

January 2004

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### Recommended Citation

Sarah Kroll-Rosenbaum, *Golden v. New York City Council*, 48 N.Y.L. SCH. L. REV. (2003-2004).

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GOLDEN V. NEW YORK CITY COUNCIL

(decided May 19, 2003)

SARAH KROLL-ROSENBAUM\*

Tocqueville observed that early America possessed “a secret tendency in democratic institutions, which [made] the exertions of the citizens subservient to the prosperity of the community, in spite of their vices and mistakes.”<sup>1</sup> This not so “secret tendency” is the very purpose of American representative democracy. Voters elect representatives to centralize and streamline the policy-making process. The electorate is then freed to carry on with other aspects of their daily lives. Occasionally, policy decisions are posed directly to voters through initiatives and voter referenda, the most common instruments of direct democracy. Voters either approve or reject these citizen- or legislature-sponsored policies at the ballot box.<sup>2</sup> Beyond the instrumentalities of electoral choice, questions inevitably emerge about the balance of decision-making powers in the rare instances of voter-legislated policy. Does the direct will of the people stand or, can a legislature interpose its authority to amend or overturn a law enacted through a voter referendum? Within this theoretical framework, legal limits must exist to delineate the boundaries of decision-making powers.

In *Golden v. New York City Council*,<sup>3</sup> the New York Appellate Division, Second Department, addressed the issue of divided powers between voters and legislature as applied to New York City Council

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1. Alexis de Tocqueville, *Democracy in America* 102 (Richard D. Heffner ed., Mentor Books 1956) (1835).

2. Election law governing the use of ballot initiatives and referenda varies between state and local governments. Generally, there are petitioning and approval requirements for citizen-sponsored ballot initiatives. Likewise, state and local election law mandates voter referendum for certain legislative acts (e.g., amending the term-limits law). See generally Initiative & Referendum Institute at the University of Southern California, at <http://www.iandrinstitute.org> (last visited March 12, 2004).

3. *Golden v. New York City Council*, 762 N.Y.S.2d 410 (N.Y. App. Div. 2003), *appeal denied*, *Golden v. New York City Council*, 100 N.Y.2d 504.

(“City Council”) term limits. The court upheld the City Council’s power to enact legislation which amended a New York City Charter (“Charter”) provision approved through a voter referendum. Specifically, the court rejected a challenge by potential City Council candidates to the City Council’s authority to enact New York City Local Law Number 27 of 2002 (“Local Law No. 27”).<sup>4</sup> Local Law No. 27 amended the City Council’s term limits law.<sup>5</sup> Plaintiffs sought to invalidate Local Law No. 27 and asked the court to declare that “any further attempt by respondent The New York City Council to enact such law is subject to a mandatory referendum.”<sup>6</sup> In rejecting plaintiffs’ claims, the *Golden* court clarified when a law is subject to mandatory referendum. Its ruling implicitly delineated the boundaries between direct and representative democracy in New York City.<sup>7</sup> This Case Comment contends that while the majority’s general holding correctly upheld Local Law No. 27, the court stopped short of creating meaningful precedent. Rather, as the dissent aptly asserted, a clear legal threshold must exist that limits the City Council’s legislative authority and defines precisely when voters must decide through referendum to amend the term limits law. In the balance between direct and representative democratic decisions, there must be unambiguously defined limits on voter and City Council power. Clear disclosure in the law will protect voters’ interests and curb political over-reaching by the City Council.

*Golden* resolved a seemingly simple conflict between three laws enacted at different times through referenda,<sup>8</sup> each addressing City Council-member eligibility and term limits. In 1989, voters adopted Charter § 25(a) to coordinate elections with decennial redistricting.<sup>9</sup> Many City Council districts are reapportioned following the decennial census such that voters find themselves voting for new and different candidates than they elected two years earlier. Ac-

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4. N.Y., N.Y. Local Law 27 (2002).

5. The specific amended term limits provisions were New York City Charter § 25 (2001), New York City Charter § 1137 (2001), and New York City Charter § 1138 (2001).

