

CONGRESSIONAL RECORD:

CONTAINING

THE PROCEEDINGS AND DEBATES

OF THE

SIXTY-SECOND CONGRESS, FIRST SESSION.

VOLUME XLVII.

WASHINGTON:

1911.

PETITIONS, ETC.

Under clause 1 of Rule XXII, petitions and papers were laid on the Clerk's desk and referred as follows:

By the SPEAKER: Resolution of the Christian Endeavor Local Union of Tulsa, Okla., in favor of legislation to prohibit the shipment of liquor into prohibition States; to the Committee on Alcoholic Liquor Traffic.

By Mr. ASHBROOK: Petition of Adam Shade, of Harrisburg, Pa., asking for the passage of a general pension bill; to the Committee on Pensions.

By Mr. DYER: Papers to accompany bill granting a pension to Catherine Hudson; to the Committee on Invalid Pensions.

By Mr. FULLER: Petition of the Arizona Woolgrowers' Association, in opposition to all bills proposing to reduce the tariff on wool and meats until the Tariff Board makes its report; to the Committee on Ways and Means.

Also, petition of citizens of La Salle, Ill., for the creation of a national board of health; to the Committee on Interstate and Foreign Commerce.

By Mr. HAYES: Petition of George J. Pettit and 17 other residents of San Francisco, Cal., urging the passage of the Davis bill providing for an increase in salary for the underpaid Government employees throughout the United States; to the Committee on Reform in the Civil Service.

By Mr. PADGETT: Papers to accompany bill granting an increase of pension to M. S. Carlisle; to the Committee on Invalid Pensions.

By Mr. THISTLEWOOD: Petition of the Southern Illinois Millers' Association, protesting against admitting flour free; to the Committee on Ways and Means.

SENATE.

MONDAY, August 7, 1911.

The Senate met at 10 o'clock a. m.

Prayer by the Chaplain, Rev. Ulysses G. B. Pierce, D. D.

The Journal of the proceedings of Saturday last was read and approved.

ENROLLED BILL SIGNED.

The VICE PRESIDENT announced his signature to the enrolled bill (H. R. 2983) for the apportionment of Representatives in Congress among the several States under the Thirteenth Census, which had heretofore been signed by the Speaker of the House of Representatives.

PETITIONS AND MEMORIALS.

The VICE PRESIDENT presented a memorial of District Grand Lodge, No. 2, Independent Order of B'nai B'rith, of Cincinnati, Ohio, remonstrating against the treatment accorded American citizens in Russia, which was referred to the Committee on Foreign Relations.

He also presented a memorial of sundry citizens of Hartford, Kans., remonstrating against the establishment of a rural parcels-post system, which was referred to the Committee on Post Offices and Post Roads.

Mr. WETMORE presented a petition of the Rhode Island Quarterly Meeting of Friends, praying for the ratification of the proposed treaties of arbitration between the United States, Great Britain, and France, which was referred to the Committee on Foreign Relations.

Mr. CRANE (for Mr. LODGE) presented a petition of the Press Association of the State of Massachusetts and a petition of the Rhode Island Society of Friends, praying for the ratification of the proposed treaties of arbitration between the United States, Great Britain, and France, which were referred to the Committee on Foreign Relations.

Mr. PERKINS presented petitions of the Chamber of Commerce of San Francisco, the Commercial Club of Santa Barbara, the Chamber of Commerce of Sacramento, the Humboldt Chamber of Commerce of Eureka, the Chamber of Commerce of Riverside, the Chamber of Commerce of Oakland, the Board of Trade of Pasadena, and the Chamber of Commerce of Los Angeles, all in the State of California, and of the World Peace Foundation and the Business Men's Association of Salem, N. J., praying for the ratification of the proposed treaties of arbitration between the United States, Great Britain, and France, which were referred to the Committee on Foreign Relations.

Mr. ROOT presented 100 petitions of citizens of Brooklyn, N. Y., and 88 petitions of citizens of New York City, N. Y., praying for the repeal of the duty on lemons, which were ordered to lie on the table.

RECLAMATION OF THE EVERGLADES OF FLORIDA.

Mr. SMOOT, from the Committee on Printing, reported the following resolution (S. Res. 130, S. Dec. 89), which was considered by unanimous consent and agreed to:

Resolved, That there be printed as a public document, under the direction of the Joint Committee on Printing, a compilation of acts, reports, and other papers, State and national, relating to the reclamation of the Everglades of the State of Florida, with accompanying illustrations.

BILLS INTRODUCED.

Bills were introduced, read the first time, and, by unanimous consent, the second time, and referred as follows:

By Mr. DILLINGHAM:

A bill (S. 3175) to regulate the immigration of aliens to and the residence of aliens in the United States; to the Committee on Immigration.

By Mr. RAYNER:

A bill (S. 3176) granting a pension to Carolyn V. Maucha (with accompanying paper); to the Committee on Pensions.

By Mr. CLARK of Wyoming:

A bill (S. 3177) granting an increase of pension to Felix Deflin (with accompanying papers); to the Committee on Pensions.

NEW MEXICO AND ARIZONA.

The VICE PRESIDENT. The morning business is closed. The Chair lays before the Senate, under the order heretofore made, House joint resolution 14.

The Senate, as in Committee of the Whole, resumed the consideration of the joint resolution (H. J. Res. 14) to admit the Territories of New Mexico and Arizona as States into the Union upon an equal footing with the original States.

Mr. NELSON. I offered to the joint resolution an amendment in the form of a substitute. I now wish to modify the substitute. On page 3, line 4, after the first word "That," strike out the words "within 30 days" and insert "immediately." I offer it in that form, so that it will read:

That immediately after the passage of this resolution, etc.

The VICE PRESIDENT. The Senator from Minnesota modifies his amendment. The modification will be stated.

The SECRETARY. On page 3, line 4, strike out, after the word "That," the words "within 30 days" and insert in lieu the word "immediately," so as to read:

That immediately after the passage of this resolution and its approval by the President the President shall certify the fact to the governor of Arizona, etc.

The VICE PRESIDENT. The substitute will be so modified. The substitute has already been read to the Senate.

Mr. NELSON. I shall later on ask leave to address the Senate on the subject of the substitute.

The VICE PRESIDENT. The question is on agreeing to the amendment submitted by the Senator from Minnesota [Mr. NELSON] as a substitute.

Mr. BRISTOW. As I understand it, the question is on an amendment to the substitute, which the Senator from Minnesota has offered.

The VICE PRESIDENT. No; the question is on agreeing to the amendment. The Senator from Minnesota has a right to modify it, the substitute not having been acted upon. He has simply made a modification.

Mr. STONE. May I inquire if it is the so-called Nelson amendment which is now before the Senate?

The VICE PRESIDENT. The Nelson amendment is now before the Senate.

Mr. NELSON. And I modified my own amendment by striking out the words "within 30 days" and inserting "immediately," which I had a right to do.

The VICE PRESIDENT. Certainly. The Secretary will again state the modification.

Mr. HEYBURN. Mr. President, I suggest the absence of a quorum.

The VICE PRESIDENT. The Secretary will call the roll.

The Secretary called the roll, and the following Senators answered to their names:

Bankhead	Cullom	Myers	Smoot
Borah	Dillingham	Nelson	Stanhenson
Brandegee	Foster	O'Gorman	Stevenson
Bristow	Gamble	Overman	Swanson
Brown	Gronna	Owen	Tamm
Bryan	Guggenheim	Pace	Thornton
Burnham	Heyburn	Perkins	Watson
Chamberlain	Johnson, Me.	Poliventer	Watson
Chilton	Kern	Reed	Wetmore
Clapp	Lippitt	Richardson	Williams
Crane	Martin, Va.	Reed	Work
Crawford	Martine, N. J.	Smith, Mich.	

The VICE PRESIDENT. Forty-seven Senators have answered to the roll call. A quorum of the Senate is present.

Mr. SMITH of Michigan. I understand that the Senator from Washington [Mr. POINDEXTER] is ready to proceed, and I hope he will do so.

The VICE PRESIDENT. The Senator from Minnesota had the floor when the question of a quorum was raised. If the Senator from Minnesota does not desire to hold it—

Mr. NELSON. I simply stated that I would later on have something to say in respect to my substitute; not at this time, but later.

CORRECTIONS IN APPROPRIATION ACTS.

Mr. WARREN submitted the following report:

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the joint resolution (H. J. Res. 1) to correct errors in the enrollment of certain appropriation acts approved March 4, 1911, having met, after full and free conference have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its amendments numbered 2 and 3.

That the House recede from its disagreement to the amendment of the Senate numbered 1, and agree to the same.

That the House recede from its disagreement to the amendment of the Senate amending the title of the joint resolution, and agree to the same.

F. E. WARREN,
GEO. C. PERKINS,
MURPHY J. FOSTER,

Managers on the part of the Senate.

JOHN J. FITZGERALD,
A. S. BURLESON,
J. G. CANNON,

Managers on the part of the House.

Mr. HEYBURN. Mr. President, I understand that this report presents what is intended to be a final disposition of the joint resolution in conference. I notice that the conferees of the Senate have receded from amendment No. 2 relating to the funds of the University of Idaho; I have been more jealous of the action of Congress and of the conference committee in regard to this item than I would have felt justified in being were it a personal matter or one other than affecting the educational fund. I desire before action is taken upon the conference report to state very briefly my position so that the RECORD will always make plain the fact and the reason.

Under the general law of the United States there is paid by the General Government to the universities of the States a certain percentage of the money received from the sale of public lands.

Mr. WARREN. Five per cent.

Mr. HEYBURN. It is 5 per cent. That piece of legislation works out automatically as a rule. The accounts are made up in the department, and, the amount being found due, the Government sends a draft or the Government's check to the treasurer of the educational institution, in this case the University of the State of Idaho. The Government, pursuant to its custom, did send a check or draft, and it never reached its destination. It was not registered. No special pains were taken that it should be considered other than ordinary mail in transmission. The Government was notified by the university of the failure of the receipt of its check, whereupon the Government refused to take any further notice of the question unless the State or the university should give a bond in a large amount, far in excess of the amount of the check lost.

The university could not give a personal bond nor could it, under any existing conditions or law, secure an individual bond. It was compelled to go to a bonding agency and pay \$500, the regular fee, for that surety bond. There was no fault on the part of the State or of the university; if there was a fault, it was on the part of the Government, or those acting for it. There should have been no bond required, because the Government could have protected itself against a second payment by refusing to honor a lost draft. There is no rule better established in commercial life than that the Government stood to lose nothing; it could only pay the one draft. Notwithstanding that fact, the university needing this fund as a part of the national fund that is relied upon and required for the maintenance of the institution, after much interchange of correspondence, the State did pay the \$500 to a surety company to give this bond. The State merely asks that this fund be reimbursed, because a hole in a fund of that kind could not be stopped by any State action. We have no authority to divert money from some other fund to recoup that fund; so it should have been made good to the Government. That is obvious; and why any committee, or why any legislative body, should hesitate for a moment about it has always been a mystery to me.

I have stated these facts on every occasion where an explanation was due. It was a case of such obvious injustice that I have never thought for a moment that a conference committee of the two Houses would hold out, as they have for months, against allowing that to go in the urgent deficiency bill, where it properly belongs.

I am not willing, even in so righteous a cause, to tie up or long delay legislation where great interests of the Government are at stake. It is represented that by insisting upon this provision remaining in the urgent deficiency bill I am causing delay in the adjustment of the Treasury balances relative to the construction of our battleships, and that the provision which was made authorizing a payment in excess of 90 per cent—in other words, a payment to the extent of the finished or constructed work—is in jeopardy. If I yield in this matter—and I want the chairman of the Committee on Appropriations to be thoroughly advised—it will be because this measure comes in as a repeal, and not under the guise of correcting the records of a previous Congress. I would not, as a man who claims to be learned in the law, stand here and permit one Congress to attempt a correction of the Journals of a previous Congress. That is not within our power, and any claim that we are doing that, as is recited in the preamble of this joint resolution, would cause me, without regard to the merit of the measure, to stand here as long as I might under the rules of this body to resist it. If we ever open that door, then one Congress may, by merely correcting the Journal of another Congress, add to or detract from its action. I can not conceive of that being done. I think it should appear to every lawyer and every layman of this body that such a thing would be dangerous in the extreme; but with the understanding had with the chairman of the committee, that the title of this measure will be amended so as not to recite that it is for the purpose of correcting errors, I will yield, but on no other consideration. I will yield with the understanding that this \$500 which the Government owes the State of Idaho shall be taken care of in the appropriate appropriation bill at the regular session of the Senate.

I feel quite justified in taking time enough of the Senate this morning to make this matter plain, both in regard to the principle of correcting the Journals of a previous Congress and in regard to the justice of this claim of the State of Idaho against the Government. So I do not feel in an apologetic frame of mind at all. I am sure that the Senator from Wyoming [Mr. WARREN], who is chairman of the Committee on Appropriations and has direct charge of this matter, will agree with me in stating the understanding, first, in regard to the change to be made in the title of the joint resolution—that is a condition precedent to my yielding anything—and, second, that this item of \$500 shall be taken care of, so far as it is possible for any Member of this body to promise, in the regular and appropriate appropriation bill at the coming Congress.

Mr. WARREN. Mr. President, I am obliged to the Senator from Idaho for yielding his objections. The title of the joint resolution is changed by an amendment which has been accepted, so that it now reads "A joint resolution to amend certain appropriations acts, approved March 4, 1911."

I sympathize with the Senator in the matter of the Idaho University. There seems to have been wrong done by somebody. It seems to me that a second check or draft might have been issued, stating that it was a duplicate; and the first, the original, being unpaid, the duplicate should be paid, and so forth, instead of mulcting the State of Idaho for \$500.

I propose, so far as I am individually concerned, to assist the Senator in any way I can at the proper time, under the rules, to obtain relief for his State. Of course, I can promise nothing as to what may come in the appropriation bills, because that is a matter for the Senate to settle as to the Senate side, the House of Representatives to settle on the other side, and for the conferees on the part of the two Houses to settle finally as to both sides; but I am thoroughly in sympathy with the Senator in the claim for his State, and shall cooperate, so far as I can, with the Senator in some proper way to obtain the relief that is sought.

The VICE PRESIDENT. The question is on agreeing to the conference report.

The conference report was agreed to.

MESSAGE FROM THE HOUSE.

A message from the House of Representatives, by Mr. J. C. South, its Chief Clerk, announced that the House had passed the following bills:

S. 1149. An act permitting the Minneapolis, St. Paul & Sault Ste. Marie Railway Co. to construct, maintain, and operate a railroad bridge across the St. Croix River between the States of Wisconsin and Minnesota;

S. 2732. An act to authorize the Providence, Warren & Bristol Railroad Co. and its lessee, the New York, New Haven & Hartford Railroad Co., or either of them, to construct a bridge across the Palmers or Warren River, in the State of Rhode Island; and

S. 2763. An act to authorize the St. Louis-Kansas City Electric Railway Co. to construct a bridge across the Missouri River at or near the town of Weldon Springs Landing, Mo.

NEW MEXICO AND ARIZONA.

The Senate, as in Committee of the Whole, resumed the consideration of the joint resolution (H. J. Res. 14) to admit the Territories of New Mexico and Arizona as States into the Union upon an equal footing with the original States.

Mr. POINDEXTER. Mr. President, I take it that the paramount question involved in the pending joint resolution, and particularly in the amendment to the joint resolution, as reported by the committee, which has been offered by the Senator from Minnesota [Mr. NELSON], is the question of whether or not the people of a proposed State of this Union shall have the right of self-government in their local affairs and shall be admitted to the Union, if they are admitted, upon an equal footing with every other State in the Union. I regard that question as paramount to any consideration of the merits of the proposed local laws of Arizona, whether or not they shall have direct legislation in their State affairs or shall not have it, and the manner in which they shall choose or remove their public officials in their local State affairs.

It has been said by a distinguished Senator that the Senate and Congress are particularly interested in this joint resolution because it involves the participation of a State in the government of the United States through the representation of the State in Congress. I submit, Mr. President, that the only concern that the Congress of the United States legitimately has in that question is that the State, when it is admitted to the Union, shall conform itself to the Constitution of the United States and the laws made in pursuance of that instrument, including as a part of that general obligation the sending of Senators and Representatives to represent the State in the Congress. I submit, sir, that when that question has been determined the interest and the legitimate concern of the United States or of Congress in the form of the laws of Arizona comes to an end. There is no more important principle involved in the Constitution of the United States than that the activities and concern of the Nation should come to an end at that point in its interference with the action of States. The arguments turning upon that question—

Mr. HEYBURN. Mr. President, I want to inquire of the Senator—

The VICE PRESIDENT. Does the Senator from Washington yield to the Senator from Idaho?

Mr. POINDEXTER. Certainly.

Mr. HEYBURN. I want to inquire of the Senator whether he prefers to proceed with his argument or whether he would object, as he goes along from time to time, to such questions as might be pertinent?

Mr. POINDEXTER. I have no objection to interruption for the purpose of asking a question.

Mr. HEYBURN. Then, in connection with the last statement of the Senator from Washington, I would suggest that the Constitution upon which he relies especially provides that, after a State has rendered its verdict, Congress shall be the sole judge of the qualifications of its own Members.

Mr. POINDEXTER. That is a part of the principle which I have just stated. I do not take issue with the Senator from Idaho upon that proposition; but that question is not involved here. There is not any question whatever before this Congress at this time as to the qualifications of any Senator or any Representative in Congress from the proposed State of Arizona, and that suggestion has nothing whatever to do with any question now before Congress.

Mr. HEYBURN. Mr. President—

The VICE PRESIDENT. Does the Senator from Washington further yield?

Mr. POINDEXTER. I yield to the Senator from Idaho.

Mr. HEYBURN. It would not have been pertinent except for the statement of the Senator that when a State had sent its representatives to Congress that was the end of it. I merely intended to point to the fact that it was not the end of it; that it was only the beginning of the test of the qualifications and of the right to sit in Congress.

Mr. POINDEXTER. I did not confine my statement to the function stated by the Senator from Idaho, but I said that the proposed State should conform itself to the Constitution. The particular provision to which the Senator now refers is a part of the constitution and included within the legitimate activities

of Congress, but it is entirely aside from any question now before this body.

The arguments, Mr. President, that are being leveled against the constitution of Arizona all resolve themselves, when digested and analyzed—and I am more and more convinced of this upon reading the speeches that have been made here in opposition to this joint resolution—into the proposition that the people can not be trusted with power; that the people are not competent to make laws for their own government; to choose and depose their own officials. The arguments are but the repetition of the arguments that were made against the Declaration of Independence of this country, and the Constitution about which the Senator talks and under which we are now living. They are the same arguments that were interposed against every advance in the development of that system of free laws and free government under which we are living now. Read the history of England and you can read almost word for word the arguments that are simply being repeated here as to the dangers and pitfalls lying in the path of giving the people power over their affairs. They reduce themselves to the logical proposition that the fewer people that are vested with a voice in the Government the better it is, and the less power they have the better it is in a system of government. That is the argument, and that is all there is to the argument.

The people of Arizona, assembled in convention for the purpose of adopting a fundamental law for the government of the new State, adopted this preamble:

We, the people of the State of Arizona, grateful to Almighty God for our liberties, do ordain this constitution.

They expressed their joy—and no doubt it was not a mere formal expression, but evidenced their sincere satisfaction and joy—at the prospect, after 20 years of agitation and struggle, of admission into the sisterhood of States, that at last the opportunity had come for self-government; and they expressed their gratitude for the privilege of themselves adopting a system of law for the government of their local affairs. Is Congress to make a mere travesty of that solemn expression on the part of the constitutional convention representing the people of Arizona? Is their expression of gratitude for their liberties and the privilege of adopting a self-governing constitution to be a mere irony and mockery? Are we to make it a mere piece of irony and a travesty upon the facts by denying them admission into the Union until they adopt a constitution not satisfactory to the people of Arizona, but a constitution that meets the judgment, the wishes, and the views of people who do not live in Arizona, who have no concern and no interest in the affairs of Arizona so far as those affairs are local, and no concern with the administration of their local laws? Are we to establish the principle in this country that self-government, the right of the States under the Federal Union to control their own affairs, is a mistaken policy? Are we going to depart from well-settled precedent in that regard? Are Senators who are so enamored of the Constitution as it was originally formed any less enamored of that feature of the Constitution than they are of the other features of it? I take it that there is no more important principle in the Constitution than that vital one which preserves the right of local self-government, and that is the question which is involved, and the most important question that is involved, in this joint resolution.

As to the particular provisions of the constitution of Arizona, there are only a few of them which are particularly objected to. The effect of the primary election laws, the recall, the initiative, and the referendum, as has often been stated, is not to abolish any of the present organs of government, but the purpose is to increase the responsibility of these agencies to the people, and by doing so, by increasing the responsibility of those departments of the government which are already established in the States and in the United States, to secure that good administration which Senators say is the cure for all of our political evils. The purpose of these new provisions is to secure good administration, good execution of the laws on the part of the officials who have been chosen under the present system, not to abolish those offices, not to abolish those departments of the government, but it is to make them responsible to the people and bring to bear upon them a motive for executing their offices faithfully and justly, and for doing that which the Senator held up as that in which they are most lacking, and as the cure for whatever political evils may exist at the present time in this country.

The difficulty with our present system is not that the people have not the power to prevent the passage of laws; they have that power in the most marked degree; but the difficulty is that the people have not the power to enact laws. The one power is just as essential as the other in any system of popular government. There are plenty of checks, but there is not enough

motive power. There is ample negative weight, but there is not enough affirmative force. A small minority can absolutely prevent the enactment of statutes desired by the majority, and a still smaller minority can prevent any change in the constitution.

Mr. HEYBURN. Mr. President—

The VICE PRESIDENT. Does the Senator from Washington yield to the Senator from Idaho?

Mr. POINDEXTER. I yield.

Mr. HEYBURN. I would suggest to the Senator that the provision contained in the proposed constitution expressly authorizes 25 per cent of the people to do that which the Senator complains may be done by a mere minority.

Mr. POINDEXTER. The Senator from Idaho has spoken on this question a number of times, and no doubt has familiarized himself with the facts in the case, and that being so, I am very much surprised to hear him make that statement, because he is mistaken. There is no such provision in the proposed constitution.

I was very much surprised a few days ago to hear the Senator from Idaho make the positive statement. It so happened that, in reply to a question that had been asked me by some one who lived in a distant part of the country, whether or not a petition for the recall of an official—which is that provision which the Senator is referring to—when it was filed had the effect of deposing the official from office, I had just stated that it did not. Immediately afterwards I heard the Senator from Idaho, upon the floor, in serious debate, repeatedly make the statement that it did have that effect, and now I understand he is repeating it here. There is not a word in the proposed constitution of Arizona that provides for any such thing, not a word.

Mr. HEYBURN. Mr. President—

The VICE PRESIDENT. Does the Senator from Washington further yield to the Senator from Idaho?

Mr. POINDEXTER. I yield further.

Mr. HEYBURN. The point I made at that time and that I am now making is that 25 per cent of the people filing a protest or a demand for the removal of the officer puts him at once upon his defense and forces him into a campaign that can not last more than 30 days and may be determined in 20. In other words, it takes him from the performance of his duty as a legislator and compels him to enter into a contest to defend himself.

I made the point that if you would file petitions for withdrawal against enough members you could send them all into the political campaign at once, in order to determine whether or not at the end of 20 days they should continue to be members of the legislature, and thus you would destroy the vitality and effective power of the legislature.

Now, I have not attempted to present this more than meagerly and briefly; but because the Senator has challenged that which I said on a former occasion, I desire, with his permission and courtesy, to make it so plain now that I will not hereafter be subject to a charge of having said that it was complete upon the filing. I said the effect of it, of the filing, was as complete as it would be at the end of 20 days, within which the matter may be decided. Now do I make myself plain to the Senator?

Mr. POINDEXTER. Perfectly so. I am perfectly willing to yield for a question, but—

Mr. HEYBURN. I would not have intruded upon the Senator's time except for the fact that he made a statement as to what I had said on a former occasion. I understand the Senator is entitled to express himself in his own time. I merely expressed the idea that you could send a majority of the members of the legislature away from the performance of their duties into the field of contention as to whether or not they should remain there. Now, I will not interrupt the Senator further.

Mr. POINDEXTER. That is not the question we have been discussing at all. It is an entirely different one, Mr. President. The statement which was made by the Senator from Idaho appears in the Record. I will not take the time now to send for the Record and to read the statement, but I think the Senator on reading it will find that the statement was that the filing of the petition effected the recall. That is a mistake.

Mr. HEYBURN. The Senator will pardon me. I will not enter into it any more than merely to say—I have not myself looked at the Record—that I stated at the time I was only meagerly expressing it, and I do not believe there is any profit in challenging that Record, because I said it was a meager presentation of it, and there may be phrases which, if taken alone, would stop there. But I afterwards, and especially on Saturday, went further and explained, not so completely as I have on this occasion, what I meant by the petition working its purpose. It works its purpose when it takes a man out of

the performance of his duties and sends him into the field for reelection. That is the effect of it.

Mr. POINDEXTER. Of course it is not essential what the Senator said on some former occasion so much as it is essential what he is saying now. I read the debate between the Senator from Idaho and the Senator from Oregon [Mr. BOURNE], at which time, when the Senator's attention was called to the language of the constitution, he modified his position. This is the language to which I referred. The Senator from Idaho, as shown by the Record of August 5, said:

Mr. HEYBURN. It requires a majority to elect a man to the legislature, but it only requires 25 per cent of the vote to deprive him of his office.

Mr. HEYBURN. Yes.

Mr. POINDEXTER. It requires a majority vote to deprive him of his office after a deliberate, orderly election, held according to the election laws of the State.

Mr. HEYBURN. I was speaking of the effect of it in general terms. I see no reason at all to take it back.

Mr. POINDEXTER. In order that there may be no misunderstanding about it, on the same day the CONGRESSIONAL RECORD shows the Senator from Idaho to have made this statement:

The filing of the petition terminates the service of the officer against whom it is filed. No action is required to give it further force.

Mr. HEYBURN. That is in the legislature.

Mr. POINDEXTER. Yes.

Mr. HEYBURN. Yes. That is absolutely true; it terminates his service by taking him out—and I explained that at some length—of the legislature and putting him into a campaign. If I should conclude to speak again on the subject, and it is thought necessary, I will elaborate that; but I think I have already made it plain.

Mr. POINDEXTER. I think so. So I will not pursue that question further.

Of course, as stated before, there is involved here no question of a modification or an amendment of the Constitution of the United States, but it is assumed that the proposed constitution is a departure generally from that system of government which is provided for under the Constitution. Certain Senators assume—I do not think the Senator from Idaho does, and I have the very greatest respect for his opinions, particularly for his legal opinions, because of my personal knowledge of his distinguished legal career—apparently take the position that while they are perfectly free to suggest amendments to the Constitution of the United States which vitally change the system of government provided for by it, that anybody else who proposes a change of that system of government is a lunatic or a soothsayer or a political prophet or a reformer in the opprobrious sense in which they use that word.

