



CRC SPECIAL REPORT

MICHIGAN CONSTITUTIONAL ISSUES



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February 2010

First in a series of papers about state constitutional issues

GENERAL REVISION OF THE MICHIGAN CONSTITUTION

Proposal 2010-01 on the November 2, 2010, statewide ballot will ask Michigan voters whether a constitutional convention should be convened for the purpose of a general revision of the state Constitution. The 1963 Michigan Constitution provides in Article XII, Section 3, that in 1978 and every 16 years thereafter the question of a general revision of the constitution shall be submitted to the electors of the state.

Options for Michigan Voters

Proposal 2010-01 will ask Michigan electors to assess how well the fundamental law of the state serves as a framework for efficient, accountable government services that meets today's economic and social needs. In November, voters will choose: to convene a constitutional convention to draft a revised constitution to deal in a holistic manner with issues perceived to be problematic; or to allow the 1963 Michigan Constitution to continue in its present form.

If Proposal 2010-01 is approved, Article XII, Section 3 of the Michigan Constitution requires a special primary and a special election to be held within six months to select convention delegates. Michigan's election law provides for four elections in a calendar year, so the elections would occur in February and June of 2011. Article XII, Section 3 of the Constitution further provides that the electors of each representative district (110 districts) and the electors of each senatorial district (38 districts) shall elect one delegate to the convention.

The 1963 Constitution provides that the convention would convene in Lansing on October 4, 2011. The delegates are empowered to choose their own officers, determine the rules of proceedings and judge

the qualifications, elections and returns of its members. The delegates will be compensated for their time and to incur additional cost through the appointment of such officers, employees, and assistants as it deems necessary; printing and distribution of documents, journals, and proceeds; and explanations and information dissemination about the proposed constitution. The Constitution does not dictate the length of time that a convention can use to draft a revised constitution.

If Proposal 2010-01 is rejected by the voters, the 1963 Constitution will remain in effect. The legislature and voters may continue to adapt the 1963 Constitution to future economic and social needs by offering amendments to reform specific sections viewed as problematic. If the question is rejected, it will automatically appear on the ballot again in the year 2026.

Michigan voters decided against similar ballot questions in 1978 (640,286 Yes to 2,112,549 No) and 1994 (777,779 Yes to 2,008,070 No). The 1963 Michigan Constitution has proven to be a living document, having been amended numerous times over the 45 years since its adoption.

Wholesale Revision

A state constitutional convention elected by the people is free to fashion any kind of document it pleases, subject only to restraints imposed by the United States Constitution as the supreme law of the land and subject, of course, to having its work ratified by the state's electors. While Michigan's his-

tory with constitutional revision has tended to incrementally build on existing constitutions, nothing would bind a 2011 constitutional convention to such an approach.

Further, while a number of electors may agree upon issues in need of constitutional reform, there are no



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single, correct reforms to most of the large and important questions that would confront a convention. These are matters of opinion and judgment, and honest differences of view can readily be entertained. In the end, a convention must

submit the results of its deliberations to the state's electors for approval. To merit this approval, a proposed revision of the constitution must be a document that can be read and understood by citizens and which in meritorious

features commends itself to the people as a worthy instrument for the furtherance of effective and responsible government directed to the end of serving and promoting the common good.

The Nature and Purpose of a State Constitution

The idea of a written constitution defining the structure of government and enumerating the rights of the people as a limitation on the powers of government is deeply-rooted in Anglo-American history. The adoption of the first state constitutions preceded the drafting of the United States Constitution by the Philadelphia convention of 1787 which established the federal system under which we now operate—a system under which governmental power is divided between the federal or central government and the fifty states of the Union.

A constitution should serve the purpose of a fundamental organic document: establishing, defining and limiting the basic organs of power, stating general principles, and declaring the rights of the people.

American constitutionalism presupposes certain basic principles that find expression either expressly or impliedly in state constitutions as well as the constitution of the United States. Some

of these are so fundamental and familiar and their implications so plain that they need not be developed at length:

- That political power rests ultimately in the people;
- That the popular will is reflected in the constitution and in the institutions of representative government designed to serve the interests and welfare of the people;
- That the organs of government are subject to the limitations imposed by the people and by the rights retained by them;
- That a constitution is fundamental and supreme law; and
- That the courts in the exercise of the power of judicial review have the responsibility and the duty to uphold this fundamental law and to refuse to enforce legislative and other acts of government found to be in conflict with it.

In addition to these principles, a state constitution can be expected to achieve a number of fundamental objectives. The first fundamen-

tal objective is to establish the organs of governmental power, to define and distribute authority among them, and to state limitations on these powers. Secondly, the questions of direct participation by the electors in the legislative process by means of the referendum and initiative and the mechanics of these processes require attention. Finally, it may be suggested that since the political process is such an inherent part of government and the operation of representative government, attention may well be given in the constitution to the roles that political parties may play in Michigan's state and local government.

Apart from the electorate and the three branches of government, the other organs or bodies that may be vested with constitutional status are public corporations. These may be divided into two categories: (1) municipal corporations and other local governmental units including counties, townships, and metropolitan districts and (2) public corporations organized for specific purposes

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such as the state universities. With respect to both classes, the questions respecting constitutional position and authority—including, in the case of those in the first class, the important questions of home rule status—are matters of basic concern.

In addition to establishing the structure of state government, municipal corporations and other local governments, and public corporations, alteration of a state constitution has the potential to alter the basis upon which state laws and judicial decisions are based. Amending or revising the state constitution could affect broad concepts, such as home rule for local governments, the involvement of citizens through elections, initiatives, and referenda, and the state's responsibil-

ity for funding public education. It also could affect more narrow concepts, such as government finance, the death penalty, and eminent domain.

A constitution should not be an elaborate document. It should be relatively compact and economical in its general arrangement and draftsmanship. Details should be avoided and matters appropriate for legislation should not be incorporated into the organic document. Chief Justice Marshall stated this idea in classic form in the course of his famous opinion in *McCulloch v. Maryland*.

A Constitution to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execu-

tion, would partake of a proximity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves... . In considering this question, then, we must never forget that it is a Constitution we are expounding.

Justice Cardozo stated the matter more succinctly:

A Constitution states or ought to state not rules for the passing hour but principles for an expanding future.

The 1963 Michigan Constitution contains 12 articles, with several sections contained within each article. In brief, these articles are:

Article I – Declaration of Rights sets forth basic individual liberties which are to be secure from impairment by the actions of state government.

Article II – Elections defines the qualifications of electors and provides for the place, manner, and time of elections. Article II also discusses the board of state canvassers, recalls, the powers of initiative and referendum, and term limitation. Additional provisions for term limitation are found in Articles 4, 5 and 12.

The Michigan Constitution

Article III – General Government establishes Lansing as the seat of government and provides for a separation of the powers within the structure of state government.

Article IV – Legislative Branch establishes the constitutional framework for the conduct of legislative powers through a Senate and House of Representatives.

Article V – Executive Branch establishes the constitutional framework for the conduct of executive powers by the governor, lieutenant governor, attorney general, secretary of state, and certain boards and commissions.

Article VI – Judicial Branch establishes the constitutional framework for the general authority of the judiciary to interpret the law.

Article VII – Local Government contains many of the provisions regarding the system of local government in Michigan, which includes counties, townships, cities and villages, and authorities.

Article VIII – Education defines the role and responsibility of the state for elementary-secondary education and higher education.

Article IX – Finance and Taxation contains various limitations upon the otherwise plenary power of the legislature to raise

funds through taxation, ranging from the proportion of value at which property may be taxed, to requiring voter approval before local governments may increase certain taxes and indebtedness, to specifying how certain revenues are to be expended.

Article X – Property creates limitations on the powers of eminent domain and escheats and entrusts to the state general supervisory jurisdiction over all state owned lands.

Article XI – Public Officers and Employment provides for an oath of office for public officers,

the beginning of terms of office, a classified state civil service, a merit system for employees of local governments, and for the impeachment of civil officers.

Article XII – Amendment and Revision provides for the amendment and general revision of the Constitution.

The 1963 Constitution, Michigan's fourth, is now 46 years old. Over that time Michigan's population has grown from 8 million to more than 10 million. Transportation and communication networks have developed to connect people and population centers. The roles

of governments have expanded to support welfare programs and to more actively attract and encourage economic development. Although certain provisions of the 1963 Michigan Constitution are in violation of the United States Constitution, the framework for Michigan government is generally workable. Since adoption, 70 constitutional amendments have been proposed; 30 of which have gained approval from the electors. If a constitutional convention is convened, it will have the goal of making Michigan government work better, not to solve a constitutional crisis.

Series of Papers

Over the coming months, the Citizens Research Council of Michigan will publish a series of papers to provide information which electors may use to decide whether the convening of a constitutional convention is in the best interest of Michigan at this

time. The series will relate the age and length of the Michigan constitution relative to those of other states; provide a historical perspective of the 1963 Constitution; and consider obsolete and problematic provisions, as well as provisions that voters may wish to

change in each article to set a new direction for the state. Look for these papers to be released on roughly a bi-weekly schedule at www.crcmich.org/election and sign up for CRC's e-mail updates to have notice of their release delivered directly to your inbox.



CRC SPECIAL REPORT

MICHIGAN CONSTITUTIONAL ISSUES



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A BRIEF MICHIGAN CONSTITUTIONAL HISTORY

At the November 2, 2010 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the 1963 Michigan Constitution. The question appears on the ballot automatically every 16 years as required by the Constitution. The Constitution provides that a convention would convene in Lansing on October 4, 2011. If the question is rejected, it will automatically appear on the ballot again in the year 2026.

The 1963 Constitution is Michigan's fourth adopted constitution. Only 10 states have revised and adopted a greater number of state constitutions. Michigan was one of 13 states to revise their state constitution between 1948 and 1975. Only two states have gone through the revision exercise in the years since.¹ This paper is designed to explore the regular submission of constitutional revision questions to the voters and the evolution of the constitution that has occurred since Michigan's first constitution was adopted in 1835.

Michigan Constitutional History

The people of Michigan have adopted four constitutions (1835, 1850, 1908 and 1963), have rejected two (1867 and 1873) and failed to approve the calling of a convention on 11 occasions (most recently in 1994).

Early Constitutions

The Constitution of 1835. In 1835, the territorial council provided for an election of delegates to a constitutional convention. Ninety-one delegates assembled in Detroit in May and concluded their deliberations in June. The proposed constitution was submitted to the voters of the territory in October 1835, 15 months before Michigan was admitted into the Union. It was overwhelmingly approved (6,299 in favor, 1,359 opposed).

The 1835 Constitution has been praised by many political scientists who claim it to be the best among the four Michigan constitutions. It provided for election of only the Legislature, Governor, and Lieutenant Governor, with other state offices filled by appointment. It was the first state constitution to provide for the appointment of a state superintendent of public instruction. The brevity and simplicity of the document has been acclaimed.

The Constitution of 1850. In 1849, the Legislature submitted to the voters the question of calling a constitutional convention to revise the 1835 Constitution. The voters approved the question and 100 delegates were elected in 1850. The delegates convened in June and adjourned in August. The proposed constitution

was twice the length of the Constitution of 1835 and its detailed provisions reflected the prevalent tendency of that period to incorporate into basic law provisions more properly left to statutes. In November 1850, the voters overwhelmingly approved the proposed constitution (36,169 in favor, 9,433 opposed). The 1850 Constitution included the provision that every 16 years, and at other times as provided by law, the question of calling a constitutional convention automatically be submitted to the voters. However, calling a convention required approval of a majority of those voting at the election and not just a majority of those voting on the question.

Revision Attempts, 1867-1904

General dissatisfaction with the 1850 document led voters to approve by a three to one margin the calling of a constitutional convention in 1866, pursuant to the 16-year requirement. The 100 delegates were elected in April 1867; convened in Lansing in May; and adjourned in August 1867. The proposed constitution was rejected by the voters in 1868 (71,733 in favor, 110,582 opposed).

In 1873, the Legislature authorized the Governor to appoint an 18-member commission to study the 1850 Constitution and propose amendments and revisions.

¹ *The Book of the States*, 2009 Edition, Volume 41, The Council of State Governments, Lexington, KY, www.csg.org.



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The commission submitted its formal report for a revised constitution to the Governor and the Legislature placed it on the ballot. In November 1874, the voters rejected the proposed constitution by a three to one margin (39,285 in favor, 124,034 opposed).

Following the 1874 attempt to revise the 1850 document, the question of calling a constitutional convention was rejected by the voters five times. Legislative action placed the question on the ballot in 1890, 1892, and 1904, and the 16-year constitutional provision submitted the question to the voters in 1882 and 1898. In each instance, the majority of those voting in the election failed to approve the proposal, although in 1892, 1898 and 1904 the majority of those voting on the question gave their approval.

The Constitution of 1908

In April 1906, the voters approved the question of a general constitutional revision that had been placed on the ballot by legislative action. Ninety-six delegates were elected. The convention convened in Lansing in October 1907 and adjourned in March 1908. The proposed constitution reflected characteristics of the progressive reform movement including home rule for cities. The proposed constitution was approved by the voters in November 1908 (244,705 in favor, 130,783 opposed).

Over the ensuing 53 years, the 1908

Constitution was subject to constant revision. Michigan voters were asked to amend the 1908 Constitution 122 times; of which 66 proposed amendments were adopted and 56 were rejected. By 1960, the Michigan Constitution had grown to 15,323 words. Despite the continuous attention and amendment, a general dissatisfaction with the document created a growing desire to revise the constitution.

Attempts to Revise the Constitution of 1908. Between 1926 and 1961, there were five referenda on the question of revising the 1908 Constitution. The first effort, pursuant to the 16-year requirement, was rejected by the voters in November 1926 (119,491 in favor, 285,252 opposed). The next vote on calling a convention in November 1942, again pursuant to the 16-year constitutional requirement, was rejected by the voters. It received approval by a majority of those voting on the question (468,506 yes, 408,188 no), but not a majority of those voting in the election.

In November 1948, the Legislature submitted the question of general constitutional revision to the voters. Although the majority of the votes on the question favored the proposal as they had in 1942, it failed due to the constitutional provision requiring a majority of votes cast in the election.

In 1958, the 16-year requirement again placed a ballot proposal for a general constitutional revision

before the voters. This effort also failed. Once again, it lacked the necessary majority of votes cast in the election, although the proposal received the majority of votes on the issue (821,282 in favor, 608,365 opposed). In 1958, 2,341,829 votes were cast in the election, but only 1,429,647 (or 61 percent) voted on the question of calling a convention.

In effect, failure to vote on the ballot question was counted as a vote against the calling of a convention under this provision.

It is significant that the vote favoring constitutional conventions increased with each successive revision attempt between 1926 and 1958, with substantial favorable majorities of those voting on the issue achieved in 1948 and 1958. The next step in the effort to call a constitutional convention was to change the requirement for calling a convention from a majority of electors voting in the election to a simple majority of those voting on the question.

Gateway Amendment and the April 1961 Referendum. In 1960, leading civic organizations in Michigan developed an initiative proposal to amend the 1908 Constitution to simplify the calling of a constitutional convention. It provided for approval of a convention call by a simple majority of those voting on the issue, and altered the basis of representation by authorizing one convention delegate from each state House and Senate district. The pro-

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posal called for submission of the question of general constitutional revision at the 1961 spring election, specified time limits for electing delegates and specified when and where the convention should convene. The gateway amendment was approved by the voters in November 1960 (1,312,215 in favor, 959,527 opposed).

Pursuant to the new amendment, the question of a general constitutional revision was submitted to the voters in April 1961. The proposal was approved by a margin

Michigan prior to the 1961-62 constitution convention was similar in many ways to Michigan today. The state was hard hit by a national recession in the late 1950s. Residents had a growing sense that state government was dysfunctional: unable to manage available resources and efficiently deliver services. The following were some of the issues that citizens considered before deciding whether to convene a constitutional convention:

Legislative Branch Issues. Political control of the legislature was a primary issue. Under the 1908 Constitution, Southeast Michigan had a growing sense of under representation. The three southeastern Michigan counties of Wayne, Oakland, and Macomb had about 48 percent of the state's population, but only 26 percent of the senate seats and 43 percent of the house seats.

Southeast Michigan does not suffer the same sense of under representation under the 1963 Michigan Constitution. A legislative issue to be considered today is the fact that apportionment provisions

of only 23,421 votes (596,433 in favor, 573,012 opposed). It is noteworthy that if the former constitutional requirement of a majority of those participating in the election had applied, the proposal would have failed.

Michigan Constitutional Convention of 1961-62

Delegates to the 1961 Constitutional Convention were nominated in July 1961 and the 144 delegates were elected in September on a partisan ballot from single-member districts, one each from the 110

Constitutional Issues in 1960

in the 1963 Constitution were ruled in violation of the U.S. Constitution and Michigan provides for reapportionment and redistricting through the legislative process.

Executive Branch Issues. In 1961, a common sense existed that the executive branch was ineffectual and needed changes. Executive officers were elected every two years. The direct election of eight officers limited the administrative control of the governor. The executive branch was divided and subdivided into 120 administrative agencies. The 1940 amendment that gave the civil service system constitutional status left the governor and the legislature with little direct control over compensation of the state's workforce.

While the executive branch is selected and organized differently under the 1963 Constitution, Michigan's elected leaders today continue to seek ways to streamline state government, including examination of the number of state departments, the role of boards and commissions, and setting pay and benefit levels of the executive branch employees.

House and 34 Senate districts. The convention convened in October 1961 and after seven months of work, recessed. On August 1, 1962, the final document of 19,203 words was approved by the convention for submission to the voters on April 1, 1963. (The 1963 Michigan Constitution now has 35,858 words.²) The new Constitution was approved in a very close vote (810,860 in favor, 803,436 opposed) and took effect January 1, 1964.

² The Book of the States.

Judicial Branch Issues. The method of selecting judges to the state Supreme Court and lower court levels was a primary issue awaiting the 1961 constitutional convention. Additionally, the fractured judicial system, with justices of the peace and municipal courts for example, created uncertainty in the minds of many forced to enter the court system.

The 1963 Constitution unified the state judiciary into "one court of justice" but did not change the method of selecting Supreme Court justices. The method of selecting Supreme Court justices would likely again be an issue if a constitutional convention is convened in 2011. Also, some may desire to align court funding from a single source to be consistent with the state's role in administering the lower courts under the "one court of justice" concept.

Educational Issues. Besides deciding whether to appoint or elect the state board of education and the state superintendent of public instruction, attention was directed at the system of higher education.

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Fragmented control of the several state universities and the special powers and privileges accorded to the University of Michigan, Michigan State University, and Wayne State University were the primary educational issues.

Today, the autonomous university system remains a contentious issue. Some may argue that language should be included to define a minimum level of funding for education in addition to the current provisions requiring the legislature to “maintain and support a system of free public elementary and secondary schools...”

Local Government Issues. Disagreement over whether perceived changes caused by increasing urbanization, and improvements in transportation and communication especially, required a re-definition of the role of existing governmental units was an issue in 1961. The

discussion focused on whether reform could eliminate duplication, waste, and inefficiency, while retaining democratic and responsible government. Some contended that the current governmental system did not provide an adequate structure for meeting area-wide or metropolitan problems that usually extend beyond the present political boundaries.

The 1963 Constitution did not introduce any major reforms to Michigan's structure of local government and these issues remain core to conversations about potential reforms to enable local governments to better provide services in an increasingly global economy.

Finance and Taxation Issues. Because Michigan had just come through a severe recession and had struggled to maintain balanced state budgets, several finance and taxation issues were at the fore-

front for voters deciding to call a constitutional convention. Electors were considering whether graduated income taxes should be authorized; how to free the legislature from restrictions on taxing and spending powers created by high levels of revenue dedications or earmarking; whether the state's limitations on borrowing should be altered; if there was a need to remove or raise property tax limitations to increase local taxing power; and whether to continue existing provisions requiring a uniform rule of taxation.

Although state and local taxation has evolved significantly since the early 1960s, electors are again confronted with the constitutional issues of graduated income taxes, excessive tax earmarking, state and local tax and spending limitations, and the uniform rule of taxation when considering the need for a 2011 constitutional convention.

CRC's Con-Con Papers

The Citizens Research Council of Michigan was extensively involved in analyzing the 1908 Michigan Constitution and assisting the 1961 constitutional convention. Some of the research papers about these topics are available on the CRC website. To view these papers, go to:

Michigan Constitutional Issues, CRC Report 201, June 1960, www.crcmich.org/PUBLICAT/1960s/1960/rpt201.pdf

A Primer on State Government Organization in Michigan, CRC Report 203, October 1960, www.crcmich.org/PUBLICAT/1960s/1960/rpt203.pdf

A Comparative Analysis of the Michigan Constitution (Vol. 1 & Vol. II), CRC Report 208, October 1961, www.crcmich.org/PUBLICAT/1960s/1961LIST.HTM#208

The State Constitution: Its Nature and Purpose, CRC Memo 202, October 1961, www.crcmich.org/PUBLICAT/1960s/1961/memo202.pdf

Constitutional Aspects of State-Local Relationships - I: Municipal and County Home Rule for Michigan, CRC Memo 203, October 1961, www.crcmich.org/PUBLICAT/1960s/1961/memo203.pdf

Constitutional Aspects of State-Local Relationships - II: Metropolitan Government, CRC Memo 205, November 1961, www.crcmich.org/PUBLICAT/1960s/1961/memo205.pdf

State Ballot Issues – A General Revision of the Laws, CRC Council Comments 737, October 1962, www.crcmich.org/PUBLICAT/1960s/1962/cc0737.pdf

A Digest of the Proposed Constitution, CRC Report 213, November 1962, www.crcmich.org/PUBLICAT/1960s/1962/rpt213.pdf

An Analysis of the Proposed Constitution, December 1962, www.crcmich.org/PUBLICAT/1960s/1962/apc01-11.pdf

Other papers have not yet been put in electronic format on the CRC website (Starting at www.crcmich.org/PUBLICAT/1960s/1960LIST.HTM). If you wish to review papers that are listed but not available online, please contact crcmich@crcmich.org to request a copy.



CRC SPECIAL REPORT
MICHIGAN CONSTITUTIONAL ISSUES



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AMENDING THE MICHIGAN CONSTITUTION: TRENDS AND ISSUES

In Brief

At the November 2, 2010 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the 1963 Michigan Constitution. The question appears on the ballot automatically every 16 years as required by the Constitution. The Constitution provides that a convention would convene in Lansing on October 4, 2011. If the question is rejected, it will automatically appear on the ballot again in the year 2026.

The 1963 Michigan Constitution has been amended 31 times since it went into effect in January 1964, nearly doubling its length and adding to its complexity. Much of the additional length has consisted of changes that could have been made statutorily or that simply elevated statutory provisions to constitutional status.

The modern era of constitutional amendment in Michigan began with the adoption of the initiative in 1913. The 1908 Constitution was amended 69 times in 126 attempts and, by the end of the 1950s, pressure developed to replace the old document with a new one.

The articles of the 1963 Constitution most proposed for amendment have been Article IV (the legislative article), and Article IX (the finance and taxation article). Others subject to frequent amendment have been Articles I (Declaration of Rights), V (Executive Branch), and VIII (Education). In all, there have been 35 amendments to articles out of 80 proposed changes. (Some of the 31 successful proposals amended more than one article.)

Early amendments centered on the powers and structure of government, particularly issues of judicial selection and tenure and the State Officers Compensation Commission.

The period from the mid-1970s to the mid-1990s was dominated by issues arising from the so-called "Tax Revolt." In that period, 15 proposed amendments that would shift, reduce, or limit the growth of taxes were placed before the voters. Of these, 13 were defeated, with only the Headlee Amendment (1978) and Proposal A (1994) being adopted, but they framed the debate on government's claim on economic resources for two decades.

Recent years have seen the rise of amendments flowing from social agendas, such as prohibition of same-sex marriage; prohibition of certain affirmative action programs; and limitations on the expansion of gambling.

A review of the amendment history of the 1963 Michigan Constitution leads to several conclusions:

- Many of the amendments made changes that could have been accomplished by statute and have added significant length and complexity to the document;
- Addition of provisions of a statutory nature can result in "snowballing" of amendments because it becomes necessary to amend the Constitution in order to change detailed language;
- A common theme of amendments, especially since 1992, has been that of weakening the legislature.

With the exception of 1990, Michigan voters have been called upon to consider at least one proposed amendment to the 1963 Michigan Constitution in every even numbered year since 1966, as well as in 1981, 1989, and 1993. The number of proposals

appearing on any one ballot has ranged from one, in several elections, to 10, in 1978.

With the passage of Proposal 08-2 of 2008, the Constitution has been amended 31 times since it went



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into effect in January 1964. These 31 amendments have increased its length from 19,203 words in the original document to 36,525, a growth of 90.2 percent.¹ While there may be no way of determining the optimum length of a state constitution, constitutional scholars generally agree that it should

¹ Council of State Governments, *Book of the States 1964-65 and 2009*. CRC Calculations.

be brief and sparing in detail as befits a basic document intended to endure and to be accessible to its citizens. Even upon its adoption, the current Michigan Constitution was slightly longer than most state constitutions and, while some of the amendments have made changes that could have been made only by amending the Constitution, most of the changes that have contributed to its growth could have been accomplished

statutorily, either by the legislature or by statutory initiative.

Michigan is one of 18 states that have both legislative and initiative methods of placing proposed constitutional amendments before the voters for their approval. The adoption of the voter initiative early in the life of the 1908 Constitution marks the beginning of the modern era of constitutional amendment in Michigan.

A Century of Constitutional Amendment in Michigan

The Initiative Comes to Michigan

The initiative, in which citizens may circulate petitions that force proposed constitutional amendments (or statutes) onto the ballot, and the referendum, in which legislatures place such issues before the voters, form the basis of constitutional amendment in Michigan. Their arrival, a century ago, created the amendment process now familiar to Michigan voters.

National Roots

Associated with the Progressive Movement, the roots of the voter initiative in United States are found in the 1880s and 1890s when dissatisfaction with close relationships between legislative bodies and various interests, including railroads and utilities, and frustration in achieving legislative

support for proposed reforms led a number of citizens to form organizations aimed at promoting a means of circumventing those elected bodies to achieve legislative goals. The means chosen was the voter initiative, which, together with the referendum and recall, was expected to give citizens the tools to hold their elected representatives to account.

In 1898, South Dakota became the first state to amend its constitution to provide for the initiative and the referendum. Four years later, Oregon did the same thing and, over the following decade, 13 more states, including Michigan, followed suit. All of the states adopting the initiative and referendum in this period were in the Midwest and Far West, with the exception of Mississippi, whose provisions, adopted in 1912, were declared unconstitutional by state

courts in 1917. Following the end of the Progressive Era, the wind went out of the sails of the direct democracy movement and the only states to adopt the initiative and referendum since then have been Florida in the late-1960s and Mississippi, which restored its process in 1992.

Early Michigan Experience

Movement in Michigan toward adoption of the initiative began in the mid-1890s with the formation of the Direct Legislation Club, which, with the support of Detroit mayor and later Michigan governor, Hazen S. Pingree, pushed for the voter initiative to facilitate adoption of a reform agenda. Their efforts did not meet with success until adoption of the 1908 Constitution, which contained a provision for the initiative that was, however, so restrictive that ever using it was doubtful.

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In 1913, the Constitution was amended to permit the initiative (both constitutional and statutory) and the referendum in essentially the same form as they appear in the 1963 Constitution and direct democracy in Michigan became a reality.

One of the movements prominent in the Progressive Era was the temperance movement. In 1916, anticipating the adoption of the 18th Amendment to the U.S. Constitution, the first successful initiated amendment to the Michigan Constitution was a measure

Providing for prohibition in the state forever of the manufacture, sale, keeping for sale, giving away, bartering or furnishing of any vinous, malt, brewed, fer-

mented, spirituous or intoxicating liquors, except for medicinal, mechanical, chemical, scientific or sacramental purposes.

The amendment passed by a margin of 55 percent-45 percent.

“Forever” lasted only 16 years, because in 1932, anticipating the 21st Amendment to the U.S. Constitution, the second successful initiated constitutional amendment in Michigan established a liquor control commission to “exercise complete control of the alcoholic beverage traffic with the state, including the retail sales thereof.” An electorate, apparently thirsty and weary of organized crime, adopted this amendment by a margin of 68 percent-32 percent. So, the net

effect of the first two successful voter initiatives was to adopt prohibition and then to repeal it.

The third successful initiative, however, had a lasting impact. Also adopted in 1932, this amendment, emblematic of the Great Depression, added a Section 21 to Article X of the 1908 Constitution (the finance article) establishing the 15-mill limit on the property tax rate, which, in modified form, remains in the current Constitution. It was significant in and of itself, but it also signaled the beginning of the use of the constitutional initiative to attempt to shape state and local tax policy. During the 30 years beginning in 1932, of 24 initiated proposed amendments, 10 related to state taxation (four were adopted).

Amending the 1908 Constitution: Summary

Beginning in 1910 and ending in 1961, 126 amendments to the 1908 Michigan Constitution were submitted to the voters. Of these, 69 were approved and 57 were rejected. The success rates of the proposals submitted by the legislature and initiated proposals were dramatically different. Legislatively-proposed amendments were approved 69 percent of the time (59 approved; 26 defeated), while initiated proposals were approved 24 percent of the time (10 approved; 31 defeated).

The subjects of the proposals ranged widely, but also reflected the periods during which they were offered. Progressive Era reforms included woman suf-

frage, authorization of the statutory initiative and referendum and the recall (all legislatively proposed) and creation of a state civil service (proposed by initiative). Non-partisan election of the judiciary was proposed by initiative and rejected by the voters, but when it was proposed by the legislature several years later, it was adopted. Other amendments were responsive to the need for massive infrastructure investments brought about by urbanization and the proliferation of the automobile, such as bonding authority for drainage districts and highway construction (legislatively proposed) and the dedication of gas and weight tax revenues (initiatory).

The initiative was used in two significant amendments (dedicating gas and weight taxes to highway purposes in 1938 and dedicating a significant portion of the state sales tax to schools and local government in 1946) to limit the latitude of the legislature in budgetary determinations. By the late-1950s, about 70 percent of state revenues were earmarked, hampering the ability of the state to deal with a budget crisis at that time. Reducing the proportion of constitutionally-dedicated taxes became one of the leading arguments in favor of revising the Michigan Constitution.

Among initiated proposals re-

jected by the voters were compulsory school attendance, authorization of an income tax, and county home rule.

In the decade beginning in 1951, 18 proposed amendments were adopted, while only three were

rejected, a success rate of 86 percent. Along with 51 previous amendments, these new provisions gave the Constitution the appearance of a patchwork quilt of trivia and excessive detail, which provided for far too many executive branch agencies, ex-

cessive earmarking of taxes, and a system of legislative representation skewed toward rural interests. These issues, among others, led a number of groups to support the calling of a constitutional convention.

Amending the 1963 Constitution

The 31 amendments to the 1963 Constitution have resulted from 68 attempts, which began in November 1966 with an unsuccessful proposal to lower the minimum voting age from 21 to 18. The first successful attempt came in August 1968 with the passage of three legislatively-proposed amendments that established the

Judicial Tenure Commission, required the legislature to establish a State Officers Compensation Commission, and prescribed a method of filling judicial vacancies.

The first use of the initiative to amend the 1963 Constitution came in 1970 with the passage of Proposal C (anti-parochial),

which prohibited direct or indirect state aid to non-public schools and pupils. This came in reaction to legislation passed in 1970 that provided that the state would pay a portion of the salaries of lay teachers teaching secular subjects in non-public schools.

Table 1
1963 Michigan Constitution: Amendment Approval Rate by Article (1964-2008)

Article	Joint Resolutions			Initiative Petitions			Total		
	Attempts	Adopted	Percent Adopted	Attempts	Adopted	Percent Adopted	Attempts	Adopted	Percent Adopted
I	4	4	100.0	3	3	100.0	7	7	100.0
II	2	0	0.0	1	1	100.0	3	1	33.3
III	0	0	0.0	0	0	0.0	0	0	0.0
IV	20	4	20.0	4	3	75.0	24	7	29.2
V	2	1	50.0	3	1	33.3	5	2	40.0
VI	3	3	100.0	0	0	0.0	3	3	100.0
VII	0	0	0.0	0	0	0.0	0	0	0.0
VIII	1	1	100.0	4	1	25.0	5	2	40.0
IX	16	8	50.0	13	2	15.4	29	10	34.5
X	1	1	100.0	0	0	0.0	1	1	100.0
XI	0	0	0.0	2	1	50.0	2	1	50.0
XII	0	0	0.0	1	1	100.0	1	1	100.0
<i>Total</i>	49	22	44.9	31	13	41.9	80	35	43.8

Note: 80 attempts to amend specific articles in 68 proposals

Neither legislative joint resolutions nor initiative petitions enjoyed a better than 50 percent overall success rate. If, however, Article IX is excluded, initiative petitions were successful 61.1 percent of the time. If Article IV is excluded, joint resolutions were successful 62.1 percent of the time.

Articles Frequently Subject to Amendment

Of the 12 articles in the 1963 Michigan Constitution, five (I, IV, V, VIII, and IX) have been the subject of 87.5 percent of the proposed amendments, with Articles IX (finance) and IV (legislative) leading by a wide margin. **Table 1** shows the number of times each article has been proposed for amendment, the means of proposal, and the success rate. (Note that, while the Constitution has been proposed for amendment 68 times, several of the proposed amendments related to more than one article, which explains the 80 times articles have been proposed for amendment and the 35 times articles have been amended.)

Article I (Declaration of Rights)

Seven amendments have been proposed to Article I and all seven were successful. The first four, proposed by the legislature, dealt with criminal procedure:

- Proposal A (1972) Trial by jury of fewer than 12 jurors in misdemeanor cases
- Proposal K (1978) Permit courts to deny bail under certain circumstances in violent crimes
- Proposal B (1988) Rights for victims of crimes

Public Act 219 of 1999 changed the numbering of ballot proposals from letters to 3 or 4 numbers: the first two digits are the last two digits of the year of election and the next digit(s) indicates the order in which the question was filed to appear on the ballot.

- Proposal B (1994) Limiting criminal appeals

The last three were placed on the ballot by initiative petition and reflect the ideological struggles of the last several years:

- Proposal 04-2 (2004) Recognizing only an agreement between one man and one woman as “a marriage or similar union for any purpose”
- Proposal 06-2 (2006) Banning certain governmental affirmative action programs
- Proposal 08-2 (2008) Legalizing human embryonic stem cell research

Article IV (Legislative Branch)

There have been 24 proposals to amend Article IV, with only seven being approved by the voters. Of the 20 legislative proposals, four were adopted, two of which dealt with the State Officers Compensation Commission (SOCC):

- Proposal 2 (1968) Require the legislature to create the SOCC
- Proposal A (1972) Permit the legislature to authorize a state lottery
- Proposal A (1982) Reforming legislative immunity from civil arrest and process during legislative sessions
- Proposal 02-1 (2002) Require the legislature to act affirmatively on SOCC proposals

The 16 legislative proposals to amend Article IV that were rejected by the voters include seven whose purposes were not aimed directly at legislative powers or structure. Four were tax limita-

tion proposals (1980, 1981, 1989, and 1993); one would have increased the sales and use taxes (1989); one was a proposal to lower the minimum drinking age to 19 (1980); and one would have established a railroad redevelopment authority (1978). Of the nine that were aimed at legislative powers and structure, two dealt with legislators being appointed or elected to other offices (1968 and 1972); two dealt with legislative approval of administrative rules (1984 and 1986); and others dealt with the SOCC (1986); powers of the lieutenant governor (1980); civil immunity for legislators (1980); establishment of the State Library of Michigan in the legislature (1986); and lowering the minimum age of legislators from 21 to 18 (1976).

Initiated proposals to amend Article IV have succeeded in three of four attempts:

- Proposal D (1978) Increase the minimum drinking age from 18 to 21
- Proposal B (1992) Term limits for legislators
- Proposal 04-1 (2004) Require voter approval of the extension of gambling and certain new state lottery games

The one defeated initiated proposal would have required two-thirds legislative approval of statutes intervening in municipal concerns of general purpose local governments (2000).

Article V (Executive Branch)

Two of the five proposed amendments to Article V were adopted; a legislative proposal:

- Proposal M (1978) Replace the State Highway Commission with the State Transportation Commission

And an initiated proposal:

- Proposal B (1992) Term limits for the governor, lieutenant governor, attorney general, and secretary of state.

The defeated attempts to amend Article V include a legislative proposal restricting the powers of the lieutenant governor (1980); and initiative petitions that would have given constitutional status to the Department of State Police (1982) and that would have provided for the election of the Public Service Commission (1982).

Article VIII (Education)

Of the five proposals placed on the ballot to amend Article VIII, three have dealt with aid to non-public schools. The successful proposals were an initiated proposal:

- Proposal C (1970) Prohibit direct or indirect aid to non-public schools

And a legislative proposal:

- Proposal A (1998) Change the word “handicapped” to the word “disabled” in Section 8

The defeated proposals were all the result of initiated petitions. Two were attempts to remove the prohibitions against vouchers imposed by Proposal C of 1970 (1978 and 2000). One provided for local school board responsibilities as a part of a much larger tax proposal (Smith-Bullard, 1980).

Article IX (Finance and Taxation)

As might be expected, the finance and taxation article has attracted the most attention from those interested in amending the 1963 Constitution. Despite the attention, however, the success rate has not been high. Of 29 proposals, only 10 (34 percent) have passed. Even this is somewhat misleadingly high in that six of the ten successful amendments were designed to enshrine various natural resources trust funds and the Veterans’ Trust Fund in the Constitution, beyond the reach of the legislature, meaning that the other 23, most of which were taxing and spending limitations, had a success rate of only 17 percent.

The success rate in amending Article IX has not been high and there has not been a taxing and spending limitation proposal on the ballot since 1994. Nevertheless, the number and potential significance of the proposals to amend Article IX warrant a somewhat more detailed review than for the other articles.

The proposals to amend Article IX can be grouped into five categories: 1) Tax and spending limitations (tax shift, tax reduction, tax growth limitation); 2) Greater progressivity; 3) Tax increase; 4) Revenue dedication; and 5) Finance. Some of the proposals encompassed categories 1 and 4, but will be covered here in accordance with their primary purpose.

Note: Solid bullets denote the successful amendments. Hollow bullets denote the unsuccessful attempts to amend Article IX.

Tax and Spending Limitations

The use of the ballot to attempt to limit state and local taxes, which began with the 15-mill property tax limit in 1932, reached full flower in the two decades from the mid-1970s to the mid-1990s. Fifteen proposals reached the ballot during this period, but only two passed, one initiated proposal and one legislative proposal:

- Proposal E (1978), the eponymous Headlee Amendment², was an initiated proposal which limited state revenue to a fixed percentage of state personal income, created new property tax limitations, and provided for payments to local units of government for state mandates.
- Proposal A (1994) was a legislative proposal that provided for a dramatic shift of funding of school operations from the property tax to the state sales tax, a modified acquisition valuation system for determining taxable property values, and differential taxation of business and residential property. (Proposal A could not be considered by the voters solely on its merits because the legislature had passed a statute with similar provisions involving increasing the income tax instead of the sales tax, which was to go into effect in the event

²Richard Headlee was an insurance executive and later gubernatorial candidate.

Proposal A was rejected.)

A target, if not the principal target, of every proposed tax limitation proposal was the property tax. The dilemma faced by those wishing to reduce the property tax, however, was the overarching role played by that tax in financing local government, the services of which, especially public safety and education, are among those most valued by the public. The least disliked tax, the sales tax, is levied by the state and may not be levied by local government under the current Constitution. As a consequence, the majority of tax limitation proposals proposed a shift from reliance on the locally-levied property tax to the state-levied sales tax. This approach did not find favor with the voters until Proposal A was adopted—although the voters were not offered the choice of Proposal A or the status quo.