6. *Golden v. New York City Council*, 765 N.Y.S.2d 135, 136 (N.Y. Sup. Ct. 2003).

7. *Golden*, 762 N.Y.S.2d at 413.

8. The three laws in question were New York City Charter § 25 (a) enacted in 1989 and New York City Charter §§ 1137 and 1138, both enacted in 1993.

9. New York City Charter § 25 (2001).

ording to Charter § 25(a), the normal four-year City Council terms would be interrupted with two consecutive two-year terms every twenty years. Therefore, City Council members who were elected for a two-year term in 2001 and a subsequent two-year term in 2003, would be elected for a four-year term in 2005. In 1993, New Yorkers adopted Charter §§ 1137 and 1138 through referenda, which limited the elected terms of City Council members.<sup>10</sup> The newly adopted Charter § 1137 limited terms of office, as a matter of public policy, to no more than eight consecutive years.<sup>11</sup> Charter § 1138 rendered candidates who had previously served in public office for two or more consecutive terms ineligible to run again for that office unless a full term had since elapsed.<sup>12</sup> The cumulative effect of these three provisions was to bar incumbent candidates, who had previously served a four-year term and a two-year term, from seeking a second two-year term during the twenty-year odd cycle. Otherwise, the candidates would serve for more than two consecutive terms, in violation of § 1138, or would only have served in public office for six years, two years short of the eight-year limit mandated by § 1137.

In order to cure this conflict, the City Council, in its 2002 session, overrode a mayoral veto to enact Local Law No. 27.<sup>13</sup> Local Law No. 27, which amended Charter § 25, states that:

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10. New York City Charter §§ 1137 and 1138 also apply to mayor, public advocate, comptroller and borough president.

11. New York City Charter § 1137 provides:

[i]t is hereby declared to be the public policy of the city of New York to limit to not more than eight consecutive years the time elected officials can serve as mayor, public advocate, comptroller, borough president and council member so that elected representatives are "citizen representatives" who are responsive to the needs of the people and are not career politicians.

12. New York City Charter § 1138:

[n]otwithstanding any provision to the contrary contained in this charter, no person shall be eligible to be elected to or serve in the office of mayor, public advocate, comptroller, borough president or council member if that person had previously held such office for two or more full consecutive terms (including in the case of council member at least one four-year term), unless one full term or more has elapsed since that person last held such office; provided, however, that in calculating the number of consecutive terms a person has served, only terms commencing on or after January 1, 1994 shall be counted.

13. *Golden v. New York City Council*, 765 N.Y.S. 2d 135, 138 (Sup. Ct. 2003).

Notwithstanding any other provision of this charter or other law, a full term of two years, as established by this subsection, shall not constitute a full term under section 1138 of this charter, except that two consecutive full terms of two years shall constitute one full term under section 1138. A member of the council who resigns or is removed from office prior to the completion of a full term shall be deemed to have held that office for a full term for purposes of section 1138 of the charter.<sup>14</sup>

Under Local Law No. 27, an incumbent candidate running in the 2003 election who had previously served a four-year term and a two-year term could now serve a second two-year term without violating the City Charter.

The *Golden* plaintiffs argued that the City Council overstepped its authority when it amended this series of referenda. Voters, plaintiffs contended, should decide whether to amend the term limits law directly through referendum.<sup>15</sup> The Supreme Court of Kings County agreed, holding that Local Law No. 27 was subject to mandatory referendum. The critical distinction for the lower court was whether Local Law No. 27 extended the length of terms or merely altered the qualifications for reelection.<sup>16</sup> If the law extended the length of the terms of office, it was subject to mandatory referendum.<sup>17</sup> If, however, Local Law No. 27 “merely impose[d] a qualification for office . . . [then it] . . . *may not* be submitted to the electorate due to the absence of any express statutory authority enabling the Council to do so.”<sup>18</sup> The court heeded plaintiffs’ argument that the City Council’s consideration of the law frustrated due process because it shifted power from junior Council-members to senior Council-members.<sup>19</sup> Given the nearly certain re-election of incumbents and the preference for senior members in leadership appointments, senior Council-members whose terms would otherwise end, had an interest in extending the length of their terms.<sup>20</sup>

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14. N.Y., N.Y. LOCAL LAW 27, § 1(B)(25) (2002).

