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# Withdrawing Power from Federal Courts to Declare Acts of Congress Void

## AN ADDRESS

DELIVERED AT THE AUDITORIUM IN OKLAHOMA CITY, OKLA., JANUARY 27, 1917

*By*

HON. ROBERT L. OWEN
UNITED STATES SENATOR

PRESENTED BY MR. SHEPPARD
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## SENATE RESOLUTION NO. 383.

[REPORTED BY MR. CHILTON.]

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IN THE SENATE OF THE UNITED STATES,
*March 2, 1917.*

*Resolved*, That the manuscript submitted by the Senator from Texas (Mr. Sheppard), on February twenty-seventh, nineteen hundred and seventeen, entitled "Withdrawing from the Federal Courts the Power to Declare Acts of Congress Void," an address by Senator Robert L. Owen, be printed as a Senate document.

Attest:

JAMES M. BAKER,
*Secretary.*

# WITHDRAWING POWER FROM FEDERAL COURTS TO DECLARE ACTS OF CONGRESS VOID.

By Senator Robert L. Owen.

*Oklahoma City, Okla., January 27, 1917.*

Ladies and Gentlemen, Fellow Citizens of Oklahoma:

I come to speak to you on a matter which I regard as of very great gravity. It is the question of withdrawing from the Federal courts a power which they have long been permitted by Congress to exercise, to declare acts of Congress void as unconstitutional.

This country has reached a point where public opinion has slowly come to the conclusion that the refuge of monopoly is to be found in the Federal courts. This country has perceived many acts intended to protect human life, intended to safeguard the mass of men, nullified by the Federal judiciary.

Every monopolist and his attorney, actual, hopeful, or expectant [laughter], will swear by the Federal courts and the Constitution as by the Arc of the Covenant and rush to its defense like the Sons of Levy, especially when the Constitution is not being assailed but being properly interpreted.

I have demanded that Congress should exercise its plain, conceded, constitutional right and withdraw from the Federal courts the power to declare acts of Congress unconstitutional or void on grounds of public policy. [Applause.] I have made this demand because Congress can not otherwise protect the common people against predatory monopoly. [Applause.]

Congress can not otherwise furnish the American people the means by which to adjust the great questions arising between capital and labor, great questions affecting the business, political, moral, and physical life of the Nation.

I have, therefore, desired, as one of the public servants of Oklahoma, to be permitted to advise the people of this State to instruct their Representatives in Congress and in the Oklahoma Legislature to support my demand for the control of the Federal judiciary, if the people of Oklahoma wish to abate the high cost of living and to enjoy fully their inalienable and indefeasible rights of self-government.

One of the most skillful special pleaders in Oklahoma, a gentleman very attractive socially, of considerable learning, and of great oratorical power, has seen fit to throw himself at the head of the Sons of Levy in defending the Ark of the Covenant, which being interpreted means to defend the alleged right of nine learned lawyers, appointed for life, by previous administrations, and out of sympathy with the succeeding administration or with national public opinion but sitting on the Federal bench to nullify and abort the legislative power

of a hundred million people. In a burst of beautiful eloquence, he quotes the Holy Scriptures as the clarion call, and in the words of the Prophet Joshua, proclaims: "As for me and my house, we will serve the Lord." [Laughter and applause.]

In answer to this ringing challenge, I answer: "I am willing to serve the people, the common people, the commonest kind of people, and let them judge who the Lord is the Sons of Levy serve."

In order that you may clearly understand what it is I have proposed, and why, I present to you the following resolution:

Whereas the Constitution of the United States gives no authority to any judicial officer to declare unconstitutional an act which has been declared constitutional by a majority of the Members of the United States Senate and of the House of Representatives and by the President of the United States, who, on their several oaths, have declared the opinion in the passage of such act that it is constitutional; and

Whereas in the Constitutional Convention, in which the Constitution of the United States was framed, the motion was three times made to give to the Supreme Court, in some mild form, the right to express an opinion upon the constitutionality of acts of Congress, and was three times overwhelmingly rejected; and

Whereas such assumption of power by the Federal courts interferes with the reasonable excercise of the sovereignty of the people of the United States and diverts it from the hands of the representatives of the people in Congress assembled to a tribunal appointed for life and subject to no review and to no control by the people of the United States, and is therefore against a wise public policy; and

Whereas the declaration by any Federal court that the acts of Congress are unconstitutional constitutes an usurpation of power: Therefore be it

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the passage of this act Federal judges are forbidden to declare any act of Congress unconstitutional.

No appeal shall be permitted in any case in which the constitutionality of an act of Congress is challenged, the passage by Congress of any act being deemed conclusive presumption of the constitutionality of such act.

Any Federal judge who declares any act passed by the Congress of the United States to be unconstitutional is hereby declared to be guilty of violating the constitutional requirement of "good behavior" upon which his tenure of office rests and shall be held by such decision ipso facto to have vacated his office.

SEC. 2. That the President of the United States is hereby authorized to nominate a successor to fill the position vacated by such judicial officer.

(After resolution there was much applause.)

This resolution I intend to amend so that if any statutory Federal court thinks an act repugnant to the Constitution he shall certify the act to Congress and suspend final action on the case until further instructed by Congress on the point the court may raise and leave the appeal from State Courts as it now stands. In this way a safeguard will be provided against a possible inadvertence in any act of Congress.

The meaning of this resolution is that when inferior Federal judges, such as district, circuit, and other statutory judges, interpret an act which Congress has passed, they shall deem the passage of the act as establishing a conclusive presumption of the constitutionality of such act under penalty of vacating their office.

The resolution means that the Supreme Court will have no opportunity to pass on the constitutionality of an act of Congress under its appellate jurisdiction, which is the only jurisdiction in which such questions can arise, except from State Courts and under which is no probable danger to the public interest. Congress has the constitutional power to withhold from the appellate power of the Supreme Court the right to pass on the constitutionality of the acts of Congress. [Applause.]

The McCardle case, 1868: The Supreme Court decided in that case by unanimous opinion that Congress had that power. The Congress has that power, and the time has come for Congress to exercise that power.

The Supreme Court itself has many times sustained this interpretation, as in Wiscart *v.* Dauchey, 3 Dall., 321 (1796); Duroussean *v.* U. S., 6 Cranch., 307 (1810); U. S. *v.* Gordon, 7 Cranch., 287 (1813); Daniels *v.* C., R. I. & P. R. R., 3 Wall., 250 (1865); In re McCardle, 7 Wall., 510 (1868); Nat. Ex. Bk. *v.* Peters, 144 U. S., 570 (1891); Col. C. C. M. Co. *v.* Turck, 150 U. S., 138 (1893).

