

# Citizens Research Council of Michigan

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## Michigan Constitutional Issues

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Third in a series on revising the Michigan Constitution

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### 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

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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 have the right peaceably to assemble," or "[e]very person has 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).