

## TERM LIMITS, INITIATIVES, AND OTHER GIMMICKRY

*Daniel H. Lowenstein\**

When I first got a letter asking me to be on this panel, I was confused. I thought maybe they had sent it to the wrong person or sent me the wrong panel, until I read the description and saw that they were talking about these devices—line-item veto, term limits, and initiatives. My primary field has been election law and I will limit my remarks accordingly. But my guess is, the skepticism I am about to express would go over to many non-electoral devices, too.

Just to tell you where I am coming from, I think that we actually do live in a democracy, despite the skepticism a lot of people express about the political process. Ultimately, major matters are decided by the public. It is a debate of ideas. So, if you want to limit government, what you need to do is persuade the public that it is a good idea to limit government.

So, to begin, I will discuss briefly term limits, initiatives, and an extra item—redistricting—and why I am skeptical about all three.

*Term limits.* We do have some experience with term limits in California. Other states do as well. Any of you who think that term limits are likely to lead to a legislature more to your liking, I invite you to visit California. You can observe the California legislature. And if you go home with a pro-term-limits opinion, I will be deeply shocked. I believe that the California legislature is probably the most liberal legislature that we have ever had in this country. I do not know; I have not looked at the Massachusetts legislature. Maybe they would give us some competition.

But you know, I think what term limits do is make legislatures less effective than they would be otherwise, whatever it is that they are trying to do by way of public policy. If legislators came to office with a little label on their forehead that said either “leadership” or “backbencher” and you could apply limits only to the backbenchers, I still would not favor term limits, but I would not oppose them so strongly. It is hard to be an effective leader when you are a lame duck from the day you enter office.

I used to live in Sacramento. I knew something about what was going on in the legislature. Now, I rely more on secondhand accounts. But all the

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\* Daniel H. Lowenstein is a Professor at the University of California, Los Angeles School of Law. Professor Lowenstein originally delivered these remarks during Showcase Panel III, entitled *Are Constitutional Changes Necessary to Limit Government?*, at the Federalist Society’s 2006 National Lawyers Convention, on Saturday, November 18, 2006, in Washington, D.C.

secondhand accounts I get from across the political spectrum tell me that the legislature, especially the assembly, which has been most affected by term limits, has just become a dysfunctional organization.

*Initiatives.* I have not yet read John Matsusaka's book, which Bill Eskridge referred to.<sup>1</sup> But I think highly of Matsusaka, and I have no doubt that his conclusions are well founded. So let us take it as given that some experience with initiatives shows that there is a statistical tendency to reduce state budgets. There are still two problems with that, however. First of all, Matsusaka is a social scientist. He is not a constitutional designer, and he does not purport to be. He is properly studying what has happened and perhaps extrapolating to what tends to happen under the current circumstances. But these are not laws of physics, and what has happened is not bound to continue under different political circumstances.<sup>2</sup> So, even assuming his thesis is correct, I do not think you can project it into the indefinite future. Nor, if you are thinking about initiatives at the federal level, as Professor Eskridge said and I agree,<sup>3</sup> can you assume that the dynamics of it are going to be the same at the federal level as they are at the state level.

But there is another question, and that is, what do you mean by limiting government? Is it simply a matter of how much money the government spends? Let me give you an example from California. We had Proposition 13.<sup>4</sup> We also had a less well-known initiative shortly after that limiting spending by the state government. Maybe those have a tendency to control spending to some extent in California. But this is leaving aside side-effects such as the shift of power from local government to state government, which may be good or bad, depending on your view. And there are other things besides spending money.

One major initiative that passed in California, not too many years after I moved there, was Proposition 20, which created the state coastal commission, which was, at the time, a very large advance in land use regulation

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<sup>1</sup> JOHN G. MATSUSAKA, *FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY* (2004); see William N. Eskridge, Jr., *No Easy Constitutional Solution for Big Government*, 102 NW. U. L. REV. 457, 458–59 (2008) (discussing John Matsusaka's book). Fortunately, that deficiency has been corrected. See also Daniel H. Lowenstein, *Competition and Competitiveness in American Elections*, 6 ELECTION L.J. 278, 288–89 (2007) (discussing Matsusaka's book together with some of his other work).

<sup>2</sup> As I discovered later upon reading the book, Matsusaka actually finds that in the early decades of the twentieth century, the initiative tended to influence states toward higher spending levels. The consistent trend has been that the initiative moves state fiscal policy closer to the point desired by the public. Research by Matsusaka and others indicates the same is true on a number of social issues. See, e.g., John G. Matsusaka, *Direct Democracy and Social Issues* (May 2007) (unpublished paper), available at <http://ssrn.com/abstract=989682>.

<sup>3</sup> See Eskridge, *supra* note 1, at 459.

