

25 Oct 2021

Senator Steve Glazer
State Capitol, Room 5108
Sacramento, CA 95814

Assemblymember Marc Berman
P.O. Box 942849
Sacramento, CA 94249-0024

Re: Policy analysis of recall reform proposals

Dear members of the California Legislature:

We respectfully submit the attached policy analysis for consideration at the October 28, 2021 joint legislative hearing on recall reform. We assembled a team of academic experts on direct democracy, political science, and California polling data to analyze the current state of California's recall process and to assess several proposed reforms.

We hope our analysis and conclusions about which reforms your committees should in our view consider, and which it should avoid, assists you in the policymaking process. Please contact us if we can provide further assistance.

Respectfully submitted,



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California recall process reform proposals analysis, October 2021

Summary of conclusions

We favor:

- Improving the replacement candidate procedure. The existing qualifying procedure is unclear and can be too easy — or too hard. We would adapt the in-lieu signature framework from Elections Code section 8106 and make the signature gathering window coincide with the 30-day petition withdrawal period, or some other set time window.
- A new election model for replacements. The existing same-day plurality replacement procedure is lawful, but seems unfair. We would instead require a majority vote for the replacement, either in a separate runoff (greater cost) or ranked-choice voting on the same day (no new costs).

We disfavor:

- Requiring grounds for recall. As shown by the eight malfeasance states, adding this requirement likely would effectively end the recall in California.
 - Increasing the qualifying signature requirement. This seems unnecessary, because California's large population already makes it difficult to qualify a state officer recall — as shown by how few attempts have ever qualified. At most a modest increase is justified.
 - Automatic replacement. It takes power from the electorate; it can make additional recalls against officers in the line of succession more likely; and it encourages partisan behavior that will harm the working trust between state officials.
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1. Recall overview

Recall is a procedure that allows citizens to remove and replace a public official before the official's term ends. Unlike impeachment (which is a legal process) the recall is a political process. Impeachment requires a legislative or judicial body to bring specific charges, followed by a trial. Recalls are elections.

Nineteen states and the District of Columbia permit recalling state officials: Alaska, Arizona, California, Colorado, Georgia, Idaho, Illinois, Kansas, Louisiana, Michigan, Minnesota, Montana, Nevada, New Jersey, North Dakota, Oregon, Rhode Island, Washington, and Wisconsin.¹ At least 41 states and the District of Columbia permit local recall elections.²

Recall states have varying procedures, but all share these elements:

- Proponents apply to circulate a recall petition; some states require stating grounds.
- Proponents must gather a number of signatures in a period of time.
- Election officials verify that the signature threshold is met.
- A recall election is held, and if it succeeds a replacement procedure applies.

The recall is intended to (and does) modify representative government to make it more responsive to majority will.³ California's government is expressly voter-directed: "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."⁴ The recall is often called a weapon aimed at representatives: Hiram Johnson called it the "gun behind the door" and asked: "How best can we arm the people to protect themselves hereafter?"⁵ The ballot argument in favor of 1911 Senate Constitutional Amendment 23 framed the recall as the power "to remove a dishonest, incapable, or unsatisfactory servant." And it described the recall as a means to require a public servant "whose stewardship is questioned . . . to submit the question of his continuance in office to a vote of the electors. [¶] If a majority of all voting at the election say that their servant is unfit to serve them longer, he is thereby retired."

¹ Joseph F. Zimmerman, *The Recall: Tribunal of the People* (SUNY Press 2013, second edition) at 15, 21. Virginia has a unique process: it requires citizen petitions, but after the required number of signatures is verified a court conducts a recall trial to decide whether the official will be removed from office. Authorities differ on whether this counts as a recall procedure.

² There is no consensus on this figure. Compare [The National Conference of State Legislatures](#) (30) with [Ballotpedia](#) (39). Yet the numbers are likely higher: for example, Vermont is currently in the no-recalls column, but it will have one as of October 19, 2021.

³ Bird and Ryan at 3; Zimmerman at 111 ("The device clearly is a constant reminder sovereignty resides in the voters.").

⁴ Cal. Const., art. II, § 1.

⁵ The Progressive reforms were contemporaneously described as "significant and useful weapons of democratic control." Bird and Ryan, *The Recall of Public Officers* (The Macmillan Company 1930) at 2. Woodrow Wilson also used "the gun behind the door" metaphor. *Id.* at 10. See also Zimmerman at 1.

California voters overwhelmingly (76%) adopted the recall in 1911. From its inception in California the recall and other direct democracy powers commanded strong public support, adopted by large majorities.⁶ Periodic calls to abandon or weaken the recall are commonly met with “strong popular disapproval.”⁷ Modern polling consistently shows that the electorate strongly favors its direct democracy powers.⁸

The key tradeoff in designing a recall system is between availability and integrity: the recall should be available enough to be a viable means of removing a bad official, but not so easy to invoke that it can be abused.⁹ In the following sections we discuss the benefits and burdens of several proposed reforms to California’s recall.

