RECALL ME MAYBE? THE CORROSIVE EFFECT OF RECALL ELECTIONS ON STATE LEGISLATIVE POLITICS

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For the first time in Colorado's 137-year history, voters in two districts recalled their state senators from office in September 2013. Although the event prompted significant debate over the controversial gun legislation that sparked the grassroots efforts to trigger the recall elections, discussion generally overlooked the implications of using political recall altogether—implications that concern the very foundation of American democracy: the role of the legislator. This Comment aims to fill that gap, examining politically motivated recalls in the context of state legislatures.

Using the recent Colorado examples as a case study, this Comment argues that increased use of the tactic will shake the foundation of state legislative politics. By forcing legislators to consider the chance that they might be recalled after voting on any controversial issue, the tactic upsets the delicate balance between a legislator's ideal dual-role as a delegate and trustee, thereby distorting legislative decision-making. Additionally, increased use of political recall threatens to create a literal manifestation of the "permanent campaign," and disproportionately advantage special interest and national groups in state politics.

Seeking to address the problems associated with the increased use of this dangerous tactic, this Comment presents three policy recommendations. Two of the recommendations are aimed at preventing politically

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motivated recalls from becoming the norm in state legislatures, while the third seeks to ensure that they do not take hold in a branch of government where their presence would be of even greater cause for concern—the judiciary. Specifically, this Comment recommends that states ban politically motivated recalls altogether. Alternatively, states could raise the signature requirement for initiating a politically motivated recall. At the very least, this Comment recommends that measures should be taken to ensure politically motivated recalls are never used against judges.

INTRODUCTION

There's no denying that the recall is a relatively crude instrument that could be used abusively.[1]

Colorado made political history in September 2013 when voters in two districts recalled their state senators from office.[2] The votes marked the first time in Colorado's 137-year history that a state representative was forced out of office prior to the end of his or her term in the legislature.[3] Although both recalls were lawful under the Colorado Constitution,[4] political analysts expressed concern about why the recalls were initiated.[5] The targets of the recalls—Senate President John Morse and Senator Angela Giron—had not been accused of malfeasance, illegal activities, or misconduct while in office.[6] Instead, the recall elections were inspired by the senators' votes on controversial legislation passed only six months earlier.[7] In other words, the recall elections were entirely politically-motivated.

Specifically, Senator Morse's and Senator Giron's support for new gun legislation provoked the Colorado recalls.[8] The legislation was passed in response to the Aurora Theater shooting,[9] the massacre at Sandy Hook Elementary School,[10]

1. Patrick Basham, *The Silver Lining in California's Recall Cloud*, CATO INST. (Sept. 18, 2003), http://www.cato.org/publications/commentary/silver-lining-californias-recall-cloud, *archived at* http://perma.cc/Y9WH-5E58.

2. *2 GOP State Senators Sworn in After Colorado Recalls*, FOX NEWS (Oct. 3, 2013), http://www.foxnews.com/politics/2013/10/03/2-gop-state-senators-sworn-in-after-colorado-recalls/, *archived at* http://perma.cc/3D9F-2N8K [hereinafter FOX NEWS, *Colorado Recalls*].

3. *Id.*; *see also Recall of State Officials*, NAT'L CONF. ST. LEGISLATURES (Sept. 11, 2013), http://www.ncsl.org/legislatures-elections/elections/recall-of-state-officials.aspx, *archived at* http://perma.cc/HU6X-BCFU [hereinafter NCSL, *Recall of State Officials*].

4. *See* COLO. CONST. art. XXI; *see also infra* Part I.A.

5. *See, e.g.*, Editorial Bd., *Recall Votes Are No Way to Run a Government*, WASH. POST (Sept. 12, 2013), http://articles.washingtonpost.com/2013-09-12/opinions/42006458_1_recall-senate-president-john-morse-politicians, *archived at* http://perma.cc/7S4C-FYSH.

6. FOX NEWS, *Colorado Recalls*, *supra* note 2.

7. *Id.*

8. *Id.*

9. Jennifer Brown, *12 Shot Dead, 58 Wounded in Aurora Movie Theater During Batman Premier*, DENV. POST (July 21, 2012, 12:31 AM), http://www.denverpost.com/ci_21124893/12-shot-dead-58-wounded-aurora-movie-theater, *archived at* http://perma.cc/Z5BE-A2D9.

10. *Sandy Hook Shooting: What Happened?*, CNN, http://www.cnn.com/

and Colorado's sordid history with gun violence.[11] The senators voted in favor of three controversial bills in March 2013 that placed limitations on ammunition magazines, required universal background checks, and forced customers to pay the cost of background checks.[12]

Almost immediately after the votes, efforts to recall both senators began.[13] Just over three months after the gun legislation passed, the Colorado Secretary of State certified the signatures on the recall petition against Senator Morse, announcing that organizers had submitted a sufficient number of signatures to require a recall election.[14] Less than a week later, the Secretary of State certified the signatures on the recall petition against Senator Giron.[15] Following an

interactive/2012/12/us/sandy-hook-timeline/, *archived at* http://perma.cc/FFK2-M8BC ("Twenty-six people—20 students and six adults—were shot and killed at the Sandy Hook Elementary School in Newtown, Connecticut on December 14 [2012].").

11. FOX NEWS, *Colorado Recalls*, *supra* note 2; *see also* Matt Ferner, *Gun Violence in Colorado: From Columbine to Aurora, Mass Shootings Reignite Gun Law Debate*, HUFFINGTON POST (Dec. 17, 2012), http://www.huffingtonpost.com/2012/12/17/gun-violence-in-colorado-_n_2316633.html, *archived at* http://perma.cc/HD4V-8UXZ ("Colorado . . . [has] the dubious distinction of being the home of two of the nation's worst mass shootings in recent history . . . . Thirteen years ago, on the morning of April 20, 1999, Eric Harris, 18, and Dylan Klebold, 17, opened fire on their fellow classmates at Columbine High School in Littleton, Colorado killing 15 and wounding 24 with firearms . . . . Then . . . [in 2012] . . . Colorado was at the center of another mass shooting tragedy when a gunman wearing a gas mask and sheathed in head-to-toe body armor entered an Aurora movie theater during a midnight screening of 'The Dark Knight Rises' killing 12 and injuring 70 others.").

12. House Bill 13-1224 placed limitations on ammunition magazines; House Bill 13-1228 required the Colorado Bureau of Investigation to charge for background checks; House Bill 13-229 required background checks for firearm transfer between two private individuals. *See* H.B. 13-1224, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013); H.B. 13-1228, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013); H.B. 13-1229, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013); *see also* Lynn Bartels & Kurtis Lee, *3 New Gun Bills on the Books in Colorado Despite its Wild West Image*, DENV. POST (Mar. 20, 2013), http://www.denverpost.com/breakingnews/ci_22831085/colorado-gov-hickenlooper-signs-key-gun-control-bills, *archived at* http://perma.cc/3AU8-EXVD.

13. Efforts to recall Morse began in the 11th District, an area of eastern Colorado Springs. Efforts to recall Giron were also initiated in the 3rd District, which comprises most of Pueblo County. Bartels & Lee, *supra* note 12.

14. Kurtis Lee, *Colorado Senate President John Morse Recall Petition Certified*, DENV. POST (June 18, 2013), http://www.denverpost.com/ci_23486124/organizers-submit-sufficient-signatures-recall-sen-john-morse, *archived at* http://perma.cc/U3W9-G35Q.

15. Kurtis Lee, *Angela Giron Recall Effort Moves Forward with Signatures Certified*, DENV. POST (June 24, 2013), http://www.denverpost.com/ci_23528963/angela-giron-recall-effort-moves-forward-signatures-certified, *archived at* http://perma.cc/733U-HMAR.

unsuccessful judicial challenge of the language that appeared on the petitions, the Secretary of State set the date of the recall elections.[16] On September 10, 2013, voters in State Senate District 11 recalled John Morse with a vote of 9,094 in favor of recall and 8,751 votes against. Voters in District 3 recalled Angela Giron by a margin of 19,355 for recall and 15,201 against.[17] Ultimately, only seven months after the controversial votes, both senators were out of a job.

On its face, the successful deployment of a politically-motivated recall in Colorado may seem relatively insignificant to those outside of the state. But, in the states that do not prohibit its use, politically-motivated recall is a growing trend.[18] Additionally, debate over whether politically-motivated recalls are a legitimate tool in a representative democracy strikes at one of the most foundational questions of republican governance: what is the appropriate role of a legislator?[19]

This Comment argues that the increased use of politically-motivated recalls sets a dangerous precedent in the context of state legislative politics. Specifically, politically-motivated recalls make democratic governance more difficult by fundamentally altering the mindset of legislators and distorting the political landscape at the state level.

Part I of this Comment provides some necessary background on politically-motivated recalls by exploring the history of recall in the United States, defining the term, and examining the legal procedure for recalling an elected official. Next, Part II uses the recent Colorado examples as a case study to explore how increased use of the tactic will shake the foundation of state legislative politics. In particular, Part II

16. Kurtis Lee, *Sens. John Morse, Angela Giron Recall Elections Set for Sept. 10*, DENV. POST (July 18, 2013), http://www.denverpost.com/ci_23686763/john-morse-angela-giron-recall-elections-can-proceed, *archived at* http://perma.cc/LZ3E-RWVR.

17. Lynn Bartels, Kurtis Lee & Joey Bunch, *Colorado Senate President John Morse, State Sen. Angela Giron Ousted*, DENV. POST (Sept. 10, 2013), http://www.denverpost.com/breakingnews/ci_24066168/colorado-senate-president-john-morse-recalled-angela-giron, *archived at* http://perma.cc/CLH6-V7TS.

18. Ryan Holeywell, *The Rise of the Recall Election: Angry Voters Are Increasingly Using Recall Elections to Remove Local Leaders*, GOVERNING (Apr. 2011), http://www.governing.com/topics/politics/rise-recall-election.html, *archived at* http://perma.cc/EF7J-WZJG.

19. *See* Josh Israel, *Time to Re-Think Recall Elections*, THINK PROGRESS (Nov. 26, 2013), http://thinkprogress.org/politics/2013/11/26/2969601/rethink-recall-elections/#, *archived at* http://perma.cc/YDG-7CNN.

considers how politically-motivated recalls distort legislative decision-making, create a literal manifestation of the "permanent campaign," and disproportionately advantage special interest and national groups in state politics. Finally, Part III of this Comment concludes with policy recommendations aimed at preventing politically-motivated recalls from becoming the norm in the state legislature, and ensuring they do not take hold in a branch of government where their presence would be of even greater cause for concern—the judiciary. In the legislative context, this Comment argues that the best course of action is to ban politically-motivated recalls altogether. Alternatively, because this course of action is likely infeasible, states should raise the signature requirement for initiating a politically-motivated recall. At the very least, this Comment contends that measures should be taken to ensure politically-motivated recalls are never used against judges.

I. RECALL ELECTIONS AND THEIR PLACE IN AMERICAN POLITICAL HISTORY

This Part provides essential background on the concept of recall, its history, and the law governing its use. First, it explores the historical foundation of recall in American politics. Next, it defines "recall," distinguishing between political and apolitical recalls and considering the non-partisan nature of the political tactic. Third, this Part examines how recalls are used today. Finally, it explores the procedure for initiating and conducting a recall election using Colorado election law as an example.

