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# Michigan Constitutional Issues

CITIZENS RESEARCH COUNCIL OF MICHIGAN IS A 501(C) 3) TAX EXEMPT ORGANIZATION

**Report No. 313-01** **First in a series on revising the Michigan Constitution** **June 1994**

## THE NATURE AND PURPOSE OF A STATE CONSTITUTION

### THE ISSUE IN BRIEF

At the general election to be held on November 8, 1994, the people of Michigan will decide the question whether to call a Constitutional Convention to revise the present state Constitution Which was adopted April 11 1963. Section 3 of Article 12 of the State Constitution requires that "[a] the general election to be held in the year 1978, and in each sixteenth year thereafter and at such other times as may be provided by law, the question of a general revision of the constitution shall be submitted to the electors of the state...."

In resolving the question of whether to call a Michigan Constitutional Convention, it is essential that voters have an adequate understanding of the nature and purpose of a state constitution. This analysis examines the basic principles underlying American constitutional law, particularly as those principles concern the nature of state government. This analysis summarizes the issues examined in Research Council Memorandum No. 202, The State Constitution: Its Nature and Purpose, authored by Paul G. Kauper, October 1961, 29 pages.

### Introduction

American constitutional law presupposes certain basic principles that find expression, either explicitly or implicitly, in state constitutions and the Constitution of the United States. Some of these principles are so fundamental and familiar, and their implications so plain, that it is sufficient simply to enumerate them: that political power resides ultimately in the people; that the popular will is reflected in the institutions of representative government which are created to serve the interests and welfare of the people; that those institutions of government are subject to the limitations imposed by the people and by the rights retained by them; that a constitution is the fundamental and supreme law; and that courts when exercising the power of judicial review have the responsibility and obligation to uphold this fundamental law and to remit enforcement of legislative and other acts of government which are repugnant to it. These are propositions which need no elaboration. The matters discussed below regarding the nature and purpose of a state constitution, both in relation to the structure of the federal system and to the internal purpose served by such a document, warrant a more extended treatment.

### The Notion of a Written Constitution as Supreme Law

The United States Constitution and the state constitutions, some of which predate the federal charter, give expression to the concept that the basic framework and institutions of government and the liberties which the people reserve to themselves are to be reduced to writing In a document that is recognized as the supreme law. The contours of American government, that now are so accepted as to be taken for granted, and which in the main consist of a distribution of powers

between a central government and constituent states in a federal system and a well-defined separation of powers within their respective spheres, could not be achieved on a constitutional basis except through a written document.

## States as Part of the Federal Union

In 1868, the United States Supreme Court observed In the case of **Texas** v **White** that the United States Constitution "looks to an indestructible Union composed of indestructible States." That Michigan Is one of the states comprising this union is of great importance in determining the nature and purpose of its Constitution. The states, while indestructible and possessed of a distinctive constitutional status and sphere of autonomy, are not totally sovereign in the usual sense of that word due to the authority ceded to the federal government.

Because of the express and implied delegation of certain powers to the federal government, the express and implied denial of other powers to the states, and because the federal Constitution recognizes certain individual liberties which can be enforced as a matter of federal law against the states in dealing with their own citizens, states are not sovereign in the full sense of the word.

Nevertheless, the states continue to occupy a place of great significance and responsibility in the federal Union. The states continue to have primary responsibility for a wide array of activities, including the bulk of the criminal laws, the system of private law and its administration, the role of local governments, elementary-secondary education, and public health and safety. In In addition, the states exercise significant regulatory power in important areas of economic life, notwithstanding the increasing reach of the federal government into vital segments of the national economy. The nature of the federal-state relationship considered here is expressed in the Tenth Amendment to the United States Constitution which provides that "[t]he powers not delegated to the United States by this Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

## State Constitutions as Documents of Limitation

It is an accepted tenet of American constitutional law that the principal purpose of a state constitution is to serve as a limitation upon the governmental power of the state. Although a state constitution also defines the organs of government, allocates the powers of government among those organs and declares basic liberties, these considerations are secondary to that of limiting state governmental power. Because that power derives from the nature of sovereignty itself, it is plenary except in so far as it may be limited by a state constitution or by the Constitution of the United States.[*]

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[*] The fact that state constitutions are primarily documents of limitation upon an otherwise plenary, preexisting authority is one explanation for their considerable length. According to data compiled by the Council of State Governments as of January 1, 1994, the 50 state constitutions ranged in length from approximately 174,000 words (Alabama) to 6,600 words (Vermont). The average length was 28,591 words. By comparison, the Constitution of the United States is but approximately 4,400 words.

The sovereign power of a state is to be contrasted with the delegated power of the federal government. In theory at least, the domestic powers of the federal government are limited to those that either are explicitly granted by the Constitution of the United States or which arise by necessary implication. There is a notable exception to the federal government's delegated power: the power to conduct foreign relations, which is generally considered to be an inherent attribute of a sovereign nation. In essence, the Constitution of the United States delegates to the federal government powers which it would not otherwise possess, while the constitution of a state serves not as a grant of authority but as a limitation upon a preexisting authority, the precise outer limits of which are difficult to mark.

The significance of the fact that the powers of a state are plenary, except to the extent they are constitutionally limited, is not always understood. Thus, it not uncommonly occurs that when a state legislature enacts a law, those who may consider it to be objectionable in certain respects may inquire as to what provision of the state constitution authorizes the law. However, in order to vindicate the exercise of a given power, a state legislature need not point to a power granted to it in the constitution. The only relevant inquiry would be whether any provision in the state constitution (or federal Constitution) prohibited the legislative action. In theory, if a state constitution did no more than to establish a legislative body, despite an absence of any specific grant of authority, that body could enact general laws pursuant to the police power, levy taxes of various kinds, borrow and spend money, condemn property for public use, and perform all other acts embraced within the concept of the general powers of government.

**The Separation of Powers**

Based upon Montesquieu's celebrated analysis, the powers of government may be classified into three categories: legislative, executive, and judicial. In the absence of a state constitutional provision to the contrary, and to the extent they are not delegated to the national government, these powers are exercised by the legislative branch of state government. One of the traditional methods by which citizens afford themselves protection from the abuses which naturally would flow from such a centralization of governmental power in one institution is by providing in their state constitutions for a separation of that power.

The doctrine of separation of powers is fundamental to American constitutional thinking and practice. According to this doctrine, the powers of government are dispersed among and within distinct branches of government. For example, Section 2 of Article 3 of the present Michigan Constitution states that "[t]he powers of government are divided into three branches of government; legislative, executive, and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Hence, in Michigan as in other states, the Legislature has the power to enact laws, but not to enforce them; the executive is granted the power to enforce the laws, but not to enact them; and neither can construe the law with finality, for that power is committed to the province of the courts.

## Other Considerations

The organs of government as set forth in a state constitution should be vested with powers adequate to achieve the ends of good government. This means, among other things, that the government should be endowed with the capacity to fashion and administer policies which promote

the general welfare as determined by a preponderant public opinion in light of new and changing circumstances. At the same times the vast expansion of governmental authority and the increased demands imposed upon citizens by regulatory and tax laws, make it equally imperative that the safeguards of representative government, such as the rule of law, the reserved rights of the people, and the restraints designed to prevent arbitrary and irresponsible exercise of power be preserved and strengthened.

The present Michigan Constitution was adopted by the people over 30 years ago. Any proposed revision of that Constitution would do well to observe those considerations which have been determined by experience to be the enduring values of a government resting on the consent of the people. To fashion a fundamental order of government, to preserve the continuity of constitutional tradition by holding fast to that which is good, while ensuring a government which would be adequate to meet not only present needs, but also those of tomorrow -- this is the challenge which would confront a state Constitutional Convention.

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# Michigan Constitutional Issues

CITIZENS RESEARCH COUNCIL OF MICHIGAN IS A 501(C) 3) TAX EXEMPT ORGANIZATION

**Report No. 313-2** **Second in a series on revising the Michigan Constitution** **July 1994**


## THE NOVEMBER 1994 BALLOT QUESTION AND A BRIEF MICHIGAN CONSTITUTIONAL HISTORY

### THE ISSUE IN BRIEF

At the November 8, 1994 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the Michigan Constitution of 1963. The question appears on the ballot automatically every 16 years as required by the Constitution. If the question is approved, within six months a special primary and an election will be held for delegates. The Constitution provides that a convention would convene in Lansing on October 2, 1995. If the question is rejected, it will automatically appear on the ballot again in the year 2010.

The people of Michigan have adopted four constitutions have rejected two others and have failed to approve the calling a constitutional convention on 10 occasions.

The Michigan Constitution of 1963 compared to other state constitutions is relatively newer, has fewer than the average number of words and has been amended less frequently. Michigan has had a total of four state constitutions, only nine states have had five or more. Since Michigan adopted its current constitution in 1963, nine other states have adopted new state constitutions. There have been 51 proposed amendments to the present Michigan Constitution submitted to the voters: 18 were approved, 33 rejected.

### The Ballot Question

The Constitution of 1963 requires that every 16 years the question of calling a constitutional convention be placed before the voters of Michigan. The proposal will appear on the ballot in November in language similar to the following which was used on the November 1978 ballot:

> Shall a convention of elected delegates be called for the purpose of a general revision of the Michigan Constitution, any such revision to be submitted to the voters for ratification?

If a majority of the electors voting on the question approve the calling of a convention, then within six months a special primary and an election will be held for delegates. One delegate is to be elected on a partisan ballot in each of the 110 state House and 38 Senate districts. If the question is rejected, it will automatically appear on the ballot again in the year 2010.