2. Proposed California recall reforms

a. Improving the replacement candidate qualifying procedure

Existing California law lacks a clear replacement candidate qualifying procedure, because the Elections Code procedures for primary elections do not apply to recalls.¹⁰ Instead, recalls are conducted “in substantially the same manner provided by law for a regular election of the office.”¹¹ This statutory silence effectively grants the secretary of state discretion to impose any set of reasonable requirements on the replacement candidates.¹²

In both of California’s gubernatorial recalls the secretary of state confined the choice to two possible qualifying procedures: the easier party primary standard, or the harder independent candidate standard. Both chose the easier primary candidate procedure. The result is a vastly lower number of signatures required to qualify, because the party primary standard merely requires 65 supporters, while the independent standard requires support from 1% of all registered California voters.¹³ In the 2003 Gray Davis recall the independent standard would have required 149,956 valid signatures.¹⁴ In the 2021 Gavin Newsom recall the independent standard would have required 221,544 signatures.¹⁵

⁶ Zimmerman at 13; Bird and Ryan at 54. The recall was approved by a vote of four to one; it received the second largest vote and won by the largest majority out of all 23 proposals on the October 10, 1911 special election ballot. See also Bird and Ryan at 362: “The public is too well satisfied with the sense of security which the existence of the recall conveys to permit it to be discarded. As a defensive weapon of democracy it apparently has come to stay.”

⁷ Bird and Ryan at 7.

⁸ David A. Carrillo, Stephen M. Duvernay, Benjamin Gevercer & Meghan Fenzel, *California Constitutional Law: Direct Democracy* (2019) 92 S. Cal. L. Rev. 557, 626. Commentators similarly disfavor diluting the recall: “because the people are sometimes vanquished by their own weapon is no justification for depriving them of so desirable a potential means of protection.” Bird and Ryan at 351.

⁹ This question dates to the recall’s origins in Los Angeles in 1903. Bird and Ryan at 90. “The flexibility necessary for the useful functioning of any democratic instrument makes the abuse of those instruments possible.” *Id.* at 351.

¹⁰ Elec. Code § 8000.

¹¹ Elec. Code § 11328.

¹² See *Burton v. Shelley* (Aug. 7, 2003) 03 Cal. Daily Op. Serv. 706, 2003 WL 21962000, at *1.

¹³ Elec. Code §§ 8300, 8400, 8550(f).

¹⁴ See Cal. Sec. of State, [Odd-Numbered Year Report of Registration: February 10, 2021](#) at 1 and [Statewide Special Election — FAQs About Recalls, October 7, 2003](#). Elec. Code § 8062(a)(1) (candidates required to collect “not fewer than 65 nor more than 100” signatures to appear on the ballot).

¹⁵ See Cal. Sec. of State, [Report of Registration: August 8, 2003](#) at 1.

The benefit of a more-onerous replacement candidate procedure is that it is sufficiently difficult to qualify that only serious candidates could quickly fund a signature drive. The constitutional and statutory provisions combine to create a narrow time window for replacement candidates to gather signatures. Prospective candidates cannot declare candidacy before the election is certified.¹⁶ But they must file the required paperwork no less than 59 days before the scheduled recall election.¹⁷ And that election must be held 60 to 80 days after certification.¹⁸

The result is a one-to-three week window to gather signatures: in both 2003 and 2021 the replacement candidates had about 16 days of signature gathering time. Professional signature gatherers typically charge approximately \$2 to \$3 per signature, and because signature prices rise when (as here) timing is compressed and there are competing players the price could rise to \$5 per signature. Thus, the independent candidate procedure likely would require at least \$1,000,000 to qualify. That amount would bar most frivolous candidates.

The potential downside of a more rigorous replacement candidate standard (like the 1% requirement for independent candidates) is that it could unduly burden genuine prospects. The compressed timeframe to collect signatures is more burdensome than the funding requirement: even a well-funded candidate might struggle to gather several hundred thousand signatures in a matter of weeks. The solution here is to consider a third path: the options are *presently* limited to the primary and independent procedures, but not *necessarily* so.

We favor two reforms: adapting the in-lieu signature framework from Elections Code section 8106, and giving replacement candidates a set time period to collect signatures:

- The in-lieu signature framework from Elections Code section 8106 would require replacement candidates in a gubernatorial recall to gather 7,000 signatures.¹⁹ Adopting

¹⁶ In a regular primary election Elections Code section 8020(b) requires that the declaration of candidacy forms “shall first be available on the 113th day prior to the direct primary election” — but the election date is unknown until the Lieutenant Governor sets the election date, which happens only after the Secretary of State certifies the election.

