absolutely sovereign, can command, or extinguish and swallow up the executive and the judiciary, appropriating to itself their functions. But in America, a legislature is a legislature and nothing more. The same instrument which creates it creates also the executive governor and the judges. They hold by a title as good as its own. If the legislature should pass a law depriving the governor of an executive function conferred by the Constitution, that law would be void. If the legislature attempted to interfere with the jurisdiction of the courts, their action would be even more palpably illegal and ineffectual.[1]

The executive and legislative departments of a State government have of course the right and duty of acting in the first instance on their view of the meaning of the Constitution. But the ultimate expounder of that meaning is the judiciary; and when the courts of a State have solemnly declared the true construction of any provision of the Constitution, all persons are bound to regulate their conduct accordingly. As was observed in considering the functions of the Federal judiciary (Chapter XXIII.), this authority of the American courts is not in the nature of a political or discretionary power vested in them; it is a necessary consequence of the existence of a fundamental law superior to any statute which the legislature may enact, or to any right which a governor may conceive himself to possess.[2] To quote the words of an American decision: —

"In exercising this high authority the judges claim no judicial supremacy; they are only the administrators of the public will. If an Act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the Act is forbidden by the Constitution, and because the

[1] It has, for instance, been held that a State legislature cannot empower election boards to decide whether a person has by duelling forfeited his right to vote or hold office, this inquiry being judicial and proper only for the regular tribunals of the State. — Cooley, *Constit. Limit.*, p. 112. Acts passed by legislatures affecting some judicial decision already given, have repeatedly been held void by the Courts. They would be doubly void as also transgressing the Federal Constitution.

[2] In Switzerland, however, the cantonal courts have not, except perhaps in Uri, the right to declare invalid a law made by a cantonal legislature, the legislature being apparently deemed the judge of its own powers. A cantonal law may, however, be quashed, in some cases, by the Federal Council, or pronounced invalid by the Federal Court. See an interesting discussion of the question in Dubs, *Das oeffentliche Recht der Schweizerischen Eidgenossenschaft*, Part I. p. 113.

will of the people, which is therein declared, is paramount to that of their representatives expressed in any law."

It is a well-established rule that the judges will always lean in favour of the validity of a legislative Act; that if there be a reasonable doubt as to the constitutionality of a statute they will solve that doubt in favour of the statute; that where the legislature has been left a discretion they will assume the discretion to have been wisely exercised; that where the construction of a statute is doubtful, they will adopt such construction as will harmonize with the Constitution, and enable it to take effect. So it has been well observed that a man might with perfect consistency argue as a member of a legislature against a bill on the ground that it is unconstitutional, and after having been appointed a judge, might in his judicial capacity sustain its constitutionality. Judges must not inquire into the motives of the legislature, nor refuse to apply an Act because they may suspect that it was obtained by fraud or corruption, still less because they hold it to be opposed to justice and sound policy. "A court cannot declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited, or such rights guaranteed or protected, by the Constitution.[1] . . . But when a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a pro-

[1] This was not always admitted; just as in England it was at one time held that natural justice and equity were above Acts of Parliament. So in the case of *Gardner* v. *The Village of Newburg* (Johnson's *Chancery Reports*, N. Y. 162), the New York legislature had authorized the village to supply itself with water from a stream, but had made no provision for indemnifying the owners of lands through which the stream flowed for the injury they must suffer from the diversion of the water. The Constitution of New York at that time contained no provision prohibiting the taking of private property for public use without compensation; notwithstanding this, Chancellor Kent restrained the village from proceeding upon the broad general principle which he found in Magna Charta, in a statutory Bill of Rights, which of course could not control the legislature, and in Grotius Puffendorf and Bynkershoek. (I owe this reference to the kindness of Mr. Theodore Bacon.)

