the general good—of its people. And the only restraints upon it are such as are imposed by the constitutions, both State and Federal.

It seems that definition of the power gets us nowhere in this discussion, for we are still left to find what constitutional limitations are imposed upon the power. And here, again the restraints which the Constitution imposes depend upon the nature of the law which the legislature has enacted. As we are here concerned only with those restraints which the Constitution of the United States imposes upon the power of the States to enact laws of the kind in question, it seems that the only Federal restrictions upon that power are to be found in the Thirteenth and Fourteenth Amendments.24

Since the adoption of the Thirteenth Amendment, there have been many appeals to its protection. Yet none of them have been productive of the desired results except those cases in which the benefits of one man's labor have accrued to some one else, such as peonage,25 and child labor cases.26 Apparently it never has been, and likely never will be, applied to a case which lacks the element of servitude of one man to another as master.27 Public service—serving the State—never has been considered as coming within the amendment; objections to working on the public roads,28 jury service,29 militia service,30 compulsory assistance in making arrests,31 and the like have always been over-ruled. Why, then, should a law which requires a person to serve nobody in particular be held a violation of the Thirteenth Amendment?

In the Fourteenth Amendment there are three clauses which, by a stretch of the imagination, might be considered infringed by

24 The first ten amendments place no restriction upon the States; they relate only to the Federal government. Barron v. Baltimore, 7 Peters 243 (U. S. 1833).
25 Ante, note 25.
26 See United States v. Anacarola, 1 Fed. 676, 17 Blatchf. 423 (1880).
27 See note 23, ante.
28 E. g., see W. Va. Code, c. 43 § 12. "In 1889 the statutes of 27 states provided for such labor on public roads." Butler v. Perry, 240 U. S. 328 (1916).
29 E. g., see W. Va. Code, c. 116, § 1. And see, sustaining the constitutionality of this statute, State v. Mounts, 36 W. Va. 175, 16 S. E. 407 (1892); State v. Scott, 36 W. Va. 704, 15 S. E. 905 (1802).
30 E. g., see W. Va. Code, c. 18, § 2.
an industry law, viz., (1) the "privileges and immunities" clause, (2) the "equal protection of the laws" clause, and (3) the "due process" clause.

The Fourteenth Amendment provides, inter alia, that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The "privileges and immunities" protected by this clause which are not amply and with more exactness and certainty protected by other provisions in the Constitution, have been searched for in vain.

"It is only when the party aggrieved by a state law can find no Federal guaranty of right based upon a specific provision of the Constitution and feels, nevertheless, that some 'inalienable right' is being violated, that he falls back upon the 'privileges and immunities' clause, thinking that surely in words of such glittering promise there must be some substance of civil rights not elsewhere found. But in every case to date has grasped for substance and found only shadow." 42

The second provision of the Fourteenth Amendment referred to provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The primary purpose of this provision is

". . . to prevent state Legislatures from making discriminations without any basis; in other words to do away with class legislation." 43

It is not aimed at a statute which applies equally to all within the State. The only objection, under this provision, that could be raised to the law in question is that the classifications of persons as to age, sex, status, and the like, are "without any basis." That the law in question would be, or could be made, unobjectionable in this respect, seems indisputable.

The other provision of the Fourteenth Amendment that might be expected to prohibit legislation of the kind in question is that

42 Stanley C. Morris, "What are the Privileges and Immunities of Citizens of the United States?" 28 W. VA. LAW QUAR. 38, 54. See also D. C. McGovney, "Privileges or Immunities Clause, Fourteenth Amendment." 4 Ia. L. REV. 218, in particular 222-223, where he says: "In fact this clause of the Constitution has almost a one hundred per cent. record of attempted misapplications. Though over forty cases have come before the Supreme Court of the United States in which a contention has been made of State abridgment of an alleged privilege or immunity protected by this clause, in not a single instance has the court so held. The syllabi of State decisions indicate that lawyers have made like contentions and likewise to no avail, in about three hundred cases. The few State decisions in which the courts have agreed that an alleged privilege or immunity was within this protection seem to have been erroneously decided."

clause providing that "no state shall . . . deprive any person of . . . liberty . . . without due process of law."