¹⁷ Elec. Code § 11381(a): “For recalls of state officers, the nomination papers and the declaration of candidacy shall, in each case, be filed no less than 59 days prior to the date of the election and not before the day the order of the election is issued. The Secretary of State shall certify the names of the candidates to be placed on the ballot by the 55th day prior to the election.”

¹⁸ Cal. Const., art. II, § 15.

¹⁹ The relevant portions of that statute:

(a) Notwithstanding any other provision of this article, a candidate, or a person authorized by the candidate, may submit a petition containing signatures of registered voters in lieu of a filing fee as follows:

(1) For the office of California State Assembly, 1,000 signatures.

(2) For the office of California State Senate and the United States House of Representatives, 2,000 signatures.

(3) For candidates running for statewide office, 7,000 signatures.

(4) For all other offices for which a filing fee is required, if the number of registered voters in the district in which a candidate seeks nomination is 2,000 or more, the candidate may submit a petition containing three signatures of registered voters for each dollar of the filing fee, or 7 percent of the total of registered voters in the district in which the candidate seeks nomination, whichever is less.

(5) For all other offices for which a filing fee is required, if the number of registered voters in the district in which a candidate seeks nomination is less than 2,000, the candidate may submit a petition containing three signatures of registered voters for each dollar of the filing fee, or 14 percent of the total of registered voters

this procedure would borrow from existing law, clarify the qualifying procedure, and set a signature requirement somewhere between the two existing options. This middle-ground procedure balances concerns about ballot access and preserving its integrity.

- The signature-gathering period should coincide with another clear, certain statutory time window: the 30-day signature withdrawal period, for example.²⁰ Giving candidates a set period to gather signatures marked from an earlier definite point in the recall process would give candidates a fair opportunity to collect signatures without compromising the other pre-election deadlines. And it would balance replacement candidates' ability to qualify for the ballot with the state's interest in efficient election administration.

We favor changing the replacement candidate qualifying procedure for two reasons. The current statutory scheme is incomplete and vague, leaving excessive discretion to election officials and creating a chaotic qualifying process that burdens candidates. And the low bar that applied in the two previous gubernatorial recall elections permitted abuse of the process, with dozens of farcical candidates qualifying on a lark. Clarifying the replacement candidate qualifying procedure with a higher signature requirement and a set time window will give sincere contenders a fair chance of qualifying. Because it can be accomplished through the statutory process alone this is the easiest reform proposal to enact.

b. The majority vote and new election model

Because California law treats the recall as a ballot measure and the replacement race as a plurality election, a replacement candidate who receives under 50% of the vote could win. There is nothing unlawful about this; it has happened in at least five recalls in the past ten years, including in California state senator Josh Newman's recall in 2018. Outside the recall context, about 25% of gubernatorial elections in California since 1914 resulted in a governor being elected without a majority. Although a plurality voting rule may seem odd, there is no consensus system among the 19 states that allow gubernatorial recall elections. And all eight states with a replacement election use a plurality voting requirement:

- Two states (California and Colorado) have a yes-or-no vote on the recall question followed by a same day replacement.
- Two states (Illinois and Georgia) have a yes-or-no vote on the recall followed by a replacement vote on a later date.
- Four states (Arizona, Nevada, North Dakota, Wisconsin) have a new election.
- Eleven states (Alaska, Idaho, Kansas, Louisiana, Michigan, Minnesota, Montana, New Jersey, Oregon, Rhode Island, Washington) appear to have a yes-or-no vote with an automatic replacement: the lieutenant governor or secretary of state replaces a

in the district in which the candidate seeks nomination, whichever is less.

²⁰ See Elections Code § 11108(b): "Notwithstanding any other law, any voter who has signed a recall petition under this chapter shall have the voter's signature withdrawn from the petition upon the voter filing a written request that includes the voter's name, residence address, and signature with the elections official within 30 business days of the Secretary of State's notice provided by subdivision (a)."

recalled governor.²¹ Other recalled officials generally are also replaced by an appointment.²²

Changing the plurality vote rule would require a constitutional amendment; changing the election model arguably would not. California's replacement rule is unchanged since 1911: it requires an "election to determine whether to recall an officer and, if appropriate, to elect a successor," and when the officer is removed, "if there is a candidate, the candidate who receives a plurality is the successor."²³ Early local California recalls most commonly used the existing statewide procedure: combined ballot with two questions (whether to recall and who would succeed), and similarly employed a plurality replacement rule with the office being filled by the candidate receiving the highest vote.²⁴

The current system of a same-day replacement plurality election is lawful, but it suffers from the perception of unfairness due to the possibility that the winning replacement candidate may have fewer votes than those who voted to retain a recalled official. Some propose to require a replacement to secure a majority. A new election with a majority vote rule beneficially matches existing systems, speaks to voter familiarity, and avoids the seemingly unfair plurality replacement problem. This seems like the simplest solution and arguably fits with the common understanding of how an election should work.²⁵ Voters are accustomed to two-step elections. The new election model also removes the incentive for the targeted official to manipulate candidate entry (or absence) by copartisans in the replacement race.

