The Michigan Supreme Court

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"JUDICIAL POLITICS": RESTORING THE MICHIGAN SUPREME COURT

By Nelson P. Miller

A wise trial judge once said that he listens even to his worst critics, because there is often at least a grain of truth in what they say.

And so here it is. Law students around the country are now being taught in a popular law school casebook that the Michigan Supreme Court exemplifies "judicial politics."[1] Under that very heading, the casebook criticizes one of the Court's many recent cases[2] that have overturned long-standing liability precedents "embraced virtually universally" in other jurisdictions.[3] The casebook then summarizes the Court's recent political history, including its appointments, partisan-style elections, and record election spending.[4] It then cites law review commentary proving the reconstituted Court's unusually high rate of overturning its own precedent[5]—all to prove that "something else" ("judicial politics") "was also at work in Michigan."[6]

The casebook and the law review article it cites are not the only such criticism of our high Court specifically and Michigan's "judicial politics" in general.[7]

Indeed, it is well documented that public confidence in the judiciary is on the wane. It is not merely nostalgia making us believe that there has been a decline in respect for judges. One American Bar Association poll showed only 32 percent of the public being very confident in the American judiciary.[8]

When it comes to the political nature of the Michigan Supreme Court, the critical commentators may not be merely reading judicial tea leaves. One member of the Court wrote in dissent recently that, "Certainly, a majority of this Court is at liberty to change the common law regarding open and obvious should it be moved to do so."[9] The dissent's statement may or may not have been directed toward those who were disagreeing on principle, politics, or tradition with the Court's decisions. But the statement does reveal something of the Court's raw political power. Is a majority really *all* it takes? What of the principle of stare decisis? What of the need to justify Court decisions with sound logic and legal reasoning? What of the structure of state government?

The concern here is not about tort liability or other issues on which the Court has acted. It is not to take sides in the current appoint, nominate, elect, and litigate political strategies of the opposing business and consumer interests. Both conservative and liberal,

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A CRITICAL LOOK AT THE JURISPRUDENCE OF THE MICHIGAN SUPREME COURT

By Victor E. Schwartz

Is it all just "politics" on the Michigan Supreme Court? That is the suggestion that some critics of the Court, including learned Professor Nelson P. Miller, have raised.[1] Yet, many others consider the Michigan Supreme Court to be the "finest court in the nation," and the qualifications of two of its members led some pundits to suggest that they be considered potential U.S. Supreme Court nominees.[2] The Court's decisions make clear that it is not about politics; rather, the Court's focus is on the rule of law.

In the late 1990s, Governor John Engler appointed three well-qualified appellate court judges to the Michigan Supreme Court: Clifford W. Taylor on September 1, 1997; Robert P. Young, Jr. on January 3, 1999; and Stephen J. Markman on October 1, 1999. Michigan voters elected Justices Taylor and Young to full eight-year terms in 2000. That year, Michigan citizens also elected Justice Markman to complete the remaining four years of the term to which he was appointed. They subsequently elected him to a full eight-year term in 2004.

This article considers the judicial philosophy of the Court and closely examines its jurisprudence over the past four years. What is revealed is a court with a profound respect for the legislature as the body charged with making public policy. It also shows judges who see themselves as interpreters of the law, not creators of the law. An objective evaluation shows that the Court's decisions are among the most thoroughly reasoned of any state high court, elected or appointed, and regardless of political affiliation.

Judicial Philosophy

Over the past 40 years, the balance of power in a number of states has shifted from state legislatures to the judicial branch. Some state court judges have shown an increasing willingness to overturn clear public policy choices of the legislative branch.[3] The Michigan Supreme Court has not followed this path. To the contrary, it has demonstrated a deep respect for the fundamental principle of constitutional government: separation of powers. The current majority on the Michigan Supreme Court describe themselves as "judicial traditionalists" who believe judges are properly constrained to apply

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Democrat and Republican, can abuse judicial power. Rather, it is about the Court as an institution and (more broadly) the law and structure of our state government.

If the implication is that a political majority is all the Court believes it needs to change the common law, then there are reasons to conclude that its actions are unconstitutional. The Court operates under several fairly specific constraints imposed by the state constitution:

- the Court is only one division of a constitutional court of justice[10] created by the people of the state;
- the Court is constituted by non-partisan elections;[11]
- the judiciary has only tricameral authority with the legislative and executive branches;[12]
- the judiciary must not exercise powers belonging to the legislative branch;[13]
- Michigan judges have only bicameral authority with Michigan juries;
- the judiciary is constituted to interpret the laws, not to make or enforce them;[14] and
- the Court's decisions must be guided and shaped by reason[15]—that is, by principled decisions justified by a natural jurisprudence rather than by a constituent Court majority.

