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Raphael J. Sonenshein

California State University, Fullerton, rsonenshein@fullerton.edu

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CAN A CITIZENS' COMMISSION HELP REPAIR CALIFORNIA GOVERNMENT? LESSONS FROM LOCAL CHARTER REFORM

*Raphael J. Sonenshein**

While there is widespread agreement that there is a crisis of governance in California, there is little consensus on what institutional structure would best facilitate useful reform. Although the idea of a constitutional convention captured the imagination of the reform community, it failed to generate enough financial and political support to be implemented. The citizens' commission, another model of reform, has been largely ignored. Yet hundreds of municipal reforms have widely and successfully used the commission model over the past century. Some state constitutional reforms outside California have successfully used such commissions. Further, the legendary U.S. Constitutional Convention of 1787 more closely fits the definition of a commission than a convention. The commission model of governmental reform is much less exciting than a constitutional convention but for that very reason it reduces the initial risk of undertaking such an effort, a risk that is likely to prove fatal to reform. The low profile of citizen commissions allows a thorough airing of issues and the development of the sort of credibility that may give its recommendations surprising force. California may look to the structures of Florida and Utah—states in which permanent constitutional reform commissions have legal standing—as models of how California could steadily and effectively work toward a solution in a manner that both reduces the immediate political risk to all affected interests and leaves open the chance for long-term reform. While California's attempt at reform by commission failed in 1996, there are lessons from that experience that can make success more likely.

* Chair, Division of Politics, Administration, and Justice, California State University, Fullerton. Based on a presentation at "Rebooting California: Initiatives, Conventions and Government Reform," Loyola Law School Los Angeles, September 27, 2010.

“I don’t get the big deal. In my city, if we had these kinds of problems, we’d appoint a charter reform commission made up of our most respected citizens. They’d go off and study it, and come back with recommendations, and then we’d vote on it and fix the problem.”

—Anonymous attendee at a book forum on California’s constitution, California State University, Fullerton, September 16, 2010

I. INTRODUCTION

While there is widespread agreement that California’s governance structure is broken,¹ there is a woeful lack of agreement on practical ways to fix the system.

Reforming governmental structures, even when there is widespread acknowledgement that the status quo does not work, presents complicated political and design challenges. Interest groups and politicians scan the horizon for changes that may affect them. They often feel safer with the existing system, which they have learned to navigate, rather than with a new system that might force them to learn the ropes all over again. And how can they trust whoever has the power to propose and implement reforms?

Reform is a risk. As appealing as any design for new governmental structures may be, reform changes the rules. And changing the rules may change who gets power.² Reform may also jeopardize deeply held beliefs (such as in equal rights and civil liberties) that current arrangements guarantee. Reformers, therefore, must consider how to get the voters and powerful interest groups to

1. The belief that California has major structural problems has become widespread since budget gridlock became chronic over the last decade. *E.g.*, *California: The Ungovernable State*, ECONOMIST, May 14, 2009. Several citizen organizations emerged to argue for a fundamental overhaul, including Repair California and California Forward. *See* JOE MATHEWS & MARK PAUL, CALIFORNIA CRACKUP: HOW REFORM BROKE THE GOLDEN STATE AND HOW WE CAN FIX IT (2010) (describing a recent example of a program for structural change); Bruce E. Cain & Roger G. Noll, *Introduction* to CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING STATE GOVERNMENT MORE EFFECTIVE AND RESPONSIVE 1 (Bruce E. Cain & Roger G. Noll eds., 1995); Vladimir Kogan, *Lessons from Recent State Constitutional Conventions*, CAL. J. POL. & POL’Y, 2010, at 1, 5–6; Editorial, *The Big Fix*, L.A. TIMES, May 21, 2009, at A34.

2. *See* Gerald Benjamin & Thomas Gais, *Constitutional Conventionphobia*, 1 HOFSTRA L. & POL’Y SYMP. 53, 66 (1996); *see, e.g.*, Amy Bridges & Richard Kronick, *Writing the Rules to Win the Game: The Middle-Class Regimes of Municipal Reformers*, 34 URB. AFF. REV. 691, 693 (1999).

even consider reform. Some reforms, such as term limits,³ are popular enough that they can overcome such resistance, but most reforms lack that sort of popular support.⁴ Reform requires a political strategy in the broadest sense—namely a plan to get reform on the agenda, to develop credible proposals, and then to get reforms implemented.

A strategy that *leads* with risk will likely fail. For example, if there is too great a perceived danger of an ill-advised reform at the outset, powerful interest groups and the voting public will kill it in its infancy. Conversely, a strategy that is too modest, one that reduces risk so much that the reform proposes no significant improvements, is a waste of time.⁵ The key is to develop a process that properly limits the initial risk of undertaking change and then generates the credibility and political strength to implement significant, useful reforms.

The mechanism for reform that has garnered the most attention in California is the constitutional convention.⁶ There is no well-established model for a convention. However, we can rely on past experience to highlight a convention's distinctive features.⁷ First, a convention has roots in popular representation.⁸ The delegates are so

3. Elisabeth R. Gerber, *Reforming the California Initiative Process*, in CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING STATE GOVERNMENT MORE EFFECTIVE AND RESPONSIVE, *supra* note 1, at 296 ("In fact, state legislative term limit laws have passed by popularly initiated measures in 16 states, while none have been passed by the state legislatures themselves.").

