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THE INDEPENDENCE OF THE JUDICIARY, THE SAFEGUARD OF FREE INSTITUTIONS

*Address to the Graduating Class of the Yale Law School, June
17, 1912, by William B. Hornblower, of New York.*

In choosing a subject for this address, I have been tempted to take some academic topic such as the relative merits and demerits of the common law system of jurisprudence "broadening out from precedent to precedent" as compared with statutory law rigidly embodied in codes, or the relative merits and demerits of combination as compared with competition in trade and commerce and the merits and demerits of statutory regulations on such subjects.

There are, however, certain burning questions of the day affecting the independence and the integrity of our judicial system on which I feel it to be the duty of every lawyer to speak out with all the force and emphasis at his command and which I do not feel at liberty to ignore.

To evade or to ignore these questions would be to be recreant to my professional duty. When the integrity and independence of the judiciary are at stake, all other questions become unimportant.

When the sappers and miners are at work undermining the foundations of our judicial structure, it is idle to discuss questions of detail of construction or reconstruction of the edifice.

The young men just graduating from our law schools find themselves confronted by a most serious situation. They find the courts subjected to attack and exposed to peril. The rising

generation of lawyers are called upon to resist this attack and to defend the courts from this peril. As officers of the courts sworn to support the Constitution of the United States and of the State, and to faithfully discharge their duties as attorneys and counselors at law, it becomes their duty to see that no harm comes to the administration of the law, or to the usefulness or the prestige of the courts, and that no harm comes to the commonwealth through this attack on the courts and the law.

The air is rent by the clamor of those who are crying out for what is known as judicial recall.

This is no longer an academic question. Three at least of our States have already embodied it in their Constitutions. Agitation in favor of extending this so-called reform to other States has been and is being actively carried on. Advocates of the recall are found even in the ranks of our own profession.

The self-styled Progressive is not necessarily the true Progressive. He may be a reactionary of the worst kind. To set back the clock of time is not progress but regress. Civilization rests upon law. Law rests upon the courts. The courts rest upon popular respect. If for law and for the courts are to be substituted the voice of a temporary majority of the people, then are we *pro tanto* abandoning the achievements of civilization and drifting back to barbarism.

Civilization consists in subordinating the wishes of the majority to the rights of the minority. Slowly and carefully and painfully have the ideals of civilization been built up. Every now and then we are called upon to contend with an outburst of primeval passion in the shape of lynch law. The spirit of lynch law may be manifested in attacks on the individual citizen or in attacks on the courts themselves. In this country our fathers devised safeguards of the rights of a minority against the temporary whims of the majority by imposing constitutional limitations upon legislative authority. The judiciary has by its duty to administer and define these constitutional limitations and to refuse to enforce unconstitutional legislation become the defender of these fundamental rights of the minority.

It has always been the boast of our Anglo Saxon republic that we are a common sense people; that extreme theories have no charm for us; that we do not fall in love with mere phrases or catch-words. The conservatism of our people has been proverbial. The bar of this country has been the guiding force

which has kept the popular ideals from running after strange gods.

The question now confronts us, are the old ideals to be abandoned? Are we to continue to be a government of law administered by the courts, or are we to become a government of agitators by whom law and the courts are only to be tolerated so long as the law and the courts are in accord with the popular wishes of the moment? These are grave questions going to the very root of our system of government.

Of course, the proposition for recall of judges is not imminently threatening in those States where the judges are not as yet elected by popular vote. In Connecticut, in Massachusetts and in New Jersey, for instance, where the judges are appointed by the Governor or the Legislature, there is no force in the *a priori* argument that a judge elected by the people should be immediately and directly responsible to and removable by the people. The spirit of antagonism to judicial independence, however, unless checked, will inevitably spread to the States where the judiciary is non-elective. Members of the bar in all the States are thus vitally interested in resisting the propaganda for recall of judges.

As to the question of the recall of judges during their term of office, the question is to be considered under various aspects. First, as to its effect upon the personnel and character of the judges themselves. Secondly, as to its effect upon the rights of individual litigants. Thirdly, as to its effect upon the principles of the law. Fourthly, as to its effect upon the rights of the public.

The aspects of the question in each of these particulars need to be separately considered. They are, however, in the popular discussion of the subject continually confused.

