



Fred Morrison, professor of law, University of Minnesota

Interview with The Civic Caucus

8301 Creekside Circle #920, Bloomington, MN 55437

March 16, 2012

Notes of the Discussion

Present : Verne Johnson, chair; David Boden, Audrey Clay, Janis Clay, Pat Davies, Paul Gilje, Jim Hetland (phone), Dwight Johnson, Sallie Kemper, Dan Loritz, vice chair, and Wayne Popham (phone)

A. Welcome and introduction— Verne and Paul welcomed and introduced our guest speaker for the day, Fred Morrison, professor of law, University of Minnesota. Morrison was invited to discuss which matters are appropriate for a state constitution and which are appropriate for state law. Distinguished as both a Rhodes Scholar and a Fulbright Professor, Morrison taught at the University of Iowa College of Law before joining the University of Minnesota Law School faculty in 1969. He served on the staff of the Minnesota Constitutional Study Commission, 1971-1973. As a recognized scholar of comparative public law, Morrison authored an introduction to the Minnesota Constitution, 20 *William Mitchell Law Review* 287 (1994). A teacher of constitutional, international, local government and comparative public law, he has twice served as Interim Dean of the U of M Law School. In May of 1997, Morrison was honored with the University President's Award for Outstanding Service.

B. Summary— Morrison explains how amendments to the Minnesota constitution are proposed and enacted, including a "peculiar" majority required when amendments are submitted to a vote of the people. He discusses the difficulty in changing amendments once enacted, as compared to changing state law and that with constitutional amendments the Legislature can bypass a Governor's veto and appeal directly to voters. Possible changes suggested by Morrison: (a) allowing the Governor to submit amendments directly to voters, without approval of the Legislature, (b) allowing proposed state laws, not only constitutional amendments, to be submitted directly to voters, (c) enacting Ranked Choice Voting (RCV) to reduce polarization between political parties and thereby reduce the temptation to use constitutional amendments to bypass a Governor's veto, (d) enacting an open primary for candidates for state office to reduce polarization.

C. Comment and discussion— During Morrison's comments and in discussion with the Civic Caucus the following points were raised:

1. Legislative proposals in Minnesota may be submitted for a vote of the people, but only as amendments to the state constitution— The only way in Minnesota for the Legislature to submit a proposed legislative change to a vote of the people is to submit the proposal as a change in the state constitution. Once enacted a constitutional amendment may be modified or repealed only via another constitutional amendment. Unlike some other states that allow for referenda, Minnesota has no provision for the Legislature to submit a proposed law—as distinguished from a constitutional amendment—for vote of the people. Measures enacted into state law may be changed by the Legislature, but constitutional amendments may be changed only by putting another amendment to the vote of the people.

2. By submitting a constitutional amendment, the Legislature can bypass the Governor— Proposed laws enacted by the Legislature also require the Governor's approval. Proposed constitutional amendments are submitted directly to the people by the Legislature, without any involvement of the Governor. Consequently, if the Legislature and Governor are at odds on certain provisions—as is the case today in Minnesota with a GOP Legislature and a DFL Governor—the Legislature can avoid a Governor's veto by going directly to the voters with proposed constitutional amendments. The 2012 Legislature has been considering several such proposals, including prohibiting gay marriage, enacting right to work, requiring voter ID, and requiring an extraordinary legislative majority to increase taxes.

3. Essential provisions in a constitution outlined— The essential purpose of any constitution, including the U.S. Constitution and the Minnesota State Constitution, is to establish the structure of government: who makes the laws, how they go about making the laws, and who carries out the laws. The U.S. Constitution originally established only the executive, legislative and judicial branches, but two years after its ratification, the first ten amendments forming the Bill of Rights were added.

4. Proposing an amendment to the Minnesota constitution is comparatively straightforward— There are no restrictions on what may be included in Minnesota's constitution. The only requirement is to follow the procedures for amendments as outlined in the constitution. While amending the U. S. constitution is a major undertaking (requiring a two-thirds vote of both the U.S. House and Senate plus ratification by legislatures of three-quarters of the states), amending the Minnesota constitution is comparatively easier, Morrison said.

In Minnesota an amendment may be proposed to the electorate, only in a general election, by a simple majority vote of both the Minnesota House and Senate. The Governor plays no official role, neither approving nor rejecting the proposal, in the decision to submit an amendment to the voters.

5. A "peculiar" majority is required to ratify Minnesota amendments- -A "peculiar" majority, as Morrison expressed it, is necessary for voter approval. A majority voting in favor of the amendment isn't enough. The amendment must be approved by a majority of people *voting in the election*. In 1980, for example, an amendment to establish initiative and referendum in Minnesota received a majority of votes cast on the amendment (970,407, yes, and 854,164, no). But the amendment was

rejected because it failed to receive a majority of the total number of voters at the election (2,079,411). Thus, failure to vote on the amendment has the same effect as voting "no".

Morrison noted how a popular amendment can yield "spillover" effect on a race for Governor. In 1998, Minnesota voters overwhelmingly approved an amendment to preserve the state's "hunting and fishing heritage" (1,556,895, yes, 460,747, no, with 2,105,343 voting at the election). That was the election in which an unconventional Independence Party candidate, Jesse Ventura, was elected Governor. Morrison said he thinks that the hunting and fishing amendment brought out many voters who otherwise would not have gone to the polls and such voters were more attracted to an unconventional candidate like Ventura.

