

Chapter 1

The Sovereign Citizen

The recall is a process for removing a public officer from an elective office before expiration of his or her stipulated term of office. The process begins when removal proponents file petitions containing the required number of valid signatures with the designated officer responsible for conducting a special election to determine whether the officer should be removed from office for specified reasons. A recall election, also known as a recall referendum, is based on the “gun behind the door” theory positing elected office holders must be kept continuously responsible to the voters. Such an election may be limited to the question of removing the targeted officer or also may involve the selection of a replacement in the event the officer is removed.

A constitutional or a statutory provision in twenty-six states authorizes the recall. Additionally, the state legislature in several states, for example, Connecticut, has enacted special acts authorizing specific local governments to use the recall. “Home rule” constitutional provisions in several other states, such as Massachusetts, allow general purpose local governments to draft and adopt charters authorizing the electorate to employ the recall, and other local governments in these states have employed home rule powers and amended their existing charters to provide for the recall.¹ The New York State Constitution since 1923 contains home rule provisions, but in 1989 the state comptroller opined, “since neither article 9 of the State Constitution nor Municipal Home Rule Law, §10 expressly provide home rule authority to provide for recall election, a city may not adopt a local law authorizing recall elections.”²

The 2012 Census of Governments revealed there were 89,004 local governments: 38,917 general purpose local governments, and 50,087 special purpose governments in the United States.³ The number of public officers subject to the recall in the United States is unknown, but the total is large because there were 18,828 elected state government officers and 483,830 elected local government officers according to the 1992 Census

of Governments (the latest available data), a total larger than the number of elected officers in any other nation.⁴

The electorate employing the recall in effect act *de facto* as a petit jury trying a public officer on charges contained on petitions initiated by a recall group that served as a grand jury. In contrast to criminal charges filed against a person, the regular grand jury process is bypassed, although the officer subject to a recall petition and recall election also may be subject to criminal prosecution if a legal wrong has been committed. The officer, of course, can seek judicial review of alleged procedural errors in the petition process and alleged invalid signatures on petitions.

Proposals for authorizing voters to employ recall elections to keep public officers continuously responsible to the electorate generated major controversies in states and municipalities since the recall first was proposed in Los Angeles in 1901. The recall proposal immediately raised the question of whether the fundamental nature of representative government would be transformed if the recall was authorized and used by voters on a regular basis.

The proposition that citizens should play an informed and active role in the governance process is enshrined deeply in the political culture of the United States and is epitomized today by the open town meeting in many New England towns where voters assemble to elect town officers, and to make governmental decisions by enacting bylaws. Nevertheless, there is wide disagreement as to the forms and the extent of citizen participation that are desirable.

At one extreme, the view prevails that voters directly should make all laws and those holding an office should do so on a part-time basis. The early New England town meeting accepted this concept of citizen participation, and made voting and office holding by freemen compulsory.⁵

At the other extreme, the leadership-feedback theory limits the role of citizens primarily to electing periodically for fixed-term government officers who provide leadership in public affairs by proposing policies. This model is reflected in the due process requirement for public hearings on many types of proposed or requested governmental actions.⁶ Citizen feedback on proposals may induce elected officers to modify the proposals before their enactment and implementation. Decision-making responsibility, however, remains with the officers.

If the principle guiding all elected public officers was *res publica* (the public good), the leadership-feedback concept would be an adequate guide for and check upon decision-making by public officers. Opponents of this type of decision making are convinced periodic election of officers for fixed terms is an inadequate safeguard of the public weal and that more immedi-

ate mechanisms must be available to the voters to ensure elected officers act as agents of their constituents when making decisions on important matters. Thus, opponents argue a popular mechanism must be available to voters to remove elected officers accused of malfeasance (bad or corrupt conduct), misfeasance (incompetent performance of duties), and nonfeasance (nonperformance of duties).

The possibility of corrupt behavior by officer holders in the United States long has been recognized. In 1782, Thomas Jefferson stressed the importance of informed citizens in the following terms: "In every government on earth is some trace of human weakness, some germ of corruption and degeneracy, which cunning will discover, wickedness insensibly open, cultivate, and improve. Every government degenerates when trusted to the rulers of the people alone. The people themselves therefore are its only safe depositories. And to render even them safe, their minds must be improved to a certain extent."⁷

Although his proposal was described as one establishing a spoils system, President Andrew Jackson in an 1829 message to Congress emphasized:

There are perhaps few men who can for any great length of time enjoy office and power, without being more or less under the influence of feelings unfavorable to the faithful discharge of their public duties. Their integrity may be proof against improper considerations immediately addressed to themselves; but they are apt to acquire a habit of looking with indifference upon the public interests, and of tolerating conduct from which an unpracticed man would revolt. Office is considered as a species of property; and Government rather as a means of promoting individual interests than as an instrument created solely for the service of the People. Corruption in some and in others a perversion of correct feelings and principles divert Government from its legitimate ends, and make it an engine for the support of the few at the expense of the many.⁸

Jackson's remedy relied on the ballot box and frequent elections of all public officers to curb the evil he described and to ensure the popular will and popular government prevail.

