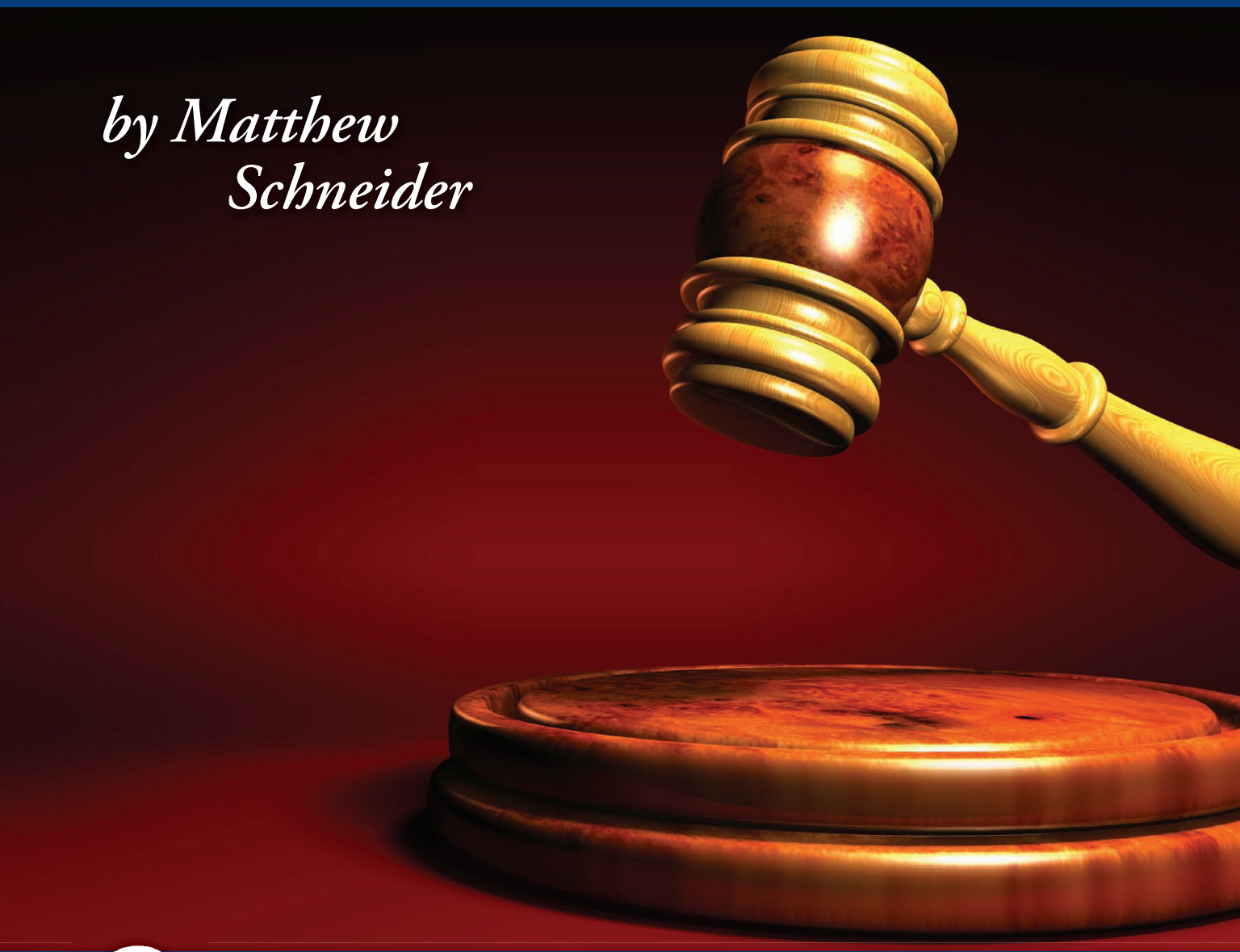
Michigan's Big Four:
An Analysis of the Modern Michigan Supreme Court

by Matthew Schneider



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In May 2000, the *Wall Street Journal* featured an update on the Michigan Supreme Court that praised the court's majority as "unusually thoughtful, sophisticated, and articulate."[1] In October 2005, a *Wall Street Journal* column referred to the court as "The Finest Court in the Nation."[2] More recently, in November 2007, *Human Events* labeled the majority "the gold standard" for state judges.[3] These commentaries are follow-ups to other articles that have generously identified the Michigan Supreme Court as a national leader in sound reasoning and judicial restraint. Alternatively, the court has been the source of criticism for abandoning long-standing judicial doctrines. For example, *The Detroit Free Press* chided the Michigan Supreme Court for abandoning the "absurd result" doctrine, which "discouraged [judges] from enforcing laws adopted by the Legislature if to do so would produce an 'absurd result.'"[4] Still, there is broad agreement among conservative legal scholars that Michigan's highest court has greatly advanced the delicate art of being faithful to the law while, at the same time, giving respect for the proper balance between the branches of government and the rights of the people.

Some of the press appears to be based on the recognition that the current majority is more likely to exercise judicial "restraint" rather than judicial "activism."[5] For the purposes of this White Paper, the terms "restraint" and "activism" are defined with their most ordinary meanings. As explained below, judicial restraint is the notion that judges base their decisions on purely legal sources directly relevant to the question at hand, such as statutes and constitutions, instead of on outside sources or their subjective opinions. Judicial activism is the theory under which judges may "actively" interpret the law on a broad plane and are not necessarily constrained to relying upon the sources and issues strictly before them.

Judges who exercise restraint tend to defer to the legislature's policy choices, and refrain from using the courts to solve difficult social problems that could instead be decided through popular referendum, constitutional amendment, or legislation. These judges also typically apply theories of constitutional and statutory interpretation that restrict, rather than expand, their discretion. In other words, judges "restrain" themselves from overreaching, from deciding questions not squarely before them, and from applying their own personal preferences in their opinions.[6]

For example, a judge practicing restraint would hold that a contract specifying a duration of 90 days means that the contract lasts only for 90 days. The judge would not find that the contract lasts for 91 days to satisfy the needs of a sympathetic party, or to amend an unwise legislative decision that had allowed for only 90-day contracts, no matter how beneficial or severe the consequences of a 90-day expiration.

Judicial activism, on the other hand, is the notion that judges should, in the words of United States Supreme Court Justice Stephen Breyer, interpret statutes and the Constitution in a way to "find practical solutions to important contemporary social problems."[7] That is, under this theory, judges may use constitutions or statutes as a base from which to begin their legal analysis, but they are not necessarily constrained by those laws and may reach beyond them when they feel it necessary to resolve disputes. Additionally, activist judges generally do not believe they are constrained to following the legislature when the legislature's acts are foolish or unwise.

Judges who exercise activism tend to see the other side of the coin in the 90-day contract problem described above. For example, a judge practicing activism might hold open the contract for 91 days (or more) where an expiring contract would cause severe hardship or perhaps unconscionable harm to a party. The activist judge might seek to enlarge the duration of the contract even if the issue squarely before the court does not involve the contract at all, if doing so would produce a more equitable result. He or she

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might draw upon case law from another jurisdiction when the original jurisdiction's law does not provide a result that allows the extension of the contract. Or, in what some devotees of restraint might argue is a "worst-case" scenario, an activist judge might enforce the 91-day contract because of his or her personal belief that "justice" requires it.

When applying the 90-day contract analogy to the Michigan Supreme Court, the current majority has typically enforced the terms of contracts as written and has restrained itself from opining beyond those terms. The court has been reluctant to accept the novel theories of parties that a contract should be held open past its 90-day expiration. That is, the majority typically adopts a philosophy of restraint, rather than expanding the terms of the contract for some other reason. For authority, the court frequently looks to the state's founding documents and earliest court opinions. On occasion, as this White Paper explains, the court has relied upon the precedent established in the late 1800s by a majority of four Michigan Supreme Court justices commonly referred to as the "Big Four."