If the question is approved, the Constitution provides that a convention would convene in Lansing on October 2, 1995. A convention would choose its own officers, adopt rules, employ staff, print and distribute documents, and disseminate information about the proposed constitution. Each delegate would receive compensation provided by law. Constitutional conventions in

Michigan are unlimited in their scope: a convention could propose a completely new constitution or offer specific amendments to the current Constitution. The present Constitution provides that any proposed constitution or amendments be submitted to the voters at a time set by the convention not less than 90 days following adjournment.

## 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 10 occasions (most recently in 1978).

### 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 overwhelming 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

There was general dissatisfaction with the 1850 document and in 1866, pursuant to the 16-year requirement of the 1850 Constitution. voters approved by a three to one margin the calling of a constitutional convention. 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 a 18-member commission to study the 1850 Constitution and propose amendments and revisions. The commission submitted its formal report for a revised constitution to the Governor and the Legislature placed it on the bal-

lot. 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).

**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 was in November 1942, again pursuant to the 16-year constitutional requirement. The 1942 proposal for general revision 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 at 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. 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 proposal 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 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 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 new Constitution was approved in a very close vote (810,860 in favor, 803,436 opposed) and took effect January 1, 1964.

**1978 Ballot Proposal**

The Constitution of 1963 continued the requirement of periodic submission to the voters of the question of calling a convention.- It provided that the constitutional convention question be placed on the 1978 statewide ballot and every 16 years thereafter. The question was defeated overwhelmingly on November 7, 1978 (649,286 in favor, 2,112,549 opposed).

**Michigan Constitution of 1963**

The 1963 Constitution was shorter than the 1908 Constitution and was more logically organized. It incorporated a number of changes that were generally considered to be desirable including the four-year term for Governor and Senators and an elective state board of education. Overall, the 1963 Constitution reflected the need for a modern constitution for a major industrial state.

(text continued on page 6)

## General Information on State Constitutions
## (as of January 1, 1994)

| State | Number of Constitutions | Date of Present Constitution | Estimated Length (words) | Number of Amendments -Submitted- | -Adopted- |
|---|---|---|---|---|---|
| Alabama | 6 | 1901 | 174,000 | 783 | 556 |
| Alaska | 1 | 1959 | 16,675 | 32 | 23 |
| Arizona | 1 | 1912 | 28,876 | 215 | 119 |
| Arkansas | 5 | 1874 | 40,720 | 171 | 81 |
| California | *2* | 1879 | 33,350 | 814 | 485 |
| Colorado | 1 | 1876 | 45,679 | 254 | 124 |
| Connecticut | 4 | 1965 | 9,564 | 29 | 28 |
| Delaware | 4 | 1897 | 19,000 | (a) | 123 |
| Florida | 6 | 1969 | 25,100 | 92 | 65 |
| Georgia | 10 | 1983 | 25,000 | 52 | 39 |
| Hawaii | 1 | 1959 | 17,453 | 102 | 86 |
| Idaho | 1 | 1890 | 21,500 | 189 | 109 |
| Illinois | 4 | 1971 | 13,200 | 14 | 8 |
| Indiana | 2 | 1851 | 9,377 | 70 | 38 |
| Iowa | 2 | 1857 | 12,500 | 52 | 49 |
| Kansas | 1 | 1861 | 11,865 | 118 | 90 |
| Kentucky | 4 | 1891 | 23,500 | 65 | 32 |
| Louisiana | 11 | 1975 | 51,448 | 92 | 54 |
| Maine | 1 | 1820 | 13,500 | 192 | 162 |
| Maryland | 4 | 1867 | 41,349 | 238 | 205 |
| Massachusetts | 1 | 1780 | 36,690 | 144 | 117 |
| **Michigan** | **4** | **1964** | **20,000** | 51(b) | **18(b)** |
| Minnesota | 1 | 1858 | 9,500 | 207 | 113 |
| Mississippi | 4 | 1890 | 24,000 | 148 | 116 |
| Missouri | 4 | 1945 | 42,000 | 132 | 81 |
| Montana | 2 | 1973 | 11,866 | 32 | 18 |
| Nebraska | 2 | 1875 | 20,048 | 293 | 197 |
| Nevada | 1 | 1864 | 20,770 | 184 | 113 |
| New Hampshire | 2 | 1784 | 9,200 | 280 | 143 |
| New Jersey | 3 | 1948 | 17,086 | 57 | 44 |
| New Mexico | 1 | 1912 | 27,200 | 240 | 123 |
| New York | 4 | 1895 | 80,000 | 280 | 213 |
| North Carolina | 3 | 1971 | 11,000 | 35 | 27 |
| North Dakota | 1 | 1889 | 20,564 | 235 | 129 |
| Ohio | 2 | 1851 | 36,900 | 253 | 151 |
| Oklahoma | 1 | 1907 | 68,800 | 293 | 146 |
| Oregon | 1 | 1859 | 26,090 | 383 | 193 |
| Pennsylvania | 5 | 1968 | 21,675 | 26 | 20 |
| Rhode Island | 2 | 1843 | 19,026 | 102 | 56 |
| South Carolina | 7 | 1896 | 22,500 | 648 | 463 |
| South Dakota | 1 | 1889 | 23,300 | 191 | 99 |
| Tennessee | 3 | 1870 | 15,300 | 55 | 32 |
| Texas | 5 | 1876 | 76,000 | 518 | 353 |
| Utah | 1 | 1896 | 11,000 | 131 | 82 |
| Vermont | 3 | 1793 | 6,600 | 208 | 50 |
| Virginia | 6 | 1971 | 18,500 | 28 | 23 |
| Washington | 1 | 1889 | 29,400 | 158 | 88 |
| West Virginia | 2 | 1872 | 25,600 | 110 | 64 |
| Wisconsin | 1 | 1848 | 13,500 | 174 | 129 |
| Wyoming | 1 | 1890 | 31,800 | 102 | 61 |

(a) Proposed amendments are not submitted to the voters in Delaware.
(b) As of June, 1994.

Source: The Book of the States, 1994-1995, The Council of State Governments.

The Michigan Constitution of 1963 compared to other state constitutions is relatively newer, has fewer than the average number of words and has been amended less frequently. Michigan has had a total of four state constitutions; only nine states have had five or more. Since Michigan adopted its present Constitution in 1963, nine other states -- Connecticut, Florida, Georgia, Illinois, Louisiana, Montana, North Carolina, Pennsylvania, and Virginia -- have adopted new state constitutions. Three states have constitutions dating back to the eighteenth century: Massachusetts, New Hampshire, and Vermont.

At 20,000 words, the Michigan Constitution is shorter than the constitutions of 28 states and is less than the average length of 28,591 words. The Vermont 1784 document is the shortest with 6,600 words. The Alabama Constitution of 1901 with 174,000 words is the longest document and has had the greatest number of amendments: 783 proposed amendments, 558 adopted.

Since adopting the current Michigan Constitution in 1963, there were constitutional amendments on the ballot in every general election except 1990. There were 51 proposed amendments to the Constitution of 1963 submitted to the voters: 18 by initiative petition and 33 by the legislature. Of the 51 proposed amendments, 18 were approved and 33 rejected. Only one state constitution, Illinois, has fewer amendments than Michigan, eight compared to 18.

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# Michigan Constitutional Issues

CITIZENS RESEARCH COUNCIL OF MICHIGAN IS A 501(C)(3) TAX EXEMPT ORGANIZATION

**Report No. 313-3** **Third in a series on revising the Michigan Constitution** **July 1994**

## THE DECLARATION OF RIGHTS OF THE MICHIGAN CONSTITUTION

### THE ISSUE IN BRIEF

At the general election to be held on November 8, 1994, the people of Michigan will decide the question whether to call a constitutional convention to revise the Michigan Constitution of 1963. The question appears automatically on the statewide ballot every 16 years as required by the Michigan Constitution.

As was noted In the first of this series, 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 which 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 which 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.

### Introduction

Article 1 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 freedom 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 protects 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. By contrast, the Michigan Constitution

protects the right of individuals 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 United States 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 individual 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 United States Supreme Court held that the Fourteenth Amendment of the United States Constitution "incorporated" the Bill of Rights and made those protections applicable to the states.

Although a majority of the United States 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 United States Constitution than upon the federal courts' reading of it, the scope of those protections could be diminished by subsequent United States 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 United States 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 United States Constitution, there is nothing in the United States 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.

**Constitutional Convention Issues**

If the people of Michigan decide at the general election this November to call a state constitutional convention, it is likely such a convention would be expected to resolve several divisive issues concerning individual rights, issues which were not controversial when the last state Constitutional Convention was convened 30 years ago if, indeed, they were issues at all.

**Physician-Assisted Suicide**

Whether a person who suffers from illness, although not necessarily one having a terminal prognosis, has a right under the Michigan Constitution to physician assistance in terminating his or her life is a question which has sorely vexed state policymakers and much of the public in recent months. (Recently, a panel of the Michigan Court of Appeals held, among other matters, that no such right exists under the state Constitution, but the Michigan Supreme Court has agreed to review the case.) In 1993, the state Legislature prohibited physician assisted suicide, but considerable litigation has rendered the status of the law unclear. The Legislature also established a study commission, but the commission failed to reach a consensus. Among the relevant considerations for a constitutional convention would be: whether such a right exists under the state Constitution, or should be granted; the nature and scope of such a right; and the extent to which limitations should be imposed, either in the Michigan Constitution or by the Legislature to prevent potential abuses.*

**Criminal Appeals by Right**

Section 20 of Article 1 of the Michigan Constitution accords certain rights to persons accused in criminal prosecutions, one of which is the right of appeal. The use to which this constitutional provision has been put of late has been a source of controversy concerning the administration of the Michigan court system and the prompt dispensation of justice. For example, the backlog of cases before the Michigan Court of Appeals is such that it now takes three years for the average case to be decided. Each year, the Court receives approximately 13,000 appeals. Of these, roughly 4,400 or 34 percent are appeals from individuals who plead guilty, but subsequently become dissatisfied with the disposition of their case. Frequently, the basis of the appeal is the length of the sentence imposed. Thus, a constitutional convention might be called upon to decide whether the automatic right of appeal should be limited in certain respects. One suggestion has been to treat a voluntary and knowing guilty plea as waiving an automatic right to appeal. The Michigan Legislature has placed such a proposed constitutional amendment on the November 1994 general election statewide ballot.

