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The Recall and the Political Responsibility of Judges

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THE RECALL AND THE POLITICAL RESPONSIBILITY OF JUDGES.

THE movement for the recall of State officers is one which has become important only within the past three or four years.

The first application of the recall as a modern institution in the United States appears to have been in Los Angeles in 1903, where the institution was adopted in the amendment of the charter framed by that city. From Los Angeles the recall as applicable only to municipal officers spread to other California cities, and has now been rather widely adopted in other States. The first State constitutional amendment with respect to the recall, that of California in 1906, provided that municipal charters should control with respect to the tenure of office or dismissal from office of municipal officers or employees.

The first State-wide provision for a recall of public officers was that inserted into the constitution of Oregon by an amendment adopted on June 1, 1908. A proposal in substantially the same terms as the Oregon provision was incorporated into the proposed constitution of Arizona, which was approved by a vote of the people of that territory on February 9, 1911, and a somewhat similar provision was adopted as a constitutional amendment by a vote of the people of California on October 10, 1911.

In Oregon the recall is made applicable to every public officer, State or local (although limited apparently to elective officers), and the procedure is initiated by a petition of twenty-five per cent of the number of electors who voted at the preceding election for justice of the State supreme court. This recall petition must include twenty-five per cent of such electors of the whole State if the officer to be recalled is elected from the State at large, or twenty-five per cent of such electors within the district from which he was elected, if he is an officer elected not by the State at large.

The recall petition sets forth the reasons therefor. If the officer against whom the petition is filed resigns, his resignation is accepted and the office is filled "as may be provided by law." If he does not offer his resignation within five days after the petition is filed, a special election is ordered within twenty days to determine whether he shall be recalled, and he continues to perform the duties of his office until the result of the election is officially declared. On the ballot used in the recall election may be printed in not more than two hundred words the reasons for demanding the recall, and in not more than two hundred words the officer's justification of his course in office. Other candidates may be nominated, to be voted upon at the recall election,[1] and the person receiving the highest number of votes is elected to serve for the remainder of the term; that is, the officer against whom the petition is presented is recalled if any other candidate can obtain a higher number of votes at the recall election. No recall petition may "be circulated against any officer until he has actually held his office six months, save and except that it may be filed against a senator or representative in the Legislative Assembly at any time after five days from the beginning of the first session after his election. After one such petition and special election, no further recall petition shall be filed against the same officer during the term for which he was elected unless such further petitioners shall first pay into the public treasury the whole amount of its expenses for the preceding special election." The Legislative Assembly of Oregon is required to pass additional legislation in aid of the recall, "including provision for payment by the public treasury of the reasonable special election campaign expenses of such officer." The proposed Arizona recall provision is very similar to that of Oregon, the only important difference being that the recall petition shall be signed by such number of electors "as shall equal twenty-five per cent of the number of votes cast at the last preceding general election for all of the candidates for the office held by such officer."

The provisions for recall contained in the California constitutional amendment are in several respects different from those referred to above. The recall petition need ordinarily be signed only by electors equal in number to at least twelve per cent of the entire vote cast at the last preceding election for all candidates for the office held by the officer sought to be recalled, but twenty per cent of such electors are

[1] In the Arizona constitution it was provided that unless the officer sought to be recalled otherwise requests in writing, his name shall be placed as a candidate on the official ballot without nomination. In Oregon the name of such officer appears whether he wishes or not, if a recall election is held, although he may prevent such an election by resigning.

required if the officer sought to be removed "is a State officer who is elected in any political subdivision of the State." If the officer sought to be recalled was elected from the State at large, the recall petition must be circulated in not less than five counties, and must be signed in each of such counties by voters equal to at least one per cent of the entire vote cast therein. The recall election is to be held not less than sixty nor more than eighty days after the certification of the petition to the governor; this is a difference of great importance in that it interposes between the recall petition and the election a much longer period of time than does the Oregon provision. On the election ballot the officer sought to be recalled has three hundred words in which to justify his conduct, although the reasons for recall must be stated in not more than two hundred words.

