

COMMENTS

Electoral Recall in Washington State and California: California Needs Stricter Standards to Protect Elected Officials from Harassment

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I. INTRODUCTION

The 2003 recall movement in California, which culminated in the removal of Governor Gray Davis from office and his replacement with Hollywood action-hero Arnold Schwarzenegger, is a bizarre twist in U.S. politics that raises some thorny political and legal questions.¹ By following the procedures set forth in the California Constitution² and the California Elections Code,³ a group of California voters discontent with Davis's governorship successfully removed him from office and replaced

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1. On October 7, 2003, voters approved the recall of Governor Davis and elected Arnold Schwarzenegger as Davis's replacement. The election results are as follows:

Shall GRAY DAVIS be recalled (removed) from the office of Governor?

Yes 4,976,274 (55.4%)

No 4,007,783 (44.6%)

Leading Candidates to succeed GRAY DAVIS as Governor if he is recalled:

Arnold Schwarzenegger (Rep.) 4,206,284 (48.6%)

Cruz M. Bustamante (Dem.) 2,724,874 (31.5%)

Tom McClintock (Rep.) 1,161,287 (13.5%)

CALIFORNIA SECRETARY OF STATE KEVIN SHELLEY: ELECTION RESULTS AND DATES (2003), at http://www.ss.ca.gov/elections/elections_elections.htm (last visited July 10, 2004) [hereinafter ELECTION RESULTS].

2. CAL. CONST. art. II, §§ 13-19 (1976).

3. CAL. ELEC. CODE §§ 11000-11386 (West 1996).

him with a candidate with no political experience but broad popular appeal and independent wealth.⁴

The potential for political chaos resulting from the California recall did not go unnoticed by California voters⁵ and gave rise to broad, statewide support for reform of the recall system.⁶ California voters realized what was apparent to many onlookers: The recall significantly disrupted the political system in California and stalled the normal functioning of the government. The recall election forced Governor Davis to campaign relentlessly to maintain his job and distracted him from his constitutionally prescribed duties as the chief executive of California.⁷ While it is too soon to determine whether anything positive, such as a revitalization of the California economy, will come out of this drastic recall measure, it is unlikely that California's political system will be able to withstand similar disruptions in the future. Thus, California's recall system must be reformed.

Many states have mechanisms to recall statewide elected officials, but these recall systems do a better job of minimizing the potential for political chaos than does the California system. In comparing the recall schemes of Washington State and California, for example, it is apparent that the California recall mechanism suffers from constitutional defects

4. Before the recall election, Schwarzenegger's assets were estimated at more than \$68 million. Lance Williams, *FINANCES: Actor's First Disclosure of Money Muscle*, S.F. CHRON., Aug. 10, 2003, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/chronicle/archive/2003/08/10/ARNOLD.TMP> (last visited July 10, 2004). The most recent two installments of Schwarzenegger's "Terminator" franchise, *Terminator 2: Judgment Day* and *Terminator 3: Rise of the Machines*, have together grossed almost a billion dollars worldwide in box office sales. *The Top 200 Highest Grossing Movies of All-time (Worldwide)*, at <http://www.insiders.com/gross/top150-world.php> (last updated July 10, 2004).

5. See, e.g., *With New Ads, California Recall Takes Nasty Turn* (Sept. 24, 2003), at <http://www.cnn.com/2003/ALLPOLITICS/09/24/judy.desk.recall/> (last visited July 2004) ("Meanwhile, the group Californians Against the Costly Recall released its own ad with a grim warning: 'Whoever takes over, the bad feelings and political chaos may get even worse.'"); Jake Tapper, *Recall the Recaller? Calif. Democrat Raises Possibility of a Retaliatory Bid* (Aug. 4, 2003), at http://abcnews.go.com/sections/wnt/Politics/calif_recall030804.html (last visited July 10, 2004) ("Some believe California's turmoil may not be over in October, and the rest of the country shouldn't necessarily greet the current and future California chaos with bemusement.").

6. According to a poll conducted by the San Francisco Chronicle, approximately sixty percent of California voters believe that the recall process, while a valuable tool, should only be used when there is an illegal or unethical activity by an elected official, and most voters polled believed that there should be stricter petitioning requirements in the recall process. Linda Gledhill, *Most Voters Support Changing Recall Steps*, S.F. CHRON., Oct. 16, 2003, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/10/16/MNGBH2CATD1.DTL> (last visited July 10, 2004).

7. See John Canalis, *Ex-Governors Weigh in on Recall*, Pasadena Star News, Aug. 25, 2003, available at <http://www.pasadenastarnews.com/Stories/0,1413,206%257E25101%257E1591525,00.html> (last visited July 10, 2004).

and unnecessarily exposes elected officials to political harassment. The most notable constitutional defect California's recall mechanism has is the signature-gathering requirement, which discriminates against non-registered voters, and thus violates the First Amendment. Since revision is necessary to remedy this constitutional defect and to fulfill the demands of California voters,⁸ California legislators should begin such legislative efforts.

In order to meet California voters' demand that recall be available only when an elected official has engaged in illegal or unethical conduct,⁹ California legislators should fashion their new recall system after the one used in Washington State. Washington's recall model not only does not suffer from the constitutional defects of the California provisions, but also more adequately balances the need to protect elected officials from harassment and the desire to give the citizens of a state some direct influence over their elected officials. California legislators should thus work to create this kind of balance by amending its flawed recall process to mimic Washington's effective recall system.

This article highlights the weaknesses of the electoral recall mechanisms in California and the way in which the Washington recall process has avoided such weaknesses. Part II provides general background information on the development of recall mechanisms. Part III explores how the United States Supreme Court has ruled on recall attempts and the specific guidance the Court has provided for states in developing adequately protective recall processes. Part IV analyzes the strengths and weaknesses of the California recall provisions by examining the recall-related opinions of California courts and the complexities of Governor Davis's recall. Part V provides a solution to the California dilemma by exploring an alternative form of recall established in Washington, examines both the constitutional and statutory provisions of Washington's recall mechanism, and analyzes Washington courts' interpretation of these provisions. After comparing the two recall regimes, Part V argues that the Washington mechanism is superior to California's process. Finally, Part VI urges California legislators to promote the true purposes of recall by ensuring government accountability and public participation while minimizing the risks of hindering the government functioning that such harassment of elected officials tends to elicit.

8. Gledhill, *supra* note 6.

9. *Id.*

II. BACKGROUND

A. The Populism Movement Led to the Adoption of the Recall, the Initiative, and the Referendum by Many States.

The movement for recall in the United States was fueled by concerns similar to those that served as the impetus for the initiative and referendum in many states: a fear that state governments were no longer accountable to the people.¹⁰ The Populist and Progressive movements at the end of the nineteenth century and the beginning of the twentieth century created these mechanisms of direct democracy.¹¹ The adoption of these procedures was founded on the principle that elected officials are merely agents of the people and, accordingly, the people should have the power at all times to control their agents' activities.¹² This increased desire for popular controls over government came about because of widespread corruption and election fraud during that period.¹³ Thus, initiative and referendum procedures were specifically adopted as a way of allowing the people direct influence over the laws that governed them.¹⁴ Similarly, in light of the growing distrust of elected officials,¹⁵ recall provisions gave the people the ability to keep their decisionmakers on close leashes, thereby promoting the accountability of representative government.¹⁶

Although early twentieth century efforts at direct democracy came about to increase public control over elected officials, these measures have also been seen as a way to increase public participation in

10. CHARLES A. BEARD & BIRL E. SHULTZ, DOCUMENTS ON THE STATEWIDE INITIATIVE, REFERENDUM AND RECALL 52 (1970).

11. *Id.*; see generally, LAURA TALLIAN, DIRECT DEMOCRACY: AN HISTORICAL ANALYSIS OF THE INITIATIVE, REFERENDUM AND RECALL PROCESS (1977) (history of Populism movement).

12. BEARD, *supra* note 10.

13. INITIATIVE, REFERENDUM, AND RECALL: DIRECT DEMOCRACY IN THE UNITED STATES, Major Studies and Issue Briefs of the Congressional Research Service, CRS-1, 1992 Supp., No. 91-752-GOV (Univ. Publications of Am.) (hereinafter INITIATIVE, REFERENDUM, AND RECALL).

