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Election and Recall of Federal Judges.

ABSTRACT OF SPEECH

OF

HON. ROBERT L. OWEN,

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[Congressional Record, p. 3687.]

Mr. OWEN. Mr. President, I am moved to offer this bill for the election and recall of Federal judges, and to discuss it, in connection with the Arizona constitution.

The people of that State propose the right to elect and recall all officials, including judges, by a vote of the electorate.

ABSTRACT OF ARGUMENT.

I shall endeavor to show the justification of the right of election and recall of judges—

First. By precedents, showing that many States do elect their judges and that all of the 46 States do have the explicit right to recall their judges by the legislature, or automatically recall by a short or fixed tenure of office.

Second. That the election and recall of judges is justified by sound reason and common sense.

Third. That the recall of judges is justified in a peculiar sense in this Republic at this time, for the reasons—first, the Federal courts have unlawfully assumed the right to declare acts of Congress unconstitutional; second, have undertaken to invade the legislative function of Congress by judicial legislation; third, have overridden the rights of State laws in a similar manner, either on the charge that such State laws were unconstitutional or that such State laws were invalid on grounds of policy; fourth, such courts have become tyrannical by denying jury trial in contempt cases, inconsiderate in injunction cases, and so forth, and that the reason of this bad behavior is due to the fact that the judiciary is not responsible to the people either by election or recall.

The election and recall of Federal judges would abate the present jealousy felt by the States against the Federal Government and bring into harmonious relation the States and Nation.

I shall examine the argument of judicial infallibility and answer it.

I shall endeavor to show that the Constitution of the United States abundantly justifies Congress to follow the example of the States and provide both the election and the recall of Federal judges.

I shall endeavor to show that the time has come when the liberties of the American people require the exercise of this constitutional power, or if it be deemed unconstitutional by Congress, then that Congress should submit an amendment to the Constitution to provide for this and other relief by establishing an easy means of amending the Constitution.

THE ARGUMENT.

Mr. President, the bill which I now submit proposes to put the recall of Federal judges in the hands of the Congress of the United States, while the Arizona constitution proposes to

put the recall of judges in the hands of the electorate of that State. They are the sovereign power, they are the governing power, and if the court has a bias against the interest of the people and the people wish to recall for that purpose that bias need not be named as a ground for such action. It need not be mentioned. No reason is necessary to be assigned why the sovereign power of the people of this country should be exercised in recalling any public servant. It has a right to be exercised without assigning reasons.

To assign reasons is to discredit the incumbent, while removal without assignment of reasons is the mildest method of dealing with a public servant whose service is no longer desired. And self-governing people should govern themselves without apology or need to assign reasons in the exercise of the right of self-government. The mere fact that the people do not like a judge and do not desire him to serve them justifies recall. He has no function, no public office, or public dignity except as it is bestowed upon him by the people themselves, yet the Tory argument is constantly advanced—that judges ought not to be recalled, that they ought to be *independent of the people*, that they ought to have office for life whether their service is acceptable to the people or not. There is no sound sense and no good reason in this contention, and it impairs the right of self-government and liberties of a free people. Such a policy can only result in a judicial oligarchy.

THE PEOPLE ARE CONSERVATIVE.

It will be contended by some that the recall of judges might safely be left to the National Legislature or to the State legislatures, but should not be left to the electorate, because the electorate would not be so conservative in the exercise of the power to recall a judge as their representatives in the legislature.

The answer to this is that the electorate of an American State and of any of the American States is abundantly conservative and moves very slowly, more slowly than their progressive representatives would move.

A political party is controlled by caucus and in convention, and is easily moved by passion or impulse. The people in their peaceful homes or in the quiet seclusion of a voting booth are not so easily moved.

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The reactionary argument that the people are turbulent, unduly excitable, that they are wild and visionary, that they are unduly passionate, that they comprise an irresponsible mob unworthy to be trusted with power, comes with poor grace from those who hold their honors, their dignities, and their salaries from these same people.

The long-suffering patience of the people is best evidenced by the forbearance with which the people permit men in public service to give currency and approval to these unfounded and absurd criticisms of the great American electorate.

IF PEOPLE ARE INTELLIGENT ENOUGH TO ELECT AND RECALL SENATORS, WHY ARE THEY NOT INTELLIGENT ENOUGH TO ELECT AND RECALL JUDGES?

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Every Member of Congress is elected by direct vote of the people. Have the people intelligence enough to elect Senators

and Members of the House, and yet do they lack intelligence to elect or to recall a judge? Would they recall a Senator or a Member of the House who performed his duty faithfully and truly represented his constituency?

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THE CHIEF VALUE OF THE RECALL WILL BE FOUND IN MAKING ITS USE UNNECESSARY.

Mr. President, the chief value of the recall will not be the exercise of this power in actually recalling judges, but the contrary. If the power of recall exists, the conduct of judges will be so exemplary, so satisfactory to the people of the United States, that no recall of any Federal judge would ever be necessary. The moment the recall went into effect the courts would promptly discontinue their unauthorized, unconstitutional, and grossly improper conduct of declaring an act of Congress unconstitutional. The Federal courts would no longer, because of their views of public policy, amend acts of Congress by inserting words in important statutes which Congress had refused to insert, as the Supreme Court, in substance, did in its opinion in the Standard Oil case and in the Tobacco Trust case. The courts would no longer deal with undue severity in contempt cases, and government by injunction would cease. The right of recall and the power of recall would make the recall itself unnecessary.