**Abortion**

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* An initiative petition has been approved for circulation which would place a proposed amendment to the Michigan Constitution regarding physician-assisted suicide on the statewide ballot. However, it is not clear the proposal would accomplish its intended purpose, even if adopted. The proposal would add a Section 25 to Article 1 of the Michigan Constitution providing that "the right of competent adults, who are incapacitated by incurable medical conditions, to voluntarily request and receive medical assistance with respect to whether or not their lives continue, shall not be restrained or abridged." The potential problem with this wording is that it fails to bestow a right. Instead, it appears to assume the existence of such a right and merely states that the right is not to be "restrained or abridged." By contrast, existing provisions of Article 1 of the Michigan Constitution declare particular rights to exist. For example, "[t]he people <u>have</u> the right peaceably to assembly," or "[e]very person <u>has</u> a right to keep and bear arms." (Emphasis supplied.) However, whether the Michigan Constitution contains a right to physician-assisted suicide is an issue that the state Supreme Court has not yet resolved.

Thirty years ago, the United States Supreme Court held that the United States 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 United States Supreme Court has held that the United States 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 allow the Legislature 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**

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 prohibition 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-six states presently authorize the death penalty as punishment upon conviction for specific crimes.

**Inoperative Provision**

If a constitutional convention were called, it should delete the last sentence of Section 11 of Article 1 of the Michigan 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 United States Supreme Court in **Mapp** v **Ohio,** (367 US 643; 1961).

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# Michigan Constitutional Issues

CITIZENS RESEARCH COUNCIL OF MICHIGAN IS A 501(C)(3) TAX EXEMPT ORGANIZATION

**Report No. 313-4** **Fourth in a series on revising the Michigan Constitution** **July 1994**

## ELECTIONS AND TERM LIMITATION PROVISIONS IN THE MICHIGAN CONSTITUTION

### THE ISSUE IN BRIEF

At the November 8, 1994 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the Michigan Constitution of 1963. The question appears on the statewide ballot automatically every 16 years as required by the Constitution.

This analysis of Article 2 on elections examines problems the state has experienced in relation to the functioning of the board of state canvassers and with details relating to the powers of initiative and referendum. In addition, two provisions in Article 2 are obsolete. There are several issues that a constitutional convention might wish to consider.

Article 2 of the Michigan Constitution provides for elections. It defines the qualifications of electors and provides for the place, manner, and time of elections; 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. With the exceptions described below, the elections and term limitation provisions in the Michigan Constitution are reasonably clear and concise and accomplish their intended purposes.

## Board of State Canvassers Issues

### The Role of the Board of State Canvassers

Section 7 of Article 2 provides that a four-member board of state canvassers shall be established by law. Michigan election law requires the board to perform several duties including: approving the not more than 100-word descriptive designations of statewide propositions to appear on the ballot; reviewing signatures on petitions for recalls, initiatives or referendums; reviewing election returns for president and vice-president of the United States, state executive branch officers United States senators and representatives, circuit court judges, state senators and representatives elected from a district comprised of more than one county, and for statewide propositions; and conducting recounts when requested of election returns for any of these offices. The Constitution provides that no candidate for an office to be canvassed shall serve as a member of a board of canvassers.

The duties of the board of state canvassers are clerical and ministerial, seemingly self-executing and without ambiguity. However, political disagreements have plagued the implementation of these provisions. On several occasions board members have attempted to broadly define their role in a larger way than the statutory definition. The state Attorney General has opined that the board is without authority to address questions concerning the merits or constitutionality of an initiated proposal. There also have been problems in agreeing on the authenticity of the signatures on a petition, problems in performing board duties in a timely fashion, and problems in

getting board agreement on a 100-word description of proposals. (In July, 1994, the Governor by executive order transferred the statutory responsibilities of approving the 100-word description of statewide ballot propositions from the board of state canvassers to the six-member state administrative board. This board consists of the Governor, Lieutenant Governor, State Treasurer, Secretary of State, Attorney General, and Superintendent of Public Instruction, the last three having constituted the board prior to amendment in 1955.) While statutory in nature, these problems seem to stem in part from the fact that it is a four-member board, composed of an even number of members from both parties who, while appointed by the Governor, are nominated by the two major political parties. Appointments to this presumably impartial board are made in a very political manner and the role of the board is not constitutionally defined.

While it would seem prudent to maintain the restriction on candidates serving on a board of canvassers a constitutional convention might wish to consider whether a constitutional mandate for a board of state canvassers is in fact necessary. Should it opt to continue this constitutional mandate, it might choose to reconsider the number of members on the board, perhaps providing for a tie-breaking vote, provide for their nomination and selection, and consider whether to constitutionally enumerate the role of the board.

**Timeliness of Actions by Board of State Canvassers**

The Constitution requires that initiative petitions contain a number of signatures equal to a percentage of the total vote cast for all candidates for governor at the last gubernatorial election: five percent for a proposal to initiate a referendum on a statute; eight percent to initiate legislation; ten percent to propose an initiated constitutional amendment; and, 25 percent for the recall of elective officers. Michigan election law provides for the board of canvassers to review the petitions to ascertain that the requisite number of qualified and registered electors' signatures are on the petition and to make an official declaration of the sufficiency or insufficiency of any petition. Section 9 of Article 2 requires the Legislature to either enact or reject initiated legislation within 40 session days of its receipt.

A problem arises from the fact that neither the state Constitution nor Michigan election law requires the board of canvassers to either begin or complete certification of petitions for Initiated referendum and initiated legislation by a date certain. In contrast, Section 2 of Article 12 requires filing of petitions to initiate a constitutional amendment at least 120 days before the next general election. Certification of the petitions must be completed at least 60 days prior to that election. Michigan election law requires the certification of recall petitions within 35 days after their filing. With no requirements for either beginning or completing the certification of initiative or referendum petitions by a date certain, it is possible for the board to set its own agenda, and on occasion, the board has failed to act in a timely fashion. A constitutional convention might wish to create provisions for the filing of petitions and the beginning and completion of certification. This could be a process similar to that for initiated constitutional amendments or recalls, with the proviso that for an initiated statute an additional 40 days must be allowed for legislative action on the initiative. Such timetable provisions should ensure that the question is placed on the ballot at the next general election after filing of the petitions.

## Other Issues

### Form and Manner of Initiated Legislation

Another question that might be considered by a constitutional convention is the extent to which a law proposed by initiative petition must conform to the requirements established for laws proposed by the Legislature. Section 9 of Article 2 defines the power of initiative as "the power [of the people] to propose laws and to enact and reject laws, and limits the extent of this power by providing, "[t]he power of initiative extends only to laws which the legislature may enact under this constitution...." It is not entirely clear whether this provision was intended only as a restriction upon the substantive content of an initiated law, or also restricts its form to that prescribed for laws enacted by the Legislature. For example, Article 4 provides for the style of laws (Section 23), that no law shall embrace more than one subject and that the subject shall be expressed in its title (Section 24), and for the method of revision, alteration or amendment (Section 25). A constitutional convention might wish to clarify if initiated law must meet requirements such as those provisions in Article 4.

### Legislative Avoidance of Referendum

Section 9 of Article 2 defines the referendum as "the power [of the people] to approve or reject laws enacted by the legislature..." and limits the extent of this power by providing, "[t]he power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds...." Without a clear definition of appropriations bills, this restriction on the referendum has become equivocal in recent years, as bills have included both substantive policy and appropriations. The Legislature has included token appropriations in what appear to be substantive bills and substance into appropriations bills, apparently to avoid a possible referendum vote by the electorate. A constitutional convention might wish to more clearly define "appropriations" to avoid future abuses of this limitation on referendum.

### Term Limitation

At the 1992 general election, 59 percent of the Michigan electors voted to add four sections to the state Constitution. Section 10 of Article 2, Section 54 of Article 4, and Section 30 of Article 5, were added to limit the number of terms of office that could be served by United States congressional representatives (no more than three two-year terms during any 12-year period) and senators (no more than two six-year terms during any 24-year period), members of the state Legislature (three two-year terms for representatives and two four-year terms for senators), and elected officials of the executive branch of state government (two four-year terms). Section 4 of Article 12 provides for the severability of the term limitation sections, subsections, and parts from each other in case one is found to be invalid or unconstitutional. It is worth noting that provisions in other states that limit the terms of United States congressional representatives have come under judicial review. Although the people of Michigan have recently spoken on this issue and these provisions will not affect a candidate for office until three years after the possible convening of a convention, a constitutional convention might wish to revisit the term limitation issue.

## Obsolete Provisions

### Conformity to the United States Constitution

As was discussed in the first of this series on constitutional convention issues **(Report No. 313-01),** states are not sovereign entities In the full sense of the word. States may not in their constitutions violate the rights reserved to the people in the United States Constitution. Sections 1 and 6 of Article 2 of the Michigan Constitution do just this.

**Qualifications of Electors** Section 1 of Article 2 of the Michigan Constitution provides that citizens who are 21 years of age or older who have resided in this state six months, and who meet local residency requirements are qualified to vote. This conformed to the federal voting age requirements in 1963, but those requirements have since changed. In 1971, the Twenty-sixth Amendment was added to the United States Constitution, providing that the right to vote of citizens who are 18 years of age or older shall not be abridged on account of age. Section 1 of Article 2 of the Michigan Constitution is contrary to the United States Constitution, and has not been adhered to since 1971. Additionally, 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** Section 6 of Article 2 provides that only property taxpayers and their spouses may vote on ballot issues to increase the constitutional property tax rate limitations for a period of more than five years or to issue bonds. The United States Supreme Court has held that with respect to laws affecting the right to vote, unless an election is for narrow, special purposes, the only permissible constitutional qualifications for voting are residence, age, and citizenship. In another cases the court has ruled that restricting the right to vote on the issuance of general obligation bonds to property owners violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. While there has never been a court case in Michigan challenging Section 6, it is clear that it would not be sustained and municipalities have ceased using property ownership as a criterion for participating in these elections.