14. BEARD, *supra* note 10, at 22; see also INITIATIVE, REFERENDUM, AND RECALL at CRS-1-CRS-2:

Initiative is the process by which voters propose and enact laws or constitutional amendments, independent of legislatures. A requisite number of voters sign petitions for an initiative to be placed on the ballot. If a majority of voters approve the initiative at a statewide level, it is enacted. Most states prohibit initiatives on certain issues. Referendum provides a mechanism by which voters may approve or disapprove of statutes which have already been enacted. Referenda fall into three categories: citizen petition to approve or disapprove statutes enacted by the state legislature; voluntary referral of a law by the legislature; and referral of certain questions to voters as required in state constitutions. Procedural for referendum by citizen procedure are similar to those for initiatives.

Id.

15. INITIATIVE, REFERENDUM, AND RECALL at CRS-1.

16. See BEARD, *supra* note 10, at 52.

government.¹⁷ During the twentieth century, voter turnout on a national level decreased substantially.¹⁸ Allowing the public to exert more direct control over government officials through recall elections may provide voters with the sense that their vote is actually important. This phenomenon was demonstrated in the recent California recall election, in which voter turnout was significantly higher than in previous gubernatorial elections.¹⁹

B. Direct Democracy Has Been Misused.

While electoral recall, initiative, and referendum are rooted in policies of democratic principles such as public participation in government and the accountability of elected officials, this type of public power is not without its dangers. Because the electorate is not constituted of only lawyers, politicians, and economists, the electorate may not necessarily understand the delicate balance that keeps government working. Therefore, direct democratic procedures create the possibility that voters might blame their economic or other hardships on elected officials who might not be responsible for their problems. Moreover, while direct democracy can foster the ideals of populism, direct measures also allow special interest groups to bypass legislative safeguards and directly influence the public.²⁰ Just as the initiative and referendum processes bypass the safeguards of the legislative system,²¹ the installation of new leaders through an electoral recall bypasses the normal protections of a republican form of government. Essentially, a recall regime with weak standards, such as California's, deteriorates an elected official's ability to take actions that may have negative short-term consequences but favorable long-term consequences. By having a term of years secured without the threat of recall except for illegal or unethical

17. See, e.g., David B. Maglebe, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. LAW REV. 13, 43 (1995).

18. According to the Federal Elections Commission, voter turnout in presidential elections has been on a steady decline since the 1960s, from more than 62% in 1960 to barely more than 50% in 2000. FEDERAL ELECTIONS COMMISSION, ABOUT ELECTIONS AND VOTING, at <http://www.fec.gov/elections.html> (last visited July 19, 2004).

19. In the 2003 recall election 61.20% of registered voters cast ballots. In contrast, in the 2002 general election in which Governor Davis was elected for his second term in office, only 50.57% of registered voters cast ballots. ELECTION RESULTS, *supra* note 2.

20. Daniel M. Warner, *Direct Democracy: The Right of the People to Make Fools of Themselves; The Use and Abuse of Initiative and Referendum. A Local Government Perspective*, 19 SEATTLE U. L. REV. 47, 86 (1995) (providing several examples of the misuse of the initiative and referendum in Washington State); Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 439 (1998) ("the absence of deliberation, low and uneven voter turnout, voter ignorance, the influence of money, and special-interest capture all undermine the responsiveness of direct democracy").

21. See Warner, *supra* note 20, at 88.

acts, as in Washington, elected officials are better able to consider the long-term effects of their policies.

*C. The Histories of Recall in California and Washington
Are Largely Identical.*

1. California

In 1911, electoral recall was added to the California State Constitution as Article XXIII, section 1.²² This was largely a response to the dominance of railroad companies over California's economics and politics.²³ As a result of public resentment of the railroads' control of government, the Progressive candidate for governor, Hiram Johnson, won the general election in 1910.²⁴ During this movement, the Progressive Party stressed the importance of the provision in the 1849 and 1879 California State Constitutions that "[a]ll political power is inherent in the people."²⁵ The Progressive position was that "direct democracy" would allow the public to act as a check on the power of the legislature and special interests²⁶ and ensure that the public's "inherent" power is not usurped. Governor Johnson expressed specific interest in direct democratic processes such as the initiative, the referendum, and the recall.²⁷ In tandem with the Progressive majority in the legislature, Governor Johnson proposed the constitutional amendments that created the initiative, referendum, and recall procedures, which were adopted by voters on October 10, 1911.²⁸

Until its repeal and codification in the California Elections Code in 1970, the recall amendment remained largely unchanged.²⁹ After codification, the remaining provisions were renumbered as Article II, sections 13 to 19, and adopted in 1976.³⁰ This codification arose from a

22. JOSEPH R. GRODIN ET AL., *THE CALIFORNIA STATE CONSTITUTION: A REFERENCE GUIDE* 75 (1993).

23. *Id.* at 16–17.

24. *Id.* at 17.

25. CAL. CONST. art. I, § 2 (repealed 1980); GRODIN, *supra* note 22, at 17.

26. GRODIN, *supra* note 22, at 17.

27. *Id.*

28. *Id.* at 17–18.

29. *Id.* at 75.

30. This was accomplished through the passage of California Proposition 9, in 1974. Proponents of this revision argued that a "YES vote on Proposition 9 will apply the people's right to recall public officials more uniformly and will clarify the signature-gathering process. It will also eliminate inequities in the existing 'grace period,' which is the time between an officer's election and the time when a recall drive may begin." *California Voter's Pamphlet*, General Election November 5, 1974, available at http://holmes.uchastings.edu/ballot_pdf/1974g.pdf (last visited July 10, 2004).

1959 study recommending that the constitution be entirely revised to make it more streamlined.³¹ During this reorganization, although most of the provisions were simply renumbered, some substantive changes were made to the recall procedures.³² Most importantly, recall was expanded to include officers of county boards of education and normalization of recall procedures for statewide and local officials.³³

2. Washington

The recall provisions in Washington were adopted in response to many of the same pressures that spawned the recall movement in California. In the 1880s, significant railroad construction took place in Washington, spurring major population growth in the region.³⁴ Resentment at railroads and other large corporations grew because of their monopolistic practices, political abuses, and a belief that corporations had too much influence over legislators and government officials.³⁵ As in California, this distrust manifested itself by the development of the Populist Movement, which established its own political party shortly after Washington gained statehood.³⁶ The Populist philosophy was based on distrust of legislatures and corporate influence in government and a belief that direct democracy was a way to combat corruption.³⁷ The Populists elected to office succeeded in adopting a number of direct democracy provisions in the state constitution, including the initiative, the referendum, and the recall.³⁸

D. California and Washington Are Not Alone in Adopting Recall Measures.

Eighteen states, the District of Columbia,³⁹ and Guam⁴⁰ have adopted statewide recall procedures and thirty-six states have allowed

31. Before these revisions, the California Constitution was ten times longer than the federal constitution, and was the second longest state constitution. GRODIN, *supra* note 22, at 19.

32. See THE LAW OF POLITICS: FEDERAL & CALIFORNIA FAIR POLITICAL PRACTICES & ELECTION LAWS 371 (Thomas G. Reddy, ed., 1978) (hereinafter LAW OF POLITICS).

33. *Id.* at 97-99.

34. Between 1880 and 1890 the population of the territory to become Washington State grew from 75,000 people to around 350,000. ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 11 (2002).

35. *Id.*

36. *Id.*

37. *Id.* at 12.

38. *Id.*

39. Jennie Bowser, *Recall of State Officials*, National Conference of State Legislatures, at <http://www.ncsl.org/programs/legman/elect/recallprovision.htm> (last modified June 23, 2003).