Critics of the Michigan Supreme Court argue that the court's majority is actually "activist." They argue that because the court frequently overrules or reverses its previous decisions, the court's unwillingness to follow stare decisis is evidence that the majority's personal preferences guide the court's decisions. This paper explores the validity of that criticism by examining the court's most recent decisions and by comparing them to the decisions of the court in past years. This paper also compares the current court's decisions to the decisions of the Big Four of a much earlier era. In doing so, this White Paper addresses two issues: (1) What is the historical background of the Michigan Supreme Court and how has the court evolved? and (2) What are the most recent significant opinions of the court?

A Court Transformed

Any attempt to explain how the Michigan Supreme Court has come to be so highly regarded by some—and so controversial by others—must first explore its evolution. In the decades surrounding the 1870s, Michigan's Supreme Court followed a jurisprudence similar to the current court's. The early court, led by the "Big Four" —Chief Justice Thomas M. Cooley and Associates Issac P. Christiancy, James V. Campbell, and Benjamin F. Graves—helped shape our nation's understanding of separation of powers[8] and standing to sue.[9] The court gave deference to the Constitution and statutes when establishing legal principles such as mutual mistake in contracts[10] and the right to vote for mixed-race citizens.[11] The justices frequently articulated their intention to follow the Michigan Constitution where public opinion dictated a different result, even in hotly controversial areas such as public funding for private railroads.[12]

Even today, practically every first-year student in American law schools is exposed in some fashion to the Big Four, whether it be through a resuscitation of a passage from *Cooley's Constitutional Limitations*[13] or through a contracts class case briefing of the 1887 classic, *Sherwood v. Walker*,[14] more affectionately known as "the cow case." Indeed, the court of the Big Four was quite well regarded, and that reputation has continued until the present day.[15]

As the court of the Big Four began to dissolve in the late 1880s and the mid-1890s, the Michigan Supreme Court slipped into a period that has been described by some as undistinguished. The court continued on a relatively steady path and generally eschewed activism, but failed to produce a collection of memorable opinions. The court relied upon the Big Four's opinions for precedent and regularly cited to the earlier court's decisions.

In 1970, a dramatic—and unique—election of two new Justices drastically changed the jurisprudence of the supreme court. Then, as is now, vacancies on the court were filled in two ways. First, in the case of a mid-term vacancy due to retirement or death, the governor would appoint a new justice until the next subsequent election.[16] Second, in the case of an end-of-term vacancy, candidates for the court were nominated by Party regulars at partisan political conventions.[17] Those candidates would then run in the general election as non-partisan candidates.[18] What made 1970 so different was that Democratic Party members nominated two former popular governors—G. Mennen "Soapy" Williams and John B. Swainson—to run for the supreme court. Both easily won. Incumbent Justices John R. Dethmers and Edward S. Piggins, both Republicans, were defeated.

Prior to their elections, Williams' and Swainson's experience in state government consisted of *making* public policy, rather than *interpreting* it. Williams had served twelve years as governor, and prior to that had worked in state government. Swainson had served two years in the governor's office and previously had been Lieutenant Governor and a State Senator. Significantly, Williams had appointed five members of the court and Swainson had appointed two, all of whom shared a similar philosophy as the governors who appointed them.

While it may be a coincidence, at about the same time that Williams and Swainson joined the bench, the Michigan Supreme Court began overruling and disregarding long-standing court decisions in certain politically sensitive or policy-oriented areas of the law. To the disdain of many, the justices began overruling long-established precedent, including opinions of the Big Four. The decisions below illustrate the changes in the court's jurisprudence (years of opinions are included for reference).

Criminal Law

In the area of prohibiting successive criminal prosecutions, the court in *People v. White* (1973)[19] overruled the original rule as established in *People v. Parrow* (1890)[20] and *People v. Ochotski* (1898).[21]

In the area of dual prosecution by federal and state sovereigns, the court in *People v. Cooper* (1976)[22] failed to follow the U.S. Supreme Court decision in *Bartkus v. Illinois* (1959).[23]

In the area of allowing a jury to convict of a lesser included offense, the court in *People v. Jones* (1975)[24] and *People v. Chamblis* (1975)[25] did not follow the original rule as established in *Hanna v. People* (1869).[26]

Tort Reform

In the area of recovery of damages, as provided by state law, the court in *Lambert v. Calhoun* (1979)[27] overruled the original rule in *Holland v. Eaton* (1964).[28]

In the area of determining proximate cause, the court in *Hagerman Group v. Gencorp Automotive* (1998)[29] did not follow the original rule in *Stoll v. Laubengayer* (1913).[30]

Governmental Immunity

In the area of immunity of the government from suit by an injured person, the court in *Gregg v. State Highway Department* (1990)[31] declined to follow the original rule in, among other cases, *Goodrich v. Kalamazoo County* (1943).[32]

Contracts

In the area of applying contracts as written rather than determining whether a particular clause is "reasonable," the court in *Tom Thomas Org., Inc. v. Reliance Ins. Co.* (1976)[33] and *Camelot Excavating Co., Inc. v. St. Paul Fire & Marine Ins. Co.* (1981)[34] did not follow the original rule in *McIntyre v. Michigan State Ins. Co.* (1883)[35] and *Law v. New England Mut. Accident Ass'n* (1892),[36] among other cases.

The jurisprudence of the Williams and Swainson court continued for approximately a quarter-century. Then, in 1990, Michigan voters ushered in a profound change in the state's judiciary by electing John M. Engler as Michigan's Governor. Engler, a devotee of the Big Four, and ironically, a graduate of the Lansing, Michigan law school that now bears Big Four Chief Justice Thomas M. Cooley's name, made reforming the judiciary a focal point of his administration. Engler explained his judicial philosophy as follows:

> I want jurists on the Michigan bench who understand that it is legislators, not judges, who make the law; who believe that the people should govern through their elected representatives; who comprehend that the burden of policy-making is on the legislative not the judicial branch; who render decisions based on the *text* of the Constitution or statute rather than on somebody's social agenda. In short: I'm looking for a few intelligent, hard-working men and women with fidelity to the Constitution![37]

During the Engler Administration, four justices retired, which allowed the governor to appoint successors until the next political convention and subsequent general election. In 1997, Engler vested the first of his four supreme court appointments in Clifford W. Taylor, whom he had earlier appointed to the Court of Appeals, to fill the seat of retiring Justice Dorothy Comstock Riley. In 1998, Engler appointed Robert P.

Young, Jr. to fill the seat of retiring Chief Justice Conrad Mallett. Also in 1998, Engler-appointed court of appeals Judge Maura D. Corrigan was elected to fill the slot of retiring Justice Patricia Boyle. And, in 1999, Engler appointed Stephen J. Markman in place of retiring Justice James Brickley. Following their nomination by delegates at state Republican Party conventions, voters returned Taylor, Markman, Corrigan, and Young to the court in the next general elections.

As the newly constituted court began to form, Engler's first supreme court appointee, Clifford Taylor, frequently dissented from the post-1970 majority. When Markman, Corrigan, and Young joined the court, all of Taylor's dissents became majority opinions. For example, Justice Taylor's dissent in *Hagerman v. Gencorp Automotive* (1998)[38] was adopted in *Paige v. Sterling Heights* (2006).[39] His dissent in *Jacobson v. Parda Federal Credit Union* (1998)[40] was adopted in *Joliet v. Pitoniak* (2006).[41] And, Taylor's dissent in *Rogers v. City of Detroit* (1998)[42] became the majority view in *Robinson v. City of Detroit* (2000).[43]

By the time Engler left office due to term limits in 2002, the Michigan Supreme Court had begun to restore the original precedents that had been overruled by the court in the decades following the 1970s. The following uses the previous cases as an example.

