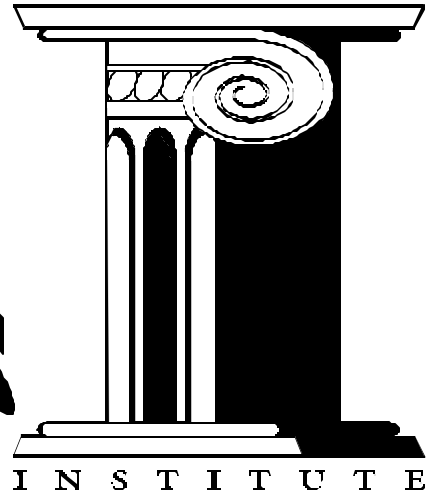


LIMITS



On Power and the Use of Coercion

Let 50 Recalls Bloom

by Stephen Moore and Paul Jacob

The biggest winner in last week's historic recall election in California was not Arnold Schwarzenegger, but rather the citizens of California. Millions of California voters have exercised their right to remove an incompetent and corrupt governor. Three cheers for democracy. The scandal is that less than half the states give voters the right to recall their elected officials. We think this should be made a basic right of voters in all states and at the federal level. Recall is the ultimate voter safeguard to keep politicians honest and accountable.

This isn't the way the Left sees it at all. The *Los Angeles Times* argued that the recall was "baldly partisan, threatens political civility that allows

democracy to work, has become a circus that mocks the electoral process, and is inherently undemocratic." But what in the world is undemocratic about a citizen-driven movement (two million Californians signed petitions for the recall) that engaged and energized voters across the state?

Why should politicians be "entitled" to a full four years in office if they are not performing? If corporate CEOs run their businesses into the ground, they don't get to stay in their job for a term in office. It would be a breach of fiduciary duty of a board not to depose an incompetent CEO. Well, Gray Davis was the de facto CEO of California, the sixth-largest financial entity in the world. The economy cratered. The voters had a fiduciary duty to oust Davis as they did.

One group called "Republicans Against the

Recall" complained that the recall is a "weapon of mass political destruction. The recall will set a terrible precedent. Soon labor unions and environmentalists will be trying to recall Republicans." Good. Many Republicans should be recalled from office. In Nevada, voters are attempting to recall their Republican governor, Kenny Guinn, for raising taxes after he had promised not to. Good move. Recalls are the ultimate shock therapy that empowers voters to impose discipline and accountability on politicians. We need more such mechanisms, not fewer.

The recall procedure is a political reform that came out of the progressive era of American politics. It was designed to wrestle control of the political process away from entrenched special interests and politicians who had been

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Dr. Don Racheter,
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Initiative and Referendum in the States

by Amy K. Frantz

Voters in at least two states this November considered initiatives to expand opportunities for gambling. In **Colorado**, a Constitutional Amendment initiative to allow video lottery terminals at certain racetracks and casinos in the state was defeated. The proceeds from the video lottery were slated to go, in part, toward tourism promotion and additional spending on parks and recreation.

Maine voters rejected, by a 2-1 margin, a proposed initiative to allow two Indian tribes to open a casino in southern Maine, despite promises to create thousands of jobs at the casino and supporting businesses and to dedicate part of the casino proceeds to state education and municipal revenue sharing. However, the state's voters did approve an initiative to permit slot machines at certain racetracks, provided part of the proceeds are used to reduce the cost of prescription drugs for

seniors and to fund college scholarships.

In **Denver, Colorado**, voters were asked to consider the so-called "peace initiative" promoted by a former Transcendental Meditation teacher. This initiative, requiring city officials to implement programs to reduce stress and promote peace, was defeated by a more than 2-1 margin.

In **Washington State**, a statutory initiative to repeal the state's ergonomics regulations was approved. National ergonomic regulations were issued during the Clinton Administration, but were repealed by Congress in 2001. Initiative 841 repeals the ergonomic regulations issued by the Washington State Department of Labor and Industries. Labor unions opposed the repeal, while business associations and individual companies supported

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The Case for a Supermajority to Raise Taxes

by Robert A. Lawson, Ph.D.

