CRC Special Report
Michigan Constitutional Issues

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Article XII – Amendment and Revision

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.

Article XII is the only article of the 1963 Michigan Constitution that does not relate to the structure or powers of government or to the rights of citizens. It provides for the process of altering the Constitution, either through amendment, which can occur as the result of legislatively-referred proposals or voter-initiated proposals, or revision, which can occur by means of a constitutional convention.

The principal challenge that would be faced by a constitutional convention in considering constitutional amendment and revision would be that of finding the appropriate degree of difficulty in adopting constitutional changes in order to maintain a proper balance between the roles of the Constitution as a governing document of the state with enduring principles and one with provisions relevant to changing economic, social, and political environments.

Introduction

Regardless of how carefully drafted a state constitution may be when it is adopted, it will be necessary or appropriate to change it from time to time. Evolving social, economic, or political conditions will necessitate addition, deletion, or alteration of provisions to assure that the constitution provides for the kind of state and local governmental structure and authority required to remain relevant to the environment within which it exists.

Alteration of individual provisions or provisions related to each other is called *amendment*. More extensive change, altering several unrelated provisions, is called *revision*. Article XII of the 1963 Michigan Constitution sets forth the ways in which amendment and revision of the basic Michigan governing document may occur.

Amending a Constitution

Extent of change

A constitutional amendment can be very specific. For example, Proposal D of 1978 changed one number in Article IV, Section 40, thereby increasing the minimum drinking age from 18 to 21.

A constitutional amendment can also encompass several sections of one or more articles in changing a particular policy. For example, Proposal E of 1978 (the Headlee Amendment) altered Section 6 of Article IX and added ten new sections to that article in instituting a policy of tax limitation. In 1992, Pro-

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posal B amended one section in each of four articles (II, IV, V, and XII) in order to establish term limits in Michigan.

A question arises when an attempt is made to present to the voters an amendment that would change several unrelated sections of the constitution. Is it amendment? Or, is it revision, which might require consideration by a constitutional convention? Michigan voters have never really been faced with such a proposal, but in 2008, a wide-ranging voter-initiated proposal (Reform Michigan Government Now!) that would have amended many unrelated articles and sections, received enough signatures to make it to the ballot, but was ruled ineligible by the courts on technical grounds. The distinction between amendment and revision constitutes a gray area.

Purpose of change

The Michigan Constitution can be and has been amended in order to accomplish one or more of several purposes:

"Clean up"

The Michigan Constitution of 1963 contains several provisions (e. g., minimum voting age of 21, county board of supervisors chosen from governmental units, term limits for members of Congress) that have been found in violation of the U.S. Constitution. It would be desirable to amend the Constitution to remove the unconstitutional language in order to assure that all of the provisions in the Constitution are actually operable. Despite many recommendations to do this, however, neither the legislature nor the voters have placed such a "clean-up" amendment on the ballot.

Add or alter basic provisions of governance

A state constitution contains basic provisions of governance; that is, provisions that establish the basic structure of government, its powers, and the rights of citizens, and which should not be alterable by the legislature acting alone. Occasionally, basic provisions may be expanded or made more explicit by amendment or new provisions may be added. This does not mean that a "basic" principle will always be uncontroversial. For example, the constitution is the appropriate place to provide for the number of terms elected officials may serve. Proposal B of 1992, which established term limits for elected executive branch officials and legislators, changed the constitutional policy from unlimited terms to very limited numbers of terms for these officials. Proposal C of 1970, which prohibited public aid to nonpublic schools and students, might be considered an elaboration or extension of the provision in Article I, Section 4, which prohibits public aid to "any religious sect or society, theological or religious seminary."

Amend provisions in original constitution that could be considered statutory in nature

The 1963 Michigan Constitution contains many sections of material, some of it carried over from the 1908 Constitution, that could have been left to statute. For example, a 1954 amendment to the 1908 Constitution established a 3 percent on the tax on gross taxable sales of tangible personal property. The 1908 Constitution was again amended in 1960 to increase that limitation to 4 percent. Article IX, Section 8, of the 1963 Constitution originally provided for a continuatin of the 4 percent rate limit. In 1994, Proposal A amended Section 8, adding a 2-percent additional sales tax dedicated to the School Aid Fund. Although an alternative to Proposal A, increasing the personal income tax, could have been accomplished by statute because no constitutional limit on the rate of the personal income tax exists, using the sales tax for that purpose necessitated a constitutional amendment.