The Court further operates under several more general constraints, including that:

- the Court is not to exercise popular sovereignty, which the state constitution instead reserves to the people;[16]
- the state constitution does not grant the Court legislative power, which is instead vested in the Senate and House of Representatives;[17] and
- the Court is not to act as an executive or imperial judiciary, for all executive power is vested in the governor.[18]

If the current state constitution is any indication, we are not properly served by a supreme court that conceives of and carries out its role as a political, legislative-style court. Court decisions should and must involve more than political majorities.

The Court is, of course, not ignorant of these structural constraints. Quite the contrary: the Court itself just last year recognized in *National Wildlife Federation v Cleveland Cliffs Iron Co*[19] that another (political rather than judicial) branch of government may not expand the Court's powers beyond that allowed by the state constitution. One branch of government cannot grant another branch powers that the people carefully divided between those branches, where their object in doing so was to disperse and control the exercise of governing power.[20]

So, too, the judiciary itself ought not to claim powers it does not have, to act by partisan majority unconstrained by the weight and reason of its own prior decisions, in violation of the state constitution's structural constraints.

Michigan's Code of Judicial Conduct reinforces the constitutional structure of an impartial judiciary, holding that "[a]n independent and honorable judiciary is indispensable to justice in our society…."[21] Michigan judges must maintain "high standards of conduct so that the integrity and independence of the judiciary may be preserved."[22] "At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary."[23] "A judge should be unswayed by partisan interests, public clamor, or fear of criticism."[24]

The problem here is not the electing (versus appointing) of judges. Survey shows that Americans have far greater confidence in judges elected by non-partisan ballot than in appointed judges.[25] Putative party affiliation for members of the Michigan Supreme Court, taken by the public as an indicator of judicial decisions to come, is nothing new.[26]

Rather, the present problem is the public impression that judges are disregarding what the state constitution provides as appropriate constraints on judicial power. The Court must not be a king without clothing. The robes its members wear represent the institution's unique, and uniquely reserved, role in government.

It is not, however, simply a concern over the structure of state government. It is also a concern over the history of the Court itself—of its prior decisions and the way in which the Court regards those decisions. The common law is something much more than the latest decision by a majority of the Court. It is a tradition—in the case of torts, one that goes back several millennia to the earliest known laws. That tradition reflects time-tested values and solutions. Sometimes the tradition is inapposite. But in such cases, the public deserves an explanation for why change is appropriate—an explanation larger than the raw fact that a majority of the Court sees fit to make the change.

Which brings us to the last major point: court decisions must also be the product of sound reasoning. Majorities can be gathered around any result, sound or not. But judicial decisions need to be reasoned. There are demonstrable facts about our human condition that dictate certain principles that ought to be followed—or if not followed, then an explanation given for the departure from them.

That exercise in reason is at the core of the judicial function. The citizenry deserves sound judicial opinions, especially when the Court departs from tradition and precedent—without respect to the ability of the Court to gather a majority around such a departure.

In short, it takes more than a majority.

We could simply shrug at the Court's recent decline in the public's eye. But as the Honorable Roger Miner, senior judge on the United States Court of Appeals for the Second Circuit, recently wrote, "Lack of confidence in the judiciary is surely a serious matter, for the citizenry is well aware that a properly functioning, impartial, and ethical judiciary is the sine qua non of a just and democratic society."[27]

It is not a time to blame the citizenry. Judge Miner, at least, had the good sense to point a finger the other way, saying,

> *The major cause of the loss of public confidence in the American judiciary… is the failure of judges to comply with established professional norms, including rules of conduct specifically prescribed. In brief, it is the unethical conduct of judges, both on and off the bench, that most concerns the citizenry and is principally responsible for the crisis in confidence that the judiciary faces in these early years of this new millennium.*[28]

And so here is what it may take to put some of the luster back on the Court.

First, the Court should absolutely refrain from any statement such as the one shown previously, in which it attributes its decision solely to the presence of a majority on the Court. Constitutionally, traditionally, and prudentially, it takes more than a majority. For any member of the Court to say that a majority is all it takes is unwise and unconstitutional, and should be untrue.

Second, the Court should further refrain from any statement in which it suggests that its prior decisions have no role. Prior decisions of the Court have a substantial role, particularly for the practitioners and their clients who have followed them. The Court should always be constrained to address its prior decisions, and at the same time to acknowledge their role and import.

Third, the Court should refrain from conduct that is properly categorized as legislative rather than judicial. Even the idea that the common law is always the Court's to shape, as a majority of its members may decide from time to time, may be incorrect. Note, for instance, how circumspect the Court was in *Placek v City of Sterling Heights*[29] when it replaced contributory with comparative negligence.[30] There, the Court first engaged in an analysis of whether the change was appropriately made by the Court—a procedural question the Court should (and generally does) first address in any such case.