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# Michigan Constitutional Issues

CITIZENS RESEARCH COUNCIL OF MICHIGAN IS A 501(C)(3) TAX EXEMPT ORGANIZATION

**Report No. 313-5 Fifth in a series on revising the Michigan Constitution August 1994**

## THE EXECUTIVE BRANCH

### THE ISSUE IN BRIEF

At the November 8, 1994 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the Michigan Constitution of 1963. The question appears on the statewide ballot automatically every 16 years as required by the Constitution.

The executive branch is one of the three principal branches of government. As such, it is essential that voters have a clear understanding of the role of the executive branch and the issues associated with it that may be considered in a constitutional convention. Delegates to the 1961 Constitutional Convention were concerned with strengthening the office of governor. Major changes adopted to achieve this end included increasing the governors authority as it relates to the management of state government and the organization of the executive branch, reducing the number of elected officials, and enhancing the governor's role in the budget process.

The 1963 Constitution established two new constitutional commissions and retained another constitutional commission. The new commissions are transportation and civil rights, while the existing one is civil service. Each of the three commissions is the head of one of the principal departments of state government. There would be several major potential constitutional convention issues if the calling of a convention is approved by the people. These would include the governors executive reorganization power, the role of the Civil Service Commission, the election of state executive officials, and the need for a constitutional Transportation Commission.

### Introduction

Article 5 of the Michigan Constitution entitled, “Executive Branch,” establishes the constitutional framework for the executive branch of state government, one of the three principal branches of government along with the legislative and judicial branches. Under the separation of powers doctrine, the executive branch is responsible for overseeing the execution of the laws and delivering governmental services. A majority of delegates to the 1961 Constitutional Convention wanted to strengthen the office of governor and allow the governor to meet the evolving needs of state government. Opponents of strengthening the governor were concerned with the concentration of power in the governor. This concern manifested itself early in the Constitutional Convention when Delegate Brake offered an amendment to an executive committee proposal that read, “The executive power is vested in the governor.” Delegate Brake wanted to insert the word “chief” before executive, which indicated that not all executive power rested in the governor. The proposed amendment was defeated, which set the tone for efforts to increase the governors executive powers.

## Strengthening the Office of Governor

**Organization and Management** In order to strengthen the governors management role, a maximum of 20 principal departments was authorized; at the time of the Constitutional Convention, there were an estimated 120 executive agencies. For many years there were 19 principal departments, but in 1991 the Governor reduced the number to 18 through an executive order which abolished the Department of Licensing and Regulation and transferred its functions to the Department of Commerce.

Directly related to the establishment of no more than 20 principal departments was authorization for 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." In order to effect a reorganization, the governor must issue an executive order outlining the specific organizational changes, then the Legislature has 60 calendar days to disapprove the executive order by both houses.

During the 26 year period 1965 through 1990, there were few substantive reorganizations by executive order, and most of the substantive executive orders transferred small organizational units from one principal department to another principal department. The current Governor has made extensive use of the executive reorganization power, including major reorganizations. In addition to the abolishment of the Department of Licensing and Regulation, examples of major reorganizations include the abolishment of the Corrections Commission and the restructuring of the Department of Natural Resources.

To improve the management of state government, the Constitution provided for gubernatorial appointment of most principal department heads and reduced the number of elected department heads from six to three (the attorney general, secretary of state and State Board of Education). Of the current 18 principal departments: three are headed by constitutionally elected officials (attorney general, secretary of state and State Board of Education); 11 department heads are directly appointed by the Governor; and, four are appointed by boards or commissions appointed by the Governor (civil rights and civil service, which are constitutional, and agriculture and natural resources, which are statutory). The Constitution provides that department heads appointed by the governor be subject to senate confirmation except for the Civil Service Commission.

**State Budget** A strong executive budget section was included in the 1963 Constitution. The governor is required to submit a balanced budget for all state operating funds. Michigan had a statutory executive budget prior to 1963. The governors line item veto of appropriations was retained.

One of the Innovative provisions of the 1963 Constitution was a requirement that the governor, with the approval of the appropriating committees of the House and Senate, reduce appropriation authorizations when revenues fall below revenue estimates. This provision has been implemented statutorily by requiring the governor to issue executive orders reducing proposed spending. The executive orders become effective when approved by a majority of each of the two appropriating committees. Executive orders reducing general fund-general purpose appropriations in the amount of $1.8 billion have been issued since the first one in 1971. These actions accompanied by other efforts has resulted in only two general fund deficits ($310 million in 1989-90 and $169 million in 1990-91) since the 1963 Constitution became effective. Prior to that time,

there were general fund deficits in each of the last six fiscal years before the 1963 Constitution became effective. The effect of the constitutional budgetary provisions have been salutary in that state officials generally have met their responsibility to balance the state budget.

**Other Provisions** Executive appointments with the advice and consent of the Senate require Senate action within 60 session days after the date of appointment. Any appointment not acted on within the 60 day period stands confirmed. There was no similar provision under the 1908 Constitution; thus an executive appointee not confirmed was subject to Senate rejection at any time.

The governor's powers of inquiry and removal of officers, except legislative or judicial officers, for specific causes was made effective for all time periods. Under the 1908 Constitution, this power was in effect only when the Legislature was not in session.

The governor, lieutenant governor attorney general and secretary of state are elected for a four year term rather than a two year term. In addition the governor and lieutenant governor are elected on a joint ballot rather than separately as was the requirement under the 1908 Constitution.

## Constitutionally Established Commissions

The 1963 Constitution established two new commissions and retained another constitutional commission. The new commissions were transportation and civil rights, while the existing one was civil service.

**State Transportation Commission** Prior to the 1963 Constitution, Michigan had an elected state highway commissioner created by statute. One of the major debates in the Constitutional Convention related to the number of executive branch officials that should continue to be elected. A minority of convention delegates wanted to continue the practice of electing the highway commissioner. Instead the 1963 Constitution provided for a State Highway Commission of four members appointed by the governor, who in turn appointed a state highway director. A constitutional amendment was approved by the voters in 1978 changing the name to the State Transportation Commission, increasing its membership to six and providing that the director of the State Transportation Department be appointed as provided by law. Public Act 484 of 1978 authorized the governor to appoint the transportation director.

**Civil Rights Commission** Arguably, the most pressing domestic issue during the deliberations of the 1961 Constitutional Convention was civil rights. Delegates to the Convention were committed to guaranteeing the civil rights of all citizens. The result was the creation of an eight-member constitutional Civil Rights Commission appointed by the governor, with no more than four members from the same political party. The director, by statute, is appointed by the Commission. In accordance with law, the Commission is authorized "to investigate alleged discrimination against any person because of religion, race, color or national origin."

**Civil Service Commission** The Civil Service Commission is provided for in Section 5 of Article 11, but the civil service system is an integral part of the executive branch and the Department of Civil Service is one of the existing 18 principal departments of state government. The constitutional civil service provisions were adopted by the voters in 1940, and the substance of the provisions were retained in the Constitution of 1963. There continues to be a four member, non-

salaried, bipartisan Commission appointed by the governor to set policy for the Department of Civil Service and the state personnel System. A state personnel director position is established in the classified service and is appointed by the Commission. The Legislature is required to appropriate to the Department not less than one percent of the aggregate payroll of the classified service for the preceding fiscal year.

In order to facilitate management flexibility and policy development, the Constitution Increased the number of positions exempt from the classified service from two to five for each department. This was in addition to the heads of principal departments and the principal executive officers of boards and commissions heading principal departments. Finally, eight exempt positions were authorized in the governors office, an increase of six. Another change modified the Commission's power to fix rates of compensation. The Commission is required to give prior notice to the governor of any increase in compensation. Such increases can take effect only at the beginning of a fiscal year, unless waived by a majority vote in the House and Senate. The Legislature within 60 days of the budget submission may reject or reduce a pay increase by a two-thirds vote in both houses of the Legislature.

State police troopers and sergeants were granted the right to bargain collectively by constitutional amendment in 1978. All conditions of employment, except promotions but including retirement and pensions, are subject to collective bargaining and binding interest arbitration.

## Constitutional Convention Issues

If the calling of a constitutional convention is approved by the people, there are several issues concerning the executive branch that likely would generate intense debate. Several of these issues received scrutiny in the 1961 Constitutional Convention.

**Executive-Reorganization Power** As was indicated above, the current Governor has made more extensive use of the executive-reorganization power than any of his predecessors. There are two areas where efforts may be made to reduce the extent of the governor's reorganization power. There was lengthy discussion in the 1961 Constitutional Convention concerning whether a reorganization proposal should be disapproved by majority vote in both houses or by either house. Prior to the constitutional authority, there was statutory executive-reorganization authority that provided for disapproval of a reorganization proposal by either house of the Legislature. Persons wanting to increase legislative power may seek to reduce the current 'requirement for disapproval by both houses to one house.

Two 1991 executive reorganization orders were challenged in the courts. One related to the employment security commission and the second involved a major restructuring of the Department of Natural Resources. Both cases contended that the Governor exceeded the constitutional authority and the enabling law relating to executive reorganization. Ultimately, the Michigan Supreme Court in **House Speaker v Governor** (443 Mich 560; 1993) upheld the Governor's actions in reorganizing the Department of Natural Resources. In the case involving the employment security commission, the Michigan Court of Appeals recently ruled that the Governor could abolish the commission. This decision has been appealed to the Michigan Supreme Court. There may be efforts in a constitutional convention to restrict the governors authority to abolish existing statutory departments and commissions, and to create new departments through the

promulgation of executive reorganization orders. In any event, the current Governor's use of the executive reorganization authority has focused attention on this constitutional power.