FIRST, as to the effect upon the personnel and character of the judges themselves.

It is urged that men are frequently chosen for the bench who are incompetent, inefficient or even corrupt; that the remedy by impeachment for the removal of a judge found to be incompetent, inefficient or corrupt is grossly inadequate; that where a judge is found to be incompetent, inefficient or corrupt, the people whose servant he is should have the right to summarily remove him without the formality of a trial and to substitute in his place a better man. This sounds plausible, but to any one who is familiar

with the working of our judicial system, the fallacy of this argument will be apparent if he stops to give it full consideration.

So far as concerns the question of incompetency or inefficiency this is a matter for difference of opinion. What constitutes incompetency or inefficiency? Every defeated litigant considers the judge who decides against him to be incompetent and inefficient, and in this opinion he is frequently encouraged by his counsel who is temporarily smarting under what he considers an undeserved defeat. The question of the competency or efficiency of a judge is one to be determined by a careful consideration of his judicial decisions as a whole. To have the question of the competency or efficiency of a judge passed upon by popular vote is as irrational as it would be to have the competency or efficiency of a physician passed upon by popular vote. How are the people to determine whether the judge whose recall is proposed is really inefficient or incompetent? It is easy to allege inefficiency or incompetency, but opinions will differ as to whether a particular judge is or is not inefficient or incompetent.

When we come to the question of corruption, the injustice of having such charges passed upon by popular vote after a heated campaign with violent harangues by popular orators without any legal proof of the charges, is manifest. To have the honesty or dishonesty of a judge determined by the effect of stump speeches upon the platform, by loose declamations and unsworn statements of interested parties without any opportunity for careful examination, is to subject a judge to an indignity and a possible injustice which may blast his reputation for a lifetime. How often have we heard disgruntled clients, or even indignant lawyers, complain that a judge has been bought or improperly influenced to render adverse decisions when we are confident that such charges are absolutely unfounded, and are the product of an overheated imagination resulting from the bitterness of defeat in a hard-fought litigation!

The recall will furnish a ready weapon for party warfare upon the judges. Republican judges may be voted out and Democratic judges voted in and *vice versa*, whenever the shifting popular majority shall change from one party to the other.

Certainly as a method of improving the personnel of the judges, the method of subjecting them to the indignity of a recall whenever any defeated litigant can persuade a majority of the voters that a judge is incompetent or inefficient or corrupt is the worst

possible method. To force a judge against whom such charges are made to take the stump and defend himself in public while still on the bench would make his position as a judge intolerable to himself and worse than useless to the public.

It is difficult enough already, especially in our larger cities, to induce the ablest and most successful members of the bar to forego the honors and pecuniary rewards of the bar for the labors and the smaller compensation of the bench. If the position of the judge is to become subject to the indignity of a possible recall, it is hard to see what inducement there would be to a successful practitioner to incur the risk of such indignity.

Moreover, the futility of the scheme for judicial recall as a remedy for existing evils, real or imaginary, is apparent. The advocates of recall overlook the fact that the successors of these incompetent, inefficient or corrupt judges are to be selected by the voters of the very same constituency which is responsible for the election of the incompetent or inefficient or corrupt men who are to be recalled, and the identical political bosses, or conventions, or primaries, which selected the recalled judges are to select their successors. We are thus traveling in a vicious circle. Elect incompetent, inefficient or corrupt men, recall them and elect others in their place to be again recalled and others again to be elected in their place by the same constituency and the same methods.

SECONDLY, as to the effect of recall upon the rights of individual litigants.

It needs no prophet to foresee what the effect might be upon the mind of the judge where on the one side was a litigant with powerful political influence, and on the other side an individual contending for his rights against such influence. So where an individual is contending for his rights or his alleged rights against the interests or supposed interests of the community in which he lives, or against a strong popular prejudice, how can any but an exceptionally strongminded judge be expected to hold the scales of justice even? Our ideal of a judge as we have heretofore understood it is that of a judge absolutely fearless, knowing no friend or foe, knowing neither majority nor minority, knowing neither rich nor poor, fearing no man and no body of men. We have heretofore endeavored to cultivate this ideal by giving a judge a fixed term of office during which he can be removed only for cause and after an opportunity to be heard in his own defense by a competent tribunal. If we substitute for this ideal a judge

who may at any moment be recalled by reason of an unpopular decision, the tendency is to have a judge constantly listening for a wave of public opinion with his "ear to the ground" or eager to curry favor with the bosses who control the nominations and who can incite the voters to the exercise of their power of recall. I do not mean of course to say that every judge would be of this character or that the standard of judicial independence and integrity would be immediately disturbed, but I do say that the tendency and the constantly accelerating tendency would be to substitute for the fearless and independent judge a spineless, flabby, cowardly judge, a reed shaken by the wind.