The word "liberty," as used in the Constitution, has been somewhat loosely defined to mean

". . . not merely the right to go where one chooses, but to do such acts as he may judge best for his interests, not inconsistent with the equal rights of others; that is to follow such pursuits as may be best adapted to his faculties, and which will give him the highest enjoyment. The liberty mentioned is deemed to embrace the rights 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 [but not to loaf] where he will; to earn his livelihood by any lawful calling, 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 purpose above mentioned." 44

Even this definition, which undoubtedly gives the word "liberty" all due breadth of scope, tacitly admits that it is a variable conception, dependent upon the "equal rights of others." 45 Obviously, the "liberty" of a person and the "equal rights of others" may be different in times of peace from what they are in times of war. Perhaps I may be pardoned, therefore, for again going into this subject. An eminent writer has said that

". . . it is worth noticing that in this connection the word and clause with which we are dealing are in almost every instance inserted in a section of the constitution dealing exclusively with the conduct of criminal trials, with the privileges of the accused, with a process in which the whole question is whether the person concerned shall be deprived of one or the other of certain rights; that is, of life, or personal liberty, or property as a penalty for crime; and it is declared that he shall not, without due process of law. A priori, therefore, it

44 See Young v. Commonwealth, 101 Va. 853, 862, 45 S. E. 327, (1903). (Italics ours.) The latter part of this quotation is about the same as that given by Sir William Blackstone more than one hundred and fifty years ago. See note 52, post. See also In re Jacobs, 88 N. Y. 98, 106; and in general cases cited 12 C. J. 336 n. 67. The right of contract is generally considered as protected by this provision of the Constitution; yet even this right must give way to laws which are a legitimate exercise of the police power. See Mill Creek Coal & Coke Co. v. Public Service Commission, 84 W. Va. 662, 100 S. E. 557 (1919). Cf. Freund, Police Power, § 448 et seq.

45 In Hardie-Tyne Mfg. Co. v. Cruse, 89 Ala. 66, 66 So. 657, 661 (1914), it is said: "The 'liberty' guaranteed by the Constitution is liberty regulated by law and the social compact, and in order that all men may enjoy liberty it is but the tritest truism to say that every man must renounce unbridled license. So wherever the natural rights of citizens would, if exercised without restraint, deprive other citizens of rights which are also and equally natural, such assumed rights must yield to the regulations of municipal law." (Italics ours.) The courts are no longer defining the "liberty" guaranteed by the Constitution in such all-inclusive terms as those used in cases decided a few decades ago. Cf., for instance, People v. Gibson, 109 N. Y. 398, 17 N. E. 343 (1888).
would seem that in this connection the term is not used in its broadest sense to denote all civil rights, but, like the term ‘life’ and ‘property’ to denote one particular kind of civil right, of which the law is accustomed to deprive persons by way of punishment.”

Suppose, however, that an industry law be considered a deprivation of liberty in the sense in which that term is used in the Constitution. Still, such a law is not forbidden if it be due process of law. And, as before stated, what is due process of law is also a variable conception. As has been aptly stated

"... the highest court and most high courts have refused to regard constitutions as codes, and of late years have more and more made due process of law whatever process seems due to the demands of the times, as understood by the judges of the time being.

"The direct appeal of property to due process has for the most part failed; and apparent successes have but taught legislators how to arrive at the same result in another way. The indirect appeal through liberty is still going on, for the American belief that every freeman can do what he likes, where and when he pleases, as long as he do not infringe the moral law as expressed in the usual criminal code, dies very hard. But it is dying, and the courts, when invoked today under the due-process clause, are doing little more than easing the patient’s later days.”

And again

"... more pitfalls have been prepared for him who complains of undue process than for any other litigant, in what is usually a court of generous practice.

"If decision cannot be avoided, presumptions are next considered,—such as the prima facie constitutionality of any act; that what is enacted expresses the public policy of the state, or that what is complained of is matter of discretion,—which is not reached by the clause.”

In the last analysis, whether or not a State may restrain the individual’s ‘inalienable right’ to loaf would likely depend upon whether or not, in the opinion of the Supreme Court, such a restraint is reasonable. Whether, at the present time, consider-

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48 Ibid., p. 230.

