



# Statutory Ballot Initiatives

## *A Power Reserved for the People or a Tool of the Legislature?*

By Christopher M. Trebilcock

Michigan's 1963 constitution continued the tradition of direct democracy, including the power to amend the constitution and propose and repeal laws by petition of electors through initiative and referendum.<sup>1</sup> Since adoption of the 1963 constitution, 33 initiatives for constitutional amendments, 14 statutory initiatives, and 10 referenda have been placed on the ballot for consideration by Michigan electors.<sup>2</sup> This is in addition to the 43 proposed constitutional amendments and 14 referenda placed on the ballot by the Michigan legislature.<sup>3</sup> Not included in these numbers are the nine times the legislature adopted a statutory initiative during the 40-day period after the initiative was presented by the secretary of state to the legislature to either adopt or reject.<sup>4</sup>

Petition-based proposals to initiate legislation or amend the constitution may only appear on the ballot in November

of general election (even numbered) years.<sup>5</sup> There has been an average of more than four ballot proposals every election since 1963 (or two per year).<sup>6</sup> The statutory initiative is much more likely to achieve passage, doing so 57 percent of the time compared to a success rate of 45 percent and 46 percent for constitutional amendments and referenda, respectively.<sup>7</sup> Including the nine times the legislature adopted a proposed statutory initiative in lieu of submitting it to the electorate as permitted by Article 2, Section 9 of the constitution, statutory initiatives have become law 71 percent of the time after the initiative is certified by the Michigan Board of Canvassers.<sup>8</sup> Coupling these numbers with the recent legislative tactic of "adopt and amend" adopted by the legislature in 2018,<sup>9</sup> some have questioned whether the forms of direct democracy enshrined in the Michigan Constitution during the 1961–1962 Constitutional Convention are being used and interpreted as intended by the delegates.

## At a Glance

Section 9 of Article 2 of the Michigan Constitution defines the statutory initiative process as the power that the people reserve to themselves “to propose laws and to enact and reject laws.”

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### Overview of the statutory initiative process

Section 9 of Article 2 of the Michigan Constitution defines the statutory initiative process as the power that the people reserve to themselves “to propose laws and to enact and reject laws.”<sup>10</sup> This reserved power of initiative extends to any law the legislature may enact, excepting those that include appropriations.<sup>11</sup> “The initiative provision set forth in [Article 2, Section 9] is not expressed in terms of an individual right, but is reserved to the people collectively, and serves as an express limitation on the authority of the Legislature.”<sup>12</sup>

To start the process, an individual or group of individuals must submit a copy of the proposed initiative to the secretary of state before circulating the petition.<sup>13</sup> Within a single, 180-day period, proponents must then gather petitions containing valid signatures of registered voters equal in number to at least 8 percent of the total votes cast in the last election for governor.<sup>14</sup> For statutory initiatives proposed before the next gubernatorial election in 2022, proponents are required to submit at least 340,047 valid signatures.<sup>15</sup>

Once gathered, the initiative petitions must be filed with the secretary of state.<sup>16</sup> Upon receipt of the filing, the secretary of state must immediately provide notice to the Board of State Canvassers.<sup>17</sup> “Upon receiving notification of the filing of the petitions, the Board of State Canvassers shall canvass the petitions to ascertain if the petitions have been signed by the requisite number of qualified and registered electors.”<sup>18</sup> The Board of State Canvassers is required to “make an official declaration of the sufficiency or insufficiency of an initiative petition no later than 100 days before the election at which the proposal is to be submitted.”<sup>19</sup> If certified, the secretary of state then submits the statutory initiative petition to the legislature for consideration.<sup>20</sup>

The legislature is required to enact, without modification, or reject any proposed initiative within 40 session days; an initiative not enacted by the legislature is placed on the statewide ballot at the next general election.<sup>21</sup> A law that is initiated or adopted by the people is not subject to gubernatorial veto, and once adopted by voters cannot subsequently be amended or repealed except by the voters or by a three-fourths vote of the legislature.<sup>22</sup> Unless the legislature votes by a two-thirds majority that the initiative is to have immediate effect, the initiated law becomes effective on the 90th day following the closing of the legislative session.<sup>23</sup>

