A "Supreme" Controversy

To the Editor:

The editorial decision to select Professor Nelson P. Miller and attorney Victor E. Schwartz to present point/counterpoint views on the jurisprudence of the Michigan Supreme Court is puzzling (January 2006).

Professor Miller offers a highly abstract view of what he sees is the Court's disrespect for *stare decisis.* Regretfully, he gives no examples. Nor does he say anything about the division of the justices in critical decisions, i.e., 5 to 2 most times and 4 to 3 sometimes. Surely a more forceful critique could have been presented to describe the many times anti-people orientation of majority decisions of the high court.

As for the choice of Mr. Schwartz, he is a well-known apologist for a conservative jurisprudence and a national leader in what is euphemistically known as "tort reform." An indication of the lack of intellectual honesty in his defense of majority decisions is citing Patrick J. Wright's description of the Supreme Court as the "finest court in the nation." Mr. Wright is senior legal analyst at the Mackinaw Center for Public Policy, a well-known right-oriented think tank.

Surely the readership deserves better than what was presented as the competing jurisprudential views of the present Supreme Court.

Avern Cohn
Detroit

To the Editor:

I read the point and counterpoint portion of the January 2006 *Michigan Bar Journal,* which dealt with the quality of decisions used by the present Supreme Court. One of the authors was Victor E. Schwartz, who provided strong support for the majority on the Michigan Supreme Court. Surely, in the context of the format a legal expert supporting the decisions of the Supreme Court is appropriate. However, I noted that Mr. Schwartz is identified in the following way: "Victor E. Schwartz is chairman of the Public Policy Group in the Washington, D.C., office of the law firm of Shook, Hardy & Bacon, L.L.P." He is further identified as being one of the authors of the Prosser textbook on Torts and as a member of the American Institute, Restatement of Torts.

His biography in the *Bar Journal* is misleading. I have been involved in forums where Mr. Schwartz has participated and found him to be an advocate for tort reform. The public policy group to which he refers is part of the Shook law firm, which firm he has described as having "a primary defense practice." More importantly, he serves as general counsel to the American Tort Reform Association (ATRA). I think it is important to properly identify the potential bias of those writing on a subject as important as the quality of decisions authored by the majority of the Michigan Supreme Court. Perhaps you could round out Mr. Schwartz's biography by properly identifying the public policy group is in reality part of his defense firm and his affiliation with ATRA.

Paul Rosen
Southfield

To the Editor:

Nelson Miller began his thoughtful editorial "'Judicial Politics': Restoring the Michigan Supreme Court" (*Michigan Bar Journal,* January 2006) with a provocative revelation: "Law students around the country are now being taught in a popular law school casebook that the Michigan Supreme Court exemplifies 'judicial politics.'" He continued that the Court has "overturned long-standing liability precedents 'embraced virtually universally' in other jurisdictions."

So it was surprising to read Victor Schwartz's counterpoint that "many others consider the Michigan Supreme Court to be the 'finest court in the nation.'" Could this be true? Who were these many others? A citation check revealed the "many others" to be the Court's former administrator, Patrick J. Wright, who now works for Mackinac Center. (And even Mr. Wright was more circumspect, speculating, hopefully, how the Court "may be" perceived as he touted his former bosses Maura Corrigan and Robert Young as potential nominees to the U.S. Supreme Court during the Harriet Miers drama.) That this Court is extremely political is belied by a *National Review* article noting that, "Engler has also reshaped the state judiciary: Michigan may have the most conservative state supreme court in the nation." ("W.'s Man in Michigan—Michigan governor and George W. Bush supporter John Engler," Feb. 21, 2000.)

Mr. Schwartz failed to deliver the promised "objective evaluation" of the Michigan Supreme Court. Instead he relied heavily on several of the justices' own self-aggrandizing characterizations of themselves and their judicial philosophy. The Court was praised for applying the "actual text" in cases, or, as Justice Taylor referred to it, the "plain application" of the "ordinary meaning" of such text. This reveals the Court to be unnecessarily political and even intolerant of dissent, for when it characterizes its own interpretations as being based on the *plain* meaning of a text, it insinuates that those who would interpret the language differently are unreasonable. (Ironically, Schwartz later praised the Court when it did not follow its own philosophy in a particular case, noting that it was not bound by "a mechanical interpretation" of text.)

The Court was lauded for "not engaging in judicial nullification of the policy choices of the state's legislature." Yet this Court has done just that, rendering most employment legislation in Michigan a dead letter. Its interpretation of the burdens of proof in employment cases is so twisted that it diametrically opposes the United States Supreme Court's *unanimous* interpretation of those burdens. (Compare, *Lytle v Malady (On Rehearing),*

458 Mich 153, 175 (1998) ("[D]isproof of an employer's articulated reason for an adverse employment decision defeats summary disposition *only if such disproof also raises a triable issue* that discriminatory animus was a motivating factor underlying the employer's adverse action." (emphasis added)) and *Reeves v Sanderson Plumbing Products, Inc,* 120 S Ct 2097, 2108; ("[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.")

