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FALLACIES OF THE RECALL OF JUDICIAL DECISIONS

By T. B. Kelley.

"If an act of the legislature is declared by the state courts to violate a provision in the state constitution, after an interval for consideration, the people of the state shall have an opportunity to vote on the question whether they desire to have the act become the law in spite of the fact that the opinion of the court is that the statute is contrary to the constitution."

The above proposition hatched in the fertile and productive brain of our Ex-President Roosevelt and commonly known as "The Recall of Judicial Decisions," has caused much disturbance, and just now, among subjects of popular discussion holds a prominent place.

By many it is regarded as an entirely new thing, a recent innovation, a veritable res nova, with all the interest that attaches to a marvelous political elixir, just discovered, and of which, as is usual, in regard to its virtues and faults it is not understood even by political savants and patent medicine venders. But upon a closer examination it will be found that it is only in comparison with the recent past that this system can claim the charm of novelty. "It hath already been of old time which was before us," and if there be new things under the sun, the so called Recall of Judicial Decisions is not one of them. Direct legislation is the most convenient and natural expression of the will of a comparatively small and democratic, self-governing, independent state. It was not wanting in ancient and medieval times. The pure democracies of Greece and her lesser successors down to the present time bear testimony of this fact. It was so in the primitive German tribes in the time of Tacitus. High among the Alps, a sturdy race, realizes even until this day a pure democracy in the smaller divisions of the Swiss government; but changes have come in the national government, written constitutions have taken the place of customs and precedents, and a representative form prevails, as it necessarily must in any form of government which has
attained, or ever will attain, any degree of prominence among the nations of the world.

Indiscussing the advisability of any proposition it is first essential to get a clear idea of exactly what that proposition means. From the name applied—Recall of Judicial Decisions,—many have supposed that it meant, that when, in a tribunal, a certain issue is decided, as we may surmise, against the defendant, the people might vote on whether the decision should remain in favor of the defendant or be reversed. This is not the true meaning, but it is as set forth in the first few lines of this paper, i. e. that the judgment is not to be recalled, but that the validity of the law governing, is to be decided by the people assembled in the booths.

Further limitations are put upon the proposition by its author in such words that it seems he must have meant that no one should understand them. These limitations are: That he stands for recall, by a vote of the people, of only such judicial decisions as (1) are rendered by state supreme courts in declaring state statutes unconstitutional, (2) where the litigation is not one between man and man, but only where it concerns some great economic or social question involving the general welfare of the whole people of a large class, (3) where there is not involved the question of the validity of a statute as repugnant to the Federal constitution. As to the classes negatived he means to suspend the action of the recall, and let it be applied in all others. The first limitation is itself an emphasis and indication of the telestic failure which such a system must meet. It brings out clearly the inconsistency and repugnancy of direct judicial adjudication by the people of a state. The people of any state, which can be only a small part of our Federal jurisdiction, may be so easily wrought up over some certain topic for a time that in contradiction to all good judgment, law, or society they will so vote as to impose on themselves a law which, in a cooler moment, they would not think of approving if enacted by a legislature and which no level headed Legislator would ever vote for.

The second limitation cannot stand as it reads and leave any application for the Recall; for every lawyer and judge knows, and every layman should know, that the great economic questions do not arise (except in very rare cases), as a special case to be decided for the purpose of settling a momentous question, but spring up in a case between man and man in which at first the direct and concrete object of the litigation is devoid of public interest. This classification is not meant as it is stated or else means nothing at all.

The third qualification—That any statute in conflict with the Federal constitution shall not be voted upon, practically eliminates all applica-
tion for the recall. The provisions of the Federal Constitution comprise in almost the identical words the principal provisions embodied in the state constitutions. Almost without exception when a statute is in conflict with a state constitution it is also in conflict with the Federal Constitution, and thus the question adjudicated would really be the repugnance of a state statute to the Federal Constitution. Thus the people of a state could not decide the constitutionality of a statute until it had been adjudicated by the Federal Courts; neither could the decision by the people be binding even on the state in another like case, for the state courts are sworn to decide cases in accordance with the requirements of the Federal Constitution, and the votes of the people could not change a principle of fundamental law established by a judicial judgment.