The major risk to adopting a majority vote replacement rule lies in failing to make necessary changes to the replacement election to accommodate the new voting rule. In a crowded same-day field election it may be impossible for one candidate to muster a majority, leaving the office vacant. Adopting a majority vote replacement also requires changing the new election model; one common proposal is to hold a separate runoff election between the top two field finishers.²⁶ That has the benefit of maximizing voter choice. But a separate election is costly and burdensome: unless the recall coincides with a regular election, it requires two separate elections and doubles a recall's cost.²⁷ Having a separate day for a replacement vote also potentially drives down turnout. And the new separate replacement election arguably converts the recall into a special election rerun of the gubernatorial contest.

²¹ Only three of these states (Idaho, Oregon, and Washington) have had a recall of a state legislator. The laws in some of the other states may allow for the replacement by an election model, though the language appears to favor the automatic replacement method.

²² Michigan has the automatic replacement model solely for Governors and uses a new election for other officials. New Jersey uses the automatic replacement for state-level officials and a later-date replacement race for local officials.

²³ Cal. Const., art. II, § 15, subd. (a) and (c).

²⁴ Bird and Ryan at 18.

²⁵ For a contrary view, see Michael B. Salerno and Mark Paul, "[The replacement election in the recall is unnecessary; here's why](#)," CalMatters September 1, 2021. The authors argue that it is inappropriate for the legislature to provide by statute for a replacement election system at all; the authors argue instead that existing constitutional succession-in-vacancy provisions should apply.

²⁶ Note that the legislature considered and rejected switching to this system in 1915. Bird and Ryan at 76.

²⁷ Zimmerman at 48; still, at 139 he notes that "Democracy costs the taxpayers money, yet no one objects to the cost of regular elections."

We favor a same-day replacement question with ranked-choice voting, which permits California to keep its current system of a two-part ballot with a simultaneous replacement. This resolves concerns about plurality replacements and avoids the increased costs of a separate replacement contest. Rather than selecting one replacement candidate, voters would rank the replacement candidates in order of preference. The candidate with the lowest vote total is eliminated in successive rounds, and their votes transfer to other candidates until one candidate has a majority. Ranked-choice voting is well-suited to recall elections where support can be divided between dozens of candidates. This is the best and most cost-effective improvement to the existing first-past-the-post plurality method.

Finally, we disfavor a new election system that permits the targeted official to replace themselves. California and Colorado specifically prevent this possibility,²⁸ while Georgia allows the targeted official to run.²⁹ Permitting the targeted official to run in the replacement race arguably takes one anomalous result scenario (a recalled official's replacement receives fewer votes) and replaces it with another odd result (a recalled official wins the replacement race). Recalled officials in other states have at times lost the recall but replaced themselves.³⁰ Permitting the recalled official to run undercuts the recall's purpose, suffers from the snap special election redux problem, and permits the anomalous result of allowing voters to simultaneously fire and rehire the same official in an election that produces a status quo ante result. That seems like a pointless exercise.

c. Increasing the signature requirement to qualify a recall

The signature gathering phase is arguably the most important part of the recall campaign.³¹ It tests seriousness of purpose and proves whether voters want a recall on the ballot. The vast majority of recall attempts fold when proponents fail to gather enough signatures to meet the requirement. This shows that signature requirements are an effective filter and proxy for voter interest: the frequent inability to garner initial support from even a small percentage of likely voters suggests the absence of deep untapped wells of voter interest in recalls.

The key tradeoff here is between accessibility and abuse: it is “essential for the effective functioning of the recall that the percentage be not so high as to render it inoperative, nor yet so low as to facilitate its misuse by an official's political opponents.”³² There are two common standards for calculating signature requirements: either a percentage of registered voters in the jurisdiction, or of turnout in the past election.³³ Local governments in California historically experimented with signature requirements ranging from 10 to 55% of the total vote in the last

²⁸ Cal. Const., art. II, § 15; Colo. Const., art. XXI, § 3.

²⁹ Ga. Code § 21-4-13(g).

³⁰ For example, see the 2018 mayoral recall election in Fall River, Massachusetts.

³¹ Zimmerman at 57: a recall campaign's success “is influenced heavily by the threshold petition signature requirement.”

³² Bird and Ryan at 61–62.

