

WHY DID AMERICANS BACK TERM LIMITS?

By Richard P. Hiskes

Every election provides its own festival of speculation about the fundamental supposition of democracy: that citizens are indeed able and willing to govern themselves. Our most recent exercise in expressing the "general will" was not an exception, but this time it carried unusual irony. In fourteen states voters overwhelmingly approved amendments *limiting their ability to choose their representatives* by enforcing the principle of office rotation in Congress, and in some cases, in state legislatures as well. [The popular vote in these 14 referendums on term limits, together with data on how Republicans, Democrats, and independents voted, are shown in the *Public Opinion Report* of this issue, p. 97.]

The constitutional status of the term limit referendums remains in doubt, awaiting federal court review. But these ballots carry special significance for the future regardless of their eventual judicial resolution. First of all, since the US remains one of the few western (or non-western) democracies without a national referendum procedure, these votes came closer than any before to being a national policy ballot. They provided over one-third of the country's voters with the opportunity to vote on term limits, exceeding by nearly 10% the proportion voting on the second largest set of referendums—the 1982 nuclear freeze ballots. Second, this issue marks one of the few times that the public has used the referendum to limit its own power as well as that of some institution of government. By enforcing rotation in office, citizens remove their chance to reelect incumbents after a specified tenure.

Putting The People Down

Since in every state where the referendums were held (and approved) voters re-elected most incumbent House members whose names were on the ballot, cynicism seems an obvious response. So

far, explanations of this apparent paradox have manifested a sneering and amateurishly psychological bent. By their vote citizens are analyzed as trusting their own representative, but no one else's; willing to rely on their own political acumen, but not their fellow citizens'; and even as questioning their own resolution to throw the rascals out. Such analyses offer a choice of cognitive dissonance, a sociopathology, or a puerile self-loathing, to explain the vote. In none of these is the electorate given much credit for understanding how politics really works. And, of course, all such explanations imply the need for further education and protection of citizens by their intellectual betters.

In fact, it's these explanations themselves that lack sophistication or subtlety in their cynicism. They miss what are the two most significant conclusions to be drawn from the people's action. The first bears witness in an unexpected way to the public's insight into Madisonianism. The referendum votes embody much political acumen about the role of institutions in US politics. The second conclusion is less optimistic and indeed signifies the unfortunate nature of the vote. When I return to this point below, I'll discuss how using the referendum process to achieve the goal of term limitation denatures that very process, and points to an even greater loss in the power of citizens to "oblige," as Madison put it in *Federalist #51*, "[government] to control itself."

The Rational Public

On the first score it's clear that by their vote in the referendums citizens expressed a loss of faith in aspects of the electoral process: To favor term limits is to admit that elections themselves will not achieve office rotation. Citizens might be lampooned here for not realizing that together they have always had the power to

enforce rotation simply by "voting the rascals out." On the other hand, supporters of the referendums recognize that—given the huge advantages incumbents have conferred upon themselves, in seeing to it that generally favorable images of themselves are widely disseminated—the wise course is to admit susceptibility to such blandishments and take steps to assure their larger objective nonetheless. These steps constitute a new institutional guarantee of rotation imposed on incumbents, regardless of the latter's success in stacking the electoral deck. It may seem odd to use the traditionally anti-institutional measure of the referendum to achieve institutional reform and revitalization, but the decision shows both rationality and considerable self-knowledge.

More than this, the referendum outcome resonates with the spirit of Madisonian institutionalism. In 1787, Madison believed that key to protecting the people's liberty was erecting a "constitutional clockwork" of institutions designed to check and balance each other's power. The governmental institutions were thus to be subject to citizens' electoral decisions but would not require the latter's constant supervision. Voters would be able to enjoy the luxuries of liberty without the onerous burden of incessant public participation.

Madison can be faulted for not recognizing that other benefits would accrue from increased political participation. But as he saw it, the essential goal was to guarantee an "automatic" response to power imbalance, one which would come from the institutional mosaic itself. This institutionalized check over the day-to-day functioning of government released citizens to exercise their energies in their own daily lives where they saw fit, confident that power was counteracting power to maintain their liberties.

