

the resolution approves the admission of Arizona with the judicial recall, unless the voters themselves repudiate it.

"Under the Arizona constitution all elective officers and these include county and state judges, six months after their election, are subject to the recall. It is initiated by a petition signed by electors equal to 25 per cent of the total number of votes cast for all the candidates for the office at the previous general election. Within five days after the petition is filed, the officer may resign. Whether he does or not, an election ensues in which his name, if he does not resign, is placed on the ballot with that of all other candidates.

"The petitioners may print on the official ballot 200 words showing their reasons for recalling the officer, and he is permitted to make defense in the same place in 200 words. If the incumbent receives the highest number of the votes he continues in his office; if not, he is removed from office and is succeeded by the candidate who does receive the highest number.

"This provision of the Arizona constitution, in its application to county and state judges, seems to me pernicious in its effect, so destructive of independence in the judiciary, so likely to subject the rights of the individual to the possible tyranny of a popular majority and, therefore, to be so injurious to the cause of free government that I must disapprove a constitution containing it.

"Of course a difference of opinion as to the wisdom details in a state constitution ought not to lead me to set up my opinion against that of the people of the territory. It is to be their government and while the power of congress to withhold or grant statehood is absolute, the people about to constitute a state should generally know better the kind of government and constitution suited to their needs than congress or the executive. But when such a constitution contains something so destructive of free government as the judicial recall it should be disapproved.

"By the recall in the Arizona constitution it is proposed to give to the majority to remove arbitrarily and without any delay any judge who may have the courage to render an unpopular decision.

"By the recall it is proposed to enable a majority of 25 per cent of the voters of the district or state, for no prescribed cause, after the judge has been in office six months, to submit the question of his retention in office to the electorate. The petitioning minority must say on the ballot what they can against him in 200 words, and he must defend as best he can in the same space.

"Other candidates are permitted to present themselves and have their names printed on the ballot, so that the recall is not based solely on the record or the acts of the judge, but also on the question whether some other and more popular candidate has been found to unseat him.

"Could there be a system more ingeniously devised to subject judges to momentary gusts of popular passion than this? We can not be blind to the fact that often an intelligent and respectable electorate may be so roused over an issue that it will visit with condemnation the decision of a just judge, though exactly in accord with the law governing the case, merely because it affects unfavorably their contest.

"Controversies over elections, labor troubles, racial or religious issues, issues as to the construction or constitutionality of liquor laws, criminal trials of popular or unpopular defendants, the removal of county seats, suits by individuals to maintain their constitutional rights in ob-

struction of some popular improvement—these and many other cases could be cited in which a majority of a district electorate would be tempted by hasty anger to recall a conscientious judge if the opportunity were open all the time.

"No period of delay is interposed for the abatement of popular feeling. The recall is devised to encourage quick action, and to lead the people to strike while the iron is hot. The judge is treated as the instrument and servant of a majority of the people and subject to their momentary will, not after a long term in which his qualities as a judge and his character as a man have been subjected to a test of all the varieties of judicial work and duty so as to furnish a proper means of measuring his fitness for continuance in another term.

"On the instant of an unpopular ruling, while the spirit of protest has not had time to cool and even while an appeal may be pending from his ruling in which he may be sustained, he is to be haled before the electorate in a tribunal, with no judicial hearing, evidence, or defense, and thrown out of office, and disgraced for life because he has failed, in a single decision, it may be to satisfy the popular demand.

"Think of the opportunity such a system would give to unscrupulous political bosses in control, as they have been in control not only of conventions, but elections. Think of the enormous power for evil given to the sensational, muckraking portion of the press in rousing prejudice against a just judge by false charges and insinuations, the effect of which in the short period of an election by recall, it would be impossible for him to meet and offset.

"Supporters of such a scheme seem to think it will work only in the interest of the poor, the humble, the weak and the oppressed; that it will strike down only the judge who is supposed to favor corporations and be affected by the corrupting influence of the rich. Nothing could be further from the ultimate result. The motive it would offer to unscrupulous combinations to seek to control politics in order to control the judges is clear.

"Those who will benefit by the recall are those who have the best opportunity of the majority of the people to action on a sudden impulse. Are they likely to be the wisest or the best people in a community? Do they not include those who have money enough to employ firebrands and slanderers in a community and the stirrers up of social hate? Would not self-respecting men well hesitate to accept judicial office with such a sword of Damocles hanging over them?