**Civil Service Commission** Although other states provide a constitutional basis for their merit system, no state has as strong a constitutional system as Michigan. The existing provision is detailed enough so there is no need for any enabling legislation, and it allows the Commission to adopt rules and regulations implementing its authority. The automatic one percent appropriation provision exempts the Department of Civil Service from the rigors of the appropriation process. The Constitutional Convention of 1961 reviewed the constitutional status of civil service, but made no significant substantive changes. A new convention might give consideration to three modifications to the existing system.

Provision for an automatic appropriation of one percent of classified payroll was included in the 1940 civil service amendment to guarantee an adequate source of funding, and was included after the Legislature gutted a statutory civil service system. It is considered good public policy for governmental agencies to undergo the scrutiny occurring through the budget process. It may be that the state civil service system is well enough established so that the automatic appropriation is no longer necessary.

A second issue concerns state employment and collective bargaining. Prior to 1978, the Commission was of the view that it had no authority, absent constitutional amendment, to extend collective bargaining to classified employees because to do so would involve an unauthorized delegation of the Commission's authority. After approval of the 1978 constitutional amendment authorizing collective bargaining for state police troopers and sergeants and a 1978 letter opinion of the Attorney General stating that the Civil Service Commission did possess the authority to grant collective bargaining to classified employees, the Commission, in 1980, authorized collective bargaining for the majority of classified employees. The Commission's authority to establish a collective bargaining system for classified employees has not been addressed by Michigan courts and would be an appropriate subject for clarification in a constitutional convention.

A third area for review is the Commission's role in reviewing and approving personal service contracts. The purpose of the existing review is to protect the merit system from abuse through the use of contractual service employees in lieu of classified employees. Downsizing the state work force and privatization of state services has raised concerns that the merit system may be undermined by the expanded use of contractual personal services. The existing wording relating to Commission approval or disapproval of personal service contracts is an appropriate subject for review in light of the changing environment concerning the delivery of state services.

**Other Areas of Consideration** An issue in the 1961 Constitutional Convention concerned elective versus appointive state officials. The committee on the executive branch recommended changing the method of selection of six state administrative officials from elective to appointive. The six were the attorney general, auditor general, highway commissioner, secretary of state, superintendent of public instruction and state treasurer. In the Constitution, the attorney general and secretary of state were retained as elected officials. In a constitutional convention, the election or appointment of administrative officials, probably, would focus on the attorney general, the secretary of state and possibly the superintendent of public instruction who is appointed by

the State Board of Education. The need for constitutional status for the Transportation Commission also might be reviewed.

The governor is responsible for calling elections to fill vacancies in the House and Senate. Concern has arisen that elections are not always called in a timely manner. Legislative vacancies result in citizens not being represented when public policy is established. A constitutional convention might consider proposals that establish a timetable for calling special elections when legislative vacancies occur.

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# Michigan Constitutional Issues

CITIZENS RESEARCH COUNCIL OF MICHIGAN IS A 501(C)(3) TAX EXEMPT ORGANIZATION

**Report No. 313-6 Sixth in a series on revising the Michigan Constitution August 1994**


## THE LEGISLATIVE BRANCH

### THE ISSUE IN BRIEF

At the November 8, 1994 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the Michigan Constitution of 1963. The question appears on the statewide ballot automatically every 16 years as required by the Constitution.

The Michigan Legislature, composed of a senate and a house of representatives, is the lawmaking body of state government. This analysis examines several issues concerning provisions in the "Legislative Branch" Article of the Michigan Constitution which a constitutional convention likely would be expected to resolve: legislative apportionment, legislative immunity from civil process, pay setting procedures, legislative disposition of administrative agency rules and legislative authorization to enact public sector collective bargaining laws.

### Introduction

The powers of state government, because they derive from the nature of sovereignty itself, are plenary except in so far as they may be limited by a state constitution or by the Constitution of the United States. In the absence of a state constitutional provision to the contrary these powers belong to the legislative branch of state government. The Michigan Constitution divides these powers among three distinct branches: legislative, executive, and judicial.

Given the expansive scope of legislative power, neither the Michigan Constitution nor this analysis attempts to mark its outer boundaries. Rather, Section 1 of Article 4 (the "Legislative Branch" Article) simply declares the legislative power of Michigan is vested "in a senate and a house of representatives." The Michigan Constitution need not contain any specific grants of authority to the legislative branch of state government, in contrast with the executive and judicial branches which, in the main, exercise powers specifically enumerated. In theory, if the Michigan Constitution did no more than establish the Legislature, that institution could engage in all acts that are embraced within the concept of the general powers of government.

### Constitutional Convention Issues

If the people of Michigan decide at the general election this November to call a constitutional convention, there are several provisions of Article 4 of the Constitution upon which the convention might wish to focus its attention.

**Legislative Reapportionment**

Legislative apportionment is the process by which a state is divided into geographic districts from which voters elect state senators and state representatives. With regards to legislative apportionment, the Michigan Constitution is deficient in two respects: it neither specifies what official is responsible for legislative apportionment, nor what standards are to govern the process.

Less than one year after the Michigan Constitution was adopted, a majority of the apportionment provisions (Sections 2 through 6 of Article 4) were declared unconstitutional by the United States Supreme Court in 1964 as in violation of the Equal Protection Clause of the Fourteenth Amendment. Even though Michigan has been without valid apportionment 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. As a result, after the 1970, 1980 and 1990 federal decennial censuses, the Michigan Supreme Court was prevailed upon to develop an apportionment plan since neither the legislative apportionment commission (which the Michigan Supreme Court declared unconstitutional in 1982) nor, later, the Legislature itself could reach agreement.

Each of the four state Constitutions that have been adopted by Michigan voters since 1835 has contained specific legislative apportionment provisions. This fact suggests voters have deemed it unwise to leave the matter entirely to the discretion of any branch of government. The 1961 Constitutional Convention suffered the misfortune of drafting legislative apportionment standards at the very point in time when the federal case law on the matter was evolving. That case law, at least in so far as basic standards are concerned, is now settled. Thus, due to the fundamental importance of legislative apportionment and given the fact that Michigan voters have historically believed it should be governed by the state Constitution, a constitutional convention might propose language specifying what official should bear responsibility for legislative apportionment and, consistent with federal case law, what standards should govern the process.

**Legislative Immunity from Civil Arrest and Process**

The first sentence of Section 11 of Article 4 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 predecessor Michigan Constitutions, dating back to 1835, also 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. Given the reality of continuous legislative sessions, Section 11 of Article 4 provides legislators with an uninterrupted immunity from civil arrest and civil process. (Since the term “session” or “session day” has been construed to include the first day of session, the day upon which the Legislature adjourns sine die, and each day in between,, the Legislature technically is “in session” even while in recess.)

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.

**State Officers Compensation Commission**

In August of 1968, voters adopted an amendment to Section 12 of Article 4 proposed by the Legislature establishing a state officers compensation commission which recommends compensation for the Legislature, governor, lieutenant governor, and justices of the state Supreme Court. Commission recommendations automatically take effect January I of each odd-numbered year unless rejected by a two-thirds vote in both houses of the Legislature by February 1 of that year. Candor compels the conclusion that the chief object of the present arrangement was to permit increases in compensation for the Legislature, and incidentally for other state officers, but in a manner which would, and in fact does, avoid direct legislative responsibility. A constitutional convention might consider returning to the former constitutional arrangement whereby the Legislature set its own pay and was held accountable to voters by virtue of the fact that such pay increases could not take effect until after an intervening election.

**Administrative Rules**

Section 37 authorizes the Legislature to permit a joint legislative committee, acting between legislative sessions, to suspend administrative rules. However, periodically the Legislature has asserted the authority to empower a committee not only to suspend administrative rules, but also to approve or reject rules. In fact, since the late 1970s, the Legislature has taken the position that administrative rules cannot take effect unless they are approved by a joint committee on administrative rules.

The present legislative treatment of administrative rules not only is contrary to Michigan Attorneys General opinions (by which the Legislature is not bound) but also is contrary to the Michigan Constitution (by which the Legislature <u>is</u> bound.) Concerning the former, Michigan Attorneys General have ruled consistently (in 1953, 1958, and 1967) that since administrative rules have the force and effect of law, the Legislature cannot act upon them except through constitutionally ordained legislative process, "namely by bill." (Before a bill becomes law it must be passed by both houses of the Legislature and be presented to the governor for approval or disapproval.) Concerning the latter, clearly Section 37 of Article 4 does no more than authorize the Legislature to empower a joint committee to <u>suspend</u> administrative rules <u>between</u> sessions of the Legislature. When Section 37 was drafted, a typical legislative session lasted about six months, with long intervals between sessions. Therefore, a procedure whereby a legislative committee could suspend temporarily administrative rules until the Legislature reconvened was eminently understandable.

That the present practice is of questionable constitutionality is reflected by the fact that on two occasions (in 1984 and 1986) the Legislature found itself in the odd position of asking voters to adopt a proposed constitutional amendment to authorize the very practice in which the Legislature was already engaged. Both of the proposed constitutional amendments were rejected by voters, but the Legislature has continued the practice unabated. Given the history of legislative abuses of Section 37 and the fact that sessions of the Legislature now extend year rounds a constitutional convention should consider prohibiting the Legislature from acting upon administrative rules except by bill.