4. *Id.*

5. See David K. Hamilton, *Lay Local Government Charter-Writing Commissions*, 14 ST. & LOC. GOV'T REV. 124, 126 (1982).

6. The idea for a constitutional convention as a vehicle for addressing California's modern crisis is relatively new. See, e.g., MATHEWS & PAUL, *supra* note 1, at 14 ("[T]he Bay Area Council, a policy group backed by businesses such as Google... suggested that the state's operating system needed a complete rewrite."); see Raphael J. Sonenshein, *What Charter Reform Commissions Can Teach Us About a Proposed Constitutional Convention in California*, CAL. J. POL. & POL'Y, 2010, at 1, 1; Jim Wunderman, *California's Government Has Failed Us*, S.F. CHRON. (Aug. 21, 2008), http://articles.sfgate.com/2008-08-21/opinion/17123410_1_constitutional-convention-new-government-california-constitutional-revision-commission (proposing that a constitutional convention be called for that purpose).

7. See C.L.W., Jr., Note, *State Constitutional Change: The Constitutional Convention*, 54 VA. L. REV. 995, 995–1030 (1968) (providing a thorough analysis of the dynamics of a state constitutional convention).

8. See NEW AM. FOUND., CRUCIAL DETAILS OF A CALIFORNIA CONSTITUTIONAL CONVENTION: DELEGATION SELECTION METHODS, SCOPE OF THE CONVENTION, PUBLIC PARTICIPATION (2009), available at http://www.newamerica.net/files/nafmigration/ConCon_details.pdf.

named because the people delegate authority to them.⁹ Even appointed delegates are chosen based on representational criteria (e.g., union members, women, young people, and racial and ethnic minorities).¹⁰

Second, a convention has actual authority, because it acts as a mechanism to achieve reform and reach decisions.¹¹ Some decisions are implemented directly, such as the national nominating convention's choice of the party's presidential and vice presidential candidates.¹² Other decisions may be implemented indirectly, such as the creation of ballot measures or proposals for the legislature.¹³

A convention's legitimacy derives from its popular roots. Because the people select the members, or the members are appointed to represent specific segments of the populace, the convention's recommendations should carry great authority.

A convention is both the most exciting and the riskiest model of governmental reform. It hearkens back to the U.S. Constitutional Convention of 1787, the Big Bang of governmental reform.¹⁴ If the people elect the delegates or if the appointment of delegates is meant to ensure representation from a wide variety of constituencies, then the people should and likely will feel some connection to the convention itself. A convention will generate tremendous media coverage. The delegates will consider themselves to be delegates

9. *See id.* at 2.

10. *See id.* at 3.

11. *See* Sonenshein, *supra* note 6, at 1.

12. *See* NEW AM. FOUND., *supra* note 8, at 8.

13. *See* Sonenshein, *supra* note 6, at 1.

14. *See generally* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 52–63 (The Macmillan Company 1921) (discussing how economic interests may have found the proposed national government advantageous); CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787, at 1–15 (Back Bay Books 1986) (describing the origins of the U.S. Constitutional Convention); MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 1–42 (1st ed. 1913) (giving background on the calling of the U.S. Constitutional Convention and the convention's members); EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC, 1763–89 (3d ed. 1956) (describing how the colonists' immediate needs led to their search for constitutional principles, eventually leading to the Revolutionary War); Sonenshein, *supra* note 6, at 1 (discussing how the appeal of the U.S. Constitutional Convention of 1787 may fuel excitement about having a constitutional convention in California).

more than trustees and may consider themselves to be elected officials in their own right.¹⁵

The flip side of excitement is risk. Elected or appointed delegates may well believe that once the convention opens, they are free to make their own rules. For example, suppose a state's voters call a convention strictly to address state budget rules. One or more delegates might well insist that the state constitution should forbid the budget from including abortion funds or require that it guarantee a minimum level of income for all state residents. Once created, a convention may be hard to rein in.

Because of the excitement and authority associated with a convention, activist groups and politicians would have an urgent interest in influencing who becomes a delegate and what the delegates decide. They would watch carefully as the convention develops, from its design to its selection of delegates to its leadership choices to its handling of individual issues. The potential excitement and risk of a convention may also account for the intense media interest in a convention.¹⁶ After all, who would not want to cover a convention that might go anywhere and do anything?¹⁷ Such a convention could be easily distinguished from the contemporary presidential convention, where the near certainty of the result helps account for its declining television coverage.¹⁸

And yet, despite the excitement, the convention idea has failed to take hold in California. In 2009, advocates of a California convention halted their plan to gather signatures for a convention ballot measure, citing a lack of funding.¹⁹ While the lack of funding was the most obvious cause of the convention proposal's withdrawal, there had also been little attention to the many organizational issues

15. This well-known distinction in political science is between legislators who see themselves as delegates sent to carry out the wishes of their constituents and trustees who view their role as using their own judgment in the best interests of the community. The latter model is associated with Edmund Burke.

16. See Sonenshein, *supra* note 6, at 1; see also *The Big Fix*, *supra* note 1, at A34 (providing reasons why California needs a constitutional convention to solve its statewide problems).

17. It is reasonable to infer that the decreased interest of national media in covering presidential nominating conventions is related to the certainty of the outcome and the resulting scripting of the event. See Benjamin & Gais, *supra* note 2, at 62.