They assume, with the exception of the proposed amendments which they themselves approve of, that every other amendment is an attack upon a holy covenant which ought to be perpetual—an act adopted 124 years ago, under conditions absolutely and entirely different from those that are existing now, by a set of men who were the equals of any equal number of men that ever assembled for a public purpose, and who did a greater work than any other similar body of men ever did, but who were not gifted with the prescience of the ages, could not look centuries ahead and see the conditions that were going to exist and spring up anew throughout the land, bringing about the need for new instruments of government. I imagine that nobody would be more surprised than some of the men who framed the Constitution of the United States to hear the arguments made now that we must not in any respect modify or change the agencies of government provided for at that time.

I think it was Mr. Dooley who said that Thomas Jefferson was a very good man, but that he lived before the days of open plumbing. We can not limit ourselves in the details of governmental agencies absolutely and entirely to those that were provided for when the Constitution was adopted. I do not know of anybody who absolutely proposes that except the Senator from Idaho, and I only infer it to be true in his case.

Mr. HEYBURN. As the Senator has challenged me, I ask that he permit me to inquire just the point of that remark.

Mr. POINDEXTER. The point is simply this: I said there were other Senators who objected to any amendments to the Constitution, except those they themselves approved of, and thought it was a species of political lunacy to propose any others; but they did admit that there were some that would be wise; but that the Senator from Idaho, so far as I am aware, is the only Senator and the only person that I know of who is opposed to any change whatever, and takes the position that it would be in the nature of a political crime to make any change, however slight, in the Constitution of the United States.

Mr. HEYBURN. If the Senator will permit me, I will assist him in formulating an expression of my real position in a few words. It is not that I object to any change in the Constitution merely because somebody proposes it. I object to any amendment to the Constitution that is not of compelling force. Were I participating in the making of a constitution, I would doubtless find much in some of the propositions that would influence me in my action. But the value of a constitution is its stability; the value of a constitution consists in the fact that it can not legitimately be changed by the easy methods of legislation.

Now, I am not perhaps so much of a bourbon as the Senator would picture me, and yet I have no hesitation in saying that to-day presents no problem to my mind that requires any amendment or change in the Constitution of the United States; none whatever. I merely wanted to assist the Senator in drawing a picture of my bourbonism.

Mr. POINDEXTER. I am very glad to have the Senator's definition of his bourbonism and explanation of his constitutional attitude. I want to modify my statement to this extent, that I did hear the Senator make this apparently reluctant concession: That if a sufficient number of legislatures of the United States directed Congress to call a convention for the purpose of amending the Constitution he would do his duty and vote for carrying out the directions of a sufficient number of the States.

Mr. HEYBURN. I have taken an oath to do that—to obey the Constitution and uphold it and support it—and the Constitution says that when a sufficient number of the States by their legislatures demand the calling of a convention, the Congress shall do so; and I have no hesitation in saying I stand ready to keep that faith.

Mr. POINDEXTER. When the Constitution of the United States was adopted the people were fresh from their experiences with the arbitrary power of the King and Parliament of Great Britain, and their principal idea was to destroy centralized power and so distribute it that no one function or agency of the Government could oppress the people; and they were eminently successful in doing so. Nor to this day have there been serious complaints, except perhaps in the administration of John Adams, of the oppression of the people by the Government. No one is making that complaint to-day.

It is not action, but inaction, that they are complaining of. It is not oppression by the Government that galls and burdens them, but oppression and extortion by great private powers, which have, at first gradually and of late years quite rapidly, appeared and grown to exaggerated influence in the land.

These private monopolies and crude but powerful industrial barons have grasped the opportunities of the minority and of the distribution of power and the separation of the functions of government under our system to delay for a generation, or to finally defeat, the enactment of laws by which they should be regulated and restrained. For the same reason they have been able to thwart a vigorous administration of such laws as were with much toil and tribulation already placed upon the statute books. Through an extraconstitutional system of government by conventions and caucuses, which were wholly a law unto themselves and entirely without restraint of the Constitution or of statute, these private interests have seized by cunning and fraud many public governmental functions. They have operated these stolen agencies which belong to the people wholly for private aggrandizement, and by this means have established in this country monopolies far greater than those which blighted the enterprises of France upon this continent or sapped and destroyed the vigor of Rome.

They have built up a government within a government—a government of machine organization, machine caucuses, machine conventions, within but distinct from the established system of constitutional legislatures, congresses, executives, and judiciary. In too many instances and for too long periods of time, largely by reason of the lack of affirmative power of the people under the Constitution, the machine system of government has overwhelmed and dominated that provided for by the Constitution. The relation of these two powers is like the governor of France and the intendant of the King in early Canada: like the ideal and ostensible sovereign, representing the dignity and welfare of the people, and the secret and sinister hand of Mme. de Pompadour really directing the affairs of state.

In some of its methods and manifestations this unconstitutional government of private interests is as ominous and secret as the Nihilists, the Camorra, or the Ku-Klux Klan; but it is more powerful than any of them. It has its feudal sovereign and feudal lords dictating the affairs of States and cities, and crowned with as absolute power within their respective principalities as the potentates of the East. This is the condition which has thrived on the ease by which affirmative action by

the people can be defeated. To meet its evils gradually—and not suddenly, as claimed by the learned Senator from Utah—the people, with much patience, study, toil, and experiment, have devised certain remedies. Gradually, in many localities, by these means they are destroying the power of the system machine and reclaiming the power of the public. Some of these remedies are included in the constitution of Arizona, and it does not become the Congress of the United States to deny to the people of Arizona the laws they desire and to force upon them, as the price of statehood, a constitution they do not desire.

If this Government fails, it will fail from the evils I have outlined above, and it will never fail from giving into the hands of the people real power to carry out its functions according to their purpose and intent, unless, Mr. President, the day shall come when those people shall be incapable of self-government. Then will be the time to adopt another system of government.

Mr. HEYBURN. Mr. President—

The PRESIDING OFFICER (Mr. BRYAN in the chair). Does the Senator from Washington yield to the Senator from Idaho?

Mr. POINDEXTER. I yield.

Mr. HEYBURN. I would like to impose upon the patience of the Senator from Washington for a moment. Is it not true that this constitution is a contract between the people of the State of Arizona and the United States? Is not its real nature that of a contract? These people say to the Government, "If you will admit us into the Union as a State, we will administer our laws upon the principles stated in this contract." Therefore is not the United States a very much interested party in the contents of such a document?

Mr. POINDEXTER. That is going into rather an academic discussion, as to whether it is a contract or is not a contract. It is sufficient to say to the people of Arizona that they should be admitted, and admitted subject to the Constitution of the United States and the laws enacted in pursuance thereof, whether it is a contract or not.

Mr. HEYBURN. But they are admitted by virtue of a document now offered. Does the Senator contend that none but the people of the State of Arizona are interested in the contents of this document? Are not all the people of the United States equally interested in it?

Mr. POINDEXTER. All the people of the United States are not equally interested in it. All the people of the States have not an equal right to interfere in it. They have no right at all. Under the system provided for by the Constitution and the principle upon which our Government was founded and has been administered up to the present time, they have no legitimate interest in it; and we have no right when we come to admit a State into the Union to say that the people of Arizona are not as intelligent as those in the Senator's own State, or in my State, or in any other State. The people of Arizona have a right to say what constitution shall govern them in their domestic government, because the Constitution of the United States does not contemplate arbitrary action to the contrary on the part of a great nation. There is a handful of people who have reclaimed a desert and made it habitable for man. They have worked out, through all the difficulties and hardships of early settlement in the wilderness, a system of law for the orderly conduct of their community.

Mr. HEYBURN. If I may further interrupt the Senator, is it not true that the State of Arizona is a geographical proposition primarily; that the territory now within those lines is the property of the people of the United States, and that they are yielding up their jurisdiction over it—that is, the absolute jurisdiction—to the people who are or who may hereafter be within it? Does not that give all the people of the United States some right to pass upon the conditions of this contract—the people who are going to do business in that Territory or the people who live in that Territory and yet are not citizens of it?

Mr. POINDEXTER. To pursue this rather abstract inquiry it gives them the right to do so so long as it remains a Territory; but I understand the proposition to be that we are to admit them as a State.

Mr. HEYBURN. After they are a State.

Mr. POINDEXTER. And you can not admit them properly, as I said a moment ago, except upon an equal basis with every State in the Union.

Mr. HEYBURN. Is it to be upon an equal basis with every other State if we deprive the courts in which the people of the State who have interests must have their rights settled of that stability which marks the character of courts in other States? Is it not to be on an equal footing with other States that outside property holders are entitled to go into the courts of that

State and are entitled to that same condition of stability in those courts that they would find elsewhere? Are we not interested in that question?

Mr. POINDEXTER. Not at all. They have no interest whatever in it, and one reason why they have no interest in it is because, in the remarkable ability of the framers of the Constitution of the United States in providing for every contingency, they have provided for just the contingency mentioned by the Senator from Idaho—that our Federal courts shall have jurisdiction in the State of Arizona in which the people of other States can appear and over which the State and the people of Arizona have no control.

Mr. HEYBURN. But till—

The PRESIDING OFFICER. Does the Senator from Washington yield further to the Senator from Idaho?

Mr. POINDEXTER. I yield further.

Mr. HEYBURN. But still the people must have a right to go into the State of Arizona and do business and have access to any courts which are open to any other citizen. They ought not to be compelled by reason of the character of the court to avoid the courts of the State in which they are permitted under the constitution of Arizona to do business. Otherwise they could not do business on an equal footing with other people.

Mr. POINDEXTER. The Senator seems to have a notion that the people of Arizona are going to initiate deliberately a régime of force—intelligently establishing a system of courts in which they could not get justice.

Mr. HEYBURN. No.

Mr. POINDEXTER. And that they are wilfully going to establish courts for their own oppression instead of the preservation of their rights. Every citizen of the United States who goes into the State of Arizona has the same right in the State courts in those matters in which the State courts have jurisdiction as, for instance, in the police regulations of the State and the punishment of crime that any citizen of the State of Arizona will have. The Senator seems to think that the people of Arizona are deliberately going to establish a system of courts for their oppression, and tyranny, and wrong, and injustice. I submit that the people of Arizona can be depended upon to establish a system of courts in their own interest, and let every citizen of the United States come into the State of Arizona and look to those courts and depend upon the same justice from those courts as do the people of Arizona in the protection of themselves and their property and their personal rights.

Mr. HEYBURN. Mr. President—

The PRESIDING OFFICER. Does the Senator from Washington yield further?

Mr. HEYBURN. If I may once more interrupt the Senator—

Mr. POINDEXTER. I yield to the Senator for a question.

Mr. HEYBURN. I was going to suggest that the nonresident could not initiate or take steps to remove the local judge, while the residents, should they suspect that the local judge might not agree with them in regard to the case, might remove him the day before the trial, and the nonresident would then have to commence over again.

Mr. POINDEXTER. That is just a chimera. It is just an imaginary situation which the Senator conjures up out of his great imaginative powers. No citizen of Arizona can remove a judge under this recall provision.

Mr. HEYBURN. Twenty-five per cent of them can.

Mr. POINDEXTER. Twenty-five per cent can not remove him.

Mr. HEYBURN. They can incapacitate him. No judge against whom a petition has been filed can go on with the trial of a case.

Mr. POINDEXTER. It is easy enough to imagine difficulties and obstacles. I am not an advocate, Mr. President, of a universal system of recall of the judiciary. While I have no prejudices against it, I am an advocate of allowing every jurisdiction in the United States, every State which is a member of the Union, to exercise its own judgment, and particularly the deliberate will of its own people in regard to that question. I am not proposing it for my State at this time. The people of my State are not proposing it for my State. But if conditions arose in that State, as conditions have arisen in the Territory of Arizona, and in their experience with the judiciary there, which convinced the people that it is necessary to put a more direct control over the judiciary in the hands of the people, I do not consider that there is any particular danger in the way of giving that power into the hands of the people.

I am not suggesting and no one is suggesting, so far as I am aware, the universal application of the recall of judges; but, as I have just said, I have no apprehension that evil will result from placing in the hands of a free and intelligent people power

by the ordinary and solemn process of the ballot, by a majority of the people, not alone by petitions signed by 25 per cent. not by the people without discussion, not by a people who "have nothing to think with," as one of our facetious citizens said about a certain convention in the days of 1896, but by a people who do think, who "have something to think with," who have an opportunity to read and means of communication and discussion of the merits of judges and other officials, after full and deliberate discussion—a free and intelligent people, acting by a majority, in the orderly process of the ballot.

Mr. HEYBURN. Mr. President—

The PRESIDING OFFICER. Does the Senator from Washington yield further to the Senator from Idaho?

Mr. POINDEXTER. I yield to the Senator from Idaho.

Mr. HEYBURN. I should like to suggest to the Senator in the nature of a question whether a controverted question upon which the integrity and fitness of a judge should depend could be taken up and discussed and decided within 30 days in a State like Arizona? Suppose the withdrawal was based upon an alleged erroneous decision in one of those great mining contests, some of which I have known to last for more than six months, it would have to be gone over by the people of the State and determined as a basis for their voting as to whether or not the judge was in error. Does that seem to be a conservative method of government?

Mr. POINDEXTER. If such a thing as that actually occurred I would not consider that the people were particularly conservative. But that is another one of the things which does not exist except in the Senator's contemplation, and never will exist. It never will be possible to get even 25 per cent of the people of Arizona to sign a petition for the recall of a judge because of a decision in a mining case, much less to get a majority of them to recall him. They are not going to be exercised by any such matters as that.

I have known of conditions of the judiciary where it would have been possible to get 25 per cent of the people to sign a petition for a recall, but it did not depend upon any decision which the court had rendered. It might have depended upon a series and the general course and tenor of the decisions such a judge had rendered. It might have depended upon some misconduct upon his part, as in a case which is recited in a document which I have in my hand of a judge in the State of Montana. The records of the supreme court of the State show that he was in a state of beastly intoxication during the progress of an important trial over which he was presiding. One instance, even, of that kind might not be sufficient to induce 25 per cent of the people to recall him. It might be that they would be induced by a condition which is also recited in this document of a judge of a supreme court in one of the States of the Union who submitted the opinion of the court, which he had been delegated to prepare, to the counsel of a great corporation, which was one of the parties to the case, for his O. K. and revision before it was promulgated as an opinion of the court.

Such things as that, if they unfortunately exist, would bring about the filing of a petition by 25 per cent of the people for the recall of a particular judge, and not because he decided a case in favor of one party or the other.

I want to say to the Senator from Idaho that if he has grasped the true significance of the American character he knows as well as I know that if there is one thing which would keep a judge upon the bench and would insure the favor and the support of an American population it would be the fact that those people were convinced that he could not be swayed from the righteous course as a judge, either by popular clamor or by the insidious influence of some great party litigant.

This talk about a judge being recalled because he was firm in the line of duty, or about his being kept upon the bench by the people because, on the other hand, he was ready to listen to popular clamor and to decide cases as the mob wanted him to decide them, is the most arrant nonsense and a most unjust reflection upon the intelligence of the great people who have made this Nation. There is not a constituency in the Union, in a Territory or in a State, which would recall a judge because he had established a reputation for fearlessness in deciding cases according to the right and merit of the cases, however his decision might be. I have known of cases in which people were interested in a decision in a certain way and the decision was the other way. The judge had the applause of the people, not because he decided the case one way or the other way, but because the people admired the character of the judge. They are wonderfully good judges of character. I read somewhere the other day that the House of Commons of Great Britain was a wonderfully good judge in estimating the character of its members, and that it soon took a man's measure, and perhaps

the same thing is true of the Congress of the United States, but I will tell you a better judge of the character of men, and that is the people of the country. It does not take them long to take the measure of a judge upon the bench. They do not measure it upon this decision or that decision, but they measure it upon his course of conduct and his life. They believe in making but one test of his character: Is he a good judge, who can not be swayed by popular influence or by corruption or by the sinister influence of great litigants? If so, there is no great danger of his ever being recalled. They will welcome him upon the bench and keep him there.

There are too many cases, unfortunately, in this country where there are not good judges upon the bench. I am not in the habit of raking up the unfortunate things which occur here and there, and they are greatly in the minority in the number of our public officials, whether judicial or otherwise. In the discussion of this question, if you decide correctly, you must take notice of the fact, public notice, senatorial notice of the fact, that there are many cases where there are upon the bench, or have been upon the bench, just the kind of judges that Senators who are opposing this constitution say would be developed under a recall system. They say that you would develop judges with their ears to the ground; in other words, judges who would listen to outside influences in deciding cases. The reason this recall was proposed is because of the fact that in Arizona there were judges upon the bench, where there was no recall, who had their ears, not to the ground, perhaps, but who heard the corrupt whispers of some great political machine, combined with great business interests.

Yes; as suggested to me by the Senator from Oklahoma [Mr. OWEN], the Southern Pacific Railroad and other interests of that kind. That is far more to be feared if, unfortunately, the people in the first instance should elect to the bench a man whose official actions were to be determined by any such influences, that he would be reached by such interests as the Southern Pacific Railroad, than that he would be reached by the so-called clamor of the people. The right kind of a judge would not be reached by either, any more than he would be reached as to a case pending in his court at the end of his term of four years, as provided in many States, and as is provided in the Arizona constitution, and the election was coming on, any more than he would be influenced in the decision of his cases by the approaching election. I say that if such a judge was influenced by that, of course he would likewise be influenced by a recall, but if in either case he is subject to such influences, he is not a fit man to be upon the bench. You can not devise, with all the wit and ingenuity of man, a system of government which would be a success in the hands of officials of that kind. You have got to presume that there will be men of courage and honesty to enact, execute, and decide the laws of a country in order to make a success of any system. The people of Arizona are now trying to devise a plan not to put temptation in the way of judges, but to remove temptation from them, and to make them responsible to the people.

Mr. HEYBURN. Mr. President, will the Senator permit an interruption?

The PRESIDING OFFICER. Does the Senator from Washington yield?

Mr. POINDEXTER. I yield for a brief question, Mr. President.

Mr. HEYBURN. Mr. President, in a contest after the petition for withdrawal had been filed, would there not be an inclination on the part of those who were charged with having an interest in the decision that was the basis of the withdrawal combining for the purpose of either retaining or expelling the judge?

Mr. POINDEXTER. There would be absolutely no danger of that when the matter is to be submitted to the entire population—no possibility of it.

Mr. HEYBURN. Now—

Mr. POINDEXTER. If the Senator will allow me, there might be some danger of it, as was suggested by Justice Story when the question was submitted to the Legislature of Massachusetts as to whether the Legislature of Massachusetts should have the right to remove judges upon address without notice, without trial. He suggested that it was dangerous, and he pointed out the manner in which great influences might reach the ears of the legislature of which we have had too many examples since Justice Story uttered that prophecy. He had confidence in the people, and I repeat, as I said a moment ago, that while there might be danger of such influences affecting the legislature, with power to remove without notice it is impossible that they could control the action of the people of the entire judicial district.

Mr. HEYBURN. I have had personal knowledge of the fact that the Senator has had a somewhat extended and honorable career upon the bench, and I will ask Did the Senator ever know in his experience, either at the bar, before going on the bench, or when presiding over the court, of conditions arising out of the trial of cases that in his judgment would seem to indicate or suggest the necessity of such a provision as this?

Mr. POINDEXTER. Yes; I have already mentioned two of them this morning.

Mr. HEYBURN. I do not recall them.

Mr. POINDEXTER. I dislike to repeat that history and those instances which are well known. Let me read to the Senator a reference. I read from an address by the Hon. T. J. Walsh, of Helena, Mont., before the Washington State Bar Association at Spokane, Wash., July 28, 1911, in response to the question of the Senator as to whether I had any knowledge of such cases.

Mr. HEYBURN. This is merely an address before the bar?

Mr. POINDEXTER. Yes; it was an address before the bar association, but it is now an address before the Senate of the United States. I am going to read this in answer to the Senator's question. This gentleman had knowledge of what he was speaking, and the bar association was just as appropriate a place as any other to give expression to it. Mr. Walsh says:

The supreme court of my State—

That is, the State of Montana—

granted a new trial in *Finlen v. Heinze* (28 Mont., 548) because the undisputed evidence showed that the judge who tried the case, while hearing it, being more or less steeped in liquor, trafficked through a lewd adventuress with one of the parties to the action. Some chapters from the recent judicial history of this State might serve as well to illustrate the utility of a system through which could be secured the prompt elimination of a judge whose conduct was such as to excite deserved public reprobation. Had not the erring justice, who fled before the wrath of this association, kindled at the disclosure of his intrusting to counsel for one of the parties in a suit before him, a corporation of great wealth, the preparation of the opinion of the court, voluntarily relinquished his seat, the people of Montana would have had abundant cause to be thankful had they been able to retire him under a recall.

Mr. HEYBURN. The legislature could remove him.

Mr. POINDEXTER. There are 16 States in the Union in which the legislature has the power to remove judges without notice and without trial.

Mr. OWEN. Thirty-two can remove them by act of the legislature.

Mr. CLAPP. Thirty-two States can do so, I think.

Mr. POINDEXTER. I am very much obliged to the Senators for the correction.

Mr. CRAWFORD. Mr. President—

The PRESIDING OFFICER. Does the Senator from Washington yield to the Senator from South Dakota?

Mr. POINDEXTER. I yield.

Mr. CRAWFORD. Is it not a fact that in a number of those instances it requires a two-thirds vote of the legislature, making the action practically one of impeachment, although not upon the same grounds upon which impeachment would be sustained?

Mr. POINDEXTER. Some of them do not require a two-thirds majority; and when—

Mr. CRAWFORD. Is it not so required in the great majority of those States?

Mr. POINDEXTER. It is in a majority of them, but not in all of them. In one of them the majority of the legislative body of the State—a mere majority, not two-thirds—had the power of removing judges when the State was admitted into the Federal Union—one of the original thirteen Colonies.

Mr. CRAWFORD. Yes; in one instance. Now I should like to ask the Senator another question. There does not seem to be any limit in this provision. The Senator has mentioned one or two cases commonly known, in which it seems to me very clear grounds for impeachment existed. I do not know whether or not an attempt to impeach was resorted to, but in the recall as proposed in the constitution of Arizona, and in the recall of judges as it has been advocated on this floor, no cause is to be assigned for the recall. It is to be an absolute exercise of the will of the majority. A judge may be recalled because he is not radical enough. It has been argued on the floor that he ought to be recalled if he is wrong temperamentally, although honest. Does the Senator approve of a recall based upon grounds like those?

Mr. POINDEXTER. I do not approve of the recall based upon any specific grounds in the statute at all. I do not think the grounds ought to be stated. I think it is a matter absolutely in the discretion of the people of the State, just as the election of a judge is in their discretion. If they are capable

of electing a judge, they are capable of reelecting him or of deposing him from office.

I understand that, although this system is in force in one of the States of the Union, it has never been exercised, and the probability is that it would scarcely ever be exercised in any jurisdiction where it was adopted. The existence of it would have the effect desired, just as the existence of water transportation alongside of a railroad has the effect of regulating railroad rates, even though the water transportation is not used. The existence of the power and the possibility of using it would have the desired effect of making a judge, where it is unfortunately necessary to take such steps, responsible to the people.

The objection urged against the recall is that we should have an independent judiciary. I infer that Senators who make that argument mean that we should have a judiciary independent of the people. If they do mean that, this is the first time in the history of the struggle of the English-speaking race to establish their present system of government that that contention has been made. The independence of the judiciary, as contemplated by the framers of the Constitution, as contemplated by the English people in the act of settlement in 1688, and in all of the struggles which the English people have had to establish their liberties as against the tyranny of the Crown, meant independence of the monarch and not independence of the people. The struggle was to make the judges dependent upon, or at least responsible to, the people, instead of making them independent of the people. Judges, as Senators well know, when this question came up in the course of years and in the development of the courts upon which our courts are modeled, were absolutely dependent upon the king. The king was the judge, and he delegated certain individuals to take his place, because in the multitude of his engagements he did not have time to look after the individual cases.

Mr. CRAWFORD. Mr. President, will the Senator permit me?

Mr. POINDEXTER. He delegated men to take his place. They represented the king, were appointed by the king, and removed by the king at his pleasure. If the king was a benevolent despot, the judge was satisfactory for the time being to the people, but if the king was a tyrant, as he often was, there were protests on the part of the people, and finally there was an establishment of the system that the judiciary should be independent, not of the people, but independent of the king.

Mr. CRAWFORD. Mr. President—

The PRESIDING OFFICER. Does the Senator from Washington further yield to the Senator from South Dakota?

Mr. POINDEXTER. I yield.

Mr. CRAWFORD. Does the Senator not admit that there is a wide distinction between the relations, for instance, of a legislator to the people or an executive officer to the people and the scope of duties that rest upon a judge? The legislator is enacting a law by which the entire people of a State or a nation shall be controlled; an executive officer is enforcing that law; but a judge is deciding a question between private litigants, or he is deciding a question of which the most important feature is that the right of the minority shall be protected; it may be in a matter of religious belief, which awakens the deepest feelings that exist in society and where a majority may be arrayed against a minority. It may be a question involving race prejudice, which again awakens the deepest passions that can arouse mankind, and it may be a contest between one poor, weak human being and the vast majority. If the decision in such a case is to be controlled by the majority of the people, who can invoke a recall against the judge pending the trial, to what tribunal is the minority ever to appeal? To what tribunal under the sun can the one poor unfortunate who is facing the overwhelming sentiment that appears to be against him go? What answer does the Senator make to that, where you can invoke a recall and appeal simply to the right of the majority?

Mr. POINDEXTER. The first answer that I make to that, Mr. President, is that under our Constitution the Senator supposes an impossible case. It is impossible that any court in this country should have before it the decision of a religious question to the extent of enforcing religious obligations upon an individual. The courts have nothing to do with that. That is carefully taken out of the jurisdiction of the courts and of the Government. There is an absolute separation between religion and politics and Government in this country. The Senator is supposing a condition that is impossible.

Mr. CRAWFORD and Mr. ROOT addressed the Chair.

The PRESIDING OFFICER. Does the Senator from Washington yield, and to whom?

Mr. POINDEXTER. I yield to the Senator from South Dakota.

Mr. CRAWFORD. We can take one instance, which stirred the State of Wisconsin a few years ago to its very foundation, and that was what was known as the Bennett school law, which involved the question of the reading of the Scriptures in the common schools and awakened all the prejudices and feeling that can be aroused upon a question of that kind. A case gets into court; it may involve a religious question; it may involve the enforcement of a quarantine or the invasion of what is regarded as a sacred personal security, against vaccination or something of that kind. Such a case should be tried by an impartial judge and not by a court under the influence of what may be the predominating sentiment of the community; and where is the minority to go for protection if it is at the mercy of a recall? What answer does the Senator make to situations of that kind that do arise?