³³ The signature threshold usually is based on turnout in the last election for that office. In some jurisdictions, the number is calculated based on turnout in the governor's race in that jurisdiction (which is invariably a higher bar).

election for the office.³⁴ The most common modern signature requirement is 25%; Kansas has the highest requirement and some argue that California has the lowest.³⁵

This list of signature requirements for recalling state officials is ranked roughly in descending order from most to fewest signatures:

Signature requirement:	States using threshold:
40% of turnout in the last election	Kansas
25% of registered voters	New Jersey
25% of turnout	Alaska, Arizona, Colorado, Michigan, Minnesota, Nevada, North Dakota, Washington, Wisconsin
20% of eligible voters	Idaho, Louisiana
15% of eligible voters	Georgia
15% of turnout	Oregon, Rhode Island
15% of turnout and the support of a bipartisan grouping of legislators	Illinois
12% of turnout for the office	California (12% of the 12,464,235 votes cast for governor in 2018 is 1,495,709)
10% of registered voters	Montana (10% of the 752,538 registered voters in 2020 is 75,253)
10% of turnout:	Virginia (which may not have a recall law impacting state officials or specifically governors; it also uses a procedure called recall trials, where if enough signatures are gathered a judge holds a trial rather than an election).

California’s 12% signature requirement has been unchanged since its adoption in 1911.³⁶ It is on the low end in terms of necessary percentage, but the real number is much higher because California is the most populous state.³⁷ This partly explains why, despite California’s seemingly low signature requirement, it has proved quite difficult to meet. For example, the qualifying rate for California gubernatorial recall attempts is under 4% (two of 55), and just 6% (11 of 179) recall attempts of any California state official collected enough signatures to qualify for the ballot. And both California gubernatorial recalls that qualified did so in unusual circumstances.

³⁴ Bird and Ryan at 17. “The recall laws of California illustrate almost every conceivable variation in recall procedure.” Id. at 17 n.31.

³⁵ Zimmerman at 39. He notes that a low signature requirement “obviously encourages” recalls.

³⁶ Bird and Ryan at 72.

³⁷ Carrillo, Spivak & Stracener, *California’s electorate runs the game in recall elections*, Harvard Social Impact Review (September 8, 2021). For example, Montana’s far lower population makes its real signatures number far lower than California’s.

The 2002 gubernatorial election saw the lowest voter turnout in California history, making the 2003 Davis recall effort relatively easy to qualify. The 2021 Newsom recall campaign proponents benefited from additional time for gathering signatures granted during the COVID pandemic; absent that extra time it is unlikely the Newsom recall would have qualified.

The benefits and burdens of increasing the signature requirement are clear and the same: increasing the requirement would make it harder for recalls to qualify. Given the already-high bar to qualifying statewide officer recalls in California and the low qualifying rate of past recall attempts, this proposal seems like a solution to a nonexistent problem.

We disfavor increasing the signature requirement for statewide officer recalls to make it more difficult to qualify recalls because past attempts show that the existing standard is already difficult to satisfy.³⁸ Other solutions would make the recall less prone to abuse while keeping it available for ready use when needed. For example, signature requirements for successive recalls could progressively increase: the original San Francisco recall system started at 10% then doubled for a second attempt and tripled for a third try; Berkeley required 15% for a first attempt and 30% for a second attempt.³⁹ The 2021 Newsom recall election was the sixth attempt against that officer, and progressively increasing signature requirements likely would curtail future similar repeated attempts. Or proponents could be put at risk by being required to post a bond to reimburse the state for all or part of its expenses in an unsuccessful second attempted recall — Pomona’s original recall system required proponents to deposit a certified check “for an amount equal to the cost of the last recall election” against the targeted official.⁴⁰

If reform is desired here, we favor switching to the standard used by California’s largest cities: a registered voter requirement with a 10% threshold. Doing so would primarily provide clarity, with a secondary effect of modestly increasing the signature requirement. The registered voter requirement reduces the variability of tying the recall to turnout in the last election and sets a more consistent standard. That consistency would reduce tactical calendaring incentives for recalls following unusually low-turnout elections. It also partly satisfies calls to raise the signature requirement: if applied to the 2021 Newsom recall, a 10% of registration standard would have modestly raised the required signatures to over 2.2 million, versus the 1.5 million required by the current 12% of turnout standard. Note that this change requires a constitutional amendment.⁴¹ And it would unhitch the recall from the initiative and referendum, which would still be tied to gubernatorial turnout.

³⁸ Bird and Ryan at 20: “when the large number of officials which have fallen within the jurisdiction of the recall is borne in mind, the number of those who have fallen victims to its operation is still comparatively insignificant.”

³⁹ Bird and Ryan at 66–67.

⁴⁰ Bird and Ryan at 70.

⁴¹ Cal. Const., art. II, § 14(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.”

d. Requiring grounds for recall

The majority of recall states permit a recall for any reason or no reason.⁴² California does so: “Sufficiency of reason is not reviewable.”⁴³ That makes the California recall process a political question that is not judicially reviewable.⁴⁴ Michigan constitution article II, section 8 similarly provides that “The sufficiency of any statement of reasons or grounds . . . shall be a political rather than a judicial question.” This is consistent with the nature of recall campaigns as political campaigns, so they can be and often are politically motivated.

