

## ARTICLES in addition to, a

several States, pursuant to the fifth Article of the original Constitution.

st. .... After the first enumeration required by the first Article of the Constitution which, the proportion shall be so regulated by Congress, that there shall be until the number of Representatives shall amount to two hundred nor more than one Representative for every fifty thousand persons.

d... No law, varying the compensation for the services of the Senators and Representatives

# The Michigan Constitution

## An Independent Source of Legal Rights

By John Postulka

### Fast Fact

The Michigan Constitution differs from the United States Constitution in several ways. These textual differences may mean that the Michigan Constitution offers broader rights than the federal constitution.

**T**here is general agreement on the Michigan Supreme Court that, when possible, issues of interpretation should be resolved by giving a plain reading to the text.<sup>1</sup> But despite this recent consensus, historically the more common practice when interpreting the Michigan Constitution is to borrow the interpretation given to its federal counterpart. The result is that quite a bit of language in the Michigan Constitution has never been fully explored. In light of the current textualism domination, now may be a good time to take a second look at the Michigan Constitution, specifically areas where it differs from the United States Constitution. The outcome may be new and broader rights for Michiganders. This article gets the ball rolling by discussing some of the more obvious differences between the constitutions and offering some thoughts on what they may mean.

### Fair and Just Treatment Clause

Most of the specific rights recognized in the Michigan Constitution have equivalents in the U.S. Constitution. But a few are

unique to the Michigan Constitution. One of them is the right to fair and just treatment in legislative and executive investigations and hearings. Odds are that most Michigan residents, including attorneys, have probably never even heard of this right.

The right to fair and just treatment, which is not mentioned in the U.S. Constitution, can be found in Article I, Section 17 of the Michigan Constitution. Specifically, that section provides:

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. *The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.*

Based solely on the language used, this right seems fairly broad. By its plain terms, the Michigan Constitution guarantees a right to fair and just treatment in all legislative and executive investigations and hearings. So the right would appear to apply in all nonjudicial investigations and hearings. Due to its apparent breadth, the

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impact of this right could be great. For example, the police department is undoubtedly an executive agency.<sup>2</sup> When the police are questioning a suspect about criminal activity, they are clearly doing an investigation.<sup>3</sup> And when the police lie to a suspect during an interrogation, they are definitely treating him unfairly. So it could be argued that this type of conduct, which is allowed under the U.S. Constitution,<sup>4</sup> violates the Michigan Constitution.

Of course, there are counterarguments to that position. Since the clause refers to investigations and hearings, the inference is that the investigation must relate to a possible hearing for the right to be triggered. And since criminal matters culminate in trials, not hearings, the clause does not apply to criminal investigations. However, it doesn't appear that any court has ever actually considered whether the seemingly broad right to fair and just treatment applies to a criminal investigation. In fact, as the Michigan Court of Appeals has stated "[t]here are very few published cases that cite the fair and just treatment clause for any purpose...explain its meaning, larger purpose, or relationship to the other rights enumerated in that section of the constitution in any detail."<sup>5</sup>

The right to fair and just treatment could also have application in the civil context. Consider a public employee who is asked to participate in an investigation. His employer does not like the information he provides and subsequently fires him—conduct that may violate the fair and just treatment clause. The employer may have defenses available, such as that the fair and just treatment clause does not allow for damage claims against nonstate entities<sup>6</sup> or that the Whistleblower Act, which contains similar protections, provides the exclusive remedy.<sup>7</sup> But even taking into consideration

these possible defenses, the fair and just treatment clause may still be worth considering by plaintiffs' attorneys, at least for injunctive relief, if not more.<sup>8</sup>

However, as in the criminal context, the cases applying the fair and just treatment clause in the civil context are few and far between. Accordingly, despite the clause being approximately 50 years old, there still remain to be resolved very important questions about its proper interpretation. Criminal defense and plaintiff-side employment attorneys should take note.

## Freedom of Speech

While the fair and just treatment clause has received little attention from the courts, the same cannot be said of most of the other rights discussed in the Michigan Constitution. However, it is not uncommon for Michigan courts to simply adopt the interpretation given to the corresponding federal constitutional provision. Usually, when courts have done this despite textual differences, the reasoning has been based on an examination of sources external to the text, like the history and debates surrounding the provision's adoption.<sup>9</sup> But the Michigan Supreme Court has thrown this method of interpretation into doubt in recent years. In 2008, the Court criticized the consideration of nontextual sources in constitutional interpretation, stating that "extrinsic evidence can hardly be used to contradict the unambiguous language of the constitution."<sup>10</sup> It specifically stated that the "constitutional convention debates and the Address to the People...are...not controlling."<sup>11</sup> In light of these statements, it may be a good time to take another look at those parts of the Michigan Constitution that have been given the same interpretation as their federal counterparts despite textual differences.

An example of a right that is worded differently in the Michigan and U.S. Constitutions but has been given the same basic interpretation is freedom of speech. The First Amendment of the U.S. Constitution provides that "Congress shall make no law...abridging the freedom of speech." Article 1, Section 6 of the Michigan Constitution states "Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press."

The plain language of both the Michigan and U.S. Constitutions prohibits laws abridging speech. But the Michigan Constitution goes further by saying that every person "may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right." Based on this additional language, the Michigan Constitution may offer broader protection than the U.S. Constitution. For example, under the U.S. Constitution, certain categories of speech are not afforded any constitutional protection.<sup>12</sup> It could be argued that since the Michigan Constitution says people "may speak freely...on all subjects," there are no similar categories of unprotected speech in Michigan.