Unsuccessful tax shift proposals have included five legislative proposals:

- Proposal C (1980) Reduce property tax; increase state sales tax from 4 percent to 5.5 percent
- Proposal A (1981) Reduce local homestead and local individual income taxes; increase sales tax and reduce state income tax credits
- Proposal B (1989) Reduce property taxes; increase state sales tax from 4 percent to 6 percent
- Proposal A (1992) Modified acquisition value system for determining taxable value for property tax

- Proposal A (1993) Modified acquisition value system for determining taxable value for property tax; reduce property tax for school operations; create foundation plan for school support; increase sales tax from 4 percent to 6 percent (foreshadowed successful Proposal A of 1994)

There were four unsuccessful initiated tax shift proposals:

- Proposal C (1972) Limit property tax for school, county and township purposes; establish state tax program for school support (Would have resulted in overall tax increase)
- Proposal H (1978) Eliminate property tax for school operations; require legislature to establish a program of state taxation to support K-12 education
- Proposal A (1980) Reduce property tax; shift the burden to state taxes (Overall, net tax increase)
- Proposal C (1992) Exempt property tax from portion of school operations; institute modified acquisition value system of determining taxable value (Would have resulted in significant reduction in property taxes)

Three proposals, all initiated and all defeated, would have resulted in significant tax reduction and, while tax increases would have been technically possible, adoption would have been seriously impeded:

- Proposal J (1978) Reduce

property tax assessment ratio from 50 percent to 25 percent of true cash value and place other limits on state finances (First “Tisch” proposal³)

- Proposal D (1980) Roll back assessments; reduce the assessment ratio; institute a modified acquisition value system of determining taxable value; limit the power of the legislature to impose taxes (Second “Tisch” proposal)
- Proposal C (1984) Roll back newly adopted taxes, subject to restoration by voter approval; stringent supermajority or voter approval requirements for new taxes (“Voter’s Choice”)

Tax growth limitations have sought not to shift the burden from one tax to another or to reduce government taxing and spending, but to place limits on growth. The successful Headlee Amendment was such a provision. A somewhat similar initiated proposal failed two years before the adoption of the Headlee Amendment:

- Proposal C (1976) Limit state taxes to 8.3 percent of state personal income

Greater Tax Progressivity

Some proposals have attempted to alter the base or rate of state taxes to move toward greater progressivity in the tax system. The only proposal to pass was an initiated proposal:

- Proposal C (1974) Eliminate

³ Robert Tisch was a drain commissioner from Shiawassee County

sales tax on food and prescription drugs

Three issues on the ballot, all unsuccessful, proposed to remove the prohibition against the graduated income tax. One was a legislative proposal:

- Proposal I (1968)

The two initiated proposals were:

- Proposal D (1972)
- Proposal D (1976)

Tax Increase

One unsuccessful legislative proposal was aimed primarily at raising taxes:

- Proposal A (1989) Increase sales tax rate from 4 percent to 4.5 percent; dedicate the new revenues to local schools

Revenue Dedication

Attempts to limit the budgetary latitude of the legislature by constitutionally restricting various revenue sources to certain programs have met with marked success. The successful proposals have all been the result of legislative joint resolutions:

- Proposal M (1978) Allocate at least 90 percent of gasoline tax revenues to road purposes, with the remainder available for other purposes

Beginning in 1984 a series of five amendments was initiated placing a great deal of statutory language in Article IX resulting in the elevation to constitutional status of a number of relatively minor funds related to natural resources, state parks and recre-

ation, and veterans, thereby removing them from legislative discretion. The proposals and the funds they protected are:

- Proposal B (1984) Natural Resources Trust Fund
- Proposal P (1994) State Parks Endowment Fund
- Proposal C (1996) Veterans' Trust Fund
- Proposal 02-2 (2002) Recreation Land Acquisition Fund
- Proposal 06-1 (2006) Conservation and Recreation Legacy Fund; Non-Game Fish and Wildlife Trust Fund; Game and Fish Protection Trust Fund

Two attempts to dedicate state revenues have failed. The first was a legislative proposal:

- Proposal A (1974) Prohibit the use of motor fuel revenues for highway road patrols; limit non-highway uses to 1/18 of total revenues

The second was initiated:

- Proposal 02-4 (2002) Reallocate most tobacco settlement revenues to organizations, both public and private, dealing with health care

Finance

One non-revenue related amendment, a legislative proposal, was adopted:

- Proposal C (1978) Authorize the deposit of state funds in savings and loan associations and credit unions, in addition to banks

Other Articles

Article II (Elections) has been amended once, a meaningless attempt to limit the terms of members of the Michigan Congressional delegation. This portion of the term limits amendment has since been ruled unconstitutional by the U.S. Supreme Court in a 1995 Arkansas case:

- Proposal B (1992) Limit terms of Michigan members of the U.S. House of Representatives and U.S. Senate and to provide incentives to incumbents to voluntarily limit their terms if amendment ruled invalid

Two legislatively-proposed amendments to lower the minimum voting age from 21 to 18 (1966, 1968) were rejected by the voters.⁴

Article VI (Judicial Branch) has been amended three times by means of legislative proposals:

- Proposal 1 (1968) Establish Judicial Tenure Commission
- Proposal 3 (1968) Define manner of filling judicial vacancies
- Proposal B (1996) Establish qualifications for judicial offices

Article X (Property) has been amended once as the result of a legislative proposal:

- Proposal 06-4 (2006) Re-

⁴ These rejections became moot with the adoption of the 26th Amendment to the U. S. Constitution in 1971, which reduced the minimum voting age nationally to 18.

Approval Rates by Decade

In the first three decades of the life of the 1963 Constitution, approximately one-third of the proposed amendments were adopted, whether proposed by joint resolution (34.4 percent) or initiative petition (33.3 percent). Since 1993, however, over three-quarters of the proposals have been adopted by the voters, with 100 percent of the legislative proposals adopted and 42.9 percent of the initiatives passing. All of the amendments proposed in 2004, 2006, and 2008 were adopted.

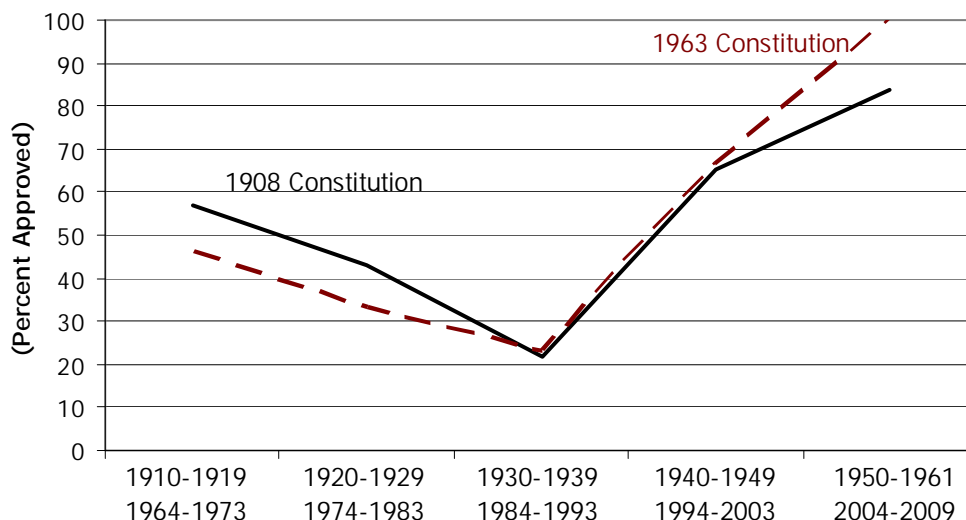
Table 2
Approval Rate by Decade (1964-2008)
1963 Michigan Constitution

Decade	Joint Resolutions			Initiative Petitions			Total		
	Attempts	Adopted	Percent Adopted	Attempts	Adopted	Percent Adopted	Attempts	Adopted	Percent Adopted
1964-1973	10	5	50.0	3	1	33.3	13	6	46.2
1974-1983	12	4	33.3	12	4	33.3	24	8	33.3
1984-1993	10	2	20.0	3	1	33.3	13	3	23.1
1994-2003	8	8	100.0	4	0	0.0	12	8	66.7
2004-2008	2	2	100.0	4	4	100.0	6	6	100.0
Total	42	21	50.0	26	10	38.5	68	31	45.6

Compared to amendment of the 1908 Constitution, amendment of the 1963 Constitution has been less frequent. In a 51-year period from 1910 to 1961, 126 amendments were proposed to the 1908 document, an average of about 25 per decade, with 69 approved, an average of about 14 per decade. In the 42 years between 1966 and 2008, about 17 amendments per decade have been proposed to the 1963 Constitution, with about eight being adopted.

As the 1963 Constitution has aged, the approval rate of proposed amendments has followed a pattern strikingly similar to that of the 1908 version.

Chart 1
Approval Rate by Decade (1910-2009)



strict the use of eminent domain

Article XI (Public Officers and Employment) has been the target of two initiated proposals, one of which was successful:

- Proposal G (1978) Grant Michigan state troopers and

A number of conclusions may be drawn from a review of the experience to date in amending the 1963 Michigan Constitution.

Many of the amendments have been essentially statutory provisions placed into the Constitution. Some provisions, such as term limits, limitations on bail and trial by jury, and filling judicial vacancies, whether or not good public policy, probably fit with the nature of a basic document. Other amendments, such as the minimum drinking age, the Headlee Amendment and, in particular, the voluminous amendments to Article IX relative to natural resource and veterans' trust funds are certainly statutory in nature, in the sense that the policies embodied in the provisions could have been adopted statutorily, either by the legislature or by means of the statutory initiative. The statutory initiative offers substantial protection against amendment or repeal but has been used sparingly. More frequent use could have relieved the Constitution of a large amount of detail and complexity.

Between the purely constitutional and purely statutory

sergeants the right to collective bargaining and binding arbitration

A similar proposal regarding classified state employees was rejected in 2002.

Finally, Article XII (Amendment and Revision) has been amended once

Conclusions

amendments are amendments with essentially statutory language that have been placed in the Constitution because the amended provisions themselves were statutory in nature. An example is Proposal A of 1994, the aims of which could not have been accomplished statutorily under the existing language of Article IX, Section 6, which itself was already detailed and statutory in nature in that it limited the sales tax rate and dedicated revenue to specific purposes.

The most obvious example of purely statutory language in the Constitution is found in Sections 35 and 35a and 37-42 of Article IX, placed in the Constitution in a series of five amendments, totaling some 3,118 words (or about nine percent of the Constitution), from 1984 to 2006. These amendments lifted language directly from existing statutes and placed it in the Constitution with the object of preventing the legislature from using balances in various funds for purposes other than those for which they were created.

Addition of essentially statutory material to the Constitution can

by means of initiative petition:

- Proposal B (1992) Provide for severability of any unconstitutional provisions of the term limits amendment

No attempts have been made to amend Article III (General Government) or, perhaps surprisingly, Article VII (Local Government).

create a "snowball effect." Using the example of the trust fund amendments to Article IX, the provisions are so detailed that they will likely require amendment, thereby adding more statutory material and further exacerbating the problem. Indeed, Section 35, adopted in 1984 was amended in 1994 and 2002. Section 35a, adopted in 1994, was amended in 2002, and Section 37, adopted in 1996, was also amended in 2002. More statutory material will likely engender greater need for amendment, and so on.

A common theme of amendment, especially since 1992, has been that of weakening the legislature. One method adopted for weakening the legislature in the Constitution is that of simply removing from legislative purview certain subjects viewed as worthy of protection from alteration by statute. The trust fund amendments to Article IX constitute the wordiest example of this approach, but other examples include: Requiring voter approval of any expansion of gambling; specifying what can be recognized as "marriage or similar union" for any purpose; restric-

tions on the use of eminent domain; and specifying the minimum drinking age.

A variation on this approach is the extensive and complex set of limitations on taxing and spending, ranging from the revenue limit and state mandate funding requirement in the 1978 Headlee Amendment to the taxable value limit and extraordinary majority legislative voting requirement for exceeding statutorily determined millage limits in Proposal A of 1994. Other restrictions adopted in this area have included eliminating the sales tax on food and prescription drugs and the requirement that at least 90 percent of gasoline tax revenues be allocated to general road purposes. And, it may be noted that the limits on property taxation in the original 1963 Constitution found their way into the 1908 Constitution by means of amendment.

It should be noted that many of these restrictions came about as

the result of legislative joint resolution.

These amendments, as restrictive as they may be with respect to their specific subjects, do not strike at the heart of the legislative process. The one amendment that has done so is Proposal B of 1992, which instituted among the nation's most restrictive set of term limits for elected state officials, particularly legislators. Whether Proposal B was intended by its framers to weaken the legislature may be debatable, but clearly a case can be made, and has been, that such has been its effect.

Amendment experience with the 1963 Constitution can be divided into three periods. At the risk of oversimplification, the first period began in 1966 and extended to the mid-1970s. This period was dominated by amendments having to do with the power and structure of government—Judicial Tenure Commission; filling judicial vacancies; trial by jury; and

SOCC, for example.

The second period, from the mid-1970s to the mid-1990s, was dominated by proposed tax and spending limitations, which, although most were defeated by wide margins, framed the debate over the appropriate claim of government on the economic resources of the state for two decades.

The third period, from the mid-1990s to the present, has seen the rise of proposals designed to advance various social agendas: Restrictions on the expansion of gambling; limiting marriage to unions between one man and one woman; banning certain affirmative action programs, and, of somewhat lesser moment, changing the word “handicapped” to “disabled” in Article VIII.

It is likely that future amendments to the Michigan Constitution will continue to reflect the concerns and fashions of the times in which they are adopted.



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ARTICLE I – DECLARATION OF RIGHTS

In Brief

At the November 2, 2010 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the 1963 Michigan Constitution. The question appears on the ballot automatically every 16 years as required by the Constitution. The Constitution provides that a convention would convene in Lansing on October 4, 2011. If the question is rejected, it will automatically appear on the ballot again in the year 2026.

The Citizens Research Council of Michigan takes no position on the question of calling a constitutional convention. It is hoped that examination of the matters identified in this paper will promote discussion of vital constitutional issues and assist citizens in deliberations on the question of calling a constitutional convention.

The powers of a state government are plenary, except to the extent they are constitutionally limited. The purpose of a bill of rights is to enumerate those basic individual liberties that the people intend to be secure from impairment by the actions of their government. Both the Constitution of the United States and the Michigan Constitution contain such enumerations. This analysis examines the dual role that a state bill of rights fulfills: according concurrent protection to individual liberties which also are protected under the federal Constitution and serving as an independent source for individual liberties which are not accorded recognition at the federal level. It also examines recent trends in amending Article I of the 1963 Michigan Constitution.

Introduction

Article I of the Michigan Constitution entitled, "Declaration of Rights," sets forth basic individual liberties which are to be secure from impairment by the actions of state government. Many of these individual liberties are similar to those found in the federal Bill of Rights. For example, both the Michigan Constitution and the federal Bill of Rights accord the right to an equal protection of the laws and of the people peaceably to assemble. Both recognize free-

dom of religious worship, freedom of expression and of the press, and both prohibit depriving a person of life, liberty, or property, without due process of law. Given these similarities, the question may be asked whether such an enumeration of rights in the Michigan Constitution is needed, given that they also are protected under the federal Constitution. For several reasons, this question should be answered in the affirmative.

The Case for a State Bill of Rights

Differences in Rights Protected

First, the notable similarities between the rights enumerated in the Michigan Constitution and those protected by the Bill of Rights tend to obscure certain subtle but significant differences. For example, the Second Amendment of the United States Constitution historically has been interpreted to protect from infringement not the individual right to bear arms –

despite occasional contentions to the contrary – but rather a right vested in the states to maintain militia. The U.S. Supreme Court recently has interpreted the Second Amendment as an individual's right to bear arms, but that case involved the District of Columbia, which is a federal territory. The Court has not yet applied that interpretation to the states. By contrast, the Michigan Constitution protects the right of indi-



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viduals to bear arms for their own defense as well as that of the state.

Similarly, while the Michigan Constitution prohibits punishment that is either cruel or unusual, the Eighth Amendment of the federal Constitution prohibits only punishment that is both cruel and unusual. It was on the basis of this difference that the Michigan Supreme Court in 1992 struck down portions of a law requiring a sentence of life without possibility of parole upon conviction for specific drug offenses as violative of the state Constitution, even though the U.S. Supreme Court had earlier found no violation of the Eighth Amendment.

Basis for Application of Bill of Rights to the States

Second, the federal Bill of Rights was intended to serve as a limitation upon only the federal government. Thus, the First Amendment begins, “Congress shall make no law....” (Emphasis supplied.) For the protection of indi-

vidual liberties against impairment by state action, it was thought that a citizen should look to the constitution of the state wherein he or she resided and not to the federal government. Indeed, it was not until 1925 that the U.S. Supreme Court held that the Fourteenth Amendment of the U.S. Constitution “incorporated” the Bill of Rights and made those protections applicable to the states.

Although a majority of the U.S. Supreme Court has never subscribed to the view that the Fourteenth Amendment incorporated the entire Bill of Rights, in a series of individual adjudications since 1925, the Court has applied the bulk of the Bill of Rights – what Holmes called the “great ordinances” of the Constitution – to the states. However, because the application of the Bill of Rights to the states relies less upon the text of the U.S. Constitution than upon the federal courts’ reading of it, the scope of those protections could be diminished by sub-

sequent U.S. Supreme Court decisions.

State Constitutional Provisions as Independent Source of Rights

Third, the final authority to interpret and fix the meaning of a state constitution rests with the supreme court of each state. Thus, the supreme court of a state has the discretion, within judicial boundaries, to interpret that constitution in such a manner as to accord the citizens of that state more rights than they enjoy under the U.S. Constitution. For example, while the Michigan Supreme Court has consistently held the scope of the equal protection provision of the Michigan Constitution to be coextensive with the scope of the Equal Protection Clause of the U.S. Constitution, there is nothing in the U.S. Constitution which would bar the Michigan Supreme Court from expanding the orbit of the equal protection language of the Michigan Constitution and of the rights protected thereunder.

Changes to Article I since Adoption of the 1963 Constitution

Since adoption of the current Constitution in 1963, seven amendments have been proposed to Article I and all seven were successful. The first four, proposed by the legislature, dealt with criminal procedure:

- Proposal A (1972) Trial by jury of fewer than 12 jurors in misdemeanor cases
- Proposal K (1978) Permit courts to deny bail under certain circumstances in violent crimes
- Proposal B (1988) Rights for victims of crimes
- Proposal B (1994) Limiting criminal appeals

Three of these four constitutional amendments amended existing

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sections, Proposal B in 1988 added section 24 to Article I.

The last three were placed on the ballot by initiative petition and reflect the ideological struggles of the last several years:

- Proposal 04-2 (2004) Recognizing only an agreement between one man and one woman as “a marriage or similar union for any purpose”
- Proposal 06-2 (2006) Banning certain governmental affirma-

tive action programs

- Proposal 08-2 (2008) Legalizing human embryonic stem cell research

These amendments became sections 25, 26 and 27 of Article I.

Constitutional Convention Issues

If the people of Michigan decide to call a state constitutional convention, it is likely such a convention would be expected to address several divisive issues concerning individual rights, issues which were not controversial when the last state Constitutional Convention was convened 47 years ago if, indeed, they were issues at all.

As was noted in CRC Report 313-03, since the mid-1990s, proposed constitutional amendments have been designed to advance various social agendas: Restrictions on the expansion of gambling; limiting marriage to unions between one man and one woman; banning certain affirmative action programs, and, of somewhat lesser moment, changing the word “handicapped” to “disabled” in Article VIII.

Revisiting Recent Amendments

The three most recent amendments to Article I – restrictions on same sex marriage, banning certain affirmative action programs, and authorizing human embryo and embryonic stem cell research – remain controversial topics. These three amendments are examples of statutory mate-

rial being enshrined in the Constitution to protect against future changes. Despite the voters recently expressing their preferences on these questions, it is possible that a constitutional convention will be asked to revisit some or all of these issues.

Same Sex Marriage

In 2004, Section 25 was amended to Article I providing that, “...the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union...” Unlike the other sections of Article I that protect individual rights against impairment by the actions of state government, Section 25 prohibits actions that are viewed by some as rights. The amendment enshrined in the constitution language that existed then, and now, in statutory law.

Although the amendment addresses only the definition of “marriage or similar union”, a Michigan Supreme Court ruling in *National Pride at Work Inc v Governor of Michigan*¹ (2008) found

that the amendment prohibits public employers from providing health-insurance benefits to their employees’ qualified same-sex domestic partners. At the time of that ruling, it was expected that the decision would affect up to 20 universities, community colleges, school districts and governments in Michigan.

Michigan is one of 27 states that currently have constitutional provisions prohibiting same-sex marriage and 41 states that have statutory prohibitions on same-sex marriages.²

Affirmative Action

In 2006, Section 26 was amended to Article I to ban affirmative action programs that grant preferential treatment to individuals or groups on the basis of race, sex, color, ethnicity, or national origin in public education, public employment, and government contracting. Over the years affirmative action has evolved to comprise multiple meanings, including programs and processes

¹ coa.courts.mi.gov/documents/OPINIONS/FINAL/SCT/20080507_S133429_164_natlpride3Nov07-op.pdf.

² [Calif. gay marriage ruling sparks new debate](http://www.stateline.org/live/details/story?contentId=310206), Stateline.org, Pew Center on the States, www.stateline.org/live/details/story?contentId=310206.

to implement and ensure fair hiring, testing, and admissions policies; outreach programs directed towards members of under-represented groups; programs that give preferential treatment to qualified individuals from under-represented groups; and outright quotas to redress blatant discrimination by a certain entity or in a specific industry.

The amendment to the Michigan Constitution was introduced following decisions in the U.S. Supreme Court on two University of Michigan cases, *Grutter v. Bollinger et al.* (2003) and *Gratz et al. v. Bollinger et al.* (2003), which defined what is legal in regard to public university admissions policies. Those rulings said that minority status can be viewed by university officials as a single positive factor, among many, contributing to student-body diversity. Minority status cannot be given a fixed number of points or be used to meet any sort of minority “quota” or “set-aside.” Although permissible under federal law, Section 26 made clear that Michigan schools are not to use minority status as a positive factor contributing to school admissions.

At the state’s 15 public universities, undergraduate admissions at the University of Michigan-Ann Arbor had to change the most to comply with Section 26. Also, graduate and professional programs across the state required changes in their admissions policies. With respect to state and local government, recent U.S. Supreme Court decisions already barred the use of quotas and set-

asides, and have made it illegal to have an affirmative action preference program without a compelling governmental interest.

Stem Cell Research

In 2008, Section 27 was amended to Article I to allow for research on human embryos in Michigan. Regenerative medicine is a scientific and medical discipline that is focused on utilizing the body’s own regenerative capabilities to repair or replace diseased or defective tissues and organs in the human body and to find new therapies for diseases and conditions that currently have limited or no treatment options. Prior to adoption of the amendment, Michigan was considered to have some of the most restrictive laws in the nation respecting human embryonic stem cell research. It was illegal for researchers to conduct research on human embryos, which prohibited researchers from creating new human embryonic stem cell lines in the state. (The creation of new lines allows research to expand.) Scientists were allowed to conduct research using embryonic stem cell lines created outside the state and to use adult stem cells. Even after adoption of Section 27, research on human embryos in Michigan is subject to federal regulations and is restricted to embryos that were created for the purpose of fertility treatment, but are scheduled to be discarded because they were either 1) left over after fertility treatment and no longer needed by the donor or 2) unsuitable for implantation into a woman’s uterus. Embryos must be donated with the informed, written consent of the donors.

Other Issues

It is possible that interest groups could bring other social/moral issues to a constitutional convention, including abortion or the death penalty.

Abortion

The U.S. Supreme Court has held that the U.S. Constitution contained an individual right to privacy. In 1973, the Court held that abortion was encompassed within that right. States were prohibited from placing unreasonable restrictions upon access to abortion, absent a compelling state interest. However, a number of issues remain. For example, although the U.S. Supreme Court has held that the U.S. Constitution does not require that public monies be provided to fund abortions, a Michigan constitutional convention might be asked to place language in the state Constitution to require or to expressly prohibit public funding of abortion. Questions might also arise concerning whether the Michigan Constitution should address the legislature’s authority to impose restrictions such as a waiting period prior to receiving an abortion or to require parental consent in the case of minors.

Death Penalty

A constitutional convention may wish to revisit Michigan’s ban on the death penalty as punishment for certain heinous crimes. In 1846, Michigan abolished imposition of the death penalty for all crimes but treason. Since January 1, 1964, the death penalty has been prohibited by the state Constitution. (The death penalty pro-

hibition is found in Section 46 of Article 4 of the Michigan Constitution, the “Legislative Branch” Article, not the “Declaration of Rights” Article.) Whether or not the death penalty prohibition should continue no doubt would be an issue which a state constitutional convention would be asked to consider. Thirty-five states presently authorize the death penalty as punishment upon conviction for specific crimes.³

³ Death Penalty Information Center, www.deathpenaltyinfo.org/states-and-without-death-penalty.

Twenty-four of the 27 sections in Article I, the Declaration of Rights, sets forth basic individual liberties which are to be secure from impairment by the actions of state government. Many of these individual liberties are similar to those found in the federal Bill of Rights. A constitutional convention may choose to revisit the rights enumerated in Article I, but no issues have risen to a

Inoperative Provision

Section 11 provides protection against unreasonable searches and seizures. The last sentence of the section provides, “The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.” This sen-

tence has been ruled invalid because it conflicts with the 4th Amendment to the U.S. Constitution. In *People v Pennington*, (383 Mich 611; 1970), the Michigan Supreme Court held that this sentence, which allowed certain evidence to be admitted into criminal proceedings, violated the federal exclusionary rule as enunciated by the U.S. Supreme Court in *Mapp v Ohio*, (367 US 643; 1961).

Conclusion

level of crisis that would suggest immediate reform is necessary.

The final three sections in Article I, which have been added since 2004, move beyond defining basic individual liberties to be protected. The sections creating restrictions on same sex marriage, banning certain affirmative action programs, and authorizing human embryo and embryonic stem cell

research reflect the ideological struggles of the last several years. Supporters of the amendments used amendments to the constitution to make change more difficult if the political winds shift in the future. Despite the voters recently expressing their preferences on these questions, it is possible that a constitutional convention will be asked to revisit some or all of these issues.



CRC SPECIAL REPORT

MICHIGAN CONSTITUTIONAL ISSUES



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ARTICLE II - ELECTIONS

In Brief

At the November 2, 2010 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the 1963 Michigan Constitution. The question appears on the ballot automatically every 16 years as required by the Constitution. The Constitution provides that a convention would convene in Lansing on October 4, 2011. If the question is rejected, it will automatically appear on the ballot again in the year 2026.

The Citizens Research Council of Michigan takes no position on the question of calling a constitutional convention. It is hoped that examination of the matters identified in this paper will promote discussion of vital constitutional issues and assist citizens in deliberations on the question of calling a constitutional convention.

Should a constitutional convention be convened, it would likely be called upon to amend or delete inoperative and obsolete provisions in Article II and to examine the article's provisions related to direct democracy.

Introduction

Article II of the 1963 Michigan Constitution deals with elections, and contains two original sections that are obsolete and one section added by initiative petition, the intent of which the United States Supreme Court has determined to be unconstitutional. Article II also contains sec-

tions pertaining to direct democracy: recall, initiative, and referendum. This article also establishes, but does not define the role of, the State Board of Canvassers, whose members have on several occasions challenged its traditional ministerial role.

Inoperative and Obsolete Provisions

State constitutions may not violate the provisions of the United States Constitution. The language of a state constitution should reflect the reality of the law and should be understandable to citizens. Provisions of the state constitution that are inoperable because they violate the provisions of the federal constitution make the language of the state constitution confusing and misleading. Inoperative provisions should be removed or revised to reflect the current state of the law.

Sections 1, 6, and 10 of Article II of the Michigan Constitution are not consistent with the provisions of the federal constitution.

Qualifications of Electors

Article II, Section 1 sets the minimum voting age in Michigan at 21 and creates residency requirements. In 1970, President Nixon signed an extension of the Voting Rights Act of 1965, setting a minimum voting age of 18 in all federal, state, and local elections. Oregon and Texas successfully challenged that part of the law; in *Oregon v. Mitchell*, 400 U.S. 112 (1970), a divided U.S. Supreme Court declared unconstitutional that section of the federal law that applied to state and local elections. This raised the possibility that states that had established minimum voting ages other than 18 would have to maintain two sets of



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voter registration records, one for federal elections and one for state and local elections.

In 1971, the U.S. Congress proposed, and three-fourths of the state legislatures ratified, the 26th Amendment of the United States Constitution, establishing the nationwide minimum voting age to be 18: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."¹ That U.S. Constitutional amendment supersedes any state constitutional or statutory provision, including Article II, Section 1 of the Michigan Constitution. As a result, the minimum voting age in Michigan is 18, as provided in state law.

In addition, the Michigan Attorney General has stated, based on several United States Supreme Court cases, that the six-month residency requirement is no longer applicable. The current statutory requirement is 30 days.

Property Ownership Requirement for Voting

Article II, Section 6 requires electors voting on an increase in the

¹ United States Government Printing Office, *The Constitution of the United States*, www.gpoaccess.gov/constitution/html/amdt26.html.

ad valorem tax rate or bond issues to be property owners. In *Kramer v. Union Free School District No. 15*, the U.S. Supreme Court reversed a decision of a New York District Court. That court had dismissed a complaint by a bachelor who did not own or lease taxable real property, who challenged a state law that provided that in certain school districts, residents who were otherwise eligible to vote could vote only in school district elections if they owned or leased taxable real estate or if they were parents or custodians of children enrolled in the local public schools. The U.S. Supreme Court held that the relevant section of the New York law was unconstitutional because it violated the Equal Protection Clause of the 14th Amendment.²

In *Cipriano v. City of Houma*, the U.S. Supreme Court found that a Louisiana law that provided that only property taxpayers had the right to vote to approve the issuance of revenue bonds for a municipal utility system violated the Equal Protection Clause of the 14th Amendment and was there-

² U.S. Supreme Court Center, U.S. Supreme Court Cases and Opinions, Volume 395, *Kramer v. Union Free School District No. 15* [395 U.S.621 (1969)].

fore unconstitutional.³

Based on these and other cases, it is clear that Article II, Section 6 would not be sustained were it to be challenged. Municipalities no longer use property ownership as a criterion for participating in elections.

Federal Term Limits

Article II, Section 10 seeks to impose term limits on Michigan members of the United States House of Representatives and United States Senate. This section, as well as additions to Article V, Section 54 (term limits for state legislators) and Article VI, Section 30 (term limits for state executive branch elected officials), were added to the 1963 constitution by initiated petition in 1992. The language clearly recognizes that the intent – placing term limits on U.S. senators and members of congress – may be unconstitutional, and severs this provision from other parts of the initiative that impose limits on state officers (which is not prohibited by the U.S. Constitution).

The 22nd Amendment to the U.S. Constitution limits the president

³ U.S. Supreme Court Center, U.S. Supreme Court Cases and Opinions, Volume 395, *Cipriano v. City of Houma* [395 U.S. 701 (1969)]

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to two terms, and 15 states including Michigan have term limits for state legislators (six states have had legislative term limits repealed or invalidated by the courts). It is Article I, Section 2 of the U.S. Constitution that establishes the qualifications for the U.S. House of Representatives:

No person shall be a representative who shall not have attained to the age of twenty five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of the state in which he shall be chosen.

Article I, Section 3 of the U.S. Constitution includes the minimum qualifications for the U.S. Senate:

No person shall be a sena-

tor who shall not have attained the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of the state for which he shall be chosen.

In *US Term Limits, Inc v Thornton* [514 US 779; 115 S Ct 1842; 131 L Ed 2d 884 (1995)], the U.S. Supreme Court ruled in a five to four decision that the U.S. Constitution prohibits states from adopting Congressional qualifications that are in addition to those enumerated in the Constitution. The case found that Amendment 72 to the Arkansas Constitution, which prohibited an otherwise-eligible candidate for Congress from being on the ballot if that candidate had already served three terms in the House of Representatives and two terms in the

Senate, was in violation of the Federal Constitution.⁴ According to the Michigan Legislature website, "The Supreme Court held that: (1) states may not impose qualifications for offices of the United States representative or United States senator in addition to those set forth by the Constitution; (2) power to set additional qualifications was not reserved to the states by the Tenth Amendment; and (3) state provision is unconstitutional when it has likely effect of handicapping a class of candidates and has sole purpose of creating additional qualifications indirectly."⁵

⁴ The OYEZ Project, U.S. Supreme Court Media.

⁵ www.legislature.mi.gov

Provisions Related to Direct Democracy

State Board of Canvassers

Created by the Michigan Constitution of 1850 and continued in the 1908 Constitution and in Article II, Section 7 of the 1963 Constitution, the state Board of Canvassers is mandated by the constitution and established in statute. The constitution requires that the board have four members and that a majority of board members may not be from the same political party, but it does not clearly define the role of the board. According to statute, the two Democrat and two Republican members are nominated by the political parties and appointed by the Governor; three members

constitute a quorum, and at least one member of each party must vote for an action to pass.

According to its website, duties of the state Board of Canvassers, which are statutorily determined, include the following:

- Canvassing (to canvass is to examine or scrutinize) and certifying statewide elections, elections for legislative districts that cross county lines, and all judicial offices except Judge of the Probate Court.
- Conducting recounts for state offices.
- Canvassing nominating petitions filed with the Secretary

of State.

- Canvassing state ballot proposal petitions.
- Assigning ballot designations and adopting ballot language for statewide ballot proposals.
- Approving electronic voting systems for use in the state.

The controversy surrounding the Board of Canvassers relates to its function of certifying statewide ballot proposals. Article II, Section 9 provides for initiative and referendum; Article XII, Section 2 provides for amending the state constitution. In both cases, petitions containing sufficient signatures must be filed with the Secretary of State's Office in order

to place an issue on the ballot, and the Board of Canvassers is authorized by law to certify those petitions.

The staff of the Bureau of Elections, located in the Secretary of State's Office, is available for consultation on the design of an initiative petition format (the election law is very specific in detailing the form and content of statewide ballot proposals). The Board of Canvassers may, but need not, approve the language of a proposed petition. Approval of a proposed ballot proposal by the Board of Canvassers does not imply endorsement of the proposal, but only that the petition meets the technical requirements of font size and form, so that the petition cannot be challenged later as to form. Rejection of a proposed petition does not prohibit signature collection, but does mean that the petitions would be easier to challenge.

The Michigan Election Law specifies that the Board of Canvassers must ascertain if petitions have been signed by the requisite number of qualified and registered electors. The board also must certify the language of the ballot question and summary. The board may hold hearings, issue subpoenas, and administer oaths. The board is required to make an official declaration of the sufficiency or insufficiency of a petition at least two months prior to the election.

A constitutional convention would likely be asked to address questions that have repeatedly arisen about the extent of the board's

authority. In 2002, the board did not certify two proposals which opponents claimed did not list all of the constitutional provisions that would be affected. The Court of Appeals later directed the board to place one of those petitions, dealing with the distribution of tobacco settlement revenues, on the ballot. The Court agreed with the board that the other petition, dealing with the sentencing of drug offenders, was insufficient (that petition stated that it would add a new section, Section 24, to Article 1 of the constitution, but Section 24 already existed). The Court noted that the board has the responsibility to determine whether a petition's form and wording are correct, but that the board may not engage in complex legal analysis.

In 2005, the board bowed to political pressure when Democratic members refused to certify ballot initiative signatures and place the "Michigan Civil Rights Initiative," a constitutional amendment that banned certain affirmative action programs on the November, 2006 ballot. The proposed constitutional amendment, to ban preferences in education, public employment, and public contracting, was opposed by a broad and vocal coalition. The board's refusal was not predicated on a violation of the form of the proposal (the board had approved the petition as to form in 2003) or the sufficiency of valid signatures, but rather on allegations of misrepresentation of the content in the process of obtaining signatures. The issue was placed on the ballot by order of the Michigan Court of Appeals and was approved by the voters.

The Board of Canvassers' authority is ministerial: the board does not have authority to disapprove a ballot proposal on the basis of the content of the proposal or on complex legal analysis. Clarification of the extent of the board's authority could be addressed statutorily. Elimination of the board would have to be accomplished constitutionally.

Recall of Elected Officials

Article II Section 8 provides for the recall of elected officials other than judges of courts of record. Recall allows citizens to seek to remove an elected official before the end of that official's term. Recall is a political process, in contrast to impeachment, which is a legal process for removing an elected official for violating a law.

Recall was one of the Progressive Era initiatives to promote direct democracy and make government more responsive and responsible, by giving citizens power over unresponsive, incompetent, or otherwise unacceptable, (in Michigan, as in some other states, this includes politically unacceptable) elected officials. Michigan and Oregon were the first states to allow recall of state officials, in 1908.

Michigan is one of 18 states that allow the recall of state officials, and one of at least 36 states that allow the recall of local officials. Michigan does not allow recall of judicial officers (there is divided opinion on whether judicial officers should be elected). Eight other states require specific grounds for recall (malfeasance, conviction for a felony, misappro-

priation of public funds, etc.), but Michigan's recall provisions are more representative in acknowledging the political nature of recall efforts: "The sufficiency of any statement of reasons or grounds...shall be a political rather than a judicial question."⁶ The process of recall is specified in Michigan election law.⁷

In Michigan, as in other states, the number of signatures required on a recall petition is higher than the number required for an initiative or referendum. Michigan requires recall petitions to have valid signatures numbering at least 25 percent of the total number cast for governor in the last gubernatorial election in the electoral district of the officer sought to be recalled. In other states, the required minimum number of signatures is based on a variety of criteria: a proportion of the number of inhabitants qualified to vote for a successor; a proportion of the number of votes cast for that position in the last election; a specific number of qualified signatures; a proportion of all persons who voted in the last election; a proportion of the number of registered voters at the time of the last election; or a proportion of the total vote for the candidate receiving the most votes at the last election.

The period allowed to collect signatures in Michigan and four other states is a 90-day window.

⁶ National Council of State Legislatures, *Recall of State Officials*, March 21, 2006.

⁷ MCL 168.951-976.

Signatures dated more than 90 days before the petition is filed are invalid and are not counted. Florida allows only 30 days to collect signatures for recall of municipal or charter county officials; some states have no time limit for collecting signatures.

Nationwide, recall efforts against state officials have generally been unsuccessful, but two Michigan state senators were successfully recalled in 1983. Attempts to recall local government officials are more frequent in Michigan.

Issues related to recall that a constitutional convention would be asked to address include the effect the possibility of recall may have on elected officials faced with necessary, but politically unpopular decisions. Policy questions include whether Michigan should continue to allow recall, and if so, under what conditions. Should recall be more, or less, difficult than now required (e.g. should the number of signatures required be increased or decreased, or should the reasons that justify recall exclude valid political positions)? Should judges continue to be exempt from recall? Should the mechanics of the recall process be altered?

Initiative and Referendum

In the late 19th Century, U.S. efforts to challenge the special interests that controlled the political process were informed by the Swiss, who had adopted direct democracy in the forms of referendum in 1844 and initiative in 1891. In Michigan, a limited and restrictive form of initiative (only

on constitutional amendments, on petition of 20 percent of the number that had voted in the previous election, and with the approval of the legislature voting in joint session) first appeared in the 1908 constitution.⁸

Article II Section 9 of the 1963 Michigan Constitution authorizes the use of initiative and referendum. A constitution convention may consider whether Michigan should continue to permit use of these tools of direct democracy.

Initiative

The "initiative" is a proposal for a new law (or a constitutional amendment, as provided in Article XII, Section 2) that is placed on the ballot by a citizen petition. Michigan is one of 21 states that allow initiatives to propose statutes, and one of 18 states that allow the initiative to propose constitutional amendments.

Michigan's constitution provides for indirect initiative: once a sufficient number of valid signatures have been collected, the issue goes to the legislature, and if approved by the legislature within 40 days, the proposal becomes law without a vote of the people or approval by the Governor. If the legislature does not approve the legislation, the proposal is submitted to the people. Michigan is one of five states where the legislature may place an al-

⁸ National Council of State Legislatures, *Initiative and Referendum in the 21st Century; Final Report of the NCSL I&R Task Force*, July 2002.

ternative proposition on the ballot in addition to the initiative.