PRECEDENTS—NEARLY ALL THE STATES DO ELECT THEIR JUDGES.

Mr. President, when our Federal Constitution was adopted in 1787 none of the judges were elected by the people, although there was a greatly restricted suffrage; but since that time, although the suffrage has been greatly enlarged, so that we have almost universal manhood suffrage and in five States woman's suffrage, yet with the growth of modern Democracy or progressive Republicanism very many of the States have adopted the doctrine of electing judges and giving them fixed terms of office. For example:

(Here follow provisions for electing or appointing judges in the 46 States.)

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It will thus be seen that 36 States elect the judges by popular vote; Connecticut, Georgia, Rhode Island, Vermont, and Virginia elect by the general assembly; and Delaware, Maine, Mississippi, New Hampshire, and New Jersey appoint. All of the States have the recall by fixed tenure, except Massachusetts, New Hampshire, and Rhode Island, all of which recall by the legislature. Thirty-two of the States provide by constitution for recall of judges by the legislature.

It is therefore substantially the unanimous opinion of all the States that judges should hold by fixed tenure and be subject to the automatic recall of short terms or by resolution of the legislature.

When the Constitution of the United States was adopted, in many States the legislatures directly elected the judiciary, as in Connecticut, Rhode Island, New York, Delaware, New Jersey, Virginia, North Carolina, and Georgia, and they exercised control over the judges by fixing their term of office "during good behavior," as was done in New Hampshire, Massachusetts, New York, Maryland, North Carolina, South Carolina, and Virginia,

and by a short tenure of office of one year, as in Rhode Island, Connecticut, and Georgia, and by the right of recall by an address of the legislature, as in Massachusetts, New Hampshire, Maryland, Delaware, South Carolina, and Pennsylvania.

THE RECALL OF JUDGES BY STATES.

Many of the States have exercised and now exercise the right of recall of the judiciary by the address of the legislatures. For example:

(Here follow provisions governing the recall in 32 States.)

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In many of the States—Alabama, Delaware, Florida, Kentucky, Louisiana, Michigan, Mississippi, Nevada, Pennsylvania, South Carolina, Texas, and so forth—the language is used in the constitution that where the offense charged is not sufficient ground for impeachment that judges may be recalled or removed by address of the legislature.

IMPEACHMENT IS MERELY A FORM OF RECALL.

It is not denied that judges should be impeached when guilty of high crimes. All the State constitutions, and the United States Constitution also, provides for this, and it is justified by reason. But impeachment is far more serious than recall. Impeachments involve the conviction for criminal conduct. The recall is a much more benign remedy, and can be invoked where the fault of the judge or the reason for removal is not so great as in the case of impeachment and may be invoked with honor to the judge who has become infirm and who may for his own good be retired on a pension. All of the States provide for recalling judges by impeachment, but this recall carries disgrace.

THE SHORT TENURE OF OFFICE OF A JUDGE IS A FORM OF RECALL.

Mr. President, the short tenure of office is a form of recall, by virtue of which the people who elect judges or have them elected by the legislature, or appointed by the governor, prevent them from becoming a judicial oligarchy, prevent them from becoming tyrannical, and prevent them from becoming judicial rulers or indulging any unseemly exercise of power by recalling them with a short tenure of office.

As I pointed out, three of the States when the Constitution was framed elected judges only for 12 months. It is wonderful, when a careful examination is made, to see how universally the people of this country have provided against judicial oligarchy in the States by a fixed tenure of office. I call attention to this record, giving all of the States in order, the number of years for which the higher State judges are elected, and how elected or appointed, and the number of these States which at the same time, in addition to the short tenure, exercise the right of recall directly through the legislature.

Thirty-four of the States elect judges by the qualified electors, six others elect judges by the general assembly, and only six States appoint by the governor and council. Forty-three States exercise automatic recall by the fixed or short tenure of office and 32 States recall directly by the legislature; and no State fails to have the right of recall either by the short or fixed tenure or by the legislature.

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TENURE OF OFFICE OF STATE JUDGES, ETC.

Alabama, 5 years. Recall by legislature. Elected by qualified electors of State.

Arkansas, 8 years. Elected by qualified electors of State.

California, 12 years. Recall by people's vote (pending). Elected by qualified electors of State.

Colorado, 9 years. Elected by qualified electors of State.

Connecticut, 8 years. Recall by legislature. Appointed by general assembly.

Delaware, 12 years. Recall by legislature. Appointed by governor.

Florida, 6 years. Recall by legislature. Elected by qualified electors of State.

Georgia, 6 years. Recall by legislature. Elected by general assembly.

Idaho, 6 years. Elected by qualified electors of State.

Illinois, 9 years. Recall by legislature. Elected by electors of each district.

Indiana, 6 years. Recall as by law. Elected by electors of State at large.

Iowa, 6 years. Elected by qualified electors of State.