6. Once enacted, amendments in Minnesota are extremely difficult to modify or remove—

Morrison noted that once an amendment is adopted in Minnesota, it is necessary to go through the entire process again for repeal: first, approval by majority vote of both the Minnesota House and Senate, second, gearing up for an amendment campaign, and third, approval by voters in the general election by a majority of those voting at the election.

Responding to a question, Morrison said repeal or modification has been successful only a couple of times, one of which involved the state lottery. The state constitution as originally enacted prohibited a lottery in Minnesota. That provision was repealed in 1988 when voters approved an amendment that repealed the prohibition on the lottery, with the proviso that the lottery be run by the state.

7. Some other states have experienced considerable difficulty in adjusting to changing circumstances because of amendments that have tied the hands of their legislatures—

Morrison cited the example of California where a constitutional amendment was adopted some 25 years ago prohibiting an increase in taxes without a two-thirds vote of both the House and Senate. The state continued to have an obligation to carry on the state's business, but with the two-thirds majority required to increase taxes resulting in stalemate, California proceeded essentially to go broke.

8. Some changes may be enacted *only* by constitutional amendment— Proposals to change the structure of the legislative, executive, and judicial branches may only be accomplished via constitutional amendment, which requires a vote of the people. Changes in the method of selecting judges, for example, require a constitutional amendment. In the discussion it was noted that a proposal has been before the Legislature to require that judges initially reach office by merit appointment, followed by retention elections after their first terms. A constitutional amendment would be necessary to adopt that proposal. To date the Legislature has declined to place that proposal on the ballot.

9. The Legislature has often tied the hands of subsequent Legislatures by constitutional amendments that otherwise could have been enacted by state law—

One can find many constitutional provisions enacted over time that might seem unusual today, but such provisions may only be modified or repealed by another constitutional amendment.

It is common for the Legislature to make changes in state laws each session, simply by passing new laws. But enacting a constitutional amendment effectively means "hands off" to subsequent Legislatures, Morrison said. Such an approach is particularly valued by interest groups who benefit

from the amendments. Depending on the subject, interest groups may stimulate their followers to turn out in disproportionate numbers at the polls, thereby helping to make a change that later becomes almost impossible to modify or dislodge by a proportionately-elected Legislature.

As an example of unusual provisions in the constitution Morrison mentioned what has been referred to as the "vegetable clause" of the state constitution, Article 13, Section 7, enacted in 1906: "Any person may sell or peddle the products of the farm or garden occupied and cultivated by him without obtaining a license therefor."

Another amendment, in 1920, specified the exact location of 70 state trunk highways.

10. Numbers of amendments proposed at one time presents no problem— A participant noted that the Legislature usually tries to limit the number of measures presented to the voters at one time. Several proposed amendments might concern subjects that do not necessarily require changes in the state constitution but rather could be addressed by state law. Those subjects, if proposed as amendments, the participant asserted, might crowd other proposals off the ballot —such as changes in the structure of the executive, legislative or judicial branches—that could be addressed only by a constitutional amendment.

Morrison responded that the number of proposed amendments on the ballot at the same time should not present a problem unless the ballot becomes so long that voters, succumbing to ballot fatigue, start to ignore the items toward the end.

11. Give the Governor the same right as the Legislature to appeal directly to the people?— Morrison suggested that if the Governor and Legislature are at loggerheads that perhaps the Governor ought to have the same privilege the Legislature enjoys in going directly to the citizens for what it wants. Currently, the Legislature can go over the head of the Governor and appeal directly to the people by proposing a constitutional amendment. Maybe the Governor should have the same right, to propose a constitutional amendment without approval of the Legislature, he said.

12. Allow a vote of the people for state laws, not only constitutional amendments?— Noting the inherent difficulty to further amending or repealing constitutional amendments, Morrison said he wonders whether the Minnesota constitution should be changed so that proposed laws could be submitted to a vote of the people. Thus, lawmakers wouldn't be driven to constitutional amendments as the only types of proposals that legally could be placed on the ballot. Lawmakers could choose to submit proposals for changes in law, knowing that voter approval wouldn't necessarily make it almost impossible to modify the proposals later. Laws once enacted—even by public vote—could be changed at any session of the Legislature.

13. Move to ranked choice voting?— A questioner asked Morrison whether sharp divisions between GOP and DFL caucuses are prompting the Legislature's growing interest in bypassing the Governor's potential veto by submitting amendments directly to the voters. Morrison suggested that the problem of politically sharp divisions might be eased if the state moved to Ranked Choice Voting (RCV). Under RCV, candidates need to attract a majority of voters, not only a plurality, to get elected. Thus candidates would have incentives to moderate their positions to attract support from a broader group than those supporting narrower ideological positions.

14. Move to an open primary?— Another approach that might stimulate candidates to moderate their positions, thereby reducing the likelihood of extreme polarization, Morrison suggested, would be to enact an open primary. In an open primary the two top vote getters, regardless of party, would move to the general election. Thus all candidates in all parties might find it helpful to take positions calculated to attract support from as broad spectrum of voters as possible. Now in Minnesota primary elections voters are restricted to voting their preferences for candidates within the same party.

15. Thanks— On behalf of the Civic Caucus, Verne thanked Morrison for meeting with us today to help us better understand the implications of constitutional amendment.