This leads us to a more important and decisive view of the question, to-wit: That any law providing for a Recall of Judicial Decisions is itself unconstitutional, it being repugnant to the Federal Constitution. (Art. 4. Sec. 4). The constitution there provides that: "The United States shall guarantee to every state in the union a republican form of government." It is obvious that the Recall of Judicial Decisions could not apply in any state without a direct provision in the constitution of the state to that effect. So far as the state is concerned it must first be adopted as a part of the supreme law, as one of the fundamental principles of its form of government. The framers of the Federal Constitution recognized the distinction between the republican and democratic form of government and carefully avoided the latter; the form of state government perpetuated by the Federal Constitution was the republican form, with the three departments of government, in force in all the states at the time of the adoption of the constitution.

Direct legislation by the popular vote of the people is invalid because government by the people directly is inconsistent with our form of government. And now to prove the latter statement let us ascertain the exact meaning of the phrase—"Republican Form of Government," especially as in contra-distinction to a democratic form. "Webster" defines a republic, or a state having a republican form of government as: "A commonwealth, a state in which the exercise of the sovereign power is lodged in representatives elected by the people. In modern usage, it differs from a democracy or a democratic state, in which the people exercise the power of sovereignty directly." And then for an example of the proper use of the word he gives a quotation from Joseph Story as follows: "The founders of the constitution laid the cornerstone of our national republic." A democracy is defined as "A government by the people, a form of government in which the supreme power is lodged in the hands of the people directly, or a state or body politic. the legislative
judicial and executive power of which is in the hands of the people, either
directly or through representatives." Applying these definitions to the
principles advocated by the Recall of Judicial Decisions can any fair
minded man of common sense and judgment say that under a system
where the final decision as to what the governing rules of our state shall
be is left to the people and to them alone, is a republic? Everyone must
emphatically answer: No! it is not a republican form of government but
is a democracy and as near a pure democracy as is possible to have in a
great nation. Under the proposed method all three of the departments
of the government are jumbled up together, all separation of powers
disregarded, and so conglomeration are handed to the public, the mob,
majority, or whatever you may call it, for them to mangle and tear to
pieces as they may see fit. Is this the sort of republican form of govern-
ment which is guaranteed to each of the states by the Federal Constitu-
tion? No man who has ever passed through the primary grades in the
study of Civics would say "yes."

That this state of affairs was foreseen and deliberately provided
against is evidenced by a quotation from Madison in the Federalist in a
discussion concerning what sort of government we should adopt,—

"But who can say what experiments may be produced by the
caprice of particular states, by the ambition of enterprising leaders,
or by the intrigue and influence of foreign powers?"

"As long, therefore, as the existing republican forms are con-
tinued by the states they are guaranteed by the Federal Constitution.

"The only restriction imposed on them is this: that they shall
not exchange republican for anti-republican constitutions; a restric-
tion which, it is presumed, will hardly be considered as a grievance."

And Webster in his speech of the Rhode Island government, said:

"The people cannot act daily as people. They must establish
a government and invest it with as much of the sovereign power
as the case requires. * * * * The exercise of legislative power and
the other powers of government immediately by the people them-
selves is impracticable. They must be exercised by representatives
of the people, and what distinguishes the American government as
much as anything else from any government of ancient or modern
times, is the marvelous felicity of its representative system. * * * *
The power is with the people, but they cannot exercise it in masses
or per capita. They can only exercise it by means of their repre-
sentatives. * * * * *We are not to take the will of the people
from public meeting, or from public assemblies, by which the
timid are terrified and the prudent are alarmed, and by which society is disturbed. These are not American modes of securing the will of the people, and never were.”

