

1999

The Consent of the Governed: Recall of United States Senators

Timothy Zick

William & Mary Law School, tzick@wm.edu

Repository Citation

Zick, Timothy, "The Consent of the Governed: Recall of United States Senators" (1999). *Faculty Publications*. 817.
<https://scholarship.law.wm.edu/facpubs/817>

Copyright c 1999 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/facpubs>

The Consent of the Governed: Recall of United States Senators

Timothy Zick*

*The power under the Constitution will always be in the People. It is entrusted for certain defined purposes, and for a certain limited period, to representatives of their own choosing; and whenever it is executed contrary to their Interest, or not agreeable to their wishes, their Servants can, and undoubtedly will be, recalled.*¹

I. Introduction

Our government ultimately rests upon the notion of popular consent.² Yet many of the Framers, most notably James Madison, harbored a deep-seated fear that the passions of the people, left unchecked, would be democracy's undoing. The institution of representative government was intended to filter, and thereby control, the passions, partisanship, and self-interest of the masses "through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."³ In the main, the Framers

* B.A., Indiana University, 1989; J.D., Georgetown University Law Center, 1992. Law clerk for the Honorable Levin H. Campbell, Senior Circuit Judge, United States Court of Appeals for the First Circuit. The author wishes to thank Madeleine Timin, Stephen Engle, Lisa Billowitz, and Jamie Wacks for reviewing earlier drafts of this article. Without their encouragement and very helpful suggestions, this project would not have been completed. Any errors that remain are the author's alone.

1. George Washington, *quoted in* 1 DEBATE ON THE CONSTITUTION 305, 306-07 (B. Bailyn ed. 1990).

2. THE DECLARATION OF INDEPENDENCE provides, in part:

We hold these truths to be self-evident; that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed

THE DECLARATION OF INDEPENDENCE para. X (U.S. 1776).

3. THE FEDERALIST NO. 10, at 126 (James Madison) (Isaac Kramnick ed. 1987) [hereinafter THE FEDERALIST].

have earned praise for the system they devised to keep the peoples' passions in check.

This is not to say that popular or direct democracy, under which the people decide how they wish to be governed, has not had its moments, particularly in recent years.⁴ The people of twenty-two states, for example, began in 1990 to enact laws that restricted access to the election ballot for long-time congressional incumbents or limit the number of terms an individual could serve in the House or Senate. These "term limits" provisions were narrowly rejected by the Supreme Court in *United States Term Limits, Inc. v. Thornton*⁵ on the ground that they were "contrary to the 'fundamental principle of our representative democracy,' embodied in the Constitution, that 'the people should choose whom they please to govern.'"⁶

The recent impeachment proceedings against President Clinton have afforded an opportunity for us once again to test the Framers' prescience. It has been commonly said that Madison and company were correct—that ultimately it was the disinterested and temperate Senate that saved the day by acquitting the president of all charges. But this praise for the Framers ignores the wisdom of the people, who concluded long before the president's acquittal that he ought not be removed from office. It was the public that was disinterested and temperate, urging in every opinion poll that the Senate censure rather than remove, condemn but not impeach. The "factious tempers"⁷ Madison warned of were displayed not by the

4. The methods chosen for enforcing the will of the people upon Members of Congress are as old as the nation itself and as varied as the people of the several states. The method chosen by Kentucky voters in 1832 was perhaps the crudest in history. Senator Humphrey Marshall, returning from Washington after casting his vote in favor of ratification of the controversial Jay's Treaty, narrowly escaped his constituents' ire:

[H]e was seized by a mob, and rushed to a muddy pond, into which he was about to be thrown, when he reminded the rioters that it was the practice of persons, previous to being baptized, to relate their experience He thereupon made a witty speech, and "was conducted to his home with every mark of respect that such a rabble was capable of manifesting to him."

WILLIAM PLUMER, MEMORANDUM OF PROCEEDINGS IN THE U.S. SENATE, 1803-07 620 (1923), *quoted in* 2 GEORGE H. HAYNES, THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE 1024 (Russell & Russell 1960). Modern methods are more civilized; citizens have asserted their right to participate in government by directly legislating on issues ranging from affirmative action to local property taxation. *See* PETER SCHRAG, PARADISE LOST 9-10 (1998) (describing California's "condition of permanent neopopulism").

5. 514 U.S. 779 (1995).

6. *Id.* at 783 (1995) (quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969)).

7. THE FEDERALIST NO. 10, at 126 (James Madison).

people, but by the peoples' representatives. Even most Republicans in the Senate, that most deliberative of bodies by the Framers' design, insisted that President Clinton had betrayed the peoples' trust, although the people surely did not say as much. In essence, these senators substituted their factious inclinations for the public good. Hence the failed impeachment of President Clinton teaches that it is not the passions of the people, as Madison and others held, that is to be feared, but the partisanship and self-interest of the peoples' representatives in Congress.

This is a lesson not lost on several states. Since the Progressive Era, states have passed statutes or constitutional provisions that allow voters to remove or discharge their representatives in Congress by filing a petition bearing a specified number of signatures demanding a vote on the representative or senator's continued tenure in office.⁸ These "recall" statutes have been used effectively for many years to check state and local officials.⁹ Their efficacy with regard to members of Congress, however, remains an open question. Recall proceedings have from time to time been contemplated or initiated by disappointed constituents wishing to remove Members of Congress who have in the voters' view breached the public trust. However, efforts to force a recall have foundered amid speculation that the people of a state cannot

8. Fifteen states provide for recall of elected state officials, and thirty-six states permit the recall of various local officials. See THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 126-27 (1989). Many of the state provisions arguably apply to Members of Congress, as they cover all elected officials, without specifically excluding Members of Congress. Some states leave no room for doubt; their recall measures specifically include Members of Congress. The following state provisions apply expressly to Members of Congress: LA. CONST. art. 10, § 26; N.D. CONST. art. 3, § 10; N.J. CONST. art. I, ¶ 2; WIS. CONST. art. 13, § 12; ARIZ. REV. STAT. ANN. §§ 19-221-222 (West 1990); MICH. STAT. ANN. § 6.1121 (Law. Co-op 1993); WIS. STAT. ANN. § 9.10 (West 1996).

9. Adoption of the recall device in America usually is traced to the enactment of the Los Angeles city charter in 1903. For a description of the tide of adoption of recall measures during the Progressive era and beyond, see CRONIN, *supra* note 8, at 128-33. Although the idea of recall often is associated with the populists and progressives, in fact its historical roots run much deeper. Athenian democracy, for example, instituted the ostracism of politicians by majority vote to protect the *polis* from corrupt or overly ambitious officials. See *id.* at 128. Officials could be banished from the city-state for ten years. See *id.* Prior to 1850, the Swiss provided for the recall of public officials by a method similar to the current state laws, although they rarely used the device. See *id.* at 129.

constitutionally recall a Member of Congress.¹⁰ The defeat of state term limits measures has likely hardened this view.

In this Article, I argue that regardless of its constitutionality, recall is an important monitoring device that should be available to the people of a state who conclude that a United States Senator has breached the public trust and is unfit to represent his or her constituents in Congress. In Part II, I demonstrate that this is not such a radical idea—indeed, state recall of federal representatives has a rich constitutional history, including extensive debates waged in the state conventions concerning ratification of the Constitution. Part II concludes with a brief review of the modern state recall measures. In Part III, I criticize court decisions, including dicta in the *Thornton* majority and dissenting opinions, and scholarly commentary, that dismiss recall as an unconstitutional accountability measure. I argue that whether recall is still available to the people after *Thornton* remains an open question. In Part IV, I conclude that, regardless of whether recall is constitutionally proscribed, there are compelling reasons for placing in the hands of the people through a constitutional amendment the power to recall their United States Senators. Indeed, I argue that this power is a component of the power to directly elect United States Senators, granted to the people by the Seventeenth Amendment. Finally, in Part V, I propose a somewhat cautious approach, borrowed from the experience with recall of state and local officials, to allowing the people of the states to recall their United States Senators.

10. Voters in Oregon in 1992 considered instituting that state's statutorily prescribed recall proceedings against Senator Robert Packwood after allegations of sexual harassment surfaced. See Glenn R. Simpson, *Senate Ethics Staff Launches a Preliminary Investigation of Packwood for Harassment*, ROLL CALL, Dec. 3, 1992 [hereinafter *Senate Ethics Staff*]. Two Senators caught up in the so-called "Keating Five" scandal—John McCain (R-Ariz) and Dennis DeConcini (D-Ariz)—also were targets of a recall effort. See Glenn R. Simpson, *Chances of Enforcing Packwood's Removal Are Remote*, ROLL CALL, Dec. 7, 1992 [hereinafter *Chances of Enforcing*]. A group opposing Chippewa Indian treaty rights began a recall campaign against Rep. David Obey (D-Wis). See Tim Curran, *Clerk Says Members Cannot Be Recalled*, ROLL CALL, May 21, 1990.

II. The History of State Recall

A. *The Articles of Confederation and the Philadelphia Convention*

Although it has received little scholarly attention, recall has a fertile constitutional history. The nation's first Constitution, adopted in 1777, provided that each state's delegates in the Continental Congress:

[S]hall be annually appointed in such manner as the legislature of each state shall direct . . . *with a power reserved to each state to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.*¹¹

This provision merely embodied the then-existing custom whereby each legislature retained control of the state's delegates in the Continental Congress.¹² Though the power of recall was available to the states under the Confederation, there is no record of it having ever been exercised.

There is virtually nothing in the surviving records of the Philadelphia Convention of 1787 relating to the power of recall. As the majority in *Thornton* pointed out in a footnote, Madison's notes reflect only that the Constitutional Convention failed to adopt the "Virginia Plan," which called for representation that would have favored the larger states, and which also incidentally contained, among other things, a constitutional provision for recall of members of the House of Representatives.¹³ Rejection of the Virginia Plan, however, did not settle the issue of recall. The central issue raised by the Virginia Plan was determining the representation in Congress, which was finally settled by the "New Jersey Plan" compromise to have a Senate allotted by states and a House allotted by population. The Virginia Plan was dropped in the Committee of the Whole without debate, and was set aside two days after its introduction by Edmund Randolph on May 29, 1787

11. ARTICLES OF CONFEDERATION, art. V (emphasis supplied).

12. State legislatures regularly instructed the delegates to the Congress of the Confederation. The delegates considered such instructions binding. See 2 HAYNES, *supra* note 4, at 1025.

13. See *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 810 n.20 (1995); see also 1 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 20, 210, 217 (rev. ed. 1966) [hereinafter FARRAND]. Apparently, the delegates did not even consider a right of recall of Senators.

because, among other reasons, it “entered too much into detail for general propositions.”¹⁴ By the time, three months later, when the delegates took up the details of the legislative branch, the Virginia Plan was far in the past.

B. The Federalist Papers and State Ratifying Conventions

Most of the leaders during the Framers’ era were profoundly skeptical of direct or pure democracy on a large scale. The Anglophile Alexander Hamilton, for example, initially favored a modified form of British monarchy and urged that Senators serve for life or at least during “good behavior.”¹⁵ In his Federalist No. 10, Madison set forth the classic statement of the filtering principle, under which public views would be “refine[d] and enlarge[d]” by “passing them through the medium of a chosen body of citizens.”¹⁶ Even many Antifederalists believed that the frailties and passions of ordinary men made them incapable of responsible participation in government. Still, there were those Antifederalists who viewed a form of explicit representative democracy as vital. Representatives of the people, they thought, should be bound by the dictates of the governed. Thus, in order to devise a constitution that could win approval at state ratifying conventions and gain the acceptance of the public at large, the Framers ultimately embraced a somewhat watered down version of “consent of the governed,” consisting of a lower House that would represent the passions of the people and a Senate intended to curb the anticipated excesses of democracy.

1. The House of Representatives—That no one during the debates at Philadelphia or in the state conventions suggested that the people of the states should have the power to recall Members of the House of Representatives should come as no surprise. With respect to the House of Representatives, citizens were to express their consent through the representational device and, more specifically, through the mechanism of frequent elections. As the Framers conceived the House, its members would have “an

14. 5 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 127, 137 (1836) [hereinafter ELLIOT’S DEBATES].