40. See *Gutierrez v. Ada*, 528 U.S. 250 (2000).

electoral recall in local jurisdictions.⁴¹ Despite these numbers, there have only been two successful recalls of governors to date.⁴² All recall provisions share three elements. First, all require a petition signed by a certain number of voters to start the recall process.⁴³ For a statewide recall, this percentage varies from 10 percent in Montana to 33.3 percent in Louisiana.⁴⁴ Second, all have some type of certification or review of the sufficiency of the recall petition.⁴⁵ Review standards vary among states, from merely procedural requirements in California, to a review of the sufficiency of the charges in Washington. Finally, all require the election or appointment of a successor to the now-vacant office.⁴⁶

States use three different methods to appoint a successor.⁴⁷ The most well-known method—adopted in California—conducts the recall election and the election for the replacement official simultaneously.⁴⁸ The second method conducts the recall election first, and if the recall is successful, then conducts a separate election for the successor.⁴⁹ The third method appoints a successor after a statewide official has been recalled.⁵⁰ This third method, used in Washington, minimizes the potential for a recall to deteriorate into a California-style popularity contest.⁵¹

41. Bowser, *supra* note 39. There are state-wide recall provisions in the following states: Alaska, Arizona, California, Colorado, Georgia, Idaho, Kansas, Louisiana, Michigan, Minnesota, Montana, Nevada, New Jersey, North Dakota, Oregon, Rhode Island, Washington, and Wisconsin.

42. The first recall of a governor was in 1921 when North Dakota voters successfully recalled Governor Lynn J. Frazier. The second was in 2003 when California voters successfully recalled Governor Gray Davis. *Id.*

43. *Id.*

44. *Id.* California requires only 12 percent, while Washington requires 25 percent.

45. *See id.*

46. *Id.*

47. *Id.*

48. Other states that have adopted this method are Arizona, Colorado, Nevada, North Dakota, and Wisconsin. *Id.*

49. States that have adopted this method are: Georgia, Louisiana, Michigan, Minnesota, Montana, New Jersey, Oregon, and Rhode Island. *Id.*

50. States adopting this method are: Alaska, Idaho, Kansas, and Washington. *Id.*

51. *See, e.g.*, Gene Sperling, *In California, All Votes Not Created Equal* (Sept. 12, 2003) at http://quote.bloomberg.com/apps/news?pid=10000039&sid=aVNRyKj34NLM&refer=columnist_sperling (last visited July 10, 2004) (“This worrying outcome posed by the California [recall] law could set a particularly damaging precedent when states are facing harsh budget deficits. Let’s face it, no one likes the painful choices to close a deficit, whether they are tax increases, spending cuts or some mix of the two. Deficit reduction is often about finding the least bad of very unpopular and ugly fiscal choices. The crucial test shouldn’t be whether a governor’s tough choices lose a popularity contest, but whether there is a viable alternative that more people support.”).

III. THE UNITED STATES SUPREME COURT ON RECALL

Although the Supreme Court has not focused significant attention on electoral recall, it has recognized the validity of the recall process. A few opinions shed some light on the Court's position on the validity of various states' recall processes and on policy considerations that should be taken into account when analyzing the sufficiency of any recall mechanism. The following subsections outline U.S. Supreme Court cases dealing with electoral recall issues and highlight the most important policies the Court has considered when examining the validity of direct democracy mechanisms.

A. The Court Recognizes the Validity of Recall.

The mere fact that the Supreme Court has ruled on recall issues implicitly condones the use of recall by the states. For example, in *Republican Party of Hawaii v. Mink*,⁵² Justice Rehnquist considered an emergency appeal by appellants, two recalled Honolulu city council members who had lost a local recall election.⁵³ Appellants sought to run in the special election to fill the vacancies caused by their own recall.⁵⁴ Appellants argued that the Court should either order a stay of the order by the Supreme Court of Hawaii preventing them from running, or enjoin the conduct of appellee, the city clerk of Honolulu, from refusing to put appellants' names on the recall ballot.⁵⁵ Appellants' theory was that the recall provisions of the Honolulu City Charter violated the federal constitution as interpreted by the Supreme Court in *Anderson v. Celebrezze*.⁵⁶ The Ninth Circuit concluded that the ordinance was unconstitutional, but the Supreme Court of Hawaii, adopting a narrow interpretation of the ordinance to avoid the constitutional problems,

52. 474 U.S. 1301 (1985) (Rehnquist, C.J.).

53. Hawaii is one of the states that allows for recall of local elected officials, but does not have a statewide electoral recall process.

54. *Mink*, 474 U.S. at 1302.

55. *Id.* at 1301, 1302.

56. 460 U.S. 780 (1983). *Anderson* involved an Ohio law requiring an independent candidate for President to file a statement of candidacy eight months before the election in order to appear on the ballot. *Id.* at 780. The *Anderson* Court held that the Ohio law burdened "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters . . . to cast their votes effectively." *Id.* at 787. Finding this burden to "unquestionably outweigh the State's minimal interest in imposing a March deadline," the *Anderson* Court invalidated the Ohio statute. *Id.* at 806. In *Mink*, petitioners argued that the Honolulu City Charter, requiring that "[n]o person, who has been removed from his elected office or who has resigned from such an office after a recall petition directed to him has been filed, shall be eligible for election or appointment to any office of the city within two years after his removal or resignation," was unconstitutional under *Anderson*. 474 U.S. at 1301-02.

refused to allow appellants to run in the election.⁵⁷ Although not providing much reasoning in this emergency appeal, Rehnquist stated that the “City Charter provision as interpreted by the Supreme Court of Hawaii is not, in my judgment, clearly unconstitutional . . . these circumstances . . . and the usual presumption of constitutionality accorded to the state and local laws lead me to deny the application.”⁵⁸ Thus, the validity of the general concept of recall was acknowledged by the Supreme Court.

Similarly, the United States Supreme Court directly addressed electoral recall procedures in *Gutierrez v. Ada*.⁵⁹ A federal statute required that the election of the Governor and Lieutenant Governor of Guam receive a majority of votes to prevent a run-off election.⁶⁰ Respondents argued that the Guam Election Commission had improperly discounted the ballots that were left blank in determining that Gutierrez had gathered the required majority of votes.⁶¹ The Court noted that requiring a majority of the total number of voters on Election Day would be in tension with the provisions that provide for recall elections of the Governor and Lieutenant Governor.⁶² The recall provision looked to the total number of persons who actually voted for Governor, not to the total number of people who cast ballots.⁶³ The Court pronounced that “[i]n a rational world, we would not expect the vote required to oust a Governor to be pegged to a lower number than it would take to elect one.”⁶⁴

Mink and *Gutierrez* demonstrate that the Supreme Court accepts the general idea of electoral recall as long as the recall provisions are adopted in such a way to avoid conflict with the Constitution. The Court is understandably reluctant to interfere with procedures adopted by the states to promote democratic principles; however, close examination of Supreme Court cases dealing with other forms of direct democracy and the constitutional separation-of-powers doctrine sheds some light on the type of recall challenges the Court may consider.

57. *Mink*, 474 U.S. at 1302.

58. *Id.*

59. 528 U.S. 250 (2000).

60. *Id.* at 252–53 (citing 48 U.S.C. § 1442).

61. *Id.* at 253.

62. *Id.* at 257; 48 U.S.C. § 1422a(b) (“Any Governor, Lieutenant Governor, or member of the legislature of Guam may be removed from office by a referendum election in which at least two-thirds of the number of persons voting for such official in the last preceding general election at which such official was elected vote in favor of recall and in which those so voting constitute a majority of all those participating in such referendum election.”).

63. *Gutierrez*, 528 U.S. at 257.

