



# CRC SPECIAL REPORT

## MICHIGAN CONSTITUTIONAL ISSUES



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### ARTICLE VIII – EDUCATION

#### 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 responsibility of the state for elementary and secondary education and higher education (both community colleges and public universities) is found in Article VIII of the Michigan Constitution. A review of the article raises a number of issues that would likely be debated at a constitutional convention, including both funding and governance issues. The level of state support provided to local school districts is a contentious issue and the language requiring the legislature to maintain and support a system of public education may be reviewed. Current language has not provided sufficient grounds for judicial intervention in school funding; stronger language requiring equal or adequate funding of public education may make the state vulnerable to court challenges. The current constitutional prohibition against aid to nonpublic schools has been an issue over the years with the passage of charter school legislation in 1993 and a 2000 ballot proposal to allow for school vouchers (defeated), and would likely be evaluated by a constitutional convention.

A constitutional convention would likely review the governance structure set up in Article VIII for issues related to both K-12 education and higher education. The legislature, governor, state board of education, and superintendent of public instruction all have roles in K-12 education governance. Under the current system, governance is shared with ultimate authority over governance and funding residing with the state legislature. The state board of education has a constitutional oversight role, but it has been a limited role in practice. Additionally, statewide planning and coordination of higher education could be discussed and may lead to changes in how institutions of higher education are governed or how board members are selected. The election of members of the state board of education and three governing boards of public universities (University of Michigan, Michigan State University, and Wayne State University) adds 32 state education officials to the ballot (eight elected every two years in staggered elections) and lengthens the ballot significantly.

Finally, the establishment and support of public libraries in the 1963 Constitution may be discussed because of the evolving needs of residents with respect to libraries and technology.

#### Introduction

The Michigan Constitution singles out education as a uniquely important state function by devoting an entire article to it and by stating that “schools and the means of education shall be forever encouraged” (Section 1). Article VIII deals with elementary and secondary education as well as higher education; it has been amended only twice (once to prohibit aid

to nonpublic schools and once to change the word *handicapped* to *disabled* to comply with the nomenclature in the federal American with Disabilities Act). However, if a constitutional convention is called for, a number of sections of Article VIII may be subject to review and potential alteration.



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## Constitutional Convention Issues

Issues likely to be discussed at a constitutional convention include those related to elementary and secondary education governance and funding, higher education organization and governance, and public libraries.

### Elementary and Secondary Education

Section 2 states that “The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law.” While this is the only mention of the state legislature in relation to elementary and secondary education, it is important because it gives the legislature ultimate authority over public K-12 education. The Constitution gives the governor a role in education as an ex-officio member of the state board of education (Section 3) and limited executive authority over the superintendent of public instruction. The state board of education and superintendent of public instruction are both created and their duties outlined in Article VIII.

### State Legislature

A constitutional convention may review the role of the state legislature in public education. Under the current constitution, the legislature has ultimate authority over elementary and secondary

education, but it delegates the provision of education to local and intermediate school districts. A constitutional convention may clarify the duties of the legislature in regard to public K-12 education or it may weaken the authority of the legislature by strengthening the state board of education.

### State Board of Education

The state board of education consists of eight members nominated by party conventions and elected at-large to eight-year terms in statewide elections. The board has the responsibility of appointing the superintendent of public instruction and determining his or her term of office. This was an expansion on the 1908 Constitution that had provided for an elected four-member board of education, including the elected superintendent of public instruction, with limited authority and responsibility.

The 1963 Constitution attempted to expand the responsibilities of the state board of education. Section 3 states that the board shall serve as the general planning and coordinating body for all public education and have leadership and general supervision responsibilities over all public education, except public universities. While the Constitution

gives the board a broad grant of authority, in practice, the board’s role has been more “consultative and deliberative.”<sup>1</sup> The board is empowered to make education policy only within the limits established by state law; e.g., the board is not empowered to make funding decisions regarding schools, but is supposed to advise the legislature “as to the financial requirements of all public education.”<sup>2</sup> The board’s role was further defined and somewhat reduced by two executive orders which transferred administrative statutory powers and responsibilities as head of the Michigan Department of Education (MDE) from the board to the superintendent of public instruction. Additional state laws and court decisions have detailed the board’s responsibilities and extended its supervisory powers over nonpublic education.

