The Usurped Power of the Courts

By ALLAN L. BENSON

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And here’s another just as good:

The Growing Grocery Bill
By ALLAN L. BENSON

The first paragraph reads:

“This earth is like a big bombshell. The high cost of living is the fuse. The fuse has burned nearly to the shell. Something is about to happen. Either the fire will be put out and all will be well, or the fire will not be put out and all will be hell. The French revolution was caused by the high cost of living. And a woeful woman, walking the streets of Paris, beating a drum and crying ‘Bread,’ was the spark that set off the shell.”

It also says:

“It will not always be safe to keep millions hungry.”

Mr. Benson hints that the masses will not always hunger and starve quietly and politely.

This pamphlet startles the wage-earner, the housewife and the politician. It presents the evidence. It shows the fallacy of co-operative buying and petty reforms. It gives the only remedy—Socialism.

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The Usurped Power of the Courts

BY ALLAN L. BENSON

The Supreme Court’s Limited Powers Under the Constitution

PLEASE consider briefly nine men in Washington. Not one of them is the President. Not one of them is a member of Congress. Not one of them was elected by the people. Not one of them can be dismissed by the people. Yet, a mere five of these nine men can, if they choose to do so (and they have frequently chosen to do so), undo the work of the President, the work of Congress and set at naught the will of a nation of 90,000,000. They can tell the President, the Congress and the people that, when they made a law, they meant either more or less than they said. They can take out or put in; add or subtract.

Nor, under the present practice, can any power stay their hands. No power can stay their hands because everything is below them and nothing is above them. We of New York, nine millions strong, are below them. You of the middle west, the far west and the south, many more millions strong, are below them. Only the constitution of the United States seems to be above them—and it isn’t. The constitution of the United States, if it were above them, would constitute a barrier beyond which they could not go. These nine gentlemen who compose the Supreme Court of the United States can go anywhere. They can go anywhere, because they have arrogated to themselves the exclusive right to declare what the constitution means. If the constitution is in their way, they push it back. If it is too rigid, at one joint, to suit them, they limber it. If it is too limber, at another joint, to suit them, they stiffen it.
Here is government of the real sort. Government that governs! Government that resides in Washington and sends out a current of dominating energy to the farthest point over which the flag floats. Government that need bend to nothing but its fears, and yield to nothing but the storm that threatens to become a devastating hurricane. Government by judges for the people!

Yet, it will not be here contended that our highest federal judges have given us nothing but bad government. They have often given us good government. They have sometimes been not only just but generous. So was George III sometimes not only just but generous. He once returned to the American colonists approximately $1,000,000 that they had contributed in excess of their just share of taxes. But the point is that, even if the best were to be said about our judge-made government, it could not truthfully be said that it is democratic government.* Yet, if we have not democratic government—that is, government by the people—what has happened since we asserted in the Declaration of Independence that “governments derive their just powers from the consent of the governed?” What has happened since Lincoln declared that “no man is good enough to govern another man without that other man’s consent?” Judge-made government by judges whom the people neither make nor control cannot truthfully be said to derive any of its powers from the consent of the governed. Therefore, unless Lincoln was wrong, no man is good enough to sit upon the bench of a supreme court, either federal or state, and, by judicial interpretation, make laws that the people do not want, or destroy laws that the people do want.

Let us not blink at the facts. If judges are making and unmaking laws in this country and they are— they are exercising despotic power. And, precisely to the extent of such judicial activities, we are living under a despotism. Moreover, if Lincoln was right when he said that the nation could not endure “half slave and half free,” was not Thomas Jefferson right when he said that the nation could not endure under the present judicial despotism?† In other words, if despotism and

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* “It has been common to designate our form of government as a democracy, but in the true sense in which that term is properly used, as defining a government in which all its acts are performed by the people, it is about as far from it as any other of which we are aware.” —Former Associate Justice of the Supreme Court Miller in “Lectures on the Constitution of the United States.”

† “It has long been my opinion . . . . that the germ of dissolution of our federal government is in the constitution of our federal judiciary, an irrepressible body (for impeachment is scarcely a scarecrow) working like gravity by day and night, gaining a little to-day and a little to-morrow, and advancing its noiseless steps like a thief over the field of jurisdiction.” —Jefferson, in a letter to C. II. Hammond, 1821.

“You seem to consider the judges as the ultimate arbiters of all constitutional questions; a very dangerous doctrine indeed, and one that would place us under the despotism of an oligarchy.” —Jefferson in a letter to a Mr. Jarvis, 1820.
liberty exist in the same nation, is it not in the nature of things that the despotism should eventually crowd out the liberty or be crowded out by the liberty?

LOOK AT THE FACTS

HERE are some facts that I shall establish, and over which I shall ask you to ponder:

Nowhere in the constitution of the United States is the Federal Supreme Court authorized to declare an act of Congress unconstitutional.

When it was proposed, in the constitutional convention of 1787, to give the Federal Supreme Court even a limited veto upon Congress, the convention, not once, but four times, refused to do so. The Federal Supreme Court in the beginning claimed no such power and, for years, made no attempt to exercise it.

The power to declare acts of Congress unconstitutional was usurped on behalf of the Supreme Court by Chief Justice John Marshall, who, in order to read into the constitution his authority to do so, was compelled to repudiate his own words upon the same subject, as expressed before the Virginia convention that ratified the constitution, and at least one other of his earlier utterances.

Congress has the power, which it may exercise at any time that it chooses to do so, to compel the Federal Supreme Court to keep its hands from federal laws—the best proof of which is that Congress once exercised this power, and the Supreme Court, without hesitation, yielded to it.

Also, it will be shown that prior to the revolution, no colonial supreme court ever dared to set aside the act of a legislature, and that, to this day, the United States is the only great nation on earth that permits a court to overrule a legislative body.

If these statements are true, every American citizen ought to know they are true. If they are true, we fought the Revolutionary War for one thing and got another. If they are true, we should make up our minds whether we want the republic for which our forefathers fought, or the limited despotism—constantly growing greater—that the courts are imposing upon us. If we want the despotism, we need do nothing. Just let the courts go their way. But, if we want a republic, we shall have to put our courts down where they belong, and our congress and our state legislatures up where they belong. We shall have to say to our judges, both big and little: "You are not good enough to rule us without our consent AND WE DON'T CONSENT."

Let the assertions herein made about the courts be considered in the chronological order of the events to which they pertain.
Going back to the period immediately preceding the Revolutionary War, we find that, up to that time, no colonial supreme court had ever set aside the act of a legislature. Professor Cooley, in "Constitutional Limitations" (sixth edition, p. 193), declares that the first law ever invalidated in America upon the ground of its unconstitutionality was the act involved in the case of Trevett vs. Weeden, which was decided in the Superior Court of Judicature of Rhode Island in September, 1786. A few months later, the judges, all of whom were elective, were kicked out of office by the legislature.

By the time that the constitutional convention met in 1787 to frame the present national constitution, five states were beginning to claim the power to declare acts of the legislature unconstitutional. This statement is made by Professor J. Allen Smith in his excellent work, "The Spirit of American Government." These states were Virginia, Rhode Island, New Jersey, Connecticut and Massachusetts.

"In eight of the thirteen states," says Professor Smith (p. 90), "the doctrine that the judiciary could refuse to enforce laws regularly enacted by the legislative body had not even been asserted by the courts themselves, much less recognized and accepted by the people generally."

And the courts of the five states that claimed this power did not at first exercise it. The Virginia Court of Appeals, as early as 1782, expressed the opinion that "the court had power to declare any resolution or act of the legislature, or of either branch of it, to be unconstitutional and void." But the court took good care to keep this conviction in the form of mere opinion. Not until years later was a law invalidated.

Unconfirmed bits of history suggest that the Supreme Courts of Massachusetts and New Jersey may have declared laws unconstitutional in 1786 or 1787. But the first case mentioned in the reports of state decisions was that of Bayard vs. Singleton, which was decided by the Superior Court of North Carolina in 1787. The court cast out the law and the people did as follows to the court (Coxe, "Judicial Power and Unconstitutional Legislation," p. 252):

"The judges were fiercely denounced as usurpers of power. Spaight, afterward governor, voiced a common notion when he declared that 'the state was subject to three individuals who united in their own persons the legislative and judicial power, which no monarch in England enjoys, and which would be more despotic than the Roman triumvirate and equally insufferable!'"

North Carolina, at that time, had a population of 393,751. Mr. Spaight declared that three despots ruled it and was much wroth thereat. What would Mr. Spaight have said if he could have seen nine merry gentlemen put a word into the Sherman Anti-Trust Law in the summer of 1911, that the representatives...
of 85,000,000 people had for fifteen years resolutely refused to put in, though often importuned by the trusts to do so? What would he have said if he had been here in 1894 and seen five justices of the United States Supreme Court kill an income tax law that 65,000,000 people, through their representatives, had enacted?

But no matter. The point is that prior to the Revolutionary War, no colonial court ever claimed the right to overrule a legislature, and that after the war, the people denounced, in severest terms, the courts of the five states that claimed and exercised this right. Which facts having been made plain, we may go on to the convention that framed the present national constitution.

THE MAN WHO MADE THE CONSTITUTION

The man who really made the present constitution, in the sense that his brain supplied all of the distinctive features that differentiated it from all other federal constitutions—the ashes of this man lie in a forgotten grave in a Philadelphia cemetery. His name was Pelatiah Webster. He was a prosperous merchant, a relative of both Daniel and Noah Webster, a graduate of Yale, a financier and economist of high standing, yet, for a hundred years, his name was almost as nearly forgotten as if he had never lived. To this day probably not one American in 100,000 has ever heard of him. That a few have now heard of him is due to the painstaking research of Hannis Taylor, diplomat and historian, whose works on the origin and growth of the English and the American constitutions have won him a reputation as broad as the domain of the English language.

Pelatiah Webster had a good deal to do with the story I am trying to tell, so I shall set down some facts about him. On February 16, 1783, he published in Philadelphia a pamphlet entitled "A Dissertation on the Political Union and Constitution of the United States which is Necessary to their Preservation and Happiness." In this pamphlet, an original copy of which is in the Library of Congress in Washington, Webster urged the necessity of calling a convention to draft a new constitution and outlined, at great length, the kind of a constitution that he favored. James Madison, a member of the constitutional convention and afterwards President of the United States, referred to Webster and his pamphlet as follows (Elliot's Debates, Vol. 5, p. 117):"
Mind you, Pelatiah Webster, though he advocated and outlined a new constitution at least four years before the assembling of the constitutional convention, was not a member of that body. But his fundamental, revolutionary ideas of a federal government, as he had worked them out years before, were placed bodily in each of the three plans that were presented to the convention for a new constitution. They were in the so-called Virginia plan, of which Madison was regarded as the author, and the Pinckney plan, both of which were presented to the convention at its first business session. They were in Alexander Hamilton's plan, which was presented some weeks later. They were not in the New Jersey or Paterson plan, because Paterson aimed at nothing but the patching-up of the old Articles of Confederation. But they are in the Constitution of the United States as it stands to-day. Mr. Hannis Taylor enumerates and comments upon them as follows ("The Origin and Growth of the American Constitution," p. 172):

"A federal government with independent powers of taxation."
"The division of the federal head into three departments—legislative, executive and judicial."
"The division of the federal legislature into two branches."
"A federal government with delegated powers operating directly upon the citizen, the residuum of power remaining in the states."
"It is no exaggeration to say that Webster's creation, based upon those four novel principles, were as different from any preceding federal system as a modern mogul engine is from an ancient stagecoach."

Now, what did this man who had so much to do with the making of the Constitution think about the courts? Did he believe in the creation of a Supreme Court that should have the power to destroy acts of Congress? Did he believe in the creation of a Congress that should have no power to enforce its own will against the opposition of the Supreme Court? These questions go pretty nearly to the roots of our constitution and, fortunately, there is light to throw upon them.

Pelatiah Webster, in his draft of a constitution, did not say much about the courts. He advocated the establishment of a federal judiciary, but he never even suggested that it should have power to invalidate acts of Congress. Yet, Mr. Hannis Taylor, who is both a defender of the Supreme Court as it stands and an advocate of judge-made law, reaches the astounding conclusion that the present condition of growing judicial despotism is the logical, justifiable and admirable outcome of Webster's conception of a federal judiciary. Says Mr. Taylor: ("The Origin and Growth of the American Constitution," p. 153):

"Thus emerged the splendid conception of the Supreme Court of the United States armed not only with original jurisdiction 'to terminate and finally decide controversies arising between different states' but also with an appellate jurisdiction 'in cases of great moment on the same reasons that such appeals are admitted in all the states of Europe.'"
IT may seem presumptuous to differ from the re-discoverer of Pelatiah Webster as to what he thought about anything. I should not do so, were it not for the fact that Pelatiah Webster himself told what he thought about some things and left a record of what he thought. In view of the fact that even Mr. Taylor does not contend that Webster ever said that he favored a supreme court that should have the power to set aside acts of Congress, what may we reasonably infer as to Webster’s attitude from such remarks as these, all of which are taken from his famous pamphlet of 1783:

“Laws or ordinances of any kind (especially of august bodies of high dignity and consequence) which fail of execution, are much worse than none; they weaken the government; expose it to contempt.” (How many acts of Congress and the various state legislatures “fail of execution” because the supreme courts declare them unconstitutional? And, did Webster say that the “august bodies” need not feel punctured in dignity if the men who palsied their hands happened to be judges?)

“A government which is but half executed, or whose operations may be stopped by a single vote, is the most dangerous of all institutions.” (A single vote—that of Justice Shiras—“stopped the operation of the government” in its effort to enforce the income tax law that Congress had enacted.)

“I do not mean to give these great ministers of state a negative on Congress” (Webster was speaking not of judges, but of Cabinet officers. In no other place did he use the expression “negative on Congress,” and here he used it to show that he did not advise the giving of such power, at least to the Cabinet; nor did he elsewhere ever suggest that he would advise that it be given to any body.)

“I propose that any state may petition Congress to repeal any law or decision they may have made, and, if more than half of the states do this, the law or decision shall be repealed, let its nature or importance be however great, excepting only such acts as create funds for the public credit. . . .” (Having made no other provision for the setting aside of acts of Congress that might be regarded as unconstitutional, what did Webster mean by this? Did he not mean that the people should be given power to set aside acts of Congress for any reason or for no reason? If so, he meant that the people might destroy such laws as they regarded as unconstitutional. If he meant that the people should have supreme power over their laws, he could not have meant that the Supreme Court should have such power.)

Furthermore, in writing upon the desirability of giving the
states power to compel Congress to repeal objectionable laws, Webster said:

"The reason is, the uneasiness of a majority of states affords a strong presumption that the act is wrong, for uneasiness arises much more frequently from wrong than right." (If Webster believed that the people should have the right to destroy even good laws, if they objected to them, did he also mean that a supreme court should also have the power to destroy good laws to which the people did not object?)

Let him speak for himself:

"If every act of Congress is subject to this repeal" (that is, repeal upon petition of a majority of the states) "Congress itself will have stronger inducement, not only to examine well the several acts under their consideration, but also to communicate the reasons for them to the states, than they would have if their simple votes gave the final stamp of irrevocable authority to their acts." (Can this mean anything else than that Webster believed that only the approval of the people was necessary to put the "final stamp of irrevocable authority" upon acts of Congress?)

So one might go through Webster's pamphlet, picking out paragraphs that revealed his state of mind. It is true that these paragraphs sometimes refer to problems that arose under the confederation. That does not matter. Webster laid down broad principles. "August bodies that cannot enforce their own laws are contemptible," he said in substance. Quite so. And it matters not whether that august body be the Congress of the United States under the confederation, or any other Congress. Is it not absurd that nine men who were not chosen by the people should exercise the power to amend or destroy laws enacted by a Congress of approximately 500 men, most of whom were directly elected by the people? It is also without sanction in the constitution.*

When we go to the records of the Constitutional Convention itself to find whether its members intended that the Supreme Court should have such power, we find a strange state of facts. First, the constitution contains no such authorization. Furthermore, the convention, upon four occasions, voted down resolutions that were intended to give the Supreme Court, not an absolute but a limited veto upon acts of Congress. Yet there can be no doubt that the majority of the convention

* "The marvel is that neither in the state nor federal constitutions was this novel and far-reaching right (to declare laws unconstitutional) "bestowed by express constitutional grant; in both systems, it emerged as a rule of judge-made law."—(Taylor, "The Origin and Growth of the American Constitution," p. 331.)