In the direct initiative process used in some other states, once a sufficient number of valid signatures has been collected, the issue is placed directly on the ballot for determination by the voters. Two states allow both direct and indirect initiatives, 14 states allow direct initiatives for statutes, and five (including Michigan) allow indirect initiatives.⁹

Purposes and Form. If the initiative is retained, a constitutional convention may wish to insert language clarifying how the initiative may be used. Some states that allow the initiative restrict the purposes for which it can be used. Initiatives that modify the rights of individuals; that affect the judiciary or prescribe court rules; that amend the state constitution; that enact emergency measures; that propose local or special legislation; or that make appropriations, may be prohibited. Some states prohibit the same measure being set before the voters more often than once in three years. In Michigan, the initiative extends only to laws that the legislature may enact (the initiative may not be used, for example, to reestablish a minimum voting age of 21).

Some states restrict statutory initiatives to a single subject, which advocates claim enhances clarity and transparency. Michigan is

⁹ Steven L. Piott, University of Missouri Press, *Giving Voters a Voice: Origins of the Initiative and Referendum in America*, 2003.

one of 11 states that do not have this restriction.

A constitutional convention may revisit the process for putting initiatives on the ballot. The Michigan Constitution establishes a minimum number of signatures on petitions for initiatives equal to eight percent of the total votes cast for all candidates for governor at the last gubernatorial election (that number is currently 304,101, according to the Secretary of State). The required number of signatures must be collected within any 180 day period, according to Michigan statute. Of the 21 states that allow the statutory initiative, Massachusetts requires the fewest signatures (three percent of votes cast for governor in the last election) and allows the shortest time for gathering signatures (60 days). A few states require a number of signatures equal to as much as ten percent of the votes cast in last general election; some states allow an unlimited amount of time to collect signatures. Michigan is one of nine states that do not require a geographical distribution for petition signatures. Other states require minimum percentages of signatures to be from different regions as defined by counties or congressional districts.

Initiatives in Michigan. In Michigan since 1963, 17 initiatives proposing statutes have been certified. The Michigan Legislature approved four of these within the 40-day period allowed; those four proposals became law by legislative action and did not appear on the ballot.

- Amendment to prohibit the appropriation of public funds to pay for welfare abortions unless the abortion is necessary to save the life of the mother, 1987 (no amendment by legislature)
- Amendment to require parental consent for abortions performed on unemancipated minors, 1990 (title and two sections amended by legislature)
- Amendment to define legal birth and the commencing of legal personhood, 2004 (ruled unconstitutional in federal court)
- Amendment to repeal Public Act 228 of 1975, the single business tax, 2006 (no amendment by legislature)¹⁰

Of the 13 initiated legislative proposals that did appear on the ballot, seven were approved by the voters and six were rejected. The seven approved initiatives, and subsequent actions on those statutes, are as follows:

- Repeal Public Act 6 of 1967, to permit the establishment of daylight savings time, 1972
- New act to prohibit the use of nonreturnable beverage containers; to require refundable cash deposits for returnable containers; and to provide penalties for violation of the law, 1976 (legislature amended title and three sections and added eight sections)

¹⁰ Michigan Secretary of State, Bureau of Elections website: www.Michigan.gov/sos.

- Amendment to revise standards for grant of parole and to prohibit grant of parole for certain defined crimes until court imposed minimum sentence is served, 1978 (one section amended by legislature, one section repealed)
- Amendment to prohibit utility increases without full notice opportunity for hearing; to abolish all rate adjustment clauses; and to prohibit the public service commission from conducting two or more proceedings on the same petition or application for rate increase and from conducting hearing on additional rate increase petition or application when utility already has a petition or application pending, 1982 (one section amended by legislature)
- New legislation calling for mutual, verifiable nuclear weapons freeze between the United States and the Union of Soviet Socialist Republics and requiring transmission of communication to United States government officials, 1982 (no amendment by legislature)
- New legislation to permit casino gaming in qualified cities, 1996 (most of 36 sections have been amended by legislature)
- New legislation to permit the use and cultivation of marijuana for specified medical conditions, 2008 (no amendment by legislature)¹¹

¹¹ Michigan Secretary of State, Bureau of Elections website: www.Michigan.gov/sos.

A law submitted by initiative and approved by the voters takes effect ten days after the vote is certified. After an initiative petition is approved by the voters, no gubernatorial approval is necessary, nor may the governor veto the proposal. In Michigan, a three-quarters vote of the House and Senate is required to amend or repeal an initiated statute (all of the amendments noted above in the list of initiated statutes required this supermajority approval). Of the seven voter-approved initiated statutes, one had no real effect (the call for a nuclear weapons freeze); two have not been amended (one was a repeal, leaving nothing to amend); and four have been amended (one extensively).

Ten states restrict the legislature's power to repeal or amend an initiated statute; the California legislature is prohibited from amending or repealing an initiated statute. In 14 states, the legislature may repeal or amend an initiated statute at any time.

Referendum

A popular "referendum" is a proposal placed on the ballot by a citizen petition to repeal a law that has been enacted by the legislature and signed by the governor. Like the initiative, adoption of the referendum was a Progressive Era response to the control of state legislatures by special interests. Michigan is one of 24 states that permit citizen initiated referenda. (Legislative referenda, also called legislative propositions or legislative measures, are placed on the ballot by the legislature.)

Besides considering continuation of the power of referendum, a constitutional convention may wish to revisit the process of initiating the referendum. Citizen initiated referenda in Michigan require a number of valid signatures equal to five percent of the total vote cast for governor in the last gubernatorial election (the Secretary of State's Office indicates this number is currently 190,063). The petition may be circulated from the date the law being challenged is enacted until the filing deadline, which is 90 days after the final adjournment of that legislative session.

If the referendum petition is certified by the Board of Canvassers as having sufficient signatures, the implementation of the law that is being contested is suspended, pending the determination by the voters.

Referenda cannot be used to rescind acts that make appropriations or to meet deficiencies in state funds. This provision has led the legislature to include an appropriation in controversial legislation to make the act referendum proof. Because this provision is in the constitution, any limitation that would prevent abuse of the provision by the legislature would have to be included in the constitution.

Although the signature requirement is less, referenda occur less frequently than initiatives. Since 1963 in Michigan, only seven referenda have been placed on the ballot by petition, and of those, only one was approved. That November, 1988 referendum tar-

Laws Subjected to Referendum by Petition Under the 1963 Michigan Constitution

<u>Referendum called on</u>	<u>Purpose of Bill</u>	<u>Election Date</u>	<u>Outcome</u>
Act 240 of 1964	To institute use of Massachusetts ballot in Michigan to prevent straight party ticket voting	Nov. 1964	Rejected
Act 6 of 1967	To permit establishment of daylight saving time	Nov. 1968	Rejected
Act 59 of 1987	To prohibit use of public funds for the abortion of a recipient of welfare benefits unless the abortion is necessary to save the life of the mother	Nov. 1988	Adopted
Act 143 of 1993	To reduce auto insurance rates; place limits on personal injury benefits, fees paid to health care providers, and right to sue; and allow rate reduction for accident-free driving	Nov. 1994	Rejected
Act 118 of 1994	To amend certain sections of Michigan Bingo Act	Nov. 1996	Rejected
Act 269 of 2001	To amend certain sections of Michigan election law	Nov. 2002	Rejected
Act 160 of 2004	To allow hunting season for mourning doves	Nov. 2006	Rejected

Source: Michigan Manual 2009-2010, Michigan Legislative Service Bureau.

geted PA 59 of 1987, to prohibit the appropriation of public funds to pay for welfare abortions unless the abortion is necessary to save the life of the mother. In addition to the seven petition referenda, 13 referenda were placed on the ballot by the legislature, and nine of those were approved by the voters.¹² Laws approved by referenda may be amended by the legislature at any time.

Initiative and Referendum Policy

The controversy surrounding the initiative and referendum centers

¹² Bureau of Elections website, www.Michigan.gov/sos.

on the right of citizens to directly participate in the process of passing and repealing laws. Concerns arise about the effect of direct democracy on government when issues are placed directly before the voters, without the benefit of a legislative balancing of competing policy needs; on the ease or difficulty of placing an issue on the ballot; on the often confusing language that makes it difficult for voters and public officials to interpret and predict the actual effect of proposals; and on instances of alleged fraud in gathering signatures. The 1996 casino initiative exemplifies another concern: The language of that proposal required extensive amendment to allow implementation of the voter-approved law.

There are concerns about “outsiders” and special interests funding initiatives. “To supporters, initiatives and referendums are a legitimate and often effective way to bring unresponsive or gridlocked government actions closer to majority preferences and empower citizens... Critics charge that initiatives and referendums unwisely elevate the influence of narrow interests, erode representative government...”¹³

¹³ Phyllis Meyers, Initiative and Referendum Institute, University of Southern California, *Direct Democracy and Land Use: Eminent Domain and Big Box Development at the Local Ballot Box*, 2007.

Conclusion

Section 1 of Article II of the 1963 Michigan Constitution should be updated to make it conform to the U.S. Constitution's minimum voting age. Based on various U.S. Supreme Court decisions, it is clear that Section 6 would also be declared unconstitutional if challenged. Section 10 should be eliminated because it seeks to establish congressional term limits, a goal that the U.S. Supreme Court has found to be unconstitutional. All of these changes could be accomplished by amendment or as part of a general revision.

Sections 7, 8, and 9, which allow citizens to exercise direct democracy through recall, initiative, and referendum, are the more interesting policy issues. Not all states provide for direct democracy in this way, and questions arise concerning the effect these citizen rights have on the adoption of considered, balanced legislation. A further question, in the context of a constitutional convention, is whether, and which, aspects of these issues should be addressed constitutionally or statutorily.

Recall, initiative, and referendum were adopted as means to empower citizens to challenge the perceived control of special interests over the state legislature. Ironically, in recent times, these tools of direct democracy have, on occasion, been used by special interests to achieve their goals. While these processes exclude the checks and balances, the debate, deliberation, and compromise that characterize representative democracy, they do engage citizens in discussions and determinations of important public policy issues.



CRC SPECIAL REPORT MICHIGAN CONSTITUTIONAL ISSUES



No. 360-06

A publication of the Citizens Research Council of Michigan

April 2010

Sixth in a series of papers about state constitutional issues

ARTICLE III - GENERAL GOVERNMENT

In Brief

At the November 2, 2010 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the 1963 Michigan Constitution. The state Constitution itself requires that the question of calling a constitutional convention appears on the statewide ballot every 16 years. If the proposal is approved, the convention would convene in Lansing on October 4, 2011. If the proposal is not approved, the question will automatically appear again on the ballot in 2026.

The Citizens Research Council of Michigan takes no position on the calling of a constitutional convention. It is hoped that examination of the matters identified in the series of publications, of which this report is a part, will promote a discussion of vital constitutional issues and assist citizens in deliberations on the question of calling a constitutional convention.

Should a constitutional convention be convened, it would examine the provisions of Article III, General Government. Among the eight sections in Article III are two that are of special interest from a public policy perspective (and one of those only because of the use of the word "militia," the popular association of which has changed over time).

Introduction

Article III of the current Michigan Constitution contains provisions relating to the general structure of the state government. In Section 1, Lansing is designated as the state capital (in 1847, the state legislature determined that Detroit's location on the border made it vulnerable to invasion by British forces in Canada and relocated the capital to Lansing). The state government is organized into

legislative, executive, and judicial branches, patterned on the federal model (Section 2). Section 7 provides that laws in force at the time of adoption of the constitution, and not contradicted by the constitution, remain in force. The governor and legislature are authorized to ask the opinion of the state supreme court on important questions of law (Section 8).

Constitutional Convention Issues

If the people of Michigan decide to call a state constitutional convention, it is likely such a convention would take a closer look at three sections of Article III.

Michigan's Militia

Section 4 provides that "The militia shall be organized, equipped and disciplined as provided by law." The militia referred to in Section 4 should not be confused with the Michigan Militia, a volunteer organization which at one time claimed over 10,000

members. Rather, the militia referred to in Section 4, now known as the Michigan National Guard, has a history that predates Michigan statehood. This history is recounted in detail on the website of the Michigan Department of Military and Veterans Affairs.¹

In the early days of settlement, the militia fought in the War of 1812, the Black Hawk War, and border

¹ www.michigan.gov/dmva/0,1607,7-126-2364--00.html



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disputes (the “Toledo War” and the “Patriot War”). The First Michigan Volunteers served in the Mexican War in 1847-1848; several Michigan regiments served in the Civil War. In 1870, the militia became the “Michigan State Troops,” and in 1891, the name was changed to the “Michigan National Guard.” Michigan National Guard units have been mobilized and fought in the Spanish American War, World War I, World War II, the Korean Conflict, and the Persian Gulf Conflict. Currently, members of the Michigan National Guard are deployed in Kuwait, Iraq, Afghanistan, and the United Arab Emirates.

The Michigan National Guard includes both Army and Air Guard components. These units can be called into action by the Governor to assist in the event of local emergencies or civil disturbances, or by the President to serve with active duty troops in foreign wars or national emergencies. Reflecting the dual mission of all states’ Guard units, the Michigan National Guard has been deployed to keep the peace and to provide security both within the state and across the world.

All states are required by federal law to maintain a militia, but a constitutional convention could clarify the language of Article III, Section 4 to identify the Michi-

gan National Guard as this state’s militia.

Intergovernmental Agreements

Section 5 allows the state and local governments to enter into agreements with other states, the United States, Canada, or their political subdivisions, for the performance, financing, or execution of their functions, subject to other provisions of the constitution and general law. This authority for cooperation with governments outside of Michigan is related to other constitutional provisions that provide for local government cooperation (Article VII, Section 28) and that allow the establishment of multi-purpose authorities in metropolitan areas (Article VII, Section 27).²

Section 5 was a new section to the Michigan Constitution when it was added in 1963. The framers of the Constitution envisioned a need for such provisions to deal with matters such as flood control, navigation, water conservation, protection of wildlife and

² These issues are explored in great detail in CRC Report 346, *Authorization for Interlocal Agreements and Intergovernmental Cooperation in Michigan*, www.crcmich.org/PUBLICAT/2000s/2008/rpt354.html.

game, and harbor development and regulation. The authority provided by Section 5 is far narrower than is provided by Article VII, Section 28 and there are far fewer examples to illustrate its usefulness. Section 5 allows communities along Michigan’s borders with Ohio, Indiana, and Wisconsin to cooperate with communities in those states. It also allows for cooperation with Canadian communities, most notably at the bridges between Detroit and Windsor, Port Huron and Sarnia, and the cities of Sault Ste. Marie in Michigan and Ontario. It allows municipalities and the state to participate in cooperative bodies such as the Great Lakes Commission, which deals with Great Lakes watershed issues.

Internal Improvements

Section 6 prohibits the state from participating in internal improvements, except as provided by law. “Internal improvements” are now known as public infrastructure, especially infrastructure that is developed for the benefit of private investors.

The debate about the proper role of government in the building of roads, canals, harbors, and railroads dates to the 19th Century. Prior to the Civil War, strict constructionists and defenders of states’ rights objected to federal investment in internal improve-

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ments. Both the federal and state governments provided subsidies for the construction of internal improvements, most of which were also privately funded and expected to generate returns for the private investors. Many states had provided state funds for the construction of privately owned infrastructure, or had incurred considerable debt in constructing toll roads, canals, and railroads. Governmental involvement was justified in order to facilitate trade, transportation, national defense, national unity, and economic prosperity. Unfortunately, many of these projects were characterized by corruption and ended in financial catastrophe; a number of states had trouble repaying debts incurred for internal improvements. In response to those experiences, many states amended their constitutions to prevent investment in internal improvements. Generally, if there is no essential governmental purpose for a capital project, these constitutional provisions apply.

Michigan continues to be one of many states with constitutions that include an internal improvements clause, which limits the state's ability to engage in capital projects. Judicial interpretations of states' internal improvements clauses are based on "essential" government purposes, "predominantly" governmental purposes, or other defining terms.

The 1835, 1850, 1908, and 1963 Michigan Constitutions all addressed the issue of internal improvements, but in very different

ways.³

The 1835 constitution encouraged internal improvement and directed the legislature to develop infrastructure goals and provide funds to meet those goals.⁴ In contrast, the 1850 constitution forbade the state from becoming "a party to, or interested in any work of internal improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the state of lands or other property."⁵

The constitution of 1908 stated that "The state shall not be a party to, nor be interested in any work of internal improvement, nor engage in carrying on any such work, except in the improvement of, or aiding in the improvement of the public wagon roads, in the reforestation and protection of lands owned by the state and in the expenditure of grants to the state of land or other property."⁶ That language was

amended in 1945 and 1946 to include a number of exceptions, including development, improvement and control of public roads, harbors of refuge, waterways, airways, airports, landing fields and aeronautical facilities; the development, improvement and control of rivers, streams, lakes and water levels, for purposes of drainage, public health, control of flood waters and soil erosion; reforestation and protection and improvement of lands.

The current, 1963 state constitution states that "The state shall not be a party to, nor be financially interested in, any work of internal improvements, nor engage in carrying on any such work, except for public internal improvements provided by law."

Michigan funds and participates in roads, ports, airports, housing, broadband, and other improvements that are specifically authorized in state statute. The traditional way that states have circumvented internal improvements clauses has been to create dummy corporations or independent public bodies to administer funds for private projects.

The state's capital outlay process controls the planning and financing of acquisition, construction, renovation, and maintenance of facilities used by a state agency, public university, or community college. Nearly all major state owned facility renovations and new construction are financed by the State Building Authority (SBA) from bond proceeds. SBA bonds are limited obligations of the SBA,

³ This history is explained in *A Comparative Analysis of the Michigan Constitution*, a Citizens Research Council analysis of state constitutional provisions written in 1961, to assist the constitutional convention that developed the 1963 Constitution. www.crcmich.org/PUBLICAT/1960s/1961/rpt208.pdf

⁴ 1835 Constitution, Article XII, Section 3

⁵ 1850 Constitution, Article XIV, Section 9

⁶ 1908 Constitution, Article X, Section 14

payable from the annual SBA rent payment in a state budget bill, and are not general obligations of the state. Highway and bridge construction projects are covered by other administrative and legislative procedures.⁷

In order to support the development of housing for low and moderate income residents, and still accommodate the internal improvements clause, the State of Michigan created the Michigan State Housing Development Authority, which sells bonds and channels federal grants to fund that development.

Then-Governor George Romney requested an advisory opinion from the state Supreme Court as to the constitutionality of the law that created the Michigan State Housing Development Authority (MSHDA) in 1966. Advisory Opinion re Constitutionality of PA 1966, No 346 addresses three constitutional provisions: the internal improvements clause, the prohibition on the lending of state credit (Article IX, Section 18), and the requirement of the approval of two-thirds of the members serving in each house of the legislature for the appropriation of public money or property for local or private purposes (Article IV, Section 30). The opinion ruled

the law to be constitutional, and stated that:

- The State may not directly engage in the financing or construction of private housing.
- The encouragement of housing construction is a proper public purpose for the creation of a State agency.
- The funds of the State housing development authority are not State funds.
- The bonds of the State housing development authority are not obligations of the State.
- An appropriation to the State housing development authority for the purpose of administration is a proper public function.
- An appropriation to the housing development fund, or the capital reserve fund of the State housing development authority is not a proper public purpose.

As to the internal improvements clause:

Moneys of the State housing development authority are not moneys of the State. The funds to be established under the act are trust funds to be administered by the State housing development authority. The State has no beneficial interest in such funds, and when such funds are used to finance the construction of housing, the State cannot be said to be financially interested in such construction. We conclude, therefore, that while the construction of private

housing is not a public work of internal improvement, the act does not make the State a party to, financially interested in, or engaged in carrying on such work, and the act does not therefore offend against Constitution 1963, Article 3, Section 6.

As a constitutional policy issue, restrictions on the state's involvement in internal improvements, designed to promote the wise use of state resources, must be weighed against the necessity to ensure that the residents of this state have the infrastructure necessary to compete successfully in the 21st Century economy. Consideration should include the governmental interest in reducing unemployment; building healthy neighborhoods; promoting manufacturing, tourism, or agriculture; and making technology more widely available. Further, consideration should recognize developments in the investment environment and in the use of public-private partnerships to develop, maintain, and operate infrastructure. While the exception provided ("except for public internal improvements provided by law") allows projects that receive legislative approval, the constitutional convention may wish to review the internal improvements clause to determine whether the conditions that justified the prohibition are still persuasive, and whether there are better approaches to protect taxpayers and ensure provision of modern infrastructure (e.g. high speed Internet connections) that is necessary to economic competitiveness and prosperity.

⁷ Al Valenzio, House Fiscal Agency, *Michigan's Capital Outlay Process*, March 2007. www.house.mi.gov/hfa/PDFs/capoutl.pdf



CRC SPECIAL REPORT

MICHIGAN CONSTITUTIONAL ISSUES



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Seventh in a series of papers about state constitutional issues

ARTICLE IV – LEGISLATIVE BRANCH

In Brief

At the November 2, 2010 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the 1963 Michigan Constitution. The question appears on the ballot automatically every 16 years as required by the Constitution. The Constitution provides that a convention would convene in Lansing on October 4, 2011. If the question is rejected, it will automatically appear on the ballot again in the year 2026.

The Citizens Research Council of Michigan takes no position on the question of calling a constitutional convention. It is hoped that examination of the matters identified in this paper will promote discussion of vital constitutional issues and assist citizens in deliberations on the question of calling a constitutional convention.

State government powers are expansive and shared among three branches of government: legislative, executive, judicial. The lawmaking powers reside with the Michigan Legislature, which consists of a senate and a house of representatives. Should voters approve the calling of a constitutional convention, it is likely that delegates to the convention would examine a number of provisions contained in Article IV entitled, "Legislative Branch", dealing with: obsolete provisions and institutional matters; the legislative structure; term limitations; setting elected officials' compensation; and other issues. The legislature's role in the state's financial affairs as described outside of Article IV (e.g., "power of the purse" in Article IX and "balanced budget" in Article V) will be covered separately in forthcoming analyses.

Introduction

Article IV, Section 1 succinctly states that legislative power "is vested in a senate and a house of representatives." Absent further refinement of such powers, such authority would be sufficient to allow the legislature to carry out all acts that are embraced within the concept of the general powers of government. Unlike the executive and judicial branches of state government that exercise powers specifically enumerated to them, the Michigan Constitution, in theory, does not need to define the specific grants

of legislative authority. Article IV, however, does contain provisions that define legislative powers, in addition to provisions that involve the legislative institution itself; its structure, organization, and procedures. This article also contains provisions governing the legislative redistricting process, which have been deemed to be unconstitutional by the Michigan Supreme Court, that should be eliminated and replaced with valid language.

Obsolete Provisions

States have considerable discretion in drafting the fundamental law that govern their operations and that afford rights to their citizens. State constitutions, however, are bound by the parameters of the United States Constitution and may not violate the provisions contained in that document. State constitutional provisions that are obsolete because they violate the provisions of the federal constitution make

the language of a state constitution confusing and misleading to the citizenry. These provisions should be removed or revised to reflect the current status of law.

Article IV contains provisions relating to legislative redistricting that are not consistent with the federal constitution. Given the importance of redistricting



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to the electoral process and to ensuring representative democracy, the existing language that details the process of redistricting and the body responsible for this process should be eliminated and replaced with wording that complies with the United States Constitution.

Legislative Redistricting

Legislative redistricting is the process by which a state is divided into geographic districts from which voters elect state senators and state representatives. With respect to legislative redistricting, the 1963 Michigan Constitution is

deficient in three respects: 1) it does not specify what body, agency, or official is responsible for the process; 2) it does not list the state-specific standards that govern the process; and 3) it does not indicate how often the process is to take place. Despite the fact that Michigan has been without valid redistricting provisions for the past 30 years, neither the legislature, nor the voters through their power to propose constitutional amendments, has chosen to address the issue.

Background

Michigan's current constitutional redistricting provisions were

drafted at the same time precedent-setting legal cases were being decided by the U.S. Supreme Court establishing standards that states are required to follow in the redistricting process, namely the "one person, one vote" principle. The 1963 Constitution was crafted and took effect before federal legal precedent on the matter was settled and requires legislative districts to be crafted on a combination of factors, including population and land area. In 1962, the U.S. Supreme Court set the stage for future review of state legislative redistricting standards when it found that the matter was subject to judicial review and that it

"Apportionment" or "Redistricting"?

These two terms are often used interchangeably; however, doing so can lead to confusion. The terms have distinct definitions, depending on the context in which they are being discussed, e.g., state legislative bodies or the U.S. Congress. "Apportionment" is the process of determining the number of representatives to which each state is entitled in the U.S. House of Representatives. Each state is guaranteed at least one representative. The process of dividing the remaining seats in the U.S. House among the various states following each decennial U.S. census is called "reapportionment". (Seats in the U.S. Senate are not apportioned among the states because each state is assigned two seats in that chamber, regardless of population.) Once each state's allocation of U.S. House seats is determined, geographic boundaries for each congressional district are established, a process called "redistricting". States carry out the redistricting process for seats in the U.S. House. In the federal vernacular, "apportionment" and "redistricting" have separate meanings.

With respect to legislative bodies at the sub-federal government level, the term "apportionment" has little relevancy in light of U.S. Supreme Court rulings requiring the distribution of political power on the basis of "one person, one vote". Because the Michigan Constitution was drafted before resolution of these federal court cases, the original language refers to "apportionment" because legislative seats were "apportioned" to areas of the state based on land and population factors. Today, political power is required to be distributed primarily on the basis of population. Thus, the appropriate term to be used in state constitutions, including Michigan's, with respect to distributing the power of legislative bodies is "redistricting". As is the case at the federal level, this is a process of determining the geographical boundaries of individual legislative districts following each U.S. census.

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was not solely the province of the political process in the states.¹ By June of 1964, the U.S. Supreme Court had rendered a decision that both houses of a bicameral state legislature must be divided up substantially on a population basis.² In light of the federal court action, the Michigan Supreme Court deemed the constitutional provisions related to the method of redistricting in Michigan (e.g., population and land area) to be in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.³

Responsibility

Absent clear lines of constitutional responsibility to the contrary, redistricting is a function to be discharged by state legislative bodies. The Michigan Constitution (Article IV, Section 6) entrusted this responsibility to an independent body (Commission on Legislative Apportionment); however, this body was declared unconstitutional in 1982 by the Michigan Supreme Court, largely on the reasoning that the body did not have valid criteria to guide its actions following the Court's finding that apportionment provisions of the state constitution violated the federal Equal Protection Clause.⁴ Since that time, the Michigan Legislature has attempted to carry out the redistricting process. In years in which an independent body or the legislative body failed to fulfill

this fundamental and recurring governmental function, responsibility for redistricting has fallen to the judicial branch of government.

The Michigan Supreme Court drew up legislative districts following the 1970, 1980, and 1990 U.S. censuses. The Commission on Legislative Apportionment initiated the redistricting process following the 1970 and 1980 censuses, but was unable to agree to a final plan and thus the courts finalized a plan.⁵ Following the 1990 census, the Michigan Legislature failed to adopt a redistricting plan and the final plan was developed by the Supreme Court.

The "void" of constitutional responsibility and standards was filled in 1996 by way of Public Act 463, which directed the Michigan Legislature to develop a redistricting plan following each census, beginning in 2000, and prescribed the specific guidelines to use, while adhering to federal law. The state law further directed that the Supreme Court "shall have original and exclusive state jurisdiction to hear and decide all cases or controversies" involving redistricting plans developed by the legislature.⁶ PA 463 marked the first time following the Supreme Court's 1982 ruling invalidating the role of the Commission on Legislative Apportionment that responsibility for the redistricting

process was clearly defined in law.

Current Redistricting Guidelines

Since the U.S. Supreme Court's precedent-setting rulings in the mid 1960s requiring state legislatures to redistrict on a population basis, the Court has permitted some deviation from strict adherence to a population-only standard. Acknowledging the difficulties associated with pure mathematical equality in redistricting, the Court has allowed the use of other factors to effect rational state policy.⁷ Both the Michigan Supreme Court and the Michigan Legislature, in establishing the statutory provisions in PA 463, have relied upon the following standards to guide the redistricting process in Michigan:

1. Contiguity – the ability to move to any location within a district without leaving it.
2. Compactness – districts should be as square in shape as practicable.
3. Adherence to local boundaries - districts should follow existing political and geographical boundaries, or respect identified communities of interest.

Public Act 116 of 2001 established the current senate and house districts using PA 463 guidelines, and have been in effect since the August 2002 primary election.

¹ Baker v Carr (369 US 186; 1962)

² Reynolds v Sims (377 US 533; 1964)

³ In re Apportionment of State Legislature – 1982 (413 Mich 96; 1982)

⁴ In re Apportionment of State Legislature – 1972 (387 Mich 442; 1972). In re Apportionment of State Legislature – 1982.

⁵ 1996 PA 463, MCL 4.262.

⁶ Mahan v Howell (410 US 315; 1973)

Constitutional Convention Issues

Each of the four state constitutions that have been adopted by Michigan voters since 1835 has contained specific legislative redistricting provisions. This fact suggests voters have deemed it unwise to leave the matter entirely to the discretion of any branch of government, which is currently the case. Redistricting language in the current 1963 Constitution is invalid and should be eliminated and replaced. If Michigan voters decide to call a constitutional convention, the convention might consider the following questions/issues for Article IV:

Who should be responsible for redistricting? As a result of PA 463 of 1996, the Michigan Legislature is tasked with redistricting the House of Representatives and the Senate every 10 years. The potential problems associated with entrusting the responsibility for the redistricting process to the same body that is directly affected by its outcomes are obvious. The potential for political manipulation was an underlying reason behind the establishment of a separate body to handle redistricting by the framers of the 1963 Constitution.

Thirteen states give first and final responsibility for redistricting to an appointive commission outside of the states' legislatures. Two states use advisory commissions to draft redistricting plans that the states' legislatures are presented with and five states employ backup commissions when the legislatures are unable to develop plans. Iowa, unlike

any other state, grants this responsibility to nonpartisan legislative staff. Despite the strong prevalence of independent bodies in other states, as evidenced by Michigan's experience, having a commission does not necessarily ensure a timely, effective, and efficient redistricting process.

What guidelines should govern the process? With the exception of the population standard demanded by federal law, other basic redistricting guidelines are enumerated in state statute (PA 463), as opposed to the Michigan Constitution. Should these basic geographical standards (contiguity, compactness and local boundaries) appear in Michigan's fundamental law? Should this list be expanded to include political/legal factors, such as preservation of communities of interest, protecting minority voting rights, protection of incumbents, and/or assuring competitive partisan elections?

Politics, generally, is an inherent aspect of the redistricting process. The history of the use of specific "political" factors to draw legislative districts is replete with legal challenges. Some factors, such as protecting incumbents, have passed legal muster, while others remain unresolved. The courts have considered the issue of "political gerrymandering" (i.e., drawing of legislative districts to advantage one political party over another) and have found the issue to be "nonjusticiable" (i.e., court could not rule on the issue)

⁷ *Vieth v Jubelirer* (541 US 267, 281; 2004)

based on a lack of standards for ruling on the matter.⁸

When Should Redistricting Occur? Current statutory guidelines covering the legislative redistricting process in Michigan require the exercise to be completed once every 10 years, beginning November 1, 2001. This date was set to accommodate the schedule of the decennial census. Michigan constitutional language, although voided in 1982, contemplated that redistricting would occur once every 10 years. Absent constitutional language to the contrary, the Michigan Legislature can engage in the process more frequently than once every 10 years by making statutory changes. Consideration might be given to limiting, by way of constitutional language, the redistricting process to once every 10 years, as has been common practice for over 180 years.

Other states, most notably Texas, have attempted mid-decade redistricting with many of the attempts challenged in court and resulting in varying outcomes. In many cases, the redistricting process was revisited by a newly-elected state legislature after a shift in political power occurred. In a number of cases, mid-decade redistricting plans replaced plans drafted by the courts and used in previous elections.

The 2010 census is currently ongoing, the results of which are scheduled to be released to states for redistricting purposes no later than April 1, 2011. Michigan law requires the legislature to develop house and senate redistricting

plans based on the new census data by November 1, 2011, to be first used at the August 2012 pri-

mary elections. In light of this timeline, if a constitutional convention were to modify the cur-

rent redistricting process it would not be implemented until after the next U.S. census, in 2020.

What about Congressional Redistricting?

The 1963 Michigan Constitution does not contain any mention of redistricting U.S. congressional districts. Federal law grants to state legislatures the authority to draw up the boundaries of congressional districts equal to the number of seats in the U.S. House of Representatives each state is entitled to based upon the most recent U.S. census. The U.S. Supreme Court has ruled that states are required to redistrict solely on the basis of population, ensuring that each district is of equal population.¹

In addition to the strict population guideline, states are allowed to adopt secondary guidelines to govern the process. Michigan's current 15 congressional districts are established in law (2001 amendments to Public Act 282 of 1964), under statutory guidelines contained in the Congressional Redistricting Act (Public Act 221 of 1999). In general, these guidelines are similar to those governing redistricting of Michigan's legislature: contiguity, compactness, and adherence to local boundaries. A constitutional convention might consider what entity would be responsible for devising redistricting plans and what criteria, in addition to population, should be used.

¹ Wesberry v Sanders (376 US 1; 1963)

Institutional Issues

State legislative bodies are designed to reflect a state's people and political traditions. These factors and others account for the structure and overall size of the legislative body in a particular state as well as the sizes of the individual chambers that comprise the body. As a result, it can be said that there is no "typical" structure or size for a state legislative body in the aggregate or for its individual chambers. States also vary considerably in their use of term limits for members of legislative bodies.

Legislative Structure

Most states, including Michigan, mirror the Federal government

with bicameral (two chamber) legislative branches of government. Nebraska's legislature consists of a single chamber (unicameral) called the senate. Commonly, the "upper" chamber in the bicameral structure is smaller in size and its members serve longer terms. The Michigan Senate, created in Section 2, consists of 38 members serving four-year terms. The Michigan House of Representatives (Section 3), similar to the U.S. House of Representatives, is larger in size (110 members) and its members serve shorter terms (two years).

Michigan's legislature has operated as a full-time, continuous body for much of the past 30

years, despite the fact that constitutional language contemplates a part-time body. Provisions regarding immediate effect (Section 27), special session (Section 28), gubernatorial "pocket veto" (Section 33), and referendum (Article II, Section 9) were included in the 1963 Constitution based on the assumption that the legislature would function in a part-time capacity. Nothing in Section 13 dealing with convening in "regular session", or elsewhere for that matter, prevents the legislature from functioning as it currently does, i.e., year-round session.

Nine other states have full-time legislatures that meet throughout the year (identified in **Table 2**

below). The remaining states have either part-time bodies (18 states) or a “hybrid” legislature (22 states), meaning the legislative session is limited in duration but the legislators are engaged in other related activities when not in session.

Size and Chamber Makeup. Provisions in each of Michigan’s four constitutions have allowed the size of the legislature to grow from 66 members in 1835 to 148 members today. Under Michigan’s 1835 constitution, the number of representatives was required to be at least 48, but not greater than 100, while the number of senators was required to be as close as possible to one-third of the number of representatives. The 1835 Constitution required the addition of senate and house districts following the organization of counties and as a result of reapportioning.

The adoption of new constitutions and amendments to those constitutions has gradually increased the number of legislators over time (**Table 1**).

Representation. Michigan’s population in 1960 was 7,823,194. The average senate district contained 205,874 people and the average house district contained 71,120 residents. Although Michigan’s population has grown steadily since the adoption of the 1963 Constitution, the size of its legislature has remained constant.

Based on the U.S. Census Bureau’s 2009 estimate of Michigan’s population (9,969,727), the average senate district contained 262,361 residents and the average house district contained 90,634 residents. Today, senators and representatives represent populations about 27 percent larger, on average, than they did over four de-

acades ago. Advances in technology, transportation, and communications have helped legislators manage the growth in legislative districts and attend to the representation demands of constituents.

Interstate Comparisons. To varying degrees, 33 states have modified the overall size of their legislative bodies and their constituent chambers from 1960 to 2009. No identifiable pattern is apparent with respect to the rationale for increasing or decreasing the size of the legislative bodies over time. In these states, 19 legislatures were decreased in size and 14 were increased. Overall, there has been a general decrease in the total number of legislators in the United States, from 7,781 in 1960 to 7,382 in 2009 according to the National Conference of State Legislatures. Twenty-one of the states that

Table 1
Number of Senators and Representatives under Michigan Constitutions

	<u>Senate</u>	<u>House</u>	<u>Total</u>	<u>Ratio</u> <u>Member to Population</u>
1835 Constitution				
1835	16	50	66	1: 479
1850	22	63	85	1: 4,678
1850 Constitution				
1851	22	63	85	1: 4,678
1908	32	100	132	1: 18,341
1908 Constitution				
1909	32	100	132	1: 48,271
1963	34	110	144	1: 54,328
1963 Constitution				
1964	38	110	148	1: 52,859
today	38	110	148	1: 67,363

Source: 2008 Michigan Manual

Table 2
Full-Time Legislatures: Changes in the Size of Legislatures 1960 - 2009

<u>State</u>	<u>1960 Population</u>	<u>2009 Population</u>	<u>Percent Change</u>	<u>1960 Legislative Districts</u>	<u>2009 Legislative Districts</u>	<u>Percent Change</u>	<u>Last Modification</u>
California	15,850,000	36,961,664	133%	120	120	0%	na
Florida	5,000,000	18,537,969	271%	133	160	20%	1972
Illinois	10,113,000	12,910,409	28%	235	177	-25%	1982
Massachusetts	5,167,000	6,593,587	28%	280	200	-29%	1978
New Jersey	6,099,000	8,707,739	43%	81	120	48%	1968
New York	16,827,000	19,541,453	16%	208	212	2%	2004
Ohio	9,739,000	11,542,645	19%	177	132	-25%	1966
Pennsylvania	11,343,000	12,604,767	11%	260	253	-3%	1966
Wisconsin	3,964,000	5,654,774	43%	133	132	-1%	1972
Michigan	7,848,000	9,969,727	27%	144	148	3%	1964

Source: National Conferences of State Legislatures, "Changes in the Size of Legislatures, 1960 – 2006". U.S. Census Bureau.

have made changes to the size of their legislative bodies over the past 45 years have done so multiple times and the remaining 12 states made a single change during this period.

Of the states with full-time legislatures, five states reduced the sizes of their legislatures and four states increased the sizes of their legislative bodies (Table 2). Some of these changes have been very minor, such as Michigan's addition of four senate seats in conjunction with the adoption of a new constitution in 1964. In contrast, the Massachusetts Constitution, the oldest state constitution in the country, reduced the number of legislators by 80 in 1978. New Jersey had a 48 percent increase in the size of its legislature over this period, a change that closely reflects the 43 percent population growth.

Constitutional Convention Issues

If the Michigan electorate decides to call a constitutional convention at the November general election, the convention might consider the following questions dealing with the size and structure of the legislative body.

Should the Structure of the Legislative Branch Change? Arguments in favor of switching to a part-time legislature rest largely on the costs involved in running a full-time body. By limiting the length of the legislative session (e.g., specific number of "session" or calendar days) legislators' salaries and benefits can be reduced commensurately. Reductions in staff levels and associated costs might also accompany a switch to a part-time legislature. Actual savings are likely to be small in relation to Michigan's total state

budget (\$46 billion), but the perception of cost-reduction may have populist appeal.

Converting to a part-time legislature, however, reduces neither the number nor the scope of important public policy issues confronting the legislative branch. Such a conversion means that less time will be devoted to "non-mandatory" legislative responsibilities in order to address those "mandatory" responsibilities, such as enacting an annual budget, in a timely manner.

Should the Size of the Legislature Change? Generally, justifications for making changes to the size of state legislative bodies have been based on the grounds of representation, costs, and/or efficiency. Legislative district population growth can affect how individuals perceive

they are being represented by their legislators. Increases in legislative district size generally result in more heterogeneous districts on many fronts. Elected officials are expected to represent the interests of their districts on a host of issues and a decrease in district homogeneity, perceived or otherwise, can reduce representation in the legislative arena. Further, given the increased workload associated with representing more constituents, legislators may have to reduce the amount of resources they devote to each constituent, which also affects representation. Advances in communication technology can help reduce the effects of legislative population growth on representation.

Generally speaking, larger legislatures cost more. However, reducing the size of a legislative body does not guarantee a reduction in costs. The number of people requiring representation and the accompanying workload remains when legislative district sizes are expanded. Fewer elected officials may result in larger staffs to handle the workload associated with legislative activities such as answering constituent inquiries, preparing and analyzing legislation, preparing for committees. The increase in staff size and the accompanying costs could offset any savings resulting from reducing the number of legislators. It is likely that there is a greater relationship between state population and legislative costs than there is between the number of legislators and legislative costs.