At the 1961 Constitutional Convention, most of the debate focused on whether the governor should be a voting member of the

<sup>1</sup> Citizens Research Council of Michigan. *Organization of State of Michigan Education Functions*. Report No. 335, December 2002: pg. 1.

<sup>2</sup> State Board of Education, Michigan Public Act 287 of 1964, MCL 388.1011.

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state board of education. The principal arguments in opposition focused on 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.

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.”<sup>3</sup> The board was given, what appeared to be, a broad grant of constitutional authority over all public education. General dissatisfaction with the existing governance system at the state level as it relates to K-12 education would probably lead to a thorough review of education governance in a constitutional convention. The reality in Michigan is that the state board shares the responsibility for education policy making and reform with the legislature and governor, and this has led the board to take a more consultative and advisory role and has also contributed to partisan politics playing a greater role in the development of education policy. Michigan is not unique in this regard as others have characterized state boards of education as having “significant powers but limited influence,” and as

<sup>3</sup> Citizens Research Council of Michigan. *Michigan Constitutional Issues: Education*. Report No. 313-7, September 1994.

being relatively weak institutions in relation to other state actors.<sup>4</sup>

The selection of members of state boards of education varies across the states. Twelve states elect some or all of the members of their state board of education (ten states, including Michigan, elect all state board members; two states elect some state board members, with the remainder appointed by the governor). In New Mexico, the elected state board of education is advisory only. The remaining 36 states have appointed state board members. In the majority of these states, board members are appointed by the governor; in two states they are appointed by the legislature; and in two states, members are appointed by multiple authorities. Two states, Minnesota and Wisconsin, do not have state boards of education.<sup>5</sup>

A constitutional convention might consider restructuring the state board, strengthening its constitutional authority and oversight role, or eliminating the board altogether. Current board members are elected which contributes to an already lengthy ballot and raises questions about voters’ knowledge of state board candidates and their qualifica-

<sup>4</sup> Paul Manna. *State Governance, Policy, and Education Performance in the United States*. Annual Meeting of the American Political Science Association. Chicago, September 2-5, 2004: pg. 3.

<sup>5</sup> Mary Fulton. *State Education Governance Models*. Education Commission of the States: State Notes, March 2008.

tions for office. A convention may review how other states select state board members and consider allowing the governor and/or other state officials to appoint some or all of the members of the state board of education. The relationship between the governor and state board may be reviewed; the role of the governor may be weakened by removing the governor from the board or strengthened by making the governor a voting member. The relationship between the legislature and state board may be reviewed as well; the role of the legislature may be weakened by strengthening the state board’s authority and oversight role or may be strengthened by eliminating the state board of education. A strengthened state board of education would provide an authoritative statewide body with a focus on education as opposed to the legislature, which must spread its resources and energies across many topics. In practice, state boards of education have not proven to be strong, authoritative institutions.

## Superintendent of Public Instruction

Section 3 specifies that the superintendent of public instruction serves as the non-voting chair of the state board of education and as the executive director of the MDE. Unlike most other executive department heads, who are appointed by and report to the

<sup>6</sup> See Citizens Research Council of Michigan, Special Report #360-08, *Michigan Constitutional Issues: Article V – Executive Branch*.

governor, the superintendent serves at the will of the board.<sup>6</sup> However, the superintendent does head an executive office, sit on the governor's cabinet, and act as a staff officer to the governor.