"There is no provision in the Constitution of the United States . . . which clothes the judiciary with the power to declare an act of the legislature generally null and void on account of its conceived repugnance to the constitution, or on any other account."—(Burgess, "Political Science and Constitutional Law," Vol. 2, p. 364.)
desired that the court should exercise the power to declare laws unconstitutional, and hoped that it would seize the power it has seized. The convention simply left the question open, neither authorizing nor forbidding the exercise of such judicial power, though the prodding of the radical minority was sufficient to compel the insertion of a clause under which the jurisdiction of the court might be shorn by Congress almost to the bone.

The point is that, by the time the convention met in 1787, the great democratic outburst that expressed itself in the Declaration of Independence had somewhat subsided, and the propertied, reactionary element had recovered the ascendancy.* Fifty-six men signed the Declaration of Independence, but only six of those signers sat in the Constitutional Convention. But the leading monarchists of the time, with Alexander Hamilton at their head, were there; and the representatives of such wealth as there was were there.

"PHRASES WHICH WOULD NOT ALARM"

But back at home were the people, tired by war and hard times, not so alert in the expression of their democracy as they used to be, but still, at heart, deeply democratic. Therefore, it became the task of the gentlemen who sat in the constitutional convention so to frame a constitution that it would permit as many as possible of their ideas to be worked out, while retaining a purring phraseology that would insure its ratification by the states.

Gouverneur Morris, who claimed to have written the constitution with his own hand, admitted as much in a letter to Timothy Pickering, under date of December 22, 1814 (Elliot’s Debates, Vol. 1, p. 506), though he lacked the frankness to admit that the purring extended to other matters than the judiciary.

"That instrument" (the constitution), said Morris, "was written by the fingers which write this letter. Having rejected redundant and equivocal terms, I believed it to be as clear as our language would permit; excepting, nevertheless, a part of what relates to the judiciary. On that subject, conflicting opinions had been maintained with so much professional astuteness that it became necessary to select phrases which, expressing my own notions, would not alarm others. . . ."

* "Many of those who had espoused democratic doctrines during the revolution became conservatives after the war was over."—(Smith, "The Spirit of American Government," p. 28.)

"Who would have thought, ten years ago, that the very men who risked their lives and fortunes in support of republican principles, would now treat them as the fictions of fancy?"—(Delegate Smith in the New York convention that ratified the Federal Constitution.—Elliot’s Debates, Vol. 2, p. 250.)
Yet, Morris knew well enough that he had selected phrases to deal with other matters than the judiciary.

"You have made a good constitution," said a friend to Morris after he returned from the convention.


In other words, Morris realized that in order not to "alarm others" he had written the constitution so loosely in places that favorable judicial construction would be required to achieve the purposes of the reactionary majority that framed it.

Thus cautiously did the dominant element of the convention go about it to accomplish their purposes without awakening the people. They went even further. They ordered that all doors be locked during sessions, that votes should be taken by states instead of by individuals—this to prevent the world ever from knowing how individuals voted—that no delegate should even take notes without permission from the convention; and, at the conclusion, they ordered the secretary to turn over his notes (which, years afterward, were discovered to be almost worthless) to Washington, who was requested to keep them until such time as Congress might call for them. Washington deposited the notes in the state department, where they remained until Congress published them in 1848. But not until Madison's Journal was published, in 1841, was anything made public that even approximated an adequate account of the convention's proceedings. In fact, Madison's Journal, though it is the best of all the records, contains some wide gaps. The real story of the convention died with its last member.

Of the four plans for a constitution that were submitted, the New Jersey, or Paterson plan, may be ignored, because it contemplated only the revision of the old Articles of Confederation. Alexander Hamilton's plan may be dismissed with little more than the brief but illuminating statement of Dr. Johnson, a delegate from Connecticut, that it was "praised by everybody, but supported by none." * Considering the nature of Hamilton's plan, Johnson's statement throws a strong light upon the real sentiments of the convention. Hamilton proposed that the President and the senators be elected for life (the people, in neither instance, however, to do the electing), that the President should appoint the governors of states; that both the President and the governors should have an absolute veto over the acts of Congress and the state legislatures, respectively, and that the Supreme Court should have the right (he almost used plain words) to declare acts of Congress unconstitutional.

But while Hamilton was one of the three or four towering figures in the convention, even those who shared his views recognized that he was too bold in the expression of them. The people would never ratify such a constitution. And so, Hamilton's plan, though he made a five-hours' speech in its advocacy, was never even submitted to a committee for consideration.

ONE EFFORT TO GIVE COURTS THE POWER

Pinckney's plan, though it came more nearly than any of the others to approximating the constitution that was afterward adopted, contained nothing that hinted at judicial destruction of laws, and, therefore, it did not draw the fire of those who were opposed to such destruction. The Virginia plan, as drafted by Madison, did contain such a clause, and precipitated a contest that broke out at intervals during almost the entire period of the convention. Madison was too cautious to go directly about the accomplishment of his purpose. In defining the jurisdiction of the Supreme Court, he did not say (perhaps because he did not want to say) that the court should have the power to set aside acts of Congress. But he did insert a resolution in which he sought to accomplish a part of the same object in a less conspicuous manner. Here is the resolution:

"Resolved, that the executive and a convenient number of the national judiciary ought to compose a council of revision, with authority to examine every act of the national legislature before it shall operate, and every act of a particular legislature (that is, a state legislature) before a negative thereon shall be final; and that the dissent of the said council shall amount to a rejection, unless the act of the national legislature be again passed, or that of a particular legislature be again negatived by (here a blank was left for a percentage) of the members of each branch."

Mind you, even Madison did not here propose that the veto of the Supreme Court and the President, acting jointly, should be final. Congress could still override them. But Madison had introduced the principle of a judicial negative upon a legislative body. And the struggle in the convention over the judiciary began.

The first contest came on Monday, June 4. Elbridge Gerry, though he frankly declared that he believed the Supreme Court should have power to declare acts of Congress unconstitutional, moved that consideration of the resolution be postponed in order that he might introduce another to give the President an absolute veto. The motion to postpone consideration of Madison's resolution was carried by a vote of 6 to 4. Connecticut, Delaware, Maryland and Virginia voted against postponement.

Then came the discussion upon Gerry's resolution to give the President an absolute veto. Madison, in his journal, quotes Gunning Bedford, Jr., of Delaware:
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The Usurped Power of the Courts

"Mr. Bedford was opposed to every check upon the legislature, even the council of revision first proposed. He thought it would be sufficient to mark out in the constitution the boundaries to the legislative authority, which would give all the requisite security to the rights of the other departments. The representatives of the people were the best judges of what was for their interest, and ought to be under no external control whatever. The two branches would produce a sufficient control within the legislature itself."

After which, the convention voted unanimously to deny the President an absolute veto, and, by a vote of 8 to 2, gave him the limited veto that he now possesses.

THE FOURTH ATTEMPT

MADISON'S plan to give the Supreme Court limited power to veto acts of Congress seemed dead, but it was not. Two days later, the proposal was revived by James Wilson, of Pennsylvania, who moved a reconsideration of the vote by which the resolution was defeated. Madison seconded the motion and made a lengthy speech in which he pictured the supposed need of the presidency for such judicial support and defense. But again the plan was defeated, this time by a vote of 8 to 3.

Having suffered three rebuffs, many a man would have abandoned his project. James Madison was not such a man. Slight, almost frail of body, and so self-conscious that his face often blazed with blushes, he yet combined with cautious tactics a sort of padded persistency that was always noiselessly active. And, on August 15, Mr. Madison made a fourth attempt to incorporate in the constitution a clause that would give the Supreme Court a limited veto over Congress. Again, James Wilson seconded the motion.

Please read Mr. Madison's resolution—you may observe that Gouverneur Morris had no monopoly of the power to "select phrases" when writing about the courts:

"Every bill which shall have passed the two houses shall before it becomes a law, be severally presented to the President of the United States, and to the judges of the Supreme Court for the revision of each. If, upon such revision, they shall approve of it, they shall respectively signify their approbation by signing it; but if, upon such revision, it shall appear improper to either, or both, to be passed into a law, it shall be returned, with the objections against it, to that house in which it shall have originated, who shall enter the objections at large upon their journal, and proceed to reconsider the bill; but if, after such reconsideration, two-thirds of that house, when either the President or a majority of the judges shall object, or three-fourths where both shall object, shall agree to pass it, it shall, together with the objections, be sent to the other house, by which it shall be likewise reconsidered, and if approved by two-thirds or three-fourths of the other house, as the case may be, it shall become a law."—(Madison's Journal as printed in Vol. 5, p. 426 of Elliot's Debates.)

Did you notice the word "either" in the eighth line? All along, it had been contended by Madison that the council of revision was intended only to strengthen the hands of the executive by preventing the presidency from being crushed into obscurity by Congress. Yet, we now find the persistent Mr. Madison trying to smuggle through a resolution, by the terms of which the disapproval of "either" the President or the Supreme Court would be sufficient to destroy any congressional act that
could not afterwards muster at least a two-thirds vote in both houses of Congress, only one of which houses was to be elected by the people. The resolution, as a matter of fact, would have diminished the presidential office, instead of increasing it. The President would have been compelled to divide at all times and to surrender at some times the limited veto power that he now possesses. I say he would have been compelled to surrender at some time this power, because, as matters stand, the President alone possesses what is known as a veto power, while under Mr. Madison's resolution, the Supreme Court could have interposed a veto even if the President had given his approval of the measure.

The measure would have had to receive a majority of the votes in the House and the Senate, the latter of which was avowedly created to protect capitalists, and whose membership would therefore be composed of senators who represented the class against whom the bill was aimed.

The bill would have next had to go to a President whom the people did not elect, and to a Supreme Court selected by that President. And, if the President, for a moment, happened to slip from the clutches of the small class who hoped always to elect him, and sign the bill, the Supreme Court's power of revision would still have given the rich minority another chance to interpose a veto, which could have been surmounted by not less than a two-thirds vote in each branch of Congress.

THE END OF THE STRUGGLE

READ what happened to Mr. Madison's resolution, as he reported in his Journal:*

"Mr. Pinckney opposed the interference of judges in the legislative business; it will involve them in parties and give a previous tincture to their opinions.

"Mr. Mercer heartily approved the motion. It is an axiom that the judiciary ought to be separate from the legislative; but equally so that it ought to be independent of that department. The true policy of the axiom is that legislative usurpation and oppression may be obviated. He disapproved of the doctrine that the judges, as expositors of the constitution, should have authority to declare a law void. He thought laws ought to be well and cautiously made and then to be uncontrollable.

"Mr. Dickinson was strongly impressed with the remark of Mr. Mercer as to the power of judges to set aside the law. He thought no such power should exist. He was at the same time at a loss what expedient to substitute. The justiciary of Arragon, he observed, became by degrees the lawgiver."

Mr. Madison's resolution was then fourthly and finally voted down, 8 to 3. On August 27, when Dr. Johnson made what Mr. Madison evidently believed to be an insidious attempt to give the Supreme Court a pretext upon which it might usurp the power to declare any act of Congress unconstitutional, Mr.

Madison vigorously opposed such action, and, for many years, believed he had won. Dr. Johnson moved to insert in the following sentence, the words that are italicized:

"The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, by their authority."

On this subject, Madison wrote in his Journal: *

"Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the court generally to cases arising under the constitution, and whether it ought not to be limited to cases of a judiciary nature. The right of expounding the constitution, in cases not of this nature, ought not to be given to that department."

"The motion of Dr. Johnson was agreed to nem. con., it being generally supposed that the jurisdiction given was constructively limited to cases of a judiciary nature."

"Generally supposed," is good. Mr. Madison may have supposed that the majority of the convention intended to limit the power of the court to expound the constitution, but there were other delegates who indulged no such supposition. Among these was Edmund Randolph, Governor of Virginia and member of the convention, who, partly on this account, refused to sign the constitution. Fifteen other delegates who attended the convention, also, for one reason or another, did not sign the constitution, but their refusals were neatly covered up under this ambiguous phrase drafted by Gouverneur Morris and appended to the constitution:

"Done in convention by the unanimous consent of the states present—"

and, on September 17, with all the records under lock and key, the constitution was sent to the Continental Congress in such a manner as to convey to the people the impression that it represented the unanimous opinion of the delegates, though, as a matter of fact, only 39 out of 55 had signed it.†

So ended the great struggle for the mastery of the courts. And, at the February (1800) term of the United States Supreme Court, Mr. Justice Chase, in deciding the case of Cooper vs. Telfair, said:

"Although it is alleged that all acts of the legislature in direct opposition to the prohibitions of the constitution would be void, yet it still remains a question where the power resides to declare it void.‡

But the strong man who was both to claim and to seize this power for the court was already coming, and, the next year, took his seat at the center of the bench.

‡ 4 Dallas, 19.
John Marshall, the Father of American Judicial Despotism

The ripple that men call death blots out most of us, and the world rolls on as if we had never lived. But we who are to be blotted out have an abiding interest in those whose deeds insure them a brief survival beyond the grave. In other words, we worship power. We are interested in the man who has it. Our interest is not much dependent upon what he does with it. He may do good or ill. So far as our interest is concerned, we require only that the power shall be great, and that it shall be used courageously.

Therefore, we are interested in the life of John Marshall. Marshall had a giant’s power and used it like a giant. As the Chief Justice of the United States Supreme Court, he created the greatest court that the world ever saw. Not the best court, the greatest court. The court with the most power. A court that never existed anywhere until Marshall’s time, and has never existed anywhere else since his time. A court not chosen by the people, that destroys or re-writes laws enacted by the people. A court that derives its own great powers from lines that the court itself read into the constitution—lines that the men who made the constitution refused to put into it.

Indeed, the United States Supreme Court is the greatest court in the world in the sense that it exercises powers that are not even claimed by the highest tribunal of any other land. England would not tolerate such a court. France would not tolerate such a court. Germany would not tolerate such a court. Even Spain would not tolerate such a court. When laws are made in these nations, no court may set them aside. No court may change a letter of them. Measured by its power, can there be any doubt that our greatest court is superlatively great?

John Marshall made the United States Supreme Court great by interposing the bulk of his mountainous audacity between the people and the means by which they might express their will. On behalf of the court, Marshall usurped greater powers than are held by any king in Europe. And, although Marshall has been dead 76 years, his brain and his will go marching on. Moreover, Marshall dead is greater than ever was Marshall living. In his lifetime, the United States Supreme Court exercised despotic powers over only a few millions of people—all on the fringe of one continent. Now the court exercises despotic powers over 100,000,000 of human beings, some of whom are in the far corners of the seas.

Yet John Marshall, in his earlier manhood, scorned, or pretended to scorn, the great principles for which he afterward
fought. In those days, he did not believe the supreme court had the inherent right to destroy acts of congress. He said the constitution gave the court no such power. But when he spoke thus, John Marshall was not a judge. He was a veteran, fresh from the Revolutionary War, and a lawyer. He had not yet felt the tug and the pull of the Latin legal maxim that "It is the office of a good judge to enlarge his jurisdiction;" to lust for power, to grab it and to hold it. But that day came to Marshall, and when it came, he was in a position to make the most of it. He was the chief justice of a court that, as Jefferson said, was "advancing its noiseless steps like a thief over the field of jurisdiction."

However, let us consider Marshall's record as it was made. His first recorded utterance upon the constitutional power of the courts was before the Virginia convention that met at Richmond in 1788 to ratify or reject the proposed national constitution. Patrick Henry had spoken long and earnestly against the court clause. He had gone even so far as to declare that "Old as I am, it is probable I may yet have the appellation of rebel."

Marshall replied to him. He spoke earnestly. What was to be the jurisdiction of the proposed court?

"In all cases affecting ambassadors, other public ministers and consuls," said the constitution, "the supreme court shall have original jurisdiction.

"In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make."

"The honorable gentleman," said Marshall, "says that no law of congress can make any exception to the federal appellate jurisdiction of facts as well as law. He has frequently spoken of technical terms and the meaning of them. What is the meaning of the term 'exception'? Does it not mean an alteration and diminution? Congress is empowered to make exceptions to the appellate jurisdiction, as to law and to fact, of the supreme court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people."