**Resolution of Public Employment Disputes**

Section 48 of Article 4 authorizes the Legislature to enact laws providing for the resolution of public employment disputes, except those involving the state civil service. While the Legislature was doubtless possessed of such authority absent Section 48, a majority of the 1961 Constitutional Convention thought it prudent to remove any doubt as to the authority. It was under the auspices of Section 48 that the Legislature enacted Public Act 379 of 1965, the public employment relations act.

Act 379 is the dominant statute governing public employment relations in Michigan. Furthermore, the Michigan Supreme Court has held consistently that the public employment relations act prevails over conflicting statutes, municipal charters, and ordinances notwithstanding contentions by cities, counties, public universities, local school districts, and inferior state courts that other laws or even the state Constitution carve out exceptions to the act. (Indeed, the only governmental institution about which the question has arisen that the Michigan Supreme Court held was not subject to the public employment relations act is the Court itself.)

Due to the manner in which the Michigan Supreme Court has interpreted the public employment relations act, state Attorney General opinions have stated that public employers and their affected employees in effect have the right through the process of collective bargaining "to negotiate a statute out of existence as to the contracting parties." It is doubtful that the people of Michigan, by approving Section 48 of Article 4, intended that all other state statutes and, indeed, other provisions of the state Constitution were to become mere appendages to the Legislature's authority to resolve public employment disputes. A constitutional convention might wish to ponder the extent to which public sector collective bargaining agreements should supersede state statutes, charter provisions, or ordinances.

# Citizens Research Council of Michigan

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# Michigan Constitutional Issues

CITIZENS RESEARCH COUNCIL OF MICHIGAN IS A 501(C) 3) TAX EXEMPT ORGANIZATION

**Report No. 313-7** **Seventh in a series on revising the Michigan Constitution** **September 1994**


## EDUCATION

### THE ISSUE IN BRIEF

At the November 8, 1994 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the Michigan Constitution of 1963. The question appears on the statewide ballot automatically every 16 years as required by the Constitution.

The role and responsibility of the state for elementary-secondary education and higher education is found in Article 8 of the Michigan Constitution. There are a number of major issues concerning education. Despite the approval of Proposal A in 1994, the funding of K-12 education continues to be an issue. There has been discussion of amending the Michigan Constitution by adding language that would make K-12 education a fundamental right so that the courts could intervene to address school funding disparities. The current constitutional prohibition against aid to nonpublic schools has been an issue and the new charter school legislation has highlighted that issue.

There are also constitutional issues regarding the governance of K-12 and higher education. The state board of education and the governing boards of the three largest universities are composed of eight members each, elected at large for eight-year terms. The election of 32 state education officials adds to the long ballot. Also, the relationships among the state board of education, the state superintendent and the governor have been an issue.

### Elementary and Secondary Education

**State School Aid** The Michigan Constitution requires the state to "maintain and support a system of free public elementary and secondary schools as defined by law." Based on the wording in their constitutions, a number of states have experienced judicial challenges to their school funding systems because of per pupil expenditure disparities among school districts.

The two most significant Michigan court decisions concerning whether disparities in per pupil expenditures violate the state Constitution are **Governor** v **State Treasurer** (389 Mich 1; 1972) and **East Jackson Schools v State of Michigan** (133 Mich App 132; 1984). In 1972, the Michigan Supreme Court in **Governor** v **State Treasurer** declared the then existing deductible-millage school aid formula in violation of the state Constitution. In 1973, after the U.S. Supreme Court ruled in **San Antonio Independent School District** (411 US 1; 1973) that per pupil disparities did not violate the Equal Protection Clause of the U.S. Constitution and the Legislature enacted a new school aid formula, the state Supreme Court vacated its earlier decision.

In **East Jackson Public Schools,** plaintiffs sought a declaratory judgment that the state school-finance system violated state constitutional provisions providing for the equal protection of the laws and requiring the Legislature to maintain and support a system of free public elementary and secondary schools. The Court of Appeals ruled that the Constitution did not require equal financial support of public schools, and also rejected the argument that education is a fundamental right under the state Constitution. Plaintiffs appealed the decision in **East Jackson Public Schools** to the state Supreme Court, but that Court denied leave (419 Mich at 943).

In 1970, the voters added language to Section 2 prohibiting state aid to nonpublic schools. This occurred after an acrimonious public debate that had existed for about two years, and after a $22 million 1970-71 appropriation for state aid to nonpublic schools was enacted.

**State Board of Education** Section 3 of Article 8 of the state Constitution established an eight-member state board of education, whose members are nominated at political party conventions and elected at large. Section 3 also provides that the state board of education appoint the superintendent of public instruction. The 1908 Constitution had provided for an elected four-member board, including the elected superintendent of public instruction, with limited authority and responsibility.

The 1963 Constitution expanded the responsibilities of the state board of education. The board is given leadership and general supervision over all public education, except institutions granting baccalaureate degrees. The board serves as, "the general planning body for all public education including higher education, and shall advise the legislature as to the financial requirements in connection therewith." For a variety of reasons, the state board of education has not exercised this broad grant of authority.

At the 1961 Constitutional Convention, most of the debate focused on whether the governor should be a voting member of the state board of education. The principal arguments in opposition to including the governor as a voting member were 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. Another significant issue was whether to continue to elect the superintendent of public instruction.

## Higher Education

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 University, and Wayne State University are elected at large, while the governing boards of the other ten four-year institutions are appointed by the governor with the advice and consent of the Senate. The 13 boards consist of eight members each.

An effort was made in the 1963 Constitution to provide for planning and coordination of higher education through the state board of education. This authorization is found in Section 3 of Article 8. The state board's authority as it relates 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. The Michigan Supreme Court in **Regents of the University of Michigan** v **the State,** (395 Mich 52; 1975)

found that the state board of education's authority is advisory and the autonomy of the universities remained unchanged.

A new provision in 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.

## Constitutional Convention Issues

If the people approve the calling of a convention, there are several issues concerning Article 8 that likely would generate substantive discussion.

**State Responsibility for Financing K-12 Education** Michigan has adopted a new school-finance system that has reduced reliance on the property tax as a source for financing elementary-secondary education. Per pupil revenue disparities will be reduced under the new funding allocation system, but significant disparities will continue to exist. A number of successful court challenges in other states to state school finance systems have been made using the education article of the state constitution as the basis for the challenge. All state constitutions contain an education clause requiring the state legislature to provide a system of free public education. The language ranges from language similar to Michigan requiring the Legislature to, "maintain and support a system of free public elementary and secondary schools... 11 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 recent 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.

As noted above, the existing language in Article 8 has not provided a basis for successfully challenging Michigan's school finance system in the courts. There are citizens who are impatient with the political process in seeking to reduce per pupil disparities and would seek judicial intervention. This viewpoint may be represented In a constitutional convention and 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.

Another school finance issue is the existing prohibition to support private schools with public funds. New charter school legislation, which permits state aid to nonprofit "public school academies," has focused attention on this issue. The legislation skirts the issue by defining the academies as "public schools." 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.

**Elementary-Secondary Education Governance** 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." The board was given, what appeared to be, a broad grant of constitutional authority over all public education. There has been general

dissatisfaction with the existing governance system at the state level as it relates to K-12 education, and it probably would receive a thorough review In a constitutional convention.

There is no clear pattern among the states regarding the manner of selecting the state board of education or the chief state school officer. Michigan is one of nine states that elects a state board of education, which In turn appoints the chief state school officer. The Constitutions of 1850 and 1908 provided for the election of the superintendent of public instruction. A constitutional convention might consider returning to an elected superintendent of public instruction. Consideration also might be given to the governor appointing some or all of the members of the state board of education.

**Higher Education Governance** One issue relates to 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. This perception combined with the difficulty in judging the qualifications of candidates for the elected higher education governing boards of the three largest universities and concern with the long ballot may focus attention on this issue.

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 has not been successful. One alternative is a separate state board for post-secondary education that would be responsible for planning and coordination.

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# Michigan Constitutional Issues

CITIZENS RESEARCH COUNCIL OF MICHIGAN IS A 501(C)(3) TAX EXEMPT ORGANIZATION

**Report No. 313-8** **Eighth in a series an revising the Michigan Constitution** **September 1994**

## THE JUDICIAL BRANCH

### THE ISSUE IN BRIEF

At the November 8, 1994 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the Michigan Constitution of 1963. The question appears on the statewide ballot automatically every 16 years as required by the Constitution.

The judicial system of Michigan, composed of a Supreme Court, court of appeals and various inferior courts, is the branch of state government responsible for interpreting the law. This analysis examines several issues concerning provisions in Article 6, the "Judicial Branch," of the Michigan Constitution which a constitutional convention likely would be expected to resolve: judicial branch organization and administration; whether members of the Judicial branch should continue to be chosen through election; and the proper extent of state Supreme Court rulernaking authority.

### Introduction

Within the constitutional context of separation of powers, the 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 momentous questions of public policy or merely pedestrian questions which are of importance only to the particular suitors. Due to the limited nature of the judicial power, Hamilton observed in early 1788 that of the three branches of government, the judicial posed the least threat to individual liberties since that branch held neither the power of the sword (as did the executive), nor of that of the purse (as did the legislative). While the sphere of judicial influence certainly has expanded since the time of Hamilton (rendering obsolete Montesquieu's observation that the judicial power "is next to nothing") the properly understood role of the courts remains a limited one.

Courts, whether state or federal, derive their powers from the constitution by which they are established. Section 1 of Article 6 of the Michigan Constitution (the "Judicial Branch" Article) 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."

## Constitutional Convention Issues

If the people of Michigan decide at the general election this November to call a constitutional convention, there are several provisions of Article 6 of the Constitution upon which the convention might wish to focus its attention.