Mr. ROOT. Mr. President—

Mr. POINDEXTER. If the Senator from New York will pardon me just a moment, I will say that the case to which the Senator from South Dakota has referred was simply a case which involved the preservation of the very principle which I have just stated—the separation of the State from religious matters. It was not a case which involved the religion or the religious scruples or the religious practices of any individual. The Senator from South Dakota can not devise any system of judiciary which would not be in some degree responsible to the people. You have got to have an appointive power. It is a question of to what degree the judiciary shall be responsible; whether it shall be far removed from the influence of public opinion or whether it shall be subject to a certain extent to public opinion. It is a necessity of the case. The minority can not control the judiciary and the majority can not control it free from the influence of the minority. Under the system which is proposed here the minority have their influence; they have—

Mr. CRAWFORD. Will the Senator permit me?

Mr. POINDEXTER. They have their means of influencing the election. It is a minority that starts any recall proceedings—one-fourth of the people—the minority of which the Senator is speaking.

Mr. CRAWFORD. Upon that point the power that I want to see maintained in this country, if the Senator will permit me, is the power that the majority can not control and that the minority can not control the courts, just as the Senator said a moment ago. But are you not now, by your recall, removing that situation and putting in its place a situation in which the majority can control? And if the majority can control and review in this country the decisions of the courts, then I ask again to what tribunal can the minority ever go?

Mr. OWEN. Mr. President—

Mr. POINDEXTER. If the Senator will allow me, I will answer the question again; the same question that I think the Senator has repeated several times. Under this system the minority makes its appeal to the public opinion of the State just as it makes its appeal if it is interested in the proposition under the present law in the election of a judge. You can not suppress, and there is no intention to suppress, the expression of the opinion of the minority, their influence in the election; and, as I stated before, the provision in this constitution is that a minority may institute the recall proceedings.

Mr. CRAWFORD. Mr. President—

The PRESIDING OFFICER. Does the Senator from Washington yield to the Senator from South Dakota?

Mr. POINDEXTER. Yes.

Mr. CRAWFORD. I promise not to keep interfering with the Senator. But upon this very point: We are hearing criticism to-day of a recent decision of the Supreme Court of the United States. One class of people are saying that they wrote into the statute legislation that they had no right to put into it, and that court will be arrayed before public opinion by one set of people who are radical in their views. Another large number of people will sustain them, because they believe in the conservatism represented by the opinion of the court.

Now, in a case of that kind or in similar cases, does the Senator believe that the power should reside in the people to thrash out all of the intricacies of an involved question of that kind and determine—as nonexperts—who is right and who is wrong, and have their decision become the permanent law of these United States? During one administration, sir, the controlling power may be conservative and would uphold with enthusiasm every decision that John Marshall wrote. The next administration might be radical, and if they had the power, might reverse and overthrow every decision that John Marshall wrote.

Where would there be any permanency, I ask the Senator, in the decisions of the courts of this country if all could be reviewed by the majority under the recall or put in the mael-

strom of heated discussion and an interrogation point lie beyond every decision? No one would know what the decision of the majority will be. Does the Senator believe that our courts in this country should be placed on a footing of that kind?

Mr. POINDEXTER. No proposition has been made, as I stated before, to establish a universal system of recall. There is no question before this body of recalling the Supreme Court or other Federal judges. But I do say that if the people of this country, acting through constitutional means, desire to provide for the recall of their Federal judges, they should have, and do have, the power so to provide.

The question that is before this Congress is an entirely different one—as to the recall of judges in a State, its local judiciary, dealing with its local matters—and it is not for us to decide the merits even of that question. The question, the merits of which we are to decide, is whether or not those people have the right to determine the question for themselves.

Mr. CRAWFORD. That is an entirely different proposition.

Mr. WORKS. Mr. President—

The PRESIDING OFFICER. One moment. Does the Senator from Washington yield, and to whom?

Mr. POINDEXTER. I yield to the Senator from California.

Mr. WORKS. The Senator from Washington has made the statement that there have been no prosecutions, no litigation, in this country involving religious rights. I can not allow that statement to pass without correction. There have been a number of prosecutions in this country against individuals for exercising what they believed to be their religious duties, and they have involved religious questions; and as the Senator from South Dakota has very well said, there is no question that can be brought before the courts that is likely to involve more prejudice, more feeling, a greater degree of public sentiment that is likely to influence a vote upon a question of this kind, than a religious question.

Mr. POINDEXTER. There ought not to be any religious questions before the courts, unless it should be the question of preserving the guaranty of the Constitution that there should be no law respecting an establishment of religion, nor prohibiting the free exercise thereof. I am not familiar with the cases to which the Senator from California refers, but certainly it should be the duty of a court to refuse to decide religious questions—not to decide them, but to refuse to take jurisdiction of them, except as just stated.

But that is aside from the question. Suppose you take it from the judiciary. The question still remains with the people as to whether or not religion is to be interfered with. It still remains with the legislative department to legislate upon those subjects within the Constitution, or with the people to amend the Constitution. So there is no religious principle involved with relation to the judiciary that is not applicable to the legislature and to the people themselves.

Mr. HEYBURN. Mr. President—

The PRESIDING OFFICER. Does the Senator from Washington yield to the Senator from Idaho?

Mr. POINDEXTER. Yes.

Mr. HEYBURN. I suggest that the legislature can not affect or change a decision of a court. There is no appeal to the legislature from an erroneous decision of a court.

Mr. POINDEXTER. The legislature can to as great extent and to a greater extent legislate in regard to these matters than a court can decide as to them.

Mr. HEYBURN. That is before they are decided, but after they are decided the legislature can not affect them.

Mr. POINDEXTER. I am not speaking of a particular case. I am talking of religious policy and religious establishments. Neither under the recall is there an appeal to the people from a decision of the court. There is no provision whatever for any interference by the people with any decision of the court.

As I stated before, I have no apprehension that evil will result from placing in the hands of a free and intelligent people the power by orderly and solemn process to remove from his high position a judge who disgraces it by corruption, cruelty, or willful injustice. There is no danger of the masses of the people, actuated by public opinion, seeking to do injustice to some individual litigant in a court, as Senators seem to apprehend, nor that the majority will be controlled by malice or a desire to oppress some individual as to his case pending in a court.

The fear of a judiciary entirely responsible to the people is a class fear. It is fostered principally by the powerful growth, both natural and artificial, of our modern private monopolies, which are not so often seeking justice in our courts as they are seeking favor and special advantage.

In putting this provision into their constitution the people of Arizona are engaged in a new phase of the same struggle their ancestors were engaged in—to free the judiciary from the control of powers and influences above and beyond the people. The

guaranty of a republican form of government was a guaranty against monarchy or oligarchy. Does a single Senator in this body believe that it was intended as a limitation on popular rights?

The recall of judges in England is lodged in the Parliament. Popular government is far more extensive and powerful in England than it is in this country. Parliament can recall immediately without notice any judge in England, and Parliament is directly subject to public opinion in England.

There is no such system of checks and balances there as there is here, and yet that is the country which meets with favor as to their system of government with the conservative Senators who seem to be afraid of intrusting power in the hands of the people.

The referendum is continually put into practice in England. Immediately upon an adverse vote on a question of national concern it is submitted to the people, and if the people act upon it the result of their action takes immediate effect in the assembling of the newly chosen House of Commons, which is the governing body of England—not as in this country after an intervening period of more than a year, during which time a Congress repudiated by the people, not responsible to the people, as expressed in their votes, meets and legislates for those people; and even after that period the will of the people as expressed at the polls takes effect only as to one of our two legislative Chambers.

There have been no disasters with respect to the peace and order of the community and the security of property and the sacredness of personal rights in England by vesting in the people control over their judiciary and the control, the absolute control, and the immediate control over their Parliament.

There are those, sir, who hold up in this country the referendum as a populistic, and socialistic, and anarchistic proposition, and yet when our Canadian brethren across the line submit the reciprocity treaty to a referendum, immediately those who are opposing it in this country begin to say "it must be all right if the conservative Canadians in the Dominion of Canada adopt it."

The learned Senator from Utah [Mr. SUTHERLAND] says that we ought not to indulge in experiments, but that we ought to be guided by the light of experience. I should like to know how we can be guided by the light of experience unless we indulge in experiments. You can never tell whether a system is going to succeed, you can never know from experience whether it is going to succeed until it has been tried. We have in this case, as the Senator from Oklahoma [Mr. OWEN] suggests to me, ample experience. It is not an untried field. It has been tried through the centuries and proved to be absolutely safe.

I admit that this whole proposition and the entire Arizona constitution, particularly with reference to those questions that have been raised here, is a failure and falls to the ground at once if the premises laid down by those who have spoken against it here are sound; but I deny the premises. Their proposition is that the people are actuated by passion and prejudice; that they are tyrannical; that they are unintelligent; that they are foolish. I think the distinguished Senator from Utah [Mr. SUTHERLAND] figures it out in an exact mathematical formula that there are 16 fools out of every 54 electors. I do not think so. It may be so in Utah, but I do not think so, nor in any other State in the Union.

Mr. O'GORMAN. Mr. President—

The PRESIDING OFFICER. Does the Senator from Washington yield to the Senator from New York?

Mr. POINDEXTER. Yes.

Mr. O'GORMAN. Do I understand the Senator from Washington to state that popular government more generally prevails in Great Britain than in the United States?

Mr. POINDEXTER. Yes. I said that popular rights and the effect of public opinion in England upon the Government was more extensive, more direct, and more powerful than it is in this country.

Mr. O'GORMAN. I do not agree with the Senator in his views, but I ask a further question. Does he state that the power to recall English judges is confided to the Parliament?

Mr. POINDEXTER. Yes.

Mr. O'GORMAN. The Senator offers that as a reason, then, why the same power to recall should be vested in the people? The policy of most of the States of the Union, the power recognized in the proposed Arizona constitution, gives the right to remove a judge to the legislature of the several States, and if the Senator from Washington so highly commends the British system, where the power to remove a judicial officer is vested in the legislature of the country, why do you oppose a similar policy here, either in Arizona or in any other State?

Mr. POINDEXTER. I do not oppose a similar policy here. I have no objection to the legislature of the State having the

power to remove a judge. I have no objection at the same time to the power to recall the judiciary being vested in a greater power than the legislature. I think it is more conservative, it is safer, it is more stable than to have it vested in the legislature. I called attention to the English system as demonstrating the fact that you can have a stable judiciary which is subject to immediate recall by a department of the people's government outside of the judiciary.

Mr. O'GORMAN. Does the Senator from Washington state that in Great Britain the policy has ever existed of submitting the recall of a judicial officer to the vote of the people of the electorate?

Mr. POINDEXTER. I do not recall any instance in which that was involved. I can readily imagine—

Mr. O'GORMAN. I think we will be agreed that never in the history of the English Government have the people been permitted by a popular vote to determine whether a judicial officer shall retain his position or not.

I only alluded to this observation of the Senator because in my opinion he is singularly unhappy in his illustration.

Mr. POINDEXTER. I should like to say to the Senator, in reference to his last suggestion, that never in the history of Great Britain have the people of Great Britain, by popular vote at the polls, placed a judge upon the bench, any more than they have taken him from the bench. At the same time, in the great State of New York, in which the Senator graced the judicial bench for a long term of years, the people select their judges at the polls. I think, using the Senator's own language, the Senator from New York is singularly unhappy in his illustration and argument against popular control of judges in this country in calling attention to the fact that the English people do not, by popular vote, either select or recall their judges, because we have demonstrated in this country that, notwithstanding that is a fact in England, there is nothing impossible about it in this country. Popular choice or popular rejection of judges at the polls has been eminently successful in most of the States of the Union.

I did not cite the power of Parliament over the judiciary as being identical in all respects with the power proposed by the constitution of Arizona. I did cite it as a demonstration or as an argument that if you can trust the legislative power with control over the tenure of office of the judges, by the same sign and for much stronger reasons you can intrust the people with control of the judiciary.

Mr. OWEN. Mr. President—

Mr. POINDEXTER. I hope the Senator from Oklahoma will excuse me for a moment. I can readily see in case an issue should arise in Great Britain over the removal of one of their judges by Parliament that it would make an issue upon which the people under their system would act. If Parliament in its attempt to remove a judge, or if the Government should propose a bill removing a judge, if it were an issue of sufficient public interest, involving questions of sufficient importance, and that resolution should be defeated in Parliament, immediately the question would be submitted to the people of Great Britain and it would be decided at the polls.

I do not hold up the Government of Great Britain as a model in all respects. No government is perfect. Nearly every government has some features better than other governments. We have some that are better, and Great Britain has some that are better than ours. I can readily understand the position of the Senator from New York. Coming from that section of Great Britain in which I understand he had his origin, or his ancestors, he would deny the proposition that Great Britain has a popular government. I agree with him entirely in that respect, as to that particular operation of the Government of Great Britain, but I still contend that the action of public opinion in Great Britain has more direct and complete influence in the enactment and execution of its laws than public opinion has in this country. Parliament is immediately responsive to the people, and its power under the people is supreme. Its acts can not be vetoed by the executive nor held invalid by the judiciary. The influence of the people in choosing the Senate of the United States is diluted through the legislatures; only a portion of the legislature is chosen in a single election, and only one-third of the United States Senate, at intervals of two years. Furthermore, our constitutional system has been perverted by the growth of the power of party conventions, caucuses, and committees, entirely irresponsible to the people, to an extent undreamed of in England.

Mr. OWEN. Mr. President—

The PRESIDING OFFICER. Does the Senator from Washington yield to the Senator from Oklahoma?

Mr. POINDEXTER. I yield to the Senator.

Mr. OWEN. I wish just to emphasize what the Senator from Washington is saying, that the conservative class of Great Britain regard the electorate of Great Britain as more conservative than the Parliament itself. They expressed that opinion in the tax laws proposed by Parliament in appealing to the body of the people against the more progressive action of the Parliament itself.

Mr. POINDEXTER. That is very true. The privileged class of England have sought to appeal again and again to the people against the progressive program of the House of Commons. The constant practice in Great Britain is to submit to the people all questions of national importance upon which there is a vote against the Government in the House of Commons. In some instances, when there is no adverse vote, upon the voluntary action of the Government it is submitted, as in the instance suggested by the Senator from Oklahoma.

Referring again very briefly, Mr. President, to the assertion which is made that the independence of the judiciary will be destroyed by giving the people an opportunity at times other than at the regular election to decide upon the tenure of office of judges, I want to say again that a judge's true character soon becomes known and established in his general reputation, and the accuracy of such popular estimate is proved by the rule of evidence which makes such general reputation competent evidence. Who is there, sir, who believes that a judge who by this true test bore a general reputation for honesty, fearlessness, integrity, and general competency on the bench could ever be removed from office by popular vote, even though in some particular case he should render an unpopular decision?

There has been an unfortunate suggestion made in some quarters—I have not heard it in this body—that one thing to be considered in determining whether we should adopt the joint resolution as reported by the committee is the probability that Arizona would elect two Democratic Senators. I have no idea whether that is true or not, but the suggestion, coming from whomsoever it may, is most unfortunate. The time has long gone by when a political party can make capital for itself by calculating as to the gain or loss of a Senatorial vote by the admission of a State into the Union. I do not think that that consideration will influence the vote of a single Senator in this body. I refer to it chiefly in response to suggestions which have been made throughout the country outside of this body.

The fact of the case is that, so far as parties are concerned, while it is true, as has been said, that this is a government by parties and must continue to be so, jockeying between the organizations of two great political parties, which organizations unite to effectuate their common purposes whenever a certain interest and a certain political system is involved, has largely destroyed the healthy, robust, partisan sentiment which once existed in this country in either one of the political parties of which we are now members.

Mr. SMITH of Michigan. Mr. President—

The VICE PRESIDENT. Does the Senator from Washington yield to the Senator from Michigan?

Mr. POINDEXTER. I yield.

Mr. SMITH of Michigan. The statement of the Senator from Washington that partisan advantage has been suggested on the floor is entirely new to me.

Mr. POINDEXTER. I said that I had not heard it suggested on the floor. I have heard it suggested in other quarters, outside of Congress.

Mr. SMITH of Michigan. I want to say that so far as my observation has gone—so far as our relation to this subject is concerned—I do not believe that the question of political partisanship has entered into this matter at any stage, and I should feel very badly, indeed, if I thought that any Member of the Senate or any officer of the Government would be guided by that spirit in the consideration of a matter so important to the people of both Territories.

Mr. POINDEXTER. Mr. President, I am thoroughly satisfied that what the Senator from Michigan has just said is the sincere expression of his feelings upon that subject, and that his conduct will be governed by that feeling. I know that to be the case, and, as I said before, I believe that to be the case with every Senator. But nevertheless the question has been discussed, and is being considered; whether or not it is anticipated that it would influence the action of Congress I do not know. It will not influence, in my judgment, the action of this body.

The tendency in the relations of parties in this country toward a natural party division, between a liberal party and an ultraconservative party, and that such a real division and natural alignment does not exist at the present time, is emphasized by the fact that this very question which I have just suggested is not a question being discussed before Congress at

this time, while on former occasions, when the admission of States into the Union was proposed, it was discussed and was one of the paramount principles which determined the action of Congress.

A good deal has been said, Mr. President, about the general character of the constitution of Arizona. It is to be noted that most of those Senators who are opposed to the admission of Arizona into the Union under its constitution are in favor of the admission of New Mexico under its proposed constitution. I think that circumstance is very significant. It raises a query at once as to whether, if the proposed constitution of Arizona did not extend popular rights and the influence of public opinion in the government but took the opposite direction, the Senators who are opposing it would not be in favor of it. I infer that they would be in favor of it if it took an opposite direction, limiting and curtailing the rights of the people, because, as I said, they favor the constitution of New Mexico, which contains, among other curious provisions, one of the most remarkable that was perhaps ever incorporated in a constitution for a self-governing State. It is in the third section of the nineteenth article of the constitution of New Mexico, and is as follows:

SEC. 3. If this constitution be in any way so amended as to allow laws to be enacted by direct vote of the electors, the laws which may be so enacted shall be only such as might be enacted by the legislature under the provisions of this constitution.

In other words, the delegates to that constitutional convention undertook to limit the action of the people of New Mexico for all future time to be in accordance with the views of these delegates upon these propositions. If I should find myself at any time in the position of opposing the admission of States to the Union under such a constitution as they themselves choose to adopt, I would far rather oppose the admission of a State into the Union on account of a reactionary provision in its constitution such as that I have just read from the constitution of New Mexico undertaking to tie the hands of the people forever. It seems to me an insolent suggestion to the people of that Territory to undertake to say to them that they can not in the future enact a constitution except such as meets the approval of these delegates. Of course, the provision will have no effect; there is no power in the convention to make such a provision. Nevertheless, it shows the sort of an instrument prepared and the intention of those who adopted it.

I wish to read very briefly, as a part of my remarks, from the same address of Mr. Walsh, which I referred to before, a quotation incorporated into it from an article by Irving Browne, in the Green Bag, in 1890, relating to the judiciary, in which he says:

I have given the names of more than 100 judges, with particulars of many of them--

Referring to the judiciary, I will say to the Senator from New York, of his State:

I believe that under a system of appointment by the governor this test would not have been equalled in merit and distinction, and I point to it as a standing refutation of the argument that the people are not fit to name their judges.

Of course, if they are fit to name them at one time they are fit to name them at another time and to pass upon their fitness in a recall election.

In the American Law Review, answering this statement of Mr. Browne, Mr. Leonard Jones says:

The worst thing, however, about the elective system is not the fact that it affords unworthy men the chance to obtain judicial office by purchase or other corrupt practices, but that it necessarily, to a greater or less extent, destroys the independence of the judges.

The same argument is made against the elective system of judges that is made against this provision in the Arizona constitution. He adds:

What chance is there that a judge who is shortly to seek a reelection by the people will uphold the law and justice in a case where the popular clamor is against law and justice?

Rightly the gentleman who wrote this paper commenting on the quotation simply says:

What chance, indeed, unless he be a man and not a caiff? With that kind of a judge the argument has added force as it is directed against the elective system, because that kind of a judge is likely to solace himself with the reflection that, so far as the recall is concerned, it may not be invoked against him anyway, while if his term is expiring and he seeks reelection he is up against it to a certainty. Moral courage is a quality cardinal in character in a judge. He is called upon to exercise it in the daily discharge of his duties. He is fortunate, indeed, if he is not obliged repeatedly in his official career to brave the enmity of powerful interests whose activity is more to be feared than an outburst of passion upon the part of a community or State against an upright public official who faithfully discharges his duty as he sees it.

Of course, there have been a great many facetious remarks and frivolous arguments made against this system, and in one attack which was made upon it it is said that the Senator

from Utah [Mr. SUTHERLAND] amused himself by booting the composite citizen around the Senate Chamber. That probably will not be as interesting as the composite citizen booting a candidate for the Senate around the State of Utah. It is a game in which there are compensations. If one is to be booted, of course he likewise has an opportunity to boot. The Senator from Utah says that he is in favor of giving the privilege to the voters of Utah to vote upon the election of Senators of the United States.

Mr. SMITH of Michigan. Mr. President--

The VICE PRESIDENT. Will the Senator from Washington yield to the Senator from Michigan?

Mr. POINDEXTER. I yield.

Mr. SMITH of Michigan. If it does not interrupt the Senator, his strictures on the New Mexico constitution, so far as the right to change it is concerned, I do not desire to controvert at this time, but I simply desire to say to the Senator that 56 per cent of the qualified voters of New Mexico voted for that constitution. I think it is the largest percentage of votes cast for the constitution of a new State of which I have any figures or with which I am at all familiar.

Mr. POINDEXTER. Two-thirds of the voters in Arizona voted for the constitution of Arizona.

Mr. SMITH of Michigan. No; the Senator is mistaken. The total vote on the approval of the Arizona constitution was 12,187 votes out of a total voting population of 45,323. There were 3,822 votes cast against it, and 35 per cent of the qualified voters--

Mr. POINDEXTER. How many votes were cast for it?

Mr. SMITH of Michigan. Twelve thousand one hundred and eighty-seven out of 45,323.

Mr. POINDEXTER. How many votes were cast against it?

Mr. SMITH of Michigan. Three thousand eight hundred and twenty-two.

Mr. POINDEXTER. I said two-thirds. There were more than two-thirds of the people voting on the proposition in favor of the constitution.

Mr. SMITH of Michigan. No; the Senator is mistaken. Thirty-five per cent of the total number of qualified voters voted in favor of the constitution and 8 per cent of the total population voted in favor of it.

Mr. POINDEXTER. The Senator is talking about the qualified voters. I am speaking of the votes that were cast upon that question.

Mr. SMITH of Michigan. In order to be perfectly understood I will say that by the census returns in 1910 Arizona has a population of 204,354, of whom 155,550 are native born and 48,804 foreign born. Of this population 118,576 are males and 85,778 females. The total number of white males over 21 years of age is 65,133, of whom 39,427 are native born and 5,896 naturalized.

So of the total voting population, apparently 45,323, there were cast for the constitution 12,187 votes; against it 3,822, or a total of 16,009 on the question of its adoption, being about 35 per cent of the total number of qualified voters and slightly less than 8 per cent of the total population. The votes for the constitution were less than 27 per cent of the voting population and 6 per cent of the total population.

Mr. BOURNE. Mr. President--

The VICE PRESIDENT. Does the Senator from Washington yield to the Senator from Oregon?

Mr. POINDEXTER. If the Senator will permit me just a moment, I should like to say that I have no issue whatever with the Senator from Michigan, because I am in favor of the joint resolution in the form in which it has been reported here by the committee for the admission of these Territories, and upon the same ground he has just mentioned as to the Territory of New Mexico, that these constitutions have been acted upon and adopted by the majority of the people of the proposed States, as represented by those voting upon the question.

Mr. SMITH of Michigan. The votes that I have just read for the information of Senators are not intended as a disparagement of their claim, but in order that there may be no question as to the number of qualified voters of the Territory and the number of votes actually cast.

Mr. BOURNE. Mr. President--

The VICE PRESIDENT. Does the Senator from Washington now yield to the Senator from Oregon?

Mr. POINDEXTER. I yield.

Mr. BOURNE. The fact in reference to the votes cast on the Arizona constitution is that 62 per cent of the voters of the Territory, as represented by the vote for Delegate in the previous election, voted at the constitutional election. Out of that

62 per cent 76 per cent of the 62 per cent voted in favor of the adoption of the constitution as it is now before the Senate.

Mr. POINDESTER. Some remarkable propositions are submitted in attacking this proposed constitution by the Senator from Utah [Mr. SUTHERLAND]. Among others, I find the remarkable statement that—

Everybody will agree that the average man is not as intelligent, as able, or as honest as the ablest, or the most intelligent, or the most honest.

I do not know what deduction the Senator from Utah proposes to draw from that profound statement. I suppose everybody will agree that the man who is not able is not as able as the man who is able. However ominous it may be, I suppose we must admit it. Having carefully laid this deep foundation, the learned Senator boldly proceeds to his apparent assumption that 1 man is more honest than 10, and that the governing business should be cheerfully intrusted to as few as possible—logically this would be the one ablest and best that the Senator speaks of—while the rest of the people devoted themselves to "feeding and clothing families of 6 or 8 or 10 children." The Senator merely ignores the more or less widespread idea that a more direct participation in the government and control over their officials may be of some benefit in the rearing of these families.

He says:

There are some who seem to imagine there is some mysterious virtue in mere numbers; that 10 men are necessarily more intelligent, more moral, and more honest than 1 man; that by adding together a thousand individuals, none of whom has ever gone beyond the multiplication table, some strange and weird transmutation results by which the combined mass is enabled to work out the most difficult problem in Euclid with the utmost accuracy.

Of course there is not any such contention as that made. Nobody is proposing to submit a problem in Euclid to the combined mass of the people; but should it be so submitted, it would be accurately solved, for Euclid himself, in the person of every great mathematician in the land, would be engaged upon it. I do not view this matter in the sense of composite action or composite citizenship. It is the individual action of all citizens acting as individuals, creating what is known as public opinion. The Senator from Utah proceeds to conclude his argument in this wise:

Thus, following out this highly intelligent theory—

He says with fine sarcasm and irony—

whenever one is anxious to have a message carried with the greatest haste from one part of the city to another, obviously the thing to do is to employ not the fleetest messenger boy in the service, but arrange with 10 or a dozen average boys to unionize the job.

I think that the entire argument on both sides of this question may be epitomized in that illustration which the Senator from Utah has adopted; and the fallacy of his proposition is perfectly patent in that statement. It is not proposed to eliminate the fleetest messenger boy, supposing that the object to be accomplished is to send a messenger with the utmost dispatch and safety—it may be added, and security—from one part of the city to another, and to put in his place 10 average messenger boys. That is not the proposition at all. The proposition is that in the performance of this work, if you want to use messenger boys as an illustration, we will take the entire force of messenger boys, and they will all work together, the fleetest backed up by the strongest and most enduring and most reliable. We will have not only the fleetness of the hare, but also the industry of the tortoise, which sometimes wins the race. We are not going to exclude the fleetest messenger boy, as the Senator from Utah supposes; we are not going to eliminate the ablest men; we are not going to take out of the action of the people in these matters all the wisest and best men and leave only average men. I think he allows that there are three wise men out of every 54, and he says they will be eliminated, and the average man will be taken. I do not know where he gets that notion. It is for the very purpose of securing the action of both the wise and good, who under the machine system of politics are too often entirely excluded, that popular government is proposed. If there are only three there, you need them all the more, and we want to keep them there. We are going to let them have their influence; and I want to say that they will have their influence in the community in proportion to their wisdom. If one man is abler, smarter, more enterprising, and more successful than another in the community, his influence will be in proportion to his virtue and his superiority over his neighbors.