49 As remarked by Mr. Justice Holmes, in his justly famous dissenting opinion
ing the present condition of our resources, our industries, our man-
fold and complex social relations, and the prevailing public opin-
ion, such a law, if enacted in times of peace, would be considered
reasonable is, of course, a matter largely of conjecture. Perhaps
we are not yet ready for such a law—perhaps the prevailing public
opinion, and the condition of the country, would not now justify
it. Perhaps that is why, prior to the year 1917, no such laws ex-
isted in the United States. But what bodies of men are more rep-
resentative of the people, are better able to judge, what the pre-
vailing public opinion with respect to such matters is, or whether
the "general welfare" demands such legislation, than our legis-
latures? If the legislature, within its conveniently elastic police
power, deems itself warranted in enacting, in times of peace, a
law of this kind, the courts should be slow to condemn it. He who
assails it would, so we are told, encounter, in the Supreme Court,
"more pitfalls" than have been prepared for any other litigant,
in addition to the presumption of its "prima facie constitu-
tionalty."

As Dean Pound, of Harvard, would probably put it, interest-
est of the individual in being allowed to remain inactive—to loafo-
would be weighed against the interest of the state in preserving
public order and guarding the public welfare by requiring him to

In Lochner v. New York, 198 U. S. 45, 75-76 (1905) : "The liberty of the citizen
to do as he likes so long as he does not interfere with the liberty of others to do
the same, which has been a shibboleth for some well-known writers, is interfered
with by school laws, by the Post Office, by every state or municipal institution which
takes his money for purposes thought desirable, whether he likes it or not. The
Fourteenth Amendment does not enjoin Mr. Herbert Spencer's Social Statics. The
other day we sustained the Massachusetts vaccination law. United States and state
statutes and decision cutting down the liberty to contract by way of combination are
familiar to this court. Two years ago we upheld the prohibition of sales of stock
on margins or for future delivery in the constitution of California. The decision
sustaining an eight hour law for miners is still recent. . . . .

"General propositions do not decide concrete cases. The decision will depend on a
judgment or intuition more subtle than any articulate major premise. . . . I think
that the word liberty in the Fourteenth Amendment is perverted when it is held to
prevent the natural outcome of a dominant opinion, unless it can be said that a
rational and fair man necessarily would admit that the statute proposed would
infringe fundamental principles as they have been understood by the traditions
of our people and our law."

Professor Cheadle, in "Government Control of Business," 20 Col. L. Rev. 438,
449, says: "The legislature is also bound by the principles of the law—but not in
the same way as the courts. The legislature, being the policy-determining branch
of the government, operating on behalf of society, may in its legislation depart
from time honored principles and adopt new ones, either when the principle de-
parted from is not fundamental in the life of the people or when the economic
or social changes have made a principle desirable." The legislature, he says, "is peculiarly
fit to recognize new claims and interests as they arise and its decision
so to do should stand unless it clearly appears to be capricious, arbitrary or dishon-
est, or entirely out of harmony with any general social or economic view taken
by the public."

61 Statutes forbidding picketing by strikers have been upheld. Hardie-Tynes
Mfg. Co. v. Cruse, 89 Ala. 66, 66 So. 657 (1914). Also statutes forbidding strikes
and lockouts. People v. United Min. Workers of America, 201 Pac. 54 (Colo. 1921); State v. Howatt, 198 Pac. 686 (Kans. 1921). See also
note 27, ante.

62 See, e.g., "Outline of a Course in History and System of the Common
Law." See also his "Interests of Personality," 28 Harv. L. Rev. 343-365, 445-456;
"The End of Law as Developed in Juristic Thought," 27 Harv. L. Rev. 605-629,
50 Harv. L. Rev. 201-229.
work, and, in addition, the interest of society as a whole in having the social wealth increased. Considered this way, it will be seen that the interests on one side of the scales diminish and those on the other side correspondingly increase as our social relations become gradually more and more complex. Which side is heavier at the time the question arises, is the problem for the court.

If it be desired to find reasons which might be considered sufficient to justify legislation of this kind, let us first go to Blackstone, who has defined "liberty" in broad and liberal language.

We find him stating, "Idleness in any person whatsoever is also a high offense against the public economy." Notice that he says "any person whatsoever." Would we be justified in concluding that he means rich as well as poor? And why should idleness in any person whatsoever be a high offense against the public economy? He explains

"In China it is a maxim that if there be a man who does not work, or a woman that is idle, in the empire, somebody must suffer cold or hunger, the produce of the lands not being more than sufficient, with culture, to maintain the inhabitants, and therefore, though the idle person may shift off the want from himself, yet it must in the end fall somewhere. The court, also, of Areopagus at Athens punished idleness, and exerted a right of examining every citizen in what manner he spent his time; the intention of which was, that the Athenians, knowing they were to give an account of their occupations, should follow only such as were laudable, and that there might be no room left for such as lived by unlawful arts."

