the Dred Scott case.* The criticism of that decision by Abraham Lincoln was sharp and shrewd. That decision, probably more than anything else, made the great Civil war inevitable and brought in its train the enactment of the thirteenth, fourteenth, and fifteenth amendments.

We can not overlook the fact that the supreme court, in reaching out for more power, held in 1842 that a corporation was a citizen of the state which had created it.** Up to that time the court had uniformly held that a corporation was not a citizen within the meaning of the "diverse citizenship" clause of the constitution. The result of this "change of front" was that corporations have brought their cases in the federal courts in overwhelming numbers before life-tenure, appointive judges, most of whom have been trained in the employment of corporations. As the president of one great railroad company said when he defied a state statute regulating its rates, "the federal courts are the haven and home of corporations."

Later on we had another spectacle. The legislature elected by the people of New York, in the discharge of the police powers resident in every state government, passed an act restricting the hours of labor of bakers subjected to excessive heat in their trade. The highest court in New York promptly held that the people of the state could thus protect the health and the lives of its laborers.*** The case was carried into the supreme court of the United States, and there, by a vote of five infallible judges against four fallible judges, the powers of the states were set aside and it was held that the great state of New York could not thus protect the lives and health of its laborers because it would interfere with the "liberty of contract."**** The reason given was worse even than the usurpation of authority. It was an insult to the intelligence of the public, for everybody knew that these bakers were not seeking to vindicate the liberty of contract, but were asking to be protected in their lives and health. The decision of the court was in truth based upon unwillingness to curb the power of the employer over the employee.

Further back we had been treated to the spectacle in the Dartmouth College case***** of the court holding that the charter of a corporation was not a privilege but a contract, and therefore irrevocable, with the sequence that if a corrupt legislature could be induced to grant a charter, no subsequent honest legislature could revoke it. There would be no place for the people to control their own government. To meet this condition the people of the several states promptly made amendments to their constitutions, by which it was provided that charters of all corporations granted thereafter should be subject to change, modification, or repeal at the will of the legislature. It was thus that the people were forced to regain their control over their creatures by nullifying the decision of the courts. For 100 years the court had held an income tax constitutional. By this means, indispensable aid had been given to the party of the Union in carrying on the Civil war. But those who were called upon to pay the income tax, the multimillionaires and great corporations, again presented a case calling in question the validity of the action of congress. The supreme court, following the precedents from the foundation of the government, but only by a bare majority, again affirmed the power of congress. Soon thereafter one of the majority judges, having received possibly a wireless intimation of the views of the 39 men who signed the constitution at Philadelphia in 1787, let it be known that he had experienced a change of heart. A petition for rehearing was granted and then by another vote of five infallible judges against four fallible judges (with a change of personnel, however) the act of congress was held unconstitutional, though it had been passed by an almost unanimous vote in both houses of congress and had been approved by the president.******

The result of this astounding change was that more than $100,000,000 of taxes annually were transferred from those best able to pay them and upon whom congress, with the approval of the president had placed them, and were imposed upon the toiling masses who were already overtaxed. The people of the Union would not stand for this, and again a constitutional amendment was passed and finally adopted. But in the meantime it is estimated that more than $2,000,000,000 were levied upon the producers of the country to the exemption of the great corporations and of the multimillionaires upon whom congress in the discharge of its duties and powers had seen fit to lay it.

Other instances of this abuse of irresponsible power by the courts could be cited, in both the federal supreme court and many of the state courts. But it should go without saying that irresponsible and irreviewable power is always tyranny. Even if its effects are not always as evil as the cases thus cited, it is intolerable because it is in contradiction of the will of the people, upon whom we boast that our government rests: "All power proceeds from the people and should be exercised for their good only."

Not only such power was not given to the judiciary in any constitution, state or federal, but in the convention at Philadelphia there was an attempt to put it in the United States constitution. It was voted down, though the clause was brought forward by James Madison, afterwards president of the United States, and by James Wilson, afterwards a member of the United States supreme court. That convention sat with closed doors, with its members sworn not to communicate any of its proceedings to their constituents, and a vote to destroy its journal was prevented only by a bare majority. That journal was not made public for 49 years, and we now know from it that this proposition that the judges should pass upon the constitutionality of acts of congress was defeated four times, i. e., first on June 4, 1787, receiving at that time the vote of only two states. It was renewed no less than three times, i. e., on June 6, July 21, and, finally, for the fourth time on August 15, and at no time did it receive the vote of more than three states. On this last occasion (August 15) Mr. Mercer thus summed up the thought of the convention: "He disapproved of the doctrine that the judges, as expositors of the constitution, should have authority to declare a law void. He thought laws ought to be well and cautiously made and then to be incontrovertible."

The doctrine that the courts can set aside an act of the legislature has never obtained in England, which has no written constitution, nor in France, Germany, Holland, Belgium, Denmark, Austria, Norway, and Sweden, nor in any other country that has a written constitution. Its assertion in this country has not therefore even the "tyrant's plea of necessity." The rest of the world have gotten along very well without it.