Criminal Law

The court restored the original rule of prohibiting successive prosecutions when *People v. Nutt* (2004)[44] overruled *People v. White* (1973)[45] and followed *People v. Parrow* (1890)[46] and *People v. Ochotski* (1898).[47]

The court followed the original rule for dual prosecution by federal and state sovereigns when *People v. Davis* (2005)[48] overruled *People v. Cooper* (1976)[49] and followed the U.S. Supreme Court decision in *Bartkus v. Illinois* (1959).[50]

The court followed the original rule for allowing a jury to convict of a lesser included offense when *People v. Cornell* (2002)[51] overruled *People v. Jones* (1975)[52] and *People v. Chamblis* (1975)[53] and followed *Hanna v. People* (1869).[54]

Tort Reform

The court restored the original rule for recovery of damages, as provided by state law, when *Cameron v. Auto Club Insurance Association* (2006)[55] overruled *Lambert v. Calhoun* (1979)[56] and restored *Holland v. Eaton* (1964).[57]

The court restored the original rule for determining proximate cause when *Paige v. City of Sterling Heights* (2006)[58] overruled *Hagerman Group v. Gencorp Automotive* (1998)[59] and followed *Stoll v. Laubengayer* (1913).[60]

Governmental Immunity

The court restored the original rule of immunity of the government from suit by an injured person when *Grimes v. Department of Transportation* (2006)[61] overruled *Gregg v. State Highway Department* (1990)[62] and followed *Goodrich v. Kalamazoo County* (1943).[63]

Contracts

The court followed the original rule for applying contracts as written rather than determining whether a particular clause is "reasonable" when *Rory v. Continental Ins. Co.* (2005)[64] overruled *Tom Thomas Org., Inc. v. Reliance Ins. Co.* (1976)[65] and *Camelot Excavating Co., Inc. v. St. Paul Fire & Marine Ins. Co.* (1981)[66] and followed *McIntyre v. Michigan State Ins. Co.* (1883)[67] and *Law v. New England Mut. Accident Ass'n* (1892),[68] among other cases.

Today, now-Chief Justice Taylor, along with Justices Corrigan, Markman, and Young, has resurrected much of the philosophy of the Big Four of Michigan's early court. Their opinions frequently cite to the state's earliest precedent, the cases of Justices Cooley, Christiancy, Campbell, and Graves, and the decisions of the United States Supreme Court.

Some charge that the members of the Taylor court have unnecessarily reversed precedent and have engaged in an "activist" philosophy; defenders of the court argue that a deeper look at the court's recent decisions reveals that the modern court has restored the original opinions that were misinterpreted or not followed by the post-1970 court. They say that the court has not applied new legal theories and has followed federal precedent and the widely held views of sister state courts.

The Modern Jurisprudence of the Michigan Supreme Court

The best way to evaluate the impact of the Michigan Supreme Court is to examine some of the landmark decisions it has handed down in recent years. Below are several of the court's more noteworthy modern cases.

Standing

Perhaps the modern Michigan Supreme Court's greatest impact on Michigan law has been in the area of whether parties had standing to appear in court. Prior to 2001, Michigan courts had defined standing in general terms but had not provided an explicit test to determine whether parties had met the essential elements of standing. The court's 1995 attempt to fashion a standing rule resulted in separate opinions, with some focusing on whether the plaintiff could show a personal rather than a public injury, others on whether the plaintiff's injury was within the "zone of interest" of the intent of the legislature, and still others who sought to bring Michigan law in line with the federal standing test.[69] The supreme court clarified the state of the law in its 2001 opinion in *Lee v. Macomb County Board of Commissioners*.[70]

In *Lee*, the supreme court replaced this approach to standing with the modern federal approach. At issue in *Lee* was whether the plaintiffs had standing to compel their county board of commissioners to levy a tax to create a veterans' relief fund for indigent veterans, in accordance with the state's Soldiers' Relief Fund Act.[71] While Michigan law did in fact require county commissions to create such a fund, it was undisputed that none of the plaintiffs had ever sought relief under the Act itself. The Michigan Court of Appeals majority held that the plaintiffs had standing because they were "members of the class for whose benefit the Act was enacted" and because they were "detrimentally affected in a manner different from the public generally."[72] The court of appeals also found that plaintiffs' actions could not be dismissed due to failure to exhaust statutory remedies because plaintiffs were claiming that the county had failed to comply with the Act.[73]

The Michigan Supreme Court used the opportunity in *Lee* to clarify the state's standing doctrine. The majority, consisting of Justices Markman, Taylor, Young, and then-Chief Justice Corrigan, first recognized that standing is a venerable doctrine in the federal system that derives out of U.S. Constitution Art. III, Sec. I, which limits the judicial power to only "Cases" and "Controversies."[74] Second, the court examined U.S. Supreme Court precedent and determined that *Lujan v. Defenders of Wildlife*[75] had provided a clear and workable test for standing.[76] Third, the court noted that the post-Civil War decisions of the Michigan Supreme Court's Big Four supplemented the *Lujan* test and recognized the importance of separation of powers as part of the standing doctrine analysis.[77] Finally, the court observed that Michigan's court in recent years had tried, but failed, to come up with a workable standing test.[78]

Accordingly, the court adopted the *Lujan* test and held that "injury in fact" is a necessary requirement to establish standing. Because the plaintiffs in *Lee* had never sought relief under the Act in question, the court held that they could not establish that they had suffered injury by failing to gain relief under the Act. The court reversed the court of appeals, which had failed to follow the articulable standard in *Lujan*.

Justice Weaver, concurring, would have declined to adopt the *Lujan* test and would have continued to apply Michigan standing requirements "based on prudential, rather than constitutional, concerns."[79] Justices Kelly and Cavanagh, dissenting, agreed with the adoption of the *Lujan* test, but opined that the plaintiffs had standing because relief under the Act would have benefited these particular veterans in a concrete and particularized manner.[80] The majority, however, maintained that the argument that any claimant would be better off with more money "misses the point."[81] The issue, the majority stated, was whether the plaintiffs could show that they had been injured, not whether they could show that they could recover money damages assuming their injury, as the U.S. Supreme Court has explained.[82]

Following *Lee*, the supreme court further developed its standing doctrine and continued to rely on the *Lujan* test. All of the court's decisions after *Lee* relied on established federal law and the basic principle of separation of powers. For example:

- In *National Wildlife Federation v. Cleveland Cliffs*

Iron Company,[83] the issue was whether the non-profit organization plaintiffs had standing to bring suit in the interests of their members where such members would have standing as individual plaintiffs. The court found that plaintiffs had standing, conditioned on their ability to show an actual, individualized injury existed, as the U.S. Supreme Court has required. Majority: Justices Markman, Taylor, Young, and Chief Justice Corrigan. Concurring in result only: Justices Cavanagh, Kelly, and Weaver.[84]

• In *Michigan Citizens for Water Conservation et al*. v. *Nestle Waters North America, Inc.*,[85] the court addressed whether plaintiffs had standing to obtain an injunction preventing a water bottling company from withdrawing underground water on lands they allegedly used. The court held that the plaintiffs had standing regarding land in which they held an interest, but lacked standing on lands that they did not use or access. By doing so, the court mimicked long-settled federal case law that requires plaintiffs to show a specific injury in order to have standing. Majority: Justices Corrigan, Markman, Young, and Chief Justice Taylor. Dissent: Justices Cavanagh, Kelly, and Weaver.[86]

• In *Rohde v. Ann Arbor Public Schools*,[87] the court examined whether a statue that conferred standing on persons simply because they were taxpayers was constitutional. The court, relying on established U.S. Supreme Court precedent, held that the statute could not confer standing where the taxpayers could not demonstrate an actual injury-in-fact. Majority: Justices Corrigan, Markman, Young, and Chief Justice Taylor. Concurring: Justices Cavanagh and Kelly. Dissenting in part and concurring in part: Justice Weaver.[88]

Tort Reform

In 2004, the Michigan Supreme Court joined the majority of state supreme courts in upholding as constitutional the ability of state legislatures to cap damages in civil cases.[89]