Within this context, the term limit referendums can be viewed as the public's latest flash of Madisonian insight. Term limits are an institutional device to control government in the same mechanical, automatic way as do the other elements of the checks and balances system. Their approval displays citizens exhibiting a "republican intuition" about how to respond when their liberty is being threatened—here, by a class of self-perpetuating, professional politicians. The solution is simple and elegant: erect a new institution—term limitation.

The referendum process was born early in this century during a time characterized by a loss of faith in political institutions. The process retains its full Progressive pedigree only when used to protect the citizens' voice from becoming overly institutionalized. To their defenders, such as myself, referendums are important because they provide politics with the voice of real people, not institutions.

Referendums open the processes of government to the raucous cacophony of citizens in full voice. They can be dangerous for their susceptibility to demagoguery, and occasionally they go too far in their appeal to full-blooded passion—witness the Colorado vote voiding laws protecting the civil rights of homosexuals. But the openness of referendums as a legislative process ensures—as we are already seeing in Colorado—that the debate will continue even after the vote is taken. That continuity of discussion is the virtue of referendum politics as an aspect of direct democratic participation.

Referendums Become "Regular Politics"

Referendums are meant to be different from regular electoral politics—not to become the captives of money or media or political correctness, as political institutions and elections lately have become. The term-limit referendums, however, show how much referendum politics is now becoming like electoral politics in its

worst aspect—its captivity to big money and media.

The term-limit referendums need to be seen as the end of a lengthy development in which referendums have lost their progressive nature. The development has been shaped by a series of Supreme Court decisions, whose effects are paradoxical. On the one hand they have brought referendums into the mainstream of US politics; On the other, they have cost referendum politics its soul.¹

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The Court has rendered decisions that supply answers to four constitutional questions regarding referendums. In *Pacific States Tel. & Tel. Co. vs. Oregon*, the Court declared that referendums did not violate the Constitution's "guarantee clause" (Article IV, section 4), which assures every state a republican form of government.² Second, in a series of cases beginning in the 1960's, the Court subjected referendum decisions to the same judicial scrutiny as laws emanating from legislatures, thereby extending judicial review to the legislative decisions of citizens.³ Third, in 1976 Chief Justice Warren Burger declared (in *City of Eastlake vs. Forest City Enterprises*) that a "referendum cannot be characterized as a delegation of power."⁴ In so doing Burger opined that a constitutional amendment is not required to establish a national referendum process.

Finally, in its *Bellotti* (1978) and *Meyer* (1988) decisions, the Supreme Court did particular damage to the special nature of referendum politics. It refused in *Bellotti* to limit the amount of money that corporations could spend in referen-

dum campaigns, on the ground that such limits would constitute unlawful infringements on the corporate right of speech. Referendum campaign spending became the equivalent of speech in the Court's view, and even the rather loose strictures on spending in election campaigns could not be applied to it. In *Meyer*, the Court sanctioned the use of professional signature gatherers in the referendum process, thereby giving rise to a whole new class of paid political consultants, and removing the common citizen even further from the seat of power in referendums.⁵ Taken together, these actions by the Court have been part of a path away from empowerment for ordinary citizens in their use of the plebiscite.

Given the changed nature of referendums, the only rational course for the public was to give up on populist measures and erect the new institutional device of term limits. That the referendum was the *via media* of this surrender to institutionalism and big money is at once sad and ironic, and oddly resourceful.

Endnotes

¹For a full discussion of the evolution of Court doctrine regarding referendums, and of how referendums have changed as a result, see my discussion in chapter 7 of: John J. Rourke, Richard P. Hiskes, and Cyrus Ernesto Zirakzadeh, *Direct Democracy and International Politics*, (Boulder, CO: Lynne Rienner Publishers, 1992).

²223 U.S. 118 (1912).

³See *Reitman vs. Mulkey*, 387 U.S. 369 (1967); *Hunter vs. Erickson, Mayor of Akron*, 393 U.S. 385 (1969); *James vs. Valtierra*, 402 U.S. 136, 141 (1971); *Crawford vs. Board of Education*, 102 U.S. 3211 (1982); and *Washington vs. Seattle*, 102 U.S. 3187 (1982).

⁴426 U.S. 668 (1976), p. 672.

⁵For a discussion of the negative effects of the Meyer decision, see Daniel Hays Lowenstein and Robert M. Stern, "The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal," *Hastings Constitutional Law Quarterly*, 1989, pp. 175-224.

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