15. *Golden*, 765 N.Y.S. 2d at 145.

16. *Id.* at 140.

17. *Id.* at 139. *See infra* notes 26-27.

18. *Id.*

19. *Golden*, 765 N.Y.S.2d at 145.

20. *Id.*

The court found that as a political reality, Local Law No. 27 extended term length.<sup>21</sup> The lower court supported its finding that Local Law No. 27 affected term length, rather than mere eligibility, stating that “the enactment of Local Law No. 27 without referendum was inconsistent with the historical practice of enacting term-limit legislation by referendum.”<sup>22</sup> Indeed, Local Law No. 27’s legislative history suggested that “voters should decide any major change to the term limit law . . . [which] . . . would have to be done by ballot initiative or voter approved charter revision.”<sup>23</sup>

The Appellate Division reversed, limiting its inquiry to “whether a law created by a voter-initiated referendum can be amended by the New York City Council without referendum.”<sup>24</sup> Skirting the City Council’s contentious partisan politics in favor of a purely procedural tack, the court stated that “we do not consider whether such action by the City Council is moral, ethical, or politically advisable.”<sup>25</sup>

The court pointed to the standard for mandatory voter referendum, which is set out in Charter § 38<sup>26</sup> and Municipal Home Rule Law § 23.<sup>27</sup> Read together, the court found that “a local law is subject to mandatory referendum if it ‘changes the term of an elective officer’ . . . or if it ‘abolishes, transfers or curtails any power of an elective officer.’ ”<sup>28</sup> Because Local Law No. 27 “merely amended

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21. *Id.*

22. *Golden*, 762 N.Y.S.2d at 413.

23. *Golden*, 765 N.Y.S.2d at 141 (citing *Defining Qualification for Council Office: Addressing the Two Year Inequity*, New York City Council Report, 2002).

24. *Golden*, 762 N.Y.S.2d at 412.

25. *Id.*

26. New York City Charter §§ 38.4-5 (2001), state that:

A local law shall be submitted for the approval of the electors at the next general election held not less than sixty days after the adoption thereof, and shall become operative as prescribed therein only when approved at such election by the affirmative vote of a majority of the qualified electors of the city voting upon the proposition, if it: . . . (4) Abolishes an elective office, or changes the method of nominating, electing or removing an elective officer, or changes the term of an elective officer, or reduces the salary of an elective officer during his or her term of office; (5) Abolishes, transfers or curtails any power of an elective officer.

27. Municipal Home Rule Law §§ 23(2)(e)-(f) is the New York State provision that grants municipalities the right to issue referenda. The language is much the same as §§ 38.4 and 38.5 of the New York City Charter (N.Y. City Charter, *supra* note 26).

28. *Golden*, 762 N.Y.S.2d at 413.

the term-limit provisions of the City Charter without changing the length of the term of office, or curtailing any power of the office,"<sup>29</sup> it was not subject to mandatory voter referendum. The court concluded that the City Council, therefore was within its legal right to amend § 1138 of the New York City Charter.<sup>30</sup>

Beyond the standard established in the City Charter and the Municipal Home Rule Law, the court used *Caruso v. City of New York*<sup>31</sup> as an analogue. In 1966, voter referendum established Local Law No. 13-A, which limited membership on a review board to hear civilian complaints against the New York City Police.<sup>32</sup> *Caruso* involved a challenge to the City Council's ability to amend the law, twenty years after it was enacted.<sup>33</sup> Despite the scarcity of case law on the subject, the New York County Supreme Court held that the City Council was within its authority to amend the law as it would any other law.<sup>34</sup> Voters would have alternative remedies, the court contended, "[e]ven assuming the Council immediately amended the Charter following the voter initiative . . . [t]hey could amend the Constitution, the Municipal Home Rule Law, or perhaps the Charter, to control or curb Council powers with respect to initiated legislation."<sup>35</sup> The Court of Appeals unanimously affirmed.<sup>36</sup>