Jacksonian democracy was based in part on the democratic theory that each candidate for elective office announces his or her policies and ethical standards, and voters select the candidate reflecting their popular will. If an elected officer does not implement popular policies or live up to ethical standards, the officer may be removed should he or she stand for

reelection and replaced by a person representing the views of the majority of the voters.

The recall, however, is designed to correct public officers' errors of commission and omission by removing them from office before the expiration of their terms of office. The reasons for the use of the recall are not limited to a *scandalum magnatum* because the recall can be employed in a majority of the recall states for any reason, including disagreement on a policy issue. The Constitution of Michigan, for example, stipulates "the sufficiency of any statement of reasons or grounds procedurally required shall be a political rather than a judicial question."⁹ However, eight states—Alaska, Georgia, Kansas, Minnesota, Montana, Rhode Island, Virginia, and Washington—specify specific grounds for employment of the recall.

The Nebraska Supreme Court in 1913 opined:

The policy of the recall may be wise or it may be vicious in its results. We express no opinion as to its wisdom with respect to the removal of administrative officers. If the people of the state find after a trial of the experiment that the provisions of the statute lead to capable officials being vexed with petitions for their recall, based upon mere insinuations or upon frivolous grounds, or because they are performing their duty and enforcing the law, as they are bound to do by their oath of office, or lead without good and sufficient reason to frequent and unnecessary elections, they have the power through their Legislature to amend the statute so as to protect honest and courageous officials.¹⁰

In upholding the constitutionality of a city charter providing for the recall, the Washington Supreme Court in 1909 explained: "Like the British ministry, an elective officer under the charter is at all times answerable to the people for a failure to meet their approval on measures of public policy. . . . Whether the interests of the city will be better subserved by a ready obedience to public sentiment than by a courageous adherence to the views of the individual officer . . . is a political and not a legal question."¹¹ However, not all state supreme courts view the recall as a process involving only a political question as is revealed in the detailed analysis of the recall process in Chapter 2.

Are elected officers the delegates or agents of the people? The *delegate concept*, also known as the trustee concept, posits elected officers will use their good judgment, based on the facts they have gathered and analyzed, to make decisions promoting the public good and are not bound by the wishes of their respective constituents. John F. Kennedy wrote a best selling

book—*Profiles in Courage*—praising certain decision makers for opting for a policy that was not popular with the citizenry yet was viewed by decision makers as being in the best interest of the polity.¹²

The *agent concept* posits elected public officers must make decisions solely on the basis of the wishes of the electorate. Proponents are convinced that voting in periodic elections is an inadequate safeguard of the public weal, and the ballot box must be continuously available to the electorate to enable them to enforce their will. The ultimate instrument available to the voters in certain states and general purpose local governments is the recall, which allows voters to circulate petitions calling for a special election to determine whether a named officer should be removed from office. If employed frequently, the recall would establish the principle that officers are agents of the voters who have the right at any time to replace their agents. Chapters 3 and 4 explore the frequency and the reasons for the use of the recall in the United States.

Recall supporters maintain elected officers are agents of the voters who possess sovereign power to remove at any time a officer who fails to follow the public's will as expressed at the ballot box. They also maintain all public officers are legally and morally responsible to the voters, and the recall permits voters to enforce the officers' responsibility.

Although the theory of the recall is premised on ensuring decision making in accord with the public's will, the recall also can be employed to remove a public officer accused of malfeasance, misfeasance, and nonfeasance, to deal with situations in which the officer is not removed by the impeachment process, the legislative address process (legislative directive to the governor to remove an officer), or direct gubernatorial action if authorized in the absence of a statute providing for the automatic vacating of an office when the incumbent is convicted of a felony. Due process of law guarantees and restrictions on the use of these alternative removal methods typically make them relatively ineffective, long drawn-out, and costly procedures and thus the recall may be more effective in removing an officer.

The Washington Supreme Court commented on the recall in 1914, and emphasized: "It cannot be questioned that the recall and its usual concomitant, the referendum, are wholesome means to the preservation of responsible popular government. They employed a principle as old as the English constitution. The frequent appeals of the English ministry from a vote of Parliament to a vote of the people on a given measure, requiring the members of Parliament to stand for reelection upon that measure as an issue . . . is obviously but a recall as to the personnel of the government and a referendum as to the given measure."¹³

Does a state or local government elected officer have a right to hold office guaranteed by the U.S. Constitution? The answer clearly is no because courts have ruled an election is not a contract and an elected officer has no property interest in the office. The U.S. Supreme Court in 1939 opined there is no U.S. constitutional guarantee—whether procedural due process or contract right—attached to the recall.¹⁴ The U.S. Court of Appeals for the 5th Circuit in 1971 similarly rejected a due process attack on the use of the recall to remove a Florida elected local government officer.¹⁵ The court opined: “Any governmental body is required to act fairly, but that is not true as to the voter. Insofar as the United States Constitution is concerned, an elector may vote for a good reason, a bad reason, or for no reason whatsoever. The principle applies to recall elections as it does to all other elections.”¹⁶