HJR 7 proposes a constitutional amendment that would require increases in state taxes be approved by a two-thirds “supermajority” of the legislature. The Buckeye Institute has a long record of advocating for a smaller state government, and a supermajority requirement should constrain the ability of the legislature to expand government.¹ Therefore, HJR 7 is consistent with our long-held position.²

The concept of a supermajority is hardly new. For issues of particular importance, such as constitutional amendments, most states and the federal government require majorities in excess of a simple majority for passage. Therefore, there is nothing undemocratic about a supermajority requirement; alternatively, there is nothing special *per se* about the standard “fifty percent plus one” rule of passage.

It is widely recognized that one of the most significant threats in any democracy is the ability of the majority to tyrannize the minority.³ In fact, we also worry as much, if not more, about the ability of organized special interests to use the political process to exploit an unorganized majority.⁴

If we wanted to eliminate such threats, of course, we

could require a unanimity rule to pass legislation. There would be little threat of tyranny if we required all parties to agree to any measure before passage. The downside of such a rule is that the costs of the requisite negotiating among the participants would be very high indeed, and many worthwhile decisions would die on the vine. In addition, unanimity would allow “holdouts” to strategically bargain with the remaining participants, thus threatening any agreement from taking place.⁵

Because of these problems, collective decisions must in fact be made with a decision rule that is less than unanimous if we are going to get anything done.⁶ But there is no reason to suppose that a simple majority is necessarily the optimal decision rule.

For relatively minor decisions, the low-cost simple majority rule is probably acceptable in most circumstances. But for significant decisions, a supermajority is clearly called for.

The question then before us is whether tax increases represent a significant enough threat to warrant the extra protections afforded by a supermajority rule? I think the answer to this question is yes.

Taxes represent a claim on the part of the government on

the property of citizens, and as Justice Marshall told us, “the power to tax involves the power to destroy.”⁷ The majority (or for that matter an organized special interest) can often use the power to tax to effectively steal the property of others.

The use of the power to tax to take property from one to give to another jeopardizes the very legitimacy of government. A supermajority is a way to better assure that taxes are being used for truly *public* purposes that better all (or at least most) Ohioans.

Ohio would not be unique if it were to enact this legislation. At least a dozen states have some form of supermajority requirement to raise taxes and/or increase government spending beyond some limit.⁸

Supermajority requirements have hardly prevented states and the federal government from amending their constitutions when desired. And looking back at those cases in which constitutional amendments failed to get the necessary supermajority, but did get a simple majority, such as the Equal Rights Amendment, one could argue that we were wise to avoid passing such measures given the lack of a true consensus.

Supermajorities can act as a brake against rash political

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**The Case for a
Supermajority . . .
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decisions which we would later regret, but which we would have difficulty undoing *ex post*. Like other constitutional restrictions (such as the Bill of Rights, term limits, etc.), a supermajority is designed to reduce the likelihood of the worst kinds of abuses that can occur in any democracy.

By itself, a supermajority rule alone will not usher in an era of radically smaller government. After all, a supermajority requirement does not prevent tax increases, it merely requires that any tax increase receive broad-based support and be for the common good. This is only prudent, given the potentially destructive nature of taxes.

ENDNOTES:

¹A very good overview of the arguments in favor of supermajority rules can be found in an article by John O. McGinnis and Michael B. Rappaport, "The Case for Supermajority Rules," *Policy Review*, December 1999.

²The Buckeye Institute does not advocate for or against particular pieces of legislation, but rather argues for policies consistent with our mission. Nothing written or spoken here should be construed as an attempt to aid or hinder the passage of any legislation.

³This fear consumed the Founders and is the reason behind many of the features embedded in the Constitution itself. The Bill of Rights in particular represents an attempt to protect the minority from the political power of the majority.

⁴A classic discussion on this topic is by Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, MA: Harvard University Press, 1965).

⁵This discussion draws heavily on the classic work of Nobel Laureate James Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor: University of Michigan Press, 1965).

⁶However, requiring unanimous agreement is the norm in our private lives. In markets, which rely on voluntary exchange, all parties to the transactions must agree for a transaction to take place. In essence, everyone in markets has veto power to kill any deal in which he is a participant.

⁷*McCulloch v. Maryland*

⁸These states include Arizona (1992), Arkansas (1934), California (1978), Delaware (1980), Florida (1971/1996), Louisiana (1966), Mississippi (1970), Nevada (1996), Oklahoma (1992), Oregon (1996), South Dakota (1996), Washington (1993).