Thus Marshall ripped the robes from the judicial despot that he believed Patrick Henry had conjured up. There would be no despot. The constitution, if adopted, would give the supreme court unqualified power with regard only to "ambassadors, other public ministers and consuls." In all other matters, congress need consult nothing but its own pleasure in altering or diminishing the power of the court.

That was quite a way for Marshall to go, but it was not as far as he went. In arguing a case before the supreme court, a few years later, in which others sought to have the Virginia Sequestration act declared unconstitutional, he made the flat statement that in the absence of explicit constitutional authority, the court had no right to set aside laws enacted by congress. Here are his very words:

"The legislative authority of any country can only be restrained by its own municipal constitution; this is a principle that springs from the very nature of society, and the judicial authority can have no right to question the validity of a law unless such jurisdiction is expressly given by the constitution."

And the constitution of the United States had given the supreme court no such authority, either "expressly" or by implication. The court had claimed no such power. The court, during the first fourteen years of its existence, had exercised no such power. James Madison, who has been called the "Father of the Constitution," years afterward declared in congress that a decision concerning the constitutionality of a law might come with "as much propriety from the legislature as from any other department of the government." And, at another time, he asked:

"I beg to know upon what principle it can be contended that any one department draws from the constitution greater powers than another in making out the limits of the powers of the several departments?" (Elliot's Debates, Vol. 4, pages 354 and 382.)

What Madison thought upon this subject, however, was not destined to be of much importance. His view did not prevail. Since the close of the revolution, there had been a great judicial itching for power to declare laws unconstitutional. Haters of democracy hoped the courts would grab this power. Some of the state courts had already done so, but the national supreme court had hesitated. It hesitated, for a time, even after Marshall became chief justice.

Marshall became chief justice in 1801. President John Adams, a fine old aristocrat who had a lusty contempt for the people, appointed him. Marshall's appointment was one of Adams's last acts. A great popular reaction against the Federalist party had resulted in the election to the Presidency of Thomas Jefferson. The people had also given Jefferson's party control of congress.

At the very beginning of Jefferson's administration, an incident arose that, small in intrinsic importance though it was, robbed Jefferson's party of complete control of the government, and afforded the opportunity for the supreme court to usurp
the authority that it still exercises. During the last days of Adams's administration, he had nominated and the senate had confirmed the nomination of William Marbury to be justice of the peace for the District of Columbia. Marbury's commission had been signed and sealed, but not delivered when Jefferson came into office and made James Madison secretary of state.

Madison refused to deliver Marbury's commission, on the ground that the appointment was still incomplete and the new administration did not choose to complete it.

Marbury instituted mandamus proceedings against Madison to compel him to deliver the commission. Jefferson's administration resisted the proceedings upon the ground that they were unconstitutional, though authorized under the Federal Judiciary Act.

The case came before the United States Supreme Court and was decided in 1803. Perhaps there is no finer example of the judicial "whip-sawing" of an administration than is afforded by this decision. The court found that Jefferson and Madison were wrong, and that Marbury was entitled to his commission. But the court also found that it was unable to grant the relief prayed for, because of the unconstitutionality of that part of the Judiciary Act under which Marbury had brought suit. Which would have been pleasing to Jefferson and Madison if the court had not proceeded to arrogate to itself the exclusive right to pass upon the unconstitutionality of laws.

This was the first act of congress ever invalidated by a court. Chief Justice Marshall wrote the decision and read it. In order to write the decision and to read it, Marshall had to repudiate his reply to Patrick Henry before the Virginia Constitutional Convention, as well as his argument before the United States Supreme Court in the case of Ware vs. Hylton. In order that the reader may follow Marshall's somersaulting, I quote the following extract from the decision:

"To what purpose are powers limited, and to what purpose is that limitation committed to writing, if those limits may at any time be passed by those intended to be restrained? The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret the rule. If two laws conflict with each other, the courts must decide on the operation of each. This is the very essence of judicial duty.

"If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply."

If congress had promptly challenged the court, these words would have amounted to nothing. Sixty-five years later, congress did challenge the court on this very point, and the court took the back track with surpassing speed and energy. But at
the time that Marshall uttered his challenge congress sputtered but did not fight. The court, through Marshall, having made a monumental bluff, was permitted to "get away with it."

Some realization of the magnificence of Marshall's audacity can be obtained, of course, by contrasting the reasoning in his earlier utterances, with the reasoning in the Marbury decision. But if one stop there, he will miss some of the audacity. Think of such reasoning as this:

"To what purpose are powers limited, and to what purpose is that limitation committed to writing, if those limits may at any time be passed by those intended to be restrained? . . . . It is emphatically the province and duty of the judicial department to say what the law is."

Let us pick those sentences to pieces.

Paraphrasing the words of Marshall, let us ask: "To what purpose are constitutions written if a handful of judges, appointed for life and not responsible to the people, are to have the exclusive power to determine what the constitution means?"

Also, who is it that written constitutions are "intended to restrain?"

Are they intended to restrain the people?

If they are, written constitutions should be abolished, because it should not be within the power of a few to restrain all the others.

But written constitutions were not, in the beginning, intended to restrain the people. They were intended to restrain the king and to protect the people from him. Written constitutions were the invention of the French who adopted this method of ham-stringing the sovereign. As a matter of logic, a written constitution in a republic is an absurdity. The people's will should be the highest law. When the people's will changes, the law should be changed. Is it not absurd that we should have to fiddle and fuss for years to obtain the legal right to enact an income tax law, for instance? This country should be for the living, rather than for the dead, and, even if an income tax law were prohibited by a constitution made by men who have now been dead a century, is it not absurd that we should heed the prohibition? England has no written constitution, and its government is much more responsive than ours to popular will.

Certainly, the modern idea of a good constitution is one that can be easily changed. None except hard-shelled plutocrats dissent from this. Yet a constitution that can be easily changed is not a constitution at all, in the true sense. It exercises little if any restraint, because it is purposely made so flexible that
public opinion can bend it to fit its changing needs. A constitution that can be easily amended is merely an expression of public policy that is intended to stand until the public changes its policy. On the other hand, a constitution that cannot be easily amended is the infliction of the will of the dead upon the living. Therefore, what is the sense of aping the monarchy-ridden French of the eighteenth century when we have not the king that the French sought to curb with a written constitution? Surely, we do not want to prevent ourselves from doing what seems best.

In any event, what authority had Marshall for saying that “It is emphatically the province and duty of the judicial department to say what the law is”? The constitution does not say so. A law itself should be able to tell what it is. If it is plainly written it can do so. If it is not plainly written, anyone who tries to tell what the law is must do a good deal of guessing. Ought anyone to be permitted to guess what a law is? Ought even the supreme court to be permitted to guess—five guessing one way, perhaps, and four another? Wouldn’t it be simpler and better to send the law back to congress with some such remarks as these:

“This law seems to have been loosely drawn. We are in doubt as to the meaning of congress. Some of us think you mean this. Some of us think you mean that. What do you mean?”

And, if the constitutionality of a law were questioned, why would it not be simpler and better to let the people themselves pass upon it? In other words, why not have the referendum? The question of a law’s constitutionality should be only the question of whether it is in harmony with the public will. Who is better qualified than the public to say whether a law is in harmony with the public will? Of course, every scheming corporation that wants to evade a just law should not be permitted, on its sole initiative, to submit the law to a referendum. Otherwise, the resultant confusion arising out of a multitude of cases would render intelligent decision impossible. No law should be submitted to referendum except upon petition of not less than 5 per cent. of the qualified electors. This would result in unquestioned obedience to ordinary acts of congress. And, the few extraordinary acts of congress that might be called into question, the people could intelligently decide. The United States Supreme Court hardly averages a decision a year of first rate importance. Does anyone believe that the people would have lacked the ability to decide whether the Standard Oil Company and the American Tobacco Company were violating
the Sherman Anti-Trust Law? Does anyone believe that the people would have read the word "unreasonable" into the law? In the face of the fact that for fifteen years congress resolutely refused the requests of the trusts that the word "unreasonable" should be put into the law, does anyone believe that either congress or the people desired that it should be there? Then why did the supreme court put it there? Simply because the court had usurped the power to do so and chose to exercise it. Can you think of any other reason?

Therefore, we now have, not an independent judiciary, but an independent legislature. It is more than that. It is a super-legislature. It is above congress and above all other legislatures. It is above the president and above the people. And, having usurped the power to declare laws void on the ground of their alleged repugnance to the constitution, it has taken courage from its success and gone on to unparalleled lengths. The supreme court no longer contents itself with the destruction of laws that it deems unconstitutional. The supreme court destroys or amends laws to conform with its own political and economic opinions.

In proof of this assertion, I shall first cite the words of Hannis Taylor, a profound admirer of the court and its judge-made law:*

"It (the court) has opened up a fresh fountain of judge-made law from which a copious stream has been flowing for more than forty years. Whenever a new problem arises, it is solved by a new judge-made rule."

I should question this statement only to the extent of denying that the supreme court "solves" new problems "whenever" they arise. The supreme court, with its Dred Scott decision, took a hand in the slavery question, but the Civil War was required to solve it. Incidentally, the Civil War solved the slavery question by repudiating the conclusions of the court. Up to the present moment, the supreme court has failed quite as dismally in its attempt to solve the trust question. After 15 years of discussion, the trust question is no more nearly solved than ever it was.

The court first decided that the Anti-Trust law was constitutional and meant precisely what it said, scorning the suggestion that only "unreasonable" restraints of trade were prohibited.

The last decisions reverse the first, except as to the constitutionality of the law, insert the word "unreasonable" and clothe the United States courts with power to determine what constitutes an unreasonable restraint of trade.

In other words, the anti-trust law is no longer written in the statute books, but in the minds of the judges. That is legal which they say is legal. That is illegal which they say is illegal. Congress need no longer bother about the trust question. The people need no longer bother about the trust question. Having tapped a “fresh fountain,” the judges will settle the trust question for us with their new “judge-made law.”

Now it may be that these eminent judges, most of whom were corporation lawyers until they went upon the bench, can settle the trust question for us better than we could settle it for ourselves. Maybe the wisdom of these nine men is greater than the wisdom of the other 90,000,000. Maybe they are more patriotic than we are, more public-spirited than we are, and better than we are in every way. If so, we should take good care of them, lest they prematurely die, and leave us bankrupt in governmental capacity; for we shall doubtless be unable to fill their places. And, while they live, we should contrive to extract from them for our benefit, as much wisdom as possible. If these men are such colossal geniuses, it is nothing less than criminal stupidity for us not to take full advantage of their great abilities. We should turn congress out to graze and tell the supreme court to make the laws. What is the use of having 500 common men in the halls of congress if nine men in the supreme court chamber can do the work better? But if these nine men are not colossal geniuses, whose like we shall never see again, we should put them in their places and make them stay there. For, whatever else we may say of this judge-made government, it is not democratic government. It is not government by the people. It is government by despots. And, officially, at least, we tired of government by despots in the eighteenth century.

But our judicial despots are not tired of ruling us. Indeed, they gain energy as they gain headway. In the beginning, they were satisfied to declare such laws unconstitutional as they regarded repugnant to the constitution, “beyond a reasonable doubt.” Then they dropped the “reasonable doubt” rule, and five judges began to destroy laws that four judges said ought not to be destroyed. But the usurpation of power only whetted the lust for power until the court at length embarked upon the policy of invalidating or amending laws merely because the court disapproved the policies that the laws were intended to put into effect.

Please consider the astounding nature of these various usurpations. Even after Marshall took the first plunge and claimed authority on behalf of the court to invalidate such laws as the court might regard as violative of the constitution, the anaihila-
tion of a law was still regarded as an exceedingly grave act that ought not to be undertaken except where the fact of the violation was plain.

Justice Chase in 1796 said:

“If the court have such power I am free to declare that I will never exercise it but in a very clear case.”

Justice Waite, in 1878, said:

“Every possible presumption is in favor of the validity of a statute and this continues until the contrary is shown beyond a reasonable doubt. One branch of the government cannot encroach upon the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.”

Justice Harlan, in 1905, said:

“If there be doubt as to the validity of the statute that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation.”

Of course, when judges by a vote of five to four destroy laws, there can be no further pretense that the court is following its old rule never to invalidate acts except where there is no longer reasonable doubt of their unconstitutionality. But the fact is that the court did not even stop there. The court went on to the point where it destroyed laws merely because the court disapproved of the policies embodied in the laws. Of course the real reason was never given—always there was some alleged violation of the constitution—but the language of the court often made plain that the official reason for the destruction of a law was not the actual reason, the actual reason being the court’s disapproval of the policy expressed in the law.

Here is a case in point.

Congress, in 1894, placed a tax of 2 per cent. upon annual incomes of more than $4,000. Everybody knows the story of how Justice Shiras after voting to sustain the law changed his vote and enabled the court to kill the measure by a vote of 5 to 4. Justice Field wrote the opinion of the court, and the reader may judge from the following extract what were the real reasons that caused the destruction of the law:

“The present assault upon capital is but the beginning. It will be but the stepping stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness. If the purely arbitrary limitation of $4,000 in the present law be sustained, none having less than that amount of income being assessed or taxed for the support of the government, the limitation of future congresses may be fixed at a much larger sum, at $5,000, $10,000, or $20,000, parties possessing an income of that amount alone being bound to bear the burdens of government; or the limitation may be designated at such an amount as a board of ‘walking delegates’ may deem necessary.”

A high-power mind is not required to perceive that the income tax law was declared unconstitutional because the court did not approve the policy of taxing incomes. Yet, think of the impertinence and audacity of the court in saying so. It was none of the court’s business whether the law, if enforced, would bring about war between the poor and the rich. It was none
of the court's business whether later congresses might exempt all incomes of less than $20,000 and throw the whole tax upon those of greater incomes. It is never the business of any court to consider the wisdom or folly of any law. The constitution reposes this responsibility exclusively upon congress and the president. All legislative powers are vested in congress, subject only to the veto check of the president, which can be overridden by a two-thirds vote. Yet more and more, the United States Supreme Court is taking upon itself the power to legislate, to kill what it wholly dislikes, and to patch up what it likes in part.

Take the Standard Oil and Tobacco decisions, for instance. The Sherman Anti-Trust Law, as it was passed by congress, did not read:

"Every contract combination in the form of trust or otherwise or conspiracy which shall restrain trade and commerce more than the United States Supreme Court shall believe trade and commerce ought to be restrained is hereby declared illegal, and, upon conviction by the court, shall within whatever time the court may be pleased to allow, proceed to reorganize its business in a manner satisfactory to the court."

but that is the way the court had made the law read. And, what a predicament we are in. Nobody knows the law against trusts. Nobody can know the law. No longer is there a written law. The law is whatever the supreme court thinks it is from day to day. Fifteen years ago, the supreme court thought the law was what congress said it was, and so ruled. Now the court says the law is not what congress said it was. The law is the discretion of the court. If the court believes a combination is in "unreasonable" restraint of trade, it so decides. If the court believes another combination is restraining trade only "reasonably," the law falls and the offender goes free. The oil and the tobacco trusts are declared to be "unreasonable," and a day or two later the Harriman railway merger is declared to be "reasonable." Everything depends upon the whim of the court.

President Taft himself said as much in a message to congress, in 1910:

"It has been proposed, however," he said, "that the word 'reasonable' should be made a part of the statute, and then that it should be left to the court to say what is a reasonable restraint of trade, what is a reasonable suppression of competition, what is a reasonable monopoly. I venture to think that this is to put into the hands of the court a power impossible to exercise on any consistent principle which will insure the uniformity of decision essential to just judgment. It is to thrust upon the courts a burden that they have no precedents to enable them to carry, and to give them a power approaching the arbitrary, the abuse of which might involve our whole judicial system in disaster."

But the half of the court that Taft appointed joined with all of the other half except Justice Harlan to put into the law the word that Taft said "might involve our whole judicial system in disaster." The plain intent of congress that "every" combination in restraint of trade shall be held illegal is set at naught
that nine men may take it upon themselves to settle for us, in such manner as they may see fit, the greatest economic problem of the age. And after they did it, Taft commended them.

Can anyone imagine anything more absurd in a republic? What kind of a republic is it in which the people have nothing to do with the greatest question that has to do with the cost of their bread and butter? What kind of a republic is it in which nine men wrench from the people the bludgeon with which they hoped to beat off corporate marauders?