Under the Oregon provision and under that proposed in Arizona no special election is to be held if the officer resigns within five days after the filing of a recall petition, but in California "if such officer shall resign at any time subsequent to the filing thereof, the recall election shall be had notwithstanding such resignation," and the question of recall is to be voted upon irrespective of such resignation. The most important characteristic of the recall election in California is that by which it is sought to separate the question of recall from the question as to the election of a successor, should the officer actually be recalled. With respect to this matter the California provision must be quoted in full:

"Any person may be nominated for the office which is to be filled at any recall election by a petition signed by the electors, qualified to vote at such recall election, equal in number to at least one per cent of the total number of votes cast at the last preceding general election for all candidates for the office which the incumbent sought to be removed occupies. * * *"

"There shall be printed on the recall ballot, as to every officer whose recall is to be voted on thereat, the following question: 'Shall (name of person against whom the recall petition is filed) be recalled from the office of (title of the office)?,' following which question shall be the words 'yes' and 'no' on separate lines, with a blank space at the right of each, in which the voter shall indicate, by stamping a cross (X), his vote for or against such recall. On such ballots, under each such question there shall also be printed the names of those persons who have been nominated as candidates to succeed the person recalled, in case he shall be removed from office by said recall election; but no vote cast shall be counted for any candidate for said office, unless the voter also voted on said question of the recall of the person sought to be recalled from said office. The name of the

person against whom the petition is filed shall not appear on the ballot as a candidate for the office. If a majority of those voting on said question of the recall of any incumbent from office shall vote 'No,' said incumbent shall continue in said office. If a majority shall vote 'Yes,' said incumbent shall thereupon be deemed removed from such office upon the qualification of his successor. The canvassers shall canvass all votes for candidates for said office and declare the result in like manner as in a regular election. If the vote at any such recall election shall recall the officer, then the candidate who has received the highest number of votes for the office shall be thereby declared elected for the remainder of the term."

The California amendment also contains full provisions as to the form and verification of a recall petition. As in Oregon, a recall petition is not to be circulated against any officer until he has served for six months, but to this provision there is an exception with respect to members of the legislature. As has already been suggested, in Oregon after one recall election against an officer another such election during his term is practically forbidden by the fact that a heavy expense must be borne by those desiring a second recall election, but in California there is merely a provision that "no proceedings for another recall election of said incumbent shall be initiated within six months" after an election in which the attempt to recall failed. In Oregon the legislature is in terms required to make "provision for payment by the public treasury of the reasonable special election campaign expenses of such officer" [who is sought to be recalled]; in California more definite language is used: "If at any recall election the incumbent whose removal is sought is not recalled, he shall be repaid from the State treasury any amount legally expended by him as expenses of such election, and the legislature shall provide appropriation for such purpose."

The recall provisions which have been summarized above apply to all elective officers and therefore apply to judges in Oregon and California. This fact seems to have attracted little or no attention in Oregon in 1908, and the recall seems almost as a matter of course to have been applied to judges as well as to other elective officers. A definite issue upon the subject of the recall of judges was raised by Mr. TAFT's opposition to the Arizona recall provision. The events of the summer of 1911 are now fresh in the minds of readers. On August 15 Mr. TAFT vetoed a joint resolution providing that the people of Arizona should be required to vote upon the question of excepting "members of the judiciary" from the operation of the recall but that Arizona should be admitted as a State irrespective of how the question should be decided by the popular vote. A joint

resolution was then passed providing that Arizona should not be admitted unless the recall of judges is stricken from its constitution, and this joint resolution Mr. TAFT approved on August 22.[2]

In the discussion which took place in the House of Representatives and in the Senate, both before and after Mr. TAFT's veto message, elaborate arguments were presented against the recall of judges, and these arguments were vigorously combatted by a small group of progressives. It may be well here to summarize the defects of the recall, as presented by these arguments, and by Mr. TAFT's veto message:

(1) It is urged that a judge is an officer whose decisions should not be influenced by popular passion—that his rulings may be just and in accordance with the law, and perhaps also in accord with the matured judgment of the community, but that by means of the recall a judge in such cases may be removed before the passions of the moment have had time to cool. It is said that the judicial function is one of administering impartial justice without regard to consequences, and that the recall will cause a judge to depart from a position of impartiality, and to render his decisions in accordance with the popular views of the moment. Now, it must be agreed that there is much to this argument, and that in rulings in criminal cases and in the generality of civil cases between man and man a judge should be in a position which will permit impartiality and soberness of judgment.

However, in this respect the recall provisions of California differ materially from those in Oregon and Arizona. In Oregon the recall election must come within twenty-five days after the filing of the petition, and in Arizona the election must come in any case within thirty-five days after the filing of the petition; but in California the election comes not less than sixty nor more than eighty days after the certification of the recall petition to the governor, and within two months or more popular feeling may change materially.

