CRC MEMORANDUM

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INSERTING LEGAL CODE INTO THE MICHIGAN CONSTITUTION

Several proposed amendments to the 1963 Michigan Constitution submitted to voters either by the legislature or by initiative petition in recent years (and in particular this year) have contained enough detail to raise the question of whether the Constitution is the appropriate place for such detailed and often complex provisions, regardless of their public policy merits.

Michigan electors are in line to vote on five proposed constitutional amendments at the November 6, 2012, general election dealing with matters of renewable energy, unionization of home health care workers, collective bargaining, state tax limitation, and international crossings. A review of the proposed amendments reveals that several are quite lengthy, go into substantial technical detail, and deal with issues that would be found in statutory law, not in the constitutions, of most states.

The Detail of a Legal Code

The questions of what specifically should be dealt with in a state constitution and the purposes to which a state constitution should be directed are questions which depend for their answer on the choice of a basic approach to constitution making. Most students of the subject agree that detailed constitutional provisions run contrary to the role of a constitution as an enduring, understandable basic governing document. They feel that the constitution should serve the purpose of a fundamental organic document establishing, defining, and limiting the basic organs of power, stating general principles and declaring the rights of the people. These guiding principles suggest that the constitution should not be an elaborate document; that it should be relatively compact and economical in its general arrangement and draftsmanship; that details should be avoided; and that matters appropriate for legislation should not be incorporated into the organic document.

In 1819, John Marshall, Chief Justice of the United States Supreme Court, made an enduring observation concerning the nature and purpose of constitutions. In *McCulloch v Maryland*, (17 US (4 Wheat) 316, 406), Marshall noted that

> [a] constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which composed those objects be deduced from the nature of the objects themselves. ... [W]e must never forget that it is a constitution we are expounding. (Emphasis in original.)

Justice Cardozo stated the matter more succinctly:

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

The early state constitutions embodied the idea that a constitution should establish a general frame of government, setting forth general principles and avoiding the detail which mistakes a constitution for a statute or legal code. And the constitution of the United States is a superb model of a compact, organic document that is logically arranged, internally coherent and drafted with the object in mind of stating broad, fundamental, and enduring purposes.

Examples of the wordiness and detail often found in a legal code that would be introduced in the 2012 proposed constitutional amendments include:

- inclusion of specific definitions of “ownership and development”, “state”, and “new international bridges or tunnels for motor vehicles” for the bridge question
- the types of technology for capturing renewable energies that will qualify as satisfying the Michigan standards, and
- creating and defining the duties and functions of a Michigan Quality Home Care Council or the compo-

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sition of represented parties that would sit on the Council.

The length and complexity of the Constitution limits the ability of state and local lawmakers to exercise judgment. Once provisions with this level of detail are amended to the Constitution, it requires another vote by the people to change it in the future. Even something as simple as technical changes – that could include new renewable energy technologies or different parties to be represented on the Council – would require additional amendments, a lengthy and expensive process.

Just as a constitution does not derive its meaning from the convention or petition authors that drafted it, but rather from the people who ratified it, neither should a proposed constitutional amendment be written in so technical a manner as to render its meaning unintelligible to the general public.[1]

Aberration or Trend?

In the 49 years since the present state Constitution took effect on January 1, 1964, a total of 71 amendments to the Michigan Constitution have been proposed. Voters have approved only 32 of these (a success rate of 46.4 percent). A review of the amendment history leads to several conclusions.

Many of the amendments made changes that could have been accomplished by statute and have added significant length and complexity to the document. The most obvious example of purely statutory language in the Constitution is found in Sections 35 and 35a and 37-42 of Article IX, placed in the Constitution in a series of five amendments, totaling some 3,118 words (or about nine percent of the Constitution), from 1984 to 2006. The 32 amendments have increased the length of the Constitution from 19,203 words in the original document to 36,647 in its present form, a growth of 90.8 percent.

Because recent amendments have embedded statutory detail into the Constitution, future efforts to address those subjects require additional constitutional amendments. Indeed, Section 35, adopted in 1984 was amended in 1994 and 2002. Section 35a, adopted in 1994, was amended in 2002, and Section 37, adopted in 1996, was also amended in 2002. Introduction of more statutory material into the Constitution will likely engender greater need for future amendments, and so on.