It is not enough to say that the nine men may use this bludgeon more effectively than the people used it. It is not enough to say that the Sherman law, as congress enacted it, was unenforceable. Certainly, it was unenforceable. Trusts thrived under it. Most of the great trusts of to-day were organized after it was created. The law never ought to have been passed. *But the law was passed!* Congress solemnly called it into being. It was the expression of the will of the American people. And, if this nation is to resume its former position as a republic, it will be necessary for the supreme court, as well as every other department of the government, to recognize that the will of the American people must he held supreme. Nobody must trifle with it.

The people will make mistakes. They have always made them. Probably, they will always continue to make them. So does the supreme court make mistakes. A court cannot take both sides of the same question without thereby convicting itself of having made a mistake, either in one instance or the other. But the people can better afford to take chances upon their own mistakes than they can to take chances upon the mistakes or the biased opinions of a court composed, for the most part, of former corporation lawyers. And, unless Americans have lost their old spirit,* the supreme court is making a monumental mistake in assuming that it can with impunity trample its way over the legislative powers of congress. The court may well ponder upon that part of Justice Harlan’s dissenting opinion in the trust cases in which he said:

> "When the American people come to the conclusion that the judiciary of this land is usurping to itself the functions of the legislative department of the government, and by judicial construction only is declaring what is the public policy of the United States, we will find trouble. Ninety millions of people—all sorts of people with all sorts of opinions—are not going to submit to the usurpation by the judiciary of the functions of other departments of the government, and the power on its part to declare what is the public policy of the United States."

Anybody who feels that this country is worth its salt must also feel that Justice Harlan was right. Nothing is more certain than that the United States Supreme Court will not much longer continue its despotic rule. It is going to be halted, either by congress, acting directly, or by the obvious wrath of the
American people. If congress doesn’t act, the American people will. They are already acting in the sense that they are discarding the idolatry with which they so long beheld the court. The gilt upon the idol is forever gone. Faith in the omnipotence, the wisdom and even the impartiality of the court is sadly shaken.

Yet congress is the body that should halt the court. First, the self-respect of congress requires that it should do so. The constitution gives congress great powers. Congress was never intended to be the doormat of the supreme court. Moreover, first among the duties of congress is the duty of conserving the liberty of the American people.

Second, congress has already demonstrated its capacity to crack the whip over the supreme court and make it mind. There is a forgotten chapter in American history which I shall next tell that has to do with one of the congresses of the re-construction period and the manner in which it made the supreme court remove its hands from a case that it had attempted to consider. There is also a most interesting decision, written and read by the chief justice, in which the court, at the command of a determined congress, backed water as if Niagara were just ahead.

In short, congress has the power, at any time that it cares to exercise it, to compel the supreme court to cease meddling with laws, either by declaring them unconstitutional, or by amending them by judicial interpretation. This is not a theory, but a demonstrated fact that the court itself, when keel-hauled by congress, quickly recognized.

Incidentally, I may say that I asked Senator La Follette this question:

"What do you believe the supreme court would do if congress should enact a law concluding with this paragraph:

"This act shall not be subject to review by the United States Supreme Court?"

"I believe," said the senator, "that the court would let the law severely alone."

When Congress Forbade the Supreme Court to Pass Upon a Law’s Constitutionality

How quickly we forget those things that our real rulers do not want us to remember. The Fortieth Congress, for instance, performed two acts of particular importance. One of those acts was the impeachment and trial of the President, Andrew Johnson. The other was the serving upon the Supreme Court of the United States of the stern order not to dare to
decide a case pending before it that involved the constitutionality of the Reconstruction Laws.

The Senate, before whom the President was tried, lacked one vote of enough to convict him. The impeachment was therefore a failure. But who does not know the story of Andrew Johnson? The school child reads it in his history. The adult scarce can find a book upon American government that does not contain some mention of it. Newspaper editorial writers, even at this late day, occasionally refer to it.

But who knows the story of the other great act of the Fortieth Congress that did not fail of its purpose—the subjection of the United States Supreme Court? Ah, who knows! Almost no one knows. The real rulers of the people—prosperous gentlemen of no official position—will not let them know. They keep it out of the school histories. They keep it out of books upon government. And, meanwhile, they set up as much of a din as they can about the “sacredness” of our national supreme court in particular and of all courts in general—the “last great bulwarks of our liberties”; “the impenetrable barriers against the mob.”

In common with everybody else, I was long ignorant of the facts, and when I heard them, I could not believe them.* That is to say, the tremendous import of the assertions caused me to suspend judgment until I could investigate them. And, when I went to Washington to investigate, I found the roads made rough for me. The Government Printing Office, which contains millions of publications, had not a single catalogue that contained the clue to the facts I sought. I ultimately found the facts only because I brought my own clue and dug out the information in the office of the clerk of the Supreme Court and in the Government Printing Office.

The story, in brief, is this:

After the Civil War, various reconstruction acts were passed, the most important of which divided the South, exclusive of Tennessee, into ten military districts, the chief administrative officer in each of which was a United States army officer. The reconstruction acts were bitterly contested, not only in the South, but in the White House and in the President’s cabinet. Northern men were arrested in the Southern States and their lives placed in jeopardy. To remedy this situation, Congress passed the act of February 5, 1867,f which gave the right of

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* It is only fair to Mr. A. M. Simons, one of the editors of *The Coming Nation*, a Socialist magazine published in Girard, Kansas, to say that he called my attention to the facts contained in this chapter and that, so far as I know, he was the first American of this generation to bring to light this forgotten event in American history.

appeal in *habeas corpus* cases to the Supreme Court of the United States.

This arrangement worked very well for the North until a Southern man sought to take advantage of the law. The Southern man was William H. McCardle, a Mississippi editor. On November 12, 1867, he was arrested by order of Major-General Ord, commanding the district of Mississippi, on charges of libel, inciting to insurrection, disorder and violence.*

McCardle was the insignificant proprietor of a cross-roads sheet, and his appeal attracted no attention until it began to be noised around Washington that the Supreme Court intended to take advantage of the situation to declare all of the reconstruction acts unconstitutional. That meant, of course, the disruption of the Northern plans for the subjugation of the South.

Kindly note what immediately began to happen to the United States Supreme Court at the hands of the Republicans who controlled Congress.

THE COURT'S ACTUAL JURISDICTION

On March 12, 1868, a little bill entitled "Senate Bill No. 213," came over to the House.† The bill provided that suits brought against revenue officers, for acts performed in the line of their official duties, might be taken to the United States Supreme Court upon writs of error. Mr. Robert C. Schenck, of Ohio, chairman of the Ways and Means Committee, explained that the bill was only to remedy the inadvertence of the Congress that passed the existing law, and expressed the hope that there would be no "objection to its consideration at this time."

Mr. Stevens of Pennsylvania objected, but subsequently withdrew his objection, and Mr. Schenck again assured the House that the bill was entirely harmless. To show with what stealth and cunning the Northern Republicans put through their plan to subjugate the Supreme Court, I shall quote the rest of the day’s proceedings direct from the *Congressional Globe*:

> **Mr. Schenck.** I suppose I need not repeat the explanation of this bill which I made a few minutes since. The whole effect of it is to place officers of revenue upon the same footing with other officers of the customs.

> **Mr. Wilson,** of Iowa. Will the gentleman from Ohio (Mr. Schenck) yield to me to offer an amendment to this bill?

> **Mr. Schenck.** I will hear the amendment.

> **Mr. Wilson.** I desire to move to amend the bill by adding to it the following:

> **SEC. 2. And be it further enacted,** That so much of the act of February 5, 1867, entitled "An act to amend an act to establish the judicial courts of the United States, approved September 24, 1789," as authorizes an appeal from the judgment of a circuit court to the Supreme Court of the United States, or the exercise of any such jurisdiction by such Supreme Court on appeals which have been or may hereafter be taken, be, and the same hereby is, repealed.

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*Wallace’s “Supreme Court Reports,” Vol. VI, page 320.
Mr. Schenck. I am willing to have the amendment received, and now I call the previous question on the bill and the amendment.

The previous question was seconded and the main question ordered.

The amendment of Mr. Wilson, of Iowa, was agreed to.

The bill as amended was then read the third time and passed.

Mr. Schenck moved to reconsider the vote by which the bill was passed, and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

Two days later, there was a great outburst in the House when the Democratic members thereof learned that they had been tricked into silence while the Republican majority were exercising their constitutional right to limit the jurisdiction of the Supreme Court. For the benefit of those who do not know the Constitution by heart, let it be said that under the organic law of the land, the Supreme Court has two kinds of jurisdiction, original and appellate. The original jurisdiction of the court does not once in five years, affect the citizen. The appellate jurisdiction—that is to say, the right to review the acts of other courts, affects him all the time. And the appellate jurisdiction is given subject to such exceptions and regulations as Congress may choose to make! Here are the exact words in which the Constitution gives the Supreme Court its two kinds of jurisdiction:

In cases affecting ambassadors, other public ministers and consuls, and in those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact—with such exceptions, and under such regulations, as the congress shall make.—Article 3, Section 2.

Well, Mr. Wilson, of Iowa, chairman of the judiciary committee, had chosen in the amendment that he smuggled into the bill piloted by Mr. Schenck, to suggest a little "exception" to the jurisdiction of the Supreme Court in habeas corpus cases. If you will read the amendment again, you will see that it was to apply, not only to appeals that might be made, but to appeals that had been made. In other words, the Supreme Court was to be forbidden to decide the McCordle case, because McCordle's appeal was the only habeas corpus appeal before the court. And, since the decision in the McCordle case would involve the whole question of the constitutionality of the reconstruction laws, the Wilson amendment was nothing more than an order to the Supreme Court to keep its hands off the reconstruction laws. Congress cared nothing in particular about McCordle, who was out on bail, anyway. Congress did care a great deal about the reconstruction laws.

"CLIPPING THE COURT'S WINGS"

Two days were required for the Democratic members of the House to awaken to the significance of Mr. Wilson's amendment. Then Mr. Boyer, of Pennsylvania, arose in his place
and uttered a profound howl. He charged Schenck with having made a deceptive plea for the bill, as a result of which the amendment slipped by. Mr. Schenck was not in the House when Mr. Boyer began, and James G. Blaine replied to him. Mr. Blaine said it was plain from Boyer's own statement, that the Democratic members "were not wide enough awake at the time the bill was passed, to see the point and bearing of the proposition."

Then Mr. Schenck returned to the hall, secured recognition from the chair, and entered upon his own defense. Referring to Boyer's charge that Schenck had not been frank and candid in speaking of the bill, the chairman of the Ways and Means Committee said:

"Sir, I have lost confidence in the majority of the Supreme Court of the United States. Is not that plain enough? I believe that they usurp power whenever they dare to undertake to settle questions purely political, in regard to the status of States, and the manner in which those States are to be held subject to the law-making power. And, if I find them abusing that power by attempting to arrogate to themselves jurisdiction under any statute that happens to be upon the record, from which they claim to derive that jurisdiction, and I can take it away from them by a repeal of that statute, I will do it. Is there any indistinctness in that?"

Mr. BOYER. That is very manly and courageous.

Mr. SCHEINK. Now, I hold that the Supreme Court of the United States, arrogating to themselves the pretension to settle not merely judicial but political questions, and trampling upon the principles of the decision made in the case of the Dorr rebellion, and upon every other decision of that kind, are, the majority of them, proceeding step by step to the usurpation of jurisdiction which does not belong to them. And, I hold it to be not only my right but my duty, as a representative of the people, to clip the wings of that court whenever I can, in any attempt to make such flights. *

Under pressure from Mr. Boyer, Mr. Schenck admitted that after he entered the House, the day the bill was passed, he heard that a "good thing" was to be offered in the form of an amendment to the bill, though he denied that the "good thing" was ever considered in committee. This admission, of course, proved Boyer's charge of bad faith, since Schenck, in his explanation of the harmlessness of the bill made no mention of the far-reaching amendment that he knew was coming. The bill could not have been considered at that time without unanimous consent, and Schenck knew well enough, of course, that if the nature of the forthcoming amendment were known, there would be no such consent. So he tried to smudge up the situation as much as he could by piling ridicule upon the other side.

"I suppose gentlemen on the other side contend," he said, "that if, after having appealed to the House to allow a bill of this kind pass, I discovered and understood that a good thing was offered to that bill by way of amendment, but which I might have guessed would not be agreeable to gentlemen who do not want the insurrectionary States to be held under law, but to have anarchy there, it was my duty to run over to that

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side, shake members by the shoulder and say, 'Wake up, Mr. Boyer; wake up, Mr. Holman! the country is in danger. This incendiary from Iowa has offered an amendment to a very innocent bill, and you are not upon the watch; the country is likely to be destroyed, the Constitution overthrown and the Supreme Court demolished, and everything is going to ruin. I beg you to arouse and get full possession of your faculties, in order to prevent this catastrophe.' That is about the position in which the gentleman has placed himself.

"Sir, the gentleman on the other side may say they did not understand it. Am I responsible for that? If I am to be responsible for the ignorance of the gentleman from Pennsylvania and his associates, upon constitutional questions or questions of law, God help me for the weight of responsibility which may be thrown upon my shoulders."

On March 21st, the subject came up in the House. Mr. Wilson, the author of the amendment to "clip the Supreme Court's wings," had a running fight with half a dozen Democrats that lasted most of the day. Here is an extract from the record:

MR. WOODWARD. Will the gentleman yield for a question?
MR. WILSON. Yes, sir.
MR. WOODWARD. I wish to inquire of the gentleman whether in his legal judgment the effect of that bill was to take away the jurisdiction of the Supreme Court in the McCardle case?
MR. WILSON. Yes, sir; I think it would be.
MR. WOODWARD. One further question. Was it not your intention, in offering that amendment, to take away the jurisdiction in that case?
MR. WILSON. Most assuredly it was my intention to take away the jurisdiction by the act of 1867 reaching the McCardle case, or any other case depending on the provisions of that act affected by the amendment.*

Thus the chairman of the Ways and Means Committee was forced to admit that he sought to prohibit the court from passing upon the reconstruction laws, since the McCardle case involved the constitutionality of the reconstruction acts, and was the only habeas corpus case before the Supreme Court upon appeal.

The House having amended and passed Senate Bill No. 213, the measure was next returned to the Senate for the purpose of giving the latter body an opportunity to pass upon the amendment. Again, the Democrats were caught napping. The records, of course, do not say so, but it would seem as if a moment were chosen for the consideration of the measure when most of the Democrats were out of the chamber. At any rate, the vote by which the amended bill was passed showed that 16 Democrats were absent, to 6 present, who voted against the bill, while 32 Republicans were in their seats to vote in the affirmative. Nor, did more than one of the six Democrats present seem to realize the importance of the Wilson amendment. After the

reading of the amendment by the clerk, Senator Buckalew arose to "observe that this is a very important amendment."* and to ask that consideration of it be postponed for a day or two, but he was bowled over by the Republican majority and a vote taken at once.

CONGRESSIONAL POWER OVER THE COURT

The bill, as amended, next went to the President, Andrew Johnson, by whom it was promptly vetoed. The President, who held all of the reconstruction laws to be unconstitutional, was quite naturally opposed to any act that would forbid the Supreme Court from giving judicial sanction to his opinions.

On March 26, 1868, the bill was called up in the Senate to determine whether it should pass notwithstanding the objections of the President. Senator Stewart of Nevada, leader of the Republican majority made the chief speech in favor of the passage of the bill. Replying to the Democratic taunt that the Republicans were afraid the Supreme Court would declare the reconstruction laws unconstitutional, he said:

Mr. President, we are charged with being afraid of the Supreme Court. I tell the Senator from Indiana we are not afraid of the Supreme Court. The Supreme Court has no power to interfere with the question of reconstruction. It has no power to determine the status of the Southern States. The Supreme Court, under the constitution, only has power to decide cases, and it must receive the law from the law-making power. We know it has no power to injure us. The policy of making the Supreme Court supreme dictator and giving it will, is a policy which, if it could be carried out to the entire satisfaction of the Democratic party, would soon subvert this government.

If the Supreme Court goes outside of a case before it and sets up its will and issues proclamations we are no more bound by those proclamations than we should be by the proclamations of any other body of men acting outside of their jurisdiction.‡

Democratic oratory against the bill continued throughout the day, but at nightfall the Republican majority, 33 strong, passed the bill over the President's veto. Nine Democrats voted against it and 12 others were absent.