15. 1 HAYNES, *supra* note 4, at 16.

16. THE FEDERALIST NO. 10, at 126 (James Madison). Hamilton recommended that the national legislature should be composed only of “landholders, merchants, and men of the learned professions.” THE FEDERALIST NO. 35, at 234 (Alexander Hamilton).

immediate dependence on, and an intimate sympathy with, the people.”¹⁷ The Framers apparently did not believe that weapons like the recall device would be necessary to maintain representatives’ accountability to their constituents. They considered it unlikely that, once elected, representatives “would either desire or dare, within the short space of two years, to betray the solemn trust committed to them.”¹⁸ The Framers undoubtedly were aware that precautions were needed for “keeping [representatives] virtuous whilst they continue to hold their public trust.”¹⁹ They left no doubt as to the most effectual method of ensuring the necessary dependence and responsibility: “Frequent elections,” Madison asserted, “are unquestionably the *only* policy by which this dependence and sympathy can be effectually secured.”²⁰ Thus biennial elections were “unalterably fixed” in the Constitution.²¹ James Madison in *The Federalist* No. 57 explained how two-year terms would secure representatives’ fidelity to their constituents. He wrote:

[T]he House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their election can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it.²²

Representatives’ accountability was to be secured by their characteristics, gratitude, duty, ambition, pride, and vanity. They could make no laws, Madison said, that would not have their full effect

17. THE FEDERALIST No. 52, at 323-24 (James Madison).

18. *Id.* No. 55, at 338; *see also, e.g., id.* No. 57, at 344 (James Madison) (stating that their characteristics “promise a sincere and scrupulous regard to the nature of their engagements . . . they will enter into the public service under circumstances which cannot fail to produce a temporary affection at least to their constituents.”).

19. *Id.* No. 57, at 343.

20. *Id.* at 324 (emphasis supplied).

21. *See id.* No. 53, at 328. Congress has passed legislation regulating the timing of elections for United States Senators and Representatives. *See* 2 U.S.C. §§ 1, 7; *Busbee v. Smith*, 594 F. Supp. 494, 525 (D.D.C. 1982), *aff’d* 459 U.S. 1166 (1983) (mem.) (holding that “exigent circumstances” can justify different date and time for congressional election).

22. THE FEDERALIST, *supra* note 17, No. 57, at 344-45 (James Madison).

on themselves.²³ Madison ultimately acknowledged that these safeguards “may all be insufficient to control the caprice and wickedness of man.”²⁴ “But,” he asked, “are they not all that government will admit, and that human prudence can devise?”²⁵ Madison even took pains to compare the new plan to the system in place under the Articles of Confederation. In contrasting the proposed House to the lower chamber in the Continental Congress, Madison noted that delegates to the latter body were “recallable at pleasure,” but he made no similar claim as to the newly comprised House, hailing instead the brevity of House members’ terms.²⁶ Recall of representatives was indeed far from the minds of Madison and the other architects of the lower chamber of Congress.

2. *The Debate Over State Recall of Senators*—In contrast to the House, the composition of the Senate and the powers it was to exercise led many in the state conventions to vigorously argue for all manner of checks on its authority. When the Constitution was submitted for ratification by the states, many strongly urged that, in view of the senators’ long terms, the power of recall ought to be given to the states.²⁷ Several delegates complained to their state conventions that one of the great defects of the proposed Constitution was its failure to provide for the recall of senators.²⁸ Luther Martin, for example, in an address delivered to the Maryland legislature on November 29, 1787, expressed concern that senators would become “totally and absolutely independent of their States”²⁹ during their six-year terms absent a provision—such as the one that existed in the Maryland Constitution at the time³⁰—allowing for their recall. Martin warned lawmakers:

During *that time*, they may join in measures *ruinous* and *destructive to their States*, even such as should *totally annihilate*

23. *See id.* at 345.

24. *Id.*

25. *Id.*

26. *Id.*

27. *See infra* note 32.

28. *See infra* note 32.

29. 3 FARRAND, *supra* note 13, at 194.

30. Maryland’s first constitution provided that its delegates to federal congresses were subject to being “superseded in the meantime by the joint ballot of both Houses of Assembly.” MD. CONST. art. 27 (1776).

their *State governments*, and their States *cannot recall* them, *nor exercise any control over them*.³¹

Martin's concerns were echoed in several other state conventions.³² At Boston, for example, Dr. Taylor insisted on annual elections and the recall of senators by the state legislatures as under the Articles of Confederation.³³ Three states ultimately proposed that the Constitution be amended to grant the state legislatures the power to recall senators.³⁴

a. Arguments Advanced in Favor of Recall of Senators—The most robust debate concerning the recall of United States Senators occurred at the New York ratifying convention, where Gilbert Livingston offered an amendment granting the state legislatures the power to recall senators. Proponents of the amendment ultimately lost the issue, but managed in the process to engage Alexander Hamilton, among other Federalists, in a wide-ranging debate concerning the nature of the states' representation in the United States Senate. As I shall demonstrate in Part III, that two-hundred-year-old debate might well be conducted on similar terms today.

31. 3 FARRAND, *supra* note 13, at 194.

32. *See, e.g.*, 2 ELLIOT'S DEBATES, *supra* note 14, at 47 (“[S]enators chosen for so long a time will forget their duty to their constituents. We cannot . . . recall them.”) (statement of Colonel Jones of Massachusetts); *id.* at 48 (“[I]f they are once chosen, they are chosen forever . . . in this [Constitution], they are to be chosen for six years; but a shadow of rotation provided for, and no power of recall.”) (statement of Dr. Taylor of Massachusetts); *id.* at 477 (“[T]hey [Senators] are without that immediate degree of responsibility which I think requisite to make this part of the work perfect.”) (statement of James Wilson of Pennsylvania); *id.* at 281 (“There are many material checks to the operation of [Congress], which the future Congress will not have They are subject to recall.”) (statement of Melancton Smith of New York); 3 *id.* at 360 (“We cannot recall our senators.”) (statement of Wilson Nicholas of Virginia).

33. *See 2 id.* at 5.

34. At a meeting in Harrisburg following the Pennsylvania convention, delegates recommended an amendment providing for the recall of senators “at any time” by the legislatures that elected them. *See id.* at 330, 337. When Rhode Island finally ratified the Constitution in 1790, it also appended a proposed amendment providing for recall. *See id.* at 337. A similar amendment proposed by Gilbert Livingston in the New York convention was the subject of a lengthy debate. *See infra* pp. 9-19. While the representatives of these states were enjoined to exert their influence for these amendments in the First Congress, there is no record of any of them being presented to the Senate. This may be due to the fact that the Senate debates were not recorded during this period and also that the *Senate Journal* and the *Annals of Congress* do not show all of the details of Senate business. Still, the *Senate Journal* did record a number of constitutional amendments offered in the Senate, but none relating to recall.

Gilbert Livingston opened the debate on recall in New York by claiming that a recall amendment was needed to ensure that senators would retain their sense of responsibility to voters. Livingston's amendment provided:

[N]o person shall be eligible as a Senator for more than six years in any term of twelve years, and that it shall be in the power of the legislatures of the several states to recall their Senators, or either of them, and to elect others in their stead, to serve for the remainder of the time for which such Senator or Senators, so recalled, were appointed.³⁵

In support of his proposed amendment, Livingston utilized rhetoric concerning the power of incumbency and congressional entrenchment that sounds arrestingly familiar to twentieth century ears. He labeled the Senate a "dangerous body"³⁶ and asked his fellow delegates to consider:

[T]he great influence which [the Senate], armed at all points, will have. What will be the effect of this? Probably a security of their reelection, as long as they please. Indeed, in my view, it will amount nearly to an appointment for life.

In this Eden they will reside with their families, distant from the observation of the people. In such a situation, men are apt to forget their dependence, lose their sympathy, and contract selfish habits.³⁷

Supporters of Livingston's recall amendment were aware that the power of recall granted under the Articles of Confederation was never exercised. Still, they believed that recall would act as a valuable check on senators—what some contemporary scholars have referred to as "the gun behind the door."³⁸ The intrepid Antifederalist John Lansing, for example, noted:

[I]f [the power of recall] should be never exercised, if it should have no other force than that of a check to the designs of the

35. 2 ELLIOT'S DEBATES, *supra* note 14, at 289.

36. *Id.* at 286. Livingston wondered: "[W]hat are the checks provided to balance this great mass of power? Our present Congress cannot serve longer than three years in six: they are subject at any time to recall." *Id.* at 287.

37. *Id.* at 287-88. Livingston feared that senators would "become strangers to the condition of the common people" as they would "have little or no check on them." *Id.* at 288.

38. *See, e.g.,* CRONIN, *supra* note 8, at 155.

bad . . . certainly no harm, but much good, may result from adopting the amendment.³⁹

Besides, Lansing noted, “[N]o inconvenience can follow from placing the powers of the Senate on such a foundation as to make [senators] feel their dependence.”⁴⁰ Recall of senators, Lansing believed, was “only a check calculated to make [senators] more attentive to the objects for which they were appointed.”⁴¹ In sum, Lansing and other supporters of Livingston’s amendment believed that the prospect of recall under the Articles of Confederation had “operated effectually, though silently.”⁴²

Answering anticipated criticisms that granting states the power of recall would enslave senators to the electorate’s every whim and deter qualified candidates, Lansing assured that in the first instance recall “is of so delicate a nature, that few men will step forward to move a recall, unless there is some strong ground for it.”⁴³ Moreover, Livingston’s supporters did not believe that the spectre of recall would inhibit virtuous men from becoming candidates for the Senate. The presence of recall under the Articles, Lansing argued, had “by no means proved a discouragement to individuals, in serving their country.”⁴⁴

According to Lansing and other Antifederalists, recall was the only means by which the states could exercise any control over their senators. These men worried that the States under the proposed Constitution would be denied even the essential power to compel the attendance of absent senators.⁴⁵ Lansing pointedly noted the fundamental problem with depositing in the Senate itself

39. 2 ELLIOT’S DEBATES, *supra* note 14, at 290.

40. *Id.*

41. *Id.* Delegates in New York, as in other state conventions, expressed considerable anxiety that the powers granted to the Senate to approve treaties, try impeachments, and confirm appointments would overrun the President. *See id.* at 309-11. Melancton Smith felt that the “inconvenience” of vesting in the Senate such broad powers “should be corrected, by providing some suitable checks,” such as recall. *Id.* at 311.

42. *Id.* at 294. Melancton Smith actually feared that “the power of recall would not be exercised as often as it ought.” *Id.* at 312. Smith nevertheless agreed that usually the mere threat of action should suffice. *See id.* at 313 (“Checks in government ought to act silently, and without public commotion.”).

43. *Id.* at 290; *see also id.* at 314 (“It is not to be supposed that a state will recall a man once in twenty years, to make way for another.”); *id.* at 312 (“It is highly improbable that a man in whom the state has confided, and who has an established influence, will be recalled, unless his conduct has been notoriously wicked.”).

44. 2 ELLIOT’S DEBATES, *supra* note 14, at 294.

45. *See id.* at 290.

the sole responsibility for bringing the peoples' will to bear on a rogue senator:

[Recall] is the only thing which can give the states a control over the Senate. It will be said, there is a power in Congress to compel the attendance of absent members; but will the members from the other states be solicitous to compel such attendance, except to answer some particular view, or promote some interest of their own?⁴⁶

Only the States, these men argued, could be trusted to police absence from the chamber or malfeasance while in office.

