Constitutional Amendment by Petition and Popular Vote

Citizens' Last Resort—Or the First?

By Gary P. Gordon and Jim Holcomb

FAST FACTS

Michigan's Constitutional Convention delegates went to great lengths to strike the right balance between citizens' right to amend the constitution and the need to discourage amendments that should be in the form of statutory enactments.

Litigation over constitutional amendments typically hinges on whether ballot proposals are "in the proper form," often focusing on whether other provisions of the constitution are altered or abrogated such that they must be republished.

Recent cases attempted to clarify the meaning of the phrase "alter or abrogate," but courts have not yet provided a bright-line test to guide practitioners.

Michigan is one of 17 states that allows amendment of its constitution by direct petition and vote of the people, and Michigan electors have used this process in varying forms since adopting the 1908 Constitution. The most recent iteration of the initiative process was adopted in 1963[1] and has been invoked 31 times since then with only 10 successful attempts.[2] Despite a relatively low success rate, proponents continue their efforts to amend the constitution through this process. In fact, in the 25 general elections after 1962, only nine have been without a petition-initiated ballot proposal. The 2012 general election cycle saw the most initiatives on the ballot with five—even after the Supreme Court refused to allow one additional ballot proposal.[3] This article explores the history and process of constitutional amendment by petition and general election vote and discusses how Michigan's evolving caselaw may affect the utility of the initiative process in future years.

History

1908 Constitution

In Michigan, the first appearance of constitutional amendment by petition was in the 1908 Constitution, which required signatures equal to 20 percent of the total votes cast for governor at the most recent election and allowed the legislature to veto the proposal—even if a majority of those voting were in favor of the proposed amendment.[4] In 1913, the legislature used its ability to propose amendments—subject to referendum—to reduce the signature requirement to 10 percent of the total number last voting for governor and remove its ability to veto an amendment adopted by the people.[5] The proposed amendment was approved and, when combined with the existing provisions of the 1908 Constitution addressing the procedural requirements for publication and statement of purpose,[6] was so detailed that little responsibility for implementation was left to the legislature. Of note was language providing:

> If the secretary of state or other person or persons hereafter authorized by law to receive and canvass same determines the petition is legal *and in proper form* and has been signed by the required number of qualified and registered electors, the proposed amendment shall be submitted to the electors at the next regular election at which any state officer is to be elected. [Emphasis added.][7]

Whether proposals are in the "proper form" was the basis for challenges to the placement of proposals on the ballot under the 1908 Constitution and continues to be the basis under the current constitution.

1963 Constitution

The current provision continues to require signatures equal to 10 percent of the total votes for governor as a basis for determining the number of signatures required,[8] but that requirement

nonetheless generated a significant amount of discussion at the 1961 Constitutional Convention. One position was that a 10 percent requirement would eventually make the process too onerous as Michigan's population increased. To address the fear that constitutional amendments would become impossible as Michigan's population grew, delegates suggested placing a ceiling of 300,000 on the number of signatures required without regard to the number of people voting for governor, but the proposal was not adopted. The debate centered on whether it should be easy to amend the constitution, with the record comments appearing to be equally split.[9] Although not directly applicable to the signature requirements, in addressing whether to require a total vote of a majority of people voting in an election to approve a referred constitutional amendment (as opposed to a majority of those voting on the amendment), delegate Rush stated:

> *[W]e do not want to make it too easy to clutter up the constitution.* That has been the fault that many people have found with our present constitution. It has been amended too many times. That was one of the reasons advanced for having a constitutional convention. And this amendment would accomplish that. In other words, people when they do not understand an amendment, a proposed amendment, will ofttimes refrain from voting on it instead of voting against it, and in many cases if they do not vote at all it amounts to almost a yes vote if you do not take into consideration the entire vote cast at that election. *And so we are submitting this proposed amendment to make it a little it more difficult to amend our constitution.* [Emphasis added.][10]