The next day the bill was taken up in the House. Again, Mr. Wilson, author of the amendment, was invited to tell what he sought to accomplish by the amendment. This is from the record:

Mr. Eldridge. Let me ask the gentleman a question.
Mr. Wilson. I yield for a question.
Mr. Eldridge. I ask the gentleman whether the real purpose, if he will allow himself frankly to avow it, is not to prevent the decision of the Supreme Court that the reconstruction laws which you have passed are themselves in violation of the Constitution?
Mr. Wilson. It may have entered into the considerations presented to my mind to prevent any court, and especially the Supreme Court of the United States, from usurping a power, if there is any intention in the minds of any of the judges to do it, which has been denied to them by the constitution of the United States, which denial has been recognized by the decisions of that court from the earliest times. This is a protection to the court, quite as much as it is an assertion of a rightful power of Congress.

(Here, Mr. Wilson quoted the unanimous decision of the Supreme Court in the case of Insurance Company vs. Ritchie

* Congressional Globe, Fortieth Congress, Part Two, page 1847.
‡ Congressional Globe, Fortieth Congress, Part Three, page 2118.
From Pearson's Magazine

(5 Wallace), in which the court recognized the right of Congress to give and take away appellate jurisdiction, and then added):

The principle here recognized of the power of Congress to divest a court of jurisdiction and thus arrest the progress of cases pending, supports fully our power to pass this bill; and no one ever has or will seriously question it. The jurisdiction given to the court by the act of February 5, 1867, is the law of the remedy in and for cases coming within its provisions. We established it and may demolish it; we passed the act and may repeal it, or any part thereof. If the McCardle case falls, the country may have escaped another political decision by a majority of the Supreme Court.*

Before adjournment, the House passed the amended bill over the President's veto and it became a law, 114 voting in the affirmative, 34 in the negative, and 41 not voting at all.

THE COURT ADMITS LACK OF AUTHORITY

We next come to that part in this great event which the Supreme Court itself played. The McCardle case had been argued before the court on March 2d, 3d, 4th, and 9th. The Wilson amendment, removing the McCardle case from the jurisdiction of the court, was introduced in the House of Representatives on March 12th. As soon as the amendment was introduced, the court let it be known, or at any rate, the report was circulated around Washington, that so long as the Wilson amendment was pending in Congress, the court would withhold its decision. But, as soon as the amendment became a law, the attorneys for McCardle asked for a rehearing, which the court granted.

Mr. Sharkey, one of the attorneys for McCardle, based his denial of the right of Congress to withdraw his client's case from the jurisdiction of the court on the ground that the constitution and not Congress gave the court its jurisdiction. He was particularly outraged in his feelings that Congress should have the audacity to try to withdraw from the court a pending case.

"This case," he said, "had been argued in this court, fully. Passing then from the domain of the bar, it was delivered into the sacred hands of the judges, and was in the custody of the court. For aught that was known by Congress, it was passed upon and decided by them. Then comes, on the 27th of March, this act of Congress. Its language was general, but as was universally known, its purpose was specific. If Congress had specifically enacted 'that the Supreme Court of the United States shall never publicly give judgment in the case of McCardle, already argued, and, upon which we anticipate that it will soon deliver judgment contrary to the views of the majority in Congress of what it ought to decide,' its purpose to interfere specifically with and prevent the judgment in this very

The argument of the learned gentleman, however, was repudiated in its entirety by the court when it handed down its decision. The McCardle case was not only thrown out for want of jurisdiction, but all of the members of the court concurred with Chief Justice Chase, who read the decision. The right of Congress to regulate the court's jurisdiction was specifically and emphatically upheld.

"It is quite true," said the Chief Justice, "as was argued by counsel for the petitioner, that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred 'with such exceptions and under such regulations as Congress shall make.' . . .

"The source of that jurisdiction and the limitations of it by the Constitution and by statute, have been on several occasions subjects of consideration here. In the case of Dorousseau vs. The United States (6 Cranch 312) particularly, the whole matter was carefully examined, and the court held 'that while the appellate powers of this court are not given by the judicial act, but are given by the Constitution,' they are nevertheless 'limited and regulated by that act, and by such other acts as have been passed on the subject.' . . .

"We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

"What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction, the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle. . . .

"It is quite clear then, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than by exercising firmly that which the Constitution and the laws confer."†

Thus ended the reputed judicial conspiracy to bring about the destruction of the reconstruction laws. The court observed that Congress meant business and the laws were not touched. But while the court figuratively read the decision with a smiling

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*Ex parte McCardle, 7 Wallace 510.
†Ex parte McCardle, 7 Wallace, pages 513-5.
face, pointing out as it did the obvious right of Congress to enact the Wilson amendment, there were yet terrible pangs within the judicial stomach. For, on October 25, 1869, the court reversed itself and claimed jurisdiction in defiance of the Wilson act, in the case of a man named Yerger, also of Mississippi, who sought to secure his liberty through *habeas corpus* proceedings. Moreover, Chase, the chief justice who wrote the first decision, wrote the second one reversing it, Justice Miller alone dissenting. Speaking of the Wilson act, the opinion read:

The effect of this act was to oust the court of its jurisdiction of the particular case then before it on appeal and it is not to be doubted that such was the effect intended. Nor will it be questioned that legislation of this character is unusual and hardly to be justified except upon some imperious public exigency.

But the court made no attempt to set aside the reconstruction laws and Congress, which was interested only in upholding the reconstruction laws, paid no attention to the usurpation.

**IS “OUR GOVERNMENT AN ARISTOCRACY”?**

I TRUST I have made it plain to those who have had the patience to follow me: (1) that Congress has the right, under the Constitution, both to “limit” and to “regulate” the appellate jurisdiction of the United States Supreme Court; (2) that the court itself has repeatedly recognized this right; and, (3) that upon at least one occasion, Congress stalked boldly into the court-room and ordered the court to keep its hands from certain laws. That the court, after yielding, reversed itself is of no importance. The court cannot erase that part of the constitution which gives Congress the right to impose limitations and regulations upon its authority. These words stand. It may be embarrassing to the Supreme Court that they should stand, but they do stand. And the best authorities unite in the statement that there is almost no limit to the limitations and regulations that Congress may constitutionally impose upon the appellate jurisdiction of the Supreme Court. Justice Iredell, a member of the court by appointment of George Washington, declared in the North Carolina convention that ratified the Constitution, that in his opinion Congress might legally go so far as to direct that all cases in the Supreme Court should be tried before a jury.* The House of Representatives of the Fortieth Congress passed a bill requiring a two-thirds vote of the court to declare any law unconstitutional, and while the bill failed in the Senate, no one questioned its constitutionality.

“It would be a strange thing,” said Senator Frelinghuysen,

of New Jersey—later Secretary of State under President Arthur—"if this nation, after all the wars we have had, after living ninety years thinking we lived under Republican democracy, should wake up and find that our government was an aristocracy, and that one or five members of the Supreme Court could regulate the political interests and relations of the country. . . .

"Congress can, by the express words of the constitution, except all appeals under the reconstruction acts. They have a perfect right to do so and need only enact the words of the constitution in doing so."

This is the opinion of an eminent Republican authority of two generations ago, amply supported by many Supreme Court decisions and disputed by but one. Assuming that he was right, and that the Supreme Court was also right except in the recanting opinion delivered by Chase, why might not Congress as legally except any law or every law from judicial review?

There was nothing peculiar about the reconstruction laws that constitutionally made them immune from judicial attack. Yet, the Republican party, as represented in Congress two generations ago, made them immune from attack, and the Supreme Court, following a long line of its own decisions, recognized and proclaimed the constitutionality of the Wilson act.

Now, the Republican party as represented by its leaders, is lauding the court to the skies and calling upon everybody to witness how beautiful a sight it is to see the court read the word "unreasonable" into the Sherman anti-trust law.

Then, the Republican party, as represented by its leaders, was choking that same court until its face was purple and forbidding it so much as to change a syllable in the reconstruction laws.

*And the Constitution is the same to-day that it was then!*

The truth of the matter is that the Republican party then represented the propertied class in this country, not as it does now, but which it does now.

The propertied class of the North was determined that the South should pass under the yoke—and the South passed.

Moreover, the rank and file of the North quite approved the subjection of the South that the propertied class demanded.

Now, the rank and file of the country do not approve the propertied class’s desire that the Supreme Court of the United States shall play fast and loose, not only with acts of Congress, but with acts of the State legislatures.

Belatedly, we are becoming somewhat weary of having so

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many of our good laws mutilated or destroyed because they are unconstitutional, and so many of our bad laws declared good because they are so very constitutional.

In other words, we are beginning to show a grain of sense. Common sense must sound the death knell of the despotic power of the courts. The two cannot exist side by side. Sooner or later, the courts must face the issue, and present indications are that the issue is almost here. Victor L. Berger, the Socialist Representative from Wisconsin, in 1911, introduced an old-age pension bill, the concluding paragraph of which provided that its constitutionality should not be subject to review by the United States Supreme Court. Of course, Mr. Berger’s bill did not get anywhere, but the idea did. After the first of this series of articles was printed, Senator Owen, of Oklahoma, delivered in the Senate a speech upon his bill for the recall of Federal judges, basing part of his plea upon the usurpation by the United States Supreme Court of the right to declare acts of Congress unconstitutional. In connection therewith, it was amusing to notice the unanimity with which the newspapers of New York, at least, concentrated their attack upon the recall while ignoring the charge of usurpation. It would almost seem as if these gentlemen know which is the hot end of the poker. The policy of the recall may be argued, but the charge of usurpation is a question of fact. And the facts are against the court.

As a despotic power, the court has existed 108 years upon what sporting gentlemen would call a “bluff.”

In 1868 Congress called the bluff and the court back-tracked hastily.

The performance can be repeated, upon a greater scale, whenever the people recover control of Congress.

Both the laws and the precedents are plain.

All of which, gentlemen like Senator Heyburn, of Idaho, do not seem to know. Otherwise, the senator would not have made himself so ridiculous as he did, in objecting to the second reading of a bill introduced by Senator Bourne, of Oregon, which provided, among other things, that no law should be declared unconstitutional except by unanimous vote of the United States Supreme Court.

The Idaho Senator’s objection was based upon what he was pleased to call the unjustifiable nature of the bill.

“It is anarchy, pure and simple,” he said.

“It is not only wholly unconstitutional, but it is scandalous.”

These are only some of his remarks—but let us consider them a few at a time.
"ANARCHY, PURE AND SIMPLE"

IT is "anarchy, pure and simple," the senator would have us believe, to require the unanimous vote of the United States Supreme Court to destroy a law, the constitutionality and the desirability of which have been attested by both branches of Congress and the President of the United States. But it is not anarchy (according to Senator Heyburn) to permit five justices to destroy a law that four justices, the President and both branches of Congress believe to be both a constitutional and a desirable law.

Also, according to Senator Heyburn, it is the very essence of liberty and stable government that five justices of the United States Supreme Court should destroy a law that both branches of a state legislature and a governor had approved, yet "scandalous and outrageous" that nine justices should be required to set aside the presumptive will of the people.

In other words, it is proper and just, according to Senator Heyburn, that the tail should wag the dog, but highly reprehensible that the dog should wag its tail.

"Not within my experience," continued the senator, "extending over a considerable number of years, has such a proposition been presented to the Senate of the United States as that printed in this bill. . . ."

Perhaps not. But if the senator had thought it worth while to look for precedents outside his own "experience," he might have found one, and that, too, in a congress dominated by his own party. Let him look up Senate Bill No. 163 of the Fortieth Congress. As the bill passed the Senate, it fixed only the quorum of the United States Supreme Court; but Mr. Wilson, a good Republican of Iowa who chanced at that time, to be officiating as chairman of the Judiciary Committee of the House, proposed an amendment which declared that the United States Supreme Court should declare no law unconstitutional except by vote of two-thirds of the whole number of justices. Let him read the speeches made thereon, noting carefully, if he will, that none of the great constitutional lawyers of the Republican majority questioned the constitutionality of the amendment, and also, let him observe that the house accepted the amendment and passed the bill, by a vote of 111 to 39.

If the senator still be in a mood for investigation, let him turn to page 791 of the Congressional Globe, Fortieth Session, and read the following extract from the speech of Senator Frelinghuysen, a man of Mr. Heyburn's own party and somewhat of an authority upon constitutional law:
“I can see no objection to a regulation requiring two-thirds to render a decision...”

That the bill died in the senate is of no importance. The bill died because plans were maturing to go after the court in a much more drastic way—the way described in the first part of this chapter.

But why make Senator Heyburn more ridiculous? His own unconscious efforts along this line might seem sufficient. Think of a Senator of the United States, presumed to know something not only of the law but of the history of his country—think of such a man declaring that because the Constitution of the United States vests the “judicial power” in the Supreme Court that Congress cannot either “modify it, detract from it or take it away.”

Why, Congress did take away the judicial power from the Supreme Court in the McCardle case, and the court sustained its right to do so. And, quite properly, too. How can judicial power be exercised without jurisdiction? Does not the Constitution say that appellate jurisdiction shall be exercised “with such exceptions and under such regulations as the Congress shall make?” And, did not Chief Justice Marshall assure Patrick Henry that “these exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people?”

Heyburn quoting constitutional law and rebuking Bourne! Great Scott, turn out the lights!

How Judicial Mangling Has Been for the Interest of Exploiters

A round the neck of every living American is a chain, one end of which is fastened to a group of tombs. The tombs are those of long-dead justices of the United States Supreme Court. The chain is a linked series of judge-made laws that the justices helped to make. The effect of the chain is to hold the “free” citizen fast while larger gentlemen, if such there be about, go through the citizen’s pockets.

If this statement were not true, it would be absurd to make it. If it is true, it is absurd to endure such conditions. This chapter will show that the statement is literally true. The proof will be taken from the reports of the United States Supreme Court. In each case, the number of the volume and the page will be given, so that anyone who cares to do so may look up the decisions for himself.

If everybody would only look up the decisions! The death-knell of the Supreme Court’s unconstitutional power quickly would be rung. But most Americans do not know these de-
cisions exist or ever existed. Most Americans do not now and never did understand their Supreme Court. For a century they held the Court in little less than awe. Complacent gentlemen like Mr. Taft advised them to do so and they did.

But the spell, the enchantment, or whatever readers may choose to call it, is passing. Men no longer believe the Court is infallible. Now, they are beginning to question even its disinterestedness. Indeed, the suspicion that the Court is playing somebody else’s game has given way to the conviction that the rich are using the Court to run the country. The decisions in the Standard Oil and Tobacco cases helped drive home the fact. But while we now know some things and suspect others, we have not begun to suspect the full truth. For, while we were sleeping that hundred years, the Court was very, very busy. It forged chains that are still upon us and which, unless they are broken, will be upon our remotest posterity. It provided conditions under which boodlers and bribers are robbing this country as they never robbed it before.

As an illustration, kindly recall the great scandal that developed in San Francisco a few years ago. Certain gentlemen wanted an overhead trolley franchise. The people did not want them to have it because they did not want overhead trolleys. That made no difference to the traction magnates. They wanted the franchise. They wanted it so much that they were willing to pay something for it. They did pay something for it. They paid more than $100,000. But not a cent of this sum went to the people. Every cent of this sum went to Abe Ruef, the boss, now in prison, and to the bribed members of the Board of Supervisors who granted the franchise.

You recall all of this. The city of San Francisco never raised a finger to invalidate the franchise upon the ground of fraud, notwithstanding the legal maxim that fraud is sufficient to invalidate any contract. Why?

Because, under decisions of the United States Supreme Court, a contract made by a legislative body authorized to make it cannot be attacked upon the ground of fraud. It must stand, notwithstanding the fraud. The courts simply will not listen to a charge of bribery against a legislative body. The courts will listen only to charges of bribery against individual legislators, and, though individuals may be convicted, all contracts for which they were bribed to vote are held valid.

Marvelous? Yes. Also monstrous. Also the law, as the United States Supreme Court handed it down to us in two decisions. Not any law, mind you, that the people ever made or ever wanted; a law that was wanted by thieves, and made by
justices of the United States Supreme Court who have been dead almost a hundred years.

