CRC Memorandum

No. 1136 A publication of the Citizens Research Council of Michigan July 2014

A Reminder to Clean Up the Michigan Constitution

Background

On June 26, 2015, the United States Supreme Court ruled in *Obergefell, et al. v. Hodges, et al.* [576 U.S. ___ (2015)] that states cannot ban same-sex marriage. The Court said that state prohibitions on same-sex marriages violate the nation's equal protection standards in the Fourteenth Amendment to the United States Constitution. With this ruling, Article I, Section 25, of the 1963 Michigan Constitution is in violation of the federal Constitution.

In addition to the obvious implications of this ruling for those persons wishing to consecrate their relationship through marriage, this ruling shines a fresh light on the fact that the Michigan Constitution contains certain deficiencies. Chief among these are those provisions that have been unenforceable for many years because they also violate the federal Constitution.

Since a primary purpose of having written constitutions is to inform citizens of the fundamental law by which they are governed, the text of the Michigan Constitution should reflect the actual status of state law. As discussed below, these deficiencies in the state Constitution may be grouped broadly into two categories: (1) inoperative or obsolete provisions that should be deleted, but which need not be replaced by new provisions and (2) inoperative provisions that should be deleted and be replaced by new provisions.

Inoperative Provisions that Should be Deleted without Replacement

It may be said, in general, that voters view constitutional amendments with some degree of suspicion unless they are convinced that the substance of a proposed amendment will achieve a beneficial result. Under the present state Constitution voters have shown some reluctance to alter the fundamental law of the state. Fortunately, the beneficial result that would flow from the category of changes about to be examined would require no such alteration. What these provisions have in common, in addition to having been invalid for many years, is that their deletion from the state Constitution need not be accompanied by replacement provisions.

In addition to the same-sex marriage prohibition contained in Article I, Section 25, of the 1963 Michigan Constitution, the following provisions are inoperative because they conflict with the United States Constitution.

Exclusionary Rule

In *People v Pennington*, (383 Mich 611; 1970), the Michigan Supreme Court held that the last sentence of Article I, Section 11, which allowed certain evidence to be admitted into criminal proceedings, violated the exclusionary rule adopted by the United States Supreme Court in *Mapp v Ohio*, (367 US 643; 1961). In general terms, the exclusionary rule provides that evidence obtained by law enforcement in violation of the Fourth Amendment to the United States Constitution must be excluded from criminal proceedings.

Voting Age

The requirement contained in Article II, Section 1 that voters be at least 21 years of age was rendered invalid by the Twenty-Sixth Amendment to the United States Constitution which reduced the voting age to 18.

CITIZENS RESEARCH COUNCIL OF MICHIGAN
Eric W. Lupher, President
MAIN OFFICE 38777 Six Mile Road, Suite 208 • Livonia, MI 48152-3974 • 734-542-8001 • Fax 734-542-8004
LANSING OFFICE 115 West Allegan, Suite 480 • Lansing, MI 48933-1738 • 517-485-9444
CRCMICH.ORG

Property Ownership Requirement

Article II, Section 6 restricted the right to vote on certain ad valorem tax limitation increases and bond issues to property owners. This provision has not been enforceable since the United States Supreme Court held that such restrictions violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *City of Phoenix v Kolodziejski*, 399 US 204 (1970). The reference to this property ownership requirement found in Article IX, Section 6 of the state Constitution is inoperative for the same reason.

County Board of Supervisors

Article VII, Section 7 required that a board of supervisors be established in each county of the state. The board of supervisors was to consist of one member from each organized township and representation from cities as provided by law. In 1966, the Michigan Supreme Court held that the method of apportioning county boards of supervisors violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Advisory Opinion re Constitutionality of Public Act 261 of 1966*, 380 Mich 736 (1966). Since this ruling, county governance has been in the form of independently elected county commissioners.

Prohibition of Public Aid to Nonpublic Schools

In 1970, Article VIII, Section 2 was amended to prohibit public financial support for nonpublic schools. The amendment added three sentences to Section 2. In *Traverse City School District v Attorney General*, (384 Mich 390; 1971), the Michigan Supreme Court held that a portion of the second sentence violated the First and Fourteenth Amendments to the United States Constitution (free exercise of religion and equal protection of the laws, respectively). The sentence in question reads as follows, with the invalidated language in italics: "[n]o payment, credit, tax benefit, exemption or deduction, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or *at any location or institution where instruction is offered in whole or in part to such nonpublic school student*."

Term Limits for Congressional Representatives

In 1992, Michigan voters adopted Proposal B, a citizen-initiated amendment to the state Constitution to add Section 10 to Article II on Elections, Section 54 to Article IV on the Legislative Branch, Section 30 to Article V on the Executive Branch, and Section 4 to Article XII to provide for severability. These sections created term limits for representatives from Michigan to the U.S. House of Representatives, the U.S. Senate, the Michigan House of Representatives, the Michigan Senate, and the office of Governor, Lieutentant Governor, Secretary of State, and Attorney General. In May 1995, the U.S. Supreme Court ruled in *U.S. Term Limits, Inc. v. Thornton* (514 U.S. 779, 1995), that the U.S. Constitution prohibits states from adopting Congressional qualifications that are in addition to those enumerated in the Constitution. Article II, Section 10 has never been enforced.