Kansas, 6 years. Recall by legislature. Elected by qualified electors of State.

Kentucky, 8 years. Recall by legislature. Elected by districts.

Louisiana, 12 years. Recall by legislature. Elected by electors of State.

Maine, 7 years. Recall by legislature. Appointed by governor.

Maryland, 15 years. Recall by legislature. Elected by electors of districts.

Massachusetts, during good behavior. Recall by legislature. Appointed by governor.

Michigan, 8 years. Recall by legislature. Elected by electors of State.

Minnesota, 6 years. Elected by electors of State.

Mississippi, 9 years. Recall by legislature. Appointed by governor.

Missouri, 10 years. Recall by legislature. Elected by electors of State.

Montana, 6 years. Elected by electors of State at large.

Nebraska, 6 years. Elected by electors of State at large.

Nevada, 6 years. Recall by legislature. Elected by qualified electors of State.

New Hampshire, during good behavior. Recall by legislature. Appointed by governor and council.

New Jersey, 7 years. Appointed by governor.

New York, 14 years. Recall by legislature. Elected by electors of judicial districts.

North Carolina, 8 years. Recall by legislature. Elected by qualified voters of State.

North Dakota, 6 years. Elected by qualified voters of State.

Ohio, 5 years. Recall by legislature. Elected by electors of the State at large.

Oklahoma, 6 years. Elected by electors of judicial districts.

Oregon, 6 years. Recall by people's vote. Elected by qualified electors of State.

Pennsylvania, 21 years. Recall by legislature. Elected by qualified electors of State.

Rhode Island, subject to resolution of general assembly. Recall by legislature. Elected by the two houses in grand committee.

South, Carolina, 8 years. Recall by legislature. Elected by joint assembly.

South Dakota, 6 years. Elected from districts by electors of State at large.

Tennessee, 8 years. Recall by legislature. Elected by qualified voters of the State.

Texas, 6 years. Recall by legislature. Elected by qualified voters of the State.

Utah, 6 years. Recall by legislature. Elected by qualified voters of the State.

Vermont, 2 years. Elected by senate and house of representatives in joint assembly.

Virginia, 12 years. Recall by legislature. Elected by general assembly.

Washington, 6 years. Recall by legislature. Elected by qualified electors of State at large.

West Virginia, 12 years. Recall by legislature. Elected by voters of State.

Wisconsin, 10 years. Recall by legislature. Elected by qualified electors of State.

Wyoming, 8 years. Elected by qualified voters of the State.

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It will thus be seen that all of the States have an automatic recall of judges by a short tenure of office, excepting Rhode Island, New Hampshire, and Massachusetts, all three of which expressly provide in their constitutions for the recall of judges by the legislature.

New Hampshire has recalled her judges four times, and, I understand, on grounds of policy. Rhode Island recalled her judiciary—by dropping them at the end of the short tenure—which declared an act of the Rhode Island Legislature unconstitutional.

I insist that the recall of judges by the voters of a State, in the seclusion of the ballot box, is more conservative than to remove judges by caucus in a legislature, where passion or interest might affect the judgment. The people of Arizona can be relied upon to deal justly with this question, and their right of self-government in this particular can not be justly denied.

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THE ELECTION AND RECALL OF JUDGES IS JUSTIFIED BY EVERY PRINCIPLE OF SELF-GOVERNMENT.

The election and recall of judges, which I have shown thus to prevail in all of the States of the Union, has been adopted by the various States after discussion and consideration by the best people in the United States, and their action in regard to this matter is justified by sound reason and common sense. Since the establishment of common schools, of high schools, of university privileges—since the establishment of the modern newspapers which penetrate every nook and cranny of the land—since the growth of universal intelligence—why should not the American people elect judges who are to serve them on the bench? If citizens have a civil dispute, do they not naturally arbitrate their differences and choose their own arbiters? And if they are satisfied, who should complain?

If citizens of a village wish to choose their own justice of the peace, why should they not have the right to elect such an official? If the citizens of a county desire to elect the county judge, what sensible reason can be assigned that those whose lives and property are subject to the jurisdiction should not elect the citizen who is a candidate for county judge? Do they not pay him his salary? Are they not self-governing people? Are they not entitled to the unqualified rights of self-government recognized in the Declaration of Independence and in the various bills of rights in the several States? Or have we forgotten the source of authority in this country, and that it springs from the people and does not descend to the people from a governing class? It seems to be necessary, Mr. President, to recall to the Congress of the United States and to the country the principles laid down by the Declaration of Independence, in which it was set forth that the right to govern came from the people and not from the king.

A JUDICIAL OLIGARCHY, OR JUDICIAL RULERS, INDEPENDENT OF THE PEOPLE, NOT CONSISTENT WITH LIBERTY AND SELF-GOVERNMENT AS SET FORTH IN DECLARATION OF INDEPENDENCE AND BILLS OF RIGHTS—THE PEOPLE ARE SOVEREIGN, NOT THE JUDICIARY—THE SOVEREIGN POWER IN THE PEOPLE MUST BE EXERCISED FOR THE WELFARE OF THE PEOPLE.