I submit to the Senate that if we want to accept the illustration of the Senator from Utah, supposing there is a difficult task for a messenger to perform, or if we are going to undertake to do a difficult, dangerous work—to "carry a message to Garcia"—we would be more apt to succeed, we would insure the success of the enterprise by commissioning to perform it

all the forces which were available, if it were possible to do so, and not by eliminating any of them. But the case is far more conclusive than the illustration. Nothing in human action can be compared with the combined, orderly, and systematic action of an entire people.

The proposition made by the Senator from Utah is entirely a mistaken conception of the purposes of these provisions. He says that there are 16 good citizens and 3 wise men. I do not know exactly what distinction the Senator proposes to make between the wise men and the good citizens; but by some fantastic alchemy which he claims will be put into operation by direct legislation or the recall of public officials these wise men and good citizens will lose their virtue and wisdom, and in a sort of Dr. Jekyll fashion be changed and merged into a dull-witted imaginary monster filled with weak or evil passions which the Senator from Utah idealizes as the "average man." The real average man is a much better person. The truth is that under the outworn system of party machines there was a subtle political chemistry which operated like a death blight on the public activities of the best and wisest men in many communities, and the purpose of the new plan is to call them into the greatest activity.

This system, as I said before, is not untried as it is contended. For six years the people of Oregon have had it in operation successfully and to the entire satisfaction of that State. I suppose if it had not been for that actual demonstration the matter would not now receive the support throughout the country that it is receiving, because the people of this country are essentially a conservative people; they are not disposed to depart from the old forms of government. As Thomas Jefferson wrote in the Declaration of Independence:

All experience hath shown that mankind are more disposed to suffer while evils are sufferable than to right themselves by abolishing the form to which they are accustomed.

It is only upon great provocations, and gradually, and by trial, experiment, labor, patience, observation, and trying these things out that the people of any community of this country can be induced to accept them.

Some Senators talk about the people of Arizona as though they were a foreign people, from Central America or the island of Haiti, and did not have a conception of free government and the ability to administer their own affairs. They have gone there and have worked out already a system of good government for their Territory. Through that experience and that labor and that tribulation they have made themselves able to adopt a satisfactory and safe constitution for their own government, and that is what they are asking Congress to recognize.

Of course, it is easy enough to reduce the whole matter to an absurdity by imagining extreme cases, and that method is continually used in opposition to this joint resolution.

One Senator says, "You can not have too much of a good thing," and then goes on to draw a ridiculous picture of some extremes which might happen, which nobody has ever proposed. "You can not have too much of a good thing," he says, with solemn dictum, in arguing this question. You can have too much of any good thing, and all the evil in the world, so far from that statement being true, comes from having too much of good things. You can have too much of anything, and whenever you do have too much of it, it becomes, instead of a good thing, an evil. Everything in the world is good if you do not have too much of it. It is no argument against this constitution or against the system of government proposed under it to imagine extreme cases to which nobody ever proposed it should be extended.

Wise men framed the Government of Athens, and wrote upon the walls of their temple—one of the axioms by which the people were to be guided—that there should not be too much of anything. It means temperance and moderation. If one can not have too much of a good thing, the Senator should at once propose that his system of selecting only the wisest and best should be carried to its logical conclusion, and the best and wisest man, if he can be found, be made the absolute ruler of us all.

I am not called upon here to defend the operation of the principles of this law in the experiences which the people have had with it through a great many years in the State of Oregon. The Senator says that it is a failure, because in one instance there were a number of votes against a statute submitted to the people which he says was a bad statute. A great many people in his party might differ with him as to whether or not it was a bad statute. It is no argument against the intelligence of the people, supposing him to be right in that respect, that they defeated it, even though there was a minority that voted in favor of it. It is easy enough to pick instances in this body, in Congress, when laws which Senators might consider to be

absurd receive the votes of a number of Senators. I am satisfied that this joint resolution that the Senator from Utah characterizes as so dangerous, so unconstitutional, so absurd, and so much without reason, just as he characterizes this statute of Oregon, which, he said, demonstrated the stupidity of the people of that State, because some of them voted for it; that this joint resolution, which the Senator from Utah says is so bad, will receive the votes of a majority of the Members of this body. The fact that the Senator from Utah does not agree with the statute which received the votes of a certain number of the citizens of Oregon, even though they were a minority, is not any argument against the success of the system.

I remember one case which the Senator cited as an instance of the incapacity of the people of Oregon, where the seine fishermen in the lower Columbia River proposed a law to shut off the wheel fishermen in the upper Columbia, and the wheel fishermen of the upper Columbia proposed a law to shut out the seine fishermen in the lower Columbia, and he says that the people of Oregon showed their utter incapacity in that matter by enacting both laws. I submit, Mr. President, that that was a very reasonable and sensible thing to do. The result of it was that it put the regulation of that matter back into the hands of the legislature; and anybody who is familiar with the fishing business in the Columbia River knows that it was a very good and sensible thing to shut it off for a while, so as to give, for at least one year, an opportunity for the salmon to replenish the river. I do not consider that instance, which the Senator from Utah so elaborates, as a reason why this system should not be adopted, nor as any demonstration whatever that the people were not capable of discriminating. I think it was a case where they exercised good judgment.

The Senator from Utah says that—

The recall contemplates not an "empire of laws" to be executed with impartiality and exactness, but an empire of men who punish not according to some fixed and definitely prescribed rule, but according to their undefined, unrestrained, and unlimited discretion.

There is no proposition in this constitution, sir, to suspend the operation of law, to interfere with due process of law, or to abolish any function of the Government. Every case that is in litigation in Arizona, if this constitution is adopted, will come for trial before a court constituted with the same full powers and jurisdiction of any other trial court, with a judge chosen by the people and sworn to execute the law. There is no provision for interfering in any way with a decree of a court except in the ordinary processes of appeal or motion. I am at a loss to understand the purpose of arguments of that kind against this proposed constitution, because they are calculated to deceive no one. If the statement were true, we might well vote against this joint resolution. It is not true, but is utterly unfounded.

He quotes John Adams—and that is as pertinent as the argument some Senators have advanced that this plan is not a republican form of government—as saying:

That form of government which is best contrived to secure an impartial and exact execution of the laws is the best of republics.

The constant difficulty under the present status, which the Senator from Utah is so loath to change, is that there is neither impartiality nor exactness in the execution of the laws. Cabals in the Government, as in the case of the pure-food laws, either construe them out of existence or modify their application to suit private interests. Too often it is the case in the courts that the great and powerful escape entirely the vengeance of the law, which is enforced with a heavy hand upon the poor and weak.

The Senator further says:

But under the system they will in the end get legislators that no thoughtful people ought to have and judges whom no free people should be satisfied with.

The word "system" is in italics in the RECORD; not in quotation marks. "Under the system!" How true it is that "under the system" they have had "legislators that no thoughtful people ought to have and judges whom no free people should be satisfied with." The "system" of corrupt politics and corrupt business has in many instances imposed such officials upon the people, and I presume that that is the reason the citizens of Arizona adopted a provision in their constitution by which they can get legislators and judges whom a free people can be satisfied with, and if they are to be in reality, and not in name only, a free people we must not take from them the means of working out this salvation.

If this were an irrevocable proposition, Mr. President, such as was attempted to be incorporated in the constitution of New Mexico, and there were a provision in this constitution that these measures, once adopted, could never be revoked, there might be some reason for pausing before passing this joint resolution; but the fact is that at all times they are subject to the action of the people. There are liberal provisions for the

amendment of the constitution by the people, and if at any time in the operation of these new agencies of popular government, which have already been tried by the people of a great State in this Union for a number of years, they should prove unsuccessful, the same people who have adopted them have the power to revoke them.

I submit, Mr. President, that this Senate and this country can not afford to establish for the first time in our history the proposition that a Territory which is to be admitted into the Union shall not have the right, within the limits of the Constitution of the United States, to frame its own local government in accordance with the desires of its people. Should we degrade Arizona, and by mere power force her to change her constitution, and admit her, so humbled, into the Union, every other State, being her equal, will be likewise humiliated.

Mr. BORAH. Mr. President, I shall vote upon the pending measure in the way which, in my judgment, will most certainly insure these Territories admission as States to the Union. The constitutions submitted by the respective Territories conform to the terms of the enabling act. They are also, in my judgment, republican in form, as that term was used and is understood in the guaranty clause of the Federal Constitution. I propose to vote for their admission, therefore, notwithstanding there is one provision in the Arizona constitution to which as a principle and policy of government I do not subscribe. But the right of local self-government is an indispensable—and, to my mind, should be an inviolate principle under our system, and notwithstanding my individual views and objections I must concede the right of the people of Arizona to settle that question for themselves. So long as their constitution is republican in form I feel that the proper rule is to leave the details to the people who are to live under it.

But in view of the fact that either or both of the resolutions require the submission of the question of the recall of judges again to the votes of the people, I want to submit some reasons why, in my judgment, the people should not retain it in their constitution. In other words, I am not quite willing to cast my vote for the constitution of Arizona without a word upon this important subject. I am not willing that my vote shall be construed as an indorsement of the principle. While it is not un-republican in form, I believe it to be unwise in principle. While the people of Arizona, under the great and indispensable and inviolate rule of local self-government, have the right to settle it for themselves, I want, in the friendliest spirit toward these splendid people of Arizona, to suggest something as to the wisdom of retaining it.

There is another reason which leads me to this conclusion, and that is that we would have no power to keep this provision out of the State constitution of Arizona if Arizona were once admitted. In other words, while we might compel Arizona to leave this provision out during the period of being admitted to the Union, upon the admission being complete Arizona could reinstate it in the constitution. I think, therefore, that it serves no good purpose to demand temporarily that which we can not effect permanently. It seems to me that we ought, therefore, to submit this matter in reason and in argument and leave it at last where our system of government intended all such things should be left—to the people of the State—to settle.

The ultimate object, Mr. President, of all good government is to at last insure an impartial distribution of justice. The purpose and object from the beginning in the affairs of government are to at last see that each and every citizen is fairly dealt with in the administration of the law by the courts. As I view it, an independent and an untrammelled judiciary is indispensable to the attainment of that high purpose.

When I say an "independent judiciary" I do not mean, as has been suggested by the Senator from Washington [Mr. POINDEXTER], a judiciary independent of the people, but I mean faithful construction and interpretation of the law as the people a judiciary authorized to act and delegated to perform its duties independent of any other influence than that of the people through their lawmaking department have written it. It is not a fair statement of the position of those who oppose the recall of judges to say that they desire a judiciary independent of the people. They believe that a judiciary controlled by no influence outward or exterior to the terms of the law is a judiciary which best serves the interests of the people. That, in our judgment, constitutes the fairest and ablest judiciary, and the fairest and ablest judiciary is the best judiciary for the people.

If I could have my way, I would elect all State judges, but I would elect them for a reasonably long term of years and at a time when general elections were not to be held. I would give an opportunity free of politics as it is possible to have it for the election by the people of their judges. But I would strive

to remove them further from politics rather than bring them closer and oftener to it. I would also strive to have their elections turn upon their general qualifications, their character, learning, and standing, rather than their decision in a particular case.

As to the Federal judiciary, I would leave it as it is. I do not believe the wisdom of the fathers could be improved upon in this respect. I would, however, carefully guard the Federal judiciary from some influences to which I shall refer later. There was no division, Mr. President, among those who framed the Constitution upon the subject of life tenure for judges. Those who wrote the Federal Constitution differed upon almost every important subject which came before them, and differed extensively and earnestly upon many of said subjects. But upon this, in some respects, the most important proposition upon which they were called upon to pass, there was practically no difference of opinion. When the measure came finally to be voted upon as to the provision for the life tenure of judges or service during good behavior, if I recall the history of that convention correctly, there was no dissenting vote.

It is true, I believe, that Mr. Dickinson moved at one time that the judges be subject to recall or removal by the President upon the petition of Congress, but this received practically no support. Mr. Wilson, of Pennsylvania, who was perhaps the most thorough advocate of popular principles in the convention, who was in favor of electing Senators by popular vote, who went so far as to say that there was no necessity for the representative principle in government other than the fact that the people could not all meet together, earnestly opposed even the resolution submitted by Mr. Dickinson. Upon this question, this principle so essential and indispensable, and in some respects new, considering the jurisdiction and the power of the court, there were no differences of any moment between the fathers who framed the Constitution.

I desire before proceeding to the argument to call attention to some declarations upon the part of those who have given much attention to this subject, because I think we can not safely proceed with a discussion of these matters dissociated entirely from the experience and wisdom of those who have gone before. We will find as we review their declarations that the reasons submitted have not been changed because of any change in the condition of affairs; in other words, the reasons which prompted those men to do as they did and to create the judiciary in the way they did are reasons which, it seems to me, ought to obtain at all times, as they apply to society under whatever form or condition that society may be found to exist.

It was said many thousand years ago in the Book which is the foundation of all our building morally that—

Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man.

That represents the attitude and the position of the ideal judge. While I am frank to confess that no system which the ingenuity of mankind can devise would bring about that exact condition of affairs, the effort upon the part of the human family should always be in the direction of securing that kind of a tribunal. Again, in this same great Book it is said:

Thou shalt not respect the person of the poor, nor honor the person of the mighty; but in righteousness shalt thou judge thy neighbor.

The design should be to place the tribunal which distributes justice between man and man in such a position that no influence shall work other than the single influence of administering equal and exact justice, regardless of whether the party is poor or rich, great or small, influential or otherwise. If I mistake not the wisdom which has gone before, if I mistake not the influences which control human nature, if I mistake not the powers which effect and mold our action consciously and unconsciously, the principle of the recall of judges would work against that proposition rather than in favor of it.

The Father of our Country, in writing his letter of April 3, 1790, to Mr. Jay, notifying him of his appointment as Chief Justice, said:

I have always been persuaded that the stability and success of the National Government and consequently the happiness of the people of the United States would depend in a considerable degree on the interpretation and execution of its laws. In my opinion, therefore, it is important that the judiciary system should not only be independent in its operation, but as perfect as possible in its formation.

John Adams said:

The dignity and stability of government in all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skillful administration of justice that the judicial power ought to be distinct from both the legislative and executive and independent upon both, that so it may be a check upon both as both should be checks upon that. The judges, therefore, should be always men of learning and experience in the law, of exemplary morals, great patience, calmness, coolness, and attention. Their minds should not be distracted with jarring interests; they should not be dependent upon any man or body of men.

Mr. Hamilton, discussing this question in one number of the *Federalist*, said:

The considerate man of every description ought to prize whatever will tend to beget or fortify that temper in the courts, as no man can be sure that he may not be to-morrow the victim of a spirit of injustice by which he may be a gainer to-day. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence and to induce in its stead universal distrust and distress.

Mr. Bayard, in the noted discussion which took place in Congress over the judiciary at the beginning of the last century, used these strong and admirable words:

Sir, the morals of our people, the peace of the country, the stability of the Government rests upon the maintenance of the independence of the judiciary. * * * The essential interests, the permanent welfare of society require this independence not, sir, on account of the judge—that is a small consideration—but on account of those between whom he is to decide. You calculate on the weakness of human nature, and you suffer the judge to be dependent on no one, lest he should be partial to those upon whom he depends. Justice does not exist where partiality prevails. A dependent judge can not be impartial. Independence is therefore essential to the purity of your judicial tribunal.

Again, he said:

Let their existence depend upon the power of a certain set of men and they can not be impartial. Justice will be trodden under foot. Your courts will lose all public confidence and respect. The judges will be supported by their partisans, who in their turn will expect impunity for the wrongs and violence they commit. The spirit of party will be inflamed to madness, and the moment is not far off when this fair country is to be desolated with civil war. * * * The independence of the judiciary was the felicity of our Constitution. * * * Prostrate your judges at the feet of party and you break down the mounds which defend you from this torrent.

Mr. Webster said upon one occasion:

There is nothing after all so important to individuals as the upright administration of justice. This comes home to every man; life, liberty, reputation, property, all depend upon this. No government does its duty to the people which does not make ample and stable provision for the exercise of this part of its power. Nor is it enough that there are courts which will deal justly with mere private questions. We look to the judicial tribunal for protection against illegal or unconstitutional acts from whatever quarter they may proceed. The courts of law, independent judges, enlightened juries, are citadels of popular liberty as well as temples of private justice. The most essential rights connected with political liberty are there canvassed, discussed, and maintained; and if it should at any time so happen that these rights should be invaded, there is no remedy but a reliance on the courts to protect and vindicate them.

Upon another occasion, speaking in eulogy of the life of Justice Story, Mr. Webster said:

I pray Heaven that we may never relinquish the independence of the judiciary. A time-serving judge is a spectacle to inspire abhorrence. The independent judge draws around him the respect and confidence of society. Law, equity, and justice require that this should be done and that should not be done. And judicial decisions should command entire acquiescence from full confidence in the purity and integrity and learning of the judge.

Mr. Kent, the first great commentator upon American law, says:

The independence of the judiciary is just as essential to protect the Constitution and laws against the encroachment of party spirit and the tyranny of faction in a republic as it is in a monarchy to protect the rights of the subject against the injustice of the crown.

Mr. Story, in his well-known work on the Constitution, says:

Upon no other branch of the Government are the people so dependent for the enjoyment of personal security and the rights of property, and it is hardly necessary to add that the degree of protection thus afforded is conditioned in turn upon the wisdom, stability, and integrity of the courts.

We think of Edmund Burke generally as alone and only a great orator, but he was a master of the science of politics, using that term in its highest and best sense. Among the multitude of brilliant men from that unhappy isle he stands out distinct and impressive in not only his brilliancy, but his profound insight into government. He said:

Whatever is supreme in a State it ought to have as much as possible its judicial authority so constituted as not only to depend upon it, but in some sort to balance it. It ought to give security to its justice against its power. It ought to make its judicature, as it were, something exterior to the State.

Mr. Harrison, late President of the United States, said:

Courts are the defense of the weak. The rich and powerful have other resources, but the poor have not. A high-minded, independent judiciary that will hew to the line on questions between wealth and labor, between the rich and the poor, is the defense and the security of the defenseless.

Wendell Phillips during his career had something to do with the question of the effect of popular sentiment upon the judiciary and upon judges. He spent his brilliant career in defending a class who at that time had few defenders in any part of this country. He realized the fact that no system could entirely remove the judiciary from the effect and control of popular opinion, and I realize that, do what we may and struggle as we will, the power of popular opinion will intrude itself at times into the temple of justice. Wendell Phillips said upon an occasion when this subject was being discussed:

We know the unspeakable value of a high-minded, enlightened, humane, independent, just judge—one whom neither fear, favor, affection, nor hope of reward can turn from his course.

I desire to call briefly the attention of the Senate to later authorities as I seek to cover some considerable time in history in order to get a drift of opinion in this matter.

Dr. Woodrow Wilson has been quoted a number of times of late by reason of his peculiarly honorable and high position in public thought, and I call attention to a word from him upon this subject. He has given it his consideration, not only from the standpoint of a student, but of late undoubtedly, as he has other questions, of a man in the practical affairs of life.

The recall is a means of administrative control. If properly regulated and devised, it is a means of restoring to administrative officials what the initiative and referendum restore to legislators, namely, a sense of direct responsibility to the people who choose them.

The recall of judges is another matter. Judges are not lawmakers. They are not administrators. Their duty is not to determine what the law shall be, but to determine what the law is. Their independence, their sense of dignity and of freedom, is of the first consequence to the stability of the State. To apply to them the principle of the recall is to set up the idea that determinations of what the law is must respond to popular impulse and to popular judgment.

It is sufficient that the people should have the power to change the law when they will. It is not necessary that they should directly influence by threat of recall those who merely interpret the law already established. The importance and desirability of the recall as a means of administrative control ought not to be obscured by drawing it into this other and very different field.

Col. Roosevelt, speaking to the people of Arizona, said:

Speaking generally, and as regards most communities under normal conditions, I feel that it is to our self-interest, to the interest of decent citizens who want nothing but justice in its broadest sense, not to adopt any measure which would make judges timid, which would make them fearful lest deciding rightly in some given case might arouse a storm of anger, temporary but fatal. You should shun every measure which would deprive judges of the rugged indifference and straightforward courage which it is so preeminently the interest of the community to see that they preserve.

Mr. CLAPP. Will the Senator pardon me?

The VICE PRESIDENT. Does the Senator from Idaho yield to the Senator from Minnesota?

Mr. BORAH. I do.

Mr. CLAPP. Is it not only fair to ex-President Roosevelt that his statement, made either at that time or at some subsequent time, to the effect that as to one of these States, at least, they should have a judicial recall, should accompany his suggestion there? I understood him to make such a suggestion later.

Mr. BORAH. I have not that statement of Col. Roosevelt, although I know that he made it; and if the Senator from Minnesota has it, I shall have no objection to incorporating it in my remarks when I print them.

Mr. WORKS. Mr. President—

The VICE PRESIDENT. Does the Senator from Idaho yield to the Senator from California?

Mr. BORAH. I do.

Mr. WORKS. I apprehend that the Senator from Minnesota refers to the State of California. In substance, Col. Roosevelt did make the statement in my State that conditions might exist, and he was led to believe they did exist in the State of California, which would justify the recall of judges.

I happen to know something about how that change of sentiment came about. Col. Roosevelt was interviewed by certain gentlemen, who undertook to make him believe that the condition of the judiciary was worse in the State of California than it is elsewhere.

Now, I desire in this place to resent that sort of a statement made with respect to the judiciary of the State of California. It is not true. Col. Roosevelt was misled with respect to it. The judiciary of the State of California will compare, in my judgment, in honesty, in integrity, and wisdom with that of any other State in the Union. We have some bad judges in the State of California—I suppose they have some in almost every State in this country—but they are few and far between, and there is no justification for the statement made by Col. Roosevelt that the recall should be applied to the State of California more than to any other State in this Union.

Mr. CLAPP. If the Senator from Idaho will pardon me, I certainly did not intend to share in any reflection on California, because when I called the attention of the Senator from Idaho to the statement I had it in mind that Col. Roosevelt applied the suggestion to Arizona.

What I wanted to say was that the quotation which the Senator from Idaho was making would seem to be made for the purpose of using Col. Roosevelt as an authority against the recall; and in that connection I did think his entire statement upon the subject ought perhaps to be considered.

Mr. BORAH. The statement which I quoted was made by Col. Roosevelt upon his visit to Arizona and to the people of Arizona; and I feel entirely free to say that notwithstanding the Colonel made some remarks in California, occasioned by a representation as to local conditions, he still feels as he bespoke himself in Arizona.

Mr. President, the State constitutional convention held in 1829 in the State of Virginia was one of the most remarkable conventions of that class that has ever been held in this country. The subjects which were up for discussion were subjects of profound interest to the people of the entire State and had excited a great deal of discussion upon the part of the people.

The membership of the convention was extraordinary. Ex-President Madison was a member of the convention. Ex-President James Monroe was its president and presided at such times as his health would permit. The brilliant and somewhat ill-fated genius, John Randolph, of Roanoke, was also a member of the convention. The Chief Justice of the United States, John Marshall, had consented to give to his native State the benefit of the wisdom of his ripened years and, though Chief Justice, he was a member of that convention. He was now in his seventy-fifth year, a stately and sublime figure.

His career had been a singularly great one. He had been a soldier at Brandywine, at Germantown, at Stony Point, and at Valley Forge. He had been a lawyer of surpassing ability at the bar. He had been a Member of Congress, and as such made the celebrated argument in the matter of the extradition of Nash which, it is said, settled the law so far as that class of cases is concerned.

He had represented his country at foreign courts. He had been for years the Chief Justice of the Supreme Court, and as such had written the opinion in the case of Marbury against Madison, of Gibbons against Ogden, of McCulloch against Maryland, the Dartmouth College case, and other noted cases, which laid broad and firm the foundations of constitutional law in this country. No man then living was a greater master of constitutional law, of the science of jurisprudence, than John Marshall, and it was in this debate that he expressed his views with reference to this important subject. I think I can recall a paragraph from the debate:

Advert, sir, to the duties of a judge. He must pass between the Government and the man whom the Government prosecutes. He has to pass between the most powerful individual in a community and the poorest and most unpopular. It is of last importance that in the performance of this duty he preserves the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security and the security of his property depends upon that fairness? The judicial department comes home in its effect to every man's fireside. It passes upon his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, controlled alone by God and his conscience? I have always thought from my earliest youth until now that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt, or a dependent judiciary.

Mr. President, we are not at liberty to wholly disregard the views of one who not only knew the law from the study which he had given it, but had known what it was to discharge the duties of a judge under very trying circumstances. He had grappled with questions upon which the life of nations depend and under merciless fire. No man ever more completely lived up to the philosophy expressed from his lips than John Marshall had lived up to the philosophy which he gave to the convention in his declining years at the time they were framing the constitution of Virginia.

We do not gather very much information, in my judgment, from reading the superficial account conveyed to us by the historian who begins with the discovery of America and completes in two or three volumes his history down to the present day. In it there is very little information of the real contests, the real conflicts which tried men's souls, especially in the quiet walks of life. The pomp and circumstance of war occupy much time and space, but too little is known of the heroes who, in quiet devotion and with unshaken courage, worked out the legal and constitutional principles upon which turned the happiness of millions. But if we will delve down into the controversies, the newspaper reports, and the information which we gather in that way we will find that John Marshall lived to a remarkable extent and in a most trying way the wisdom which he coined in a single paragraph to that convention.

When he wrote the opinion in the case of Marbury versus Madison, wherein it was held for the first time by the Supreme Court of the United States that an act of Congress coming in conflict with the Constitution was void it immediately gave rise to earnest discussion. We were then in the formative state of our Government. That question, as it was believed by many, reached to the very basic principles of our Government, and it was claimed that John Marshall had taken the opportunity or advantage of his position and had legislated and written into the Constitution a provision not there to be found. The storm of abuse, of criticism, not alone upon the part of the masses but by the great leaders of the country, was calculated to shake the firmest in his conviction. It was believed that he had rendered an opinion which destroyed to a large extent the principle upon which the Government itself was supposed to rest.

It was said here in debate a few days ago that a recall of the judges would likely change the view that an act of Congress in contravention of the fundamental law would still be void. I do not attribute to the recall of judges such a disastrous effect. I do not believe that that would happen at this time, but I have no doubt at all from a very earnest examination of the history of those days that it would have led at that time to a change of that situation and a reversal of that rule. If anyone doubts the extent to which the opposition went, they can ascertain by looking into the detail of those archives which are hidden away in the history of our Government. But Marshall never wavered. He said, in effect, I find here a supreme fundamental law, made by the people themselves, under a referendum, and no law made by the representatives of the people can override a fundamental law made by the people themselves. He was a true friend of a people's government.