64. *Id.*

B. The Supreme Court Has Found Certain Direct Democracy Provisions to Be Unconstitutional.

The Supreme Court's recent ruling on the constitutionality of Colorado's initiative process is especially relevant in determining the constitutionality of the California recall scheme. In *Buckley v. American Constitutional Law Foundation, Inc.*,⁶⁵ the Court held that part of the Colorado statute governing initiative petitions was unconstitutional.⁶⁶ The Colorado initiative process placed three conditions on initiative petition circulators: 1) they must be registered voters in Colorado; 2) they must wear a badge for identification; and 3) paid signature gatherers must have their names, addresses, and salaries published.⁶⁷ In its reasoning, the Court recognized that "[s]tates allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally."⁶⁸ Despite this general deference to the States, the Court found that petition circulation is "core political speech because it involves interactive communication concerning political change," and that "First Amendment protection for such interaction . . . is at its zenith."⁶⁹ Accordingly, the Court found Colorado's justifications for its limitations inadequate⁷⁰ and ruled that all three restrictions on the signature-gathering process violated the First Amendment.⁷¹

The *Buckley* case provides insight into the Court's approach toward dealing with the states' adoption of direct democracy procedures. Most important is the *Buckley* Court's treatment of the voter registration requirement for initiative petition circulators, because some states, such as California, have put similar restrictions on their recall procedures.⁷² The Court recognized that voter registration may be easy and thus not a substantial obstacle to participating in the initiative process.⁷³ Nevertheless, the Court believed that the choice not to register to vote

65. 525 U.S. 182 (1999).

66. *Id.* at 187.

67. *Id.* at 186 (citing COLO. REV. STAT. §§ 1-40-112(1)-(2), 121 (1998)).

68. *Id.* at 191; *see also* *Biddulph v. Mortham*, 89 F.3d 1491, 1494, 1500-01 (11th Cir. 1996) (upholding initiative proposals to amend the Florida Constitution); *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 293-94, 296-97 (6th Cir. 1993) (upholding Michigan procedures for signature gathering in the initiative process).

69. *Buckley*, 525 U.S. at 186-87 (1999) (internal quotation marks omitted).

70. Gale Norton, representing petitioners, argued that the laws were justified by Colorado's strong interest in policing petition circulators who engaged in misconduct, as well as putting a check on the domination of the initiative process by special interest groups. *Buckley*, 525 U.S. at 196, 198, 202.

71. *Buckley*, 525 U.S. at 187.

72. *See infra* Part II.C.1.

73. *Buckley*, 525 U.S. at 195.

“implicates political thought and expression,” and that a “refusal to register is a ‘form of . . . private and public protest.’”⁷⁴ For this reason, Colorado’s signature-gathering requirements violated the First Amendment.⁷⁵ By requiring signature gatherers to be registered voters, the California recall procedures also violate the principle that silence in the electoral process is a form of political speech protected by the First Amendment.

C. The Supreme Court Has Provided Guidance on Policy Considerations Relevant to a State’s Recall Mechanism.

Beyond the technical issues on the constitutionality of electoral laws in cases like *Buckley*, the Supreme Court has provided some insight into policy considerations that should be accounted for in devising—or in California’s case, revising—recall mechanisms. These cases deal with separation-of-powers issues and concerns with harassment and interference with the duties of elected officials. This guidance should be used by legislators in determining how to strike a balance between promoting the purposes of recall and the effects that recall can have on elected officials and government functioning.

The most notable case is *Clinton v. Jones*,⁷⁶ in which the Supreme Court considered when judicial interference with the duties of the executive branch is appropriate.⁷⁷ Paula Jones alleged a deprivation of federal civil rights, intentional infliction of emotional distress, and defamation against President Clinton arising from an incident that occurred when Clinton was Governor of Arkansas.⁷⁸ President Clinton argued that the civil suit should be postponed on the basis of presidential immunity because “unless immunity is available, the threat of judicial interference with the Executive Branch through scheduling orders, potential contempt citations, and sanctions would violate separation-of-powers principles.”⁷⁹ While it ultimately disagreed with President Clinton,⁸⁰ the Court did concentrate on the separation-of-powers issue.⁸¹

The *Clinton* decision should serve as a guidepost for legislators to determine what types of protections to afford elected officials to counterbalance the potentially damaging consequences to government

74. *Id.* at 195–96 (quoting testimony of William Orr, executive director of the American Constitutional Law Foundation).

75. *Id.* at 186.

76. 520 U.S. 681 (1997).

77. *See id.* at 690.

78. *Id.* at 685.

79. *Id.* at 688.

80. *Id.* at 705–06.

81. *Id.*

that are posed by recall. *Clinton* stood for the idea that the President was not entitled to temporary immunity from suits arising out of unofficial acts, and that “the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office.”⁸² The Court reasoned, in part, that while presidential duties are mandated by Article II, section 1 of the U.S. Constitution,⁸³ the risk that such suits will “generate a large volume of politically motivated harassing and frivolous litigation” is not serious because “[m]ost frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant.”⁸⁴ The Court also noted the availability of sanctions as a deterrent to bringing harassing or politically motivated litigation against the Chief Executive.⁸⁵ In finding little risk that the suits would substantially interfere with President Clinton’s ability to carry out his Article II duties, the Court denied the motion to dismiss on the grounds of presidential immunity.⁸⁶

Other cases have similarly highlighted the Supreme Court’s concern with laws that have the potential to interfere with the duties of executive officials. For example, *Barr v. Matteo* is an older case that, along with *Clinton*, could serve as a guide for balancing the public policy considerations related to recall.⁸⁷ In *Barr*, former employees brought a libel suit against officers of the Office of Rent Stabilization.⁸⁸ In considering whether the officers should be granted immunity, the Court found that it needed to

weigh . . . two considerations of high importance . . . on the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities.⁸⁹

In weighing these considerations, the Court recognized that suits against executive officers “inhibit the fearless, vigorous, and effective

82. *Id.*

83. *Id.* at 699 n.29.

84. *Id.* at 708.

85. *Id.* at 708–09.

86. *Id.* at 710.

87. 360 U.S. 564 (1959).

88. *Id.* at 565.

89. *Id.*

administration of policies of government”⁹⁰ and thus upheld the executive immunity of the officers acting in their official duty even if their actions were “within the outer perimeter of petitioner’s line of duty.”⁹¹ The Court expanded on this delicate balancing by quoting Judge Learned Hand’s decision in *Gregoire v. Biddle*:⁹²

It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. *In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . .*⁹³

These policy considerations raised by Judge Hand ring just as true in the context of electoral recall. Decisionmakers must weigh the same factors when determining whether a civil suit against an executive official may proceed as when determining if a recall petition can be certified: The public interest in proceeding with the suit or petition must be balanced against the extent to which allowing the suit or petition would interfere with the duties of the official.

D. A Summary of Supreme Court Analyses.

The above Supreme Court opinions assist in exploring the merits of the electoral recall systems in California and Washington. First, the

90. *Id.* at 571.

91. *Id.* at 575.

92. 177 F.2d 579 (2d. Cir. 1949).

93. *Barr*, 360 U.S. at 571.

Supreme Court supports the concept of electoral recall⁹⁴ and generally presumes the constitutionality of such state provisions.⁹⁵ Second, while the Court recognizes that the principles behind measures of direct democracy can be important governmental interests, the Court may strike down those provisions if they infringe on fundamental rights such as those provided in the First Amendment.⁹⁶ Third, the Court may be more skeptical of judicial interference with executive duties if there are no procedural safeguards in place—such as summary judgment or heightened pleading requirements—that help to filter out “politically motivated harassing and frivolous litigation.”⁹⁷ The following sections apply the parameters established by the Supreme Court to both the California and Washington recall systems as a way of illustrating the weaknesses of the California system while highlighting how Washington’s recall system has avoided these flaws.

IV. RECALL IN CALIFORNIA AND WASHINGTON STATE

The amendments to the state constitution that took place in the 1970s relegated most of the specifics of California’s recall procedures to the California Elections Code.⁹⁸ The signature-gathering requirements of the Elections Code are unconstitutional under *Buckley*, and the Elections Code does nothing to prevent undue harassment of elected officials. This messy statutory arrangement begs for reform.

A. The Signature Gathering Requirements in the California Election Code Violate the First Amendment.

The signature-gathering requirement of the California Elections Code infringes on the signature gatherers’ right to political expression. Section 11045 of the Elections Code requires that signature gatherers be registered voters.⁹⁹ This requirement resembles the Colorado requirement struck down by the U.S. Supreme Court’s ruling in *Buckley v. American Constitutional Law Foundation*.¹⁰⁰ In *Buckley*, the Court held that a Colorado statute requiring signature gatherers to be registered voters

94. See *Republican Party of Hawaii v. Mink*, 474 U.S. 1301, 1301–02 (1985); *Gutierrez v. Ada*, 528 U.S. 250, 251–53 (2000).

