CRC Special Report
Michigan Constitutional Issues

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Article I – Declaration of Rights

In Brief

At the November 2, 2010 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the 1963 Michigan Constitution. The question appears on the ballot automatically every 16 years as required by the Constitution. The Constitution provides that a convention would convene in Lansing on October 4, 2011. If the question is rejected, it will automatically appear on the ballot again in the year 2026.

The Citizens Research Council of Michigan takes no position on the question of calling a constitutional convention. It is hoped that examination of the matters identified in this paper will promote discussion of vital constitutional issues and assist citizens in deliberations on the question of calling a constitutional convention.

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 that 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 that 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. It also examines recent trends in amending Article I of the 1963 Michigan Constitution.

Introduction

Article I 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 historically has been interpreted to protect 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. The U.S. Supreme Court recently has interpreted the Second Amendment as an individual's right to bear arms, but that case involved the District of Columbia, which is a federal territory. The Court has not yet applied that interpretation to the states. By contrast, the Michigan Constitution protects the right of indi-

viduals 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 U.S. 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 U.S. Supreme Court held that the Fourteenth Amendment of the U.S. Constitution "incorporated" the Bill of Rights and made those protections applicable to the states.

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

Changes to Article I since Adoption of the 1963 Constitution

Since adoption of the current Constitution in 1963, seven amendments have been proposed to Article I and all seven were successful. The first four, proposed by the legislature, dealt with criminal procedure:

- Proposal A (1972) Trial by jury of fewer than 12 jurors in misdemeanor cases
- Proposal K (1978) Permit courts to deny bail under certain circumstances in violent crimes
- Proposal B (1988) Rights for victims of crimes
- Proposal B (1994) Limiting criminal appeals

Three of these four constitutional amendments amended existing

sections, Proposal B in 1988 added section 24 to Article I.

The last three were placed on the ballot by initiative petition and reflect the ideological struggles of the last several years:

- Proposal 04-2 (2004) Recognizing only an agreement between one man and one woman as "a marriage or similar union for any purpose"
- Proposal 06-2 (2006) Banning certain governmental affirmative action programs
- Proposal 08-2 (2008) Legalizing human embryonic stem cell research

These amendments became sections 25, 26 and 27 of Article I.

Constitutional Convention Issues

If the people of Michigan decide to call a state constitutional convention, it is likely such a convention would be expected to address several divisive issues concerning individual rights, issues which were not controversial when the last state Constitutional Convention was convened 47 years ago if, indeed, they were issues at all.

As was noted in CRC Report 313-03, since the mid-1990s, proposed constitutional amendments have been designed to advance various social agendas: Restrictions on the expansion of gambling; limiting marriage to unions between one man and one woman; banning certain affirmative action programs, and, of somewhat lesser moment, changing the word "handicapped" to "disabled" in Article VIII.

Revisiting Recent Amendments

The three most recent amendments to Article I – restrictions on same sex marriage, banning certain affirmative action programs, and authorizing human embryo and embryonic stem cell research – remain controversial topics. These three amendments are examples of statutory material being enshrined in the Constitution to protect against future changes. Despite the voters recently expressing their preferences on these questions, it is possible that a constitutional convention will be asked to revisit some or all of these issues.

Same Sex Marriage

In 2004, Section 25 was amended to Article I providing that, "...the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union..." Unlike the other sections of Article I that protect individual rights against impairment by the actions of state government, Section 25 prohibits actions that are viewed by some as rights. The amendment enshrined in the constitution language that existed then, and now, in statutory law.

Although the amendment addresses only the definition of "marriage or similar union", a Michigan Supreme Court ruling in *National Pride at Work Inc v Governor of Michigan*[1] (2008) found that the amendment prohibits public employers from providing health-insurance benefits to their employees' qualified same-sex domestic partners. At the time of that ruling, it was expected that the decision would affect up to 20 universities, community colleges, school districts and governments in Michigan.

Michigan is one of 27 states that currently have constitutional provisions prohibiting same-sex marriage and 41 states that have statutory prohibitions on same-sex marriages.[2]

Affirmative Action

In 2006, Section 26 was amended to Article I to ban affirmative action programs that grant preferential treatment to individuals or groups on the basis of race, sex, color, ethnicity, or national origin in public education, public employment, and government contracting. Over the years affirmative action has evolved to comprise multiple meanings, including programs and processes

[1] coa.courts.mi.gov/documents/OPINIONS/FINAL/SCT/20080507_S133429_164_natlpride3Nov07-op.pdf.