Place statutory policy in the Constitution, beyond the reach of the legislature and the courts

Although the alternative of the statutory initiative exists in the Michigan Constitution, interest groups often choose to propose amendments to the Constitution in order to insulate favored policies from future change by the legislature or the courts. (Aside from another vote of the people to amend or repeal voter-initiated laws, laws adopted by statutory initiative may not be amended or repealed except by a three-quarters vote of each house of the legislature, a high bar, but one which has been cleared. Most voter-initiated statutes have been amended by the legislature.) Two kinds of statutory material have been added to the Michigan Constitution:

1. Existing statutes. Example: Eight sections of Article IX (35, 35a, and 37-42), containing over 3,100 words, contain language that had been previously adopted by the legislature in statute providing for various recreation and conservation funds and the Veterans' Trust Fund. From 1984 to 2006, in a series of four lengthy amendments (all proposed by the legislature), these statutes were elevated to constitutional status in order to prevent future legislatures from using balances in those funds for purposes other than those for which they were created.
2. New policy not already in statute. Example: Proposal 2008-02, a voter-initiated proposal, added a Section 27 to Article I to allow human embryo and human embryonic stem cell research. This new section contains several provisions regarding the conduct of this kind of research. All of this could have been accomplished by statute, either legislatively-adopted or voter-initiated, but the sponsors of the initiative feared alteration of a statute on this subject by future legislatures.

Provisions of Article XII

Article XII contains three operative sections:

Section 1: Amendment by legislative proposal and vote of the electors

If a proposed constitutional amendment is approved by two-thirds of the members elected to and serving in each house of the legislature, it is to be submitted to the electors in no less than 60 days for consideration at the next general election or at a special election as determined by the legislature. If approved by a majority of the electors, the amendment will become part of the Constitution 45 days following the election.

Section 2: Amendment by petition and vote of the electors (Voter initiative)

Petitions containing signatures of registered electors may be used to propose constitutional amendments. A petition must:

- Include the full text of the proposed amendment
- Be signed by registered electors in number equal to at least 10 percent of the total vote cast for governor at the last general election at which a governor was elected
- Be filed with the person authorized by law [currently the Board of State Canvassers in the Department of State] to receive the petitions at least 120 days before the date of the election at which the proposed amendment is to be voted on; the validity and sufficiency of the signatures must be determined and announced at least 60 days before the election

Subsequent to approval by the Board of State Canvassers:

- The proposed amendment, existing provisions of the Constitution that would be altered or abrogated by the amendment and the ballot language is to be published as provided by law

- A "true and impartial" statement of the purpose of the proposed amendment in not more than 100 words is to be prepared for the ballot question. (Statute requires that this be prepared by the Board of State Canvassers.)

If the proposed amendment is approved by the voters, it becomes part of the Constitution 45 days following the election. If two or more amendments approved by the voters at the same election conflict, the amendment receiving the greatest number of yes votes is to prevail.

Section 3: General revision of the Constitution

Every 16 years, beginning in 1978, or at other times as may be provided by law, the question of a general revision of the Constitution is to be submitted to the voters. If the question is approved, delegates are to be elected on a partisan basis within 6 months and a Constitutional Convention convened on the first Tuesday in October following the election of delegates. It is this provision that has triggered Proposal 2010-01 on the November 2010 ballot.

(There is also a Section 4 in Article XII. It does not relate to the process of altering the Michigan Constitution. It was placed in the Constitution by Proposal B of 1992 and provides that, if any substantive part of the term limits amendment is declared invalid or unconstitutional, the remaining parts will remain in force.)

Modes of State Constitutional Amendment

All states have provisions for amending their constitutions. All states provide for legislatively-initiated methods of amending the constitution. All states, except Delaware, require voter approval of proposed constitutional amendments. The differences, then, in amendment procedures among the states are largely defined 1) by whether the voter initiative is available and 2) by the kinds of obstacles that must be overcome in order to amend the constitution.

