THE RECALL OF THE JUDICIARY IN CALIFORNIA

A Summary of Reasons Against Recalling Judges at Popular Elections

By WILLIAM DENMAN

of the San Francisco Bar

PREPARED FOR AND DELIVERED BEFORE THE COMMONWEALTH CLUB JUNE 14, 1911.

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The most important of the constitutional amendments to be voted on by the people at the special election to be held October 10, 1911, is that involving the initiative, referendum and recall, with particular reference to the latter as applied to the judiciary.

This amendment was the subject for discussion at the last monthly meeting of the Commonwealth Club. At this meeting Assemblyman W. C. Clark of Oakland, Senator Lee C. Gates of Los Angeles, Francis J. Heney and John Haynes of Los Angeles, spoke in favor of the recall as applied to the judiciary, while William Denman, Robert M. Fitzgerald and Warren Olney Jr. argued against it.

Mr. Denman's argument summarized the points against the recall, and is as follows:

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We all agree that an unfit judge should be recalled. We are in disagreement as to the method. Three ways of accomplishing the result have been considered—the recall by the governor, by the legislature and by popular election.

At the present time a judge may be removed by the legislature without impeachment proceedings by a simple joint resolution, upon

a two-thirds vote. This has not been efficacious in the past, because under the old convention system the "interests" owned the legislature. We are certain that now, under the direct primary, we shall have the same class of independent and able (if not always logical and consistent) legislators we had at the last session. We think that it is through that body, where the matter can be carefully sifted, that the people should obtain their purification of the courts.

We believe that a popular election is not the proper place to determine whether a judge should be recalled:

1. Because he is required by his oath to try cases before him according to law, even if the law's provisions be unwise. The determination whether the law's provisions are unwise and should be amended by the legislature, or the decision of the judge is an abuse of the law for which he should be recalled, is a question for experts and can no more be solved at a popular election than a question of strength of materials in building the City Hall, or of the skill of a physician in treating a complicated gunshot wound. For instance, it is safe to say that no layman within the sound of the reader's voice can honestly say whether the law was at fault, or the court, in the Schmitz decision.

2. Because the best that can be expected of even a wise law is that it will bring about substantial justice in a majority of cases. Even the wisest laws will work substantial injustice, from humanity's standpoint, in some cases. For instance, the millionaire's foreclosure of a mortgage for a thousand dollars, which throws the aged widow of a respectable workman out of her cottage and sends her to the poor-house, cannot be regarded as substantial justice from the standpoint of common humanity. Nevertheless, the law of mortgage must be upheld, or our whole system of credit will fall. This is a gross instance of what constantly happens in a much more subtle way in the decisions of courts. The question of whether the special violation of substantial justice in enforcing a good law is inevitable or due to an impropriety on the judge's part, is an expert question and cannot be solved at a popular election.

3. Because judges are human beings. We must take them as they are. If they are subject to the likelihood of facing a recall election for an unpopular decision, a considerable percentage will be influenced by those politicians and newspapers who most influence elections. We know that such politicians and such papers are often opposed to the best interests of the public.

4. Because a man who is a deep student of men and codes, and possesses a real judicial temperament, rarely has the gift of stump speaking necessary to make his case before the people in a recall campaign, even if the electorate had the expert knowledge to understand the distinctions he is attempting to make.

5. Because the judicial office is very little in the public eye. The conspicuous decision of an unpopular nature in such cases as are referred to will outweigh years of quiet, conscientious public service, all the better because accomplished in an inconspicuous manner. While the law is not an exact science in the sense of mathematics or physics, it is a *complicated* science requiring quiet expert research and a highly developed special knowledge as well as a broad sympathy and understanding of human nature.

6. Because, in order to give permanency to our institutions, our governmental organization is based on a written constitution. It is the duty of the judge to determine the constitutionality of many questions of a quasi-political nature, which affect many different factions. In the heat of such struggles a combination of factions could be easily arranged to recall the judge while the orderly and more conservative procedure of amending the constitution will be ignored. The recall at popular election would make the courts a forum of popular political controversy rather than a judicial tribunal.