(2) With respect to the Arizona provision Mr. TAFT argues (and the same argument applies to Oregon) that the issue in a recall election is not upon the recall of the officer alone, but becomes a contest between rival candidates for the office. As has already been suggested, in Oregon and under the Arizona provision if a recall petition is filed against an officer and he does not resign, an election

[2]This paper does not concern itself with the propriety or impropriety of coercing a territory as to what should be placed in its constitution, nor with the power of Arizona to readopt the recall of judges as soon as it is admitted to statehood. As to this latter point the recent decision of the United States Supreme Court in Coyle v. Smith (31 Sup. Ct. 688) seems conclusive.

is held at which the recalled officer may be opposed by other candidates, and he is recalled unless he obtains the highest number of votes in the election. The question at the election becomes not merely or primarily a question as to whether A shall be dismissed from office for certain assigned reasons, but is one as to whether A, B, or C shall have the office for the future. The issue is thus confused and is not fought out merely upon the question of A's competency.

This criticism is a just one which applies to the Oregon and Arizona recall not only as to judges but also as to all other officers. However, this criticism does not attack the principle of the recall, but merely the terms of the recall provisions in these cases. In California an effort is made to separate the issues, and separate votes are required upon the recall of an officer and upon the election of his successor. But even here the issues are confused by the submission of the two questions at the same election. Yet it is easily possible, although the proceeding is more cumbersome, to require first a distinct vote upon the question of recalling an officer, and then a subsequent election for the choice of his successor, should he be recalled. Practically, this is what is done under the present terms of the Boston charter; the mayor is elected for a term of four years, but there is submitted at the State election in the second year of his term the question as to whether there should be an election for mayor at the next municipal election, that is, after he has served two years; and if the people vote in favor of a new election the mayor's term ceases at the end of two years, and a new election is held.

(3) The third criticism of the recall is that as to the frequency and ease with which it may be employed, and this criticism applies not only to the recall of judges but also to the recall of other officers. In answer to such a criticism it may be suggested that under the Arizona and Oregon provisions a twenty-five per cent petition is required to call an election, and that practically there may not be more than one recall election during the term of any officer. But in California the number of petitioners is not so great, and the only limit on the frequency of recall elections is one that proceedings for a recall election shall not be initiated within six months after a recall election as to any officer. In these respects the California provision is perhaps more dangerous than those of Oregon and Arizona, and might subject a judicial officer to frequent popular elections.

On the whole it may be said that the recall of judges is in theory bad, when we look at the ordinary functions of judges, and consider the effect which may be had upon such functions by a constantly

present amenability to popular control.[3] And from this standpoint it may be possible to understand Mr. TAFT's veto message and the resolution recently adopted by the American Bar Association condemning the recall of judges. Yet the movement for the recall of judges has probably just begun, and the movement will in all likelihood be aided rather than retarded by the recent discussion of the subject. Back of such a movement and back of the constantly growing popular distrust of the courts there must be some facts and some arguments, which cannot be met even by Mr. TAFT's passionate declaration that he loves the courts. Movements of this sort do not spring up out of the thin air, and usually if a search is made some basis can be found for them. Perhaps some basis may be found at the same time for Senator OWEN'S proposal for the popular election of Federal judges and their removal upon a resolution of Congress, and also for Senator BOURNE'S proposal that no law should be declared unconstitutional by the United States Supreme Court except by a unanimous decision.[4] And the weakness of Mr. TAFT'S position is just this: that he fails to realize that there may be some basis for such a movement; that therefore he condemns the movement without seeking also to condemn the conditions which have produced it, and without seeking to correct such conditions. Perhaps it may be possible to summarize these conditions under two heads:

(1) The courts have ceased to a large extent to be efficient organs for the administration of civil and criminal justice. With respect to this matter due credit should be given to Mr. TAFT for his advocacy of reform. Yet even he apparently fails to realize the extent to which judicial inefficiency has weakened the popular respect for courts. There has been much talk of executive and legislative inefficiency in our States, but too little discussion of the conditions and causes of judicial inefficiency.

(2) Perhaps the most important influence in bringing about a demand for a greater popular control of courts is the increasingly important position which the courts have come to occupy as political organs of the government through their power to declare laws unconstitutional as violative of guaranties of "due process of law" and "equal protection of the laws." These guaranties mean whatever the courts in any particular case may decide that they mean, and furnish a broad foundation upon which courts may base declarations of unconstitutionality. As has been frequently suggested in recent

[3] In fact, however, the recall would probably not be so frequently used as to subject any officer to frequent popular elections; although in California recall elections as to the same officer may be held every six months, there is little likelihood of this occurring.