The *Golden* court found that the City Council had the right to amend the City Charter regardless of the fact that some of its provisions had been adopted through referenda.<sup>37</sup> Quoting *Caruso*, the court stated that "laws proposed and enacted by the people under an initiative provision are subject to the same constitutional, statutory and charter limitations as those passed by the Legislature and are entitled to no greater sanctity or dignity."<sup>38</sup> The court found plaintiffs' proof insufficient to establish that § 1137 reflected voter intent to insulate the referendum from subsequent legislative acts.

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29. *Id.*

30. *Id.*

31. *Caruso v. City of New York*, 517 N.Y.S.2d 897, 900 (N.Y. Sup. Ct. 1987).

32. *Id.* at 898-899.

33. *Id.* at 897.

34. *Id.*

35. *Id.* at 900.

36. *Caruso v. City of New York*, 533 N.Y.S.2d 379 (N.Y. App. Div. 1988).

37. *Golden*, 762 N.Y.S.2d at 413.

38. *Id.*, quoting *Caruso*, 517 N.Y.S.2d at 900.

Instead, the court found § 1137 to be “merely a statement of purpose, not a mandatory or prohibitory expression of law.”<sup>39</sup>

In his dissent, Judge McGinity agreed with the majority that Local Law No. 27 should be upheld, but argued that the court should go further and declare express language limiting the City Council’s legislative authority to alter the term limits law without voter approval. Judge McGinity proposed that “Local Law No. 27 was validly adopted by the New York City Council only to the extent that Local Law No. 27 corrects an ambiguity that a City Council member would be ineligible to serve up to eight consecutive years.”<sup>40</sup> He would “add to the declaration a provision that a City Council member would be ineligible and unqualified to remain in office for more than eight consecutive years without a referendum to amend the New York City Charter. . . to that effect.”<sup>41</sup>

Unlike the majority, which read *Caruso* to treat charter provisions enacted through voter referenda the same as other laws requiring amendment or reversal, Judge McGinity read *Caruso* more narrowly. Judge McGinity stated that “Local Law No. 27, relying upon *Caruso*, cannot be construed as permitting a member of the City Council to serve more than eight consecutive years in office without public approval.”<sup>42</sup> He looked instead to the referenda adopting Charter §§ 1137 and 1138, and concluded that the clear intent of the majority of New York City voters was to limit to eight years the maximum period one person could consecutively serve in the same public office.<sup>43</sup>

Under *Golden*, the City Council may amend voter-enacted term limits laws. While this power is necessary to remedy the conflict of the anomalous two-year terms every two decades, intent to limit City Council terms should be unambiguously written into the law. Such an explicit declaration is necessary to protect and preserve the force and character of the voters’ approval of such a law. In turn, self-interested Council-members are prevented from redefining the limits of their own terms. By expressly delineating the authority of the City Council to enact Local Laws amending voter-enacted refer-

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39. *Golden*, 762 N.Y.S.2d at 413.

40. *Id.* at 414.

41. *Id.*

42. *Golden*, 762 N.Y.S.2d at 414.

43. *Id.*



enda, a judicial declaration would demarcate the boundaries of voters' political power, protecting them from future political wrangling by the City Council.

As attorneys for the Brennan Center for Justice<sup>44</sup> suggest in an amicus brief advocating that the *Golden* court uphold Local Law No. 27, "[t]he voters did not, however, knowingly choose to undermine the Council's authority even more dramatically by limiting certain members to six years in office."<sup>45</sup> As a simple matter of public policy, it is only fair to take seriously a decision voted on with knowledge of its consequences. Unless voters were well acquainted with the prior term limit laws, nothing would have led them to believe that a properly elected Council-member would be prevented from serving for eight years. As the Brennan advocates argue, "In short, the voters of New York City were presented with a simple choice whether to vote for or against term limits that would limit their representatives to eight years in office by limiting them to two consecutive terms. That is the referendum that voters chose to support."<sup>46</sup> Moreover:

the notion that certain elected representatives would be limited to six years, rather than eight years . . . never entered the public debate and cannot be considered an intended outcome of the voters' choice at the polls. The people of New York could only have assumed they were voting for a limit of eight years through two four-year terms.<sup>47</sup>

Local Law No. 27 reflects the basic assumption that the Brennan advocates impute to voters.