Even Mr. Schwartz understands the difficulties attendant to objectively defending this Court's record. It is telling that the sole purpose of the editorial's second paragraph is to remind us that these justices survived election by the people—as if the people's unwitting imprimatur is an absolution for this Court's actions.

Del A. Szura
Rochester

To the Editor:

Attorney Schwartz's apologia for the current Michigan Supreme Court deserves a more robust rebuttal than Professor Miller provides. So here goes:

1. *Endorsement by the Wall Street Journal.* Gee: a pro-business publication thinks Michigan's Supreme Court is great. Go figure.
2. *Engler's appointees retained by voters.* I don't suppose the free advertising on the ballot ("incumbent") had anything to do with that.
3. *Judicial independence.* A court that allows the legislature to dictate court procedure is blurring, not upholding, the separation of powers. See *McDougall v Schanz,* 461 Mich 15 (1999).
4. *Policy making.* As if limiting premises liability to extreme (and rare) cases like 30-foot chasms and puddles blocking an entire entrance is not a policy decision. See *Lugo v Ameritech Corp,* 464 Mich 512 (2001).
5. *Outcome oriented.* I did a study of the opinions issued by Michigan's Supreme Court in the 66 personal injury cases from July 30, 1999 through July 30, 2004 which (a) pitted an individual against a corporation and (b) involved rules of statutory construction. The results showed that Engler's appointees have *applied* rules of construction to aid both individuals (13–14 times) and corporations (13–15 times). However, these justices have also *ignored* established rules of statutory construction in 35–36 cases, or over half the time. Moreover, in practically every such case, ignoring the rules *benefited the corporate party.* Neutral application of rules of construction cannot explain these results, but desire for an outcome that will favor the corporate party can.
6. *Textualism.* In the aforementioned study, the subset of 41 cases involving "plain language" constructional rules shows a similar pattern: *when applied,* plain language

has helped both individuals (11 times) and corporations (16 times). However, in 14 cases the plain language of the statute was *ignored,* in *every such case* to the corporate party's benefit. Judges who ignore the plain language of a statute one-third of the time are not fairly called "textualist."

7. *Respect for the Legislature.* Is it respect for the legislature when the court limits legislative remedies by niggardly construction (as it has with governmental liability and workers compensation), or by inventing restrictions the legislature did not create (as it did in *Kreiner v Fischer,* 470 Mich 109 (2004), where it invented a requirement that serious impairments be long-lasting, despite no temporal language in the statute)?
8. *Decisions for "the little guy."* Attorney Schwartz had to scrape the bottom of the barrel to find what he calls decisions that favor the little guy. Even then, the cases he dredged up are highly ambiguous. For example,
   a) In *Cain v Waste Management,* 465 Mich 509 (2002), the Court *threw out* an amputee's total & permanent disability claim and then *raised the bar* for proving specific loss claims. *Cain v Waste Management,* 472 Mich 236 (2005) (abolishing the 80-year-old "loss of *industrial* use" standard in favor of a harder-to-prove "loss of use" standard). If this exemplifies the Supreme Court's concern for the little guy, most little guys would rather do without it.
   b) *Wayne County v Hatchcock,* 471 Mich 445 (2004) was a dispute between a public corporation and landowners (including a private corporation). "The little guy" had no dog in that fight.
   c) While *Glass v Goecke,* 473 Mich 667 (2005) nominally pitted beach walkers against beachfront landowners, the ruling for the former amounted to a finding that *the state retained an easement* on beachfront property. A ruling that favors the state is not an unambiguous victory for "the little guy." Even then, two of the four Engler appointees voted for the beachfront landowners.

In the end, Schwartz's examples are less probative of support for "the little guy" than they are of the fact that this court can go both ways when the fight is between fat cats (public versus private corporations, or landowners versus corporations). If, instead of cherry picking, we look at the mass of cases where the law has been ignored to benefit corporations, the odd "pro-plaintiff" decision starts to look like the token minority, hired to deflect charges of bias and permit a discriminator to indulge his prejudices without scrutiny.

After having analyzed the cases, the question in my mind is no longer *whether* Michigan's Supreme Court is prejudiced, but rather *what to do about it.* Tinkering with selection methods is not the answer: most people don't vote in judicial elections, and the ones who do vote employ immaterial or misleading criteria, such as incumbency (easily arranged by the appointing power) or an Irish-sounding name. Appointment only lands us from the frying pan into the fire: note that the worst offenders on the Supreme Court all got on the Court of Appeals by appointment, and three of the four were appointed to the Supreme Court as well.

The solution lies in the recognition that constitutional due process includes the right to unbiased judges; and that, since the Constitution is superior to both the executive and a majority of the people, neither governors nor voters have a right to foist prejudiced judges on us. The remedy for a prejudiced judge is not the ballot box, but rather a motion to disqualify. Though such motions will not likely succeed at the state level, disqualification of a state Supreme Court justice by the U.S. Supreme Court is not unprecedented. *Aetna Life Ins Co v LaVoie,* 475 US 813, 89 L Ed 2d 823, 105 S Ct 1580 (1986).

Now that Judge Alito is on the U.S. Supreme Court, perhaps he will see a case from Michigan enabling him to back up the statement he made at his confirmation hearings: that not even supreme courts are above the law.