Fourth, the Court should refrain from any decision that unduly encroaches upon the jury trial right. The role of the jury must be preserved as a check on the Court.

And fifth, the Court should always ground its decisions in reason. No decision should issue that does not have as its foundation the elucidation of a recognized and valued principle.

Too many of us have too great a regard for the Court for its standing to remain where it is. A generation of lawyers being trained right now has never known the proper regard we should all be able to have for our highest state court.

The wounds of this friend are worth more than the kisses of an enemy. It takes more than a majority. ◆

Mr. Schwartz and I agree completely on the principles and in many respects also on the evaluation of the current membership of the Court. We also agree that the people of the state as well as the members of its legal profession deserve a well-respected court. Let us all continue to work toward that end so that the next generation of law students is not taught otherwise that we have an unwisely political court.

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FOOTNOTES

1. Robertson, Powers, Anderson & Wellborn, Cases and Materials on Torts (3d ed), p 283.
2. *Stitt v Holland Abundant Life Fellowship,* 462 Mich 591, 614 NW2d 88 (2000).
3. Robertson, et al., supra n 1.
4. Id.
5. Id. citing Sarah K. Delaney, *Stare Decisis v the "New Majority": The Michigan Supreme Court's Practice of Overruling Precedent, 1998–2000,* 66 Albany L R 871 (2003).
6. Robertson, et al., supra n 1.
7. See, e.g., Deborah Goldberg et al., *The Justice at Stake Campaign, The New Politics of Judicial Elections* (2002), available at http://www.justiceatstake.org/files/JASMoney Report.pdf, cited in Roger J. Miner, *Judicial Ethics in the Twenty-First Century: Tracing the Trends,* 32 Hofstra L R 1107 (2004); see also Anthony Champagne, *Television Ads in Judicial Campaigns,* 35 Ind L R 669, 670 (2002) (citing "nastier, noisier, and costlier" judicial campaigns in Michigan and elsewhere).
8. Roger J. Miner, *Judicial Trends in the Twenty-First Century: Tracing the Trends,* 32 Hofstra L R 1107 (2004), citing ABA, *Perceptions of the U.S. Justice System* 49 (1999), reprinted in 62 Alb L R 1307, 1320 (1999).
9. See *Anderson v Pine Knob Ski Resort, Inc,* 469 Mich 20, 38 n 4, 664 NW2d 756 (2003) (dissent), citing *Gruskin v Fisher,* 405 Mich 51, 66, 273 NW2d 893 (1979).
10. MI Const art 6, § 1 ("The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court . . . .").
11. MI Const art 6, § 2 ("The supreme court shall consist of seven justices elected at non-partisan elections as provided by law.").
12. MI Const art 3, § 2 ("The powers of government are divided into three branches; legislative, executive and judicial."). See *National Wildlife Federation v Cleveland Cliffs Iron Co,* 471 Mich 608, 613, 684 NW2d 800 (2004) ("By separating the powers of government, the framers of the Michigan Constitution sought to disperse governmental power and thereby to limit its exercise.").
13. MI Const art 3, § 2 ("No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.").
14. See, e.g., MI Const art 3, § 8 (opinions on constitutionality by supreme court); *National Wildlife Federation,* 471 Mich at 614, citing and quoting Thomas M. Cooley, A Treatise on the Constitutional Limitations 92 (1886) ("It is the province of judicial power [ ] to decide private disputes between or concerning persons; but of legislative power to regulate public concerns, and to make law for the benefit and welfare of the state.").
15. MI Const art 6, § 6 ("Decisions of the supreme court . . . shall contain a concise statement of the facts and reasons for each decision . . . .").
16. MI Const art 1, § 1 ("All political power is inherent in the people.").
17. MI Const art 4, § 1.
18. MI Const art 5, § 1.
19. 471 Mich 608, 613, 684 NW2d 800 (2004).
20. *National Wildlife Federation,* 471 Mich at 614.
21. Mich Code of Judicial Conduct, Canon 1.
22. Id.
23. Mich Code of Judicial Conduct, Canon 2.
24. Mich Code of Judicial Conduct, Canon 3A.(1).
25. Miner, supra n 8, at 1110, citing Donna Walter, *Poll Ranks Public Confidence in Fairness of Judiciary,* St. Louis Daily Rec., Aug. 16, 2002. See also Girardeau A. Spann, *Pure Politics,* 88 Mich L R 1971, 2032–33 (1990) (concluding that the Supreme Court is a political body that lacks counter-majoritarian capacity); Kurt M. Brauer, *The Role of Campaign Fundraising in Michigan's Supreme Court Elections: Should We Throw the Baby Out With the Bathwater?,* 44 Wayne L R 367, 374 (1998) (noting that there is a debate whether campaign fundraising calls into question the impartiality of elected judges). But cf. *Gauntlett v Kelley,* 658 F Supp 1483, 1493 n 2 (WD Mich 1987) ("The Michigan system of selecting judges, and retaining them, is, as all know, inapposite to trying to create an independent and hence, impartial judiciary.").
26. See S. Sidney Ulmer, *The Political Party Variable in the Michigan Supreme Court,* 11 J Pub L 352, 355 (1962).
27. Miner, supra n 8, at 1107.
28. Id. at 1108.
29. 405 Mich 638, 656–660, 275 NW2d 511 (1979).
30. The *Placek* Court cited MI Const art 3, § 7, stating, "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed."

