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 sections 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 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 therefore 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

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

[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)].

[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)]

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 senator 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. 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-

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

[7] MCL 168.951-976.

[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 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 live 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)

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

[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

Referendum called on	Purpose of Bill	Election Date	Outcome
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 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]

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

[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.