18. See *id.*

19. Evan Halper & Anthony York, *California Reform Bid Called Off*, L.A. TIMES, Feb. 13, 2010, at AA2.

that would impede the creation of an effective deliberative body under the convention model.²⁰

Those who blame the convention organizers for the failure of the convention model to take hold in California should consider the difficulty of the task. California is hardly alone, as the road to conventions is often too steep to climb. The imagined benefits are distant and open to debate, while the immediate risks are overpowering and obvious. Pre-1982, successful conventions were limited in their scope to prevent the risk of a runaway convention.²¹

These factors may explain why in recent years conventions have failed to get off the ground. Since 1990, no state electorate has adopted a proposal to call a constitutional convention; fourteen proposals failed at the polls.²² Gerald Benjamin and Thomas Gais have labeled this contemporary decline of state conventions, following what was a long history of conventions, “conventionphobia.”²³

The U.S. Constitutional Convention of 1787 is, of course, the mother of all reform efforts. This small meeting began with fifty-five members and ended with thirty-nine, managed to overturn the Articles of Confederation,²⁴ and created a new constitution that has stood the test of time. It has the image of the quintessential convention.²⁵ But repeat performances are unlikely. The Constitution’s amendment process is so onerous that few changes have been made since 1787.²⁶ It is difficult to grasp how the 1787 experience could translate directly to the California of today.

20. See Sonenshein, *supra* note 6, at 8 (arguing that better organization of time, staff, and agenda will help ensure successful constitutional reform).

21. See Kogan, *supra* note 1, at 3–4; see also Benjamin & Gais, *supra* note 2, at 53, 54–57 (discussing “conventionphobia at the national level”).

22. Kogan, *supra* note 1, at 5.

23. See Benjamin & Gais, *supra* note 2, at 69.

24. See Sonenshein, *supra* note 6, at 3.

25. See *id.* at 1.

26. See Benjamin & Gais, *supra* note 2, at 56.

II. SO SHALL WE GIVE UP?

With the recent collapse of the convention option, California's reformers have fallen into despair.²⁷ But this hopelessness is unfounded. If one tool does not work, pick up another.

Where should we look for help? A constitutional system that grants formal authority only to the national and state governments naturally inclines us to look only to these levels for models of reform. In so doing, state reformers limit themselves to levels of government that have not been particularly successful in designing and sharing the best practices of restructuring government. In essence, reformers have missed an important source of experience: the local level.

Justice Louis D. Brandeis eloquently described the creative role of the states in his dissent in *New State Ice Co. v. Liebmann*:

There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. . . . To staid experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.²⁸

This concept of states as "laboratories of democracy" has endured as a magnificent justification for states in the federal system. But it would be incorrect to consider states to be laboratories of reform in which structural innovations for governance are created, tested, and disseminated in an ongoing debate about best practices.

At the state level, reform has been overshadowed by policy debates.²⁹ While there is much more flexibility and much less sanctity in state constitutions than in the federal constitution,³⁰ the

27. See Halper & York, *supra* note 19 ("There appears to be no excitement out there for these rather complicated reforms. . . . It is hard to go to the public with these ethereal ideas and have them understand what you are talking about.").

28. *Id.*

29. See *id.* at 70.

30. See *id.* at 62–67.

states have not developed structural reform to the same extent as America's local governments.³¹

III. LOOKING DOWN FOR REFORM

Meanwhile, percolating below the federal and state levels we find a level of government that is literally teeming with structural reform efforts, many of which have been successful. America's real laboratories of reform are the local governments that have proliferated throughout the nation for more than a century. Local government is easily to overlook. Municipal home rule arrived relatively late to American government, roughly a century after the nation's founding,³² and local government is the runt of the governmental litter.

For the first century of American government, localities had little scope to design and structure their own governments.³³ They were considered to be creatures of state governments, having only as much authority as states would grant.³⁴ "Dillon's Rule," a decision named after a state court judge in Iowa, asserted that state government profoundly limited local governments.³⁵ Dillon wrote in 1872:

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First those granted in express words; second those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and

31. *Compare id.* at 62–63 ("There have been 234 constitutional conventions in American states, territories, and the District of Columbia. The states have functioned under 146 separate constitutions. In the eight years between 1986 and 1993, 1007 amendments were offered to documents currently in force. Of these, 708 passed."), with Hamilton, *supra* note 5, at 124 ("Approximately three-fourths of the states now allow local governments some discretion in framing their own charters. This allowance has produced a substantial increase in local government charter-writing activity. For example, of the 84 home rule counties that adopted new charters through 1980, 56 had been written since 1965 and 39 since 1970." (citations omitted)).

32. *See* Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1340 (2009).

33. *See id.*; Frank J. Goodnow, *Municipal Home Rule*, 21 POL. SCI. Q. 77, 79–81 (1906).

34. *See* Baker & Rodriguez, *supra* note 32, at 1340.

35. *See, e.g.*, *City of Clinton v. Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455 (1868). *See generally* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1109–13 (1980) (discussing the philosophical background of Dillon's doctrine).

purposes of the corporation—not simply convenient, but indispensable.³⁶

In the latter part of the nineteenth century, state governments began to grant home rule authority to local governments.³⁷ California, in fact, was one of the first states to grant home rule.³⁸ Missouri was first in 1875,³⁹ followed by California in 1879.⁴⁰ The vehicle for home rule was the city charter. The voters adopted a document that became the community's governing constitution.⁴¹

With the adoption of a new city charter, a city became the author of its own destiny. Charter cities, in contrast to “general law” cities, could select their form of government among many models and had greater freedom to contract and to implement other business practices. For instance, they could enshrine pension rules beyond the reach of the city council and mayor by putting them in the charter.⁴² And, most importantly for this Article, charters themselves could be changed through a process of charter reform.⁴³ Today, roughly a quarter of all incorporated cities in California operate as charter cities.⁴⁴

In stark contrast to the federal and state levels, reform has constantly preoccupied local governments. To some degree, much of

36. JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 448–50 (5th ed. 1911)

37. Baker & Rodriguez, *supra* note 32, at 1341; David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2387–97 (2003) (stating that Missouri was the first state to grant home rule, in 1875; California followed in 1879); Goodnow, *supra* note 33, at 84.