"What kind of judgments might the unpopular side expect from courts whose judges must make their decisions under such legalized terrorism? The character of the judges would deteriorate to that of trimmers and time servers and independent judicial action would be a thing of the past. As the possibilities of such a system pass in review, is it too much to characterize it as one which will destroy the judiciary, its standing, and its usefulness? The argument has been made to justify the judicial recall that it is only carrying out the principle of the election of the judges by the people. The appointment by the executive by the representation of the majority in so far as future bias is concerned there is no great difference between the appointment and the election of judges. The independence on the judiciary is secured rather by a fixed term and fixed and irreducible salary. It is true that when the term of judges is for a limited number of years and re-elections is necessary it has been thought and charged some-

times that shortly before election in cases in which popular interest is excited, judges have leaned in their decisions toward the popular side.

"As already pointed out, however, in the election of judges for a long and fixed term of years, the fear of popular prejudice as a motive for unjust decisions is minimized by the tenure on the one hand while the opportunity which the people have calmly to consider the work of a judge for a full term of years in deciding as to his re-election generally insures from them a fair and reasonable consideration of his qualities as a judge.

"While, therefore, there have elected judges who have bowed before unjust popular prejudice, or who have yielded to the power of political bosses in their decisions, I am convinced that these are exceptional, and that, on the whole, elected judges have made a great American judiciary. But the success of an elective judiciary certainly furnishes no reason for so changing the system as to take away the very safeguards which have made it successful.

"Attempt is made to defend the principle of judicial recall by reference to states in which judges are said to have shown themselves to be under corrupt corporate influence and in which it is claimed that nothing but a desperate remedy will suffice. If the political control in such states is sufficiently wrested from corrupting corporations to permit the enactment of a radical constitutional amendment like that of judicial recall, it would seem possible to make provision in its stead of an effective remedy by impeachment in which the cumbersome features of the present remedy might be avoided, but the opportunity for judicial hearing and defense before an impartial tribunal might be retained.

"Real reforms are not to be effected by patent short cuts or by abolishing those requirements which the experience has shown to be essential in dealing justly with everyone. Such innovations are certain in the long run to plague the inventor or first user and will come readily to the hand of the enemies and corrupters of society after the passing of the just popular indignation that prompted their adoption.

"Again, judicial recall is advocated on the ground that it will bring the judges more into sympathy with the popular will and the progress of ideas among the people. It is said that now judges are out of touch with the movement toward a wider democracy and a greater control of governmental agencies in the interest and for the benefit of the people.

"The righteous and just course for a judge to pursue is ordinarily fixed by statute or clear principles of law, and the cases in which his judgment may be affected by his political, economical or social views are infrequent. But even in such cases, judges are not removed from the people's influence. Surround the judiciary with all the safeguards possible, create judges by appointment, make their tenure for life, forbid diminution of salary during their term and still it is impossible to prevent the influence of popular opinion from coloring judgments in the long run.

"Judges are men, intelligent, sympathetic men, patriotic men, and in those fields of the law in which the personal equation unavoidably plays a part, there will be found a response to sober, popular opinion as it changes to meet the exigency of social, political and economic changes.

"Indeed this should be so individual instances of a high-bound and retrograde conservatism on the part of courts in decisions which turn on the individual economic or sociological views of the judges may be

pointed out but they are not many, and do not call for radical action.

"In treating of courts we are dealing with a human machine, liable like all the inventions of man to err; but we are dealing with a human institution that likens itself to a divine institution because it seeks and preserves justice. It has been the cornerstone of our gloriously free government in which the rights of the individual and of the minority have been preserved, while governmental action of the majority has lost nothing of beneficent progress, efficacy and directness. This balance was planned in the constitution by its framers and has been maintained by our independent judiciary.

"Precedents are cited from state constitutions said to be equivalent to a popular recall. In some cases judges are removable by a vote of both houses of the legislature. This is a mere adoption of the English address of parliament to the crown for the removal of judges. It is similar to impeachment in that a form of hearing is always granted. Such a provision forms no precedent for a popular recall without adequate hearing and defense, and with new candidates to contest the election.

"It is said the recall will be rarely used. If so, it will be rarely needed. Then why adopt a system so full of danger. But it is a mistake to suppose that such a powerful lever for influencing judicial decisions and such an opportunity for vengeance because of adverse ones will be allowed to remain unused.

"But it is said that the people of Arizona are to become an independent state when created, and even if we strike out judicial recall now, they can incorporate it in their constitution after statehood.

"To this I would answer that in dealing with the courts, which are the cornerstone of good government and in which not only the voters but the non-voters and non-residents, have a deep interest as a security for their rights of life, liberty and property, no matter what the future action of the state may be, it is necessary for the authority which is primarily responsible for its creation to assert in no doubtful tones the necessity for an independent and untrammelled judiciary."

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