### Judicial Financing and Administration

As was noted earlier, the judicial system established by the Michigan Constitution is composed of "one court of justice" which is then divided into a number of separate courts. The intent behind this somewhat awkward constitutional phraseology was to establish a single, unified judicial structure composed of several divisions, but at the top of which would be a state Supreme Court with exclusive administrative and supervisory control over all lower courts. 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 would be more efficient and economical. However, two issues have arisen regarding the one court of justice concept. One has to do with how state courts are funded; the other with how well they are managed.

The responsibility for funding trial courts in Michigan traditionally has been that of units of local government. However, Public Act 438 of 1980 provided among other things that the state would assume this responsibility over a six-year period beginning in 1983. Except for the three trial courts in Wayne County (third circuit court, 36th district court, and Detroit recorder's court), the state Legislature did not appropriate monies to meet the financial obligations apparently assumed under Act 438 and litigation ensued.

One of the arguments made by plaintiffs was that the one court of justice concept placed upon the state Legislature a constitutional obligation to fund the entire state judicial system. A current justice of the state Supreme Court has expressed the same opinion by way of dicta. **Frederick** v **Presque Isle County Circuit Court,** (439 Mich 1; 1991). However, in January of this year the Michigan court of appeals rejected that argument. The record of the 1961 Constitutional Convention indicates that the one court of justice concept was intended to be only an administrative, and not a funding, arrangement. If a state constitutional convention is approved, it might wish to clarify whether the concept should include state funding of judicial functions as well.

The second issue has to do with the administration and management of the state judicial system. The state Constitution lodges that responsibility exclusively in the state Supreme Court by means of the one court of justice concept and by the requirement that the chief justice appoint an administrator of the courts. There are differing opinions regarding the extent to which that system is well managed. The same may be said regarding the productivity of the state Supreme Court. However, whether the conditions which give rise to these opinions suggest inadequate resources or the inefficient use of existing resources remains an open question. Independence of the judicial branch has its virtues. However, because the administration of the judicial branch is lodged exclusively in the Michigan Supreme Court, the management and organization of the judicial branch probably receives less legislative and executive branch attention than would otherwise be

the case. A state constitutional convention might wish to revisit the issue of how the judiciary should be organized and administered.

**Selection of Supreme Court Justices**

Section 2 of Article 6 provides that the Supreme Court Is to consist of "seven justices elected at non-partisan elections as provided by law." However, justices are nominated by their respective political parties at conventions which tend to be highly partisan affairs. (While Section 2 of Article 6 allows incumbent justices to renominate themselves by filing an affidavit of candidacy, this approach poses the practical disadvantage of forfeiting political party support and, thus, is not utilized with great frequency as the sole method of renomination.) Given the method by which state Supreme Court justices are nominated, the requirement that they be elected on a nonpartisan basis appears to serve no discernible purpose except to provide an illusion of nonpartisanship which, in reality, may not exist.

If a constitutional convention is approved, it might wish to examine different methods of selecting Supreme Court justices and other judges. One alternative would be to require that state Supreme Court justices be nominated (as well as elected) on a nonpartisan basis, which is what the state Constitution now requires for Judges of the court of appeals, circuit courts, and probate courts. Such an approach would remove partisanship from the nominating process where, arguably, it should have no place. An alternative at the other extreme would be to dispense altogether with electing Supreme Court justices and provide instead that they be appointed by the governor.. subject to advice and consent of the senate as is done at the federal level. Indeed, four of the seven current justices of the state Supreme Court were initially appointed by a governor (as were one-third of the 24 current judges of the court of appeals) and there has been no indication that those justices who initially were appointed have performed in a manner inferior to those justices who initially won their seats by election.*

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* A state constitutional convention might consider providing for gubernatorial appointment of all judges as one means of shortening the election ballot. At present, Michigan voters are asked to elect 609 members of the judicial branch of state government: seven Supreme Court justices; 24 court of appeals judges (28 as of November 8, 1994); 179 circuit judges; 107 probate judges; 259 district judges; and 29 Detroit recorder's court judges. Considering the plethora of judicial positions and of the individuals who wish at any given time to occupy them, voters often may have little more to distinguish one candidate from another than a well-known surname.

It is noteworthy that the states follow several approaches with respect to how supreme court justices initially are selected. According to data compiled by the Council of State Governments, supreme court justices In 23 states are appointed by the governor, often from a list of names provided by a judicial selection commission; justices in ten states are elected on a partisan ballot; in 13 states they are elected on a non-partisan basis; and in the remaining four states supreme court justices are selected by the state legislature. In a number of instances where the initial method of selection is by appointment, justices subsequently must stand for election.

**Supreme Court Rulemaking Authority**

Section 5 of Article 6 provides that the Supreme Court "shall by general rules 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 problems. 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 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.

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# Michigan Constitutional Issues

CITIZENS RESEARCH COUNCIL OF MICHIGAN IS A 501(C)(3) TAX EXEMPT ORGANIZATION

**Report No. 313-09 Ninth in a series on revising the Michigan Constitution October 1994**

## SYSTEM OF LOCAL GOVERNMENT

### THE ISSUE IN BRIEF

At the November 8, 1994 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the Michigan Constitution of 1963. The question appears on the statewide ballot automatically every 16 years as required by the Constitution.

Article 7 on "Local Government" contains many of the provisions regarding the system of local government in Michigan, which include counties, townships, cities and villages and authorities. (School districts and community college districts do not have constitutional status.) There are two major issues on local government that a constitutional convention might address:

1. Is the present basic organizational structure of local government adequate to meet the needs of today and tomorrow? There are 1,859 overlapping counties, townships, cities and villages, more than 60 percent of which serve fewer than 2,500 people, providing local services and using scarce public resources.

2. Are the powers of local units of government sufficiently broad and flexible to permit them to respond effectively to the needs of their citizens and to be held accountable to the public?

### Local Government Provisions in the Michigan Constitution

Article 7 contains 34 sections: 16 deal with county government; four with townships; 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 51 proposed constitutional amendments that have been submitted to the voters since 1963, none dealt with the Local Government Article of the Constitution.

### Local Government Structure in Michigan

Much of the system of local government organization today was established in the Northwest Ordinance of 200 years ago, 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 and villages and special districts. The number of local units in Michigan has changed relatively little since the 1963 Constitution.

**Number of Units of Local Government in Michigan**

| | 1962 | 1992 | Change |
|---|---|---|---|
| Counties | 83 | 83 | -0- |
| Townships | 1259 | 1242 | - 17 |
| Cities & Villages | 509 | 534 | + 25 |
| Sub-Total | 1851 | 1859 | + 8 |
| Special Districts | 99 | 277 | +178 |

The only significant change in the past 30 years has been in the number of special districts, primarily in library, airport, solid waste, and water and sewer. The modest decline in the number on townships reflects the incorporation of cities. There was a net increase of only eight general purpose local units between 1962 and 1992.

**Governmental Units in Michigan by Population Groups**

| Population Groups | Counties | Cities/Villages | Townships | Total |
|---|---|---|---|---|
| 100,000 and over | 18 | 8 | 0 | 26 |
| 25,000 - 99,999 | 33 | 37 | 17 | 87 |
| 2,500 - 24,999 | 31 | 171 | 403 | 605 |
| Less than 2,500 | 1 | 318 | 82 | 1,141 |
| Total | 83 | 534 | 1,242 | 1,859 |

Most of the general purpose local units serve relatively small populations Only 113 of the 1,859 general purpose governments serve 25,000 or more people; 1,141 serve less than 2,500 people, and 548 of these serve less than 1,000 people. These 1,859 general purpose local units have an estimated total of 15,000 elected officials.

In addition to a large number of local units, local governments in Michigan are overlapping jurisdictions, not only geographically, but also in powers and functions. County governments overlap city and township governments and townships overlap village governments. An incorporated city is separate from the township, but a village continues as part of the township.

**The Issues on Local Government Structure** A basic question a constitutional convention should consider is whether the present organizational structure of local government meets the current and future needs of citizens. A convention could examine the need for 1,859 local units of government, 61 percent of which serve fewer then 2,500 people. A convention might consider whether county, township, city and village, 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 constitutional convention might consider "reinventing" local government.

A comprehensive review 20 years ago by the Governor's Special Commission on Local Government concluded that the local government structure needed to be reorganized to "define the power and authority relationships between counties and municipalities in both service delivery and regulatory functions." The Commission also recommended that the local government framework 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 govern-

ment. This new framework of municipal government would eliminate the intermediate form of government, the village.

## Home Rule

The people in the state constitution define the legal relationship between the state and local governments and establish the relative degree of dependence on or independence from state control of local governments. 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 a 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. **Clinton v Cedar Rapids and the Missouri River Railroad,** (24 Iowa 455; 1868).

As opposed 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." **People e v Hurlbut,** (24 Mich 44, 95; 1871).

The continuing tension between Dillon's Rule and the Cooley Doctrine is the attempt to balance the interests of the state against the rights of communities to determine their own government. Through the 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.

Under home rule, power is granted to local units to deal with local problems and needs. Michigan is considered a strong home rule state. 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. The Michigan Constitution of 1908 provided home rule for cities and villages and the Constitution of 1963 extended home rule to counties, but Wayne is the only county that has adopted a home rule charter. Townships do not have home rule powers.

The constitutional status of township and county officers has been retained in each of the four Michigan Constitutions. The 1963 Constitution requires the election as township officers of a supervisor, clerk, treasurer, and not to exceed four trustees. It also requires the election as county officers of a sheriff, clerk, treasurer, register of deeds, and prosecuting attorney. These constitutional elected county officers must be continued even in a home rule charter form of county government, despite the provision in the 1963 Constitution that the county home rule charter enabling legislation may permit the organization of county government in form different from that set forth in this Constitution. The state constitution does not require specific city or village elected officials: the form of government and elected officials are determined in the home rule charter.