Advocates of reducing the number of legislators suggest that smaller legislative bodies are likely to be more efficient and capable of getting things done in a timely fashion. Opponents argue that, for better or for worse, the legislative process is not intended to be neat and efficient. The complex and very difficult issues facing legislative bodies each legislative session can require a substantial amount of time and resources to understand, investigate, and develop consensus around.

Legislative Term Limitations

In the 47-year history of the 1963 Constitution, the concept of legislative term limits is a fairly new one. Michigan voters, via a citizen initiative in November 1992, approved constitutional term limits for those serving in the Michigan Senate and House of Representatives effective for terms beginning on or after January 1, 1993. Correctly, or otherwise, some people contend that Michigan's current term limitations for legislators are partially to blame for the perceived dysfunction of the institution at times, as marked by the adoption of late state budgets in two of the past three years.

Michigan's move to adopt term limits occurred during the same time that other states approved similar measures. Today, 15 states, including Michigan, have legislative term limits. Michigan's model, contained in Section 54, caps the number of times that an individual may be elected to the Senate (two times) and to the

House (three times) and provides a lifetime ban following service. Only five other states employ lifetime limits, which are much more restrictive than consecutive limits.

A constitutional convention could consider any number of options with respect to the term limit provisions of the current document, including complete abolishment. Elimination of the limits altogether is doubtful in light of the failure to do so in other states across the country. Voters in states with term limits appear to want some form of forced evacuation from their legislative bodies. Given the restrictive nature of Michigan's limits, the topic of shortening them is unlikely to occupy much time either. It is most likely that a convention, if called, would focus its discussion on the pros and cons of lengthening the limits now in place. Such discussions could address service time in the individual chambers or an overall limit for serving in the legislature.

Setting Elected Officials' Compensation

Few public policy issues generate as much public attention as compensation levels of elected officials. The level of attention heightens when these officials receive, what appear to be, generous raises or when adjustments are made during periods of austere public budgets. Questions and concerns also arise when the process for determining pay levels is not transparent, lacks accountability, or does not apply uniformly to all officials.

Michigan citizens have maintained influence or control over state officers' compensation in a variety of ways since Michigan's first constitution. From the 1835 Constitution to the 1963 Constitution and two subsequent amendments, many changes occurred in the officials covered and the method in which compensation changes were made. Under the 1963 Constitution, as amended in 1968, the body responsible for recommending compensation levels for Michigan's top public officials is the State Officers Compensation Commission (SOCC) and provisions regarding its actions are contained in Section 12.

Background

Section 12 empowers the State Officers Compensation Commission (SOCC) to establish salary and expense allowances for top elected state officials of all three branches of government, subject to legislative approval. Amendments to Section 12 were approved by Michigan voters in 2002; however, the implementing legislation did not pass until 2006 (Public Act 629) and took effect January 1, 2008. Under the provisions of the 2002 amendatory language to Section 12:

- the attorney general and secretary of state were added to the SOCC determination process;
- the legislature, by majority vote, now has to approve SOCC determinations for the adjustments to occur;
- the legislature now has the authority to amend SOCC determinations by proportionate

reductions, but without reducing salaries or expenses below current levels;

- compensation adjustments now become effective in the legislative session after the next general election; and
- the legislature can establish qualifications for SOCC membership.

It is generally viewed that these changes addressed some of the major failings of the previous Section 12 provisions, which were adopted via the 1968 amendment. The changes increased the accountability associated with setting elected officials' pay by requiring an affirmative legislative vote and requiring an intervening general election before compensation changes take effect.

SOCC Determinations 1968 to 2009

Under the pre-2002 provisions of Section 12, SOCC determinations took effect unless rejected by two-thirds of the members elected to and serving in the house of the legislature. Between 1968 and 2002, rejection occurred once in 1991, which established pay increases for 1991 and 1992. Faced with a markedly different economic climate and state finances in persistent deficit, the 2009 SOCC made salary recommendations calling for 10 percent reductions for all covered positions, except Supreme Court justices. The recommendations received legislative approval in April 2009 and will take effect following the 2010 general election for those officials taking office on January 1, 2011.

The 2009 recommendations were precedent-setting in that they were the first in the 40-year history of the SOCC process that called for year-over-year salary reductions of top elected officials. While SOCC-recommended salary increases have been rejected (1991), SOCC has never recommended *decreases* from current salary levels. Section 12 does not prohibit such decreases; however, all "determinations" prior to 2009 dealt with increases. As a result of its constitutional history, the term "determinations" effectively became synonymous with changes that would increase pay levels, not decrease them.

Constitutional Convention Issues

A constitutional convention, if called at the November general election, might be expected to weigh in on the following issues related to setting compensation levels for Michigan's top state officials.

Is SOCC the Right Body? The SOCC has not operated flawlessly or without controversy during its 40-year history. The 1968 amendatory language was deemed unacceptable and replaced in 2002, and delays in passing implementing legislation for the new language resulted in the SOCC taking no action between 2002 and 2009. After finally getting language in place that appears to provide greater transparency, accountability, and uniformity with respect to setting compensation levels, a constitutional convention might consider an alternative to the SOCC. While many states use an independent

body such as the SOCC, others employ a variety of methods for determining elected officials' compensation levels, ranging from automatic adjustments based on price or income levels to legislative determination of pay. Leaving decisions to current sitting legislators would make them directly accountable to voters for their compensation levels.

Reducing Salaries. The 2009 SOCC salary determinations shed light on the interaction of two sections of Michigan's Constitution that previously were not considered to be interrelated. Although a formal legal opinion has not been rendered, it appears that the two sections conflict under certain circumstances. Whereas the provisions of Article IV, Section 12 apply to all elected officials with respect to pay *in-*

creases and decreases ("determinations"), Article VI, Section 18 (Judicial Branch) specifically addresses *reducing* judicial salaries. Although the SOCC is empowered to set compensation levels for justices of the Michigan Supreme Court, SOCC determinations indirectly impact the salary levels of judges of Michigan's lower courts (i.e., Court of Appeals, Circuit Court, and Probate Court). The salaries of these judges are statutorily linked to the Supreme Court justices' salaries pursuant to the Revised Judicature Act, PA 236 of 1961.

Article VI, Section 18 stipulates that judicial salaries must be uniform and reductions may not occur during a term of office unless there is a "general salary reduction in all other branches of government." Authority to effect such

general changes in pay for such a broad swath of government employees is divided among a number of different entities, including SOCC (elected officials), Michigan Civil Service Commission (executive branch employees), Michigan Supreme Court (judicial branch employees), and Michigan Legislature (legislative branch employees). Given the fact that the SOCC lacks authority over "all other branches government", it would appear that this body, while having valid authority to increase judicial salaries (directly and indirectly), does not have the constitutional power to reduce such salaries, creating a scenario where judicial salaries effectively can never be reduced. This inconsistency might be an issue considered when examining changes to the constitutional provisions of Article IV and Article VI.

Legislative Immunity from Civil Arrest and Process

Section 11 provides state senators and representatives a privilege of immunity from civil arrest and civil process while the legislature is in session and for the five days both before and after session. The three previous constitutions contained similar provisions. However, neither the drafters of the present or former legislative immunity provisions, nor the voters who adopted the respective Michigan Constitutions which contained them, contemplated that the legislature routinely would be in session throughout the year. Michigan's legislature routinely is in session

Other Issues

from early January until adjournment sometime around December 25. Given the reality of continuous legislative sessions, Section 11 provides legislators with an uninterrupted immunity from civil arrest and civil process.

In 1982, voters adopted an amendment to Section 11 proposed by the legislature which authorized legislative immunity "except as provided by law." However, to date the legislature has not utilized this amendatory language to restrict the scope of legislative immunity. A state constitutional convention might wish to reconsider what the appropriate scope of such immunity ought

to be in light of the current practice of year round legislative sessions. One option would be to limit legislative immunity to "working sessions" of the legislature, which would allow civil arrest or civil process while the legislature was in recess.

Appropriation Bills Not Subject to Referendum

Section 34 provides that all bills, except those appropriating money, passed by the legislature and approved by the governor may include a provision that requires voter approval before becoming law. Similarly, Section 9 of Article II shields all acts containing appropriations from citizen-led ref-

erenda. These two sections, taken together, effectively prevent the legislature from relinquishing its “power to appropriate” to other entities, in this case by passing a

controversial issue on to the people. As was noted in CRC’s previous paper, *Article II – Elections*, making appropriations “referendum-proof” can shield contro-

versial legislation from aspects of direct democracy. Subjecting laws that make appropriations to the referendum would require changes to the constitution.

Conclusion

The current language contained in Article IV dealing with redistricting should be replaced with new provisions that are fully compliant with the federal constitution and court cases. At a minimum, the new language should address: who is responsible for the redistricting process; what state-specific criteria are to be used in the process; and how often it should occur. Redistricting is too important to the elective franchise and state and national traditions of representative democracy to not carry the weight of constitutional attention. Leaving redistricting to the whims of the legislature every 10 years can foster public distrust and concern regarding the end product.

Other sections of Article IV that would likely receive attention at a constitutional convention deal

with the structure and operation of the legislative body itself. Some people might view such institutional matters through the perspective of the current political debates in Lansing and render a decision that something must be “structurally” wrong with the legislature and therefore support modifications to Article IV. However, such an approach ignores the current realities of the environment in which all modern legislative bodies operate. Economic, demographic, and social changes are occurring at rapid rates and the resultant public policy issues facing legislators are as significant and challenging as they have ever been. Deficiencies in the Michigan legislature, whether real or not, may not be owed to something fundamentally wrong with the constitutional foundations of the entity itself,

but rather an outcome of the subject matter and environment that lawmakers must deal with. While it is likely that “structural” changes would be best addressed during a constitutional convention rather than via piecemeal amendments to the Michigan Constitution, fundamental flaws in the institutional makeup and operation of the legislative branch are not currently apparent.

Michigan’s current term limitations were added to the Constitution by amendment in 1992 and modifications could be made in the same manner if so desired. Voters are beginning to see some of the practical and measurable outcomes of the tight, lifetime limits in place in Michigan and will likely continue to face the issue in the future, well after the vote in November.



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ARTICLE V – EXECUTIVE BRANCH

In Brief

At the November 2, 2010 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the 1963 Michigan Constitution. The question appears on the ballot automatically every 16 years as required by the Constitution. The Constitution provides that a convention would convene in Lansing on October 4, 2011. If the question is rejected, it will automatically appear on the ballot again in the year 2026.

The Citizens Research Council of Michigan takes no position on the question of calling a constitutional convention. It is hoped that examination of the matters identified in this paper will promote discussion of vital constitutional issues and assist citizens in deliberations on the question of calling a constitutional convention.

State government powers are expansive and shared among three branches of government: legislative, executive, judicial. Executive power resides with the governor. With the exception of the three departments headed either by popularly-elected individuals (secretary of state and attorney general) or a board (state board of education), the governor exercises unified direction of all the departments and agencies in the executive branch.

For 47 years, Michigan state government has operated under a constitutional framework that centralizes executive power in a single office and provides for a strong governor. With the exception of two amendments to Article V, "Executive Branch", the original constitutional provisions governing the operations of the executive branch remain basically intact. Despite this consistency over the years, a number of issues might be considered by a potential constitutional convention charged with looking at Article V dealing with: executive reorganization powers, single versus plural executive, filling legislative vacancies, office vacancies of executive officials, the governor's role in the state budget process, and the governor's appointment powers.

Introduction

The separation of powers doctrine provides for three branches of government (legislative, executive, and judicial). In this model of governance, the executive branch is responsible for overseeing the execution of laws and the delivery of governmental services. Article V of the Michigan Constitution vests the executive power of state government in the governor and broadly defines the appointive, reorganizational, and budgetary powers of the office, and it also allows the governor to call the legislature into extraordinary session. In addition to the governor, Article V provides for four other popularly-elected executive branch officials to play roles in the execution of state government; lieutenant governor, attorney general, secretary of state, and state board of education (an eight-member plural head of the

Department of Education). Article V also discusses the organization of the executive branch.

During the 1961 Constitutional Convention, considerable debate and action surrounded the topic of strengthening the power of the governor, which resulted in major changes in the executive article. The governor's role in governing state affairs was strengthened by: 1) extending the term of the office from two to four years; 2) reducing the number of elective executive branch officers from eight to four; 3) increasing the authority of the governor by capping the number of departments and allowing greater discretion in the organization of the executive branch; and 4) expanding the governor's role in the budget process.



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From a public policy standpoint, very few issues have arisen in the past 47 years pertaining to the proper functioning of Article V relative to the governor's ability to effectively carry out his or her executive powers. This fact is evidenced by the relatively few times that amendments have been offered to Article V; of the five contemplated amendments,

only two were approved. The first successful amendment (1978) had the effect of further centralizing executive power in the governor by replacing the State Highway Commission with the State Transportation Commission and changing the Commission's primary function from administrative to policy making (Section 28). A 1992 amendment provided term

limitations for the governor, lieutenant governor, secretary of state, and attorney general (Section 30). On the surface, such limitations theoretically diminished the power of the governor to the benefit of the legislative branch; however, term limits also were enacted at the same time for state legislators.

Constitutional Convention Issues

Despite the relatively few attempts to modify Article V over the years, a constitutional convention is likely to consider a number of issues surrounding the executive branch of government, including: 1) the reorganization powers of the governor; 2) single versus plural heads of departments and agencies; 3) the authority of the governor to call special elections to fill legislative vacancies; 4) issues related to executive office vacancies; 5) the governor's responsibility for maintaining annual budget balance, particularly as it relate to executive order reductions; and 6) the governor's appointment authority as it is limited by the Senate's advice and consent power.

Executive Reorganization Power

One popular criticism of the 1908 Constitution was that it provided for a de-centralized executive branch which lacked clear lines of

authority in the executive powers of state government. Proponents of a new constitution sought to centralize executive power in the governor and through a new structure for the executive branch. However, concerns were raised about the organizational powers pertaining to the executive branch and how to balance the new political power of the governor. The 1961 Constitutional Convention resolved this by establishing the broad framework for the executive branch in the new constitution and granting organizational authority to both the legislative and executive branches. Initial "organizational" authority was provided to the legislature via the temporary provisions of the new constitution and required this power to be exercised within two years of the effective date of the new document (Schedule and Temporary Provisions, Section 12). After this initial organization by law, the constitution provided the governor with "reorganizational"

power. The legislature's initial actions, as codified in the Executive Organization Act of 1965 (Public Act 380 of 1965), and any subsequent reorganizations by the governor were limited by the provisions of Article V, Section 2, which capped the number of principal departments at 20.

In addition to the cap on departments, Section 2 further allows the governor to "make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration." Five principal departments are established in the 1963 Constitution, either by specific reference (e.g., state transportation department and state department of education) or because language requires certain individuals to head a principal department (e.g., attorney general, secretary of state, and state treasurer). Outside of the five constitutionally-established departments, the gov-

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ernor has substantial authority to structure the executive branch in the manner he or she desires.

The governor's reorganization authority is not absolute; it is subject to legislative "veto" in that executive orders contemplating organizational changes can be nullified if disapproved by a majority vote in both chambers of the legislature. Until the early 1990s, Michigan state government operated with 19 departments (original allocation by The Executive Organization Act of 1965) and there were few changes to the organization of the executive branch; however, over the past 20 years, the organization of state government has undergone substantial changes, with the stated goal of reducing the number of departments through consolidations and eliminations. The executive branch is currently organized into 15 principal departments. Given the changes to the executive branch over the last two decades, issues have arisen regarding the governor's reorganization powers contained in Article V that might be considered by a constitutional convention.

Given the general trend towards fewer departments, consideration might be given to further limiting the number of state departments. Although justification for most departmental consolidations and eliminations to date have been made on the grounds of efficiency and cost savings, these changes entail governance issues as well. Proponents of further centralizing and strengthening the powers of the governor would likely support efforts to reduce the number of department heads that directly

report to the state's chief executive. Opponents of strengthening the governor would raise concerns about concentration of power.

A second issue, the legislature's role in executive branch reorganization, arises because some executive branch reorganizations have generated considerable legislative scrutiny, especially in recent years. Heightened legislative scrutiny dates back to 1991 when two executive orders were challenged in court on the grounds that the governor exceeded his constitutional authority and violated state law. In one case brought by the speaker of the House of Representatives against the governor, the Michigan Supreme Court ultimately upheld the governor's power to restructure the Department of Natural Resources. More recent reorganization efforts that abolished the Department of History Arts and Libraries and changed the authority of the Commission of Agriculture and Natural Resources Commission, although not subjected to judicial review, received considerable attention by the legislature. A constitutional convention may review the governor's authority to abolish and modify existing statutory departments and commissions, and to create new departments through the executive order process. Consideration might be given to the constitutional requirement that both legislative chambers must disapprove executive order reorganizations by changing the threshold to disapproval by either house, a position that proponents of stronger legislative control over the executive branch structure might advocate.

Single versus Plural Executive

The 1963 Constitution favored the "single head" over the "plural head" form of governance for principal departments within the executive branch. This represented a departure from the previous constitution that placed control of executive branch departments and agencies with various boards and commissions. Section 3 of the current document states, "The head of each principal department shall be a single executive unless otherwise provided in this constitution or by law." While the 1963 Constitution allows for the plural form of department head, it requires the governor to appoint members of such boards or commissions, unless these members are elected or appointed pursuant to other constitutional provisions.

Since the adoption of the current constitution, the number of plural heads of departments has declined, in part due to departmental consolidations and eliminations. For example, the Department of Civil Service was eliminated in 2007, and the constitutionally-established Civil Service Commission, which previously served as the head of the department, was transferred to the Department of Management and Budget. More recently, executive reorganization orders changed how the directors of the Department of Agriculture and the Department of Natural Resources and the Environment are selected to provide direct gubernatorial appointment of these positions. As a result of these recent changes, only two principal de-

partments (of 15 currently) are headed by the plural form of governance, the Department of Education (elected) and the Department of Civil Rights (appointed).

The single executive structure has not been universally applied to the state administrative agencies that exist within the principal departments. A host of plural bodies established within the departments exercise administrative and/or advisory functions. Nearly all of these bodies are established within state law, while some have constitutional status (e.g., Civil Service Commission). Two issues arise here that might be considered by a constitutional convention. The first issue relates, in a similar fashion, to that discussed above regarding “single head” versus “plural head” for administrative agencies. Should all administrative agencies exist with a single executive to foster greater management control and efficiency? Plural bodies serving in advisory capacities are probably best to ensure that different perspectives and points of view are considered when public policy is debated.

Another issue that arises concerns the number of plural-headed entities that exist at the sub-department level. Unlike the principal departments, the maximum number of which is capped in the constitution, the executive branch is not bound by a specific number of boards or commissions that can exist within each department. These entities are very common in both the private and public sector governance models and advocates for them contend that they provide a level of inde-

pendence and insulation from political manipulation. Bipartisan representation on these bodies, which is often required, can ensure that a minority voice in the policy debate is heard. On the other hand, critics suggest that such bodies lack accountability and make timely decision-making difficult to achieve. The widespread and disparate use of these bodies throughout state government results in little consistency. The various bodies share little in common in terms of internal operations, membership selection, or general roles and responsibilities, all issues which can make it difficult for citizens to understand how their government is structured and operates.

Legislative Vacancies

Section 13 requires the governor to call elections to fill vacancies that occur in the House of Representatives and the Senate. This method for filling legislative vacancies has been in operation dating back to the 1908 Constitution. The constitutional language is written in a way that provides the governor with considerable flexibility in the application of this long-standing power. While the language requires the governor to call such elections, it does not provide any sense of timing for such elections. Vacancies in either the House or Senate can leave constituents with a sense of underrepresentation in Lansing, which can be especially problematic when the length of a vacancy is extended because of the political motives of the governor. While long-standing vacancies can damage citizens’ sense of representation in the halls of government,

conducting special elections to fill vacancies can prove problematic and costly, especially if a vacancy occurs near the end of a term.

Some of the issues surrounding timing have been attended to with the consolidation of election dates in Michigan, but the governor is not bound by such limitations and may call special elections when he or she wants. Generally, filling a vacancy requires a primary election followed by a general election; however, the Michigan Election Law (Public Act 116 of 1954) permits the governor to direct that the vacancy be filled at the next general election if the vacancy occurs after the primary election and before the general election. By statute, candidates from each political party to fill the unexpired term are nominated by county committees of the respective political parties. In view of the desirability of the governor to have discretion in this matter, a constitutional convention might consider modifying the mandatory intent of the language to reflect the flexibility that has been afforded to the governor in practice.

A constitutional convention might also consider practices in other states and craft a new method for filling legislative vacancies. According to the National Conference of State Legislatures, 25 states, including Michigan, have provisions to fill legislative vacancies by special election and the remaining states use an appointive process. In 11 of the “appointive” states, the governor makes the appointment, while seven states give this authority to county commissioners. Another five states grant the appointment authority

to the same political party as the legislator that vacated his office. In two states, the legislature appoints the replacement to complete the term of the individual that left office.¹

Office Vacancies of Statewide-Elected Officials

Timely and clear lines of succession relating to vacancies in elective office are hallmarks of democracies. Vacancies in the offices of statewide-elected executive branch officials can be either permanent (resignation, death) or temporary (absence from state, incapacitation). Article V covers these issues, but it is deficient with respect to vacancies in the office of lieutenant governor and it could be updated to reflect the modern day roles and responsibilities of the governor.

Section 26 discusses how temporary gubernatorial vacancies, such as out-of-state travel or “inability” to serve, are to be handled. With respect to such vacancies in the office of the governor, the 1963 Constitution makes no distinction. Whenever such scenarios arise, the governor’s duties devolve to the lieutenant governor, or whoever is currently serving as the “next in line”. In light of modern day communication and travel speeds, and the frequency and reasons for the state’s chief executive to travel, it seems somewhat antiquated that temporary

¹ National Conference of State Legislatures, *Filling Legislative Vacancies*, January 2010. www.ncsl.org/default.aspx?tabid=19495

vacancies and the devolution of gubernatorial powers caused by travel should be treated the same as those caused by an “inability” to serve.

Section 26 provides a clear line of succession to the office of the governor when a vacancy occurs. The first person to fill a gubernatorial vacancy is the lieutenant governor, followed by other statewide-elected officials. However, the Constitution is silent with respect to filling a void in the office of lieutenant governor. The lack of specific constitutional provisions for filling a vacancy in this office was a change from the 1908 Constitution, which allowed the governor to appoint a replacement. A constitutional convention might revisit the issues surrounding vacancies in the office of lieutenant governor.

The lieutenant governor is one of four statewide-elected officials serving in the executive branch. However, unlike the secretary of state and attorney general, the lieutenant governor appears on the same ballot as the governor, thereby ensuring that the chief executive and his or her lieutenant are from the same political party. The lieutenant governor has both executive and legislative roles, but does not possess any unique executive branch powers and only performs those duties assigned by the governor. In fact, Section 25 prohibits the governor from delegating any vested powers to the lieutenant governor. In terms of constitutional legislative powers, the lieutenant governor serves as the president of the Michigan Senate and its presid-

ing officer, and is allowed to vote only to break a tie in the 38-member body.

Vacancies in other statewide-elected offices are filled according to provisions contained in the 1963 Constitution. Section 21 requires the governor to appoint replacements for vacancies in the offices of secretary of state and attorney general. Without a means to fill a vacancy in the office of lieutenant governor, it must remain unfilled until the next gubernatorial election, a scenario that occurred when Lieutenant Governor Milliken ascended to the chief executive post after Governor Romney resigned to become Secretary of the U.S. Department of Housing and Urban Development in 1969.

Vacancies in the office raise both practical and political issues. Positions on statutorily-created boards, such as the State Administrative Board, that the lieutenant governor serves on would have to remain vacant until after a gubernatorial election. Similarly, tie votes in the Michigan Senate could not be broken because the constitution entrusts only the lieutenant governor with this responsibility. (The decision making process in the Michigan House of Representatives does not provide a procedure, constitutionally or statutorily, to break a tie.)

The current system of gubernatorial succession introduces a political consideration: when a lieutenant governor ascends to the chief executive post and the lieutenant position is left vacant, the “next in line” for gubernatorial succession is the secretary of state, who may

or may not be from the same political party as the new governor. In the absence of a lieutenant governor, the secretary of state would also serve as governor in the event that the governor leaves the state or is unable to perform the duties of the office. Under the provisions of the 1908 Constitution, the new governor would appoint a lieutenant governor to fill his or her vacated position, thus ensuring political party continuity in the governor's office. However, this "appointive" process for filling vacancies in the lieutenant governor's office could result in a person serving as governor who was not directly elected by Michigan voters.

While it is unlikely that a constitutional convention would find major problems with the practical issues associated with lieutenant governor vacancies, it might find the political concerns of sufficient weight to merit addressing how to fill vacancies in the office when they occur.

State Budget

In addition to the provisions designed to strengthen the office of the governor from an organizational and management standpoint, the 1963 Constitution included new provisions that strengthened the governor's role in the state's fiscal affairs. Specifically, the Constitution included a new section that requires the governor to submit to the legislature for its consideration a balanced budget for all state operating funds (Section 18). Previously, executive budget submittal was governed by statutory law, not constitutional law. This balanced-budget provision was supple-

mented by other language (Section 20) that requires the governor, with the approval of the appropriations committees of the House and Senate, to reduce appropriation authorizations when revenues fall below the estimates on which appropriations were based. This constitutional requirement is implemented through statutory provisions contained in the Management and Budget Act (Public Act 431 of 1984) that direct the governor to issue executive order spending reductions when estimated revenues fall short of spending. Appropriation reductions ordered by executive order require approval of the two appropriations committees only; appropriation reductions effected through appropriation acts, on the other hand, require a majority vote in each chamber and signature by the governor, who has line-item veto authority.

The use of executive order spending reductions has become a key component in the state's arsenal for maintaining balanced budgets throughout the year, especially during economic downturns when actual state tax receipts deviate substantially from the original estimates. For the fiscal year 2008-2009 budget, and in response to fiscal effects of the "Great Recession", executive orders were used mid-year to reduce general fund spending by \$356 million. The executive order process enables the state budget to be modified in an expedited way, avoiding some of the delays that can accompany the full legislative process. However, the process also removes certain state fiscal decisions from the scrutiny of the entire House and Senate.

Appointment Power

Under the 1963 Constitution, the governor's appointment power was considerably expanded from what existed in the 1908 Constitution, mainly as a result of the centralization of executive authority and the elimination of certain elected positions in the executive branch. Appointive positions are created both in the Constitution (e.g., certain department heads and university board members) as well as in state law (e.g., certain boards and commissions within principal departments). In some cases, the governor exercises the appointment power unilaterally, while in other cases the power is limited.

In many states and the federal government, the appointment power held by the chief executive is subject to legislative scrutiny, effectively creating a system of checks and balances between the two branches of government. In Michigan, the governor and the Senate share in the responsibility for selecting certain qualified persons exempted from the state civil service to serve in the executive branch of state government. The foundation for shared appointment power exists in the "advice and consent" provision of Section 6. Under this section, a gubernatorial appointment subject to advice and consent can be nullified only if disapproved by a majority vote within 60 days of the appointment being made. Absent such action, an appointment stands. Michigan's process is different from the federal government's process, in that individuals nominated by the President to serve in senior govern-

mental positions generally can not do so until they are confirmed by the U.S. Senate. (Article II, Section 2 of the U.S. Constitution grants the President the authority to appoint individuals to positions when the Senate is in recess; however, such appointments must be confirmed by the end of the next session, otherwise the position becomes vacant again.) In Michigan, gubernatorial appointees assume their appointed positions upon taking the oath of office as required by Article XI, Section 1 and continue to serve unless the full Senate votes to disapprove the appointment.

As a matter of practice, the advice and consent process has been used to varying degrees over the years. In some cases, appointments have been subject to little if any legislative scrutiny. In recent years, however, a quasi-formal process has been developed and it has been applied more uniformly. There is no state statute governing the process; however, some attorney general opinions have been rendered on the subject. Ultimately, the process is a political one in that disapproval results from a vote of the Senate.

Recent appointments have raised issues regarding the timing of the governor's use of appointment authority, which might be considered by a constitutional convention. Nothing in current law discusses the question of "when" a governor can make an appointment. This can prove problematic when a term for a position subject to gubernatorial appointment expires at or near the end of the current governor's term in office. In such cases, and when there is turnover in the governor's office, the appointee, although appointed by the previous governor, effectively serves "at the pleasure" of the new governor. In theory, nothing under current law prevents a governor from making appointments for terms that expire well-after he or she leaves office, although as a practical matter this is most likely to occur nearer the end of a governor's time in office.

Another issue relating to the governor's appointment power that might be considered by a constitutional convention concerns the state administrative organization for the supervision of elementary and secondary education. The 1963 Constitution provides for a statewide election of the eight-member State Board of Education, a body responsible for supervision

and policy over all public education, except higher education institutions. The Board is responsible for appointing the superintendent of public instruction. Consideration might be given to centralizing the governor's executive authority over education policy matters by moving to an appointed state school board and superintendent.

Other states vary in their use of appointive versus elective methods to select public education officials. Of the states with boards of education, 36 use some sort of appointive (usually by the governor) process. (Minnesota and Wisconsin do not have boards and the board in New Mexico is advisory only.) Nine states, including Michigan, employ elections to select board members while two states use a combination of appointments and elections. In 24 states, the chief state school official is appointed by the state board, while in 12 other states the governor appoints this official. Fourteen states provide for a separately-elected chief state school official.²

² Education Commission of the States, *State Education Governance Models*, March 2008. www.ecs.org/clearinghouse/77/78/7778.pdf

Conclusion

Unlike other articles in the 1963 Constitution, Article V does not include provisions that have been ruled unconstitutional or inoperable. From this standpoint, a constitutional convention would not be tasked with developing con-

forming language with the U.S. Constitution or U.S. Supreme Court decisions. A constitutional convention would likely examine the broad issues dealing with the powers of the governor and executive branch structure and or-

ganization. Nothing in Article V has prevented the executive branch from governing effectively over the past 47 years and no related issues have risen to the level of crisis that would suggest immediate modification is necessary.



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ARTICLE VI – JUDICIAL BRANCH

In Brief

At the November 2, 2010 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the 1963 Michigan Constitution. The question appears on the ballot automatically every 16 years as required by the Constitution. The Constitution provides that a convention would convene in Lansing on October 4, 2011. If the question is rejected, it will automatically appear on the ballot again in the year 2026.

The Citizens Research Council of Michigan takes no position on the question of calling a constitutional convention. It is hoped that examination of the matters identified in this paper will promote discussion of vital constitutional issues and assist citizens in deliberations on the question of calling a constitutional convention.

State government powers are expansive and shared among three branches of government: legislative, executive, and judicial. Judicial power resides with the courts. In Michigan, the judicial system is composed of a Supreme Court, a statewide court of appeals, county or multi-county circuit and probate courts, and county or municipal district courts. The 1963 Constitution created “one court of justice,” meaning that all courts are organized under the Supreme Court and operate under rules and procedures created by the Supreme Court. It is likely that a constitutional convention, should one be convened, would focus on the operations of the judicial system within that framework, including: court organization, the role of the county clerk in circuit courts, the selection of justices and judges, court rulemaking, the funding of trial courts, and continuance of the Judicial Tenure Commission.

Introduction

Within the context of the separation of powers doctrine that characterizes Michigan’s state government, judicial power consists in general of the authority exercised by courts to interpret the law. The exercise of that authority generally is limited to specific cases and controversies brought before the courts for resolution by public and private parties and may involve significant questions of public policy or merely pedestrian questions that are of importance only to the parties of the case.

Courts derive their powers from the Constitution and laws by which they are established. Article VI, Section 1 declares the judicial power of the state

... is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

Article VI has been amended three times by means of legislative proposals. In 1968, the people adopted two separate constitutional amendments to 1) establish the Judicial Tenure Commission and 2) define the manner of filling judicial vacancies. In 1996, the Constitution was amended to establish qualifications for judicial offices.



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Constitutional Convention Issues

The 1850 and 1908 Michigan Constitutions granted the Supreme Court general superintending control over lower courts. However, by the time of the 1961 Constitutional Convention, circuit courts, and to a lesser extent probate courts, had evolved into quasi-independent entities whose judges considered themselves accountable only to the local voters by whom they were elected. A majority of the delegates to the 1961 Constitutional Convention concluded that a more centralized judicial structure – “one court of justice” – would be more efficient and economical.

Court Organization

In general, the overall organization of the court system would likely be one of the first issues a constitutional convention might consider, should one be convened.

The current organization places the Supreme Court atop all other courts. It acts as the court of last resort and the body responsible for overseeing all court divisions below it.

The court of appeals is the intermediate appellate court between the trial courts and the Supreme Court. This court is relatively new in Michigan, having been established by the 1963 Constitution. It hears civil and criminal cases

appealed to it from trial courts. Article I, Section 20 provides that everyone convicted of a criminal offense, other than by a guilty plea, has the right to an appeal. Decisions of the court of appeals are final unless reviewed by the Supreme Court.

Article VI, Section 11 creates circuit courts as the trial court of general jurisdiction, with jurisdiction over all actions except those given by law to another court. It has original jurisdiction over criminal cases, including felonies and certain serious misdemeanors, and civil cases where the amount in controversy is \$25,000 or more and cases where a party seeks an equitable remedy. Finally, the court has jurisdiction over family cases, appeals from other courts, and administrative agencies. Circuit courts have superintending control over courts within the judicial circuit, subject to final superintending control of the Supreme Court.

Article VI, Section 15 creates probate courts with jurisdiction over admission of wills, administration of estates and trusts, guardianships, conservatorships, and treatment of the mentally ill and developmentally disabled.

Finally, district courts were created under authority of Article VI, Section 1, which provides for

“courts of limited jurisdiction that the legislature may establish.” They have jurisdiction over all civil claims up to \$25,000 including small claims, landlord-tenant disputes, land contract disputes, and civil infractions. District court judges also may conduct marriages in a civil ceremony.

Within Michigan’s trial courts, the legislature has created specialty courts, such as mental health courts; drug/sobriety courts; child support specialty courts; and youth/teen or family courts.

The State Court Administrative Office is the administrative agency of the Michigan Supreme Court. The Office assists the Supreme Court to aid in the administration of the courts. It helps to track and manage caseloads, mediates disputes between courts and their funding units, provides technical assistance in the administration of the courts, and provides education to support operation of the courts.

Starting with an examination of court operations under the “one court of justice” principle, a constitutional convention might consider the extent lower courts have been organized and operated efficiently under direction from the state Supreme Court and the State Court Administrative Office. Providing a chain of command

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under the Supreme Court has created leadership in the organization and administration of lower courts and consistent management of the caseloads assigned to judges within each circuit or district. Occasions have arisen at all lower court levels where lower court judges have disagreed with administrative decisions made in Lansing that have affected the operations of that court. Similarly, at a time when local governments are seeking efficiencies through intergovernmental collaboration for the joint provision of services, the need for approval from court administrators of actions to consolidate court operations between two jurisdictions can be viewed as an impediment.

Such an examination could also consider the types and responsibilities of the lower courts. Michigan is one of 40 states with an intermediate appellate court. The court of appeals has lessened the caseload for the state Supreme Court, thus allowing that court to concentrate its efforts on issues of highest criminal and civil significance. Also, the states without intermediate appellate courts tend to be smaller in population, lessening the value of their comparison to Michigan.

Not all states have multiple general trial courts similar to Michigan's circuit, probate, and district courts.¹ Generally, management of the number of judges per circuit or district has allowed for a fairly equal application of justice throughout the state, but in

¹ *Book of the States*, 2008, Council of State Governments, Table 5.2.

some parts of the state, the division of the courts into different types has required probate judges to share time in the circuit courts to help manage uneven caseloads. Authorization for a unified trial court would create efficiencies by allowing trial court judges to hear any case regardless of whether it currently would be sorted into district, circuit, or probate courts. Efforts to move toward a unified trial court in Michigan would be complicated under the present constitution by the varying jurisdictions of judges. Counties are often the control unit for district courts, but several of Michigan's more populated cities bear that responsibility. Circuit and probate courts are often, but not always coterminous.

Clerk of Circuit Courts

Section 14 provides that, "The clerk of each county organized for judicial purposes or other officer performing the duties of such office as provided in a county charter shall be clerk of the circuit court for such county..." A constitutional convention might find this an antiquated arrangement reflecting a period when neither the county clerk's role related to the county's operations nor clerk of the courts consumed the workload of clerk's office staff.

Today this arrangement leaves the staff members assigned to the courts beholden to two masters: the county clerks and the circuit court judges attempting to manage a caseload. Judges at times find themselves at the mercy of those clerks for court proceedings, for the court cannot convene without the clerk to record filings, arguments, and testimony. The

arrangement has also complicated administration of the circuit courts by requiring judges to work with the county clerks' offices as they attempt to achieve efficiencies. While the clerks are surely equally interested in achieving efficiencies, they are independently elected and may have separate ideas about how efficiencies can best be achieved. At no other court level do judges have to work with independently elected officials to manage administration of the courts.

Selection of Justices and Judges

The method of selection of Michigan Supreme Court justices, court of appeals judges, and circuit, probate and district court judges is a question that has persistently cropped up throughout Michigan's history and undoubtedly would be reopened at a constitutional convention.

Michigan's history with judicial selection is mixed. The 1835 Constitution called for the governor to appoint supreme court justices. The 1850 and 1908 Constitutions authorized the election of supreme court justices. The 1963 Constitution maintained the election of judges, but called for candidates for supreme court justices to be nominated by political parties.

Section 2 provides that "The supreme court shall consist of seven justices elected at non-partisan elections as provided by law... Nominations for justices of the supreme court shall be in the manner prescribed by law." Current state law provides that nominations for the office of supreme

court justice shall be made at the state party conventions held in the fall, one candidate for each vacancy to be filled at the next general election. In addition, Section 2 allows that any incumbent justice may become a candidate for reelection by filing an affidavit of candidacy.

Section 8 provides that court of appeals judges “shall be nominated and elected at non-partisan elections from districts drawn on county lines and as nearly as possible of equal population, as provided by law....”

Also, circuit court judges (Section 12) and probate court judges (Section 16) “...shall be nominated and elected at non-partisan elections in the circuit in which they reside...”

The question of the method of selection of judicial officers in all courts is one of great importance. At issue are several fundamental safeguards: (1) an independent judiciary; (2) accountability to the residents of the state; and (3) the desire to entrust judicial questions to highly qualified judicial personnel. It is, of course, known that either an elective system or an appointive system can produce some excellent judges and also some mediocre or poor judges. A constitutional convention would be left to decide which system is more likely to produce consistently the high quality, impartial judges that are essential to the proper functioning of our judicial system, and who should be charged with evaluating the quality of the judges.

The importance of preserving the

concept of an independent judiciary elected by and responsible to the people is the main argument of those that favor judicial elections. Historically, Michigan has shown a strong preference for an elective judiciary and the practice of filling vacancies by appointment is inconsistent with this tradition.

Those favoring an appointment process to fill judicial vacancies argue that it improves the quality of judges because a more selective screening process can be developed and employed. Furthermore, a short-term appointment followed by an election gives the electorate the advantage of being able to vote for or against a judge on the basis of his record in office.

The problem with judicial elections is that, other than in a few high profile cases, few people are sufficiently exposed to the judges to evaluate their demeanor, judicial reasoning, or decisions handed down. Those closest to the judicial system are the victims of crime or civil action, those accused of committing crimes or defendants in civil actions, and the lawyers that represent those parties. Others are left to research judges’ histories or select candidates on a slate of nominees based on name recognition. Unlike other political offices, where candidates can promise action on particular issues or identify a political bent, judges are specifically prohibited from predetermining how they would rule on specific matters.

