

The Progressivist Origins of the 2003 California Gubernatorial Recall

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Introduction

On November 5, 2002, more than three and a half million Californians voted to elect Gray Davis to a second term as their Governor.¹ Less than a year later, fewer than a third of that number of Californians set in motion a process which put an early end to his administration through the use of an arcane procedure known as the recall.² Was this recall what was envisioned by the Progressive reformers who designed the procedure almost a century ago? I argue that the Progressives valued public participation and open debate above all else, and that this recall, though circus-like in many respects, has if nothing else, captured the public's interest. However the Progressives valued public participation because they felt it would decrease the influence of moneyed interests in the political decision-making process, and there is no evidence that this recall has accomplished that goal; if anything it has demonstrated the electoral value of money and connection with special interests.³ Though it is impossible to know if the Progressive

¹ Statement of the Vote, *Summary Pages*, xv (2002).

² See Secretary of State, *FAQ About Recalls*, available at www.ss.ca.gov.

³ E.g., the recall petition was reportedly financed by millionaire Congressman Darryl Issa; Lt. Governor, and lead Democratic candidate, Cruz Bustamante has been roundly criticized for his connection with various Indian gaming tribes (which have contributed heavily to his campaign); Arnold Schwarzenegger has reportedly donated over \$4 million to his own campaign; Governor Davis has been under scrutiny for his

drafters of the recall legislation would be pleased, in the wake of the first certified recall of a California official elected to state-wide office, this paper seeks to address how closely this recent recall was aligned with the Progressive vision.

The Progressive Origins of the Recall

The politics of the early 20th century were not so different from those of today. Debates raged over the issues of governmental responsibility, voting rights, the role of the courts, and social justice.⁴ Some politicians believed, as some do now, that they ought to be faithful to the wishes of their constituencies, some saw themselves more as stewards, and a small group of “Progressive” politicians believed that the people themselves should control their collective political destiny.⁵

These Progressive reformers launched a movement predicated on their belief in the value of direct democracy and the economic independence of individuals.⁶ Underlying that belief was a general distrust of representative, or corporate, power structures, which

close ties to many of the large labor unions in the state. *See infra* note 45.

⁴ *See* Benjamin Parke DeWitt, THE PROGRESSIVE MOVEMENT: A NON-PARTISAN, COMPREHENSIVE DISCUSSION OF CURRENT TENDENCIES IN AMERICAN POLITICS 143-243 (Macmillan 1915); *The Progressive Party Platform of 1912*, in THE PROGRESSIVE MOVEMENT 1900-1915, 128-132 (Richard Hofstadter ed., Prentice-Hall 1963).

⁵ *Id.*

⁶ Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL’Y REV. 11, 16-18 (1997).

were viewed as being prone to corruption.⁷ The Progressive Era, which began in the last years of the 19th century and lasted for nearly twenty years, was marked by a national movement to return power directly to the people, who had long since lost the political voice they once had in the town hall meetings of colonial times.⁸ Led by the likes of Theodore Roosevelt, Robert LaFollette, Woodrow Wilson and California Governor Hiram Johnson, the Progressives set out generally to put an end to corrupt government and business practices; though various actors within the movement maintained their own, often disjointed, positions on specific issues.⁹ Most Progressive politicians did, however, agree that in order to return political power to their constituents systemic changes would be necessary.¹⁰ The initiative, referendum, recall, direct primaries, and non-partisan elections were all suggested as methods by which to accomplish that goal.¹¹

The recall was contemplated as a mechanism to remove from office officials who were “manifestly unfit to serve their constituencies” or were abusing the powers of their

⁷ *Id.*

⁸ *See id;* DeWitt, *supra* note 4, at 142-43.

⁹ *See* Persilly, *supra* note 6, at 22-30; *The Progressive Party Platform of 1912*, *supra* note 3, at 128. Richard Hofstadter, one of the leading writers on the topic, characterized the movement itself as being both vague and lacking in cohesion or uniformity. Richard Hofstadter, *THE AGE OF REFORM: FROM BRYANT TO F.D.R.* 5-8 (1955).

¹⁰ *See generally* Hofstadter, *THE AGE OF REFORM*, *supra* note 9.