Voter Initiative

A product of the Progressive Era (late-19th and early-20th Centuries), the voter initiative was first adopted in South Dakota in 1898. Four years later, Oregon adopted the initiative and, over the following decade, 13 more states, including Michigan, almost all in the Midwest and Far West, followed suit. Presently, 18 states have the voter initiative for constitutional amendments, although three states—Illinois, Massachusetts, and Mississippi—have provisions, either substantive or procedural, that greatly constrain its use. Because it adds a whole new avenue for proposing amendments, the presence or absence of the initiative is a significant factor in determining the ease with which a state constitution can be amended.

Procedures for Amendment ("Obstacles")

Amending a state constitution should present obstacles, but not insuperable ones. Amendment should ideally negotiate the fine line between maintaining the fundamental, enduring nature of a constitution and the necessity of keeping it vital and relevant. States vary in the kinds of obstacles that must be overcome in order to amend their constitutions:

For legislatively-referred amendments:

- *Multi-session approval requirements/extraordinary majority requirements.* State constitutions may require that an amendment be approved in more than one session of the legislature (Indiana goes further and requires an election to intervene between approvals) before it can be submitted to the voters. They may also require approval by extraordinary majorities (in Michigan, two-thirds of each house) for submittal to the voters. These requirements often appear to be alternatives in that states with multi-session requirements tend to require only simple majority votes of the legislature, while those with extraordinary majority requirements tend to require only one vote. In some states, the alternative is made explicit; if the legislature

can muster the required extraordinary majority, it needs only one vote; if it can achieve only a simple majority, it will need an additional vote.

For voter-initiated amendments:

- *High signature requirements.* Every state with the initiative requires that the number of valid signatures on the petition equal a percentage of some verifiable measure. Typically, this is a percentage of the vote in the previous election for some political office, usually governor (although one uses the U.S. presidency and one uses the secretary of state). One state uses state population. Because of the variability in the denominators of these fractions, it is difficult to make direct comparisons among the various requirements. However, using the 12 states that use the last vote for governor as the denominator, two require 15 percent, one requires 12 percent, five (including Michigan) use 10 percent, and four require 8 percent.
- *Signature distribution requirements.* Half of the states with the initiative require some degree of geographic distribution of the signatures. These provisions typically require that a minimum percentage of the signatures come from a certain proportion of counties or congressional districts. Michigan has no such requirement.

Voter approval requirements:

- *Extraordinary election requirements.* Most states, including Michigan, require only a majority of those voting on the issue in one election to approve a proposed constitutional amendment. Three, however, pose an additional requirement that the "yes" votes on the amendment also equal at least a certain percentage of the total votes cast at the election. New Hampshire requires two-thirds voter approval of a proposed amendment. Florida requires two-thirds voter approval of an amendment creating a "new state tax or fee" and, in 2006, Florida adopted a constitutional amendment requiring 60 percent voter approval of any proposed constitutional amendment.[1] Finally, Nevada requires majority voter approval in two successive elections.

[1] Ironically, the 2006 Florida amendment requiring 60 percent voter approval of constitutional amendments was, itself, adopted only by a margin of 58-42.

Constitutional Convention Issues

The basic question concerning the process of altering the Michigan Constitution is whether it is, by some standard, too easy to do so. The 1963 Constitution has been amended 31 times since its adoption and, while this frequency does not appear to be out of line with other states,[2] it may be argued that the Michigan Constitution is nevertheless accumulating a disproportionate number of provisions that should have been left to statute if, in fact, they should have been adopted at all. In addition, the Michigan Constitution has become a target of national groups wishing to establish their favored policies in the constitutions of those states that have the initiative.

Of the provisions used by states to make amendment of their constitutions more difficult, the only one used by Michigan that is relatively stringent is the two-thirds vote requirement in each house for legislatively-referred amendments, a requirement it shares with 13 other states. Its signature requirement for voter-initiated amendments is about average. And it does not have multi-session approval for legislatively-proposed amendments, does not have signature distribution requirements for voter-initiated petitions, and does not have extraordinary election requirements.

