

the elimination of the elected superintendent of schools would place too much power in the hands of the governor and his State Board of Education. In retrospect, this fear was highly colored by the fact that the sitting governor was a Republican who had crossed swords frequently with the teachers' unions while the Superintendent of Schools was a more sympathetic Democrat. This illustrates the predictable point that where people stand in the Constitutional Reform debate often depends upon where other people sit.

Also active in the revision discussions were the taxpayer groups. Elements of the Commission's proposals were clearly designed to court their support, for example, a requirement that the state's budget be balanced or that the state should maintain a 3 percent general fund reserve. But the taxpayer groups did not like the fact that the Commission tried to restore local control over local taxes under a simple majority vote or that it provided for supplemental school funding.

Clearly, all types of constitutional reform (i.e., revisions or amendments) will often have to overcome opposition by key interest and constituency groups. But, processes vary in terms of how and when interest group intervention occurs. A constitutional revision commission provides several opportunities: at the time commissioners are appointed, when the legislature takes up the commission's proposals, and then later in the electoral battle. At the point that the proposals reach the legislature, the most important power is negative; that is, the ability to block undesirable proposals by putting pressure on key legislators to kill the offending measures before they are placed on the ballot.

Finally, there is the electoral stage. Assuming the whole package, or at least some part of it, emerges from the legislature, it must be sold to the voters. Here again, elected officials and interest groups have some influence over the final outcome since they help run and finance the campaign for the proposition. They can also work against a measure, or allow it to die by not giving it the support it needs to win.

By comparison, constitutional change by amendment has fewer hurdles and veto points. A group of citizens can hire a consultant to help draft the changes they want. With the help of a professional signature gathering firm and a little financial support, the measure can gain enough signatures to go on the ballot with legislative approval. The key to success is winning the public's approval.

Opinion is divided as to whether the popular initiative process has been captured by special interests or not. Journalists like Peter Schrag and

David Broder believe that there are enough examples of interest groups getting what they want from the initiative process, but political scientist Elizabeth Gerber's research suggests that interest groups are more successful in stopping what they do not like than passing what they like.<sup>6</sup> Assuming that the latter is true at least, it has the same implication for constitutional revision and amendments: in the final stage of public approval, the opposition of key interest groups can seriously undermine the prospects of constitutional change.

In sum, the fact that there are greater obstacles facing revisions than amendments goes a long way towards explaining why California amends constantly and revises sparingly. But does it matter?

### THE SIGNIFICANCE OF REVISION VERSUS AMENDMENT

In theory, constitutional revision should be more comprehensive and qualitatively more significant than a constitutional amendment.<sup>7</sup> But what if revision occurs increasingly through amendment: What is gained and what is lost? The most important advantage should lie in the ability of a Revision Commission to consider how all the pieces fit together. Where the amendment process is piecemeal and sequential, the revision process affords the opportunity to logically relate proposals to goals, and to make the entire package of proposal coherent.

This is illustrated by the California Commission's early discussions. Formed at a time of an acute fiscal crisis amid the California recession in the early nineties, the Revision Commission was given a mandate to solve policy problems by fixing governmental structure. In all of its publications, the Revision Commission was careful to spell out its goals and to explain the connection between those goals and specific recommendations. In general, the five goals it focused on were: improving the accountability and responsiveness of state and local governments, eliminating barriers to efficiency, increasing flexibility, and enhancing fiscal integrity.

Most of the recommendations relating to the state's executive branch focused on the absence of accountability and responsiveness. In the words of the final report, "The current organization of the state's executive branch does not promote responsiveness or efficiency in the execution of state policy. The executive branch is divided among a dozen elected public officials with few direct lines of accountability. This dispersion of

power creates inflexibility and fragmentation and reduces responsiveness and efficiency.”<sup>8</sup> To this end, they proposed that the governor and lieutenant governor run on the same ticket, that there should be a reduction in the number of statewide elected officials, and that the Board of Equalization should be abolished.

By comparison, on the subject of the California legislature, the Commission was more concerned about its stability and effectiveness. It worried that the term limitations were too short to allow legislators to become knowledgeable: “Rapid turnover has resulted in large numbers of freshmen legislators who are not knowledgeable about the complexities of the legislative process. This lack of experience often results in an inability to deal with complex and difficult policy issues that involve some amount of history.”<sup>9</sup> Its solution was to lengthen terms so that each member could serve three four-year terms in each house and that the limits should be staggered so that one-half of each house would be elected every two years.

Whether or not one agreed with the specific proposals, it is apparent that the Commission made a valiant attempt to link its recommendations tightly to a small set of specified goals. In its final report, the Commission very carefully spelled out the rationale behind each of its proposals. The Commission structure in this case permitted a deliberative methodology that attempted to make coherent proposals based on logic, testimony, and evidence. The meetings were open, and the actions of the body well documented by the press. By comparison, ICAs are composed in private and offer little documentation of how the proposals came into being.<sup>10</sup> From a democratic theory point of view, the revision process seems vastly superior in this regard.