"The Unanimous Declaration of the Thirteen United States of America," issued July 4, 1776, said:

We hold these truths to be self-evident; that all men are created equal; that they are endowed by their Creator with certain inalienable

rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends *it is the right of the people to alter or abolish it* and *to institute new government, laying its foundation on such principles* and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness.

This declaration is a declaration in effect that all powers of government emanate directly from the people. And this right is reiterated in the constitutions of almost every State in the Union, declaring in various forms that all powers of government spring directly from the people. For example:

(Here follow excerpts from 46 State constitutions, showing all political power to be in the hands of the people.)

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Mr. President, undoubtedly all governing powers spring from the people, and this fundamental fact is recognized universally. One of the most important of the governing powers is the right to elect judges and to recall them when they cease to be satisfactory to the people for any reason whatever, *or without any reason whatever. The people are not called upon to assign any reason in exercising this right of self-government.*

IF JUDGES SHOULD BE APPOINTED FOR LIFE, WHY NOT HAVE SENATORS AND CONGRESSMEN APPOINTED BY THE PRESIDENT FOR LIFE?

If judges for life, why not Senators and Congressmen for life? Why not prosecuting attorneys for life? Why not a President for life? Would it not make them more *independent* of "*popular clamor*"? Would it not thus enable them to be free from the influence of the *prejudices, passions,* and *immature views* of the *vulgar populace?* Would they not, under such favorable conditions, make better *rulers* of the people?

But, Mr. President, it is not *rulers of the vulgar populace* we seek. We demand *public servants,* not *rulers,* and we wish these servants to respect the will of the people, and not despise the people, or view them as a "vulgar populace." Let us hear no more of "*popular clamor*"; of the "*turbulence of the democracy*"; of the "*vulgar populace.*" The people have more wisdom, more dignity, and more justice than those of their paid servants who indulge such sentiments or voice such views. No man has the right to hold public office and thus offend the confidence of those who trust him with their powers and dignities.

THE RIGHT OF RECALL OF JUDGES IS JUSTIFIED BY REASON AND COMMON SENSE AS WELL AS BY PRECEDENT.

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Why should anyone contend that a judge who for any reason is incapacitated to properly serve the people should not be recalled, except by impeachment?

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Should a judge who becomes imbecile, weak of intellect, or a neurotic, retain power to pass upon the life and property of citizens, upon the liberty of citizens, without the possibility of recall except by impeachment? Impeachment is too severe in such a case. The recall may be applied with honor. Such a judge having been faithful might well be recalled and placed upon a pension roll by virtue of his past services.

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Shall a judge who is a victim of paresis or of a permanent malignant disease continue to wear the ermine and oppress those who have honored him, and they have no remedy? Shall his incompetency, his unfitness, his inefficiency have no remedy except by impeachment? The recall is a much milder system than impeachment. It operates benignly, and may remove a judge who becomes infirm, disabled, or inefficient, without disgrace, and it may be exercised with honor to the judge.

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Mr. President, a judge upon the bench is only a human being after all, and he might become intemperate, not sufficiently to justify impeachment, perhaps, but sufficiently to justify recall. He might become mentally incapable or physically incapable, not sufficiently, perhaps, to justify impeachment, but quite sufficiently to justify recall for the benefit of the service.

Such a judge might become corrupt and be so skillful in his corrupt judgments that it would be impossible to impeach; and yet the wisdom of his removal by recall might be beyond doubt.

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Mr. President, there are many degrees of malfeasance and of misfeasance justifying recall which would not justify impeachment. Mr. President, a judge upon the bench is merely a lawyer employed by the people, at a salary, to interpret the law. He does so in the light of his environment, influenced by his education, by his previous political and judicial predilections, influenced by his long practice at the bar. Perhaps he may have been the valued attorney of various powerful corporations, whom he has long served and whose interest in him has led to his preferment on the bench by the skilled influences of commercial interests brought to bear upon the appointing power. Suppose such a judge in a series of decisions uniformly decided cases against the interests of the people, whose servant he had become, and uniformly decided such cases in favor of special privilege, whose paid servant he formerly was. Should the people have no right to recall him except by impeachment? Such a judge may be perfectly conscientious; but will that suffice to justify his continuance in office under such circumstances?

Mr. President, the right of recall of judges is all the more important when we recognize the fact that the big interests of this country have taken infinite pains to bring about the nomination and promotion as Federal judges of those whose opinions and bias of mind were known to be favorable to their point of view.

Whenever a vacancy occurs on the Federal bench, immediately the most lively and active pressure is brought to bear by various business interests in favor of candidates desired by them, and I pause to remark that it is quite immaterial whether such candidate has previously been regarded as a Democrat or as a Republican.

I do not mean to suggest that candidates thus urged are in any degree dishonest or corrupt, although that is always a possibility; but I do mean to say that they are merely human beings. That such candidates have been practicing lawyers, some good lawyers and some not so good, gives them no divine unction of infallibility. That they are influenced and con-

trolled in their opinions by their education and their environment and by the arguments which they have previously been engaged in making is absolutely certain. I do mean to say that corporate interests do seek to place upon the Federal bench and in the State courts those candidates who are known to favor the point of view of the special interests as against the interests of the people, and that I do believe such appointments on the Federal bench are the rule and not the exception.