Robert Lawson is Director of the Buckeye Institute's Center for Economic Growth and Prosperity and the George H. Moor chair in economics at Capital University. This article was given as testimony before the Ohio House Ways & Means Committee on May 8, 2003.

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LIMITS

Question of the Quarter:

Should Iowa adopt a supermajority requirement to increase taxes?

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Let 50 Recalls Bloom

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bought off by them. But now commentators want the politicians to be immune from voter disapproval. David Broder of the *Washington Post* recently moaned, "The recall is the by-product of almost everything that has gone wrong in our political system. Partisan excess, rampant personal ambition, dereliction of leadership, media inattention, phony populism, and, as usual, the influence of money all are part of this nearly unprecedented perversion of representative government." How in the world is what occurred in California, "phony populism?" For years and years liberals political analysts like Mr. Broder have been bemoaning voter apathy and disengagement from politics. Here millions of voters mobilized in record numbers in California to change the way their government is being operated, and the exercise is being denounced as a circus. No wonder voters are cynical.

Today only 15 states allow citizens to recall their politicians for incompetence, criminal behavior, or other misdeeds in office. This allows the voters to rebel peacefully against political arrogance and

misconduct. This is a commonsense voter disciplining measure to keep the politicians accountable to the people who put them in office. The nation needs more such mechanisms to ensure accountability, not fewer.

We believe that every state should empower its citizens with three basic rights as voters: referendum, initiative, and recall. These measures each put power into the hands of voters at a time when politicians, bought off by trial lawyers, unions, or business interests, refuse to put the public interest first.

We also favor a constitutional amendment to permit voters in states and congressional districts to recall their congressional representatives in Washington. That would make congressmen stop and think before they run \$500 billion budget deficits, vote themselves preposterous pay raises, kite checks from the congressional bank, and engage in other acts of mischief.

Thomas Jefferson had it exactly right when he once declared: "A little rebellion now and then is a good thing." That is what happened in California. With a bigger budget deficit than all the other 49 states combined, the political system in Sacramento needed a good shake up. Too bad so few states allow this peaceful form of rebellion to take place through the power of recall.

Stephen Moore is President of Club for Growth and a contributing editor of National Review. Paul Jacob is President of Citizens in Charge.

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Citizens in Charge is a non-profit, non-partisan advocacy organization working to protect citizen initiative and referendum rights in the 24 states with I&R and to expand initiative and referendum rights to voters in states that lack the process. For more information visit Citizens in Charge's Website at www.citizensincharge.org, e-mail Mr. Jacob at pj@citizensincharge.org, or call 1-866-3-CHARGE.

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The FTC Gets in Its Licks

by George C. Leef

The freedom of Americans to peacefully manage their own affairs has been shrinking for many decades, as government officials find more and more reasons to tell us what things we must do and what things we may not do. The pettiness of it all is wonderfully demonstrated in a recent decision by the agency that supposedly acts as a protector of the consumer: the Federal Trade Commission (FTC).

The FTC has legal power to block business mergers that it decides might “lessen competition.” Recently, the management of Dreyer’s Inc., a firm that makes ice cream, concluded a deal with the international food giant Nestlé, under which Nestlé would purchase Dreyer’s stock and wind up with majority control of the firm. Dreyer’s shareholders approved the transaction, only 0.1 percent of the shares being voted against. But it isn’t enough just to have a willing buyer and a willing seller in modern America. You also have to play “Captain, may I?” with government officialdom. In March, the FTC announced its opposition to the merger. If Nestlé and Dreyer’s want to merge, they will have to fight it out with the FTC in court.

Here are the pertinent facts. There is a huge market for ice cream and similar frozen desserts (like Eskimo Pies). A

small part of that market consists of what the FTC calls “superpremium” ice cream — very rich and costly brands such as Häagen-Dazs, Ben & Jerry’s, and Godiva. The FTC contends that 98 percent of the “superpremium market” is “controlled” by three large manufacturers: Nestlé, Dreyer’s, and Unilever. If two of those three were allowed to merge, the result would be “greater concentration” in the industry, which the FTC invariably assumes to mean less competition and therefore harm to consumers. The director of the FTC’s Bureau of Competition, Joe Simons, said, “This merger, as structured, would likely raise prices and reduce choice for consumers. The market for superpremium ice cream is already highly concentrated and this deal will reduce the number of significant competitors from three to two.”