## CONGRESS AND THE SUPREME COURT NOT COEQUAL.

The law schools have been teaching thousands of boys to be lawyers, have been teaching them that the Constitution established three coordinate, coequal branches of the Government. This is a fundamental error, because there were established three coordinate but not coequal branches of Government. The sovereign law-making power of the people, as far as they delegated such powers, were vested expressly in Congress, using these words:

> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof.

Congress, by statute, established a Supreme Court, the executive departments, and fixed their powers in accordance with the Constitution and in accordance with the power vested in Congress as the law-making power.

Congress fixed the number of judges on the Supreme Court. It can add to that number now or it can diminish the number by an act of Congress.

Congress fixed the compensation of the Supreme Court.

Congress, through the Senate branch, confirms a justice of the Supreme Court before he can take his seat.

Congress can impeach the Supreme Court and remove that court from office. [Applause.]

Congress, under the Constitution, was expressly charged with fixing the appellate jurisdiction of the Supreme Court—and that's all the jurisdiction they have worth mentioning.

The Supreme Court has only original jurisdiction in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party. Only about one such case arises in 10 years. All other jurisdiction is appellate. One case in about 5,000 is under original jurisdiction, about 4,999 cases under appellate jurisdiction.

Congress has the duty imposed upon it under the Constitution to fix that appellate jurisdiction and make such exceptions and such regulations as Congress sees fit.

## THE POWERS OF CONGRESS.

I am talking now of the power of Congress under the Constitution without changing the Constitution, without modifying its meaning, without putting a strained interpretation upon it. I am talking now

of the power. I shall talk presently of the duty of exercising that power and give you the reasons why I think the time has come to exercise it.

The Constitution, Article I, section 1, declares the following powers vested in Congress. I wish you would listen to these powers of Congress:

All legislative powers herein granted shall be vested in the Congress of the United States, which shall consist of a Senate and House of Representatives.

It gave the House of Representatives and the Senate the power to impeach any officer of the United States, including judges. It gave the Senate the power to sit as a high court of impeachment over judges. It gave the Senate the right to advise with the President of the United States and confirm the appointment of all officers of the United States, including judges.

It gave each House the authority to determine its own membership and its own proceedings.

It exempted the Members of the Senate and the House from arrest by judges except for treason, felony, breach of the peace.

It provided that they should not be questioned in any place about any speech or debate in either House, not even by judges.

It gave Congress the power to lay and collect taxes, duties, imposts, and excises; to pay the debts and pay for the common defense and general welfare of the United States.

To borrow money. It has borrowed billions of dollars.

To regulate commerce. It has regulated hundreds of billions of commerce.

To establish a uniform rule of naturalization and uniform laws on the subject of bankruptcies.

To coin money, to regulate the value thereof and of foreign coin, and fix the standard of weights and measures.

To punish counterfeiters.

To establish post offices and post roads.

To grant patents and copyrights. It has granted over a million patents.

To constitute tribunals inferior to the Supreme Court.

To define and punish piracies and felonies committed on the high seas and offenses against the law of nations.

To declare war, grant letters of mark and reprisal, and to make rules concerning captures on land and water.

To raise and support armies.

To provide and maintain a navy.

To make rules for the government and regulation of the land and naval forces.

To provide for calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasions.

To provide for organizing and disciplining the militia, and for governing such part of them as may be employed in the service of the United States.

To exercise authority over all places purchased by Congress, carrying into execution the foregoing powers and all other powers vested by the Constitution in the Government of the United States or in any department or officer thereof, including the judicial department.

The Constitution expressly provides that Congress shall not do certain things, for instance:

It forbade interference with the slave trade up to 1808.

It forbade the suspension of the writ of habeas corpus except where the public safety required it.

It forbade a bill of attainder or ex post facto law.

It forbade a capitation or other direct tax on the States unless in proportion to the census.

It forbade an export duty.

It forbade a preference to be given to the port of one State over another.

It forbade expenditure of money except by lawful appropriations.

It forbade titles of nobility.

And the people refused to ratify that Constitution until the Bill of Rights in the 10 amendments were agreed to be added to that Constitution and made a part of it. In that Bill of Rights were reserved the various rights of the people, which Congress was charged with the duty of defending, as follows:

The first, free religion. The gentlemen who wrote that Constitution forgot to put that in. [Applause.]

Free speech.

A free press. The gentlemen who wrote that Constitution forgot to put that in. Thomas Jefferson demanded that they go in.

Free right of assembly.

Free right of petition for redress of grievances. The gentlemen who wrote that Constitution forgot to put those things in.

The right of the State to have troops.

The right of the people to keep and bear arms.

The right of the people to be free from the quartering of soldiers upon them.

Freedom from unlawful searches and seizures.

Freedom from arrest for crime except on indictment.

The right of life, liberty, and property, not to be interfered with except by due process of law.

The right against taking private property for public use, without just compensation.

The right for speedy public trial by an impartial jury. The gentlemen who wrote the Constitution forgot to put all those things in. And when they came home and saw Thomas Jefferson they heard from him, and others like him, and they heard from the people of the country, too. They could not have had the Constitution ratified except for that Bill of Rights, put in this Constitution.

The right to be informed of the nature of the accusation against a citizen.

The right to be confronted with witnesses against a citizen.

The right of compulsory process for obtaining witnesses.

The right to have counsel in the defense of the rights of a citizen.

The right to a trial by jury.

The right against excessive bail, excessive fines, or cruel or unusual punishment.

The gentlemen who wrote this Constitution forgot to put those things in, but this Bill of Rights safeguarded the people, and it was on the demand of the people and of men like Thomas Jefferson, who believed in the people and stood for them, that this Bill of Rights went into this Constitution. [Applause.]

THE PEOPLE ALONE CAN CONTROL CONGRESS.

I refer to that because it is a part of this argument.

My friend, Judge Charles B. Stuart, quotes with great zeal Alexander Hamilton, Gerry, and others, who didn't believe in democracy, who regarded "all political evils as due to the **turbulence** of the democracy."

Alexander Hamilton believed in a President appointed for life, with the right to appoint governors of States for life, consisting of those who were representing the aristocracy of the country, in order that the people might be held in subjection and governed **according to law.** [Laughter and applause.]

THE PEOPLE CONTROL CONGRESS.

These instructions which I have read to you were laid upon the Congress by the people, and the people retained in their own hands all powers not expressly granted to Congress. Congress was charged with the lawmaking power of the people, **subject to the people themselves alone.**

And the people took every pains in this Constitution to require the entire House of Representatives and one-third of the Senate, every two years, to come back before the people and give an account of their stewardship, and receive the approval of the people before they continued the duty of making laws for the people. In that way the people kept in their own hands the sovereignty which was declared vested in them by the Bill of Rights in every one of the 48 States in this Union. Read these constitutions.

