# CONSTITUTIONAL LAW

HON. MICHAEL WARREN†



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† Oakland County Circuit Court Judge. B.A., 1989, *magna cum laude*, Wayne State University; J.D., 1992, *cum laude*, University of Michigan Law School. Judge Warren is the Presiding Judge of the General Civil/Criminal Division of the Oakland Circuit Court, and serves on the Michigan Supreme Court Committee for Model Civil Jury Instructions. He also teaches Constitutional Law as a Visiting Professor at Thomas M. Cooley Law School. He is the co-founder of Patriot Week (www.PatriotWeek.org) and Chair and President of Patriot Week Inc., a nonprofit corporation. He is the author of, inter alia, AMERICA'S SURVIVAL GUIDE, HOW TO STOP AMERICA'S IMPENDING SUICIDE BY RECLAIMING OUR FIRST PRINCIPLES AND HISTORY (2007), *available at* www.AmericasSurvivalGuide.com; *How to Kit: Obtain a Finding of Contempt of Court for Failure to Obey an Order or Judgment of the Court*, Institute of Continuing Legal Education (ICLE); and *Contempt of Court & Broken Windows, Why Ignoring Contempt of Court Undermines Justice, the Rule of Law, and Republican Self-Government* (Engage). He also authored *Constitutional Law*, 56 WAYNE L. REV. 991 (2010). He is a former member of the Michigan State Board of Education. He is the Chair of Cornerstone Schools Association. After leaving the State Board of Education, he served on the State Board of Education's Task Force on Social Studies. He also served on the Advisory Boards of the Michigan Civics Institute and Michigan School Board Leaders Association. Judge Warren is a former partner of the Detroit-based law firm Honigman Miller Schwartz and Cohn LLC, where he concentrated on business transactions, corporations, and securities work. He also served as the Executive Director for The New Common School Foundation. Following graduation from law school, Judge Warren was a clerk to Michigan Supreme Court Justice Dorothy Comstock Riley. He has received the Distinguished Public Servant Award from the Oakland County Bar Association, The Great Influence Award from the Michigan Council for the Social Studies, a Special Tribute from the Michigan Legislature, and the Distinguished Jurist Award from the Women Lawyers Bar Association of Michigan (Oakland County). Judge Warren would like to thank Sara E. Allen, J.D. candidate 2012, Thomas M. Cooley School of Law, for her valuable assistance in preparing this article for publication.

## I. INTRODUCTION

The recent major trends of Michigan constitutional law have grown stronger over the course of the *Survey* period, most specifically the lack—and even reversal—of independent Michigan constitutional law when a federal constitutional counterpart exists. With regard to Michigan constitutional provisions that have no federal parallel or are textually different in a material fashion from the federal parallel, the substantive themes involved: (i) clarification of the procedures and burdens of proof applicable to Michigan's Headlee Amendment; (ii) ensuring judicial review of administrative agency decisions; (iii) limiting the application of Michigan's ban against cruel or unusual punishment to the registration requirements of Michigan's Sex Offender Registration Act; and (iv) clarifying the right to bear arms. Michigan retreated from independent constitutional analysis in the arena of zoning and land use. Furthermore, substantive themes during the *Survey* period for Michigan jurisprudence involving federal constitutional law in which Michigan has materially parallel constitutional provisions include: (a) maintaining the separation of powers; (b) bolstering the protection against double jeopardy; (c) clarifying the right to confrontation in connection with testimony offered in nontraditional manners; (d) refining due process; (e) addressing the right to effective assistance of counsel; (f) clarifying the limits to the right against self-incrimination in civil proceedings; (g) ensuring the racial integrity of jury pools and equal protection of the laws in the exercise of peremptory challenges; (h) addressing the void for vagueness doctrine; (i) clarifying zoning and ripeness; and (j) defining the protections against unreasonable searches and seizures. Finally, in connection with federal constitutional law with no Michigan parallel, Michigan jurisprudence clarified the applicability of the Full Faith and Credit Clause of the Federal Constitution in Michigan courts.

## II. MICHIGAN CONSTITUTIONAL LAW, GENERALLY

Continuing the trend from the last *Survey* period, there was no material development of independent Michigan constitutional law during the *Survey* period when parallel federal and Michigan constitutional provisions exist. Michigan jurisprudence usually simply applies federal constitutional analysis.[1] It is commonplace that there is no pretense of separately interpreting or evaluating Michigan constitutional provisions.[2] Michigan's application of federal law and omission of any meaningful separate Michigan constitutional analysis is deep and broad, applying to areas of constitutional law as diverse as the prohibition against double jeopardy,[3] the right to confrontation,[4] the right to due process of law,[5] the right to trial by a jury composed of a fair cross section of society,[6] the right to the effective assistance of counsel,[7] ripeness,[8] the right against self-incrimination,[9] and the separation of powers.[10]

Wholesale deference to federal jurisprudence is an important substantive development in light of Michigan's rich history of constitutional analysis. Indeed, Michigan constitutional jurisprudence has historically received extensive national recognition, granting Michigan Supreme Court Justices enormous influence.[11] Even recently, the

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1. *See, e.g.*, TIG Ins. Co. v. Dept. of Treasury, 464 Mich. 548, 557, 629 N.W.2d 402 (2001).

2. *Id.*

3. People v. Szalma, 487 Mich. 708, 716, 723-726, 790 N.W.2d 662 (2010).

4. People v. Rose, 289 Mich. App. 499, 510-17, 808 N.W.2d 301 (2010), *appeal granted* 488 Mich. 1034, 293 N.W.2d 235 (2011), *vacated*, 490 Mich. 929, 805 N.W.2d 827 (2011).