<sup>4</sup> See generally PROPOSITION 13 AND ITS CONSEQUENCES FOR PUBLIC MANAGEMENT (Selma J. Mushkin ed., 1979); Howard Jarvis Taxpayers Ass'n, Proposition 13, <http://www.hjta.org/proposition13> (last visited Sept. 10, 2007).

over an enormous area, the California coastline.<sup>5</sup> Now, I do not want to argue for or against that law, but it seems to me that the California Coastal Commission, so far as public spending is concerned, is not a particularly major item. It is probably a very small item in the state budget. But is that limited government, when the initiative is used to extend regulation in that dramatic way? If the initiative can be used for that purpose and also has the effect to marginally decrease federal and state spending, would you say that is a net limitation or expansion of government?

I think everybody who studies the initiative will agree with this: if you look at it over time, the initiative does not belong to liberals. It does not belong to conservatives. It has been used by both sides quite effectively, and by all kinds of other groups that cut across the liberal-conservative divide. It should be considered on its own merits, but not as something that is going to benefit one side of the political spectrum or the other. We can say that based on experience.

*Redistricting.* Let me also say a word about redistricting, because I spent the 1980s defending the California redistricting plan, both in court and in public debate, against Republican charges that this was the greatest crime in the history of mankind. The *Wall Street Journal* editorial page certainly seemed to think so,<sup>6</sup> and many Republicans at the time thought redistricting change would be the key to Republican electoral success. Now, in the current decade, it is interesting because a different ox was gored by redistricting after the 2000 Census, and Democrats have been upset by it. The main push for redistricting change has been from the Democrats, not in California but in other states, and many Republicans have been resisting it.

For example, Mike Carvin, whom some of you may have heard give a stirring address on his view of civil rights at this National Lawyers Convention, has been effectively defending Republican plans around the country against Democratic challenges.<sup>7</sup> Here again, I think both Republicans and Democrats who think redistricting “reform” will solve their problems are mistaken. I do not have time to go into all the details here; it is a very complicated subject.<sup>8</sup> But redistricting has very little effect, I think, on the gen-

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<sup>5</sup> See JOHN M. ALLSWANG, *THE INITIATIVE AND REFERENDUM IN CALIFORNIA, 1898–1998*, at 136 (2000).

<sup>6</sup> See, e.g., Editorial, *Adios, Gerrymander*, WALL ST. J., Dec. 20, 1991, at A14; Editorial, *Assault on the Gerrymander*, WALL ST. J., Dec. 20, 1989, at A14; Editorial, *California Etch-a-Sketch*, WALL ST. J., Sept. 20, 1991, at A12; Editorial, *Gerrymandered to the Kitchen*, WALL ST. J., Apr. 30, 1990, at A14; Editorial, *Picasso Democracy*, WALL ST. J., Aug. 24, 1987, at 22; Editorial, *Squeezing the Gerrymander*, WALL ST. J., July 3, 1986, at 16.

<sup>7</sup> Michael A. Carvin, Address at the Federalist Society’s 2006 National Lawyers Convention: Civil Rights in the 21st Century (Nov. 17, 2006); see also Michael A. Carvin & Louis K. Fisher, “A Legislative Task”: *Why Four Types of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts*, 4 ELECTION L.J. 2 (2005).

<sup>8</sup> See generally Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1 (1985); Daniel H. Lowenstein, Vieth’s

eral thrust of partisan or policy politics in this country. It can be of great importance to individual politicians, which is why they care about it so much, but I think that the press and many politically active people greatly exaggerate the significance of it.

So, I want to conclude with the point again that if you want limited government, the way to get it is not to rely on gimmicks. The way to get it is the old-fashioned way: to convince the public that it is a good idea. My first flight out of Burbank on Wednesday, when I was coming over here, got canceled, so I had more time than I expected to sit in airports, and I spent at least a little bit of that time profitably reading an article in an issue of *National Review* by Ramesh Ponnuru—a rather astute political analyst.<sup>9</sup> He was writing about the crisis of conservatism at the present juncture—although I think he wrote the piece before the election. Let me just read you a sentence or two from his conclusion. He says, “That crisis can be boiled down to two propositions. The first is that, at least as the American electorate is presently constituted, there is no imaginable political coalition in America capable of sustaining a majority that takes a reduction of the scope of the federal government as one of its central tasks.”<sup>10</sup> That is bad news for those of you who want limited government. “The second is that modern American conservatism is incapable of organizing itself without taking that as a central mission.”<sup>11</sup>

What he is saying is that the conservative movement cannot stand without a wing pushing for limited government, but it cannot possibly succeed if that wing leads. So, I think you have a burden of persuasion, and a tricky but not unmanageable political task to make sure you get your share of what you want without seeking so much that you undermine the entire movement. Whether that is the right analysis or not, I am convinced you are not going to win by gimmicks. You are going to have to do it by hard political work.

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*Gap: Has the Supreme Court Gone from Bad to Worse on Partisan Gerrymandering?*, 14 CORNELL J.L. & PUB. POL’Y 367 (2005).

<sup>9</sup> See Ramesh Ponnuru, *Conservatives on the Couch: A Diagnosis*, NAT’L REV., Nov. 20, 2006, at 32.

<sup>10</sup> *Id.* at 34.

<sup>11</sup> *Id.*