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the actual text of the Constitution and statutes to the particular facts of the case before them.

A majority of the Michigan Supreme Court justices have explained their view of the proper separation of powers, and particularly the prerogative of the people's representatives in the legislature to make public policy decisions:

> *We, the majority, apply the text of the constitution, a statute, or an ordinance according to its ordinary meaning. We are prepared to live with the result of the plain application of such texts, regardless of whether we personally agree with the outcome. We subscribe to the notion that judges are not the lawgivers in our society; rather, they are the interpreters of the law.*[4]

Upon becoming chief justice, Clifford Taylor commented that the "hard part" about judging is that "[e]ven though I may want a case to turn out a certain way, I must be disciplined enough to have it turn out a different way if the law requires it. That's what good judges do. They are not driven by outcomes—they are driven by the law."[5] The Court's decisions bear out this judicial philosophy.

Some have questioned whether the Michigan Supreme Court is too quick to overturn older decisions, in disregard of the doctrine lawyers call stare decisis, the following of precedent. Among them are Professor Nelson P. Miller, who has suggested that Governor Engler's appointments to the court have led to "an unusually high rate of overturning its own precedents." The only objective support for this assessment is found in a student note published in the *Albany Law Review*.[6] But this "objective" source attributes the overruling of 25 cases between 1998 and 2002 to the *current* majority.[7] A closer review reveals that 11 of these 25 cases (44 percent) were decided *before* the current majority joined the Court or had the support of at least one member of the minority.[8]

When the Court has overturned prior rulings, it has always done so in well-reasoned opinions with appropriate respect for the value of stability in the legal system. But the Court has properly recognized that stare decisis is not a cement block; when the fundamental reasons for an old rule have changed, courts properly consider changing that rule. The Court discussed the purpose and application of stare decisis in *Robinson v City of Detroit:*[9]

> *Stare decisis is generally "the preferred course 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." However, stare decisis is not to be applied mechanically to forever prevent the court from overruling earlier erroneous decisions determining the meaning of statutes.*[10]

Both logic and public interest considerations echo that stare decisis is not to be followed "blindly."[11] Before overturning precedent, the Court has carefully considered whether a question of law was wrongly decided. Then it has considered if there are "real world reliance interests which would be adversely affected by overturning a case." Justice Maura D. Corrigan, a member of the current majority, has observed that "if a prior decision of this court reflects an abuse of judicial power at the expense of the 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."[12] Chief Justice Taylor has recognized that even a bad decision should not be overturned if "so entrenched and life-altering that a court cannot change it."[13] The Court has not overturned cases on a "flavor of the month" basis.

Demonstrating a Profound Respect for the Legislature

Michigan's Supreme Court justices express frustration that some state judiciaries have "muscled the legislature out of the way" and "displaced the people's policy choices with the courts."[14] In a recent interview with his law school alma mater, Justice Taylor commented:

> *[O]ne of the greatest issues here, and in the country, is whether courts are improperly usurping legislative authority. I believe our court is on the forefront of this discussion. We strive to not engage in policymaking from the bench. When any court gets into policymaking, outside the common law, it becomes inevitably partisan and is usually crowding out the legislature. This is unfortunate as it miscomprehends the proper delegations of power to both us and the legislature in the Constitution.*[15]

Justice Robert Young has expressed similar views in the proper role of the judiciary vis-à-vis the legislature:

> *It is my belief that the judicial culture of the last 40 years has fully embraced judicial activism, a philosophy that I believe is fundamentally elitist and which is unquestionably founded on the belief that we judges, being more intelligent and better educated than the rabble who are elected to our legislatures, are in a superior position to make refined social policy judgments about the critical questions of the day. . . . I think the framers of our Constitution would be baffled, if not horrified, to learn that our courts, not our legislatures, were deciding such fundamental [social questions] . . . on bases that some would suggest are simply contrived constitutional grounds that have no link to the text of our Constitution.*[16]

Justice Young has observed that the judiciary is "institutionally incompetent" to make legislative social policy decisions.[17] He appreciates that appellate courts decide cases on particular facts.[18] They cannot hold hearings, call back witnesses, or subpoena documents. Nor can they engage in the public discussion, debate, and compromise that characterize the political branches of government.