5. Kyser v. Kasson Twp., 486 Mich. 514, 522-34, 786 N.W.2d 543 (2010).

6. People v. Bryant, 289 Mich. App. 260, 267-71, 796 N.W.2d 135 (2010).

7. People v. Gioglio, 292 Mich. App. 173, 807 N.W.2d 372 (2011), *rev'd*, 490 Mich. 868, 802 N.W.2d 612 (2011).

8. Hendee v. Putnam Twp., 486 Mich. 556, 569-72, 786 N.W.2d 521 (2010); *id.* at 582, 592-94 (Cavanagh, J. concurring).

9. Huntington Nat'l Bank v. Ristich, 292 Mich. App. 376, 808 N.W.2d 511 (2011).

10. *Kyser*, 486 Mich. at 535-39.

11. *See, e.g.*, David T. Hardy, *A Well-Regulated Militia: The Founding Fathers and the Origin of Gun Control in America*, 15 WM. & MARY BILL RTS. J. 1237, 1268 (2007) ("Thomas Cooley was the most renowned American legal authority of his age. Cooley became the first Dean of the University of Michigan Law School, and later sat on the Michigan Supreme Court; Roscoe Pound named him as among the top ten American judges of all time, and one scholar considers him 'the most influential legal author of the late nineteenth and early twentieth centuries.'"); William J. Fleener, Jr., *Thomas McIntyre Cooley: Michigan's Most Influential Lawyer*, 79 MICH. B.J. 208, 209 (2000) ("Cooley's influence is clear in almost every segment of the law and the legal profession. He was heavily involved in the origins of legal education, especially in Michigan. His students included Justices Day and Sutherland, and Clarence Darrow. He was the first to clearly

decisions of the court have captured substantial attention in the legal press.[12]

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set forth several legal theories that are relied on today, and he set in place the structure of administrative law that stands today."); Paul D. Carrington, *Laws as "The Common Thoughts of Men": The Law, Teaching and Judging of Thomas McIntyre Cooley*, 49 STAN. L. REV. 495, 495 (1997) ("Cooley, a close contemporary of Dean Langdell, was in his time the premier judge, law teacher, and legal scholar in America, overshadowing not only Langdell, but his somewhat younger associate, Oliver Wendell Holmes."); *Mr. Justice Cooley*, 32 AM. L. REV. 916, 918-19 (1898) (remarking upon Cooley's death that the "talent of its Members placed the Supreme Court of Michigan in the very first rank of American State Courts").

12. One commentator summarized a glowing review of the recent supreme court jurisprudence from 2002-2006:

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

Victor E. Schwartz, *A Critical Look at the Jurisprudence of the Michigan Supreme Court*, 85 MICH. B.J. 38, 38-41 (2006).

Professor Robert A. Sedler articulated a less enthusiastic view:

> In the period from 1999 to 2008, the Michigan Supreme Court overruled thirty-four decisions on ideological grounds. The Court's unrestrained overruling of its prior decisions in the period from 1999-2008 contrasts sharply with the Court's reluctance to do so in the preceding ten-year period from 1989 to 1998, before a new Court majority had been formed as the result of three appointments by former Governor John Engler in 1997 and 1999, the election of these incumbent justices in 1998-2002 and the election of Justice Corrigan in 1998.

Robert A. Sedler, *The Michigan Supreme Court, Stare Decisis, and Overruling the Overrulings*, 55 WAYNE L. REV. 1911, 1939 (2009).

The Michigan Supreme Court has been the focus of several other scholarly articles. *See, e.g.*, *The States as Laboratories of Constitutional Interpretation*, 119 YALE L.J. 1750, 1804 (2010) ("The Michigan Justices see no difference between the respective roles of federal and state judges in statutory interpretation and routinely argue aggressively that

Despite current trends, it is axiomatic that the Michigan Supreme Court has the authority to develop independent constitutional jurisprudence of the Michigan Constitution. In fact, the Michigan Supreme Court has recently recognized that "[i]n interpreting our Constitution, we are not bound by the United States Supreme Court's interpretation of the United States Constitution, even where the language is identical."[13] The court of appeals made a nearly identical observation during the *Survey* period.[14] Indeed, in light of Michigan's long standing faithfulness to more traditional modes of constitutional interpretation,[15]

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the reasons for supporting textualism in the federal courts are equally applicable in the state court context."); Justice Stephen Markman, *Originalism and Stare Decisis*, 34 HARV. J.L. & PUB. POL'Y 111, 119-22 (2011) ("Over the course of a decade and more than 30,000 cases, the Michigan Supreme Court has moved unwaveringly in the direction of conforming our case law with the language of the positive law. There have been fits and starts and junctures at which the law needed to move forward more gradually and with greater deference to precedent . . . . With each new judicial generation, there are new precedents that one camp of judges or the other finds intolerable and unacceptable. In just one year, for example, since the nonoriginalists on my court regained a majority, they have been aggressive in rejecting the precedents of the last decade, the period of originalist dominance, and in restoring the status quo ante by reinstalling their preferred decisions of the 1980s and 1990s.").