38. See Barron, *supra* note 37, at 2298.

39. Baker & Rodriguez, *supra* note 32, at 1371 n.160.

40. Barron, *supra* note 37, at 2298.

41. See *id.* at 2295; John C. Peppin, *Municipal Home Rule in California*, 30 CALIF. L. REV. 1, 5 (1941).

42. See Ted Hunt, *The Problem with Charter Cities*, AM. POLICE BEAT, <http://www.apbweb.com/news/9-opinion-editorial/1456-the-problem-with-charter-cities.html> (last visited Nov. 20, 2010).

43. See RAPHAEL J. SONENSHEIN, THE CITY AT STAKE: SECESSION, REFORM, AND THE BATTLE FOR LOS ANGELES 5 (2004) (“A number of cities have reformed their charters as a method to reexamine the effectiveness and responsiveness of governing institutions.”). Over time, some of the comparative advantages of charter cities have been eroded as states have given greater flexibility to general law cities. For a list of charter cities in California, see *Charter Cities List*, League of Cal. Cities, <http://www.cacities.org/index.jsp?zone=locc&previewStory=26279> (last visited Nov. 20, 2010).

44. *Facts At A Glance (2010)*, LEAGUE OF CAL. CITIES, <http://www.cacities.org/index.jsp?zone=locc&previewStory=53> (last updated Nov. 30, 2010) (noting that 120 of 481 California cities are charter cities).

urban politics could be understood as the conflict between political machines and bosses on the one hand, and urban reformers on the other.⁴⁵ Many working class leaders believed that the reformers only wished to substitute middle class leaders for themselves, and their suspicions were often correct.⁴⁶ But urban reform today is such a powerful symbol that it is not only the property of “do gooders” and middle class “morning glories” but is also contested in city politics by a wide variety of interest groups.⁴⁷ Some structural reforms, such as the adoption of district elections instead of at-large elections, were explicitly designed to enhance minority representation.⁴⁸

Urban reform, built on the energy of the Progressive movement, generated a massive array of research, institutions, journals, activists, and experiences.⁴⁹ In 1899, the National Municipal League (now the National Civic League) published the first edition of the *Model City Charter*.⁵⁰ In 2003, the National Civic League published its eighth edition.⁵¹ With the *Model City Charter*, a new or experienced city and its charter commission could examine the city’s charter in light of the views of reformers nationwide—views that reflected competing schools of thought.⁵² Traditionally, most reformers emphasized the council-manager system, but in recent years, there has been more backing for strong mayors.⁵³ Other organizations, such as the Strong Mayor-Council Institute, challenged reformers’

45. See Amy Bridges & Richard Kronick, *Writing the Rules to Win the Game: The Middle-Class Regimes of Municipal Reformers*, 34 URB. AFF. REV. 691, 692 (1999).

46. See *id.* at 703.

47. See SONENSHEIN, *supra* note 43, at 6 (“The battle today is really not between the reformers and the party regulars. It is between competing visions of urban reform: for example, businesslike efficiency weighed against greater representation for minorities.”).

48. Compare Susan Welch, *The Impact of At-Large Elections on the Representation of Blacks and Hispanics*, 52 J. POL. 1050, 1050 (1990) (finding that at-large elections represent blacks more in 1990 than they did a decade prior, but that district elections still represent blacks better than at-large elections; however, district elections do not necessarily create more equal representation for Hispanics), with Chandler Davidson & George Korbel, *At-Large Elections and Minority-Group Representation: A Re-Examination of Historical and Contemporary Evidence*, 43 J. POL. 982, 998 (1981) (observing that current changes from at-large to single-member-district elections enhance minority representation in various political subdivisions).

49. See SONENSHEIN, *supra* note 43, at 19.

50. NAT’L CIVIC LEAGUE, MODEL CITY CHARTER viii (8th ed. 2003).

51. *Id.* at i.

52. See generally *id.* at vii–xiv (providing background on the origins and growth of the *Model City Charter* and its use by municipalities).

53. James H. Svava, *Do We Still Need Model Charters? The Meaning and Relevance of Reform in the Twenty-First Century*, 90 NAT’L CIVIC REV. 19, 20–21 (2001).

bias toward the council manager system.⁵⁴ The public administration literature has addressed comparisons between forms of local government, with detailed assessments of the impact of structure on spending, economic equality, business development, and representation.⁵⁵

Every five years, the International City/County Management Association (ICMA) conducts a survey of cities and their municipal structures. In the five years preceding the 2001 report, 10 percent of all cities reported attempting structural reform.⁵⁶ In the five years preceding the 2006 report, 8.8 percent of cities reported the same activity.⁵⁷ Of these attempts, nearly half were successful at the ballot box.⁵⁸

Although the percentages may seem low, the absolute numbers of successful reforms are fairly impressive. Within the broad numbers lies evidence that local government offers an array of reform models, both in process and in outcome.

54. See STRONG MAYOR-COUNCIL INST., <http://strongmayorcouncil.org/home.html> (last visited Oct. 22, 2010).

55. See generally David R. Morgan & John P. Pelissero, *Urban Policy: Does Political Structure Matter?*, 74 AM. POL. SCI. REV. 999, 999–1006 (1980) (describing a study that found that reformed cities did not change fiscal behavior).

56. INT'L CITY/CNTY. MGMT. ASS'N, MUNICIPAL FORM OF GOVERNMENT, 2001, at 2 (2001) [hereinafter ICMA 2001], available at <http://lawschool.westlaw.com/Files/Download/5492974/iCMA.%202002.%20Municipal%20Form%20of%20Government%202001.pdf> (listing aggregate survey results).