John Braden
Fremont

"Practice Pointer" Creates Conundrum

To the Editor:

Andrew Rogness presents the intriguing idea of following each request for admission under MCR 2.312 with a probing interrogatory under MCR 2.309 when the respondent refuses to admit such a request. The interrogatory is phrased to force an explanation of the reasons for the denial. ("Practice Pointer or: How I Learned to Stop Getting Sand-bagged in Discovery and Love the Rules of Civil Procedure," Andrew Rogness, *Michigan Bar Journal,* January 2006).

As with many opportunities, however, there are also problems: MCR 2.312(F) *requires* that requests for admissions and answers to them "must" be filed with the court. To the contrary, however, MCR 2.302(H)(1), generally *bars* the filing of interrogatories and their answers with the court.

So a conundrum arises: the requests for admissions and answers to them, *must* be court-filed, while the interrogatories and their answers, in the same document as the article proposes, *cannot* be filed. What, then, will clerks around the state do when such a document is proffered for filing? It is reasonable to believe that at least some will refuse to file it, because MCR 2.301(H)(1) bars filing the interrogatories it contains. It might then be argued that the requests for admissions intermixed with interrogatories in such a document whose filing the clerk refuses, thereby become invalid, because they were not filed as MCR 2.312(F) requires. In this way, the procedural device to force answers from the responding party becomes, instead, a problem for the requesting party.

I discussed this by e-mail with Mr. Rogness, who responded that he "generally" finds clerks accept his requests-to-admit-and-interrogatory-combined "package" for filing. He was open, however, to a suggestion I made, for situations when a clerk refuses to file a request for admissions document because it also contains interrogatories: consider serving the respondent a requests-for-admissions-only document, but also simultaneously serving a separate, *one-question,* interrogatory document. This "form" interrogatory would raise the same searching subquestions his article proposes. The respondent would be instructed to *reuse* this form interrogatory to answer, as necessary, each of the respondent's answers to a request for admission that was not an unqualified admission.

This slight modification still uses Mr. Rogness' technique of an interrogatory that immediately forces the respondent to explain his or her unwillingness to admit the request without qualification. Here, however, "must-be-filed" requests for admissions are not mixed with "must-*not*-be-filed" interrogatories in one document. This eliminates the danger of the clerk refusing to file the request for admissions because it is combined with interrogatories, thereby denying the requesting party the effective use of the request for admissions device.

William R. VanderKloot
Richmond, Virginia

Light Years Away from a Real Solution

To the Editor:

I am writing in response to Terence L. Blackburn's article entitled, "Make Tests Relevant" (*Michigan Bar Journal,* January 2006). In his article, Mr. Blackburn writes: "The real issue confronting the gatekeepers to our profession is whether the bar examinations are an adequate measure of attorney competence." However, he advocates merely "reducing the number of subjects tested, ensuring that the questions adequately focus on basic and fundamental subjects and issues, and standardizing the grading process and results." This measure is light years away from the real solution.

The real solution begins with focusing on what attorneys do. In litigation, attorneys gather facts and information; interview clients, potential clients, and witnesses; research the law; prepare claims, complaints and answers; draft discovery requests, like interrogatories, requests for documents, and requests for admissions; depose witnesses and represent clients and witnesses at depositions; prepare motions, briefs, and responses; argue at motion hearings; prepare case evaluation summaries and represent clients at case evaluation hearings; conduct trials and evidentiary hearings; write appellate briefs and argue their positions; and write letters and memos. In transactional practice, attorneys write contracts and other transactional documents. Moreover, attorneys have to relate with judges, clerks, opposing counsel, colleagues, legal assistants, legal secretaries, clients, potential clients, and others. Finally, attorneys have to decide and recommend case strategy and tactics.

After focusing on what attorneys do, the next step is to develop a way to promote attorney abilities and skills in these areas. I believe that the medical profession has it right: Let's require law school graduates to serve a two-year rotating internship, with one year at one law firm, government agency, corporation, public interest organization, or other place of legal practice, and the next year with a second organization. Let's work with these organizations to develop fair and effective criteria for deciding who should advance to the next step, becoming an attorney. The basis of these criteria should be how well the potential attorney has progressed during the two years.

Finally, the potential attorney should appear before a group of experienced attorneys and showcase his/her progression and talents. This examination will involve interviewing a potential client or client; writing a motion, response, or brief; examining and cross-examining witnesses; deposing witnesses; preparing a contract; and other examples of what attorneys do. Also, the examination process should include a professional responsibility component emphasizing real professional responsibility issues that attorneys often encounter, the conflicts involved, and the decision-making involved, with actual application of the Rules of Professional Conduct to these actual situations.

Compared to the present bar examination process, this experiential process will lead to a more professional legal profession. The bar examination tests few skills, mainly test-taking. This experiential process tests far more areas, mainly knowing how to learn, knowing how to relate with others, knowing how to adhere to the Rules of Professional Conduct, and knowing how to decide. To succeed in the world, attorneys need to be far more than good test-takers. Let's change our bar admission process to admit those truly capable of being good attorneys.

Howard Yale Lederman
Berkley