A. History of Recall

Recall is an electoral procedure that allows citizens the opportunity to remove and replace a public official before the end of his or her term in office.[20] Debate over recall's place in American politics dates back to colonial times.[21] The General

20. NCSL, *Recall of State Officials*, *supra* note 3.

21. Even prior to the Constitutional Convention, debate over recall was directly tied to the fundamental question about the role of elected officials, "namely whether the official should act as a trustee and vote his own opinion or perform as a delegate and vote according to the wishes of his constituency. This

Court of the Massachusetts Bay Colony codified recall in law for the first time in 1631.[22] The Articles of Confederation also included the mechanism for removing public officials from office.[23] In 1787, recall became a point of contention at the Constitutional Convention in Philadelphia as delegates considered the foundational principles of the newly formed democratic republic.[24] Edmund Randolph, a delegate from Virginia,[25] included recall as part of the Virginia Plan, but the Convention ultimately struck the provision in a motion by Charles Pinckney, a delegate from South Carolina.[26]

Following the convention, debate over whether recall should be incorporated into the Constitution intensified.[27] Antifederalists, including Luther Martin, a delegate from Maryland, stressed that the American Revolution was an attack on traditional power structures and argued that the lack of a recall provision in the Constitution provided insufficient popular control over elected officials.[28] Specifically, Antifederalists like Martin feared that senators would "disregard their position as delegates of the people, and be free to work against the interests of their own states."[29] Recall, therefore, served as an important monitoring device, preserving an unambiguous form of representative democracy by binding the representatives to "the dictates of the

long running debate continues to this day with criticism of poll-driven politicians." Joshua Spivak, *What Is the History of Recall Elections?*, HIST. NEWS NETWORK (Sept. 1, 2003), http://hnn.us/article/1660, *archived at* http://perma.cc/6575-CFQH.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Biographies of the Secretaries of State: Edmund Randolph*, OFF. HISTORIAN, U.S. DEP'T STATE, http://history.state.gov/departmenthistory/people/randolph-edmund-jennings (last visited Feb. 1, 2014), *archived at* http://perma.cc/SWP4-KP6Y.

26. *Spivak*, *supra* note 21. For more information about Charles Pinckney's contributions to the Constitution, see *Charles Pinckney and the U.S. Constitution*, CHARLESTON CNTY. PUB. LIBRARY, http://www.ccpl.org/content.asp?action=detail&catid=6047&id=15740&parentid=5748 (last visited Feb. 1, 2014), *archived at* http://perma.cc/HP5G-YEZ4.

27. Antifederalists argued that recall should be included, while Federalists argued that it should not. *See Spivak*, *supra* note 21 (explaining that specifically, in the context of state ratifying conventions, delegates debated whether provisions for recall should be included in the structure of the United States Senate).

28. *Id.*

29. *Id.* "[T]hus, sir, for six years, the senators are rendered totally and absolutely independent of their states, of whom they ought to be the representatives, without any bond or tie between them." *Id.* (quoting Luther Martin).

governed."[30]

Federalists countered, arguing that senators should not be so tightly bound to their constituents and the interests of their states.[31] Alexander Hamilton, for instance, explained that recall would "render the Senator a slave to all the capricious humors among the people."[32] Hamilton feared that recall would create instability in government[33] and "prevent . . . senators from being able to make difficult decisions."[34] James Iredell, a Federalist leader in North Carolina who later became a Supreme Court Justice,[35] expressed this same fear at his state's ratifying convention,[36] arguing that "the Senate should not be at the mercy of every popular clamor."[37]

Ultimately, the Federalists prevailed in the debate over recall's place in national politics, and the states ratified the Constitution without its inclusion.[38] This fact did not signal the death of recall, but merely shifted the discourse and the use of the recall to different playing fields—state and local politics—where it remains a hotly contested issue today.[39]

B. Political vs. Apolitical Recalls

The recall process can be political or apolitical depending

30. Timothy Zick, *The Consent of the Governed: Recall of United States Senators, Delegate Theory of Representation*, 103 DICK. L. REV. 567, 572 (1999). The Antifederalists expressed their concerns at state ratifying conventions. At New York's Ratifying Convention, for instance, legislators feared that the lack of recall would prevent states from having a check on a senator with a six-year term. For instance, John Lansing feared that the senators would lose their respect for the people from whom they received their existence, and consequently disregard the great object for which they are instituted. *Id. See also Spivak*, *supra* note 221 (explaining the Antifederalist arguments for recall generally).

31. Zick, *supra* note 30, at 572.

32. *Id.* at 579.

33. *Id.* at 580.

34. *Spivak*, supra note 21 ("[If recall is included], the senator will perpetually feel himself in such a state of vassalage and dependence, that he never can possess that firmness which is necessary to the discharge of his great duty to the Union.") (quoting Alexander Hamilton).

35. *James Iredell, 1790–1799*, SUP. CT. HIST. SOC'Y, http://www.supremecourthistory.org/history-of-the-court/associate-justices/james-iredell-1790-1799/ (last visited Feb. 1, 2014), *archived at* http://perma.cc/RZ7A-CHNW.

36. Zick, *supra* note 30, at 581.

37. Spivak, *supra* note 21 (citing 5 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 127, 137 (1836)).

38. *Id.*

39. Holeywell, *supra* note 18.

on the rules of the state. Apolitical, or "for cause," recalls are initiated because of an elected official's crime, ethics violation, or gross misconduct.[40] Some states mandate the showing of cause before the recall of an elected official may be initiated.[41] Kansas, for instance, confines the grounds on which a state or local official can be recalled to "conviction of a felony, misconduct in office or failure to perform duties prescribed by law."[42] Under the Kansas law, "misconduct" is limited to "a violation of law by the officer that impacts the officer's ability to perform the official duties of the office."[43] The Kansas statutes leave no room for recall motivated by anything other than the misconduct of a legislator while in office.[44] Kansas's recall provisions thus fall into the apolitical category because an elected official can never be recalled for a controversial stance on a political issue.[45] Of the nineteen states that currently permit recall of state officials, seven allow only apolitical recall.[46]

40. *See, e.g.*, R.I. CONST. art. IV, § 1; KAN. STAT. ANN. § 25-4302 (2014); MONT. CODE ANN. § 2-16-601 (2013); *see also* Reid Wilson, *The Era of Recall*, WASH. POST (Sept. 3, 2013), http://www.washingtonpost.com/blogs/govbeat/wp/2013/09/03/the-era-of-the-recall/, *archived at* http://perma.cc/Y8YJ-J8RX; Israel, *supra* note 19.

41. *See, e.g.*, R.I. CONST. art. IV § 1; KAN. STAT. ANN. § 25-4302 (2014); MONT. CODE. ANN. § 2-16-601 (2013).

42. KAN. STAT. ANN. § 25-4302(a) (2014).

43. *Id.* § 25-4302(b).

44. *See id.* § 25-4302.

45. *See id.*

46. The seven states are Alaska, Georgia, Kansas, Minnesota, Montana, Rhode Island, and Washington. NCSL, *Recall of State Officials*, *supra* note 3. *See also* R.I. CONST. art. IV, § 1 (limiting recall to instances where an official has been "indicted or informed against for a felony, convicted of a misdemeanor, or against whom a finding of probable cause of violation of the code of ethics has been made by the ethics commission"); WASH. CONST. art. I, § 33 (limiting recall to "[c]omission of some act or acts of malfeasance or misfeasance while in office, or . . . violation of oath of office"); MINN. CONST. art. VIII, § 6 (limiting recall to "[s]erious malfeasance or nonfeasance during the term of office in the performance of the duties of the office or conviction during the term of office of a serious crime"); ALASKA STAT. § 15.45.510 (2014) (limiting recall to "lack of fitness, incompetence, neglect of duties or corruption"); GA. CODE ANN. §§ 21-4-3(7), 4(c) (2014) (limiting recall to "[acts] of malfeasance or misconduct while in office; violation[s] of oath of office; failure to perform duties prescribed by law; willfully misused, converted, or misappropriated, without authority, public property or public funds entrusted to or associated with the elective office to which the official has been elected or appointed"); KAN. STAT. ANN. § 25-4301 (2014) (limiting recall to [c]onviction for a felony, misconduct in office, incompetence, or failure to perform duties prescribed by law"); MONT. CODE ANN. § 2-16-603 (2014) (limiting recall to "[p]hysical or mental lack of fitness, incompetence, violation of oath of office, official misconduct, conviction of certain felony offenses"); VA. CODE ANN. §

By contrast, the other twelve states that permit recalls of state officials allow for both apolitical and politically-motivated recalls—recalls initiated because of an elected official's stance on a particular issue.[47] In these cases, there is no evidence of criminal activity or misconduct on the part of the legislator.[48] Rather, the underlying justification for recall is that the official should be replaced because he or she is no longer being faithful to the desires of his or her constituency.[49] Debate over whether politically-motivated recall is an appropriate measure in any circumstance is, therefore, fundamentally tied to questions regarding the role of an elected official: "namely whether the official should act as a trustee and vote his own opinion or perform as a delegate and vote according to the wishes of his constituency."[50] Currently, twelve states have no limitations on the grounds for which recall can be sought, opening the door to recall efforts that are politically motivated.[51] Arizona, California, Colorado, Idaho, Illinois, Louisiana, Michigan, Nevada, New Jersey, North Dakota, Oregon, and Wisconsin allow both political and apolitical recalls and are, therefore, the focus of this Comment.[52]

After they are initiated, political recalls polarize state and local politics, but it is important to note that the tactic itself is ideologically neutral.[53] On the whole, liberals attempt to recall conservative politicians about as often as conservatives

24.2-233 (2014) (limiting recall to "[n]eglect of duty, misuse of office, or incompetence in the performance of duties when that neglect of duty, misuse of office, or incompetence in the performance of duties has a material adverse effect upon the conduct of the office, or upon conviction of a drug-related misdemeanor or a misdemeanor involving a 'hate crime'").

47. *See* Karen Shanton, *Most Recall Elections Are Politically-Motivated, The Thicket at State Legislatures*, NAT'L CONF. ST. LEGISLATURES (Sept. 12, 2013, 8:20 AM), http://ncsl.typepad.com/the_thicket/2013/09/most-recall-elections-are-politically-motivated.html, *archived at* http://perma.cc/4PRS-6BEN.

48. *See id.*

49. This justification may be based on a single controversial vote by that legislator. Zick, *supra* note 30, at 572 (explaining that recall binds representatives to the "dictates of the governed").

50. Spivak, *supra* note 21.

51. *See* NCSL, *Recall of State Officials*, *supra* note 3.

52. *See id.; see also* Ray Long, *Illinois Voters to Decide Recall Power*, CHI. TRIB. (Oct. 31, 2010), http://articles.chicagotribune.com/2010-10-31/news/ct-met-illinois-governor-recall-20101031_1_signatures-illinois-house-illinois-voters (explaining that Illinois amended its state constitution to allow for recall in the wake of the Rod Blagojevich corruption scandal).

53. Basham, *supra* note 1.

attempt to recall liberals.[54] And, although the recent Colorado recalls led some political commentators to suggest that recall elections favor Republicans, in the context of state legislative politics, this has not been the case.[55] Of the thirty-eight state legislative recall elections in United States history, fourteen were held against Democrats and twenty-four against Republicans.[56] More recent recall data show a similar trend.[57] Since 2003, seven recall elections have come against Democrats and thirteen against Republicans.[58] The use of political recall to oust members of both political parties should therefore concern legislators on both sides of the aisle.

C. Procedure for Recall

Each state provides its own legal procedure for recall elections, but the underlying process is consistent across the board: a sufficient number of constituents sign a petition condemning an elected official in order to initiate a new election.[59] This section uses Colorado's recall procedure as an example of the specific steps necessary to trigger a recall.

Article XXI of the Colorado Constitution states, "every elective public officer of the state of Colorado may be recalled from office at any time by the registered electors entitled to vote."[60] Section 1 of Article XXI lays out the basic procedure for recall with specific emphasis on the petition.[61] First, a valid petition for recall must be filed with the same office that

54. *Id.*

55. Karen Shanton, *Recalling a Little History*, *The Thicket at State Legislatures*, NAT'L CONF. ST. LEGISLATURES (Sept. 12, 2013, 2:54 PM), http://ncsl.typepad.com/the_thicket/2013/09/recalling-a-little-history.html, *archived at* http://perma.cc/762Z-8NC2.

56. *Id.* (explaining that Democrats survived eight of the recall attempts, while Republicans survived nine).

