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Recommended Citation

58 N.Y.L. Sch. L. Rev. 1

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Revisionists' History: A Foreword

58 N.Y.L. SCH. L. REV. 11 (2013–2014)

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REVISIONISTS' HISTORY: A FOREWORD

On a cool morning in March 2012, in the shadow of three New York City government landmarks—the Municipal Building, City Hall, and the Tweed Courthouse—*New York Law School Law Review's* then-Faculty Publisher Marcey Grigsby and I met over coffee to talk about transitions.

The first transition we discussed was the one I was about to make from City Hall, where I had served as legal counsel to Mayor Michael R. Bloomberg for more than ten years, to New York Law School, where I now serve as Dean and President. The second transition we discussed is the one that will take place on January 1, 2014 when many of the city's local elected officeholders, including the Mayor, Comptroller, and Public Advocate, will leave office and be replaced by new leaders elected in the November 2013 general election.

With Professor Ross Sandler, Director of New York Law School's Center for New York City Law, we agreed that the citywide transition and the twenty-fifth anniversary of the 1988 and 1989 Charter revisions, together presented a unique opportunity to reflect on the impact of charter revision over a quarter-century. Indeed, the fundamental structural changes that were first considered by the 1986–88 Commission, and ultimately proposed by the 1989 Commission and adopted by the voters, are the ones by which the city is governed today. Although a significant earlier work documenting the process and intent behind the 1989 revisions was written by Frederick A.O. Schwarz, Jr. and Eric Lane, and published by this *Law Review*, there has been relatively little serious reflection since then on how well those changes have served the needs of the city over the years.¹

Similarly, there has been relatively little discussion about the changes brought about as a result of the work of the Charter Revision Commissions post-1989. Accordingly, the development of a clearer understanding of the long-term impacts of all of those changes, and what we learned from the debates during this period, became a key objective of our inquiry. To help in this discussion, we were able to gather together some of the most influential figures in city government and certain key players in Charter revision. These participants included former Commission Chairs, as well as Commissioners and staff, other public officials, scholars, leaders from the “good government” community, and observers from the media.²

1. See 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. 723 (1998).

2. See Lucas Anderson, *Promoting an Effective and Responsive City Government by Retaining and Strengthening the Office of the Public Advocate*, 58 N.Y.L. SCH. L. REV. 165 (2013–2014); John Avlon, *Change the Rules and You Change the Game: That's Why Charter Revisions Matter in New York City*, 58 N.Y.L. SCH. L. REV. 25 (2013–2014); Michael A. Cardozo, *Reflections on the 1989 Charter Revisions*, 58 N.Y.L. SCH. L. REV. 85 (2013–2014); Elizabeth Fine & James Caras, *Twenty-Five Years of the Council-Mayor Governance of New York City: A History of the Council's Powers, the Separation of Powers, and Issues for Future Resolution*, 58 N.Y.L. SCH. L. REV. 119 (2013–2014); Matthew Goldstein, *Working Toward a Better-Functioning Government: Reflections on the 2010 Charter Revision Commission*, 58 N.Y.L. SCH. L. REV. 43 (2013–2014); Randy M. Mastro, *On the Voters' Terms: Amending New York City's Charter to Protect Voter-Imposed Term Limits*, 58 N.Y.L. SCH. L. REV. 139 (2013–2014); Christine Quinn, *A Discussion on New York City and its Future: A Conversation with New York City Council Speaker Christine Quinn*, 58 N.Y.L. SCH. L. REV. 55 (2013–2014); Frederick A.O. Schwarz, Jr., *Twenty-Five Years Later: Reflections of New York City's 1989 Charter Revision Commission and on Charter Commissions in General*, 58 N.Y.L. SCH. L. REV. 95

An understanding of the evolution and efficacy of New York City's basic governing document—in essence its constitution—matters greatly. Like a constitution, the Charter broadly sets out the structure, powers, functions, duties, and processes of the government. However, unlike a constitution, the Charter generally does not create substantive rights. And, unlike the complex processes required to amend the U.S. or New York State Constitutions, most provisions of the Charter can be changed locally by simple legislation, passed by the City Council and signed into law by the Mayor. However, there are areas of local lawmaking that are the subject of mandatory referendum and they include proposals that would, for example, abolish, transfer, or curtail any power of an elected officer, or eliminate or create new elective offices altogether.³ A referendum is also mandated for proposals that would, for instance, affect the city's franchises, dispense with public notice and hearing requirements, or repeal or amend the core provisions of the city's conflicts-of-interest law.⁴ Because Charter Revision Commissions have the power to place proposals on the ballot, they have been appointed to review and make recommendations on these issues and others.