In *Phillips v. Mirac, Inc.*, the Michigan Supreme Court held that a law that capped the amount of damage liability—in this case, to lessors of cars—did not violate the plaintiff's rights under the Michigan Constitution to equal protection, due process, or a jury trial.[90] In *Phillips*, a passenger in a car leased from an Enterprise Rent-A-Car franchise was killed in an auto accident. Margaret Phillips, the mother and representative of the decedent's estate, sued the franchise under a law that established liability for car lessors in certain situations. The law Phillips relied upon to sue the franchise, however, also included a cap on damages for such lessors at $20,000 per injured person and $40,000 per accident.[91]

The trial court concluded that damage caps to auto lessors were unconstitutional for three reasons. First, the court held that damage caps violated the plaintiff's right to a jury trial because the jury trial right includes the right of the jury to determine damages, and such a right cannot be altered by the courts or by the legislature. Second, the trial court found that damage caps violated equal protection because they caused similarly situated parties to be treated differently. Under the same reasoning, the court lastly concluded that damage caps violate due process of law.[92]

The court of appeals reversed,[93] and the Michigan Supreme Court affirmed the court of appeals. Writing for the majority, then-Justice Taylor, joined by Justices Markman and Young and then-Chief Justice Corrigan, engaged in an exacting analysis of precedent and the original meaning of "trial by jury" in Michigan and federally.[94] In doing so, the court reiterated the age-old and well-established proposition that the role of the jury is confined to deciding material issues of fact, while the role of the judge is to decide issues of law. The court noted the United States Supreme Court's recent affirmation that assessing civil damages "cannot be said to involve the 'substance of a common-law right to a trial by jury,' nor a 'fundamental element of a jury trial.'"[95] Thus, while the jury could find facts, including the amount of damages, the court could then increase or decrease the damages in accordance with the legislature's directive, because deciding according to the established law is the proper role for the judge. The court's opinion provided the following comparison:

> [F]or example, while a jury may find a defendant has acted negligently and the amount of damages occasioned thereby, the court may apply the governmental immunity act and find there is no liability, despite the plaintiff's damages. Or a jury may find a hunter has been

injured and damaged on a defendant's property because of the defendant's negligence, but the recreational trespass act will, in certain circumstances, preclude liability. Moreover, uncontroversially, after the jury has been dismissed, a court may enter an order that doubles or trebles the amount of damages assessed, pursuant to any of the numerous statutes that concern postverdict adjustment of damages.... The damage cap is a piece with these numerous examples that for generations have not been successfully challenged on the basis of constitutional infirmity and that reflect the previously unchallenged understanding springing from a recognition that juries only decide facts.[96]

On the issue of equal protection, the court acknowledged that the plaintiff in question was treated "differently," in that she could not recover damages even though plaintiffs in suits not involving rental cars could. The court stated, however, that such a disparate treatment was neither improper nor at all surprising:

> As is apparent, when any statute is passed, the Legislature is almost invariably deciding to treat certain individuals different from others. This exercise of discrimination between citizens means, for example, that some pay taxes at one rate, while others pay at another rate. Or some get a tax or social service benefit that others do not, and so on. Line drawing of this sort is inherent in all governments[.][97]

With this in mind, and combined with the fact that the damage caps legislation was economic in nature, the court applied rational basis review and concluded that the Michigan legislature could easily have had several rational reasons for the tort cap law, such as the legislature's obvious desire to reduce insurance costs for car lessors.[98] The court therefore found no equal protection violation, and, for the same reasons, found no violation of due process.

Justice Weaver reached the same conclusion but dissented in part over the majority's interpretation of the historical right to a jury trial.[99] Justices Kelly and Cavanagh dissented and invited the majority to be guided by the minority of states that have declared damage caps unconstitutional.[100] The dissent felt that to deny a certain figure of damage recovery was synonymous with the denial of due process, equal protection, and the right to a jury trial.[101] Justice Cavanagh and Kelly argued that "the damages cap invades the jury's role," and even if it did not, the cap in question was not justified by a legitimate governmental goal.[102]

In response to the dissent, the majority noted that economic regulation such as damage caps has, both on the state and federal levels, been properly held to be a policy issue for the legislature and the governor.[103] The majority suggested that striking down this type of tort reform statute would be a piece of the puzzle that could "usher in a new *Lochner* era" in which American courts once again legislate from the bench on economic issues.[104] The majority stated that "economic regulation, such as the measure we deal with today, has consistently been held to be an issue for political process, not for the courts."[105]

Property Rights

Eleven months before the United State Supreme Court handed down its controversial 5-4 decision in *Kelo v. New London*,[106] which held that general community benefits from economic growth qualified as a permissible "public use" for a government's use of eminent domain, the Michigan Supreme Court reached the seemingly opposite result, albeit that it was interpreting the Michigan, not the United States, constitution. In *County of Wayne v. Hathcock*,[107] Michigan's highest court was presented with "a clash of two bedrock principles of our legal tradition:" the right of the people to own private property, and the state's right to condemn private property for the use of the state.[108] Unlike the U.S. Supreme Court, the Michigan court held that eminent domain could not trump the people's right to dominion over their own private property under the Michigan Constitution.

In *Hathcock*, Wayne County, Michigan sought to use the power of eminent domain to condemn nineteen parcels of personally owned real property in order to construct a 1,300-acre business and technology park. The county argued that a commercial park would reinvigorate the economy by bringing in new businesses and jobs. The County relied primarily on the seminal 1981 decision in *Poletown Neighborhood Council v. Detroit*,[109] often cited in law school textbooks, in which a Michigan Supreme Court of an earlier era had upheld

the Detroit Economic Development Corporation's plan to raze an entire neighborhood of homes to make way for a General Motors plant. The county argued that *Poletown* had been correctly decided and therefore required a similar approval for the construction of the modern technology park.

The Wayne County property owners, on the other hand, argued that the county's attempt to exercise eminent domain was not supported by Michigan law. More importantly, the owners contended that *Poletown* was wrongly decided. They argued condemnation was forbidden because the Michigan Constitution, like the federal constitution, requires that condemnation of public property must advance a "public use." A commercial park, argued the property owners, was not a "public use."[110]

In a unanimous opinion, the Michigan Supreme Court overruled *Poletown* and sided with the property owners. Writing for the court, Justice Young concluded that although the county's attempted use of eminent domain was authorized by an act of the legislature, it did not pass muster under the Michigan Constitution. The court held that the state's desire to condemn private property and hand it over to a private entity, such as a private business interest, is only appropriate in one of three contexts: 1) when there is an extreme public necessity; 2) when the property remains subject to public oversight; and 3) when the property is condemned because of independent public significance, rather than the interests of the private entity that will take over the land.[111]

In this case, the court explained, Wayne County's proposed condemnation did not satisfy any of the three tests, and therefore could not be seen as a "public use." The private businesses that would take over the land would have been acting not out of the public good, but instead would act in their own interests to make a profit.[112] Moreover, there was no plan for future public oversight of the land.[113] Finally, the public would have only received the "benefits" realized by the profits of the private companies. Such a generalized economic benefit of reducing unemployment might have never even been realized.[114] In a reference to Chief Justice Cooley, the court explained:

> Every business, every productive unit in society does, as Justice Cooley noted, contribute in some way to the commonwealth. To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain.[115]

In reaching its conclusion, the court suggested that the Michigan Supreme Court of the previous few decades had abandoned its own jurisprudence:

> [T]he majority opinion in Poletown is most notable for its radical and unabashed departure from the entirety of this Court's pre-1963 eminent domain jurisprudence.… Poletown's conception of a public use—that of "alleviating unemployment and revitalizing the economic base of the community"—has no support in the Court's eminent domain jurisprudence before the Constitution's ratification.[116]

While all justices agreed that *Poletown* should be overruled and the private property rights of the defendants be preserved, Justices Cavanagh and Kelly dissented in part over whether *Hathcock* should be applied retroactively. The majority concluded that the decision should be applied retroactively to the 1981 *Poletown* decision, because the court was not announcing a new rule of law; rather, it was simply returning the law to what had existed before *Poletown*.[117] The dissenters believed that retroactive application would "penalize" those who had relied on *Poletown*.[118]

Criminal Law

The Michigan Supreme Court has significantly influenced the United States Supreme Court's analysis of criminal law. In 1999, the Michigan Supreme Court held that the Fourth Amendment's Exclusionary Rule does not require a court to suppress evidence seized during the execution of a search warrant when the searching officers violate the "knock and announce" rule to enter the warrant location. In 2006, the U.S. Supreme Court followed the Michigan Supreme Court's lead and agreed.