This is good economics as well as good law. It is a basic and well known principle of economics—understood for hundreds of years, as shown by the foregoing quotation—that idleness is one of the chief causes of high prices, of want, of human misery. And it is now well-known that high prices are one of the chief causes of strikes, of boycotts, and even of wars. That a law aimed at the destruction of idleness would be promotive of national prosperity, of lower prices with more wealth with which to purchase, will

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53 See 1 BLACKSTONE, COMMENTARIES, *125: "This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when He endued him with the faculty of free will. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it."

54 See IV BLACKSTONE, COMMENTARIES, *169. (Italics ours.)

55 Ibid. (Italics ours.)
hardly be denied. That under such conditions the desire of workmen to strike (especially if they knew they must not long remain idle) would be greatly lessened. Would not the prevention of strikes promote the general welfare? And promotion of the general welfare is clearly one of the purposes for which the police power exists. Perhaps, you say, this is rather far-fetched. Not quite so far, however, as the power of the Federal government to protect the wild game in the forests of the Northwest.

But whether it be considered that such a law would be productive of greater internal peace by preventing strikes, it cannot be doubted that it would be productive of greater internal prosperity. And what is the difference between internal prosperity and "general welfare," to the protection of which the police power extends?

Considered concretely, what right have I to insist that one ounce, or a half-ounce, be taken away from every loaf of bread you buy in order to pay for my sacred right to loaf; or to insist that you work an hour a day longer in order that I may loaf? This, too, seems far-fetched, but it is, nevertheless, true, even though I have plenty of money with which I may pay "spot cash" for everything I buy. In order to make this clear, suppose that you and I constitute a community shut off from the rest of the world. I have plenty of money and am willing to pay you to feed and clothe me. Suppose further that by working six hours a day you can produce enough food and clothing for one. You would then have to work twelve hours a day in order to feed and clothe us both. In such a community would you not insist on exercising your "equal right" to a little rest and recreation and refuse to produce enough to feed us both? Suppose we go a step further and consider six persons in this community, five of whom

55 "It is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interests of the public health, morals, or safety." Chicago, etc. R. Co. v. Tranbarger, 238 U. S. 67, 77 (1916). "... if [the police power] has, in more recent decisions, been defined to include all those regulations designed to promote the public convenience, the general welfare, the general prosperity, and extends to all great public needs, as well as regulations designed to promote the public health, the public morals, or the public safety." Per Main, J., in State v. Finney, 79 Wash. 608, 611, 140 Pac. 918, 919 (1914). And see cases cited in 12 C. J. 820 n. 56. This appears to have been overlooked by the West Virginia court in Ex parte Hudding, 86 W. Va. 526, 108 S. E. 827 (1920) for it says (p. 531): "... under the Constitution it [the police power] is confined to matters relating to the public health, the public morals, and the public safety." It is, to say the least, difficult to reconcile this statement with that in Mill Creek Coal & Coke Co. v. Public Service Commission, 84 W. Va. 662, 672, 100 S. E. 557, 561 (1919): "It is settled law that the police power of the state embraces regulations designed to promote the public conveniences or the general welfare and prosperity, as well as those in the interests of the public health, morals and safety." It seems that the West Virginia court has a way of shifting the scope of this power around so as to fit the case in hand no matter what it is, so as to decide it either way.

insist on exercising their "inalienable right" to loaf. The one
who is willing to work cannot by any efforts he may put forth
feed and clothe the other five. The principles of economics—the
inevitable laws of God—would then work havoc with this "inalien-
able right" of some of these men to loaf. So would the same law op-
erate throughout the world if five-sixths of the men should assert
their "right" to loaf. This principle was well understood by Cap-
tain John Smith when he "enacted" an industry law of his own
for the early Virginia settlers, punishing all offenders with Mother
Nature's own punishment—hunger—as the alternative.\(^5\) The
principle is the same whether applied in a simple small community
or to a whole nation, or to the whole world, when considering the
right of one man to loaf; the difference is only one of degree. He
who insists on exercising his "inalienable right" to loaf deprives
somebody else of an "equal right" of another kind.\(^6\)