13. People v. Goldston, 470 Mich. 523, 534, 682 N.W.2d 479 (2004). *See also* Harvey v. State, Dept. of Mgmt. & Budget, Bureau of Ret. Services, 469 Mich. 1, 6, 664 N.W.2d 767 (2003); People v. Collins, 438 Mich. 8, 43, 475 N.W.2d 684 (1991) (Cavanagh, C.J., dissenting) ("Even though this Court has traditionally examined United States Supreme Court analyses when interpreting parallel provisions under our state constitution, this does not mean that this Court must follow the United States Supreme Court's majority's interpretation of the United States Constitution if that interpretation is unpersuasive on its own merits. This Court is a sovereign, independent judicial body with ultimate authority to interpret Michigan law. We should not endorse the reasoning of a majority of the justices of the United States Supreme Court unless their reasoning is intrinsically persuasive on the merits.").

14. People v. Schwartz, No. 291313, 2010 WL 4137453, at *4 (Mich. Ct. App. Oct. 21, 2010) ("The recent decisions by the Supreme Court of the United States do not implicate the proper interpretation and scope of this state's guarantee to bear arms; the courts of this state are free to interpret our own constitution without regard to the interpretation of analogous provisions of the United States Constitution.").

15. Current Chief Justice Robert P. Young, Jr. recently explained Michigan's long-standing adherence to the traditional mode of constitutional interpretation:

> The current Traditionalist majority of the Michigan Supreme Court subscribes to a view of constitutional interpretation often labeled "originalism," but known in Michigan as the rule of "common understanding." This rule has a long provenance in our state's jurisprudence dating well back into the nineteenth century--nearly to our entry into the Union as a state. Justice Thomas M. Cooley was one of the greatest jurists this country has produced. He served as the twenty-fifth Justice of the Michigan Supreme Court from 1864 to 1885. Over one hundred years ago, Justice Cooley set forth, in his highly regarded

> treatise on constitutional law, the principles of interpreting constitutional texts according to the rule of common understanding.

Justice Robert P. Young, Jr., *A Judicial Traditionalist Confronts Justice Brennan's School of Judicial Philosophy*, 33 OKLA. CITY U. L. REV. 263, 274 (2008).
Indeed, in *Comm. for Constitutional Reform v. Sec'y of State*, 425 Mich. 336, 338-44; 389 N.W.2d 430 (1986), the Michigan Supreme Court explained the long standing traditional rules of constitutional construction applicable to the Michigan Constitution:

> For over a century, this Court has followed a number of consistent, "dovetailing rules of constitutional construction[.]" "The cardinal rule of construction, concerning language, is to apply to it that meaning which it would naturally convey to the popular mind . . . ." A collateral rule "is that to clarify meaning, the circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished may be considered."
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> In *Regents*, . . . this Court explained the appropriate use of the record of debates contained in the Official Record of the Constitutional Convention of 1961 and the "Address to the People":
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> > The debates must be placed in perspective. They are individual expressions of concepts as the speakers perceive them (or make an effort to explain them). Although they are sometimes illuminating, affording a sense of direction, they are not decisive as to the intent of the general convention (or of the people) in adopting the measures.
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> Therefore, we will turn to the committee debates only in the absence of guidance in the constitutional language as well as in the "Address to the People," or when we find in the debates a recurring thread of explanation binding together the whole of a constitutional concept. The reliability of the "Address to the People" (now appearing textually as "Convention Comments") lies in the fact that it was approved by the general convention on August 1, 1962 as an explanation of the proposed constitution. The "Address" also was widely disseminated prior to adoption of the constitution by vote of the people.

Comm. for Constitutional Reform v. Sec'y of State of Mich., 395 Mich. 59-60, 235 N.W.2d 1 (1986) (emphasis removed) (citations removed).
In *Pfeiffer v. Detroit Bd. of Ed.*, this court stated:

> In determining this question, we should endeavor to place ourselves in the position of the framers of the Constitution, and ascertain what was meant at the time; for, if we are successful in doing this, we have solved the question of its meaning for all time. It could not mean one thing at the time of its adoption, and another thing today, when public sentiments have undergone a change.

Pfeiffer v. Detroit Bd. of Ed., 118 Mich. 560, 564, 77 N.W. 250 (1898) (citing McPherson v. Sec'y of State, 92 Mich. 377, 52 N.W. 469 (1892)).
The intent of the framers, however, must be used as part of the primary rule of "common understanding" described by Justice Cooley:

and the fact that the current Michigan Constitution was drafted by a Michigan convention of delegates in 1961 and ratified in 1963 by Michigan voters (as opposed to a federal convention in 1787 and ratification by the states in 1789 for the Federal Constitution), that the Michigan Constitution and Federal Constitution could have substantively different meanings (even with parallel language) should not be surprising.[16] Yet, treating them exactly the same is the dominant trend in Michigan.

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> A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.

*In re* Proposal C., 384 Mich. 390, 405, 185 N.W.2d 9 (1971) (emphasis added); *see also* THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS (6th ed. 1981) (1868).

16. Justice Cooley explained when examining the issue of double jeopardy under MICH. CONST. of 1850, art. 6, § 29:

> But it is urged that the clause is meaningless unless the effect is given to it for which the prosecution contends. In this we do not agree. It may have meaning and effect, though different than the prosecution contends for. And in seeking for its real meaning we must take into consideration the times and circumstances under which the State Constitution was formed--the general spirit of the times and the prevailing sentiments among the people. Every constitution has a history of its own which is likely to be more or less peculiar; and unless interpreted in the light of this history, is liable to be made to express purposes which were never within the minds of the people in agreeing to it. This the court must keep in mind when called upon to interpret it; for their duty is to enforce the law which the people have made, and not some other law which the words of the constitution may possibly be made to express. The present Constitution of this State was adopted in 1850, when all the tendencies of the day were in the direction of enlarging individual rights, giving new privileges, and imposing new restrictions upon the powers of government in all its departments. This is a fact of common notoriety in this State; and the tendencies referred to found expression in many of the provisions of the Constitution. Many common-law rights were enlarged; and if any were taken away, or restricted in giving new privileges, it was only incidentally done in making the general system more liberal, and, as the people believed, more just. Such a thing as narrowing the privileges of accused parties, as they existed at the common law, was not thought of; but, on the contrary, pains were taken to see that they were all enumerated and made secure. Some were added; and among other provisions adopted for that purpose was the one now under consideration.