57. *Id.*

58. *See id.*

59. ALASKA CONST. art. XI, § 11; ARIZ. CONST. art. VIII, § 2; CAL. CONST. art. II, §§ 13–19; COLO. CONST. art. XXI; GA. CONST. art. II, § 2.4; IDAHO CONST. art. VI, § 6; ILL. CONST. art. III, § 7; KAN. CONST. art. IV, § 3; LA. CONST. art. X, § 26; MICH. CONST. art. II, § 8; MINN. CONST. art. VIII, § 6; NEV. CONST. art. II, § 9; N.J. CONST. art. I, § 2(b); N.D. CONST. art. III, §§ 1, 10; OR. CONST. art. II, § 18; R.I. CONST. art. IV, § 1; WASH. CONST. art. I, § 33–34; WIS. CONST. art. XIII, § 12; MONT. CODE ANN. §§ 2-16-601–635; VA. CODE § 24.2-233.

60. COLO. CONST. art. XXI, § 1.

61. *Id.*

handles nominations for that elected position.[62] To be valid, the petition must contain a total number of signatures of at least 25 percent of the total number of votes cast in the previous election for the position the incumbent occupies.[63] In Senator Morse's recall election, for instance, organizers needed to gather 7,178 valid signatures to initiate a recall based on the 28,712 votes cast in the previous election.[64] Section 1 also mandates that recall petitions contain a general statement of no more than 200 words describing the grounds on which recall is sought.[65] The Morse recall petition, for example, included 199 words stating, in part:

> Senator John Morse (D-Colorado Springs) has failed to represent the interests of his constituents and has taken direction from national organizations that do not represent the values and liberties of Colorado citizens . . . . His legislation . . . attempts to subvert the Second Amendment rights of citizens[,] . . . necessitat[ing] his recall from office as the only reasonable and available means to defend the inalienable liberties of the citizens of his district.[66]

62. For example, in Colorado, petitions must be filed with the Election Division of the Secretary of State's office. *See* COLO. OFFICE SEC'Y STATE, ELECTIONS & VOTING, *available at* http://www.sos.state.co.us/pubs/elections/Candidates/files/HowToRunForOffice.pdf (last visited Aug. 2, 2014), *archived at* http://perma.cc/W8NJ-MVAP.

63. COLO. CONST. art. XXI, § 1.

64. In the previous election Owen Hill received 13,526 votes, John Morse received 13,866 votes, and Douglas Randall received 1,320 votes. COLO. OFFICE OF SEC'Y OF STATE, COLORADO CUMULATIVE REPORT: OFFICIAL RESULTS – GENERAL ELECTION (May 12, 2011, 10:58 PM), http://www.sos.state.co.us/pubs/elections/Results/2010/general/ColoradoReport.html, *archived at* http://perma.cc/6ARH-7S4K.

65. COLO. CONST. art. XXI, § 1.

66. GOTREMORSE.COM, http://gotremorse.com/home/?page_id=510 (last visited Nov. 9, 2013), *archived at* http://perma.cc/3KD-BBCX (quoting the recall petition: "Senator John Morse (D-Colorado Springs) has failed to represent the interests of his constituents and has taken direction from national organizations that do not represent the values and liberties of Colorado citizens. Despite having sworn to support and uphold the Constitution of the United States and of Colorado, he has shown contempt for the constitutional liberties of the people he represents. He proposed legislation that shifted liability to firearms manufacturers and gun owners from violent criminals where it rightfully belonged. His legislation was drafted with significant input from the Brady Campaign, which attempts to subvert the Second Amendment rights of citizens. He has limited public debate in the Senate and thereby minimized the opinions of Colorado citizens but permitted celebrities from other states to express their opinions on Colorado bills. These

Article XXI does not include a provision limiting the grounds for recall in any way.[67] In fact, Section 1 permits citizens to initiate politically-motivated recall by stating that "the registered *electors shall be the sole and exclusive judges* of the legality, reasonableness and sufficiency of such ground or grounds assigned for such recall, and said ground or grounds shall not be open to review."[68]

Section 2 of Article XXI provides additional information on the form of the recall petition and its sufficiency. First, to be valid, signatures on the petition must include both the date the person signed the petition and his or her address.[69] Next, protests challenging the sufficiency of the petition must be filed within fifteen days after the petition is filed.[70] Finally, after the petition has been submitted, the governor must set the date of the recall election within thirty to sixty days.[71]

Section 3 of Article XXI outlines the procedure for the recall election itself, with specific emphasis on the form of the ballot. The ballot must include a 200-word statement including the reasons for recall explained in the petition.[72] Additionally, the officer against whom recall is sought may submit a statement justifying his course of conduct while in office.[73] This statement, limited to 300 words, must be included on the ballot as well.[74] Senator Morse, for instance, submitted a statement defending his actions as a legislator, stating in part:

> Vote NO on the out-of-state billionaires and extremists who are wasting $150,000 of our tax money and spending millions on a negative campaign to recall your twice-elected senator, John Morse. They are doing this because John responsibly voted to require criminal background checks for

actions have shown contempt for firearm manufacturers and for the rights of Colorado citizens. Additionally, it was clearly an abuse of the coercive powers of government. Senator Morse's abuse of his office and his failure to respect the rights and interests of his constituents necessitates his recall from office as the only reasonable and available means to defend the inalienable liberties of the citizens of his district.").

67. *See* COLO. CONST. art. XXI.
68. *Id.* § 1 (emphasis added).
69. *Id.* § 2.
70. *Id.*
71. *Id.*
72. *Id.* § 3.
73. *Id.*
74. *Id.*

> gun purchases . . . . Vote NO on recalling John Morse because it is Better to be Safe than Sorry.[75]

Following both statements, the ballot must include two parts. First, the ballot asks: "Shall (name of the person against whom the recall petition is filed) be recalled from the office of (title of the office)?"[76] Voters may answer "Yes" or "No" to this question. Second, the ballot provides the names of the candidates to replace the officer in the event that the recall is successful.[77] A petition following normal election procedure nominates these candidates.[78] A vote for any candidate on the second question is not counted unless the voter also voted for or against recall in the first question.[79] If a majority of voters respond "Yes" to the first question, the officer is recalled and replaced by the candidate receiving the most votes under the second question.[80] In the Senator Morse recall, for example, 50.89 percent of voters responded "Yes" to the question "Shall John Morse be recalled?"[81] Senator Morse was consequently recalled from his position and replaced with Bernie Herpin, the candidate that received a majority of votes under the second

75. Kurtis Lee, *Ballots in Recall Elections Will Have Messages Addressing Voters*, DENV. POST (Aug. 8, 2013, 11:48 AM), http://blogs.denverpost.com/thespot/2013/08/08/ballots-in-recall-elections-will-have-messages-addressing-voters/99136/, *archived at* http://perma.cc/3YRD-JFBK (quoting the statement defending Morse's actions as a legislator: "Vote NO on the out-of-state billionaires and extremists who are wasting $150,000 of our tax money and spending millions on a negative campaign to recall your twice-elected senator, John Morse. They are doing this because John responsibly voted to require criminal background checks for gun purchases. In the state senate, his priorities are public safety, creating new jobs, strengthening our economy, and helping our veterans who have defended our freedom. John Morse has spent most of his life serving our community as a paramedic, police officer and Police Chief. He has firsthand experience treating gunshot victims on the streets of Colorado Springs and has been shot at himself. He led the fight to crack down on sexual predators and put them in prison where they belong. Join John in voting NO to protect our kids. Vote NO on felons and spouse abusers buying guns. Say NO to extremists. Vote NO on recalling John Morse because it is Better to be Safe than Sorry.").

76. COLO. CONST. art. XXI, § 3.

77. *Id.*

78. *Id.*

79. *Id.*

80. *See id.*

81. COLO. OFFICE SEC'Y OF STATE, COLORADO ELECTION RESULTS: 2013 RECALL ELECTION, http://results.enr.clarityelections.com/CO/47986/118604/en/summary.html (last visited July 15, 2014), *archived at* http://perma.cc/4VWU-Y4W5.

question.[82]

D. The Use of Recall Over Time

Since 1913, sufficient signatures have been gathered to trigger a recall against state legislators thirty-eight times, and elections have ousted the incumbent twenty-one times.[83] In thirty-five of those thirty-eight instances, efforts to recall the legislator were politically motivated.[84] A recall triggered by an apolitical motivation has not occurred since 1988.[85] Although these numbers show that recall has been a relatively rare occurrence in state legislative politics over the past century, the use of recall has increased dramatically in recent years.[86] Of the thirty-eight recall elections in history, nineteen came after 2003 and eleven occurred in 2011 alone.[87] This dramatic increase in the use of recall is attributable to a number of changing political dynamics, but three factors are at its core: (1) national issues dominate local politics; (2) new technologies available to grassroots organizers have lowered the barriers to entry for initiating a recall election; and (3) the success of recent recalls makes the tactic more appealing.[88]

First, although early recalls were primarily concerned with local issues, today, outside groups and highly contentious

82. *See id.*

83. NCSL, *Recall of State Officials*, *supra* note 3. *See also* Shanton, *supra* note 47. As a practical matter, recall elections are most frequently deployed at the local level; approximately three-fourths of recall elections occur in the context of city councils and school boards. Currently, twenty-nine states allow recall elections in local jurisdictions. The twenty-nine states that allow recall of local officials are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Kansas, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Washington, West Virginia, Wisconsin, and Wyoming. The nineteen states that permit recall of state officials are: Alaska, Arizona, California, Colorado, Georgia, Idaho, Illinois, Kansas, Louisiana, Michigan, Minnesota, Montana, Nevada, New Jersey, North Dakota, Oregon, Rhode Island, Washington, and Wisconsin.

84. *See* NCSL, *Recall of State Officials*, *supra* note 3. Sufficient signatures have been gathered to trigger a recall election 38 times, 35 of which have been politically motivated. *Id.* See Appendix for a description of all 38 recall attempts, including the proffered reason for recall and the outcome of each election.

85. *See infra* Appendix.

86. Wilson, *supra* note 40.

87. *See* NCSL, *Recall of State Officials*, *supra* note 3.

88. Wilson, *supra* note 40.

national issues play a larger role in the process.[89] The Seattle recall of Mayor Hiram Gill in 1911 was based on a purely local issue, the Mayor's legalization of gambling and prostitution in the city.[90] The Colorado recalls in September 2013, by contrast, were predicated on the senators' support of gun control, one of the most contentious national issues of our time.[91] Although the number of issues controversial enough to trigger a recall was once small, today many national issues play out at the lower levels of government. For example, employment and economic policies that stripped public workers of their collective bargaining rights triggered the recall election of Governor Scott Walker in Wisconsin.[92] And, an Arizona district recalled State Senator Russell Pierce in 2011 because of his role in crafting a controversial immigration bill.[93] Gun control is therefore only one example of a controversial national issue now playing out in state legislatures. Overall, "from abortion and gay marriage . . . the number of activists angry enough to mount recalls is likely to increase . . . ."[94]

Second, organizers now have access to new technologies that make it easier and faster to gather the requisite number of signatures to initiate a recall.[95] In Colorado, for instance,

89. *Id.*

90. *Id.*

91. *See, e.g.*, Bartels & Lee, *supra* note 12; *see also Times Topics: Guns and Gun Control*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/g/gun_control/index.html (last visited Aug. 2, 2014), *archived at* http://perma.cc/8K7Z-N3T3.

92. *See* Brian Montopoli, *Scott Walker Wins Wisconsin Recall Election*, CBS (June 6, 2012, 11:54 AM), http://www.cbsnews.com/8301-503544_162-57447954-503544/scott-walker-wins-wisconsin-recall-election/, *archived at* http://perma.cc/TG3Z-8KHC.