¹¹ *See* DeWitt, *supra* note 4, at 213.

office.¹² One of the major tenets of the Progressive platform was the reallocation of political power away from small vested interests and into the hands of the majority of people.¹³ Thus by granting the electorate the right to remove officers the recall was the populist version of impeachment, which allowed only elected representatives to remove an officer. From the Progressivist vantage this shift in the balance of power was particularly significant given their view that political parties were tools of the special interests run by self-interested party bosses.¹⁴ These fears were encapsulated in the inaugural address of 1911, wherein Governor Hiram Johnson spoke of giving Californians the means to “protect themselves hereafter” from both “big business,” like the “the former political master of this State, the Southern Pacific Company,” and other private interests.¹⁵ The initiative, referendum and recall were the means he offered to achieve that goal.¹⁶ Of the recall he said: “[it is] the precautionary measure by which a recalcitrant official can be removed,” and he went on to speak of his trust in the voters and in their ability to govern. Johnson founded his vision on his trust in the electorate not to use the recall for petty or personal

¹² *Id.* at 215, 241. The recall ballot itself contains two sections: the first posing the question, shall the officer be recalled from the office which she holds, the second, listing the names of replacement candidates. *See* CAL. ELECTION. CODE §§ 11320, 11322.

¹³ DeWitt, *supra* note 4, at 143.

¹⁴ *Id.* at 150-51.

¹⁵ 1911 CAL. ASSEMBLY J. 46-49 (Jan. 3, 1911).

reasons, as his opponents suggested they would.¹⁷ The Progressives knew that Johnson's faith alone would not be enough to countermand criticisms of the procedure; to that end they fine-tuned the recall theory.

California Progressives made their first attempt at recall legislation in 1911, responding to the clarion call made by Governor Johnson at his inauguration.¹⁸ The bill, passed in both the Assembly and Senate, provided that county officers could be recalled at anytime once they had been in office for a minimum of six months. A petition to effect the recall required the signatures of twenty percent of the entire vote cast for all candidates for United States Representative in that county at the last general election. It was required that such a petition include a statement of the grounds on which the official should be recalled. Once the petition was approved a special election should be held not less than thirty-five or more than forty days afterwards. If a general election was already scheduled within sixty days of the certification then the board of supervisors for the county retained the discretion to hold the recall election "at any such general election occurring not less than thirty-five days after such order." The law also stated that the name of the officer being recalled was

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *See* Act to provide for direct legislation, including initiative, referendum, and recall by electors in counties, by adding two new sections to the Political Code to be numbered section 4058 and section 4021a, respectively, April 3, 1911, ch. 342, 39th Session (1911), *available in* STATUTES OF CAL. 577-581 (1911).

not to appear on the ballot as a candidate.¹⁹ These requirements were designed to be broad enough to make a recall movement feasible while still being limiting enough to prevent a small cadre or interest group from whimsically bringing about a recall to the detriment of the state.²⁰

In October of 1911, a special election was called to allow the electorate to vote on the adoption of constitutional amendments codifying the Progressive reforms passed in the legislature during the preceding term.²¹ The recall provision was offered as Senate Constitutional Amendment No. 23.²² The proffered amendment provided that all elective officers could be removed from office at “any time.” It maintained the provision of the earlier legislation allowing the electorate to elect a successor, while also adding or modifying portions of the earlier law. The proposed amendment required that the recall petition be signed by at least twelve percent of the number of voters in the last election for candidates for the incumbent’s office. It also required that the petition include the

¹⁹ *Id.* at 580-81. Oregon adopted the recall in 1908, the first state to do so. Kelly and Harbison, *AMERICAN CONSTITUTION* 641 (4th ed. 1970). Eight states had adopted the recall by 1915: Arizona, California, Colorado, Idaho, Michigan, Nevada, Oregon, and Washington. DeWitt, *supra* note 4, at 233.

²⁰ DeWitt, *supra* note 4, at 235.

²¹ Proposed Amendments to the Constitution of the State of California, with Legislative Reasons for and Against Adoption Thereof: to be Voted Upon at a Special Election to be Held on Tuesday, the Tenth Day of October, A.D. 1911, (September 1, 1911).

²² *Id.* The recall provision is currently codified as CAL. CONST. art. 2 § 15.

signatures of at least twenty percent of the votes cast in the previous election held for that office if the incumbent officer was a state officer elected in any “political subdivision of the state.” In the case of state officers, the recall petition needed to be circulated in at least five counties and signed in each of those counties by at least one percent of electors determined by reference to the previous election for that office. The petition also needed to contain a statement of the grounds of removal “the sufficiency of which shall not be open to review.” The special election was to be held between sixty and eighty days after certification of that petition. Successor candidates were required to obtain a petition signed by at least one percent of the total number of votes cast at the preceding election for that office and file such petition not less than twenty five days before the recall. The name of the incumbent was not permitted to appear on the ballot. The provision from the previous bill which prevented the officer from being recalled for six months after taking office was retained— though members of the legislature were excepted from this waiting period, and could be recalled as early as five days after the convocation of session following their election. Finally the Amendment required the state to repay the incumbent for any expenses incurred if that incumbent was not successfully recalled.²³