In the interests of the individual litigant, therefore, we should protest against this change in our judicial system.

THIRDLY: As to the effect of judicial recall upon the principles of the law.

It is to be borne in mind that our common law system of jurisprudence is founded upon the courts. The courts not only administer the law, but declare the law. Indeed it may be said that the law is what the courts declare it to be. And this is true, even where statutes are concerned, since statutes have to be interpreted and enforced by the courts. If the system of judicial recall is to be adopted, it would necessarily be applied not only to the judges of the inferior courts of *nisi prius*, but to the judges of the Appellate Courts as well whose duty it is to declare those general principles which are to govern the *nisi prius* courts in the practical administration of the law. It is essential to the orderly development of our jurisprudence that the judges of our various courts of last resort should be encouraged by the tenure of their office, and the surroundings of their position to exercise a calm and broad judgment in the disposition of the important questions coming before them for determination, and that they should be guided by the well considered precedents of the past as interpreted by what the Supreme Court of the United States has called "the rule of reason." How can it be expected that the orderly administration of the law by our highest courts of our various states and the harmonious development of our jurisprudence can be maintained if a judge of the highest court of the State is obliged to answer at any time to a popular agitation for his recall, based upon some judicial decision in which he has participated? A judge of the highest court of the State whose judicial labors might be interrupted at any moment by such a con-

tingency would cease to be an exponent of the principles of law and would rapidly tend to become a respecter of persons, of parties, of politicians and of the temporary majority of the voters.

FOURTHLY: As to the effect of judicial recall upon the rights of the public.

The public is entitled to the free and untrammelled exercise by the judges of the functions for which they are put in office. If instead of devoting their entire time to the performance of their public duties, the judges are liable to be called aside from time to time to conduct a political campaign in defense of their own conduct upon the bench, to that extent the public is deprived of the services for which they have placed the judges upon the bench.

The spectacle of our judges instead of earning their salaries by persistent attention to their judicial duties spending their time and their salaries in racing up and down their judicial districts haranguing the multitude in defense of their judicial conduct is such a perversion of all judicial proprieties that only the comic opera stage and the genius of Gilbert and Sullivan are adequate to do justice to the situation. It must be borne in mind that the better the judge and the longer he serves upon the bench the less facile does he become in the arts of public speaking and the more helpless does he become to meet the specious, adroit, plausible, unscrupulous and malicious demagogues who may come forward upon the stump to attack him. Indeed to a sensitive, high-minded, upright judge nothing could be more revolting than to be forced into a campaign in the midst of his term of office to prevent his recall and to be compelled to choose the alternative of letting the campaign go by default while he, quietly and laboriously, goes on with his judicial work or of matching his powers of public address against the noisy and glib vituperation of the stump orator, whose powers of reasoning are usually in inverse ratio to his powers of vigorous denunciation.

The judges' principal function is after all to protect the rights of the minority against the majority. The public is vitally interested in preserving intact this function. The majority of to-day may become the minority of to-morrow.

We hear it said constantly nowadays that the reason for this agitation for judicial recall, and for the apparent strength of the agitation among the people, is the inefficiency of the judicial system as it now exists; in other words, that there are so many inefficient and incompetent judges upon the bench, that the public

mind has become impatient and demands some effective method of repudiating them. I have already pointed out, however, that where our judges are elected by the people, the remedy by recall will be absurdly ineffective. We are quite as likely to have successors who will be equally inefficient or incompetent as the judges who are recalled.