7. Because, viewing the last objection from another angle, if it is the desire to take from the courts the power to declare acts of the legislature void as unconstitutional, then this should be done directly and honestly by amending the constitution and declaring that the legislature should be the final judge of the constitutionality of its own acts. It should not be done indirectly and dishonestly by holding a club over the heads of the judges.

8. Because in California one of the principal evils in our judicial system no longer exists, i. e., the election of a judge on a partisan ticket. He will no longer feel bound to decide these constitutional political questions in favor of the party which has seated him upon the bench. (Statutes 1911, ch. 398.)

9. Because in California another glaring evil of our judicial system has been removed, i. e., the nomination of judges in political conventions where their choice was often neglected entirely by the delegates, who were interested chiefly in the more engrossing executive and legislative offices, and where the judges were as often

selected by the boss or the interests he represented. (Statutes 1911, ch. 398.)

10. Because none of the progressive governments of modern times having a non-partisan judiciary—such as Switzerland, Great Britain, New Zealand, Australia, nations that have had for twenty years the reform legislation we are just initiating—have ever suggested the recall of the judiciary at a popular election.

11. Because for the first time in the history of the state we have strong and independent legislators, elected after a direct primary and free from the control of the convention bosses. Such a tribunal could give the question of recall an expert hearing and arrive at a fair and practical result. It is not hampered by any of the technicalities of an impeachment proceeding. It may remove on a joint resolution receiving a two-thirds vote, a smaller proportion than is required for a jury verdict in an ordinary civil case.

If the question becomes one for a popular election, the legislature will feel no responsibility. Just as the last legislature ignored charges of a most damaging nature against certain members of our courts because it felt that in all likelihood they would be decided at a recall election to take place this fall, thus doing the accused judges a gross injustice if the charges were false, or the people a gross injustice if they were true.

12. Because the measure is entirely out of harmony with that other constitutional amendment passed by the same legislators, *taking from the people* the right to elect the members of the most powerful judicial tribunal in the state—a tribunal whose single adjudication affects the common man in more ways than a hundred Supreme Court decisions—the Railroad Commission. Not only is the election of the members of this judicial tribunal taken from the people and its members made appointive by the governor, but they are not included in the provisions of the recall amendment and cannot be removed by the legislature by joint resolution, as are the judges.

On the plea of making the judges of the Supreme Court free from the Southern Pacific Railroad, we are asked to elect them by popular vote and subject them to a recall at a popular election. On the plea of making the railroad commission—which is the court in whose adjudications the Southern Pacific is now chiefly interested—free from that corporation, we are asked in the same breath to take from the people the right to elect them and to deny to the people the

power to recall at popular election. In other words, the Southern Pacific will control our Supreme Court unless we apply to it the popular election and the popular recall, and the Southern Pacific will control the railroad commission unless we deny to it popular election and popular recall.

Perhaps we can now understand what Senator Works meant by "reform run mad". Happily other excellent enactments of this session of the legislature are not marred by such inconsistency.

13. Because a self-respecting candidate will hesitate to run in the recall election under the law as framed. Under the law there is no vacancy unless a majority vote is polled to recall the incumbent. The new candidate's name goes on the same ballot that settles the recall—that is to say, he becomes a candidate for a position that is not vacant. A man might spend weeks canvassing the state, obtain a plurality of votes and beat all his opponents, and still not be elected because there is no vacancy on account of the failure to recall the incumbent.

To sum it up, the settlement of the necessity for recalling a judge at a popular election calls on the average voter to make a decision he has not the special knowledge to make. It places the incumbent in fear of removal by men without the time or the special information or training necessary to give him a fair hearing. It would make weak judges weaker, and deter strong and self-respecting men from becoming candidates for the bench.