²³ *Id.* at 22. Prior to placement on the Ballot, Senate Constitutional Amendment No. 23 was debated and adopted by the legislature. The surviving mark-up of the Amendment indicates that several early versions contained language allowing the incumbent’s name to be automatically placed on the ballot as a successor candidate. One such proposal by Senator Gates, on January 21, 1911, was referred to the Senate Judiciary Committee where such language was stricken, it appears, prior to the final mark-up and adoption by the Senate as a whole on February 21, 1911. *See* Original Bill

The Ballot Pamphlet containing proposed Amendment No. 23 provided a passage written by Senator Gates and Assemblyman Clark outlining reasons why the recall should be adopted. These proponents of the Amendment characterized it as a measure which would give the public “the power to remove a dishonest, incapable, or unsatisfactory servant.” Their argument stressed that the people were the source of all government and all laws in the state, and that if the people had the right “to hire” public servants then they must also have the right “to fire” them. Trust in the people, in their ability to wield the recall as a sword against the corrupt and not to use it “lightly” or apply it “triflingly” was the central theme upon which the argument, and indeed the Progressivist movement, were based.²⁴ The Ballot Pamphlet also contained a passage written by Senator Curtin, an opponent of the proposed amendment. Senator Curtin directed his criticisms not at the theoretical underpinnings of the recall itself, but rather at the language of the proposal: “[it] requires no charges of misconduct, malfeasance or corruption on the part of the officer, but just because [the officer] fails to perform some act, the performance of which would be popular, a movement to ‘recall’ him can be started [italics omitted] . . .” According to Curtin, the language of the amendment allowed for a duly elected officer to be thrown out prior to a regular election simply because she took an unpopular position. In contrast to the argument made by Gates and Clark, Curtin wrote of his distrust of the

File S.C.A. 23 (1911).

²⁴ Proposed Amendments, *supra* note 21, at 23-24. Much of the argument was directed specifically at the recall of judicial officers, which shall not be discussed

people, of the inability of the majority to restrain themselves and use the recall sparingly.²⁵

Despite heated debate, Amendment No. 23 was passed on October 10, 1911.

There were no major reforms of the recall provisions until 1974, when the California Constitution Revision Commission suggested changes to streamline the language of Amendment No. 23.²⁶ Those proposed changes were submitted to the people as Proposition 9, Assembly Constitutional Amendment No. 29, “[a] resolution to propose to the people of the State of California an amendment to the constitution of the state, by repealing Article XXIII thereof and adding Article XXIII thereto, relating to recall of public officers.”²⁷ The Ballot Pamphlet from the 1974 General Election contained an argument in favor of Proposition 9 written by Assemblymen Keene and Arnett, and Judge Sumner, Chairman of the Constitution Revision Commission. That argument posited that the proposed reforms would allow the Constitution Revision Commission to continue its

herein.

²⁵ *Id.* at 24-25. Strikingly similar arguments were made throughout the 2003 recall campaign by Davis supporters. *See generally Davis v. Shelley*, Petition for Writ of Mandate and/or Prohibition; Memorandum of Points and Authorities in Support Thereof, S117921 (2003), at 14.

²⁶ Several other attempts were made to revise the language of the Constitution, though none relevant to the recall were affected. *See* Letter from Richard L. Patsey, Special Counsel, to Members of the Constitution Revision Commission, Re: Progress of Revision in the State Legislature (April 22, 1966) (available as Exhibit A in *Frankel v. Shelley*, Petition for Writ of Mandate; Supporting Memorandum of Points and Authorities; and Exhibits).

²⁷ A.C.A. No. 29 (1973), 1973-74 Regular Session, as referred to the Committee on Elections and Reapportionment. *See* California Voters Pamphlet, General Election,

work in “modernizing our State Constitution so that it can be understood by the average citizen.” These proponents of Proposition 9 went on to explain that the technical language of the recall provisions would be “transferred to the statutes,” while the “basic rights” of the provisions would remain in the Constitution itself. The opposing commentary however, written by Senator Stull and Assemblyman Antonovich, alleged that relocating “technical detail” to the statute books “dangerously threaten[ed] the people’s fundamental right of recall.” The nucleus of the Stull/Antonovich discussion was the Progressivist mantra: locate power in the people.²⁸ The recapitulation of that theme was most aptly demonstrated in their argument that the revisions would transfer power “from you, the electorate, to the legislature . . . [the] [r]ecall of elected public officials is too important to trust to politicians.”²⁹ Despite the oppositions contentions, on November 5, 1974 Proposition 9 was passed, and most of Article No. 23 was codified in the CAL. ELECTION CODE, leaving only 320 words in the Constitution concerning the recall.³⁰

The 2003 Gubernatorial Recall

A. Genesis of the 2003 Recall

Since the first recall legislation was passed in California in 1911, 31 attempts have

November 5, 1974.