But is it said that our entire administration of justice in this country is full of technicalities and delays, and that this constitutes an excuse, if not a justification, for the present distrust of the judiciary and the present agitation for some such rough and ready remedy as judicial recall. It must of course be admitted that many of the criticisms of our judicial system and of the administration of justice are well taken. I do not admit, however, that there is any special force in these objections when directed against the courts of the present day, as compared with the courts of any previous date. Indeed I am inclined to think that the courts of to-day are less technical and less disposed to sacrifice substance to form and to sacrifice justice to methods of practice, than at any previous period in the history of our country.

Comparisons between the methods of administering justice in this country, and those which are prevalent in England are misleading. Extreme instances are cited from one or another of our forty-eight States, and these extreme instances are compared with the average course of justice in Great Britain. If, however, we take the States by themselves and compare one with another, and compare the generality of the States with the courts of Great Britain, we should find a very different story.

The bench and bar of to-day are, I venture to say, keenly alive to the importance and necessity of revising and simplifying our methods of procedure. In my own State the legislature has at its last session directed the Board of Statutory Consolidation, of which I am one of the members, to report a plan to the legislature at its next session for the simplification of our procedure, which has become by successive attempts at reform, and successive codes of procedure and codes of civil procedure, a complicated and voluminous practice Act of Brobdignagian proportions. But I am unable to see and cannot concede that the discontent with the present methods of practice is the real ground for the popular agitation against the courts and the judges. The people as a whole are but little affected by the delays or difficulties caused by technical procedure. Indeed they know little or nothing of these

things by experience. Their real grievances are caused by particular acts of particular judges in particular cases which are made the basis of inflammatory attacks by agitators, and which are supposed to be against the interests of the people or of some class of the people. So far as concerns the grievances growing out of technicalities or the cumbersome administration of the law, judicial recall would be worse than futile, since the individual judge is not responsible for the cumbersome provisions of practice acts, but the legislatures who have adopted them. It is not the individual judge who is to be attacked, but the whole body of judges and the legislature which enacts the law under which the judges are required to administer their offices.

Let us not deceive ourselves or live in a "fools' paradise".

The real ground of popular unrest and discontent with the courts is the feeling that courts are too much inclined to favor vested rights of property rather than personal liberty. There is a restiveness at constitutional restraints which finds vent in the demand for judicial recall and recall of judicial decisions.

Yet it is precisely by the enforcement of those constitutional restraints that personal liberty is to be preserved.

"Due process of law" is the protection not only of "property" but of "life and liberty as well." "Life, liberty and property" are not to be taken away, says the constitutional prohibition "without due process of law."

Weaken the power of the courts to protect "property" and you necessarily weaken the power to protect life and "liberty" against unconstitutional encroachments.

It behooves every lawyer who loves his country to bestir himself and to appeal to that American respect for law and regard for the Constitution and that wholesome American contempt for the visionary theorist and the wily agitator which have hitherto preserved our liberties from destruction.

I have hitherto spoken of judicial recall. What about the so-called "recall" of judicial decisions? This is a scheme lately devised by an ex-President of the United States. By the later interpretation placed upon it by its author it is narrowed down to a very limited class of cases. It is not every decision which is to be recalled by popular vote but only special classes of decisions. Indeed the decision itself is not to be revoked so far as concerns the individual litigants with regard to whom the decision was had, but the principle announced by the decision. The scheme as at

present formulated by its author, as I understand it, is this: Whenever the highest court of a State shall have declared unconstitutional a particular statute of the State passed under the "police power" of the State for the supposed benefit of the health or welfare or safety of a portion of the community, and whenever such statute has been held by the highest court of the State to be unconstitutional because interfering with the life, liberty and property clause of the constitution of the State, the people of the State shall have the right by a majority vote to set aside the decision of the court declaring the statute to be void and to restore the authority of the statute by *plébiscite*.

As thus restricted, the principle leaves unimpaired the power of the highest court of the land, a court by the way composed entirely of judges not elected by the people at all, but appointed by the executive with the consent of the Senate and not removable by the people but only removable by impeachment, and holding office for life or good behavior, to do the very things which the State courts are to be prohibited from doing, viz.: to set aside absolutely and without any right of review, a statute of a State passed under the police power of the State for the protection of the life, health or safety of a portion of the community.

If it be said that a statute approved by the State court is hardly likely to be set aside by the United States Supreme Court, we can point to numerous cases where this has been done.