A short time ago I had the honor of calling the attention of the Senate to an illuminating instance of how judges appointed to discharge the most important work are influenced by their previous environment. This was illustrated by the record of the Electoral Commission of 1877, appointed to determine who should be President of the United States—whether Mr. Tilden, of New York, or Mr. Hayes, of Ohio.

That commission was composed of five Justices of the Supreme Court of the United States—Hon. Joseph P. Bradley, Hon. Nathan Clifford, Hon. Samuel F. Miller, Hon. Stephen J. Field, and Hon. W. Strong; five distinguished United States Senators—Edmunds, Morton, Frelinghuysen, Thurman, and Bayard; and five great leaders of the House of Representatives—Mr. Payne, Mr. Hunton, Mr. Abbott, Mr. Garfield, and Mr. Hoar. This distinguished commission passed upon four contested-electoral cases involving the electoral vote of Oregon, of South Carolina, of Louisiana, and of Florida, a voluminous record, involving many difficult questions, and the remarkable result followed that every one of the 15 followed his previous political predilection, and by a decision of 8 to 7 decided every point of importance in that case and decided the result in each of the four cases in the strictest accord with the previous political opinion of each of these 15 judges sitting upon that electoral commission to determine the Presidency of the United States in the Tilden and Hayes controversy.

It is not necessary to question the integrity of purpose or the sincerity of judgment of any one of the seven great Democrats who sat on that Electoral Commission or of the eight distinguished Republicans who sat on it, but it taught a lesson to this country that men are profoundly influenced by their previous environment and partisan prejudices. These illustrations could be multiplied indefinitely.

Mr. President, this peculiar characteristic of mortal man to be influenced by his previous opinions must not be ignored by prudent statesmen in determining the conduct of government. If the Supreme Bench, consisting of nine excellent gentlemen, should be composed of nine loyal and patriotic Irishmen, they would be unanimously in favor of "home rule" for Ireland, and give most learned reasons for the opinion. Or if this excellent tribunal should consist of nine loyal and faithful Tories, they would conscientiously decide "home rule" to be a dangerous heresy, and give overwhelming arguments why it should be denied. Nor would it be fair or decent to charge them with bad faith for their decisions or opinions. It is a question of previous predilection, of previous fixed opinion, of the point of view which has molded itself in the personal experience of the judge and become a part of him.

A President who could be persuaded to appoint a majority of Irishmen on the Supreme Bench need not be astonished at home-

rule decisions. Nor should he be shocked if a Tory bench decide against home rule.

This psychological fact gives a sound reason for the active interest of big business in the appointment of Federal judges. Big business men understand perfectly well the importance of engineering the nomination of judges. Yes, Mr. President, and they understand perfectly well the importance of engineering the nomination of a President of the United States whose honest sympathies and views are in harmony with their point of view, so that such an Executive should be expected to listen with respect and with conviction to the convincing arguments in favor of candidates for the ermine "who are the right kind of people." These amiable gentlemen who engineer nominations "know exactly what they want." As Abraham Lincoln once remarked, "For the kind of people that like that kind of thing, it is the very kind of thing that that kind of people like."

I venture to believe, Mr. President, that the people of the United States have slowly learned to know exactly what they want, and the people will acquire it by peaceful processes, by progressive processes, and, among other agencies, by the right of election and of recall of judges.

THE RECALL JUSTIFIED AS A MEANS OF CONTROLLING A JUDICIAL RULING POWER THAT HAS VIOLATED THE CONSTITUTION OF THE UNITED STATES, VIOLATED THE RIGHTS OF THE STATES, INVADED THE LEGISLATIVE FUNCTION, AND BECOME AN INSTRUMENT OF OPPRESSION THROUGH JUDICIAL LEGISLATION.

The Federal courts have invaded the Constitution and invaded the rights of the States and invaded the legislative function of Congress and of the States, and have become an instrument through which the special interests have been enabled to block all progressive legislation of recent years. The manner in which this has been done has been well explained by James Allen Smith, Ph. D., professor of political science, University of Washington, in The Spirit of American Government; by Hon. Walter Clark, chief justice of the Supreme Court of North Carolina, in his address before the law department of the University of Pennsylvania, April 27, 1906 (Exhibit B); by Gilbert E. Roe, under the title of "Our Judicial Oligarchy," in La Follette's, June 17, 1911, to July 15, 1911; Pearson's, August, 1911; and by other able lawyers and students of government.

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The Constitutional Convention, secret and reactionary though it was, four times refused to provide that the Supreme Court should pass upon the constitutionality of acts of Congress, to wit: On June 5, 1787, the proposal received the vote of two States only; on June 6, July 21, and August 15 the proposal was renewed, and at no time received the votes of more than three States.

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This mild provision for *disapproving a law before passage*, which still might pass by a two-thirds vote of Congress, even if disapproved by the Supreme Court was overwhelmingly rejected.

The court now vetoes an act of Congress after it is passed, and a unanimous Congress can not make it constitutional or valid *if the court's action is constitutional.*

Such a provision in the Constitution would have defeated it before the States, yet by slow degrees the Supreme Court has

assumed, without constitutional warrant, to declare acts of Congress unconstitutional. The Constitution is one of delegated powers, and it does not delegate the right to declare statutes unconstitutional.