"Six days [a week] shalt thou labor ..." saith the Lord.\(^7\)
Most of our religious leaders, in their fervent desire to constrain
obedience to the divine interdiction against laboring on the Sab-
bath, have overlooked this extremely important part of the com-
mandment. It is written in our Bible as the word of God Him-
selah, and it is moreover, written all over the face of His green earth
in what we call laws or principles of economics which are infin-
itely more immutable than the proverbial laws of the Medes and
Persians: Thou shalt labor. And His punishments for disobe-
dience are manifold and inexorable. Should the court deny to our
legislatures the right to enact a law in conformity with a law
which God Himself has made?

That our legislatures can be depended upon to remain well
within the bounds of reason in this respect is evidenced by the

\(^{5}\) See Captain John Smith, Works, (Edward Arber Edition), Vol. I, p. 149,
quoting a speech made by Captain Smith in 1609 when he was president of the colony,
in which he said: "Countrimen, the long experience of our late miseries, I hope is
sufficient to persuade every one to a present correction of himselfe; and thynke
not that either my pains, or the adventurers purses, will ever maintaine you in
Idlenesse and sloth. I speake not this to you all; for diverse of you, I know,
deserve both honor and reward better than is yet here to bee had; but the greater
part must be more industrious, or starve. Howsoever you have bin herefore toler-
ated by the authoritie of the Councell from that I have often commanded you; yet
seeing nowe the authoritie resteth wholly in my selfe, you must obey this for a law,
that he that will not work, shall not eate, except by sickenesse he be disabled. For
the labours of 30 or 40 honest and industrious men shall not bee consumed to main-
tain 150 idle varlets."

\(^{6}\) Cf. John B. Chandle, "Government Control of Business," 20 Col. L Rev. 438,
443: "It is, however, a matter of great social importance and public interest today
that cities containing millions of inhabitants be not left at the mercy of a rigorous
winter without fuel and food; and the state must recognize this fact even though
in the recognition they interfere with some phase of individual freedom of action. In
other words, freedom from restraint of the individual in even his own business
activity is an interest which cannot be so asserted as to make society the victim,
and this is true whether the unfortunate result to society is deliberately intended,
or is only incidental. It is in its final analysis a question of social necessity."

\(^{7}\) Exodus, 20, 9.
many hours-of-labor statutes which have been enacted in recent years.61

It seems that practically the only objection that could be inter-
posed to the enforcement of an industry law is that it infringes the
person's "inalienable right" to loaf which, in any event does not
exist except relatively, whereas the reasons in its favor are many
and preponderant.62

If this is true in times of peace, a fortiori, is it true in time of
war, for while the power "to declare war" and, incidentally, to
carry it through to a successful conclusion, is given exclusively
to the Federal government, this does not necessarily prohibit the
States from rendering assistance.63

Fortunately there are two cases dealing with this subject, one
decided by the Court of General Sessions of Delaware in 1919,64
and the other decided by the Supreme Court of Appeals of West
Virginia in 1920.65

The Delaware case arose upon a motion to quash an indictment
for violation of an industry law, or Council of Defense Act. It
was contended that the act was a violation of the Thirteenth and
Fourteenth Amendments to the Constitution. The court after
affirming the auxiliary war power of the State, sustained the valid-
ity of the act as a lawful exercise of that power and of the police
power. It said

"One of the objects of the act was to aid in winning the
war by increasing the production of food and supplies and by
saving the loss incident to the maintenance of those male citi-
zens between the ages of 18 and 55 who were engaged in no
useful or lawful occupation. War cannot be carried on with-
out food and supplies, nor can food and supplies be produced
except by labor, and who are more able to labor than male
citizens between the ages of 18 and 55?"66