The Constitutions of 1850 and 1908 provided for the popular election of the superintendent of public instruction, as 14 other states currently do; a constitutional convention might consider returning to an elected superintendent of public instruction. Another consideration may be to allow the governor to appoint the superintendent, which would weaken the role of the state board and give the governor more authority over the superintendent. In 24 states, the chief state school officer (i.e., the superintendent of public instruction in Michigan) is appointed by the state board of education; in 12 states, the position is appointed by the governor.

## School Funding

### State Support for K-12 Education

Section 2 requires the state legislature to "maintain and support a system of free public elementary and secondary schools as defined by law." Based on the wording in their constitutions, 44 states have experienced constitutional challenges to state education finance. These cases originally argued for school funding equity, but then began to focus on the adequacy of state school finance systems. Decisions rendered by state courts have varied, some siding with plaintiffs arguing for school finance equity or adequacy and others finding

for the states defending their current system.<sup>7</sup> State courts in general have been more accepting than federal courts of the notion that states provide a constitutional right to education because each state's constitution articulates that state's responsibilities in relation to public education.<sup>8</sup> The provisions range from language similar to Michigan's ("...maintain and support a system of free public elementary and secondary schools...") 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 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. Schools and students in California recently filed a lawsuit claiming that elected officials have failed in their obligation to support public schools.<sup>9</sup>

<sup>7</sup> Michael A. Rebell. "Educational Adequacy, Democracy, and the Courts." *Achieving High Educational Standards for All: Conference Summary*. Eds. Timothy Ready, Christopher Edley Jr., and Catherine E. Snow, Division of Behavioral and Social Sciences and Education, National Research Council: pg. 226.

<sup>8</sup> Todd Ziebarth. *State Constitutions and Public Education Governance*. Education Commission of the States: State Notes, October 2000.

<sup>9</sup> Jill Tucker and Marisa Lagos. "Schools, students sue state over funding." *San Francisco Chronicle*, 21.May.10. [www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2010/05/21/MNDV1DHVMC.DTL](http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2010/05/21/MNDV1DHVMC.DTL) (accessed 26.May.10).

Michigan courts, however, have not found Michigan's school finance system to be in violation of state law or the State Constitution. In *Governor v State Treasurer* (1972), the Michigan Supreme Court declared the former deductible-millage school aid formula to be in violation of the Michigan Constitution. In 1973, after the U.S. Supreme Court ruled in *San Antonio Independent School District v Rodriguez* that per pupil disparities did not violate the Equal Protection Clause of the U.S. Constitution and the State Legislature enacted a new school aid formula, the Michigan Supreme Court vacated its earlier decision. In *East Jackson Public Schools v State of Michigan* (1984), the Michigan Court of Appeals rejected arguments that the State Constitution provided a fundamental right to education and that it imposed upon the legislature a requirement of equal financial support of local schools. The Michigan Supreme Court refused to hear an appeal.<sup>10</sup>

With the passage of Proposal A in 1994, Michigan adopted a new school finance system that accomplished a number of objectives: 1) it reduced local property tax rates for taxpayers across the state; 2) it reduced school districts' reliance on local property tax revenues, thereby increasing their reliance on state tax revenues (e.g., sales and in-

<sup>10</sup> Citizens Research Council of Michigan. *School-Finance Reform in Michigan: Will Judicial Intervention be Next?* Council Comments No. 986, January 1990.

come tax revenues), which tend to be more directly linked to the economy and more volatile; 3) it limited the growth of local property tax revenues through a new property tax limitation which keeps a property's taxable value from increasing more than five percent or the rate of inflation, whichever is less; and 4) it reduced per pupil revenue disparities in districts across the state.