93. Elise Foley, *Russell Pearce Recall Election: Arizona Immigration Law Architect Defeated By Jerry Lewis*, HUFFINGTON POST (Nov. 8 2011, 10:53 AM), http://www.huffingtonpost.com/2011/11/08/russell-pearce-recall-election-jerry-lewis_n_1083129.html, *archived at* http://perma.cc/M363-V726; *see also* Ann Morse, *Arizona's Immigration Enforcement Laws*, NAT'L CONF. ST. LEGISLATURES (July 28, 2011), http://www.ncsl.org/ research/immigration/analysis-of-arizonas-immigration-law.aspx, *archived at* http://perma.cc/WA3M-X828 [hereinafter NCSL, *Arizona*] ("SB 1070, 'Support Our Law Enforcement and Safe Neighborhoods Act,' was approved by the Arizona Legislature on Monday, April 19, and signed into law by Governor Brewer on Friday, April 23, 2010. SB 1070 includes provisions adding state penalties relating to immigration law enforcement including trespassing, harboring and transporting illegal immigrants, alien registration documents, employer sanctions, and human smuggling.").

94. Wilson, *supra* note 40.

95. *Id.*

grassroots groups used an iPhone application that allowed them to directly interface with the Secretary of State's voter database.[96] This new technology made the process of finding valid signers of the recall petition much faster because the organizers could check, in real time, whether individuals were eligible to sign the recall petitions rather than waiting for the Secretary of State to validate the signatures after the petition was submitted.[97] Victor Head, one of the organizers who worked on the Giron recall campaign, explained "[f]rom the smartphones, we had the secretary of state's voter registration website locked in and at the ready . . . . In 30 seconds, we were able to punch in a name, ZIP code and birth date and confirm that people signing were actually registered and lived in the district."[98] In conjunction with the relatively small number of signatures necessary to initiate a recall election,[99] this new technology makes it even more likely that opposition parties and grassroots organizations will use recall more aggressively moving forward.[100]

The combination of these two factors makes future recall elections easier to initiate both politically and practically, but no factor will spur future efforts more than the success of

96. *Id.* ("While recall supporters once needed to gather many more signatures than required by law, to ensure they had enough valid entries, the new technology makes it much easier to do the work, said Laura Carno, the conservative activist behind one of the Colorado recalls. 'That group in Pueblo didn't have any paid signature gatherers. They did it 100 percent with volunteers,' she said of the recall backers who used the app.").

97. *Id.*

98. Kurtis Lee, *Colorado Online Voter System Could Play Role in Future Recall Elections*, DENV. POST (July 28, 2013, 12:01 AM), http://www.denverpost.com/ci_23746296/colorado-online-voter-system-could-play-role-recall-election, *archived at* http://perma.cc/4ZS-9MBS.

99. *See* COLO. OFFICE OF SEC'Y OF STATE, TOTAL REGISTERED VOTERS BY STATE SENATE DISTRICT, PARTY, AND STATUS (Sept. 2013), *available at* http://www.sos.state.co.us/pubs/elections/VoterRegNumbers/2013/September/VotersBySenateDist.pdf, *archived at* http://perma.cc/M2RC-PSNK; *see also infra* Part III.B. There were 11,285 signatures necessary to initiate a recall against Senator Giron in State Senate District 3 (i.e., only 13.8 percent of the total registered voters, 81,873, in the district at the time of the recall). There were 7,178 signatures necessary to initiate a recall against Senator Morse in State Senate District 11 (i.e., only 10.2 percent of the total registered voters, 70,062, in the district at the time of the recall).

100. Wilson, *supra* note 40 (quoting Rick Ridder, a Colorado Democratic strategist: "[i]f anybody can get 12,000 signatures, or whatever's needed to recall somebody on a singular vote that somebody's upset about, you're going to see both parties using the recall process in a very aggressive fashion.").

recalls.[101] As political analysts, organizers, and politicians watch recall efforts succeed on multiple dimensions (e.g., replacing incumbent legislators and shaping state and federal political discourse),[102] they will push for additional deployment of the tactic. Just over a month after the successful recalls in Colorado, California gun-rights advocates announced plans to target Democratic state legislators who had supported gun-control legislation.[103] And, in Colorado, voters in a third district initiated another recall effort against Senator Evie Hadak for her support of the same gun legislation less than a month after the successful recalls of Morse and Giron.[104]

Contextualized by these new political dynamics, recall is an increasingly viable option for opposition groups to respond to policies they disfavor. Some political analysts now claim that "an era of recalls may be at hand," leaving few legislators safe regardless of their political affiliation.[105]

Colorado's recall procedure, like those of eleven other states, leaves the door too open for politically-motivated efforts to oust an incumbent legislators before the end of his or her term in office. The recalls of Morse and Giron in September 2013 illustrate the effectiveness of politically-motivated recall as a tool to quickly change the dynamics of state legislatures. Although they were once reserved for the most contentious

101. Holeywell, *supra* note 18. ("Tom Cochran, executive director of the U.S. Conference of Mayors, calls it 'recall fever.'")

102. *See id.*

103. Valerie Richardson, *California Gun Grab Triggers Colorado-Style Recall Launch*, WASH. POST (Oct. 25, 2013), http://www.washingtontimes.com/news/2013/oct/25/california-gun-grab-triggers-colorado-style-recall/, *archived at* http://perma.cc/7X68-Y9VJ ("Among the Democrats under consideration by recallers is Assembly Speaker John Perez, who represents a heavily Democratic Los Angeles district . . . . The other Democrats are seen as less secure, including three who gained their seats in recent special elections: state Sen. Ben Hueso of San Diego; state Sen. Norma Torres of Chino; and Assemblywoman Lorena Gonzalez of San Diego.").

104. David Mitchell, *Recall Effort Begins Against State Sen. Evie Hudak*, FOX 31 DENV. (Oct. 4, 2013, 9:35 PM), http://kdvr.com/2013/10/04/recall-effort-begins-against-state-sen-evie-hudak/, *archived at* http://perma.cc/LG3V-LH3X; *see also* Kurtis Lee & Lynn Bartels, *Evie Hudak Resigns: Colorado State Senator Avoids Recall Election*, DENV. POST (Nov. 27, 2013, 8:48 AM), http://www.denverpost.com/breakingnews/ci_24611818/colorado-state-sen-evie-hudak-resign, *archived at* http://perma.cc/WCT4-DTKY. Rather than face a potential recall election, Hudak resigned her office. "In her resignation letter, Hudak said her decision would spare Jefferson County residents from having to shell out more than $200,000 for a special election, especially after the county has cut programs for seniors and mental health." *Id.*

105. Wilson, *supra* note 40.

local issues, today, the number of issues controversial enough to incite a recall effort has increased and new technologies have made recall elections easier to initiate. Ultimately, it is likely that the influence of political recalls will only increase moving forward, making an examination of their effect on state legislative politics necessary.

II. THE CORROSIVE EFFECT OF POLITICAL RECALL ON STATE LEGISLATIVE POLITICS

This Part examines why the increased use of politically-motivated recalls will have a devastating effect on the future of state legislative politics. Specifically, this Part argues that recalls will distort a legislator's decision-making process, generate a literal manifestation of the permanent campaign, and allow national groups and special interest groups to exercise disproportionate control—relative to constituents—over state politics.

A. Legislative Decision-Making

Debate over politically-motivated recall must begin with a discussion of the fundamental role of a legislator within a representative democracy and the influences a legislator *should* consider when making decisions in office. There are a number of both internal and external influences on legislative decision-making. Two primary influences include constituent interests and personal ideology.[106] This section examines these influences through the lens of three dominant legislative decision-making theories. Subsequently, this section argues that politically-motivated recalls have the potential to warp a legislator's decision-making process by overemphasizing constituent interests at the expense of personal ideology.

106. Constituent interests and personal ideology are by no means the *only* primary influences on legislative decision-making. Rather, legislative decision-making might also be influenced by, *inter alia*, re-election concerns, financial contributions, and political party pressure. For illustrative purposes, however, constituent interests and personal ideology are the focus of this discussion. For a more detailed discussion of the numerous influences on state legislative decision-making, see Robert J. Huckshorn, *Decision-Making Stimuli in the State Legislative Process*, 18 MO. L. REV. 164 (1965); JOHN W. KINGDON, CONGRESSMAN'S VOTING DECISIONS 3–25 (3rd ed. 1988).

1. The Spectrum of Legislative Decision-Making

There are two primary normative theories of representation that articulate the spectrum of influences on legislators: the delegate theory and the trustee theory.[107] These two theories provide a lens through which a legislator's decision-making can be examined and purport to explain how legislators *should* make decisions while in office. Additionally, the politico theory,[108] a third model of representation, provides a middle ground for legislators attempting to capitalize on some of the advantages of serving as both a delegate and a trustee.

On one end of the spectrum, representatives who behave as delegates "simply follow the expressed preferences of their constituents."[109] As a preference-based model of representation,[110] the delegate theory maintains that legislators ought to reflect purposively the desires of their constituents.[111] In other words, the legislator is a servant of the population he or she represents.[112]

On the other end of the spectrum, representatives who behave as trustees have more autonomy and independence in their decision-making.[113] The trustee theory, which is a competency-based model of representation,[114] maintains that

107. NANCY L. SCHWARTZ, THE BLUE GUITAR: POLITICAL REPRESENTATION AND COMMUNITY 24 (1988).

108. *See id.*

109. SUZANNE DOVI, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY: POLITICAL REPRESENTATION § 1.1 (Edward N. Zalta ed., 2014), *available at* http://plato.stanford.edu/entries/political-representation/#DelVsTru, *archived at* http://perma.cc/K6UE-W9ZE.

110. Justin Fox & Kenneth W. Shotts, Delegates or Trustees? A Theory of Political Accountability 2 (July 23, 2007) (unpublished manuscript) (on file with Yale University), *available at* http://www.yale-university.org/leitner/resources/docs/delegates.pdf, *archived at* http://perma.cc/36AS-UA8E.

111. Donald J. McCrone & James H. Kuklinski, *The Delegate Theory of Representation*, 23 AM. J. POL. SCI. 278, 278 (1979).

112. *See id.* at 278; *see also* SCHWARTZ, *supra* note 107, at 24; Pei-te Lien et al., Concepts and Correlates of Political Representation: A Multicultural and Subnational View 3 (2009) (unpublished manuscript) (paper prepared for presentation at the 2009 annual meeting of the Western Political Science Association), *available at* http://www.gmcl.org/pdf/WPSA09_Lien%20et%20al%20Paper-1.pdf, *archived at* http://perma.cc/7E8R-RB8K (proponents of the delegate theory, including James Madison, argue that the foundation of a representative democracy depends on the "instructions from their constituency through . . . [their] expressed preferences . . . .").

113. SCHWARTZ, *supra* note 107, at 24.

114. Fox & Shotts, *supra* note 110, at 1–2.

representatives must be able to act "according to personal judgment" in order to advocate for constituent interests.[115] Proponents of the trustee theory, including the philosopher Edmund Burke, the father of modern conservatism,[116] argue that by following their own judgment about the best policy action, legislators are able to work together and further the interests of the constituency.[117]

A third option, the politico model, is a compromise between the delegate and trustee theories.[118] Representational actions of legislators who subscribe to this theory "depend upon the particular circumstances of the decision-making process."[119] Developed by the political theorist Hanna Pitkin, this conception of representation seeks to "balance out the perceived preferences of the represented with the representatives' institutional role as advocates of constituency interest."[120] The representative must act pursuant to the demands of the constituency, but must also "act independently . . . [using his or her own] discretion and judgment."[121] This will not be a problem for a legislator when his personal beliefs align with the views of his constituency. However, when the two influences are at odds, legislators should have the qualified discretion afforded to them under the politico theory in determining how to cast their vote. Politico theorists argue that the model is preferable because it allows

115. SCHWARTZ, *supra* note 107, at 24.

116. Carl T. Bogus, *Rescuing Burke*, 72 MO. L. REV. 387, 389 (2007).

117. DOVI, *supra* note 109 § 1.1 ("Parliament is not a congress of ambassadors from different and hostile interests, which interest each must maintain, as an agent and advocate, against other agents and advocates; but Parliament is a deliberative assembly of one nation, with one interest, that of the whole . . . You choose a member, indeed; but when you have chosen him he is not a member of Bristol, but he is a member of Parliament.") (quoting EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 115 (Penguin Books 1968) (1790)) (omission in original).