95. *Mink*, 474 U.S. at 1302.

96. *Buckley v. Am. Constitutional Law Fdn., Inc.*, 525 U.S. 182, 187 (1999).

97. *Clinton v. Jones*, 520 U.S. 681, 708 (1997); see also *Barr*, 360 U.S. at 565.

98. GRODIN, *supra* note 22, at 75.

99. “Only registered voters of the electoral jurisdiction of the officer sought to be recalled are qualified to circulate or sign a recall petition for that officer.” CAL. ELEC. CODE § 11045.

100. 525 U.S. at 187.

violated the First Amendment.¹⁰¹ In striking down the Colorado statute, the Court reasoned that not registering to vote can be a form of political expression and that by placing limitations on that expression, the Colorado law violated the First Amendment.¹⁰² While it might be argued that this requirement makes recalls more difficult to initiate and helps protect elected officials from harassment, the *Buckley* Court specifically recognized how easy it is to become a registered voter.¹⁰³ Because registering to vote is not a significant obstacle, the signature-gathering requirement does not serve to protect elected officials from harassing recall attempts and merely infringes on the fundamental rights protected by the First Amendment.

Abstaining from registering to vote is as much a form of political expression in California as it is in Colorado. Furthermore, the justifications offered in defense of the Colorado statute—promoting administrative efficiency, informing voters, and “polic[ing] lawbreakers among petition circulators” by ensuring that the “circulators will be amenable to the Secretary of State’s subpoena power”—are as unpersuasive when applied to the recall provisions of the California Elections Code as they were when applied to Colorado’s initiative process in *Buckley*.¹⁰⁴ Therefore, if challenged, courts will likely find that section 11045 of the Election Code violates the First Amendment.

Nevertheless, even if California’s requirement that signature gatherers be registered citizens is unconstitutional, it is unlikely that courts would strike down California’s entire recall system on that basis alone. In *Partnoy v. Shelley*, one of the many cases surrounding the recent recall of Governor Davis,¹⁰⁵ the plaintiffs alleged that California’s recall system was unconstitutional¹⁰⁶ because of a provision of the Elections Code that required voters to cast their opinion on the issue of the recall before voting for a successor candidate.¹⁰⁷ The district court applied strict scrutiny to the statute and found it unconstitutional.¹⁰⁸ The *Partnoy* Court reasoned that forcing voters to participate in the recall in order to later vote for a succeeding governor limited the voters’ right to

101. *Id.* The statute found to violate the First Amendment in *Buckley* required that “[n]o section of a petition for any initiative or referendum measure shall be circulated by any person who is not a registered elector and at least eighteen years of age at the time the section is circulated.” COLO. REV. STAT. § 1-40-112 (1998).

102. *Buckley*, 525 U.S. at 195–96.

103. *Id.* at 195.

104. *Id.* at 192, 196.

105. 277 F. Supp. 2d 1064 (S.D. Cal. 2003).

106. *Id.* at 1071.

107. “No vote cast in the recall election shall be counted for any candidate unless the voter also voted for or against the recall of the officer sought to be recalled.” CAL. ELEC. CODE § 11382.

108. *Partnoy*, 277 F. Supp. 2d at 1075, 1079.

free expression because the First Amendment protects “both the right to speak freely and the right to refrain from speaking at all.”¹⁰⁹ Nevertheless, on rehearing, the Court found that this section was severable from the rest of the recall provisions because the provision was “grammatically, functionally, and volitionally separable,”¹¹⁰ and there was “no reason to believe that the California voters did not want the remaining recall procedure in the absence of section 11382.”¹¹¹ Likewise, while a court would probably find the voter registration requirement in section 11045 to be unconstitutional, it would also deem this provision severable from the rest of the recall scheme. Nevertheless, while the unconstitutional nature of section 11045 is not fatal to the entire recall system because of its severability, this constitutional conflict exhibits the need for reform to take into account the modern understanding of the proper breadth of direct-democracy mechanisms.

B. California’s Constitutional Recall Provisions Make Elected Officers More Susceptible to Harassment Because They Prohibit the Judiciary from Determining the Sufficiency of a Recall Petition.

The signature-gathering requirements of section 11045 are likely unconstitutional because they infringe fundamental rights protected by the First Amendment, but the California Legislature should not stop by merely remedying these defects in the Election Code. Rather, the Legislature should take this opportunity to amend the constitutional provisions relating to recall.¹¹² Only an amendment of the California Constitution can reform California’s recall system so that it adequately protects elected officials from harassment. Because Washington’s recall system avoids these major problems, drafters of California’s amendment should use Washington’s system as a model.

As currently formulated, the constitutional provisions in need of reform are in Article II, sections 13 to 19 of the California State Constitution. Article II defines recall as “the power of the electors to remove an elected officer.”¹¹³ Recalling a statewide elected official under California’s constitution requires: 1) a petition alleging the reason for the recall, the sufficiency of which cannot be reviewed; 2) that such petition

109. *Id.* at 1078 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

110. *Id.* at 1081 (quoting *Valley Outdoor, Inc. v. County of Riverside*, No. 02-55475, slip op. 8539, 8540 (9th Cir. Aug. 1, 2003)).

111. *Id.* at 1087.

112. The California Constitution establishes the procedure for amending its constitution. CAL. CONST. art. IIX. A vote by two-thirds of each house of the state legislature is necessary to propose a constitutional amendment. *Id.* § 1. Such a proposal must be approved by a majority of voters. *Id.* § 2. Alternatively, voters may amend the constitution through the initiative process. *Id.* § 3.

113. CAL. CONST. art. II, § 13.

have the signatures of at least 12 percent of electors who voted in the previous election for the office; and 3) that the signatures from at least five counties equal 1 percent of the last vote for the office in the county.¹¹⁴ The California Constitution specifically permits recall of the Governor, and assigns specific duties to various government officials if such a recall occurs.¹¹⁵ However, it specifically prohibits any review of the sufficiency of the charges giving rise to the recall.¹¹⁶

1. The Recall Provisions of the California Constitution Need Revision to Reflect the Priorities Expressed by the Supreme Court.

The primary problem with the California Constitution's recall provisions is its low standard for initiating recalls. Because the Election Code does not heighten these standards, the recall provisions allow for substantial harassment of elected officials. Consider *Clinton v. Jones*, in which the United States Supreme Court considered the substantial safeguards in civil litigation that help prevent harassing or frivolous litigation.¹¹⁷ Precisely because the legal safeguards were already in place to protect the President from harassment, the Supreme Court allowed litigation to proceed that might have seemed to interfere with the President's executive duties.¹¹⁸ Just as the federal constitution gives the President specific executive duties,¹¹⁹ the California Constitution gives the Governor specific executive duties.¹²⁰ It would be difficult to argue that provisions of the California Constitution, such as those prohibiting the courts from reviewing the sufficiency of a recall petition,¹²¹

114. Section 14, "Recall Petitions," provides the following:

(a) Recall of a State officer is initiated by delivering to the Secretary of State a petition alleging reason for recall. Sufficiency of reason is not reviewable. Proponents have 160 days to file signed petitions.

(b) A petition to recall a statewide officer must be signed by electors equal in number to 12 percent of the last vote for the office, with signatures from each of 5 counties equal in number to 1 percent of the last vote for the office in the county. Signatures to recall Senators, members of the assembly, members of the Board of Equalization, and judges of courts of appeal and trial courts must equal in number 20 percent of the last vote for the office.

(c) The Secretary of State shall maintain a continuous count of the signatures certified to that office.

Id. § 14.

115. "If recall of the Governor or Secretary of State is initiated, the recall duties of that office shall be performed by the Lieutenant Governor or Controller, respectively." CAL. CONST. art. II, § 17.

116. CAL. CONST. art. II, § 14(a) ("Sufficiency of reason is not reviewable.").

117. *Clinton v. Jones*, 520 U.S. 681, 708 (1997).