²⁸ California Voters Pamphlet, General Election, November 5, 1974, 32-35.

²⁹ *Id.*

been made to recall a state-wide official. All of those attempts failed— excluding the 2003 Gubernatorial Recall. The first successful recall process began on March 25, 2003, when a petition began circulating to recall Governor Gray Davis.³¹ The proponents of this recent recall were given 160 days to collect 897,158 signatures from at least 5 counties.³² On July 23, 2003, Secretary of State Kevin Shelley certified the recall for the ballot; for the first time in California’s history recall proponents were able to collect the requisite number of signatures to trigger a special election.³³ Under CAL. CONST., art. II, sections 15 and 17, Lieutenant Governor Cruz Bustamante then became empowered to set the date of that election; he did so, choosing Tuesday, October 7, 2003.³⁴

Almost immediately, prospective candidates began gathering signatures to qualify as candidates to replace the sitting Governor. By August 1, 2003, nearly 300 individuals had taken out papers to run for Governor.³⁵ The severely truncated nature³⁶ of the special

³⁰ *Id.* at 32-34.

³¹ *See* Recall Facts, Cal. Secretary of State Homepage, at <http://www.ss.ca.gov/recall>.

³² *See id.* The number of signatures required is equal to twelve percent of the votes cast for Governor in the 2002 election, the last time that office appeared on the ballot. *Id.*

³³ *See id.*

³⁴ *See id.*

³⁵ *See id.*; Secretary of State Statewide Special Election, Candidate Status Report, at <http://www.ss.ca.gov>.

election cycle and the specialized rules governing the recall attracted a large number of candidates who would normally have been winnowed out in the traditional gubernatorial election process. In the special election no primaries took place, qualification for the ballot required only 65 signatures and a \$3,500 registration fee, and, due to the anomalous nature of the recall, media attention was focused on even the most minor candidates. A combination of these factors led to the qualification for the ballot of 135 candidates, Governor Davis not among them.³⁷

B. Progressive Nature of the 2003 Process

Is this “circus”³⁸ what the Progressives envisioned when they first crafted the recall over 90 years ago? Progressives were chiefly occupied with improving social

³⁶ There are only 75 days separating the date of certification and the October 7th election.

³⁷ See Recall Facts, *supra* note 31; Candidate Status Report, *supra* note 35. Candidates come from a range of backgrounds from Lt. Governor Cruz Bustamante and State Senator Tom McClintock to actor Arnold Schwarzenegger, *Penthouse* publisher Larry Flynt, porn star Mary Carey, and syndicated columnist Arianna Huffington. Certified List of Candidates, *available at* http://www.ss.ca.gov/elections/2003_cert_cand.htm.

³⁸ The term “circus” has been applied by hundreds of commentators, in hundreds of articles concerning the recall, *see e.g.*, Karen Tumulty, *The 5 Meanings of Arnold*, TIME, October 11, 2003; Thomas F. Schiller, *Any Way You Look At It, He’s Legit*, WASH. POST., Oct. 11, 2003, B01.

welfare and ending political corruption by transferring power to the population at large.³⁹

Is that what this recall has accomplished? Examining the origins of the recall effort, the stated purpose of the proponents, the responses of opponents, the replacement candidates, and public perception of the recall, it becomes apparent that the recall is, in many ways, what its Progressive designers envisioned, and in just as many ways, not at all what they had in mind.

The early proponents of the recall were a small group of Republicans⁴⁰ who charged Governor Davis with “gross mismanagement”⁴¹ of the state. They alleged that the Governor had been: “overspending taxpayers’ money, threatening public safety by cutting funds to local governments, failing to account for the exorbitant cost of the energy fiasco, and failing in general to deal with the state’s major problems until they [reached] the crisis stage.”⁴² A prima facie examination of these stated reasons would lead one to conclude that this recall was exactly what the Progressives had envisioned: the people asserting their power to “fire” an unsatisfactory public servant. However a more thorough examination of

³⁹ Persily, *supra* note 6, at 22-23.

⁴⁰ The public face of which was Darryl Issa, a Republican Congressman from Southern California. Many in the media have suggested that Issa spent several million dollars from his personal fortune to bankroll signature gathering and pro-recall advertising.

⁴¹ Recall Petition, Proponent’s Grounds for Recall and the Governor’s Response, available at <http://www.ss.ca.gov/recall>.