The courts of no republic have such authority. In the great Republics of New Zealand, Australia, Switzerland, and France, and even in the Empires of Great Britain and Germany, Austria, and of Denmark, the courts exercise no such right.

I understand the constitution of Mexico, our great neighbor on the south, directly forbids the courts to declare unconstitutional an act of the Congress of Mexico.

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The conduct of George Jeffreys, lord chief justice of England, in holding acts of Parliament invalid, caused the revolution of 1688 in England.

The revolution of 1688 led to the act of settlement of 1701, since which time Parliament has exercised the right of recall of English judges.

Thomas Jefferson, in his letter to Mr. Jarvis, in 1820, wisely said:

> 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.

John Marshall, the famous Chief Justice of the Supreme Court, before he became Chief Justice, declared in the presence of the Supreme Court:

> 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 a jurisdiction is *expressly* given by the Constitution. (Ware *v.* Hylton, 3 Dall., 211.)

No one pretends that the jurisdiction is *expressly* given by the Constitution, and John Marshall ought to have known it was expressly refused.

In all of the great Governments of Great Britain, Germany, France, Switzerland, and so forth, the Parliament decides the constitutionality of its own acts, being responsible to the suffrage of the people. The Congress of the United States—consisting of 483 elected representatives of the people in the Senate and House, who took a solemn oath of office before Almighty God that they would faithfully observe the Constitution—and the President are naturally better qualified and fitted to determine the constitutionality of their own acts, being immediately responsible to their people at home, than any other power. They are better qualified to do this than the nine lawyers comprising the Supreme Court, who are appointed for life, and who are not responsible to the people and who are not elected by the people. The Supreme Court is appointed by the President, the President being nominated by a national convention consisting of delegates three degrees removed from the people, and elected by electors several times removed from the people.

Those who are directly responsible to the people, those who have by constitutional authority the right to make the laws, are charged by the Constitution with the duty of observing the Constitution in making such laws, and they take a solemn oath to perform this very function.

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To allow their decisions to be set aside by any tribunal not responsible to the people, not elected by the people, not subject to the recall of the people, or of the people's representatives, is to establish a judicial oligarchy and to overthrow the Republic. It very nearly overthrew the Republic under the Dred Scott decision attempting to nationalize slavery.

To permit the Supreme Court to nullify acts of Congress, declared by Congress to be constitutional, is to permit the judicial branch to overthrow the legislative branch, as it has overthrown the antitrust law without declaring it unconstitutional. No such power was intended by the Constitution to be granted to the judiciary branch. This doctrine was most emphatically denied by President Jackson in the case of the United States Bank, which the Supreme Court attempted to uphold against his policy. Jackson did not permit it, and received the approval of the people of the country.

THE JUDICIAL RULING POWER HAS BECOME A BULWARK OF SPECIAL PRIVILEGE.

Up to 1887 20 Federal statutes and 185 State statutes had been held invalid by the Supreme Court of the United States alone. This does not include the innumerable State statutes which the lower Federal courts have nullified under the shield of the Supreme Court decisions. This list will be found in One hundred and thirty-first United States Reports, Appendix CCXXXV, and since that time this list has been greatly increased, and the decisions have been most objectionable since 1887. These decisions have usually been made by a divided court, but in some cases the change of a single vote would have completely changed the result. The legislation thus destroyed was practically all carefully devised to meet existing and recognized evils, and enacted in response to an overwhelming demand of the people. (Gilbert E. Roe.)

These various decisions have not only nullified statutes of the greatest importance, passed for the protection of the people, but other decisions have been made, which are, in effect, judicial legislation.

THE GREAT INDUSTRIAL CORPORATIONS HAVE BEEN SHIELDED UNDER THESE DECISIONS, THE CONTROL OF RAILWAYS AND MONOPOLIES OBSTRUCTED, COMPENSATION FOR INDUSTRIAL ACCIDENTS DEFEATED, AND THE ARBITRATION OF INDUSTRIAL DISPUTES STRUCK DOWN, AND VARIOUS STATE STATUTES VETOED AND ABOLISHED.

Out of the great multitude I submit a few instances as illustrations. For example:

In *ex parte* Young (209 U. S. 123) the attorney general of Minnesota is punished for contempt for performing his duty in obedience to the statute of the State of Minnesota regulating the rates of public-service corporations.

The *statute of Texas* was set aside as unconstitutional in the case of Galveston, Harrisburg & San Antonio Railroad Co. versus the State of Texas (210 U. S., 217), taxing the gross receipts of railroad companies within the State.

The *statute of Kansas* taxing the Western Union Telegraph Co. was set aside in like manner. (216 U. S., 1.)

The *Oklahoma constitution* establishing a corporation commission was declared invalid under the Constitution of the United States by the decision of Justice Hook, March 29, 1911.

Judge Sanborn's decision in the case of Sheppard versus Northern Pacific Railway Co. on April 11 practically destroyed the Minnesota statute providing for the regulation of rates of public-service corporations.