For the Michigan Supreme Court, such observations are not mere rhetoric or abstract theory, but a judicial philosophy applied in each and every case. For instance, the Court recently demonstrated its respect for the separation of powers in *Henry v Dow Chemical Co.*[19] In that case, the five justices signing the majority opinion refused to legislate from the bench to create a new legal claim for medical monitoring absent present physical injury.[20] They followed Michigan precedent that a claim in tort law was based on an existing, not a speculative, injury. Their ruling also respected the constitutional principle of separation of powers. The Court's opinion clearly explains why it refused to permit this type

of claim. People living and working near a chemical plant in Michigan filed the case. The Court recognized that many public and private interests had to be considered in deciding whether to create a new medical monitoring cause of action. For example, allowing uninjured people to recover could create a potentially limitless pool of plaintiffs, clog court dockets, and "drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care."[21] Judicial administration of a medical monitoring trust fund would strain court resources. On the other hand, plaintiffs could easily spend a lump-sum award on a new car or flat-screen television instead of on medical monitoring.

Recognizing that courts have little expertise or objective guidance on how to set up medical monitoring programs and would be "craft[ing] public policy in the dark," the Court decided not to create this potentially problematic new cause of action. It explained that "the people's representatives in the Legislature . . . are better suited to undertake the complex task of balancing the competing societal interests at stake."[22] It was for the Michigan Legislature, not the court, to decide whether to create a claim that would be "a new and potentially societally dislocating change to the common law."[23]

The Michigan Supreme Court also has demonstrated its respect for the separation of powers in upholding rational civil justice reforms. Unlike some state courts that have struck down limitations on liability on the basis of obscure or vague state constitutional provisions, engaging in "judicial nullification" of the policy choices of the state's legislature,[24] the Michigan Supreme Court has respected the "lawmaking" branch of government.[25] Most recently, the Court upheld a law that was intended to help assure that Michigan citizens pay less for rental cars by limiting the absolute liability of the car rental company for acts of those who rent their vehicles.[26] "Damage caps are constitutional in causes of action springing out of the common law because the Legislature has the power under our Constitution to abolish or modify nonvested, common-law rights and remedies," the Court explained.[27] It also found that the legislature had a rational basis for enacting the law: its desire to reduce insurance costs or to increase consumers' choice of providers.[28] The Court was not willing to "usher in a new *Lochner* era,"[29] referring to turn-of-the-20th-century rulings in which the Supreme Court of the United States invalidated various "economic" laws,[30] which the justices found to be unsound public policy; for example, regulation of hours and wages. U.S. Supreme Court has since repudiated its *Lochner*-era cases,[31] and the Michigan Supreme Court echoed this repudiation when it observed "economic regulation, such as the measure we deal with today, has consistently been held to be an issue for the political process, not for the courts."[32]

Reaching Well-Reasoned Opinions Based on Law, Not Politics

More often than not, members of the Court are in agreement when they decide cases. Since 2000, more than half of the Court's decisions have enjoyed the support of at least one of the "pre-Engler" justices in the minority.[33] One need only turn to the recent opinion of the Michigan Supreme Court in *Glass v Goeckel* for a perfect example showing the Court's opinions are dictated by principles of law, not politics.[34] The case pitted landowners and small businesses that sought exclusive use of their valuable beachfront property against Michigan residents who argued that they had the right to enjoy a walk along the shoreline of the Great Lakes. Those who believe politics motivates the decisions of the Court were probably surprised at the result. The Michigan Supreme Court unanimously reversed an appellate court decision for the property owners that would have permitted people to walk along private property bordering the shore, but only if they kept their feet in the water. Instead, after close consideration of the "public trust doctrine," the Supreme Court agreed that people might freely walk along the shore, even if others own that land.[35]

One year earlier, in *County of Wayne v Hathcock,* the Court rejected the notion that "a private entity's pursuit of profit was a 'public use' for constitutional takings purposes simply because one entity's profit maximization contributed to the health of the general economy."[36] In that case, the court overturned its 1981 decision in *Poletown,*[37] which allowed the City of Detroit to use its eminent domain power to bulldoze an entire neighborhood in order to sell the property to General Motors for an automobile plant. The *Poletown* decision was the first of its kind and set a national trend. But in *Hathcock,* the Court firmly rejected *Poletown,* this time in a case involving taking 500 acres of private property around an airport for development into an office park.

> *It is true, of course, that this Court must not "lightly overrule precedent." But because* Poletown *itself was such a radical departure from fundamental constitutional principles and over a century of this Court's eminent domain jurisprudence leading up to the 1963 Constitution, we must overrule* Poletown *in order to vindicate our Constitution, protect the people's property rights, and preserve the legitimacy of the judicial branch as the expositor—not creator—of fundamental law.*[38]

Thus, in a dispute pitting small property owners against economic development interests, the little guy won. To those who have suggested that the Court abandons stare decisis to protect business interests, *Glass* and *Hathcock* show the opposite to be true.