Since the passage of Proposal A, revenues per pupil in the lowest revenue districts have increased 159 percent from \$2,762 in FY1994 to \$7,151 in FY2010. During that time period, revenues per pupil in the highest revenue districts increased only 18 percent from \$10,294 to \$12,159. This has reduced the spending gap between the highest revenue and lowest revenue districts by over 33 percent, from a gap of approximately \$7,500 per student in FY1994 to a gap of only \$5,000 per student in FY2010. The current school finance system has made the amount of revenue provided to educate each pupil less dependent on where each pupil lives and the property wealth of that district. However, the gap in spending across districts has not been erased and disparities in spending continue to exist.

As noted above, the existing language in Article VIII has not yet provided a basis for successfully challenging Michigan's school finance system in the courts. Some advocates of more funding for schools may be impatient with the political process and may seek to reduce per pupil disparities or to increase funding to "adequate" levels through judicial interven-

tion. If this viewpoint is represented in a constitutional convention, 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.

### **Prohibition on Aid to Nonpublic Schools**

In 1970, Michigan voters added language to Section 2 of Article VIII of the Constitution prohibiting state aid to nonpublic schools. This occurred after a two-year long acrimonious public debate that culminated in Public Act 100 of 1970 (the school aid act), which provided that the state would pay 50 percent of the salaries of certified lay teachers who teach secular subjects in nonpublic schools in fiscal years 1971 and 1972, and 75 percent of such salaries in subsequent years. A 1971 Michigan Supreme Court decision (*Traverse City School District v Attorney General*) found one sentence of the amendment to be in violation of the U.S. Constitution and therefore unenforceable, but validated the remainder of the constitutional amendment and the prohibition on aid to nonpublic schools. Public schools academies (i.e., charter schools) are not affected by this amendment because, while they are organized differently than traditional districts, they are considered to be local public schools and qualify for state aid in a way similar to traditional districts. However, schools of choice and charter schools have blurred the lines between public and nonpublic schools creating greater accep-

tance of alternative sources of education.

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. It should be noted that a 2000 statewide ballot initiative that would have removed the general prohibition against indirect aid to nonpublic schools and established a voucher system in certain districts was defeated by a 69 to 31 percent margin.<sup>11</sup> The U.S. Supreme Court has ruled that school choice and voucher programs pass constitutional scrutiny if the programs provide true private choice and government aid (state and federal) reaches private religious schools only as a result of the genuine, independent choices of private individuals. This is in contrast to programs that provide government aid directly to sectarian schools, which are less likely to pass constitutional scrutiny.<sup>12</sup>

### **Higher Education**

#### **Selection of Governing Boards**

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

<sup>11</sup> Citizens Research Council of Michigan. *Statewide Ballot Issues: Proposal 00-1 – School Choice*. Report 331, September 2000.

<sup>12</sup> *Zelman v Simmons-Harris*, 536 U.S. 639.

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

A constitutional convention may review 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. Furthermore, voters face difficulty in judging the qualifications of candidates for the elected higher education governing boards of the three largest universities and in evaluating the votes and actions of current board members due to lack of

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<sup>13</sup> Michigan's 13 public university include: Central Michigan University, Eastern Michigan University, Ferris State University, Grand Valley State University, Lake Superior State University, Michigan State University, Michigan Technological University, Northern Michigan University, Oakland University, Saginaw Valley State University, University of Michigan (includes an Ann Arbor campus, Dearborn campus, and Flint campus), Wayne State University, and Western Michigan University. Sometimes the three University of Michigan campuses are referred to as three separate public universities, but they are governed by one university board.

voter knowledge of candidates, board members, and the governing boards themselves. This can lead to ballot roll-off, where voters fail to vote for offices like university governing board members that are further down on the ballot, and/or voting based solely on name recognition or party affiliation. These issues in addition to concern with the long ballot may focus attention on this issue at a constitutional convention.