Only eight of the 19 recall states require specific grounds for a recall. These eight states are known as *malfeasance* states because the required grounds all generally concern misconduct in office that either constitutes or resembles criminal acts. For example, Alaska requires “lack of fitness, incompetence, neglect of duties or corruption;”⁴⁵ Georgia, Minnesota, and Washington require “malfeasance” in office;⁴⁶ Kansas requires conviction of a felony, official misconduct, or dereliction of duty;⁴⁷ Montana requires unfitness, misconduct, or a felony conviction;⁴⁸ and Rhode Island requires a criminal conviction or ethical violation.⁴⁹

Recent California polls show support for requiring specific grounds for a recall.⁵⁰ A malfeasance requirement has common-sense appeal because it seems consistent with the concept of the recall as a means to remedy official misconduct that resembles a quasi-impeachment mechanism. Voters might expect that adopting a malfeasance requirement would prevent the recall from being abused for political and policy disputes. Yet the recall’s adopters in the “any reason or no reason” states like California understood and intended that recalls could be used for political reasons and to impact policy.⁵¹

The disadvantage of imposing a malfeasance standard is that it effectively neutralizes the recall.⁵² Recalls will become extremely rare if California adopts a malfeasance standard: of the 48 state-level recalls in U.S. history, only one occurred in a malfeasance state.⁵³ On the local level in the past decade, in the most populous malfeasance state (Washington) just seven recalls qualified, while in neighboring Oregon (a smaller “any reasons” state) 114 qualified. California

⁴² Zimmerman at 4.

⁴³ Cal. Const., art. art. II, § 14(a).

⁴⁴ Zimmerman at 30.

⁴⁵ AS §15.45.510. A recent decision in Alaska (*State v. Recall Dunleavy* (2021) 491 P.3d 343) may have paved the way for it to effectively become a political recall state.

⁴⁶ GA Code §21-4-3(7) and 21-4-4(c); MN Const. Art. VIII §6; WA Const. Art. I §33.

⁴⁷ KS Stat. §25-4301. This malfeasance requirement may lack teeth. Section 25-4302 states that “No recall submitted to the voters shall be held void because of the insufficiency of the grounds, application, or petition by which the submission was procured.”

⁴⁸ MT Code §2-16-603.

⁴⁹ RI Const. Art. IV §1.

⁵⁰ See recent polls by [Berkeley IGS](#) and [UC San Diego Yankelovich](#).

⁵¹ The ballot argument in favor of California’s 1911 Senate Constitutional Amendment 23 described the recall as a means “to require a public servant . . . whose stewardship is questioned by [the proponents] to submit the question of his continuance in office to a vote of the electors. [¶] If a majority of all voting at the election say that their servant is unfit to serve them longer, he is thereby retired.” And it similarly framed the recall as “The power to remove a dishonest, incapable, or *unsatisfactory* servant.” (Emphasis added.)

⁵² Zimmerman at 57: “voters typically experience greater difficulty” in removing officials in malfeasance states.

⁵³ Washington, 1981. At the time, Washington’s Supreme Court had opened up the recall to a more political version.

has seen six successful state legislator recalls, but only one (Marshall Black) concerned actual corruption. This difference shows that a malfeasance standard is very effective at achieving its design purpose of barring recalls for reasons other than malfeasance. And this record suggests that recalls would be rare if California became a malfeasance state.

This difference in qualifying recalls results because malfeasance thresholds are inherently more difficult to satisfy. Proof of actual malfeasance is less available than mere public disapproval, and courts can (and have) intervened to halt recalls that they viewed as showing insufficient malfeasance grounds.⁵⁴ Malfeasance short of charged criminal conduct is particularly difficult, and arguably more prevalent: “stupid bunglers” are more common than “shrewd corruptionists” and the inherent difficulty of proving non-criminal misconduct “is in itself sufficient reason for a remedy which, while perhaps assuming some form of malfeasance, does not involve the necessity of proving it.”⁵⁵ A malfeasance requirement may also make signature gathering more difficult if voters, guided by specific grounds for a recall, refuse to sign petitions that in their mind falls short of the required malfeasance threshold.

We disfavor a malfeasance requirement for several reasons. Requiring cause for a recall will reduce the electorate’s recall power by making it far more difficult to exercise. Requiring reasons will make recall campaigns more expensive and difficult even in cases of clear misconduct, because proponents will be forced to litigate expensive court battles over sufficiency before beginning the signature process. Adjudicating sufficiency will force courts into the political thicket as arbiters of what qualifies as appropriate grounds.⁵⁶ A malfeasance requirement is antithetical to the recall’s original intent, which was to “give to the electorate the power of action when desired.”⁵⁷ Less a reform and more a hobble, adopting a malfeasance standard likely will effectively neuter this direct democracy power.

e. Automatic replacement methods

To the extent that a “most common” system for replacing a recalled official exists it is some form of automatic replacement, which is the case in 11 of the 19 recall states. California could adopt an automatic replacement system such as the order of constitutional officer succession. That method has limited benefits: it arguably prevents recalls that are merely attempts to reverse the past election, and it limits a recall’s costs. It is cheaper than the new election model of holding two separate contests on different days, and the societal cost is reduced because it eliminates replacement campaign expenditures.