On the 31st of July, 1911, I put in the Congressional Record an extract from the constitution of each of the 48 States on this very point, because at that time, five years or more ago now, when the Standard Oil decision was rendered I made a demand for the control of the Federal judiciary, and I put in the record then the power which the people of this country had retained over the State judiciary. The people kept control of Congress, and when Congress passes a law in pursuance of the Constitution, the Congress itself declares that law to be the Supreme law of the land and does not say that the law may be declared void by the judges. [Much applause.]

Unhappily, Congress not having in express terms forbidden this unwise practice Congress may be fairly held to have acquiesced in it.

The Constitution requires every Senator and every Representative in Congress to take a solemn oath to support faithfully and truly the Constitution of the United States.

When, on their oaths, the members of the House of Representatives of the United States, and the United States Senate, with the approval of the Vice President of the United States, who presides over the Senate of the United States, and with the approval of the President of the United States, passes an Act, a conclusive presumption arises that the act is constitutional, and this presumption can only be overthrown by the disapproval of the people of the United States, who will return a new Congress and correct any unconstitutional or impolitic acts of an expiring Congress. [Applause.]

THE SUPREMACY OF THE LEGISLATIVE POWERS OF OTHER NATIONS.

No civilized nation permits the judges on the bench to declare unconstitutional or void the acts of the Parliament. Great Britain, in 1700, February 6, declared that judges should hold their office "while they behaved themselves well," subject alone to removal by resolution of Parliament. That is what I proposed in 1911 for the United States. I thought the time had then come for that rule in the United States.

France does not permit the laws of Parliament to be set aside by the judges.

Italy, in its written constitutional law, provides that the judges shall not set aside an act of the Parliament.

It is the written law of Austria.

It is the written law of Germany.

It is the written law of Belgium.

It is the written law of Denmark.

It is the written law of Australia.

It is the written law of New Zealand.

I speak of these things because the civilized world which has considered government *by the people*, having all agreed upon this doctrine, there must be sound reason for it. It is not an accident. It is written out of the blood and tears of centuries. [Applause.]

It is true that in 1788 several lawyers of distinction (and privilege) contended that the contemplated Supreme Court of the United States should have the right to declare acts of Congress unconstitutional. Judge Stuart quotes several of them. He quotes Daniel Webster; he quotes Oliver Ellsworth; he quotes John Marshall and Alexander Hamilton. All I care to say now is that the selfish opinions of such lawyers of aristocracy were no more convincing then than they are now. [Applause and laughter.]

Oliver Ellsworth, and Daniel Webster, and Alexander Hamilton and John Marshall did make that argument to the great property holders of their States with a view to getting their support for the Constitution, because the Constitution needed friends at that time, but John Marshall, who spoke equally well on either side of the case, defended the Constitution against the charge of Patrick Henry that it would establish a judicial despotism by the following remarks. I want you to listen to John Marshall because he is the patron saint of all the gentlemen who differ with me about this question. Here is what John said. I will not call him by a more familiar name. [Laughter.]

> Congress is empowered to make exceptions to the appellate jurisdiction as to law and 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. (Elliott's Debates, vol. 3, p. 560.)

The plain truth is, the people of the American Colonies who lived under the English practice recognized as a fixed principle of government that the judiciary is subject to the legislative power of the people. The English law that I referred to a moment ago was to that effect, and that law was the law of the Colonies, which they perfectly well understood. It is true that Rhode Island did about this time pass an act which its supreme court declared unconstitu-

tional. It is also true that the legislature put the court out of office for that reason.

It is also true that two or three other States had a similar experience, and the court was rebuked by the people for its conduct in this matter.

The Legislature of New Hampshire removed its supreme court four times on the ground of policy.

On July 31, 1911, in Congress, and before the Bar Association of Oklahoma on the 23d day of December, 1911 (vol. 5), I explained the extraordinary pains the people of the United States have taken to prevent the usurpation of their power by the judges.

Now, listen to this. Here is what the people at home think—here is what the common people think; you will find the details in Volume 5:

### THE PEOPLE CONTROL THE STATE JUDICIARY.

Forty-eight States have two ways of removing judges by impeachment, and either by a short tenure of office or by resolution of the legislature. Thirty-two States have three ways of removing judges. Thirty-two States may remove judges by resolution of the State legislature. Seven States have four ways of removing judges, viz, impeachment, legislative recall, short tenure of office, and popular recall.

They started the popular recall in Oregon, first, because of the gross aggression of the railroad interests and other private interests of the State, which had corrupted practically their whole government in the interest of property against the people. The recall was applied to all officials; no exception was made as to judges. The judges of that State now would compare favorably with those of any other State. And they did the same thing in California recently for the same reason, Hiram Johnson making his campaign for governor and winning overwhelmingly, when the chief issue was the recall of judges and on the slogan that "the Southern Pacific has got to go out of the governing business in California." Do not make any mistake about this matter.

Forty-five States recall judges by a short tenure of office and all the States, the 48 States, have the right of impeachment. No one ever hears any complaint of our State judiciary for the very reason the judiciary is in sympathy with the people and serve them acceptably.

Oklahoma, as we all know, has reason to be especially proud of her supreme court. Its members are nominated and elected by the people and the justices of the supreme court are in sympathy with the people.

### THE PEOPLE WISH THE FEDERAL JUDICIARY RESTRAINED.

The people are overwhelmingly opposed to the usurpation of legislative power by the Federal judiciary appointed for life.

Nobody knew better than John Marshall himself that the Supreme Court had no right to declare an act of Congress void under the Constitution, for in the case of Ware *v.* Hilton, John Marshall stated—

now listen to the patron saint of the opposition—this is John, John Marshall whom I am quoting:—

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.

The word "municipal" is used in the broadest sense.

This is John Marshall. And nobody pretends that there is any express provision in the Constitution of the United States conferring any such authority.

The highest authority on English and American law has been Sir William Blackstone. He is the one that all law clerks, law schools, and law students swear by. Listen to Sir William. He says:

When the main object of a statute is unreasonable the judges are not at liberty to reject it, for that were to set the judicial power above that of the legislature, which would be subversive of all government. (Blackstone's Commentaries, p. 85, sec. 3.)

I have to talk in the language of the lawyers, otherwise I would not perhaps be understood by them.

A VOICE. Judge Stuart forgot to say that.

Senator OWEN. Perhaps he had not recently read Blackstone.

Thomas Jefferson had a view full of apprehension after John Marshall came on the bench.

The Congress did not rebuke Marshall for the Marbury *v.* Madison case, and Thomas Jefferson didn't see the way clearly how to protect the country against that aggression, and this is what he said:

It has been my opinion that the germ of dissolution of our Federal Government is in the constitution of the Federal judiciary, an irrepressible body working like gravity by day and by night, gaining a little to-day and a little to-morrow and advancing with a noiseless step like a thief, over the field of jurisdiction, until all shall be usurped. (Federal Law Journal, vol. 66, p. 293.)