Origin of the Recall

The term *recall* is associated directly with the word “democracy,” which is an amalgamation of two Greek words meaning “power of the people.” There was no need for a corrective device, such as the recall, in the historic New England open town meeting because assembled voters enacted all bylaws. Elected administrators—selectpersons, town clerks, fence viewers, cattle reeves, and so forth—were not subject to recall, but served the short term of one year and exercised little discretionary authority in carrying out the policies adopted by the annual town meeting and, if any, special town meetings.

In 1915, Frank F. Abbott traced the origin of the recall to ancient Rome in the year 133 bc when Tribune Octavius was removed from office by a vote of the people because he vetoed a Senate bill.¹⁷ Abbott quoted Plutarch’s life of Tiberius as follows:

Octavius, however, would by no means be persuaded to compliance; upon which Tiberius declared openly, that, seeing the two were united in the same office, and of equal authority, it would be a difficult matter to compose their differences on so weighty a matter without a civil war; and that the only remedy which he knew, must be the deposing one of them from office. He desired, therefore, that Octavius would summon the people to pass their verdict upon him first, averring that he would willingly relinquish his authority if the citizens desired it. . . . The law for his deprivation being thus voted, Tiberius ordered one

of his (Octavius) servants . . . to remove Octavius from the rostra. . . . This being done, the law concerning the lands was ratified and confirmed . . .¹⁸

The essential elements of a recall were employed in this case. A charge was made, there was no judicial procedure, and the tribune was removed from office by vote of the people.

The first authorization for the use of the recall in the United States is found in the Declaration of the Rights of the Inhabitants of the Commonwealth contained in the Pennsylvania Constitution of 1776: "VI. That those who are employed in the legislative and executive business of the state may be restrained from oppression, the people have a right, at such periods they may think proper, to reduce their public officers to a private station, and supply the vacancies by certain and regular elections."

The concept of the recall also was incorporated into article 5 of the Articles of Confederation and Perpetual Union, effective in 1781, which provided that states could replace at any time their delegates to the Congress. The voters, however, only indirectly participated in this type of recall because they lacked the direct power to replace delegates.

The origin of the movement for authorization of the recall of elected officers in the United States is traceable in general to the growing distrust of state legislatures in the nineteenth century, and in particular to the populist and progressive movements in the later part of the century, which sought constitutional changes to empower voters to correct abuses of power by elected officers.

Distrust of State Legislatures

The framers of the constitutions of the original thirteen states placed great trust in the legislative branch by granting it broad exercisable powers and subjecting it only to the prohibitions contained in the constitutional bill of rights.

However, the growth of Jacksonian democracy, as reflected in the election of most state and local government officers for short terms, in the 1830s and subsequent decades revealed growing voter distrust of government officers in general and state legislators in particular. Voters in New York state, for example, were distressed by the substantial state debt incurred as the result of state financial aid for canal and railroad construction and associated scandals, and pledges of state credit to private companies. Fear of a powerful governor, reflected in the New York State Constitution of 1777, gave way to fear of an irresponsible state legislature by 1846.¹⁹

The replacement fundamental document, drafted by a convention and ratified in an 1846 New York referendum, placed restrictions on the state legislature relative to state finance, corporations, and other matters. Jacksonian democracy was responsible for incorporation in the constitution of provisions for the election of judges, previously appointed by the governor with senate approval; popular election of the attorney general, canal commissioners, state comptroller, secretary of state, state engineer, surveyor, and inspectors of prisons; and a reduction of the term of office of senators from four to two years.²⁰ Members of the assembly, the lower house, continued to serve a one-year term. The new constitution also reflected distrust of the state Legislature by directing that the question of whether a convention should be called to revise the constitution must appear automatically on the ballot every twenty years, a provision in the current constitution.²¹

In 1874, New York voters ratified six proposed constitutional amendments. Concern with pork barrel appropriations led to the authorization of the governor to veto items in appropriation bills.²² The second amendment forbade the state Legislature to enact a local or private bill relating to thirteen specified subjects, and a third amendment forbade the state Legislature to audit or "allow any private claim or account against the state."²³

Legislation by "reference" was eliminated by a fourth amendment that stipulated "no act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act."²⁴

With respect to bills imposing, continuing, or reviving a tax or creating a debt, a fifth amendment provided "the question shall be taken by yeas and nays, which shall be duly entered upon the journals, the three-fifths of all the members elected to either house shall, in all such cases, be necessary to constitute a quorum therein."²⁵

The sixth limiting amendment forbade the state Legislature to "grant any extra compensation to any public officer, servant, agent, or contract, or contractor."²⁶ The current New York State Constitution contains the first five of these amendments.