With that said, the Michigan Constitution does temper its free speech protections by saying individuals are "responsible for the abuse of such right." This phrase could be interpreted broadly to



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conclude that the categories of speech not protected under the federal Constitution are not protected under the Michigan Constitution either, because they amount to an abuse of the right. But then again, the word “responsible” has special meaning in the civil, but not criminal, context.<sup>13</sup> So the counterargument would be while individuals can be held civilly responsible for abuses, they cannot be criminally prosecuted for any speech.

Either way, it is an issue that deserves attention. Unfortunately, despite the Michigan Supreme Court’s statement that “in certain instances, the Michigan Constitution may confer broader protection upon certain types of expression,”<sup>14</sup> the Michigan freedom of speech clause has never received the attention it deserves. Instead, the prevailing view seems to be that the Michigan and U.S. Constitutions afford identical protection when it comes to speech. The Michigan Court of Appeals and the Sixth Circuit have held that “[t]he rights of free speech under the Michigan and federal constitutions are coterminous.”<sup>15</sup> Maybe that is the right result. But so far, the Michigan courts have yet to justify it by fully explaining how it squares with the different language used in the two constitutions.<sup>16</sup>

### Conclusion

The differences discussed are just a few examples of how the Michigan and U.S. Constitutions diverge. There are many others.<sup>17</sup> Since recent Michigan jurisprudence indicates the text of the constitution controls above all other sources, attorneys may want to take another look at the Michigan Constitution, which, textually at least, appears to offer more protection than its federal counterpart. As Justice Thomas Brennan stated 35 years ago, “[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the [United States] Supreme Court’s interpretation of federal law.”<sup>18</sup> ■



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### ENDNOTES

1. The Michigan Supreme Court justices seem to accept that unambiguous text should be given its plain meaning. The difference among the justices focuses on when text is “unambiguous.” See *Peterson v Magna Corporation*, 484 Mich 300; 773 NW2d 564 (2009).
2. *Scheuer v Rhodes*, 416 US 232, 244–245; 94 S Ct 1683; 40 L Ed 90 (1974) (the “segment of the executive branch of a state government that is most frequently and intimately involved in day-to-day contacts with the citizenry... [is] the local police officer”) (emphasis added).
3. See *Michigan v Summers*, 452 US 692, 700 n 12; 101 S Ct 2587; 69 L Ed 2d 340 (1981) (“several investigative techniques which may be utilized effectively in the course of a Terry-type stop. The most common is interrogation...”) (emphasis added).
4. E.g., *McConkie v Nichols*, 446 F3d 258, 261 (CA 1, 2006) (though lying to a suspect is “not something to be condoned,” neither does it violate due process).
5. *Jo-Dan, Ltd v Detroit Bd of Ed*, unpublished opinion per curiam of the Court of Appeals, issued July 14, 2000 (Docket No. 201406).
6. In *Jones v Powell*, 462 Mich 329; 612 NW2d 423 (2000), the Michigan Supreme Court held that the Michigan Constitution does not allow for damage suits against cities or government employees when suit can be brought under 42 USC 1983.
7. Michigan courts have held that the Whistleblower Act provides the exclusive remedy and preempts common law wrongful discharge claims. See *Anzaldua v Neogen Corp.*, 292 Mich App 626, 631; 808 NW2d 804 (2011). That argument, however, may not carry weight when an employer is relying on a constitutional provision and not the common law.
8. At least one court has held that the Michigan Constitution can be relied on to state a cause of action against a county for declaratory relief. *Swartz Ambulance Service v Genesee Co.*, 666 F Supp 2d 721, 726 (ED Mich, 2009).
9. E.g., *Dept of Civil Rights v Waterford Tp Dept of Parks & Recreation*, 425 Mich 173; 387 NW2d 821 (1986).
10. *Nat’l Pride at Work v Governor*, 481 Mich 56, 80; 748 NW2d 524 (2008).
11. *Id.* at 84 n 25.
12. *RAV v City of St Paul*, 505 US 377, 382–383; 112 S Ct 2538; 120 L Ed 2d 305 (1992) (the U.S. Constitution “permit[s] restrictions upon the content of speech in a few limited areas, which are ‘of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’”)
13. See MCR 4.101(G)(3) (“[u]pon a finding of responsibility in a state civil infraction action...”).
14. *People v Neumayer*, 405 Mich 341, 364; 405 NW2d 230 (1979).
15. *In re Contempt of Dudzinski*, 257 Mich App 96, 100; 667 NW2d 68 (2003); *Lucas v Monroe Co.*, 200 F3d 964, 972 (CA 6, 2000). The courts cited *Woodland v Michigan Citizens Lobby*, 423 Mich 188; 378 NW2d 337 (1985) as holding that “the rights of free speech under the Michigan and federal constitutions are the same,” however, *Woodland* does not appear to actually go that far. Rather, it simply held that under the specific facts of that case, the two constitutions commanded the same result.
16. For example, in *Neumayer*, the Michigan Supreme Court held that the Michigan Constitution does not prohibit banning obscene materials, as that term is defined by federal law. 405 Mich at 365. But in doing so, it relied on public policy. Relying on public policy appears to be inconsistent with the Court’s recent statements that the text alone controls.
17. Const 1963, art 1, § 2 (equal protection); § 4 (freedom of worship and religious belief); § 6 (bearing of arms).
18. Brennan, *State constitutions and the protection of individual rights*, 90 Harv L R 489, 491 (1977).