118. SCHWARTZ, *supra* note 107, at 25 ("[P]olitico (a skillful combination of delegate and trustee).").

119. Lien et al., *supra* note 112, at 3.

120. *Id.* at 2; *see also* DOVI, *supra* note 109 § 1.1 ("Hanna Pitkin argues that theorists should not try to reconcile the paradoxical nature of the concept of representation. Rather, they should aim to preserve this paradox by recommending that citizens safeguard the autonomy of both the representative and of those being represented. Representatives must act in ways that safeguard the capacity of the represented to authorize and to hold their representatives accountable *and* uphold the capacity of the representative to act independently of the wishes of the represented.").

121. HANNA F. PITKIN, THE CONCEPT OF REPRESENTATION 209 (1967).

legislators to act "in the interest of the represented, [and] in a manner responsive to them."[122] Additionally, they contend that compromise is more likely in a legislature comprised of politicos.[123]

The three theories explored above offer a unique window into how politically-motivated recall impacts legislative decision-making. Although this Comment does not make the normative judgment that one of these theories is always preferable, it does contend that there is significant danger if legislators are not afforded some degree of autonomy while in office. Because it sits somewhere in the middle of the spectrum of influences explored in this section, this Comment uses the politico model as a frame for examining how political recall affects legislative autonomy. As the next section explores, the increased use of political recall will dramatically tip the scales towards the delegate model in legislative decision-making as legislators are forced to consider a new powerful influence, a recall election.

2. The Impact of Politically-Motivated Recall on Legislative Decision-Making

The most fundamental danger of a political recall in the context of state legislative politics is not the election, but the underlying implications of the tactic itself. Specifically, forcing legislators to behave as strict delegates threatens the ability of the representative to act with any autonomy while in office. Although frequent recall elections have social and financial costs,[124] just the threat of politically-motivated recall has the potential to fundamentally alter legislative voting behavior.[125] Politically-motivated recalls are becoming easier and more frequent as the number of issues contentious enough to trigger a recall in state legislative politics grows.[126] Unfortunately,

122. *Id*.

123. *Id*.; *see infra* Part II.A.2.

124. *See, e.g.*, Associated Press, *State Asked to Pay for Recall Elections*, DENV. POST (Jan. 16, 2014), http://www.denverpost.com/news/ci_24924437/gessler-refusing-pay-pueblo-recall-election, *archived at* http://perma.cc/Q4E9-PCS2 (stating that it cost Pueblo County $270,000 and El Paso County $150,000 to conduct the special elections recalling Senator Giron and Senator Morse).

125. *See* Thad Kousser, Jeffrey B. Lewis & Seth E. Masket, *Ideological Adaptation? The Survival Instinct of Threatened Legislators*, 69 J. POL. 828, 829 (2007).

126. *See* Wilson, *supra* note 40; NCSL, *Recall of State Officials*, *supra* note 3.

politically-motivated recalls are dangerous because they place too much emphasis on the representative's role as a delegate on one isolated issue. The increased frequency of political recall introduces a powerful new influence on the mindset of legislators who must now consider the threat of being recalled when making any decision. The proliferation of politically-motivated recall also threatens to increase political gridlock as legislators become less likely to compromise for fear of immediate retaliation in the form of a recall.

Unlike normal elections prompted by the expiration of term limits, politically-motivated recalls generally serve as a referendum on one political issue.[127] In the mind of a legislator, a recall may come as "a large shock to their beliefs about the political preferences of their voters, but that shock is isolated from other changes in the legislative environment."[128] A recall election is "a single decision that is itself the outcome . . . . Governing, by contrast, has many interconnected points of outcome through time."[129] Representation is not done in a vacuum in which there is only one issue to be considered at any given time. On the contrary, every piece of legislation is impacted by all other pieces of legislation being considered in that session and beyond. For instance, a legislator may cast a vote on one bill because he or she received a promise of a vote from another representative on a related—or entirely unrelated—piece of legislation. Unlike campaigns, which are zero-sum games, governing is an additive game where "today's adversaries may be tomorrow's allies."[130] A legislator may make the informed decision to vote contrary to the desires of his or her constituency on one issue in order to ensure that a second bill (one that is more important to his or her constituents) has a better chance of passing later. Political compromise is therefore dependent on give-and-take relationships between legislators on a variety of issues that can only occur when the entire legislative environment is

127. The Colorado recall elections, for instance, served as a referendum on gun rights. *See* Bartels, Lee & Bunch, *supra* note 17.

128. Kousser, Lewis & Masket, *supra* note 125, at 829.

129. Hugh Heclo, *Campaigning and Governing: A Conspectus*, *in* THE PERMANENT CAMPAIGN AND ITS FUTURE 1, 11 (Norman J. Ornstein & Thomas E. Mann eds., 2000).

130. Norman J. Ornstein & Thomas E. Mann, *Conclusion: The Permanent Campaign and the Future of American Democracy*, *in* THE PERMANENT CAMPAIGN AND ITS FUTURE 219, 225 (Norman J. Ornstein & Thomas E. Mann eds., 2000).

considered. Even James Madison, the father of the delegate theory of representation, acknowledged that an individual cannot be a competent legislator until he has gained the practical knowledge that comes from participating in representation itself.[131] The threat of a politically-motivated recall, however, makes compromise more difficult as representatives fear voting contrary to the desires of their constituency on *every* issue.

There are many advantages to a legislature comprised of representatives who behave as politicos in office. Most importantly, legislative autonomy makes political gridlock less likely as compromise is easier to achieve.[132] Although faithfulness to constituent desires is certainly one consideration legislators should have in mind when they cast a vote, total faithfulness to a legislator's role as a delegate ignores the increased information legislators have relative to their constituents. This information is directly tied to political compromise and effective governance.[133] Constituents lack the information necessary to understand the "inside baseball" explored above. Legislators who subscribe to a pure form of the delegate theory will miss opportunities for compromise as their votes track the wishes of their constituency on every issue regardless of its degree of importance to those individuals. On the other side of the spectrum, legislators who faithfully subscribe to the trustee theory may lose sight of their constituents' desires in a futile attempt to enact massive policy reforms. The politico model, however, provides a balance that allows legislators to facilitate compromise. Because they must consider their constituents' opinion, legislators will know which items on the political agenda can be sacrificed, and which are sacred cows.[134] And, because they have the discretion to use

131. *See* THE FEDERALIST NO. 53 (James Madison) ("No man can be a competent legislator who does not add to an upright intention and a sound judgment a certain degree of knowledge of the subjects on which he is to legislate. A part of this knowledge may be acquired by means of information which lie within the compass of men in private as well as public stations. Another part can only be attained, or at least thoroughly attained, by actual experience in the station which requires the use of it. The period of service, ought, therefore, in all such cases, to bear some proportion to the extent of practical knowledge requisite to the due performance of the service.").

132. PITKIN, *supra* note 121, at 209–10.

133. *Id.*

134. It is important to note that it is much more difficult to determine which issues are true political "sacred cows" as highly controversial national issues

their own judgment, they will be able to determine which compromises are appropriate.

Recalls, however, make coalition building more difficult and strain inter-party relations.[135] The mere threat of a political recall makes it nearly impossible for legislators to behave as politicos, as any controversial vote could threaten a legislator's job. If, for instance, a legislator makes a conscious decision to vote against constituent desires on one issue in an effort to compromise, an unhappy organization might initiate a recall. The number of highly controversial political issues combined with new technology making recall easier to initiate further compounds this problem. Politically-motivated recall, therefore, has the potential to force legislators to behave strictly as delegates, thereby eliminating many of the benefits of politico theory.

The American system of government is "premised on the notion that voters entrust their representatives to act with deliberation and a degree of independence."[136] In fact, one might question why there are constitutionally-mandated term limits at all if legislators should not have some autonomy in office. If a legislator's decisions should always accurately reflect the desires of his or her constituency, why not have new elections every year? Or—more drastically—after every vote? There is no question that this independence should be tempered by the opinions of the constituency a legislator represents. However, if political recalls become a normal feature of state legislative politics, the degree of independent judgment legislators have at their disposal will significantly decrease and politicians will have a harder time achieving compromise. Ultimately, political recall threatens to re-entrench the most frustrating aspects of the American political system: gridlock and polarization.

B. The Permanent Campaign

Beyond the negative impacts of recall on legislative decision-making, the increased use of political recall will also create a literal manifestation of the "permanent campaign."[137]

dominate state legislative politics.

135. Ornstein & Mann, *supra* note 130 at 225.

136. *Recall Votes are No Way to Run a Government*, *supra* note 5.

137. *See* Heclo, *supra* note 129, at 1–2.

Coined by Sidney Blumenthal during the Reagan Administration, the permanent campaign is "a combination of image making and strategic calculation that turns governing into a perpetual campaign."[138] Fundamentally, the permanent campaign "remakes government into an instrument designed to sustain an elected official's popularity."[139]

Originally, the concept of the permanent campaign described the "complex mixture of politically sophisticated people, communication techniques, and organizations . . . [with] [e]lections themselves [comprising] only one part of the picture."[140] At the national level, where recalls are unavailable to constituents, this articulation of the term remains useful. But, in a state where political recalls are allowed, the term takes on a literal meaning as elections may occur much more frequently than a legislator's term in office would otherwise allow.[141] Although recalls were once an extraordinary measure, today the tactic is becoming increasingly common.[142] An increased number of elections—specifically those that occur in what would otherwise be non-election years[143]—threatens to further blur the line between campaigning and governing.[144]

Campaigns are already viscerally unappealing to the general public who view the ever-expanding "campaign season" with contempt and disengagement.[145] Modern campaign practices, including attack ads, "have left millions of Americans manifestly dissatisfied with the electoral process and . . . [have] added to the cynicism about the legitimacy of policy decisions."[146]

138. *Id*. at 2.

139. SIDNEY BLUMENTHAL, THE PERMANENT CAMPAIGN 7 (1982).

140. Heclo, *supra* note 129, at 15.

141. Wilson, *supra* note 40 ("There was a time, not so long ago, when the phrase 'permanent campaign' described a state of mind. Now, as the number of state legislators who find themselves facing recall efforts mounts, the permanent campaign is taking on a much more literal meaning.").

142. *See infra* Part I.C; *see also* Chris Cillizza, *Welcome to the Age of the Recall Election*, WASH. POST (Oct. 8, 2013), http://www.washingtonpost.com/blogs/ the-fix/wp/2013/10/08/welcome-to-the-age-of-the-recall-election/, *archived at* http:// perma.cc/4MR-UBFK.

143. Wilson, *supra* note 40 ("We'll now have legislative races in even-numbered years and odd-numbered years. That's going to change the dynamic of politics in this state.") (quoting Rick Ridder, a Colorado Democratic strategist).

144. AM. ENTER. INST. & BROOKINGS INST., THE PERMANENT CAMPAIGN AND ITS FUTURE vii (Norman J. Ornstein & Thomas E. Mann eds., 2000).

145. Ornstein & Mann, *supra* note 135, at 224.

146. *Id*.