A new state constitution, ratified by New York voters in 1894, sought to eliminate enactment of unprinted bills by stipulating that "no bill shall be passed or become law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar days prior to its final passage, unless the governor, or the acting governor, shall have certified to the necessity of its immediate passage."²⁷ Voters also decided to remove from the state Legislature the power to incur long-term full-faith and credit debt by stipulating legislative proposals to contract such debt

are subject to a voter referendum.²⁸ The current state constitution contains these provisions.

Although the New York State Constitution contains the largest number of prohibitions and restrictions on the exercise of legislative powers, many other state constitutions were amended or replaced in the nineteenth century in order to restrict the power of the state Legislature and generally to increase the power of the governor. These reforms, however, did not restore confidence in the state Legislature in many states.

The continuing unrepresentative nature of many state and local governments and associated corruption generated several reform movements. Citizen dissatisfaction with certain statutes enacted by the state Legislature and its failure to act on other bills desired by the electorate led to the ratification of a constitutional amendment in South Dakota in 1898 authorizing the voters by petitions to employ the protest referendum and the initiative.²⁹ The former allows voters by means of petitions to suspend a newly enacted statute until a referendum is held to determine whether the statute should be repealed.³⁰ The initiative authorizes the electorate to file petitions to place a proposed constitutional amendment or statute on the referendum ballot.

These citizen control devices quickly were found to be desirable by voters in several other states who amended their respective constitution to authorize the use of the protest referendum and the initiative. Nevertheless, ardent reformers were convinced the voters needed what the reformers perceived to be the ultimate control device—the recall—which has a long history of use in Switzerland.

Cantonal law in Schaffhausen, for example, provides for petitions, signed by a minimum of 1,000 qualified voters of the canton, to be submitted to the president of the Communal Council of the commune in which each signer resides for a determination of the validity of each signature.³¹ Insufficient petitions are returned to the circulators who may collect additional signatures within a specified period of time. When the closing date is reached, the Executive Council ascertains whether the number of signatures is adequate and publishes its finding. If the petition contains the required number of signatures, the Executive Council must schedule a removal election within thirty days.

Agitation for the Swiss type of recall developed in the 1890s, and the 1892 and 1896 national platforms of the Socialist Labor Party and the platform of the Populist Party in several states called for adoption of the recall that also was known as the “imperative mandate.” No government, however, adopted the recall until voters approved a new city charter containing the recall for Los Angeles on January 22, 1903.³²

Populist-Progressive Roots

The United States underwent a dramatic metamorphosis between 1865 and the early decades of the twentieth century from a predominantly agricultural economy and society to one with large cities and the majority of the workforce engaged in industry and commerce. Agricultural mechanization and the manpower needs of the growing industrial cities promoted an exodus from the land to the cities during a time period time when economic depressions and financial panics had an adverse effect on farmers.

The socioeconomic transformation of the nation generated several popular movements, including the granger, populist, municipal reform, administrative management, and progressive movements. The granger movement, a farmers' movement, was directed primarily against railroads, which often had a monopoly on transportation and charged what the traffic would bear. This movement achieved national success in 1887 when Congress enacted the Interstate Commerce Act regulating railroad fares and routes.³³

The populist movement included much more than the Populist Party. Populists were in general sympathy with Jacksonian Democracy, supported the movement to curb monopolies, and favored the silver standard, a graduated income tax, women's suffrage, the initiative, protest referendum, and the recall. Eric F. Goldman commented: "In the spirit of Populism, progressives took up new proposals for direct democracy or the advancement of lower-income groups, most notably popular primaries, recall of elected officials, workmen's compensation legislation, and minimum-wage and maximum-hour laws."³⁴

Richard Hofstadter noted populism and progressivism arose during a period of large-scale immigration from Europe of individuals whose culture and religion differed from those of the "Yankees" who generally were Protestants. He explained the system of political ethics of the immigrants as follows: "The system . . . took for granted that the political life of the individual would arise out of family needs, interpreted political and civic relations chiefly in terms of personal obligations, and placed strong personal loyalties above allegiance to abstract codes of law or morals. It was chiefly upon this system of values that the political life of the immigrant, the boss, and the urban machine was based."³⁵

Hofstadter also referred to the development of the agrarian myth, traceable to the farmer soldiers of the revolutionary war and Jefferson's belief in the yeoman farmer, which "encouraged framers to believe they were not themselves an organic part of the whole order of business enterprise and speculation that flourished in the city, partaking of its character

and sharing in its risks, but rather the innocent pastoral victims of a conspiracy hatched in the distance.”³⁶

The conspiracy theory in particular colored the thinking of populists who sought to improve the agricultural economy and establish popular government. Writing in 1914, Albert M. Kales commented: “Unpopular government is, and indeed always has been a government of the few, by the few, and for the few, at the expense and against the wish of the many. . . . If the extra-legal unpopular government by politocrats rests upon a condition of political ignorance on the part of the electorate, then it will be said that the obvious cure is to dissipate that ignorance by political education.”³⁷

