

# Recalling Representative Democracy

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“THE UNITED STATES SHALL GUARANTEE TO EVERY STATE IN THIS UNION A REPUBLICAN FORM OF GOVERNMENT . . .”

So begins Article IV, Section 4 of the Constitution. Over the years, that sentence has not received much scrutiny, nor inspired fractious public debate, as have, for example, the Constitution’s guarantees of liberty, equality, and separation of powers. Indeed, since the 19th century, the Supreme Court has held that the republican guarantee clause is not even justiciable by the federal courts.

It’s hard to know exactly what the Framers meant by the word “republican.” We know what it does *not* mean: government by monarchy, and government by coup, but rather government by “We the People,” the words that give meaning to the Constitution’s own majestic preamble.

But which people? The people acting directly through plebiscite, or the people one step removed, authorizing representative government and reasoned, deliberate processes for reaching decisions? With the effort to recall a sitting governor in California, the question of the true meaning of the guarantee clause takes on new salience.

For better or worse, California has led the nation in experiments in direct democracy, with the recall contest the latest example. The recall provision, like its siblings, the initiative and referendum, and its half-sibling, the term limit, was born of the state’s turn-of-the-century populism. Good government reformers believed such measures would let good and wise citizens take back control of government from the smoke-filled rooms of political bosses.

“The opponents of direct legislation and the recall, however they may phrase their opposition, in reality believe the people can not be trusted,” declared California Governor Hiram Johnson, a champion of the populists, in his inaugural address in 1911. “[T]hose of us who espouse these measures do so because of our deep-rooted belief in popular government, and not only in the right of the people to govern, but in their ability to govern.”

In contrast, the framers of the Constitution distrusted direct democracy, and did not provide for any plebiscitary processes. The President cannot be recalled for unpopular policy, but only impeached and removed by the Congress for “high crimes and misdemeanors.” As James Madison wrote in *The Federalist Papers* No. 37: “Stability . . . requires, that the hands, in which power is lodged, should continue for a length of time, the same. A frequent change of men will result from a frequent return of electors, and a frequent change of measures, from a frequent change of men; whilst

energy in Government requires not only a certain duration of power, but the execution of it by a single hand.”

Even constitutional amendments require intervention of the national legislature. In *Federalist* No. 49, Madison wrote, “The danger of disturbing the public tranquility by interesting too strongly the public passions is a still more serious objection against a frequent reference of constitutional questions to the decision of the whole society.”

Yet Madison never foresaw the changes that two centuries would bring: television, cable and Internet technology that enable citizens to be more informed and more directly involved in public decision making than ever before; and widespread disillusionment with representative government and its tendency toward gridlock.

Do such changes, though, argue for more direct democracy? One wonders what a latter-day Hiram Johnson would make of a recall election that unleashes 135 candidates from television comedians and talk-show pundits to a woman capitalizing on campaign publicity to promote on-line sales of thong underwear. Perhaps he would brush aside the circus-like atmosphere and point to the many citizens who, disenchanted by government, have become engaged again in politics. Perhaps he would tinker with the process to erect higher hurdles to a recall. Or perhaps he would newly appreciate the Constitution, with its representative systems and its emphasis on ensuring that decisions would not be rushed.

The question is more than academic for those of us teaching at law schools. The legal profession, beyond any other, is the glue that binds together our republican form of government. Whether as legislators or executives, policy analysts or lobbyists, attorneys are found in all lines of government, and the expertise they develop in law school is vital for their work. Lawyers also protect the interests of businesses and individuals affected by all that government does.

Lawyers have a responsibility, to ensure that government remains effective for and accountable to the people. One of the beauties of the Constitution is that its federalism encourages local democratic experiment. But lawyers are also in a good position to recall that democracy sometimes works best when it works slowly. For deliberation is, after all, a defining feature of what lawyers do.



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