118. *Id.*

119. U.S. CONST. art II, § 2.

120. "The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed." CAL. CONST. art. V, § 1.

121. CAL. CONST. art. II, § 14.

unconstitutionally violate the separation-of-powers doctrine so thoroughly described in *Clinton*. Nonetheless, California's relaxed approach toward recall does not strike a proper balance of policy considerations behind its recall measures. This approach fails to protect the executive official to the extent the Supreme Court suggested is necessary in order to ensure that the recall does not inhibit executive functioning.¹²²

Although the recall of statewide elected officials is a relatively rare occurrence, the mere potential for recall can interfere with the duties of officials. Proponents of California's current recall system have argued that the recall mechanism does not pose a serious threat of harassment to elected officials and does not interfere with government functioning because the constituents are responsible enough to know when a recall is necessary. This argument is supported by the fact that Governor Davis's recall election was the first successful gubernatorial recall election in California's history.¹²³

However, while Davis was the first of California's governors to have been actually recalled, there have been thirty-one previous attempts to recall California governors.¹²⁴ Each of these attempts likely interfered with the governor's effectiveness, as well as with the functioning of the executive branch. Moreover, the precedent set by Davis's recall, that unpopularity is sufficient grounds for a recall,¹²⁵ will likely lead to Californians using the recall mechanism with increased frequency.¹²⁶ Furthermore, this precedent will undoubtedly put increased pressure on future governors to maintain popularity to avoid a recall thereby distracting the officials from their executive duties. In addition, developments in modern communication technology will likely make the signature-gathering requirements easier to satisfy,¹²⁷ resulting in an increased potential for harassment of elected officials. Because

122. See *Clinton*, 520 U.S. at 708; *Barr v. Mateo*, 360 U.S. 564, 565 (1959).

123. CALIFORNIA SECRETARY OF STATE KEVIN SHELLEY: FAQs ABOUT RECALLS (2003), at http://www.ss.ca.gov/elections/elections_recall_faqs.htm#20 (last visited July 10, 2004).

124. *Id.*

125. In June 2003, while the recall movement was gathering steam, Governor Davis's approval rating was at twenty-one percent. *Gov. Gray Davis: Keeping His Eye on the Job* (Jun. 26, 2003), at <http://www.cnn.com/2003/ALLPOLITICS/06/26/cnna.davis/>.

126. For example, a petition to recall Governor Schwarzenegger is already circulating in California. This petition can be viewed at <http://www.petitiononline.com/calgov/petition.html> (last visited July 10, 2004).

127. Besides the internet petitions calling for the recall of Governor Schwarzenegger, there are several Internet sites promoting such a recall. See, e.g., <http://www.recallarmie.com/> (last visited July 10, 2004); <http://www.helpcalifornia.info/> (last visited July 10, 2004); http://www.codepinkalert.org/CodePink_Vigil_Information_Arnold_Protest.html (last visited July 10, 2004); http://www.realseduction.com/ra_index.htm (last visited July 10, 2004).

approximately nine million people voted in the recall election,¹²⁸ a petition of only about one million persons¹²⁹ of the approximately 15 million registered voters in California¹³⁰ would be necessary to force another recall election.

Proponents of California's recall system may also argue that the United States Supreme Court's decisions in *Clinton* and *Barr* are not relevant to the recall issue because recall is a process initiated by the people, not a governmental branch, and thus recall should not be subject to a separation-of-powers analysis. This argument is without merit for multiple reasons. First, the recall process in California does raise separation-of-powers concerns because it involves two branches of government; the legislature must certify a recall petition against a member of the executive branch.¹³¹ As with the initiation of a recall, the initiation of a lawsuit could be considered an execution of a power inherent in the people. However, the Supreme Court in *Clinton v. Jones* specifically recognized that judicial involvement with such a suit, regardless of the individuals who initiated it, raised the separation-of-powers issue.¹³² Similarly, although individuals initiate a recall, the California Legislature must certify it. Therefore, it is necessary to consider the relationship between the legislative and executive branches in California when determining the validity of the recall process. Second, even if California's recall process were not directly submitted to a separation-of-powers analysis, the principles enunciated in *Clinton* and *Barr* relating to protection of elected officials from harassment¹³³ remain relevant considerations in reforming California's recall process.

A more colorable but ultimately hollow argument against recall reform is that any restrictions on the recall process would usurp the inherent power of California's citizens. As the argument goes, because power is inherent in the people, voters should be able to exercise their recall rights even if such an exercise of power interferes with government functioning or constitutes harassment of the duties of one

128. ELECTION RESULTS, at http://www.ss.ca.gov/elections/elections_elections.htm (last visited July 10, 2004).

129. A successful recall petition in California must have the signatures of 12 percent of voters who voted in the last election for the office subject to the recall. CAL. CONST. art. II, § 14. Approximately one million signatures equals 12 percent of the nine million voters who participated in Davis's recall election.

130. CALIFORNIA SECRETARY OF STATE KEVIN SHELLEY: REPORT OF REGISTRATION (2004), at http://www.ss.ca.gov/elections/ror/regstats_01-02-04.pdf (last visited July 10, 2004).

131. "The Legislature shall provide for circulation, filing, and certification of petitions, nomination of candidates, and the recall election." CAL. CONST. art. II, § 16.

132. *Clinton v. Jones*, 520 U.S. 681, 705-06 (1997).

133. *Id.* at 708; *Barr v. Mateo*, 360 U.S. 564, 565 (1959).

governmental branch.¹³⁴ Even before the populist reforms of the twentieth century, the concept that political power is inherent in the people was well established. For example, James Madison said that “[t]he people were in fact, the fountain of all power, and by resorting to them, all difficulties were got over.”¹³⁵ While this inherent power is well acknowledged, “[e]ven the most ardent supporters of popular sovereignty acknowledge that majority rule is not the same as majority will and certainly not the same as majority whim.”¹³⁶ Accordingly, normally scheduled elections are the proper way to express the inherent power of the people. There is a strong state interest in holding elections at the scheduled times except in the most egregious circumstances.¹³⁷ Regularly planned elections support the legitimacy of the government and do not undermine the inherent power of the people. Rather, regular elections further the inherent power by legitimizing it.¹³⁸ The Supreme Court in *Harper v. Virginia State Board of Elections* stated that “the political franchise of voting [is a] fundamental political right . . . because [it is] preservative of all rights. . . . [Because] the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right to vote of citizens must be carefully and meticulously scrutinized.”¹³⁹ If recall proliferates as a method of expressing political disappointments, such a mechanism will dilute the potency of the electoral process and reduce the legitimacy of elected officials. Such a consequence infringes on the basic right to vote and the fundamental rights flowing from that basic right.

Overall, the California recall process is marred in confusion and questions of constitutionality. Moreover, the recall process fails to achieve any sort of balance between the purposes behind recall and the dangers recall presents. Instead, the current recall process opens the door for harassment of political figures and interference with their official duties. Although California’s low standards for initiating a recall

134. The Progressives, in support of the adoption of direct democracy in California, emphasized a provision of the former California constitution that “[a]ll political power is inherent in the people.” CAL. CONST. art. I, § 2 (repealed 1980); GRODIN, *supra* note 22, at 17. The current California Constitution retains this concept of power: “All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require.” CAL. CONST. art. II, § 1.

135. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 476 (Max Farrand ed., 1937) (quoting Madison).

136. Vikram David Amar, *Adventures in Direct Democracy: The Top Ten Constitutional Lessons from the California Recall Experience*, 92 CAL. L. REV. 927, 949 (2004).

137. *Id.* at 951.

138. *Id.* at 942.

139. 383 U.S. 663 (1966) (internal quotation marks omitted); *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964)).

promote the principles of direct democracy, such standards also potentially undermine the saliency of the electoral system by allowing harassment of elected officials. The fact that there is no judicial review of the recall claims is a major flaw in the current process. Constituents can recall any elected official for any reason, as long as enough signatures appear on the petitions. This low threshold for recall petitions is not difficult to meet in a state as populous as California. Fortunately, the balancing of interests necessary to reform the system is not difficult. California should consider the models of recall offered by other states when determining how to revise their provisions. Washington provides an excellent example of a recall regime that strikes the optimal balance between the policy considerations behind recall and the threats to political stability in the recall process.