Kales traced the movement for the recall to the realization by many citizens that the Jacksonian system of frequent elections did not prevent the “extra-legal government” from ensuring the election of its local supporters to office.³⁸ He was critical of the long ballot that placed an undue burden on the electorate to study the qualifications and records of numerous candidates for office, and also warned the recall could be employed by the “extra-legal government.”³⁹

The progressive movement developed as the populist movement was declining at the turn of the twentieth century. Whereas the latter movement was primarily agrarian based, the progressive movement was led by middle- and upper middle-class leaders in cities and was a nationally based movement. The two movements in effect became one in the early twentieth century. Hofstadter provided an interesting insight into the leaders of the progressive movement, described as of “the Mugwump type,” who “were progressives not because of economic deprivations but primarily because they were victims of an upheaval in status that took place in the United States during the closing decades of the nineteenth and the early years of the twentieth century.”⁴⁰ Hofstadter referred to the Mugwumps being bypassed by the newly rich and becoming “less important . . .”⁴¹

The progressives were able to develop broad popular support in many regions of the nation, including the Midwest, West Coast, and Massachusetts. In 1910, William Allen White, a famous Kansas City newspaper editor, commented favorably on the adoption of the recall: “So the appearance of the recall, in the cities of a dozen states within a little over a year, should make those statesmen nervous who look forward to the time when the country will go back to the Good Old Days. For this tightening grip of the people upon their state governments . . . has been an intelligent, gradual, well-directed growth of popular power.”⁴²

In 1912, Walter E. Weyl provided a different perspective when he reported the progressives sought to install popular control of governmental organizations and procedures and “to break the power of a politically

entrenched plutocracy.”⁴³ He was convinced legislators did not fear being defeated for reelection when opponents charged that their betrayal of the public trust would ensure they never would be reelected because the legislators “interpreted the word ‘never’ in a Gilbertian Sense, as meaning ‘hardly ever.’”⁴⁴

Leaders of the progressive movement also were involved in other contemporary movements: municipal reform, national short ballot, and administrative management. The former movement was well under way in the early 1890s and included the formation of the National Municipal League in 1894 under the leadership of New York City Police Commissioner Theodore Roosevelt and other reformers concerned about the corruption associated with boss-controlled cities.

Hofstadter was convinced “[t]he progressive leaders were the spiritual sons of the Mugwumps, but they were sons who dropped much of the ideological baggage of their parents. Where the Mugwumps had been committed to aristocracy, . . . the progressives spoke of returning government to the people. . . . The progressives had, on a substantial number of national issues, reliable allies in the very agrarian rebels for whom the Mugwumps had had nothing but contempt.”⁴⁵ In his view, the progressives campaign for adoption of the initiative, protest referendum, and recall “was, in effect, an attempt to realize Yankee-Protestant ideals of personal responsibility; and the progressive notion of good citizenship was the culmination of the Yankee-Mugwump ethos of political participation without self-interest.”⁴⁶ Hofstadter described the progressives’ attempt “to institutionalize a mood” as an impossible task.⁴⁷

Progressive leader Robert M. La Follette of Wisconsin was a strong advocate of the recall that “enables the people to dismiss from public service those representatives who dishonor their commissions by betraying the public interest.”⁴⁸ He emphasized that it was essential that voters must be given a means of stopping and reversing “the evils of misrepresentation and betrayal” if representative government is to be achieved in the United States.⁴⁹ Combined with the initiative and the protest referendum, the recall empowered the electorate to exercise absolute control of a government, according to La Follette.⁵⁰

Early Development of the Recall

The Republican Party controlled the state of California and the city of Los Angeles at the beginning of the twentieth century, but the party in turn took orders from the Southern Pacific Railroad. The migration of people

to southern California produced a sharp increase in the population of Los Angeles during the last two decades of the nineteenth century and generated pressures for a reorganization of the city government.⁵¹ There had been three failed attempts to revise the 1889 city charter by 1900, but pressure for revision continued. The city council called an election on July 17, 1900, for a board of freeholders to draft a new charter.

One of the fifteen members of the board was Dr. John R. Haynes, an advocate of the initiative and referendum who drafted the first provision for a modern recall in the United States. He drafted provisions for the initiative and referendum and included a provision for the recall with the hope it might be approved along with the other provisions. There was little opposition to the initiative and referendum provisions as several cities had adopted such charter provisions. The recall, however, was an unknown device.

Surprisingly, there was little broad opposition to the recall and the small amount of press coverage was positive. Before a referendum could be held, the California Supreme Court ruled that the charter could be changed only by amendments submitted by the city council. The Los Angeles City Council took no action on the proposed charter.

In 1902, a charter revision commission was formed that recommended adoption of the initiative, the referendum, and the recall, and the City Council referred these provisions, along with twelve others, to the voters to make a decision on December 1, 1902. Voters approved the initiative and referendum by a margin greater than six to one and the recall by a vote of four to one.