Proponents of recall by state legislatures reasoned that since the Senate was designed to serve as a bulwark to the independence of the states and a check on the encroachments of the federal government, its members ought to be peculiarly under the legislatures' control. To these men, power to recall a senator who refused or neglected to comply with the legislatures' wishes seemed to be a natural concomitance of this theory of the Senate.⁴⁷ Recall supporters complained that friends of the Constitution were inclined to use the concept of the Senate as representative of state sovereignty when it suited their purpose, and when it did not, to ignore it or to imply that attachment to state interests was an evil.⁴⁸ Moreover, recall supporters accepted that in some instances the smaller interests of the states should be sacrificed to great national objects. But Lansing raised an important point: "[W]hen a delegate makes such sacrifices as tend to political destruction, or to reduce sovereignty to subordination," Lansing argued, "his state

46. *Id.* Occasionally, concern over absenteeism rankled the state legislatures. In 1807, for example, the Ohio legislature requested that Senator Samuel Smith resign, declaring he had been guilty of great negligence in not attending to his duty in Washington. *See* HAYNES, *supra* note 4, at 1023-24. One of Smith's colleagues, in his diary, declared the charge was true, and commented:

The proceeding of the Legislature is singular. And query, what can a State do, if a Senator neglects to attend? Perhaps the only remedy is for the Senate themselves, in such a case, to expel the member for breach of their rules in not attending their duty.

See id. at 1024 (quoting PLUMER, *supra* note 4, at 620).

47. *See, e.g.*, 2 ELLIOT'S DEBATES, *supra* note 14, at 311 ("[A]s the senators are the representatives of the *state legislatures*, it is reasonable and proper that they should be under their control.") (statement of Melancton Smith).

48. *See, e.g., id.* at 312 ("Sir, the Senate has been generally held up, by all parties, as a safeguard to the rights of the several states But now, it seems, we speak in a different language; we now look upon the least attachment to their states as dangerous."); *see also id.* at 289-91, 294.

ought to have the power of defeating his design, and reverting to the people.”⁴⁹ Whether an agent of the state, the Union, or both, Lansing and the Antifederalists did not want to create senators who were untouchable gods.

b. Arguments Advanced Against Recall of Senators—Alexander Hamilton was the most vocal opponent of granting the States power to recall their senators. Hamilton first questioned the necessity of the recall device: “[C]an we imagine,” he asked, “that the senators will ever be so insensible of their own advantage as to sacrifice the genuine interest of their constituents?”⁵⁰ Hamilton believed that the spectre of losing office by losing favor with the state legislatures constituted a sufficient check.⁵¹

Perhaps recognizing that this appeal was not likely to sway many Antifederalists, Hamilton then turned to the primary argument advanced by opponents of recall of senators. The power to recall senators, Hamilton urged, would create chaos by “render[ing] the Senator a slave to all the capricious humors among the people.”⁵² A senator subject to recall by the state legislatures would, Hamilton feared, “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.”⁵³ Chancellor Robert Livingston agreed. He contended that under the proposed recall amendment, “a senator may be appointed one day and recalled the next,” leading to “a source of endless confusion.”⁵⁴ Robert Morris similarly objected that Livingston’s amendment “would create a slavish subjection to the

49. *Id.* at 295.

50. *Id.* at 303-04; *see also* 3 *id.* at 97 (“I do not conceive they will so soon forget the source from whence they derive their political existence.”) (statement of James Madison).

51. *See id.* at 317-18 (“[T]he senators will constantly be attended with a reflection, that their future existence is absolutely in the power of the states. Will not this form a powerful check?”) (statement of Alexander Hamilton).

52. 2 ELLIOT’S DEBATES, *supra* note 14, at 302; *see also, e.g.,* 1 *id.* at 361 (“The dread of being recalled would impair their independence and usefulness.”) (statement of Wilson Nicholas).

53. *See* 2 *id.* at 302-03; *see also id.* at 318-19 (“[T]o be dependent from day to day, and to have the idea perpetually present, would be the source of numerous evils.”) (statement of Alexander Hamilton). There can be little doubt that the “evils” Hamilton prophesied stemmed in large measure from his fundamental distrust of the masses. *See, e.g.,* 2 *id.* at 302 (“To deny that [the people] are frequently led into the grossest errors by misinformation and passion, would be a flattery which their own good sense must despise.”); *id.* (“[T]hey do not possess the discernment and stability necessary for systematic government.”).

54. *Id.* at 291.

contracted views of and prevailing factions of the state governments,"⁵⁵ and, in a flash of the rhetoric that sometimes crept into the debate on this and other issues, even expressed the fear that recall might be so distracting to senators as to expose the nation "an easy prey to its enemies."⁵⁶

Hamilton acknowledged the people's "zeal for liberty" and acknowledged that the object sought by supporters of recall was a valuable one,⁵⁷ but ultimately rested his opposition to Livingston's amendment on the need for "*strength and stability* in the organization of our government, and *vigor* in its operations."⁵⁸ Hamilton insisted that the effect of a state's recall of its senators would be to take away the stability of government by depriving the Senate of its permanency and "by assimilating the complexion of the two branches to destroy the balance between them."⁵⁹ Only the House was to be "immediately constituted by and peculiarly represent the people."⁶⁰ The Senate, Hamilton explained at the New York convention, was to provide the "balance" and "control" necessary to efficient government.⁶¹ Stability, Madison reasoned, surely would be compromised by a "numerous and changeable body"; security would be attainable only where the assembly is "*durably* invested with public trust."⁶² Fixed terms of considerable duration were considered by Hamilton, Madison, and other Framers as essential to the success of the Senate and, indeed, the entire republic.

Hamilton's admonitions concerning the need for stability were repeatedly underscored by James Madison in a series of essays in *The Federalist Papers*. Hamilton and other Federalists were

55. *Id.* at 297. Lansing noted that the recall power had never been exercised under the Articles, and countered that "as far . . . as experience is satisfactory, we may safely conclude that none of these factious humors will operate to produce the evils which the gentlemen apprehend." *Id.* at 299.

56. *Id.* at 297.

57. See 2 ELLIOT'S DEBATES, *supra* note 14, at 301.

58. *Id.* (emphasis in original).

59. *Id.* at 303, 316 ("[T]he reasoning which justly applies to the representative house, will go to destroy the essential qualities of the Senate.")

60. *Id.* at 302.

61. *Id.* Several delegates in Philadelphia expressed the same sentiment, calling for a "firmness" in the Senate. See, e.g., 1 FARRAND, *supra* note 13, at 415 ("This body must act with firmness.") (statement of Governor Randolph); *id.* at 414 ("In the second branch of the general government we want wisdom and firmness.") (statement of Oliver Ellsworth).

62. THE FEDERALIST, *supra* note 17, No. 63, at 369 (James Madison) (emphasis supplied).

convinced that the aristocratic elements in society must play a vital role in countering the popular storms and passions of ordinary people. As Madison explained, the Senate was designed as a check on the

propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions.⁶³

Further, Madison wrote:

[T]here are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn.⁶⁴

The Senate in such a situation was to act as a “defence to the people against their own temporary errors and delusions,” an “anchor against popular fluctuations”; its role was to “suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind.”⁶⁵ James Iredell put the Federalist consensus plainly at the North Carolina ratifying convention: “[T]he Senate,” he said, “should not be at the mercy of every popular clamor.”⁶⁶

The desire of Hamilton and Madison for “some stable institution in the government”⁶⁷ greatly influenced the shape that section three of the First Article of the Constitution would ultimately take. Considerable duration of terms was necessary, but not sufficient, to guarantee the Senate’s great firmness. The Framers felt also the need to separate the rulers in the Senate from the ruled. To accomplish this result, they decided to place the

63. *Id.* No. 62, at 366.

64. *Id.* No. 63, at 371.

65. *Id.*; see also 1 FARRAND, *supra* note 13, at 151 (“The use of the Senate is to consist in its proceeding with more coolness, with more system, and with more wisdom, than the popular branch.”) (statement of James Madison). The Framers had read about the rise and decline of Athens and other ancient city-states that preached and practiced direct democracy, and they accepted the widely held view that the follies of such kinds of democracy easily outweighed their virtue. “What bitter anguish,” Madison mused, “would not the people of Athens have often escaped if their government had contained so provident a safeguard against the tyranny of their own passions?” THE FEDERALIST, *supra* note 17, No. 63, at 371 (James Madison).

66. 4 ELLIOT’S DEBATES, *supra* note 14, at 40.

67. THE FEDERALIST, *supra* note 17, No. 62, at 368 (James Madison).

power to choose who should sit in the Senate—a matter of great controversy and countless proposals at the Philadelphia Convention—not with the voters at large but rather with the more prudent and virtuous state legislatures. A large proportion of the delegates to the state conventions were or had been members of state legislatures themselves and considered themselves well qualified to choose their states' senators. The state legislatures, most believed, would serve as a filtering mechanism to screen popular passions and ensure the election of virtuous senators.

For Livingston, Hamilton, and many others at the time of the framing, nothing was considered more ominous than the machinations of parties or “factions.” The state legislatures were considered stable bodies, fortresses against odious factions. Many feared that giving these bodies the power to recall senators would strengthen the hand of factions and introduce improper considerations into the selection process.⁶⁸ Chancellor Livingston, for example, feared that factions might seek to use the recall to ruin a man of “incorruptible integrity” for partisan gain.⁶⁹ Livingston feared that if a Senator “deviated, in the least degree, from the line which a prevailing party in a popular assembly had marked for him, he would be immediately recalled.”⁷⁰ “How easy would it be,” Livingston fretted, “for an ambitious, factious demagogue to misrepresent him, to distort the features of his character, and give a false color to his conduct! How easy for such a man to impose upon the public, and influence them to recall and disgrace their faithful delegate!”⁷¹ Hamilton also feared that the influence of factions on the representatives in the state legislatures would cause them to be “governed by improper passions.”⁷² Hamilton noted that “[i]f the members of Congress are too dependent on the state legislatures, they will be eternally forming secret combinations from local views.”⁷³

68. 2 ELLIOT'S DEBATES, *supra* note 14, at 291 (“The state legislatures, being frequently subject to factions and irregular passions, may be unjustly disaffected and discontented with their delegates . . .”) (statement of Robert Livingston).

69. *Id.* at 292.

70. *Id.*

71. *Id.*; *see also id.* (“There are a thousand things which an honest man might be obliged to do, from a conviction that it would be for the general good, which would give great dissatisfaction to his constituents.”).

72. *Id.* at 317.

73. 2 ELLIOT'S DEBATES, *supra* note 14, at 318. Hamilton posed a hypothetical salt tax that he asserted would undoubtedly be opposed by the Eastern States. “Would it be wise,”

Federalists rejected the argument of the Antifederalists that the Senate, thus removed from the people, would become a tyrannical aristocracy. Various obstructions were placed in Senators' paths to combat this danger. To become so corrupted, Madison explained, the Senate

must in the first place corrupt itself; must next corrupt the State legislatures; must then corrupt the House of Representatives; and must finally corrupt the people at large.⁷⁴

The Federalist stalwart Rufus King believed that the state legislatures did not need the recall power, as they retained the "powerful check" of instructing their senators—telling them how to vote—should they misbehave.⁷⁵ Besides, Hamilton added, the constant rotation of the Senate's membership would impose a "lively sense of their dependence" on members whose office is near the point of expiration.⁷⁶ Hamilton and other Federalists believed that this would be a sufficient guarantee of senators' dependence on the States.⁷⁷

Federalists in New York also based their opposition to Livingston's recall proposal on the distinction they drew between state and federal officers. Hamilton did not accept the Antifederalist assertion that senators were mere agents of the state legislatures. He argued:

That a man should have power in private life of recalling his agent is proper, because in the business in which he is engaged he has no other object but to gain the approbation of his principal. Is this the case with the Senator? Is he simply the agent of the State? No. He is an agent for the Union, and he

Hamilton asked, "to give the New England States a power to defeat this measure, by recalling their senators who may be engaged for it?" *Id.*

74. THE FEDERALIST, *supra* note 17, No. 63, at 373 (James Madison).

75. See 4 ELLIOT'S DEBATES, *supra* note 14, at 47; see also *id.* ("When they hear the voice of the people solemnly dictating to them their duty, they will be bold men indeed to act contrary to it.") (statement of Rufus King). On the practice of instruction of senators, see *infra* notes 146-148 and accompanying text.