[4] Congressional Record, 62d Cong., 1st session, pp. 3687, 4039. August 4, 14, 1911.

years, the courts have become practically legislative organs with an absolute power of veto over statutory legislation which they regard as inexpedient; and this power has been used most frequently with respect to social and industrial legislation enacted to meet new social and economic conditions.

In these matters the courts exercise definite political power without a corresponding political responsibility.[5] And it is the exercise of power as to questions of public policy—questions more or less political in character—that has to a large extent weakened the position of the courts and led to the demand for an increased popular control over them. As to such questions, popular sentiment will in the end prevail, but the interference of the courts in such matters is injurious both to the community and to the courts themselves.[6] In no case have the courts in the long run succeeded in carrying their point when they have arrayed themselves against the popular sentiment on social and political questions, but not until recent years have the courts exercised political powers to such a great extent. Mr. TAFT claims that few cases come before the courts in which the decisions of the judges are influenced by the political, social and economic views of the judges, but such cases are more numerous than he is inclined to admit. He urges that in such cases the courts will respond "to sober popular opinion as it changes to meet the exigency of social, political and economic changes." These statements by the president contain an admission that the courts have become at least to a certain extent policy-determining organs. Even if such a function were a proper one for the courts, it is hardly possible to agree that the courts have adjusted themselves to the present social and industrial conditions.[7]

Our industrial organization has passed from an individualistic into a highly organized and centralized state. Toward this development of industry our courts have on the whole taken a liberal attitude. But our present social and industrial organization has made

[5]This fact was clearly recognized by Senator Clapp. Congressional Record, 62d Congress, 1st session, p. 4037.

[6]Under the present conditions a serious danger may present itself with respect to the courts. There has been little inducement to corrupt the courts so long as they did not exercise political functions. In the past corrupting influences have been directed toward the legislatures in order to control legislation, but now with the control of legislation transferred to the courts the forces which have operated in the past to produce corruption in the legislature and executive may direct their attention to the judicial department of the government. Judges are but human, and a systematic effort of certain elements in the community to control the courts might succeed for a while if there were sufficient inducement to produce such an effort.

[7]Perhaps, however, it should be suggested that the United States Supreme Court has within the past few years shown a tendency to adjust itself to new social and industrial conditions.

necessary new legislation to protect rights of individuals which under earlier conditions did not need legal protection. And toward such new legislation the courts cannot be said to have been liberal. Our legal philosophy is still highly individualisic in character, and is in large part out of touch with the needs of the day, and judges steeped in an outworn philosophy are hardly the persons to determine industrial and social policies at the present and for the future.

The present situation has recently been very well expressed by Mr. EDWARD T. DEVINE:

"For better or worse, the courts through a great extension of their functions in interpreting statutes and passing upon their constitutionality, have become a part of the law-making body. Their veto is as effective and as frequently exercised on vital questions as that of the executive. Laws are declared to be unconstitutional not because they conflict with anything which common sense can discover in the constitution, but because they conflict with the economic views or the social philosophy held by the judges and by them read into the constitution. If the courts set aside acts of the legislatures—not technically, perhaps, but really—because they believe them to be unwise, they must expect their decisions to be subjected to criticism and discussion. They sacrifice their immunity from hostile criticism. Those who like their decisions and are benefited by them will approve. Those who do not like them will protest. The discussion ceases to be one of law for trained lawyers, and becomes one of public policy, for all intelligent citizens."[8]

But it is urged that, even if these conditions be admitted, the recall of judges is a dangerous expedient, and that it is unnecessary because (1) for actual corruption judges may be removed after impeachment; (2) judges may in a majority of the States be removed upon address by the legislature, and may thus be gotten rid of even though impeachment proceedings are out of the question; (3) in almost all of the States judges hold for fixed and often short terms, and in about three-fourths of the States they are elected by popular vote;[9] and (4) it is urged that judges may be brought to a realization of modern conditions by a campaign of education, which may in time cause them to decide social and industrial questions in accordance with social and industrial facts. A campaign of education is a slow process, although it may be that in this manner judges may be brought to a realization that certain things were facts by the time

[8] The Survey, August 5, 1911.

[9] Most of the state constitutional provisions with respect to election, tenure, and removal of judges are conveniently collected in Senator Owen's speech, Cong. Rec. 62d Cong., 1st session p. 3687. August 4, 1911.

that such facts had through the progress of society ceased to exist.