There are many other examples where those who suggest that the Court favors business over the "little guy" are operating by personal feelings rather than facts—the Court's actual decisions. For instance, in *Clark v Kmart Corp,* the Court reaffirmed the duty of a storekeeper for the safety of its customers.[39] It reinstated a $50,000 verdict to a woman who slipped and fell on a grape, finding the jury had sufficient evidence to find the store could have had constructive notice of a dangerous condition. It did so even though there was no direct evidence of how the grapes came to be on the floor of a checkout lane and how long they remained there prior to the fall.

The allegation that the Court echoes business was also shown to be unfounded in the case of *Cain v Waste Management, Inc.*[40] The Court ruled against an employer who challenged a workers' compensation ruling requiring it to compensate a truck driver based on the loss of two legs when the amputation of only one was

necessitated after a tragic accident. At issue was the definition of the word "loss." After closely examining the history and purpose of the workers' compensation statute and commonly understood meaning at the time of enactment, as well as case law from Michigan and other jurisdictions, the Court found that "loss" was not subject to a mechanical interpretation. It was defined based on utility and ability to work.

Another example of the Court's favoring workers' rights is *Elezovic v Ford Motor Co.*[41] In that case, the Court held that an individual supervisor could be held personally liable for sexual harassment under Michigan's Civil Rights Act, even if the employer is excused from liability because the plaintiff did not follow proper procedures in reporting the harassment. Clark, Cain, and Elezovic again show that this is a Court that fairly applies the law based on the facts of the case and the law, not politics or any purported desire to limit the liability of business.

An Alternative Reason: Politics in Judicial Elections?

The facts demonstrate that the Michigan Supreme Court respects the rule of law. When they do, some in the media or in academia perceive the Court as influenced by "politics." These perceptions, which elevate feelings over facts, may logically stem from contentiousness of judicial elections in the state. In Michigan (and in many other parts of the country), the cost of judicial campaigns has skyrocketed. Their tone has substantially deteriorated.[42] These are facts upon which critics and supporters of the Court should agree. Once low-key contests, state judicial elections now draw the close attention (and financial contributions) of the full range of interest groups in addition to members of the bar.[43] The atmosphere where one side "wins" over another sets up a situation where the "losing side" sits and waits to level criticisms at the Court.

Those justices thrust into this system do not benefit from hostile elections. They are forced to spend a great deal of time raising money. They are placed in the very awkward position of "campaigning" for the bench. To their credit, the justices of the Michigan Supreme Court have withstood vicious attacks in the media; they have stood steadfast for the rule of law. They have not altered their judicial philosophy.[44] It is not surprising that several justices have expressed support for an appointive system.[45] If the Court were to "vote," it might well change the system. But that goes to the core point about the Michigan Supreme Court: the justices appreciate that whether to change Michigan's method of selecting judges, and how, like other public policy decisions, is a decision for the state legislature and the voters. Until that time comes, current members of the Court and future judicial candidates can only be expected to play by the current fundraising and ethical rules and to campaign with respect toward opponents and the dignity of the office. The Michigan Supreme Court justices have been able and, we expect, will continue, to rise above the election melee and base their decisions on the rule of law, rational development of the common law, the true meaning of statutes, and the state and federal constitutions. ◆