61 See, for instance, the law improperly declared invalid in Lochner v. New York,
198 U. S. 45 (1905); the eight-hour law for miners, sustained in Holden v. Hardy,
166 U. S. 366 (1898). See Barnes FEDERAL CODE 1918, §§ 6585, 8090, 8091-8093,
8109; W. VA. CODE, c. 15R.
62 Cm. Mill Creek Coal & Coke Co. v. Public Service Commission, supra, in which
the court held that even contract rights must give way where the public convenience—
the general welfare—demanded.
63 State v. McClure, 30 Del. 265, 105 Atl. 712 (1919) wherein it is said: "Unless
the power of the several states to enact legislation beneficial to the federal govern-
ment while it is at war with a foreign country is expressly prohibited by the Con-
stitution or such prohibition is a necessary implication from other powers granted to
the federal government or denied to the states, the several states have such power.
"We find nothing in the Constitution either expressed or implied which would deny
to the several states such power."
64 State v. McClure, supra.
65 Ex parte Hudgins, 86 W. Va. 526, 103 S. E. 327 (1920).
66 State v. McClure, supra, p. 714.
Another object of the act is said to be

"... to preserve order within the state. The passage of the act compelling male residents of the state between the ages of 18 and 55 to be employed during the period of the war and six months thereafter we believe was a reasonable exercise, under the circumstances, of the police powers vested in the Legislature. . . . .

"It is generally known that the demands of the national government in waging the present war have greatly curtailed the means of preventing crime and reduced the number of men available to protect the lives and property of the public. It was proper for the Legislature having this in mind to pass reasonable and just laws to preserve order within the state and to protect the lives and property of those within its borders providing that male residents between certain ages should be engaged in some useful or lawful occupation."

In the West Virginia case the indictment was for failure to work as required by the statute, during the period between March 29th and April 12th, 1920. The prisoner had been in the service throughout the entire period of the war. He was on the firing line when the Armistice was signed, and was not discharged until the month of May, 1919. After having been indicted, he filed his petition for a writ of habeas corpus, relying upon two grounds:

"First, that the time prescribed within which the statute was to remain in effect had expired by limitation when petitioner is alleged to have committed the several offenses; second, that the said act is unconstitutional and void, being violative, (1) of the Thirteenth Amendment of the Constitution of the United States . . . . ."

Instead of deciding the case upon the first of these two grounds, as the court might very well have done, the duration of the act being limited to the period of the war and six months thereafter, it decided the case entirely upon the second ground. The court found that the restraint imposed by the statute upon personal liberty could not be made to fit in under any of the five classes of restraints of a public nature authorized by Mr. Cooley, and said that, therefore, this restraint cannot be allowed—even in times of

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67 Ibid.
68 See Ex parte Hudgins, supra, p. 527. The act was also claimed to be violative of certain provisions of the West Virginia Constitution.
69 Ibid, p. 529, where it is said: "Whether the war had then ended within the provision of this act, we need not decide, for we have reached the conclusion that the act is unconstitutional and ought to be so declared."
70 See COOLEY, CONSTITUTIONAL LIMITATIONS, 484. It will be noted that only one case is cited in this work at this point, and that it supports only one class.
war. Just where a writer, even of the calibre of Mr. Cooley, gets the authority to lay down a rule, binding not only upon the courts, but also upon the legislatures, in which lawful restraints upon personal liberty are divided into five classes, and no more, is not explained. Mr. Cooley should feel flattered! Surely such weight has never before been given to the statements of a textbook writer. If it were obvious from the nature of things that the rule could not be otherwise, this might be all right. But in the field of constitutional law it seems a radical departure from the liberal policy of the Supreme Court of the United States, which is to leave all possible latitude to the legislature in enacting laws for the general good, and to avoid a direct decision curtailing that power when a case can be decided upon another ground. It seems that in this case the West Virginia court has taken a long step in the direction of the "unchangeableness attributed to the laws of the Medes and Persians" so justly denounced by the Supreme Court.

In justification of its holding, the court said,

"If a citizen, say of fifty or fifty-five years of age, had worked diligently earlier in life, and had laid up a competency with which to support himself and his dependents in his or their stations of life, that he might for the rest of his days live in comparative ease and freedom from the burdens of his earlier years, he could not defend himself on that account nor escape the penalties imposed for a violation of the statute, characterizing him as a vagrant and punishable as such."