An emblematic approach of Michigan appellate courts is to note by brief citation that parallel Michigan constitutional protection exists,[17] and then to rely exclusively upon federal law as the controlling authority.[18] Another characteristic approach is to note the parallel Michigan and federal counterparts by brief citation, and then cite entirely Michigan cases—but without any clear indication that the Michigan jurisprudence is truly independent of federal law.[19]

On some occasions, for example, in the realms of double jeopardy,[20] the right to confrontation,[21] and the right against self-incrimination,[22] the courts explicitly recognize that Michigan law simply follows federal law.

Another method is to conflate the Michigan and federal constitutional guarantees. For example, in one case the court of appeals explained that the Federal[23] and Michigan constitutions[24] both guarantee a trial by jury. In addressing the defendant's claim that the composition

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People v. Harding, 53 Mich. 481, 485-86, 19 N.W. 155 (1884). *See also* People v. Hodgers, No. 287306, 2010 WL 480998, at *5 (Mich. Ct. App. Feb. 11, 2010) (Stephens, J., dissenting) (citing People v. Collins, 438 Mich. 8, 31 n.39, 475 N.W.2d 684 (1991)) ("When determining if it is appropriate to interpret the Michigan Constitution differently than the United States Constitution, it is appropriate to consider, among other factors, the history of the state constitution and common law.").

17. *See, e.g.*, Pellegrino v. AMPCO Sys. Parking, 486 Mich. 330, 335; 785 N.W.2d 45 (2010) (citing U.S. CONST., amend. XIV, § 1 and MICH. CONST. art. 1, § 2) (finding that MICH. CT. R. 2.511(F)(2) is "altogether consistent with, and indeed premised on, our federal and state constitutions, as well as United States Supreme Court and Michigan Supreme Court precedents.").

18. *Id.* at 333-37 (citing Batson v. Kentucky, 476 U.S. 79, 89, 96-98 (1986); Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991)).

19. *See, e.g.*, People v. Roberts, 292 Mich. App. 492, 497, 808 N.W.2d 290 (2011) (per curiam) ("The 'void for vagueness' doctrine is derived from the constitutional guarantee that the state may not deprive a person of life, liberty, or property, without due process of law.") (citations omitted) (quoting State Treasurer v. Wilson, 150 Mich. App. 78, 80, 388 N.W.2d 312 (1986)) (on remand). The court then only cited Michigan authorities, some of which cited the First Amendment to the United States Constitution. *Id.* at 497-98 (citing People v. Heim, 206 Mich. App. 439, 441, 522 N.W.2d 675 (1994)).

20. *Szalma*, 487 Mich. at 716 (quoting People v. Nutt, 469 Mich. 565, 591, 677 N.W.2d 1 (2004)) ("the people of this state intended that our double jeopardy provision 'would be construed consistently with Michigan precedent and the Fifth Amendment'").

21. *Rose*, 289 Mich. App. at 513 (finding that the court of appeals had previously adopted *Maryland v. Craig*, 497 U.S. 836 (1990), as binding jurisprudence, and analyzing the case in light of *Craig*).

22. *Huntington Nat'l Bank*, 292 Mich. App. at 384 (quoting Phillips v. Deihm, 213 Mich. App. 389, 400, 541 N.W.2d 566 (1995) ("The privilege against self-incrimination under the Michigan Constitution is no more extensive than the privilege afforded by the Fifth Amendment of the United States Constitution.")).

23. *Bryant*, 289 Mich. App. at 265-66.

24. *Id.* at 265 (citing MICH. CONST. art. 1, § 14, "the Michigan Constitution guarantees the right to a trial by jury").

of his jury violated his right to a jury drawn from a "fair-cross-section" of the community,[25] the court freely cited without distinction both federal and Michigan precedent.[26] Likewise, in addressing whether a constitutional claim was ripe, in light of the fact that a party had not exhausted all of its administrative remedies, all three opinions in the Michigan Supreme Court case of *Hendee v. Putnam Township*[27] cited Michigan Supreme Court precedent, but also found that such jurisprudence is consistent with federal law[28] articulated in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.[29] In an exemplar opinion, *Kyser v. Kasson Township*,[30] the Michigan Supreme Court adopted a federal definition for Michigan's separation of powers provision.[31] In the course of its analysis, the court applied the federal definition and Michigan precedent, and referred to another Michigan constitutional provision to reverse unique Michigan constitutional law.[32] Similar conflation occurred in connection with the prohibition against unreasonable searches and seizures[33] and the right to confrontation.[34] In many cases, the Michigan Constitution was simply ignored.[35]

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25. *Id.*

26. *Id.* at 265-68 (quoting People v Hubbard, 217 Mich. App. 459, 472, 552 N.W.2d 493 (1996); Duren v. Missouri, 439 U.S. 357, 364 (1979)).