57. INT'L CITY/CNTY. MGMT. ASS'N, MUNICIPAL FORM OF GOVERNMENT, 2006: TRENDS IN STRUCTURE, RESPONSIBILITY, AND COMPOSITION 3 (2006) [hereinafter IMCA 2006], available at <http://icma.org/Documents/Document/Document/664> (listing aggregate survey results).

58. *Id.*

Extent of Structural Reforms⁵⁹		
	2001 Report	2006 Report
	5 years preceding	5 years preceding
Surveys sent	7867	8278
Responses	4244	3864
Charter cities	54.6 (%)	56.9
Reform efforts	10.0 (%)	8.8
Success rates (percentage):		
At large to district	34.8	42.1
District to at large	no data	47.8
Mixed system	34.3	45.0
Changed mix	42.9	36.8
Increase members	58.3	58.6
Decrease members	50.0	54.5
Method of election of top elected	39.5	55.9
Increase powers of top elected	41.7	41.7
Decrease in powers of top elected	43.8	55.6
Add professional administrator	71.8	71.8
Eliminate professional administrator	28.1	29.4
Change appointment of admin.	16.7	0
Change form of government	45.0	44.9

IV. THE CHARTER REFORM COMMISSION

Charter reform requires an institutional mechanism. A charter reform commission, whether appointed or elected, is the preferred mechanism.⁶⁰ A commission is not required to amend a city charter because the city council—or the voters, where state law allows—can normally place any revisions on the ballot. But commissions have emerged as a popular means to achieve reform.⁶¹

59. *Id.*; IMCA 2001.

60. See Raphael J. Sonenshein, *What Charter Reform Commissions Can Teach Us About a Proposed Constitutional Convention in California*, CAL. J. POL. & POL'Y, Jan. 2010, at 1, 2.

61. *See id.*

In fact, the citizens' commission has been one of the great American innovations. For more than a century, American government has benefited from commissions that have weighed issues and offered recommendations.⁶² Commissions have generated credibility outside or alongside the political process.⁶³ Well-known examples include the Kerner Commission that famously concluded that America was becoming two nations—one black, one white—after the 1960s riots;⁶⁴ the Christopher Commission that generated successful reforms of the Los Angeles Police Department after the Rodney King beating;⁶⁵ the 9/11 Commission following the 2001 attacks;⁶⁶ and the Knapp Commission on police corruption in New York City.⁶⁷

The definition of a commission, like that of a convention, must be distilled from experience. By common usage and practice, a commission is a body of citizens separate from an elected executive or legislature that is tasked with analyzing an issue and proposing solutions either to a legislative body, an executive, or the voters.⁶⁸ A commission may be either elected or appointed.⁶⁹ If elected, a charter

62. See, e.g., *id.*

63. See Serge Grossman & Michael Simon, *And Congress Shall Know the Truth: The Pressing Need for Restructuring Congressional Oversight of Intelligence*, 2 HARV. L. & POL'Y REV. 435, 436 (2008) (alongside the political process); Steven F. Huefner, *Don't Just Make Redistricters More Accountable to the People, Make Them the People*, 5 DUKE J. CONST. L. & PUB. POL'Y 37, 40–42 (2010) (outside the political process); Peter W. Salsich, Jr., *Grassroots Consensus Building and Collaborative Planning*, 3 WASH. U. J.L. & POL'Y 709, 719–20 (2000) (outside the political process).

64. Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 302 (2010).

65. See *id.*

66. Bennie G. Thompson, *A Legislative Prescription for Confronting 21st-Century Risks to the Homeland*, 47 HARV. J. ON LEGIS. 277, 281–82 (2010).

67. Steven B. Duke, *Mass Imprisonment, Crime Rates, and the Drug War: A Penological and Humanitarian Disgrace*, 9 CONN. PUB. INT. L.J. 17, 27 (2009).

68. See Salsich, Jr., *supra* note 63, at 712 (“[Neighborhood collaborative planning] can, though, be a useful technique for giving residents a feeling that they have a stake in the outcome of decisions that may be made about their community, as well as a way to participate in the decision-making process.”); see Huefner, *supra* note 63, at 40–42 (describing a 2005 redistricting commission in California); see also NAT'L CIVIC LEAGUE, GUIDE FOR CHARTER COMMISSIONS 6 (5th ed. 1991) (“The charter commission, a distinctly American contribution to the art and practice of local government . . . has a unique and important service to perform. Like a constitutional convention at the state or national level, it investigates the existing government and charter . . . Free from the necessity of engaging in actual government and party strife, it can turn its full attention to the improvement of governmental machinery.”).

69. See Hamilton, *supra* note 5, at 124.

reform commission bears some resemblance to a convention. Indeed, elected charter reform commissioners behave quite differently from appointed ones.⁷⁰ In some states, like Michigan, elected commissions predominate.⁷¹ Appointed commissions are more likely to be described as “blue ribbon” panels.⁷²

The nation’s two largest cities, New York City and Los Angeles, completed major charter reforms in recent decades.⁷³ In the late 1980s, New York City faced a governance crisis because a federal court ruled the Board of Estimate was in violation of one person, one vote.⁷⁴ The city established two successive charter reform commissions that recommended major changes to the city’s governance; these recommendations were adopted by the voters.⁷⁵ The commissions successfully navigated New York City’s intense and complex politics.⁷⁶ The authors of the changes prepared several publications that both provided details about the mechanics and politics of reform as well as some advice to other charter commissions.⁷⁷

In California, major charter reforms were completed in recent decades in San Francisco, San Jose, Oakland, and San Diego.⁷⁸ In

70. *Id.* at 125–26.

71. See Susan B. Hannah, *Writing Home-Rule Charters in Michigan: Current Practices in Constitution Making*, 84 NAT’L CIVIC REV. 140, 141–42 (1995).