⁴² *Id.*

the afore stated reasons might lead one to conclude that each of these charges represents a disagreement over a particular public policy issue: how taxpayer money should be spent, how the energy crisis should be handled, when and how to deal with the state's public policy problems. Although every incarnation of the California recall legislation has included a provision bestowing power on the people to remove from office an official for "any reason," the underlying rationale of the Progressivist framers was to enable the population to expel corrupt influences.⁴³ The corrupting influences chiefly at issue for the Progressives were special interests which used money to buy power and influence.⁴⁴ Although Governor Davis had, throughout his career, routinely been charged with being

⁴³ See, Proposed Amendments, *supra* note 21; Governor Johnson's Inaugural Address, 1911 CAL. ASSEMBLY J. (Jan. 3, 1911), *supra* note 15, at 46-49. The inclusion of "any reason" was purposeful, as at least six states require in their recall statutes allegations of illegal conduct or malfeasance in order for the official to be recalled (e.g., ALASKA STAT. § 15.45.510; KAN. STAT. ANN. § 25-4302(a); MINN. CONST., art. VIII, § 6; MONT. CODE ANN. §2-16-603(3); R.I. CONST., art. IV, § 1; WASH. CONST., art. I, § 33.).

⁴⁴ See Governor Johnson's Inaugural Address, 1911 CAL. ASSEMBLY J. (Jan. 3,

“bought” by special interest groups, the proponents of the 2003 recall failed to make any such charge while circulating the recall petition. In fact many opponents charged that these proponents themselves were part of a special interest group attempting to wrest power from a duly elected official:

1911), *supra* note 15, at 46-49.

Just days after the Governor's inauguration in January . . . a handful of rightwing politicians are attempting to overturn the voters' decision. They couldn't beat [Governor Davis] fair and square, so now they're trying another trick to remove him from office. [¶] This effort is being led by the former Chairman of the State Republican party, who was censured by his own party. [¶] We should not waste scare taxpayers' dollars on sour grapes. The time for partisanship and campaigning is past. . . .⁴⁵

⁴⁵ Recall Petition, *supra* note 41. Given the tremendous amount of money spent by the top two vote-getters, it is not surprising that all parties were somewhat hesitant to raise the issue of the influence of moneyed elites. Cruz Bustamante, the highest Democratic vote-getter, who accepted campaign spending limits, received \$3,774,050 in contributions between

August 24 and September 20, 2003; Arnold Schwarzenegger, the winner of the election and highest Republican vote-getter, did not accept campaign spending limits, and received \$9,228,507.84 in contributions during the same reporting period. Over the course of the election Mr. Bustamante received large contributions from, *inter alia*, Pacific Gas & Electric Corporation (\$5,000), California Building Industry Association (\$10,000), California State Council of Laborers (\$6,500), Morongo Band of Mission Indians (\$12,500), and the Pechanga Band of Mission Indians (\$35,000). Similarly Mr. Schwarzenegger received several dozen contributions from special interest groups which amounted to over \$21,000 each (e.g., FLD Interests, Hilmar Cheese Co., Baratt Mortgage, Lowe Enterprises, Jordan Vineyards and Winery, and Capitol Steel, etc.). See <http://cal-access.ss.ca.gov/Campaign.htm>.

Given the Progressive disdain for political parties, which were thought to be run by corrupt party bosses, it is difficult to say whether the proponents or opponents had the stronger Progressivist argument in the 2003 recall battle.

In responding to criticism of the recall procedure the Progressives were quick to point to their trust in the people not to wield such a powerful tool lightly, however the hurdles to recalling an official set up by these framers are much more easily overcome today than they would have been in the early part of the 20th century. The “twelve percent” and “five county” signature requirements found in the text of the earliest recall legislation were intended to be somewhat difficult to overcome, though not so difficult as to make a recall an impossibility.⁴⁶ Today, the advent of mass media culture, quick and low cost transportation, the internet, 24 hour news cycles, and in the introduction of professional signature gatherers onto the political scene have altered the way one must approach these “hurdles.”⁴⁷ Indeed, one wonders if the

⁴⁶ See DeWitt, *supra* note 4, at 158, 232-35.

⁴⁷ Decreasing voter turnout in all electoral contests since the time of the Progressives should also be considered, as the number of Californians has increased exponentially and the number of electors has not grown concomitantly. In a state with a population of 34,501,130 people, according to 2001 US Census Bureau Statistics (*available at* <http://quickfacts.census.gov/qfd/states/06000.html>), only 15,380, 536 people registered to vote in the special election, of the 21,833,141 voters eligible to register. Report of Registration, September 22, 2003: Historical Registration Statistics for the 15-Day Close, *available at* http://www.ss.ca.gov/elections/ror_092203.htm. These numbers reflect a slight decrease in registration from the last off-year election, but an increase in the actual number of registered voters from the 2002 election (a general election considered comparable to the

Progressive framers would have increased the difficulty of the process given the ease with which a relatively small group of individuals was able to launch the 2003 recall. I argue that the highly partisan nature of the 2003 recall campaign was not, in itself, adverse to the ideals which the Progressives espoused, however the role of money and special interest groups, on both sides of the effort, would indeed fly in the face of all that they envisioned.