I beg you to observe that I quote the page whenever I make a reference. Judge Stuart neglected to do that.

Evidently Jefferson did not observe the power of Congress to limit the appellate jurisdiction of the court. If he had, he would not have been afraid at all. The country is in no danger on earth; the Constitution is all right, doesn't have to be changed; it only has to be exemplified and decently interpreted and made to accomplish the ends for which it was intended.

Andrew Jackson is another authority I want to call your attention to. Do you remember what he said of John Marshall in a famous case? He said this:

John Marshall has rendered his decision. Now let us see him enforce it.

That is what Jackson said, but I want to quote you the language of Jackson in the case of the Bank of United States. Jackson said this:

It is maintained by the advocates of the bank that its unconstitutionality, in all its features, ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I can not assent. * * * If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the court must each for itself be guided by its own opinions of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the

constitutionality of any bills or resolutions which may be presented to them for passage or approval, as it is of the Supreme Court, when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges; and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning deserve. (Senate Journal, July, 1832, p. 451.)

President Jackson overlooked the fact that Congress has the power to impeach the President and the Supreme Court and that Congress therefore exercised the sovereign law-making power of the people, but he states correctly that "the Supreme Court must not be permitted to control the Congress."

My friend, Judge Ames, I fear did not clearly understand President Jackson's view in his remarks on "Jackson's day" when he quoted him as authority against my position.

President Jackson overlooked the power of Congress to control the appellate jurisdiction of the Supreme Court, which would make it impossible for the Supreme Court to put itself in mischievous conflict with the sovereign lawmaking power of the Nation.

Abraham Lincoln (I want you to see that I have some friends along the line here; I am not entirely alone) resisted the Dred Scott decision and said that he would not oppose the decision as far as it related to the slave individually, and then he said these memorable words:

But we, nevertheless, do oppose that decision as a political rule which shall be binding on the voter to vote for nobody who thinks it wrong; which shall be binding on the Members of Congress or the President to favor no measure that does not actually concur with the principles of that decision. * * * We propose so resisting it as to have it reversed, if we can, and a new judicial rule established upon this subject. (Works of Jefferson, vol. 12, p. 163.)

Well, he had some trouble in reversing it. It took the bloodiest war in our history to reverse it, and four years of fratricidal strife, and billions of treasure; with grief, sorrow, heartburning and bitter hatred that lasted for generations.

It is hard to reverse the decisions of the Supreme Court by that kind of a method, *but it was reversed.* They declared in the Dred Scott decision slavery a constitutional right. Well, the people didn't think so, and the people changed that decision. The Supreme Court held the Missouri compromise on slavery unconstitutional and void in the Dred Scott decision and held in effect that Congress had no power as a forum to settle the question of slavery as long as a single slaveholder objected. This decision inflamed the North and led to the withdrawal of the Southern States and to war.

### THE CONSTITUTIONAL CONVENTION, 1788.

In the Constitutional Convention which framed this United States Constitution, Edmund Randolph, on June 4, 1787, proposed the following 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 that the dissent of said council *shall amount to a rejection* unless the act of the National Legislature be again passed. (Elliott's Debates, vol. 1, pp. 159, 164, 214.)

They didn't propose to finally veto an act of Congress and never let it go into effect. They only proposed to have a temporary veto, and if Congress insisted on passing it then let it be the law, but even that moderate proposition was three times defeated and never received the vote of over 3 States out of the 13.

A like proposition was also rejected August 5, 1787. (Elliott's Debates, vol. 1, p. 243.)

Only 11 members of the Constitutional Convention out of 65 favored giving the judiciary *any control*. These were Blair, Gerry, Hamilton, King, Mason, Morris, Williamson, Wilson, Baldwin, Brearly, and Livingston.

Hamilton, Morris, Gerry, and several others of this group were known to be strongly opposed to democracy.

George Washington, Charlie Pinkney, James Madison, and many others, 22 in number, are known to have expressly opposed any judicial veto. There were 65 members and only 11 on record as favoring any form of judicial interference with the legislative powers. (This is fully set up in Davis on Judicial Veto, p. 49.)

The Constitution, however, speaks for itself; it puts the sovereign power in Congress, the power to control the appellate jurisdiction, and thus to prevent the exercise of the judicial veto, if it is attempted.

The judicial veto has been attempted.

It has been exercised.

It has been proven highly mischievous.

It has become unendurable. [Applause.]

## MARBURY *v.* MADISON CASE.

John Marshall was a federalist, an aristocrat, a reactionary, a man of considerable ability, with a consuming desire for power, great tenacity of purpose, and a great hatred for Thomas Jefferson and his doctrines.

John Adams, the federalist, took advantage of the election of Jefferson, the democratic republican, to put John Marshall, the federalist, on the bench as Chief Justice for life, as one of his last acts before he turned over the Government to Thomas Jefferson. Keep that in mind, because it meant trouble, and here comes the first trouble. In Marbury *v.* Madison, John Marshall violated the first principles of government of the English-speaking people in assuming the right to declare void the will of the National Legislature.

Congress (under Art. III, sec. 1), in distributing the judicial powers of the United States, when it established the Supreme Court by the judiciary act of 1789, gave the Supreme Court, wisely and justly, and lawfully *in addition* to its "original" jurisdiction, the right to issue a writ of mandamus as a part of the judicial powers of the United States. Why, a little citizen having a case against a great Cabinet officer could hardly expect to get his relief from a small subordinate officer of the judiciary department. When he makes a demand on the Secretary of State for his right he ought to have the backing of the very highest judicial authority—one that can speak to the Secretary of State on terms of some comparative equality.

John Marshall struck down that right on the pretense that Congress had no right to add to the "original" jurisdiction of the Supreme

Court. Congress did not add anything to the "original" jurisdiction of the Supreme Court. The Constitution placed the judicial powers of the United States in the Supreme Court and in such inferior courts as Congress should establish, and Congress, in pursuance of that authority, gave the right of issuing the writ of mandamus to the Supreme Court, as it had a plain constitutional right to do.

A little fellow named Marbury, in the District of Columbia, had been appointed notary public by the retiring administration; his commission had been made out; it had been signed by the President, by the Secretary of State, had the seal on it, and was lying on the table of the Secretary of State for delivery. The incoming Secretary of State refused to deliver it, and Marbury went to John Marshall, Chief Justice of the Supreme Court of the United States, and asked to have a writ of mandamus issued on the Secretary of State to deliver that commission. John Marshall said "no"; that Congress has no right to authorize the Supreme Court to issue writs of mandamus; that was unconstitutional on the part of Congress. And when he refused that jurisdiction of a writ of mandamus he seized the power to declare an act of Congress void, and, therefore, attempted to make himself the judicial ruler of the United States, by exercising a judicial veto over Congress.