However, there is more to contemporary constitution reform than rational logic and deliberation. A successful constitutional change must succeed in terms of political and popular logic as well. And because these last two screens are so important, it may be that the usefulness and practicality of deliberative constitutional revision is much diminished in the modern era. A closer inspection of the California’s experience reveals that while the Commission made concessions to political logic and public opinion, they did not go far enough. That resulted in the quick demise of the Commission’s final report. As a result, the most likely prospect of significant constitutional change in California is through the sequential passage of separately formulated ICAs and LCAs.

## THE DOMINANCE OF POLITICAL LOGIC AND PUBLIC OPINION

In an ideal world, constitution making is a logical and analytical exercise. Decision makers define general goals that help link solutions to well specified problem in clear and coherent ways. In reality, modern constitutional revision is formed as much by political and electoral logic as by rational deliberation. Political logic refers to the appeal that changes have to key groups and constituencies in a society. As with policy, the political prospects of a constitutional change depend upon three considerations: first, the distributive consequences of given proposals; second, the relative power of winners and losers; and third, the ability of proponents to win over a sufficient number of swing groups to form a minimum winning coalition.

With respect to the first point, the distributive consequences, constitutional changes usually have material or power/influence consequences for various groups in the political system. Returning to the example of the 1993 Commission, the proposals to have the lieutenant governor run on the same ticket as the governor, or the suggestion that the elected superintendent of schools be made an appointed position, clearly would have strengthened the governor's hand. At the time it was proposed, it would have also fortified the position of Republicans relative to Democrats since the governor was a Republican and the lieutenant governor and the superintendent of schools were Democrats. In effect, the Revision Commission's proposals distributed power and influence in two dimensions: institutionally (in favor of the executive branch) and by party.

Political actors should probably discount the short-term partisan consequences if they believe that their party might eventually control the governorship. But that did not happen in the California case for two reasons: first, because the political stakes at the moment seemed so high, and second, because there had only been three Democratic governors prior to 1998 since the turn of the century. Far from assuming the Rawlsian veil of ignorance, players in the California constitutional battle scrutinized each proposal with a view toward how it affected them.<sup>11</sup> Predictably, the winners under the status quo resisted proposals that made them weaker, and vice versa, the losers under the status quo favored proposals that made them stronger.

The second consideration with respect to the prospects of constitutional reform is how powerful and/or numerous the winners (i.e., as

defined above) are as compared to the losers. It is almost a certainty that any important constitutional change will affect important interests. The 1993 Commission could have taken a safer political route by not alienating hard-to-defeat interests, but this would have eliminated any proposals that affected taxes (because taxpayers groups are quite powerful in California and politicians do not want to be labeled as pro-tax), institutional structure (because politicians control the second stage of the revision process), and initiative reform (because the initiative industry can mobilize significant opposition in an election).

Alternatively, the Commission could have picked a dominant coalition of interests and made sure that all of its proposals favored them. Instead, it chose to give and take a little from everyone. The idea was that if everyone got something and felt that structural change was important (i.e., because there was a fiscal crisis), they would be willing to compromise and lose something as well. As the recession receded and the sense of crisis abated, the perceived pressure to do something dropped between the time of the Commission's appointment in 1993 and its final report in 1996. At some point in that period, the perspective of each affected constituency changed: instead of choosing between different reforms, the prospect of sticking with the status quo was now on the table.

From the Republican perspective, the Commission's recommendations gave them a balanced budget and enhanced gubernatorial power, but at the cost of losing supermajority taxing rules at the local level. Sticking with the status quo in 1996 looked more attractive. Conversely, Democrats liked the more flexible taxing authority the Revision Commission's proposals offered, but not the budget and executive branch changes. The status quo looked better to them as well. If there was a constitutional moment, it had surely passed by 1996. The better moment was in 1993 when the status quo did not seem viable.

The absence of swing groups was also a problem for the Revision Commission. Again, this was partly a matter of tactics. Many of the problems that the Revision Commission took on were important and highly polarized, and had been referred to them precisely because offsetting powerful interests or the fear of public retaliation had stalemated the normal political processes. For instance, since the passage of Proposition 13, property tax reform had become the third rail of California politics—untouchable for politicians who wanted to be reelected, because it impacted property owners in such a critical way. Or to take another example, even though many experts believed that initiatives had created a disjointed and

highly constrained budgetary process, no elected official dared to propose amending direct democracy. The unstated premise of the 1993 Commission was that it could make hard political choices that the legislature and governor could not or would not make, but in the end, the Commission's proposals had to be vetted by the legislature and the voters anyway. The legislature would be vulnerable for the vote it took on the recommendations, and the public had the ultimate say without the benefit of participating in the Revision Commission's deliberations. The hope that the forces that stalemated the governor and legislature would not stalemate the Revision Commission was ultimately ephemeral.

### THE VOICE OF THE PEOPLE

The ultimate determinant of the success or failure of modern constitutional revision is public opinion. The eighteenth-century federal model of a convention—respected notables whose proposals are ratified by state legislatures—is simply not relevant to modern state constitutions. All routes to revision and amendment in California lead ultimately to public opinion. The people ultimately determine what can and cannot be accomplished in terms of constitutional reform.