Debates over the specifics of that vision have come to light in a multitude of court battles which began shortly after the recall was certified. In *Robins v. S.C. (Shelley)*, recall opponents alleged that there were irregularities in the petition signature collection process and requested a stay of the recall process pending further investigation.⁴⁸ The basis of the claim in that case was that paid professional signature gatherers from outside California were used to collect signatures for the recall petition, and that not all of those signatures were valid. The trial court declined to stay the recall pending a hearing, and was upheld by both the Second Appellate District and the California Supreme Court, which declined to review the petition.⁴⁹ Almost simultaneously,

statewide special election). Even though the number of registered voters has increased due to legislative reforms such as the “Motor Voter” law, enacted in the mid 1990s, the number of registered voters has not kept pace with the increase in the number of eligible voters. Report of Registration, February 10, 2003: Historical Registration Statistics, *available at* http://www.ss.ca.gov/elections/ror/regstats_02-10-03.pdf. A mere 8,880,475 people voted in the 2003 recall election on the question “Shall Gray Davis be recalled?”: 4,916,226 (or 55.4%) in favor of recalling Governor Davis, and 3,964,249 (or 44.6%) opposed. Results of the 2003 California Statewide Special Election, *available at* <http://vote2003.ss.ca.gov>Returns/recall.htm>.

⁴⁸ See L.A. Superior Court No. BC299066; S117661, 2003 Cal. LEXIS 5661.

⁴⁹ See *id.* Petitioners in the Supreme Court sought review of the Court of Appeal’s denial

another petition for a writ of mandate and stay of the recall was brought by James B. and Louise Frankel.⁵⁰ The *Frankel* petition challenged the constitutionality of allowing the names of successor candidates to appear on the recall ballot.⁵¹ The petitioners argued that a recall of a sitting governor created a vacancy in the office which, according to CAL. CONST. art V, section 10, should be filled by the Lieutenant Governor.⁵² In addition they stressed that the 1974 revision of the recall language added limiting language (“if appropriate”) to Article II, section 15, thus causing the statute to read: “An election to determine whether to recall an officer, and *if appropriate*, to elect a successor shall be called . . .”⁵³ Petitioners argued that the added language implied the existence of certain circumstances in which it was not appropriate to hold

of a writ of mandate and failure to make an order granting injunctive relief. *Id.*

⁵⁰ Petition for Writ of Mandate; Supporting Memorandum of Points and Authorities; and Exhibits, *Frankel v. Shelley*, S117770 (Cal. 2003).

⁵¹ *Id.* at 4-8.

⁵² *Id.* at 4.

an election for successor candidates.⁵⁴ The Supreme Court however disagreed. In a non-published decision the court denied the petition saying:

⁵³ *Id.*

⁵⁴ *Id.*

[w]e have concluded that petitioners have not demonstrated a sufficient likelihood of success to warrant the issuance of an alternative writ or order to show cause. . . . The history of the recall procedure embodied in the California Constitution . . . makes it clear that . . . when an officer is removed from office by recall and is immediately replaced by the candidate who receives a plurality of votes at the election, no ‘vacancy in the office occurs [citations omitted]. . . .⁵⁵

Given that the recall procedures have never previously been tested at a state-wide level it is difficult to understand how the Court could conclude that history has made any portion of the recall legislation clear. However, given that the successor candidate language has been part of the recall legislation since the original 1911 bill, and has not in any subsequent version been removed, placing the names of successor candidates on the same ballot as the recall proposal is indeed what the Progressive framers must have intended. Though whether or not they intended 135 people to be considered as replacement candidates is a question that is not so easily answered.

⁵⁵ *Frankel v. Shelley*, S117770, 2003 Cal. LEXIS 6100 (Cal. 2003).

That very question was addressed in *Burton v. Shelley*⁵⁶, wherein petitioner Mark Burton requested a writ of mandate to compel Secretary of State, Kevin Shelley, to restrict replacement candidates to persons who qualified for nomination under ELECTIONS CODE section 8400; meaning that recall replacement candidates would be required to obtain the signatures of one percent of the entire number of registered voters in the state.⁵⁷ Burton argued that the language of section 8400 was more specific than that of section 11328, which the Secretary of State determined would govern the recall procedures, and that, as such, it was appropriate to use the section 8400 language, which is concerned with candidates running as independents in a state-wide election.⁵⁸ The Secretary of State, citing previous recall elections for legislative offices, responded that sections 11328⁵⁹ and 11381 should govern the recall election, just as they would a regular primary nomination for candidates for statewide office.⁶⁰ Respondent's brief focused chiefly on the relative unfairness of requiring potential candidates to acquire 150,000 signatures

⁵⁶ S117834, 2003 Cal. LEXIS 6102 (Cal. 2003).