Inoperative Provisions that Should Be Deleted and Replaced

Congressional and Legislative Redistricting

Those provisions of the state Constitution that formerly governed legislative redistricting best illustrate that category of constitutional provisions which should be deleted, but replaced by new provisions. Congressional and legislative redistricting are the methods by which states are divided into geographic districts from which voters elect Michigan's representatives to the United States House of Representatives, state senators and state representatives. The state Constitution is deficient in regard to redistricting in two respects: it neither specifies what official

is responsible for redistricting, nor what standards are to govern the process. Less than one year after the state Constitution was adopted, a majority of the apportionment provisions (Article IV, Sections 2 through 6) were rendered unconstitutional by virtue of the United States Supreme Court decision of *Reynolds v Sims*, 377 US 533 (1964). The essence of *Reynolds* is that the Equal Protection Clause of the Fourteenth Amendment generally requires that state legislatures be apportioned on the basis of "one person, one vote."

There the matter has stood for over 50 years because neither the legislature, nor the voters of Michigan through the power to propose constitutional amendments, have chosen to address the issue. It is noteworthy that each of the four Michigan Constitutions adopted since 1835 has contained specific legislative apportionment provisions. This fact suggests voters have deemed it unwise to leave the matter to the discretion of any branch of state government, including the judiciary, which by default has conducted the reapportionment process in Michigan for 40 years (after the 1970, 1980, 1990, and 2000 census). The 2010 redistricting process was carried out under statutory guidelines that conformed to judicial standards. Given the historical preference of Michigan voters, and due to the fundamental importance of legislative apportionment, state constitutional provisions specifying what official should bear responsibility for the process and what standards should govern that process would seem a prudent recourse.

Other Provisions

In addition to the reapportionment provisions, there are other provisions of the state Constitution which deserve attention because they have been rendered all but inoperative by Michigan courts. The first is Article IX, Section 6 which imposes limitations upon local property taxation. The Michigan Supreme Court once said that this provision had been "bruised, beaten and backed to the brink of sterile and forceless words" by the courts, and this remains an accurate description. Article IX, Section 29, has been interpreted so narrowly that it precludes most allegations of unfunded mandates because not all local units of government are required to provide the service in question. Article IX, Section 32, which authorizes taxpayers to file suit in the Michigan Court of Appeals to enforce the 1978 Headlee tax limitation amendment, essentially has been treated with disdain by the Michigan Court of Appeals.

The Means of Revision

The Michigan Constitution provides two methods whereby amendments to it may be proposed: (1) by two-thirds vote of the members in each house of the state legislature or (2) by petitions containing the signatures of registered electors equal in number to at least ten percent of the votes cast for all gubernatorial candidates at the preceding general election. However, neither method restricts the manner whereby either the legislature or the people may arrive at the conclusion that a constitutional amendment would be salutary in a given instance. Broadly speaking, there are three methods with historical precendent that either have been or could be used to examine the Constitution and bring potential corrective or clarifying amendments to the attention of the legislature or the people.

Law Revision Commission

One purpose of the bipartisan legislative council created by Article IV, Section 15 of the Michigan Constitution is to "periodically examine and recommend to the legislature revision of the various laws of the state." This responsibility has been delegated to a Michigan Law Revision Commission established by Public Act 268 of 1986. The commission consists of two members each from the state Senate and House of Representatives, plus four non-legislators. Although Public Act 268 refers to the "common law and statutes" and does not mention the state Constitution, utilization of the commission to propose to the Legislature constitutional revisions would permit necessary review and recommendations to be formulated by an established body with expertise in law revision.

Joint Legislative Commission or Legislatively-Established Commission

Second, the Michigan legislature could establish, in accordance with its rules, a joint committee composed of Senate and House members or could establish by law a commission composed of individuals to be appointed in the manner provided by law. For example, in 1993 the California Legislature established a 23-member commission to recommend, constitutional revisions to the budget process, the structure of state government, and inter-governmental relations.

Gubernatorial Commission

Finally, governors of Michigan on occasion have established by executive order commissions of distinguished citizens to examine significant public policy issues, including constitutional revision. For example, constitutional revision study commissions were appointed by governors in 1878, 1938, 1941 and 1960. An eight-member commission was established in 1986 to review management-labor relations in the state classified civil service system and a 12-member commission was established in 1993 to review the effectiveness of, and to make recommendations to strengthen, the 1978 Headlee tax limitation amendment to the Michigan Constitution. These commissions proved to be useful vehicles for studying important matters of public policy.

Conclusion

It is likely that Michigan lawmakers will draw their attention in the coming months to the many laws that should be revised to reflect the new reality of same-sex marriages. It is equally important that our policymakers draw their attention on necessary amendments to clean up the Michigan Constitution. Citizens should be able to access a written constitution to understand the fundamental structure, basic laws, and limitations on the governments that serve them. The Michigan Constitution now contains more than half a dozen provisions that are inoperable because they conflict with provisions in the United States Constitution. These provisions could be removed from the current document without replacement causing no harm to the operations of or limitations to our state and local governments.

Additionally, another United States Supreme Court ruling (*Arizona State Legislature v. Arizona Independent Redistricting Commission et. al.*, 576 U.S. ___ (2015) makes clear that states have latitude to take remedial actions to reign in the practice of gerrymandering and improve voter and candidate participation in elections. Michigan's constitutional provisions for congressional and legislative redistricting have been in violation of the United States Constitution for as long as the 1963 Michigan Constitution has served as the fundamental law of the state. In separate writings*, the Citizens Research Council of Michigan has called for a constitutional amendment that would amend Sections 2 through 6 of Article IV of the 1963 Michigan Constitution and enshrine in the constitution provisions to:

- Recreate a redistricting commission,
- Limit redistricting to once per decade,
- Describe the appropriate redistricting procedures and timeline,
- Increase transparency and public engagement,
- Protect electors' right to challenge redistricting plans,
- Minimize population variance among districts,
- Ensure contiguous single-member districts,
- Create district boundaries that adhere to political boundaries, and
- Protect communities of interest.

* See (crcmich.org/a-call-for-redistricting-reform/ and crcmich.org/congressional_legislative_redistricting_reform-2011/)