The state Legislature traditionally approved home rule charter provisions submitted by cities, but there were strong attacks on the Los Angeles charter provisions authorizing the initiative, the referendum, and the recall. Nevertheless, voters approved the charter amendments on January 22, 1903. The recall provision was used immediately to remove a member of the City Council who was considered to be a machine politician.

In 1912, H.S. Gilbertson referred to the political leaders responsible for the incorporation of the recall into the Los Angeles city charter, and wrote they probably lacked a political theory and were seeking to address a misrepresentative system in which elected officers often defied the will of the general public.⁵² He added the recall "was conceived in a spirit of optimism" relative to the ability of the average voter to exercise continuous oversight of elected officers.⁵³ Furthermore, he credited the framers of the device with the foresight of preventing "outbursts of passion" by requiring petition circulators to obtain valid signatures equal to 20 to 25 percent of those who voted in the preceding election.⁵⁴

Twenty-five California municipalities adopted the initiative, the referendum, and the recall by 1911 when the state constitution was amended to authorize the recall of statewide elected public officers. This authorization was unusual in that a single petition, signed by the requisite number of voters, was sufficient to trigger a recall election for more than one officer.

The 1905 adoption of the recall by Pasadena, California, was unique. A city charter revision committee decided not to include the recall in a revised charter. Frustrated voters used the initiative to add a recall amendment to the charter.

In his 1905 message to the state Legislature, Gov. Robert M. La Follette of Wisconsin recommended that the recall of city officials be authorized, but such a statute was not enacted until 1911.⁵⁵ It was not until 1926 that the Constitution of Wisconsin was amended to provide for the recall. In 1911, the state Legislature for the first time approved a constitutional recall amendment and in 1913 approved the amendment for the second time. Voters in 1913, however, rejected the proposal. After a resurrected proposal was approved by the state Legislature in 1923 and in 1925, voters in 1926 ratified the amendment that currently is in effect.⁵⁶ In 1933, the state Legislature enacted an implementing statute specifying recall procedures.⁵⁷

The first state to authorize the recall of elected state officials was Oregon, which adopted a recall constitutional amendment in 1908. The campaign for electoral reforms in Oregon was led by the People's Power League, which succeeded in 1902 in its efforts to have the state adopt the initiative and the referendum and in 1904 the direct primary. In 1908, the League placed, via the initiative, a proposed constitutional amendment authorizing the recall on the election ballot and the proposal was ratified by 62 percent of the voters.⁵⁸ Every elected public officer was made subject to the recall, which could be initiated by petitions containing signatures equal to 25 percent of the total vote for a state Supreme Court justice in the previous election in the concerned district.⁵⁹ Over the next seven years, seventeen recall elections involving thirty-four elected officers were held with twenty-five officers removed.⁶⁰

By 1914, nine additional states—Arizona (1912), California (1911), Colorado (1912), Idaho (1912), Kansas (1914), Louisiana (1914), Michigan (1913), Nevada (1912), and Washington (1912)—had adopted a constitutional provision authorizing the recall, and in 1910, the Illinois General Assembly authorized use of the recall by statute.

It is interesting to note that during the immediate post-World War I period, nine *länder* (states) in Germany during the Weimar Republic authorized voters in cities to employ the recall.⁶¹ In common with the Swiss practice, the recall, with the exception of one city, could be employed by

the electorate only to dissolve the entire council and to order new elections. Between 1919 and 1924 under a socialist government in Brunswick, voters were empowered to remove from office the Bürgermeister and collectively or individually members of the stadtmagistrat (council).⁶² However, the voters seldom employed the recall.

Current Status

Today, the constitutions of nineteen states authorize the electorate to employ the recall to remove all or specified elected public officers. Twenty additional states sanctioned by statute the use of the recall to remove all or specified elected officers. Several states lacking a constitutional provision for the recall have a constitutional home rule provision that has been used by a number of general purpose local governments to draft charters providing for the recall or to amend charters to add a recall provision. As explained in Chapter 2, the state Supreme Courts in Connecticut and Pennsylvania invalidated home rule charter recall provisions.

Support for the recall by the municipal reform movement, which sought to eliminate boss rule and corruption in cities and to have services provided in an economical and efficient manner, led to widespread incorporation of the recall in newly drafted commission and council-manager charters. Furthermore, the recall was added to a number of council-manager charters because opponents of the manager plan of administration maintained that a nonelected public officer should not possess the amount of authority typically delegated to a manager by the charter. When proponents of the plan pointed out that the manager can be removed at any time by a simple majority vote of the local legislative body, the opponents often replied all the manager has to do to stay in office is to perform favors to keep a majority of the members of the governing body satisfied and they will vote to retain him. Proponents, in response to this objection, suggested the incorporation of a recall provision in the charter to allow voters to remove local legislators who do not vote to discharge an incompetent manager. As explained in Chapter 4, the recall in manager municipalities generally has been employed to remove a local legislator who voted to discharge the manager.