Thus in the famous bake-shop case of *People v. Lochner*, 177 N. Y., 145, the Court of Appeals of New York affirmed the constitutionality of a law limiting the hours of labor of employes in bakeries and held it to be a valid exercise of the police power of the legislature relating to the public health. This decision was reversed by the Supreme Court of the United States (198 U. S., 45), which court held the act to be unconstitutional, as an unreasonable interference with the liberty of the citizen.

The number of cases is legion where State statutes which have been upheld by the State courts have been set aside by the United States Supreme Court as violating the clause of the Federal Constitution forbidding a State to pass any law impairing the obligation of a contract.

How long will it be before some future agitator clamoring for the right of the people to rule will insist that the decisions of the United States Supreme Court itself shall be made subject to review by popular vote? The Federal Courts have been in the

past subjected to the fiercest attacks by political agitators and have been regarded with far more disfavor than the State courts. Only recently, the decisions of the United States Supreme Court in applying the "rule of reason" to the Sherman Anti-Trust Act and in applying to that act a "reasonable construction" have aroused the anger of a large number of extremists.

The attack on the right of the courts to declare an act of the legislature or of Congress unconstitutional is but a recrudescence of an attack which has been from time to time waged upon the courts ever since the foundation of our Federal government. It has, indeed, been from time to time openly asserted and claimed that the courts have usurped a power not originally conferred upon them by the Constitutions, State or Federal, and not within the original intention or purview of the framers of the Constitutions. This proposition has even received support and encouragement from some of our best known writers on academic questions of constitutional law and even from professors in our law schools. It may not be unnecessary, therefore, to remind ourselves of the fallacy of this proposition.

So far as the Federal Constitution is concerned the debates in the convention and the statements in the *Federalist* clearly show that the power and duty of the courts to declare an act of Congress or an act of the legislature void as unconstitutional was contemplated.

In the Convention which framed the Federal Constitution, it was proposed to create a "council of revision" to be composed of the executive and a convenient number of the national judiciary, with authority to examine every act before it shall operate with a qualified veto power. This proposition was, however, rejected.

In the course of the debate, the provision for making the judiciary a part of the Council of Revision was objected to on the ground among others that it would interfere with their freedom from bias when later called upon to expound the law.

On this point, Mr. Elbridge Gerry, of Massachusetts, said he doubted whether the judiciary "ought to form a part of it, as they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their constitutionality. In some States the judges had actually set aside laws as being against the Constitution. This was done, too, with general approbation." *Madison's Journal of the Federal Convention* (Scott's Ed., Chicago,

Albert Scott & Co., 1893), p. 101. Mr. Gerry moved a proposition to give the veto power to the executive alone. Mr. Rufus King, of Massachusetts, seconded the motion "observing that the judges ought to be able to expound the law, as it should come before them, free from the bias of having participated in its formation." (*Ibid.*, pp. 101 and 102.)

Farrand's Records of the Federal Convention, Vol I.,
pp. 97, 98.

Mr. Wilson of Pennsylvania assumed that the judges as expositors of the laws would have power to refuse to give effect to laws clearly unconstitutional (*Ibid.*, p. 398).

Mr. Luther Martin of Maryland considered that the association of the judges with the executive would be a dangerous innovation. "As to the constitutionality of laws, that point will come before the judges in their proper official character. In this character they have a negative on the laws. Join them with the executive in the revision and they will have a double negative." (*Ibid.*, p. 402.)

Farrand's Records of the Federal Convention, Vol. II.,
p. 76.

There were, it is true, some members of the convention who protested against conferring upon the judiciary the right to refuse to enforce unconstitutional statutes; but their protests only serve to emphasize the views of those who assumed that the judiciary would of necessity be called upon to pass upon the constitutionality of statutes, State and Federal.

That the power and duty of the courts to pass upon the constitutionality of statutes was contemplated and intended by the framers of the Federal Constitution is made plain by the statements of the *Federalist*.

In No. LXXVIII of the *Federalist*, it is said: "The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority, such for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing. * * *

“The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

“Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. * * *

“If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty. This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill-humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.”