Scarcely less bitter was the criticism at the time he rendered his opinion in the case of *Cohens v. Virginia*. At that time the Supreme Court announced for the second time that it would review the decision of a State court where a Federal question was involved. This led to the pronouncement upon the part of the State that it would not abide by the decision of the court. It was so earnestly and firmly believed that the Government was being centralized to the extent of the destruction or elimination of the sovereign integrity of the State that men earnestly, conscientiously, profoundly believed that Marshall had committed what one distinguished writer at the time called a "judicial crime." John Randolph said:

All wrong, all wrong; but no man in America can tell why or wherein it is wrong.

It was a criticism of the law, but a profound compliment to the logic of Marshall.

Mr. President, taking the time of the Senate for a moment longer, we find another and a more peculiarly interesting event when Marshall came to try, to sit as a trial judge at the trial of Aaron Burr. Here was a man of remarkable gifts, of splendid attainments, and, as one historian says, possessing the quickest and most active mind that ever animated 5 feet 6 inches of clay, charged with treason. He was abhorred, and justly so, by the then President of the United States, the most popular man at the time in the country. He was equally disliked, if not abhorred, by John Marshall, and yet John Marshall must preside at the trial of the man who I have but little doubt Marshall thought entertained within his bosom the purpose and plans of treason.

Juror after juror went into the box when Burr was being tried, and stated either that he was of the opinion that Burr was guilty, or that while perhaps technically he had escaped the law that morally he was guilty; and some three or four weeks were exhausted in trying to get a jury. Finally a jury was sworn, which no one can doubt had before it took its oath really made up its mind as to his guilt.

There was a universal demand and a claim upon the part of those in power as well as the masses of the people that this man who was engaged in treason against his Government should suffer the penalty.

And yet Henry Wirt, the brilliant advocate, said that it was Marshall's decision which stepped in between Aaron Burr and death. Marshall held to what they declared was a mere technical pretense for the purpose of preserving the life of Burr—that unless he was personally present when the overt act was committed he could not be tried under that indictment. Thus it was practically withdrawn from the jury, and the jury were not permitted to pass upon the question of his guilt or innocence, and indeed the jury refused to return a verdict of not guilty, in so many words, but would only consent to say that he had not been proven guilty in accordance with the instruction and the indictment.

The concluding paragraph of Mr. Marshall's judgment in that case is worth remembering, in view of the attack which was made upon him. He said:

That this court does not usurp authority is most true. That this court dares not shrink from its duty is not less true. No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he has no choice in the case, if there is no alternative presented to him but the dereliction of duty and the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace.

Now, I ask my friends who say that these popular influences do not control men: What was it that enabled John Marshall to sit upon that trial, trying a man whom he utterly detested, without a single manifestation of passion or fear, when every other prominent citizen of the United States seemed influenced and controlled by that popular passion and fear? At least all

joined with it. The President, his Cabinet, and the leaders of public thought denounced the decision. John Marshall refused to permit personal hatred, popular condemnation, or fear to enter the temple where he presided.

We can not expect human nature to be supreme in all events and over all circumstances, it is true, but we ought to be careful in the trying hour in which a judge is called upon to pass upon such conditions not to load him with the things which control men in spite, ordinarily, of anything that they may do.

I would not contend for a moment that Marshall had any keener sense of right and justice than some of the men who criticized him, but he realized that he was in a place where he must listen to no other influence, no other direction, than that which was found in the provisions of the Constitution which he was called upon to construe. Other men, unconsciously influenced by another power, arrived at just the opposite conclusion and were equally honest and equally upright. Will we burden our judges in such an hour with this extra burden?

Mr. Rawle, in speaking to Marshall's life at the dedication of a monument to him in this city in 1884, and referring to the Burr trials, said:

The impartiality which marked the conduct of those trials has never been exceeded in history. No greater display of judicial skill and judicial rectitude has ever been witnessed. The judge was unmoved by criticism, no matter from what quarter, and was content to await the judgment of posterity.

The judgment of posterity has been rendered. It comes of all classes. His masterly spirit, like that of Washington's, has rebuked party lines, and men of all shades of political belief and party affiliations pay willing tribute to the greatness of his service as a judge. I quote from among a countless throng of admirers two distinguished men of our times, and I choose them in part because their party affiliations would not lead them into an inconsiderate partisan eulogy. The Hon. Richard Olney, ex-Secretary of State, upon the occasion of the celebration of the centennial of the installation of the first Chief Justice of the Supreme Court of the United States, said:

If it be true—as it is beyond cavil—that to Washington more than to any other man is due the birth of the American Nation, it is equally true beyond cavil that to Marshall more than to any other man is it due that the Nation has come safely through the trying ordeals of infantile weakness and youthful effervescence and has triumphantly emerged into well-developed and lusty manhood.

The late Edward J. Phelps, upon the same occasion but at a different place, said:

Looking back now upon this long series of determinations (Marshall's decisions), it is easy to see how different American history might have been had they proved less salutary, less wise, and less firm. The court did not make the Constitution, but has saved it from destruction.

Would any American, looking back over such scenes and realizing that perhaps the difficulties which we have known are small compared with those which we are to know, burden a court with any other consideration or subject it to any other influence than that of a full, faithful, and fearless construction of the Constitution of the laws of the land, regardless of the temporary benefits, or supposed benefits, to be derived from a temporizing construction? The people had made the Constitution. It had been referred to them, and they had approved it. It was the people's law, and John Marshall, in the supreme majesty of his genius, made it the title deed to nationality, as the people intended it should be. Passing conditions and temporary circumstances would have modified it, but he did not accede to these conditions or circumstances.

Mr. President, I only recall these matters as an illustration of the conditions which sometimes must necessarily confront every high judicial officer. If I can be satisfied with the purity of the manner in which a judge is elected or selected, I want thereafter for him to be able to consult no other influence than that which has been crystallized into the Constitution or the statutes by the people, and it is just as much to the interest of the people and to their welfare that that be so as it is to individuals or special interests.

It is sometimes charged that the courts legislate, and that this is one of the reasons why the recall should be adopted, to prevent the courts from legislating. My own opinion is that it would be only one more influence which they would have to resist in order at times to prevent themselves or restrain themselves from legislating.

But the charge that the courts legislate is not one which is as important or as aggravated a charge as is sometimes supposed. I grant you that there are instances in which the courts seem to construe a statute other than as the Congress or the legislature wrote it. I know of some instances in which I would arrive at a different conclusion from the conclusion reached by the court. But, Mr. President, as a matter of fact, the pronounced instances in which a court legislates are very few and very rare indeed, and most of those are superinduced

and compelled by reason of the inefficient language employed by the lawmaking body. You find me a case where the court seems to legislate and I will find you a statute uncertain, ambiguous, or impossible of execution under a literal construction—a statute not very credible to the lawmaking body.

Let me call your attention to an instance in which it was alleged that the court legislated. We passed an immigration act in 1884 or 1885, if I remember correctly, and we prohibited any corporation, individual, or company from going abroad and hiring persons for service or labor and bringing them to this country. There was no exception in the rule except with reference to actors and lecturers and one or two others, and so all other persons, in plain language, were prohibited from being brought into this country under hire for service or labor.

The Holy Trinity Church of New York City employed a minister abroad and brought him here, and some one proceeded, under the statute, to collect the fine for violating the law. The court below, looking at the statute, said "this includes all persons for service and for labor, by any individual or by any corporation," and it rendered a judgment in favor of those who were contending for the fine. The matter went to the Supreme Court, and the court held that Congress could not have intended to include ministers, and thereby wrote into the statute, in effect, the word "ministers." There was no dissenting opinion in that case.

The entire court agreed that the intent of the lawmaker was the law, and it was clear that it was not the intent, from the object and purposes of enacting the statute, to preclude the employment of ministers of the gospel abroad and bringing them here to attend their church or congregation. Thereby it is true in effect that they technically wrote into the law the word "ministers." They did it, Mr. President, in my judgment, under a rule of law that is older by far than our jurisprudence, as old as any jurisprudence, and that is to ascertain the real intent of the lawmakers, taking into consideration the objects which they had desired to accomplish. The court must sometimes deal with loose legislation, and the legislators protect their own shortcomings by asserting that the court legislates.

It was said in debate here the other day also that they had written into the fourteenth amendment some words not to be found there or given a construction not justified by the language of the fourteenth amendment. In other words, it was contended that the fourteenth amendment was passed to apply to negroes alone, and that the court had written into it such language as would cover corporations and other individuals.

A slight investigation of the history of the passage of that amendment will show that not only does the language of the amendment cover other persons, but that the design and purpose, as shown by the debates, was that it should. It might not be the construction which you or I would arrive at with reference to the meaning of the amendment, but the court arrived at the conclusion that the intent of the framers of the instrument was as they interpreted it to be, and I think the debates of Congress will show that. I submit here some declarations on that subject by those who were in a position to know. Roscoe Conkling, who was in Congress at the time, afterwards said:

At the time the fourteenth amendment was ratified, as the records of the two Houses will show, individuals and joint-stock companies were appealing for congressional and administrative protection against invidious and discriminating State and local taxes. One instance was that of an express company, whose stock was owned largely by citizens of the State of New York, who came with petitions and bills seeking acts of Congress to aid them in resisting what they deemed oppressive taxation in two States, and oppressive and ruinous rules of damages applied under State laws. That complaints of oppression in respect of property and other rights, made by citizens of Northern States who took up residence in the South, were rife, in and out of Congress, none of us can forget; that complaints of oppression, in various forms, of white men in the South—of "Union men"—were heard on every side, I need not remind the court. The war and its results, the condition of the freedmen, and the manifest duty owed to them, no doubt brought on the occasion for constitutional amendment; but when the occasion came, and men set themselves to the task, the accumulated evils falling within the purview of the work were the surrounding circumstances, in the light of which they strove to increase and strengthen the safeguards of the Constitution and the laws.

Senator Edmunds declared:

There is no word in it that did not undergo the completest scrutiny. There is no word in it that was not scanned and intended to mean the full and beneficial thing that it seems to mean. There was no discussion omitted; there was no conceivable posture of affairs to the people who had it in hand which was not considered.

Senator Howard, who had charge of the report, said:

* * * The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State.

So, Mr. President, we are engaged in asserting oftentimes that there is legislation upon the part of the court, when, in fact, it is engaged in what it must necessarily do in arriving at

the most righteous conclusion it can from ambiguous or uncertain or complicated language and from the intent of the lawmakers. There are very few decisions found in the Supreme Court of the United States where that is not the rule. There are very few opinions in which it could not be justly said that notwithstanding the statute has been construed to cover a subject not covered by the literal words it is covered by the rule that the intent of the lawmaker is the law. That has been true ever since we have had jurisprudence.

I do not defend, nor would it be any compliment to the Supreme Court if I should, each and every opinion which has been rendered by that court. I know that there are individual opinions which do not meet with my approval and which, in my judgment, ought to have been rendered otherwise. But take the hundred and more years which have marked the work of that court, dealing with the most profound questions ever submitted to a tribunal, complicated with the different rights of the different States and the people in the States, dealing with interests which involve the welfare of millions of people, and judge it as an entirety and tell me where in the history of the world you will find a tribunal with the record of the Supreme Court of the United States—not always, Mr. President, beyond the reach of possibility of error, but from day to day and year to year and decade to decade dealing with these great questions, administering, in my judgment, the most complete justice that has ever come from a great tribunal.

It is constantly asserted that the courts do not afford the same rights and protection to the poor as to the rich. What occasion will there be for a court to protect the poor man under the recall if this poor man is in court against some powerful individual in the community?

But, Mr. President, I deny this charge, and I could cite hundreds of cases to justify my contention. I contend that there is no place in our Government to-day where those without wealth, influence, or friends are so thoroughly protected as in the courts. There are miscarriages of justice, and there always will be; there are bad decisions, and there always will be; but on the whole our courts are not subject to this attack. Does the executive, the legislature, furnish the hearing and the protection for the friendless which are furnished by the courts? I want to recall a noted case for illustration:

Near the close of the war a man by the name of Milligan was arrested in Indiana for giving aid and comfort to the enemy. Congress, the lawmaking body of the Government, had passed a law suspending the right of the writ of habeas corpus and a commission appointed by the executive branch of the Government had tried him and condemned him to be shot. Here was the Executive, and in the chair no greater man ever sat than sat then in the chair; here was the Congress; and here, if you please, were the people, believing that this man was guilty of treason, striking at the life of the Nation—he was standing under sentence not only of the commission but under sentence of public opinion. But when his case was taken to the Supreme Court of the United States, that tribunal, overriding the action of the Executive and overriding the action of Congress, said this man is entitled, according to this instrument which guides us, to a jury trial; and standing alone, with almost every man's hand against him, that tribunal threw about him the guaranties of that instrument which the people had made for the protection of all. The bitterness, the hatred of civil war, all the fiendish, ghoulish malevolence of that conflict could not weigh against this condemned traitor.

Let me read a paragraph or two from that decision. It thrills one with pride and exaltation that they could come in such an hour from our courts:

Time has proven the discernment of our ancestors, for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than 70 years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint and seek by sharp and decisive measures to accomplish their ends deemed just and proper, and that the principles of constitutional liberty would be in peril unless established by irrevocable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people equally in war and in peace and covers with the shield of its protection all classes of men at all times and under all circumstances.

The crimes with which Milligan was charged were of the gravest character, and the petition and exhibits in the record, which must here be taken as true, admit his guilt. But, whatever his desert of punishment may be, it is more important to the country and to every citizen that he should not be punished under an illegal sentence, sanctioned by this court of last resort, than that he should be punished at all. The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict, even upon the guilty, unauthorized, though merited, justice.

My friends, we demand perfection, the absence of all mistakes, from all bodies and departments except our own. Has Congress

no mistakes to its credit? Have the State legislatures, elected every year or two years fresh from the people, made no mistakes? Its names are legion. Have juries drawn fresh from the people and recalled for each trial made no mistakes? Lord Brougham said:

In my mind he was guilty of no error, he was chargeable with no exaggeration, he was betrayed by his fancy into no metaphor, who once said that all we see about us, kings, lords, and commons—the whole machinery of the State—all the purposes of the system and its varied workings, end in simply bringing 12 good men into a box.

But with all this and these mistakes we will not abolish State legislatures nor juries. We know that with some mistakes there is yet incalculable good. With some poor or bad decisions there are thousands which administer justice and enforce rights between man and man. With some poor or bad judges there are hundreds and hundreds brave, fearless, and incorruptible. As a whole, our system is the admiration of every people on the globe.

When we view our jurisprudence as a whole, when we take its work from the beginning until now, may not we justly and truly say, as was said by the lawgiver of Israel:

What nation is there so great that hath statutes and judgments so righteous as all this law which I set before you this day?

No one will be quicker to admit than the people themselves that there comes a time in dealing with the affairs of men when there should be not hasty action, but enforced delay and consideration. It is not because men disbelieve, if you please, in the power of the people, but they believe that as a practical matter of administering government these conditions must exist in order that the people's rights may be preserved. It is no compliment to a people to say that calmness and consideration are not to be elements of their final judgments.

I know, too, Mr. President, that politics sometimes has its influence in the highest court. I should like to legislate to prevent rather than to accentuate it. I know there are times when these influences are felt and that the court ought not to give attention to such influences. We all concede that the controversy is how to diminish the effect of it rather than how to increase it; and in my humble judgment the recall of judges, instead of diminishing, would increase it. It would necessarily bring it into politics; you could not prevent it. Merciful justice! have we not enough politics in our system already, such as it is? Shall we now include the courts? You are much mistaken if you think the people want more politics; they want less. If you will give me a lawmaking department which is intelligent and true to the people, an executive department fearless and true with the judicial system which we now have, I will show you the best governed and the happiest people in the world.

But, Mr. President, I am not only opposed to the popular recall, but I am opposed to private recall. I am opposed to the subtle, silent system which has grown up in this country to a remarkable extent unknown to most people—that of exercising an influence upon Federal judges through the executive departments of our Government. If there is going to be a recall, we want a popular recall. We want a people's recall. We want it in the open and not in quiet and subtle ways by devious and undiscovered methods. We want the privacy sought to be established between Federal judges and the heads of departments forever condemned and damned. It is vicious, indefensible, and ought to forever discredit the judge who would brook it or the department head which would seek it.

I am not going to discuss this at length at this time. I hope to do so at a later date. I only want to say now it is well known to those who have examined and watched the system that, during the last few years, when certain departments here are interested in a question they have a system by which they get for a particular cause a judge off the bench that they want off and another on that they want on. They have a system of transfer and exchange carried on formally under the statute, but in fact through the impudent exertion of power upon the part of the interested department. If the time ever comes in this country when the people of the country understand that there is any string attached to a Federal judge which they do not through established laws hold, they will not only elect, but they will recall their Federal judges. Those who are preaching against the recall of judges throughout this country must be careful that they do not adopt a system which will far outweigh the strength of their words and overcome their arguments. When the system goes so far that an assistant United States attorney privately approaches a Federal judge to suggest that he disqualify himself to sit in a particular case or formally consent to be transferred because some one else is wanted to try the case, it is time that the system should be exposed. The statutes provide for changes when necessary because of disqualification or an extra amount of business, but it contemplates that it be done in the open, and if a judge is

actually disqualified let the disqualification be shown in the presence of the contending parties.

Another practice has been growing up year by year for the last few years, until, in my opinion, much of the strength of the recall to-day arises out of the belief that those who may effect the promotion of judges exert through the different departments an influence that ought not to be submitted to under any circumstances. Those who want to prevent a recall in this country must not play politics with the Federal judiciary, nor seek to select judges for particular cases other than in the way prescribed by statute. They will not be able to withstand the demand to make judges subject to the recall of the people unless those judges are permitted to act without being subject to the suspicion that they are subject to a private recall. Be it said to the credit of the Federal bench that generally it has as much contempt for this system as it ought to have.

Speaking for myself, I would not as a result of it establish a popular recall as to judges, but I would make haste in all proper ways to recall and forever condemn those who would seek to perpetuate the system. Our judiciary has never been subject to criticism, except in those instances where there was an extraordinary, a persistent, and a determined effort to bring to bear the influence of politics. It is just in proportion as that influence has had its effect that our judiciary is subject to criticism.

Mr. President, I maintain that in writing a law, in placing upon the statute books a guide or rule of action for men, we ought to listen closely to the instructions of a well-formed and well-sustained public opinion. I am aware that the complex and involved conditions of modern questions require much study and long training upon the part of the successful legislator. But this is only a part of the equipment and only a part of that which should go into the law. Upon no question with which we deal here can we afford to ignore that wholesome, practical wisdom born of the reflection and experience of 90,000,000 people. It is a remarkably safe guide. It has served this country well when wise statesmen seemed powerless to determine upon a policy. It has in it something of that strength, that saving common sense, that intuitive sense of equity and justice not always found outside of the great forum where men gather wisdom in the actual struggle for existence. The law should embody in its enactment not only the technical skill and more profound insight of the trained legislator but it should embody as nearly as may be the practical information of the railroad owner and the laborer, of the banker and the farmer, the merchant and the lawyer, and the countless thousands upon whose integrity and industry rests the whole vast fabric of modern business and out of whose experience must come also our humane and beneficent policies.

But after the law is written the man who construes it, and by its terms measures out to each citizen his duty or his obligation, should consider nothing but the terms of the law as written. He has nothing to do with its leniency or its harshness, its wisdom or its unwisdom. He is not to consider the effect of its enforcement unless it be when there is doubt as to its terms. He can not consider his own interest, he can not seek the advice of friends, and he can serve the people in no other way than by faithfully construing the law which the people, through the law-making department, have written. Though the public welfare, the public interest, and public sentiment seem to be on one side and only the legal rights of an humble, obscure citizen upon the other, his duty is still the same. He is an unworthy judge if he considers otherwise. He must reply to all influences, be they private or public, as the chief justice replied to the English king who sent to know if he would consult with him before rendering his decision: "When the cause is submitted I will decide as becomes the chief justice of England." If the law be a bad law, detrimental to the public welfare, the people may modify or repeal it. But the judge who legislates not only violates his oath, but undermines the basic principles of our institutions and opens the door to injustice and fraud.

The most paltry being who slimes his way through the machinery of government is the judge who seeks to locate the popular side of a justiciable controversy. The man of small fortune or limited means will always suffer in a contest with influence or wealth in such a court. Instead of a trial, if he has a just cause, he will get demurrers and postponements, costs, and that delay which in the end constitutes a denial of justice. How many lawyers representing a poor or obscure client have not heard the client breathe a prayer of relief if it could be said to him, "This judge before whom you are going will decide absolutely as he sees the law; the influence of your antagonist will not affect him." Unless a judge is corrupt or in some such way at fault, which things may always be dealt

with under the law, I want him to know when he takes his oath that he is to serve the stated time for which he has been elected or chosen. I want him to feel and know that for that length of time he can walk unafraid in constant company with his own conscience and follow, without fear or favor, the light of his own intellect. The distribution of justice is the most solemn and most difficult task which government imposes upon men. Human nature is weak for the task at best. Remembering this, we should not impose upon those who are called to this high service our selfishness, our objections, our prejudices, our partisanship, unrestrained by their oath or their obligations, unsteadied by their sense of responsibility. We should rather brace and prop them for the work in a way best calculated to inspire courage, confidence, and independence. It is my deliberate and uncompromising opinion that without a free, untrammelled, independent judiciary popular government, the government of the people, by the people, and for the people, would be a delusion—a taunting, tormenting delusion. That is the unbroken record from the dicasteries of Athens to the mimic tribunals of justice which are found to-day in some of the Republics to the south.

I am afraid that the principle of the recall as applied to judges will tend to establish the rule of the majority in matters of judicial controversy. It will tend to make decisions bear the color and drift of majority rule or party domination rather than that of a faithful rendition of the law and the facts. What is the basic principle of democratic or republican government? We sometimes urge that the first principle is that the majority shall rule. That is true in making laws and determining policies, but it has no place in and will destroy republican government if applied to the courts or to controversies to be determined under the law. There all men are equal. Back of the rule of the majority is the great principle of equality, the basic, bedrock principle of free government. The difference between the old democracies or republics, which perished, and ours, is that the ancient republics could devise no way by which to shield the rights of the minority. Though the majority must rule, yet a government which has no method for protecting the rights of the minority—for it has rights—is a despotic government. I do not care whether you call it a monarchy, an aristocracy, or a republic. A government which will not protect me in my rights, though I stand alone and against all my neighbors, is a despotic government. If our courts are taught to listen, trained by this subtle process of the years to hearken to the voice of the majority, to whom will the minority appeal for relief? If the voice of the majority controls, if this principle finally comes to be recognized in the timidity of judges, to what power in our Government will the isolated, the unfortunate, the humble, and the poor go for relief? Where will those without prestige, without wealth or social rank go for protection?

It is easy, Mr. President, in our zeal to put forward under the guise of popular government things which will challenge the saneness or practicability of the entire movement and thus bring discredit and defeat to great and important measures. It is indispensable to the success of all efforts to secure results for the people that we should distinguish at all times in proposed changes between that which experience has proven to be evil and that which experience has proven to be good. We must not mistake the mere spirit of reckless change for the throes of progress. The intellectual capital of a single decade is too small upon which to proceed to the business of changing the fundamental basis of government—we must add to it the accumulated experience of all the past. Many a splendid movement for better government has become surfeited with an excess of ecstasy and thus surfeiting "sicken and so die." It requires just as much judgment, coolness, and persistency, just as much common sense, just as shrewd and keen a regard for the common experience and the peculiar qualities of human nature to achieve good legislation for the people as it does to enact the bad. When we take an unwise or an impractical position we have contributed something to the victory of the opposition.

There is a vast amount of practical common sense in the ordinary American citizen. He is never long in error. He loves liberty, but he also in the end demands security and stability. He would not long accept a proposition which would imperil the stability and independence of the judicial system for which his ancestors fought for three centuries. One of the main questions settled by the English revolution of 1688 was that the people should have the right to appeal for protection to an independent tribunal of justice. Prior to that time the judges were subject to removal by the King. Under this power he took some of the keenest intellects and brightest minds of the English bar and made of them the corrupt and willing instruments of oppression and injustice. Rather than to go before such a tribunal Essex took his own life in the tower. Under this system

Pemberton was appointed, that he might preside at the trial of Russel, and was then recalled because his instructions, though strikingly unfair and partial, were not sufficiently brutal to satisfy the insatiable monster who had given him his soiled and polluted ermine. Under such a system the martyr of English liberty, Sydney, was beheaded; freedom of speech was destroyed, habeas corpus denied, and individual rights trampled under foot. So when the English yeomanry drove their monarch from the throne they wrote into the terms of the "act of settlement" that "judges' commissions be made during good behavior and their salary ascertained and established." This took it out of the power of the King to remove the judges and out of his power to impoverish them by withholding their salary. This was the first step toward an independent judiciary, and it was not long until the great English orator could truly say, in speaking of this to the English people:

Though it was but a cottage with a thatched roof which the four winds could enter, the King could not.

Thereafter, instead of Jeffreys denouncing and cursing from the bench the aged Baxter, instead of Dudley taunting and tormenting the New England colonists, instead of Scroggs and Saunders, subtle and dextrous instruments of tyranny, we have Somers and Holt, and York and Hardwick, and Eldon and Mansfield laying deep and firm the great principles of English law and English justice, principles which still shield and guard the personal rights of every member of the English-speaking race, principles which our fathers were careful to bring here, principles which every American citizen would unhesitatingly shoulder his musket to defend and preserve.

No less fruitful of great names and commanding figures has been the system in our own country. Jay and Marshall, Taney and Kent and Story and that line of judges, reaching down to the distinguished and cultured Chief Justice who now presides over the Supreme Court. The intellect, the character, the best there was in these men of heart and mind, years of consecration and toil, are embedded in our jurisprudence, and constitute to-day the greatest of all guaranties for the perpetuity of our institutions and the continued happiness and prosperity of the common people.

Sir, it seems to me that the experience of the past has closed the discussion as to the necessity of an independent judiciary. A feeble, a timid, an obedient judiciary, whether to popular demand or king, has always in the end proven to be an incompetent, a cruel, or a corrupt judiciary. Such a judiciary leaves human rights uncertain and worthless, unsettles titles, destroys values, leaves the workman and the employer alike without protection or guidance, and has more than once demoralized or destroyed governments. Trade, commerce, or labor have never, and will never, flourish or prosper under an unstable and unreliable system of courts. Whether you look upon the wreck of ancient republics and democracies where the courts yielded their decisions to the triumphant faction or party or to modern monarchies where the miserable instruments of kingly power served well their master, whenever and wherever in all history you find a dependent judiciary you find that it is the man of limited means, the poor man, who suffers first and suffers most—the man who has not the wealth to purchase immunity or the prestige to command decrees.