76. See 2 *id.* at 319.

77. John Jay in THE FEDERALIST No. 64 considered the possibility that the Senate might act corruptly in exercising its treaty power. He rejected the idea that the President and two-thirds of the Senate would be capable of such conduct as "too gross and too invidious to be entertained." *Id.* at 379. Nevertheless, Jay reasoned that the "motive to good behavior is amply afforded by the article on the subject of impeachment." *Id.* Impeachment is an answer to presidential misconduct, but precedent indicates that senators cannot be impeached. See *infra* note 145.

is bound to perform services necessary to the good of the whole, though his State should condemn them.⁷⁸

Others shared Hamilton's view of the nature of federal representation. Robert Livingston, for example, noted:

[S]ometimes it happens that small sacrifices are absolutely dispensable for the good and safety of the confederacy; but, if a senator should presume to consent to these sacrifices, he would be immediately recalled The general government may find it necessary to do many things which some states might never be willing to consent to.⁷⁹

Hamilton's position could not have been clearer. In his view, "[T]he local interests of a state ought, *in every case*, to give way to the interests of the Union"⁸⁰

A few opponents of Livingston's recall amendment feared that the states by exercising the recall power could effectively "annihilate the government" by recalling members and failing to elect anyone in their place.⁸¹ Once again, Lansing forcefully answered the criticism, referring to the experience under the Articles of Confederation and denouncing such a projection as not reasoning upon probability.⁸² In any event, Lansing added, he had "no objection that a clause should be added to the amendment, obliging the state, in case of a recall, to choose immediately other senators to fill the vacancy."⁸³

Finally, Hamilton and opponents of recall were not satisfied that the absence of abuse of the recall device under the Articles of Confederation proved the merits of Livingston's amendment. "The experience of a few years, under peculiar circumstances," Hamilton said, "can afford no probable security that it never will be carried into execution with unhappy effects."⁸⁴ A seat in the United States Senate, Hamilton darkly suggested, had been "less an object of ambition" under the Articles, and "the arts of intrigue, consequently, have been less practiced."⁸⁵ All was about to change with the creation of a more powerful Congress.

78. 2 ELLIOT'S DEBATES, *supra* note 14, at 319-20.

79. *Id.* at 291-92.

80. *Id.* at 303.

81. *See id.* at 299.

82. *See id.*

83. 2 ELLIOT'S DEBATES, *supra* note 14, at 300.

84. *Id.* at 306.

85. *Id.*

Despite Federalist objections, Livingston's amendment was finally adopted as one of the amendments for which New York's representatives in the First Congress were solemnly enjoined to exert all their influence. It does not appear, however, that the Senate ever took up this or any of the other proposed recall amendments.⁸⁶ Rejection of recall measures in the First Congress did not end the debate over recall of federal legislators. For many years resolutions proposing recall amendments were frequently introduced in Congress, often following public scandals.⁸⁷ None, however, ever received significant support.

c. The Locus of State Power—One additional observation should be made concerning the state debates on recall. None of the delegates advocated placing the power of recall in the people, as do current state recall laws. Since the decision had been made to grant the state legislatures the power to select senators, there was no reason to debate the propriety of placing in the people directly the power of removal. A few delegates did point out the difficulties in vesting in the voters themselves the power of recall. John Lansing, for example, asserted that placing the power directly in the hands of the people was “impracticable,” as (in that age) “[t]here [was] no regular way of collecting the people’s sentiments.”⁸⁸ Perhaps better capturing the sense of the delegates was Melancton Smith, who argued that only the state legislatures would be competent to exercise the recall power. They did not suffer from the “impulses of the multitude” and, unlike the people at large, would not be “incompetent to deliberate discussion, and subject to errors and imprudences.”⁸⁹

C. Early State Laws

While Congress failed to pass a recall provision, states began to experiment on their own after 1900 with provisions that became the ancestors of the modern recall measures. The people of Oregon, for example, by initiative in 1908 adopted a constitutional provision under which “[e]very public officer . . . is subject, as

86. See *supra* note 34.

87. For example, “such a resolution was immediately introduced in the House of Representatives, upon the announcement of the verdict in the Chase impeachment trial, March 1, 1805.” 2 HAYNES, *supra* note 4, at 1024 n.1.

88. 2 ELLIOT’S DEBATES, *supra* note 14, at 294.

89. *Id.* at 312.

herein provided, to recall by the legal voters of the state or of the electoral district from which he is elected.”⁹⁰ North Dakota in 1920 passed an Act providing a recall procedure applicable to “any elective congressional, state, county, judicial or legislative officer.”⁹¹ The Arizona “Advisory Recall” statute, enacted in 1913, provided that any candidate for a seat in the United States Senate may file with his nomination petition his signature to “Statement No. 1”: “If elected to the office of United States Senator, I shall deem myself responsible to the people, and under obligation to them to resign immediately, if so requested by an advisory vote.”⁹² A candidate also could sign “Statement No. 2,” declaring that the candidate would not be under an obligation to resign. The Secretary of State was instructed to place under each candidate’s name on the ballot: “Pledged to Advisory Recall,” or “Refuses Pledge to Advisory Recall,” or “Silent as to Advisory Recall.”⁹³

D. Modern State Recall Laws

Existing state recall measures grew out of the early state experimentation. While the recall measures are by no means uniform, there are many similarities.⁹⁴ State recall laws usually are one-shot provisions—electors are limited to filing one recall petition and having one recall election against an official during the term for which he or she was elected.⁹⁵ Electors may petition for the recall of an official by filing a petition bearing a specified

90. OREGON CONST. art. II, § 18.

91. “In the debate over the Nye election case in January, 1926, this Act was repeatedly cited as evidence that the North Dakota legislature considered their Senators to be state as well as federal officers.” 2 HAYNES, *supra* note 4, at 1025 n.2.

92. Arizona Civil Code, 1913, ch. III, §§ 3357-64.

93. 2 HAYNES, *supra* note 4, at 1025.

94. For an excellent description of state recall measures, see Elizabeth E. Mack, *The Use and Abuse of Recall: A Proposal for Legislative Recall Reform*, 67 NEB. L. REV. 617, 625-29 (1988).

95. See WIS. STAT. ANN. § 9.10(6) (West 1996); see also MICH. STAT. ANN. § 6.1969 (Law. Co-op 1993) (providing for further recall elections when petitioners pay expenses).

number of valid signatures⁹⁶ demanding a vote on the official's continued tenure in office.⁹⁷

State laws vary as to requirements concerning the proper grounds for recall. Some provisions place no restrictions whatever on the reason for recall; some provisions require a brief but clear statement of the reason for recall and further require that the reason be based on acts or conduct of the official while in office; still other provisions strictly define the permissible grounds for recall.⁹⁸ Michigan's law, for example, requires that the petition "[s]tate clearly each reason for the recall," which must be "based upon the officer's conduct during his or her current term of office," and stated in not more than 200 words.⁹⁹ In contrast, under Wisconsin's recall statute, Members of Congress may be recalled for any reason at all.¹⁰⁰

If a petition meets all of the necessary requirements, a recall election is held. The incumbent continues to perform the duties of office until the election results are officially determined. If the recall is successful, a special election is held within sixty days for the filling of the vacancy.¹⁰¹

III. The Scholarly Consensus and the *Thorton* Opinions

Only two courts have ever confronted the issue of state recall of Members of Congress. An Idaho state court in an unreported memorandum decision interpreted Idaho's recall statute to apply only to state officers, and further opined that the law was unconstitutional as applied to United States Senators because it would constitute a "qualification" for office in addition to age, residency, and inhabitancy in violation of Article I, Section 3 of the United

96. Signature requirements under the state laws vary. Most recall laws require that at least 25% of the voters petition for a recall election. *See, e.g.*, MICH. CONST. art. 2, § 8 (requiring 25% of the number of persons voting in the preceding election for the office of governor in the electoral district the incumbent represents); WIS. CONST. art. 13, § 12(1) (providing the same requirement as the Michigan Constitution).

97. There are various requirements as to the form of the petitions, including the size and type of print, requirements as to certificates of petition circulators, and filing of registration statements. *See, e.g.*, MICH. STAT. ANN. § 6.1952; WIS. STAT. ANN. § 9.10(2).

98. *See Mack, supra* note 94, at 625-32.

99. MICH. STAT. ANN. §§ 6.1952(1)(c), 6.1966.

100. *See WIS. STAT. ANN. § 9.10(3).*

101. *See, e.g.*, MICH. STAT. ANN. § 6.1971. The official who is recalled cannot be a candidate in the special election. *See id.* § 6.174. If an official resigns either subsequent to the filing of petitions or after the calling of the recall election, the election does not proceed. *See id.*

States Constitution.¹⁰² In the only other court challenge, a federal district court in Michigan dismissed a complaint seeking a declaratory judgment that United States Senators from Michigan were subject to recall under that state's recall law on the grounds that no Article III controversy had been pleaded.¹⁰³ The few scholars who have addressed the subject have generally adopted the reasoning of the Idaho court.¹⁰⁴

The Idaho court's dicta and the scholarly opinion, which treat recall as an unconstitutional "qualification," ignore the crucial distinction the Framers made between the power to *expel* and the power to *exclude* Members of Congress. Exclusion of a member by qualification results in a candidate being refused a seat based upon the candidate's failure to meet the stated qualification.¹⁰⁵ Nothing in any state recall statute, however, prohibits a person from being elected and seated, so long as the candidate meets the age, residency, and inhabitancy "qualifications" set forth in Article I. A recall election operates only *after* a seat is occupied—it is in the nature of an expulsion from office, not an additional "qualification" for office.¹⁰⁶

In *United States Term Limits, Inc. v. Thornton*,¹⁰⁷ both the majority and the dissenters hinted, but did not hold, that the people of a state cannot constitutionally recall a Member of Congress. As noted above, the majority pointed out in a footnote that Madison's

102. Rankin v. Cenarrusa, Civil No. 39700 (District Court for the Fourth Judicial District of Idaho) (Oct. 9, 1967). The United States Constitution provides:

No Person shall be a Senator who shall not have attained the to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

U.S. CONST. art. I, § 3, cl. 3.

103. See Hooper v. Hart, 56 F.R.D. 476, 477 (W.D. Mich. 1972) (per curiam).

104. See Simpson, *Chances of Enforcing*, *supra* note 10 ("Most legal scholars believe that U.S. Senators and Representatives, as federal officers, may not be recalled . . . the chances of the Oregon [recall] law being upheld are considered slim."); see also JOSEPH P. ZIMMERMAN, PARTICIPATORY DEMOCRACY 108 n.21 (1986) (noting that State provisions may violate United States Constitution); Senate Election Law Guidebook, S. DOC. NO. 103-13, at 336-37 (1994) ("[M]aking a United States Senator or United States Representative subject to removal by a state recall election would constitute an additional qualification for office which the states do not have the constitutional authority to enact.").

105. See Powell v. McCormack, 395 U.S. 486, 508 (1969).

106. For a discussion of the distinction between exclusion and expulsion, see Gerald T. McLaughlin, *Congressional Self-Discipline: The Power to Expel, To Exclude and To Punish*, 41 FORDHAM L. REV. 43, 45 (1972); see also Note, *The Power of a House of Congress to Judge the Qualifications of Its Members*, 81 HARV. L. REV. 673, 675-76 (1968).

107. 514 U.S. 779 (1995).

notes reflect that the Constitutional Convention failed to adopt the "Virginia Plan," which contained, among many other things, a constitutional provision allowing the states to recall United States Senators.¹⁰⁸ As the state ratifying conventions demonstrated, however, rejection of the Virginia Plan hardly demonstrated a consensus on the issue of recall.

More troubling for supporters of state recall is the Court's general approach to state power. The *Thornton* majority searched the Constitution for some provision granting to the states the power to limit the terms of senators and representatives.¹⁰⁹ Finding no such express grant of state power, the Court held that the Constitution prohibits states from limiting the terms of their federal representatives and senators. But the Constitution does not require an affirmative grant of power to the states. Unlike the Federal Government, which enjoys no authority beyond that conferred by the Constitution, the states and the people of each individual state may exercise all powers that the Constitution does not withhold from them.¹¹⁰ If the Constitution is silent on a question, it does not bar action by the states or the people. As the Constitution does not bar the people of the states the power to recall their federal legislators, they should be free to exercise that power. If the Court continues to analyze state power as it did in *Thornton*, however, states would not have the power to conduct a recall election, as nothing in the Constitution grants them that power.