Please be kind enough to read the facts about the first case, as you may read them in the office of the clerk of the Supreme Court, or in any good law library. The first case is known as that of Fletcher vs. Peck.* The Legislature of Georgia, in 1795, sold half a million acres of public land to a little group of capitalists. The people were so outraged at what was palpably a theft of public property that they elected a legislature which, the next year, denounced the whole transaction as fraudulent, gave a wealth of detail concerning the manner in which the preceding legislature had been bribed, and repealed the act under which the sale had been made.

That put a cloud upon the title of every acre of the land. But the little group of crooked capitalists had seen the storm before it burst and prepared for it. They had deeded their land to stool-pigeons who, in turn, deeded it to other stool-pigeons. Thus two knots were put over the knot that the legislature sought to untie with a repealing act.

One of the stool-pigeons named Fletcher brought proceedings against another stool-pigeon named Peck to perfect his title, his claim being that he was an “innocent purchaser” from Peck. The proceedings were so plainly trumped up that when they reached the United States Supreme Court, the Chief Justice who read the decision, commented upon the probability that it was “a mere feigned case.” Yet, the Court sustained Fletcher’s fraudulent title to the land, and, in these words, refused to consider the charge that the legislature had been bribed:

“If the principle be conceded that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect? Must it be direct corruption? Or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what numbers of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment? If the majority of the legislature be corrupted it may well be doubted whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated is not clearly discerned.”

“Now, wait. Waste no sympathy upon that troubled court. The court wasn’t troubled. It was entirely competent, had it been so disposed, to declare a plain case of bribery to be a plain case of bribery. It was entirely competent, had it been so disposed, to set aside the sale of half a million acres of land upon the well-established principle of law that fraud vitiates a contract. But, please read the decision of the Court in the light of the well-authenticated fact that many, if not most of the great land holdings of the day had been obtained by bribery.

*6 Cranch, 87.
Colonial history abounds with official documents pertaining to the bribery, by land thieves, of governors and other officials of the British Crown. The best families resorted to bribery and other forms of fraud to obtain great tracts of land. Even the estate of George Washington is said to have been robbed of 3,000 acres of land, as late as 1806, by Joseph Kerr who, a few years later, became United States Senator from Ohio.*

And, if the United States Supreme Court had decided against these Georgia land thieves, upon the ground that they had bribed the legislature, a very black cloud would have been thrown upon the titles to millions of acres of land, including the comfortable estates of some very wealthy and aristocratic gentlemen.

Yet, at this late day, no man can definitely say that such considerations entered the mind of the noble Court. That must ever be a matter of opinion. I simply show what would have happened to land titles if the Court had decided the other way. And, since the rich men of a century ago owned little else but land, it is apparent that an adverse decision would have ruined them. In any event, the State courts quickly took the cue to refuse to consider bribery as ground for invalidating a contract to which a legislative body had been a party, the reason therefor being put, in one case, in particularly humorous language. The Erie Railroad Company having done a little bartering with the legislature of Pennsylvania, proceedings were begun to recover the valuable privileges stolen. The Supreme Court of Pennsylvania, however, virtuously declined to have anything to do with the case. The refusal was put in these words:†

"Official morality in us requires that we shall not assume the authority to judge of the official morality of the legislature. For the faithfulness and honesty of their public acts, we repeat, they are responsible to the people alone, and not by means of an trial before the courts."

A generation ago, the United States Supreme Court applied the same doctrine to city councils and boards of supervisors. The San Francisco board of supervisors having been accused of boodling in connection with a municipal grant, the court, in refusing to invalidate it, said:‡

"Their motives, considered as the moral inducement for their votes, will vary with the different members of the legislative body. The divers character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable."

The foregoing decisions in favor of bribe-givers made their paths smooth up to a certain point. The courts had solemnly

* This statement is made upon the authority of Robert E. Lee, Jr., of Virginia, and the other heirs of Washington who are still trying to induce Congress to reimburse them for the loss of the land. A bill for this purpose was before the Sixty-first Congress. See House Report 2179, Private Calendar 778.
† Suhbury & Erie Railway Company vs. Cooper, 33 Pa. St., 278.
‡ Soon Hing vs. Crowley, 113 U. S., 703.
pledged themselves to non-interference. But it was still an open question whether a legislature had the right to repeal the fraudulent contracts made by a predecessor. The decision in the case of Fletcher vs. Peck had not decided that. The perfection of Fletcher’s title upon the “innocent purchaser” theory made it unnecessary to base the decision upon the validity or non-validity of the repealing act. At the same time, the inference was left that the repealing act might have been sufficient to recover the land if it had been enacted before the property passed into the hands of “innocent purchasers.”

In other words, from the point of view of gentlemen who bribe legislative bodies, the decision in the case of Fletcher vs. Peck was good as far as it went, but it did not go far enough. It guaranteed legislative contracts from judicial attack, so far as bribery was concerned, but it did not guarantee them from attack by repealing acts.

But this defect (from the bribe-giver’s point of view) was remedied by the United States Supreme Court in 1818. In that year, a decision was handed down that, beginning where the Fletcher vs. Peck decision stopped, went on to the point where the “vested interests” of bribe-givers were drawn under the shelter of the Constitution. The cause at bar has become historic as the “Dartmouth College Case.” *

That case is worth knowing about. It is most interesting. Daniel Webster victoriously argued it. Chief Justice John Marshall read the decision. As a judicial proceeding it was scandalous. Marshall shrinks and Webster shrinks as the facts are told. But therein does not lie its greatest importance. The Dartmouth College case is chiefly important because it affords a superb illustration of the manner in which the principles laid down by courts in particular cases are seized upon by the brigands of industry to fit their own thievish cases. In the Fletcher case, for instance, the worst that could be said of the Supreme Court was that it sanctioned a palpable fraud rather than upset the land titles of the country. Yet, the decision later became the shelter of traction thieves and the various other public-service corporations that, to obtain franchises, so often corrupt city councils. But, of course, no sane critic of the United States Supreme Court would be so stupid or so malignant as to contend that in deciding the Dartmouth College case as it did, the Court consciously went about it to complete the shelter to boodlers that was given by the Fletcher decision. None but the basest judicial criminals could be guilty of such plotting. Yet, the bribers and boodlers seized

* Trustees of Dartmouth College vs. Woodward, 4 Wheaton, 517.
upon the Dartmouth College decision and obtained as much advantage from it as they could have obtained if it had been given for their express benefit by the basest judicial criminals. Moreover, the Supreme Court has yet to raise a hand to stop them. Here are the facts about the case:

In the middle of the eighteenth century, an old preacher named Eleazer Wheelock established a charity school, at his own expense, upon his farm, which occupied the present site of Dartmouth College in New Hampshire. Part of his self-imposed task was to go out into the brush and induce Indian boys to come and partake of food, clothing and education, afterward sending them out among their tribes as missionaries.

Others having joined in the work with gifts of money and grants of land, Wheelock applied for a charter, which, in 1769, was granted by the Legislature of New Hampshire, in the name of the British king. The charter, which was declared to be perpetual, provided that the governing body should be twelve trustees and a president; that Wheelock should be the first president, with power to name his successor, and that the twelve trustees should have power to fill vacancies among their own number. Wheelock died in 1779 after having named, as his successor, his son John.

John did not get along very well with the trustees. The fires of discontent burned slowly, but by 1801, they were ablaze. The Presbyterian trustees were against the Congregationalists, and the Congregationalist trustees were against the Presbyterian trustees. Wheelock who was a Presbyterian sided with his church members, thereby gaining the hostility of the Congregationalists.

WEBSTER'S COURT STRATEGY

In these religious differences were the "makings" of a fine row. But it soon developed that there were other differences—political differences. Wheelock and his Presbyterians were Jeffersonian Democrats. The Congregationalists were Federalists. As the row proceeded, each side, wanting aid, cast an eye to its political friends in office.

Thus the feud continued for a number of years. Finally, under cover of the friendship of the Federalist administration in New Hampshire, the Federalist faction in the Board of Trustees removed Wheelock from the presidency.

The Jeffersonian Presbyterians seemed finally beaten. It was their good fortune, however, to learn in 1816 that the Democrats had swept the State, electing the governor and the legislature. And, having been taught by the Congregation-
alists that politics and religion make a mighty potion, they proceeded to make a mightier one. They induced the Legislature to amend the charter of the college, increasing the number of trustees from 12 to 21, and creating a board of 25 overseers, to be appointed by the president and the board of trustees. And, after the 10 additional trustees had been appointed by the governor of the State, their first act was to oust the Congregationalist president and re-elect Wheelock. The anti-Wheelock faction took the case to court, but the Supreme Court of the State decided against them.

Then the case was appealed to the United States Supreme Court. Daniel Webster appeared as the attorney for the faction that was resisting the amendments to the charter. The facts connected with the hearing are so scandalous that I shall ask no reader to take them from me. Instead, I shall ask every reader to take the facts from Senator Henry Cabot Lodge's "Life of Webster." Mr. Lodge has profound reverence for the memories of Marshall and Webster; therefore, it is improbable that he would have set down scandalous facts about them if historical research had not compelled him to do so.

From Mr. Lodge, we learn that Webster's plan of campaign, from the very beginning, was to accentuate the political phase of the trouble (which of course, had no place in court), and to rely upon his ability to revive in Marshall the bitter hatred that the Chief Justice felt toward Jefferson when Jefferson was President. Yet, Webster's argument, as he revised it for publication, contains no trace of politics. He did not care to have the world know the means he had used to win. He always admitted there was "something left out" of the official report. But, read the story, as Lodge tells it:

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"In the midst of all the legal and constitutional arguments, relevant and irrelevant, even in the pathetic appeal which he used so well in behalf of his alma mater, Mr. Webster boldly and yet skillfully introduced the political view of the case. So delicately did he do it that an attentive listener did not realize that he was straying from the field of 'mere reason' into that of political passion. Here, no man could equal him or help him, for here his eloquence had full scope, and, on this he relied to arouse Marshall, whom he thoroughly understood. In occasional sentences, he pictured his beloved college under the wise rule of Federalists and the church. He showed the party assault that was made upon her. He showed the citadel of learning threatened with unholy invasion, and falling helplessly into the hands of Jacobins and free-thinkers.

"As the tide of his resistless and solemn eloquence, mingled with his masterly argument, flowed on we can imagine how the great Chief Justice roared like an old war horse at the sound of a trumpet. The words of the speaker carried him back to the early years of the century when in the full flush of manhood, at the head of his court, the last stronghold of
Federalism, the last bulwark of sound government, he had faced the power of the triumphant Democrats. Once more it was Marshall against Jefferson—the Judge against the President. Then he had preserved the ark of the constitution. Then he had seen the angry waves of popular feeling breaking vainly at his feet. Now, in his old age, the conflict was revived. Jacobinism was raising its sacrilegious hand against the friends of order and good government. The joy of battle must have glowed once more in the old man's breast, as he grasped anew his weapons, and prepared with all the force of his indomitable will to raise yet another constitutional barrier across the path of his ancient enemies."

Mr. Webster's argument, however, appears to have had absolutely no effect upon the minds of the Court. That is to say, Marshall and Bushrod Washington, who were upon his side before he had uttered a word, were the only ones who were upon his side after he had uttered every word. The other five justices, according to Lodge, were against him.

**FAR-REACHING RESULTS OF TWO DECISIONS**

MARSHALL was in a tight corner. He wanted very much to strike at Jefferson and Democracy, yet he had not the votes to do it. In this emergency, he prevented an immediate decision, and soon afterward, the Court adjourned for the term.

Then, as Mr. Lodge says, a movement was begun to "get at" the justices during their vacation. Political friends went to their homes. Pamphlets and written arguments were sent to them. Chancellor Kent, a rock-ribbed Federalist, was induced to use his influence.

"The whole business," says Mr. Lodge, "was managed like a quiet, decorous, political campaign."

In these days, the same sort of gentlemen would doubtless call such scandalous proceedings a "campaign of education." By whatever name it be called, the campaign won, the Court deciding in favor of Webster and the college by a vote of five to two. And, the gist of the decision was that one legislative body cannot repeal the contracts made by a predecessor, or even by itself. Since which time the situation has been this:

*Under the decision of the United States Supreme Court in the case of Fletcher vs. Peck, the fact that a legislative body has been bribed to make a contract is not sufficient to cause a court to declare the contract void.*

*Under the decision of the United States Supreme Court in the Dartmouth College case, even a contract obtained by the bribery of a legislative body cannot be repealed.*

In other words, each decision constitutes half of a perfect shield for the men "higher up" who furnish the bribes, but do not lay themselves liable to prosecution by actually passing them, yet obtain all the profits of the bribery.

These decisions are perfect illustrations of two tendencies.
First, the tendency of courts to torture words* to enable the courts to do the wrong things that they want to do. Second, the tendency of dishonest men to lay hold of legal principles laid down in the adjudication of particular cases and apply them to their own thievish ends—ends that were never considered when the principles were enunciated.

The Constitution of the United States, for instance, provides that the judicial department shall be one of three co-ordinate departments of the government. Yet who, except justices of the United States Supreme Court, ever would have suspected that the use of the word "co-ordinate" was intended to mean that the Supreme Court must not only refrain from interfering with boodlers while carrying away property belonging to the public, but must actually give them legal title to the stolen goods. This is the more remarkable since the same word did not and does not restrain the same court from invalidating acts of legislative bodies that are desired by the people and untainted by bribery.

Take the Dartmouth College case. It would be a very unkind person who would contend that Webster consciously argued to protect the "vested rights" of boodlers who buy street railway, water and gas franchises, sell school lots to cities at exorbitant prices, and, in numerous other similar ways, prey upon municipalities. Except for the political phase of the case, Webster thought he was arguing for a college. His argument abounds with the history of legislative grants to educational institutions. Unless he was a greater dissembler than even Senator Lodge has shown him to be, Webster never suspected that he was fighting the battle of forthcoming generations of boodlers. He thought he was fighting for colleges—not Dartmouth alone, but for all colleges that had charters! Read his own words, near the close of his address—words that, in the light of subsequent events, seem almost childish in their narrowness of scope:

"The case before the court is not of ordinary importance, nor of every-day occurrence. It affects not this college only, but every college, and all the literary institutions of the country."

"All the literary institutions of the country!" How a little time crumples up the wisdom of the wisest. Believing that Webster was honest and saw no farther ahead than he said, let us thank God that he is dead. At least, he is spared the sorrow and the humiliation of knowing whose battle he really fought.

Webster won his case because the Court belatedly reached

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*"Courts strain and torture the words of a constitution in order to find in it authority which they believe the government ought to have, or strain and torture its words to take out of it a power which they think the legislature and the executive ought not to have."—Senator Cummings, in a speech in the Senate last summer.
the conclusion (though Webster barely suggested it in his argument) that the attempt to amend the charter was a violation of the inhibition in the national Constitution against the passing of laws by States "altering or impairing the obligation of contracts." There is no reason to believe that the Constitutional Convention, in inserting this clause in the Constitution, had in mind anything else than the safeguarding of the contractual relationships of the primitive business life of the day. The steam engine and the electric motor not having arrived, public-service franchises were unknown. It is doubtful if the framers of the Constitution, if they had been interrogated in 1787, would have said they intended the clause to operate as a restraint upon the power of a legislature to amend the charter of a public institution within the State. Webster certainly thought so little of the clause that he did not base his main argument upon it. Indeed, it is said one of the trustees of the college, who was not even a lawyer, first called Webster's attention to these words in the Constitution as possible authority for resisting the attempt to amend the charter. But, even if it be conceded that the words were properly applied to the Dartmouth College case, does any sane man believe the framers of the Constitution included in it this clause for the purpose of sanctioning every crooked contract that a legislative body might be bribed to make? If they did, their purpose has not been altogether fulfilled, as some of the newer States, by constitutional enactment, have forbidden their legislatures to make any contract, or grant any franchise that does not contain a provision for its amendment or repeal.

Let us now consider a characteristic instance of the manner in which State supreme courts—following the lead of the greater court in Washington—"torture" constitutional words to keep the people securely under the feet of their masters. The people of New York wanted an Employers' Liability law. Russia had one. Spain had one. Austria-Hungary had one. So did Germany, France and Great Britain. So did Kansas, New Jersey and Massachusetts. Also, the movement to enact such a law was well under way in a dozen States. So, New York, quite properly, as her people believed, joined the procession and, after a hard struggle, secured such a law.