⁵⁷ See CAL. ELECTIONS CODE § 8400. One percent of the number of registered voters totals approximately 153,000 valid signatures. *Burton*, 2003 Cal. LEXIS at *1. All further references are to the CAL. ELECTIONS CODE unless otherwise stated herein.

⁵⁸ Reply to Secretary of State Kevin Shelley's Opposition to Petition for Writ of Mandate, *Burton v. Shelley*S117834 (2003) at 3.

⁵⁹ Section 11328 states in relevant part that recall elections "shall be conducted . . . in substantially the manner provided by law for a regular election for the office."

⁶⁰ Secretary of State Kevin Shelley's Opposition to Petition for Writ of Mandate, *Burton v. Shelley*, S117834 (2003) at 2-4.

“in a matter of days” and so postulated that the nominee qualifications set forth in sections 8001 through 8105 must apply.⁶¹ In an unpublished decision, the California Supreme Court concluded that the petitioner had failed to demonstrate a sufficient likelihood of success to warrant issuance of the requested writ, delaying the recall.⁶² The Court also suggested the importance of not interfering with the ability of any replacement candidate to appear on the ballot, and, citing the onerousness of the 150,000 signature requirement, found no clear error in the Secretary of State’s decision to allow candidates on the ballot with only the 65 signatures required by section 8062.⁶³ What restrictions did the Progressive framers intend to place on prospective successor candidates? The language of the 1911 Ballot Measure (S.C.A. No. 23) was specific about the number of signatures required and the appropriate time frame in which to gather them:

⁶¹ *Id.* at 4.

⁶² *Burton*, 2003 Cal. LEXIS at 2.

⁶³ *Id.* at 3-4.

Any person may be nominated for the office which is to be filled at any recall election by a petition signed by electors, qualified to vote at such recall election, equal in number to at least one per cent [sic] of the total number of votes cast at the last preceding election for all candidates for the office which the incumbent sought to be removed occupies. Each such nominating petition shall be filed with the secretary of state not less than twenty-five days before such recall election.⁶⁴

⁶⁴ Proposed Amendments, *supra* note 21, at 22. The mark-up of the proposed amendment shows that initially a fifteen day window was proposed, but that language was amended in the Senate to read twenty-five. Original Bill File S.C.A. 23, 1911, *supra* note 23, at ¶ 21.

That language remained in the constitution until 1974, when the passage of Proposition 9 caused it to be relocated to the CAL. ELECTIONS CODE.⁶⁵ In 1976 the provision was repealed and replaced by former section 27431 (current section 113800), which altered the earlier statute to simplify the language, and, it is argued by some, may have been intended to reduce the number of signatures needed to qualify as a replacement candidate.⁶⁶ Regardless of the “fairness” of requiring a replacement candidate to gather a large number of signatures in a short span of time (which in the initial draft of Amendment No. 23 was much shorter⁶⁷) the Progressive drafters specified a requirement that placed a heavy burden on potential candidates so that the recall would not become a circus-like spectacle.⁶⁸ The one percent requirement can be viewed as an effort to countermand criticisms which characterized the recall as a vehicle for a tyrannical majority to sweep duly elected officials out of office and hastily replace them. Thus the 65 signature requirement, though perhaps a legitimate interpretation of the current statutory scheme, may dilute the original Progressive purpose of ensuring the credibility of the electoral process. The lax requirement in effect allows persons without any popular support to participate in a

⁶⁵ California Voter Pamphlet, *supra* note 28. The language was codified in former section 27008. Stats. 1974, ch. 233, § 6, p. 439.

⁶⁶ *See* Stats. 1976, ch. 1437, § 4, p. 6447; *Burton* 2003 Cal. LEXIS at *10-12.

⁶⁷ *See infra* note 64.

⁶⁸ The one percent signature burden would have been even more onerous in 1911 given the difficult of transportation and slowness, relative to today, of the mechanisms for disseminating information.

state-wide race from which they would normally be excluded, though it does allow for direct participation in the political system through a mechanism outside of the political parties which Progressives found to be so corrupt.