Other than frustrating the general public, political commentators note that the permanent campaign has potentially devastating consequences for the political system.[147] Specifically, constant campaigning makes ambition more important than governing competency, exposes legislative decision-making to constant negative messaging, and gives politicians an excuse for postponing important decisions.[148]

Additionally, political fund-raising at the national level already dominates the attention of legislators and their staff.[149] "Members of the [United States House of Representatives], facing re-election contests every two years, are essentially campaigning and raising money all the time, one election bid merging into the next, with little or no respite between."[150] Increased use of political recall threatens to bring this national problem to the state level. Legislators will be forced to ensure that there is sufficient money in their coffers to contest a recall should one occur. To accomplish this task, they too will "begin fund-raising earlier and earlier in an election cycle, and . . . raise money throughout the course of their . . . terms."[151] Constant fund-raising is especially concerning for members of state houses of representatives, who nearly all face an election every two years.[152]

Overall, the increased use of political recall has the potential to create a never-ending cycle of campaigns at the state level. If the rate of political recall continues to increase, a literal manifestation of the permanent campaign subsequently threatens to contribute to political apathy and force legislators to spend more time fund-raising than governing.

147. Chuck Raasch, *Permanent Campaign vs. The Quality of Presidents*, USA TODAY (Dec. 1, 2011), http://usatoday30.usatoday.com/news/opinion/forum/story/2011-12-02/campaign-gop-romney-obama/51550844/1, *archived at* http://perma.cc/ZNJ3-4SAJ.

148. *Id.*

149. AM. ENTER. INST. & BROOKINGS INST., *supra* note 144, at vii. Fund-raising "trumps all competitors in the struggle for the attention of politicians and their aides." *Id.*

150. Anthony Corrado, *Running Backward: The Congressional Money Chase*, *in* THE PERMANENT CAMPAIGN AND ITS FUTURE 75, 75 (Norman J. Ornstein & Thomas E. Mann eds., 2000).

151. *Id.*

152. Alabama, Louisiana, Maryland, Mississippi, and North Dakota are the only states that do not have two-year terms for members of the state house of representatives (each of those states has four-year terms). BALLOTPEDIA, http://ballotpedia.org/Lengthoftermsofstaterepresentatives (last visited Aug. 6, 2014), *archived at* http://perma.cc/72TK-W9SZ.

C. Power of Special Interest and National Groups

Finally, politically-motivated recalls increase the power of national groups in state legislative politics. Supporters of political recall may claim that the recalls are initiated because a legislator's votes no longer accurately reflect the opinions of his or her constituency. However, the power of well-financed special interest groups often dominates the recall process.[153] These groups, usually located outside the state where the recall will occur, overshadow the local electorate.[154] When Wisconsin Governor Scott Walker, a Republican, successfully defeated a recall election in 2012, more than half of the $63.5 million dollars spent on both sides of the campaign came from outside the state.[155] This trend continued in the Colorado recalls:[156] of the $540,000 raised in support of the recall, $368,000, or 68 percent, came from donations outside of Colorado.[157] On the other side of the campaign, $1.5 million of the $3 million dollars raised came from outside of the state.[158] A large portion of this money was used to fund TV advertisements, campaign literature, and to pay for the services of national consulting firms.[159]

The astonishing influx of out-of-state funds in Wisconsin and Colorado exposes the non-local nature of the groups and individuals exerting the most influence over state legislative politics during recalls. In Colorado, for instance, the largest donors on both sides of the recall campaign were national groups or individuals from outside the state.[160] Specifically, the National Rifle Association (NRA) contributed $360,000—well

153. NCSL, *Recall of State Officials*, *supra* note 3.

154. *See, e.g.*, Gavin Aronsen, *The Dark Money Behind the Wisconsin Recall*, MOTHER JONES (June 5, 2012, 6:00 AM), http://www.motherjones.com/mojo/2012/06/wisconsin-walker-recall-money-stats, *archived at* http://perma.cc/B35U-JQ45 (reviewing source of funding for Governor Scott Walker's recall election).

155. *Id.*

156. Kurtis Lee & Zahira Torres, *Outside Money Shows National Interest in Colorado Recall Elections*, DENV. POST (Sept. 9, 2013), http://www.denverpost.com/news/ci_24046748/outside-money-shows-national-interest-colorado-recall-elections, *archived at* http://perma.cc/Y3TV-UDJ5.

157. *Id.*

158. *Id.*

159. *Id.* ("The Chicago-based firm Adelstein Liston, which helped President Barack Obama's re-election campaign, has raked in large sums from committees against the recalls, while Virginia-based firm Starboard Strategic has seen thousands pour in from committees in favor of the recalls.").

160. *Id.*

over half of the funds raised in support of the recall—while Michael Bloomberg, the former mayor of New York City, and Eli Broad, a California entrepreneur, gave a total of $600,000 to defend the incumbent senators.[161] Although registered voters ultimately have the final say, outside money is important to the advertising and grassroots efforts necessary to initiate and defend recalls.[162]

Today, national and special interest groups exercise disproportionate control over the recall process relative to constituents. Compounding this problem, recalls are isolated in nature (there are generally no other elections taking place in the same time period), making national attention and financial support inherently easier to attract.[163] Most disturbingly, the influence of these groups undermines a representative's ability to govern as a delegate; the winner of a recall election may reflect which special interest group spent more money or did a better job at getting out the vote, rather than an accurate image of constituents' desires.[164] A recall initiated because of a representative's "unfaithfulness" to his or her constituency may, therefore, produce a result that strays even further from the "true" desires of the constituency.

III. POLICY RECOMMENDATIONS

This Part presents two policy recommendations that have the potential to remove or at least decrease the corrosive effect

161. *Id.*

162. *See, e.g.*, Alan S. Gerber, *Does Campaign Spending Work?: Field Experiments Provide Evidence and Suggest New Theory*, 47 AM. BEHAVIORAL SCIENTIST 541, 542–43 (2004), *available at* http://karlan.yale.edu/field experiments/papers/00246.pdf, *archived at* http://perma.cc/E3PB-RCUK (finding that campaign spending yeilds electoral benefits, especially for challengers).

163. *See, e.g.*, *Colo. Recalls Attract National Attention, Money*, WIS. DEMOCRACY CAMPAIGN, http://www.cpr.org/news/audio/colo-recalls-attract-national-attention-money, *archived at* http://perma.cc/JJ86-KWVT.

164. For example, Wisconsin Governor Scott Walker successfully defended a recall in 2012, outspending and later defeating his challenger by wide margins. *Wisconsin's Walker Survives Recall By Wide Margin*, FOX NEWS (June 6, 2012), http://www.foxnews.com/politics/2012/06/05/polls-close-in-wisconsin-voter-turnout-reported-heavy/, *archived at* http://perma.cc/V5DJ-ZV3P; *Recall Race for Governor Cost $81 Million*, COLO. PUB. RADIO, http://www.wisdc.org/pr072512.php (last visited Sept. 19, 2014), *archived at* http://perma.cc/Y2D4-G4GD ("Walker and Republican groups and committees outspent all of the Democratic candidates, groups and committees $58.7 million to $21.9 million in the governor's race where Walker defeated his Democratic challenger Tom Barrett . . . .").

of politically-motivated recalls on state legislative politics. First, this Part considers the option of banning politically-motivated recall altogether. Second, it considers the effect of increasing the barriers organizers must overcome before initiating a recall election. Next, this Part examines the concerning application of politically-motivated recalls to the judiciary. This Part concludes that increasing the number of signatures required to initiate a recall is the most promising policy option to decrease the use of politically-motivated recalls in the future.

A. Banning Politically-Motivated Recalls

The first and most potent policy option available to opponents of politically-motivated recalls is to ban their use altogether. A ban on politically-motivated recalls would take the form of restricting the grounds on which recall may be sought. States that allow recall to be initiated, for any reason, would need to amend their election laws to model the laws of states like Kansas, which limit recall of elected officials to misbehavior of those elected officials.[165] In these states, constituents could still initiate apolitical recalls in response to a legislator's misconduct, but, because they would no longer be able to initiate a recall for political reasons (e.g., a controversial vote), legislators would have more freedom to compromise.[166] The procedure for this change would need to take the form of a state constitutional amendment.[167]

Critics of this policy change would argue that eliminating political recall will decrease a legislator's accountability to his or her constituents.[168] To a certain extent this is true; banning political recall would give legislators more autonomy in decision-making. But, as explained above, there are significant

165. *See supra* Part I.C; *see also* KAN. STAT. ANN. § 25-4302(a) (2014) (laying out the permissible grounds for recall: "[C]onviction of a felony, misconduct [violation of law that impacts officer's ability to perform official duties] in office or failure to perform duties prescribed by law.").

166. *See infra* Part II.2.

167. *E.g.*, COLO. CONST. art. XXI, § 1. In Colorado, section 1 of article XXI of the state's constitution would need to be amended.

168. *See* NCSL, *Recall of State Officials*, *supra* note 3 ("Supporters of the recall maintain that it provides a way for citizens to retain control over elected officials who are not representing the best interests of their constituents, or who are unresponsive or incompetent. This view holds that an elected representative is an agent or a servant and not a master.").

policy and governing advantages to affording legislators qualified independence while in office. Additionally, legislators are still accountable to constituents each time they run for re-election, which occurs frequently because of relatively short term limits at the state level.[169] Overall, eliminating political recall altogether would mitigate many of the problems described in Part II.

B. Increasing the Signature Requirement

A second, less drastic policy option is to heighten the institutional barriers to initiating a recall election by increasing the number of signatures required for a recall petition to be deemed sufficient. Although this option would not eliminate the consequences of politically-motivated recalls altogether, it would make the process of triggering a new election more cumbersome, thereby decreasing the attractiveness of using recalls.

Current signature requirements for recall petitions are relatively low.[170] In Colorado, the signature requirement to produce a recall is 25 percent of the votes cast in the previous election.[171] This may seem like a tough task to overcome to produce a recall, but, in reality, the number is a relatively low bar especially when viewed in context of the new technologies available to grassroots organizers.[172] Take, for instance, the number of signatures necessary to initiate the recall of Senator Morse: 7,178.[173] Colorado State Senate District 11, Morse's district, had a total of 70,062 active registered voters at that time, 18,250 of whom were Republicans.[174] Based on these

169. *See supra* note 152.

170. See sources cited *supra* note 84 and accompanying text. *See also* CAL. CONST. art. II, § 14(b) ("The number of signatures needed on the petition to recall State Senators, Members of the Assembly, Members of the Board of Equalization and Judges of Courts of Appeal must equal at least twenty percent (20%) of the last vote for the office."); WIS. STAT. § 9.10(1)(b) (requiring that a petition for recall of an officer shall be signed by electors equal to at least 25 percent of the vote cast for the office of governor at the last election within the same district or territory as that of the officeholder being recalled).

171. COLO. CONST. art. XXI, § 1.

172. Wilson, *supra* note 40.

173. There were 28,712 total votes in District 11's previous state house election. 28,712 x 0.25 = 7,178. COLORADO CUMULATIVE REPORT: OFFICIAL RESULTS—GENERAL ELECTION, *supra* note 64.

174. COLO. OFFICE OF SEC'Y OF STATE, *supra* note 99.

statistics, the conservative organizations seeking recall had more than 2.5 times the necessary number of voters to initiate a recall based on the registered Republicans in the district alone.[175]

The statistics of Senator Giron's recall provide another illustration of the ease with which organizers acquired the requisite signatures, 11,285 signatures were required to initiate the recall based on the 45,140 votes cast in the previous election.[176] At the time of Giron's recall, Colorado State Senate District 3 had a total of 81,873 active registered voters, 19,006 of which were registered Republicans.[177] Overall, these statistics confirm that, because of the relatively low number of signatures required compared to the number of registered voters of both political parties, recall is a very real possibility in many districts.

It would take a comprehensive analysis of voting data from each state legislative district to make a truly informed judgment on how many signatures should be required to initiate a political recall. That analysis is beyond the scope of this Comment, but one issue is immediately apparent after consideration of the data from the Colorado recalls: if the signature requirement remains tied to the number of votes cast in the previous election, even a dramatic increase in the percentage required to initiate a recall may not surpass the number of registered voters of the opposition party in that district. In District 11, for instance, if the number of requisite signatures had been 50 percent of the votes cast in the previous election, there would still have been 3,894 more registered Republicans in the district than signatures necessary to initiate the recall.[178]

A potential solution to this problem would be to tie the requisite number of signatures to the total number of voters in a given district rather than the number of votes cast in the previous election (leaving the percentage requirement the

175. *Id.*

176. COLO. OFFICE OF SEC'Y OF STATE, *supra* note 64.

177. *Id.* That is 1.7 times the necessary number of voters to initiate a recall.