It is important to note, though, that some may view the election of the governing board members of the state's three research universities as vital to the independence of those universities. A provision for electing the regents of the University of Michigan goes back to the 1850 Constitution; the 1908 Constitution contained provisions for electing board members for all three of the largest universities. At the 1961 Constitutional Convention, one delegate stated "...it's of the greatest importance that you maintain the election of the boards of control of the 3 large universities. It gives the boards an independence that they would not have were they appointed by the governor, and this at times could be important."<sup>14</sup>

### Planning and Coordination

An effort was made in the 1963 Constitution to provide for planning and coordination of higher education through the state board of education (Section 3 states that the state board "shall

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<sup>14</sup> State of Michigan Constitutional Convention 1961: Official Record, Volume I, pg. 1143.

serve as the general planning and coordinating body for all public education, including higher education"). The state board's authority as it related 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. In *Regents of the University of Michigan v the State* (1975), the Michigan Supreme Court found that the state board of education's authority is advisory and the autonomy of the universities remained unchanged.

Michigan has 13 independent, autonomous public universities with governance undertaken by separate institutional governing boards, and 28 public community colleges with locally elected governing boards. Michigan's organization of its public institutions of higher education is unique. Twenty-four states operate under one or two consolidated statewide governing board(s); 24 states have a statewide coordinating board that serves as liaison between state government and the governing boards of individual institutions; and only two states (Delaware and Michigan) operate without a statewide coordinating or governing board. "Michigan is the only state with both a large population and a large number of institutions that has neither a consolidated governing board nor a coordinating board. Michigan's unique decision to reject centralized governance or coordination is reflective of the state's long history of guarding institutional autonomy."<sup>15</sup> Critics of the current

system claim that it can lead to mission creep and duplicative college programs across the state. Advocates stress the importance of institutional autonomy.

A statewide university system would make statewide planning and coordination of higher education easier and may increase efficiency by coordinating the programs offered by different universities and colleges across the state. Even if the current system of independent universities and colleges is kept, 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 have not been successful. A constitutional convention may wish to revisit that goal. One alternative short of a state university system might be a separate state board for post-secondary educa-

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<sup>15</sup> Carolyn Waller, Ran Coble, Joanne Scharer, and Susan Giamportone. North Carolina Center for Public Policy Research. *Governance and Coordination of Public Higher Education in all 50 States*, 2000: pgs 49-50.

While Article VIII has not been amended heavily over the years and does not have many unconstitutional or inoperable provisions, a review of it highlights a number of issues that would likely be debated at a constitutional convention, relating to both education governance and funding. Broad

tion that would be responsible for planning and coordination.

## Community Colleges

Section 7, which was new to 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.

## Libraries

Section 9 requires the legislature to provide for the establishment and support of public libraries. It specifies that libraries should be available to all residents and should be supported by fines assessed and collected for any breach of the penal laws in several counties, townships, and cities (state law specifies that the proceeds of all fines for any breach of the penal laws of Michigan when collected in any county and not already apportioned shall

be apportioned by the county treasurer in accordance with the directions of the state board for libraries<sup>16</sup>).

A constitutional convention may wish to review this section of the Constitution and debate whether the establishment and support of public libraries belongs in the Constitution. Some may feel that with recent technological advancements, particularly with the advent of the Internet, libraries are changing rapidly to meet the needs of residents and therefore should not be established in the Constitution with a dedicated source of funding because it is a more static document that is less amenable to adjustments than state law. Others, however, would stress the importance of public libraries in providing services to those without access to books and technology at home and the many cuts libraries have faced over the years to reinforce a need to establish libraries with a dedicated source of funding in the Constitution.

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<sup>16</sup> Distribution of Penal Fines to Public Libraries, Michigan Public Act 59 of 1964, MCL 397.32.

## Conclusion

issues likely to be discussed include the relationship among and roles of the governor, legislature, state board of education, and superintendent of public instruction, in the governance and funding of K-12 education; the language outlining the state's responsibility to provide for and fund education;

statewide planning, coordination, and governance of higher education; and the establishment and support of public libraries. While there are likely differing viewpoints on these issues, there is nothing in Article VIII that has risen to the level of crisis that would suggest modification is necessary.