If there is any man in the world who is interested in having a brave, able, fearless, independent judiciary, judges who will, as against influence or power, political or financial, interpret the law as it is written, it is the man of limited or no means. His small holding, the honor of his name, his liberty, even his life, may be in jeopardy. If so, does he want a judge who will listen to wealthy friends or political advisers? Does he want to approach a tribunal above which rests the threat of political humiliation or punishment? Does he want to meet in court some political dictator? I repeat, the man of influence, of means, may contend against such odds, but the humble citizen without prestige or wealth can not do so. We owe it to ourselves and to posterity, to the institutions under which we live, and above all to the common people of this country, to see to it that our judiciary is placed, as nearly as human ingenuity can do so, beyond the reach of influence or any of the things which may cloud the mind with passion or fear or dull the conscience to the highest demands of even-handed justice.

Mr. President, in order that what we do for the people may be permanent and beneficial, in order that our honest purposes may not come back cursed with frailty and impotency, let us not ignore the plainest dictates of reason and the soundest principles evoked out of all these years of experience. While we pursue with unwonted zeal the abstract rights of man we are at the same time bound to remember man's nature. We want liberty and popular government, to be sure; but unless these are accompanied with wisdom and justice, unless there

goes along with all reforms the homely, practical, common sense which takes notice of man's vices as well as his virtues our efforts will end at last in the misery of failure. When the people have written the law, then let us have an independent judge, free from any political fear, to interpret the law as written until the people rewrite it. The people's courts can no more survive the demoralizing effect of the vices of majorities in the administration of justice than the king's courts could stand against the influence of their masters.

Sir, we can never, never afford to forget that a republic, too, must have its element of stability—its fundamental law and its independent judiciary to construe and apply it. A democracy can not be as changeful as the moods of a day and long endure. A republic must have in it the element of respect and reverence, of devotion to its institutions and loyalty to its traditions. It, too, must have its altars, its memory of sacrifices—something for which men are willing to die. If the time ever comes when the fundamental principles of our Government as embodied in our Constitution no longer hold the respect and fealty of a majority of our people popular government will, as a practical fact, not long survive that hour. The poorer classes, the overworked and humble, those without wealth, influence, and standing will cry for rest and find it in any form of government which can give it to them. I look upon an independent judiciary as the very keystone to the arch of popular government. Without it the wit of man never has and never can devise a popular scheme of government that will long protect the rights of the ordinary citizen.

I have often thought if there is a sacred spot on the face of God's footstool made so by the institutions of man it is in front of the tribunal where presides the Chief Justice of the United States. There you may take the poorest, the most unfortunate individual in the land and he is heard, heard, sir, as if he stood clothed with all the influence which wealth and friends could bestow. Though he stands there with every man's hand against him and every right denied, that tribunal throws about him the guaranties and protection of the Constitution, the fundamental law which the people have made for the protection of all, and he stands upon an equality with every other man in the land. Even though he be too impecunious to file a brief, with no less care will those painstaking and overworked and devoted men examine into and determine his cause. And if in the end judgment shall be rendered in his favor, if need be the power of this Union will enforce its terms. Do we appreciate the worth of this tribunal and the great underlying principles which have made it what it is? Do we understand how this Government of ours without this steady, stable, immovable tribunal of justice would go to pieces in a decade? A decade, Mr. President! Rather should we say to all practical effects it would depart in a night. Not a court beyond the possibility of error, not a court whose opinions are to be deemed above the reach of fair and honest criticism, but a court which, whether viewed as to the reach and scope and power of its jurisdiction or as to its influence and standing, its ability and learning, its dedication and consecration to the service of mankind, is the greatest tribunal for order and justice yet created among men.

I sympathize fully and I want to cooperate at all times with those who would make the political side of our Government more responsive and more obedient to the demands of the people. I know that changed conditions demand a change in the details of our Government upon its political side. But the rules by which men who distribute justice are to be governed and the influences which embarrass them in this high work are the same now and will always be the same as they have ever been. Let us not impeach the saneness and the worth of our great cause by challenging the great and indispensable principle of an independent judiciary. Let us not mislead the people into the belief that their interests or their welfare lies in the direction of justice tempered with popular opinion. Let us not draw these tribunals, before which must come the rich and the poor, the great and the small, the powerful and the weak, closer, even still closer, than now, to the passions and turmoils of politics. Let us cling to this principle of an independent judiciary as of old they would cling to the horns of the altar.

Mr. ROOT. Mr. President, the act of June 20, 1910, provides for the adoption of a constitution by the people of Arizona. It is further provided in the twenty-second section of the act:

SEC. 22. That when said constitution and such provisions thereof as have been separately submitted shall have been duly ratified by the people of Arizona, as aforesaid, a certified copy of the same shall be submitted to the President of the United States and to Congress for approval, together with the statement of the votes cast thereon and upon any provisions thereof which were separately submitted to and voted upon by the people. And if Congress and the President approve said constitution and the said separate provisions thereof, if any, or if the President approves the same and Congress fails to disapprove the

same during the next regular session thereof, then and in that event the President shall certify said facts to the governor of Arizona, who shall, within 30 days after the receipt of said notification from the President of the United States, issue his proclamation for the election of the State and county officers.

The act further provides, in section 23:

When said election of State and county officers, members of the legislature, and Representative in Congress, and other officers above provided for shall be held and the returns thereof made, canvassed, and certified, as hereinbefore provided, the governor of the Territory of Arizona shall certify the result of said election as canvassed and certified, as herein provided, to the President of the United States, who thereupon shall immediately issue his proclamation announcing the result of said election so ascertained, and upon the issuance of said proclamation by the President of the United States the proposed State of Arizona shall be deemed admitted by Congress into the Union by virtue of this act on an equal footing with the other States.

The joint resolution which is now before the Senate provides:

That the Territories of New Mexico and Arizona are hereby admitted into the Union upon an equal footing with the original States, in accordance with the terms of the enabling act approved June 20, 1910, upon the terms and conditions hereinafter set forth.

"The terms and conditions hereinafter set forth" are, in substance, the requirement that the people of New Mexico shall again vote upon that provision of their proposed constitution which relates to the amendment of the constitution and that the people of Arizona shall again vote upon the provision of the proposed constitution which relates to the recall of the officers, including the recall of judicial officers. The provision is that if the people of Arizona, voting upon this clause of the constitution which relates to the recall of judges, shall vote to amend the constitution so as to omit judicial officers from the recall provision, then that amendment shall become a part of the constitution; but if the same shall fail of such majority, then the section relating to recall shall remain a part of said constitution.

It follows necessarily, sir, from the provisions which I have read, that the constitution of Arizona and the provision of that constitution relating to the recall of judges is now before the Senate for its approval or disapproval. No man can say that his vote here fails to commit him to the approval of a recall of judges or to a disapproval of that recall. We have resolved that the Territory of Arizona shall be admitted to the Union if the Congress approve the constitution that its people have framed, and only if the Congress approve or if the President approve and the Congress does not approve. The question is squarely and sharply defined. We can not in our vote upon this joint resolution escape an expression of the position taken by the Congress of the United States upon the proposal that judges shall be liable to recall by a popular vote. What we say here is of little consequence; what we do here is of vast importance to the people of our country and to the development of our system of government.

The Supreme Court of the United States has decided in the Coyle case, the case relating to the right of the people of Oklahoma to change the location of their State capital, notwithstanding the provision of the enabling act which forbade that change, that after a Territory has once been admitted as a State, the provisions of the enabling act do not control the action of the State—the court has held that the admission of the State upon an equality with all the other States of the Union carries with it the power to regulate by constitutional provision and by legislation under the State constitution all the matters which are within the scope of authority of any of the States in the Union. The moment the enabling act is passed, the conditions are complied with, and the proclamation is issued, the power of the National Congress over the great field of local self-control has ended.

In the consideration and action of the Senate upon this joint resolution, we speak the last word that it is competent for us to speak regarding the provisions of the State's constitution. The law of the United States under which this Territory is to be admitted has required, and now requires, that the admission shall be only upon the presentation to us of a constitution that we approve. The question before the Senate is, Do we now approve the provisions of the Arizona constitution? If we do, the State will be admitted under that constitution in accordance with the terms of the enabling act; and it will be admitted in accordance with the terms of that act because the constitution has the approval of the Congress of the United States. Are we ready, Mr. President, to approve this provision? If we are, we shall say so by our action upon this joint resolution. If we are not ready to approve this provision of this constitution, we are bound by the law we ourselves have enacted to make that known by our action, and we can not escape the responsibility for or the consequences of that act.

What is the provision relating to the recall of judges? It is contained in the eighth article of the constitution which is before

us for approval or disapproval. The first section of that article provides:

SECTION 1. Every public officer in the State of Arizona holding an elective office, either by election or appointment, is subject to recall from such office by the qualified electors of the electoral district from which candidates are elected to such office. Such electoral district may include the whole State. Such number of said electors as shall equal 25 per cent of the numbers of votes cast at the last preceding general election for all of the candidates for the office held by such officer may by petition, which shall be known as a recall petition, demand his recall.

SEC. 2. Every recall petition must contain a general statement, in not more than 200 words, of the grounds of such demand, and must be filed in the office in which petitions for nominations to the office held by the incumbent are required to be filed.

Then follow provisions relating to signatures and statements of the residence of the signers.

SEC. 3. If said officer shall offer his resignation, it shall be accepted, and the vacancy shall be filled as may be provided by law. If he shall not resign within five days after a recall petition is filed, a special election shall be ordered to be held, not less than 20 nor more than 30 days after such order, to determine whether such officer shall be recalled. On the ballots at said election shall be printed the reasons, as set forth in the petition, for demanding his recall, and, in not more than 200 words, the officer's justification of his course in office. He shall continue to perform the duties of his office until the result of said election shall have been officially declared.

SEC. 4. Unless he otherwise request, in writing, his name shall be placed as a candidate on the official ballot without nomination. Other candidates for the office may be nominated to be voted for at said election. The candidate who shall receive the highest number of votes shall be declared elected for the remainder of the term. Unless the incumbent receive the highest number of votes, he shall be deemed to be removed from office upon qualification of his successor.

To summarize these provisions, sir, they amount to this, that at any time after a period of six months one-fourth of the persons who voted at the last election in the State or in the judicial district may, by signing and filing a petition, deprive any judicial officer of the right to his office which he has secured by his election through the casting of a majority of the votes for him in the election. The effect of that is that one-fourth of the electors may decree and effect a reconsideration of the election. That is quite independent, sir, of any action by a majority of the electors at the election which is thereafter to be held. The mere filing of the petition by approximately one-half of the men who voted against a judge sets at naught his election, deprives him of his right to the office, and compels him to seek a new title to the office through another election; and in that other election to which he has to submit himself he has not only to defend his course, to justify his conduct upon the bench, but he has to enter into a contest as against the popularity, the merits, the claims to recognition of one or any number of opposing candidates.

His right to the office to which he has been elected being swept away, he is obliged to go before the people and retry the question of their preference; it may be as between him and the man he has defeated, or between him and some other possibly more popular candidate, under the penalty of ignominy and disgrace following upon the removed official, if his popularity has waned or a stronger and more popular candidate is nominated against him. That is the tenure of judicial office which this constitution proposes to establish in the State of Arizona, if that State be now constituted by our approval of this provision.

Let me ask the Senate to consider for a moment what will be the necessary working of such a system? We all know that from time to time there arise in all courts cases which enlist great popular interest. Sometimes they are cases in which men are accused of crime and there is a well-founded and general public abhorrence of the crime. I submit to the experience of the Members of the Senate the suggestion that the tendency of the public in their abhorrence of a great crime is to assume that the man who is declared by the police authorities to be responsible for it is responsible, to overlook questions of evidence as to whether he be the true criminal and questions as to the degree and character of his guilt, and to assume that the man who is charged is the man who is guilty. The more atrocious the crime the more general and customary is this tendency to condemn a person who is charged with its commission.

Sometimes questions which attract public interest are questions having a political bearing. In our complicated system of government it frequently happens that questions are submitted to the courts upon the determination of which must depend the success of one party or another in establishing its views or in securing the control of the machinery of government. It is but a few days since the courts of my own State passed upon a question as to the validity of the apportionment of the State, and upon their decision rested, perhaps, the question whether one or the other of the great political parties should have control of the government of the State.

Such cases are frequently arising in all of our States, and it frequently happens that there is great public excitement, intense

interest, strong desire to have the decision in accordance with the views of political partisans, who naturally consider the view of their own party to be the correct view.

Sometimes such questions arise from the conflict of religious opinions. I have heard it said in this Hall to-day that courts can never pass upon religious questions. Ah, Mr. President, would any Senator say that no court can enforce the provisions of our Constitution in favor of religious liberty? New sects are continually arising in our country, and the votaries of the religious views of those sects are at the beginning small and insignificant minorities. Questions regarding their rights as religious bodies, questions regarding their rights to freedom of worship and of expression, are protected by the provisions of our constitutions, and against the wish, against the prejudice, against the passion of the vast majority of the people, the courts, and the courts alone, can maintain the rights of the few to pursue the dictates of their own conscience rather than the will of the majority.

Sometimes questions arise upon those limitations which our constitutions impose upon the action of legislatures and executive officers and people alike by those great rules that protect liberty and property against the power of government wherever it be vested.

Now, sir, picture to yourselves a judge before whom one of these cases is brought. A few people, a single man, is upon one side. The powers of a government are upon the other side. For the few and the weak there stand only the rules of law. Upon the other side stands the public desire to have a decision in accordance with the public interest or the public feeling. Picture to yourselves the judge who is called upon to decide one of those cases, and consider what his frame of mind and condition of feeling must be when he knows that if he decides against public feeling immediately a recall petition will be signed and filed, and the great body of the people against whose wish he has ruled will be called upon, will be required, to vote whether they prefer him to some man who has never offended public opinion.

Upon all these cases, sir, so far as they depend upon evidence—and a vast majority of them do depend upon evidence—which is produced in the trial and which enters into the record of the case, the public does not see the record. It receives its information from the press. I beg the Senate to recall the reports of trials and arguments in our courts which they have been accustomed to see in the public press. The conditions of newspaper enterprise do not permit the publication of the full record of any trial. The gentlemen of the press, eager to secure items of news that will be interesting to the readers of their papers, catch upon the spectacular and interesting and startling incidents of the trial and reproduce them in their columns.

The judge is to pass upon the evidence that appears in the record, but he is to be judged upon the newspaper reports of the trial. And to whom, sir, will the judge try that case? To whom will counsel argue that case? What will become of that spirit which pervades every true court of justice, in which the facts as ascertained and the law interpreted and these alone form the basis of judgment? Is it in human nature that a judge, sitting under such circumstances as are exhibited by this provision which I have read, shall do other than try his case rather to the reporters than to his conscience, to his knowledge of the law, and to his understanding of the facts? For at every step the judge is upon trial. His defense will not come when he has the opportunity to put 200 words of justification onto the ballot. His defense will begin with the first step in the trial of the cause. Human nature can not work otherwise. In all these great cases of public interest the judge will be on trial on the newspaper record, and in that trial he will take a far deeper interest than in the trial of the defendant or in the rights of the parties upon the record of the court.

Let me illustrate the way in which this provision is bound to work by reading from a newspaper called the People's Paper, published in Los Angeles, Cal., Saturday, April 15, 1911. In large black letters:

Aroused people to recall judge.

In large, but not so large black letters below:

Los Angeles will be first to use new law and oust union persecutor from the bench.

In large black letters, but still not so large:

To recall Judge Joseph Chambers for persecuting union strikers is now the declared purpose of Los Angeles Socialists and union men, who assert that immediately upon the passage of the State recall amendment Chambers will be the first judge in California to receive the attention of an aroused people, determined to oust him from the bench.

The recall petition will set forth that this judge raised the bail of three union men, John Creilly, R. L. Murray, and Isaac Libby, from the usual \$50 to the outrageous sum of \$300 per man; that the maximum fine for their alleged offense of picketing is but \$50, and therefore in

making their bonds six times as large as the highest possible fine Chambers must have determined to punish the strikers before a jury could have an opportunity to declare them innocent.

Why a judge on the bench, the petition will recite, should have thus made himself an open partisan of the Merchants and Manufacturers' Association can only be explained by the fact that out of the 310 metal trades mechanics, brewery workers, and other union strikers arrested and taken to the police court only 4 convictions were obtained.

Plainly, the public and jurymen believed these men innocent. Plainly, the judge concluded that if strikers were to be punished it must be done before trial.

The petition will then show that the average workingman has little money, as Chambers well knows, and therefore he practically attempted to harass them with imprisonment an unknown number of days in a vile jail awaiting trial by demanding of each striker \$300 cash bail.

Mr. President, I do not know whether this recall petition which is outlined there was ever filed. I do not know what action was taken regarding it. I do not know whether the judge was right or wrong in fixing \$300 as the amount of bail.

Mr. WORKS. Mr. President—
The PRESIDING OFFICER (Mr. LIPPITT in the chair). Does the Senator from New York yield to the Senator from California?

Mr. ROOT. One moment, please. But I do not doubt that this paper illustrates, and well illustrates, what will be the inevitable course that will ensue upon the establishment of such a tenure of official office as is provided for by this constitutional provision.

Mr. WORKS. Mr. President, I do not desire to antagonize anything that has been said by the Senator from New York, for I fully agree with the position he takes upon this question, but I do desire to say that there is yet no law in the State of California for the recall of judges.

Mr. ROOT. I am very glad to hear it.

Mr. WORKS. I desire to state further that in my judgment if the recall did exist in the county of Los Angeles, my home, there would be no danger of the judge referred to in this article being recalled on any such ground as is set forth in the newspaper.

Mr. ROOT. I am very glad to hear that also. As I have just said, I do not know whether any action was taken. It is evident no action was taken, because the law was not passed, but I have read this paper to illustrate the way in which the recall provision will be regarded by the people who have a deep interest in judicial action; and it is under the pressure of such attempts, if such a provision is adopted, that every judge must administer justice in the causes which excite public interest and public passion. And those are the causes which test the strength and effectiveness of a system of administering justice.

In the year of the Declaration of Independence the temporary legislative body of Massachusetts undertook to frame a constitution for the State, and sent to the different towns of the State a request for their consent to the establishment of such a constitution. On the 1st of October, 1776, the people of Concord in their town meeting adopted a resolution refusing to accept a constitution so framed. Among their reasons they said that they refused "because we conceive that a constitution in its proper sense intends a system of principles established to secure the subject in the possession and enjoyment of the rights and privileges against any encroachment of the governing party." That reason applies, sir, whether the governing party be a king or a president or a legislature or the people at the polls. The Constitution in its just sense intends to secure the subject in the possession and enjoyment of his rights and privileges against any encroachments of the governing party.

The men who sent back that answer, that they would not accept a constitution framed by the legislature which ought to be restrained by the Constitution, were the very men who stood at Concord Bridge and had the courage to fire the first shots against the overwhelming power of England. I trust, sir, I believe, that the spirit of Concord, of 1776, has not died out among the American people, and that they are not yet ready to put the judge, who alone can maintain the rights of the citizen against the governing party, at the immediate mercy of the governing party. We are not yet ready to say to the judge whom we put upon the bench to maintain the great principles of justice, "You shall maintain them under the penalty of being deprived of your office and being disgraced for life if you oppose the will of the governing body."

Mr. President, I should not oppose the admission of Arizona with provisions in its proposed constitution which were of minor consequence, even though I did not agree with them. There are many provisions in this constitution which I think inexpedient and unwise. There are a number of provisions which I deeply regret to see incorporated in the constitution of any American State. But for all that I would not oppose the admission of Arizona as a State upon a constitution adopted by a vote of her

people because it contained those provisions or because it contained any provision which did not seem to me to be fundamental in its character and to be in a considerable measure a negation of the true principles of our Government.

I conceive that this provision for the recall of judges is of that character. I think it goes to the very basis of our free Government, and I will proceed to state why I think it differs from the other provisions which I dislike. I have no quarrel with the gentlemen who extol the wisdom of the people. I believe that in the long run, after mature consideration and full discussion and when conclusions are reached under such circumstances as to exclude the interests or the prejudice or the passions of the moment, the decisions of the American people are sound and wise. But, sir, they are sound and wise because the wisdom of our fathers devised a system of government which does prevent our people from reaching their conclusions except upon mature consideration, after full discussion, and when the dictates of momentary passion or self-interest are excluded.

The framers of our Government were largely men who had been bred and had inherited deep religious convictions, and among those convictions was the realization of the fact that among all the virtues that it is incumbent upon men to cultivate and to seek the virtue of self-restraint stands one of the first. That view of human strength and weakness, sir, lies at the bottom of the religion which we all profess. Whatever be the creed, the denomination, the name underlying the religion of all of us, as it underlay the religions of the framers of our Government, is the knowledge that we are fallible, prone to evil, weak in the face of temptation, liable to go astray, and that we sorely need to restrain ourselves from the following of our own impulses by the rule of principles—principles of religion, principles of morality, principles of justice. We know that but for some ruling principle we are sure to err, and that our holding to the straight path depends upon our fidelity not to the impulse or the wish of the moment, but our fidelity to the principles that control our lives and conduct.

Many of the framers of the Republic were men who inherited the traditions of a theocratic government, in which men were controlled as against their own impulses and passions by the dictates that were handed down in the revelation from the Divine Ruler. In a belief which we can not gainsay to-day they undertook to establish for this Government a code of fundamental principles of justice, of equality, principles formulated in specific rules of conduct to make practical their application. Those principles we describe as the constitutional limitations of the National and the State constitutions:

No man shall be deprived of his property except by due process of law.

Private property shall not be taken for public use except upon due compensation.

No man shall be compelled to be a witness against himself.

No man shall be twice put in jeopardy for the same offense.

And all the others, that great array of the fundamental and essential principles by which the American Republic has imposed restraints upon itself against its own interest of the moment, its own wishes of the moment, its own prejudice and passion of the moment; that great array of the fundamental rules of justice, of liberty, of human rights, which I say the American Republic has imposed upon itself is the great secret of the success of the American experiment in government, the maintenance of justice and order, individual liberty and individual opportunity in this vast continent, among these 90,000,000 people. And for the maintenance of those rules of justice our fathers provided that the government which may seek, under the interest or the passion of the moment, to override them shall be withheld by the judgment of a body of public officers separated from the interests and passions of the hour, with no pride of opinion because of having made a law, with no lust for power because of a desire to execute a law, with a strong hand according to individual opinion as to what may be best; but impartial, sworn only to the administration of justice, without interest, without fear, and without favor. They intrusted the maintenance of these rules to a body of judges, who were to speak the voice of justice without fear of punishment or hope of reward.

It is the establishment of this system of rules, fundamental rules, intrusted for their declaration and maintenance to a body of impartial judges, that is the great contribution of America to the political science of the world, the great contribution of America to the art of self-government among men.

Why, Mr. President, was it necessary to establish these rules of right? Why should there be a provision in our constitutions which prevents the taking of private property for public use without compensation? Why should there be a provision that no man shall be twice put in jeopardy for the same offense? Why should there be a provision that no cruel or unusual pun-

ishment shall be inflicted, unless it be that the existence of such rules was deemed to be necessary and is deemed to be necessary to control the governmental power of the moment?

The essential difference, sir, between the establishment of one of these great rules of right conduct in a constitution and the enactment of a law either by a legislature or by a people is that the fundamental rule is established upon considerations of abstract justice. The rule is established when no one has any concrete interest to be affected, when no one is desirous of doing the wrong thing that the rule prohibits or of undoing the right thing that the rule maintains. It is then, sir, that the voice of an intelligent people is the voice of God, when upon considerations of justice, when considering what is right and fair, and makes for justice and liberty, a people establish for their own control and restraint a rule of right; and the abstract rule is necessary because when the concrete interest comes into play, because when the passion of the moment comes into play, because when religious feeling is rife, when political feeling is excited, when the desire for power here or the desire to push forward a propaganda of views here comes into play, then the inherent weakness of human nature makes it certain that the great and fundamental principles of right will be disregarded.

Sir, we see every day legislatures of our States passing laws which are in violation of these fundamental rules. We see every day public officers exercising an arrogant power in violation of the fundamental rules, except as they are restrained by the cold and impartial voice of those tribunals that our people have established to assert the control of the principles of justice over the interests and the passions of the moment.

Mr. President, this provision for the recall of judges strikes at the very heart of that fundamental and essential characteristic of our system of government. It nullifies it; it sets it at naught; it casts to the winds that protection of justice that our fathers established and that has made us with all our power a just and orderly people. For, sir, when we say to the judge upon the bench, who is bound to assert the rules of justice established in a constitution long years before for the restraint of the people in their passion or their prejudice, you shall decide for the rules of justice at your peril; when we say to the judge if you maintain the abstract rule of justice against the wish of the people at the moment you shall be turned out of office in ignominy, we nullify the rule of justice and we establish the rule of the passion, prejudice, and interest of the moment.

So, sir, I say that this provision of the Arizona constitution strikes at the very heart of our system of government. It goes deeper than that. This provision, sir, is not progress, it is not reform; it is degeneracy. It is a movement backward to those days of misrule and unbridled power out of which the world has been slowly progressing under the leadership of those great men who established the Constitution of the United States. It is a move backward to those days when human passion and the rule of men obtained rather than the law and the rule of principles, for it ignores, it sets at naught the great principle of government and of civilized society, the principle that justice is above majorities.

I care not how small may be the numbers of a political faith or a religious sect, I care not how weak and humble may be a single man accused of however atrocious a crime, time was when the feelings and the passions and the wish of a majority determined his rights and oftentimes his right to life; but now, in this twentieth century, with all the light of the civilization of our times, after a century and a quarter passed by this great and free people following the footsteps of Washington, Hamilton, Jefferson, and Madison, now with all the peoples of the world following their footsteps in the establishment of constitutional governments, the hand of a single man appealing to that justice which exists independently of all majorities has a power that we can not ignore or deny but at the sacrifice of the best and the noblest elements of government.

There is such a thing as justice, and though the greatest and most arrogant majority unite to override it, God stands behind it, the eternal laws that rule the world maintain it, and if we attempt to make the administration and award of justice dependent upon the will of a majority we shall fail, and we shall fail at the cost of humiliation and ignominy to ourselves.

I do not envy the men who prefer the uncontrolled rule of a majority free from the restraints which we have imposed upon ourselves to the system of orderly government that we have now established. I do not envy the men who would rather have the French constituent convention, controlled by Marat and Danton and Robespierre, than to have a Supreme Court presided over by Marshall; who would rather have conclusions upon a question of justice reached by a popular election on the basis of news-

paper reports than to have the impartial judgment of a great court. I do not envy the men who have no sympathy with Louis XVI against the dictates of the majority of the French Malesherbes and De Sèze pleading for the lawful rights of capital in 1793.

I do not envy the men who see nothing to admire in John Adams defending the British soldiers against the protests of his neighbors and friends and countrymen after the Boston massacre. Rather, sir, would I feel that my country loves justice and possesses that divine power of self-restraint without which the man remains the child, the citizen remains the savage, and the community becomes the commune; that my country has carried into its system of law, and, whatever be its wish for the moment, whatever its prejudice, whatever its passion for the moment, will forever maintain as of greater importance than any single issue or any single man or any single interest, that reverence for the eternal principles of justice which we have embedded in our fundamental law as our nearest approach to the application of the Divine command to human affairs.

