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## Reforming California: Political Patchwork versus a Constitutional Convention

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With constitutional reform fever seeming to emerge from nowhere in the summer and fall of 2009, it looked as though Californians would soon get the opportunity to vote on calling a state constitutional convention. Almost as rapidly, the fever waned, and with it went the potential for a convention. For those who follow California politics, the abrupt change of political winds is nothing new. But that tailspin did manage to generate a revival of interest in restructuring California government for the 21st century and beyond. The state now lumbers along with an 1879

constitution, amended over 500 times, the third longest constitution in the world, behind only Alabama and India.<sup>1</sup>

Yet even if the window of opportunity for a constitutional convention may have closed, Californians continue to tinker with electoral rules and structural changes, while specific reforms remain on the political agenda. Hence, we need to examine such ideas carefully. This special edition of the *California Journal of Politics and Policy* tackles political reform in the Golden State. We have assembled five articles analyzing and proscribing a variety of reforms to restructure California. Some of the reforms discussed, like the new Top Two Primary and the Citizens Redistricting Commission, have already become law, while several others have not. Regardless of whether they focus on reforms enacted or merely considered, all the contributions to this

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volume are committed to providing more in-depth analysis of specific proposals than has been previously available.

In this introduction we summarize some of the key arguments made by our contributors. But we think it would be helpful for readers to gain an understanding of how the state is again at the stage of considering individual reforms, when wholesale constitutional change only recently seemed quite possible. We turn to that topic first.

### **The Rise and Fall of the Cal Con-Con**

The sudden interest in a constitutional convention (or con-con for short) emerged after Jim Wunderman, president of the politically influential Bay Area Council, wrote an op-ed essay in the *San Francisco Chronicle* on August 21, 2008 calling for a state convention. The Bay Area Council is an association of the largest businesses in the region, and Wunderman wrote the editorial while visiting Sacramento during the 2008 budget stalemate, a then-record 80-day slog. Having received much positive feedback, Wunderman began working with other good government groups to create a unified organization. The group, which became known as Repair California, held a series of public summits around the state to gauge support for a con-con. These summits and statewide polling revealed strong interest.

To implement its goal of holding a constitutional convention, Repair California would need to amend the constitution. There is no little irony in a group bemoaning the incremental amalgamation of California's current constitution by using that same process to call for a state convention. Nonetheless, this was necessary because the only current avenue of calling a convention requires a two-thirds vote of the legislature, something everyone agrees is extremely unlikely. To bypass the legislature, reformers would have had to place two initiatives on the 2010 or 2012 ballot: one that would allow an initiative to call a constitutional convention and a second that would then call the con-con. Both measures would have to pass, and Repair California claimed both could be on the same ballot, although others were skeptical.

But just as quickly as the idea of a con-con entered California's political lexicon, the driving energy behind the reform seemed to evaporate. Repair California announced in February 2010 that it would not be able to raise the considerable amount of money to put the initiatives on the ballot. As of early 2012, the group and its website appear dormant. What happened?

As with all good reforms, the details need to be right, and the details here were a problem. A big issue for any convention is who would serve as delegates. Would they be elected, randomly selected, appointed, or chosen through some combination of these methods? Who would appoint

them? If randomly selected, how would this be accomplished? Would delegates run in local legislative districts or specially-drawn districts just for the convention? Were there to be any restrictions on who could serve as delegates? How would potential delegates raise money to run a campaign? Who could give? These are just a few of the many questions that immediately emerge when talk turns to a constitutional convention, whether state or national.

Repair California tried to preempt some of these questions by announcing its own rules for potential delegates: some would be randomly selected from a pool of volunteers, while the 58-county board of supervisors would appoint the rest. This puzzled a lot of supporters. Why limit the delegation to inexperienced neophytes and political hacks chosen by myopic local politicians? Where were the experts? The state leaders? The elder statesmen? How could you expect this group of potential delegates to create a new constitution that would need to be ratified by the electorate?

In addition, the proposed constitutional convention would have certain restrictions on what could be debated. No discussion of volatile social issues. No discussion of water, something that can get any calm Californian into an angry tirade very quickly. The convention would be limited to governance and budget issues. Ostensibly, these decisions were made to make any constitution that emerged from the convention more likely to be approved by the

voters. But it may have made voters, and perhaps financial backers as well, less interested in the revision process itself.

Although Repair California may have made the most visible and concerted effort to establish a con-con, it was hardly the only advocate. In a widely cited book about what's wrong with California government, Joe Matthews and Mark Paul of the New America Foundation strongly advocated for a constitutional convention.<sup>2</sup> But none of the efforts to call a convention gained traction.