The generally poor success rate of proposed amendments suggests that voters are reluctant to alter the contours of the state's fundamental law unless they are convinced that such alterations are warranted. However, it may be that considerations other than constitutional reverence are also at work.[2]

The Constitution as a Preference

The common approach of proposing solutions to often complex policy issues in the Michigan Constitution rather than Michigan's statutes may relate to the relative ease of access that is provided for amending the document as well as the permanency proponents seek for their solutions.

State constitutions, as compared with the constitution of the United States, can be amended with relative ease. In the usual case, a state constitution can be amended by affirmative majority vote at a popular election on a proposition placed on the ballot either by the legislature or initiated by citizens by petition. The power to amend the constitution by simple majority vote is no different from the power of the people to vote on legislative propositions submitted for popular referendum or on legislative propositions initiated by citizens' petitions. It is not surprising, therefore, that the distinction between the constitution as fundamental law, on the one hand, and ordinary statutory law, on the other, have tended to become lost in the process.

The Michigan Constitution permits the initiative to be used (1) to initiate a constitutional amendment or (2) to enact or amend a law. A ballot question on a proposed constitutional amendment requires petitions con-

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

[2] See *Amending the Michigan Constitution: Trends and Issues*, CRC Special Report No. 360-03, March 2010, www.crcmich.org/PUBLICAT/2010s/2010/rpt36003.html.

taining the signatures of registered voters equal in number to at least *ten* percent of the votes cast for all gubernatorial candidates at the preceding general election. A ballot question on a proposal to initiate a law requires petitions containing the signatures of registered voters equal in number to at least *eight* percent of the votes cast for all gubernatorial candidates at the preceding general election. With a difference of only two percentage points in the requirements, the higher requirement for a constitutional amendment generally translates to only 60,000 to 75,000 signatures (depending on the number of votes cast in the last gubernatorial election). Because the difference in signature gathering requirements for these purposes is negligible, it appears advocates of change often select the route that will provide the most permanence, i.e., to enshrine their public policy preferences within the Constitution.

Several factors would seem to explain why efforts to amend Michigan Constitution should be the preferred method of altering Michigan law. First, the cost of petition circulating efforts is such that proponents of any issue would prefer that their efforts be long lasting and meaningful. Also, the issues being addressed in initiatives – both constitutional amendments and initiated laws – tend to be more controversial and divisive than the subjects that are addressed in the legislative process that is used for addressing most policy issues. It is hoped that a constitutional amendment can bring a long-term resolution to these divisive issues.

Additionally, a proposed law introduced by initiative could be hijacked by the legislature. Proponents of change that petition to have a law changed often resort to this time consuming and costly process when they feel that the legislature is unable or unwilling to address the policy issues to their satisfaction. The constitutional process for initiating a law allows the legislature to enact the proposal without change. Once enacted, the laws may be amended by the legislature at any subsequent session. Constitutional amendments may only be altered in the future by subsequent votes of the electorate.

Finally, petition circulators often try to account for a certain number of spoiled signatures by collecting more than the required amounts. This allows the circulators to account for the potential rejection of some percentage of signatures because of errors by signature gatherers and/or signers and to withstand challenges by opponents. It has occurred to more than one person coordinating petition gathering efforts that building in a safe number above the eight percent requirement for initiating laws soon gets them close to the number of signatures needed to initiate a constitutional amendment.

The Need for Restraint

A good case can be made for limiting the state constitution to the essentials or fundamentals and avoiding inclusion of matters ordinarily reserved for the legislative process. The state constitution is by definition the state's fundamental law. It is judicially enforceable as the supreme law of the state, subject of course, to federal limitations, and takes precedence over ordinary laws and administrative acts. The purpose of a constitution as historically conceived is to establish the basic order of government. The constitution loses much of its distinctive significance as the basic and enduring instrument of government when the process of constitutional amendment or revision is used as a substitute for legislation.