27. 486 Mich. 556, 786 N.W.2d 521 (2010).

28. *Id.* at 571-72; *id.* at 579-81 (Cavanagh, J., concurring); *id.* at 587-88 (Corrigan, J., concurring).

29. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985).

30. 486 Mich. 514, 786 N.W.2d 543 (2010).

31. *Id.* at 535 (quoting Massachusetts v. Mellon, 262 U.S. 447, 488 (1923)).

32. *Id.* at 535-36 (citing Brae Burn, Inc. v. Bloomfield Hills, 350 Mich. 425, 431, 86 N.W.2d 166 (1957); *Mellon*, 262 U.S. at 488; MICH. CONST. art. 4, § 52).

33. *Roberts*, 292 Mich. App. at 503-04 (discussing Michigan jurisprudence, but failing to articulate whether the court's analysis was based on the Fourth Amendment of the United States Constitution or a parallel provision of the Michigan Constitution); People v. Steele, 292 Mich. App. 308, 806 N.W.2d. 753 (2011) ("The stop of defendant's vehicle implicates defendant's right to be free from unreasonable searches and seizures. Both the United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures. US CONST. amend, IV; MICH. CONST. art 1, § 11." However, the court failed to explain whether there was any difference in those guarantees when addressing the particular issue before the court).

34. *See Rose*, 289 Mich. App. at 499 (beginning with a thorough analysis of federal precedent, but also reviewing Michigan jurisprudence).

35. *See, e.g.*, People v. Davenport, 488 Mich. 1054, 794 N.W.2d 616 (2011) (considering whether the trial court should conduct an evidentiary hearing "to develop the record on the issue of whether his shackling during trial prejudiced his defense"); *Rose*, 289 Mich. App. at 517-23 (undertaking a due process analysis without any reference to whether it was rooted in the Federal or Michigan Constitutions); *Roberts*, 292 Mich. App.

Another nearly perplexing method is to undertake constitutional analysis without identifying which constitutional provision is being reviewed.[36] For example, in *People v. Rose*, the court of appeals disposed of the criminal defendant's argument that he was denied the effective assistance of counsel without referencing what constitutional provision —or, for that matter, which—it was applying.[37] Instead, the court only cited Michigan cases as the basis for its reasoning and decision.[38]

The application of the Michigan Constitution versus federal law is no trivial matter, as was most vividly illustrated by the Michigan Supreme Court's reversal of firmly rooted jurisprudence establishing unique Michigan constitutional protections on behalf of owners of properties possessing natural resources. Prior to the *Survey* period, Michigan constitutional law had long established a "very serious consequences test" that was "unique to Michigan law and only applied in situations where a zoning ordinance affects a landowner's ability to extract natural resources . . . ."[39] Thus, "[i]n this context, federal and state rights are not coextensive. Rather, in Michigan the landowner is afforded more protection under the Michigan Constitution than under the federal Constitution."[40] However, in *Kyser v. Kasson Township*, the Michigan Supreme Court reversed itself and the court of appeals (which relied upon then-binding Michigan Supreme Court precedent) by finding that "the rule articulated in *Silva v. Ada Township*, which held that a zoning ordinance is unreasonable if the person challenging the ordinance can show that there are natural resources on the property and that no very serious consequences would result from extracting such resources," was "not a constitutional requirement, and, in fact, violates the constitutional separation of powers."[41] The court came to this conclusion by finding that the Michigan Constitution's Due Process Clause did not mandate the "no serious consequences test," and the Michigan Supreme Court grafted that test onto the Michigan Constitution over the course of decades of

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at 503-05 (rejecting the defendant's challenge to the admission of certain statements under the Fifth Amendment of the United States Constitution without mentioning the parallel Michigan constitutional provision); People v. Aspy, 292 Mich. App. 36, 808 N.W.2d 569 (2011) (addressing the defendant's due process argument solely under federal authority).

36. *Aspey*, 292 Mich. App. at 45-46.

37. *Rose*, 289 Mich. App. at 527-28.

38. *Id.*

39. Velting v. Cascade Charter Twp., No. 283638, 2009 WL 3013202, at *7 (Mich. Ct. App. Sept. 22, 2009).

40. *Id.* at *11.

41. *Kyser*, 486 Mich. at 577 (internal quotation marks omitted).

judicial construction.[42] The court arrived at this searching inquiry, however, with no reference to the traditional modes of constitutional construction previously embraced by the court over the ages.[43] Instead, the court based the analysis in general principles articulated in Michigan due process jurisprudence.[44]

Whether the lack of independent development of Michigan constitutional law can be fairly attributable to the failure of parties raising the issue, the dispositive role of federal law (i.e., that analysis of Michigan law was unnecessary, redundant, or rendered moot), lack of attention or interest by the courts, or the inapplicability of the Michigan Constitution, is unknown from the face of the opinions. They are silent regarding the issue.

## III. INDEPENDENT MICHIGAN CONSTITUTIONAL JURISPRUDENCE

Michigan courts rendered several significant cases based entirely on the Michigan Constitution during the *Survey* period. One involved the structure of state government (i.e., the prohibition on unfunded mandates and the funding requirements between the state and local governments),[45] another involved judicial review of administrative agencies,[46] and yet another involved individual rights (in particular, the bar against cruel or unusual punishment).[47] A fourth case examined the Michigan Constitution's protection of the right to bear arms in contrast to the somewhat parallel federal right.[48]

### *A. The Headlee Amendment*

In *Adair v. State of Michigan*, 456 school districts and a taxpayer from each district brought suit against the State of Michigan.[49] The suit claimed that certain state mandated school district reporting requirements violated article 9, section 29 of the Michigan Constitution (commonly referred to as the "Headlee Amendment") because they were not

42. *Id.* at 528-29.