In *People v. Stevens*,[119] police obtained a search warrant for drugs at defendant Stevens' home. They executed the search warrant and found the anticipated contraband. After Stevens was charged with a drug offense, he filed a motion to suppress and argued that the method the police used to enter the house

was improper. Stevens claimed that because of the improper entry, the evidence seized during the search warrant execution could not be used against him. The case centered on whether the officers, who had waited mere seconds before entering the home, had violated the "knock and announce" rule by failing to wait a reasonable amount of time before entering Stevens' home.

The trial court granted defendant's motion to suppress, and the court of appeals affirmed.[120] The Michigan Supreme Court reversed in an opinion joined by Justices Corrigan, Taylor, Young, James Brickley (the predecessor to Justice Markman), and then-Chief Justice Weaver. The court first considered whether the police officers' violated the defendant's Fourth Amendment protection against unreasonable searches required the suppression of the evidence.[121] The court recognized that under the U.S. Supreme Court's decision in *Weeks v. United States*,[122] the judge-made Exclusionary Rule did not allow evidence seized during an unlawful search to be introduced against a defendant at trial.

Next, the court held that nothing in the Fourth Amendment required suppression of evidence. The court recognized that both state and federal disincentives against illegal searches acted to protect citizens from violations of the "knock-and-announce" rule.[123] For example, a Michigan statute provided that any person executing a search warrant who willfully exceeds his authority or exercises it was unnecessary severity shall be guilty of a misdemeanor.[124] Additionally, 42 U.S.C. §1983 allows civil remedies when the knock-and-announce principles have been violated. These protections, the court held, are effective deterrents to police misconduct that are less severe that the drastic step of suppressing evidence.[125]

Finally, the court considered whether any Act of the legislature required suppression of the evidence. The court then said:

> The Legislature has not chosen to specifically mandate the sanction of excluding evidence seized as a result of the violation of [the state knock and announce rule]. Nothing in the wording of the statute would suggest that it was the legislators' intent that the exclusionary rule be applied to violations of the "knock and announce" statute. Therefore, we decline to infer such a legislative intent. To do otherwise would be an exercise of WILL rather than JUDGMENT. (emphasis in original).[126]

Approximately three months after *Stevens*, the Michigan Supreme Court again reversed the Michigan Court of Appeals in a case with nearly identical facts. In *People v. Vasquez,*[127] the trial court had suppressed evidence seized during a search warrant execution because the police had waited "[l]ess than a second" before entering the search location. While the trial court and the court of appeals had found the searches violated the "knock and announce" rule,[128] the Michigan Supreme Court, in a per curiam opinion joined by Justices Corrigan, Markman, Taylor, Young, and then-Chief Justice Weaver, reaffirmed *Stevens* and held that suppression was not the appropriate remedy. Seven years after the decisions, the U.S. Supreme Court in *Hudson v. Michigan*[129] applied *Stevens* and *Vasquez* on a national level.

In *Hudson*, Detroit police officers executing a search warrant at defendant Hudson's home violated the knock-and-announce rule. The trial court suppressed evidence seized during the search. The Michigan Court of Appeals, relying on *Stevens* and *Vasquez*, reversed. The defendant was convicted at trial and the Michigan Supreme Court declined to review his conviction on appeal.[130] Hudson appealed to the U.S. Supreme Court. Justice Antonin Scalia, writing for the majority, agreed with *Stevens* and *Vasquez* and held that suppression is not a proper remedy for violating the knock-and-announce rule. Like the Michigan Supreme Court, the U.S. Supreme Court found that the threat of civil action, rather than the possibility of suppression of evidence at trial, will adequately deter police officers from violating the knock-and-announce rule.[131]

People v. Stevens and *People v. Vasquez* are examples of the modern Michigan Supreme Court's influence on American law. The U.S. Supreme Court upheld the Michigan Court of Appeals in *Hudson*, which had relied entirely upon *Stevens* and *Vasquez*. That is, the U.S. Supreme Court adopted the reasoning and logical application of the Exclusionary Rule as set forth by the Michigan Supreme Court.

Voter Identification

In 2007, the Michigan Supreme Court upheld a provision of Michigan election law that requires voters to show photo identification before voting. In *In re*

Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71,[132] the court held in a 5-2 opinion that the photo identification requirement is a reasonable, nondiscriminatory restriction that has the legitimate goal of preserving the fairness of elections.

The case centered on section 523 of the Michigan Election Law.[133] In 1996, the Michigan Legislature amended the Election Law to include section 523, which requires that a potential voter present photo identification in the form of a driver's license, state-issued identification card, or other commonly known picture identification card before receiving a ballot at a polling location. Section 523 also requires the voter to complete an application listing his or her signature and address. If the voter does not have photo identification, he need only sign an affidavit affirming his valid voter status before being allowed to vote.[134]

Shortly after section 523 was passed by the legislature and signed into law by the governor, Michigan Attorney General Frank J. Kelley[135] issued an opinion concluding that the photo identification provision violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[136] The Attorney General opined that the photo identification requirement was "not necessary to further a compelling state interest" in the absence of significant voter fraud, and that the requirement created "economic and logistical burdens" on people who did not have photo identification.[137] Thereafter, although the law was validly passed and issued, the Michigan Secretary of State refused to comply with or enforce section 523.

In 2006, the Michigan House of Representatives adopted a resolution requesting the Michigan Supreme Court to issue an advisory opinion on whether the photo identification requirement of section 523 violated either the Michigan or the United States constitutions.[138] The court accepted the invitation and requested briefing and argument from the newly elected Attorney General Michael A. Cox, who argued as both the opponent and the proponent of the issue.[139]

After hearing oral argument, the Michigan Supreme Court upheld section 523 in an opinion authored by Justice Young and joined by Chief Justice Taylor and Justices Corrigan, Markman, and Weaver.

The court first recognized (as has the United States Supreme Court) that although a citizen's right to vote is fundamental, it is not absolute.[140] For example, legislatures may regulate the time, place, and manner of elections.[141] Legislatures may also enact laws to ensure the purity of elections, preserve ballot secrecy, and establish voter registration requirements.[142] The court noted that the purpose of these laws is not to discourage qualified persons from voting, but instead to prevent voter fraud.[143] Thus, an individual's right to vote competes with the state's compelling interest in ensuring the integrity of its elections.[144]

Second, the court relied upon United States Supreme Court precedent holding that a "flexible standard" of scrutiny, rather than strict scrutiny analysis, applies when considering the constitutionality of election laws.[145] Under the federal balancing test set forth in *Burdick v. Takushi*,[146] the initial step in determining the legitimacy of the election law is to consider the nature and significance of the law's burden on the right to vote in comparison to the state's interest. If the burden on the right to vote is severe, the law must be "narrowly drawn" in order to advance a compelling state interest. But if the law is reasonable and not discriminatory, the law should be upheld because it furthers the state's important interest in fairly regulating elections.[147]