The dissenters in *Thornton*, in concluding that the people of the states have the power to limit the terms of their federal legislators, correctly applied the fundamental rule that "[u]nless the Federal Constitution affirmatively prohibits an action by the States or the people, it raises no bar to such action."¹¹¹ Curiously, however, they too hinted that the people of the states cannot recall a Member of Congress. The dissenters at various points commented that states were denied the recall power because (1) Article I specifies fixed terms of office for representatives and senators; (2) once elected, members are part of a national body insulated from

108. *See id.* at 810 n.20.

109. *See id.* at 798-827.

110. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

111. *Thornton*, 514 U.S. at 853 (Thomas, J., dissenting).

state control; and (3) the Framers granted the power to determine the salaries of congressmen to the federal government rather than to the states.¹¹²

The dissenters do not get very far by simply reciting the text of Article I. As noted, the dissenters' conclusion that state term limits laws were constitutional rested heavily upon the fundamental principle that only an affirmative prohibition bars state power. There is nothing in the Constitution's text that expressly prohibits the states from exercising the recall power. The slating of terms at two years for representatives and six years for senators is not an affirmative prohibition of state power. The dissenters acknowledged Chief Justice Marshall's admonition that when the Framers intended to withdraw power from the states, they knew how to say so unambiguously.¹¹³ And they stressed a "reluctance to read constitutional provisions to preclude state power by negative implication."¹¹⁴ If they were to be true to these principles, the dissenters could not conclude that the Constitution prohibits the states from exercising the power of recall.¹¹⁵

Nor did the dissenters offer any support for the new rule of constitutional jurisprudence that "once the representatives chosen by the people of each State assemble in Congress, they form a national body and are beyond the control of the individual states until the next election."¹¹⁶ During the lengthy debates concerning proposals to allow the states to recall United States Senators, no one ever posited that members, once elected, would be insulated from all state control. Certainly the early practice of state "instruction" of United States Senators,¹¹⁷ under which the state

112. *See id.* at 858, 882, 890.

113. *See, e.g.*, U.S. CONST., art. I, § 10; *see also* *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833) (When the Constitution has prohibitions, "[t]he question of their application to the states is not left to construction. It is averred in positive words.").

114. *Thorton*, 514 U.S. at 870 (Thomas, J., dissenting).

115. The dissenters did not include in their dicta any argument that the power granted to each House to expel its members by two-thirds vote, *see* U.S. CONST. art. I, § 5, cl. 2, somehow acts an affirmative prohibition on state power. Under the usual rules of constitutional interpretation, the granting of the power to expel removes any doubt as to the Federal Government's authority to cut short the term of a Member of Congress. But that grant of power does not necessarily remove any state power to act when Congress fails to do so.

116. *Thorton*, 514 U.S. at 858 (Thomas, J., dissenting).

117. During the second quarter of the nineteenth century, some state legislatures required that a state's United States Senators vote on an issue in accordance with the state legislature's majority view. This practice came to be known as "instruction" of Senators.

legislatures dictated to Senators the positions they should take with regard to various matters, as well as the early state recall measures, argue against the dissenting justices' view. Moreover, if the Framers had intended such a radical insulation of senators and representatives, they could easily have provided for it in the Constitution itself by affirmatively denying the states the power to interrupt the terms of members—or, for that matter, from exercising any other control over members who have been elected and seated.

The payment of the salaries of federal representatives was a matter of great concern to the Philadelphia delegates. Certainly, urged James Madison, congressmen were not to be paid by the states, whose parsimony toward their local legislators was notorious. During debate, Madison referred to the “great inconveniences experienced under the old Confederation.”¹¹⁸ When Oliver Ellsworth moved to insert a provision in the Constitution providing that the states would pay their senators' salaries,¹¹⁹ Madison objected that if the motion should be agreed to, senators would “hold their places during pleasure; during the pleasure of the State Legislatures,”¹²⁰ thus subverting the end intended by allowing the Senate a duration of six years. Madison did not believe that “one government should be dependent on another.”¹²¹ History shows, however, that there were no similar “great inconveniences” with respect to the exercise of recall under the Articles of Confederation—the power in fact was never exercised. As for Madison's fear that one government might be dependent upon another, that concern is not at all implicated by state laws leaving to *the people* the decision whether to remove a senator or representative. The decision on salaries is slender evidence indeed upon which to rest the conclusion that the Framers denied the people of the states the power of recall.

IV. The Case for Recall of U.S. Senators

Particularly in light of the *Thornton* Court's analysis of state powers and the dissenters' rule insulating Members from state

Some Senators were forced to resign when they disobeyed instructions. See *infra* notes 146-148 and accompanying text.

118. 3 ELLIOT'S DEBATES, *supra* note 14, at 369.

119. See 1 FARRAND, *supra* note 13, at 427.

120. *Id.*

121. 3 ELLIOT'S DEBATES, *supra* note 14, at 369 (emphasis supplied).

control once seated in the national legislature, it is probable that the Court would hold that the states or the people lack power under the Constitution to recall a Member of Congress. Without such power, however, voters have little recourse to take their government back from incompetent or corrupt federal legislators, particularly United States Senators.¹²² There continues to be substantial support for the idea of controlling federal legislators through recall. In the most recent survey on the subject, conducted in 1987 for Thomas Cronin's book *Direct Democracy*, sixty-seven percent of respondents favored a constitutional amendment providing for the recall of senators and representatives by vote of the people of a state.¹²³ One scholar has issued a call for such an amendment along with an exhaustive laundry list of other proposed constitutional amendments, but no careful analysis of such a proposal has yet been undertaken.¹²⁴

Placing in the people of the several states the power to remove their United States Senators would serve at least three vital purposes. First, allowing the people of the states to recall senators would fill the many gaps in the Senate's exercise of its power to expel. The Senate historically has interpreted its power to expel members narrowly. It seems clear, for example, that a senator cannot be expelled for conduct that occurred prior to being seated or for mere acts of "nonfeasance," such as failing to attend to official duties.¹²⁵ Nor does it appear that a senator can be expelled for any actions not taken as part of his or her official duties.¹²⁶ The recall device would provide a means to fill the

122. As did the Framers, I conclude that recall is both unnecessary and unworkable for the House of Representatives. There is no pressing need for recall when Representatives are by constitutional design sensitive to their constituents' needs and opinions, and when those who breach the public trust can be turned out of office with such exceptional dispatch. There is also the practical matter of time. Madison feared that annual elections might be an encouragement to unlawful means of obtaining office, since an irregular election "cannot be annulled in time for the decision to have its due effect." See THE FEDERALIST No. 57, at 330. The same is true for a recall election—by the time all of the petition requirements are met and an election is held, a representative's term will in all likelihood have ended.

123. See CRONIN, *supra* note 8, at 132.

124. See generally CHESTER J. ANTIEAU, A U.S. CONSTITUTION FOR THE YEAR 2000 (1995); see also *id.* at 159-62 (proposing recall amendment).

125. See Note, *supra* note 106, at 682.

126. See McLaughlin, *supra* note 106, at 49-50. McLaughlin argues that as expulsion was "doubtlessly intended to be" equivalent to impeachment, the grounds for impeachment offer some guidance as to the substantive limits on Congress's power to expel. *Id.* at 49. See U.S. CONST. art. II, § 4 (providing that "[t]he President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason,

gaps in the power of the Senate to expel its members for serious misconduct (official as well as unofficial), malfeasance, and even nonfeasance.

Second, by filling these gaps in the senatorial expulsion power, state recall would encourage accountability and responsibility by senators in all of their conduct, whether official, unofficial, pre-election, or post-election. I use the term “responsibility” in this context not to refer to a senator’s responsiveness to voters’ opinions on the myriad issues a senator must address while serving. While there is certainly no shortage of incumbent arrogance, day-to-day attentiveness is not where the true difficulty lies. The primary goal of senatorial recall should not be to shackle senators to local or special interests, but rather to enable voters to remove a senator who acts reprehensibly, but whose conduct falls short of felony or treason, or to give voters the power to challenge a senator based on misconduct that occurred prior to the current term but only recently came to light.

Third, granting the people the power to recall United States Senators would ensure that it is the people who truly choose whom will govern them. As John Lansing said in New York: when a senator “makes such sacrifices as tend to political destruction, or to reduce sovereignty to subordination, his state ought to have the power of defeating his design, and reverting to the people.”¹²⁷ Or, as Professor Antieau put the case for popular sovereignty:

To make the people of a state suffer for five more years a senator who in his first year in office has proved to their satisfaction that he is unable to represent them, denies the very first premise of our democratic form of government—that all political power is forever in the people.¹²⁸

Recall is a vital component of the right of the voters to exercise direct control over their United States Senators, a right the states had exercised through informal “instruction” of senators early in the nation’s history, and a right the people of the states have exercised formally since the ratification of the Seventeenth Amendment in 1913.

bribery, or other high crimes and misdemeanors”). As the impeachment proceedings against President Clinton demonstrated, the meaning of “high crimes and misdemeanors” is far from settled.

127. 2 ELLIOT’S DEBATES, *supra* note 14, at 295.

128. ANTIEAU, *supra* note 124, at 160.

A. *The Power to Expel*

When considering the merits of senatorial recall, the first place to look is at the system the Framers themselves devised for addressing the problem of rogue senators. Each House of Congress has the power under the Constitution to expel its members on two-thirds vote.¹²⁹ More than two-hundred years has passed since the Framers granted the Senate the power to expel its members. Yet that power has been interpreted and exercised sparingly, despite continuing transgressions by senators in the exercise of both their official and unofficial duties.¹³⁰

It is instructive to observe under what circumstances the Senate has exercised the power of expulsion. As in the House, in which only two members have been expelled,¹³¹ such a course has been exceedingly rare in the Senate. In the course of the nation's history, expulsion has been threatened or applied only in cases of treason and felony convictions. Of the twenty-three cases in which senators were actually expelled, all involved charges of treason or disloyalty, and all but one dealt with senators who sided with the Confederacy in the Civil War.¹³² Ten other senators, although not expelled, have been the subject of senatorial expulsion

129. See U.S. CONST., art. I, § 5, cl. 2.

130. In the contemporary Senate, there have been scandals ranging from poor ethical judgment to doubtful institutional practices. In 1986, five senators allegedly gave preferential treatment to major campaign contributor and subsequent felon Charles H. Keating, Jr. Another senator, Brock Adams (D-Wash), was accused of sexual improprieties and declined to run for reelection in 1992. Bob Packwood suffered a similar fate in 1995. Yet another senator, Dave Durenberger (R-Minn), claimed questionable reimbursements.

131. Though expulsion has been threatened on many occasions, only two House members have ever been expelled—both on the ground of treason. They were: John W. Reid of Missouri and Henry C. Burnett of Kentucky (1861). See 2 ASHER C. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 1261-1262 (1907).