Opposition to the Recall

Not surprisingly, leaders of the major political parties and elected public officers typically opposed strongly the incorporation of a recall provision in the state constitution, state statutes, and local government charters.

Relatively strong opposition quickly developed to the recall of state public officers, with the strongest opposition directed against the recall of judges. In 1911, the American Bar Association approved a resolution opposing the recall of judges.⁶³

The U.S. Constitution grants Congress authority to admit territories to the Union as states.⁶⁴ Congress occasionally attached conditions to the admission of a territory as a state. The U.S. Supreme Court opined such conditions are judicially enforceable if they relate to federal government property in the new state, or grants of land or money to the state to be used for specific purposes.⁶⁵

The provision in the proposed Arizona state constitution, approved by territory voters, which included elected state judges as public officers subject to the recall generated a national controversy. In admitting the Arizona territory to the Union with a state constitution authorizing the recall of judges, Congress included in the joint resolution of admission a condition that a proposed amendment be submitted to the voters that would repeal authorization of the recall.⁶⁶

In 1911, President William H. Taft vetoed the joint resolution of admission and wrote in his message of disallowance relative to the recall that “its application to county and state judges, seems to me so pernicious in its effect, so destructive of independence in the judiciary, so likely to subject the rights of the individual to the possible tyranny of a popular majority, and, therefore, to be so injurious to the cause of free government, that I must disapprove a constitution containing it.”⁶⁷ Arizona voters removed the recall provision from the proposed state constitution and promptly reinserted the provision, via a constitutional amendment, after duly gaining admission as a state. New Mexico territory voters earlier removed the recall provision in their proposed state constitution at the insistence of President Taft.

Writing in 1912, Delos F. Wilcox—a leading proponent of the initiative, referendum, and recall—argued: “While the judges are bound to act in accordance with the established law and to interpret and apply that law to specific controversies, they ought to be just as responsible to the people for the manner in which they perform this function as the executive and the legislature are for the performance of their respective functions.”⁶⁸ Wilcox added that judges either must “give up their policy-determining functions or” be subject to removal by the electorate.⁶⁹

President Taft, after leaving office, became Kent Professor of Law at Yale University where he delivered a series of lectures in 1913 devoted to the initiative, the referendum, and the recall.⁷⁰ He advanced strong arguments against all three participatory devices, and embellished the reasons in his veto message for opposing the recall.

Taft was convinced the recall produced in public officers “a nervous condition of resolution as to whether he should do what he thinks he ought to do in the interest of the public, or should withhold from doing anything, or should do as little as possible, in order to avoid any discussion at all.”⁷¹ He strengthened his argument by referring to men—Washington, Lincoln, and Cleveland—who were subjected to vitreolent attacks at the time of making decisions and who later were recognized as great men.

The early decades of the twentieth century were a period of great fear of socialism. Taft buttressed his argument against the initiative, referendum, and recall by opining: “There is another basis for the movement to-day which gives strength to the proposal to put unrestrained and immediate control in the hands of a majority or minority of the electorate. It is in the idea that the unrestrained rule of the majority of the electors voting will prevent the right of property from proving an obstacle to achieving equality in condition so that the rich may be made poorer and the poor richer. In other words, a spur, conscious or unconscious, to this movement is socialistic.”⁷²

The American Bar Association appointed a committee to develop arguments in opposition to the judicial recall. The committee’s 1914 report attacked socialist promoters of the recall who allegedly were seeking to replace the governance system and were advocating the recall “as an indirect instrument for achieving such change.”⁷³

The committee rejected the argument the judicial recall is a remedial device and argued that it is subversive of a constitutional democratic system. In particular, the committee pointed out: “Any citizen, who is a lawyer or who has a judicial or lawyer-like mind, may be assumed to be able, without help, to reach an intelligent conclusion on this subject. Not so the average voter, who, . . . is easily led astray by fallacies so susceptible of subtle, insidious, and enticing presentations as those of the judicial recall.”⁷⁴

The committee noted that in 1912 Ohio voters had ratified a judicial constitutional amendment that is “less repugnant to our system of government than the recall.”⁷⁵ The amendment, referred to as the Ohio plan, stipulates a state statute can be declared unconstitutional only if six of the seven Supreme Court justices vote in the affirmative.⁷⁶

Currently, constitutional recall provisions in Idaho, Louisiana, Michigan, Minnesota, and Washington exclude judges from the recall in order to immunize them from partisan political pressures and the passions of voters.