### **Efforts at Patchwork Reform**

While much of the media attention went to Wunderman, Repair California, and the prospects of a California con-con, another group of reformers pushed for a more incremental approach to restructure the state. This group, California Forward, supports a series of constitutional amendments over several years that would build off one another to achieve substantial reform.

California Forward has many well-known bipartisan names attached to it and was started by some of California's largest nonprofit foundations. Its co-chairs are former Democratic Assembly Speaker Robert Hertzberg and Republican Thomas McKernan, the CEO of southern California's massive, politically influential Automobile Club. While Repair California was mainly by northern Califor-

nians, California Forward is based in the South. It is not clear if this has any deeper political meaning, but it does illustrate the old geographic cleavage that still divides the state.

Thus far, it is unclear how much progress California Forward will make. Yet regardless of the group's success or failure the idea of enacting specific reforms, including to amend the state constitution, continues to earn support. Patchwork reform lives.

### Recent Changes and the Need to Study Them

Amid attention to the failure, thus far, to achieve wholesale constitutional change, it is easy to lose sight of the victories Californians have won in the battle for structural and electoral change, mostly but not exclusively through the ballot initiative process.

- *Redistricting.* After numerous failed efforts to remove redistricting from the hands of state legislators, Californians in 2008 approved the creation of a commission (the California Citizens Redistricting Commission or CRC) to establish new borders for state legislators and members of the Board of Equalization. This was followed two years later by another successful ballot measure giving the CRC responsibility for establishing congressional districts. In short, Californians have effectively removed one of

the most controversial responsibilities from lawmakers and given it to a completely new nonpartisan body.

- *Changing the Primary System.* In 2010, prompted by concerns such as party ideological polarization, California voters approved an initiative known as the Top Two Candidates Open Primary Act. Under this measure, all candidates running in a primary election, regardless of their party preference, will appear on a single primary election ballot and voters can vote for any candidate. The top two overall vote-getters—not the top vote-getter from each qualified party and anyone using the independent nomination process—will move on to the general election. This represents a major change in how elections are organized.

What impact will such changes have, and what can we say at the moment about their costs and benefits? Our first two articles address these questions.

For decades, advocates of political reform in California and other states have tried to change the how district lines are drawn. Political science literature is replete with scholarship showing how gerrymandered U.S. House districts have led to fewer competitive seats and increased party polarization within Congress (although other scholarship suggests that the role of gerrymandering in promoting these ills is overstated<sup>3</sup>). This phenomenon also plays out at the state level, and this is particularly true in California, which has seen a dramatic polarization of political opin-

ions between liberal Democrats along the coast and conservative Republicans inland.<sup>4</sup> Because of the inherently political nature of the redistricting process, these divisions within the electorate tend to be not only replicated, but exacerbated, within the legislature. Historically, this has been true during times of both unified and divided government, where Democrats gain an advantage under the former scenario and incumbents of both parties gain under the latter.

Frustrated by the seeming inability of the legislature to solve the state's problems, political reformers turned to the ballot box in 2008 and 2010 to push redistricting reforms. It was hoped the reforms would lead to more competitive state legislative and U.S. House districts, thus encouraging candidates to tailor their appeals more towards the median (centrist) voter and less towards the extreme left and extreme right. With more centrist candidates in office, representing more competitive districts, reformers hoped bipartisan compromises would more easily emerge to move the state forward. The California Republican Party, which supported both measures, also hoped to lessen the Democrats' near-hegemony over the state legislative process.

The first article in our issue, by Vladimir Kogan and Eric McGhee, takes a comprehensive look at the work of California's first Citizens Redistricting Commission, which was tasked with drawing new state legislative and U.S. House districts following the 2010 Census. The authors point to several significant improvements in these

districts compared to the legislatively drawn maps of a decade earlier. The new districts tend to be more compact, more competitive, have a greater potential to fairly represent minority interests, and Assembly districts tend to be better "nested" within Senate districts. However, from the standpoint of partisan balance, the authors argue that the new maps could actually help the majority Democrats gain the heretofore elusive two-thirds majorities in the legislature that they have long been seeking (certainly not the outcome the California Republican Party was hoping for).

In many areas, geographic self-sorting of the electorate by party/ideology makes redistricting reform a tool of limited impact for reducing the dramatic polarization currently represented in the legislature. Whether the voters prefer this method of drawing districts or not, as with other reforms we will discuss in this issue, redistricting reform is unlikely to solve all of the state's problems. But its effectiveness is guaranteed to be tested in the upcoming election thanks to the California Supreme Court, which affirmed its constitutionality in a ruling handed down in late January, 2012. Their decision twice cited the Kogan-McGhee paper published here.