In a sense, the nature of the current Michigan Constitution operates as a deterrent to making amendment more difficult. So much detailed policy, especially in Article IX (Finance and Taxation), is contained in the document that when many aspects of taxation

[2] For example, the Florida Constitution, adopted in 1968, has been amended 115 times. Other states: Missouri (1945) 115 times; Montana (1972) 30 times; North Carolina (1970) 34 times; Virginia (1970) 43 times. (Source: Council of State Governments, *Book of the States, 2010*).

and intergovernmental finance, for example, require change, it cannot occur without constitutional amendment. To make amendment more difficult in the current Constitution, or one like it, then, would risk making permanent policies that should be subject to change.

Voter Initiative

The threshold issue in any discussion of whether to make the Michigan Constitution more difficult to amend is whether to retain the voter initiative. Michigan has had a functioning initiative provision in its Constitution since 1913. Since then, there have been 67 voter-initiated proposals to amend the Constitution (41 under the 1908 Constitution; 26 under the current Constitution). Of these, 20 were approved (10 under each Constitution), a success rate of 30 percent. Legislatively-referred proposals over that period had a success rate of 63 percent (80 approvals in 127 attempts). Thus, while the initiative has been used frequently, its relatively low rate of success suggests that voters do exercise a degree of discretion when deciding to amend the state's constitution.

The initiative raises certain issues:

- *Voter-initiated proposals do not receive the scrutiny and refinement to which legislative proposals are subjected.* Joint resolutions are drafted by lawyers in the Legislative Service Bureau, made subject of public hearings, debated in both houses of the legislature, and scrutinized by other interested parties before they are submitted to the voters. Voter-initiated proposals vary widely in the degree to which they are subject to professional review and, while many are carefully drafted, it is clear that others have not been drafted with adequate care. Since there is presently no real way of keeping issues off the ballot simply because of poor drafting, the opportunity of placing inappropriate language in the Constitution is greatly increased.

- *Voter-initiated proposals have become a gateway to increased requirement of voter approval.* Some voter-initiated proposals have contained requirements for voter approval of certain governmental actions normally reserved to elected bodies, usually tax increases. Most were defeated at the polls, but the successful Headlee Amendment of 1978 instituted the necessity of local voter approval of any new tax or increase in an existing tax above that authorized by law or charter.

  A potentially significant precedent was established by Proposal 2004-01, which requires that no state law that authorizes any form of gambling *nor any new state lottery games utilizing table games or player operated mechanical or electronic devices* be established, without both statewide voter approval and voter approval in the township or city where the gambling will take place. Because the Bureau of State Lottery is responsible for approving new games, Proposal 2004-01 introduced the concept of voter approval of *administrative actions* as contrasted with legislative actions.

- *States with the initiative have become targets of organizations with national agendas that would likely be unsuccessful if legislative approval were required.* Term limits, promoted by an organization called U.S. Term Limits, are in effect in 15 states. In 13 of those states, including Michigan, the policy was placed in the constitution via initiative petition. Only Louisiana and Maine have term limits that were not proposed by the initiative.

  Other recent proposals that had roots outside of Michigan included Proposal 2004-02 (defining what can be recognized as marriage or similar union) and Proposal 2006-02 (banning affirmative action programs).

- *The number of signatures that a petition secures has come to be a function of the amount of money available to pay for circulators rather than broad-based support for the proposal.* Signature requirements were originally intended to demonstrate broad initial support for a ballot proposal. The rise of paid circulators of petitions has brought this original intent into question.

Increasing Requirements for the Voter Initiative

Signature Requirements

If it is concluded that the initiative should be retained, a constitutional convention may wish to consider adopting more demanding obstacles to placing issues before the voters. Based on the provisions in other states, such provisions might take the form of:

- Increased signature requirements on petitions;
- Geographic signature distribution requirements

Substantive Review

While adoption of increased signature requirements might make it more costly or time-consuming to gather the required signatures, it would not address the issue of the standard of drafting of voter-initiated proposals, an issue that could become quite subjective. The current Constitution does not provide for substantive review of voter-initiated proposals, providing only that "any such petition be in the form, and shall be signed and circulated in such manner, as prescribed by law." Voter-initiated proposals have made it to the ballot with obvious drafting problems and, while most have been defeated, the possibility exists for a seriously inappropriate measure to be adopted.