132. Twenty-two of the twenty-three cases occurred during the Civil War. They were: Jefferson Davis, Albert G. Brown, Stephen R. Mallory, David L. Yulee, Clement C. Clay, Benjamin Fitzpatrick, Robert Toombs, and Judah P. Benjamin (1861), see *Senate Election, Expulsion and Censure Cases from 1789-1960*, SEN. DOC. NO. 98-71, at 27 (1962) [hereinafter *Senate Cases*]; James M. Mason, Robert M.T. Hunter, Thomas L. Clingman, Thomas Bragg, James Chestnut, Jr., A.O.P. Nicholson, William K. Sebastian, Charles C. Mitchel, John Hemphill, and Louis T. Wigfall (1861), *id.* at 28; John C. Breckenridge (1861), *id.* at 29; Jesse D. Bright (1862), *id.* at 30; Waldo P. Johnson (1862), *id.*; Trusten Polk (1862), *id.* at 31. In 1877 the Senate annulled the expulsion of William K. Sebastian. See 2 HINDS, *supra* note 131, § 1243. There is some question whether Senators Davis, Brown, Mallory, Yulee, Clay, Fitzpatrick, Toombs and Benjamin were technically expelled. See *Senate Cases*, at 27. William Blount of Tennessee was expelled in 1797. See *id.* at 3. For a discussion of these cases, see 1 HAYNES, *supra* note 4, at 189-99.

proceedings: four for suspected treason or disloyalty; five for allegedly accepting bribes or receiving compensation for services rendered before a department of the Government; and one for his alleged membership in a “religious hierarchy that countenanced and encouraged polygamy and united church and state contrary to the spirit of the constitution”¹³³ The most recent senators to face the threat of expulsion were Senator Harrison Williams of New Jersey and Senator Robert Packwood of Oregon. The outcomes in their cases are representative of the modern trend; like several senators before them, both men resigned their seats only after several months of incessant media scrutiny.¹³⁴

Sharply divergent conclusions might be drawn from this historical evidence. One view is that the system the Framers envisioned for removing rogue senators has worked, if somewhat imperfectly. While there have been only twenty-three recorded expulsions, the mere threat of expulsion—aided, especially in recent cases, by an increasingly vigilant press—has caused the resignation of many others accused of misconduct. But that view ignores two important points. First, those who granted the power abused in the first instance—the voters—have a legitimate claim to sit in judgment of a senator accused of misconduct or incompetency. If the people have a basic right to be represented by a senator of their choice, that right should also include the concomitant right to correct a grievous electoral mistake, even before the next election. Senators Packwood and Williams, for example, ultimately were persuaded to change their minds and to not attempt to hold onto their seats amid ethics complaints and charges of sexual harassment and bribery. Had they not resigned, it seems unlikely that these men would have been the first senators in history to be expelled absent charges of treason or disloyalty to country.¹³⁵ Moreover,

133. *Senate Cases*, *supra* note 132; 2 HINDS, *supra* note 131, § 1278.

134. Senator Packwood was outwardly defiant when the allegations against him originally surfaced. Packwood vowed to fight the charges, and he stated in an interview with the Associated Press that he should not be expelled from the Senate even if the ethics committee found him guilty. He argued (correctly) that the only Senators who have been expelled were found guilty of treason and that his alleged offenses were not comparable. See Helen Dewar, *Packwood Launches Media Defense*, WASH. POST, August 17, 1995, at A7.

135. Madison, according to his own notes, “observed that the right of expulsion . . . was too important to be exercised by a bare majority of a quorum: and in emergencies might be dangerously abused.” See 2 FARRAND, *supra* note 13, at 254. He moved that “with the concurrence of 2/3” be inserted. *Id.* But Gouverneur Morris pointed out that a two-thirds requirement “may produce abuses on the side of the minority. A few men from factious

if the Senate should fail to act, as two hundred years of experience suggests it will in all but the most outrageous cases, voters are left only to rely upon the good will and honesty of the senator accused of misconduct. That remedy, as Senator Packwood's early defiance demonstrates, gives the people no recourse.

Second, there continues to be much confusion concerning the proper boundaries of the power to expel. The Constitution is silent as to the offenses which would cause a senator to be expelled.¹³⁶ While the Supreme Court has indicated that the power to expel is a broad one, it is not unlimited.¹³⁷ When the Senate considers punishment of any kind for its members, it looks first to see whether there has been a breach of any Senate rule. In addition, the Senate and the Ethics Committee have long held that the institution has the right to punish conduct that violates the "established norms" of the Senate, even if such conduct is not explicitly prohibited by Senate rules.¹³⁸ But what constitutes an "established norm" is far from clear.

In practice, it is impossible to conceive that the Senate *would* exercise its power to expel in certain cases involving conduct reprehensible to the voting public, such as instances in which the chamber concludes that a senator's conduct has become an embarrassment to voters or to its own ranks, when a senator fails to fulfill *any* campaign platform promises, or through prolonged absence the senator fails to attend to any senatorial duties.¹³⁹

motives may keep in a member who ought to be expelled." *Id.*

136. See *United States v. Brewster*, 408 U.S. 501, 519 (1972) ("An accused Member is judged by no specifically articulated standards . . ."). As the *Brewster* Court observed, "Congress is ill-equipped to investigate, try, and punish its Members for a wide range of behavior that is loosely and incidentally related to the legislative process." *Id.* at 518.

137. The Supreme Court held in *In re Chapman*, 161 U.S. 661 (1897), that "[t]he right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a member." *Id.* at 669-70. There are obvious constitutional limitations on the right to expel, such as the rights to freedom of speech and religion, as well as due process and equal protection constraints. See McLaughlin, *supra* note 106, at 50-51.

138. Efforts by the Senate to punish its own on the basis of a violation of established norms have been controversial. See Simpson, *Chances of Enforcing*, *supra* note 10 (noting that Senator Alan Cranston's objection to use of this ground to punish him for alleged involvement with Charles Keating). No senator has ever even been threatened with expulsion for a violation of Senate "norms."

139. Although Senate rules prohibit Senators from being absent from service without leave, the advent of airline travel appears to have made prolonged absences the rule rather than the exception. A few Senators have been absent for periods greater than two years due to illness or other circumstances. Due to the infirmities of old age, Carter Glass (D-Va.) was

These circumstances appear to be matters solely between the senator and constituents of the senator's state. Further, the Senate apparently does not believe that it has the power to expel a member for misconduct committed either during prior Congresses or before entering the Senate.¹⁴⁰ Voters confronted with revelations of past misconduct after an election is held, as were the voters of Oregon in the case of Senator Packwood, apparently have no recourse whatsoever under the Constitution.¹⁴¹

It appears that expulsion is likely to be considered only in cases involving official misconduct while in office, and then only when that misconduct rises to the level of an impeachable offense. The grounds for impeachment, as set forth in Article II, Section 4, are narrow; they are limited to "treason, bribery, or other high crimes and misdemeanors."¹⁴² The constitutional debates make clear that the impeachment provisions were aimed at preventing "the possibility of tyrannical, oppressive, corrupt and willful use of the power connected with a public office."¹⁴³ In short, expulsion, like impeachment, probably is limited to cases involving an indictable offense arising from official duties, such as bribery of a senator.¹⁴⁴ Impeachment itself, even if it were an available

absent from June 1942 until his death on May 28, 1946. See ROBERT C. BYRD, *THE SENATE 1798-1989, HISTORICAL STATISTICS 1789-1992*, 673 (Wendy Wolff ed. 1988). Karl Earl Mundt (R-S.D.) was absent from November 1969 to January 1973 after he suffered a stroke. He refused to resign and served until the expiration of his term. *Id.*

140. See 2 HINDS, *supra* note 131, §§ 1283-1289; see also *Powell v. McCormack*, 395 U.S. 486, 508-09 (1969) (discussing power to expel for prior misconduct). Senate scholar George Haynes has called this the "twilight zone of the Senate's jurisdiction." 1 HAYNES, *supra* note 4, at 189. For a view that the power to expel for prior misconduct is desirable, see Note, *supra* note 106, at 684. Congress has far greater latitude in punishing its Members than in expelling them. See McLaughlin, *supra* note 106, at 60-66.

141. The WASHINGTON POST broke the story about Senator Packwood's alleged sexual harassment 19 days after Packwood won a fifth term. Packwood won the election by just 4% of the vote. See Simpson, *Senate Ethics Staff*, *supra* note 10.

142. U.S. CONST., art. II, § 4 provides: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

143. John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1, 53 (1970).

144. See McLaughlin, *supra* note 106, at 49 ("[T]o be impeachable, the conduct in question must either be an indictable offense which involves serious consequences to the United States or, if not an indictable offense, one which involves malicious or corrupt acts in the discharge of official duties, causing great detriment to the United States.").

option,¹⁴⁵ punishes only malfeasance in office, not misfeasance or nonfeasance, and graft is in any event difficult to prove.

B. *The Source of Consent*

A recall amendment would not represent the first attempt by the states to gain direct control of the United States Senate. During the second quarter of the nineteenth century, the practice of instruction—the requirement that a state’s senators vote on an issue according to the state legislature’s majority view—was prevalent in many states.¹⁴⁶ Instruction was not based on any power granted by the Constitution, but rather by then-accepted theories of representative government. States supporting Jeffersonian Republicans or Jacksonian Democrats in the years 1800-1840 were most inclined to practice instruction.¹⁴⁷ Many senators simply ignored instructions; however, others were actually forced to resign when they disobeyed their legislatures. Such cases were, in practical effect, the very first recall movements.¹⁴⁸

But voters were not satisfied with having their state legislatures instruct their senators on certain issues. They wanted to choose directly who would represent them in the Senate. Though the Constitution did not expressly grant them the power to do so, States moved at the beginning of the twentieth century to take popular control of senatorial elections. In 1901, Oregon enacted a

145. An impeachment proceeding has been brought against only one Senator. On July 7, 1797, the House decided to bring impeachment proceedings against William Blount of Tennessee. *See Senate Cases, supra* note 132, at 3. Blount was first expelled from the Senate; he then attacked the jurisdiction of the Senate to try him for impeachment. *See id.* His claim that he could not be a “civil officer” of the United States subject to impeachment was upheld by the Senate when it dismissed the impeachment proceedings. *See id.* This result has been considered a precedent for the proposition that Members of Congress are not impeachable.

146. For a detailed history of the practice of instruction, *see* 2 HAYNES, *supra* note 4, at 1025-34; *see also* Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens’ Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 517-28 (1997) (describing constitutional debates over instruction and early practice). Members of the Continental Congress considered binding the instructions received from their state legislatures, and delegates to the Philadelphia Convention also came with instructions. *See* HAYNES, *supra* note 4, at 1025.

147. *See id.* at 1027-28.

148. After 1840 the practice of instructing senators declined for various reasons. Among the various causes for the decline were the blatantly partisan use of instruction in abolitionist and states’ rights issues and mounting objections to the removal of respected senators who were perceived to have voted according to their best judgment. *See* CRONIN, *supra* note 8, at 26.

primary law under which voters expressed their choice for senator by precisely the same process as that used in electing their governor.¹⁴⁹ Many states followed Oregon's lead and adopted what came to be known as the "Oregon System" for the popular choice of senators.¹⁵⁰

Then came the ratification after a century-long struggle of the Seventeenth Amendment, which provided for the direct election of senators.¹⁵¹ Senate scholar George Haynes has provided a picture of historical events leading up to ratification of the Seventeenth Amendment:

For some years before the opening of the new century, conditions had been ripening toward that change. The election of Senators by direct vote of the people was a later phase of the movement to democratize American government, a movement which had begun to manifest itself many years earlier in the broadening of the suffrage, the multiplication of elective offices and the shortening of their terms, the putting of constitutional curbs upon the power of state legislatures, and the widespread adoption of the initiative and referendum, and the recall.¹⁵²

Popular opinion and the nation's leaders eventually came to embrace the view that under the system of indirect election by state legislatures, many senators were indifferent to popular demands, and obligated instead to corporations that could often influence the senators' elections. In addition, there was widespread concern over corruption and deadlock occurring in the state legislatures.¹⁵³ Direct election was to eradicate the evils associated with election by a third party agent, "to act as a democratic vaccine to immunize

149. See 1 HAYNES, *supra* note 4, at 98-104.

150. See *id.*

151. See *id.* at 96 n.1 (noting that the first resolution proposing constitutional amendment introduced in 1826); see also BYRD, *supra* note 139, at 402 (noting that the movement to achieve direct election of Senators spanned from 1826 to 1912). The Seventeenth Amendment states:

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

U.S. CONST. amend XVII.