Impeachment cannot be said to be an effective instrument for the control even of judicial corruption; and removal on an address of the legislature is equally ineffective as a means of control where two-thirds of each branch of the legislature must act either alone or together with the governor of the State. Popular election and comparatively short terms in a number of States have apparently not kept judges closely enough in touch with social and economic conditions. Various reasons have been assigned for the continued irresponsibility of judges in the exercise of political functions and even in the exercise of their normal judicial functions:

(1) Some urge that where corrupt influences control in State elections their effect may be manifest in the judicial department as well as in the legislative and executive departments, and there have undoubtedly been cases of judicial corruption and of improper influences in judicial elections. Yet it must be said that in the main our courts have been free from improper influences, and that the bias of our judges against new social and industrial legislation is an intellectual bias and not one based upon corrupt motives.

(2) A judicial decision ordinarily involves directly only the parties to the suit, and its wider bearing is not made as much of as is the bearing of legislative and executive actions. Moreover, a decision is ordinarily couched in somewhat technical language, and is placed on grounds which appear plausible.[10] The people are not constantly alert, and though there may have been vigorous agitation for the passage of certain legislation, a judicial declaration that it is invalid comes usually long after the agitation has quieted down; our traditional respect for the courts causes the blame for the failure of the legislation to be placed upon that ever-present scape-goat, the State legislature. When a judge presents himself for re-election, it may be some four or more years after rendering such a decision, the matter has been forgotten. This, perhaps, amounts simply to a statement that the people have not yet become accustomed to the exercise of political functions by the courts.

(3) Another reason for judicial irresponsibility is based upon the close relations between judges and practicing attorneys. Lawyers are conservative and exercise a large influence in judicial elections.

[10]The power of the courts in this country has led until recently (and at present upon the part of the legal profession) to the treatment of judicial decisions as if they were oracles or sibyline sayings, and judicial decisions have far too great an importance both in legal development and in legal instruction. Judges are human; their decisions are often decidedly human; and a dialectical treatment of them, after the fashion of the scholastic philosophy, overlooking their practical bearing and practical worth, is a disadvantage.

Moreover, lawyers are to a large extent dependent for their success upon the favor of the judges before whom they practice, and are therefore prevented from making criticisms. This situation has recently been very well expressed by Professor WIGMORE:

"The public does not fully understand the position of a judge, in respect to his immunity from exposure by the bar. His professional iniquities or incompetencies, if any, are so committed as to become directly known only to a few persons in any given instance; and these few persons are the attorneys in charge of the case. Where peculation, 'graft,' or other similar abuse is involved, this limitation on the class of direct witnesses is peculiarly the feature. Now the attorneys in that case are going to be the attorneys in other cases before the same judge. Thus, the chief or only witnesses to his misdoing are the very persons who are dependent upon his will for their future success on behalf of their future clients. To bear open testimony against him now is to risk professional ruin at his hands in the near future. Moreover, this ruin can be perpetrated by him without fear of the detection of his malice; because a judge's decision can be openly placed on plausible grounds, while secretly based on the resolve to disfavor the attorney in the case. Hence, lawyers dread, most of all things, to give personal offence to a judge who is likely to resent it. And hence, *they will not testify openly* to facts—even the most solid facts—of corruption or incompetency, while the judge is on the bench and likely to remain there."[11]

Not only are practicing lawyers restrained from criticising improper acts of judges, but they must also be cautious in their criticism of legal principles as applied by the judges before whom they practice. Should an attorney so far transgress as openly to criticise a judge, even at the time when that judge is running for re-election, the possibility of disbarment is not a remote contingency.[12]

If the above analysis of present conditions is a correct one there is some solid basis for the movement for the recall of judges. We have officers exercising large political powers without a corresponding political responsibility. But it is out of the question to amend the Federal constitution and to obtain a recall of Federal judges. Will the introduction of the recall as to State judges prove an adequate remedy for the present situation?

Now the United States Supreme Court exercises power to declare State laws unconstitutional as violative of the Federal constitution, and will continue to have such power, irrespective of any State ac-

[11] 6 Ill. L. Rev. 198 (October, 1911).