72. Hamilton, *supra* note 5, at 126.

73. Raphael J. Sonenshein, *Gotham on Our Minds: New York City in the Los Angeles Charter Reform of 1996–1999*, in NEW YORK & LOS ANGELES: POLITICS, SOCIETY, AND CULTURE 301 (David Halle ed., 2003)

74. See Frank J. Mauro & Gerald Benjamin, *The Reemergence of Municipal Reform*, in RESTRUCTURING THE NEW YORK CITY GOVERNMENT: THE REEMERGENCE OF MUNICIPAL REFORM 1, 3 (Frank J. Mauro & Gerald Benjamin eds., 1989); Joseph P. Viteritti, *The Tradition of Municipal Reform: Charter Revision in Historical Context*, in RESTRUCTURING THE NEW YORK CITY GOVERNMENT: THE REEMERGENCE OF MUNICIPAL REFORM, *supra*, at 16, 29; Frederick A. O. Schwarz, Jr. & Eric Lane, *The Policy and Politics of Charter Making: The Story of New York City’s 1989 Charter*, 42 N.Y.L. SCH. L. REV. 729, 731–32 (1998).

75. See Mauro & Benjamin, *supra* note 74, at 5–7.

76. See *id.* at 6–7.

77. See generally *id.* (focusing on the most significant and controversial issues that confronted the Schwarz Charter Revision Commission and the Ravitch Commission that preceded it).

78. In 1998, Oakland voters approved a charter change to increase the authority of the mayor. *Brown v. Fair Political Practices Comm’n*, 100 Cal. Rptr. 2d 606, 608 (Ct. App. 2000). An attempt by the mayor of Sacramento to increase mayoral authority failed to win council approval to go the ballot in 2010. Ryan Lillis, *Kevin Johnson Won’t Raise Strong-Mayor Issue Until Next Year or 2012*, SACRAMENTO BEE (Apr. 13, 2010), <http://blogs.sacbee.com/capitolalert/latest/2010/04/kevin-johnson-wont-raise-strong.html>. Voters in San Diego replaced

Los Angeles, pressure from the San Fernando Valley for secession from the city led to the creation of two competing charter reform commissions, one elected and one appointed.⁷⁹ After two years of competition, they agreed on a single charter, persuaded the city council to place it on the ballot, and received voter endorsement in 1999.⁸⁰

At any given time, an Internet search turns up functioning charter reform commissions in cities of all sizes around the country. The commissions borrow from each other, conduct meetings and hearings in their own communities, and develop recommendations. Some succeed and some fail.⁸¹ The charter reform commission is a core element of a *culture of reform* at the local level.

To get an idea of how much more widespread charter reform commissions have been than state constitutional conventions since 1990, consider my own experience: since 1997, I have been the principal staff person for appointed charter reform commissions in Los Angeles, Glendale, Burbank, Culver City, and Huntington Beach, all within a relatively narrow corridor of Los Angeles and Orange Counties. During that same period of time, voters have not approved a single state constitutional convention. . And of course my own experience represents only a tiny sliver of the wide range of local charter commissions to be found in cities throughout the nation during the same period.

Commissions are so ingrained in the charter reform process that books have been written to guide commissioners in their duties.⁸² The sharing of experience is a common feature in local charter reform. When I took my position in Los Angeles, I contacted Eric Lane, who had been the executive director of the New York City charter reform ten years earlier. The final report and the official

their Council-Manager system with a Mayor-Council plan on an experimental basis in 2006, and then on a permanent basis in 2010. *Proposition D: Strong Mayor Form of Governance City of San Diego*, SMART VOTER, <http://www.smartvoter.org/2010/06/08/ca/sd/prop/D/> (last visited Nov. 1, 2010).

79. SONENSHEIN, *supra* note 43, at xiii, xvi.

80. *Id.* at 104, 181–83, 191.

81. NAT'L CIVIC LEAGUE, *supra* note 68.

82. *See, e.g., id.*; Adam W. Herbert, *The Los Angeles Charter: Lessons of Defeat*, 60 NAT'L CIVIC REV. 603 (1971) (providing a political study of the failed charter process). A range of other less well-known guides are cited in James M. Harkin, *Structural Change and Municipal Government: The Syracuse Case*, 15 ST. & LOC. GOV'T REV. 3 (1983).

records of a previous (failed) charter reform commission in Los Angeles were available for our guidance.⁸³

Generally, charter commissions hire their own staffs and also draw on city staff, conduct wide-ranging surveys of comparative best practices, hear testimony and debate, and conduct a thorough review of the charter itself.⁸⁴ Many times, local observers underestimate such commissions because of their rather quiet beginnings. If it can reach a consensus, however, the commission tends to get much more positive support for its recommendations by the end than might be envisioned at the start. A commission's odds of success are greatly enhanced if its leadership is attuned to the political viability of its proposals.⁸⁵

The basic value of a commission model for the California governance crisis is that it reduces the initial risk of undertaking reform, while offering the possibility of well-designed reforms that may build credibility among elites and with the voters. This model is the converse of the constitutional convention, which stacks its risks up front.⁸⁶ Furthermore, initiating a commission is much easier than creating a convention. A commission can be established by a majority vote of the legislature, by the governor, or ideally by both working together. By contrast, the creation of a constitutional convention requires action from the voters.⁸⁷ The commission model provides the possibility of developing a long-term culture of reform—not by promising a magic bullet solution, but by becoming a credible clearinghouse and evaluator of all possible proposals over a considerable period of time.