[2] Calif. gay marriage ruling sparks new debate, Stateline.org, Pew Center on the States, www.stateline.org/live/details/story?contentId=310206.

to implement and ensure fair hiring, testing, and admissions policies; outreach programs directed towards members of under-represented groups; programs that give preferential treatment to qualified individuals from under-represented groups; and outright quotas to redress blatant discrimination by a certain entity or in a specific industry.

The amendment to the Michigan Constitution was introduced following decisions in the U.S. Supreme Court on two University of Michigan cases, *Grutter v. Bollinger et al.* (2003) and *Gratz et al. v. Bollinger et al.* (2003), which defined what is legal in regard to public university admissions policies. Those rulings said that minority status can be viewed by university officials as a single positive factor, among many, contributing to student-body diversity. Minority status cannot be given a fixed number of points or be used to meet any sort of minority "quota" or "set-aside." Although permissible under federal law, Section 26 made clear that Michigan schools are not to use minority status as a positive factor contributing to school admissions.

At the state's 15 public universities, undergraduate admissions at the University of Michigan-Ann Arbor had to change the most to comply with Section 26. Also, graduate and professional programs across the state required changes in their admissions policies. With respect to state and local government, recent U.S. Supreme Court decisions already barred the use of quotas and set-asides, and have made it illegal to have an affirmative action preference program without a compelling governmental interest.

Stem Cell Research

In 2008, Section 27 was amended to Article I to allow for research on human embryos in Michigan. Regenerative medicine is a scientific and medical discipline that is focused on utilizing the body's own regenerative capabilities to repair or replace diseased or defective tissues and organs in the human body and to find new therapies for diseases and conditions that currently have limited or no treatment options. Prior to adoption of the amendment, Michigan was considered to have some of the most restrictive laws in the nation respecting human embryonic stem cell research. It was illegal for researchers to conduct research on human embryos, which prohibited researchers from creating new human embryonic stem cell lines in the state. (The creation of new lines allows research to expand.) Scientists were allowed to conduct research using embryonic stem cell lines created outside the state and to use adult stem cells. Even after adoption of Section 27, research on human embryos in Michigan is subject to federal regulations and is restricted to embryos that were created for the purpose of fertility treatment, but are scheduled to be discarded because they were either 1) left over after fertility treatment and no longer needed by the donor or 2) unsuitable for implantation into a woman's uterus. Embryos must be donated with the informed, written consent of the donors.

Other Issues

It is possible that interest groups could bring other social/moral issues to a constitutional convention, including abortion or the death penalty.

Abortion

The U.S. Supreme Court has held that the U.S. 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 U.S. Supreme Court has held that the U.S. 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 address the legislature's authority 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

A constitutional convention may wish to revisit Michigan's ban on the death penalty as punishment for certain heinous crimes. 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 pro-

hibition 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-five states presently authorize the death penalty as punishment upon conviction for specific crimes.[3]

[3] Death Penalty Information Center, www.deathpenaltyinfo.org/states-and-without-death-penalty.

Inoperative Provision

Section 11 provides protection against unreasonable searches and seizures. The last sentence of the section provides, "The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state." This sentence has been ruled invalid because it conflicts with the 4th Amendment to the U.S. 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 U.S. Supreme Court in *Mapp v Ohio*, (367 US 643; 1961).

Conclusion

Twenty-four of the 27 sections in Article I, the 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. A constitutional convention may choose to revisit the rights enumerated in Article I, but no issues have risen to a level of crisis that would suggest immediate reform is necessary.

The final three sections in Article I, which have been added since 2004, move beyond defining basic individual liberties to be protected. The sections creating restrictions on same sex marriage, banning certain affirmative action programs, and authorizing human embryo and embryonic stem cell research reflect the ideological struggles of the last several years. Supporters of the amendments used amendments to the constitution to make change more difficult if the political winds shift in the future. Despite the voters recently expressing their preferences on these questions, it is possible that a constitutional convention will be asked to revisit some or all of these issues.