43. *See supra* text accompanying note 17; *see also supra* text accompanying note 18.

44. *Kyser*, 486 Mich. at 520, 528-29, 535-39.

45. Adair v. State, 486 Mich. 468, 785 N.W.2d 119 (2010).

46. Midland Cogeneration Venture Ltd. P'ship v. Naftaly, 489 Mich. 83, 803 N.W.2d 674 (2011).

47. *In re* TD, 292 Mich. App. 678, -- N.W.2d -- (2011).

48. People v. Schwartz, No. 291313, 2010 WL 4137453 (Mich. Ct. App. Oct. 21, 2010).

49. *Adair*, 486 Mich. at 474-75.

specifically funded by the state.[50] The Michigan Supreme Court had previously affirmed the dismissal of twenty of twenty-one claims of violation of the Headlee Amendment brought by the plaintiffs.[51] The court remanded the sole remaining claim to the court of appeals, which in turn submitted the matter to a master (a trial court) to hear testimony about the evidentiary basis of the suit.[52] With some modifications, the court of appeals adopted the factual and legal findings of the master, which found that the state had violated the Headlee Amendment on the remaining claim.[53]

The Headlee Amendment was adopted by the people of the State of Michigan as the result of statewide initiative enacted in 1978.[54] Along with several other provisions, the Headlee Amendment added article 9, section 29 to the 1963 Michigan Constitution (commonly referred to as the "'prohibition on unfunded mandates' or POUM provision"),[55] which provides:

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs. The provision of this section shall not apply to costs incurred pursuant to Article VI, Section 18.

The plaintiffs argued that Governor Jennifer Granholm's adoption of Executive Order No. 2000-9 violated the POUM provision; the Order "established the Center for Educational Performance and Information (CEPI) . . . . Along with later legislation, it required school districts to actively participate in collecting, maintaining, and reporting various types of data."[56] In addition, state law[57] provided that school districts would only receive state funding if they "furnish[ed] all data that the

50. *Id.* at 474.
51. *Id.* at 493.
52. *Id.* at 475-76.
53. *Id.* at 475-76.
54. *Id.* at 473.
55. *Adair*, 486 Mich. at 473.
56. *Id.*
57. MICH. COMP. LAWS ANN. § 388.1752 (West 2006).

state considers necessary for the administration of the State School Aid Act."[58]

Before beginning its analysis, the Michigan Supreme Court reaffirmed certain long-standing rules of constitutional construction:

> We have established that "[t]he primary and fundamental rule of constitutional or statutory construction is that the Court's duty is to ascertain the purpose and intent as expressed in the constitutional or legislative provision in question." When interpreting constitutional provisions, we are mindful that the interpretation given the provision should be "'the sense most obvious to the common understanding'" and one that "'reasonable minds, the great mass of the people themselves, would give it.'" "[T]he intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed . . . ."[59]

Although the court noted these rules of construction at the outset of its analysis, it did not expressly incorporate them vigorously in its decision. Instead, the court explained that the POUM provision clearly provides that "before the state imposes a new or increased activity or service on a local unit of government, it must appropriate funds to cover any necessary increased costs."[60] A key issue facing the court, however, was "who bears the burden of showing that the new or increased activity or service resulted in necessary increased costs."[61] The court settled this question by determining that:

> [T]o establish a violation of the POUM provision, a plaintiff must show that the state required a new activity or service or an increase in the level of activities or services. If no state appropriation was made to cover the increased burden on local government, the plaintiff need not show the amount of increased costs. It is then the state's burden to demonstrate that no state funding was required because the requirement did not actually increase costs or the increased costs were not necessary.[62]

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58. *Adair*, 486 Mich. at 474 (footnote omitted).
59. *Id.* at 477-78 (alterations in original) (footnotes omitted).
60. *Id.* at 479.
61. *Id.*
62. *Id.* at 479 (footnote omitted).

Affirming the court of appeals, the supreme court adopted the Special Master's finding that "[a]mple testimony established that both the amount of information collected and the manner in which the information had to be reported after CEPI was significantly greater and more intensive than before."[63] Likewise, the supreme court accepted the special master's determination that no evidence existed to show that the state appropriated money "to fund plaintiff school districts' implementation of the reporting requirements . . . ."[64] Thus, the court reasoned, the plaintiffs were "entitled to a declaratory judgment unless defendants demonstrate that plaintiff school districts' costs were not increased as a result of the requirements or that the costs incurred were not necessary."[65]

The supreme court also found that the unfunded mandates created "increased costs involv[ing] hiring additional personnel, reassigning existing staff to help meet the CEPI requirements, and purchasing computer software to enable compliance with them."[66] Districts were also forced to incur overtime, divert manpower, and were unable to complete other tasks because of compliance with the reporting requirements.[67]

The supreme court rejected the defendants' argument (which was embraced by the dissent) that the plaintiffs must show that they incurred additional costs as a result of the increased activities or services imposed on them.[68] To the contrary, the court held that once a plaintiff shows that the state has imposed unfunded mandates that incur additional activities or services, "[t]he burden then shifts to the state to show: (1) that it is not required to pay for it because the new or increased level of activity did not result in increased costs or (2) that those costs were not 'necessary' under" the enabling legislation set forth in MCL section 21.233(6).[69]

The court further noted that the enabling legislation of the POUM provides that a "'necessary cost'" is the "'net costs of an activity or service provided by a local unit of government.'"[70] "'[N]et costs'" the court explained, is defined as "'the actual cost to the state if the state were to provide the activity or service mandated as a state requirement . .