This is the classic approach of antitrusters: define markets with absurd narrowness and then assume that any reduction in the number of competitors is an “injury to competition” necessitating their intervention. It’s all done to help those of us who can’t resist an occasional bowl of ice cream. I cheerfully admit to being one of those people, and would be quite pleased to see the FTC stop pretending to do me favors.

First, the “superpremium ice cream market” is nonsense. There is nothing unique about Häagen-Dazs, Dreamery, Ben & Jerry’s, or any of the other brands. They cost more per ounce and have a higher butterfat content, but still it’s just ice cream. Dreyer’s superpremium ice creams compete for consumer favor with their premium labels, as well as with many other ice creams, like Sealtest and Texas Gold. If the three or two makers of superpremium ice cream should start to raise their prices, they will find their sales falling as consumers switch to other ice creams or other luxury desserts that now seem to be a better value.

Second, the FTC treats as of no consequence the sellers of that small slice of the “superpremium market” not accounted for by the big makers. But they exist and offer real competition. I grew up in a city known for its custard stands (Milwaukee) and consumers can and do purchase terrific ice cream there. (Maybe the FTC wizards don’t think that “custard” belongs in the same market as “superpremium ice cream,” but I do.) If the Dreyer’s-Nestlé merger takes place and prices go up for superpremium ice cream sold in stores, many consumers will stock up on pints or quarts of custard. Also, most cities have specialty ice-

cream shops such as Baskin-Robbins that sell scrumptious products that I'd bet the regulators at the FTC couldn't tell from "superpremium" in a blind taste test. If prices for products like Häagen-Dazs go up, those shops will find themselves serving more customers.

Third, the FTC makes far too much of the reduction in the number of major competitors from three to two. It's an economic old wives' tale that the intensity of competition is a function of the number of firms. Fewer firms do not necessarily mean less competition. Unilever's Ben & Jerry's brand will still struggle just as hard to win purchasers away from other labels, no matter the ownership arrangement of Dreyer's and Nestlé facilities. That's because they are also struggling to win customers from other ice creams and luxury desserts.

Finally, even if all the competitors in the "superpremium" market were to raise their prices that would simply invite new competition from ice-cream makers who don't currently produce superpremium brands but could readily do so.

It looks awfully silly for a government agency to flex its muscles over a proposed merger involving a small part of the market for one kind of dessert. Even if the FTC's fears were realized, all that would happen is that a container of Cherry Garcia or Black Raspberry Avalanche might go

up in price from perhaps \$3.29 to \$3.49. Why should that be any concern of the federal (or state or local) government? Anyone who doesn't like the price increase can buy something else, or have "superpremium" ice cream less often. Government is supposed to protect our rights to life, liberty, and property, not fret over whether we're getting the lowest possible price for ice cream.

So why go through this exercise, either forbidding a harmless merger or forcing the firms to spend huge sums on legal fees to fight an FTC injunction in court? In a column in the March 12 *Wall Street Journal*, writer Holman Jenkins put his finger on the reason: "Now the agency has manufactured an enemy monopolist that it can be seen vanquishing in a fabulous war of regulatory coercion. . . . It's obvious why the FTC engages in such intellectual sleight of hand. It wouldn't have anything to do otherwise. Were they obliged to wait until presented with a case raising genuine antitrust concerns, its lawyers might spend the whole of their government service twiddling their thumbs."

That's exactly it. Government agencies want to be perceived as beehives of activity. If they weren't, taxpayers might start asking impertinent questions like, "Why are we paying high salaries to all these people?"

Jenkins's column hit a raw nerve at the FTC. It drew an indignant reply letter from Bureau of Competition Director Simons, who harrumphed that Jenkins was displaying his "indifference to consumer welfare."

But free markets are the best maximizers of consumer welfare, and they don't stop working just because the owners of two competitors want to merge their operations. We no more need a federal agency to oversee competition than we need one to make sure that gravity keeps working.

George C. Leef is the book review editor of Ideas on Liberty and too familiar with the ice-cream market for his own good.

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**I&R in the States
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the repeal, fearing the high cost of compliance with the ergonomics regulations.

In October, the gubernatorial recall election also provided **California** voters the opportunity to vote on two initiatives, both of which were defeated. Proposition 54 banned state and local governments from collecting racial statistics and data. Proposition 53 required a portion of the state budget to be set aside for infrastructure spending.

Amy K. Frantz is a Research Analyst with Public Interest Institute.

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