**Home Rule Issues** The Governor's Special Commission on Local Government recommended that the Constitution be amended so that townships be permitted to reorganize under the provi-

sions of the Home Rule City Act without regard to the population and density requirements. Both cities and townships would have separate executive and legislative branches of government. Subject to voter approval of a proposed charter, townships would be able to choose by referendum whether the executive branch be popularly elected or appointed by the township council.

With respect to counties, the Governor's Commission recommended “that county government be structured to require the establishment of an executive officer with full responsibility over all the agencies of county government” and “the use of a referendum to determine the method of selecting a county executive officer by election or through appointment by the Board of County Commissioners.” The commission also recommended “that the Legislature adopt a resolution calling for a revision of Article VII, Section 4, of the Michigan Constitution, and in its place permit each county to decide by action of the county board of commissioners which, if any, of the county officers it shall establish and whether such other officers shall be elected or appointed, subject to popular referendum.”

The 1963 Constitution continued the provisions of the 1850 Constitution regarding representation on the county boards of supervisors of one member from each township and representation from cities as provided by law. Those boards violated one person-one vote principles and were declared invalid under the U.S. Constitution by the U.S. Supreme Court. The Legislature in 1966 required direct election of county commissioners from single member districts. The unconstitutional provisions on the board of supervisors remain in the Constitution.

Another issue is that the 1963 Constitution specifically granted cities and villages power to levy taxes other than property taxes, subject to limitations and prohibitions proved by law to ease the burden on the property tax and to provide additional revenues. However, this constitutional taxing authority was immediately preempted by legislation prohibiting any local non-property tax unless it is specifically authorized by statute.

The city and county home rule provisions of the Michigan Constitution are not self-executing and require implementing legislation. The current implementing legislation for municipal home rule is somewhat broader than that for counties but both are subject to legislative interference and the legislature often shows little self-restraint in interfering in local affairs. A constitutional convention might consider self-executing home rule provisions that would clearly establish home rule supremacy on matters of local concern -- a constitutionally protected sphere of immunity from state intervention in local affairs.

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# Michigan Constitutional Issues

CITIZENS RESEARCH COUNCIL OF MICHIGAN IS A 501(C)(3) TAX EXEMPT ORGANIZATION

**Report No. 313-10** **Last in a series on revising the Michigan Constitution** **October 1994**

## FINANCE AND TAXATION

### THE ISSUE IN BRIEF

At the November 8, 1994 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the Michigan Constitution of 1963. The question appears on the statewide ballot automatically every 16 years as required by the Constitution.

The power to tax and the disposition of the revenues derived therefrom involve two of the essential characteristics of civil government. This analysis examines several provisions in Article 9, "Finance and Taxation," of the Michigan Constitution and Issues related to them that a constitutional convention might consider: state and local property taxes; a graduated income tax; local sales taxes; and the effectiveness of the 1978 (Headlee) tax limitation amendment.

### Introduction

It was noted in the first of this series on revising the Michigan Constitution that the principal purpose of a state constitution is to serve as a limitation upon the governmental power of the state. Perhaps in no area is the foregoing principle more often illustrated than with respect to the power of the government to tax and the interest of the people to limit that power. Thus, Article 9, "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 specifying how the revenues from certain taxes are to be expended. Many of these provisions were contained in the state Constitution when it was adopted, while others were added subsequently by voters.

### Constitutional Convention Issues

If the people of Michigan decide at the general election this November to call a constitutional convention, there are several provisions of Article 9 of the Constitution upon which the convention might wish to focus its attention.

#### Property Taxation

Section 3 of Article 9 requires that general ad valorem property taxes be uniformly imposed upon all nonexempt property; that property be uniformly assessed at the same proportion of market value (not to exceed 50 percent); and that the Legislature provide for a system of equalization of assessments. In March of 1994, voters amended several provisions of Article 9. Section 3 was

amended to exclude school operating taxes from the uniformity requirement and to limit annual increases in the taxable value of individual parcels of property to the lesser of five percent or inflation. Beginning with 1995 taxes, property will be reassessed at the proper percentage of true cash value when sold. The taxable value cap had the effect of grafting a modified, acquisition-value system of assessing property onto what had been a market-value based system. However, the requirements of uniformity (except for school operating taxes) and equalization were not altered. One result has been to complicate administration of the property tax. A constitutional convention might rethink the wisdom of excluding school operating taxes from the uniformity requirement and of superimposing a modified acquisition-value system upon a market-value based system.

**Property Tax Limits** Section 6 of Article 9 imposes an aggregate limit of 15 or 18 mills on nonchartered counties, nonchartered townships, and school districts for operating purposes. These limits may be increased up to 50 mills for up to 20 years by voters. The principal shortcoming of the 50 mill limit is that so much millage is excluded from it (resulting from both its own terms and judicial fiat) that the limit has been rendered virtually meaningless. For example, the statewide average millage rate has not been below 50 mills since 1972. Furthermore, there is no effective enforcement mechanism with respect to that millage that is subject to the limit. As a result, the limit was exceeded on six occasions during the late 1980s and early 1990s. Given the history of the 50 mill limit, a constitutional convention might wish to weigh the general efficacy of property tax limits and (if continued efficacy is deemed to exist) the method by which to establish a limit that is truly effective rather than a mere parchment barrier.

**Graduated Income Taxes**

Section 7 of Article 9 prohibits the imposition of an income tax, graduated as to rate or base, by the state or any of its subdivisions. While this prohibition once was a contentious issue -- proposals to allow graduated income taxes were defeated in 1968, 1972 and 1976 -- the issue has receded in recent years. (Forty-one states levy a personal income tax, of which eight states, including Michigan, do so at a uniform rate upon all income levels.) However, it might be argued that the use of federal adjusted gross income, together with various credits and exemptions, has had the practical effect of graduating the Michigan income tax base. The "Address to the People" which accompanied the present Constitution did note that income calculated for federal tax purposes could be used and that the Legislature could prescribe reasonable exemptions. Furthermore, the courts of Michigan have upheld the use of exemptions, exclusions and credits, but on 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. For example, the homestead property tax credit produces what amounts to a graduated income tax (or a nonuniform property tax, if the homestead property tax credit is looked upon as property tax relief). 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.

**Local Sales Taxation**

Section 8 of Article 9 limits the rate of the sales tax on gross taxable sales of tangible personal property to four percent, plus an additional two percent of gross taxable sales recently adopted for school aid purposes. Whether the limitation was intended to apply only to a state sales tax or

also to a local sales tax is unclear. 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 preempt the sales tax "as a state sales tax." However, the wording of Section 8 stands in contrast to that of Section 7 which prohibits "the state or any of its subdivisions" from imposing a graduated income tax. These two sections, when read together, suggest that when the drafters of the state Constitution intended to limit not only legislative authority, but also the authority of units of local government, they clearly expressed that intent. In 1991, the Legislature authorized certain municipalities to impose several taxes, including the equivalent of a local sales tax upon restaurant meals, to finance professional sport stadia and convention facilities. To date, none of the eligible municipalities has sought voter approval to impose the taxes authorized. A constitutional convention likely would address the question of whether the state Constitution does, or should, prohibit local sales taxation.

**Degree of Constitutional Detail**

One of the continuing areas of disagreement at the 1961 Constitutional Convention was the level of detail which the Constitution should contain in the area of taxation. Many delegates were of the opinion 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 an unfettered discretion. The fact that the sales tax rate could be increased only if voters amended the state Constitution, while the income tax rate could be increased by the Legislature alone, played a significant role in the adoption of Proposal A of 1994. Similar differences of opinion arose concerning the extent to which constitutional provisions should dedicate revenues to specific purposes. For example, in recent years about 25 percent of total state tax revenues have been constitutionally earmarked to specific funds, an amount that will increase to about 33 percent in 1995, when the recent school finance changes are fully implemented. If a constitutional convention is called, the extent to which legislative discretion concerning taxation and the disposition of revenues should be limited will, again, likely be an issue.

**The 1978 Tax Limitation Amendment (Headlee)**

At the November 1978 general election, Michigan voters approved a tax limitation proposal which amended Section 6 of Article 9 and added ten new Sections (Sections 25 through 34) to Article 9. The tax limitation amendment: limited state revenues to a fixed percent (9.49 percent) of state personal income; required the state to maintain at least the proportion of spending paid to local units in 1978; prohibited the state from imposing unfunded mandates upon local units; prohibited local units from imposing new taxes, raising existing taxes, or issuing new unlimited-tax, general-obligation debt without voter approval; and limited local property tax revenue growth by requiring local units to reduce maximum authorized tax rates to offset real growth in assessed valuation. In 1993 the Governor appointed a 12-member commission to review the tax limitation amendment and various implementing statutes. The recently issued report of the commission concluded that many of the foregoing provisions have proven to be quite effective and recommended changes to increase the effectiveness of other provisions. The latter are summarized below.

**State Revenue Limit** The Section 26 revenue limit generally has been effective and noncontroversial, chiefly because it was imposed when state revenues as a percentage of personal income

were at a peak. It should be noted that Section 26 authorizes an adjustment in the revenue limit when programs are transferred between governmental levels by constitutional amendment. A recent example was Proposal A of 1994, which had the effect of transferring 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. 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.

**Voter Approval of Local Taxes** Section 31, to the extent here relevant, prohibits units of local government from levying new taxes or increasing existing taxes without voter approval. The foregoing requirement has not been applied to special assessments or to numerous fees adopted by many communities. While there are recognized legal distinctions between taxes and special assessments or fees, the practical distinctions often are not readily apparent other than that the latter may be imposed without voter approval. A constitutional convention might wish to define the term "tax," or in the alternative, to require voter approval of all governmental "exactions," regardless of nomenclature.

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This is the last in a ten-part series on Michigan Constitutional Issues regarding specific issues which a constitutional convention might consider. This series was funded in part by a grant from the Matilda R. Wilson Fund and consists of:

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| 313-03 | The Declaration of Rights of the Michigan Constitution |
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