### Power of the people or tool of the legislature?

The Michigan Supreme Court has long recognized that the drafters of the 1963 constitution did not intend the legislative initiative process provided by Article 2, Section 9 to be an easy pathway to enact new laws.<sup>24</sup> As various ballot initiative groups have sought to do during the COVID-19 crisis,<sup>25</sup> delegates at the Constitutional Convention sought to reduce the number of signatures required to place a question on the ballot from 8 percent to 5 percent. That effort was rejected, and during the debate on the proposed reduction, Delegate Kuhn observed of the procedure eventually adopted:

It’s tough. We want to make it tough. It should not be easy. The people should not be writing the laws. That’s what we have a senate and house of representatives for. 2 Official Record, Constitutional Convention 1961, p. 2394.<sup>26</sup>

During the convention, Delegate Hoxie, chairman of the Committee on Legislative Powers, when submitting reasons to support the committee’s proposal governing statutory initiative and referendum (Proposal 118), further advised the convention that the committee “[r]emoved from constitutional status... the provisions on content and time of filing petitions, canvassing of names on petitions, type sizes, and right of the Legislature to prescribe penalties.... All of these matters are left to the Legislature in the last sentence.”<sup>27</sup>

Despite Kuhn’s description of the intent behind Article 2, Section 9 and Hoxie’s confirmation that the legislature was to codify the administrative procedures previously enshrined in the constitution, courts have consistently and routinely struck down both parts of the codification of the former constitutional procedural rules referenced by Hoxie and more recent efforts defining the administrative process for exercising “the people’s power” of initiative. For example, in *Wolverine Golf Club v Hare*, the Court of Appeals ruled unconstitutional the requirement that proposed initiatives be submitted at least 10 days before the start of the legislative session.<sup>28</sup> According to the Court, even though the time limit was contained in the constitution before 1963, because “the circumstances which necessitated the rule have all changed, it cannot be said that reasonableness of the rule necessarily remains.”<sup>29</sup>

More recently, in *League of Women Voters of Michigan v Secretary of State*, the Court of Appeals struck down three key provisions of a 2018 effort by the legislature to place additional procedural and administrative rules on the statutory initiative process.<sup>30</sup> Specifically, the Court found that the 15 percent cap on signatures from any one congressional district was an unconstitutional burden on the petition process as guaranteed by the state constitutional provision governing initiatives and referenda; that the check-box requirement mandating paid petition circulators to disclose their status violated the U.S. Constitution's First Amendment right to free speech; and that the requirement that paid circulators file an affidavit disclosing their status before circulating petitions also violated the First Amendment.<sup>31</sup> These conclusions are not surprising, given that the courts universally accept the principle that “[c]onstitutional and statutory initiative and referendum provisions should be liberally construed to effectuate their purposes, to facilitate rather than hamper the exercise by the people of these reserved rights.”<sup>32</sup> As the Supreme Court recognized in 1967, “. . . the initiative provisions are powers reserved to the people and that therefore they must be guarded against ‘conceivable if not likely evasion or parry by the legislature.’”<sup>33</sup>

### What limits are necessary and reasonable?

The Supreme Court in *Wolverine Golf Club* recognized that the legislature is not without power to place additional regulations on the statutory initiative process:

[W]e do not intimate that a time limit necessary and reasonable for the effective administration of the initiative process after the legislature has considered the initiative petition, might be invalid. Such will withstand challenge so long as it does not constitute an unnecessary restraint on the right of initiative.<sup>34</sup>

For example, although not yet challenged in court, effective June 7, 2016, MCL 168.472a was amended to remove the rebuttable presumption that signatures older than 180 days before filing were stale and void, and now specifically excludes from consideration signatures that are more than 180 days old.<sup>35</sup> The Court of Appeals in *League of Women Voters of Michigan* also left standing several of the 2018 changes, including those that (1) invalidate petition signatures if the circulator provides false or fraudulent information,<sup>36</sup> (2) invalidate petition signatures if the petition form does not comply with legal requirements,<sup>37</sup> (3) invalidate petition signatures that are not signed in the circulator's presence,<sup>38</sup> and (4) provide for an optional approval of the content of the petition summary by the Board of State Canvassers before circulating the petition.<sup>39</sup> Thus, the statutory initiative process is not without limits and the legislature may amend the laws to address legitimate administrative concerns inherent in the initiative process.