63. *Id.* at 481.
64. *Adair*, 486 Mich. at 482.
65. *Id.* at 483.
66. *Id.* at 483.
67. *Id.* at 483-85.
68. *Id.* at 486.
69. *Id.* at 487.
70. *Adair*, 486 Mich. at 487 (quoting MICH. COMP. LAWS ANN. § 21.233 (West 2006)).

. .'"[71] Interestingly, this means that the test is how much it would cost the state—not the districts—to implement any mandated activity (even though the mandate is on the districts to implement the requirement).[72] Although the enabling legislation exempts from the POUM any de minimis costs (defined as a net cost under $300),[73] the court noted that there was "no temporal limitation" to that exemption, and the master's conclusions[74] and supporting evidence showed that CEPI requirements would be in excess of such a de minimis amount.[75]

Because the plaintiffs in the case were only seeking a declaratory judgment, the court found that the plaintiffs were not required to prove the specific amount of damages.[76] Moreover, the court found that to require the plaintiffs to prove an exact amount of damages would turn topsy-turvy the requirements of the Headlee Amendment, which is a requirement on the state to fund mandates, not a requirement on local units of government to calculate the state's cost to fund them.[77] Indeed, the court reasoned that Headlee cases should be decided promptly—in fact, before forcing a local unit of government to comply with an unfunded mandate.[78] Accordingly, "[i]t would be nonsensical" and "contrary to the purposes" of the Headlee Amendment to require the local units to determine the costs of implementation.[79]

The final issue addressed by the court was whether the plaintiffs were entitled to attorney fees.[80] Although the plaintiffs brought twenty-one claims, they only prevailed on one of them: the POUM claim involving CEPI.[81] The court explained that the Michigan Constitution provides that

> Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit.[82]

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71. *Id.* (quoting MICH. COMP. LAWS ANN. § 21.233).
72. *Id.* at 487.
73. MICH. COMP. LAWS ANN. § 21.232(4) (West 2006).
74. *Adair*, 486 Mich. at 487.
75. *Id.* at 487-88.
76. *Id.* at 488.
77. *Id.* at 488-89.
78. *Id.*
79. *Id.* at 491.
80. *Adair*, 486 Mich. at 491-94.
81. *Id.* at 493.
82. MICH. CONST. art. 9, § 32.

Noting that "suit" and "sustained" were not defined in the Michigan Constitution or its enabling legislation, the court reasoned that, "we again apply the rule of common understanding to ascertain the purpose and intent of Const. 1963, art. 9, § 32."[83] Reviewing the definitions of these terms in *Black's Law Dictionary* and a lay dictionary, the court determined that, despite the dismissal of other claims, the declaratory action was a "suit" that was "sustained."[84] Reversing the court of appeal's denial of all attorneys fees, the supreme court awarded attorneys fees, but limited them to those "fees incurred during the litigation related to the recordkeeping claim only."[85]

Justice Markman, joined by two colleagues, filed a thorough, comprehensive, and vigorous dissent, arguing that the plaintiffs should bear the burden of proof at all times, and "that the plaintiffs failed to establish a POUM violation because they failed to submit proof of specific 'necessary increased costs' through the reallocation of funds or out-of-pocket expenses required by the new recordkeeping requirements."[86] Justice Markman also concluded that "[t]here are significant practical consequences to the majority's interpretation that will over time transform the Headlee Amendment from a provision limiting public expenditures into a provision facilitating such expenditures."[87]

*B. Judicial Review of Administrative Agency Decisions*

At issue in *Midland Cogeneration Venture Limited Partnership v. Naftaly* was whether the Michigan Legislature had the authority to prohibit appeals to the circuit court from the State Tax Commission (STC) regarding property classifications assigned to real property.[88] At the heart of this controversy was the unique Michigan constitutional provision that provides judicial review from administrative actions set forth in article 6, section 28 of the Michigan Constitution:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution

83. *Adair*, 486 Mich. at 492.
84. *Id.* at 493.
85. *Id.* at 493-94.
86. *Id.* at 495 (Markman, J., dissenting) (footnote omitted).
87. *Id.* at 495-96.
88. Midland Cogeneration Venture Ltd. P'ship v. Naftaly, 489 Mich. 83, 803 N.W.2d 674 (2011).

> or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law . . . .[89]

The last sentence of MCL section 211.34c(6) barred circuit courts from hearing appeals from the STC on property classifications.[90] Striking down the legislation at issue, the Michigan Supreme Court unanimously held that "circuit courts have subject matter jurisdiction over appeals" from the STC regarding property classifications.[91] More specifically, the court found that the Michigan Legislature's attempt to prohibit appeals was unconstitutional because decisions of the STC regarding property classifications "are quasi-judicial and affect property rights"[92] and that article 6, section 28 of the Michigan Constitution "guarantees judicial review" of those decisions.[93]

Recognizing that the court "presume[s] that statutes are constitutional as written," the supreme court explained that courts "exercise the power to declare a law unconstitutional 'with extreme caution.'"[94] After quoting the applicable constitutional text, the court explained that "Article 6, § 28 is not an absolute guarantee of judicial review of every administrative decision."[95] To the contrary, to be subject to judicial review, "(1) the administrative decision must be a 'final decision' of an administrative agency, (2) the agency must have acted in a 'judicial or quasi-judicial' capacity, and (3) the decision must affect private rights or licenses."[96]

Noting that the first factor was conceded,[97] the court determined that "[t]he dispositive question" involved the second factor, i.e., whether the STC property classification decisions "are quasi-judicial in nature."[98] Citing Michigan precedent, the court explained that "quasi-judicial" is a "broadly" used term that applies to administrative bodies that exercise

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89. MICH. CONST. art. 6, § 28.