2. The Washington Recall Provisions Have Stricter Standards Than Those in California and Do Not Suffer from Similar Constitutional Defects.

In 1912, Washington added Amendment 8 to its constitution, which included a provision for recall.¹⁴⁰ Article I, section 33 of the Washington Constitution provides the requirements for the recall of elected officers. This provision requires a recall petition to allege that the officer “has committed some act or acts of malfeasance or misfeasance while in office or has violated his oath of office.”¹⁴¹ Article I, section 34 gives the Washington Legislature the authority to enact laws to carry out the provisions of section 33 and establishes the requirements for recall petitions. Specifically, section 34 requires that petitions be signed by 25 percent of electors (compared to 12 percent in California) computed from the total number of votes cast for that office in the preceding election for the recall of various highly placed state officers, senators, and

140. UTTER, *supra* note 34, at 46.

141. Article I, section 33 of the Washington Constitution provides the following:

Every elective public officer of the state of Washington except judges of courts of record is subject to recall and discharge by the legal voters of the state, or of the political subdivision of the state, from which he was elected whenever a petition demanding his recall, reciting that such officer has committed some act or acts of malfeasance or misfeasance while in office, or who has violated his oath of office, stating the matters complained of, signed by the percentages of the qualified electors thereof, hereinafter provided, the percentage required to be computed from the total number of votes cast for all candidates for his said office to which he was elected at the preceding election, is filed with the officer with whom a petition for nomination, or certificate for nomination, to such office must be filed under the laws of this state, and the same officer shall call a special election as provided by the general election laws of this state, and the result determined as therein provided.

WASH. CONST. art. I, § 33.

representatives. For all other elected officials, the percentage of signatories must be 35 percent.¹⁴²

Washington courts have defined their role in the recall process well. One year after the enactment of the recall provision, in *Cudihee v. Phelps*,¹⁴³ the Washington Supreme Court first interpreted this provision. *Cudihee* involved the recall of a King County sheriff.¹⁴⁴ The plaintiff argued that the court should enjoin the county auditor from taking action on the recall petition until a court had determined the truth of the allegations in the recall.¹⁴⁵ The *Cudihee* court held that, while it may have the power to review the sufficiency of the “statement of the allegations made as a cause for removal,” the ultimate question of “whether such cause actually exists . . . and . . . whether the officer shall be discharged, shall be had before the tribunal of the people.”¹⁴⁶ This general principle that the court may review the sufficiency of the recall petition as to the allegations of “malfeasance or misfeasance” and violations of the “oath of office,”¹⁴⁷ but not as to the truth of the allegations, has remained constant in judicial interpretation of the Washington recall mechanism.¹⁴⁸

For a brief period in the 1960s and early 1970s, there was a trend to liberally construe the constitutional standards for recall by equating

142. Article I, section 34 of the Washington Constitution provides the following:

The legislature shall pass the necessary laws to carry out the provisions of Section thirty-three (33) of this article, and to facilitate its operation and effect without delay: Provided, That the authority hereby conferred upon the legislature shall not be construed to grant to the legislature any exclusive power of lawmaking nor in any way limit the initiative and referendum powers reserved by the people. The percentages required shall be, state officers, other than judges, senators and representatives, city officers of cities of the first class, school district boards in cities of the first class; county officers of counties of the first, second and third classes, twenty-five per cent. Officers of all other political subdivisions, cities, towns, townships, precincts and school districts not herein mentioned, and state senators and representatives, thirty-five per cent.

WASH. CONST. art. I, § 34.

143. 76 Wash. 314, 136 P. 367 (1913).

144. *Id.*

145. *Id.* at 330, 136 P. at 373; Note, G.V.T., *Recall of Public Officers: Discretionary Acts Cannot Be a Sufficient Basis for Recall*, 48 WASH. L. REV. 503 (1973).

146. *Cudihee*, 76 Wash. at 331.

147. WASH. CONST. art. I, § 33.

148. See, e.g., *Bocek v. Bayley*, 81 Wash. 2d 831, 835, 505 P.2d 814, 817 (1973) (finding that “in determining the validity of recall charges, courts are limited to examination of the charges stated and cannot inquire into factual matters extraneous to the allegations” and that “courts must assume the truth of the charges in determining whether legally sufficient grounds for recall have been stated.”) (quoting State ex. Rel. Citizens Against Mandatory Bussing [sic] v. Brooks, 80 Wash. 2d 121, 124–25, 492 P.2d 536 (1972); In re Recall Charges Against Feetham, 149 Wash. 2d 860, 873, 72 P.3d 741, 747 (2003) (finding that the court’s review of a recall petition is “only for a prima facie case, not for the truth of the charges.”).

“malfeasance” with any wrongful act.¹⁴⁹ However, in *Cole v. Webster* the court explicitly rejected this reasoning in favor of a heightened standard that “is consistent with the original intent of the framers of the constitution’s recall provision” and frees “public officials from the harassment of recall elections grounded on frivolous charges or mere insinuations.”¹⁵⁰ In *Cole*, the Washington Supreme Court recognized what the California recall process ignores: that the recall system must achieve a delicate balance between the purposes of recall and the potential interference with the duties of elected officials. Accordingly, the court held that the judiciary must “review the sufficiency of [recall] charges as a matter of law and decide whether the facts, if true, establish a prima facie act of misfeasance, malfeasance, or a violation of the oath of office” in order to go forward with a recall election.¹⁵¹

The Washington Legislature has embraced and codified the principle of judicial review of recall petitions.¹⁵² In 1984, the legislature amended the recall provisions to require that the petitioner “verify under oath that he or she has knowledge of the alleged facts upon which the state grounds for recall are based.”¹⁵³ The recent amendments to the recall statute retained this requirement.¹⁵⁴ Both the 1984 and 2004

149. G.V.T., *supra* note 145, at 508–09; Michael L. Cohen, *Recall in Washington: A Time for Reform*, 50 WASH. L. REV. 29, 41 (1974).

150. 103 Wash. 2d 280, 283, 288, 692 P.2d 799, 802, 804 (1984) (overruling *Danielson v. Faymonville*, 72 Wash. 2d 854, 435 P.2d 963 (1967); *State ex rel. LaMon v. Westport*, 73 Wash. 2d 255, 438 P.2d 200 (1968); *State ex. Rel. Citizens Against Mandatory Bussing [sic] v. Brooks*, 80 Wash. 2d 121, 492 P.2d 536 (1972); *Bocek v. Bayley*, 81 Wash. 2d 831, 505 P.2d 814 (1973)).

151. 103 Wash. 2d at 288.

152. WASH. REV. CODE § 29.82.010 (1984).

153. *Chandler v. Otto*, 103 Wash. 2d 268, 272, 693 P.2d 71, 73 (1984); § 29.82.010.

154. The most recent recall statute provides the following:

Whenever any legal voter of the state or of any political subdivision thereof, either individually or on behalf of an organization, desires to demand the recall and discharge of any elective public officer of the state or of such political subdivision, as the case may be, under the provisions of sections 33 and 34 of Article 1 of the Constitution, the voter shall prepare a typewritten charge, reciting that such officer, naming him or her and giving the title of the office, has committed an act or acts of malfeasance, or an act or acts of misfeasance while in office, or has violated the oath of office, or has been guilty of any two or more of the acts specified in the Constitution as grounds for recall. The charge shall state the act or acts complained of in concise language, give a detailed description including the approximate date, location, and nature of each act complained of, be signed by the person or persons making the charge, give their respective post office addresses, and be verified under oath that the person or persons believe the charge or charges to be true and have knowledge of the alleged facts upon which the stated grounds for recall are based.” For the purposes of this chapter: (1) “Misfeasance” or “malfeasance” in office means any wrongful conduct that affects, interrupts, or interferes with the performance of official duty; (a) Additionally, “misfeasance” in office means the performance of a duty in an improper manner; and (b) Additionally, “malfeasance” in office means the commission of an unlawful act; (2) “Violation of the oath of office” means the neglect or knowing failure by an elective public officer to perform faithfully a duty imposed by law.

versions of the statute define “misfeasance” or “malfeasance” as wrongful conduct that “affects, interrupts, or interferes” with an official duty. “Misfeasance” is the performance of an official duty “in an improper manner,” while “malfeasance” is “the commission of an unlawful act.”¹⁵⁵ “[V]iolation of the oath of office” is the “neglect or knowing failure by an elected public officer to perform faithfully a duty imposed by law.”¹⁵⁶ Accordingly, unlike California, mere unpopularity is not enough in Washington to serve as the basis for a recall.