Human language could not be more explicit than this. The *Federalist* was, as we all know, published as an appeal by Madison, Hamilton and Jay to the American people for the adoption of the Constitution. That the adoption of the Constitution by the various States was due to the lucid and forcible exposition of its principles in the *Federalist* has been universally conceded. It follows that when the Constitution was adopted, it was adopted with explicit notification that the courts were intended to have the power to declare statutes unconstitutional.

I am quite at a loss to understand the state of mind of those who talk about "judicial usurpation" in passing upon the constitutionality of statutes. It would clearly have been judicial breach of duty if the courts had failed to exercise the function thus clearly imposed upon them.¹

Indeed, the duty of a court to refuse to enforce an act which violates a provision of the Constitution is perfectly obvious when we reflect upon the nature and objects of constitutional restrictions upon legislative authority.

As the matter was forcibly stated by Chief Justice Marshall in the great epoch-making case of *Marbury v. Madison*, 1 Cranch's Reports, 137-180: "If two laws conflict with each other the courts must decide on the operation of each. So, if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution and not such ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution and see only the law. This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void is, yet, in practice, completely obligatory. It would declare that, if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that these limits may be passed at pleasure."

¹ The evidence on this subject is very clearly set forth in an able and thorough article by Prof. C. A. Beard in the "Political Science Quarterly" entitled "The Supreme Court—Usurper or Grantee?" which was called to my attention after I had completed the first draft of this address ("Political Science Quarterly," March, 1912, Vol. XXVII., Number 1).

So unanswerable was the logic of the Chief-Justice's opinion that although it was really but an *obiter dictum*, the decision of the Court being that they had no jurisdiction of the particular matter before them, being an application for an original writ of mandamus, not in aid of their appellate jurisdiction, the application for the writ being discharged,—yet it became the foundation stone on which was built up the vast structure of constitutional jurisprudence, state and national, in this country. This structure has stood firm, from that day to this, notwithstanding the assaults of would-be innovators and the criticisms of academic theorists.

In George Ticknor Curtis's *Constitutional History of the United States* (Vol. I., p. 593), the subject is very forcibly put as follows: "To withhold from the citizen a right to be heard upon the question which in our jurisprudence is called the constitutionality of a law when that law is supposed to govern his rights or prescribe his duties, would be as unjust as it would be to deprive him of the right to be heard upon the construction of the law. or upon any other legal question that arises in the cause. The citizen lives under the protection, and is subject to the requirements, of a written fundamental law. No department of the national, or of any state government, can lawfully act otherwise than according to the powers conferred or the restrictions imposed by that instrument. If the citizen believe himself to be aggrieved by some action of either government which he supposes to be in violation of the Constitution, and his complaint admit of judicial investigation, he must be heard upon that question, and it must be adjudicated, or there can be no administration of the laws worthy of the name of justice."

It is said by Mr. Justice Brewer in *Muller v. Oregon*, 208 U. S., 420: "Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written Constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking."

The most serious aspect of the present agitation is not in its immediate results, but in the tendency towards ever increasing and rapidly accelerating demands for further changes in the direction of impairing the integrity and the independence of the judiciary.

It is said that the recall of judges if put into the Constitution of a State will be seldom used, and the experience of Oregon is cited as an example.

The test will come, however, in times of great public excitement, when popular resentment is aroused against the enforcement of the law affecting some class of the community.

Already threats have been made to invoke the recall in California to rebuke the judges for enforcing the law. What would have been the situation during the recent McNamara trial in California if judicial recall had been in force during that trial?

The McNamaras were on trial it will be remembered for dynamiting a newspaper office in Los Angeles, causing the death of several workmen. Intense feeling was aroused by the trial. Great numbers of men connected with Labor Unions insisted and most of them perhaps honestly believed the McNamaras to be innocent of the alleged crime and to be the victims of an unjust and malignant persecution in the interest of the capitalistic classes. The McNamaras ultimately and before the close of the trial confessed their guilt and thus took the question of their guilt or innocence at once and forever out of the region of uncertainty.

No amount of testimony, however direct and positive and however convincing to a jury could possibly have made the guilt of the defendants absolutely clear to their sympathizers beyond all controversy, so long as the defendants had continued to protest their innocence. Suppose they had not confessed their guilt, but had been convicted and sentenced, can we doubt that there would have been public resentment and public clamor and that judicial recall would have been promptly invoked to punish the judge who presided at the trial? Confession of guilt and that alone has vindicated the prosecutor and the judge.