⁵⁴ Courts in Kansas, Minnesota, Montana, and Washington have quashed recall attempts for insufficient grounds. Zimmerman at 32–36.

⁵⁵ Bird and Ryan at 348. Cf. Hanlon’s razor: “Never attribute to malice that which is adequately explained by stupidity.”

⁵⁶ For example, a Washington state court recently quashed a recall petition against Governor Jay Inslee after a costly court battle. [KPQ News June 19, 2021](#). Washington’s constitution (article I, § 33) limits recalls to public officials who have “committed some act or acts of malfeasance or misfeasance while in office, or who has violated his oath of office.” [According to the Washington Attorney General](#), the court dismissed the recall petition on the grounds that the five allegations were “legally and factually insufficient.”

⁵⁷ [1911 inaugural address](#) of California Governor Hiram Johnson.

But the automatic replacement model has serious drawbacks. It would “solve” a problem with direct democracy by instituting the least democratic option available, where the system designates the replacement, not the voters. It would transform the recall — where the voters select the replacement — into another impeachment process.⁵⁸ And the argument that it prevents relitigating the past election is suspect. Experience shows that automatic replacement does not lessen recall attempts; instead, it may *increase* recall attempts against other state officials in the line of succession. California’s two gubernatorial recall elections targeted the governor alone because the existing simultaneous replacement system removes incentives to target officials in the line of succession. But in past gubernatorial recalls in other states with automatic replacement systems the proponents simply targeted the replacement officials.

For example, in North Dakota in 1921, the electorate removed the governor, the attorney general, and the agriculture-and-labor commissioner.⁵⁹ And in 2012 in Wisconsin, gubernatorial recall proponents gathered an additional 900,000 signatures to also qualify a recall against the lieutenant governor. Indeed, historically multi-candidate recall attempts are the rule, not the exception. There have been 116 recall votes in California in the last 11 years; in 32 of those elections more than one official was on the ballot, compared to 27 times when only one official saw a vote. Automatic replacement will not guarantee an orderly succession; instead it more likely will increase the number of targeted officials.

Automatic replacement also exacerbates the conflict potential between a governor and the potential replacement official (commonly the lieutenant governor). Fifteen states saw recall attempts against governors between 2019 and 2021. The two most serious attempts were in Oregon and Alaska — both of which use the automatic replacement model. Due to a quirk in Oregon’s law, its automatic replacement process nearly caused a constitutional crisis.⁶⁰

We disfavor the automatic replacement model. Rather than removing politics from the recall process, it eliminates voter choice, encourages tactical partisan behavior, and may increase the likelihood of a multi-candidate recall effort. Concerns about automatic replacements are particularly acute in California, which has a separately-elected executive branch and often elects governors and lieutenant governors from different parties: it was so from 1979 to 1999. Automatic replacement may encourage politically motivated recalls in that scenario. One proposal (which we also disfavor) would make the governor and lieutenant governor run together on a ticket. That would create more problems than it solves by abolishing an independent constitutional executive office and reducing it to a mere political running mate, creating an anomaly in California’s divided executive branch and increasing the governor’s power.

⁵⁸ When a statewide officer is impeached and removed, the governor appoints a replacement. Gov. Code § 3038. When a governor is impeached and removed, the lieutenant governor automatically becomes governor. Cal. Const., art. V, § 10.

⁵⁹ Those three officials made up the Industrial Commission and were in charge of several state-sponsored entities.

⁶⁰ Oregon does not have a lieutenant governor; its secretary of state is next in line. The secretary of state was a Republican, but that official died in office. Under Oregon law, a non-elected replacement was not eligible to succeed to the governor’s office — but the recall petitioners challenged this and were prepared to fight any effort to bypass the Republican in court.

3. Debate about whether the recall is overused or overpowered

State-level recall attempts in all recall states have been largely unsuccessful.⁶¹ The recall is used much more often at the local level.⁶² Across all statewide offices in all recall states, far more recall efforts fizzle than qualify for an election: the proponents abandon the effort, fail to gather enough valid petition signatures, run out of funds, or fall short from some combination of those factors.⁶³ Early commentators in California concluded that predictions by the recall’s originators that it would be used sparingly proved to be accurate.⁶⁴ Modern national and California experience, with a much larger timeframe, similarly supports a conclusion that the recall is rarely employed.