178. COLORADO CUMULATIVE REPORT: OFFICIAL RESULTS – GENERAL ELECTION, *supra* note 64; *see also* TOTAL REGISTERED VOTERS BY STATE SENATE DISTRICT, PARTY, AND STATUS, *supra* note 99. There were 18,250 registered Republicans in District 11 at the time of the recall. If the signature requirement were raised to 50 percent, 14,356 signatures would have been needed to initiate the recall. 18,250 - 14,356 = 3,894.

same). In District 11, 25 percent of the total registered voters would have forced organizers to gather 17,516 signatures before initiating a recall.[179] Although this number is still less than the total 18,250 registered Republicans in the district, a recall of Senator Morse would have required in excess of 10,000 more signatures to initiate.[180] Ultimately, increasing the signature requirement seeks to make recall more difficult to initiate.[181]

By increasing the number of signatures necessary for a recall petition, organizers of politically-motivated recalls would need to find a wider support base before a recall election is initiated. Increasing the signature requirement would help ensure that the political motivation for the recall was one of the sacred cows of a legislator's constituents. Additionally, increasing the number of signatures required would slow the recall process, giving voters a better opportunity to understand the issues and making it less likely that the support of national groups and special interest groups would be decisive. Overall, by increasing the number of signatures necessary to initiate a recall, this political tactic will become a "last resort" for political activists rather than the modus operandi.

C. Future Research: The Judiciary

The recall of state officials in the legislative branch of government will likely have serious consequences, but political recall would have even more devastating results if the tactic took hold in another branch of government: the judiciary. Currently, six states allow citizens to recall judges for political reasons.[182] The California Constitution, for instance, explicitly

179. *See* COLO. OFFICE OF SEC'Y OF STATE, *supra* note 99. There were 70,062 total registered voters in District 11 at the time of the recall. 70,062 x .25 = 17,516.

180. *See id.* 17,516 - 7,178 = 10,388.

181. Although the mechanics for this change are beyond the scope of this Comment, they would be an excellent starting point for future research.

182. *See* ARIZ. CONST. art. VIII, § 1 ("Every public officer in the state of Arizona, holding an elective office, either by election or appointment, is subject to recall from such office . . . ."); CAL. CONST. art. II, §§ 13–19 ("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."); NEV. CONST. art. II, § 9 ("Every public officer in the State of Nevada is subject, as herein provided, to recall from office by the registered voters . . . ."); 1987 Nev. Op. Att'y Gen. No. 87-7, 1987 WL 275509 (March 27,

includes judges in the recall provisions of state law providing that: "Senators, members of the Assembly, members of the Board of Equalization, and *judges of the courts of appeal and trial courts*" may be recalled.[183] Although the frequency of judicial recall is not increasing at the rate of legislative recall, the tactic has been successfully deployed in the judicial context.[184] In 2010, for example, three Iowa Supreme Court justices were recalled after a unanimous decision to legalize same-sex marriage in the state.[185] Much like the funding patterns found in the state legislative recalls,[186] out-of-state

1987) ("A district judge is a public officer within the context of Nev. Const. art. 2, sec. 9 and NRS 306.020, and, therefore, is subject to recall by the registered voters of the district from which he was elected."); N.D. CONST. art. III, § 10 ("Any elected official of the state, of any county or of any legislative or county commissioner district shall be subject to recall . . . ."); 2003 N.D. Op. Atty. Gen. No. L-50, 2003 WL 22702372 (Nov. 13, 2003) ("[A]ssuming all necessary filing and ballot requirements may be met, the Secretary of State may utilize the time frame set out in N.D.C.C. § 44-08-21 for calling a special election for the recall of a district judge."); OR. CONST. art. II, § 18(1) ("Every public officer in Oregon is subject, as herein provided, to recall by the electors of the state or of the electoral district from which the public officer is elected."); WIS. CONST. art. XIII, § 12 ("The qualified electors of the state, of any congressional, judicial or legislative district or of any county may petition for the recall of any incumbent elective officer . . . ."); *see also* State v. Henley, 802 N.W.2d 175, 181 (2011) (indicating that, in Wisconsin, the only constitutional authority to remove a Supreme Court justice rests with the legislature by impeachment or address, or with the voters by recall). In Colorado, judges are not currently subject to political recall, although the language in COLO. CONST. art. XXI § 1 ("Every elective public officer of the state of Colorado may be recalled from office . . . .") might imply otherwise. However, in 2014, Colorado voters filed a ballot initiative that would have affirmatively included judges in a class of public officers subject to recall. Section 1 of the proposed initiative stated, "Any elective officer in any state or local legislative, executive, or judicial office is eligible for recall. Any non-elective officer is eligible for recall when that person is . . . a judicial officer of any state or local authority . . . . This article intends to increase public accountability of public servants." *See* BALLOT INITIATIVE 76, RECALL OF STATE AND LOCAL OFFICERS (2013–14), *available at* http://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2013-2014/76Final.pdf, *archived at* http://perma.cc/QD5-L9AN. The Supreme Court denied the title setting of the initiative on the on the grounds that the measure did not constitute a single subject. *See* COLO. SEC'Y ST., RESULTS FOR PROPOSED INITIATIVE #76 http://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/results/2013-2014/76Results.html (last visited Sept. 19, 2014), *archived at* http://perma.cc/X37-BMMK.

183. *See, e.g.*, CAL. CONST. art. II, § 14(b); CAL. ELEC. CODE § 11221 (emphasis added).

184. *See* A. G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES (Nov. 3, 2010), http://www.nytimes.com/2010/11/04/us/politics/04judges.html?_r=0 (discussing recall of three judges over same-sex marriage issue).

185. *Id.*

186. *See infra* Part II.C.

special interest groups also dominated the funding of the judicial recall in Iowa.[187] The National Organization for Marriage and the American Family Association, for instance, each spent significant money in the removal campaign.[188] Although a thorough examination of the impact of recall on the judicial branch is also outside the scope of this Comment, there is little debate regarding the importance of an impartial judiciary[189] and the threat that recall poses to that constitutional value.

The Supreme Court has recognized that an independent judicial branch of government is necessary to ensure "the lack of bias for or against either party to the proceeding . . . [and] the equal application of the law."[190] Judges are already elected or subject to retention elections in the vast majority of states,[191] which leave them vulnerable to the political process and its sometimes-questionable influences like campaign finance.[192] Politically-motivated recalls, with their unnecessary and inappropriate influences, threaten to expose judges to an even more concrete form of direct democracy. It is hard to imagine that a judge could remain independent and apolitical if he or she fears retaliation in the form of a recall from writing a controversial decision. Following the Iowa judicial recalls in 2010, Erwin Chemerinsky, the Dean of the University of California, Irvine School of Law, claimed that the tactic might actually "cause judges in the future to be less willing to protect

187. Sulzberger, *supra* note 184.

188. *Id.*

189. *See* Republican Party of Minn. v. White, 536 U.S. 765, 775–76 (2002) (quoting "'impartiality' in the judicial context—and of course its root meaning—is the lack of bias for or against either party to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party.").

190. *Id.* (emphasis omitted).

191. FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES, AMERICAN BAR ASSOCIATION (2002), http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf, *archived at* http://perma.cc/GL9A-67TX. thirty-eight states have some type of judicial elections—whether partisan, nonpartisan, or uncontested retention elections—for the state's highest court. Thirty-nine states have some type of judicial election for intermediate appellate courts. And, thirty-nine states have some type of judicial election for trial courts of general jurisdiction.

192. *See* Melissa S. May, *Judicial Retention Elections After 2010*, 49 IND. L. REV. 59, 59–61 (2013) (explaining the implications of campaign finance on judicial retention elections).

minorities out of fear that they might be voted out of office."[193] The danger of politically-motivated recalls therefore has the potential to fundamentally undermine fairness and independence in the judiciary.

CONCLUSION

As the Colorado recalls illustrate, politically-motivated recalls have the ability to destabilize state legislative politics. By forcing legislators to consider the chance that they might be recalled after voting on any controversial issue, the tactic upsets the delicate balance between a legislator's ideal dual role as a delegate and trustee, and inhibits the advantages of behaving as a politico. This, in turn, makes political compromise less likely and threatens to bring about a literal manifestation of the permanent campaign. Political recalls also produce the perverse result of giving national and special interest groups a louder voice than the constituents the legislator actually represents. States that do not currently restrict the grounds on which recall may be sought should therefore consider one of two policy options: ban politically-motivated recalls altogether, or increase the number of signatures required for a politically-motivated recall to be initiated. These policy changes will provide some necessary stability in state legislative politics moving forward.

193. Sulzberger, *supra* note 184.

APPENDIX

Name	Year	State	Political?	Proffered Reason	Outcome
Marshall Black[194]	1913	Cal.	No	Convicted of embezzlement	Recalled
James Owen[195]	1913	Cal.	Yes	Effort initiated by labor unions who disapproved of voting record	Survived
Edwin Grant[196]	1914	Cal.	Yes	Stated reason was that he failed to represent the views of his district "[b]ut the desire by a political machine to punish an errant senator is viewed as the real motivation . . . ."	Recalled
Otto Mueller[197]	1932	Wis.	Yes	Effort initiated because of opposition to tax bill	Survived
Harry Merriam[198]	1935	Or.	Yes	Opposed proposed federal subsidy program for elderly	Recalled
Fisher Ellsworth[199]	1971	Idaho	Yes	Voted for bill to increase salary of state legislators	Recalled

[Table Continued on Next Page.]

194. NCSL, *Recall of State Officials*, *supra* note 3.
195. *Id.*
196. *Id.*
197. *Id.*; JOSEPH F. ZIMMERMAN, THE RECALL: TRIBUNAL OF THE PEOPLE 75 (2nd ed. 2013).
198. NCSL, *Recall of State Officials*, *supra* note 3; Jeff Mapes, *Legislative Recalls Rare, But Oregon Has Had More Than Its Share*, OREGONIAN (Aug. 11, 2011, 10:33 AM), http://blog.oregonlive.com/mapesonpolitics/2011/08/legislative_recalls_rare_but_o.html, *archived at* http://perma.cc/8AHV-NYVM.
199. NCSL, *Recall of State Officials*, *supra* note 3; ZIMMERMAN, *supra* note 196, at 74.

Name	Year	State	Political?	Proffered Reason	Outcome
Aden Hyde[200]	1971	Idaho	Yes	Voted for bill to increase salary of state legislators	Recalled
Peter von Reichbauer[201]	1981	Wis.	Yes	Effort initiated because of defection from Democratic Party	Survived
Phil Mastin[202]	1983	Mich.	Yes	Cast vote to approve increase in state income tax, reduce budget deficit, and constitutionally mandate balanced budget	Recalled
David Serotkin[203]	1983	Mich.	Yes	Supported increase in state personal income tax	Resigned
Pat Gillis[204]	1985	Or.	No	Accused of falsifying campaign endorsements and falsely claiming a master's degree in voters' pamphlet	Recalled

[Table Continued on Next Page.]

200. *Id*.

201. NCSL, *Recall of State Officials*, *supra* note 3; AP, *Ohio Senate Democrat in Power Play*, N.Y. TIMES (Dec. 12, 1982), http://www.nytimes.com/1982/12/12/us/ohio-senate-democrat-in-power-play.html, *archived at* http://perma.cc/K8VP-UL3Q.

202. NCSL, *Recall of State Officials*, *supra* note 3; *Former Senator Phillip Mastin Dies,* DAILY TRIB. (Dec. 1, 2012, 4:19 PM), http://www.dailytribune.com/article/DT/20121201/NEWS01/121209970, *archived at* http://perma.cc/E4YZ-YXUP.