The courts have attempted only once in England to assert a right to set aside an act of Parliament, and then Chief Justice Tressilian was hanged and his associates exiled to France, and hence subsequent courts have not relied upon it as a precedent.

Of course, there have been expressions at times in the courts of England criticizing acts of Parliament—generally with great modesty, but sometimes going to the extent of saying that they were not valid—but this never extended beyond an expression of disapproval, for no court in England since Tressilian's day has refused to obey an act of Parliament.

Prior to the American Revolution the acts of our colonies were sent home to England, where they were allowed or disallowed by the privy council, for in this way the mother country held its control over the colonies. After the acknowledgement of the independence of the thirteen colonies and before our federal convention met at Philadelphia, the courts of four states—New Jersey, Rhode Island, Virginia, and North Carolina—had assumed to themselves the power formerly exercised by the privy council in England. This met with immediate and strong disapproval, and in Rhode Island the judges were "dropped." These decisions were well known to the members of the convention at Philadelphia. Mr. Madison and Mr. Wilson favored the new doctrine of the "paramount judiciary" as a safe check upon legislation, for government by the people was new and the property holders were fearful of the excesses of an unrestricted congress.

The attempt was to get the judicial veto into the federal constitution in its least objectionable shape by submitting the acts of congress to the court before the final passage of an act, but even this failed, for though four times presented by these two very able and influential members, this suggestion of "judicial veto" at no time received the votes of more than one-fourth of the states. There can be no doubt that if such power had been inserted the constitution would never have been ratified by the several states.

It is true that the constitution does prescribe that the constitution of the United States and the acts passed under the authority thereof shall be supreme over the state constitutions and laws. This is necessary in any federal government. This does not, however, confer upon the supreme court the power to set aside acts of congress, like the income-tax and other statutes, not involving the boundary line between state and federal jurisdiction. The very fact that this provision was put into the federal constitution shows that the convention did not intend to confer upon the court the unlimited power claimed later under the doctrine of Marbury v. Madison. Aware of this defect, the court since the war has sought to found its jurisdiction to nullify legislative action upon the fourteenth amendment. It has been well said that that amendment, which was intended for the protection of the negro, has failed entirely in that purpose, but has become a very tower of strength to the great aggregations of wealth. Not only no force can be justly given to the construction placed by the supreme court upon the fourteenth amendment, from the knowledge of the history of its adoption, but the words used can not fairly be interpreted as they have been. "Due process of law" means the orderly proceeding of the courts, and the "equal protection of the laws" was never intended to give to the federal courts irreviewable supremacy over congress and the president.

It is not too much to say that the ingenious reasoning in Marbury v. Madison and the construction placed upon the fourteenth amendment have had the same origin in the desire of the supreme court to amplify its jurisdiction, and in the desire of the great interests to hold the courts as a shield between them and the action of congress and the legislatures when they have not succeeded in defeating legislation by fair means or foul.

But as a last resort, it is urged, must not congress and the legislatures obey the constitution? Most certainly. The members take an oath to do so, and there is as much patriotism and, considering the larger size of legislative bodies, a greater aggregate intelligence in them than in the courts. But it does not follow that if a legislature, or congress, misconceives or violates the constitution, the courts have the power to nullify their action. The only supervising control of the legislative body given by the constitution is the veto of the executive; not of the courts, and that executive veto is only suspensive. If the legislature still insists, the supervising power is in the people in the election of senators and representatives who will put a more correct construction on the constitution.

It must be remembered that there is no line in the constitution which gives the courts, instead of the people, supervision over congress or the legislature. There is no constitutional presumption that five judges will be infallible and that four will be fallible. If the legislative and executive departments of the government err the people can correct it. But when the courts err, as they frequently do—for instance, as in Chisholm v. Georgia, in the Dartmouth College case, or in the income tax case, not to mention others—there is no remedy, except by the long, slow process of a constitutional amendment or by a change in the personnel of the court, which is necessarily very slow when the judges hold for life as they do in the federal courts.

I do not intend to question the ability and integrity of Chief Justice Marshall. Like other men, he saw the world from his own standpoint and from his environment and with the prepossessions of his day. He had small faith in the capacity of the people for self-government. He believed in a strong central government and distrusted the states. He believed that the function of government was the protection of property rights, which he thought jeopardized by the rule of the people, who were mostly without property. At that time the experiment of popular government was untried and the people were uneducated. Moreover, he was a strong

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*Dred Scott v. Sandford, 19 How., 393.
**Louisville, C. & C. R. Co. v. Litson, 2 How., 497.
***Lochner v. New York, 177 N. Y., 145.
****Lochner v. New York, 198 U. S., 45.
*****Dartmouth College v. Woodward, 4 Wheat., 518.
******Pollock v. Farmers' L. & T. Co., 158 U. S., 601.