Furthermore, the effect of incorporating what are essentially legislative matters in a state constitution is to undercut the legislative process and to limit the area of legislative responsibility and discretion. It is more difficult to remove what is essentially a statutory provision from a constitution than it is to incorporate it in the first instance. Despite potential changes of circumstances or results not anticipated, the legislature is powerless to correct the situation. Insofar as these provisions are effective, they often operate with a crippling effect on the power and responsibility of the legislature to deal adequately with problems pressing for solution. The only recourse in this event is again to amend the constitution, and a large part of the prolixity and bulk of state constitutions is attributable to piecemeal and usually detailed amendments spelling out power to deal with specific situations notwithstanding previously imposed limitations that have been demonstrated to be too rigid and unworkable. The inclusion of rigid restrictions on the legislative power creates other problems. History demonstrates that they frequently become a challenge to harassed and well intentioned legislators to find ways and means of circumventing the constitution. Yet a constitution is a document that should be honored and respected.

Placing curbs on governmental power is understandable. This is one of the essential purposes of a constitution and this is a reason for including a declaration of rights. But it is another matter to cripple the legislature in the exercise of essentially legislative powers where judgment and discretion in meeting current problems are required. A state constitution designed to meet modern needs moves in a negative direction if premised on an unwillingness to entrust the people's representatives with powers adequate to their tasks. Improving the legislative process, attracting able individuals to the legislature and equipping them with the means and facilities conductive to well-informed and responsible discharge of their tasks

is a more constructive approach to the problem of responsible government than the process of popular lawmaking by means of constitutional revision or amendment or the placing of rigid constitutional limitations on the exercise of legislative powers.

Indeed, many of the 71 amendments proposed to the Michigan Constitution have attempted to head-off future debate on policy issues or place checks on legislative discretion or restricting the ability of the legislature to enact change. Past amendments proposed in this vein have included: requiring voter approval of any expansion of gambling; specifying what can be recognized as "marriage or similar union" for any purpose; restrictions on the use of eminent domain; and specifying the minimum drinking age.

This year, each of the proposed constitutional amendments on the 2012 ballot seeks to impose checks on legislative discretion or restrain the ability of the legislature to change policies in the future.

- The renewable energy proposal would supersede legislation previously enacted and restrain the ability of the legislature to act further on this matter.
- The collective bargaining proposal would impede the ability of future legislatures to enact laws abridging, impairing, or limiting public sector collective bargaining or right to work legislation for private sector employees.
- The 2/3 vote requirement for tax expansions would restrict the legislature's ability to raise revenues to fund governmental activities.
- The international bridge proposal seeks to restrict the ability of the legislative and executive branches to enter into an agreement with Canada to construct a new crossing over the Detroit River.
- Finally, the home health care worker proposal seeks to supersede recently enacted changes to state law and creates a council wherein future matters on this issue may be dealt with external to the legislative process.

This is not to suggest that some limitations on generally stated legislative power are not desirable. But any limitations adopted should not be narrowly conceived, should allow flexibility, should be carefully examined in light of their restrictive power on the legislature to meet not only today's problems but tomorrow's as well, and should be drafted with a clarity that will make it unnecessary to resort repeatedly to the process of litigation in order to determine their meaning.

The Importance of Popular Understanding

Finally, regarding the general question whether the constitution should be a relatively compact instrument limited to constitutional fundamentals or an elaborate and detailed document, it is worth mentioning that a significant element of value in a written constitution is that it is a document which citizens should be acquainted with, which they are ready and willing to read, and which they can understand. The briefer and more compact the document, the more likely it is to be read, studied and understood. Conversely, a long document replete with details does not invite the attention of average citizens or reward their efforts.

Conclusion

The problem of increasing bulkiness and the introduction of the prolixity of legal code into a state constitution is not unique to Michigan or to the 1963 Constitution in Michigan's history. The constitutions of many other states have proven prone to the same frequency of amendment and inclusion of statutory detail within those documents. Previous Michigan Constitutions also have suffered from these trends.

While constitutional purists may recognize the inadvisability of continuing to expand the state constitution in this manner, solutions to this problem are not readily apparent. A change in process would suggest an examination of whether restrictions should be placed on the amending process in the interest of assuring the status of the constitution as the fundamental and more enduring law.

Before action is taken down such a path, it must be recalled that the constitution and the statutes are tools of our democratic society. To suggest limitations on the amending process is to enter upon a sensitive area, since it is one of our traditions that a constitution resting on the will of the people should always be freely subject to amendment by expression of the same popular will. The process of amending the state constitution should be neither too difficult nor too easy.