Only four governors have ever faced a recall election vote; only two were recalled.⁶⁵ In 1921 voters recalled North Dakota Governor Lynn J. Frazier, and in 2003 voters recalled California Governor Gray Davis. In 2012 Wisconsin Governor Scott Walker survived a recall election, and in 2021 California Governor Gavin Newsom beat a recall attempt. (In 1988, Arizona voters submitted enough signatures to trigger a recall election for Governor Evan Mecham, but he was impeached before the scheduled recall election.) Recall efforts against state legislators are more common, but still unusual. Out of hundreds of total attempts to recall legislators nationwide, only 39 gathered enough signatures to trigger an election.⁶⁶ In 21 of those attempts the legislator was unseated — so nationwide only 55% of legislative recall elections succeeded. In California there have been 179 state official recall attempts: 11 (a 6% qualification rate) qualified for the ballot and of those, the official was recalled in six instances (a 54.5% success rate).

On these data, we conclude that the recall is not overpowered in recall states generally, or in California specifically, because of its low qualifying success rate. The initiative is deployed far more often nationwide and in California. This makes the initiative’s impact far greater than the recall, which has been a relatively minor change agent in politics — albeit a dramatic one when it succeeds.⁶⁷ Although California is the largest state by population with a recall, Michigan has used it more frequently on the local level and Oregon is about equal to California. And the 110 years of experience in California shows the recall to be an infrequently used tool that is less disruptive to the political sphere than its enactors may have imagined or its opponents fear.⁶⁸

⁶¹ Zimmerman at 48, calling statewide officer recalls an “infrequent occurrence,” at 59, noting that the recall “somewhat surprisingly has been little used” against state officers, and at 78, concluding that fears about the recall’s frequent use to disrupt representative government have proved “unfounded” given how “seldom” the recall is used.

⁶² Bird and Ryan at 57; Zimmerman at 19.

⁶³ Zimmerman at 19, noting that state officer recalls have been “infrequent, in part because of the difficulty of collecting signatures on petitions.”

⁶⁴ Zimmerman at xi, quoting Robert M. La Follette in 1920: the recall tools “will prove so effective a check against unworthy representatives that it will rarely be found necessary to invoke them.” Bird and Ryan at 19–20: “when the large number of officials which have fallen within the jurisdiction of the recall is borne in mind, the number of those who have fallen victim to its operation is still comparatively insignificant.”

⁶⁵ Zimmerman at 60; he notes that by comparison 16 governors have been impeached — that’s four times as many recalls.

⁶⁶ A full one-third of these occurred in Wisconsin in 2011–12.

⁶⁷ While there is risk that the recall “can be employed for partisan purposes, yet it seldom has been so used.” Zimmerman at 129; see also *id.* at 130 (recall use to frivolously harass officials is “exceptional”).

⁶⁸ This longer experience validates the view in 1930 that after 25 years the recall “realized neither the highest hopes of its sanguine originators nor the darkest prophecies of its cynical opponents,” producing neither “a democratic

4. Conclusion

We favor the proposals identified above because they will improve the electorate’s recall power by making it simpler to use, less confusing to voters, and less prone to abuse. We disfavor the reforms identified above that would reduce the electorate’s direct democracy powers by making the recall harder to use. An optimal system would preserve the recall while barring frivolous or harassing abuses of the system, but we agree with other commentators that a perfectly-designed recall system is impossible.⁶⁹ The two proposed improvements we endorse (clarifying the replacement candidate procedure, and using a same-day majority-vote replacement ballot with ranked-choice voting) have multiple benefits: they balance the tradeoff between availability and integrity, cure the perception problem of plurality replacement, reduce voter confusion, improve perceived fairness by making recalls more consistent with existing contests, and avoid increased costs associated with a separate replacement election.

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For further detail on these points see:

- Joshua Spivak (2021) *Recall Elections: From Alexander Hamilton to Gavin Newsom*
- Carrillo, Spivak & Stracener, *California’s electorate runs the game in recall elections*, Harvard Social Impact Review September 8, 2021
- Bob Wu and Brandon V. Stracener, “Two state officials will shape the recall election” SCOCABlog March 26, 2021

Utopia” nor caused “political demoralization and chaos” given that it was deployed both to “drive from office unfaithful, incompetent, and arbitrary officials” and also employed “on occasion, without justification or beneficial result.” Bird and Ryan at 342. Those authors concluded (from a much smaller dataset than ours) that “on the whole the recall has been employed with moderation,” that only “a somewhat negligible percentage of public officials become involved in recall proceedings,” and that the recall has been “applied almost exclusively to local government officials.” Id. at 342–43. Zimmerman reaches similar conclusions at 131.

⁶⁹ Bird and Ryan at 92: “Twenty-five years of municipal experimentation with recall law has resulted in no agreement as to what constitutes the ideal recall procedure.” And see id. at 351: “No system has ever been devised which will perfectly protect the electorate from its own lack of judgment and discrimination.”