"The appetite grows by what it feeds upon." It is appalling to think of the extremes to which popular majorities under the instigation of inflammatory harangues by eloquent or persuasive orators may be driven.

The right of the minority to be protected in their lives, liberty and property from the clamor of temporary popular majorities is absolutely essential to the preservation of our free institutions.

"Half the wrong conclusions at which mankind arrives are reached by the abuse of metaphors," is a remark attributed to Lord Palmerston.

"The people never give up their liberties but under some delusion," said Burke in his speech at the county meeting of Bucks.

Misleading catchwords and specious phrases are a cause of those delusions under which people are unconsciously led to give up their liberties. The abuse of such catchwords and specious phrases is quite as potent a cause of wrong conclusions as the abuse of metaphors.

"Let the people rule; Back to the people" is the slogan. Under the influence of these phrases, the attack is made upon our courts, which have heretofore made free government possible and which have been the essential safeguard of constitutional liberty. If the independence of the judiciary can be destroyed and if respect for the courts and the law can be undermined, then can the clamor of the majority be substituted for the rights of the minority and popular government based upon Constitutional limitations is at an end.

The misleading effect of catchwords and phrases is well illustrated in the matter of presidential primaries. The avowed object of these primaries was to get rid of the "bosses" and to enable the people to express their choice of candidates directly and without the interference of costly and cumbersome convention machinery. Yet has there ever been a more extraordinary exhibition of the squandering of money since the foundation of the Republic than we have seen in the presidential primaries of this year of grace 1912, in the endeavor to let the people rule? What chance, let us ask, would Lincoln, a poor country lawyer, have stood, if he had been compelled to open headquarters, to publish and distribute tons upon tons of campaign literature, to hire special trains, to pay hotel bills for himself and his cohorts, and to travel thousands of miles at his own expense or the expense of his supporters? The cold fact is, and there is no use in blinking at the fact, that no man can be a candidate for the presidential nomination to-day, who is not either a man of independent fortune, or a man who has supporters ready and willing to furnish pecuniary assistance. It is no exaggeration to say that money has been poured out like water in this campaign, not to buy votes, but to enlighten the voters as to the merits and demerits of the candidates. And all this before the national conventions have been held and before the expenses of the presidential nominees of the various parties have begun. Who would have financed the campaign expenses of the country lawyer, Lincoln, in a presiden-

tial primary, and what show would he have had as against Seward or Chase? I am not blind to the defects and dangers of our system of party conventions as heretofore carried on, but in undertaking the radical changes embodied in presidential primaries, are we not jumping from the "frying-pan into the fire?"

What I am particularly desirous of pointing out is the danger of catch-words and phrases. "Back to the people" as applied to the judiciary by recall of judges and recall of judicial decisions means "back to disorder and injustice" and death to constitutional liberty.

Fortunately, each State must determine for itself whether or not there shall be a recall of judges or a recall of judicial decisions by popular vote.

Wild vagaries of faddists and theorists may be indulged in by one or more of our States without breaking down the safeguards of our sister States. This is the greatest advantage of our Federal form of government.

I appeal to you, gentlemen, as you go forth to practice law in your various States that you do what in you lies to prevent the spread of these heresies in your several States.

Remember that the independence of the judiciary is the keystone of our form of government,—that if the keystone is removed the whole structure is in danger of disintegration and destruction.

Remember that the safeguards of the Constitution must be preserved intact and the right and duty of the judiciary to protect and enforce the Constitution of State and Nation must be sedulously and carefully maintained or the day will surely come when might shall take the place of right and when the government of the whole people, by the whole people and for the whole people shall be supplanted by government of the whole people by a majority of the voters for a majority of the voters. Then will government of law and order come to an end.

I do not believe that that day will ever come. I am a strong believer in the common sense of the common people. I believe that the rash experiments of those of our States who have adopted this revolutionary constitutional change in their judicial system known as "judicial recall" will not be followed by their sister States, and that these States themselves will come to see the error of their ways and will change back to the safe paths of their ancestors.

William B. Hornblower.