New York State's Municipal Home Rule Law provides for the creation of Charter Revision Commissions through a variety of means, including through the action of the Council, the voters, and the Mayor.⁵ Commissions are legally mandated to review the entire Charter and any proposals subject to referendum must be approved by a majority of voters to be enacted into law.⁶ Over the past twenty-five years, the process of Charter revision by referendum has been facilitated by nine mayorally appointed Charter Revision Commissions. The 1986–88 and 1989 Commissions were appointed by Mayor Koch; the 1998, 1999, and 2001 Commissions were appointed by Mayor Giuliani; and the 2002, 2003, 2004–05, and 2010 Commissions were appointed by Mayor Bloomberg. All proposals to change the Charter as set forth by these Commissions, except those in 1999 and 2003, were adopted by the voters.

Indeed, the outcomes of Charter revisions can profoundly affect the distribution of political power, accountability, and wealth in the city. Outcomes of past Charter revisions have had practical and lasting impacts upon the city's leadership structure and functions, how its elections are undertaken, how its communities are defined, empowered, and served, how its budget and finances are administered, and how its public integrity is safeguarded. These governmental functions are all critical components to ensuring a well-functioning democracy, maintaining public confidence, facilitating civic engagement, and fostering an environment for continued

(2013–2014); Edward Skyler, *Can Government Work?*, 58 N.Y.L. SCH. L. REV. 29 (2013–2014); David S. Yassky, *Learning from Washington: A New Approach to Analyzing the Structure of New York City's Government*, 58 N.Y.L. SCH. L. REV. 71 (2013–2014).

3. N.Y. MUN. HOME RULE LAW § 23(2) (McKinney 2013); N.Y.C. CHARTER § 38(4), (5) (2013).
4. N.Y.C. CHARTER § 38(7), (12), (18).
5. N.Y. MUN. HOME RULE LAW §§ 36(2), (3), (4).
6. *Id.* § 36(5).

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investment in the city by business and industry. It is, therefore, understandable how efforts to change the Charter over the years have captured the widespread attention of citizens, community leaders, politicians, and advocacy groups alike.

While all of these Commissions generated controversy to varying degrees, none of them carried the legal imperative to reshape the city's governing structure like the 1989 Commission. That legal imperative resulted from the U.S. Supreme Court's decision in *Board of Estimate v. Morris*,⁷ which held that the structure of the city's longstanding governing body, the Board of Estimate, violated the Equal Protection Clause of the Fourteenth Amendment and did not comply with the principle of one-person, one-vote. Although the 1986–88 Commission set the stage by reviewing proposals to restructure the government while *Morris* was pending in the lower courts, those proposals were ultimately deferred for consideration. Instead, that Commission placed on the ballot proposals aimed at opening up citizen access and participation in government. Accordingly, after the Supreme Court's decision in *Morris*, it was the 1989 Commission that ultimately put forth proposals to redress structural problems. When approved by the voters, those proposals yielded, among other things, the abolition of the Board of Estimate and the devolution of its powers to a variety of elective offices—some of which were reshaped, eliminated, or created anew. The resulting structure is what governs the city today.

Because the 1989 Commission was appointed out of necessity, and with such a weighty charge, it effectively set the standard against which the processes, and often the substantive merits, of subsequent Charter Revision Commissions have been judged. It is understood that subsequent Commissions, while legally mandated to review the entire Charter, were not appointed to address any legal imperative *per se*, but instead were appointed to consider proposals relating to the important political and institutional dynamics or operational challenges of the day.

As we planned the symposium, we hoped that Mayor Koch, who appointed the 1986–88 and 1989 Commissions, and Dr. Frank Macchiarola,⁸ who chaired the 2003 Commission and served on the 1986–88 Commission, would be able to participate and offer their wise perspectives on Charter revision. Sadly, that was not to be, as both Mayor Koch and Dr. Macchiarola passed away before the symposium.

By way of background, I came to know both Mayor Koch and Frank Macchiarola through my work in city government, and on various Charter Revision Commissions. I served as chief counsel to the 2003 Commission and that was where Frank and I became friends. I visited with him on December 14, 2012, four days before he passed away, and told him that the symposium would honor the legacy of his civic life. He was thrilled, warm, engaged, and insightful as always. He was full of pride and hope for the city and its people even at the end of his most extraordinary journey.

7. 489 U.S. 688 (1989).

8. Frank Macchiarola's career in public service spanned more than five decades; among other posts, Dr. Macchiarola served as Chancellor of the New York City Public Schools, Dean of the Benjamin N. Cardozo School of Law, and President and later Chancellor of St. Francis College.