Just as advocates of redistricting reform hoped it would lead to more moderate candidates whose primary audience was the median voter, this was the same impetus behind a 2010 change in California's primary system. Since 1909, California has operated under four different

primary systems, and, more recently, restless Californians have been changing their primary systems with increasing frequency. For nearly 90 years, California operated under a closed primary. In 1996, voters opted to switch to a Blanket Primary, which was in place until the U.S. Supreme Court struck it down in 2000. From 2000–2010, California used a Modified Open Primary (sometimes called a Hybrid Primary) system, before voting to switch again in 2010. In 2010, voters passed Proposition 14 and created a Nonpartisan Primary (sometimes called a Nonpartisan Blanket Primary), the third time California changed its primary system in less than 15 years.

Under the new system, all candidates for every office appear on the same ballot and the top two vote-getters (regardless of party) advance to the general election. All registered voters may participate instead of just registered party members. Unlike other primary systems, this lessens the incentive to appeal to ideological extremes and maximizes the incentive to appeal to the broadest swath of voters in the electorate. With more moderates being elected to the legislature as a result, reformers argue, centrist compromise presumably would be easier to achieve.

The second article, by Todd Donovan, asks “What Can California Learn from Washington?” by providing a detailed analysis of the similar “top two” primary system that has been in place in Washington State since 2008. Much like Kogan and McGhee, Donovan finds that “top two”

produced some notable electoral effects in Washington, although the scope of these effects was far less sweeping than reform advocates predicted, particularly regarding the partisan structure of the legislature. Because Washington and California have different political histories, and have used different primary systems prior to the implementation of “top two,” Donovan readily admits that California may experience more dramatic changes from “top two” than Washington did. However, it is possible that “top two” may be another example of putting too much faith in piecemeal reforms.

### **What Other Changes Might Be Made?**

Changes to redistricting and the primary election system hardly exhaust the possibilities for tinkering. The third, fourth, and fifth articles in this volume address other options. The piece by Stacy Gordon Fisher, Kim Nalder, and Matthew Lesenyie focuses on the role of money in lobbying and elections. The article by Joshua Dyck and Mark Baldassare has implications for reforming the initiative process. And the contribution by Elizabeth Bergman considers quasi-experimental evidence about the public’s support for expanded voting by mail.

It is difficult to discuss reform without considering the potential corrupting effects of money in elections and lobbying. Polls consistently indicate this is one of the public’s

predominant concerns. Yet Gordon Fisher and her colleagues argue that currently California does about as much as possible to prevent inappropriate behavior by legislators and lobbyists through disclosure rules and limits on gifts and contributions. They contend that future reform needs to concentrate on making existing information about the relationship between funds, legislators, and lobbying activity more user-friendly. For example, they look to the establishment of Websites that link what is now disparate data about legislators' bills, interest group positions, and campaign contributions. While the authors acknowledge that such information may only be used by more politically engaged citizens, without such changes, even the more motivated of voters would find it hard to hold lawmakers accountable in ways political theory suggests is desirable.

While Gordon Fisher and her colleagues indicate that reform efforts might be better directed, Dyck and Baldassare take on the idea that major reform in one area may be impossible because the public is too supportive of the status quo. That area is the ballot initiative process. Academics, commentators, and journalists commonly claim that while small changes are possible, Californians will not accept major reform because they are so supportive overall of voting on ballot measures. Yet Dyck and Baldassare argue that this conclusion is based on unjustified inferences drawn from responses to dichotomous, forced-choice survey questions. Using more sophisticated analysis of survey

data over multiple years, the authors conclude that Golden State voters are far more ambivalent about direct democracy than is commonly portrayed. This suggests Californians might be more supportive of implementing ideas such as the indirect initiative than might be imagined.

Bergman also focuses on the extent to which the public would support major changes, but she considers an issue that has been further under the radar in the extant discussions of constitutional change and electoral reform: increased use of voting by mail. Over the years there has been a sharp increase in absentee voting in California and there have been a number of local experiments with mail-only elections. Yet we remain a long way from abandoning the traditional polling place.

For those who might contemplate such a move, a critical question becomes: would the public support it? Bergman addresses that question in her article. She is not content to have citizens simply answer the question in the abstract, especially since (as she shows) there are strong reasons to think such beliefs are heavily influenced by allegiance to prior habits. Instead, she seeks to determine if those who actually have experienced something approaching mandatory voting by mail think differently than do other voters.