152. See 2 HAYNES, *supra* note 4, at 1041.

153. See 1 *id.* at 85-95 (describing deadlocks, "stampeded elections," bribery, corruption, vacancies, and the corruption of state politics).

the Senate from corrupt and ineffective representation.”¹⁵⁴ The democratic purpose of the Seventeenth Amendment, plainly reflected in its text requiring election “by the people,” was to increase accountability by distributing the vote to more individuals than could be bought or corrupted.¹⁵⁵ The Framers intended the Senate to be an elite chamber, isolated from the democratic demands of the House. But the Seventeenth Amendment abolished the most remarkable difference between the chambers by providing for direct elections. Whatever reservations the Framers may have held concerning popular democracy, the people in 1913 succeeded in transforming the national legislature into a body springing in *both* branches from popular vote and thus depending wholly on the nation’s will.¹⁵⁶

C. *The Merits of State Experimentation*

In contrast to the power of expulsion, the proposed alternative—the recall device—has a long and instructive history in the United States. Hamilton’s objection that a few years’ experience under the Articles of Confederation was insufficient evidence to pass on the merits of recall has been answered, at least at the state and local levels of government. According to one scholar of popular democracy, who conducted a study a decade ago, as many as 4,000 to 5,000 recall elections have been held, and several thousand more have been begun but failed to qualify for lack of signatures.¹⁵⁷ The nation’s experience with the recall device

154. Laura E. Little, *An Excursion Into the Uncharted Waters of the Seventeenth Amendment*, 64 TEMP. L. REV. 629, 640 (1991).

155. See *id.* at 637, 642; see also S. REP. NO. 60-518, at 9 (1908) (“Direct responsibility breeds honesty . . . it detects and defeats the unworthy, the incompetent, and the corrupt.”); 47 CONG. REC. S1913 (1911) (“[T]he more complete domination you give to the people the nearer you come to realizing the ideal which has been in the hearts and brains of patriots since the days of Jefferson.”) (statement of Senator Reed). The few court decisions to review the history of the Seventeenth Amendment have recognized and embraced its democratic purpose. See, e.g., *Schneiderman v. United States*, 320 U.S. 118, 143 (1943) (stating that the “[o]bject of the Seventeenth Amendment was to make [the Senate] more responsive to the public will.”); *Valenti v. Rockefeller*, 292 F. Supp. 851, 864 (S.D.N.Y. 1968) (“[T]he clear purpose of the Seventeenth Amendment was to give effect to the direct voice of the people in the selection of Senators.”), *aff’d mem.*, 393 U.S. 405 (1969).

156. Many States threatened a convention to consider popular election of senators, if the more customary channel of Congressional consideration failed. Scholars have stressed that this determination on the part of the States forced Congress to submit the amendment rather than risk an open convention. See, e.g., Gordon E. Sherman, *The Recent Constitutional Amendments*, 23 YALE L.J. 129, 146 (1913); 1 HAYNES, *supra* note 4, at 107.

157. See CRONIN, *supra* note 8, at 142.

provides at least an approximation of the experience to be expected should the people be granted the power to recall United States Senators. Proponents of a recall amendment would not be writing on a blank slate.

The terms of debate concerning recall of public officials have not changed substantially since the Framers considered the issue in 1787. Critics of senatorial recall likely would raise objections similar to those advanced by Hamilton and the Federalists at the New York ratifying convention. A close examination, however, of the states' and localities' experience with recall reveals that those concerns are unfounded.

Before reaching the primary concerns expressed by recall detractors, however, it makes sense to briefly discuss one potential criticism that the Framers did not consider—the issue of uniformity. The *Thornton* Court expressed reservations about permitting individual States to formulate diverse qualifications for their congressional representatives. The Court feared that such diversity would result in a “patchwork” that would be inconsistent with the Framers' vision of a uniform national legislature representing the people of the United States.¹⁵⁸

For recall, it would be difficult, if not impossible, to set forth uniform standards in a constitutional amendment. Placing the power to promulgate such requirements in the Senate would defeat the spirit, if not the very purpose, of a recall amendment by allowing the Senate to interpret narrowly the grounds for recall. There is no serious difficulty in allowing the states to formulate disparate requirements for the exercise of recall. As one scholar has said:

There is no valid reason why uniformity of grounds for recall, methods, and occasions must be imposed upon all the states. If one state deems conviction for bribery sufficient, another considers fraud sufficient, and a third views chronic alcoholism or regular absence from chambers sufficient, that is their right, and only theirs, to decide.¹⁵⁹

State laws that set forth individual recall requirements do not (unlike, say, state laws affecting the flow of commerce) affect the interests of any other state. Just as states may prescribe various

158. See *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 822 (1995).

159. ANTIEAU, *supra* note 124, at 160.

“time, place, and manner” restrictions for senatorial elections,¹⁶⁰ so too should the voters of a state decide whether, and under what circumstances, their senators will continue to serve in office. Only such diversity will truly effectuate the power of the people of each state to decide who will represent them in the Senate.

But a raw assertion of state power is, at best, an incomplete answer to the legitimate concerns raised in *Thornton*. The better answer is that there is a long history of state differences concerning the election of senators. For example, the legislatures’ methods for choosing senators varied under Article I, Section 3, as did their criteria for election.¹⁶¹ And two of the three minimum requirements in Article I, Section 3—citizenship and inhabitancy—at the time the Constitution was adopted depended entirely on state law.¹⁶² The strong inference from history is that state experimentation and variety, not uniformity, was expected in the area of congressional elections. There is no reason to prohibit that same variety of experience with regard to recall.

The arguments against recall advanced at the New York convention also do not stand up to careful scrutiny. One of the primary arguments first advanced by recall opponents at the New York ratifying convention was that the mere threat of a recall election would destroy the deliberative nature of the Senate and render senators, like representatives, slaves to mob sentiment.¹⁶³ The argument that senators should be shielded from democratic concerns is not new. Opponents of the Seventeenth Amendment similarly predicted that direct elections would make the Senate a mere duplicate of the House, subject to frequent waves of passion, flighty decisions, and irresponsible actions that often accompany popular clamor.¹⁶⁴ The central opposition to popular control

160. U.S. CONST. art. I, § 4, cl. 1 (granting state legislatures the power to prescribe the “Times, Places and Manner” of holding elections for senators and representatives).

161. At the first elections for Senators, in some legislatures both houses voted jointly (e.g., Virginia and New Jersey). See 2 DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788-1790 281 (G. DenBoer, et al. eds., 1984); 3 *id.* 25 (1986). Some voted separately (e.g. Massachusetts and Connecticut). 1 *id.* 514-20; 2 *id.* 28. New Hampshire apparently had one house nominate, the other approve. 1 *id.* 783. New York could not agree on any procedure. 3 *id.* 513. Maryland formally required that one Senator reside on the Eastern Shore, the other on the Western Shore. 2 *id.* 146-49.

162. See JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870 213-18 (1978).

163. See *supra* notes 52-56 and accompanying text.

164. See 2 HAYNES, *supra* note 4, at 1084.

stands on rather shaky ground when measured against current political reality. It appears to be based on the naive assumption that senators, unlike members of the lower House, do not already seek to curry favor with voters and special interests in order to secure reelection. Hamilton and others may have envisioned a system in which senators would conduct themselves differently from their House colleagues, but the Framers were sometimes poor predictors.¹⁶⁵ Study after study gives the lie to the assumption that senators stand above the wishes of their constituents, as does the remarkable success of incumbents in the Senate, particularly in recent years.¹⁶⁶ Like their colleagues in the House, senators begin to prepare for reelection almost as soon as they unpack their bags in the nation's capital.

A properly drafted recall law would not add appreciably to a senator's already pressing need to weigh constituent views. Properly conceived and exercised, the recall would serve not as a referendum for single issues like abortion or a balanced budget, but rather would provide the voters with a means of removing a senator who has perpetrated an extraordinary breach of the public trust, yet who falls outside the Senate's apparently narrow jurisdiction to expel.

Further, eighty years of experience at the state and local level suggest that providing for popular recall of senators would not, as Hamilton and other Federalists argued, result in chaos and endless confusion. In his careful study of the initiative, referendum, and recall, Professor Cronin found no evidence to support the contention that the recall device acts as an invitation to unruly, impatient action or represents a hazard to representative government.¹⁶⁷ At least at the state and local level, recall has not been a disruptive

165. To take just one example, the Framers had expected slavery to wither away of its own accord and therefore made no provision in the event that it did not.

166. Studies of Senators' behavior indicate that, like their House counterparts, Senators usually moderate their ideological positions to reflect their constituents' opinions, especially as reelection nears. See, e.g., ROBERT S. ERIKSON & GERALD C. WRIGHT, *VOTERS, CANDIDATES, AND ISSUES IN CONGRESSIONAL ELECTIONS*, IN *CONGRESS RECONSIDERED* 112 (Lawrence C. Dodd & Bruce I. Oppenheimer, eds.) (5th ed.) (1993). The authors state: "Incumbents like to stay elected, and they know that the way to do this is to provide constituents with what they want." *Id.* In recent years, the rate of return for Senate incumbents has reached or exceeded 90%. See *Incumbent Reelection Rates 1960-1990*, in *Congressional Quarterly's Guide to Congress* 705 (4th ed. 1991); NORMAN ORNSTEIN ET AL., *VITAL STATISTICS ON CONGRESS 1993-1994* 58-59 (1993). The rate of return of Senate incumbents who ran in 1994 was 92%. *Id.*

167. CRONIN, *supra* note 8, at 140-43.

force.¹⁶⁸ Professor Cronin observed that “recall, like impeachment, is a cumbersome, complicated, last-resort procedure that requires significant organizational stamina, drive, and intensity to reach the ballot box stage.”¹⁶⁹ Such safeguards have ensured that the recall is used infrequently, especially against elected state officials. As Cronin discovered:

Only one governor and a handful of other statewide-elected officials have been recalled. Several state legislators have been recalled, including two in California in 1913, two in Idaho in 1971, two in Michigan in 1983, and one in Oregon in 1988. About forty recalls have been mounted to oust state officials in California, but all except two have failed for lack of signatures. Recall drives against governors have been mounted in recent years but failed to obtain adequate signatures in California, Louisiana, and Michigan.¹⁷⁰

The odds that senators would be, in Robert Livingston’s words, “appointed one day and recalled the next,”¹⁷¹ appear slim indeed.

Other critics of recall would likely maintain, as did Hamilton and the Federalists who attended the New York convention, that the spectre of a recall election will commit legislators to “zero-risk” positions, and render them timid. But scholars who have studied the exercise of the recall against state and local government officials have concluded that there is “no evidence that [recall] has in this way seriously handicapped constructive public service.”¹⁷²

168. It is possible, though certainly not likely, that Robert Livingston’s vision of government annihilation through recall might materialize. But, John Lansing answered that criticism adequately in 1787—a recall amendment, he said, could contain a clause obliging a state, in the event of a recall, to choose immediately another senator to fill the vacancy. *See supra* notes 81-83 and accompanying text. The Constitution already contains similar requirements in cases of exclusion or expulsion. *See* U.S. CONST. art. I, § 2, cl. 4. That part of the Constitution provides: “When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.” Additionally, the Seventeenth Amendment provides that in the case of the Senate the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct. *Id.* amend. XVII, cl. 2.

169. CRONIN, *supra* note 8, at 142-43.

170. *Id.* at 127. Professor Cronin noted: “Probably as many as 2,000 county and municipal officials have been discharged around the country since Los Angeles became the first local government to adopt the recall in 1903.” *Id.* at 128.

171. 2 ELLIOT’S DEBATES, *supra* note 14, at 291.