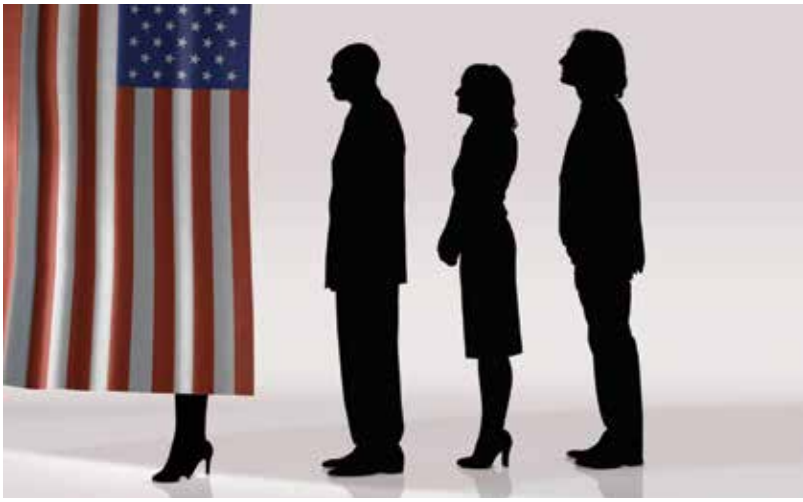
One of the supporters of the 300,000 signature cap was future Governor George Romney, who argued:

> [I] think that if we should strike out the 300,000 figure [as a cap] we would make it very unlikely that a genuine citizens' petition drive could bring about an amendment for a constitutional convention of this character. [I] certainly hope that you will defeat this amendment because I think the citizens of the state should have a target that is within their reach.[11]

There was concern that only well-organized and well-financed organizations could muster the necessary signatures without a cap on the total, with delegates specifically mentioning the "UAW-CIO, 'school groups,' and the Farm Bureau."[12]

Delegates also noted:

> [T]ime after time certain organizations have proposed constitutional amendments where an ordinary statute would have done this work as well or possibly better, because it is just as easy or almost as easy to get a constitutional amendment on the ballot by the initiative as it is to get a statute on the ballot by an initiative. So my reason here is not so much to make it more difficult to amend the constitution as to do something to discourage people from putting statutory matter into the constitution.[13]



Additional comments also supported the 10 percent requirement without a cap of 300,000 signatures by echoing the proposition that "it should not be too easy to invoke the process."[14]

Of course, the proposal ultimately passed without the 300,000-signature cap. In retrospect, the controversy over the signature cap was for naught. Michigan's current signature requirement, based on the last vote for governor, is 265,702—far fewer than the debated 300,000 cap. As predicted, though, rather than citizens' grassroots efforts, well-organized and well-funded organizations have had success in placing initiated proposed constitutional amendments before the people.

The current process

Constitutional amendments may be placed on the ballot either by the legislature or by petition.[15] The process is detailed in the constitution and supplemented by the election law.[16]

> Every petition shall include the full text of the proposed amendment, and be signed by registered electors of the state equal in number to at least 10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected….Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law….
>
> **[Submission of proposal; publication.]**
> Such proposed amendment, existing provisions of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law….
>
> **[Ballot, statement of purpose.]**
> The ballot to be used in such election shall contain a statement of the purpose of the proposed amendment, expressed in not more than 100 words, exclusive of caption. Such statement of purpose and caption shall be prepared by the person authorized by law, and shall consist of a true and impartial statement of the purpose of the amendment in such language as shall create no prejudice for or against the proposed amendment.

As in the 1908 Constitution, the constitutional process for amendment by petition is unusual because of the detail it provides for the process of petitioning. While the current provision is less detailed than the 1908 Constitution, it is still almost statutory in nature. As noted by delegate Erickson in presenting the proposal to the Constitutional Convention, "[w]e have tried to include the bare skeleton of the provision in order to still keep it self-executing…."[17]

The process is well detailed from establishing statutory requirements for the format of the petition, the size of the font on the petition sheet, the dates for filing the petitions, and the length of time during which signatures may be obtained.[18] Since adoption of the 1963 Constitution, courts have rarely denied a proposal a place on the ballot after petitions with an adequate number of signatures have been filed. Challenges for failure to meet these procedural and format requirements are usually straightforward.[19] Other bases for attacking a proposal included that the proposal constituted a general revision to the constitution,[20] the wording of the proposal was misleading,[21] and the signatures were fraudulently obtained.[22]

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The more difficult questions arise regarding the requirement to republish on the petition any provisions of the constitution that will be "altered or abrogated."[23] The majority of the reported litigation hinges on these three words. The most recent attempt by the Michigan Supreme Court to clarify the meaning of the three words—which have generated much litigation in the last 50 years—arose out of the last election cycle and dealt with four consolidated cases.[24] Justice Zahra, writing for the majority, summarized the 4–3 decision:

> We reaffirm our prior caselaw holding that an existing provision is only altered when the amendment actually adds to, deletes from, or changes the wording of the provision. We further reaffirm that an amendment only abrogates an existing provision when it renders that provision wholly inoperative.[25]

The majority found that, except for the proposal to add new commercial casinos in Michigan, none of the other proposals altered or abrogated any existing provision of the constitution. While the description of "alter" is straightforward and easily applicable, more troubling has been and may continue to be application of the word "abrogate." The majority summarized the decisions that address "abrogate":