Third, the court applied the *Burdick v. Takushi* balancing test to Michigan's section 523, and determined that the law is constitutional. The court reasoned that although the photo identification requirement imposes some burden on the voter, the burden is not severe.[148] Most Michigan voters already possess voter identification.[149] Moreover, "the act of reaching into one's purse or wallet and presenting photo identification before being issued a ballot" does not impose a "severe" burden.[150] For those people without photo identification, they may sign an affidavit instead of presenting identification.[151] Thus, the court found, there is no basis to conclude that such a requirement imposes a "severe" burden.[152] Moreover, in order to prevent in-person voter fraud—a goal in which the state has a tremendous interest—the state may impose the reasonable, nondiscriminatory restriction of the photo identification requirement.[153]

Finally, the court held that section 523 is not a poll tax. The court reasoned that although the Michigan

Secretary of State charges a fee of $10.00 to obtain a state identification card, voters may bypass the fee by signing an affidavit affirming their validity to vote instead of producing identification.[154] For voters who elect to obtain identification, the fee is waived for the elderly, disabled, and persons who present good cause for a waiver.[155]

Justice Cavanagh dissented. He argued the photo identification burden imposed a severe restriction and a disparate impact on racial and ethnic minorities, the poor, the elderly, and disabled voters, because such voters might not be able to readily obtain photo identification.[156] Under such a severe burden, he argued, the law should be subject to strict scrutiny and be narrowly tailored.[157] Justice Cavanagh opined that because there was nothing in the record to demonstrate that any voter fraud actually existed, the photo identification requirement was not narrowly tailored and therefore violated the Equal Protection Clause.[158] He alleged that the claim of voter fraud was "a tactic used to suppress the votes of minorities and the poor"[159] and that "our government has failed its citizens" because the majority "endorses misguided legislation that significantly impairs the fundamental right of thousands of our citizens to vote."[160] Justice Kelly, dissenting separately, agreed that the Michigan Election Law should be subject to strict scrutiny. She found that the "tragic decision" of the majority severely burdened the right to vote, particularly for the poor and disadvantaged.[161]

The majority criticized Justice Cavanagh's dissent as "inflammatory" and "emotional."[162] The majority found that the right to vote, though important in its own right, also includes the assurance that one's vote will be protected and will not be cancelled out by fraudulent votes.[163] That is, the state is not required to present proof of voter fraud before it tries to prevent it.[164] Rather, the state is entitled to implement a system that prevents fraudulent votes, even where that system requires photo identification or an affidavit to vote.[165]

Some have argued that the Michigan Supreme Court's opinion is significant not for what it held, but for what it declined to hold. In the months prior to the court's decision, the Speaker of the Michigan House and the Michigan Attorney General clashed over whether Attorney General Frank Kelly had acted within his state constitutional authority to issue an opinion that effectively struck down section 523. The Speaker reasoned that Attorney General opinions were not binding, and to treat them as such would violate the separation of powers.[166] The Attorney General (who was by that time Mike Cox) vehemently defended his office's ability to issue binding opinions, and claimed support for the practice in the state constitution, common law, and statute.[167] This debate quickly exploded into the media, and newspaper editorials were quick to publicize the dispute.[168] Despite this intense and public debate, the court reserved the matter for another day by finding that "the effect of an Attorney General opinion is beyond the scope of the advisory opinion."[169]

The majority was unwilling to consider the appropriateness of the *policy* choice behind the photo identification requirement. The voter identification requirement was politically charged as a public policy issue. Both the Michigan Republican Party and the Michigan Democrat Party had waded deeply into the debate and had even submitted amici curiae brief to the court. In public comments outside the briefing papers, the Democrat Party Chair called the law "part of an ongoing strategy by Michigan Republicans to disenfranchise minority and older voters."[170] The Republican Party Chair said the law was essential to make sure legitimate votes "will not be canceled out by a fraudulent vote."[171] Sidestepping all of these arguments about whether the law was "wise" or "proper," the court's majority stated:

> Whether the statute is an "ill-advised" *policy choice* is not a judgment open to the judiciary, this Court, or any member of it. (emphasis original).[172]

Stare Decisis

Perhaps the greatest criticism of the Michigan Supreme Court has been its willingness to overrule previous decisions. While the court has followed the doctrine of stare decisis, which means to "abide by, or adhere to, decided cases,"[173] it has also departed from it. Critics, including the frequently dissenting Justices Cavanagh, Kelly, and Weaver, have argued that the court is too quick to overrule or reverse long-standing cases, which they charge is in itself a form of "activism." The court responded to this criticism head-on in *Robinson v. City of Detroit*.[174]

In *Robinson*, the court considered the extent of civil liability for police officers and their government employers when a police chase results in injuries or death to a person other than the driver of the fleeing vehicle. To determine the responsibility of the officers in *Robinson*, the court revisited three of its previous decisions concerning police chase liability. In 1983, the court held in *Fiser v. Ann Arbor* that a bystander may recover from the police when a speeding suspect whom the police are chasing collides with the bystander, because the police caused the suspect to speed.[175] In 1994, the court held in *Dedes v. Asch* that the phrase "the proximate cause" as used in the state Governmental Immunity Act[176] meant "the" proximate cause as well as "a" proximate cause.[177] And, in 1998, the court in *Rogers v. Detroit* held that an officer's mere decision to pursue a suspected lawbreaker could make that officer and his employer liable if a third-party is injured during the chase.[178] All of these cases had held that the officers and their employers could be held liable for damages as a result of their official police duties.

The *Robinson* decision, in an opinion written by Justice Taylor and joined by Justices Corrigan, Markman, Young, and then Chief-Justice Weaver, overruled *Fiser v. Ann Arbor*, *Dedes v. Asch*, and *Rogers v. Detroit*. The court focused its decision to overrule the trio of cases on an analysis of the value and importance of precedent. The court recognized that stare decisis is the preferred option because it "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[179] However, the court also noted that stare decisis is a creation of policy and is not an "inexorable command."[180] The court concluded that a two-part test for stare decisis required reversal.

In applying the two-part test, the court held that the first question to consider in deciding whether to overrule a past decision is to determine whether the earlier decision was wrongly decided. The court held that *Fiser v. Ann Arbor* had fallen to a subsequent change in state law; *Rogers v. Detroit* had misinterpreted the governmental immunity statute; and *Dedes v. Asch* wrongly held that "the proximate cause" means "a proximate cause."[181] Therefore, according to the court, each case had been wrongly decided.

The second part of the test is whether the erroneously decided cases has been so fundamental and embedded that to overrule it would produce chaos. The court found that the fact that an earlier case was wrongly decided does not necessary require reversal; rather, the court must examine the effects of overruling, including the case's "practical workability," justifiability, and most importantly, the citizens' reliance on the case.[182]

Applying the second part of the test, the court concluded that neither *Fiser*, *Rogers*, nor *Dedes* could be said to be relied upon, practical, or justified today. The court noted:

> We conclude that these cases have not become so embedded, accepted or fundamental to society's expectations that overruling them would produce significant dislocations. It is apparent that the fleeing drivers, as they sought to evade the police, were undoubtedly not aware of our previous case law, nor is it likely that they drove as they did in reliance on the theory that they or the person injured as a result of their fleeing might have recourse against the municipality or individual police officers. In fact, it seems incontrovertible that only after the accident would such awareness come. Such after-the-fact awareness does not rise to the level of a reliance interest because to have reliance the knowledge must be of the sort that causes a person or entity to attempt to conform his conduct to a certain norm before the triggering event. Such a situation does not exist here.[183]

Justice Kelly, dissenting, would have required a "special justification" to overrule precedent above and beyond the majority's two-part test.[184] She was joined separately by dissenting Justice Cavanagh, and both justices spent a large portion of their opinions criticizing the majority for its "casual disregard" for precedent.[185]

Justice Corrigan addressed the dissent's charges in a separate concurrence:

> Our decisions since January 1999 reflect our adherence to our respective oaths to support the constitution and faithfully discharge the duties of our office. To preserve the legitimacy of the judicial branch, this Court must not exceed the limits of its constitutional authority. I agree that too rapid change in the law threatens judicial legitimacy, as it threatens the stability of any institution. But the act of correcting past rulings that usurp power properly belonging to the legislative branch does not threaten legitimacy. Rather, it restores legitimacy.