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Footnotes

1. See Nelson P. Miller, "'Judicial Politics': Restoring the Michigan Supreme Court," in this edition of the *Michigan Bar Journal.*
2. See Patrick J. Wright, *The Finest Court in the Nation,* Wall St J, Oct. 13, 2005, at A15.
3. See Victor E. Schwartz and Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance,* 32 Rutgers L J 907, 911–12 (2001).
4. *MGM Grand Detroit, LLC v Community Coalition for Empowerment, Inc,* 465 Mich 303, 633 NW2d 357 (2001).
5. Todd C. Berg, *Chief Justice to Carry on Court's Textualist Tradition,* Mich L Weekly, Aug. 10, 2005 (quoting Justice Taylor).
6. Sarah K. Delaney, *Stare Decisis v the "New Majority": The Michigan Supreme Court's Practice of Overruling Precedent, 1998–2002,* 66 Albany L R 871 (2003).
7. See id. at 872, 905 app. 1.
8. Five of these cases were decided prior to the appointment of Justices Young and Markman to the Court, when members of the current majority remained in the minority. Id. at 905 app. 1 (citing *People v Graves,* 458 Mich 476, 581 NW2d 229 (1998); *McKenzie v Auto Club Ins Ass'n,* 458 Mich 214; 580 NW2d 424 (1998); *People v Kaufman,* 457 Mich 266, 577 NW2d 466 (1998); *Am Fed'n of State, County, & Mun Employees v Bd of Educ of Highland Park,* 577 NW2d 79 (Mich 1998); *People v Lemmon,* 456 Mich 625, 576 NW2d 129 (1998)). An additional three of the cited cases were decided after Justices Taylor and Young joined the Court, but prior to Justice Markman's appointment. Id. (citing *MacDougall v Schanz,* 461 Mich 15, 597 NW2d 148 (1999); *Smith v Globe Life Ins Co,* 460 Mich 446, 597 NW2d 28 (1999); *People v Lukity,* 460 Mich 484, 596 NW2d 607 (1999)). In three cases, Justice Cavanagh concurred in the overruling of precedent, joined by Justice Kelly in one instance. *People v Petit,* 466 Mich 624, 648 NW2d 193 (2002) (majority opinion joined by Justice Cavanagh); *Lesner v Liquid Disposal, Inc,* 466 Mich 95, 111–16, 643 NW2d 553, 561–64 (2002) (in which Justices Cavanagh and Kelly concurred in the overturning of precedent); *People v Hardiman,* 466 Mich 417, 432, 646 NW2d 158, 166–67 (2002) (in which Justice Cavanagh concurred in the overturning of precedent and dissented on other grounds).
9. *Robinson v City of Detroit,* 462 Mich 439, 463–66, 613 NW2d 307, 320–21 (2000).
10. Id. (citations omitted).
11. Todd C. Berg, *Chief Justice to Carry on Court's Textualist Tradition,* Mich L Weekly, Aug. 10, 2005 (quoting Justice Taylor).
12. *Robinson,* 462 Mich at 473 (Corrigan, J., concurring).
13. Id.; see also *Robinson,* 462 Mich at 465–66.
14. Justice Clifford W. Taylor, *Who's In Charge: A Traditional View of Separation of Powers,* 1997 Det CL Mich St U L R 769, 769, 771 (1997).
15. Justices Supreme, Geo Wash L Sch Mag (Sum. 2005), available at http://www.gwu.edu/~magazine/ 2005_law_summer/docs/feat_justices.html (last visited Aug. 25, 2005) (remarks of Chief Justice Taylor).
16. *Reflections of a Survivor of State Judicial Election Warfare in Judicial Elections: Past, Present, and Future,* Manhattan Inst. Conf. Series, No. 2, at 8–9 (Ctr. for Legal Pol'y 2001) (remarks of Justice Robert Young), available at http://www.manhattan-institute.org/html/mics_6.htm; see also Robert Young, *Reflections of a Survivor of State Judicial Election Warfare,* Manhattan Inst. Civ. Justice Rep. No. 2 (Ctr. for Legal Pol'y 2001), available at http://www.manhattan-institute.org/html/cjr_2.htm.
17. See id. at 9.
18. See id.
19. *Henry v Dow Chem Co,* 473 Mich 63, 701 NW2d 684 (2005).
20. Some jurisdictions accepted this cause of action early on, but the trend is that courts will not allow medical monitoring absent present physical injury. The Michigan Supreme Court is the fourth state supreme court to reject this new cause of action, joining the supreme courts of Kentucky, Alabama, and

Nevada. See Victor E. Schwartz, Leah Lorber & Emily J. Laird, *Medical Monitoring: The Right Way and the Wrong Way,* 70 Mo L R 349 (2005).