The Congress of the United States ought then and there to have impeached John Marshall. [Loud and continued applause.] He was guilty of a violation of the true meaning of the Constitution; he himself in that act violated the spirit and purpose and meaning of the Constitution, and he assumed the sovereign power over the legislative agents of the people of the United States. He held office for life, and there was no way for the people to get at him except by impeachment, a hard and a difficult remedy. A great many men who would think he was wrong in his opinions, who would think that he had done very wrong, would hesitate long before they would use that drastic power, which exercised over a Supreme Court Judge blasts his name for all history. The remedy is too drastic for the offense, because, after all, the Congress can prevent the recurrence of that kind of thing simply by removing the appellate jurisdiction.

Jefferson denounced Marshall as a thief of jurisdiction, and Marshall never repeated that offense.

It was 53 years before it was repeated, in 1856, and then, in the Dred Scott case, it caused the enormous catastrophe of the Civil War.

## FLETCHER VS. PECK CASE.

The next mischievous step taken by John Marshall of national importance was in Fletcher *v.* Peck, where an act of the Georgia Legislature correcting a previous fraud was declared "unconstitutional." In this case the legislature of Georgia had been deliberately corrupted with money by four land companies and induced to pass an act conveying, without adequate compensation, an enormous grant of land, some 40,000,000 acres, belonging to the people of Georgia. The people of Georgia were enraged over it. They came together, turned out the legislature; they elected a new legislature; the new legislature immediately repealed the act. It came up before John Marshall's court, and after solemnly considering it he decided that a State didn't have the right to pass an act "impairing the obligation

of a contract." The most mischievous consequences followed. It was only necessary thereafter to corrupt a legislature and get the grant made—that settled it.

Since that time many courts have announced a wiser principle: That fraud vitiates a contract; that it is no contract when it is obtained corruptly.

### DARTMOUTH COLLEGE CASE.

A far more dangerous opinion followed this Fletcher *v.* Peck case. It was the Dartmouth case—a case that didn't seem to be of any importance at all. The legislature of New Hampshire passed an act increasing the number of trustees of Dartmouth College. The old trustees were Federalists; the new trustees anti-Federalists. Marshall and Washington were Federalists; they opposed the act of the legislature. Duval and Todd supported the legislature. Marshall succeeded in preventing a decision at that term, and by a political campaign the other three judges, Johnson, Livingstone, and Storey, were persuaded to agree with Marshall. (Life of Webster, by Lodge, p. 1–88.)

Listen to these words. Mr. Lodge says:

> The whole business was managed like a quiet, decorous, political campaign.

Chancellor Kent says the decision in that case did more than any other single act proceeding from the authority of the United States to throw an impregnable barrier around all rights and franchises derived from the grant of government. (Kent's Commentaries, p. 419.)

Fifty years later Mr. Chief Justice Cole, of the Iowa Supreme Court, said:

> The practical effect of the Dartmouth College decision is to exalt the rights of the few above those of the many. And it is doubtless true that under the authority of that decision more monopolies have been created and perpetuated and more wrongs and outrages upon the people effected than by any other single instrumentality of the Government. (Dubuque *v.* Ry. Co., 39 Iowa, 95.)

Listen to what Judge Cooley, the great constitutional lawyer, says:

> It is under the protection of the decision of the Dartmouth College case that the most enormous and threatening powers in our country have been created. Some of the great and wealthy corporations actually having greater influence in the country at large, and upon the legislation of the country, than the States to which they owe their corporate existence. Every privilege granted, or right conferred—no matter by what means or on what pretense—being made inviolable by the Constitution, the Government is frequently found stripped of its authority in very important particulars by unwise, careless, and corrupt legislation; and a clause of the Federal Constitution whose purpose was to preclude the repudiation of debts and just contracts, protects and perpetuates the evil. To guard against such calamities in the future, it is customary now for the people in forming their constitutions, to forbid the granting of corporate powers except subject to amendment and repeal, but the improvident grants of an early day are beyond their reach. (Cooley on Con. Lim., 279.)

When the Supreme Court declared the Missouri compromise, passed by Congress unconstitutional and slavery a constitutional right, it took a frightful war to settle the error of this judicial usurpation.

When the Supreme Court declared the legal tender act void, they took from the Government one of the strongest instrumentalities for the protection of the great Republic in time of war.

This gross error was corrected by reversing it. Gen. Grant did that by appointing two new judges in favor of the legal-tender act whose votes corrected the error of the Supreme Court by reversing the court. It was an undignified remedy but better than none. Congress has this right now, but the American people do not and will not approve any such practice. The judges on the Federal bench ought to represent the matured judgment and will of the American people.

### INCOME-TAX CASE.

When the Supreme Court declared the income tax void and transferred the taxes from the wealth of the country, which is protected by the expenditure of such taxes, it disregarded the will of the people of the United States and of Congress, vetoed the action of the House of Representatives, of the United States Senate, and of the President, reversed the decisions of the Supreme Court of the United States for a hundred years, and it took the people 16 years to correct it by a constitutional amendment, at a cost to the consuming masses of over $1,600,000,000.

### SHERMAN ANTITRUST ACT.

When the Supreme Court declared the Sherman antitrust law only intended to prohibit *unreasonable* restraint of trade, they rendered the act nugatory and void. The effect of this decision was to enthrone monopoly and to raise the cost of living.

### EIGHT-HOUR LAW.

If the Supreme Court should now nullify the eight-hour law and the railways of the country should arm several hundred thousand strike breakers with guns and pistols to face several hundred thousand conductors, engineers, firemen, and brakemen, and their sympathizers, no man can foresee the harmful consequences of such judicial veto of the act of Congress.

### THE REMEDY FOR THE JUDICIAL VETO.

The remedy which I have proposed is very simple.

The Constitution gives Congress all the power necessary.

All that Congress has to do is to pass the resolution I have proposed. The Constitution gives Congress entire control of the appellate jurisdiction of the Supreme Court in the following words:

> In all cases affecting ambassadors, other public ministers and consuls, and 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 exception and under such regulation as the Congress shall make.

The power of Congress in this matter was passed on in the case of William H. McCardle, an editor in southern Mississippi, arrested by Maj. Gen. Ord who was putting into effect the reconstruction Act in 1868. McCardle sued out a writ of habeas corpus from the circuit court to the Supreme Court of the United States. The

Supreme Court refused to exercise appellate jurisdiction and dismissed the case on the ground that Congress had withdrawn appellate jurisdiction in such habeas corpus cases, and that Congress had the constitutional power to do so. It was a unanimous opinion. The court said:

> 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 can not doubt as to this. Without jurisdiction the court can not 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 obvious, therefore, that we have no occasion to discuss the past history of the Supreme Court on the point of whether they have usurped jurisdiction in declaring congressional statutes void. We need not go into the past. We might say that since Congress has permitted the right without protest to pass upon acts of Congress, that it was not unreasonable that the Justices should think themselves justified in exercising the power of saying an act of Congress was unconstitutional. I am willing to acquiesce in that for the purpose of the argument but not historically. My proposition deals with the future, not the past.