83. L.A. CITY CHARTER COMM'N, CITY GOVERNMENT FOR THE FUTURE (1969). Our staff located the files of this commission in a long-neglected filing cabinet at city hall.

84. See NAT'L CIVIC LEAGUE, *supra* note 68, at 11–12.

85. See Eric Lane, *The Practical Lessons of Charter Reform*, in RESTRUCTURING THE NEW YORK CITY GOVERNMENT: THE REEMERGENCE OF MUNICIPAL REFORM, *supra* note 74, at 31–34.

86. See Joseph Grodin, *Popular Sovereignty and Its Limits: Lessons for a Constitutional Convention in California*, 44 LOY. L.A. L. REV. 623 (2011); Ann Lousin, *How to Hold a State Constitutional Convention in the Twenty-First Century*, 44 LOY. L.A. L. REV. 603 (2011); Steven Miller, *Getting to a Citizens' Constitutional Convention: Legal Questions (Without Answers) Concerning the People's Ability to Reform California's Government Through a Constitutional Convention*, 44 LOY. L.A. L. REV. 545 (2011).

87. At the local level, it is somewhat easier to establish an appointed commission than an elected one, which may require a vote of the people to create it. See CAL. CONST. art. XVIII, § 2; Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1522–23 (2009).

States have made *some* use of constitutional reform commissions.⁸⁸ Kelley Armitage describes the commission's role in state constitutional reform as "of relatively recent vintage."⁸⁹ It is not uncommon for commissions to do the quiet preparatory work for a more public convention.⁹⁰ In the state of Maryland, a commission set the table magnificently for the convention, whose final recommendations the voters nonetheless defeated.⁹¹ I believe that using commission to set up conventions is backward and that the commission ought to be front and center rather than a handmaiden to an unpredictable convention. I propose that California lead with a commission that may ultimately create the conditions for a convention. That convention would be more of a mechanism for evaluating commission proposals than a fundamental decision-maker. In that sense, this convention would more closely approximate the original convention model of 1787.

The 1787 U.S. Constitutional Convention created the reputation of the convention model itself. In our national hagiography, delegates were sent to Philadelphia, and wisely produced the world's most enduring written constitution.⁹² However, that constitutional convention was more like a commission than a convention. For example, the meeting was not really a decision-making forum, but a prelude to formal ratification by the states. Conscious of their limited popular legitimacy and given their stated assignment of "revising" the Articles of Confederation, the members invented a new ratification process that was built around real conventions, elected by the people in each state.⁹³ And in today's terms, the members of the 1787 constitutional convention were more like distinguished commissioners (trustees) than delegates. They included the cream of

88. See Benjamin & Gais, *supra* note 2, at 74–75; Cain & Noll, *supra* note 87, at 1522–23.

89. Kelley H. Armitage, *Government Lawyer: Constitution Revision Commissions Avoid Logrolling, Don't They?*, FLA. B.J., Nov. 1998, at 62; Benjamin & Gais, *supra* note 2, at 74–75.

90. Kogan, *supra* note 1, at 1–2.

91. *Id.* at 2.

92. Thomas Jefferson, who was unable to attend the convention because of his diplomatic service in Paris, referred to its members as "an assembly of demigods." NATHAN SCHACHNER, THOMAS JEFFERSON: A BIOGRAPHY 342 (1st ed. 1957).

93. See U.S. CONST. art. VII ("The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.").

the crop of the nation's leadership.⁹⁴ If ever there was a blue ribbon commission, this was it.

V. MODELS THAT MIGHT WORK

Two states, Florida and Utah, have established constitutional revision commissions that might provide models for California. The Florida Constitution requires the convening of a constitutional commission every twenty years.⁹⁵ Remarkably, the commission has the power to place amendments directly on the state ballot.⁹⁶

The Florida commission consists of the attorney general serving *ex officio* and thirty-six additional members, appointed as follows: fifteen (including the chair of the commission) by the governor; nine by each of the president of the senate and the speaker of the house of representatives; and three by the chief justice of the Florida Supreme Court.⁹⁷ The most recent commission served from 1997–1998.

Utah follows a different process. A state constitutional revision commission was created by law (not by the Utah Constitution) in 1969.⁹⁸ In 1977, the commission became a permanent government feature.⁹⁹ The commission consists of the director of the Office of Legislative Research and General Counsel *ex officio* and fifteen additional members, appointed as follows: three appointed by the speaker of the house from the house, not more than two from the same political party; three appointed by the president of the senate from the senate, not more than two from the same political party; three appointed by the governor, not more than two from the same political party; and the six remaining members selected by the previously listed members, with consideration given to geographical and bipartisan representation.¹⁰⁰

94. The delegates included James Madison, Benjamin Franklin, and Alexander Hamilton. The members chose George Washington, the leading figure of the nation, as the convention's presiding officer.

95. FLA. CONST. art. XI, § 2.

96. *Id.*

97. *Id.*

98. *Archive Report of Utah Constitutional Revision Commission*, UTAH DEP'T OF ADMIN. SERVS., <http://archives.state.ut.us/cgi-bin/cathtmljava2.cgi?RUN-WHAT=CATHTML&TEMPLATE=AGENCY&AGENCY=240> (last visited Oct. 31, 2010).

99. *Id.*

100. *Id.*

If California were to follow either of these models, the appointment process would not have to be so dependent on government officials. Positions could be reserved for members of credible organizations, such as the League of Women Voters, and even ordinary citizens.¹⁰¹ The governor and legislature could start the process by enacting a law establishing a state constitutional revision commission. The state could decide at a later time, as did Utah, to make it permanent. Based on the charter reform experience, it would be wise to appoint a mixture of well-known, experienced people and “amateurs” who more closely approximate average Californians.