A commonly observed phenomenon in judicial races is “ballot roll-off,” where voters cast votes for high profile offices but fail to vote

for offices further down the ballot. Ballot roll-off is commonly attributed to voter fatigue and voter confusion. Voter fatigue – when voters tire of the voting process – occurs most frequently for offices for which there is little recognition of the office responsibilities and little ability to judge the qualifications of the candidates. Voter confusion occurs when voters lack full understanding of the voting technology, ballot instructions, or ballot design. In the 2008 general election, more than 5 million voters participated in the presidential election, but less than 3.8 million voters participated in election of Michigan’s Supreme Court Justice. Almost 25 percent of the voters chose not to exercise the franchise for the state’s highest judicial office.² The ballot roll-off for court of appeals judges was far greater.

At the time Michigan’s Constitution was adopted in 1963 and for many years thereafter, judicial elections were staid, civil affairs that drew little controversy or attention. In recent years, judicial elections have grown increasingly political, controversial, and uncivil. The campaigns of judicial candidates, and especially interest groups, have spent far more money campaigning than ever before and efforts to get candidates elected have grown as negative as other offices for which politics have historically played greater roles.

² Michigan Department of State, Elections Division, http://miboecfr.nictusa.com/election/candlist/O8GEN/O8GEN_CL.HTM, accessed June 3, 2010.

Options to address the role of money in judicial campaigns and to allow voters to make better-informed decisions include: public financing of judicial campaigns, changing the length of judicial terms so that judges won't have to run for seats on the bench as often, taking greater strides to make judicial elections truly non-partisan, strengthening disclosure laws so that citizens know who is contributing to judicial campaigns and how much, establishing standards of conduct for campaigns, doing more to distribute information about the candidates, and establishing judicial evaluation committees.³ Specific to Michigan, changes to the Constitution to remove courts from the process of redistricting house and senate districts would lessen the political stakes associated with the election of judicial candidates. (See CRC Report No. 360-06, *Article IV – Legislative Branch*.) With less at stake for the political parties, it is possible that judicial campaigns could return to civility and improve lost confidence in the courts.

At least some of the judges are popularly elected in 38 states. The *Book of the States*⁴ reports the method of selection of judges for 1) unexpired terms, 2) full terms and 3) the retention of supreme court justices and judges of the intermediate appellate courts.

³ Honorable Dennis Archer, "Perspectives on Michigan Judicial Elections," keynote address at Perspectives on Michigan Judicial Elections symposium, Wayne State University Law School, January 12, 2004.

⁴ *The Book of the States*, 2008. Council of State Governments.

Supreme court justices are elected for full terms in 22 of the 50 states; and judges of intermediate appeals courts are elected for full terms in 19 of the 39 states that have such courts. Eight of those states select supreme court justices for full terms in partisan elections; another 14 states select supreme court justices for full terms in non-partisan elections. Michigan and Ohio are the only two states that call on partisan political parties to nominate candidates for supreme court justice to be elected in non-partisan elections. Supreme court justices either must stand for a retention vote or run for reelection in 38 of 49 states (in Massachusetts, Supreme Court and Appeals Court judges serve until death, resignation, retirement, or removal); and intermediate appeals court judges must go through an elections process in 32 of the 38 states (excepting the 11 states without such courts and Massachusetts for the reason cited above). (See **Figure 1** on p. 6)

Filling Judicial Vacancies

Until 1964, the long-standing practice was to fill judicial vacancies by gubernatorial appointment. As adopted, the 1963 Constitution required that all judges must be elected to office, thereby removing all appointive powers that existed in the 1908 Constitution. It did, however, permit the Supreme Court to assign retired judges to perform judicial duties for the limited period of time from the occurrence of the vacancy until the successor was elected and qualified.

The requirement that vacancies be filled by elections was short lived. A 1968 amendment to Section 23 authorized the governor to fill judicial vacancies in any court of record or in the district court by appointment. The governor's appointment power does not extend to newly created judgeships; these posts must be filled by election. Furthermore, Section 23 allows a person appointed to the judgeship to be eligible to run for election to the vacated post with the designation as an incumbent on the ballot. Prior to that amendment, only elected judges benefited from designation.

If a constitutional convention proposes changes to the method of selecting judges, it is likely that a convention also would address the method of selecting justices to complete unexpired terms. Alternatives a convention might consider could include: extending the election or appointment of judges to lifetime terms with vacancies filled by elections, requiring the gubernatorial appointment to come from a list of candidates offered by a judicial nominating committee, or requiring gubernatorial appointments to be filled with consent of the senate or the other statewide elected officials (e.g., the secretary of state and attorney general).

Figure 1 (on p. 6) shows that appointment processes are used to fill unexpired judicial terms in all states where unexpired terms are possible for supreme court justices or judges in the intermediate appeals (again excepting Massachusetts for the reason cited above).

Figure 1
Summary of Selection and Retention of Appellate Court Judges by State

<u>Number of States</u>	<u>Method of Selection/Retention</u>	
Supreme Court		
Method of Selection for Unexpired Term		
21	Gubernatorial appointment from judicial nominating commission	
13	Gubernatorial appointment	
8	Gubernatorial appointment from judicial nominating commission with consent of legislature	
3	Gubernatorial appointment with consent of legislature	
2	Court selection	
1	Gubernatorial appointment with approval of elected executive council	
1	Legislative appointment	
Method of Selection for Full Term		
14	Non-partisan election	
8	Partisan election	
14	Gubernatorial appointment from judicial nominating commission	
7	Gubernatorial appointment from judicial nominating commission with consent of legislature	
2	Gubernatorial appointment with consent of legislature	
2	Legislative appointment	
1	Gubernatorial appointment	
1	Gubernatorial appointment with approval of elected executive council	
1	Gubernatorial appointment from judicial nominating commission with approval of elected executive council	
Method of Retention		
19	Retention election	
14	Non-partisan election	
5	Partisan election	
3	Gubernatorial appointment from judicial nominating commission with consent of legislature	
3	Legislative appointment	
2	Gubernatorial appointment with consent of legislature	
1	Judicial Nominating Commission appointment	
Intermediate Court of Appeals		
Method of Selection for Unexpired Term		
17	Gubernatorial appointment from judicial nominating commission	
12	Gubernatorial appointment	
4	Gubernatorial appointment from judicial nominating commission with consent of legislature	
2	Court of last resort appointment	
2	Gubernatorial appointment with consent of legislature	
1	Legislative appointment	
Method of Selection for Full Term		
12	Gubernatorial appointment from judicial nominating commission	
11	Non-partisan election	
7	Partisan election	
4	Gubernatorial appointment from judicial nominating commission with consent of legislature	
2	Legislative appointment	
1	Gubernatorial Appointment	
1	Gubernatorial appointment with consent of legislature	
1	Gubernatorial appointment from judicial nominating commission with approval of elected executive council	
Method of Retention		
17	Retention election	
11	Non-partisan election	
4	Partisan election	
2	Gubernatorial appointment from judicial nominating commission with consent of legislature	
2	Legislative appointment	
1	Judicial Nominating Commission appointment	
1	Gubernatorial appointment with consent of legislature	

Source: Book of the States, 2008, Council of State Governments, Table 5.6, pp. 286-88.

Recusal of Justices

A constitutional convention also may wish to address an issue that has created controversy within the court recently. Judicial ethics require judges to recuse themselves from cases when there exists a possible conflict of interest or prejudice. In trial courts, such actions would cause cases to transfer to another trial court judge. In the court of appeals, a recusal would cause assignment of that case to another appeals court judge. In the case of the Supreme Court, the recusal of a single judge would leave only six justices and the potential of an inability to establish a majority to decide the case.

In response to these circumstances, a constitutional convention might wish to consider options for cases when a justice is unavailable to hear a case. One alternative would emulate the practice in Ohio. Section 4.02 of the Ohio Constitution provides in relevant part,

If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge.

Court Rulemaking

Section 5 empowers the Supreme Court to “establish, modify, amend and simplify the practice and procedure in all courts of this state....” Similar provisions were

contained in the 1850 and 1908 state Constitutions. While the provision appears to be straightforward, it poses two issues that a constitutional convention might want to visit. First, there is as a practical matter no bright line to distinguish questions of practice and procedure on the one hand from questions of substantive law on the other. (For example, what evidence may be admissible at trial and under what circumstances may be viewed as a matter of practice and procedure, but also may have a direct impact upon the substance of legal recourse.) Second, the Michigan Supreme Court has taken the position since 1959 that when there is a conflict concerning practice and procedure between one of its rules and a statute, the former prevails.

In effect, the Michigan Supreme Court has claimed the authority to strike down a statute adopted by the legislature, not through the customary means of declaring it unconstitutional in the context of a particular lawsuit, but simply by finding that statute to be in conflict with a court rule governing practice or procedure. Under such a circumstance, there would be no practical recourse since the final authority to interpret and fix the meaning of the state Constitution rests with the Michigan Supreme Court.

A constitutional convention might wish to provide that a statute would prevail over any conflicting court rule, irrespective of the subject matter involved. While such an approach was proposed but not adopted at the

1961 Constitutional Convention, the matter may be worthy of reconsideration.

State Funding of Trial Courts

While streamlining the court system to create “one court of justice,” neither the constitutional convention nor the legislation drafted to implement the constitutional provisions addressed the need for a unified system of court finance. As discussed above, all of the trial courts are organized under the direction of the state Supreme Court and are subject to rules and must follow operating procedures established by the state Supreme Court. However, the court organization created under the 1963 Constitution relies upon the local governments to serve as the funding units for the trial courts. The county governments, alone or in tandem, are the funding units responsible for funding the circuit and probate courts. Counties and several of the larger cities serve as the “district control unit(s)” responsible for funding district courts.

As funding units, the counties and municipalities must perform careful balancing acts with the trial courts to provide needed funding without intruding into the affairs of the courts. Every year the chief judge in each court must submit a proposed budget to the county(s) or municipality responsible for court funding. Generally the courts and funding governments are able to work together to agree on budgets that the governmental bodies can afford and that will meet the needs

of the courts. However, the separation of powers provisions in the constitution prevents the counties and cities from having any real controlling powers over the management or operations of the courts when conflicts arise.

Any conflicts are taken to arbitration before the State Court Administrative Office or are brought to suit before courts of higher jurisdiction. One of the most significant cases to be decided on court funding, *Wayne Circuit Judges v Wayne County*, 386 Mich 1 (1971), found that the judiciary possesses an inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities.

Over time, there has been some recognition by the state legislature that the state should bear the responsibility for funding the "one court of justice." The first movement in this direction was necessitated by the financial difficulties of the City of Detroit and Wayne County in the early 1980s. In 1981, the state assumed funding responsibility for the 3rd Circuit Court in Wayne County, Detroit's Recorder's Court, and Detroit's 36th District Court. Pursuant to Public Act 438 of 1980, this state action was to be the first phase of a state reorganization that would ultimately result in full state funding for the trial courts. Act 438 laid out a six-year timetable for the state to fund trial court operational expenses on a statewide basis.

While the state met its funding obligations for the Detroit and Wayne County courts, sufficient funds were never provided to fund court operations in the other 82 counties.

Public Act 189 of 1993 created new sources of funding for court operations by restructuring and increasing certain court fees. Funds from those fees were earmarked to a newly created State Court Fund, which allocated funding to trial court funding units pursuant to a formula based on the state's paying a percentage of trial court costs. Some court funding units benefited from this allocation, others did not. Again, the state was not able to provide sufficient resources to fully fund court operations statewide.

Table 1
Michigan's Trial Court System
Costs and Sources of Funding

	<u>FY2008</u>		<u>FY1993</u>	
	<u>Amount</u>	<u>Percent</u>	<u>Amount</u>	<u>Percent</u>
Costs by Court Level				
Circuit Court	\$ 888.3	61.1%	\$ 135.6	24.3%
Friend of the Court	\$ 162.6	11.2%	\$ 80.4	14.4%
Probate Court	\$ 63.5	4.4%	\$ 176.0	31.5%
District Court	<u>\$ 339.7</u>	23.4%	<u>\$ 185.8</u>	33.3%
	\$1,454.1		\$ 577.9	
Sources of Funding				
State Funding	\$ 333.8	23.0%	\$ 109.1	18.9%
Federal Funding	\$ 106.1	7.3%	\$ 64.1	11.1%
Revenue Collections	\$ 252.0	17.3%	\$ 178.0	30.8%
Calculated Local Contribution*	\$ 762.2	52.4%	\$ 226.7	39.2%

* Local court contribution includes in part a shift in funding to the court from other federal, state and county funded juvenile programs.

Source: PowerPoint presentation *Court Structure and Resources*, by Dawn Monk, Deputy State Court Administrator and Rebecca Mack, State Court Administrative Office Financial Analyst, February 9, 2010 [percentages CRC calculation].

The legislature again attempted to restructure the court system and provide equitable state funding of trial courts in 1996. Detroit's Recorder's Court was folded into Wayne County's 3rd Circuit Court. The 3rd Circuit Court and the 36th District Court no longer received special funding. New funds were established to provide operational funding to trial courts statewide.

Even with state funding that has grown substantially, locally-raised revenues are needed to fund trial court operations. Data from the State Court Administrative Office shows that the cost of Michigan's trial court system increased from \$577.9 million in 1993 to \$1,454.1 million in 2008, a 161 percent growth over 15 years. **Table 1** (on p. 8) shows the sources of the revenues used to finance the trial court system.

A constitutional convention may wish to examine whether the "one court of justice" policy should be extended to funding of the court system. A state funded court system would give the Supreme Court and court administrator's office greater latitude to achieve efficiencies by consolidating courts and enable creation of a unified trial court system in parts of the state where it could operate best. It would allow for better management of caseloads across the state, resulting in an equal application of justice regardless of location. It would make all court staffs employees of the state and would standardize compensation in terms of payrolls, pensions, and benefits.

Judicial Tenure Commission

When the 1963 Constitution was adopted, judges could be removed from the bench in only two ways: by impeachment, which can be used in the case of any civil officers; and by direct legislative action pursuant to the adoption of a concurrent resolution approved by two-thirds of the members in each house. The latter provision was added by the drafters of the 1963 Constitution because impeachment was seen as a tool that could be used only in narrow circumstances for removal, i.e., instances of corrupt conduct in office and for crimes or misdemeanors.

The first successful amendment to the 1963 Constitution, and second proposed amendment, was a legislatively-initiated proposal in 1968 to create a Judicial Tenure Commission (JTC). The JTC serves as an investigatory body, investigating complaints about the conduct of judges and submitting recommendations based on investigations of those complaints to the Supreme Court for disciplinary action. Section 30 authorizes the Supreme Court to censure, suspend with or without salary, retire or remove a judge for any of the following causes: conviction of a felony; physical or mental disability which prevents the performance of judicial duties; misconduct in office; persistent failure to perform judicial duties; habitual intemperance; and conduct that is clearly prejudicial to the administration of justice. Unlike the provisions that existed prior to the 1968 amendment that recognized only wrong-

ful conduct that would warrant removal from the bench, Section 30 recognizes that different levels of discipline are warranted for different degrees of misconduct and that sometimes it is necessary to remove a judge for health or other reasons that should not denote misconduct.

The first issue a constitutional convention might chose to address is the seemingly contradictory provision related to removal of judges. The 1968 amendment added Section 30 to create the JTC and stipulated the conditions under which judges may be censured, suspended, retired, or removed, but it did nothing to amend or delete the last sentence of Section 4, which says, "The supreme court shall not have the power to remove a judge."

Second, a constitutional convention could be expected to examine the need for the JTC and constitutional provisions for the JTC's operational process. It may wish to alter the openness of the process and the reasons for which action may be initiated. It may wish to consider membership on the commission to include more members not closely tied to the judicial system or legal profession.

According to the Judicial Tenure Commission website, the JTC concluded 581 cases in 2009. In 442 (76.1 percent) of those cases, an investigation to evaluate the complaint did not produce a sufficient showing of misconduct. Another 25 cases (4.3 percent) were settled with admonitory, cautionary, and explanatory letters, meaning that the judge was warned about his or her con-

duct but the complaint and JTC actions were not made public. Others were dismissed because of the lack of jurisdiction, lack of merit, or for other reasons. Only 1 cases (0.2 percent) rose to the level of public censure, which meant that the matter rose to the level of receiving attention by the Supreme Court.⁵

According to the Council of State Governments, states generally fall into two camps on adjudicating complaints against judges. The laws of 18 states and the District of Columbia empower the same body charged with investigating complaints against judges to also adjudicate the charges that may be warranted after investigation of the complaints. Those decisions are then subject to appeal to another body, usually the states' supreme courts. In 24 states, including Michigan, the investigating body must prepare

⁵ Judicial Tenure Commission website, <http://jtc.courts.mi.gov/statsbudget.htm>, accessed June 8, 2010.

and file charges with the states' supreme courts for adjudication. Seventeen states do not provide any mechanism to ensure the process works.⁶

Section 30 currently provides, "The supreme court shall make rules implementing this section and providing for the confidentiality and privilege of proceedings." The 1968 constitutional amendment that established the JTC purposefully created a system of confidentiality of investigations to serve as a protection to judges against malicious and unfounded charges. Although the public desires judges to be fair and impartial, their public standing and requirements to stand for election inherently make them political beings. As such, they are subject to acrimony both by discontented citizens and by political opponents wishing to unseat them from their positions on the bench. Creating a level of confi-

⁶ *The Book of the States*, 2008, Council of State Governments, pp. 294-6.

dentiality serves to keep the investigations of allegations of misconduct from becoming fodder for political posturing.

The Council of State Governments also reported on the point at which reprimands of members of the judiciary are made public. Only Washington conducts a completely open process, with all records and proceedings open from the beginning of fact finding hearings by the Commission on Judicial Conduct. Thirty-two states, including Michigan, make the process known to the public only when the investigating body decides that it has sufficient evidence to warrant filing charges with the adjudicating body. Another 11 states announce findings to the public when a decision has been adjudicated. The final states make the findings public only after the appeals process has been exhausted.⁷

⁷ *The Book of the States*, 2008. Council of State Governments, pp. 294-5.

Conclusion

Unlike other articles in the 1963 Constitution, Article VI does not include provisions that have been ruled unconstitutional or inoperable. The judicial system is operating adequately and can continue into the future with the current constitutional provisions without pause. However, some of the issues critics identify in Article VI may rise to higher levels of importance in coming

years. The increasingly political and tainted campaigns for Supreme Court justices may diminish the perception of an independent, impartial judiciary capable of dispensing justice to all. Continuance of this trend may create a rallying call to reform the methods of selecting judges. The cost of operating Michigan's trial court system has increased at a pace that imposes tremendous

burden on the local governments – counties and cities – charged with funding responsibility. A unified state funding system to parallel the "one court of justice" established by the 1963 Constitution would alleviate the mandated costs that those governments must bear and enable the court system to achieve efficiencies in operations that are otherwise unobtainable.



CRC SPECIAL REPORT MICHIGAN CONSTITUTIONAL ISSUES



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Tenth in a series of papers about state constitutional issues

ARTICLE VII – LOCAL GOVERNMENT

In Brief

At the November 2, 2010 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the 1963 Michigan Constitution. The question appears on the ballot automatically every 16 years as required by the Constitution. The Constitution provides that a convention would convene in Lansing on October 4, 2011. If the question is rejected, it will automatically appear on the ballot again in the year 2026.

The Citizens Research Council of Michigan takes no position on the question of calling a constitutional convention. It is hoped that examination of the matters identified in this paper will promote discussion of vital constitutional issues and assist citizens in deliberations on the question of calling a constitutional convention.

In addition to providing authority and power to the three branches of state government, the Michigan Constitution authorizes and empowers local governments. For counties and townships, the constitutional provisions describe their structure and powers. For cities and villages (and to a lesser extent charter counties), the constitution authorizes home rule provisions for their own self governance. A constitutional convention might be expected to examine the structure of local government in Michigan, the strength of home rule that should be authorized, the use of metropolitan government, and the removal of elected officials.

Local government finance will be discussed in context of our analysis of Article IX – Finance and Taxation.

Introduction

Thus far, CRC's series of papers analyzing constitutional issues has focused on citizens' rights, the electorate, and the three branches of government. This paper focuses on public corporations, which are organizational structures that may be vested with constitutional status. Public corporations may be divided into two categories: (1) municipal corporations and other local governmental units including counties, townships, and metropolitan districts and (2) public corporations organized for specific purposes, such as the state universities. While both types of public corporations are of constitutional concern, this paper is confined to the questions respecting the constitutional position and authority of municipal corporations—including the important question of home rule status.

Local Government Structure in Michigan

Much of Michigan's system of local government or-

ganization was established in the Northwest Ordinance of 1787, and was institutionalized in the 1835, 1850, 1908, and 1963 Constitutions. The 1963 Constitution made relatively few changes in the basic structure of local government. The system of local government in Michigan is composed of counties, townships, cities, villages, and special districts. The number of local units in Michigan has changed relatively little since the 1963 Constitution was adopted.

General-purpose local units of government—counties, cities, villages, and townships—provide a broad range of services. The entire state is organized into counties and each citizen lives in one county. The entire state is also organized into cities and townships and each citizen lives in either a city or a township, but not in both – they do not overlap. A township resident might also live in a village, which has its own government, but also remains part of the township.



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Counties were originally organized to serve as administrative arms of state government, providing local services and maintaining records. In that capacity, they are responsible for recording births, marriages, and deaths; recording the ownership of real property; providing police protection; and prosecuting those accused of criminal activities. Counties also bear some responsibility for the courts; jails; oversight of property assessing and elections administration; construction of some roads and bridges; provision and maintenance of drains; and health services. Some counties provide local government services in addition to those performed for the state, including parks, airports, libraries, public transportation, and refuse disposal.

Townships and some villages are organized under general state laws that prescribe their governmental structure and powers. Cities and some villages have created their own charters under home rule powers that allow each government's local populace to frame its own charter, determine how best to secure representation on the city council, provide its own means for selecting the mayor and the administrators of the city activities, define the powers that might be exercised, adopt nonpartisan at-large elections if it wished, and establish its own accounting and auditing controls.

The different authorizing laws and the exercise of home rule make an all inclusive list of services provided by cities, villages, and townships in Michigan difficult to assemble. Cities and townships are universally responsible for 1) property assessment as a basis of state, county, municipal, and school taxation; 2) tax collection for their own purposes and on behalf of the state, counties, and schools; and 3) the conduct of municipal, school, county, state, and national elections. Additionally, cities are required to provide for the public peace and health and for the safety of persons and property within their jurisdictions. Commonly provided local government services include police and fire protection, water and sewerage, parks and recreation, refuse collection, roads and sidewalks, libraries, streetscapes, and economic development.

Special authorities are limited-purpose governments that exist as separate corporate entities created for the purpose of combining local government resources to achieve a common goal desired by each of the involved local governments. State law provides for the creation of special authorities and for their organization, powers, and duties and provides substantial fiscal and administrative independence from general-purpose units and other special-purpose local governments. The jurisdiction of

these authorities overlaps existing boundaries of other general-purpose or special-purpose units. Some of the more common purposes for special authorities include fire protection, libraries, mass transportation, airports, solid waste, and water and sewer.

The most significant qualitative change over the past four decades has been a blurring of the differences between cities, villages, and townships. Additional powers have been granted to villages and townships, consistent with those possessed by cities. State mandates for particular types of local governments to provide specific services have been eroded. The ability of cities and villages to annex township land has been diluted. Today, Michigan's urban areas have a number of villages and charter townships intermingled among the state's biggest cities.

The primary cause of these changes was enactment of the charter township act. Although enacted in 1947, it was not until the late 1960s and 1970s that townships began adopting charter status in large numbers. Charter township status has allowed townships in urban areas to provide a full range of municipal services, paralleling those provided by neighboring cities in every way except maintenance of roads and bridges. In 2000, 15 of the 50 most populated local governments in Michigan were charter townships.

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The only noteworthy quantitative change in the number of local governments over the past 45 years has been in the number of special authorities that are created when local governments collaborate for the provision of services. The modest decline in

the number of townships reflects their incorporation as cities, mostly in the 1960s. More recently, the transformation of the villages of Clarkston and Chelsea to cities shrank the size of the surrounding townships, but did not eliminate the townships. The

incorporation of Grosse Pointe Shores as a city eliminated two townships because the former village straddles Macomb and Wayne counties. There was a net increase of only seven general-purpose local units between 1962 and 2010. (See **Table 1.**)

Table 1
Number of Units of Local Government in Michigan

	<u>1962</u>	<u>2007</u>	<u>Change</u>
Counties	83	83	-0-
Townships	1,259	1,240	- 19
Cities & Villages	<u>509</u>	<u>535</u>	+ 26
Sub-Total	1,851	1,858	+ 7
Special Authorities	99	456	+357

Source: 1962 and 2007 Census of Governments, Bureau of the Census, U.S. Department of Commerce.

Most of the general purpose local units serve relatively small populations. Only 128 (7 percent) of the 1,858 general purpose governments serve 25,000 or more people; 1,070 (58 per-

cent) serve less than 2,500 people, and 469 (25 percent) of these serve less than 1,000 people. These 1,858 general purpose local units have an estimated total of more than 18,000

elected officials.¹ (See **Table 2.**)

¹ See *The Long Ballot in Michigan*, Citizens Research Council of Michigan, Council Comments 951, November 1984, www.crcmich.org/PUBLICAT/1980s/1984/cc0951.pdf.

Table 2
Governmental Units in Michigan by Population Groups, 2000

<u>Population Groups</u>	<u>Counties</u>		<u>Cities/Villages</u>		<u>Townships</u>		<u>Total</u>	
	<u>Number</u>	<u>Percent</u>	<u>Number</u>	<u>Percent</u>	<u>Number</u>	<u>Percent</u>	<u>Number</u>	<u>Percent</u>
100,000 and over	20	24.1%	8	1.5%	0	0.0%	28	1.5%
25,000 - 99,999	38	45.8%	37	6.9%	25	2.0%	100	5.4%
2,500 - 24,999	24	28.9%	178	33.3%	458	36.9%	660	35.5%
Less than 2,500	<u>1</u>	1.2%	<u>312</u>	58.3%	<u>757</u>	61.0%	<u>1,070</u>	57.6%
Total	83		535		1,240		1,858	

Source: 2000 Census, Bureau of the Census, U.S. Department of Commerce.

Constitutional Issues

Article VII contains 34 sections: 16 deal with county government; four with township government; six with cities and villages; and two with metropolitan government or joint administration. Six sections cover more than one type of local government. Other provisions that affect local government are scattered throughout the Constitution. Of the 80 proposed constitutional amendments that have been submitted to the voters since 1963, none have dealt with the local government article of the Constitution.

Local Government Structure

A constitutional convention could examine the extent to which the present organizational structure of local government meets the current and future needs of citizens and businesses. While business location decisions in the past may have focused on Detroit or Southfield, Grand Rapids or Walker, or Traverse City or Charlevoix, businesses today compete on a global stage and could just as easily locate in India, Brazil, South Carolina, or Michigan.

A constitutional convention could examine the need for 1,858 local units of government, two-thirds of which serve fewer than 2,500 people. It might consider whether counties, townships, cities and villages, and special authority districts, with overlapping geographical boundaries, as well as overlapping powers and service responsibilities, are the most effective means of providing local services and the most efficient use of scarce public resources. A con-

stitutional convention might seek to “reinvent” local government.

Arguments have been made that the local government structure needs to be reorganized to define the power and authority relationships between counties and municipalities in both service delivery and regulatory functions. A simplified local government structure could include a municipal level of government consisting of two classes of municipalities, charter cities and townships, equal in their relationship to each other and other levels of government. This new framework of municipal government would eliminate the intermediate form of government, the village.

Other reforms might focus on the roles played by counties and townships. Convention delegates might focus on the problems inherent in attempting to solve local or regional problems at the state level. Advocates of change might focus on the perceived shortcomings of the state government and propose either to strengthen counties to usurp some responsibilities currently vested with the state or to create regional governance structures with taxing and spending powers.

Some may focus on activities that are provided at the most local levels in Michigan, but are provided at the county level in most other states – elections, property assessment, and tax collection. Should a constitutional convention choose to reform local government by charging counties with responsibility for these services,

many of Michigan’s least populated, most rural townships would exist solely to define the location of property within each county and for planning and zoning purposes. The levy of taxes would then relate to each township’s decision to provide other services (police and fire protection, refuse collection/disposal, etc.).

These types of structural reforms of local government are likely to occur only through a constitutional convention. Neither petition-initiated constitutional amendments nor legislatively-initiated reforms seem capable of achieving such wholesale change.

Reforms of this type could simplify local government, but caution should be exercised about their potential for “fixing” local government. It is not clear that the potential gain of business attraction that might come with governmental consolidations, and the resulting larger local governments with more bureaucracy, would be worth the surrender of local political control and the connection many feel with small government. The savings that may result from these potential reforms are rather insignificant in the big picture of Michigan’s government finances. The cost of operating villages and less populated townships, or the cost of a few activities that could be better provided by counties, pale in comparison to the cost Michigan’s urban cities incur to provide public safety, water and sewer, and other municipal services. The reforms that would help city governments to attract and retain people and businesses

generally are not matters that should be addressed by a constitutional convention.

County Officers

Board of Supervisors

States have considerable discretion in drafting the fundamental laws that govern their operations and that affords rights to their citizens. State constitutions, however, are bound by the parameters of the United States Constitution and may not violate the provisions contained in that document. State constitutional provisions that are obsolete because they violate the provisions of the federal constitution make the language of a state constitution confusing and misleading. These provisions should be removed or revised to reflect the current status of law.

The provisions in Section 7 that establish county boards of supervisors are not consistent with the federal constitution. The county boards of supervisors in each county were to consist of one member from each organized township and representation from cities as provided by law. Like the legislative redistricting provisions in Article IV, this language was drafted at the same time precedent-setting legal cases were being decided by the U.S. Supreme Court establishing the “one person, one vote” principle.² With equal representation granted to all townships, the vote

of a supervisor representing a township with a population of 1,000 was equal to the vote of a supervisor from a township of 10,000; and the number of people represented by members of the boards from cities could be wholly different. In 1966, the Michigan Supreme Court held that the method of apportioning county boards of supervisors violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.³

As a result of the U.S. Supreme Court’s one person-one vote decisions, boards of supervisors were replaced with county boards of commissioners that are smaller, more partisan, and representative of people rather than units of government. County commission election districts are drawn to be as nearly equal in population as is practicable based on the latest official published decennial U.S. census. They are to be contiguous, compact, of as nearly square shape as is possible. Finally, they must respect township, village, and city boundaries, and are not to be drawn to effect partisan political advantage.

The number of general law county commissioners is based on the population of the county as defined in statute:

County Population	Number of Commissioners
Under 5,001	Not more than 7
5,001 to 10,000	Not more than 10
100,001 to 50,000	Not more than 15
50,001 to 600,000	Not more than 21
over 600,000	25 to 35

The loss of the county boards of supervisors created a void. Because members of the boards of supervisors represented local governments, the county board meetings routinely brought together local government officials with the opportunity to discuss service provision. Appointed and independently elected county officials heard from the supervisors about the need for an expanded county role, the services that local units were providing adequately, and the services for which local governments would benefit from county cooperation. The move to independently elected county commissioners reduced counties’ connection to local units. Where supervisors were inherently prepared to address the needs of the local governments they represented, county commissioners tend to be aware of the needs of the local governments only when they make special efforts to learn of those needs.

At a minimum, a constitutional convention could be expected to bring Article VII into compliance with current day practice in the selection of county commissioners. Beyond that, a convention may seek to create a structure that reconnects counties with the local governments so that activities are performed in the most efficient manner and intergovernmental collaboration – arguably a principal function of counties – is facilitated to a greater extent than is currently the practice.

County Administration

Of all the types of local governments in Michigan, not one oper-

² See *Article IV – Legislative Branch*, Citizens Research Council of Michigan, Report 360-07, May 2010, www.crcmich.org/PUBLICAT/2010s/2010/rpt36007.html.

³ *Advisory Opinion re Constitutionality of Public Act 261 of 1966*, (380 Mich 736; 1966).

ates under a more antiquated structure than the counties. Four counties have taken advantage of alternative organizational structures available to all counties, but the other 79 counties operate without a single executive officer to lead the government. County commissions share legislative and administrative duties and power is further disbursed among the many independently elected constitutional officers: prosecuting attorney, clerk, register of deeds, treasurer, and sheriff. Power is further disbursed to the drain commissioner and the boards of county road commissioners.

Notwithstanding the change from county boards of supervisors to boards of commissioners, this basic structure has existed since statehood in the 1830s. It reflects the counties' role as administrative arms of the state and the principle of Jacksonian democracy, the early to mid-19th century political theory that held that the problem with government was the appointive status of government officials. The cure proposed was to have as many officials as possible elected directly to short (two-year) terms. This approach, which would theoretically keep democracy close to the people, reflected the frontiersman's belief in personal versatility and his suspicion of specialization. Government was not believed to require specialized skills or training. It was hoped that the fragmentation of power and frequent turnover of officials would prevent the formation of a government aristocracy.

The 1963 Constitution attempted to provide an alternative to this

antiquated form of local government by authorizing charter, or home rule, counties. It was hoped that home rule powers would provide counties with the ability to streamline county government and minimize the number of boards, commissions, and authorities common in the administration of county government. Counties now have two organizational alternatives to the general form: optional unified county government or charter county government. The optional unified form provides for an elected or appointed county executive and some power to reorganize the departmental structure, but in the main the core powers of the boards of commissioners, as well as the "row" officers, are undisturbed. Under the charter county form, the powers of a county executive are somewhat stronger and the options for reorganization a little greater than under the other forms. However, the requirement in Section 4 that each county independently elects a sheriff, clerk, treasurer, register of deeds, and prosecuting attorney cannot be undone by statute.

In some counties, the broad distribution of power among many officials has created deadlocks in the budgeting processes. Each elected officer is the administrative head of a department, and even in those counties with elected county executives power is not sufficiently centralized for that person to assume control of hiring and firing personnel or arranging the organization of those departments. At times of economic contraction, when many local governments are cutting the size of their budgets, the lack of

a single executive officer with control over administration of the county, and a lack of budgetary control by the county commissions, complicates the ability to manage the counties' assets and operate within the resources available.

A constitutional convention could reexamine the constitutional provisions for county government to allow greater flexibility to change officers from elected to appointed status, reorganize administration of the county, and effect the changes needed to bring county government into the twenty-first century.

Home Rule

The state constitution defines the legal relationship between the state and local governments. It establishes the relative degree to which local governments are dependent on, or independent from, state control. The dichotomy between state control and local self government is illustrated by Dillon's Rule and the Cooley Doctrine. The theory of state preeminence over local governments was expressed as Dillon's Rule in an 1868 case:

Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control.⁴

⁴ *Clinton v Cedar Rapids and the Missouri River Railroad*, (24 Iowa 455; 1868).

In contrast to Dillon’s Rule, the Cooley Doctrine expressed the theory of an inherent right to local self determination. In a concurring opinion, Michigan Supreme Court Judge Thomas Cooley in 1871 stated: “[L]ocal government is a matter of absolute right; and the state cannot take it away.”⁵

The continuing tension between Dillon’s Rule and the Cooley Doctrine is the attempt to balance matters of statewide interest against the rights of communities to determine their own government. Through a state constitution, the people can establish the structure of local government and the distribution and balance of powers between the state government and local governments.

The last two constitutions cast Michigan as a strong home rule state, consistent with the Cooley Doctrine. The Michigan Constitution of 1908 provided home rule for cities and villages. The 1963 Constitution built on that authority for cities and villages and extended the option of home rule to counties. The Michigan Constitution is one of 37 state constitutions that provide home rule for cities and one of 23 state constitutions that give home rule powers to counties. Home rule is almost universally employed to adopt city charters, but only a minority of villages have adopted home rule charters. Macomb and Wayne are the only counties that

have adopted home rule charters. Townships do not have home rule powers.

During the Progressive Era (1890 – 1920), when Michigan initially adopted its home rule provisions, the goal was to give local governments a broad range of local discretion to act and adopt policies with minimal direction, influence, and interference from state officials. Prior to that time, an excessive amount of legislative action was focused on the enactment of local acts, at times micromanaging the affairs of local governments. It was reasoned that better governance could result if the local populace could frame their own charters, determine how best to secure representation on their city councils, provide their own means for selecting mayors and administrators of the city activities, define the powers that might be exercised, and establish their own financial controls. Not only was it hoped that home rule would cause local officials to be responsible, but it was hoped that home rule would cause local government to be more responsive to the needs and wants expressed by local residents.

The question of continuing home rule for Michigan’s local governments and determining the relative home rule powers may be one of the most monumental issues that a constitutional convention would confront. The convention delegates that drafted the 1908 and 1963 Constitutions clearly favored home rule and provided broad powers for cities and villages, and to a lesser de-

gree counties. Over the century that Michigan has experimented with home rule, it is not clear that everyone has held home rule in the same regard. For while the constitution, as the supreme law of the state, provided broad home rule authority to local governments, various actions by the legislature and the courts have weakened it.

The underlying tension comes in determining whether matters are of statewide interest, and therefore should be addressed by state laws and administrative rules, or matters of local concern that each community should be free to address in ways that reflect the values of their citizens. While the Constitution provides for a liberal interpretation of the powers of municipalities, and some court opinions have declared that municipalities have all powers not expressly denied, other court rulings adverse to home rule often have led municipal officials to seek legislative solutions clarifying the extent of their authority. Each directive and clarification that has been amended to the Home Rule Cities Act and Home Rule Villages Act has had the general impact of reversing the inclusive nature of the home rule powers toward an exclusionary approach.⁶

There are several examples of constitutional home rule powers that were lessened through legislation, administrative rules, and court

⁵ *People v Hurlbut*, (24 Mich 44, 95; 1871).

⁶ Kenneth VerBurg, *A Study of the Legal Powers of Michigan Local Governments: Comparing Cities, Townships, and Charter Townships*, (1960).

cases. Section 2 extended the authority for counties to adopt a charter, but court rulings restricted such a charter from infringing on the powers or method of selection of executive county officers.

Constitutional convention delegates sought to ease the burden on the property tax and to provide additional revenues to local governments. Section 21 provides that, “Each city and village is granted power to levy other taxes for public purposes, subject to limitations and prohibitions provided by this constitution or by law.” However, this constitutional taxing authority was immediately preempted by legislation prohibiting any local non-property tax unless it is specifically authorized by state statute.

Section 22 extends home rule powers to municipal government:

Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.

But the courts have remained closer to Dillon’s Rule, taking the position that local governments derive their authority from the legislature. Contrary to the broad grant of authority, the courts have stated that:

[L]ocal governments have no inherent jurisdiction to

make laws or adopt regulations of government; they are governments of enumerated powers, acting by a delegated authority; so that while the State legislature may exercise such powers of government coming within a power designation of legislative power as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred, and subject to such regulations or restrictions as are annexed to the grant.⁷

Attempts to legislatively intrude on home rule powers and court decisions to undo the exercise of those powers are found with regard to spending power, public meetings, public access to public records, conflicts of interest by public officials, political rights of public employees, mandatory collective bargaining and compulsory arbitration of police and fire labor disputes. As the state’s largest city, Detroit has been a frequent target of both legislative action, including statutory attempts to cause change to the method of selecting Detroit city council members,⁸ and judicial decisions, such as a recent ruling

⁷ *City of Kalamazoo v Titus*, 208 Mich. 252, 262, 175 N.W. 480 (1919).

⁸ See *Election of Detroit City Council Members*, Citizens Research Council of Michigan, Memo #1063, regarding Public Act 432 of 2002, www.crcmich.org/PUBLICAT/2000s/2002/memo1063.html.

overriding the city’s ability to impose a living wage ordinance.⁹

The final section of Article VII, Section 34 was included to make clear the intent of the convention delegates that the provisions of the constitution and laws concerning counties, townships, cities, and villages are to be construed liberally in their favor and that the powers granted to counties and townships by the constitution and by law are to include those fairly implied and not prohibited by the constitution.

This section was added by the 1963 Constitution. Prior its addition, laws concerning the powers of counties and townships were written with specificity. In the years since, such laws have become briefer and have been written to liberally grant powers to those types of governments. In that regard, this provision can be seen as a success.

On the other hand, the evidence of diminishing home rule powers for cities and villages seem to indicate that Section 34 has held little sway in deciding inconsistencies between state laws and locally expressed powers in favor of the local governments.