### Is an elephant lurking in the legislature's corner?

One significant question that remains unclear is whether the legislature may adopt (or amend) a statutory initiative petition near the end of a legislative term and two years prior to when the initiative would appear on the ballot if it had been rejected by the legislature. In theory, based on the lack of clarity in current law, proponents could try to avoid a gubernatorial veto by collecting sufficient signatures to get a proposal certified and presented to the legislature in a general election year (i.e., 2020), even though the proposal would not appear on the ballot until the next general election if rejected by the legislature (i.e., 2022). To date, no court has opined as to whether Article 2, Section 9 prohibits a statutory initiative petition from being adopted by the legislature in the waning days of the legislative term if proponents successfully circulate a petition and collect a sufficient number of signatures during the roughly seven-month period after the deadline to submit signatures to the secretary of state in May and the end of the calendar year.<sup>40</sup> Applying the plain language of Article 2, Section 9 and the intent of the drafters of the 1963 constitution to this question, there is ample evidence that such a tactic is at worst unconstitutional, and at best violative of the intent of Article 2, Section 9.

Article 2, Section 9, in relevant part reads as follows:

\* \* \*

Any law proposed by initiative petition *shall be either enacted or rejected by the legislature without change or amendment within 40 session days from the time such petition is received by the legislature*. If any law proposed by such petition shall be enacted by *the legislature* it shall be subject to referendum, as hereinafter provided.

If the law so proposed is not enacted by *the legislature* within the 40 days, the state officer authorized by law shall submit such proposed law to the people for approval or rejection at the next general election. *The legislature* may reject any measure so proposed by initiative petition and propose a different measure upon the same subject by a yea and nay vote upon separate roll calls, and in such event both measures shall be submitted by such state officer to the electors for approval or rejection at the next general election.<sup>41</sup> (Emphasis added.)

For the phrases “the legislature” and “session days” to have meaning, they must be read together. Thus, Article 2, Section 9 requires that a statutory initiative be submitted to and certified by the Board of State Canvassers with sufficient time before the next general election to allow the legislature to consider the proposal for 40 session days.<sup>42</sup> If it is not possible for these prerequisites to be accomplished, the initiative should be considered untimely.<sup>43</sup>

What is more, the use of the definitive article “the” before the term “legislature” strongly suggests that all of the constitutional and statutory time limits that apply to statutory initiatives

must be capable of being satisfied by the “legislature” serving at the time the initiative petition is received from the secretary of state.<sup>44</sup> The drafters of the constitution were aware that on the first day in January after a general election, a “new” legislature would be sworn in. As such, “the legislature” as used in Article 2, Section 9 can only be understood to mean the legislative body seated at the time the initiative petition is submitted, and the initiative petition is only timely if 40 days remain in the legislative session.

Article 2, Section 9 must also be read in the context of the process the delegates contemplated at the time the 1963 constitution was ratified. “[T]he most instructive tool for discerning the circumstances surrounding the adoption of the provision is the floor debates in the Constitutional Convention record.”<sup>45</sup> As previously discussed, at the time Article 2, Section 9 was adopted, the delegates expected that any statutory initiatives would be submitted to the legislature before the first day of session and that the same legislature would have 40 session days to consider the initiative. To conclude otherwise would allow the legislature to usurp the power reserved to the people by having a group of legislators adopt an initiative supported by less than 8 percent of the electorate and two years before electors would be able to consider the same initiative at the polls if rejected by the legislature. Such a result is absurd given the common understanding of the statutory initiative process at the time of the ratification of the 1963 constitution.