This is an accurate statement of the interest of the individual in being allowed to do as he pleases. But, as before stated, against this must be weighed the interests of the State, as a juristic person in promoting the general welfare of its inhabitants, and of society in maintaining the production of necessary goods and in keeping plenty within reach of all. In deciding all cases of this kind the duty of the court should be to weigh the individual interests against the public and social interests concerned, and to decide,

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21 As observed by Professor John B. Cheadle, in his article in 20 Conn. L. Rev., 438, entitled "Government Control of Business," (p. 444): "Human interests, as a group, have such a growing content that arbitrary limits cannot and will not be assumed in advance and should not be implied; and such limits should not be deemed to arise from anything less than a strictly phrased constitutional statement of exclusion. Human interests being the things human beings estimate as of value, new interests are inevitable as the race progresses; and to deny that new interests will constantly arise demanding protection is to declare that we will stand with Joshua at Ajjalon. To pretend to forecast these potential interests in any detail is an absurd assumption of omniscience." (Italics ours.)


23 86 W. Va., 528, 531, 103 S. E. 327, 329.
without laying down a flat and inflexible rule or law, in favor of the interests which, for the time being, predominate.

The court recognized that one of the principal purposes of the legislature in enacting the law was to keep the productive resources of the State up to the highest standard during the period of the war. Yet it denied the State the right to do so. One cannot help wondering whether the court would take the same view of the matter if the state of West Virginia were confronted with the task of fighting a war single-handed, without the aid of her forty-seven sister states and the various colonial possessions of the general government. Would not the court then look upon it as a matter of self-preservation, and find copious and weighty reasons for sanctioning the restraint on the personal liberty of the individual? If so, why should it take a different view simply because we had the help of our sister states? Why should West Virginia be unwilling to bear her full share of the burden in a war fought for her as well as for the other states?

It is submitted that the West Virginia court has established an unwise precedent in denying to the state, even in times of war, the right to require industry of those of its inhabitants who are allowed by the Federal government to remain at home, when the Federal government tramples all over the "equal rights" of those whom it impresses into service. And the incongruity of it all is that the West Virginia court looked to the same instrument—the Constitution of the United States—that the Federal government looked to in finding its power to impress the state's inhabitant's into he army. If the West Virginia court is, under this decision, consistently to avoid, in times of war, denying "to any person within its jurisdiction the equal protection of the laws" it is well that the power to draft the state's inhabitants into the army is exercised by the Federal government, over which the West Virginia court has no control. In other words, the justice of requiring a few to fight the state's wars, whether they will to do so or not, while at the same time allowing others to refuse to turn a hand to help if

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74 At p. 530 the court said: "While greater production during the period of war might be desirable, is that a subject with which the state had the right to deal? We think not." Cf. Clifford R. Sulzer, "Basis of Constitutionality of Council of Defense Acts," 27 W. Va. Law Q. 171, wherein he says (p. 173): "It is difficult to see by what stretch of imagination the work required under the Council of Defense Acts comes within the prohibition of these amendments [13th and 14th]. It cannot be slavery or involuntary servitude within the meaning of the 13th Amendment for those required to labor are not owned as chattels, their labor and services are not demanded for the benefit of others, and they have their full legal rights as to the disposal of their property and services. None of their civil, political, or religious, rights are taken away. It savors of anarchy in times of an emergency to say that there is a natural right to remain idle, and it should be unnecessary to add that no such right is guaranteed by the 13th and 14th Amendments."
they will not to do so, is not apparent. Yet this seems to be the necessary result of the holding of the West Virginia court.

It is submitted that the courts, instead of eagerly rushing in to safeguard the sacred "inalienable rights" of the people against the laws of their own delegates, should proceed with extreme caution in a case of this kind, avoiding, whenever possible, holdings which would curtail the powers of the legislature. When a direct holding cannot be avoided, the courts should weigh with great care the conflicting interests involved and should throw legal sanction on the side of the balance which, for the time being, preponderates, and at the same time should reserve the right to place its stamp of approval on the other side if and whenever the interests on that side have grown to such proportions that reason requires its legal support. Only in this way can our constitutions, which were not made for one people or one time, but for all peoples and for all times, be made adequately to secure the end sought by their framers, which is the end of law, viz., the greatest good to the greatest number.\(^5\)

\(^5\) In Missouri v. Holland, 252 U. S. 416 (1920), the Supreme Court refused so to construe the Tenth Amendment as to deny to Congress the right to protect migratory birds, stating (through Mr. Justice Holmes), with reference to that Amendment (p. 433), "...when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. ... We must consider what this country has become in deciding what that Amendment has reserved."