203. NCSL, *Recall of State Officials*, *supra* note 3; *Michigan Ouster Votes Threaten Democratic Control in Legislature*, N.Y. TIMES (Dec. 2, 1983), http://www.nytimes.com/1983/12/02/us/michigan-ouster-votes-threaten-democratic-control-in-legislature.html, *archived at* http://perma.cc/H962-ALA8. Serotkin resigned before the recall votes were certified, but there were sufficient votes cast against him so that he would have been recalled. NCSL, *Recall of State Officials*, *supra* note 3

204. NCSL, *Recall of State Officials*, *supra* note 3; Mapes, *supra* note 198.

Name	Year	State	Political?	Proffered Reason	Outcome
Bill Olson[205]	1988	Or.	No	Pleaded guilty to a misdemeanor charge of sexual abuse of 12-year-old girl	Recalled
Jim Holperin[206]	1990	Wis.	Yes	Effort initiated because of controversial stance on Indian spearfishing	Survived
David Roberti[207]	1994	Cal.	Yes	Effort initiated because of attempt to enact semiautomatic assault weapons ban	Survived
Paul Horcher[208]	1995	Cal.	Yes	Voted for opposition party's candidate for Speaker of House	Recalled
Michael Machado[209]	1995	Cal.	Yes	Effort initiated because he voted for his own party's candidate for Speaker after allegedly promising to vote against him	Survived
Doris Allen[210]	1995	Cal.	Yes	Elected Speaker of the House with the help of the opposition party	Recalled

[Table Continued on Next Page.]

205. NCSL, *Recall of State Officials*, *supra* note 3.

206. *Id.*; Patrick Marley, *Holperin Won't Run for Re-election,* J. SENTINEL (Mar. 23, 2012), http://www.jsonline.com/blogs/news/143999146.html, *archived at* http://perma.cc/5G6S-2GJ7.

207. NCSL, *Recall of State Officials*, *supra* note 3; Spivak, *supra* note 21.

208. NCSL, *Recall of State Officials*, *supra* note 3.

209. *Id.*

210. *Id.*

Name	Year	State	Political?	Proffered Reason	Outcome
George Petak[211]	1996	Wis.	Yes	". . . voted yes, to allow Racine County to become a part of the Brewers stadium sales tax district . . . ."	Recalled
Gary George[212]	2003	Wis.	Yes	Voted to override governor's veto of legislation to give lawmakers final say over tribal gambling compacts	Recalled
Jeff Denham[213]	2008	Cal.	Yes	Effort initiated because of refusal to vote for state budget	Survived
Andy Dillon[214]	2008	Mich.	Yes	Effort initiated because of vote for tax increases	Survived

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211. NCSL, *Recall of State Officials*, *supra* note 3; Stephanie Jones, *Recalled Sen. Petak's Advice to Recall Candidates: 'Take nothing for Granted,'* J. TIMES (Aug. 8, 2011, 7:30 PM), http://journaltimes.com/news/local/recalled-sen-petak-s-advice-to-recall-candidates-take-nothing/article_8a8fd668-c211-11e0-b8e6-001cc4c03286.html, *archived at* http://perma.cc/KD4L-MF9W.

212. NCSL, *Recall of State Officials*, *supra* note 3; Todd Richmond, *Wisconsin State Sen. Gray George Removed From Office in Recall,* LUDINGTON DAILY NEWS (Oct. 22, 2003), http://news.google.com/newspapers?nid=110&dat=20031022&id=Ln9OAAAAIBAJ&sjid=VEwDAAAAIBAJ&pg=5233,5011945, *archived at* http://perma.cc/W74P-37HY.

213. NCSL, *Recall of State Officials*, *supra* note 3; E.J. Schultz, *Recall Fight May Turn Out to Be a Plus for Denham*, MERCED SUN STAR (May 9, 2008), http://www.mercedsunstar.com/2008/05/09/257859/recall-fight-may-turn-out-to-be.html, *archived at* http://perma.cc/9SUH-S4KB.

214. NCSL, *Recall of State Officials*, *supra* note 3; Dawson Bell, *Recall Can Still Cost Andy Dillon, Even if He Wins Re-Election*, DETROIT FREE PRESS (Oct. 27, 2008), http://www.freep.com/article/20081027/NEWS15/810270339/Recall-can-still-cost-Andy-Dillon-even-he-wins-re-election, *archived at* http://perma.cc/Q4TY-UJM7.

Name	Year	State	Political?	Proffered Reason	Outcome
Randy Hopper[215]	2011	Wis.	Yes	Favored limitations on union bargaining rights	Recalled
Dan Kapanke[216]	2011	Wis.	Yes	Favored limitations on union bargaining rights	Recalled
Robert Cowles[217]	2011	Wis.	Yes	Efforts initiated because of support for limitations on union bargaining rights	Survived
Alberta Darling[218]	2011	Wis.	Yes	Efforts initiated because of support for limitations on union bargaining rights	Survived

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215. NCSL, *Recall of State Officials*, *supra* note 3; Tom Tolan, *Signatures Filed to Recall Sen. Randy Hopper; More Possible,* J. SENTINEL (Apr. 7, 2011), http://www.jsonline.com/news/statepolitics/119449699.html, *archived at* http://perma.cc/56X5-EAKM; Chris Hubbuch, *Update: Kapanke Recall Petition Filed*, LACROSSE TRIB. (Apr. 1, 2011, 12:15 AM), http://lacrossetribune .com/news/local/update-kapanke-recall-petition-filed/article_d5240e94-5c0c-11e0-b582-001cc4c002e0.html, *archived at* http://perma.cc/66GL-ALSA.

216. NCSL, *Recall of State Officials*, *supra* note 3.

217. *Id.*; Steve Contorno, *Protestors Collect 1,200 Signatures in Recall of Wisconsin Sen. Robert Cowles*, GREEN BAY PRESS GAZETTE (Mar. 8, 2011), http://www.greenbaypressgazette.com/article/20110308/GPG0101/103080528/Protesters-collect-1-200-signatures-recall-Wisconsin-Sen-Robert-Cowles, *archived at* http://perma.cc/F6AE-VN3M; Paige Lavender, *Wisconsin Recall Elections Prompt Progressive Groups to Make Six-Figure Ad Buy,* HUFFINGTON POST (Aug. 4, 2011), http://www.huffingtonpost.com/2011/08/04/wisconsin-recall-elections_n_918520.html, *archived at* http://perma.cc/JQM9-CD7C; Amanda Terkel, *Morgan Freeman Interested In Wisconsin Recalls? New GOP Ad Has Narrator Who Sounds Like Actor,* HUFFINGTON POST (July 26, 2011, 4:13 PM), http://www.huffingtonpost.com/2011/07/26/morgan-freeman-wisconsin-recalls_n_909753.html, *archived at* http://perma.cc/CF6B-6CZZ; AP, *Recall Elections Certified for 3 Wis. Senate Dems,* HUFFINGTON POST (June 8, 2011, 10:21 PM), http://www.huffingtonpost.com/huff-wires/20110608/us-wisconsin-recalls/; AP, *Dems File Recall Petition for 3rd GOP Senator,* NEWS RADIO 620 WTMJ (2011), http://www.620wtmj.com/news/local/120060599.html, *archived at* http://perma.cc/Q9W4-UZTE.

218. NCSL, *Recall of State Officials*, *supra* note 3.

Name	Year	State	Political?	Proffered Reason	Outcome
Dave Hansen[219]	2011	Wis.	Yes	Efforts initiated because of support for limitations on union bargaining rights (specifically targeted because he fled the state in an attempt to block a controversial vote)	Survived
Sheila Harsdorf[220]	2011	Wis.	Yes	Efforts initiated because of support for limitations on union bargaining rights	Survived
Jim Holperin[221]	2011	Wis.	Yes	Efforts initiated because of support for limitations on union bargaining rights (specifically targeted because he fled the state in an attempt to block a controversial vote)	Survived
Luther Olsen[222]	2011	Wis.	Yes	Efforts initiated because of support for limitations on union bargaining rights	Survived

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219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*

Name	Year	State	Political?	Proffered Reason	Outcome
Robert Wirch[223]	2011	Wis.	Yes	Efforts initiated because of support for limitations on union bargaining rights (specifically targeted because he fled the state in an attempt to block a controversial vote)	Survived
Russell Pearce[224]	2011	Ariz.	Yes	Sponsored an anti-immigrant law	Recalled
Paul Scott[225]	2011	Mich.	Yes	Supported a bill that limited collective bargaining rights for public school employees	Recalled
Van Wanggaard[226]	2012	Wis.	Yes	Favored limitations on union bargaining rights	Recalled
Pam Galloway[227]	2012	Wis.	Yes	Favored limitations on union bargaining rights	Resigned

[Table Continued on Next Page.]

223. *Id.*

224. *Id.*; ZIMMERMAN *supra* note 196, at 69.

225. NCSL, *Recall of State Officials*, *supra* note 3; Jason Linkins, *Michigan Recall of Paul Scott May Have Unintended Consequences*, HUFFINGTON POST (Nov. 9, 2011, 5:05 PM), http://www.huffingtonpost.com/2011/11/09/michigan-recall-paul-scott_n_1084815.html, *archived at* http://perma.cc/8USA-FYTE.

226. NCSL, *Recall of State Officials*, *supra* note 3; Nate Willis, *John Lehman Defeats Van Wanggaard In Wisconsin State Senate Recall After Recount*, HUFFINGTON POST (July 2, 2012, 5:21 PM), http://www.huffingtonpost.com/2012/07/02/john-lehman-van-wanggaard-wisconsin-senate-recall_n_1643584.html, *archived at* http://perma.cc/L25G-KEAZ; John Celock, *Senator Pam Galloway Resigns Seat On Wisconsin Legislature, GOP Loses Senate Control*, HUFFINGTON POST (Mar. 16, 2012, 4:00 PM), http://www.huffingtonpost.com/2012/03/16/pam-galloway-wisconsin-recall-election-resign-senate_n_1354268.html, *archived at* http://perma.cc/UF6R-EZRZ.

227. NCSL, *Recall of State Officials*, *supra* note 3. Galloway resigned when sufficient signatures triggered a recall for the same reason as Wanggaard—favoring limitations on union bargaining rights. *Id.*

Name	Year	State	Political?	Proffered Reason	Outcome
Scott Fitzgerald [228]	2012	Wis.	Yes	Effort initiated because of support of limitations on union bargaining rights	Survived
Terry Moulton [229]	2012	Wis.	Yes	Effort initiated because of support of limitations on union bargaining rights	Survived
John Morse[230]	2013	Colo.	Yes	Supported gun legislation that placed limitations on ammunition magazines, required universal background checks, and redistributed the cost of background checks to customers	Recalled
Angela Giron[231]	2013	Colo.	Yes	Supported gun legislation that placed limitations on ammunition magazines, required universal background checks, and redistributed the cost of background checks to customers	Recalled

228. NCSL, *Recall of State Officials*, *supra* note 3; Amanda Terkel, *Scott Fitzgerald, Wisconsin Senate Leader, Says Female Challenger's Campaign Driven By Her Husband*, HUFFINGTON POST (May 15, 2012, 5:23 PM), http://www.huffingtonpost.com/2012/05/13/scott-fitzgerald-wisconsin-senate-challenger_n_1513276.html, *archived at* http://perma.cc/X84G-9KRB.

229. NCSL, *Recall of State Officials*, *supra* note 3; Katie DeLong, *State Sen. Terry Moulton Defeats Kristen Dexter, Survives Recall*, FOX 6 MILWAUKEE (June 5, 2012, 10:03 PM), http://fox6now.com/2012/06/05/state-sen-terry-moulton-defeats-kristen-dexter-survives-recall/, *archived at* http://perma.cc/K8SH-WA5Y.

230. NCSL, *Recall of State Officials*, *supra* note 3; Bartels & Lee, *supra* note 12.

231. *Id.*