## Conclusion

The power of initiative and referendum are explicitly reserved as a power of the people. Efforts to utilize Article 2, Section 9 in a manner that subverts that reserved power to a small fraction of the electorate should be rejected by the courts. ■



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## ENDNOTES

1. See Const 1963, art 7, §§ 1 and 2; art 2, § 9; and art 4, § 34.
2. *Initiatives and Referendums Under the Constitution of the State of Michigan of 1963*, Bureau of Elections, State of Mich (January 2019), available at <[https://www.michigan.gov/documents/sos/Initia\\_Ref\\_Under\\_Consti\\_12-08\\_339399\\_7.pdf](https://www.michigan.gov/documents/sos/Initia_Ref_Under_Consti_12-08_339399_7.pdf)> [<https://perma.cc/XG8W-B9DG>] (accessed July 1, 2020).
3. *Id.* at 2–6.
4. *Id.* at 10.
5. Const 1963, art 2, § 9.
6. *Initiatives and Referendums Under the Constitution of the State of Michigan of 1963*.
7. *Id.* at 2–10.
8. *Id.*
9. *In Re House of Representatives Request for Advisory Opinion Regarding Constitutionality of 2018 PA 368 & 369*, 505 Mich 884; 935 NW2d 241 (2019) (declining to opine on the constitutionality of the legislature’s use of the “adopt-and-amend” procedure in the 2018 legislative session).
10. Const 1963, art 2, § 9.
11. *Id.*
12. *Woodland v Mich Citizens Lobby*, 423 Mich 188, 214; 378 NW2d 337 (1985).
13. MCL 168.483a.
14. MCL 168.472a and Const 1963, art 2, § 9.
15. *Sponsoring a Statewide Initiative, Referendum or Constitutional Amendment Provision*, Dep’t of State, State of Mich (June 11, 2019), available at <[https://www.michigan.gov/documents/sos/Initiative\\_and\\_Referendum\\_Petition\\_Instructions\\_2019-20\\_061119\\_658168\\_7.pdf](https://www.michigan.gov/documents/sos/Initiative_and_Referendum_Petition_Instructions_2019-20_061119_658168_7.pdf)> [<https://perma.cc/2WMT-GG73>] (accessed July 1, 2020).
16. MCL 168.471.
17. MCL 168.475(1).
18. MCL 168.476(1).
19. MCL 168.477(1).
20. MCL 168.21 and Const 1963, art 2, § 9.
21. Const 1963, art 2, § 9.
22. *Id.*
23. *Frey v Dep’t of Mgt and Budget*, 429 Mich 315, 340; 414 NW2d 873 (1987).
24. *Woodland*, 423 Mich at 217.
25. E.g., *Fair and Equal Mich v Benson*, Mich Court of Claims, hearing held June 2, 2020 (Case No. 2020-000095-MMM) and *SawariMedia, LLC v Whitmer*, unpublished opinion and order of the United States District Court for the Eastern District of Michigan, issued June 11, 2020 (Case No. 4:20-cv-11246).
26. *Woodland*, 423 Mich at 217.
27. 1 Official Record, Constitutional Convention 1961, p 487.
28. *Wolverine Golf Club v Hare*, 24 Mich App 711; 180 NW2d 820 (1970).
29. *Id.* at 738.
30. *League of Women Voters of Mich v Secretary of State*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (2020) (Docket Nos. 350938 and 351073); slip op at 17.
31. *Id.* at \_\_\_; slip ops 12, 15, 17.
32. *Newsome v Riley*, 69 Mich App 725, 729; 245 NW2d 374 (1976) and *Kuhn v Dep’t of Treasury*, 384 Mich 378; 183 NW2d 796 (1971).
33. *Mich Farm Bureau v Secretary of State*, 379 Mich 387, 393; 151 NW2d 797 (1967).
34. *Wolverine Golf Club*, 24 Mich App at 738.
35. 2016 PA 142.
36. MCL 168.482a(3).
37. MCL 168.482a(4).
38. MCL 168.482a(5).
39. MCL 168.482b(1).
40. 211 PA 1999 and 182 PA 2013 were adopted in December of each legislative session after the statutory initiatives were certified by the Board of State Canvassers.
41. Const 1963, art 2, § 9.
42. *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003) (every provision must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another).
43. *Newsome*, 69 Mich App at 730 (finding that because both the 40 days in Article 2, Section 9 and two months found in MCL 168.447 the statutory initiative was timely).
44. *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 139; 860 NW2d 51 (2014) (discussing the import of definitive articles in statutory interpretation).
45. *House Speaker v Governor*, 443 Mich 560, 580–581; 506 NW2d 190 (1993).