As the doctrine stated in the text has been doubted by some critics, I may now (Sept. 1892) refer for further confirmation of it to *Dash* v. *Van Kleech*, 7 Johns. 477 (words of Chancellor Kent), and *People* v. *Gillson*, 109 N. Y. 398.

tection to no one who has acted under it; and no one can be punished for having refused obedience to it before the decision was made. And what is true of an Act void *in toto*, is true also as to any part of an Act which is found to be unconstitutional, and which consequently is to be regarded as having never at any time been possessed of legal force."[1]

It may be thought, and the impression will be confirmed when we consider as well the minuteness of the State Constitutions as the profusion of State legislation and the inconsiderate haste with which it is passed, that as the risk of a conflict between the Constitution and statutes is great, so the inconveniences of a system under which the citizens cannot tell whether their obedience is or is not due to a statute must be serious. How is a man to know whether he has really acquired a right under a statute? how is he to learn whether to conform his conduct to it or not? How is an investor to judge if he may safely lend money which a statute has empowered a community to borrow, when the statute may be itself subsequently overthrown?

To meet these difficulties some State Constitutions[2] provide that the judges of the supreme court of the State may be called upon by the governor or either house of the legislature to deliver their opinions upon questions of law, without waiting for these questions to arise and be determined in an ordinary lawsuit.[3] This expedient seems a good one, for it procures

[1] Cooley, *Constit. Limit.*, pp. 200, 227.

[2] Massachusetts, Maine, New Hampshire, Rhode Island, Colorado, Florida, and South Dakota. In Vermont a similar power is given by statute. In South Dakota the governor may require it "upon important questions of law involving the exercise of his executive powers and upon solemn occasions." In Florida it is only the governor to whom the power has been given, and whereas under the Constitution of 1868 he could obtain the opinion of the justices "upon any point of law," he can by the Constitution of 1886 require it only "upon any question affecting his executive powers and duties." A similar provision was inserted in the Constitution of Missouri of 1865, but omitted in the revised (and now operative) Constitution of 1875, apparently because the judges had so often refused to give their advice when asked for it by a house of the legislature, that there seemed little use in retaining the enactment. In the other States the judges have apparently always consented to answer, save on one or two occasions in Massachusetts. See on the whole subject an interesting pamphlet by Mr. J. B. Thayer, of the Harvard University Law School.

[3] The judges of the supreme court of Massachusetts suggest in their very learned and instructive opinion, delivered to the legislature, December 31, 1878, that this provision, which appears first in the Massachusetts Constitution of 1780, and was doubtless borrowed thence by the other States, "evidently had in view the usage of the English Constitution, by which the King as well as the House of Lords, whether acting in their judicial or in their legislative capacity, had the right to demand the opinion of the twelve judges of England." This is still sometimes done by the House of Lords acting in their judicial capacity; but the opinions of the judges so given are not necessarily followed by that House, and though always reported are not deemed to be binding pronouncements of law similar to the decisions of a court.

a judicial and non-partisan interpretation, and procures it at once before rights or interests have been created. But it is open to the objection that the opinions so pronounced are given before cases have arisen which show how in fact a statute is working, and what points it may raise; and that the judges have not, as in contested lawsuits, the assistance of counsel arguing for their respective clients. And this is perhaps the reason why in most of the States where the provision exists, the judges have declared that they act under it in a purely advisory capacity, and that their deliverances are mere expressions of opinion, not binding upon them should the point afterwards arise in a suit involving the rights of parties.[1]

The highest court of a State may depart from a view it has previously laid down, even in a legal proceeding, regarding the construction of the Constitution, that is to say, it has a legal right to do so if convinced that the former view was wrong. But it is reluctant to do so, because such a course unsettles the law and impairs the respect felt for the bench. And there is less occasion for it to do so than in the parallel case of the supreme Federal court, because as the process of amending a State Constitution is simpler and speedier than that of altering the Federal Constitution, a remedy can be more easily applied to any mistake which the State judiciary has committed. This unwillingness to unsettle the law goes so far that State courts have sometimes refused to disturb a practice long acquiesced in by the legislature, which they have nevertheless declared they would have pronounced unconstitutional had it come before them while still new.

[1] Mr. Thayer shows, by an examination of the reported instances, that in Massachusetts, New Hampshire, and Rhode Island, as also in Missouri from 1865 to 1875, the courts held that their opinions rendered under these provisions of the State Constitutions were not to be deemed judicial determinations, equal in authority to decisions given in actual litigation, but were rather *prima facie* impressions, which the judges ought not to hold themselves bound by, when subsequently required to determine the same point in an action or other legal proceeding. It is otherwise in Maine and Colorado.