The Progressive mantra of popular participation was most directly raised by the petitioners in *Davis v. Shelley*,⁶⁹ who sought a writ postponing the election until the regularly scheduled March primary, claiming that the early October date would lead to the disenfranchisement of thousands of voters across the state.⁷⁰ Specifically the petition argued that due to time constraints the state, and county of Los Angeles in particular, would be unable to open the usual number of polling places or use the most accurate voting technologies, thus denying voters in the affected areas their right to have their votes counted equally with those of other candidates in violation of the equal protection clause of the 14th Amendment.⁷¹

Additionally the petitioners claimed that the prohibition on the Governor's name being added to

⁶⁹*Davis, supra* note 25.

⁷⁰*Id.* at 1-3.

⁷¹*Id.* Similar issues were raised in *Southwest Voter Registration Education Project v. Shelley*, D.C. No. CV 03-05715-SVW, appealed to the United States Court of Appeals for the Ninth Circuit, No. 03-56498, 2003 U.S. App. LEXIS 18994, appealed to en banc panel for rehearing, September 17, 2003. *See generally* *Bush v. Gore*, 531 U.S. 98 (2000) (rearticulating the one person, one vote standard); *Reynolds v. Sims*, 377 U.S. 533 (1964) (explaining that vote dilution can constitute a violation of equal protection). In *Davis v. Shelley*, the petitioners provided statistical data and expert interpretation demonstrating that black and Latino voters in the city of Los Angeles would be less likely to have their votes counted due to the use of de-certified voting machines, and the failure to open over 1000 polling places that would normally service that community. *Davis, supra* note 25, at 1-3.

the ballot as a candidate was a similar breach of the equal protection doctrine.⁷² In an unpublished opinion the California Supreme Court denied the petition, refusing to grant the emergency stay requested.⁷³ This case, more than any of the other recall suits, centered upon the direct election issue which was the gravamen of the Progressive purpose in enacting the recall procedure. If in fact the petitioners were correct, and thousands of voters were unable to participate, or were less likely to have their votes counted, then the original purpose of the recall legislation was not only undermined, but was wholly vitiated. The enhancement of the rights and voices of average voters⁷⁴ was the axis of the Progressive platform; exemplified by, *inter alia*, the call to grant the franchise to women.⁷⁵ Therefore the charge that certain groups were prevented from having full access to their voting rights in the 2003 recall is the most serious affront to the Progressivist model of what would constitute the legitimacy of the recall procedure. Thus the question must be asked: under the framework in place did the Progressives intend for the Secretary of State to have the flexibility to set the date of the recall several months later than what the statute seems to suggest?

Amendment No. 23 outlined a time-line for special recall elections to take place, specifying that such elections take place “not less than sixty nor more than eighty days from the

⁷² *Davis, supra* note 25, at 1-3.

⁷³ *Davis v. Shelley*, S117921, Cal. LEXIS 6900, *1-2.

⁷⁴ DeWitt, *supra* note 4, at 214-16.

⁷⁵ *Progressive Party Platform of 1912, supra* note 4.

date [of certification].”⁷⁶ Subsequent versions of the text retained that same language, though all are silent as to the flexibility allowed in determining the date of the recall. However, several cases have reflected a willingness on the part of the courts to consider fiscal impact and equal protection in postponing or intervening in elections.⁷⁷ Though it is impossible to say for certain how the Progressive drafters would have viewed the addition of some flexibility into their scheme, one might convincingly argue that returning power directly to the people being the main Progressive objective, any permutation of the law to that end would be acceptable to even the staunchest strict constructionist.

Conclusion

If the original promise of the recall was to release Californians from the clutches of big money politicians, and specifically big money railroads, then the 2003 recall has demonstrated the illusory nature of that promise. If however the recall was one way the Progressives sought to encourage public participation in politics and increase public interest then this recall cannot be termed anything other than a wild success. The spirit of the recall law, first envisioned by the

⁷⁶ Proposed Amendments, *supra* note 21, at 22.

⁷⁷ See *Bottari v. Melendez*, 44 Cal. App. 3d 910, 916, n. 5, 915-17 (1975) [“Statutes significantly restricting the right to vote are especially deserving of strict scrutiny since the franchise is among the most fundamental of rights.”]; see also Proposition 183 (1994) [allowing for the consolidation of special elections to save taxpayer dollars]; see generally *Legislature v. Deukmejian*, 34 Cal. 3d 658 (1983) [Court issued pre-election writ of mandate to consider the constitutionality of an initiative that would have given voters the ability to

Progressive drafters of the early 20th century, has been vindicated, though the text of the law has undergone minor changes. What was important to the Progressives was that the people of California have a mechanism to exercise their right to rid themselves of corrupt, untrustworthy, or unsatisfactory politicians, though it remains to be seen if the recall is the procedure best suited to that purpose.

alter Congressional district boundaries drawn by the legislature.].