The home rule powers laid out in the Constitution indicate that Michigan is a strong home rule state, but in practice Michigan cities and villages have far less

⁹ See *Richard Rudolph V Guardian Protective Services, Inc.*, <http://coa.courts.mi.gov/resources/asp/ViewDocket.asp?casenumber=279433&yr=0&inqtype=public>.

home rule discretion than local governments in states such as Illinois and Colorado. In each of those states, within the scope of local responsibilities, the home rule units have considerably more discretion and freedom from state control than do comparable Michigan units.

A constitutional convention could choose to end Michigan's experiment with home rule, or diminish the home rule powers of local governments. Wording could be changed to limit home rule powers to selection of officers and creation of the rules within which local governments operate. Language could be adopted to place control over economic matters with the state.

Alternatively, a constitutional convention may wish to undo legislative actions, administrative rules, and judicial decisions by strengthening home rule. Such a preference would make the home rule powers self-executing. Local governments would no longer need empowering statutes to carry out the strong authority already granted in the constitution.

Municipal Control of Highways and Rights-of-Way

Section 29 requires public utilities to obtain consent from counties, cities, villages, and townships for the right to use highways, streets, alleys or other public places. In essence, this section says that private entities should pay economic rents for the right to use public assets for business purposes.

A provision similar to Section 29 was first included in the 1908

Constitution. Neither Section 29 nor its predecessor (Section 28 of Article VIII in the 1908 Constitution) attempted to extend to local governments the ability to regulate public utilities. In addition to its own power to enact laws, the legislature has delegated the power to regulate utilities to the Michigan Public Service Commission (MPSC). The MPSC, whose history dates to 1873, has from time to time played a role in the regulation of railroads, electricity, telephone, natural gas, petroleum pipelines, motor carriers, and water utilities. A number of court cases since adoption of 1908 Constitution declared that the local control established in the Constitution preempts the MPSC's statewide interest in regulating the use of public highways and rights-of-way by public utilities.

Over the past two decades, the authority of local units to require franchises and just compensation for use of the public right-of-way by private utilities, including electric transmission, pipeline, telecommunication and cable service providers, has been undermined by legislative initiatives. In each of these areas, the control provided to local governments in Section 29 has been eroded by state legislative assertions of authority. In effect, these legislative actions have subordinated public control of public property (rights-of-way), and the economic rents payable for the use of that public property, to the interest of private businesses.

Local governments have not received relief on these issues from the courts. As part of a whole-

sale rehabilitation of a four-mile stretch of roadway in 1999, the City of Taylor (Wayne County) acted to reduce the number of automobile collisions with utility poles along Telegraph Road by relocating electric wires to below ground. The city and utility disagreed on responsibility for the cost of moving the wires. In ruling in favor of the utility, the Michigan Supreme Court decision in *City of Taylor v. The Detroit Edison Company* 475 Mich. 109, 715 N.W. 2d 28 (2006) shifted the preemption for control of public places from the local governments to the MPSC.

In previous cases dealing with similar questions, utilities were made to bear the cost of relocation as part of the cost of doing business as long as the relocation was in the course of the discharge of a governmental function. In overturning the precedent, the court relied on reasoning that the municipalities may exercise the constitutional power to pass ordinances and regulations with reference to their highways and bridges only to the extent that those ordinances and regulations are not inconsistent with the general state law. This was the first case to arise since the MPSC promulgated rules in 1970 governing the underground placement of new and existing utility wires. Since those rules now exist, the court ruling infers that counties, cities, villages, and townships may control their highways and other public places only to the extent that their actions are consistent with state law. The court's interpretive posture can be found in the opening paragraph of the analysis: Dillon's Rule is

confirmed as the lens through which a city's home-rule power will be examined.

A constitutional convention could address the conflict between the legislative powers of the state in regard to public utilities, and the regulatory powers delegated to the Michigan Public Service Commission to oversee public utilities, and the constitutional authorities of local governments to regulate use of the right-of-way. Consistent with the earlier discussion of home rule powers, a convention could act to clarify the state preemption of local government in the regulation of public utilities as a statewide concern, or strengthen the constitutional language to reinforce what had been, until only recently, how the law was interpreted.

Metropolitan Government and Authorities

A number of public services transcend the borders of Michigan's local governments. Public transportation, major arts and cultural facilities, harbors and airports, water and sewer, and roads and bridges may provide benefits beyond the relatively small borders that characterize Michigan's local governments, or incurs costs of that are of sufficient magnitude that individual local governments cannot bear the burden alone. Each of these functions has its own constituency, yet all are oriented toward the region, rather than a single jurisdiction. Different population groups in the same part of the region may place greater or lesser value on certain regional functions. Sewerage is-

ues may be more pressing in one part of the region, while transit issues may be more urgent in another. But each function is essentially a creature of the region, not of individual jurisdictions.

As is the case with any array of services provided by an individual governmental unit, not all services are used equally by all residents of the jurisdiction. Police and fire protection blanket the city or township, while relatively few individuals may use a senior citizen center, but both may receive general tax support. In any general-purpose government, an implicit agreement exists that, while every service may not be used equally by every taxpayer, the menu of services funded by the jurisdiction will be supported by all the taxpayers. That menu may be controversial and may change over time but, in a government of any size, some tax-supported services will be used by virtually all residents, some by several, and some by very few.

Regional functions are subject to the same kinds of variation in utilization. However, no structure exists for the financing of competing regional services. Counties perform this task over a limited range of functions, but many regional problems do not respect county lines any more than city or township lines. This underlies the language in Article VII, Section 27, of the Michigan Constitution, which encourages multipurpose metropolitan authorities.

Notwithstanding any other provision of this constitution the legislature may estab-

lish in metropolitan areas additional forms of government or authorities with powers, duties and jurisdictions as the legislature shall provide. *Wherever possible, such additional forms of government or authorities shall be designed to perform multipurpose functions rather than a single function.* [Emphasis supplied.]

Although the clear intent of this section was to encourage the development of governmental units that could provide multiple services on a regional basis, there has been very little movement in that direction during the nearly five decades since the adoption of the new constitution. Instead, the prevailing vehicles for delivering regional services have been interlocal agreements and single-purpose special authorities. Some of these authorities have limited taxing ability, some are funded by user charges, and some rely on the taxing authority of the general-purpose units they encompass, but truly multipurpose regional authorities are the exception, not the rule.

A constitutional convention may wish to consider alternatives to encourage greater use of multipurpose special authorities as appropriate responses to regional service needs.

Removal of Elected Officials

In 2008, the eyes of Michigan were on the City of Detroit and the various efforts to remove then Mayor Kwame Kilpatrick from office. Section 33 provides that, "Any elected officer of a political

subdivision may be removed from office in the manner and for the causes provided by law.” Before he ultimately resigned from office, efforts to remove Mayor Kilpatrick under Article VII, Section 33, and Article V, Section 10 of the Michigan Constitution, and Section 327 of the Michigan Election Law were viewed by some as providing sufficient ambiguity

that the ability to carry out the removal could be challenged.¹⁰

There have been other local government officials that have been

¹⁰ See MCL 168.327 for removal of city officials, MCL 168.369 for removal of township officials, MCL 168.381 for removal of village officials, and MCL 168.207 for removal of county officials.

forced from office for misconduct related to their office and/or crimes unrelated to their office.

A constitutional convention could examine whether legal ambiguities and challenges to efforts to oust public officials are related to the strength of wording, or lack of same, in the constitutional provisions or in the statutes enacted to implement these provisions.

Conclusion

One of the most significant issues a constitutional convention may address is balancing the powers of the state to empower, oversee, and control local governments and the local governments’ interest in exercising the home rule powers currently provided in the constitution. Legislative action, administrative rules, and court rulings have eroded the spirit of home rule as it was originally envisioned by the drafters of the 1908 and 1963 Constitutions. Delegates to a 2011 convention

would likely provide clarity to the proper balance of the state and local government powers.

The current provisions for county boards of supervisors are inoperable because they violate the “one person, one vote” principle of the U.S. Constitution. Other reforms a constitutional convention could address in the local government article include efforts to streamline the structure of local government and creating greater flexibility to streamline

the administration of county government. It could be expected that a convention would attempt to provide greater direction on the conflict between the authority of local governments to control the use of their highways and public places by utilities and the power of the state to regulate those same utilities. Finally, a convention may choose to examine the need to address constitutional provisions related to multi-purpose special authorities and the removal of public officials.



CRC SPECIAL REPORT

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ARTICLE VIII – EDUCATION

In Brief

At the November 2, 2010 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the 1963 Michigan Constitution. The question appears on the ballot automatically every 16 years as required by the Constitution. The Constitution provides that a convention would convene in Lansing on October 4, 2011. If the question is rejected, it will automatically appear on the ballot again in the year 2026.

The Citizens Research Council of Michigan takes no position on the question of calling a constitutional convention. It is hoped that examination of the matters identified in this paper will promote discussion of vital constitutional issues and assist citizens in deliberations on the question of calling a constitutional convention.

The responsibility of the state for elementary and secondary education and higher education (both community colleges and public universities) is found in Article VIII of the Michigan Constitution. A review of the article raises a number of issues that would likely be debated at a constitutional convention, including both funding and governance issues. The level of state support provided to local school districts is a contentious issue and the language requiring the legislature to maintain and support a system of public education may be reviewed. Current language has not provided sufficient grounds for judicial intervention in school funding; stronger language requiring equal or adequate funding of public education may make the state vulnerable to court challenges. The current constitutional prohibition against aid to nonpublic schools has been an issue over the years with the passage of charter school legislation in 1993 and a 2000 ballot proposal to allow for school vouchers (defeated), and would likely be evaluated by a constitutional convention.

A constitutional convention would likely review the governance structure set up in Article VIII for issues related to both K-12 education and higher education. The legislature, governor, state board of education, and superintendent of public instruction all have roles in K-12 education governance. Under the current system, governance is shared with ultimate authority over governance and funding residing with the state legislature. The state board of education has a constitutional oversight role, but it has been a limited role in practice. Additionally, statewide planning and coordination of higher education could be discussed and may lead to changes in how institutions of higher education are governed or how board members are selected. The election of members of the state board of education and three governing boards of public universities (University of Michigan, Michigan State University, and Wayne State University) adds 32 state education officials to the ballot (eight elected every two years in staggered elections) and lengthens the ballot significantly.

Finally, the establishment and support of public libraries in the 1963 Constitution may be discussed because of the evolving needs of residents with respect to libraries and technology.

Introduction

The Michigan Constitution singles out education as a uniquely important state function by devoting an entire article to it and by stating that “schools and the means of education shall be forever encouraged” (Section 1). Article VIII deals with elementary and secondary education as well as higher education; it has been amended only twice (once to prohibit aid

to nonpublic schools and once to change the word *handicapped* to *disabled* to comply with the nomenclature in the federal American with Disabilities Act). However, if a constitutional convention is called for, a number of sections of Article VIII may be subject to review and potential alteration.



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Constitutional Convention Issues

Issues likely to be discussed at a constitutional convention include those related to elementary and secondary education governance and funding, higher education organization and governance, and public libraries.

Elementary and Secondary Education

Section 2 states that “The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law.” While this is the only mention of the state legislature in relation to elementary and secondary education, it is important because it gives the legislature ultimate authority over public K-12 education. The Constitution gives the governor a role in education as an ex-officio member of the state board of education (Section 3) and limited executive authority over the superintendent of public instruction. The state board of education and superintendent of public instruction are both created and their duties outlined in Article VIII.

State Legislature

A constitutional convention may review the role of the state legislature in public education. Under the current constitution, the legislature has ultimate authority over elementary and secondary

education, but it delegates the provision of education to local and intermediate school districts. A constitutional convention may clarify the duties of the legislature in regard to public K-12 education or it may weaken the authority of the legislature by strengthening the state board of education.

State Board of Education

The state board of education consists of eight members nominated by party conventions and elected at-large to eight-year terms in statewide elections. The board has the responsibility of appointing the superintendent of public instruction and determining his or her term of office. This was an expansion on the 1908 Constitution that had provided for an elected four-member board of education, including the elected superintendent of public instruction, with limited authority and responsibility.

The 1963 Constitution attempted to expand the responsibilities of the state board of education. Section 3 states that the board shall serve as the general planning and coordinating body for all public education and have leadership and general supervision responsibilities over all public education, except public universities. While the Constitution

gives the board a broad grant of authority, in practice, the board’s role has been more “consultative and deliberative.”¹ The board is empowered to make education policy only within the limits established by state law; e.g., the board is not empowered to make funding decisions regarding schools, but is supposed to advise the legislature “as to the financial requirements of all public education.”² The board’s role was further defined and somewhat reduced by two executive orders which transferred administrative statutory powers and responsibilities as head of the Michigan Department of Education (MDE) from the board to the superintendent of public instruction. Additional state laws and court decisions have detailed the board’s responsibilities and extended its supervisory powers over nonpublic education.

At the 1961 Constitutional Convention, most of the debate focused on whether the governor should be a voting member of the

¹ Citizens Research Council of Michigan. *Organization of State of Michigan Education Functions*. Report No. 335, December 2002: pg. 1.

² State Board of Education, Michigan Public Act 287 of 1964, MCL 388.1011.

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state board of education. The principal arguments in opposition focused on a concern that the governor would dominate the board and a belief that the board would become politicized and educational issues would be of secondary concern. Ultimately, the governor was added as an ex-officio member without the right to vote.

The framers of the 1963 Constitution had high expectations for the state board of education and its oversight role. One delegate saw the board as “a deliberative body of outstanding citizens.”³ The board was given, what appeared to be, a broad grant of constitutional authority over all public education. General dissatisfaction with the existing governance system at the state level as it relates to K-12 education would probably lead to a thorough review of education governance in a constitutional convention. The reality in Michigan is that the state board shares the responsibility for education policy making and reform with the legislature and governor, and this has led the board to take a more consultative and advisory role and has also contributed to partisan politics playing a greater role in the development of education policy. Michigan is not unique in this regard as others have characterized state boards of education as having “significant powers but limited influence,” and as

³ Citizens Research Council of Michigan. *Michigan Constitutional Issues: Education*. Report No. 313-7, September 1994.

being relatively weak institutions in relation to other state actors.⁴

The selection of members of state boards of education varies across the states. Twelve states elect some or all of the members of their state board of education (ten states, including Michigan, elect all state board members; two states elect some state board members, with the remainder appointed by the governor). In New Mexico, the elected state board of education is advisory only. The remaining 36 states have appointed state board members. In the majority of these states, board members are appointed by the governor; in two states they are appointed by the legislature; and in two states, members are appointed by multiple authorities. Two states, Minnesota and Wisconsin, do not have state boards of education.⁵

A constitutional convention might consider restructuring the state board, strengthening its constitutional authority and oversight role, or eliminating the board altogether. Current board members are elected which contributes to an already lengthy ballot and raises questions about voters’ knowledge of state board candidates and their qualifica-

⁴ Paul Manna. *State Governance, Policy, and Education Performance in the United States*. Annual Meeting of the American Political Science Association. Chicago, September 2-5, 2004: pg. 3.

⁵ Mary Fulton. *State Education Governance Models*. Education Commission of the States: State Notes, March 2008.

tions for office. A convention may review how other states select state board members and consider allowing the governor and/or other state officials to appoint some or all of the members of the state board of education. The relationship between the governor and state board may be reviewed; the role of the governor may be weakened by removing the governor from the board or strengthened by making the governor a voting member. The relationship between the legislature and state board may be reviewed as well; the role of the legislature may be weakened by strengthening the state board’s authority and oversight role or may be strengthened by eliminating the state board of education. A strengthened state board of education would provide an authoritative statewide body with a focus on education as opposed to the legislature, which must spread its resources and energies across many topics. In practice, state boards of education have not proven to be strong, authoritative institutions.

Superintendent of Public Instruction

Section 3 specifies that the superintendent of public instruction serves as the non-voting chair of the state board of education and as the executive director of the MDE. Unlike most other executive department heads, who are appointed by and report to the

⁶ See Citizens Research Council of Michigan, Special Report #360-08, *Michigan Constitutional Issues: Article V – Executive Branch*.

governor, the superintendent serves at the will of the board.⁶ However, the superintendent does head an executive office, sit on the governor's cabinet, and act as a staff officer to the governor.

The Constitutions of 1850 and 1908 provided for the popular election of the superintendent of public instruction, as 14 other states currently do; a constitutional convention might consider returning to an elected superintendent of public instruction. Another consideration may be to allow the governor to appoint the superintendent, which would weaken the role of the state board and give the governor more authority over the superintendent. In 24 states, the chief state school officer (i.e., the superintendent of public instruction in Michigan) is appointed by the state board of education; in 12 states, the position is appointed by the governor.

School Funding

State Support for K-12 Education

Section 2 requires the state legislature to "maintain and support a system of free public elementary and secondary schools as defined by law." Based on the wording in their constitutions, 44 states have experienced constitutional challenges to state education finance. These cases originally argued for school funding equity, but then began to focus on the adequacy of state school finance systems. Decisions rendered by state courts have varied, some siding with plaintiffs arguing for school finance equity or adequacy and others finding

for the states defending their current system.⁷ State courts in general have been more accepting than federal courts of the notion that states provide a constitutional right to education because each state's constitution articulates that state's responsibilities in relation to public education.⁸ The provisions range from language similar to Michigan's ("...maintain and support a system of free public elementary and secondary schools...") to stronger statements, such as public education should be "thorough and efficient," "uniform," or should provide "equal educational opportunity" to all. Kentucky and Texas are examples of states that have had their school finance systems declared unconstitutional using the education article in the state constitution as the basis for the decision. Schools and students in California recently filed a lawsuit claiming that elected officials have failed in their obligation to support public schools.⁹

⁷ Michael A. Rebell. "Educational Adequacy, Democracy, and the Courts." *Achieving High Educational Standards for All: Conference Summary*. Eds. Timothy Ready, Christopher Edley Jr., and Catherine E. Snow, Division of Behavioral and Social Sciences and Education, National Research Council: pg. 226.

⁸ Todd Ziebarth. *State Constitutions and Public Education Governance*. Education Commission of the States: State Notes, October 2000.

⁹ Jill Tucker and Marisa Lagos. "Schools, students sue state over funding." *San Francisco Chronicle*, 21.May.10. www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2010/05/21/MNDV1DHVMC.DTL (accessed 26.May.10).

Michigan courts, however, have not found Michigan's school finance system to be in violation of state law or the State Constitution. In *Governor v State Treasurer* (1972), the Michigan Supreme Court declared the former deductible-millage school aid formula to be in violation of the Michigan Constitution. In 1973, after the U.S. Supreme Court ruled in *San Antonio Independent School District v Rodriguez* that per pupil disparities did not violate the Equal Protection Clause of the U.S. Constitution and the State Legislature enacted a new school aid formula, the Michigan Supreme Court vacated its earlier decision. In *East Jackson Public Schools v State of Michigan* (1984), the Michigan Court of Appeals rejected arguments that the State Constitution provided a fundamental right to education and that it imposed upon the legislature a requirement of equal financial support of local schools. The Michigan Supreme Court refused to hear an appeal.¹⁰

With the passage of Proposal A in 1994, Michigan adopted a new school finance system that accomplished a number of objectives: 1) it reduced local property tax rates for taxpayers across the state; 2) it reduced school districts' reliance on local property tax revenues, thereby increasing their reliance on state tax revenues (e.g., sales and in-

¹⁰ Citizens Research Council of Michigan. *School-Finance Reform in Michigan: Will Judicial Intervention be Next?* Council Comments No. 986, January 1990.

come tax revenues), which tend to be more directly linked to the economy and more volatile; 3) it limited the growth of local property tax revenues through a new property tax limitation which keeps a property's taxable value from increasing more than five percent or the rate of inflation, whichever is less; and 4) it reduced per pupil revenue disparities in districts across the state.

Since the passage of Proposal A, revenues per pupil in the lowest revenue districts have increased 159 percent from \$2,762 in FY1994 to \$7,151 in FY2010. During that time period, revenues per pupil in the highest revenue districts increased only 18 percent from \$10,294 to \$12,159. This has reduced the spending gap between the highest revenue and lowest revenue districts by over 33 percent, from a gap of approximately \$7,500 per student in FY1994 to a gap of only \$5,000 per student in FY2010. The current school finance system has made the amount of revenue provided to educate each pupil less dependent on where each pupil lives and the property wealth of that district. However, the gap in spending across districts has not been erased and disparities in spending continue to exist.

As noted above, the existing language in Article VIII has not yet provided a basis for successfully challenging Michigan's school finance system in the courts. Some advocates of more funding for schools may be impatient with the political process and may seek to reduce per pupil disparities or to increase funding to "adequate" levels through judicial interven-

tion. If this viewpoint is represented in a constitutional convention, proponents might seek to include stronger language than exists in the 1963 Constitution as it relates to the state's responsibility to provide and support a system of free public education.

Prohibition on Aid to Nonpublic Schools

In 1970, Michigan voters added language to Section 2 of Article VIII of the Constitution prohibiting state aid to nonpublic schools. This occurred after a two-year long acrimonious public debate that culminated in Public Act 100 of 1970 (the school aid act), which provided that the state would pay 50 percent of the salaries of certified lay teachers who teach secular subjects in nonpublic schools in fiscal years 1971 and 1972, and 75 percent of such salaries in subsequent years. A 1971 Michigan Supreme Court decision (*Traverse City School District v Attorney General*) found one sentence of the amendment to be in violation of the U.S. Constitution and therefore unenforceable, but validated the remainder of the constitutional amendment and the prohibition on aid to nonpublic schools. Public schools academies (i.e., charter schools) are not affected by this amendment because, while they are organized differently than traditional districts, they are considered to be local public schools and qualify for state aid in a way similar to traditional districts. However, schools of choice and charter schools have blurred the lines between public and nonpublic schools creating greater accep-

tance of alternative sources of education.

Concern about the quality of public schools and the support for a competitive educational environment may result in a review of the existing prohibition against state aid to private schools. It should be noted that a 2000 statewide ballot initiative that would have removed the general prohibition against indirect aid to nonpublic schools and established a voucher system in certain districts was defeated by a 69 to 31 percent margin.¹¹ The U.S. Supreme Court has ruled that school choice and voucher programs pass constitutional scrutiny if the programs provide true private choice and government aid (state and federal) reaches private religious schools only as a result of the genuine, independent choices of private individuals. This is in contrast to programs that provide government aid directly to sectarian schools, which are less likely to pass constitutional scrutiny.¹²

Higher Education

Selection of Governing Boards

The 1963 Constitution established a more uniform system of higher education governance than existed under the 1908 Constitution. The members of the governing boards of the University of Michigan, Michigan State

¹¹ Citizens Research Council of Michigan. *Statewide Ballot Issues: Proposal 00-1 – School Choice*. Report 331, September 2000.

¹² *Zelman v Simmons-Harris*, 536 U.S. 639.

University, and Wayne State University are elected at large, while the governing boards of the ten other four-year institutions are appointed by the governor with the advice and consent of the state senate. The 13 university boards¹³ consist of eight members each.

A constitutional convention may review the method of selecting board members for the 13 four-year institutions. Consideration may be given to having the governor appoint members to all 13 governing boards rather than just the ten currently appointed by the governor. Gubernatorial appointment of members to the boards of ten of the higher education institutions has appeared to work well. Furthermore, voters face difficulty in judging the qualifications of candidates for the elected higher education governing boards of the three largest universities and in evaluating the votes and actions of current board members due to lack of

¹³ Michigan's 13 public university include: Central Michigan University, Eastern Michigan University, Ferris State University, Grand Valley State University, Lake Superior State University, Michigan State University, Michigan Technological University, Northern Michigan University, Oakland University, Saginaw Valley State University, University of Michigan (includes an Ann Arbor campus, Dearborn campus, and Flint campus), Wayne State University, and Western Michigan University. Sometimes the three University of Michigan campuses are referred to as three separate public universities, but they are governed by one university board.

voter knowledge of candidates, board members, and the governing boards themselves. This can lead to ballot roll-off, where voters fail to vote for offices like university governing board members that are further down on the ballot, and/or voting based solely on name recognition or party affiliation. These issues in addition to concern with the long ballot may focus attention on this issue at a constitutional convention.

It is important to note, though, that some may view the election of the governing board members of the state's three research universities as vital to the independence of those universities. A provision for electing the regents of the University of Michigan goes back to the 1850 Constitution; the 1908 Constitution contained provisions for electing board members for all three of the largest universities. At the 1961 Constitutional Convention, one delegate stated "...it's of the greatest importance that you maintain the election of the boards of control of the 3 large universities. It gives the boards an independence that they would not have were they appointed by the governor, and this at times could be important."¹⁴

Planning and Coordination

An effort was made in the 1963 Constitution to provide for planning and coordination of higher education through the state board of education (Section 3 states that the state board "shall

¹⁴ State of Michigan Constitutional Convention 1961: Official Record, Volume I, pg. 1143.

serve as the general planning and coordinating body for all public education, including higher education"). The state board's authority as it related to higher education was emasculated by language at the end of Section 3 which indicates that the authority of boards of higher education institutions to supervise their respective institutions is not limited by Section 3. In *Regents of the University of Michigan v the State* (1975), the Michigan Supreme Court found that the state board of education's authority is advisory and the autonomy of the universities remained unchanged.

Michigan has 13 independent, autonomous public universities with governance undertaken by separate institutional governing boards, and 28 public community colleges with locally elected governing boards. Michigan's organization of its public institutions of higher education is unique. Twenty-four states operate under one or two consolidated statewide governing board(s); 24 states have a statewide coordinating board that serves as liaison between state government and the governing boards of individual institutions; and only two states (Delaware and Michigan) operate without a statewide coordinating or governing board. "Michigan is the only state with both a large population and a large number of institutions that has neither a consolidated governing board nor a coordinating board. Michigan's unique decision to reject centralized governance or coordination is reflective of the state's long history of guarding institutional autonomy."¹⁵ Critics of the current

system claim that it can lead to mission creep and duplicative college programs across the state. Advocates stress the importance of institutional autonomy.

A statewide university system would make statewide planning and coordination of higher education easier and may increase efficiency by coordinating the programs offered by different universities and colleges across the state. Even if the current system of independent universities and colleges is kept, statewide planning and coordination of higher education may be a subject for review in a constitutional convention just as it was at the 1961 Constitutional Convention. As indicated above, efforts to give the state board of education a planning and coordination role have not been successful. A constitutional convention may wish to revisit that goal. One alternative short of a state university system might be a separate state board for post-secondary educa-

¹⁵ Carolyn Waller, Ran Coble, Joanne Scharer, and Susan Giamportone. North Carolina Center for Public Policy Research. *Governance and Coordination of Public Higher Education in all 50 States*, 2000: pgs 49-50.

While Article VIII has not been amended heavily over the years and does not have many unconstitutional or inoperable provisions, a review of it highlights a number of issues that would likely be debated at a constitutional convention, relating to both education governance and funding. Broad

tion that would be responsible for planning and coordination.

Community Colleges

Section 7, which was new to the 1963 Constitution, requires the legislature to provide by law for the establishment and financial support of public community colleges governed by locally elected community college boards, and to provide for a state board for public community and junior colleges. The Constitution provides that the board consist of eight members appointed by the state board of education. The financial support provision is so general that it has had little or no effect on the financing of community colleges.

Libraries

Section 9 requires the legislature to provide for the establishment and support of public libraries. It specifies that libraries should be available to all residents and should be supported by fines assessed and collected for any breach of the penal laws in several counties, townships, and cities (state law specifies that the proceeds of all fines for any breach of the penal laws of Michigan when collected in any county and not already apportioned shall

be apportioned by the county treasurer in accordance with the directions of the state board for libraries¹⁶).

A constitutional convention may wish to review this section of the Constitution and debate whether the establishment and support of public libraries belongs in the Constitution. Some may feel that with recent technological advancements, particularly with the advent of the Internet, libraries are changing rapidly to meet the needs of residents and therefore should not be established in the Constitution with a dedicated source of funding because it is a more static document that is less amenable to adjustments than state law. Others, however, would stress the importance of public libraries in providing services to those without access to books and technology at home and the many cuts libraries have faced over the years to reinforce a need to establish libraries with a dedicated source of funding in the Constitution.

¹⁶ Distribution of Penal Fines to Public Libraries, Michigan Public Act 59 of 1964, MCL 397.32.

Conclusion

issues likely to be discussed include the relationship among and roles of the governor, legislature, state board of education, and superintendent of public instruction, in the governance and funding of K-12 education; the language outlining the state's responsibility to provide for and fund education;

statewide planning, coordination, and governance of higher education; and the establishment and support of public libraries. While there are likely differing viewpoints on these issues, there is nothing in Article VIII that has risen to the level of crisis that would suggest modification is necessary.



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ARTICLE IX – FINANCE AND TAXATION

In Brief

At the November 2, 2010 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the 1963 Michigan Constitution. The question appears on the ballot automatically every 16 years as required by the Constitution. The Constitution provides that a convention would convene in Lansing on October 4, 2011. If the question is rejected, it will automatically appear on the ballot again in the year 2026.

The Citizens Research Council of Michigan takes no position on the question of calling a constitutional convention. It is hoped that examination of the matters identified in this paper will promote discussion of vital constitutional issues and assist citizens in deliberations on the question of calling a constitutional convention.

The power to tax and the disposition of the revenues collected involve two of the essential characteristics of civil government. This analysis examines several provisions in Article IX, "Finance and Taxation," of the Michigan Constitution and issues related to them that a constitutional convention might consider: state and local tax limitations; state tax structure; local tax structure; pension and other post-employment benefit funding; state borrowing; and, earmarking of state revenues for specific public programs. Neither the list of foregoing issues nor the presentation that follows is intended to be exhaustive.

Introduction

Article IX has been the subject of the most attempts to amend the Constitution (29 proposed amendments), indicating the importance of the issues contained therein. The article has been successfully amended 10 times, most recently in 2006. The two

most significant amendments were Proposal E of 1978 (Headlee Amendment) and Proposal A of 1994; both dealt with multiple sections and both created tax and/or spending limitations.

Constitutional Convention Issues

A key purpose of a state constitution is to limit the governmental power of the state. That principle is of particular importance with respect to the power of the government to tax and the interest of the people to limit that power. Article IX, "Finance and Taxation," of the Michigan Constitution contains various limitations upon the otherwise plenary power of the legislature. These limitations range from prescribing the proportion of value at which property may be taxed, to requiring voter approval before units of local government may increase certain taxes and indebtedness, to limiting the forms and rates of taxation (state and local), to specifying how the revenues from certain taxes are to be expended. Many of these

provisions were contained in the Constitution when it was adopted, while others were added subsequently through amendments approved by voters.

The level of detail which the constitution should contain with respect to taxation was an area of considerable disagreement at the 1961 Constitutional Convention. Many delegates believed that the Legislature should be free to determine the level and type of taxation as circumstances arose, while other delegates expressed the view that the Legislature should not be allowed complete discretion. In the end, convention delegates agreed to provide the Legislature with a "power of the purse" that is bound by consti-



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tutional limitations pertaining to the type of taxes that may be employed and the rates of certain taxes that may be levied. Subsequent amendments to the Constitution added further limitations to this foundational legis-

lative power. A new convention might begin by reexamining this fundamental question about the proper role of the state constitution relative to the Legislature's "power of the purse."

In addition to the broad concerns

surrounding the level of detail contained in Article IX that a constitutional convention would be expected to address, Article IX contains several specific provisions upon which a convention might wish to focus its attention.

State Tax and Revenue Limitations

With the exception of the limitations placed on it by the Constitution in Article IX, the Michigan Legislature unilaterally exercises the "power of the purse" without limitation when it comes to state fiscal matters. While often thought of as a single power, the "power of the purse" consists of two distinct, but related, powers designed to serve as a check and balance between the legislative and executive branches of government. Through the power to tax (Section 1), the Legislature is able to transfer economic resources from individuals and businesses to the state government to finance public goods and services and to redistribute wealth among individuals and private entities. This power is the sole province of the legislature and cannot be "surrendered, suspended, or contracted away" (Section 2). The logical complement to the power to collect taxes is the power to direct state spending through appropriations, which also rests entirely with the Legislature (Section 17). Combined,

the power to tax and the power to appropriate provide the legislative branch with the authority to command and guide state financial resources.

Prohibition on Graduated Income Taxes

A graduated or "progressive" income tax taxes higher income earners at proportionately higher rates than lower income earners. Section 7 prohibits the imposition of an income tax, graduated as to rate or base, by the state or any of its subdivisions. This provision was new to the 1963 Constitution. For all practical purposes, this provision has effectively served to limit income taxes levied at both the state and local level, and levied on both individual and business income, to those that involve a single or "flat" rate. This provision neither requires an income tax nor does it limit the maximum rate allowed if such a tax is authorized by the Legislature. These decisions are left to the discretion of the Legislature.

While the "flat" tax rate requirement of Section 7 is fairly straightforward, the section's prohibition on a "graduated" tax base is less clear. Statutory implementation of an income tax, whether for individuals or for businesses, can have the practical effect of graduating the tax base. Michigan currently uses federal Adjusted Gross Income (AGI) together with various credits and exemptions to determine the basis of taxation, effectively resulting in a "graduated" state income tax base. During the 1961 convention, there was considerable discussion about the use of federal AGI in light of the proposed new language; however, the convention delegates noted that federal AGI could be used without violating the constitutional provision. The delegates also discussed the implications of the use of credits and exemptions in light of the new prohibition and believed that the legislature could prescribe their use. Over time, Michigan courts have upheld the use of exemptions, exclusions and credits, but

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on the grounds that they apply to all taxpayers without regard to income. However, it is noteworthy that the Legislature also has enacted exemptions which are based upon income. The amount of the homestead property tax credit is based on the income of the tax filer, as is the amount of the earned income tax credit that a taxpayer can claim. [Note: Although the homestead property tax credit is applied against income tax liability, the credit is designed to provide property tax relief and therefore some contend that it cannot violate the Section 7 prohibition.]

The prohibition against a “graduated” income tax was a contentious issue for a period of time following adoption of the new constitution. Proposals to allow graduated income taxes were defeated in 1968 (Proposal I), 1972 (Proposal D), and 1976 (Proposal D). In recent years the issue has reemerged in the public policy debate in Lansing. Elimination of the restriction has been proposed to address the state’s ongoing structural budget deficits. With the same level of income growth, revenues from graduated income taxes can grow faster than the revenues from flat rate taxes if incomes grow faster for high income taxpayers than for lower income taxpayers, which has been the case in recent years.

According to the Federation of Tax Administrators, as of January 2010, Michigan was one of seven states (Colorado, Illinois, Indiana, Massachusetts, Pennsylvania, and Utah) that had a broad-based

“flat” rate individual income tax rate. [Note: The 2010 Michigan individual income tax rate is 4.35 percent.] Thirty-four states that have an individual income tax use a graduated rate system and the rates vary from a low of 0.36 percent in Iowa to a high of 11 percent in Hawaii. In addition, the number and range of the various tax brackets used in each state differ markedly, although most have between three and five brackets. Seven states (Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming) do not have an individual income tax and two states (New Hampshire and Tennessee) only apply the tax to dividend and interest income.

A constitutional convention would have an opportunity to revisit the prohibition on graduated income taxes and to consider factors that affect uniformity of the tax base. A convention would likely consider the issue in light of the fiscal challenges facing state and local governments and the potential for a graduated income tax to increase tax yields.

Limitations on Sales Taxation

While the current six percent state sales tax is often viewed as a single tax, it is actually two separate taxes – a discretionary tax and a mandatory tax. Section 8 limits the rate of the sales tax on gross taxable sales of tangible personal property to four percent and requires the levy of an additional two percent tax on gross taxable sales. Authorization for the legislature to levy the discretionary tax, at a rate of up

to four percent, mirrors the language that was included in the 1908 Constitution and carried forward to the 1963 Constitution.

Under the General Sales Tax Act, the legislature has authorized a discretionary tax at a rate of four percent, with 60 percent of the proceeds constitutionally earmarked to the School Aid Fund and 15 percent of the proceeds constitutionally earmarked for distribution to cities, villages, and townships, on a population basis. The mandatory two percent tax was added by amendment in 1994 (Proposal A) and is authorized in the General Sales Tax Act. All proceeds from the mandatory tax are dedicated in Section 8 to the School Aid Fund.

According to the Federation of Tax Administrators, as of January 2010, all but five states (Alaska, Delaware, Montana, New Hampshire, and Oregon) levied a state-wide sales tax, with rates ranging from four percent (seven states) to 8.25 percent (California). Twelve states, including Michigan, levied the tax at a rate of six percent.

The current limitations on the sales tax rate are likely to be considered in light of the state’s ongoing fiscal challenges to balance annual budgets and the desire to levy local-option sales taxes (discussed below).

State Revenue Earmarking

Earmarking, or dedicating revenues, refers to the practice of reserving revenues from specific sources for specific functions. In the absence of such revenue res-

ervations, resources flow to a government's general fund to be allocated through an appropriation process. Earmarking may occur as a fixed dollar amount or as a percentage of the revenues from a given source. In Michigan, earmarking occurs through both statutory provisions, which can be modified by the Legislature, and through constitutional provisions that require a vote of the people to alter. Constitutional earmarking is the most restrictive form and effectively limits the discretion available to the Michigan Legislature in exercising its "power of the purse" with respect to authorizing appropriations.

Article IX contains many earmarking provisions that dedicate specific percentages of revenues from different taxes to a variety of functions (See **Table 1**).

In addition to earmarking state taxes, other state revenues are controlled by constitutional earmarking provisions including various fee revenue for natural resources, state parks, and recreation purposes (Sections 35, 35a, 40, 41, and 42). In some cases, earmarking creates a separate, unique state fund (e.g., trust fund) for the purposes of receiving specific revenues and the use of the revenues is strictly controlled by constitutional language.

Some of the current earmarking provisions pre-date the 1963 Constitution and were incorporated, or expanded, in the new document. Other dedications have been added to the current constitution through amendment, with much of the amendatory activity occurring between 1994 and 2006. In terms of the

amount of revenue associated with the various provisions, the majority of the dollars earmarked pertain to provisions included in the original 1963 document.

A high level of earmarking, both constitutional and statutory, contributed to the calling of the 1961 Constitutional Convention. In the years immediately preceding the new constitution, upwards of 70 percent of Michigan state tax receipts were dedicated to specific purposes, either through law or the Constitution. Following the adoption of the new Constitution and by the late 1960s, this figure dropped to around 45 percent. Gradually, the amount of state tax revenues dedicated to specific purposes declined and remained in the 40 percent range. The school finance reforms of the mid-1990s (Proposal A of 1994) in-

Table 1
State Tax Constitutional Earmarking Provisions and Fiscal Year 2009 Collections
(Dollars in Millions)

<u>Tax</u>	<u>Earmark / Purpose</u>	<u>Total FY2009 Collection</u>	<u>Earmarked Amount</u>
Sales Tax			
4% rate (Sec. 11)	60% - schools	\$4,083	\$2,450
4% rate (Sec. 10)	15% - cities, villages, and townships	4,083	612
2% rate (Sec. 8)	100% - schools	2,042	2,042
Use Tax			
2% rate (Sec. 8)	100% - schools	431	431
Gasoline Tax (Sec. 9)	100% - transportation	837	837
Diesel Fuel Tax (Sec. 9)	100% - transportation	95	95
Vehicle Registration Tax (Sec. 9)	100% - transportation	841	841
Minor Transportation Taxes (Sec. 9)	100% - transportation	20	20
Tobacco Products Tax (Sec. 36)	6% - health care	NA	NA

Source: Michigan Department of Treasury, *Annual Report of the Michigan State Treasurer FY2009*; CRC calculations

creased the level to closer to 60 percent and the level has fluctuated little since that time. Today, about 60 percent (34 percent through the Constitution and 26 percent via state law) of the total state tax revenue (\$23 billion FY2009) is earmarked and outside of the full control of the Michigan Legislature.

State Revenue Limit

In addition to the restrictions placed on individual taxes and the disposition of certain tax proceeds, Article IX also contains an overall state revenue limitation each fiscal year (Section 26), set to a fixed percentage (9.49 percent) of state personal income. This first-ever Michigan state revenue limit was added to the 1963 Constitution as part of the Headlee Amendment in 1978, which added ten new sections (25 through 34) to Article IX and

amended section 6. The revenue limit generally has been noncontroversial, chiefly because it was imposed when state revenues as a percentage of personal income were at a peak. Section 26 authorizes an adjustment in the revenue limit when programs are transferred between governmental levels by constitutional amendment. Proposal A of 1994 transferred a substantial amount of school finance responsibility from the local level to the state. However, Proposal A did not specify that an adjustment in the revenue limit was authorized.