> [A]n existing provision of the Constitution is abrogated and, thus, must be republished if it is rendered "wholly inoperative." An existing constitutional provision is rendered wholly inoperative if the proposed amendment would make the existing provision a nullity or if it would be impossible for the amendment to be harmonized with the existing provision when the two provisions are considered together. That is, if two provisions are incompatible with each other, the new provision would abrogate the existing provision and, thus, the existing provision would have to be republished. An existing provision is not rendered wholly inoperative if it can be reasonably construed in a manner consistent with the new provision, i.e., the two provisions are not incompatible.[26]

But the difficulty in applying the definition to any given set of facts was illustrated by Justice Kelley who, speaking for the minority, agreed with the result that three of the proposals met constitutional requirements but found that the casino proposal also passed constitutional muster. While the minority opinion appears to agree with the previous definition of abrogate, the minority justices disagreed with its application regarding the casino proposal. The majority found that a provision in the proposal requiring the Liquor Control Commission to issue licenses to the eight proposed casinos would nullify language in Article 4, Section 40, which grants the Commission complete control of the alcoholic beverage traffic subject to statutory limitations.[27] But the minority opinion, examining the same language, reached the opposite conclusion, finding that, since the Commission is subject to limits the legislature may choose to place on it, the proposed constitutional amendment could also alter the Commission's authority.[28]

So while this latest opinion concisely and clearly summarizes the caselaw and defines the terms used by earlier courts, the differences in opinion regarding application of the standard of "abrogate" may leave the door open to future challenges by creative counsel to ballot proposals seeking to amend the constitution but which allegedly fail to disclose provisions of the constitution that will be "abrogated" by the proposal. ■

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ENDNOTES

1. Const 1963, art 12, § 2.
2. Michigan Bureau of Elections, *Initiatives and Referendums Under the Constitution of the State of Michigan of 1963* (May 16, 2013), available at <http://www.michigan.gov/documents/sos/Initia_Ref_Under_Consti_3-07_204464_7.pdf > (accessed December 12, 2013).
3. *Protect Our Jobs v Bd of State Canvassers*, 492 Mich 763, 773; 822 NW2d 534 (2012).
4. 2 Official Record, Constitutional Convention 1961, p 2459.
5. Const 1908, art 17, § 1.
6. Const 1908, art 17, § 3.
7. Const 1908, art 17, § 2.
8. Const 1963, art 12, § 2.
9. 2 Official Record, Constitutional Convention 1961, pp 2458–2464.
10. *Id.* at 2458.
11. *Id.* at 2463.
12. *Id.* at 2459.
13. *Id.* at 2462.
14. *Id.* ("I do not want it to be too easy…."); *Id.* at 2463 ("We do not want to make it easy to amend the Constitution….What we want to do is to keep it rather difficult to do it, but we do not want it easier to amend the constitution than it is to pass an ordinary statute….").
15. Since adoption of the current constitution in 1963, 43 proposals to amend the constitution were submitted by the legislature and 31 by initiative petition. See Michigan Bureau of Elections, n 2 *supra*.
16. Const 1963, art 12, § 2; MCL 168.471 *et seq.*
17. 2 Official Record, Constitutional Convention 1961, p 2460.
18. MCL 168.482.
19. *Consumers Power Co v Attorney General*, 426 Mich 1; 392 NW2d 513 (1986).
20. *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273; 280 Mich App 801 (2008) (the proposal was not allowed on the ballot).
21. *Coalition to Defend Affirmative Action & Integration v Bd of State Canvassers*, 262 Mich App 395; 686 NW2d 287 (2001) (the proposal was allowed on the ballot).
22. *Michigan Civil Rights Initiative v Bd of State Canvassers*, 268 Mich App 506; 708 NW2d 139 (2005) (the proposal was allowed on the ballot).
23. *Garman v Hare*, 26 Mich App 403; 182 NW2d 563 (1970), rev'd in part, 384 Mich 443; 185 NW2d 1 (1971); see also *Ferency v Secretary of State*, 409 Mich 569; 297 NW2d 544 (1980).
24. *Protect Our Jobs*, n 3 *supra* (The four proposals were too complex to be summarized here, but they dealt in general with legislative authority and collective bargaining, approval of eight additional casinos, requiring a two-thirds vote of the legislature for any tax increase, and Detroit's international bridge.).
25. *Id.* at 773.
26. *Id.* at 782–783.
27. *Id.* at 790–791.
28. *Id.* at 794–795.