Opponents of the recall also argued there was no need for the participatory device because several means of removing such officers already existed. Writing in 1914, Charles Kettleborough identified seven methods of removal in addition to the recall:

1. Impeachment, a quasi-judicial process, can be employed in all states except Oregon, to remove officers, but the process is expensive and slow, and few officers have been removed.
2. The governor is authorized to remove state and/or local officers in several states provided they are accorded their due process of law rights.
3. In 1914, eleven states authorized courts to remove certain officers if an action is brought against them. In certain states, the judge alone made the decision whether to remove an officer and in other states a jury made the decision.
4. In 1914, specified officers in Iowa and Missouri could be removed by the governor and senate acting jointly or by the state Legislature.
5. Statutes in Illinois, Indiana, and Ohio stipulated that a sheriff could be removed from office if a person in the sheriff's custody is lynched.
6. The Arizona governor was authorized to remove a militia officer upon address (directive) of the state Legislature or recommendation of the board of examination.
7. New Jersey and Oregon statutes provided for the automatic vacating of office under specified circumstances. A New Jersey officer guilty of a misdemeanor involving moral turpitude forfeits his office, and a member of an Oregon board or commission who fails to attend two consecutive meetings forfeits the office.⁷⁷

In addition to these removal methods, statutes in most states today provide for the automatic vacating of a public office if the incumbent is convicted of a felony. The Constitution of Illinois contains a broader list of grounds for vacating of a public office—conviction of bribery, felony, perjury, or other infamous crime.⁷⁸

An Overview

Declining voter turnout in most general elections and other indicia of voter alienation rekindled interest in recent years in the populist-progressive direct democracy mechanism of the recall as reflected in campaigns to recall the governors of Arizona, California, and Wisconsin; speaker of the

California Assembly; state legislators in Michigan and Wisconsin; mayors of Cleveland and San Francisco; and numerous other local government officers. The recall of Michigan and Wisconsin state legislators resulted in a change of party control of the senate in each state, a very significant political development.

Criticism of representative government continues to be voiced. Writing in 1984, political theorist Benjamin R. Barber noted: "A well-known adage has it that under a representative government the voter is free only on the day he casts his ballot. Yet even this may be of dubious consequence in a system where citizens use the franchise only to select an executive or judicial or legislative elite that in turn exercises every other duty of civic importance. To exercise the franchise is unhappily also to renounce it. The representative principle steals from individuals the ultimate responsibility for theory values, beliefs, and actions."⁷⁹ He specifically explained the citizenry is subject to statutes made without participation by the governed and this process allows representatives to "usurp" citizens "civic functions and to deflect their civic energies."⁸⁰

Barber's criticism of representative government is an overgeneralization, yet it reflects the widely held popular distrust of legislators and the legislative process. His criticism is blunted in part by constitutional and statutory provisions in many states authorizing the use of one or more of the following trivium of correctives promoted by populists and progressives—the protest referendum, the initiative, and the recall.

Chapter 2 examines in detail the constitutional and statutory recall provisions in twenty-seven states and home rule provisions in other states authorizing voters in general purpose local governments to adopt and amend charters providing for the recall. As explained in the chapter, the state Supreme Courts in Connecticut and Pennsylvania have invalidated home rule recall charter provisions. The minimum number of verifiable voter signatures needed to trigger a recall election and other procedural requirements determine the degree of difficulty encountered by voters who wish to recall an elected public officer.

The use of the recall to remove a statewide elected public officer prior to the expiration of his or her term of office has been infrequent, in part because of the difficulty of collecting signatures on petitions. Nevertheless, the recall has been successfully used to recall statewide and district elected state public officers as explained in Chapter 3.

Chapter 4 documents the considerably more frequent use of the recall to remove local government officers, which is not surprising when one considers the fact the geographical area involved is relatively small compared to the area involved if a state legislator or a statewide elected officer is the target of a recall effort. Furthermore, decisions made by local government

officers usually affect the voters directly and immediately compared with decisions made by state officers.

Chapter 5 evaluates the five major arguments advanced by recall proponents that focus on keeping elected officers continuously responsible to the voter, but also contend the recall has auxiliary benefits in the form of reducing voter alienation and increasing voter education, removal of constitutional and statutory restrictions on legislative bodies, and lengthening of terms of office that reduce election and campaign expenses.

The twelve major arguments of the opponents of the recall also are evaluated in Chapter 5. These arguments are as follow:

1. More desirable removal methods exist.
2. Voters should not be allowed to make additional mistakes in the interim between general elections.
3. Use of the recall for undesirable purposes.
4. Unnecessary restraint of innovative and energetic public officers.
5. Deterrence of high-quality potential candidates.
6. Partisan use.
7. Increased governmental costs resulting from the holding of a special election(s).
8. Undesirable simultaneous elections.
9. Frivolous harassment of public officers.
10. Abuse by special interest groups.
11. Inadequate reason(s) for employing the device.
12. Destruction of judicial independence.

Chapter 6 builds on the findings and conclusions of Chapters 2 to 5 to develop model constitutional or local government charter recall provisions to guide state and local governments and their respective voters considering adoption of the recall or revision of an existing recall provision. According recognition to the fact the recall alone will not guarantee that elected public officers will not abuse the public trust for private gain, the chapter recommends the recall should be supplemented by the indirect initiative, the protest referendum, and various provisions designed to ensure that all governmental actions are ethical and information to the extent practicable is available to the citizenry.