[12] See In re Thatcher, 80 Ohio St. 492.

tion.[13] State courts now exercise power to declare State laws unconstitutional as violative of either the State or Federal constitutions, and under present conditions the decision of a State court in such a case is final. The really serious difficulty at present is with decisions of State courts declaring laws unconstitutional as violative of "due process of law," or the "equal protection of the laws," and it is possible without the recall to remedy this situation. Practically all of our State constitutions contain guaranties as to "due process" and "equal protection" equivalent to those in the Fourteenth Amendment. If the constitutionality of a State law is contested as violating these provisions the State court may hold the State law invalid as violating either State or Federal constitutional provisions or both. If such a State decision is based on Federal constitutional grounds it is final, for at present there is no appeal to the United States Supreme Court from a State decision upholding a Federal constitutional right which is set up, even though the State decision is less liberal than decisions of the United States Supreme Court. If a State court bases its declaration of unconstitutionality on State constitutional grounds, here again its decision is final, unless overruled by a change in the State constitution.[14]

But if State courts have abused their power to declare State laws unconstitutional on "due process" and "equal protection"[15] grounds, it is possible to remedy the situation by two measures, the one involving a change in State constitutions, and the other an act of Congress:

(1) The States may strike the "due process of law" and the "equal protection of the laws" clauses from their constitutions. These clauses must mean the same thing in State constitutions as in the Federal constitution, although it must be said that they are often interpreted to mean different things, and since the Fourteenth Amendment, State constitutional provisions of this character have served no useful purpose, for private rights are adequately safeguarded by that amendment.[16]

[13] In any Federal government there must be somewhere in the governmental organization a power to preserve the balance between the Federal and State governments, to prevent encroachments by the States upon the province of the Federal government.

[14] A State decision holding a law invalid on Federal grounds or on both State and Federal grounds is at present decisive even though opposed to a decision of the United States Supreme Court upon the same point. State courts may therefore by a sort of judicial legerdemain delay indefinitely the final and uniform settlement of a constitutional question.

[15] The more specific constitutional guaranties have on the whole caused little difficulty.

[16] Of course States may, if they wish, by constitutional amendment strike out all constitutional restrictions upon their legislatures, or forbid their courts to declare State laws invalid on State constitutional grounds. But no one has yet suggested going so far as this.

(2) If the guaranties of "due process" and "equal protection" were stricken from the State constitutions, we would still have these guaranties in the Fourteenth Amendment enforcible by both State and Federal courts. The power of a State court to declare a State law to be a violation of the Federal constitution is beyond State control. And the "due process" and "equal protection" clauses, as limitations upon the States, are now too firmly embedded in our Federal constitutional law to be changed. But if the "due process" and "equal protection" clauses are stricken from State constitutions, State decisions declaring State laws unconstitutional upon these grounds must be based on the Federal constitutional provisions, and it should be possible without great difficulty to obtain a prompt and uniform interpretation of these Federal clauses for the whole country by an amendment to the Federal Judicial Code, so as to permit review by the United States Supreme Court of State decisions holding State laws invalid on Federal constitutional grounds.[17]

It may be urged that the above suggestions leave a judicial supervision of legislation as wide as before but simply center that control in one court, the United States Supreme Court. But more than this would be accomplished. One of the serious difficulties at present is the conflicting interpretation by State and Federal courts of almost identical or identical provisions in State and Federal constitutions, particularly with respect to "due process" and "equal protection," and the effect of these conflicting interpretations is that many laws are held unconstitutional which might otherwise be upheld, and that much delay is occasioned in the final settlement of constitutional questions. The suggestions made above would make conflicting interpretations impossible and prevent delay.

No increase in Federal judicial power would be made, for an unsettled question of Federal constitutional law will sooner or later come to the United States Supreme Court in any case. But such a plan would stop irresponsible and hasty decisions by State courts that State laws are unconstitutional. Yet it may be urged that this power to declare laws unconstitutional as violative of broad constitutional guaranties—a political power—will merely be concentrated in the hands of the United States Supreme Court, a non-political and irresponsible body. This is true, but a higher ability and a broader outlook may be expected from members of the United States Supreme Court than from the judges of many of our State courts. And the decisions of the highest Federal court attract wider attention;

[17]For a full discussion of the proposed amendment to the Federal Judicial Code see my article on "The United States Supreme Court as the Final Interpreter of the Federal Constitution," in Illinois Law Review for December, 1911.

they are on the whole made under a greater sense of responsibility. In addition, this court, by virtue of its unique position as the head of our judicial organization is more amenable to well-directed and fair-minded criticism. If judges must be brought in line with new social and industrial conditions, the influence of opinion and criticism is apt to be most effective with respect to the Supreme Court of the United States.

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