Mr. NELSON. Mr. President, I do not intend to take up the time of the Senate in any general, extended, academic, or historical discussion of the subject. My aim will be rather to explain to the Senate in a brief manner the scope of the amendment which I have offered as a substitute for the pending joint resolution. In order that the merits of the amendment may be fully understood, I shall briefly call your attention to some of the legislative history relating to the subject.

By the act of June 20, 1910, commonly called the enabling act, authority was given to the Territories of Arizona and New Mexico to elect delegates for a constitutional convention to formulate a constitution, and to submit it for ratification to a vote of the people. The enabling act provided that the constitutional convention of New Mexico should consist of 100 members and that of Arizona of 52 members. It further provided that after the constitutions had been formulated and adopted by the respective conventions the constitutions were to be submitted to a vote of the people of the respective Territories for ratification; and if the constitution in each case was approved by a majority of the votes cast on that subject, then the constitutions were to be submitted to the President of the United States and to Congress for approval; and if Congress and the President approved of the constitutions, or if the President approved the same and Congress failed to disapprove the same during the next regular session, then the President was to certify such facts to the governor of each Territory, who then was directed to call an election for State, county, and legislative officers and Representatives in Congress; and when the result of such election was certified to the President it became his duty to issue his proclamation of the result, which proclamation admitted the Territories as States into the Union.

The approval of the constitution is a prerequisite to the holding of an election for the officers mentioned, and it is only after such elections have been held that the Territories are to be admitted into the Union; in other words, the mere approval of the constitution does not admit the Territory, but such approval must be followed by an election for these several officers—State, legislative, and county, and Members of the House of Representatives. After such election has been held, then the President issues his proclamation, and thereupon the Territories are admitted into the Union on a footing with the other States.

The constitution of New Mexico was ratified by a much larger vote than that of Arizona. As to the vote of New Mexico, I quote the following from the speech of Attorney General Wickersham, recently delivered before the law school of Yale University:

The returns of the Thirteenth Census gave New Mexico in 1910 a total population of 327,301, of which 76,233 were native-born males over 21 years of age and 4,269 naturalized foreign-born males over 21 years of age, making an apparent total voting population of 80,502. There were cast for the constitution 31,742 votes, against it 13,399 votes, or a total of 45,141 on the question of its adoption, being about 56 per cent of the total number of the qualified voters and slightly less than 14 per cent of the total population.

There is a marked contrast between the action of the people of New Mexico in voting upon their constitution and the action of the people of Arizona in voting on their constitution. I read from the same speech on this subject:

The returns of the Thirteenth Census give Arizona in 1910 a total population of 204,354, of which 155,550 are native born and 48,804 foreign born. Of this population, 118,576 are males and 85,778 are females. The total number of white males over 21 years of age is 65,133, of which number 39,427 are native born and 5,896 naturalized citizens, so that the total voting population is apparently 45,323.

I call the attention of Senators to the figures—

There were cast for the constitution 12,187 votes, against it 3,822 votes, or a total of 16,009 on the question of its adoption, being about 35 per cent of the total number of qualified voters, and slightly less than 8 per cent of the total population.

The election for the ratification of the constitution of New Mexico was held on the 21st day of January, 1911; and the election for the ratification of the constitution of Arizona was held on the 9th day of February, 1911. Both constitutions were sent to the President and to Congress for approval in the latter part of February, 1911.

The constitution of New Mexico was approved by the President in his message to Congress of February 24, 1911, wherein he recommended the approval of the same by Congress. The constitution of Arizona has not up to this time been approved by the President. So that at this moment the constitution of New Mexico stands here before Congress as approved by the President, while the constitution of Arizona stands here without the approval of the President. As to New Mexico then, if Congress at its next regular session does not disapprove the constitution it stands approved, and when this is followed by an election of the officers mentioned the Territory will be admitted into the Union.

In the case of Arizona, the President not having approved the constitution, it operates as a stay of proceedings until Congress passes an act approving the constitution, for until such approval there can be no election and no admission.

This brings me, Mr. President, to the joint resolution which has passed the House and is now before the Senate. That joint resolution—and I give it in outline—provides that the constitution of New Mexico shall be approved after the people of that Territory have had another vote on article 19 of the constitution. That is the article relating to constitutional amendments. It is claimed and insisted that that article relating to amendments to the constitution is too conservative, too restrictive, and that it ought to be again submitted to the people for their vote. I want to call the attention of Senators to that constitution. It is not as restrictive as is claimed by many; it is not any more restrictive than our Federal Constitution. Article 19 reads in part as follows:

SECTION 1. Any amendment or amendments to this constitution may be proposed in either house of the legislature at any regular session thereof, and if two-thirds of all members elected to each of the two houses, voting separately, shall vote in favor thereof, such proposed amendment or amendments shall be entered on their respective journals with the yeas and nays thereon; or any amendment or amendments to this constitution may be proposed at the first regular session of the legislature held after the expiration of two years from the time this constitution goes into effect, or at the regular session of the legislature convening each eighth year thereafter, and if a majority of all the members elected to each of the two houses voting separately at said sessions shall vote in favor thereof, such proposed amendment or amendments shall be entered on their respective journals with the yeas and nays thereon.

In other words, at any regular session two-thirds of each house of the legislature of the State, each house voting separately, may propose amendments, the same as in the case of the Federal Constitution, while a mere majority may propose amendments after the lapse of two years and every eight years thereafter. In either case, Mr. President, whether a constitutional amendment be adopted under the first provision or under the second, it is submitted to a vote of the people, and if ratified by a majority of the electors voting thereon, and by an affirmative vote of not less than 40 per cent of all the votes cast at said election in the State and in at least one-half of the counties thereof, then such amendment becomes a part of the constitution. No more than three amendments shall be submitted at the same election.

Sections 1 and 3 of article 7, relating to the elective franchise, and sections 8 and 10 of article 12, relating to education, can not be amended unless the amendment is proposed by three-fourths of the members of each house of the legislature. These restrictions in the case of these sections and articles are for the benefit and protection of the large Mexican population. Mr. President, the provision in the constitution requiring amendments to be ratified by a 40 per cent vote in at least one-half of the counties of the State was, it was explained to the committee by representatives from New Mexico, inserted for the benefit and protection and in behalf of the poor Mexicans. Nearly half of the people of that Territory are of Mexican or of Spanish descent. They were the early and original settlers of that country. They have adopted a different system of irrigation and reclamation of their arid lands from that which generally prevails. They operate through a sort of community system, which is different from that employed by the rest of the population; and this provision was put into the constitution in order to protect them, so that no violent changes could be made. The constitution is very careful to protect the Mexicans. It provides, as I have already stated—

that no amendment shall apply to or affect the provisions of sections 1 and 3 of article 7 hereof on elective franchise unless proposed by not less than three-fourths of the votes of each house of the legislature.

This is to prevent the Mexicans from being disfranchised for not speaking the English language.

The restriction and exception as to sections 8 and 10 of article 12 are for the purpose of preventing the exclusion of the Spanish language from the public schools. In other words, the Spanish language is to be taught side by side with the English language in the public schools; and all this is for the benefit of the Mexicans who are not up to the standard of the rest of the population in the matter of the English language. I mean by that expression that they are not as well versed in the English language as are other citizens of the Territory. Many of them have a sprinkling of Indian blood in their veins, and they are descended from the old conquistadors who first explored that country. They are a quiet, law-abiding, good people, but, as I have said, they are not versed in the English language, and so this constitution of New Mexico was framed ex industria, Mr. President, to protect those people as they ought to be protected.

Compare this action of New Mexico in reference to these people with the action of Arizona, not as embodied in its constitution, but as found in its legislation. In 1909, on the 10th of March, the Legislature of Arizona passed an act that practically disfranchised all such people as these that have been taken care of by the New Mexican constitution.

I read section 1 of that law of 1909:

Every male citizen of the United States and every male citizen of Mexico who shall have elected to become a citizen of the United States under the treaty of peace exchanged and ratified at Queretaro on the 30th day of May, 1848, and the Gadsden treaty of 1854, of the age of 21 years, who shall have been a resident of the Territory one year next preceding the election, and of the county and precinct in which he claims his vote, 30 days, and who, not being prevented by physical disability from so doing, is able to read the Constitution of the United States in the English language in such manner as to show he is neither prompted nor reciting from memory, and to write his name * * * should be entitled to vote at all elections, etc.

This is the way Arizona treated the Mexicans in their midst—practically disfranchise them. In the enabling act which we passed, we provided that the old election law of 1901, which did not contain these restrictions, should apply in the matter of the election of delegates to the constitutional convention and in the manner of the ratification of the constitution.

I have called attention to this, Mr. President, for the purpose of showing the extreme care with which the people of New Mexico have provided that no injustice either in respect to education or in respect to the electoral franchise shall by any means be inflicted upon those Mexicans who constitute half of the population.

I am told that upward of 25 or 30 per cent of the permanent population of Arizona belong to the Mexican class of people, but you look in vain for any restriction in the constitution of Arizona against such legislation as that act of 1909, and that law still remains.

Mr. BACON. Mr. President—

Mr. NELSON. I yield to the Senator from Georgia.

Mr. BACON. I have not had the good fortune to hear all the Senator's speech, so he may have alluded to or said something about that as to which I desire to ask him. Do I understand the Senator to say that in the proposed New Mexico constitution there is no discrimination against the Spanish-speaking people?

Mr. NELSON. There is no discrimination against them.

Mr. BACON. I will read from the report of the House committee to see whether or not I am correct. On page 5 I find this language:

The committee has also provided in said proposed substitute that the enabling act of June 20, 1910, shall be amended by making section 5 of said act so read as to remove the disqualification imposed upon the Spanish-American population of New Mexico who can not read, write, and speak the English language for holding State offices, including membership in the legislature of the new State. No just reason is found for such disqualification.

The evidence before the committee was that these Spanish-American citizens are eager for education and largely now speak the English language, and strive to advance the teaching of English to their children in all of their public schools, but that this provision of the enabling act is regarded by them as a reflection upon them and their race. They have at all times supported by their votes and the imposition of taxes the developing of the public-school system of New Mexico. They are largely an agricultural people, frugal, industrious, and earnest supporters of every movement intended to advance the progress, prosperity, and civilization of New Mexico.

Again, it was suggested that this disqualification violates the spirit and the letter of the treaty of Guadalupe Hidalgo between the United States and the Republic of Mexico, entered into on the 2d day of February, 1848, by the terms of which the Territories of New Mexico and Arizona were for the most part acquired.

And then it goes on and quotes from the treaty.

Mr. NELSON. Unfortunately, that does not tally with the actual constitution. Let me read section 3 of article 7 relative to the elective franchise. It reads:

Sec. 3. The right of any citizen of the State to vote, hold office, or sit upon juries shall never be restricted, abridged, or impaired on account of religion, race, language, or color, or inability to speak, read, or write the English or Spanish languages, except as may be otherwise provided in this constitution; and the provisions of this section and of sec-

tion 1 of this article shall never be amended except upon a vote of the people of this State in an election at which at least three-fourths of the electors voting in the whole State and at least two-thirds of those voting in each county of the State shall vote for such amendment.

Mr. BACON. Very well. If the Senator will pardon me—

Mr. NELSON. Now, I will call attention in that connection to other paragraphs of the constitution relating to education, and the Senator will see that that report does not do justice to the constitution. Section 8 of article 12, relating to education, provides:

SEC. 8. The legislature shall provide for the training of teachers in the normal schools or otherwise, so that they may become proficient in both the English and Spanish languages, to qualify them to teach Spanish-speaking pupils and students in the public schools and educational institutions of the State, and shall provide proper means and methods to facilitate the teaching of the English language and other branches of learning to such pupils and students.

And section 10 of the same article provides as follows:

SEC. 10. Children of Spanish descent in the State of New Mexico shall never be denied the right and privilege of admission and attendance in the public schools or other public educational institutions of the State, and they shall never be classed in separate schools, but shall forever enjoy perfect equality with other children in all public schools and educational institutions of the State, and the legislature shall provide penalties for the violation of this section. This section shall never be amended except upon a vote of the people of this State, in an election at which at least three-fourths of the electors voting in the whole State and at least two-thirds of those voting in each county in the State shall vote for such amendment.

I have called attention to these two articles of the constitution, one relating to the elective franchise and the other relating to the education of the people; both of them aimed to take special care and make due provision for the Mexicans or those of Spanish descent who speak that language.

Mr. BACON. Mr. President—

The VICE PRESIDENT. Does the Senator from Minnesota yield to the Senator from Georgia?

Mr. NELSON. Yes.

Mr. BACON. With the permission of the learned Senator, I want to call his attention to the provision that I spoke of before in order that he may see that his reply does not cover this provision. The reply of the Senator to the inquiry made by me was to read sections with regard to education and with regard to the elective franchise.

Mr. NELSON. I quoted them.

Mr. BACON. But the disqualification which the House committee criticizes in its report is the disqualification from office holding. That is what it says:

Shall be amended by making section 5 of said act so read as to remove the disqualification imposed upon the Spanish-American population of New Mexico who can not read, write, and speak the English language for holding State offices, including membership in the legislature of the new State.

I have not the constitution before me, but here is the plain language of the House report, and I presume they would scarcely have incorporated that statement unless it was buttressed by the facts. So that, if it be true that the constitution of Arizona discriminates unjustly or the laws of the Territory of Arizona discriminate unjustly against the Spanish-speaking people of Arizona, it is also true, perhaps in a less degree, that there is discrimination of the same kind in the constitution of New Mexico against the Spanish-speaking people, to the extent that they are not allowed to hold any office unless they can read the English language.

Mr. NELSON. The report from which the Senator is reading seems to refer to the enabling bill or act and not to the constitution. I can not find any provision in the constitution that restricts them from holding office.

Mr. BACON. I think, possibly, from the language—

Mr. NELSON. I can not find any restriction in the constitution, and as a matter of fact they have been holding office there all this time—county offices and Territorial offices and judicial offices—and proceedings both in the legislature and in the courts are carried on in both languages.

Now, there are no such provisions in the Arizona constitution—nothing of that kind—to protect the Spanish-speaking people, the Mexicans, either in an educational way or in the matter of the elective franchise.

Mr. BACON. If the Senator will pardon me—

The PRESIDING OFFICER (Mr. CURRIS in the chair). Does the Senator from Minnesota yield to the Senator from Georgia?

Mr. NELSON. I do; but I should like to answer a question.

Mr. BACON. I beg the Senator's pardon.

Mr. NELSON. I do not like a long interruption. I am willing to answer a question, but I do not like to have a whole speech injected into mine.

Now, Mr. President, on the theory that article 19 of the New Mexico constitution, relative to amendments of the constitution,

was too conservative and too restrictive, in the joint resolution that passed the House it is provided that that question should again be submitted to the voters of New Mexico; but according to the joint resolution, whether the people of New Mexico vote that article in or out, the constitution stands approved anyway. So that it is a mere formal matter. It is not a sine qua non as to the approval of the constitution. The condition is that they must have another election, and if in that election they disapprove that paragraph of the constitution, it goes out; if they approve it, it remains in; and the constitution, in either event, is approved; and they will have to go on and hold their election and elect their officers—county, State, legislative, and congressional—and upon such election the Territory is admitted into the Union as a State.

Mr. BACON. Mr. President—

The PRESIDING OFFICER. Does the Senator from Minnesota yield to the Senator from Georgia?

Mr. NELSON. Certainly; I yield.

Mr. BACON. I do not wish to intrude on the Senator.

Mr. NELSON. I trust the Senator did not take offense at what I said before. I am always glad to yield to the Senator.

Mr. BACON. I simply desire to call the Senator's attention to the provision of the constitution of New Mexico which he could not find. He will find it on page 42, at the bottom of the page, numbered section 5. I will read it:

This State shall never enact any law restricting or abridging the right of suffrage on account of race, color, or previous condition of servitude; and, in compliance with the requirements of the said act of Congress, it is hereby provided that ability to read, write, speak, and understand the English language sufficiently well to conduct the duties of the office without the aid of an interpreter shall be a necessary qualification for all State officers and members of the State legislature.

Mr. NELSON. That is only restriction on office holding. That is, if they hold an office of that character or that grade, they are required to speak the English language sufficiently to be understood. But there is no limitation as to proceedings in the courts. For years proceedings in the courts of New Mexico have been carried on in both languages—in Spanish and in English. Counsel have had interpreters to interpret their speeches to the jury. Courts have had interpreters to interpret their charges. Interpreters have interpreted not only the testimony of witnesses, but they have actually entered into the jury box and remained with the jury while they were agreeing upon their verdict, to interpret between the Spanish-speaking and the English-speaking members of the jury.

What I have said in reference to education and the right of suffrage remains undisputed. The constitution has taken particular pains to protect those Mexicans in their right of suffrage, and the same has taken place in reference to educational facilities.

The only restriction in the constitution is the paragraph that the Senator from Georgia quoted in relation to holding State offices. There they are required to speak the English language sufficiently to be understood, but there is nothing to bar them from holding office otherwise if they can speak that language.

Article 19 of the constitution relates to amendments, to which I have referred. Many ask why do you require those amendments to be ratified by a majority of the counties? That is for the purpose of protecting those Mexicans who occupy a certain number of counties in that proposed State. If you left it to a general vote of the proposed State, requiring 40 per cent of the entire vote of the State and a majority of all votes cast, that many votes might be secured in what they call the American counties, and the Mexican counties would be entirely outvoted and left in the cold.

The New Mexico constitution, and I want to call your attention to it, has no initiative, as we understand it. It has the referendum; that is, an act of the legislature may be vetoed, may, by a referendum, a petition, be vetoed by a majority vote, equal to at least 40 per cent of the people voting on that subject.

There is no recall of judges, no initiative. The only innovation upon the ordinary customary methods that we have in the older States is in the matter of the referendum.

Now, come to the case of Arizona. In the joint resolution, as it came from the House, a provision was inserted that Arizona should have another election upon the question of the adoption of article 5 of their constitution—that part of their article which provides for the recall of judges and all other officers. But under the provision of the House joint resolution, whether the people of Arizona voted that paragraph of the constitution out or kept it in the constitution, the constitution in any event would stand approved. If a majority vote is against that paragraph of the constitution, it will be eliminated. If a majority were against elimination, it would still remain a part of the constitution.

Mr. President, to my mind there are a number of objectionable features in that constitution which as an original question I could never approve. For instance, the constitution of Arizona may be amended upon the petition of 15 per cent of the votes cast at the last election. A constitution is a fundamental law, bounding the scope of the legislative, executive, and judicial departments. Its object is to lay down the outlines of the State government, to place an embargo against popular clamor, and to keep legislation within well-defined channels. In other words, it is a bulwark against hasty and ill-advised legislation. Under this Arizona constitution 10 per cent of the voters can invoke the action of the people upon a statute. Ten per cent of the vote can initiate legislation, and 15 per cent of the vote can initiate a constitutional amendment; and if the majority of those voting upon that subject amount to 40 per cent of the total vote, it may adopt the constitutional amendment.

It seems to me, Mr. President, that that is a very objectionable feature to the constitution, but I will waive that. Then there is another article of the constitution relating to the recall of officers. All officers, executive, legislative, and judicial, can be recalled, and a member of the legislature can be recalled. The Senator from Idaho [Mr. HEYBURN] called the attention of the Senate to that the other day. When a member has been elected to the legislature, five days after his election a petition can be circulated for his recall. As the Senator from Idaho pointed out, how easy it would be for political demagogues or those who had an axe to grind and who wanted to defeat the election of a United States Senator to have enough of these petitions filed so that the legislature would be without a quorum. After the lapse of five days after an election a petition for recall can be filed against every one of them.

But the most iniquitous part of the constitution to my mind, and I can not call it by any other term, is the recall of judges. I call it iniquitous for the reason that there is something more than a mere recall in it. If the mere question were submitted to the voters as to whether the judge has been competent and faithful to his trust, and the vote were only cast upon that question, the judge might have something of a show—might have a fair chance, but this article is cunningly devised so that when a petition is filed for the recall there is another election, and the man who six months before had been elected a judge must submit to a new campaign and a new election. For aught we know it may be only a question of another candidate seeking the office, perhaps one of the defeated candidates, or perhaps some man who is a little more in popular favor.

The question will be passed upon, not whether the judge in office has offended against the law, not whether he has been unfaithful to his trust, but the question will be whether the voters like B or C better than Judge A, the incumbent. So you see that the judge who has been elected for the period of six years can, after the expiration of six months of his term, be removed by a new election. Six years is the term of office, barring the first election, of the judges of the supreme court. The first judges of the supreme court are to be elected for the same term as the first governor, and the man who receives the greatest number of votes is to be chief justice. After that, at the next general election, three judges—the number the supreme court is composed of—are to be elected, and these three judges are by lot to determine which one of them is to hold for six years, which one for four years, and which one for two years; thereafter a judge is elected every two years for a term of six years.

You can readily see, Senators, that it may occur that a judge has been elected to office by a slender majority. He may be, as a lawyer, as a citizen, and as a judge, of the highest and best order, second to none, and may prove himself a good judge, but there is some other fellow, very popular with "the boys," who wants his place; there is some other man who would like to try again to secure the office, and, under the pretext of a recall, he secures a new election; so that judge who was elected for a term of six years is only sure of a six months' term and has to run the gantlet of a new election after the period of six months' service. In other words, instead of electing a judge for a definite term of six years, as the constitution in the first instance seems to contemplate, he is really elected for a sure term of six months, with no certainty as to the rest. After a six months' service he is subject to the whim and at the mercy of disappointed office seekers and disappointed litigants.

Mr. President, if this question of recall were submitted to the voters in a fair manner, if the question was submitted to the voters whether Judge A has been an honest and faithful judge, and if the vote were taken upon that question alone, divorced from the claims of rival candidates, the judge might have a fair show. But when you have, in connection with that, other candidates coming into the field—and there must be a new election—and if one of those other candidates happens to be

more popular for the time being with the masses and gets one more vote than the judge against whom the recall petition is circulated, he is elected, and the judge goes out dishonored because he was defeated by a candidate who happens to be a little more popular. So you see that by a mere majority of one vote, through that system of new elections cunningly devised, a new man may be elected judge, not because the old judge is a dishonest judge, not because he is not a good lawyer and has not done his duty faithfully, but because, for the time being, the populace may think that the other man is a "better fellow." The cry will be, "Oh, we like him better; he is such a fine fellow. We have no objection to the old judge. While we are not prepared to say that he has not interpreted the law fairly and justly, this new man is such a nice fellow, I think we had better have him for judge." So the operation can be repeated from time to time. The man who gets in in that way by one vote on the heels of the so-called discredited judge, in six months may have to run the gantlet for a still more popular fellow; and so you can have the operation repeated every six months. Enterprising and ambitious lawyers, looking the field over and wanting a place on the bench instead of a place at the bar, will be found ready to put the machinery of recall in motion, and a judge, however worthy and competent he may be, has at all times to stand ready to meet such attacks.

You and I, Senators, know how easy it is to get petitions signed for almost any purpose. There never was a man convicted of a great crime and sent to prison but that his friends could secure an abundance of signatures on a petition for a pardon or a commutation of his sentence.

But, Mr. President, look at the iniquity of the scheme from another standpoint, and I can not help calling it by that name: By this system you hold the sword of Damocles over every judge. Every judge has not only the question addressed to him of finding the facts and to determining the law of the case, but he must also consider whether his decision will meet with popular favor, for on that will hinge the question of retaining the office. He may decide the case justly and according to law, but if in the midst of great excitement public sentiment is against him, woe be unto him. It may be a case growing out of great political controversy. It may be a case of homicide, or it may be a case arising from a railroad wreck, a mine explosion, or a labor strike or controversy, where public sentiment may be wrought up to a high state of pressure and excitement; then the poor judge is confronted with the problem of deciding the case justly, according to the law and evidence, against the popular clamor and demand, and thus putting the term of his office in jeopardy, or of yielding to the "voice of the people" for the sake of holding the office, whatever the result to the litigants may be. The honest judge, the judge with a true moral sense and genuine stamina, will have no difficulty, but the weakling, the time server, the popular idol, the hale fellow well met, will cringe and fall down and worship the popular idol, for the "voice of the people" is to him higher than the voice of the law; it is his standard of infallibility.

"The facts of the case are thus and so; clear enough beyond all dispute, and the law of the case is clear enough, but what is the public sentiment on the case? Will the public approve of my judgment as to the facts? Will the public approve of my judgment as to the law?" What will the poor judge do when confronted by such a question, and the recall keeps that question constantly before him? If he is a mere politician, if he is a mere time server, if he is a moral weakling, if he is ready to pander to popular clamor he will frame his decision regardless of the intrinsic merits, so as to catch the approval of the public pulse. If he is an honest man, if he is a man of nerve, if he believes in a government of law and order, no matter what the public may clamor for or demand, he will decide according to the law and the evidence.

Senators, are we prepared to say that we want in this country instead of a government of law, a government that will be swayed and moved by every public emotion and clamor?

Mr. President, I can recall as a boy the decision of the Supreme Court of the United States, by Chief Justice Taney, in the Dred Scott case, and what an excitement and feeling there was in the North over it. If we had had the "recall" as to Federal judges at that time, I have no doubt petitions would have been extensively circulated in the North for Justice Taney's recall. But Senators who know anything about American history know that, barring that decision, and on that we may well differ, he was one of the greatest lawyers and one of the ablest jurists who ever sat on the Supreme Court of the United States, second only to John Marshall.

I see before me my genial friend from Oklahoma [Mr. OWEN]. He has introduced a bill for the recall of Federal judges and if the bill passes we will have the recall of judges in such cases

as that to which I refer. I can remember how disappointed many of our people were when the Supreme Court announced its decision in the legal-tender case. I can remember how disappointed our people were when the Supreme Court held the income-tax provision of the tariff act of 1894 unconstitutional.

In all those cases, I dare say, it would have been an easy thing to have circulated petitions and secured abundant signers for the recall of those judges. But what a judicial system would you have in this country, State or Federal, if you had a system where, whenever a litigant was disappointed, wherever the public, fed by muckraking newspapers and magazines, were disappointed, at the mere whim of such a sentiment manufactured and created, you could displace a faithful official? What kind of a government would you have? Would you have a government of law and order, or would you have an emotional government, moving about according to the impulses and emotions of the people, misled and misinformed by a press pandering to the basest impulses of human nature and not according to the principle of our Constitution and laws?

Mr. OWEN. Mr. President—

The VICE PRESIDENT. Does the Senator from Minnesota yield to the Senator from Oklahoma?

Mr. NELSON. Certainly.

Mr. OWEN. I merely want to call the attention of the Senator from Minnesota to the tremendous historical fact that the Dred Scott decision, nationalizing slavery without the possibility of amending the Constitution, left no alternative as a remedy except a dissolution of the Union or war, and it led directly to war because there was no control over that judiciary.

Mr. NELSON. Mr. President, I do not want to kindle any of the embers of that war. I only referred to the instance of Chief Justice Taney to illustrate my argument. There is no occasion to go any further into the subject, and I will not follow the Senator in that matter.

Mr. OWEN. If the Senator will go a little further he will see the necessity of it.