To address this question, Bergman takes advantage of a quasi-experiment. She compares the attitude of voters whose polling place were closed because of a low number of registrants—and therefore were supplied a mail bal-



lot—with voters who chose to vote absentee and regular precinct voters. She reports a number of interesting similarities and differences across groups. For our purposes, her most significant finding is that voters who cast their ballots by mail because their precincts were closed, and could therefore be viewed as “forced mail voters,” tend to approve of mail-only elections. Indeed, their views are very similar in this respect to people who voluntarily voted by mail. The implication is that citizens may be less averse to this type of reform than is often believed, especially having experienced it in practice.

#### **A Caution: The Danger of Viewing Reforms in Isolation**

Thus far we have argued that while prospects for a constitutional convention have waned, specific system changes remain feasible, and recent California political history only reinforces that conclusion. Furthermore, as two of our articles show, the public is more supportive of change in some areas than commentators often claim. Thus, we need to gain a better understanding of the proposed reforms. At the same time, we remain sympathetic to one of the central arguments of con-con advocates: that reforms in isolation can be counterproductive or ineffective.<sup>5</sup>

This point may best be illustrated by considering a reform that lies outside of the content of the articles in

the present volume: efforts to ease legislative “gridlock” created by the former requirement that a two-thirds vote was needed in each house of the legislature to pass a state budget. Long-standing concerns about this provision, especially by the Democratic majority in the legislature and its allies, led to multiple efforts to change the requirement by ballot initiative. That effort finally succeeded with the passage of Proposition 25 in 2010. This constitutional initiative reduced the threshold to pass the annual budget to a simple majority in the legislature. Since tax increases still require a two-thirds vote, Prop. 25 does not entirely shut the minority Republicans out of the budget debate, but many insiders believed (or perhaps hoped) its passage would effectively hand the budget to Governor Brown and the Democratic legislative majority.

As it turned out, in the first year in which they took effect, the new budget rules proved to be something of a pyrrhic victory for Democrats, particularly in these tough economic times. The majority Democrats no longer needed to pick off the few Republican votes previously necessary to pass a budget, which often required months of negotiation and special incentives to win over those few legislators. In practice, the Democrats could pass a budget at will, but without the ability to raise taxes, they now bore responsibility for the budget cuts they have to implement to balance the budget. The best hope for achieving their priorities remains securing a two-thirds majority in the legislature,

or waiting for California's economy to improve, at which time cuts might not be as essential to balance the budget. In short, by changing the rules for adopting expenditures without altering the rules for adopting taxes, the practical effect of "reform" may have been largely undermined.

A hundred years ago, California seemed ungovernable, controlled by special interests, with political parties deemed part of the problem. Unable to call a state constitution convention, reformers banded together, won a series of elections, and restructured the state, adding direct democracy to California's Constitution and unleashing a bold new experiment. The Progressives succeeded in weakening the power of Southern Pacific Railroad, but today powerful new interests use those same tools—the initiative, referendum, and recall—to influence state government. Present-day reformers have discussed calling a constitutional convention or enacting a series of reforms to once again put California on a better path. Patchwork reform might be easier to implement in California than a constitutional convention, but it might not be better. Reform for reform sake is not a panacea. And California is too big a state to turn around by guesswork.

### Conclusion

The key point is that without a systematic effort to adopt a more comprehensive set of reforms, individual changes

may not succeed, or worse, may actually undermine one another (to be sure, this is not the case for some of the ideas discussed in the volume such as mail-only elections discussed by Bergman or the proposals by Gordon Fisher and colleagues). The beauty of a constitutional convention is that it might allow us to overcome the contradictions in Californian's governmental system. Assessing the broad content of such systematic reform remains outside the scope of this volume. Instead, we hope the contributions herein will help readers think more carefully about the plethora of patchwork changes that have been made in the past and likely will continue to be made to the California governmental system.

### Notes

<sup>1</sup> Brian Janiskee and Ken Masugi, *Democracy in California: Politics and Government in the Golden State* (2 ed.) (Lanham: Rowman & Littlefield Publishers, Inc., 2007), 27.

<sup>2</sup> Joe Matthews and Mark Paul, *California Crackup: How Reform Broke the Golden State and How We Can Fix It* (Berkeley: University of California Press, 2010).

<sup>3</sup> Seth E. Masket, Jonathan Winburn, and Gerald C. Wright, "The Gerrymanderers Are Coming! Legislative Redistricting Won't Affect Competition or Polarization Much, No Matter Who Does It," *PS: Political Science & Politics* 45 (January 2012): 39–43.

<sup>4</sup> Frederick Douzet et al., *The New Political Geography of California* (Berkeley: Berkeley Public Policy Press, 2008).

<sup>5</sup> See for example, Matthews and Paul, *California Crackup*.