And the Federal Supreme Court, speaking through Chief Justice Fuller, after quoting from Webster’s article in the Rhode Island case, said in the case of *In re Duncan*, (139 U. S. 449, 461):

“By the constitution, a republican form of government is guaranteed to every state in the union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power their governments, national and state, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the mere impulses of the majorities.”

These are some of the considerations by which is demonstrated the fallacy of pure democracy, or the fallacy of direct adjudication of constitutional questions by popular vote.

It has been stated that the Recall of Judicial Decisions is not really what its name signifies it to be. This is discussed fully in a speech made by William B. Hornblower to the graduating class of the Yale Law School, June 17, 1912, (and may be found in Senate Document 1052), which is a speech very radically against the Recall of Judges and the Recall of Decisions; also in a paper by William Draper Lewis, Dean of the Law School, University of Pennsylvania (Annals of American Acad. XLIII. 311), who is very much in favor of the Recall of Decisions. Both of these learned gentlemen deny that the so-called Recall of Decisions is really what it seems at first reading, but state that it really means: “when a state statute is declared unconstitutional, the people of the state shall have the right by a majority vote to set aside the decision of the court declaring the statute void and to restore the authority of the statute.” As thus construed the proposition is still considered as a recall of the decision as to the general principle of law involved, although not as to the immediate parties to the suit. But let us see if it is really in truth a recalling or setting aside of the decision in any manner. In the first place no court can set aside an act passed by the legislature. it can declare it unconstitutional and refuse to enforce it by
ignoring the law altogether, but nevertheless the law is still in force and a suit may be brought based upon it by another party subsequent to the decision.* But aside from the fact that a court cannot set aside the statute of a state, let us see if the proposed system would ever have the effect of recalling or declaring invalid a decision.

To understand this proposition with proper clearness we must trace briefly the history of the establishment of the seat of our legislative or law-making power in our state governments. In the beginning before we had any organized government or before we had any state constitutions, the whole of the law-making power resided in the people; but any people when formed into a division of government such as is called by us a state, and having adopted a constitution and a representative form of government, as required by the Federal Constitution, have delegated to their legislatures the power and duty to make the laws by which those same people shall be governed.

Let a circle represent the law-making power of the people as it was previous to the adoption of any constitution; then when the state is formed there is made another circle of equal size representing the law-making power of the state legislature, but how about the restrictions against state legislation on certain subjects, said restrictions being those contained in the state constitution? These we will represent by cutting off of the second circle, representing the law-making power of the legislature, a part of the circle, this fraction then will be those powers which are denied to the state legislature by the restriction clause in the state constitution. Now if all the power of making laws originally resided in the people, then this fraction cut off from the legislative power must reside in the people, that is, it is a reserve power in the people of the state, concerning which they may make laws by changing the constitution so as not to deny these powers to the legislature. But suppose that the legislature in carrying out the powers and duties imposed upon it by the people in the adoption of the constitution, should pass a law which, when some one questions the constitutionality of it, should be declared by the courts to be in conflict with the constitution, and that the power which the legislature exercised was not one of its sovereign powers but belonged to the excepted portion, the reserved power of the people. Then if the people had so amended their constitution as to give them the right to vote on the validity of this law in spite of the opinion of the court decreeing it to be unconstitutional, and they do vote in the affirmative.

for the recall of the courts decision, what is the result? When they vote the law to be good, do they thereby decide that it is constitutional? No, they merely say that it shall be a good and valid law even though it be repugnant to the constitution. Then this is an affirmation that the decision of the court was correct when it, in its adjudication reached the conclusion that the statute was in conflict with the state constitution. They have affirmed that the power to legislate upon the contested question did not reside in the legislature, but that it was exactly as the court had decided it, i.e., it is one of the reserved cases in which the people can act. In fact the very act of the people voting on the question, or as it well may be termed their legislating, has affirmed the proposition that the legislature had no power to pass such a law; for concerning those questions upon which the legislature may legislate, the people have delegated all control they may have ever had to the legislature, and it is that body alone which may act upon them. Then if the people vote for the adoption of the law, I repeat it, THEY HAVE AFFIRMED THE DECISION OF THE COURT AND HAVE NOT, AS IS CLAIMED, RECALLED IT.