> Simply put, our duty to act within our constitutional grant of authority is paramount. If a prior decision of this Court reflects an abuse of judicial power at the expense of legislative authority, a failure to recognize and correct that excess, even if done in the name of stare decisis, would perpetuate an unacceptable abuse of judicial power.[186]

Robinson was the first opinion of the Michigan Supreme Court to identify a clear standard for determining when an incorrectly decided case should be overruled.[187] Previous courts had not established any such test. *Robinson* thus clarified how Michigan courts should use stare decisis. In addition, the court emphasized that any statutory reliance analysis conducted must be considered in light of the plain meaning of any applicable statute. The *Robinson* decision has been credited by some as having instilled predictability in Michigan law, while others still complain of the lack of regard for precedent.

Statutory and Constitutional Interpretation

In one of its briefest, but most controversial, opinions involving statutory interpretation, the court in *Michigan United Conservation Clubs, et al. v. Secretary of State*[188] issued a two-page opinion interpreting a state law that appropriated $1,000,000 to the State Police to manage concealed weapons permits. By inserting the $1,000,000 appropriation, the legislature had apparently aimed to prevent a group of citizen activists from placing a referendum on the ballot that would have restricted access to concealed weapons permits. The majority opinion of the court, in its entirety, reads as follows:

> The issue here is whether [an Act of the legislature] is exempt from the power of referendum of the Michigan Constitution. Having granted leave to appeal and heard oral argument, this court finds as follows:
>
> (1) The power of referendum of the Michigan Constitution "does not extend to acts making appropriations for state institutions.…"
>
> (2) [The Act] states that "one million dollars is appropriated from the general fund to the department of state police.…
>
> (3) An appropriation of $1,000,000 is an "appropriation," and the Department of State Police is a "state institution."
>
> (4) Therefore, the power of referendum of the Michigan Constitution does not extend to [the Act].
>
> Accordingly, consistent with [the Michigan Constitution] and an unbroken line of decisions of this Court interpreting that provision, the Court of Appeals is reversed, and the relief sought in the complaint for mandamus is granted. [The decision of the Canvassing Board] is vacated and defendant Secretary of State and the Board of State Canvassers are directed that [the Act] is not subject to referendum for the reasons set forth herein.[189]

Then-Justice Taylor authored the majority opinion, followed by separate opinions from each justice. Chief-Justice Corrigan, Justice Markman, and Justice Young concurred, while Justices Weaver, Kelly, and Cavanagh dissented.

Justices Cavanagh, Kelly, and Weaver dissented on similar grounds. They recognized the intense public dispute over the Act, and argued that by passing the $1,000,000 appropriation, the legislature intended to unlawfully take the constitutional power of referendum away from the citizens.[190] Justice Weaver argued that because the money appropriated by the legislature was, in her opinion, "not necessary," the Act should have been subject to referendum.[191]

Then-Chief Justice Corrigan wrote separately to state that the legislature's subjective motivation for making the appropriation in the Act was irrelevant. Relying on Chief Justice Cooley for authority, she opined that "courts must not be with the alleged motives of a legislative body in enacting a law, but only with the end result—the actual language of the legislation."[192] Justice Markman also concurred, and agreed with Justice Corrigan that the motives of the legislature were irrelevant to the matter before the court.[193]

Justice Young concurred as well, explaining that while Justice Cavanagh's dissent provides "his own extensive personal views" on the Act, "this political issue—the merits or demerits of the underlying act—is *not* [to be considered]. The sole question we are to decide in this case is a legal one."[194] Justice Young stated that the majority aimed to apply the language of the statute "in a plain and natural manner."[195] He concluded:

> The majority's decision today will undoubtedly disappoint those who passionately believe that [the

Act] represents bad public policy. While it will be of no consolation, it bears restating that the serious underlying political question is *not* before the Court.[196]

The Future of the Court

The cases above outline the jurisprudence of the modern Michigan Supreme Court majority, led by Chief Justice Clifford W. Taylor and associate justices Corrigan, Markman, and Young. Whether this court will continue on the same trajectory is yet to be seen.

Endnotes

1 Abigail Thernstrom, *Trial Lawyers Target Three Michigan Judges Up for Election*, Wall St. J., May 8, 2000.

2 Patrick J. Wright, *The Finest Court in the Nation: Hurray for Michigan Justice,* Wall St. J., Oct. 13, 2005.

3 John Gizzi, *Here Comes the Judge (Campaign),* Human Events, October 26, 2007.

4 Brian Dickerson, *Adultery, Life and Engler's High Court*, The Detroit Free Press, Jan. 17, 2007.

5 The current majority commonly consists of four justices: Chief Justice Clifford W. Taylor; Justice Maura D. Corrigan; Justice Stephen J. Markman; and Justice Robert P. Young, Jr. The most common modern dissenters are Michael F. Cavanagh, Marilyn Kelly, and Elizabeth A. Weaver. Frequently, Justice Weaver concurs in result only.

6 *See generally* Robert H. Bork, The Tempting of America: The Political Seduction of the Law (1990).

7 Stephen Breyer, Active Liberty: Interpreting our Democratic Constitution 6 (2005).

8 *See* Sutherland v. Governor, 29 Mich. 320, 324 (1874).

9 *See* Daniels v. People, 6 Mich. 381, 388 (1859); *see also* Risser v. Hoyt, 53 Mich. 185, 193 (1884).

10 *See* Sherwood v. Walker, et al., 66 Mich. 568 (1887).

11 *See* People v. Dean, 14 Mich. 406 (1866).

12 *See* People ex rel the Detroit and Howell Railroad Co. v. Township Board of Salem, 20 Mich. 452 (1870).

13 Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union (1868). *See also* Thomas M. Cooley, The General Principles of Constitutional Law (1898).

14 66 Mich. 568 (1887).

15 For an overview of the contributions of the Big Four, see Noto, Scott: A Brief History of the Michigan Supreme Court (Michigan Supreme Court Historical Society, 1999).

16 *Cf.* Mich. Const. of 1850 at Art. VI, Sec. 14 and Mich. Const. of 1963 at Art. VI, Sec. 23.

17 *See id.* In order to earn nomination, justices were, and are, required to win over the backing of partisan Party activists. Only following the approval of a party at a political convention will justices be allowed to appear on the ballot in the general election as "non-partisan" candidates. ("Nominations for justices of the supreme court shall be in the manner proscribed by law."); *see also* Mich. Const. of 1963 at Art. VI, Sec. 2 ("The supreme court shall consist of seven justices elected at non-partisan elections as provided by law.")

18 See *id*.

19 390 Mich. 245 (1973).

20 80 Mich. 567 (1890).

21 115 Mich. 601 (1898).

22 398 Mich. 450 (1976).

23 359 U.S. 121 (1959).

24 395 Mich. 379 (1975).

25 395 Mich. 408 (1975).

26 19 Mich. 316 (1869).

27 394 Mich. 179 (1979).

28 373 Mich. 34 (1964).

29 457 Mich. 720 (1998).

30 174 Mich. 701 (1913).

31 435 Mich. 307 (1990).

32 304 Mich. 442 (1943).

33 396 Mich. 588 (1976).

34 410 Mich. 118 (1981).

35 52 Mich. 188 (1883).

36 94 Mich. 266 (1892).

37 John Engler; Address to the Michigan Supreme Court Historical Society Annual Membership Luncheon, April 18, 2002, *available at*:

http://www.micourthistory.org/resources/Speeches/engler.pdf.

38 457 Mich. 720 (1998).

39 476 Mich. 495 (2006).

40 457 Mich. 318 (1998).

41 475 Mich. 30 (2006).

42 457 Mich. 125 (1998).

43 462 Mich. 439 (2000).

44 469 Mich. 565 (2004).