172. FREDERICK L. BIRD & FRANCES M. RYAN, *THE RECALL OF PUBLIC OFFICERS* 353 (1930).

As Professor Cronin noted in his study, conservative positions are a natural consequence of direct elections:

A few officials probably minimize risktaking because of the recall. It is doubtful, however, that the recall device encourages this any more than the fact that they must stand for reelection. Politicians are generally cautious. By definition they want to retain majority and plurality support. Democratic elections encourage this. Recall is merely an additional device—a form of insurance.¹⁷³

Nor has the existence of recall inhibited qualified and talented candidates from seeking office, as Hamilton feared it might deter senators. Indeed, Professor Cronin said of this claim lodged against the recall device: “This specter of the recall turning potential elected officials into cowards unwilling to run is an exaggeration.”¹⁷⁴

The available evidence also does not support the criticism, lodged by Robert Livingston and other Federalists, that many would succeed in using the recall to ruin an official for partisan gain. A study of recall efforts in Los Angeles, where more than forty-five have occurred, found that voters rejected politically inspired recalls—movements in which “sour grapes” or personal feuds and ambitions were the chief reason behind the recall effort. As Professor Cronin explained:

A study of recall efforts in Los Angeles [showed that] . . . Los Angeles voters have generally preferred to reserve the recall for its originally intended use (to weed out malfeasance and corruption) and to settle political questions at regular elections. The same can be said of most citizens elsewhere who have exercised the right of recall.¹⁷⁵

When efforts to abuse recall have arisen, voters generally have been vigilant against exploitation and harassment. “The arbitrary or wanton exercise of the recall to displace or harass conscientious officials,” Cronin found, “usually backfires.”¹⁷⁶ “On balance,”

173. CRONIN, *supra* note 8, at 148-49.

174. *Id.* at 145.

175. *Id.* at 143 (citation omitted).

176. *Id.* at 152. This is precisely what occurred in the highly publicized recall challenge involving then-San Francisco Mayor Dianne Feinstein. Feinstein was guilty of neither crime nor incompetence of any sort, and 81% of those who voted rejected the recall attempt. *Id.* at 141.

Cronin concluded, “the recall has been mainly used to weed out incompetent, arbitrary, or corrupt officials. It is a positive device reminding officials that they are temporary agents of the public they serve.”¹⁷⁷

It is important to note also that a United States Senator would hardly be defenseless in the face of bogus charges. Senators, particularly long-time incumbents, are not ordinary government officials. Placed at their disposal are taxpayer-furnished staffs, expense accounts, offices in their districts, media broadcast studios and press aides, travel allowances, free postage privileges, free stationery, and easy access to television news and talk shows.¹⁷⁸ Such resources would be more than sufficient to allow a challenged incumbent senator to answer any charges.

Professor Cronin supports state and local recall measures, but opposes recall of senators on the ground that the six-year term for senators was “deliberately designed to take a larger view of the national interest.”¹⁷⁹ This view, however, takes too simplistic an approach to the senator’s role in our federal system. While it is true that the Framers intended senators’ long terms to insulate them from state interests, the Framers also held out the Senate as the guardian of state sovereignty through equal representation coupled with election by the state legislatures.¹⁸⁰ The loyalty of senators always has been divided between state and Union. What Hamilton could not have answered, and what Cronin failed even to consider, is what effect the Seventeenth Amendment has had on senatorial loyalties. While the Seventeenth Amendment effected no organic change in the structure of the Senate, one of its primary purposes was to make the Senate more responsive to the will of the people. The vision of the detached and nation-minded senator ignores both the Framers’ statements and, to an even greater degree, the current derivation of the Senate.

177. *Id.* at 243.

178. *See, e.g.*, 39 U.S.C. §§ 3210, 3211, 3212 (1994) (franked mail, including “mass mailings”); 2 U.S.C. § 123b-1 (1994) (Senate recording studio); *id.* § 58a (telecommunications services); *id.* §§ 57, 58c (office expense allowances); *id.* § 332 (personal staff); *id.* §§ 43, 43b, 58 (travel allowances); *id.* § 46b-1 (stationery); *id.* § 59 (offices in home state).

179. CRONIN, *supra* note 8, at 244. Hamilton also advanced this structural argument.

180. The contradiction is apparent in THE FEDERALIST No. 62, in which Madison stated that the Senate represented the portion of sovereignty remaining to the States, while in No. 63 he approvingly anticipated the Senators’ stronger “sense of national character” compared to House Members, due to the former’s longer terms and less close ties with their constituents.

Contrary to the concerns expressed in New York and at other state conventions in 1787, experience has demonstrated that in practice the recall weapon has been used most often when arbitrary or incompetent officials have aroused sufficient anger in the public to generate significant support for a recall effort. States with recall laws have not experienced weakened government, timid legislators, or abuse by political or ideological groups. Nor have they suffered a paucity of talented candidates interested in running for office.

As with any experiment of like scale, the state and local experience has not all been positive. There have been occasional misfires and abuses, particularly at the level of local government. The recall has sometimes been used to oust a local official because of the official's position on an individual policy issue, for petty partisan revenge, harassment, or for no apparent reason at all.¹⁸¹ Some scholars also have complained that the recall is being used by well-funded interest groups to serve their particular interests.¹⁸² And, of course, it is very expensive for governments to check petition signatures and conduct recall elections. But scholars and even many of the officials who have been targets of recall movements agree that occasional abuse and expense is not sufficient cause to abandon the recall altogether. Rather, constructive proposals have been offered, and enacted by state legislatures, which provide safeguards against abuse and render the recall device truly a weapon of last resort.

V. A (Cautious) Proposal for Senatorial Recall

As I have argued above, recall is an important tool for popular monitoring of senators and effectuates the peoples' interest in "choosing whom they please to govern them." Because recall is such a potent weapon, however, the essential objective should be to restrict its use to true emergencies. As under the Articles of

181. See Mack, *supra* note 94, at 618-20 (describing "recall frenzy" in Nebraska in late 1980s); ZIMMERMAN, *supra* note 104, at 125-28 (describing how two Democratic Michigan state senators were singled out for recall primarily to give the Republican party a majority in the Senate); see also CRONIN, *supra* note 8, at 241 (explaining how in San Francisco "a strident, intense and irresponsible group used recall mainly to embarrass Mayor Diane Feinstein"). Paul Horcher, a Republican in the California Assembly, was recalled on May 17, 1995, apparently for providing the vote that kept Democratic Assembly Speaker Willie L. Brown, Jr. in power, denying the GOP its first majority in the Assembly since 1970. See William Claiborne, *Voters Oust Brown Ally in California*, THE WASH. POST, May 18, 1995, at A18.

182. See ZIMMERMAN, *supra* note 104, at 126.

Confederation, the principal influence of the recall should derive from its potential, not its actual, use. Recall efforts should be encouraged only in the most serious situations, such as when a senator has been inexcusably negligent in carrying out senatorial duties, has engaged in reprehensible conduct (regardless of whether related to official duties or whether such conduct comprises treason or a felony), or has become incompetent for some reason.

The key to ensuring a healthy exercise of the recall lies in the first instance in the signature requirement. A substantial number of signatures must be required to protect senators from the irritation of fringe groups or mere partisan opposition, yet the threshold must be low enough to allow a real possibility of removal.¹⁸³ The main reason for the infrequent use of the recall device in the largest cities or against elected state officials is the large number of signatures needed to trigger a recall election. A recall of the governor of California, for example, would require more than 800,000 signatures to reach the ballot.¹⁸⁴ It is highly unlikely that any single issue could be used to mobilize such a great number of voters to move a senator's recall from office.

Obviously, states should proceed with utmost caution in fashioning the requirements for recalling United States Senators. The scorn and fear that colored the Framers' views of factions have dissipated to a considerable degree, but the danger that recall will render senators beholden to minority factions still exists in some measure. To ensure that the passions of a small minority will not force a senator to face a recall election, states should adopt signature requirements toward the higher end of the scale. A twenty-five percent signature requirement, common in many recall statutes, would be sufficiently large to deter spurious movements, yet sufficiently attainable to allow for judicious use. Moreover, to further guard against minority control, the signature requirement should be based on the percentage of *registered* voters, not on a percentage of people voting in a given election. This will ensure that a low turnout in a prior election will not lead to easy removal.

183. Providing necessary safeguards while still placing the recall device within reach of voters has proved a difficult task indeed. States have experimented with signature requirements ranging from a low of five percent to a high of forty percent. *See, e.g.*, FLA. STAT. ANN. § 100.361(1)(a)(6) (West 1982) (5% requirement); KAN. STAT. ANN. § 25-4311 (1993) (40% requirement). The various signature requirements under state recall laws are presented in CRONIN, *supra* note 8, at 126-27.

184. *See* CAL. CONST., art. 2, § 14; CAL. ELEC. CODE § 11221(c)(1) (West 1996).

Finally, because the stakes are so high, states should seriously consider requiring that a supermajority vote in favor of recall of a United States Senator should a petition drive succeed in forcing an election.

Another concern regarding any recall measures is the potential for harassment and the possible disruption of representative government that a recall effort can engender. To address this problem, a recall statute should require: (a) a clear statement of the reasons for the recall effort; (b) a showing of cause (reviewable for sufficiency in state courts); (c) a sworn affirmation of good faith knowledge concerning the truth of the allegations asserted; and (d) mandatory criminal sanctions for petitioners who knowingly circulate a recall petition with false allegations.¹⁸⁵

To further guard against abuse of the recall power by well-funded interest groups, any recall measure should also include: (a) a requirement that the petitioning parties identify themselves; (b) signature verification; (c) financial disclosure by the petitioning parties; and (e) public hearings on the merits of a recall petition.¹⁸⁶

Lastly, the grounds for recall should be flexible. Those states that currently prescribe narrow grounds for recall should loosen their standards as applied to United States Senators. Limiting recall to instances of official misconduct would leave voters in no better position than they are in under the Senate's power to expel. Such narrowly drafted laws would defeat the voters' ability to remove a senator whose prior egregious acts come to light only after a term of office has commenced.

In response to these and other calls for reform, and in particular to remedy instances of abuse, states have been fine-tuning their recall laws in the directions suggested.¹⁸⁷ There is no guarantee that reform of state recall laws will remove the possibility of abuse, harassment, or error. A determined, well-financed faction may succeed in at least subjecting a senator to an expensive and burdensome recall process. And voters make mistakes (which is one reason why they need the recall power to begin with). State experimentation with senatorial recall may come at the expense of

185. See Mack, *supra* note 94, at 634-39.

186. See CRONIN, *supra* note 8, at 245-46.

187. For example, Nebraska has been attempting to reform its recall law. See Mack, *supra* note 94, at 632-34.

good legislators. Yet while voters occasionally abuse the franchise and elect unqualified senators, no one has argued that we ought to revert to the original framework, and that the people should be denied the right to choose who will represent them in the United States Senate. Proponents of the Seventeenth Amendment were willing to accept the occasional lapse of judgment in the interest of greater accountability and control. Likewise, the possibility that the recall weapon occasionally may be misfired should not stand as a dispositive reason to reject the device.

VI. Conclusion

If the country learned anything from the constitutional crisis brought about by the impeachment proceedings involving President Clinton, it was that the people can indeed put aside self-interest and partisanship for the common good. In other words, they proved themselves capable of choosing whom they please to govern them. The Framers' two-thirds vote requirement may have been the safeguard that ultimately prevented the president's impeachment, but the peoples' voices were also heard throughout the process that led to President Clinton's acquittal.

As the drive for term limits demonstrated, the people of the states continue to seek accountability for and control of their federal representatives. Voting occasionally does not appear to satisfy their thirst for direct democracy. The Supreme Court has held that term limits, however popular, are beyond the states' constitutional powers. It may be that the Court's condemnation of state experimentation that affects Congress also encompasses the several state recall measures that have been passed but never implemented due to lingering doubts concerning their constitutionality. That would be unfortunate, for state recall measures aimed at rogue senators are a far more direct and salutary method for enforcing accountability than term limits. Such measures, if exercised responsibly under various safeguards, are a valuable component of the right granted to the people by the Seventeenth Amendment. The evidence thus far from the state and local exercise of the recall power suggests that the people are capable of implementing recall responsibly.

There can, of course, be no guarantees against abuse, no matter what safeguards accompany the power of recall. But errors and misfires are the sometimes heavy price we pay for the opportunity to experiment made possible by the federal system.

Prejudice against common citizens should not, as Justice Holmes cautioned, “prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious”¹⁸⁸ Senators, like the Federalists in New York, may consider a recall weapon in the hands of the people an unnecessary threat to their continuation in office. But amendments such as the Seventeenth stand as proof that under the Constitution the people have the last word.

188. *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting opinion).