In FY2009, state revenue collection subjected to the Section 26 limitation was \$7.7 billion below the constitutional cap. Since the transfer of the majority of education funding responsibility to the state in 1994, the revenue cap has been exceeded in three years. The first time was in FY1995, following the

full implementation of the new school financing system that relied on increased state taxation in exchange for a reduction in local property taxes. The revenue limit also was exceeded in FY1999 and FY2000, due in large measure to the strength of the state economy and attendant revenue collections. [Note: In each year the cap was exceeded, the amount was less than the one percent threshold included in Section 26 that requires pro-rata taxpayer refunds of the excess revenue. The excess revenue was deposited in the state's rainy day fund.]

In addition to considering continuance of such a limitation, a constitutional convention might wish to determine whether a proposed constitutional amendment which transfers governmental programs between levels of government must specify whether the revenue limit is to be adjusted.

State Borrowing

Establishment of provisions to limit state borrowing in the interest of protecting the credit of the state has been a topic of discussion at every constitutional convention since 1835. The topic of borrowing is covered extensively in the 1963 Constitution, including limits on the type of borrowing the state can engage in, requirements for voter approval, and a limitation as to the amount of debt that may be issued. The basic limitation on state debt is contained in Section 12, "No evidence of state indebtedness shall be issued except debts authorized pursuant to this constitution." A

constitutional convention would likely examine the state's borrowing experience in light of the operation of several constitutional provisions authorizing the issuance of debt.

General Obligation Debt

Section 15 and Section 16 provide limitations on the issuance of long-term general obligation debt, the repayment of which is backed by the pledge of the full faith, credit, and taxing powers of the state. Section 15 provides that the state may borrow money pursuant to an act passed by two-thirds of the members in each

house of the Michigan Legislature and subject to the approval of the people as to the purpose of the debt, the amount, and the method of repayment. Section 16 (discussed further below) provides the state with the authority to issue debt for the purposes of making loans to school districts. As of September 30, 2009, a total of \$1.7 billion in general obligation debt was outstanding.

Voter Approval

General obligation debt is different from state non-general obligation debt, which is issued pursuant to sections 9 and 13, in two

important ways. First, whereas general obligation debt service is financed by the General Fund, debt service (principle and interest) payments are financed with dedicated restricted revenues. For example, transportation-related debt is financed by state fuel and vehicle registration taxes. Second, the issuance of non-general obligation debt does not require the approval of the Michigan electorate. The Section 15 requirement for voter approval has been interpreted by the courts to apply only to general obligation debt. A total of \$19.7 billion in non-general obligation debt was outstanding as of September 30, 2009. Voter-approved debt represented just eight percent of the total long-term outstanding state debt at the end of FY2009. A constitutional convention might consider whether or not voter approval should be a prerequisite for all state debt, regardless of the method of repayment or type of pledge.

Arguments in favor of requiring all state debt to be approved by the electorate contend that it serves as a safeguard against the state becoming over-leveraged and protects against defaults. It is argued that citizens, regardless of the nature of the borrowing, ultimately finance the debts of the state in the form of higher taxes or special charges and therefore they should have a voice in approving that debt.

Opponents of requiring voter approval of all state debt contend that long-term borrowing is a critical financial tool of the state and widely used to support vari-

ous transportation, housing, and infrastructure projects. Because of the complex and extensive use of long-term borrowing, requiring voter approval will hamstring state officials and delay public service delivery. Arguments against voter approval also center on the fact that revenue-dedicated debt is authorized by the state legislature, which safeguards the public interest.

Short-Term Borrowing

In addition to the long-term general obligation borrowing authorized by Sections 15 and 16, Section 14 allows the state to issue short-term debt (less than one year) backed by the full faith and credit of the state, commonly referred to as “cash flow borrowing.” This type of borrowing is used to help manage the cash needs that result from timing differences between receipts and outlays. Section 14 limits cash flow borrowing to “15 percent of undedicated revenues received by the state during the preceding fiscal year” and requires repayment by the end of the fiscal year.

Since FY2003, Michigan has relied heavily on this type of borrowing to manage the daily cash needs of its major funds, the General Fund and School Aid Fund. Short-term notes are generally issued very early in the fiscal year and retired near the end of the fiscal year. For several years prior to FY2003, the state was able to avoid external short-term borrowing, and the associated costs, because the combined General and School Aid Fund cash balance was positive throughout the year. However, the state’s on-going

structural budget deficits resulted in the deterioration of these positive balances, effectively requiring the major funds to borrowing internally from other state funds and issue short-term notes to meet cash obligations. A constitutional convention would likely examine the state’s recent use of this type of borrowing in light of the persistent budget problems and evaluate whether or not the cap should be maintained, decreased, or increased.

Loans to School Districts

Article 16 provides that the state may borrow for the purpose of making loans to school districts, a provision that is statutorily implemented as the school bond loan fund (SBLF). Provision for this program was first introduced to the Michigan Constitution by amendment in 1955, and further amended in 1960. The 1963 Constitution continued the provisions in effect with minor modification.

The SBLF lets school districts borrow from the state the difference between what their debt levy generates and the amount actually needed to make their annual bond payments. In essence, the SBLF allows school districts to borrow under the state’s credit rating. In practical terms, the SBLF caps the maximum millage rate that can be levied and extends the repayment over a longer period of time. When adopted, the idea was to allow growing school districts to bond for more than their existing tax bases could support with the expectation that over time their tax bases would grow and eventually the bonds and the state loans would be repaid. It makes

it easier for school districts to convince voters to approve bond sales because it reduces millage levies in the near term in exchange for paying the loans over a longer period, thus pushing part of the cost on to future taxpayers.

A constitutional convention may wish to address several issues related to the SBLF. First, the very structure of the program has been criticized as contributing to urban sprawl. While the program could be justified in the 1950s, as school districts struggled to provide space to “baby boomers,” population growth in the state has reached a plateau. Today most of the districts forecasting growth in student populations are on the urban fringes. While the full cost of repaying the bonds needed to build

new schools may serve as a deterrent to urban sprawl, the SBLF lowers that cost in the near term.

Although the SBLF is structured to help growing districts, it is not statutorily implemented to serve only such districts. Today, the primary constituency is school districts with relatively low property wealth. Some of these districts are effectively enabled to “game” the system by perpetually borrowing. Once sufficient borrowing has occurred to get a district to the maximum required millage rate, the further incurrence of debt comes at no additional cost to existing taxpayers. Instead, it simply prolongs the repayment periods. After authorizing the sale of \$1.5 billion of bonds in 1994, voters in the De-

troit Public Schools approved the issuance of \$500.5 million of bonds in 2009. The 2009 bond authorization comes at no additional expense to existing taxpayers, but will prolong the period of time that will be needed to retire this debt.

Even if the focus of the SBLF has shifted to helping the state’s poorer districts, some of these districts have been unable to participate. Because the tax bases of some districts are sufficiently low, it is not foreseeable that state loans could ever be repaid given a realistic outlook for growth in the district’s tax base. Thus, some relatively poor districts like Hamtramck have been turned away, while wealthier districts have benefited from the program.

Local Government Finance

Throughout Michigan’s history, local governments have developed a relatively heavy reliance on the property tax as a source of local revenues. As the only source of local revenue available to local governments throughout most of this history, overlapping layers of government were often left to compete with one another for tax resources in the form of escalating property tax rates. For property taxpayers, the result was a growing property tax burden, weighted heavily by levies for school operating purposes.

Responses to the increasingly heavy property tax burden came on several fronts. First, a series of amendments to the state Constitution embedded details of the

tax’s mechanics and tax rate and base limitations in the state’s supreme law. A secondary response was the growth of state aid to local governments in Michigan as a means of compensating local governments for taxes collected at the state level that either were formerly collected at the local level or that preempted local collection of that tax. Over the years state aid has grown into the role of supplementing the reduced property revenues resulting from the tax limitations as well as enabling local governments to keep property tax rates lower than they otherwise might have been. A third response was the enactment of legislation to authorize collection of taxes other than property taxes to ease the prop-

erty tax burden. However, few municipalities have adopted these alternate sources and there has been little significant reduction of the property tax burden by those that have adopted them. Each of these developments is explored below.

Detail and Complexity

Local governments’ reliance on property taxes and the long-standing distrust of the government’s power to tax has led Michigan to engrain a great deal of detail into the Constitution. The provisions specifying the mechanics of property taxation contained in the Michigan Constitution are far more detailed than provisions for many other

issues. Sections 3, 4, 5, 6, and 31 of Article IX relate to varied aspects of property taxation.

The inclusion of finite detail in the state Constitution results in a great deal of complexity in the actual administration of the property tax. Administration of the property tax, which tends to be complex by its very nature, is made more complex as the governments and taxpayers wrangle over the meaning of constitutional terms, their application to specific situations, and the ability of the language to be adapted to changing times. This already complex system has been further complicated by layering tax limitations on top of existing provisions. A constitutional convention may want to begin with a goal of eliminating some of the complexity of the property tax system.

Local Tax Limitations

The property tax is among the least popular of the major taxes because: 1) it is paid in one or two lump-sum payments each year; 2) the base of the tax is often the primary possession of residents and businesses (i.e., individuals' homes and the buildings in which the businesses are located) and 3) it is not linked to income and taxpayers need to pay even when their income declines or ceases all together.

Dissatisfaction with the burden placed on taxpayers by the property tax has led to the creation of several limitations in Article IX. Taxes can be limited by control-

ling growth of the tax base or the tax rate applied to the base. Michigan voters have adopted both methods of limiting property taxes.

Tax Rate

The first limit to property taxes came in 1932 when the 1908 Michigan Constitution was amended to create a 15 mill aggregate limit on all jurisdictions levying property taxes. When the 1963 Constitution was adopted, the 15 mill limitation was maintained and a new 18 mill limit was introduced to eliminate the need for county tax allocation boards. A separate provision was added allowing voters to increase the limitations up to 50 mills for up to 20 years (Section 6).

The principal shortcoming of these tax limitations is that so much millage is excluded that the limitations have been rendered virtually meaningless. Debt service millage levied by local governments is excluded from the 15, 18 and 50 mill limitations, as is operating millage imposed by any city, village, charter county, charter township, charter authority or other authority, the tax limitations of which are provided by charter or by general law. These exclusions explain why aggregate property taxes levied on some parcels of property exceed fifty mills.

Actions to remedy the shortcomings of the tax limitations of the original 1963 Constitution were taken in 1978 as part of the Headlee Amendment. First, the

Headlee Amendment created a requirement for local governments to obtain voter approval for the levy of new taxes or for increasing the rate of an existing tax above that which was authorized at the time of the amendment (Section 31). Additionally, a property tax rate rollback provision was established. If the state equalized value of existing property (exclusive of new construction and improvements) in a taxing unit increases more rapidly than inflation, the maximum authorized property tax rate for the taxing unit is reduced so that the total tax levy on existing property is no greater than the prior year levy adjusted for the growth in inflation. This limitation is applied to each taxing unit as a whole, rather than to individual parcels of property within the taxing unit.

The principal shortcoming of these provisions was the application of the limitation to each taxing unit as a whole rather than to individual parcels of property. While the total tax levy of the taxing unit could not increase faster than the rate of inflation without a tax rate override vote, the value of individual parcels could, and often did, appreciate at rates faster than the rate of inflation. It was not unusual to find that the tax burden reduction caused by the tax rate rollbacks, which were calculated based on a unit-wide tax base, were not sufficient to offset the growth in tax burden property owners assumed because of appreciation of their properties.

Property Tax Base

After repeated attempts to limit property taxation by controlling tax rates, Proposal A of 1994 amended Section 3 to introduce a limitation on growth of the tax base. School operating taxes were excluded from the uniformity requirement and taxable value was created as a new measure of tax base. The calculation of taxable value limits annual increases in the value of individual parcels of property to the lesser of five percent or inflation. Property is reassessed at the proper percentage (50 percent) of true cash value when ownership transfers.

Introduction of taxable value as the new tax base created a system in which neighboring properties that are alike in every way but the year of acquisition, can be taxed at starkly different amounts depending on when ownership was last transferred.

Overlapping Limitations

A constitutional convention likely would be asked to address Michigan's overlapping property tax limitations. Each introduction of new property tax limitations has been made without eliminating or amending the existing property tax limitations already in the Constitution, thereby creating a high level of complexity and detail.

Neither the 1978 tax limitations nor the 1994 amendments altered the 15/18/50 mill limitations. Proposal A of 1994 excluded school operating taxes from the 15/18 mill tax limitations, but did not amend those limitations to reflect the change. Because the excluded school op-

erating millages were levied at different tax rates, the limitations that now apply to unchartered counties and unchartered townships vary, which creates confusion at sufficient levels as to become unenforceable.

Proposal A of 1994 also did not amend the Headlee Amendment's property tax limitations, nor did it specify how the Headlee Amendment provisions should be applied to the new measure of taxable value and the "pop ups" in value that occur when ownership is transferred. The resulting statutory implementation of these limitations has had a compounding effect creating greater aggregate limitation than either Headlee or Proposal A was designed to achieve individually.

Convention delegates would likely be asked to simplify the property tax limitations into a single enforceable system, although such a task is better suited to the crafting of statute than that of drafting a constitution.

Taxable Value

A constitutional convention might turn its attention specifically to the use of taxable value as the applicable measure of the property tax base. Challenges to modified value acquisition systems of valuing property (such as taxable value in Michigan) because they violate principles of uniform taxation have been upheld on the grounds that states have a rational interest in neighborhood preservation, continuity, and stability.¹ Constitu-

tional convention delegates might ask whether those are in fact policy issues that need to be addressed through Michigan's tax code. Does the need to pursue those goals outweigh the longstanding policy of uniform taxation?

If so, convention delegates might further ask whether a taxable value system of valuing property should be applied to all classes of property, or solely to residential property? The consequences of applying taxable value to non-residential properties are: 1) revenue loss for the state and local governments; and 2) the provision of tax advantages to businesses that have owned the land and buildings longer than other competing businesses. Ownership of residential properties tend to transfer much more frequently than that of commercial and industrial properties, and ownership in each of those classes transfer more frequently than that of agricultural properties. It could be argued that the use of taxable value as the tax base for non-residential properties is detrimental both to governmental finance and to economic development.

State Aid

A secondary response to local governments reliance on property taxes as the primary source of local government revenues has been the development of an extensive system of state aid to local governments.

The state provides a broad range of financial support to its local units of government—cities, vil-

¹ *Nordlinger v. Hahn*, (505 U.S. 1) 1992.

lages, townships, counties, school districts, and community colleges. Three-fifths of all state-levied taxes, fees and other charges are paid to local units of government. The majority of this is required by Sections 8, 10, and 11 of Article IX in payments to school districts, cities, villages, and townships.

Advocates of such a system argue that the collection and distribution of state revenues to local governments lessens the reliance on the property tax and diversifies the finances of local governments. It creates greater equity and efficiency in the financial system by distributing funds in manners different than the origins of the tax collections. It has allowed local governments to keep property tax rates lower than otherwise might have been the case. Furthermore, collection of certain taxes (i.e., sales taxes) by the state is more efficient than would be the case if each local government collected taxes independently.

Alternatively, critics might suggest that state aid has perpetuated an inefficient provision of local government services. The subsidy of local governments allows them to operate independently rather than seeking economies and efficiencies through consolidation and joint service provision. It was after the state began cutting statutory state revenue sharing that local governments intensified their efforts to seek efficiencies in the provision of services through tools such as intergovernmental collaboration. When the state was unable to maintain school aid, the dialog related to school district consolidation intensified.

A constitutional convention might begin an examination of intergovernmental finances by asking whether the requirements that the state provide aid to its local governments should continue to be engrained in the constitution. The complete elimination of these provisions would free the state legislature to focus on state services (including aid to local governments through a statutory system of sharing state revenues if the legislature so chooses). Alternatively, state aid could be replaced with a system of regional funding structures that would allow different regions of the state to focus on their own particular needs.

Depending on how a constitutional convention deals with the state aid provisions, it may also look at the safeguards that were inserted into the Constitution to protect against erosion of state aid. Separate amendments have attempted to prevent diminution of state aid and transfers of responsibility for service delivery without adequate state funding to meet those increased local costs.

Sections 29 and 30 of the Headlee Amendment were thought to be necessary because a companion section, Section 26, limits state government revenues in any given year to a fixed percentage of total personal income. Drafters of the Headlee Amendment anticipated that state policymakers might attempt to mitigate the effects of the revenue limit by shifting to units of local government responsibility for programs previously funded by the state.

State Aid to Local Governments

Section 30, added to Article IX by

the 1978 Headlee Amendment, requires the state to maintain the level of state spending paid to local governments at a level at least equal to what was paid in 1978. Since adoption of Proposal A in 1994, when the state assumed primary responsibility for funding school operations, state spending to local governments has been well in excess of the Section 30 funding requirement. A constitutional convention might consider whether such a requirement should be continued in a revised constitution, and if so, at what level.

Mandates on Local Governments

Section 29 requires the state to pay in subsequent years at least the same proportion of costs for activities or services required of units of local government as it paid in 1978, the year in which the amendment took effect.

The history of Section 29 suggests that, if it is desirable to extend such a provision into a new constitution, changes will be needed to make it work better. First, notwithstanding a few lawsuits that have been filed to challenge funding changes by the state, the provisions of Section 29 have been wholly disregarded. A process for identifying mandates and providing disbursements to fund state requirements for local governments was never implemented. The system created to identify existing mandates fell apart. Mandates were enacted without sufficient funding.

Additionally, it will be necessary to provide greater definition to the types of legislative directives

that would warrant the accompaniment of state funding. State and local officials have tended to define the concept of “activities and services required of units of Local Government by state law” differently. While the local government officials tend to look upon such requirements as any law or regulation that causes activities and services to be provided in a specific way, state officials, and the courts, have used a much narrower definition that defines mandates to include only those laws and regulations that

apply to all local governments of a type (i.e., all school districts, all counties, etc.).

Examination of the constitutions and laws of other states reveals 28 states with constitutional or statutory requirements that state funding accompany any state laws that mandate local government services and activities.² A

² See CRC Report 355, *Reforming the Process for Identifying and Funding Section 29 Mandates on Local Governments*, July 2009.

constitutional convention may address mandates in one of three ways: 1) examine the provisions of other states with similar limitations for best practices with the goal of strengthening the restrictions on unfunded mandates; 2) join the 22 states without such requirements for state funding of local government mandates; or 3) keep the current provision in place but amend it so it serves as a meaningful restriction.

Alternative Tax Sources

The decline in state shared revenues coupled with a contraction of the property tax base because of departures of people and businesses from Michigan and the nationwide bursting of the housing bubble has heightened the desire among local government officials for alternative funding sources to supplement or replace the property tax.

As was detailed in CRC’s analysis of Article VII³, one way in which the state has weakened the constitutional grant of home rule powers to local governments was by limiting their ability to levy local taxes. Article VII, Section 21 provides that “Each city and village is granted power to levy other taxes for public purposes, subject to limitations and prohibitions provided by this constitution or by law.” Unlike many other

states with strong home rule provisions that do not limit their local governments in this way, Michigan laws require an authorizing state law for local governments to levy alternate taxes.

Cities have local option income taxes at their disposal, but neither counties, villages, townships, nor school districts currently can use this or other funding sources. Independent of the article on local government, a constitutional convention might opt to include authorization for alternative funding sources for local governments in the article on finance and taxation. In doing so, a constitutional convention might consider whether the current provisions related to the sales tax collude to prohibit local governments from levying sales taxes.

Local Sales Tax Prohibition

Local government officials and proponents of regional service provision have investigated the

possibility of local-option sales taxes in Michigan. The sales tax rate limitation in Section 8 appears to not permit local sales taxes. The primary impediment arises from a conclusion that the local taxes would be subject to the aggregate rate limitation provided in the section. The current constitutional language is unclear whether the rate limitation was intended to apply only to a state sales tax or also to a local sales tax. According to a 1970 state Attorney General opinion, the legislature can only authorize a local sales tax by amending the state Constitution, since the voters who ratified the Constitution intended to designate the sales tax “as a state sales tax.”⁴ Furthermore, even if the state were to yield part of its current taxing authority to local governments, revenues collected from local

³ See CRC Report 360-10, *Article VII – Local Government*, June 2010.

⁴ OAG, 1969-1970, No. 4694.

sales taxes would be subject to the same dedication requirements found in sections 8, 10, and 11 (discussed earlier).⁵

It is worth noting that the wording of Section 8 stands in contrast to that of Section 7 which prohibits “the state or any of its

⁵ See CRC Report No. 305, *Issues Relating to the Constitutionality of Local Sales Taxation in Michigan*, June, 1992.

subdivisions” from imposing a graduated income tax. These two sections, when read together, suggest that when the drafters of the 1963 Constitution intended to limit not only state legislative authority, but also the authority of units of local government, they clearly expressed that intent.

Although the issue has been addressed by the Attorney General (which has the effect of law until modified by the courts), the

courts have not determined the legality of local sales taxes. Given the tight statutory and constitutional constraints on local government revenue-raising options, and in light of the growing fiscal challenges facing local governments prospectively, a constitutional convention is likely to consider the questions surrounding the legality of local-option sales taxes.

Other Headlee Amendment Issues

Beyond the state and local government tax and revenue limitations established by the Headlee Amendment that are discussed above, a constitutional convention may direct its attention to other constitutional issues created by that amendment. For instance, Section 25 serves as a preamble to sections 26 through 34, the purposes of which are apparent upon reading the sections. Section 33 provides definition for several of the significant terms fundamental to the Headlee Amendment’s limitations. This practice is commonly left to the legislature in other parts of the Constitution, as can be seen by the number of times the drafters used the term “as defined by law.” Section 34 directs the legislature to statutorily implement sections 25 through 33, a role that defaults to the legislature in any case because the Michigan Constitution is not self executing. These sections serve no other purposes. Convention delegates may wish to begin their task by cleaning these sections out of the Constitution.

Definition of a “Tax”

Section 31 provides that “Units of Local Government are hereby prohibited from levying any *tax* not authorized by law or charter when this section is ratified or from increasing the rate of an existing *tax* above the rate authorized by law or charter when this section is ratified...” Although Section 33 defines a number of other terms contained in the Headlee Amendment, it does not define the term “tax.” As a result, the courts have played a very important role in differentiating taxes from fees and from special assessments, especially ad valorem special assessments. If a constitutional convention opts to continue the tax limitations created by the Headlee Amendment, it could serve a vital role in providing greater definition and clarifying the extent to which local governments can use these funding tools to, at times, circumvent the intent of the limitation.

Role of the Court of Appeals

Section 32 provides that “Any taxpayer of the state shall have standing to bring suit in the Michigan Court of Appeals to enforce provisions of Sections 25 through 31...” The drafters’ notes do not indicate why the authors of the Headlee Amendment chose the Court of Appeals as the forum in which taxpayers could bring original enforcement actions. Therefore, it cannot be determined whether the drafters anticipated the difficulty that that choice would produce. Presumably, the drafters hoped to expedite the process of challenging government actions by eliminating one level of court hearings, the circuit courts that usually have full dockets, and one set of appeals.

The Court of Appeals has been reluctant to play the role that the Headlee Amendment created for it. In the most notable case, a lawsuit was filed in 1980 in the Michigan Court of Appeals on behalf of seven taxpayers, including Donald Durant, a resident of

the Fitzgerald School District.⁶ The essence of the lawsuit was that state officials had reduced the proportion of educational costs paid by the state to a level below that required by the Headlee Amendment. Over the next 17 years, the *Durant* case would beat a well-worn path between the Court of Appeals and the Supreme Court, often due to the Court of Appeals recalcitrance

⁶ *Durant v. State of Michigan*, 456 Michigan 175, 566 NW2d 272 (1997).

in carrying out its assigned role. The Court of Appeals essentially refused to consider *Durant* on its merits, choosing instead on two separate occasions to dismiss the case on technical grounds. While it is true that the case raised a number of complex factual issues, the court was not without options for dealing with them.

The court's recalcitrance stems from the fact that the Court of Appeals is an appellate court. It was not established to handle complicated factual issues, which

are often at the heart of taxpayer lawsuits, but to resolve issues of law raised on appeal from trial courts. Given the purpose that the Court of Appeals serves, the decision to assign to it responsibility to hear taxpayer lawsuits was arguably ill advised.

Should provisions of the Headlee Amendment be carried forward to a new document, a constitutional convention would likely be called upon to decide whether a unique legal process is needed for enforcing the relevant provisions.

Public Pension and Other Post-Employment Benefits

Both state and local public pension plans and retirement systems in Michigan enjoy considerable constitutional protections under Section 24. Specifically, this section establishes the "accrued financial benefits" of each plan or system as a contractual obligation of the unit of government responsible for administering the benefit program. Furthermore, the section prohibits the benefits from being "diminished or impaired" by the governmental unit. Section 24 also contains a provision relating to how the financial benefits shall be funded by each unit of government and prohibits the funding for current services from being used to finance "unfunded accrued liabilities", or the amount that the accrued actuarially-determined liabilities of a pension fund exceed the fund's assets.

Two public policy issues arise in Section 24 that a convention might consider. First, a convention might consider whether the

state's constitution should contain an explicit protection for public pension benefits or if such protection should be left to statutory law and decisions of the courts. Second, the term "accrued financial obligations" has been interpreted by the Michigan Supreme Court to be limited to pension benefits, but not other post-employment benefits (OPEBs), i.e., primarily health care benefits. The disparate treatment of pension benefits versus OPEBs would likely garner some attention during a convention.

The constitutional protections of public pensions from being "diminished or impaired" are understood to prevent state government, or its subdivisions, from renegeing on benefits previously earned based on services rendered. This does not prevent a unit of government, the employer, from modifying the level of future benefits offered to its employees prospectively. Also, this safeguard is understood to shield

public pension and retirement income from taxation by state and local governments. Private pension and retirement benefits do not enjoy the same constitutional protection from taxation, although state law does provide some degree of protection to private pension benefits.⁷ Currently, the Michigan Legislature could provide for full taxation of private pension and retirement income; however, such actions would likely raise equity concerns over the different treatment of public and private plans.

Although the majority of states provide some form of constitutional protection for their pensions, Michigan is somewhat unique in that it is one of only nine states where participants in the public pension plans have a guaranteed

⁷ The Income Tax Act of 1967 (Public Act 281 of 1967) provides a deduction from "taxable income" for a portion of private pension and retirement benefits received.

right to a benefit and that accrued financial benefits cannot be diminished or eliminated, pursuant to constitutional law. In all other states, legal protections are provided through state laws or the courts have ruled that there are safeguards based on due process or federal constitutional provisions that protect contracts.⁸ In addition to the protection from impairment, Section 24 requires full actuarial funding each fiscal year for services rendered that year and prohibits the funding from being used to satisfy unfunded actuarial accrued liabilities (UAAL). This does not prohibit financing the UAAL associated with a pension plan, only that funding intended to satisfy the “normal” cost of plan can not be diverted to the UAAL.

⁸ The other eight states are: Alaska, Arizona, Hawaii, Illinois, Louisiana, Missouri, New Mexico, New York. *State and Local Government Retiree Benefits, Report to Committee on Finance, U.S. Senate, U.S. Government Accountability Office, 2007.*

While public pensions enjoy considerable legal protections from infringement by the government, OPEBs do not according to opinions rendered by the Michigan Supreme Court. In *Studier v. Michigan Public Employees’ Retirement System*, 472 Mich 642; NW2d 350 (2005), it was determined that health care benefits do not constitute “accrued financial benefits” as the term is used in Section 24. In effect, the Supreme Court ruled that health care benefits are not protected by the Constitution from diminishment or impairment in the way that pension benefits are protected.

Options to diminish or impair OPEBs do not relate to the taxation of such benefits, like the pension benefit, but to changes in the cost-sharing arrangements between employers and employees/retirees. As the costs of post-retirement benefits continue to rise (both at the aggregate and at the per-retiree level), and state and local governments face growing fiscal challenges, it is likely that

employers will be pressured to shift more of the costs of previously-promised benefits to retirees or current employees. This can occur by requiring retirees or employees to pick up larger shares of the benefit costs, either in retirement or during their active working years.⁹ A constitutional convention would be expected to review, and possibly clarify, the degree to which the Michigan Constitution should protect certain OPEBs from being diminished or impaired.

⁹ For example, recent statutory changes to the state-administered retirement program covering public school employees (Public Act 75 of 2010) requires current school employees to contribute three percent of their salary to cover retiree health care costs. The required charge is intended to partially offset the employer’s costs associated with provided the benefit. It should be noted that a constitutional challenge to PA 75 was initiated by a group of school employees, citing the protections provided under Article IX, Section 24 to health care benefits and arguing that the new, mandatory employee contribution constitutes an impairment of the benefits.

Constitutional Sections of Statutory Nature

A constitutional purist might begin by asking how much of the current Article IX belongs in a constitution and how much should be left to legislative discretion and contained in state law. This line of thinking suggests that a constitution should not be an elaborate document. It should be relatively compact and economical in its general arrangement and draftsmanship. Details, including those provisions related to finance

and taxation, should be avoided and matters appropriate for legislation should not be incorporated into the organic document. As was detailed above, much of Article IX either limits the ability to tax or dedicates revenues to specific purposes.

The most obvious example of purely statutory language in the Constitution is found in Sections 35 and 35a and 37-42 of Article

IX, placed in the Constitution in a series of five amendments, totaling some 3,118 words (or about nine percent of the Constitution), from 1984 to 2006. These amendments lifted language directly from existing statutes and placed it in the Constitution to prevent the legislature from using balances in various funds for purposes other than those for which those balances were created.

Conclusion

The role of a state constitution in serving as a limitation on the governmental power of the state is exercised most overtly in matters of tax and finance. Drafters of the 1963 Constitution provided the legislature with a “power of the purse” that is bound by constitutional limita-

tions on the type of taxes that may be employed and the rates of certain taxes that may be levied. Subsequent amendments to the Constitution added further limitations to this foundational legislative power. As a result, should a constitutional convention be called at the November,

2010 election, the delegates may feel as though a good deal of their time is served in a legislative role dealing with provisions of Article IX that are very statutory in nature and determining the level of discretion that should be afforded to state lawmakers in terms of fiscal matters.



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ARTICLE X – PROPERTY

In Brief

At the November 2, 2010 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the 1963 Michigan Constitution. The question appears on the ballot automatically every 16 years as required by the Constitution. The Constitution provides that a convention would convene in Lansing on October 4, 2011. If the question is rejected, it will automatically appear on the ballot again in the year 2026.

The Citizens Research Council of Michigan takes no position on the question of calling a constitutional convention. It is hoped that examination of the matters identified in this paper will promote discussion of vital constitutional issues and assist citizens in deliberations on the question of calling a constitutional convention.

Eminent domain ranks as one of the governmental powers most likely to create sentiments of expanded government. The perceived abuse of that power—when governments use of that power was permitted to extend to economic development—resulted in a 2006 constitutional amendment curtailing such uses. A constitutional convention would likely be asked to reexamine the proper balance between the governments' authority to exercise this power and the rights of property owners.

Additionally, a constitutional convention may find it proper to reexamine Section 6 that provides for the rights and privileges in property of aliens.

Introduction

Article X of the current Michigan Constitution contains provisions relating to public and private property. Section 1 abolishes the disabilities of coverture (the condition or status of a married woman considered as being under the protection and influence of her husband). Section 4 authorizes state law to provide for procedures relating to escheats (the reversion of property to the state when there is a failure of persons legally qualified to inherit or to claim that property). Section 5 provides the legislature general supervisory jurisdiction over all state owned lands useful for forest

preserves, game areas, and recreational purposes. It can be expected that these would carry forward to a revised constitution largely unchanged.

Nothing in Article X has become obsolete nor in violation of provisions in the U.S. Constitution.

Article X has remained largely unchanged since adoption of the 1963 Constitution. The 2006 amendment of Section 2, dealing with eminent domain, has been the only amendment to Article X.

Constitutional Convention Issues

Two provisions that might draw the attention of a constitutional convention are found in Section 2 (Eminent Domain) and Section 6 (Resident Aliens, Property Rights).

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Eminent Domain

Eminent domain is “the power of a government to compel owners of real or personal property to transfer it, or some interest in it, to the government.”¹ Like police powers and the power to tax, the power of eminent domain has long been considered inherent in government. As such, drafters of American constitutions typically have not felt the need to enumerate the power of eminent domain, but rather have sought to place limits on government’s use of this power. The U.S. Constitution limits the power of eminent domain in the Takings Clause of the Fifth Amendment, which states in pertinent part: “... nor shall private property be taken for public use, without just compensation.” Every state has constitutional provisions that echo the Takings Clause of the U.S. Constitution. Some states also have constitutional provisions that create procedures for the use of eminent domain.

Courts have accepted the necessity of eminent domain. Historically, the courts have reasoned that all private property rights

were subordinate to the paramount power of eminent domain.² Courts also have typically accepted that the determination of public use is a legislative decision that courts should debate only if the party opposing the condemnation demonstrates “fraud, error of law, or abuse of discretion.”³

The commonly accepted “public uses” for which eminent domain is properly employed include public works projects such as roadways, railroads, airports, ports, dams, public buildings, and parks. Eminent domain permits government to overcome market barriers that would otherwise serve to halt the functioning of that government providing those services. Operation of the marketplace without barriers requires willing buyers and willing sellers. A government, when it needs land for a project, acts as a willing buyer, but private property owners are not always inclined to serve the role of willing sellers. A typical market remedy for an unwilling seller would be to seek an alternative seller, but this is not possible for most government projects. Roads and railroads are generally built in as straight a line

as possible. Governments place parks, airports, and dams on stretches of contiguous land. Alternative sellers would not serve the needs of governments for such projects. The power of eminent domain allows governments to force the owner to become a seller and requires that the owner be compensated for the taking of the property.

It is important to note that these uses sometimes include takings in which the property is transferred from a private party to another private entity. For instance, railroads are typically privately owned and dams often are constructed for private electric companies. In these instances, it is necessary for the government to facilitate the operation of private entities on the basis that those entities operate as instruments of public commerce.

In the past couple of decades, the public uses for which eminent domain has been determined to be appropriate have expanded. In recent years, some uses of eminent domain have involved the taking of private property so that it can be transferred to another private entity for an economic development purpose. The idea that governments are using eminent domain for such purposes is controversial. The root of the disagreement rests with differing opinions of whether

¹ *The Oxford Companion to the Supreme Court of the United States*, ed. Kermit L. Hall, (Oxford University Press, Inc., New York, NY, 1992) p. 253.

² *West River Bridge Co. v. Dix*, 6 How. (47 U.S.) 507 (1848).

³ MCL 213.56(2).

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economic development can be properly classified as a “public use.”

Major Court Cases

Two key court decisions led to a 2006 amendment that creates the current limitations on the use of eminent domain. The 2004 Michigan Supreme Court ruling in *County of Wayne v. Hathcock*⁴ ended the state’s reliance on *Poletown Neighborhood Council v. Detroit*⁵ as a precedent that permitted Michigan state and local governments to take property from one owner to give to another private owner in the name of economic development.

In addressing this issue, the Court adopted a three-part definition, any one of which would determine when the transfer of a condemned property to a private entity is a “public use.”⁶ The first part of the definition was “public necessity of the extreme sort otherwise impracticable.”⁷ It specified that, “[T]he exercise of eminent domain for private corporations has been limited to those enterprises generating public benefits whose very *existence* depends on the use of land that can be assembled only by the

coordination central government alone is capable of achieving.”⁸

This brand of necessity would include “highways, railroads, canals, and other instrumentalities of commerce,” all of which could potentially suffer from imperfections in the functioning of the market that could make their construction impossible without land condemnation. The government’s use of eminent domain to facilitate land assembly, and avoid the complications caused by a single landowner, in these cases, is seen as legitimate.

Second, the Court said a transfer of condemned property to a private entity is consistent with the Constitution’s “public use” requirement “when the private entity remains accountable to the public in its use of that property.”⁹ Land condemned for a public utility, for instance, would still remain accountable to the public through regulations of the Public Service Commission.

Finally, the Court said that condemned property may be transferred to a private entity “when the selection of the land to be condemned is itself based on public concern.”¹⁰ The Court said, “the property must be selected on the basis of ‘facts of independent public significance,’ meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned

land, must satisfy the Constitution’s public use requirement.”¹¹

Thus, the Court did not say that all uses of eminent domain in which the condemned property is transferred to a private entity is forbidden. It said that transfer of condemned property to a private entity may be appropriate where:

1. “public necessity of the extreme sort” requires collective action;
2. the property remains subject to public oversight after the transfer to the private entity; or
3. the property is selected because of “facts of independent public significance,” rather than the interests of the private entity receiving the property.

Shortly after the Michigan Supreme Court ruled in the *Hathcock* case, the U.S. Supreme Court ruled on the case of *Kelo v. City of New London*¹² in which condemned land would be transferred to a private entity. The City of New London, Connecticut, proposed to use eminent domain to revitalize a part of the City, hoping to address characteristics that led a state agency to designate the City a “distressed municipality.” In handing down the court’s decision, Justice Stevens observed that each state is free to

⁴ *County of Wayne v. Hathcock*, 471 Mich. 415 (2004).

⁵ *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616 (1981).

⁶ The three characteristics adopted were taken from Justice Ryan’s dissent in the *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616 (1981).

⁷ *Hathcock*, p. 33.

⁸ *Ibid.*, p. 33.

⁹ *Ibid.*, p. 34.

¹⁰ *Ibid.*, p. 36.

¹¹ *Ibid.*, p. 36.

¹² *Kelo v. City of New London*, 125 S. Ct. 2655, 2673 (2005).

set limits on the legislative powers of its legislature and municipalities. States have the latitude to decide the wisdom of using condemnation for purposes of economic development and have the leeway for setting restrictions on its use.

2006 Amendment

Michigan and many other states reacted to Justice Stevens statement by creating new limits on the governments' use of eminent domain either by changing state laws or by amending state constitutions. The 2006 amendment to the Michigan Constitution incorporated the standards laid out by the Michigan Supreme Court in the *Hathcock* ruling to shift the balance to the property owners and their right to acquire, own, use and protect private property in four ways.

1. If the government seeks to use condemnation to take an individual's principal residence, the amount of compensation paid must at least equal 125 percent of that property's fair market value.
2. While Section 2 does not define "public use," it makes clear that public use is not to include takings of private property for

Section 2, eminent domain, is the section of Article X most likely to become the subject of revision if a constitutional convention is convened. Depending on the ideological leanings of the convention

transfer to a private entity for the purpose of economic development or enhancement of tax revenues.

3. The burden of proof that the taking is for a public use is placed on the government proposing the taking instead of the owner objecting to the taking.
4. Section 2 protects against future legislative actions or judicial decisions that would reduce the rights, grants, or benefits afforded to property owners.

Issues to Consider

A constitutional convention could examine the issue of eminent domain and the difficulty of balancing the legitimate need for government taking with the protection of property owners rights. Changes that create more protections for property owners could make it more difficult and more expensive for governments to exercise eminent domain. Some might attempt to lessen the cost to governments in exercising eminent domain without creating additional opportunities for its use in economic development. Many might feel that it is too soon to judge whether the 2006 amendment created a proper balance

Conclusion

delegates, attempts could be made to shift the balance between the government's power to use eminent domain and the rights of property owners in either direction. On the other hand,

and suggest it should be given more time as is.

Property Rights of Aliens

Section 6 provides that, "Aliens who are residents of this state shall enjoy the same rights and privileges in property as citizens of this state." This provision originated in the 1850 Constitution and has carried forward with some changes on phraseology to the 1908 and 1963 Constitutions.

At first blush, it would seem that such a provision creates little controversy and is an important provision for attracting economic development from persons and businesses outside the United States. Unlike some countries, where ownership of assets by foreign interests have been nationalized during times of unrest, respect for the rights of property owners, whether domestic or foreign, provides trust that the investments made will be secure. However, in wake of the Arizona immigration law and sentiments of others that would treat aliens differently than U.S. citizens, it is possible that a constitutional convention might be seen as an opportunity to weaken the language in this provision in an attempt to weaken the rights of aliens.

the recent adoption of the eminent domain amendment may create an interest in preserving the status quo.