In *Chandler v. Otto*, the court found that these revisions were specifically designed to “allow recall for cause yet free public officials from the harassment of recall elections grounded on frivolous charges or mere insinuations” and to require recall petitions to be “both legally and factually sufficient.”¹⁵⁷ The most recent recall opinion in Washington affirmed this decision. Charges are factually sufficient if they “state sufficient facts to identify to the electors and to the official being recalled acts or failure to act which without justification would constitute a prima facie showing of misfeasance, malfeasance, or a violation of the oath of office.”¹⁵⁸ In addition, the court defined ‘legal sufficiency’ as “that the petitioner allege a prima facie case of misfeasance, malfeasance, or violation of the oath of office without justification.”¹⁵⁹

While the Washington standards for recall of elected officers are strict, such standards have not prevented voters from using their right to recall. For example, in a case of a petition to recall the Pierce County Auditor, the petitioner argued that the court should grant the recall on two charges.¹⁶⁰ The first charge alleged the commission of perjury or “false swearing” while in office and the second charge alleged misconduct regarding a statewide referendum on a new professional football stadium.¹⁶¹ The court found that the misconduct charge was not a legally sufficient basis for recall because the action in question was “a reasonable discretionary act.”¹⁶² However, the court also found that the “false swearing” charge was both factually and legally sufficient, because, if true, it was an illegal act and thus “an adequate basis for a recall charge.”¹⁶³ Thus, despite the relatively high standards of the

WASH. REV. CODE § 29A.56.110 (effective July 1, 2004) (replacing § 29.82.010).

155. *Id.*

156. *Id.*

157. 103 Wash. 2d at 274, 693 P.2d at 74.

158. *In re Recall Charges Against Feetham*, 149 Wash. 2d 860, 864–65, 72 P.3d 741, 743 (2003) (internal quotation marks omitted).

159. *Id.* at 865.

160. *In re Recall of Pearsall-Stipek*, 141 Wash. 2d 756, 761, 10 P.3d 1034, 1038 (2000).

161. *Id.*

162. *Id.* at 783.

163. *Id.* at 782.

Washington recall, the courts have not denied the voters of Washington their right to recall elected officials who have committed acts inconsistent with their duties of office.¹⁶⁴

The Washington framework for electoral recall provides a reasonable methodology for filtering out recall petitions that are designed to harass and interfere with elected officials. By examining the factual and legal sufficiency of a recall petition, the Washington courts play a similar role to that prescribed under the Federal Rules of Civil Procedure. A motion to dismiss for failure to state a claim upon which relief can be granted¹⁶⁵ requires that courts only dismiss a complaint if “the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”¹⁶⁶ A recall system should not hold a petition for recall to any lower standard, especially when the petition has the potential to seriously interfere with the constitutionally prescribed duties of an elected official. Washington’s “factually sufficient” and “legally sufficient” requirements necessarily hold recall petitions to the same standard of sufficiency as other litigation.¹⁶⁷ This is consistent with the principles the United States Supreme Court has laid down in *Clinton v. Jones* and *Barr v. Matteo*.

V. CONCLUSION

In considering issues of electoral recall, states must balance two competing interests: the populist interest in promoting government accountability and voter participation¹⁶⁸ and the governmental interest in preventing harassment of elected officials and ensuring that such officials can effectively carry out the duties of their offices.¹⁶⁹ California voters have recently used electoral recall to remove Governor Gray Davis from office. This recall was successful in the absence of any showing of wrongdoing by Davis because under California recall law, the recall petition was not required to state any reason for the recall and the California Constitution specifically prohibits the courts from

164. Other recent examples of successful recall petitions include the following: *Feetham*, 149 Wash. 2d at 873 (holding that two of the three charges in the recall petition were both factually and legally sufficient); *In re Recall of Kast*, 144 Wash. 2d 807, 819, 31 P.3d 677, 683 (2001) (holding that one of two charges in the recall petition was sufficient, and thus the recall process should go forward); *Matter of Lee*, 122 Wash. 2d 613, 619, 859 P.2d 1244, 1248 (1993) (finding charges to be sufficient and that the recalled officer “will have the opportunity to defend herself during the electoral process”).

165. FED. R. CIV. P. 12(b)(6).

166. *Conley v. Gibson*, 355 U.S. 41, 45 (1957).

167. *See In re Recall of Sandhaus*, 134 Wash. 2d 662, 668, 953 P.2d 82, 85 (1998).

168. BEARD, *supra* note 10, at 52.

169. *See generally Clinton v. Jones*, 520 U.S. 681 (1997); *see also Barr v. Matteo*, 360 U.S. 564, 565 (1959).

examining the adequacy of the recall petition.¹⁷⁰ In fact, the only adequacy requirement for the petition was a signature-gathering requirement.¹⁷¹ However, this requirement is so low that it would be unlikely to prevent anyone with adequate funds and motivation from initiating a recall against any elected official.¹⁷² These signature requirements are even less likely to provide any sort of meaningful check on the recall process in a state as large and as politically diverse as California. Because of this low standard, the California recall system allows petitions to go forward, even though the recall is intended solely for harassment or for furtherance of political goals, and even if such petitions will severely impinge the elected official's ability to perform on the job. When the elected official's duties are constitutionally mandated, such impingement is especially problematic.¹⁷³ Moreover, some of these provisions are marred with constitutional difficulties.¹⁷⁴ For these reasons, the California Legislature should amend both the California Constitution¹⁷⁵ and the California Elections Code electoral recall provisions.¹⁷⁶

In revising its electoral recall system to more adequately protect elected officials from harassment, California should adopt Washington's model.¹⁷⁷ Washington's system uses stricter signature requirements¹⁷⁸ and requires the courts to review the recall petition to determine whether the petition's allegations that the officer has committed "some act or acts of malfeasance or misfeasance while in office or . . . has violated his oath of office"¹⁷⁹ are both legally and factually sufficient.¹⁸⁰ While this model heightens the requirements for a recall petition above the standard in California, it does not prevent the people from exercising their right to recall for meaningful purposes.¹⁸¹ Thus, this model more adequately

170. CAL. CONST. art. II, § 14.

171. *Id.*

172. Only 12 percent of voters in the previous election for the same office need sign the petition in order for it to be sufficient. *Id.*

173. *See Clinton*, 520 U.S. at 685.

174. *See, e.g.*, CAL. ELEC. CODE §§ 11045, 11382.

175. CAL. CONST. art. II, §§ 14–18.

176. CAL. ELEC. CODE §§ 11000–11386.

177. WASH. CONST. art. I, §§ 33–34; WASH. REV. CODE §§ 29A.56.110–84.240 (effective July 1, 2004).

178. Either 25 percent or 35 percent of voters from the last election, depending on the office involved, are required for a recall petition to be sufficient in Washington. *Id.* § 34.

179. *Id.* § 33.

180. *In re Recall of Sandhaus*, 134 Wash. 2d 662, 668, 953 P.2d 82, 85 (1998).

181. *See, e.g.*, *In re Recall Charges Against Feetham*, 149 Wash. 2d 860, 873, 72 P.3d 741, 747 (2003); *In re Recall of Kast*, 144 Wash. 2d 807, 819, 31 P.3d 677, 683 (2001); *Matter of Lee*, 122 Wash.2d 613, 619, 859 P.2d 1244, 1248 (1993).

balances the purposes behind the recall mechanism and the dangers to efficient and functional government that such a mechanism presents.