The fourteenth amendment, intended to protect the negro, has been twisted from its purpose to protect the trusts and monopolies in imposing long hours of labor on employees on the absurd

theory that to deny the employee the right to work long hours is a denial of his constitutional "privileges."

Everyone knows that the sole intent and purpose of the people in adding this amendment to the Constitution was to protect the then recently emancipated negroes in their rights of citizenship. The courts, however, have made this amendment include all manner of trusts and corporations and of contracts and practices, none of which were even in the thoughts of the people when they adopted the amendment. In the hands of the courts this amendment has become a shield to protect corporations and combinations of wealth from the legislation aimed at them by an indignant public and also a sword by which statute after statute has been cut down, enacted by the lawmaking branch of the Government in the public interest. (Roe.)

The employers' liability act, for the protection of employees, was held unconstitutional by 5 to 4. (39 Cong. Rec., 11, 1904; 40 Cong. Rec., 93, 1905.)

The compulsory arbitration act, passed as the result of the great strike at Chicago in 1894 and intended to prevent the recurrence of such unfortunate difficulties, was destroyed by the Supreme Court. (Adair *v.* U. S., 208 U. S., 164.)

The interstate-commerce act has been emasculated by the Supreme Court. (Exhibit A.)

The wholesale liquor interest was protected by the so-called package decision (Lesley *v.* Hardin, 135 U. S., 100), and it required a special act of Congress to authorize police powers of the States to apply to liquor in original packages. (Wilkerson *v.* Rahrer, 140 U. S., 545.)

The principles laid down in the Declaration of Independence were reversed in the insular cases, holding that this Republic had imperial power to govern and control other people *as subjects*, et cetera.

The workmen's compensation law of New York was, in like manner, destroyed by the New York courts. (Ives *v.* So. Buffalo Ry. Co., 201 N. Y., 271.)

The income tax law was struck down in like manner by the Supreme Court. The serious error of the Supreme Court in this case I heretofore pointed out on the floor of the Senate, where the inhibition of a direct tax on a State was absurdly construed to inhibit a direct tax on a citizen of the United States. (May 7, 1909, Rec., 1821, and May 17, 1909, Rec., 2104.) The decision in his case, by the change of the vote of one judge—of one lawyer in this court, appointed at whose instance we do not know—has cost the mass of the people of the United States a hundred million a year for over 16 years, $1,600,000,000 in all, and relieved those best able to bear the tax of a like amount.

One billion six hundred millions of dollars by the vote of one man, appointed by what influence? We do not know and can not say. No such power ought to be put in the hands of any man. No man not responsible to the people or the representatives of the people ought to have the power to control the fiscal policy of this Nation contrary to the law of the people of the Nation and contrary to the will of the Senate of the United States and the Congress of the United States. No such unconstitutional decision would have been rendered if the court had been subject to recall.

What better evidence could be afforded of the patience, forbearance, and conservatism of the people than that they have so long borne patiently with such a decision?

Mr Justice Field, in his opinion in this case, spoke of the income tax as "*the present assault upon capital*," and suggested that, if the court allowed it to stand, the time would come when the limitation on the tax on incomes might be designated by "a board of walking delegates." This insolent reference would have justified his impeachment by Congress.

Justice Jackson, on this court, declared this decision "*the most disastrous blow ever struck at the constitutional power of Congress.*"

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Justice Brown expressed the fear that the decision, in some moment of national peril, would rise up to "*frustrate the will and paralyze the arm*" of Congress. He said:

> I hope it may not prove *the first step toward the despotism of wealth.* As I can not escape the conviction that the decision of the court in this great case is fraught with *immeasurable danger to the future of* the country, and that *it approaches the proportions of a national calamity,* I feel it my duty to enter my protest against it.

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Justice Harlan said it was to be "deeply deplored" "as a disaster to the country," and said:

> I can not assent to an interpretation of the Constitution that *impairs and cripples the just powers of the National Government in the essential matter of taxation* and at the same time *discriminates against the greater part* of the people of our country.

Justice Jackson, Justice Brown, and Justice Harlan are not radicals, but are all conservatives and patriots, and they deserve the thanks of the country for pointing out the dangerous character of the decisions of the Supreme Court in this and other cases.

The most serious feature of this decision was that the real question in the minds of the judges was not its conflict with the Constitution, but *their view of the expediency of the income tax. They thought it bad policy,* and *for that reason found it unconstitutional by an intellectual legerdemain to set aside the unbroken precedents of the Supreme Court itself for over a hundred years.*

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THE ANTITRUST ACT.

The *Sherman antitrust law has,* by the recent decisions of the Supreme Court in the Standard Oil case and in the Tobacco Trust case by writing in the word "unreasonable," *been effectually destroyed.*

It was loudly proclaimed that the Standard Oil monopoly had been dissolved by this decision. The fact is that the Standard Oil stock immediately went up, instead of down, after this decision was rendered. On May 15, 1911, the day of the decision, it was 679; and on May 19, four days later, it was 686, after the owners of this stock had had time to digest the opinion.

The packers who had been indicted as guilty of a crime, under this statute—Sherman antitrust—immediately offered the defense that their restraint of trade had been reasonable, and as they are entitled to a reasonable doubt, *the criminal part of this statute is made nugatory by the Supreme Court of the United States.* The court has, in effect, vetoed the act of Congress by judicial legislation.