It was not a very good law. Its teeth chattered and its face was pale. Its will was so weak that it offered protection only to the wage-workers who were engaged in a few of the most hazardous industries. But it was a law—a start, a beginning—and, thereat the people rejoiced.

The people are no longer rejoicing. The law is dead. It has been dead since March 24, 1911. The highest court in the
State—the Court of Appeals—killed it before it had fairly begun to operate. They disliked to kill it. They wrote sorrowful words into the sentences that killed it. But they could not let it live. Under their sacred oaths of office, they could not let it live. It was in violation of the constitution of the State of New York. It was in violation of the Constitution of the United States of America. And why? Because the constitution of the State of New York and the Constitution of the United States of America both declare in identical terms that “neither life, liberty, nor property shall be taken except by due process of law.” And, to compel an employer to compensate a workingman for injuries incurred at his work was held by the Court to be equivalent to taking the employer’s property “without due process of law.”

Now, let us go back over the tracks of these four words—“due process of law”—and find whence they came, why they came, and what, in the beginning, they were intended to mean. It is most important that we should know these facts. No four words in the English language have been worked harder by the courts. No four words have saved our satisfied, well-to-do countrymen more money. Few word-groups of four have ever slapped the poor more stingingly.

It is, therefore, with some surprise we learn that the substantial equivalents of these words were first used to protect the poor. England was the place. The time was in the year 1215. King John had long been in the habit of mistreating his subjects. What we should now call an insurgent movement was started against him, with the result that he was pleased to give the people the “Great Charter,” containing, among other guarantees, this one:

“No freeman shall be taken or imprisoned, or disseized, or outlawed, or banished, or in any way destroyed, nor will we pass upon him, nor will we send upon, unless by the lawful judgment of his peers, or by the law of the land.”

When our national Constitution was made, its framers were too busy to include a Bill of Rights, but they were compelled to promise to do so, in order to secure the ratification of the Constitution. Thus came about the first ten amendments, which were proposed by the Congress at its first session. And the colonists having had some experience with the confiscatory tendencies of English kings, the Fifth Amendment was made to contain the ancient English inhibition against taking life, liberty or property “without due process of law.” The same phrase appears in the Fourteenth Amendment, which prohibited the States from doing what the Constitution had already prohibited Congress from doing.

Such is the germ-source of this clause. Now let us see how
at different times it has been construed. Daniel Webster's construction was this:

"The meaning is that every citizen shall hold his life, liberty and property and immunities under the protection of general rules which govern society."

HOW "DUE PROCESS OF LAW" WORKS

NOW, let us see what the United States Supreme Court said on the same subject, no later than on January 3, 1911. Oklahoma had passed a law assessing all banks for the purpose of creating a fund with which to guarantee all bank deposits. The Noble State Bank resisted the payment of the assessment on the ground that the law was in violation of that dear old clause in the Constitution about "due process of law." The United States Supreme Court kindly consented to refrain from killing the law, for two reasons:

First, because "it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a public use."

Second, because "it may be said, in a general way, that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

Please notice the obvious intimation that the windows of the Supreme Court chamber are open and that a din outside can be heard within. We knew that, anyway, though we are not making as much of a din as we should. But this question may be asked: "Why is not the decision of the United States Supreme Court in the Oklahoma bank case a sufficient endorsement of the principle embodied in the New York Workingmen's Compensation Act?"

It is an endorsement, but for reasons that I cannot understand, it does not appear to be sufficient. No appeal has been taken, or seems likely to be taken from the decision of the New York Court of Appeals to the United States Supreme Court. Everybody, including the New York Court of Appeals, is sorry that the old law was destroyed, but nobody is framing a new bill, or talking about an appeal, because the attorneys for the rich, who kindly consented to have so much to say in the discussions preceding the enactment of the old law, say there can be no appeal. There can be no appeal, they say, because the decision was given under a clause in the State constitution, though this clause is identical with the clause in the national Constitution.

This may be good law, but it is not good sense. It is doubtful if it is good law. If it is good law, the appellate jurisdiction of the United States Supreme Court can be absolutely destroyed by the States, merely by including the national Constitution in each of their own. Unquestionably the United States Supreme Court would resist such an invasion of its rights
by the States. Therefore, the contention that there can be no appeal to the Federal Supreme Court, from the decision of the New York Court of Appeals in the case of the Workingmen's Compensation Act, is not good law.

Nevertheless the decision is permitted to stand. And, it is hanging like a pall, not only over the wage-workers of New York, but over the wage-workers in the few States that have such a law and in all the other States where such a law is wanted. State courts usually follow the decisions of each other, and New York's greatest court has destroyed the law on the ground that it violates a clause that is also in the national Constitution. Not another State court has spoken, but they will be compelled to speak—the employing class will make them. And, unless the decision of the New York court can be overthrown, "free" America will have closed its doors to a bit of social legislation that was long ago accepted, as a matter of course, by every monarchy in Europe. The ironical feature of the situation is supplied by the assurance of the New York Court of Appeals that "free" America cannot have such a law because it is so free.

"Practically all of these countries," said the court in speaking of those European nations that have employers' liability laws, "are so-called constitutional monarchies in which, as in England, there is no written constitution."

Of course, it is true that written constitutions, like some written laws originally intended to protect the people, have been turned against the people. It is true that the British Parliament, with its sole power to say what is the law, much more nearly represents the people of England than the American Congress does or can represent the American people. But it is not often that a high court points out these facts.

In this brief space, I can no more than suggest the depredations that the Federal and State courts have made and are making upon the people's liberties. The clause "freedom of contract" has been tortured into meaning even so absurd a thing as that a woman's "freedom" to engage to work 12 or 14 hours a day cannot be infringed by a law providing a lesser maximum. State courts have destroyed or "construed" into imbecility more thousands of laws than a diligent reader could read in twenty years.

"During the first 100 years of its (the United States Supreme Court's) history, 201 cases were decided in which an act of Congress, a provision of a state constitution or a state statute, was held to be repugnant to the Constitution or the laws of the United States, in whole or in part. Twenty * of these acts involved the constitutionality of an act of Congress. One

*Twenty-three up to the present moment. For a list of these cases up to 1889 (there is no later complete compilation), see United States Supreme Court Reports, Vol. 131, Appendix CCXXV, Banks and Brothers' edition.
hundred and eighty-one related to the constitution or the statute of a state. In fifty-seven instances, the law in question was annulled by the Supreme Court on the ground that it impaired the obligation of contracts. In many other cases, the judicial veto was interposed to prevent what the court considered an unconstitutional exercise of the power to regulate or tax the business or property of corporations. *

But let not the injudicious rush to the defense of the United States Supreme Court because, in all its history, it has declared unconstitutional only 23 acts of Congress. Some facts are to be considered; first, that all but three of these laws have been destroyed since the Civil War. The Court has only recently got under way. Never, until the Dred Scott decision, did the Court ever presume to interfere with laws concerning great national questions. Furthermore, a very few decisions, if they are sufficiently unjust, are enough to work great havoc. One door is enough for a cell and twenty are enough for a prison. And, the principles laid down in these decisions are enough to put us where we are. If they were not, we should not be where we are. These decisions destroyed, not only 23 laws, but they have prevented and still prevent us from making many other laws that we should like to make.

And, therein lies the greatest harm that comes from the exercise of such despotic power as the United States Supreme Court has usurped. It is not so much the loss of the single law, wrong as the destruction is and great as the loss may sometimes be—it is the loss of scores and hundreds of needed laws, based upon the same principles, that are killed before birth by the same shot. When we consider that the United States Supreme Court has also killed approximately 200 State laws and, by its usurpation, brought about the killing of thousands of others by State supreme courts, it is apparent that the black-robed gentlemen do not wear their black for nothing.

However, Mr. Taft tells us that we should “thank God that we had John Marshall and his associates, when the case of Marbury vs. Madison came up, to decide that the courts are the ultimate tribunal to make the law of the legislature square with the Constitution.”

If we are a set of jackasses not fit to govern ourselves, we certainly should “thank God” for sending John Marshall, his associates and their successors to govern us. And that we are unfit to govern ourselves is evidently the opinion of Henry B. Brown, former Associate Justice of the United States Supreme Court. Speaking against the recall of judges, before the American Bar Association in Boston, the former justice said:

“The practice of allowing the people themselves to choose their own officers has been the origin of most of our woes.”

That is the kind of men we have for the most part, upon the

bench of the United States Supreme Court—that kind and worse; for Mr. Justice Brown wrote some pretty good dissenting opinions in his day. Not corrupt men; not even unpatriotic men, as they understand patriotism. But men who have either a lack of faith in the ability of the people to give themselves better government than they can get from others, or who, by reason of long prior service as the attorneys for corporations, seem so often incapable of seeing anything except a corporation’s side of a case.

These are the men who wield a usurped power greater than that of any European constitutional monarch—a power that Congress, between the opening and the closing of one week in the winter of 1868, absolutely destroyed, so far, at least, as it pertained to one set of laws that the Republican leaders and the Republican party were determined should stand.

Is Congress less powerful than it was in 1868? Certainly, the court is not more powerful. The court has no power except that which is given to it by public opinion, Congress and the President. Even the United States marshals who execute the Court’s orders are appointed by the President and confirmed by the Senate, while the payment of their salaries is dependent upon the concurrence of the House of Representatives.

The real question is: "How powerful are we, the people?"

And, do we believe enough in self-government to elect a Congress that will take the Court and put it back where the Constitution placed it?

When the American people drive at a thing, they drive hard; and it would be a very near-sighted person indeed who could not perceive that, at the present moment, the people are showing unmistakable signs of an intention to drive at the United States Supreme Court, and all its lesser shadows.

What Shall We Do to Make Our Judges Recognize the Right of the People to Make and Enforce the Laws They Want?

SOMETHING is going to be done to the courts. The only question is what shall be done? Even Mr. Taft knows it. Even Mr. Taft who said at Pocatello, Idaho, on October 5, 1911: “I love judges and I love courts. They are my ideals on earth that typify what we shall meet afterward in Heaven, under a just God”—even he knows that something is going to be done. And, therefore, he wants to confine that something to a little. He wants “bad” judges impeached. He said so in another speech that he made on his grand circuit for re-election to the Presidency.
The suggestion is not new. The Constitution, which was written 124 years ago, provides for the impeachment of judges. The idea was old even when it was placed in the Constitution. Even then, it was so poor that Thomas Jefferson declared it to be "scarcely a scarecrow." Experience proves it has not improved with age. The judges who most deserved to go have always remained. A judge is impeached only once in a generation, and as judicial offenses go, the offenses of impeached judges are not often great. A drunkard was put off the bench a few years ago. Insane judges, too, have been put off.

In brief, the machinery for impeachment has failed to work. It has failed to work because it is unworkable. It is unworkable because great offenders cannot be tried except before a jury that is and always has been interested in their acquittal. The jury is the United States Senate. Conviction can be had only upon a two-thirds vote. The senate represents capitalists. The framers of the Constitution frankly declared that they created the senate to represent capitalists. "Frankly" may not be quite the word, since the Constitutional Convention was held behind locked doors, with every member pledged to secrecy, and, not until a half century later did the details of its proceedings become known. But the declaration was nevertheless made. And the United States Senate represents capitalists. It does now and always has. Moreover, for some time to come, it is likely to represent capitalists, whether the majority be Republican or Democratic.

The worst offense that a judge can commit is to give a decision that helps a few capitalists and hurts everybody else. Beside such an offense, mere drunkenness appears a virtue. But there have been many such offenses, and, unhappily, there is no reason to believe the last will be the last. More are coming. The people cry out against them. And Mr. Taft answers the cry by saying: "Impeach your bad judges, take them before the senate and try them."

This seems very simple. In a way, it is. It at least shows great simplicity of mind. But aside from Mr. Taft, who is simple enough to place any faith in the remedy? Is one set of capitalist servants likely to convict another set of serving their common master? Moreover, are they likely to bring in the verdict by a two-thirds vote? Positively not. The suggestion is so absurd that to compare it to a scarecrow is almost to insult the scarecrow. Jefferson was right. More than a hundred years of experience proves that he was right. Yet, in the year of 1911, Mr. Taft passes this painted lath back to us and asks us to believe it is a sword.

Other gentlemen suggest that all judges be elected by the
people, subject to recall at any time by the people. This sug-
gestion wrings Mr. Taft’s heart. Having been a judge himself,
he knows how noble a man must be to be a judge. Having been
a judge himself, he knows how highly important it is that we
shall have an “independent judiciary.” And, having been a
judge himself, he knows how wrong it would be suddenly to
snatch an unsuspecting citizen from a life-job, merely because the
people wanted no more of his work.

Some newspapers tell us that Mr. Taft in all of these observa-
tions, utters only the stern truth. Like Mr. Taft, such news-
papers believe the people are too stupid to elect as good federal
judges as the President can appoint. Like Mr. Taft—and to
the end that the judiciary may be “independent”—such news-
papers believe judges should serve for life, rather than for a
limited term.

And, like Mr. Taft, such newspapers roar against the recall.
They say that to apply the recall to judges would be to sub-
stitute lynch law for the “orderly processes of impeachment.”
“Popular passion” would take the place of “calm reason,”
and not even the most high-minded judge could tell what
moment “the mob” would get him.

Isn’t it strange, by the way, that when the people do what the
capitalists want done the “voice of the people is the voice of
God.”

But when the people do what the capitalists did not want
done, then the same people become “the mob.”

To be bamboozled by Mark Hanna was but the sign of “the
sturdy common sense of the American people.”

But to apply the recall to all officials, including judges, as
Arizona wanted to and will yet do—and, as California has done—
that is the work of “the mob.”

Well, maybe the mob can stand it. At any rate, let us see
whether the superior class are entirely within the facts in their
praise of the courts and their denunciation of the recall. They
say, for instance, that we have and should preserve an inde-
pendent judiciary. What do they mean by an independent
judiciary? Do they mean federal courts that are independent
of all classes, including the capitalist class? They say so, but
they don’t mean it. They know better. They would be the
last ones to favor a judiciary that was really independent of the
capitalist class. A federal judge who shows marked indepen-
dence of the capitalists at once becomes the butt of their scorn
and their ridicule. Judge Landis has had no standing in polite
society since he fined the Standard Oil Company $20,240,000.

Besides, how can a federal judge be independent of the capi-
talist class when capitalists urged the President to appoint him,
and the senatorial representatives of capitalists confirmed his appointment? Scarcely an appointment is made without capitalist endorsement. Such endorsement is the rule; the lack of it the exception. And, always the capitalist senate stands ready to defeat an unendorsed appointment that is considered objectionable. Such appointments have been defeated. Others will be.

How then can it be said that a judge who owes to capitalists his appointment by the President, who owes to capitalists his confirmation by the senate, and who, if he stands boldly by the people faces such a bombardment of ridicule as came to Landis—how can it be said that such a judge is independent of the capitalists? In theory, he is independent, because he is appointed for life, but do the decisions of federal judges indicate that they are actually independent? Is there not what the late Senator Platt called a "moral obligation" that makes them dependent?

Maybe not even that. Perhaps it is their pleasure and their joy to give so many decisions that help a few capitalists and hurt everybody else. But what difference does it make to us? We are hit by the decisions. We lose what somebody else gains. We don't like such courts. We want to get rid of them. And our capitalist brethren tell us that we must not; that we must cherish and protect our independent judiciary.

Now, the fact is that, so far as the people are concerned, what we have is an irresponsible judiciary. So far as it dares, it may do with us as it pleases. The judges owe nothing to us. We did not elect them. Under the Constitution, we cannot vote to dismiss them. In the fullest sense of the word, they are independent of us. But ought our judges to be independent of us? Is there any merit whatever in a judiciary that is independent of the people? If so, there is no merit whatever in our contention that rule should be by the people. Two forces cannot rule in the same place at the same time. If the people rule, judges cannot. If judges rule, the people cannot. Rule must be by law and the power rules that makes the law.

Federal judges make our laws. Not that they write all of them. Not that they change all of them after congress has written them. But no law that is brought into court can be administered until the Federal judges have passed upon it, if any interested party chooses to have it so passed upon. Until they have read words in or words out, as they like. And, perhaps, after they have passed upon it, it cannot be administered at all. Perhaps the Federal judges kill it by declaring it unconstitutional.