The value of the commission model is that it reduces the conflict over reform by removing the process from the elected leadership and putting a group of citizens in charge. While it may be boring at first, the commission model allows a formal reform process to begin without activating a hornet’s nest of opposition. It is, in this sense, the opposite of the convention model, which is high on excitement and risk at the outset. There is one type of charter reform commission that exists in a gray area between commission and convention—the elected charter reform commission. Under California state law, the voters may create a charter reform commission by initiative and elect its members. Then, the commission’s recommendations go directly to the voters without passing through the city council.¹⁰² In this respect, an elected commission is similar to the Florida constitutional commission. In any case, an elected commission is still likely to be much smaller and its members better able to deliberate than those of the very large body that convention advocates favor.

In 1997, the city of Los Angeles undertook an extraordinary charter reform process that reflected intense conflict between the city council and Mayor Richard Riordan.¹⁰³ The mayor and council nearly agreed to create a real hybrid commission: an appointed charter reform commission that could take its recommendations

101. The League of Women Voters mission statement is as follows: “The League of Women Voters, a nonpartisan political organization, encourages informed and active participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy.” *About the League*, LEAGUE OF WOMEN VOTERS, http://www.lwv.org/AM/Template.cfm?Section=About_Us (last visited Nov. 20, 2010).

102. See CAL. GOV’T CODE §§ 34450–34462 (West 2008).

103. See SONENSHEIN, *supra* note 43, at 85–86.

directly to the ballot without legislative review. But the deal fell through, and the mayor withdrew his support.¹⁰⁴ Without the mayor's participation, the council created an appointed commission of twenty-one distinguished and also less well-known citizens.¹⁰⁵ The mayor then utilized state law to create and finance a ballot initiative for an elected charter reform commission whose recommendations would go directly to the ballot. Thus, by 1997, the city had two competing city charter reform commissions—one appointed and the other elected—a circumstance possibly without precedent in urban government.¹⁰⁶

For two years the commissions competed like siblings. And yet, the Los Angeles charter reform succeeded, in part because of the interplay between the two models. The appointed commission provided the intellectual foundation and legitimacy for charter reform, winning support from key elites and local media for its process.¹⁰⁷ The elected commission brought popular sovereignty to the table, including the ability to go around the city council if necessary. When the two commissions negotiated a unified charter, the council and mayor were powerless to keep it off the ballot, and it received over 60 percent of the vote in 1999.¹⁰⁸ Thus, for California, a composite process of a citizens' commission followed by a convention that could examine and ratify its recommendations might bring the best of both models to the table.¹⁰⁹

In addition to maintaining reform momentum, the commission model might help with another problem in California's government—the lack of expert review of initiatives. There has been discussion about California's lack of an indirect initiative and the impact this absence has had on the quality of ballot measures.¹¹⁰ The state legislature's unpopularity weakens the argument for a legislative review of ballot measures. An alternative might be to have

104. *Id.* at 85.

105. *See id.* at 86–87.

106. *Id.* at 103.

107. *See id.* at 89.

108. *Id.* at 191.

109. A nongovernmental model of this combination may emerge if Repair California, an organization that favors a convention, and California Forward, an organization that plans to bring recommendations to the state legislature, were to join forces.

110. *See* CTR. FOR GOVERNMENTAL STUDIES, *DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT* 16–17 (2d ed. 2008).

a neutral, credible citizens' commission play the role of review body.¹¹¹ If such a commission were to become a central focus of a new culture of reform in California, the voters might welcome having a review body to improve the initiatives on which they vote. With considerable advance planning, a strategy for a reform commission can be developed to avoid previous pitfalls and enjoy the best chance of success.

An argument against a constitutional commission for California is that California has already tried constitutional reform by commission—and failed—in the early 1990s. In 1994, the state legislature created a blue ribbon commission, but when its work was completed, the legislature largely ignored its recommendations.¹¹² Successful reform requires a combination of good timing, strong organization, and political acumen. With considerable advance planning, a strategy for a reform commission can be developed to avoid previous pitfalls and enjoy the best chance of success.

Any local charter reformer would see a failed attempt at reform as a source of lessons for future success rather than as an argument against another attempt at reform. The odds are always against reform, but a well-designed mechanism to reduce risk at the outset so that long-term reform may be possible is well worth the effort.

VI. CONCLUSION

While there is widespread agreement that there is a crisis of governance in California, there is little consensus as to which institutional structure would best facilitate useful reform. Although the idea of a constitutional convention captured the imagination of the reform community, it failed to generate enough financial and political support to be implemented. The citizens' commission, another model of reform, has been largely ignored. Yet hundreds of cities successfully used the commission model over the past century to accomplish reform. Some state constitutional reforms outside California have successfully used such commissions. The

111. See Bruce E. Cain, *Introduction: To Con-Con or Not: California's Constitutional Decision*, 2 CAL. J. POL. & POL'Y 1, 2 (2010).

112. See Cain & Noll, *supra* note 1, at 1; see also Sonenshein, *supra* note 6, at 7 ("California[s] . . . constitutional revision commission[s] . . . recommendations never made the ballot and failed to even get out of the legislature. But the commission left a valuable report that would guide future commissions.").

commission model of governmental reform is much less exciting than a constitutional convention, but for that very reason it reduces the initial risk of undertaking such an effort—a risk that is likely to prove fatal to reform. The low profile of citizens' commissions allows a thorough airing of issues and the development of the sort of credibility that may give its recommendations surprising force. California should look to Florida and Utah, states in which permanent constitutional reform commissions have legal standing, as models of how California might steadily and effectively work toward a solution in a manner that both reduces the immediate political risk to all affected interests and leaves open the chance for long-term reform.