The lessons here are two-fold. First, voters should be afforded advance notice of the outcomes of their decisions (i.e., what they

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44. The Brennan Center for Justice at New York University School of Law is "a non-profit organization in New York City, [that] seeks to bring the ideal of representative self-government closer to reality." Brief of Amici Curiae Brennan Center for Justice at New York University School of Law et al. at 3, *Golden v. New York City Council*, 762 N.Y.S.2d 410 (N.Y. App. Div. 2003) (No. 2003-02410).

45. Brief of Amici Curiae Brennan Center for Justice at New York University School of Law et al. at 9, *Golden v. New York City Council*, 762 N.Y.S.2d 410 (N.Y. App. Div. 2003) (No. 2003-02410).

46. *Id.* at 6.

47. *Id.* at 6-7.

are really voting for in the referendum is for their representatives to be ineligible to run for re-election two years later). Second, while it is within the City Council's legislative ability to correct the consequences of the poorly crafted referendum, there must be limits to the City Council's ability to legislate away legitimate choice. One solution to this problem is to adopt language, similar to that suggested in Judge McGinity's dissent in *Golden*, granting voters the sole authority to alter the material provisions of the term limits law, is one solution to this problem. Doing so assures voters that the City Council will not disregard their voice on important matters like the right to electoral choice.

Language specifying that the City Council may not alter members' term limits without referendum has consequences beyond the division of power between voters and the City Council. Voters would be protected against a number of other legal maneuvers (and their political consequences) designed to amend or overturn the term limits referenda. According to Professor Ross Sandler, the City Charter can be amended or overturned in six ways besides the enactment of a local law.<sup>48</sup> The overwhelming contrast between these methods and the enactment of a Local Law, like the kind upheld in *Golden*, is that each of the alternative methods face many more hurdles, checks, and have further reaching consequences. Under any of the other scenarios, the new law would apply to all municipalities in New York State (which would surely be opposed in other places). If the law applied to New York City specifically, it would require voter approval or the support of much more than the majority of one local legislative body. Enacting a local law is the simplest and arguably the most efficient method of amending or overturning a voter-approved referendum. The simple adoption of

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48. The six methods are through: (1) State Special Law requiring the support of the majority of the City Council, the mayor, and the majority of the State legislature; (2) State general law in which the State Assembly would apply a term limits law to all municipalities in the state; (3) City Council-initiated special referendum, which, with the approval of the State Legislature, could allow voters to decide an alternative referendum; (4) Municipal Home Rule Law amendment passed by the legislature to "allow or mandate a referendum on term limits whenever initiated by a local legislature;" (5) Voter-Initiated Referendum, requiring 45,000 signatures to be included on the New York City ballot; and (6) Charter Commission-initiated referendum in which the Charter Commission could submit a referendum directly to voters. Ross Sandler, *New York City Charter, Term Limits: Seven Ways to Leave Your Lover*, 1 CITY LAW 49, 51-2 (1995).

language explicitly granting voters the right to determine through further referenda any material changes to the term limits law would still allow the City Council to act, as it did with Local Law 27, quickly and effectively to uphold the obvious will of the majority of voters. It would also, however, prevent the City Council from overstepping its bounds to materially alter the law.

As *Golden* illustrates, there is an important balance to be struck between direct and representative forms of democratic decision-making. The legal structure of most state and local electoral systems demonstrates that voters have the right to decide specific referenda on matters chosen by citizen initiative or legislative mandate. To maintain this balance, the legal boundaries of voter and legislative power must be unambiguously defined.