21. *Henry,* 473 Mich at 84, 701 NW at 694.
22. Id. at 68–69, 701 NW at 687.
23. Id. at 88–89, 701 NW at 697.
24. Victor E. Schwartz and Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance,* 32 Rutgers L J 907 (2001); Victor Schwartz, *Judicial Nullification of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law,* 31 Seton Hall L R 688 (2001).
25. See, e.g., *Taylor v SmithKline Beecham Corp,* 468 Mich 1, 658 NW2d 127 (Mich 2003) (rejecting a challenge to a Michigan statute limiting liability of prescription drug manufacturers where the drug at issue was approved for safety and efficacy by the United States Food and Drug Administration).
26. *Phillips v Mirac, Inc,* 470 Mich 415, 685 NW2d 174 (2004).
27. Id. at 430, 685 NW2d at 183.
28. Id. at 434, 685 NW2d at 185.
29. Id. at 437, 685 NW2d at 187.
30. See *Lochner v New York,* 198 US 45 (1905); see also *Adkins v Children's Hospital of District of Columbia,* 261 US 525 (1923) (finding an infringement of constitutionally protected liberty of contract to require the employers of adult women to satisfy minimum wage standards).
31. See *Williamson v Lee Optical Co,* 348 US 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."); see also *West Coast Hotel Co v Parrish,* 300 US 379, 391–400 (1937); Nebbia v New York, 291 US 502, 537–38 (1934).
32. *Phillips,* 470 Mich at 437, 685 NW2d at 187.
33. According to a review of published opinions of the Michigan Supreme Court, 33 of 77 opinions (43 percent) were unanimous in the 2000–2001 term and 40 of the court's opinions (52 percent) were joined by Justice Cavanagh, Justice Kelly, or both as either signers to the majority opinion, or as concurring with, or in the result, of the majority opinion. Michigan Chamber of Commerce, Review of the Published Opinions of the Michigan Supreme Court 2003–2004 Term 3 (2002), available at http://www.michamber.com/ba/MISupreme Court.pdf. Similarly, in the 2003–2004 term, 28 of 78 opinions (36 percent) were unanimous and 42 of the Court's opinions (54 percent) were joined by one member of the minority. Michigan Chamber of Commerce, Review of the Published Opinions of the Michigan Supreme Court 2003–2004 Term 1–2 (2004), available at http://www.michamber.com/ba/MISupremeCourt.pdf.
34. See *Glass v Goeckel,* 473 Mich 667, 703 NW2d 58 (2005).
35. There was some debate within the court in defining the scope of the public trust based on "an abstruse body of precedent," with the majority finding it defined by the ordinary high water mark, rather than the water's edge and the area of sand dampened by the water. 703 NW2d at 79 (Young, J., concurring in part and dissenting in part); see id. at *81–105 (Markman, J., concurring in part and dissenting in part).
36. *County of Wayne v Hathcock,* 471 Mich 445, 481, 684 NW2d 765, 786 (2004).
37. *Poletown Neighborhood Council v Detroit,* 410 Mich 616, 304 NW2d 455 (1981).
38. *Hathcock,* 471 Mich at 483, 684 NW2d at 787 (citations omitted).
39. See *Clark v Kmart Corp,* 465 Mich 416, 634 NW2d 347 (2001).
40. See *Cain v Waste Mgmt, Inc,* 472 Mich 236, 697 NW2d 130 (2005).
41. See *Elezovic v Ford Motor Co,* 472 Mich 408, 419–26, 697 NW2d 851, 857–61 (2005) (finding that an agent of the employer could be held liable under Mich Comp Law § 37.2201(a), even where federal civil rights law would not allow such liability, because the clear language of the Michigan statute required such a result and varied from the federal law).
42. Mark A. Behrens and Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges,* 11 Cornell J Law & Pub Pol'y 273, 275 (2002).
43. In recent years, the business community has supported judicial candidates they view as contributing to the fairness and predictability of the legal system. Some argue that business interests have been particularly influential in judicial races. But, historically, the single greatest source of contributions to judicial elections are local attorneys. Samantha Sanchez, Campaign Contributions and the Michigan Supreme Court, Mar. 2002, at 6 (finding that attorney donations constituted nearly $3 million of $8 million of campaign contributions to Michigan Supreme Court justices between 1990 and 1998). Most of those funds come from the plaintiffs' personal injury bar, which has a vested business interest in expanding liability. Id. at 9–10 (finding that the top five contributors to Supreme Court races between 1990 and 1998 in the legal field were three local personal injury law firms, the Michigan Trial Lawyers Association, and, in fifth place, a defense firm). In fact, in earlier years, the largest personal injury firms contributed more funds than all the corporations in Michigan at the time. *Reflections of a Survivor of State Judicial Election Warfare in Judicial Elections: Past, Present, and Future,* Manhattan Inst. Conf. Series, No. 2, at 14 (Ctr. for Legal Pol'y 2001), available at http://www.manhattan-institute.org/html/mics_6.htm (remarks of Justice Robert Young). It is only in recent years that the business community has started to play catch up in Michigan.
44. For example, Justices Taylor, Markman, and Young were reelected in 2000 despite an accusation in numerous television ads of being "anti-family" based on a study that the *Detroit Free Press* found based more on politics than the Court's decisions. See Dawson Bell, "Party Politics Enters High Court Race TV; Ads Slam Republican Judges," *Detroit Free Press,* Aug. 3, 2000, at 1B. Justice Young, who is African-American, was also portrayed by opponents as believing *Brown v Board of Education* was wrongly decided, a claim Justice Young vigorously disputed. See Dawson Bell, "Supreme Court Nominees Debate Testily; Candidates Rip Rivals, Ad Accusations," *Detroit Free Press,* Oct. 28, 2000, at 3A.
45. See, e.g., Todd C. Berg, *Chief Justice to Carry on Court's Textualist Tradition,* Mich Law. Weekly, Mar. 14, 2005; George Weeks, "Departing Justice Urges Judicial Term Limits," *Detroit News,* Jan. 16, 2005; Thomas J. Bray, *Op-ed, Who Judges the Judges?,* Wall St J, Nov. 21, 2000; Clifford W. Taylor, *Who's in Charge: A Traditional View of Separation of Powers,* Det C L Mich St U L R 769, 774 (1997).