A month later, on January 13, 2013, I shared Sunday dinner with Mayor Koch. Among a host of topics, we talked about the symposium. I had hoped he would join us and say a few words about our friend Frank. I also hoped he would offer his thoughts on the long-term impact of the 1986–88 and 1989 Commissions. On the question of their impact, he answered in his inimitable way: “A good question!” Because of the gravity of the changes contemplated by the 1989 Commission, and because Mayor Koch did not articulate a preconceived idea about what should happen with the 1989 Commission, he allowed it to develop proposals without a prescribed outcome to ensure broad input and support. At an especially tumultuous time for the city, this was viewed as both rare and even statesmanlike, and the proposal that emerged was successful in garnering enough votes to be adopted. Sadly, Mayor Koch passed away on February 1, 2013, just before the symposium.

Ed Koch and Frank Macchiarola were both wonderful people and leaders, and they were pioneers and visionaries who understood accountability and urgency. In many ways, Frank was very “Kochian.” And like Mayor Koch, he didn’t take any guff. He was very passionate in the views he held, but was equally interested in hearing other perspectives.

Frank engaged people and inspired them. He challenged them when it was needed. And, he was always right. Like Koch, Frank was one of those real New Yorkers who knew how to stand up for his beliefs. When he saw an injustice or something that needed to be fixed, he set out to do something about it. But, Frank was as practical as he was political. After all, he was intimately familiar with Brooklyn’s political wars and knew how both clubhouse politics and a party system could work against a broader democracy. His dogged beliefs are what allowed him to serve on the 1986–88 Commission, which proposed to New York City the nonpartisan election system that is now in place for special elections.

Those same beliefs in how government should work for its citizenry are what led Frank to serve as a founding member of the City’s Campaign Finance Board, a position to which Koch appointed him. It also drove him to break new ground while leading the City’s 1993 Districting Commission. All of these reform efforts embodied bold moves to open up opportunity for those who otherwise might not have had a chance to seek office.

Frank was particularly pleased when Mayor Bloomberg appointed him to Chair the 2003 Charter Revision Commission. Unlike the 1989 Commission, the 2003 Commission was formed with a specific charge—to review the concept and viability of implementing a system of nonpartisan primary elections in the city. I think for Frank this was a golden opportunity to take on an aspect of election reform that represented “unfinished business” from the 1986–88 Commission. Given that Charter Revision Commissions are as much about process as they are about anything else, we got off to quite a start. As a veteran of several Charter Revision Commissions, I understood the “flow” of the process—there is a beginning, a middle, and an end—so, imagine the reaction when, in March 2003, Frank declared “[t]here will be a ballot question when the charter commission concludes its work on the question of

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non-partisan elections It is not a question of whether, it is a question of how. That issue will be put forward.”⁹

Putting the issue of nonpartisan elections before the voters posed a great challenge for the next seven months, but Frank was an indomitable advocate, taking to task every naysayer. He demanded that they overcome their preconceived notions and personal investments in favor of what he held to be the certain improvements resulting from nonpartisan elections. At the final meeting of the Commission, Frank said, “[t]onight we cast our votes for the people who are today voiceless and left out as a result of a political system that has become a vehicle of the elites who use it for personal interest and private ambitions. As we go forward tonight, let us reaffirm our faith in the democracy we practice and have brought to life as result of our work and time on this Commission. Tonight we cast our votes for the generations that are to come after us.”¹⁰

Although the democratic process did not yield the proposal’s passage at the polls, I don’t think Frank was daunted by the outcome—a true believer in incremental progress, and employing different tactics as the times may demand, Frank viewed what others termed “defeat” as a victory in opening up one of several critical discussions that still are ongoing today.

On the pages that follow, you will discover the powerful voices that our contributors have shared to shape Charter revision in New York City: past, present and future. Indeed, these voices all agree that Charter Revision Commissions have a powerful role in engaging the citizenry and embracing change, a role that should be exercised cautiously, judiciously, and with purpose.

I extend both my personal and institutional thanks to all who have contributed to this valuable collection of observations, lessons, and insightful analyses.

9. See Michael Cooper, *For City Charter Commission, First a Goal, Then the Members*, N.Y. TIMES, Mar. 27, 2003, at D3, available at <http://www.nytimes.com/2003/03/27/nyregion/for-city-charter-commission-first-a-goal-then-the-members.html?ref=frankjmacchiarola>.

10. Press Release, N.Y.C. Charter Revision Comm’n, Statement from Frank J. Macchiarola, Chairman, Charter Revision Comm’n (Aug. 25, 2003), available at http://www.nyc.gov/html/charter/html/archives/pr_030826.shtml.