The public opinion aspect of constitutional revision consists of two parts: what the public will understand and what will appeal to them. The question of the public's comprehension is important, because there are many technical issues that voters will not readily understand nor have the patience to master. The recommendations of the California Constitution Revision Commission included several worthwhile proposals that unfortunately would have been hard to explain to the public if they had ever reached the ballot. For instance, the Commission's report calls for the "legislature to be authorized to include in a single implementation bill any statutory changes needed to implement the budget bill."<sup>12</sup>

Put simply, California currently limits all legislation to a single subject, preventing the legislature from combining all budget-related changes into one bill and forcing them to consider twenty to thirty different bills. If any of the implementing bills fails, it can throw the entire budget out of balance. Allowing the legislature to pass a single budget implementation bill would avoid this problem. However important to everyday legislative operations, it would be difficult to explain this clearly to voters and to convince them that this was worthy of their attention.

Normally, measures that appeal to voters are easy to understand and expressive of the public's general mistrust of government and politicians. A good example is the Commission's recommendation that the governor and legislators forfeit their salaries if the state budget is not passed by June 30 would likely pass overwhelmingly. The problem is that the simple solution is not necessarily the best one. California's budgetary problems required a systematic overhaul of the property tax system and the legislative approval process. Simply forcing legislators to make timely decisions does not address the underlying problems. But it would likely win, because it expresses the voters' frustrations with government.

There has been a decade-long debate in political science about how much voters understand about technical initiatives and whether they can find ways to make good decisions without being informed.<sup>13</sup> Pessimists argue that voters make little effort to understand complicated measures, although they often have the sense to vote no when in doubt. Optimists believe that voters can choose as if they are informed (even when they are not) by paying attention to key interest groups and individuals who become informed for them. Because there is scholarly disagreement, it is hard to draw a firm conclusion about the voters' competence to judge constitutional issues. It is at least a potential problem for constitutional measures, because many of them are technical in nature.

Beyond the question of what voters understand, there is the matter of which voters control the outcome. In both the revision and amendment processes, the state's median voter controls the final outcome of any proposed change. Hence, successful constitutional reform in the contemporary era will have a majoritarian bias no matter whether it originates as an amendment or revision. Consider the question of initiative reform. Many in California believe that the initiative process has been used excessively and too often by special interests. But in order to change the initiative process, one would have to ask the voters whom the process has served well to give up their control over policy outcomes. This is unlikely to happen. If the majority retains control through direct democracy mechanisms, they are unlikely to surrender that control willingly. So in the end, the eighteenth-century concept of a constitution that balances the rights of the minority against those of the majority simply makes no sense at the state level. Measures that would protect or favor a minority against the majority's will cannot make it through the constitutional approval process.

Thus, the strategic issue a modern Constitutional Revision Commission faces is whether to make their "best" recommendations or to go

forward with only those that meet the essential political and electoral requirements. The problem with the pure strategy is that while it might be bold and innovative, it will likely be unsuccessful unless the polity is in the grips of an extremely severe crisis. Unless the point of the revision effort is simply to make a high-minded statement about what should be done, it is not likely to be an effective strategy, if effective means something that results in actual change.

The alternative strategy is to work back from what is politically and electorally feasible to what is desirable. Identify the proposals that are likely to have a chance first, and then concentrate efforts there. Moreover, revision efforts have to become more sophisticated about public opinion just as the experts who run the campaigns for constitutional amendments have. Revision commissions should test their ideas immediately with polls and focus groups. While some might recoil in horror at a less deliberative and more political approach, the alternative is to surrender all constitutional change to the amendment process. As we have pointed out before, revision, even in a political form, offers a better hope of some coherence and logical connection between proposed changes. If the revision process is to succeed in the future, it cannot operate as if it is in an eighteenth-century political environment.

## NOTES

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# Adopting a New Constitution

## Lessons from Virginia

A. E. Dick Howard

“The earth belongs always to the living generation.”<sup>1</sup> So said Thomas Jefferson in developing a constitutional theory that included the belief that Virginia’s Constitution should be revised at regular intervals “so that it may be handed on, with periodical repairs, from generation to generation. . . .”<sup>2</sup>

Despite such advice, some generations of Americans have shown more interest than others in revising their state constitutions. For about a quarter of a century—from the 1920s into the 1940s—no American state adopted a new constitution. By midcentury, however, interest in revising these fundamental laws had burgeoned. So widespread was the movement for constitutional revision that by 1970, a leading student of the subject commented that there was at that time “more official effort directed toward revising and rewriting state constitutions than at any time in the nation’s history with the possible exception of the Civil War and Reconstruction era.”<sup>3</sup>

Some of these revision efforts were notably successful, for example, the rewriting of the Hawaii Constitution, which was approved by the people of the state in November 1968. Other revisions ended in failure, perhaps the most conspicuous instances being those of New York in 1967 and Maryland in 1968. Indeed, in modern times, many states have found it more difficult to secure popular approval of a revised constitution. When Virginians went to the polls in November 1970 to vote on a new constitution for the Commonwealth, those who hoped the result would be favorable had before them the unfortunate experience of a number of sister states. Although some states had succeeded in at least partial revision, since 1967 the voters

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