And what is the result of this affirmation? It is a direct attack upon the constitution of the state, a flat denial by the people that they are governed by any superior law, for a state constitution is in the form of restrictions on the various departments, the Legislative as well as the Executive and Judicial, and when the people declare that one legislative act, repugnant to the constitution, shall be good law notwithstanding such repugnancy, they are plainly creating an aperture through which every article of the constitution may be declared inoperative. How many people are there when they argue in favor of upholding the recall, who really know what they are talking about? How many realize that they are destroying all the safeguards of their constitution, they are adopting a system by which the minority may be run over and trampled down by the rule of the majority? They will have opened the doors to a system of legislation which is censured and condemned by every peace loving statesman, they have gone back to Medieval times, when there was no organized government, and our ancestors were groping blindly for some power with which to combat their demagogue-like rulers.

Aristotle, nearly four centuries before the Christian era said:

“One species of democracy is where the public offices are open to every citizen and the law is supreme. Another species of democracy is where the public offices are open to every citizen, but where the people and not the law is supreme. The latter state of thing occurs when the government is administered by prephismata (by
popular vote) and not according to laws, and it is produced by the influence of i.e. demagogues. But where the laws are not supreme, demagogues arise, for the people become as it were a compound monarch, each individual being invested with power as a member of the sovereign body and a people of this sort, as if they were a monarch, seek to exercise a monarchical power in order that they may not be governed by the laws, and they assume the character of a despot, wherefore flatterers are in honor by them. A democracy of this sort is analogous to a tyranny (or despotism among monarchies). Thus the character of the government is the same in both and they both tyrannize over the superior classes, and prephismata are in the democracy what special ordinances are in the despotism. Accordingly, is seems to have been justly said that a democracy of this sort is not entitled to the name of a constitution, for where the laws are not supreme, there is no constitution. In order that there should be a constitution, it is necessary that the government should be administered according to the laws, and that the magistrates and constituted authorities should decide in the individual cases respecting the application of them.”

Burke, in his reflections on the French Revolution said:

“Until now we have seen no example of considerable democracies. The ancients were better acquainted with them. Not being wholly unread in the authors who have seen the most of these constitutions and who best understood them, I cannot help concurring with their opinion that the absolute democracy, no more than the absolute monarchy, is to be reckoned among the legitimate forms of government.”

And these reflections were made on nations which are older than ours, where there was more domestic tranquility, and where there was a greater respect shown for customs and precedents.