45 390 Mich. 245 (1973).

46 80 Mich. 567 (1890).

47 115 Mich. 601 (1898).

48 472 Mich. 156 (2005).

49 398 Mich. 450 (1976).

50 359 U.S. 121 (1959).

51 466 Mich. 335 (2002).

52 395 Mich. 379 (1975).

53 395 Mich. 408 (1975).

54 19 Mich. 316 (1869).

55 476 Mich. 55 (2006).

56 394 Mich. 179 (1979).

57 373 Mich. 34 (1964).

58 476 Mich. 495 (2006).

59 457 Mich. 720 (1998).

60 174 Mich. 701 (1913).

61 475 Mich. 72 (2006).

62 435 Mich. 307 (1990).

63 304 Mich. 442 (1943).

64 473 Mich. 457 (2005).

65 396 Mich. 588 (1976).

66 410 Mich. 118 (1981).

67 52 Mich. 188 (1883).

68 94 Mich. 266 (1892).

69 *See* Detroit Fire Fighters Ass'n v. Detroit, 449 Mich. 629 (1995).

70 464 Mich. 726 (2001).

71 Mich. Comp. Law §35.21 *et seq*.

72 235 Mich. App. 332 (1999).

73 *Id*. at 335.

74 464 Mich. 726 at 735.

75 504 U.S. 555 (1992).

76 464 Mich. at 740.

77 *Id*. at 738.

78 *Id*. at 739.

79 *Id*. at 743.

80 *Id*. at 751-52.

81 *Id*. at 741, n. 8.

82 *Id*.

83 471 Mich. 608 (2004).

84 *See id*.

85 479 Mich. 280 (2007).

86 *See id*.

87 479 Mich. 336 (2007).

88 *See id.*

89 For an overview of opinions, *see* Fein v. Permanente Medical Group, 38 Cal. 3d 137; 695 P.2d 665 (1985) (California Supreme Court); English v. New England Medical Center, Inc., 405 Mass. 423; 541 N.E.2d 329 (1989) (Supreme Judicial Court of Massachusetts); Robinson v. Charleston Area Medical Center, Inc., 186 W. Va. 720; 414 S.E.2d 877 (1991) (West Virginia Supreme Court); Johnson v. St. Vincent Hospital, Inc., 237 Ind. 374; 404 N.E.2d 585 (1980) (Indiana Supreme Court); Etheridge v. Medical Center Hospitals, 237 Va. 87; 376 S.E.2d 525 (1989) (Virginia Supreme Court).

90 470 Mich. 415 (2004).

91 Mich. Comp. Law §257.401 *et seq.*

92 470 Mich. 415 at 420-21 (detailing the holdings of the trial court).

93 251 Mich. App. 586 (2002).

94 470 Mich. at 424-29.

95 Tull v. United States, 481 U.S. 412, 426 (1987).

96 470 Mich. at 428-29 (internal citations omitted).

97 *Id*. at 431-32.

98 *Id*. at 435.

99 *Id*. at 439, 444-47.

100 *Id*. at 456-58.

101 *Id*. at 449-50.

102 *Id*. at 452.

103 *Id*. at 438.

104 *See* Lochner v. New York, 198 U.S. 45 (1905).

105 470 Mich. at 438.

106 545 U.S. 469 (2005).

107 471 Mich. 445 (2004).

108 471 Mich. at 445.

109 410 Mich. 616 (1981).

110 471 Mich. at 450.

111 *Id*., *passim*.

112 *Id*. at 477.

113 *Id*. at 477-78.

114 *Id*. at 477, 482.

115 *Id.* at 482 (*citing* Ryerson v. Brown, 35 Mich. 333, 339 (1877)).

116 *Id*. at 479.

117 *Id*. at 484.

118 *Id*. at 506-07.

119 460 Mich. 626 (1999).

120 Mich. App. Order, Docket No. 180914 (1997).

121 460 Mich. 626 at 633.

122 232 U.S. 383 (1914), *overruled on other grounds by* Elkins v. United States, 364 U.S. 206 (1960).

123 460 Mich. at 641-42.

124 Mich. Comp. Law §780.657.

125 460 Mich. at 647.

126 *Id*. at 645.

127 461 Mich. 235 (1999).

128 227 Mich. App. 108 (1997).

129 547 U.S. 586 (2006).

130 465 Mich. 932 (2001).

131 547 U.S. at 599.

132 479 Mich. 1 (2007).

133 Mich. Comp. Law §168.523 (passed as Public Act 71 of 2005).

134 *Id*.

135 Attorney General Kelley, a Democrat, was the 50th Attorney General of Michigan. He served from 1961 to 1999, making him the youngest (36 years old), the oldest (74 years old), and the longest serving (38 years) Attorney General in Michigan's history.

136 *See Opinions of the Attorney General*, 1997-98, No. 6930, 1 (Jan. 29, 1997).

137 *Id*. at 3, 5.

138 *See* Michigan House of Representatives Resolution 199, adopted February 22, 2006. The Michigan House of Representatives requested the advisory opinion pursuant to Article 3, Section 8 of the Michigan Constitution of 1963, which allows the Supreme Court to opine "on important questions of law upon solemn occasions as to the constitutionality of legislation."

139 Attorney General Cox, a Republican, was elected in 2002 and took office on January 1, 2003. He was re-elected to his second and final four-year term in 2006.

140 479 Mich. 1 at 452-53.

141 *Id*.

142 *Id*.

143 *Id*. at 453 (*citing* Attorney General ex rel Conely v. Detroit Common Council, 78 Mich. 545, 559 (1889)).

144 *Id*. at 455.

145 *Id*. at 455.

146 504 U.S. 428 (1992).

147 479 Mich. at 456.

148 *Id*. at 456.

149 *Id*. at 456-57.

150 *Id*. at 457.

151 *Id*.

152 *Id*. at 457-58.

153 *Id*.

154 *Id*. at 464-65.

155 *Id*. at 465; *see also* Mich. Comp. Law §28.292(14).

156 479 Mich. at 472.

157 *Id*. at 472.

158 *Id*. at 472-75.

159 *Id*. at 475.

160 *Id*. at 469.

161 *Id*. at 503.

162 *Id*. at 466.

163 *Id*. at 467.

164 *Id*.

165 *Id*.

166 *See* Brief of the House of Representatives, Michigan Supreme Court Case No. 130589, at 3, n.1.

167 *See Cox to Speaker: Hands Off AG's Constitutional Powers,* Press Release of Attorney General Michael A. Cox, July 28, 2006.

168 *See, e.g.*, *House Speaker vs. People's Watchdog*, Detroit Free Press, August 2, 2006.

169 479 Mich. at 448, n. 5.

170 *Court OKs Photo ID for Voting,* The Detroit News, July 19, 2007.

171 *Id*.

172 479 Mich. at 466.

173 Black's Law Dictionary 1577 (revised 4th ed.).

174 462 Mich. 439 (2000).

175 417 Mich. 461 (1983).

176 Mich. Comp. Law § 691.1407(2).

177 446 Mich. 99 (1994).

178 457 Mich. 125 (1998).

179 462 Mich. at 439 (*quoting* Hohn v. United States, 524 U.S. 236, 251 (1998)).

180 *Id*.

181 *Id*. at 464-65.

182 *Id*. at 464-66.

183 *Id*. at 466-67.

184 *Id*. at 476.

185 *Id*. at 491; *see also id*. at 493-94.

186 *Id*. at 472-73 (internal citations omitted).

187 *See* Rowland v. Washtenaw County Road Commission, 477 Mich. 197 (2007) (Markman, J., concurring).

188 464 Mich. 359 (2001).

189 *Id*. at 359-60.

190 *Id*. at 411.

191 *Id*. at 418.

192 *Id*. at 367.

193 *Id*. at 403, n. 12.

194 *Id*. at 368-69.

195 *Id*. at 376.

196 *Id*. at 389.

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