I have demonstrated without the possibility of a doubt that this power is in Congress, and conceded to be in Congress by a unanimous opinion of the Supreme Court of the United States.

And I call your attention to the remarkable fact that my friend, Judge Stuart, in answering me, never made reference to that fact.

A VOICE. Maybe he forgot it.

Mr. OWEN. Yes; maybe he forgot it.

Now, the justification for the withdrawal of these cases from the Supreme Court I am going to state very briefly:

These decisions which have been rendered have been against your interest.

I want you to know that in my mind is no purpose to lower the dignity of that great court. I respect and honor that great court; I respect the learned and able gentlemen who comprise that court, individually and personally; I believe in their integrity of mind; I believe in their learning; I believe in their high personal honor; but I tell you also that I believe when you have a jury of Irishmen you will get a home-rule decision. [Laughter and applause.]

## FALLIBILITY OF MAN AND OF JUDGES.

All men are fallible. Even judges are fallible. On the Supreme Court, every season cases are decided by the hundreds, as the term goes by, in which constantly there is a minority of judges on one side and a majority of the judges on the other, and every time the majority decides a case against the minority there is a judicial ascertainment by the Supreme Court of the United States as to the fallibility of each one of the members on the minority—did you get that?—and there isn't a week that some of those judges are not in the minority, so that we have every day through the term the judicial ascertainment by the majority of the Supreme Court of the United

States of the fallibility of every one of its own members. Why, there is nothing surprising about that—everybody knew that, of course. Just happened not to think of it? They are human beings after all.

Just look at this Income Tax case, and look at the dogma of the Supreme Court on the question of deciding an act unconstitutional only when the unconstitutionality is overwhelmingly established, and only when there is no doubt about the unconstitutionality of the act. The professional dogma of the court is to give all benefits of the doubt in favor of the constitutionality. The trouble about the dogma is they never pay any vital attention to it. It is only a theoretical dogma; it is not real; I will show you why. Here is the Income Tax case. For a hundred years the Supreme Court had sustained the right of Congress to pass an income-tax law. Here was the income-tax law, passed by the House of Representatives, they said it was constitutional; passed by the Senate, they said it was constitutional; approved by the President of the United States, he said it was constitutional. Here are the decisions of the Supreme Court of the United States for a hundred years, and they said it was constitutional, and here were five judges on the bench, on the first vote, they said it was constitutional, and then Judge Blank reversed himself over night and joined the other four, which made them five, and then they decided in spite of this dogma that there was no doubt whatever about its unconstitutionality. Now, that is quite a remarkable thing. Here is Judge Blank in that case who, when he first voted it was constitutional, judicially ascertained the fallibility of the other four minority members of the court; and then when he changed his mind and joined the four minority members and made them five, he judicially ascertained the fallibility of the four he had just left, and since he was on both sides he must have been fallible. And there was a demonstration of the fallibility of every judge on the court by the action of Judge Blank. [Applause.]

## MORTAL MAN INFLUENCED BY PREVIOUS ASSOCIATIONS AND OPINIONS.

Now, you all remember that famous case of Tilden-Hayes. Here were five of the justices of the Supreme Court; five of the most conspicuous and able Senators of the United States; here were five of the ablest Members of the House of Representatives, seven Democrats, eight Republicans. There were four great contested election questions with many controverted questions, and every one of the 15 decided every case according to his own previous political predilection, and the country was astonished to find that 8 was a majority of 15. But they did discover it. [Laughter.]

Now, the point I want to make with you is that human beings of the first magnitude are influenced by their training, by their environment, by their social atmosphere, and, sometimes, by the men they eat dinner with. [Much applause and laughter.]

Now, if you put the sovereign power of declaring void the acts of your legislative representatives in the United States Supreme Court not responsible to you, you may thank yourselves for the consequences.

STANDARD OIL AND AMERICAN TOBACCO CASES.

Look at this great case known as the Standard Oil case. Here was a case where the people of this country after years of struggling finally had their Representatives in Congress, in the Senate and in the House, both agree upon the Sherman antitrust law (1890), making it a criminal offense to commit an act in restraint of trade, vital if the principle of competition is to survive; vital if the monopolies are not to be permitted to kill off every competitor and have a masterful control over the market and over the price which shall be paid for that which you produce and for that which you are compelled to buy. That law, it took you years to get on the statute book. It finally, by the slow, dragging, wearisome process of the court, came before the Supreme Court in the trans-Missouri and joint-traffic cases, and there, in three different decisions, that court declared that Congress meant what it said and that it was the law, that *any act* in restraint of trade was criminal.

Then the trusts came to Congress and tried to get a remedy. I want you to listen to the report of the Committee on the Judiciary on this very remarkable case. The proposed relief bill was introduced by Senator Warner, of Missouri, January 26, 1908. Now listen to this; I want you to listen. Here is the report of the Senate committee refusing to write the word "reasonable" into this act. Congress had said it is *not reasonable* for you to deny liberty to another man, no matter how small; it is *not reasonable* for you to meet and act in restraint of trade, restraining some other man from his rights. Listen to this Senate committee:

> The antitrust act makes it a criminal offense to violate the law, and provides a punishment applied by fine and imprisonment. To inject into the act the question of whether an agreement or combination is reasonable or unreasonable would render the act, as a criminal or penal statute, indefinite and uncertain, and hence to that extent utterly nugatory and void, and would practically *amount to a repeal* of that part of the act. * * * And while the same technical objections do not apply to civil prosecutions, the injection of the rule of reasonableness or unreasonableness would lead to the greatest variableness and uncertainty in the enforcement of the law. The defense of reasonable restraint would be made in every case, and there would be as many different rules of reasonableness as cases, courts, and juries. * * * To amend the antitrust act, as suggested by this bill, would be to entirely *emasculate* it, and for all practical purposes render it *nugatory* as a remedial statute.

President Taft, in a special message to Congress January 7, 1910, condemned the proposal of so amending the law, and said that such an amendment would—

> 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 good government. It is to thrust upon the court 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.