Now let us see how this system would work on modern law-making in regard to what is known as special legislation. There is no doubt but that it will open the door wide to any measure of discrimination which the majority may take into their hands to inflict upon the heads of the helpless minority. It will put upon the public an army of petition-pushers going along the street and button-holing every citizen, agitating the weak to stand up for their supposed rights, and under the persuasion of the empty-dry-goods-box-politicians, the public will be detached from their work and be induced into an attempt to correct their imaginary sufferings.
A man may be going along the street with head high, and feeling as though all the world were his, when he comes to the corner and notices a large crowd standing around a wagon or platform. On the platform he perceives a man waiving his arms and making, what seems from a distance, a great speech; his imagination is at once aroused and he draws nearer to see what is the cause of this commotion. He perceives upon drawing nearer that there is another man on the platform, but this other is a wooden man. The live man is still speaking, he is representing the average human being as an object of piteous decrepitude or as a hopeless subject of degenerating tissues and death dealing germs. Then he begins to listen more attentively, this is getting interesting and concerns him. The quack next inveighs against all the medical learning of the day and against the expert knowledge and experience of those acknowledged as authority in hygiene, medicine and surgery. All learning and experience as shown from history are as nothing. The wisdom of the fathers was merely tradition founded in error. What the great scientific men have wrought and handed down as a result of their many years of study and experience were mockery to the truth, all which the man on the platform proceeds to prove by saying that the medicine of today does not prevent death, for did not a man die just yesterday within a block of a large drug store and a Doctor’s office? And only last month five hundred lives were lost when a great ship sank? Then he seems to swell up with some potent influence, and looking straight at the passer-by declares that: “every man is threatened with immediate incapacity and death.” Then having thus demonstrated his major premise and at the same time all the other assumed elements of his syllogism, he reaches down into an old trunk by his side and takes out a little round yellow box, labeled in large red letters: “A MAGIC CURE ALL.” Up to this time the passer-by had been feeling pretty well, but at the sight of that little pill box and the words that followed its production, (“Now gentlemen you perceive here in my hand one of the most wonderful remedies that has ever been concocted, one of these little pills, dissolved in a glass of pure water and swallowed will immediately stop any pain you may have, no matter where it is or what its cause”); he begins to feel as though there were something inside of him that is not exactly as it should be, he feels a little sick at the stomach and there is a slight pain at the heart—then those words: “immediate incapacity and death is at your door,” sound in his ear and he takes a second look at the box and is almost persuaded. He turns to leave in disgust when there is a rush toward the platform, everyone is buying a yellow box, all are welcoming the chance to save their lives. Seized with the spirit of the mob he rushes up and deposits his twenty-five cents, which his wife had sent him to buy soap with, and
receives his life-saver. When he gets home and meets his wife at the door, and presents the little box instead of the soap, she, who has not heard the wonderful lecture or been under the influence of the mob, ridicules him and his fear of death, and immediately calls him a fool and a spendthrift. And he realizes that she is right.

How many people are there who would not be so influenced by the agitation of some question brought up under the recall? How many would have the stability and wisdom to make a cool clear decision of what is right or what is wrong? And again how many would be drawn to the platform, a political one, and join the mob, and be spendthrifts of their opportunities? It is the same principle from start to finish, fine phrases to catch the ear of the public ear and get it into an unnatural state of mind, and then “pop” at them a “cure all” remedy, for political and governmental ills; and what will we do? Why? if we have not a wife to stay at home and not hear the political arrogators, we are very likely to walk right up and buy another little yellow box.

Appeals to popular justice, inducing unrest and a general state of instability throughout the nation, should be met with distrust. Clamors for the “rights” of the people should be checked with a firm hand and with an altruistic outlook for the preservation of our national and state government. There should be kept in mind the warning of Hamilton when he said:

“A dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidding appearance of zeal for the firmness and efficiency of government. History will teach us that the former has found a much more certain road to the introduction to despotism than the latter, and that of those men who have overturned the liberties of republics the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues and ending tyrants.”

It is too often assumed, because there are flaws and instances of failures in our administrative government, that all our system is wrong, that the constitution and fundamental laws by which we are governed and held in check, are entirely unfit. Such an assumption disregards the ever present and irremediable imperfection of human existence. No people can create or ever hope to create a system of rules that will make them perfectly free. It is an underlying axiom of civilization that we must necessarily be subject to a degree of oppression, injustice and inequality. The crudest form of social organization involves a certain
amount of sacrifice, the individual must give way, and suffer the conse-
quences, for the benefit of the public.

Let it be said that our constitution is imperfect and stands in the
way of proper legislation, yes, even let it be said that our supreme courts
do not rightfully use the powers with which they have been intrusted;
but for the first objection we have an adequate remedy in our present
method of amendment, and for the latter, if it ever be true, we can never
reach a solution by letting the people say whether or not a body of men
of the highest legal training have erred in their judgment.

Finally let it be said: These suggestions do not profess to cover the
subject of Recall of Decisions, which is a great subject worthy of careful
and weighty treatment, but is simply designed to direct attention to the
fallacies of the proposition, and possibly arouse someone, capable of doing
justice to the treatment of it, to a degree where some of the points
herein stated will be worked out more fully, either in an attack upon
them or in their behalf.

Indeed there has often been in the mind of the writer, when trying
to elucidate some of the points, the expression of Job (Job, 31-35):
"Oh! that mine adversary would write a book."