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THE THEORY OF JUDICIAL INFALLIBILITY.

It has always been the habit of kings and potentates to surround themselves with pomp and ceremony to impress the mass of men with their sacred function. They have claimed to receive the right to rule from God himself, and to rule by divine right. The judge in ancient times wore a huge horsehair wig, silk gown, and ermine. It impressed the people with the enormous dignity of the individual so attired. It raised the presumption of his infallibility. It excited the reverence of men, and so *those who have found their shelter behind a judicial oligarchy have impressed tremendously upon the people of this country the idea of judicial infallibility.* We are taught that we should reverence the courts; that we should not question their judgments, and when the Supreme Court of the United States has spoken it should no more be questioned than we should question the word of God.

I believe that the people should be taught to reverence the judicial branch of the Government, and I believe the judicial branch of the Government should be so framed as to merit reverence. I have a reverence for government. I have a reverence for the judiciary. I have a great respect for the judges on the bench, yet I should not hesitate to vote for the impeachment of a corrupt judge, nor would I hesitate to vote for the recall of a judge who merited recall or a judge who regarded an income tax as an assault on wealth. The theory of judicial infallibility has the same meritorious foundation of truth as Santa Claus. It is a pleasing fiction suitable for very young children.

Four out of five of these distinguished justices and five out of four are constantly assuring the country, with great gravity and decorum, in their various opinions of the honorable and distinguished fallibility of their brethren on the bench. If we take a series of cases, each judge in turn will be found in the minority and will be discovered in the interesting situation of having the majority of the Supreme Court declaring his fallibility. Each judge in turn is proven to be fallible by the Supreme Court of the United States, until not a single justice is left whose fallibility has not been judicially ascertained by a majority of the Supreme Bench of the United States. This is interesting but not surprising, for nobody ever imagined in the first case that the justices on the bench were anything but fallible. In the Legal Tender cases did they not reverse themselves? And was not the court packed by President Grant, with the connivance of Congress, who first reduced the court and then added to it for this very purpose? In the Standard Oil case and the Tobacco Trust case did not the Supreme Court reverse itself and its own decisions in the Inter-Missouri Freight case of 1897 and in the Joint Traffic case in 1898, in which the court expressly refused to write the word "unreasonable" before "restraint of trade"? This fiction of judicial infallibility might as well be abandoned by thinking men.

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Congress is authorized by the Constitution (Art. III, sec. 1) to ordain and establish the Supreme Court and the inferior courts. By the judiciary act of September 24, 1789 (1 Stat., 73), it did ordain and establish these courts, designating how many judges should be on the court, providing them with suitable conveniences, fixed the time when they should hold office

and the place where they should hold office, providing their salary, and annually thereafter made the appropriation to keep them in office and compensate them for their services.

Congress has, since then, increased the number of judges of the Supreme Court. It has diminished the number of the Supreme Court, as it did in the Legal Tender cases, to 7 judges, and thereafter increased the number again to 9 judges (Apr. 10, 1869), and obviously under the law could provide for 25 judges on this bench or 75 or diminish it to 3 judges. It certainly has the *legal power* to refuse to appropriate its salaries if it wants to do so.

The exercise of such powers as I have enumerated—the power of impeachment, the power to ordain and establish the court, to determine the number of judges on the bench, the power to pay or withhold salaries, to determine when it shall sit and where it shall sit—certainly carries with it the smaller and lesser power of recalling judges from the bench for bad behavior and to determine what bad behavior is.

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PUBLIC OPINION OF JUDICIAL ABUSE.

Mr. President, the country has been profoundly disturbed by the aggression of the courts, by the nullification of acts of Congress on alleged constitutional grounds, by judicial legislation, even where the constitutionality of the act was conceded, and by the other judicial aggressions I have pointed out.

The Republican platform of 1908 declares against certain injunctions by the court.

The Democratic platform (1908) protests against government by injunction.

The Independence Party (1908) condemns the arbitrary use of injunctions and contempt proceedings by the courts as a violation of the fundamental American right of trial by jury.

The People's Party of 1908 emphatically condemned the unjust assumption of authority by inferior Federal courts into nullifying by injunction the laws of the State and demanding its prohibition, and so forth.

The Socialist Party, casting half a million votes and representing two and a half million people in 1908, said "our courts are in the hands of the ruling classes."

(Col. Roosevelt; President Taft; President Lincoln; United States Circuit Judge Grosscup; Hon. Walter L. Clark, chief justice of the Supreme Court of North Carolina; Hon. William Jennings Bryan; Mr. Justice Harlan; Hon. Gilbert E. Roe; and others, quoted to show the attitude of the courts.)

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I believe in the sovereignty of the people of the United States and not in the sovereignty of any judicial tribunal appointed for life. I therefore believe that they should be subject to recall, as the constitution authorizes.

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Is it possible that all of the States of the Union are wrong in their view of the necessity of controlling the judiciary by the popular vote? And if they be right, Mr. President, by what reasoning do the Senators on this floor representing those States disregard or lightly set aside the ascertained views of policy of the people of their own States?

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