This is not rule by the people. It is rule by judges. How can
rule by the people be established if judges who are above the people are at liberty to do with the law as they please? This is the crucial question. Either we believe in rule by the people, or we do not. If we believe in rule by the people, we do not believe in rule by judges. And, if we do not believe in rule by judges, we do not believe in an "independent judiciary."

The very phrase is a fraud. It came from England. But in England it never meant and does not mean what American capitalists have made it mean here. In England, an independent judiciary means a judiciary that the king can't remove, but Parliament can. Once, the king could remove any judge, while Parliament could remove none. Judges thus became dependent upon the king. Parliament wrenched this power from the king and brought about an "independent judiciary"—one that the king could not touch. But Parliament did no such foolish thing as to make the judiciary independent of everybody and everything. By a simple majority vote, the British Parliament can at any time strip the robes from any English judge, with or without reason, and without a trial. Yet American capitalists have perverted the meaning of a historic expression for the purpose of keeping us in the clutches of a judiciary so "independent" that the English people would not for one moment tolerate it.

If every American judge were elected by the people for a short term and made subject to recall, the American judiciary would cease to be an irresponsible body. If the American people know enough to elect the President, presumably they also know enough to elect the judges. The Constitution does not give the people the right to elect judges for the same reason that it does not give them the right to elect the President. The framers of the Constitution did not believe in much rule by the people. They provided that the President should be elected by the members of the Electoral College, who were made free to vote for whomsoeover they pleased. They provided that federal judges should be appointed by the President, "by and with the advice and consent of the senate." They provided that the senate should be elected by State legislatures. Only the choice of the House of Representatives did they entrust to the people. And, they provided that the House of Representatives should do nothing without the consent of the senate, and nothing without the consent of the President, except by three-fourths vote of both house and senate. Usurpation by the Supreme Court has added the consent of the court to the handicaps imposed upon the house.

Yet, these restrictions were not placed upon the people solely because the framers of the Constitution believed the people
were incapable of electing their own servants. The framers of the Constitution were afraid of rule by the people. They wanted rule by the landed aristocracy—"the well-born and the well-bred," as Hamilton expressed it—with just enough of popular rule to keep the people quiet. But the people did not keep quiet, and they have not kept quiet from that day to this. The Constitution still says that the members of the Electoral College shall elect the President, but the members of the Electoral College long ago became a distinguished assemblage of dummies. They vote as they are told by the people to vote. Not that the people yet exercise a free choice in the selection of a president. They don't. They are manipulated out of their boots in the proceedings attendant upon the nomination of candidates. The people can only tell the electors for which of the party nominees they shall vote. But five States already vote direct for Presidential nominees, and the time is not far distant when the people will actually elect the man whom they want to be President. In like manner, the people are breaking down the constitutional provision that requires the election of United States Senators by State legislatures.

It is time the people should break down the constitutional provision which requires the appointment of federal judges by the President. If federal judges kept within their constitutional sphere, doing no more than to "declare the law," it would still be time to make a change. The people should elect their own judges. But federal judges do vastly more than to declare the law. They make the law. They concern themselves with matters of governmental policy. They legislate. And, as matters now stand, after they have legislated, nobody can set their acts aside.

"The courts have nothing to do with the wisdom or policy of an act of Congress," said the late Justice Harlan in his dissenting opinion in the Standard Oil Case. And, after searing the rest of the court for reading the word "unreasonable" into the Sherman law, he continued:

"After many years of public service at the national capital, and after a somewhat close observation of the conduct of public affairs, I am compelled to say that there is abroad in the land a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction.

"To overreach the action of Congress merely by judicial construction, that is, by indirectness, is a blow at the integrity of our governmental system, and, in the end, will prove most dangerous to all. Mr. Justice Bradley wisely said when on this bench that illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of legal procedure."

Nobody who is observant and honest makes any pretense that the courts are confining themselves to the mere elucidation of the law. So marked is the judicial tendency to usurp legislative functions that authoritative writers upon the courts
generally recognize it. Since the publication of this series of articles was begun, the Macmillan Company have issued an exceedingly useful book, entitled "Social Reform and the Constitution," by Frank J. Goodnow, Professor of Administrative Law at Columbia University, on page 15 of which appears the following:

“Our constitutional law is losing what legal character it may once have had, and is becoming more or less a system of political science which at one time favors the demands of the advocates of the status quo in the domain of political relations, and at another is influenced by conceptions of present economic and social needs. In other words, the Supreme Court of the United States has really become a political body of supremest importance. For upon its determination depends the ability of the national legislature to exercise powers whose exercise is believed by many to be absolutely necessary to our existence as a democratic republic.”

If the Supreme Court is a “political body of supremest importance,” it should not only be elected by the people, but some means should be devised to make it responsive to the people’s will. Impeachment is not such a means. The recall is. We all believe in trial by jury; the recall is only trial by a jury composed of the whole people. No other means is so likely to compel a public official to do the people’s will. Cause a public official to understand that departure from loyalty to the public trust means speedy departure from office, salary and honor, and he will at least think twice before he throws out his chest, declares his “independence,” and does what the people do not want done.

A case that occurred in 1911 in New York constitutes an admirable illustration of the need for the application of the recall to judges. A United States judge fined a group of convicted trust officials approximately $40,000. The United States District Attorney who secured the convictions said the fines did not amount to a tenth of the sum that the defendants had obtained by breaking the law.

Of course, everybody but the trust gentlemen and their friends felt aggrieved at the judge. What did the judge care? Nobody could touch him. His job is for life. If he wants to, he may do the same thing to-morrow. Anybody who tries to impeach him will have a fine time. Within the meaning of the Constitution, his “behavior” has been good. Nobody contends that he kept a cash register upon the bench. Nobody saw any of the trust gentlemen slip a bribe into his pocket. Nobody believes a bribe was slipped into his pocket.

What everybody believes—the trust gentlemen excepted—is that this judge should not be upon the bench. He doesn’t administer law as the people want it administered. And, if the people are of any consequence in this country, they have a right to say how the law shall be administered. But they might as well try to butt down the Rocky Mountains with their noses as to try to get this judge off the bench through impeachment.
Yet, if he had been elected for a short term, he could be retired at the end of the term, and if the recall could be invoked against him, he could be voted out of office within 30 days.

The whole theory of those who honestly and without selfishness oppose the recall—if there be such—is that the people are dishonest, impetuous, and stupid. If such men did not believe the people, as a mass, were dishonest, they would not prate so much about the necessity of leaving judges free to “render honest decisions without fear or favor.” Who wants dishonest decisions? Have the American people ever shown a desire to wreak vengeance upon the courts because of the high quality of justice they administer? Whoever heard of such a case? Whoever heard of a judge whose reputation for justness made him unpopular? Who has not heard of judges who were unpopular because the people believed from the bottoms of their souls that the judges were biased or dishonest?

The accusation of national dishonesty cannot be made to stick. It is not true. Individually, probably none of us is 100 per cent honest. Selfishness prevents. We don’t steal our neighbor’s hams, but we sometimes take underground cuts to his pocketbook. But collectively we are honest, because there is no possibility of individual gain in collective dishonesty. Dishonesty must have an incentive, and where there is no incentive, there is no dishonesty.

Then, they say we are impetuous—we, the people of the United States. We, who came into this nation when the Constitution was formed without even a vote for President. We, who have borne the rich men on our backs from the day this government was founded to the present day. We, who have always been and are now numerically strong enough to throw off the rich men and eat them alive. We, who have been so patient with our burden, hoping that our burden would eventually peacefully consent to get off—we are impetuous and not to be trusted!

Who wants anybody to trust us? Do we not trust ourselves? Do we want Mr. Rockefeller, Mr. Morgan, or Mr. Ryan to trust us? What are they to us? We are the people of the United States! This country belongs to us. If we can trust ourselves, that is all we need to ask. If there be any gentlemen who do not want to remain in this country after we get hold of it, let them go. Their presence will not be so much missed as their impudence. What steel-pointed nerve for a little group of capitalists to say to the people of the United States: “We cannot trust you.”

The third charge—that our stupidity renders us unfit to elect and dismiss federal judges—while, of course, untrue, is not so
easily disproved. During the course of our glorious national career, we have elected some exceedingly punk Presidents. A nation that is capable of electing punk Presidents is unquestionably capable of electing punk judges. But it should also be remembered that we have elected some very good Presidents. Abraham Lincoln was quite a man, though some time was required for the best people in New York and Boston to have any use for him. But all things considered—hampered as we have been in making our choices—perhaps we have chosen quite as good Presidents as others would have chosen for us. We chose Mr. Taft. We had help, it is true, but we chose him.

But even if federal judges were elected by the people for short terms and made subject to recall, there would still remain the question of whether the courts should continue to exercise the usurped power to declare acts of Congress unconstitutional. Also, we should have to decide whether courts should continue to read words into or out of laws.

It is our good fortune that we shall not be compelled to postpone the settlement of these questions until federal judges shall be elected subject to recall. The right to appoint federal judges for life cannot be taken from the President without changing the Constitution. But no change need be made in the organic law to prevent the Supreme Court from declaring acts of Congress unconstitutional. The Constitution gives the Supreme Court so little power that it is practically at the mercy of Congress. It is entirely within the constitutional power of Congress to forbid the filling of vacancies in the membership of the court until only one justice shall be left, and then limit the jurisdiction of this justice until he might almost as well be at home asleep as upon the bench. Of course, no one wants the court to be thus choked to death. There is legitimate work for the Supreme Court to do. The sternest critic of the court demands only that it shall abandon its usurped powers and do its legitimate work. But a deep understanding of human nature is not required to perceive that usurpers do not abdicate. Always, they must be shown the door.

Concerning the power of Congress to show the Supreme Court the door, I beg leave to offer some illuminating paragraphs from Professor Goodnow's "Social Reform and the Constitution" (p. 345):

"The position of the Supreme Court is somewhat but not much stronger than that of the inferior federal courts. It is of course true that the existence of the Supreme Court is provided for by the Constitution, but the number of its members is to be determined by Congress, and appointment to fill vacancies in its membership is dependent upon the concurrent action of the President and Senate. It is also true that its original jurisdiction is fixed beyond the possibility of change, but this jurisdiction is comparatively unimportant, relating only to cases affecting ambassadors, other public ministers and consuls, and those in which a State is a party, while its appellate jurisdiction is subject to such exceptions and is to be exercised under such regulations as Congress shall make."
"Congress, acting with the President, may, by reducing the number of its judges, and by refusal to fill vacancies in its membership as they occur, condemn the Supreme Court to a slow if painless death, or while permitting it to remain in a formal state of existence may deprive it of all those powers whose exercise has made the court what it now is. Nor is the statement which has just been made a statement of the merely theoretical powers of Congress. It has been said that once in our history Congress destroyed the inferior courts. It may be added that once also in our history Congress deprived the Supreme Court of part of its appellate jurisdiction, fearing that it was about to declare unconstitutional an act of Congress and the court held not only that this action was within the constitutional powers of Congress, but that the act deprived it of jurisdiction to decide a case which had been argued before it and was at the time under advisement."

The case mentioned by Professor Goodnow, in which Congress withdrew the jurisdiction of the court, thus preventing a decision, was the McCardle case, the facts concerning which appear in the third chapter of this pamphlet.

No better advice can be given to the people of the United States than this: "Get hold of your federal courts."

No better advice can be given to the people of the several States than this: "Follow the example of California and by constitutional amendment make your State judges not only elective but subject to recall."

There can be no question as to the power of Congress to compel the federal courts to retire within their constitutional limitations. Again within their constitutional limitations, the federal courts can do only good. And, at this critical time in our national history, it is of the greatest importance that the federal courts shall be prevented from doing harm. A few colossally rich men are engaged in a Titanic struggle with the rest of the people for the control of this country. The struggle has been going on for 40 years, gathering intensity year by year, until now we are in the midst of the battle that will decide both the campaign and the war. The rich men hold most of the forts and are heavily intrenched behind their moneybags. They also hold the country for which both sides are contending. But the people of the country have the more advantageous position and the better weapons. Their weapons are their ballots. The people have the ballot-power to sweep everything before them. But they must learn to vote against their adversaries instead of against themselves, and, if they would win, they must permit no black-robed judge to creep up behind them and spike their legislative guns.

I respectfully contend that this is not mere flapdoodle. It is sense. The judges must be kept off. We have enough to fight in the corporate interests without also being compelled to fight the courts. When things come to such a pass that judges, by qualifying a law, interfere in our attempt to deal with the trusts, it is time to make war against the judges as well as against the trusts. As matters now stand, the United States Supreme Court, and not the Sherman Act, is the law concerning trusts. Any trust that the court considers "reasonable" is a
lawful corporation, and so long as we are a law-abiding people, we must tolerate it or amend the law. And, if we should try to amend the law, no power on earth, outside of the Supreme Court chamber, could tell what the court would do to the amendment. A few more such decisions and we shall bear about as close a resemblance to a republic as did Mexico under Diaz. There can be no choice among despotisms. A judicial despotism is as bad as a despotism maintained by an executive. Letters should be sent and personal appeals should be made to members of congress to proceed against the courts. If Democratic and Republican congressmen will not proceed against the courts, elect others who will. The party name that a congressman bears is not so important as the things a congressman does. A congress can be elected that will put the courts where they belong. If the American people want such a congress, they will have to elect it. The trust gentlemen will not elect it for them.

Meanwhile, let us look at California. In October, 1911, the people of the Golden State, by a majority of 100,000—a tremendous majority, when it is considered that the population of the state is less than 3,000,000—adopted constitutional amendments, providing not only for the initiative and referendum, but for the recall of every elective officer in the state, including judges. That was California's answer to Taft's veto of Arizona statehood.

Now, if the safety deposit vault prophets be correct, California thereby consigned herself to political hell, trampled upon the American flag, figuratively spat into the faces of "the fathers," and perhaps all but seceded from the Union.

But many gentlemen who write or speak glibly about California do not know much about California. They do not know what dark desperation caused California to forge such powerful weapons for the recovery of her political self-respect. It was my good fortune to live in California for a number of years when the state was not much more than a brilliant pendant upon the watch-chain of the late Collis P. Huntington, who at that time was President of the Southern Pacific Railway Company.

The state was in the muck of corruption, clear up to the hubs. The Southern Pacific Railway Company did not exist to serve California—California existed to serve the Southern Pacific Railway Company. Or at any rate, such seemed to be the railway idea of the situation. California was a luscious orange to be squeezed and sucked.

The governor, no matter what party label he bore, was always a Southern Pacifican. So were both branches of the legislature and the Board of Railway Commissioners.
When the people tired of one set of officials, they turned to the other party, only to discover—always after election—that other Southern Pacific men had beaten them in turning to the other party. For it was always an article of faith with the Southern Pacific, as it is with most great corporations, to control both parties, so that in no event could unfriendly men be elected.

But that is not the point. What I was going to say was that the corruption that centered at Sacramento overflowed the state. The cities became corrupt. Other corporations took advantage of the opportunity to do business with the boards of supervisors, judges and other officials that the Southern Pacific had established for its own convenience.

The mayor of San Francisco was usually an honest man, as, under the old charter, the mayor had little power, and it was deemed good politics to have an honest man at the head of the government to help deodorize the rest of it. But when the charter was changed and the mayor became of more importance, the boodlers made a play for the mayor and finally got Schmitz. In short, it has been said that all of the degradation of the state was directly traceable to the demoralizing influence of the Southern Pacific.

Now, there was never a prophet in my family; but as a former Californian who knows its people well, I will venture the prediction that California will not go politically to hell as the result of the initiative, the referendum and the recall; that she will not become a disgrace to the American Union; that the pillars of her temple will not be overturned by the violence of the performances within, and that she will never repeal these amendments to her constitution!

I will go further. I will make the prediction that never again will the Southern Pacific or any other corporation control the politics of California or own another governor, legislature or judge; that if any elected official shall afterward go over to them, he will be recalled as quickly as the machinery can be set in motion, and that from this time onward—at least until other states follow her example—California will be the best governed state in the American Union. And all for the simple reason that she has the best constitution upon the American continent.

She will not attain political perfection at a single leap, or at many leaps. The possession of the machinery of government by no means carries with it the wisdom to make the best use of it.

But political corruption in California is dead—dead forever—and the government from now on will be popular government—just as wise as the people are wise; no more, no less.
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