Mr. NELSON. Why do we have such constitutional provisions as those the Senator from New York [Mr. ROOR] cited a moment ago? Why do we have such provisions in our laws and constitutions providing for the protection of life, liberty, and property? We have them as a bar and protection against popular clamor and popular demand; we have them for the protection of the meek, the humble, and the lowly; we have them for the protection of the individual against the masses; we have them that popular outcry may not smother the voice of justice; and any judge on the bench who neglects his duty in that respect, in maintaining the principles of our laws and our constitutions, no matter what the popular clamor may be, is unfaithful to his trust, and ought not to remain in office.

Mr. REED. Mr. President—

The VICE PRESIDENT. Does the Senator from Minnesota yield to the Senator from Missouri?

Mr. REED. I did not understand the remark of the Senator.

The VICE PRESIDENT. Does the Senator yield to the Senator from Missouri?

Mr. NELSON. Perhaps the Senator had better wait until I get through, and then I will give him 15 or 20 minutes to answer me. Now, what do I propose by this substitute?

Mr. REED. I will be glad to wait, and I have not any doubt it will be more fortunate for the Senator if I do wait.

Mr. NELSON. The substitute I propose is to approve the constitution of New Mexico as it comes before us without any question. I regard that provision of the constitution of New Mexico, article 18, relating to amendments as fairly conservative and proper, and there is no occasion for submitting that question again to the people.

In respect to Arizona I provide by this amendment that the question shall be again submitted to the people as to the recall of judges. In other words, the amendment does not propose to interfere with the recall of any other officer; it is limited strictly to judicial officers. I framed the amendment so that if the people of Arizona eliminate the recall of judges at the election for State, county, and legislative officers and Representatives in Congress, provided for in the substitute, at substantially the same time as in the case of New Mexico, the constitution of Arizona, like that of New Mexico, stands approved. If the recall of judges is eliminated from the constitution at that election, Arizona will come into the Union at the same time as New Mexico. If my substitute is adopted and becomes a law, the President must at once notify the governors of Arizona and New Mexico, and they must, within 30 days, order and give notice of such election for State, county, judicial, and legislative officers and Members of Congress; and such election must be held not less than 60 days nor more than 90 days after notice, and when the results of such elections are

certified by the governors to the President of the United States, it is his duty, by proclamation, to declare the Territories admitted into the Union as States on a footing of equality with the other States.

Now, in respect to Arizona, I call the attention of Senators to the top of page 3. In order that the election for State officers and for the amendment of the constitution in reference to the recall of judges may take place at the same time as in New Mexico, I have stricken out, in line 4, page 3, the words "within 30 days" and inserted the word "immediately," so that it will read:

That immediately after the passage of this resolution and its approval by the President, the President shall certify the fact to the governor of Arizona, who shall, within 30 days after the receipt of such certificate from the President, issue his proclamation for an election by the qualified voters of Arizona, to be held not earlier than 60 nor later than 90 days thereafter.

That leaves it exactly the same as in the case of New Mexico. If the substitute passes the constitution of New Mexico is approved; and then it is the duty of the President to call the attention of the governor of New Mexico to the fact, who within 30 days issues his proclamation and an election is held.

The word "immediately" is not in the paragraph relating to the constitution of New Mexico. It simply says the President shall give notice after the law is passed. In order to insure the fact that the election for State officers in Arizona shall take place at the same time as in New Mexico, I have put in the word "immediately," so that if the people of Arizona at their election for State, county, legislative, and congressional officers eliminate the paragraph of the constitution providing for the recall of judges they will come into the Union exactly at the same time as New Mexico.

That is my ambition, Mr. President. I feel friendly to Arizona. Some years ago I thought, as some of the older Senators will remember, that Arizona and New Mexico were not ripe for statehood. I think they are now.

The question of politics has never cut any figure with me, Mr. President, but I have a pride in our system of government; I want to maintain its integrity; and I do not want the Congress of the United States to set a bad example in the case of Arizona.

It is said that this constitution is republican in form. It is true that in one sense it is, but in respect to the recall of judicial officers it is entirely different from and not in harmony with the Constitution of the United States.

I was very much interested in the scholarly, exhaustive, and interesting argument of the Senator from Idaho [Mr. BORAH], who seemed, in the main, to look upon the judicial office and the duties of the judiciary as I do, but who said that on account of the principle of self-government we ought to waive our objections and vote for the admission of Arizona anyway. Under the Constitution the Congress of the United States has the power to prescribe under what conditions new States shall be admitted. That power in years gone by, as we all know, was exercised in admitting certain States of the North and admitting certain States of the South. Time and time again Congress has exercised that power. We have a right to say under what conditions Arizona shall come into the Union. What I insist upon, Mr. President, is that while we have this power we shall not stultify ourselves and set an evil example to the whole country and say we will admit Arizona with this judicial recall provision in her constitution. It is to this feature of the case that I have invoked your attention. Had we not better, as legislators, take a broad ground and look upon this question in its intrinsic merits, both in respect to the future and in respect to the past? Had we not better look at this question in the broadest sense and do to Arizona as we should want done to our own States? If this question came before the State of Minnesota—the State that has been my home for 40 years—if the legislature of that State should propose to enact such a recall law as there is in this Arizona constitution, I would oppose it, Mr. President, with all my might. I should oppose it in the interest of law and order and in the interest of good government.

I have faith to believe that if this question is again submitted to the people of Arizona they will have the good sense to eliminate this provision from their constitution. A very slight vote was cast at the last election, much less than half, not much more than 35 per cent of the entire vote. Very little interest was taken in the matter. If this question goes back and the people of Arizona are told, "You can come into the Union; we will receive you with a free hand, but we want you to eliminate this recall of judges." I have faith enough to believe that the people of Arizona will accept that condition and that Arizona will come into the Union as a State just at

the same time that the Territory of New Mexico will come into the Union as a State.

Mr. WORKS. Mr. President, before the Senator takes his seat I should like to ask him a question.

The PRESIDING OFFICER (Mr. BRANDEGEE in the chair). Does the Senator from Minnesota yield to the Senator from California?

Mr. NELSON. I do.

Mr. WORKS. I have listened to this discussion with a great deal of interest. I happened to be out just at the moment that the Senator from Minnesota made some statement in respect to the irrigation laws of New Mexico having something to do with the amendment of the constitution. Would the Senator, for my benefit, restate his position in that regard?

Mr. NELSON. I will restate it, and I will state it in accordance with statements which were made before the committee. The Senator from Oklahoma [Mr. OWEN], the Senator from Indiana [Mr. SHIVELY], and other Senators will bear witness to the fact that the claim was made that those of Spanish descent in New Mexico, the so-called Mexicans, had a different system of irrigation from others; that they had a sort of community system. I did not go into details to ascertain in just what particulars it differed from the other system, but such was the case, and that was the statement made before our committee by two or three gentlemen from New Mexico.

Mr. WORKS. Mr. President, I can hardly understand how that condition of things could exist to such an extent as to affect the rights of individuals to the use of water under the laws as they exist in New Mexico. I am fairly familiar with the irrigation laws as they exist in the Western States. There are two means of acquiring title to water. One is by the purchase of land to which the water is appurtenant as a part of the land. That is the old common-law rule of riparian rights.

Mr. NELSON. I understand that; but I want to correct the Senator. That is not the question. The doctrine of prior appropriation to which the Senator is about to refer—

Mr. WORKS. Yes; I am coming to that.

Mr. NELSON. Prevails in that Territory; but the difference is that in New Mexico among the Spaniards they have a community system. They operate in communities in appropriating the water.

Mr. WORKS. Yes; undoubtedly they have in respect not only to the Spaniards or the New Mexicans, but also with respect to the Americans as well, because that system of taking out the water from the stream is quite common all over the Western States. I am, however, unable to see why that should have anything to do with the question of admitting the Territory of New Mexico or why it should have anything whatever to do with the question of the amendment of the constitution. That was what I was trying to arrive at.

Mr. NELSON. It has nothing to do with the question of admitting New Mexico, but that was one of the reasons that were given before the committee for the provision of the constitution which provided for the adoption of the amendment in the majority of the counties.

Now, to ease the conscience of the Senator, I think I will quote from Thomas Jefferson on this question. I had almost forgotten it.

Mr. WORKS. The Senator does not mean on the irrigation question?

Mr. NELSON. Oh, no; but on the question of submitting the matter and requiring a majority in certain counties. I will refer to what Thomas Jefferson said. He is quoted by Attorney General Wickersham in his speech before the students at Yale University. Speaking on that subject, he said:

Jefferson's proposed constitution for Virginia contained a provision that none of the fundamental laws and principles of government should be repealed or altered but by the personal consent of the people at meetings held in the respective counties, the people of two-thirds of the counties to give their suffrage for any particular alteration.

This Jeffersonian theory of making the alteration of the constitution dependent not only upon a certain percentage of the vote cast, but upon the consent of a specified percentage of the geographical subdivisions of the State, as we have seen, is embodied in the proposed constitution of New Mexico. The first constitution of Georgia required the consent of a majority of the counties to any amendment.

I have read this to show the Senator from California that that provision of the constitution of New Mexico is not a novel one; that it has precedents; that it has met the approval of that great leader of the Democracy, Thomas Jefferson; and it seems to me, Mr. President, where we have the approval of a man like Thomas Jefferson, I, at least, one of the pygmies of this generation, can certainly acquiesce in the doctrine and faith of Thomas Jefferson.

Mr. HEYBURN. Mr. President, before the Senator takes his seat I should like to ask him a question.

The PRESIDING OFFICER. Does the Senator from Minnesota yield to the Senator from Idaho?

Mr. NELSON. I do.

Mr. HEYBURN. I have looked in vain for any provision in the New Mexican constitution which requires that the English language shall be taught in the public schools. Does the Senator from Minnesota, who is a member of the committee, recall any provision that could be construed so as to require the English language to be taught in the public schools maintained at public expense?

Mr. NELSON. Oh, yes; there is an educational provision.

Mr. HEYBURN. I have looked at the educational provision, but I do not find that it provided that the English language should be taught in the public schools.

Mr. NELSON. Those provisions are in the laws of the Territory, and they have always been the law.

Mr. HEYBURN. No. When New Mexico was making a constitution in 1859 the people there voted down by an affirmative vote a provision requiring the English language to be taught in the public schools. I have borne that in mind ever since, having it in mind never to support the admission of any Territory that refused to require the English language to be taught.

Mr. NELSON. The enabling act provides for that, and the constitution which was adopted approved the enabling act.

Mr. HEYBURN. I have just been looking through the constitution, and I fail to find any provision that could be so construed.

Mr. NELSON. I will find it and insert it in the RECORD.

Mr. HEYBURN. There is a provision with reference to the employment of teachers, but I do not think that goes to the question.

Mr. NELSON. Mr. President, I will look up that paragraph of the constitution later.

Mr. HEYBURN. I asked the question for information.

Mr. NELSON. To sum up briefly, Mr. President, my substitute approves the constitution of New Mexico as it is. With that approval enacted into law, the people there must hold an election, notice of which must be given within 30 days by the governor, and the election must take place not earlier than 60 and not longer than 90 days after the notice of the governor. On the return of the vote for the election of State officers, county officers, legislative officers, judicial officers, and Members of Congress to the President of the United States, it is made his duty by proclamation to declare the admission of the Territory into the Union on an equal footing with the other States of the Union. The same provisions apply to Arizona ex industria. I have put into the amendment a provision that the President must give notice immediately after the passage of this joint resolution to the governor of Arizona. The governor must then within 30 days issue his notice of the election, and that election must be held not earlier than 60 and not later than 90 days after such notice. At that election all the officers that I have mentioned in respect to New Mexico—that is, county officers, State officers, judicial officers, members of the legislature, and Members of Congress—must be voted for, and then the people of Arizona must vote on eliminating that part of article 8 of the proposed constitution relating to the recall of judges. Nothing else is proposed to be eliminated. We do not interfere with the provision for the recall of any other officer. The vote is simply limited to the recall of judges. I believe the people of Arizona will eliminate that provision if it is submitted to them; and, if they do, the Territory of Arizona will come into the Union on an equal footing with New Mexico and at the same time, and no one can claim any political advantage in either direction.

Mr. CRAWFORD. Mr. President, the Senate has been in session for several hours, and the discussion has been so intensely interesting and has been followed so closely that I appreciate the fact that it is late in the afternoon to begin a discussion with the hope of holding the attention of the Senate much longer; but my convictions, Mr. President, are so strong against what is called the recall of judges, as proposed in the constitution of Arizona and as a general proposition, that I could not forgive myself were I to remain silent and before the matter reaches a vote fail to utter a few words of protest.

Mr. President, I have the honor in part to represent a State which has gone almost as far as any other State in the Union in the direction of the adoption of constitutional provisions intended to emphasize what has been called popular government. That State was the first State in this Union by popular vote to incorporate as a part of its constitution the provision known as the initiative and the referendum. It did so before Oregon adopted such a system. South Dakota enacted that provision in 1893 by a large and decisive majority, and recently it enacted a law by which it has made provision for what is known as the commission form of government in its cities of the first class, and the law providing for the government of these cities by commission contains a provision for the recall of municipal officers.

I will state frankly, Mr. President, that I am in sympathy, so far as States like the one I represent are concerned at least, with the provisions that have been put into constitutions for the purpose of enabling the people in emergencies to compel action upon matters concerning which legislatures have apparently been reluctant about carrying out the popular will. I believe that in a State like South Dakota the initiative is a good thing. I believe that in a State situated as South Dakota is the referendum is a good thing. I am not here to say that, because in experience it has proven itself a good thing in South Dakota, it ought to be thrust upon the people of a great State like New York, with 7,000,000 people. I do not know; I am not here to assume and to state in any dogmatic manner that it would be a success there; but, so far as the Commonwealth which I in part represent is concerned, with less than a million population, a population uniformly intelligent and not in such large numbers as to make it impracticable, it is a good thing; and to-day, after the trial of these years, if a proposition were submitted to the people of that State to take the initiative and referendum out of our constitution, the proposition would be overwhelmingly defeated. So I speak, Mr. President, as one who, so far as his experience and his connection with the people of a single Commonwealth are concerned, is in sympathy with very much that has been said and is being said all over the country in behalf of popular government. I believe that there is virtue in a provision which enables the people of a city which has a corrupt council or a corrupt city official to invoke the recall.

But, Mr. President, I am here to state that I do not find it in conformity with my own judgment and conscience to go further in direct legislation. I am not in sympathy, to be frank about it, with the proposition for a recall when it is applied to State officers elected for the period of two years only. I think in a case of that kind it is a handicap and can not possibly be a benefit. Why? Because a State officer, a governor, elected for only two years, can scarcely begin to carry out a single feature of his administration until, if a petition for his recall should be filed, the process of administration and execution of his policies will be interrupted, and two years will slip by, and the purposes for which he was elected and the work he sought to perform will be defeated by this interference by a recall where the period of office is for only two years. In the case of a governor of a State, elected for two years, sworn in, with a new legislature on his hands, with a new corps of State officers, with a legislative program that he expects to carry out, a small portion of the electors of the State by circulating a petition for a recall would involve him in a special election within a few months after he was installed in his office.

I say that in effect that proposition, as applied to these short terms, will be not only an instrument of obstruction and demoralization, but it has in it no protection for the public. I believe that the recall in that case, which is sufficient, is the recall which occurs in the recurring election every two years, when the officer must go before the people of his State and submit for their approval the record he has made for the two years, and if he can not satisfy them as to his efficiency and his honesty there is all the opportunity necessary for his recall. But when you go beyond that point and propose to place in the hands of a small number the power to file a petition and recall judges a step has been taken which means revolution.

From the arguments that have been made on this floor one would imagine that a judge or a State officer is a mere representative of the majority and no one else. I admit that if I go out in my State as a candidate on a platform framed by a convention of my party, embracing certain propositions, and my opponent goes out before the people of that State upon a platform presenting certain propositions advocated by his party, and we make a square issue upon those subjects, and we go out and discuss before the people of that State the issues involved, and wage a contest as to whether or not they shall give their approval to the propositions that he and his party are presenting or the opposing propositions that I and the party with which I am connected are presenting, and I win, the majority of the electors of the State deciding in favor of the propositions advocated by my party, then I, as well as the party I represent, am under obligation to enact the laws specifically pledged and specifically declared for in the campaign; to that extent, and that extent only, do I represent the majority.

But, sir, when it comes to the general administration of my office, such as the assessment of the property of the railways in my State, the telegraph companies in my State, the express companies in my State, the insurance companies in my State, the property of individual owners scattered over my State—when I act upon an assessing board to determine what the valuation of property shall be, so that there shall be a fair distribution of the burdens of government in my State, and

upon general subjects of administration based upon justice and equity, which may not have been involved in the campaign at all—may not have been in issue by any party in the campaign, and which all parties sustain—do I represent the majority? No. I represent every single property owner in my State, whether that property owner is a Socialist or a Democrat or a Republican or an anarchist. My obligation to him is just as sacred and just as binding upon me as a public officer, even though he be a member of the smallest and most insignificant political organization in the State, as it is to the party to which I belong.

Does anyone contend that my acts as a public officer are acts for which I am responsible to the majority only, and that if those acts do not meet with the approval of the temporary majority that majority shall have the right to dictate what I shall do? And if I fail to obey they shall have as a weapon by which to intimidate me the fear that unless I do obey the wish of that fleeting majority of to-day, which may be the minority to-morrow, I shall be involved at once in a fight for my political existence, or in a fight to retain the official position which I hold? Does anyone contend for a moment that the people of this country support, or wish to support, or have asked that we support in their behalf any such proposition as that, sir? I answer that they have not. They are quite content to wait until the expiration in regular course of these short biennial terms for State officers and to pass upon their claims for longer service at the frequently recurring elections held for that purpose. Except that, of course, in every State provision is made for removing all corrupt State officers by impeachment.

We run wild over some of these things, but I am not going to use ridicule in connection with them. A judge is not selected as a representative of the majority. The majority determines who shall be the judge in States where judges are elected. That, however, is simply the settlement of the method of selecting the judges. When they are selected by that method, the instrumentality and influence of the majority, so far as they are concerned, are at an end. The majority has simply performed its function in selecting the judge, and the moment he is installed he represents all the people, including the most humble, the weakest individual in the community. His obligation to the most unfortunate member of society, the man or the woman without friends, without property and helpless, is just as sacred, if not more sacred, than his obligation to the majority. His obligation to such is just as sacred, if not more sacred, than it is to the political party of which he is a member and whose suffrages put him in that position. The American people are told upon the floor of the Senate that the member of a court is a mere representative of the majority. What is that majority? It may to-day be made up of one class, the radical element; at the next election it may be made up of what we call the conservative element.

The pendulum swings back and forth. Are the laws to be changed every time the pendulum swings hither or yon? Shall the majority have the right to say: "Because we were the minority when one set of judges was put in power and rendered one class of decisions, now that we are in the majority we will put some new judges on the bench, and we will tear down the precedents heretofore written; we will overthrow the rulings heretofore made. The question of vested rights, the question of individual rights, the question of religious liberty, the question of the rights of a race, the question regarding any other right whatsoever shall be decided now according to our will—the will of to-day, which is different from the will of yesterday."

Oh, the American people have never asked for such a thing as that; and, Senators, those of us who stand for what are called progressive policies, who have made fights in our States for the regulation of corporations and the correction of abuses and the privilege of the humblest voter to have a voice in the selection of candidates for office, so that the candidates of his party shall be selected by the majority of his party rather than in the private offices of some great corporation—we have made a fight for victories won here and there; we have promoted and strengthened a great movement for better government, but I tell you we will destroy it all and sweep it all away if we show that we have not sufficient good sense and control over ourselves to know when and where to stop.

Are we going to stand for the removal of judges because their temperament is not the radical temperament that you and I and John Smith and John Brown possess? Are we going to remove judges—conceding them to be honest and brave and courageous—because we say "their leanings were a little too much on the side of property, according to our view, and not quite strong enough on the side of humanity; and, therefore, while we will not hurt their feelings by putting in the petition for their recall

that we object to them on that ground, we will nevertheless petition for their recall? We will treat them kindly, and after we have put them out of office we will pension them; but we will gently put them aside, because temperamentally they are not in harmony with us." We have heard talk of that kind here. Does anybody believe that it will meet the approval of the American people?

Do you think the American people, with all their traditions, with their history, with their love for their courts and the institutions of their land, are going for one moment to follow a leadership that preaches a doctrine like that?

Mr. SMITH of Michigan. Does the Senator from South Dakota desire to conclude this evening?

Mr. CRAWFORD. I do not care to proceed further this evening unless it is desired.

Mr. SMITH of Michigan. Mr. President—

The PRESIDING OFFICER (Mr. BRANDEGEE in the chair). Does the Senator from South Dakota yield to the Senator from Michigan?

Mr. CRAWFORD. Yes.

RECESS.

Mr. SMITH of Michigan. The Senate has been in session since 10 o'clock this morning. It is very apparent we are not going to reach a vote to-day. After conferring with numerous Senators I think it desirable that we take a recess until tomorrow morning. I therefore move that the Senate take a recess until 11 o'clock to-morrow morning.

The motion was agreed to, and (at 4 o'clock and 55 minutes p. m.) the Senate took a recess until to-morrow, Tuesday, August 8, 1911, at 11 o'clock a. m.

HOUSE OF REPRESENTATIVES.

MONDAY, August 7, 1911.

The House met at 12 o'clock m.

Prayer by the Chaplain, Rev. Henry N. Couden, D. D., as follows:

Our Father in heaven, we bless Thee for the onward march of civilization witnessed on every hand. Through the discoveries and ingenuity of man the elements have been harnessed and made to do the bidding of intelligence. The world is growing smaller; intellectual, moral, and spiritual liberty is growing larger. The peoples of all the earth are becoming better acquainted with each other, and the things which make for righteousness are in the ascendancy. God grant that the time may speedily come when all men shall look up to Thee and worship Thee as Father and live together as brothers, each vying with each to make this dear old world a better and happier dwelling place for all Thy children. And glory and honor and praise be Thine forever. Amen.

The Journal of the proceedings of Saturday, August 5, 1911, was read and approved.

LEAVE OF ABSENCE.

By unanimous consent, leave of absence was granted to—

Mr. LINDSAY, for the remainder of the session, on account of sickness.

Mr. BOEHNE, indefinitely, at the request of Mr. ADAIR, on account of sickness.

ENROLLED BILL PRESENTED TO THE PRESIDENT FOR HIS APPROVAL.

Mr. CRAVENS, from the Committee on Enrolled Bills, reported that this day they had presented to the President of the United States for his approval the following bill:

H. R. 2983. An act for the apportionment of Representatives in Congress among the several States under the Thirteenth Census.

CALENDAR FOR UNANIMOUS CONSENT.

The SPEAKER. This being suspension day, the Chair will direct the Clerk to call the Calendar for Unanimous Consent.

BARON VON STEUBEN.

The first business on the Calendar for Unanimous Consent was House concurrent resolution 3, which the Clerk reported by title.

Mr. MANN. Mr. Speaker, can we not have the resolution reported?

The SPEAKER. The Clerk will report the resolution. The Clerk read as follows:

House concurrent resolution 3.

Resolved by the House of Representatives (the Senate concurring), That there shall be printed and bound in the form of eulogies, with accompanying illustrations, 17,100 copies of the proceedings upon the unveiling of the statue of Baron von Steuben in Washington, December 7, 1910, of which 5,000 shall be for the use of the Senate, 10,000 for the use of the House of Representatives, 2,000 to be delivered to the

National German-American Alliance for such distribution as said alliance may desire to make, and the remaining 100 copies shall be bound in full morocco and distributed through the Department of State to the descendants of Baron von Steuben and the speakers who took part in said celebration.

The SPEAKER. Is there objection to the present consideration of the resolution reported by the Clerk? [After a pause.] The Chair hears none, and the gentleman from Illinois [Mr. MANN] is recognized for one hour.

Mr. MANN. Mr. Speaker, I ask unanimous consent that the gentleman from Wisconsin [Mr. BERGER] be permitted to address the House for 10 minutes.

The SPEAKER. The gentleman from Illinois has one hour, and if he wants to yield 10 minutes of it he may.

Mr. MANN. Then, Mr. Speaker, I yield 10 minutes to the gentleman from Wisconsin [Mr. BERGER], although I do not understand that I have one hour.

Mr. BERGER. Mr. Speaker, I deem it proper to make on this floor a brief preliminary statement regarding the old-age pension bill which I introduced last Monday.

Within a year you will all have to make up your minds on this subject. You will have to determine where you stand. A mighty wave of demands for the passage of some such law will roll in from every section of the country, and the issue will have to be met.

AMERICA BACKWARD IN SOCIAL LEGISLATION.

The working men and working women of this country are entitled to be taken care of in their old age. Most of them receive, in return for their labor, so small a part of what they produce that all of it is expended in merely keeping alive. Since the average wage in our country is probably not more than \$400 a year, it is obvious that it is impossible for at least half of the population to save up anything for old age.

The working class is not better off in the matter of wages in any other country. But in many of the other countries the duty of society to the aged is recognized. Old-age pension laws have been passed in the principal nations of Europe, in the Antipodes, and even in one American nation. Germany, Denmark, Italy, Austria, Great Britain, France, Canada, Australia, and New Zealand have all enacted such laws.

As usual, where legislation for the protection of the working class is concerned, the United States is lagging behind. The Republican Party put such a plank in its platform of 1900, but the Republican Congress did nothing in the matter, and the plank has disappeared from subsequent platforms.

CONDITION OF AGED WORKERS GROWING WORSE.

There can be no doubt that the condition of the aged workers has grown worse in this country during the last 30 years.

And for this reason:

Our country is rapidly changing from an agricultural to a manufacturing country.

On the farm it is comparatively easy to take care of the aged. Especially was it so in former days when living was cheap.

There is plenty of room on the farm. And even old people can usually do some chores—enough to make up for the slight expense of their keep.

It is thus no special hardship for their friends and relatives to take care of them.

The case is entirely different with the urban workers. The maintenance of their old folks by the wageworkers of the cities—especially where these men and women have children to take care of—is nowadays simply impossible.

Aged working men and working women therefore soon become objects of private or public charity.

After having lived a life of usefulness, the working men and working women of the country—the men and women who create all wealth—are usually subject to all the indignities, the sordidness, and misery of the poorhouse or the system of "outdoor relief."

No wonder there are so many tragedies. Men and women of finer sensibilities prefer death to this humiliation. [Applause.]

THE TRAGEDY OF DESTINATE AGE.

The aim of every normal man and woman is an old age free from care and want. To that end most of them toil patiently and live closely, seeking to save something against the day when they can earn no more. And yet the same fate awaits the overwhelming mass of them. In the life of the toiler there are weeks, and sometimes months, of enforced idleness, weeks of unavoidable illness, losses from cheating and swindling, and then, as age creeps on, from about his forty-fifth year, a constantly declining capacity to earn, until at 55 or 60 he finds himself helpless and destitute. There is hardly a more pitiful tragedy than the lot of the toiler who has struggled all his life to gain a competence and who at 60 years faces the poorhouse.