Review of the substance of amendments proposed by initiative before they are placed on the ballot has been proposed. In 1995, the Citizens Research Council reviewed three such proposals:[3]

- *Law Revision Commission*, whose purpose is to aid the Legislative Council in its charge (Article IV, Section 15) "to periodically examine and recommend to the legislature revision of the various laws of the state." The Commission consists of two members each from the Senate and the House of Representatives, plus four non-legislators. While the legislation creating the Commission (Public Act 268 of 1986) does not include review of proposed constitutional amendments, such a role might be added.

- *Joint Legislative Commission or Legislatively-Established Commission*, whose purpose would be to review proposed amendments and to recommend changes to the Constitution.

- *Gubernatorial Commission.* Similar in purpose to the legislative commission, but appointed by the Governor.

(Florida has a Constitution Revision Commission, consisting of 37 members appointed by the Governor, the Speaker of the House of Representatives, the President of the Senate, and the Chief Justice of the Florida Supreme Court. It meets periodically to determine whether the Florida Constitution should be amended or revised. Such a commission could be employed in reviewing proposed amendments.)

[3] See *Unfinished Business: Revising the Michigan Constitution.* Council Comments No. 1035, February 1995.

Clearly, controversy would arise if such a commission were to find that a proposed amendment was flawed in some way. Such "flaws" could cover a wide range, including, for example:

- Spelling, punctuation, and grammar
- Vague or misleading language
- Excessive detail
- Inappropriate reference to another section of the Constitution or to a non-existent section
- Conflict with existing provisions of the Michigan Constitution
- Conflict with the U.S. Constitution
- Amendment of an excessive number of provisions, which should require a constitutional convention
- Bad public policy

It would be difficult to reconcile a full-blown initiative process with a commission powerful enough to prevent voter-initiated proposals from reaching the ballot. Probably the only tool available to such a commission would be the ability to publicize its findings so that the electorate or the courts would take them into account.

Constitutional Revision

The frequency of constitutional revision varies widely across the nation. Michigan is working on its fourth constitution since 1835. Massachusetts still uses its first, adopted in 1780 and seven years older than the U.S. Constitution. Eighteen other states still use

their first constitution. At the other extreme, Louisiana is on its eleventh constitution (current one adopted in 1974) and Georgia is on its tenth. The other states fall between these. The significance of constitutional revision, then, varies from state to state.

In Michigan, constitutional revision is to be accomplished by a constitutional convention as provided for in Article XII, Section 3. A constitutional convention may wish to consider a few issues regarding revision:

- *Should the definition of revision be refined?* At present there is no bright line distinguishing amendment from revision. Some amendments (for example, Proposal A of 1994) have been extensive, amending several sections, but the provisions were all related. The unsuccessful Reform Michigan Government Now! proposal of 2008 proposed to amend many unrelated sections of the Constitution, which led to criticism that it was an attempt to revise the Constitution without a process, namely a convention, that would permit due consideration of such extensive change.
- *Should election of delegates to the constitutional convention occur in a partisan election?* The Constitution requires that delegates to a constitutional convention be chosen from Michigan House of Representative and Senate districts in a partisan election. Consideration might be given to removing that requirement.
- *Should provision be made for a Constitutional Revision Commission?* Florida has a multi-branch, bipartisan Constitutional Revision Commission, which met first in 1997-98 and which is scheduled to meet every 20 years to propose changes to the Florida Constitution. Such a commission could bring greater authority to proposed changes, either amendment or revision, than any body outside of a constitutional convention.

Conclusion

The Constitution, as the basic governing document of the state, should be durable, flexible, and understandable to the average citizen. Excessive amendment can rob the Constitution of these attributes. A constitutional convention would be faced with the problem of providing for an amendment process that would keep the Constitution relevant while retaining its role as the fundamental determinant of the structure and power of Michigan government.