CRC SPECIAL REPORT

MICHIGAN CONSTITUTIONAL ISSUES



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ARTICLE XI – PUBLIC OFFICERS AND EMPLOYMENT

In Brief

At the November 2, 2010 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the 1963 Michigan Constitution. The question appears on the ballot automatically every 16 years as required by the Constitution. The Constitution provides that a convention would convene in Lansing on October 4, 2011. If the question is rejected, it will automatically appear on the ballot again in the year 2026.

The Citizens Research Council of Michigan takes no position on the question of calling a constitutional convention. It is hoped that examination of the matters identified in this paper will promote discussion of vital constitutional issues and assist citizens in deliberations on the question of calling a constitutional convention.

Trust in government officials is key to a thriving democracy, functioning bureaucracy, and a true sense of representation on the part of citizens. Article XI is concerned with public employment and public officers in Michigan, including establishment of the state civil service system. The system has functioned without major challenges over the past 46 years; however, a constitutional convention would be expected to spend some of its time examining the issues of collective bargaining for state employees, automatic funding for the system, and legislative review of civil servant compensation. Also, a convention would be expected to discuss matters that may not have been in the forefront and on the minds of the framers of the 1963 Constitution, including restrictions on employment options for former public officials, personal financial disclosure for public officials, and ethics in state government.

Introduction

Article XI, “Public Officers and Employment”, consists of seven sections that lay out rules regarding elective office and public employment in Michigan. Currently the sections relate to the oath of office for public officers (Section 1), terms of office for state and county officers (Section 2), eligibility to hold office as a custodian of public moneys (Section 3), extra compensation for public officers (Section 4), state civil service system (Section 5), merit systems for local governments (Section 6), and impeachment of civil officers (Section 7). It can be expected that these would carry forward to a revised constitution largely unchanged in much the same way that many of these provisions were carried forward from the 1908 Constitution.

Article XI has been the subject of two citizen-initiated amendments, both dealing with Section 5 and the topic of collective bargaining for state employees.¹ A 1978 amendment was adopted by the voters to provide collective bargaining and binding arbitration to state police troopers and sergeants. In 2002, voters rejected a proposal to provide the same collective bargaining rights enjoyed by state police employees to all state classified employees.

¹ Proposal 2010-02 on the November 2010 ballot represents the third contemplated amendment to Article XI. The proposal, if approved by the voters, would add a Section 8 to Article XI to prohibit certain felons from holding elective or appointive office. See CRC Memo 1102 for more details (www.crcmich.org/PUBLICAT/2010s/2010/memo1102.html).



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Constitutional Convention Issues

Despite the relatively few times that Article XI has been considered for amendment, it is likely that a constitutional convention would discuss and review a number of issues pertinent to the topic of public employment, including the state’s civil service system (Section 5), post-employment restrictions for former state officials, financial disclosure requirements for public officials, and the establishment of an ethics commission.

State Civil Service

Broadly defined, civil service systems are those where individuals are employed on the basis of merit and performance on competitive examinations. Section 5 creates the Michigan Civil Service Commission and the state’s civil service system. The Commission is responsible for fixing rates of employee compensation, regulating the conditions of employment, and administering competitive examinations as a basis for selecting individuals for employment or promotion in the state classified service. While other states provide the foundations for their civil service systems in their constitutions, Michigan is widely considered to have the strongest constitutional system and one that requires no enabling legisla-

tion. Constitutional language spells out the organization, funding, composition, powers, and responsibilities of the Civil Service Commission. Because of this detail, the system is largely insulated from political interference, something that marred state bureaucracies in the early 20th century and led to civil service positions being filled because of political patronage as opposed to merit.

A 1940 amendment to the 1908 Michigan Constitution created the civil service system after the Michigan legislature gutted a statutory system in the late 1930s. The 1961 Constitutional Convention considered many issues surrounding the civil service system; however, no major substantive changes were made in the 1963 Constitution and most of the language from the 1908 document was folded into the new constitution. Despite the historical stability of Section 5 and its non-controversial language, a constitutional convention is likely to review a number of civil service-related issues, including collective bargaining for state employees, automatic funding for the Civil Service Commission, and the legislature’s role in setting civil service pay rates.

Collective Bargaining

Prior to 1980, it was widely held that a constitutional amendment to Section 5 was a necessary precursor to establish collective bargaining for state classified employees. It was only after a 1978 amendment that state police personnel gained access to collective bargaining. At that time, the vast majority of state workers did not have access to a collective bargaining process, and it was believed that establishing collective bargaining would constitute a delegation of the Civil Service Commission’s constitutional authority to set pay rates of classified workers.² This contrasted with the experience in the private sector and local governments in Michigan, where employee-employer relations had been governed by collective bargaining for many years.³ While organized state employee groups participated in “meet and confer” dis-

² For background, see CRC Memorandum No. 1068, “State Constitutional Issues on the November General Election Ballot – 11, Proposal 02-03: Collective Bargaining and Binding Arbitration for State Employees,” September 2002.

³ Municipal, county, university, and other types of public employees are covered by the Public Employment Relations Act (PERA), Public Act 379 of 1965.

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cussions with their employer (the State of Michigan) and entered into memoranda of understanding concerning conditions of employment, the Civil Service Commission was responsible for setting employee compensation (subject to modification by the Michigan legislature) per Section 5.

In 1980, the Civil Service Commission, through rule, authorized collective bargaining for the majority of classified employees. However, the collective bargaining agreements reached between employee groups and the State of Michigan are subject to the Commission's review, modification, and approval. The Commission's approval is deemed necessary to fulfill the Section 5 requirement that the Commission set pay rates.

Michigan state government has operated under its current system of collective bargaining for state employees for nearly three decades; however, the Commission's authority to establish this unique form of collective bargaining has not been challenged in the courts. Given that a 1978 constitutional amendment authorized only enlisted state police personnel to participate in the collective bargaining process, it would be appropriate to clarify the rights of other groups of state employees in a constitutional convention.

Civil Service 1% Appropriation

Section 5 also includes a provision for an automatic appropriation of one percent of classified payroll for the operation of the civil service system. This provision effectively insulates the Civil Service

Commission's operations from the oversight and accountability reviews that accompany the annual appropriations process. In state Fiscal Year 2008-09, the aggregate state classified payroll was \$4,781.2 million and the one percent guarantee appropriation amounted to \$47.8 million for the Fiscal Year 2009-10 budget.

A constitutional convention could be expected to review the unique funding guarantee provided in Section 5 in light of the limitations it places on legislative discretion for allocating public funds and the state's fiscal challenges over the past decade. It could be argued that the civil service system is well enough established that the automatic appropriation is no longer necessary. Supporters of the automatic appropriation would argue that the guarantee is necessary to safeguard the independence of the system from undue political intrusion, a situation that led to the constitutional amendment creating the civil service system in 1940.

Legislative Review of Civil Service Pay Recommendations

Section 5 provides the Michigan legislature with limited control over civil service pay rates approved by the Civil Service Commission. Currently, the legislature is authorized to reject or reduce increases in compensation rates for state employees for the next fiscal year only if a measure to accomplish this receives approval from two-thirds of the members in each house. The legislature has never successfully rejected or modified the pay increases recommended by the Civil Service Com-

mission, although attempts have been made (most recently in 2010). While the legislature has limited control to set classified pay rates, it has absolute authority, subject to gubernatorial veto, to set appropriation levels for state agencies and departments. In this sense, the legislature is able to directly influence the aggregate level of personnel spending in any single state agency or department.

The Constitution requires the governor to submit the upcoming pay rates, approved by the Civil Service Commission, at the same time the executive budget is presented to the legislature, which occurs in early February in most years. The legislature has a relatively narrow window to decide whether to reject or reduce the pay raises, as it must act within 60 calendar days following receipt of the governor's executive budget (early April), whereas the legislature has until the start of the new fiscal year (October 1) to complete its work on the budget. Furthermore, the legislature only can reduce proposed increases "uniformly," meaning that reductions must apply to all classes of employees affected by the increases. Also, the legislature is not permitted to reduce rates below those currently in effect.

A convention is likely to consider the issues surrounding legislative control of civil service pay rates, especially in light of state fiscal challenges and the role played by employee compensation. Some argue that the legislature should have more direct control over civil service pay given the legislature's

sole constitutional authority for making appropriations and raising the necessary revenue to support those appropriations. This might include a longer period to deliberate and act on the Civil Service Commission recommendations or the ability to reduce compensation rates below those in effect at the time the increases were transmitted to the legislature. A convention also might review the vote threshold (two-thirds in each chamber) required to modify or reject pay rates and consider a lower limit to make it easier to get the requisite votes.

Ethics Laws

A constitutional convention might want to consider introduction of ethics provisions to the state constitution. These might include restrictions on when former state officials can engage in lobbying, personal finance disclosure for elected state officials, and creation of an ethics commission with meaningful enforcement powers.

Post-Office Restrictions on State Officials

Section 54 of Article IV and Section 30 of Article V of the 1963 Constitution contain term limitations for both legislators and certain popularly-elected executive branch officials.⁴ Voters approved

⁴ Service in the Michigan House of Representatives (two-year terms) is limited to three terms and service in the Michigan Senate (four-year terms) is limited to two terms. Executive branch officials (governor, lieutenant governor, secretary of state, and attorney general) are limited to two four-year terms for each office.

term limits in November 1992 and they took effect for terms beginning on or after January 1, 1993.⁵ Given Michigan's strict, lifetime limitations, many former, term-limited officials seek employment within the private sector dealing with the issues and policy matters on which they previously worked as elected officials. Former officials might become lobbyists or government affairs representatives with trade associations, businesses, or non-profits immediately following their tenure in public office.

A convention might consider whether Michigan's Constitution should have a "revolving door" restriction that prescribes the amount of time that has to pass before former public officials can appear before bodies (legislative and/or executive) that they just left. Such "cooling off periods" are intended to make sure that elected officials are not using their current positions to advocate or advance the interests of an individual or group for which they might work following their time in public office. Currently, Michigan does not require, in any material way, a "cooling off period" before former elected public officials can work as lobbyists.⁶

⁵ The constitutional issues surrounding Michigan's term limit provisions were covered in an earlier report in this series, "Article IV: Legislative Branch", May 2010.

⁶ Public Act 472 of 1978, as amended, prohibits former members of the Michigan House of Representatives or the Michigan Senate who resign from office from becoming a paid lobbyist for the remainder of the term of office from which the person resigned.

Many states have adopted "revolving door" restrictions, either statutorily or constitutionally. In some cases, restrictions only apply to former legislators, while in other states the restrictions also apply to elective and appointive executive branch personnel.⁷ According to the National Conference of State Legislatures (NCSL), there is some form of restriction on former legislators in 31 states. Generally, the "cooling off period" ranges from one year to two years before individuals can take a position that involves direct interaction with the legislature in a particular state.⁸

If a convention opts to keep term limits in their current form and in light of the consequences of Michigan's strict term limit provisions, it is likely that a constitutional convention would discuss the advantages and disadvantages of restricting the post-office options of former public officials. Proponents of "revolving door" laws argue that they are necessary to ensure that elected officials are not beholden to certain interests while in office. Some contend that these laws promote a greater sense of public trust in government and its officials. Opponents say that "cooling off periods" are unfair to legislators because they limit

⁷ Craig Holman, "Revolving Door Restrictions by State, 2005", February 2005, Public Citizen. www.publiccitizen.org/documents/Revolving%20in%20States.pdf

⁸ Peggy Kerns, "Revolving Door Laws", January 2009, National Conference of State Legislatures. www.ncsl.org/default.aspx?tabid=15312

employment opportunities after relatively short careers in public office. Furthermore, they argue that most legislators have good character and qualifications and these individuals would make good lobbyists without breaching the public trust while in office.

Personal Financial Disclosure for Elected Officials

Personal financial disclosure laws require public officials to make certain personal financial records available for examination by the general public. Such laws are different and separate from campaign finance laws that apply to office seekers. The former deals directly with the records of an elected official as a private citizen whereas the latter set of laws focus on financial records of a specific campaign.

According to the NCSL, Center on Ethics in Government, only three states (Idaho, Michigan, and Vermont) do not require state legislators to make their personal financial records available. Forty-five states require elected officials to release annual reports of their personal finances, while two states (North Carolina and North Dakota) only mandate reports during an election year. In terms of content, states vary considerably as to the information that they require to be reported, but most require personal income information and 31 states require financial data about legislators' spouses and dependents. The NCSL also points out that some state personal disclosure laws cover connections with state

agencies (31 states) and/or lobbyists (18 states).⁹

According to a 2007 study by The Center for Public Integrity, only four states (Idaho, Michigan, Utah, and Vermont) do not require any public disclosure of financial information by their governors.¹⁰ Whether financial disclosure requirements for public officials should be in statutory or constitutional law is a matter for debate. All states with such requirements include them in statute and a convention could consider whether to include such reporting requirements in the Michigan Constitution.

Ethics Commission

In 1973, Governor Milliken signed the State Ethics Act (Public Act 196 of 1973), which established the Michigan State Board of Ethics. The Board determines the ethical conduct of classified or unclassified state employees and public officers of the executive branch of Michigan state government who are appointed by the governor or another executive department official. The Board does not have jurisdiction over state elected officials in Michigan (legislative, judicial, executive) or employees and elected officials at the various levels of local govern-

ment. Despite the existence of the Board, no single body handles ethics issues for all public employees in the state. A constitutional convention would likely consider creating such a body for Michigan and defining its powers and duties in the state's Constitution, in much the same way that other states have done.

According to the NCSL, 40 states (including Michigan) have independent ethics oversight commissions and in 35 of these states (excluding Michigan) the commission has jurisdiction over legislators.¹¹ In addition to public officials, some of these bodies have jurisdiction over lobbying laws also. The commissions vary in size, but usually consist of between 5 and 12 private citizens appointed by legislators or other state officials. Their powers and duties also vary but generally consist of the authority to review public officials' financial disclosure statements, to accept and investigate ethics complaints, and to regulate lobbyists.

In addition to the Michigan State Board of Ethics, other entities in Michigan exercise power to investigate ethics complaints of public officials. For example, both legislative chambers have committees with jurisdiction over ethics matters, the Senate Government Operations Committee and the

⁹ National Conference of State Legislatures, www.ncsl.org/programs/ethics/fd_home.htm

¹⁰ The Center for Public Integrity, *States of Disclosure*, www.projects.publicintegrity.org

¹¹ Nicole Casal Moore and Peggy Kerns, *Legisbrief Vol. 14, No. 23*, "State Ethics Commissions", National Conference of State Legislatures, April/May 2006.

House Constitutional Law and Ethics Committee. The 1963 Constitution creates the Judicial Tenure Commission (Article VI,

Section 30), which has jurisdiction over all Michigan courts and is responsible for promoting the integrity of the judicial process

and preserving public confidence in the court system.¹²

¹² www.jtc.courts.mi.gov/

Conclusion

Article XI does not contain any obsolete or non-functioning sections. While it has been the subject of a two amendment attempts over the years (one successful and one not), the article and its various provisions dealing with “Pub-

lic Officers and Employment” have served Michigan citizens well. Since the adoption of the 1963 Constitution, nothing in Article XI has risen to the level of “crisis” and the current provisions can be expected to serve the voters well

for some time to come. However, should a convention be called, convention members would be expected to deliberate the issues surrounding the state’s civil service system and ethics in the public sector.



CRC SPECIAL REPORT

MICHIGAN CONSTITUTIONAL ISSUES



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ARTICLE XII – AMENDMENT AND REVISION

In Brief

At the November 2, 2010 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the 1963 Michigan Constitution. The question appears on the ballot automatically every 16 years as required by the Constitution. The Constitution provides that a convention would convene in Lansing on October 4, 2011. If the question is rejected, it will automatically appear on the ballot again in the year 2026.

The Citizens Research Council of Michigan takes no position on the question of calling a constitutional convention. It is hoped that examination of the matters identified in this paper will promote discussion of vital constitutional issues and assist citizens in deliberations on the question of calling a constitutional convention.

Article XII is the only article of the 1963 Michigan Constitution that does not relate to the structure or powers of government or to the rights of citizens. It provides for the process of altering the Constitution, either through amendment, which can occur as the result of legislatively-referred proposals or voter-initiated proposals, or revision, which can occur by means of a constitutional convention.

The principal challenge that would be faced by a constitutional convention in considering constitutional amendment and revision would be that of finding the appropriate degree of difficulty in adopting constitutional changes in order to maintain a proper balance between the roles of the Constitution as a governing document of the state with enduring principles and one with provisions relevant to changing economic, social, and political environments.

Introduction

Regardless of how carefully drafted a state constitution may be when it is adopted, it will be necessary or appropriate to change it from time to time. Evolving social, economic, or political conditions will necessitate addition, deletion, or alteration of provisions to assure that the constitution provides for the kind of state and local governmental structure and authority required to remain relevant to the envi-

ronment within which it exists.

Alteration of individual provisions or provisions related to each other is called *amendment*. More extensive change, altering several unrelated provisions, is called *revision*. Article XII of the 1963 Michigan Constitution sets forth the ways in which amendment and revision of the basic Michigan governing document may occur.

Amending a Constitution

Extent of change

A constitutional amendment can be very specific. For example, Proposal D of 1978 changed one number in Article IV, Section 40, thereby increasing the minimum drinking age from 18 to 21.

A constitutional amendment can also encompass several sections of one or more articles in changing a particular policy. For example, Proposal E of 1978 (the Headlee Amendment) altered Section 6 of Article IX and added ten new sections to that article in instituting a policy of tax limitation. In 1992, Pro-



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posal B amended one section in each of four articles (II, IV, V, and XII) in order to establish term limits in Michigan.

A question arises when an attempt is made to present to the voters an amendment that would change several unrelated sections of the constitution. Is it amendment? Or, is it revision, which might require consideration by a constitutional convention? Michigan voters have never really been faced with such a proposal, but in 2008, a wide-ranging voter-initiated proposal (Reform Michigan Government Now!) that would have amended many unrelated articles and sections, received enough signatures to make it to the ballot, but was ruled ineligible by the courts on technical grounds. The distinction between amendment and revision constitutes a gray area.

Purpose of change

The Michigan Constitution can be and has been amended in order to accomplish one or more of several purposes:

“Clean up”

The Michigan Constitution of 1963 contains several provisions (e. g., minimum voting age of 21, county board of supervisors chosen from governmental units, term limits for members of Con-

gress) that have been found in violation of the U.S. Constitution. It would be desirable to amend the Constitution to remove the unconstitutional language in order to assure that all of the provisions in the Constitution are actually operable. Despite many recommendations to do this, however, neither the legislature nor the voters have placed such a “clean-up” amendment on the ballot.

Add or alter basic provisions of governance

A state constitution contains basic provisions of governance; that is, provisions that establish the basic structure of government, its powers, and the rights of citizens, and which should not be alterable by the legislature acting alone. Occasionally, basic provisions may be expanded or made more explicit by amendment or new provisions may be added. This does not mean that a “basic” principle will always be uncontroversial. For example, the constitution is the appropriate place to provide for the number of terms elected officials may serve. Proposal B of 1992, which established term limits for elected executive branch officials and legislators, changed the constitutional policy from unlimited terms to very limited numbers of terms for these officials. Proposal C of

1970, which prohibited public aid to nonpublic schools and students, might be considered an elaboration or extension of the provision in Article I, Section 4, which prohibits public aid to “any religious sect or society, theological or religious seminary.”

Amend provisions in original constitution that could be considered statutory in nature

The 1963 Michigan Constitution contains many sections of material, some of it carried over from the 1908 Constitution, that could have been left to statute. For example, a 1954 amendment to the 1908 Constitution established a 3 percent on the tax on gross taxable sales of tangible personal property. The 1908 Constitution was again amended in 1960 to increase that limitation to 4 percent. Article IX, Section 8, of the 1963 Constitution originally provided for a continuatin of the 4 percent rate limit. In 1994, Proposal A amended Section 8, adding a 2-percent additional sales tax dedicated to the School Aid Fund. Although an alternative to Proposal A, increasing the personal income tax, could have been accomplished by statute because no constitutional limit on the rate of the personal income tax exists, using the sales tax for that purpose necessitated a constitutional amendment.

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Place statutory policy in the Constitution, beyond the reach of the legislature and the courts

Although the alternative of the statutory initiative exists in the Michigan Constitution, interest groups often choose to propose amendments to the Constitution in order to insulate favored policies from future change by the legislature or the courts. (Aside from another vote of the people to amend or repeal voter-initiated laws, laws adopted by statutory initiative may not be amended or repealed except by a three-quarters vote of each house of the legislature, a high bar, but one which has been cleared. Most voter-initiated statutes have been amended

by the legislature.) Two kinds of statutory material have been added to the Michigan Constitution:

1. Existing statutes. Example: Eight sections of Article IX (35, 35a, and 37-42), containing over 3,100 words, contain language that had been previously adopted by the legislature in statute providing for various recreation and conservation funds and the Veterans' Trust Fund. From 1984 to 2006, in a series of four lengthy amendments (all proposed by the legislature), these statutes were elevated to constitutional status in order to prevent future legislatures from using balances in

those funds for purposes other than those for which they were created.

2. New policy not already in statute. Example: Proposal 2008-02, a voter-initiated proposal, added a Section 27 to Article I to allow human embryo and human embryonic stem cell research. This new section contains several provisions regarding the conduct of this kind of research. All of this could have been accomplished by statute, either legislatively-adopted or voter-initiated, but the sponsors of the initiative feared alteration of a statute on this subject by future legislatures.

Article XII contains three operative sections:

Section 1: Amendment by legislative proposal and vote of the electors

If a proposed constitutional amendment is approved by two-thirds of the members elected to and serving in each house of the legislature, it is to be submitted to the electors in no less than 60 days for consideration at the next general election or at a special election as determined by the legislature. If approved by a majority of the electors, the amendment will become part of the Constitution 45 days following the election.

Provisions of Article XII

Section 2: Amendment by petition and vote of the electors (Voter initiative)

Petitions containing signatures of registered electors may be used to propose constitutional amendments. A petition must:

- Include the full text of the proposed amendment
- Be signed by registered electors in number equal to at least 10 percent of the total vote cast for governor at the last general election at which a governor was elected
- Be filed with the person authorized by law [currently the Board of State Canvassers in the Department of State] to

receive the petitions at least 120 days before the date of the election at which the proposed amendment is to be voted on; the validity and sufficiency of the signatures must be determined and announced at least 60 days before the election

Subsequent to approval by the Board of State Canvassers:

- The proposed amendment, existing provisions of the Constitution that would be altered or abrogated by the amendment and the ballot language is to be published as provided by law

- A “true and impartial” statement of the purpose of the proposed amendment in not more than 100 words is to be prepared for the ballot question. (Statute requires that this be prepared by the Board of State Canvassers.)

If the proposed amendment is approved by the voters, it becomes part of the Constitution 45 days following the election. If two or more amendments approved by the voters at the same election conflict, the amendment re-

ceiving the greatest number of yes votes is to prevail.

Section 3: General revision of the Constitution

Every 16 years, beginning in 1978, or at other times as may be provided by law, the question of a general revision of the Constitution is to be submitted to the voters. If the question is approved, delegates are to be elected on a partisan basis within 6 months and a Constitutional Convention convened on the first

Tuesday in October following the election of delegates. It is this provision that has triggered Proposal 2010-01 on the November 2010 ballot.

(There is also a Section 4 in Article XII. It does not relate to the process of altering the Michigan Constitution. It was placed in the Constitution by Proposal B of 1992 and provides that, if any substantive part of the term limits amendment is declared invalid or unconstitutional, the remaining parts will remain in force.)

Modes of State Constitutional Amendment

All states have provisions for amending their constitutions. All states provide for legislatively-initiated methods of amending the constitution. All states, except Delaware, require voter approval of proposed constitutional amendments. The differences, then, in amendment procedures among the states are largely defined 1) by whether the voter initiative is available and 2) by the kinds of obstacles that must be overcome in order to amend the constitution.

Voter Initiative

A product of the Progressive Era (late-19th and early-20th Centuries), the voter initiative was first adopted in South Dakota in 1898. Four years later, Oregon adopted the initiative and, over the following decade, 13 more states, including Michigan, almost all in the Midwest and Far West, followed suit. Presently, 18 states have the

voter initiative for constitutional amendments, although three states—Illinois, Massachusetts, and Mississippi—have provisions, either substantive or procedural, that greatly constrain its use. Because it adds a whole new avenue for proposing amendments, the presence or absence of the initiative is a significant factor in determining the ease with which a state constitution can be amended.

Procedures for Amendment (“Obstacles”)

Amending a state constitution should present obstacles, but not insuperable ones. Amendment should ideally negotiate the fine line between maintaining the fundamental, enduring nature of a constitution and the necessity of keeping it vital and relevant. States vary in the kinds of obstacles that must be overcome in order to amend their constitutions:

For legislatively-referred amendments:

- *Multi-session approval requirements/extraordinary majority requirements.* State constitutions may require that an amendment be approved in more than one session of the legislature (Indiana goes further and requires an election to intervene between approvals) before it can be submitted to the voters. They may also require approval by extraordinary majorities (in Michigan, two-thirds of each house) for submittal to the voters. These requirements often appear to be alternatives in that states with multi-session requirements tend to require only simple majority votes of the legislature, while those with extraordinary majority requirements tend to require only one vote. In some states, the alternative is made explicit; if the legislature

can muster the required extraordinary majority, it needs only one vote; if it can achieve only a simple majority, it will need an additional vote.

For voter-initiated amendments:

- *High signature requirements.* Every state with the initiative requires that the number of valid signatures on the petition equal a percentage of some verifiable measure. Typically, this is a percentage of the vote in the previous election for some political office, usually governor (although one uses the U.S. presidency and one uses the secretary of state). One state uses state population. Because of the variability in the denominators of these fractions, it is difficult to make direct comparisons among the various requirements. How-

ever, using the 12 states that use the last vote for governor as the denominator, two require 15 percent, one requires 12 percent, five (including Michigan) use 10 percent, and four require 8 percent.

- *Signature distribution requirements.* Half of the states with the initiative require some degree of geographic distribution of the signatures. These provisions typically require that a minimum percentage of the signatures come from a certain proportion of counties or congressional districts. Michigan has no such requirement.

Voter approval requirements:

- *Extraordinary election requirements.* Most states, including Michigan, require only a majority of those voting on the issue in one election to approve

a proposed constitutional amendment. Three, however, pose an additional requirement that the “yes” votes on the amendment also equal at least a certain percentage of the total votes cast at the election. New Hampshire requires two-thirds voter approval of a proposed amendment. Florida requires two-thirds voter approval of an amendment creating a “new state tax or fee” and, in 2006, Florida adopted a constitutional amendment requiring 60 percent voter approval of any proposed constitutional amendment.¹ Finally, Nevada requires majority voter approval in two successive elections.

¹ Ironically, the 2006 Florida amendment requiring 60 percent voter approval of constitutional amendments was, itself, adopted only by a margin of 58-42.

Constitutional Convention Issues

The basic question concerning the process of altering the Michigan Constitution is whether it is, by some standard, too easy to do so. The 1963 Constitution has been amended 31 times since its adoption and, while this frequency does not appear to be out of line with other states,² it may be argued that the Michigan Con-

stitution is nevertheless accumulating a disproportionate number of provisions that should have been left to statute if, in fact, they should have been adopted at all. In addition, the Michigan Constitution has become a target of national groups wishing to establish their favored policies in the constitutions of those states that have the initiative.

Of the provisions used by states to make amendment of their constitutions more difficult, the only one used by Michigan that is relatively stringent is the two-thirds vote requirement in each house for legislatively-referred amendments, a

requirement it shares with 13 other states. Its signature requirement for voter-initiated amendments is about average. And it does not have multi-session approval for legislatively-proposed amendments, does not have signature distribution requirements for voter-initiated petitions, and does not have extraordinary election requirements.

In a sense, the nature of the current Michigan Constitution operates as a deterrent to making amendment more difficult. So much detailed policy, especially in Article IX (Finance and Taxation), is contained in the document that when many aspects of taxation

² For example, the Florida Constitution, adopted in 1968, has been amended 115 times. Other states: Missouri (1945) 115 times; Montana (1972) 30 times; North Carolina (1970) 34 times; Virginia (1970) 43 times. (Source: Council of State Governments, *Book of the States*, 2010).

and intergovernmental finance, for example, require change, it cannot occur without constitutional amendment. To make amendment more difficult in the current Constitution, or one like it, then, would risk making permanent policies that should be subject to change.

Voter Initiative

The threshold issue in any discussion of whether to make the Michigan Constitution more difficult to amend is whether to retain the voter initiative. Michigan has had a functioning initiative provision in its Constitution since 1913. Since then, there have been 67 voter-initiated proposals to amend the Constitution (41 under the 1908 Constitution; 26 under the current Constitution). Of these, 20 were approved (10 under each Constitution), a success rate of 30 percent. Legislatively-referred proposals over that period had a success rate of 63 percent (80 approvals in 127 attempts). Thus, while the initiative has been used frequently, its relatively low rate of success suggests that voters do exercise a degree of discretion when deciding to amend the state's constitution.

The initiative raises certain issues:

- *Voter-initiated proposals do not receive the scrutiny and refinement to which legislative proposals are subjected.* Joint resolutions are drafted by lawyers in the Legislative Service Bureau, made subject of public hearings, debated in both houses of the legislature, and scrutinized by other in-

terested parties before they are submitted to the voters. Voter-initiated proposals vary widely in the degree to which they are subject to professional review and, while many are carefully drafted, it is clear that others have not been drafted with adequate care. Since there is presently no real way of keeping issues off the ballot simply because of poor drafting, the opportunity of placing inappropriate language in the Constitution is greatly increased.

- *Voter-initiated proposals have become a gateway to increased requirement of voter approval.* Some voter-initiated proposals have contained requirements for voter approval of certain governmental actions normally reserved to elected bodies, usually tax increases. Most were defeated at the polls, but the successful Headlee Amendment of 1978 instituted the necessity of local voter approval of any new tax or increase in an existing tax above that authorized by law or charter.

A potentially significant precedent was established by Proposal 2004-01, which requires that no state law that authorizes any form of gambling nor any new state lottery games utilizing table games or player operated mechanical or electronic devices be established, without both statewide voter approval and voter approval in the township or city where the

gambling will take place. Because the Bureau of State Lottery is responsible for approving new games, Proposal 2004-01 introduced the concept of voter approval of *administrative actions* as contrasted with legislative actions.

- *States with the initiative have become targets of organizations with national agendas that would likely be unsuccessful if legislative approval were required.* Term limits, promoted by an organization called U.S. Term Limits, are in effect in 15 states. In 13 of those states, including Michigan, the policy was placed in the constitution via initiative petition. Only Louisiana and Maine have term limits that were not proposed by the initiative.

Other recent proposals that had roots outside of Michigan included Proposal 2004-02 (defining what can be recognized as marriage or similar union) and Proposal 2006-02 (banning affirmative action programs).

- *The number of signatures that a petition secures has come to be a function of the amount of money available to pay for circulators rather than broad-based support for the proposal.* Signature requirements were originally intended to demonstrate broad initial support for a ballot proposal. The rise of paid circulators of petitions has brought this original intent into question.

Increasing Requirements for the Voter Initiative

Signature Requirements

If it is concluded that the initiative should be retained, a constitutional convention may wish to consider adopting more demanding obstacles to placing issues before the voters. Based on the provisions in other states, such provisions might take the form of:

- Increased signature requirements on petitions;
- Geographic signature distribution requirements

Substantive Review

While adoption of increased signature requirements might make it more costly or time-consuming to gather the required signatures, it would not address the issue of the standard of drafting of voter-initiated proposals, an issue that could become quite subjective. The current Constitution does not provide for substantive review of voter-initiated proposals, providing only that “any such petition be in the form, and shall be signed and circulated in such manner, as prescribed by law.” Voter-initiated proposals have made it to the ballot with obvious drafting problems and, while most have been defeated, the possibility exists for a seriously inappropriate measure to be adopted.

Review of the substance of amendments proposed by initiative before they are placed on the ballot has been proposed. In 1995, the Citizens Research Council reviewed three such proposals:³

- *Law Revision Commission*, whose purpose is to aid the Legislative Council in its charge (Article IV, Section 15) “to periodically examine and recommend to the legislature revision of the various laws of the state.” The Commission consists of two members each from the Senate and the House of Representatives, plus four non-legislators. While the legislation creating the Commission (Public Act 268 of 1986) does not include review of proposed constitutional amendments, such a role might be added.
- *Joint Legislative Commission or Legislatively-Established Commission*, whose purpose would be to review proposed amendments and to recommend changes to the Constitution.
- *Gubernatorial Commission*. Similar in purpose to the legislative commission, but appointed by the Governor.

(Florida has a Constitution Revision Commission, consisting of 37 members appointed by the Governor, the Speaker of the House of Representatives, the President of the Senate, and the Chief Justice of the Florida Supreme Court. It meets periodically to determine whether the Florida Constitution should be amended or revised. Such a commission could be employed in reviewing proposed amendments.)

³ See *Unfinished Business: Revising the Michigan Constitution*. Council Comments No. 1035, February 1995.

Clearly, controversy would arise if such a commission were to find that a proposed amendment was flawed in some way. Such “flaws” could cover a wide range, including, for example:

- Spelling, punctuation, and grammar
- Vague or misleading language
- Excessive detail
- Inappropriate reference to another section of the Constitution or to a non-existent section
- Conflict with existing provisions of the Michigan Constitution
- Conflict with the U.S. Constitution
- Amendment of an excessive number of provisions, which should require a constitutional convention
- Bad public policy

It would be difficult to reconcile a full-blown initiative process with a commission powerful enough to prevent voter-initiated proposals from reaching the ballot. Probably the only tool available to such a commission would be the ability to publicize its findings so that the electorate or the courts would take them into account.

Constitutional Revision

The frequency of constitutional revision varies widely across the nation. Michigan is working on its fourth constitution since 1835. Massachusetts still uses its first, adopted in 1780 and seven years older than the U.S. Constitution. Eighteen other states still use

their first constitution. At the other extreme, Louisiana is on its eleventh constitution (current one adopted in 1974) and Georgia is on its tenth. The other states fall between these. The significance of constitutional revision, then, varies from state to state.

In Michigan, constitutional revision is to be accomplished by a constitutional convention as provided for in Article XII, Section 3. A constitutional convention may wish to consider a few issues regarding revision:

- *Should the definition of revision be refined?* At present there is no bright line distinguishing amendment from revision. Some amendments (for example, Proposal A of

1994) have been extensive, amending several sections, but the provisions were all related. The unsuccessful Reform Michigan Government Now! proposal of 2008 proposed to amend many unrelated sections of the Constitution, which led to criticism that it was an attempt to revise the Constitution without a process, namely a convention, that would permit due consideration of such extensive change.

- *Should election of delegates to the constitutional convention occur in a partisan election?* The Constitution requires that delegates to a constitutional convention be chosen from Michigan House

of Representative and Senate districts in a partisan election. Consideration might be given to removing that requirement.

- *Should provision be made for a Constitutional Revision Commission?* Florida has a multi-branch, bipartisan Constitutional Revision Commission, which met first in 1997-98 and which is scheduled to meet every 20 years to propose changes to the Florida Constitution. Such a commission could bring greater authority to proposed changes, either amendment or revision, than any body outside of a constitutional convention.

Conclusion

The Constitution, as the basic governing document of the state, should be durable, flexible, and understandable to the average citizen. Excessive amendment

can rob the Constitution of these attributes. A constitutional convention would be faced with the problem of providing for an amendment process that would

keep the Constitution relevant while retaining its role as the fundamental determinant of the structure and power of Michigan government.



CRC SPECIAL REPORT

MICHIGAN CONSTITUTIONAL ISSUES



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Sixteenth in a series of papers about state constitutional issues

STATEWIDE ISSUES ON THE NOVEMBER GENERAL ELECTION BALLOT

PROPOSAL 2010-01

At the November 2, 2010 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the 1963 Michigan Constitution. That convention would be charged with drafting a general revision of the state constitution to be submitted to the voters at a later date. The question was automatically placed on the ballot by a provision of the current state Constitution that requires the question to be asked every 16 years. Previous questions were defeated in 1978 and 1994 by sizeable majorities.

Special Elections

If voters opt to call a convention, delegates would be selected on a partisan ballot. Two more elections would be held for a special primary (February) and a special general election (May) to select delegates to the convention. Voters would select 148 convention delegates: one in each district of the Michigan House of Representatives and one in each district of the Michigan Senate.

Delegates Convene

The Constitution provides that a convention would convene in Lansing on October 4, 2011. The del-

egates would elect convention leadership from among their members, including a president, vice president(s), and committee chairs. They would hire administrative personnel and establish convention rules or bylaws. The Constitution does not stipulate a time limit or deadline by which a new constitution should be drafted.

Constitutional History

Michigan's current constitution was narrowly adopted by the voters in 1963. Since then, 80 proposed amendments have been initiated by the legislature and voter-circulated petitions. The voters have adopted 31 amendments, most frequently amending Article IV (Legislative Branch) and Article IX (Finance and Taxation). Article I (Declaration of Rights), Article V (Executive Branch), and Article VIII (Education) have been amended less frequently. In total, 35 sections have been amended or added.

If Rejected

If the question is rejected, Michigan's state and local governments will continue operating under the 1963 Constitution and this question will be slated to automatically appear on the ballot again in the year 2026.

Constitutional Issues

Why might voters decide a new constitution is desirable? Why might they decide that the current constitution is satisfactory?

From February to October of this year, the Citizens Research Council of Michigan has reviewed the provisions in each article in the current constitution.

This analysis has identified provisions that are obsolete and violate provisions of the U.S. Constitution. It found sections and articles that have withstood the test of time and seem to be working as intended. And it found provisions that have come under scrutiny over the years and likely would be the subject of debate and reform efforts at a convention.



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Inoperative and Obsolete Provisions

States have considerable discretion in drafting the fundamental laws that govern their operations and that afford rights to their citizens. State constitutions, however, are bound by the parameters of the U.S. Constitution and may not violate the provisions contained in that document. State constitutional provisions that are obsolete because they violate the provisions of the federal constitution make the language of a state constitution confusing and misleading. These provisions should be removed or revised to reflect the current status of law.

Article II (Elections) contains two original sections related to the voting age and requirements for property ownership to participate in certain elections that are obsolete. It also contains a relatively new section that provides term limits for the state's officials elected to federal offices that the U.S. Supreme Court has determined to be unconstitutional. Article IV (Legislative Branch) contains provisions relating to

legislative redistricting that are not consistent with the federal constitution. Article VII (Local Government) creates county boards of supervisors consisting of one member from each organized township and representation from cities. Because those governments tend to have unequal populations, this provision violates the federal one man-one vote requirements. Above all else, a constitutional convention would aim to clean up provisions such as these.

Highly Charged Provisions

The Constitution contains a number of provisions that sharply divide certain segments of the state's population. Depending on where one stands on these issues, Proposal 2010-01 may be seen as a threat to, or an opportunity to, alter existing policy. These provisions include: a ban on same sex marriage; a prohibition on certain affirmative action programs; authorization for stem cell research; death penalty restrictions; creation of term limits; a requirement for the election of judges; provisions for local government home rule; a

grant of autonomy to the state universities; tax and revenue limitations; dedication of tax revenues to specific purposes; and a restriction on the use of eminent domain for economic development purposes.

Policy Issues

Finally, a constitutional convention may be seen as an opportunity to reexamine state policy on a number of basic issues fundamental to the operation of state and local governments. A convention may wish to revisit: the direct democracy provisions related to recall, referendum, and voter initiation of legislation and constitutional amendments; the bicameral legislature and the size of each house; the powers of the governor to reorganize state departments; the funding of the judicial system; the types and powers of local governments; education as a right that should receive preeminence in funding; the power to tax and the limitations that should be placed on those powers; annual vs biennial budgeting; and control of the state's civil service system.

The constitutional convention process and each article of the Constitution is discussed in greater detail in CRC's series of papers (available at www.crcmich.org/PUBLICAT/2010s/2010/rpt360.html). The Citizens Research Council of Michigan takes no position on the question of calling a constitutional convention. It is hoped that examination of the matters identified in CRC's series of papers will promote discussion of vital constitutional issues and assist citizens in deliberations on the question of calling a constitutional convention.

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