The Supreme Court, in the Standard Oil cases and American Tobacco case (1911), thereupon proceeded to emasculate it and render it nugatory by writing an opinion which in effect held that a reasonable restraint of trade was not unlawful after Congress had refused to do so

I am going to read to you just one opinion from Judge Harlan on this case, and then I am going to quit that. Listen to the opinion of Judge Harlan, an honored member of that court 25 years or more—one of its leading lights. Listen to what he says:

> * * * By every conceivable form of expression the majority of the trans-Missouri and Joint Traffic cases adjudged that the act of Congress did not allow restraint of

interstate trade to any extent or in any form, and three times it expressly rejected the theory, which had been persistently advanced, that the act should be construed as if it had in it the word "unreasonable" or "undue," but now the court in accordance with what it denominates "the rule of reason," in effect inserts in the act the word "undue," which means the same as "unreasonable," and thereby makes Congress say what it did not say—what, as I think, it plainly did not intend to say, and what, since the passage of the act, it has explicitly refused to say. It has steadily refused to amend the act so as to tolerate a restraint of interstate commerce, even where such restraint could be said to be "reasonable" or "due." In short, the court, by judicial legislation, in effect, amends an act of Congress relating to a subject over which that department of the Government has exclusive cognizance. I beg to say that, in my judgment, the majority in the former cases were guided by the "rule of reason," for, it may be assumed, they knew quite as well as others what the rule of reason required when the court seeks to ascertain the will of Congress as expressed in a statute. It is obvious, from the opinions in the former cases, that the majority did not grope about in darkness, but in discharging the solemn duty put on them they stood out in the full glare of the "light of reason" and felt and said time and again that the court could not, consistently with the Constitution, and would not, usurp the functions of Congress by indulging in judicial legislation. They said in express words in the former cases, in response to the earnest contentions of counsel, that to insert by construction the word "unreasonable" or "undue" in the act of Congress would be judicial legislation. Let me say, also, that as we all agree that the combination in question was illegal under any construction of the antitrust act, there was not the slightest necessity to enter upon an extended argument to show that the act of Congress was to be read as if it contained the word "unreasonable" or "undue." All that is said in the court's opinion in support of that view is, I say with respect, obiter dicta, pure and simple.

In respect to the decision on the income tax, Mr. Justice White, in dissenting, said:

I consider that the result of the opinion of the court just announced is to overthrow a long and consistent line of decisions, and to deny to the legislative department of the Government the possession of a power conceded to it by the universal concensus for 100 years, and which has been recognized by repeated adjudications of this court. (157 U. S., 429.)

Mr. Justice Jackson of the Supreme Court, in his dissenting opinion on the income tax decision, said:

Considered in all its bearings, this decision is, in my judgment, the most disastrous blow ever struck at the constitutional power of Congress. (158 U. S., 705.)

Mr. Justice Brown, in his dissenting opinion, said:

I can not escape the conviction that the decision of the court in this great case is fraught with immeasureable danger to the future of the country and that it approaches the proportions of a national calamity. * * * I hope it may not prove the first step toward the despotism of wealth. (158 U. S., 695.)

Mr. Justice Harlan said:

It so interprets constitutional provisions * * * as to give privileges and immunities never contemplated by the founders of the Government. * * * The serious aspect of the present decision is that by a *new* interpretation of the Constitution it so *ties the hands* of the legislative branch of the Government that without an amendment of that instrument or unless this court, at some future time, should return to the old theory of the Constitution, Congress can not subject to taxation, however great the needs or pressing the necessities of the Government, either the invested personal property of the country, bonds, stocks, and investments of all kinds, etc. * * * 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. (158 U. S., 695.)

Mr. Justice Harlan also said on another occasion:

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 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

beliefs—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. (221 U. S. 1, 106.)

Mr. Theodore Roosevelt, before the Colorado Legislature, pointed out the grave danger in recent court decisions in defeating humane laws, and stated:

If such decisions as these two indicated the court's permanent attitude there would be really grave cause for alarm, for such decisions, if consistently followed up, *would upset the whole system of popular government.*

And he referred to such decisions as "flagrant and direct contradictions to the spirit and needs of the times."

Senator Robert M. LaFollette, in his introduction to Gilbert E. Roe's work, "Our judicial oligarchy," said:

Precedent and procedure have combined to make one law for the rich and another for the poor. The regard of the courts for fossilized precedent, their absorption in technicalities, their detachment from the vital, living facts of the present day, their constant thinking on the side of the rich and powerful and privileged classes have brought our courts into conflict with the democratic spirit and purposes of this generation. Moreover, by usurping the power to declare laws unconstitutional, and by presuming to read their own views into statutes without regard to the plain intention of the legislators, they have become in reality the supreme law-making and law-giving institution of our Government. They have taken to themselves a power it was never intended they should exercise; a power greater than that entrusted to the courts of any other enlightened nation. And because this tremendous power has been so generally exercised on the side of the wealthy and powerful few, the courts have become, at last, the strongest bulwark of special privilege. They have come to constitute what may indeed be termed a "judicial oligarchy."

Thomas Jefferson, in his letter to Mr. Jarvis, in 1820, rebuked him for assuming that judges should have power over the legislature, the judges being themselves beyond control except by the impossible remedy of impeachment, and 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.

A number of books have recently been written upon this matter, as "Our judicial oligarchy," by Gilbert E. Roe; "The judicial veto," by Davis; "The majority rule and the judiciary," by William N. Ransom, with an introduction by Theodore Roosevelt; "The Spirit of the American Constitution," by Prof. J. Allen Smith; all which emphasize the need to correct the practise I have referred to.

I could quote you many such opinions, but I must not take too much of your time. I want to conclude what I have to say. I want to call your attention to this: That just as soon as the decision was rendered in the Standard Oil case, declaring that "reasonable" restraint of trade was the meaning of Congress, and that Congress didn't make criminal any act in reasonable restraint of trade, the Standard Oil Co. stock went right up. The people were advised in the country that the Standard Oil Co. was being dissolved. The papers announced that the Standard Oil Co. of New Jersey had received a terrible blow by this decision. The effect of that decision was the immediate rise in the market price of the Standard Oil stock. I sent a telegram the other day to John Moody, the great statistician and head of Moody's Investors' Service, and Moody sent me back a telegram that this stock of the New Jersey Standard Oil Company and its subsidiaries, capitalized at one hundred million, and at the time of this decision in 1911 worth$600 a share, or $600,000,000, was now worth on the

market (within a period of six years) $2,400 a share, or a gross market value of $2,400,000,000. Do you get that?

Don't make any mistake about what that means. It will explain something about the 40-cent oil at Healdton and at Cushing. Now, my fellow citizens, I only refer to that one company (there are very many others of like purport), and I want to say to you that I believe it is a wise policy for the people of the United States to deal with corporations, no matter how large they are, with the same exact justice that they deal with the smallest citizen; but, at the same time, it is essential that we should protect the small citizen against the unfair exactions of predatory power. I have no prejudices against great organizations, but am proud of their accomplishments in America. All I want to see is that they do not use their great power tyrannically.

The gain on this stock in six years is $1,800,000,000. It is not all due to this decision; it is due to other factors, in part. But in my opinion a large part of this increase is due to that decision of the Supreme Court in nullifying and emasculating the antitrust law passed by Congress.

## JUDGE STUART'S REPLY.

We all saw in the paper a short time ago where a man in Chicago, by getting a monopoly on eggs in cold storage cleaned up a million dollars. He was only doing on a small scale what the big boys are doing on a large scale; that is all.

Do you object to paying 60 cents a dozen to speculators for eggs? That is a very small thing. Judge Stuart seems to think you ought not to object to paying 60 cents a dozen for eggs. Judge Stuart regards it as a joke. His answer to me before the legislature, when I pointed out this invasion of the legislative powers of the people by this decision of the Supreme Court and the result of their decision in the Standard Oil case—his answer to me was that, "something had been said about the Standard Oil Co. case"; he didn't say what—and that the high price of eggs was attributed to the decision in the Standard Oil case.

If the people of this State wish to regard the high cost of living as a piece of humor they will know where to go and get their advice.

Now I observe in this argument of Judge Stuart to what I said he answers not a word about the power of Congress—no answer to that; no adequate answer to the importance of letting the people know what the law is; no answer to the need of having in Congress a responsible forum for the settlement of internal disputes.

After we got the Sherman antitrust law it was on the statute book 21 years before the Supreme Court emasculated it. When a law is passed now you do not know whether it is the law or not. We have passed this eight-hour law, and the gentlemen who control the railway property of the country promptly announced that they would pay no attention to it at all until it was decided constitutional by the Supreme Court of the United States.

Well, I intend to introduce another act of the same kind and attach to it a condition that the question of its constitutionality shall not go to the Supreme Court. [Loud and continued applause.]

When men become so large that they feel they can openly defy the lawmaking power of the people of this country, I tell you the time has come to withdraw from the Supreme Court this refuge upon which such gentlemen rely.

My friend, Judge Stuart, tries to prejudice the jury. He talks with pathos about that great and honored southern statesman, Robert E. Lee, whom we adore, and the confiscation of his homestead. It is a red herring drawn across the trail.

The fact is the confiscation acts were declared constitutional by the Supreme Court. And the fact is that it was not Robert E. Lee, it was George Washington Custis Lee, the president of my old college, whom I knew well, who brought an action (and the Supreme Court upheld him in his right) to recover a fair money value for the property taken for a burial ground for the soldiers and sailors of the United States.

I merely mention that because the judge so emphasized the great accuracy that he should observe, and I think it worth while to call your attention to the facts, as they seem to be.

In the case of the Oklahoma State capital, Congress passed the enabling act fixing the capital at Guthrie for a certain length of time, due to the activity of certain distinguished citizens who lived up there, I suppose. The State of Oklahoma accepted that act with that clause in it, and, then, not feeling bound by it, they exercised their just rights, took a referendum vote, and voted to bring the capital to Oklahoma City. They were within their rights, and the Supreme Court, when the matter went up to them, very properly said so, and I do not doubt in the least that Congress would have said the same thing if Congress had had an opportunity to pass on it after the vote in Oklahoma, if the citizens here desired that that should be done. So much for that "appeal to the jury." [Applause.]

It shows the poverty of Judge Stuart's argument when he is driven to use arguments of that kind.

Then the next question the Judge raised was that the only thing which protects our daughters from being obliged to sit down, side by side, with a negro in the theater and at the hotel table was the action of the Supreme Court of the United States. [Laughter.] Well, I don't know about that, I think not. I know better.

The thing which protected the white people of the South was the manhood of the South, "The sovereignty of the people." [Applause.] Make no mistake about that. My people were there.

The civil-rights case was one single example, where political prejudice went too far, but those cases didn't arise in the South; they arose in Kansas, California, and New York, if I am not mistaken, and border States of Missouri and Tennessee. And I think the Supreme Court was quite right in declaring it unconstitutional, and the Supreme Court in doing so respected the will of the white race of the North and West, as well as of the South. That is about the only thing I now recall they have done in the way of declaring acts of Congress unconstitutional that I really fully approve of. The Supreme Court has had a splendid and honorable career. I am proud of that great court, but when you go back through these cases, notably the Dred Scott case, the legal-tender cases, the income-tax cases, the Standard Oil case, the American Tobacco case, in all of these cases where they decided against Congress, there followed the most harmful consequences to the people of this country. The whole trouble is you can't get at the Supreme Court if it makes a mistake, but if Joe Thompson, Member of Congress from this district, makes a mistake, or if Robert L. Owen, your Senator, makes a mistake, you can get at them quickly, and that is the vast difference, that is the exceed-

ingly important difference, if you wish to maintain democratic popular government.

Taking this power from the Supreme Court will not diminish its docket or its dignity. They have a docket now of 700 cases, and they can not read the full record of those cases in a single term; they have more now to do than they ought to be required to do. They ought, themselves, to ask Congress to limit the character of cases that come before them, both for their own sake and for the sake of litigants. I have talked to some of the judges about this need and they would welcome some relief, I am sure.

I do not believe the honorable justices on this court want to retain this responsibility which they now believe rests on them by law and certainly it will be better for the country to withhold it.

It will improve the dignity and high standing of the Supreme Court; it will improve the standing of the Supreme Court with the people of the United States; the people will have more confidence in that great court if the court is not put in the painful position of being put in conflict with Congress to the injury of the dignity of the court.

Now, my fellow citizens, the question merely comes down to this: Why do the people of this country, in sending its lawmaking agents to Washington, make them responsible to the people at home? Evidently so the people can correct the errors of Congress if the Congress errs. The crucial question is, Do you want Congress able to give relief to the country and be responsible to you, or do you want Congress to pass laws and have them declared void by a power over which you can exercise no control?

VOICES. No, no.

A VOICE. Take a vote.

A VOICE. Yes; take a vote.

A VOICE. Let's have a vote.

Senator OWEN. Now, wait a minute. If we are going to vote, let's have a fair vote on it. Those who are in favor of the proposition please arise.

STENOGRAPHER'S NOTE.—Out of an audience calculated by those who are supposed to know at 1,250, practically the entire assembly rose to their feet.

Those opposed will now please rise.

STENOGRAPHER'S NOTE.—Ten, by count, rose.

Ladies and gentlemen, these questions are before the American people. They ought to be discussed in good nature, in a friendly spirit, and we ought not to enter into the discussion of the question in an unkind way, much less to speak unkindly of our great and honored Supreme Court.

I believe the time has come when the legislative powers of the people ought to be exercised free from interruption so that the people can understand what the legislature means and then let the legislature be responsible to the people of this country. Let us know what the law means the moment it is passed. Let the Department of Justice be able to tell our business men immediately (when they ask) what the law is, and not be left to say: The department can not say until some test case is settled a few years hence by the Supreme Court.

I thank you for your courteous attention. [Applause.]

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