90. *Naftaly*, 489 Mich. at 87; *see also* MICH. COMP. LAWS ANN. § 211.34c(6) (West 2006).

91. *Naftaly*, 489 Mich. at 87.

92. *Id.*

93. *Id.*

94. *Id.* at 90 (quoting Thayer v. Dep't of Agric., 323 Mich. 403, 410, 35 N.W.2d 360 (1949) (citations and quotation marks omitted) (footnote omitted)).

95. *Id.* at 91.

96. *Id.*

97. *Naftaly*, 489 Mich. at 91.

98. *Id.*

"'power . . . to ascertain facts and make orders founded thereon . . . .'"[99] The court also approvingly quoted a Michigan Court of Appeals decision quoting *Black's Law Dictionary*, which defined "quasi-judicial" to include "'the action, discretion, etc., of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature.'"[100] Because a property classification of a particular parcel of property "resolves disputed factual claims on a case-by-case basis" that "entails an evaluation of evidence and dispute resolution," the court found such a determination is a "quasi-judicial function."[101]

Turning to the third factor, the court held "that taxpayers have a private right to ensure that their property is taxed the same as similarly situated property."[102] In particular, the supreme court again turned to *Black's Law Dictionary* to define "a 'private right' as 'a personal right, as opposed to a right of the public or the state,'" and "'right' as '[t]he interest, claim, or ownership that one has in tangible or intangible property.'"[103] After all, "[a]n erroneous interpretation of the statutory definitions could impermissibly increase their tax burden and thus affect their private right. Hence, the STC classification decisions in question affect private rights."[104]

Recognizing that article VI, section 28 provides for judicial review "as provided by law," the supreme court addressed the STC's argument that the abolition of an appeal was altogether permissible so long as it was "provided by law."[105] Rejecting that argument as proving too much, the court held that the legislature has the authority "only to prescribe the details of that review. For example, the Legislature can prescribe time frames for filing an appeal, dictate whether a party may obtain a stay pending appeal, and set forth the controlling standard of review."[106] Because "[t]here is a significant difference between dictating the mechanics of an appeal and preventing an appeal altogether," the legislature overstepped its authority by barring any judicial review

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95. *Id.* (quoting People *ex rel.* Clardy v. Balch, 268 Mich. 196, 255 N.W. 762 (1934)).

100. *Id.* at 91-92 (quoting Pletz v. Sec'y of State, 125 Mich. App. 335, 352, 336 N.W.2d 789 (1983) (quoting BLACK'S LAW DICTIONARY 1121 (4th ed. 1983)).

101. *Id.* at 92.

102. *Id.* at 93 (footnotes omitted).

103. *Naftaly*, 489 Mich. at 93 (quoting BLACK'S LAW DICTIONARY 1347-48 (8th ed. 2004)).

104. *Id.*

105. *Id.* at 94.

106. *Id.* (footnote omitted).

whatsoever.[107] To hold that the "as provided by law" language allowed state law to bar any form of judicial review would mean that the "Legislature could render the entire provision mere surplusage."[108] Because there was no "alternative mechanism" to allow review of the STC decisions, the "last sentence of MCL 211.34c(6) violates article 6, section 28."[109]

Finally, the court held that severance of the last sentence (as opposed to striking the entire statutory provision) was the appropriate remedy, in light of the fact that the other sentences of MCL section 211.34c(6) were "capable of functioning" without the offending sentence.[110] With the unconstitutional sentence struck down, the court found that the default rule established by the Revised Judicature Act[111] applied—which provides for circuit court review of administrative agency actions when it "has not otherwise been provided by law."[112] Thus, the circuit court was vested with jurisdiction to hear the case.[113]

Unlike *Adair v. State*,[114] the court in *Naftaly* did not refer to any rules of constitutional construction. However, consistent with *Adair*, the Court did refer to *Black's Law Dictionary* to determine the meaning of the Michigan Constitution.[115]

### *C. Cruel or Unusual Punishment*

One area of independent Michigan constitutional law involving individual liberty came in the context of Michigan's constitutional guarantee against "cruel or unusual punishment."[116] However, this independence from federal law is rooted in the differing texts of the Michigan Constitution and the Federal Constitution. As the Michigan Court of Appeals previously explained, "[t]he United States Constitution prohibits 'cruel *and* usual' punishment, whereas the Michigan Constitution prohibits 'cruel *or* unusual' punishment."[117]

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107. *Id.* at 94.
108. *Id.* at 95.
109. *Naftaly*, 489 Mich. at 95.
110. *Id.* at 99.
111. MICH. COMP. LAWS ANN. § 600.631 (West 2006).
112. *Naftaly*, 489 Mich. at 97.
113. *Id.*
114. 486 Mich. at 491-92.
115. *See id.* at 493; *Naftaly*, 489 Mich. at 93.
116. MICH. CONST. art 1, § 16.
117. People v. Correa, No. 290271, 2010 WL 1979297, at *9 (Mich. Ct. App. May 18, 2010) (quoting U.S. CONST., amend. VIII (emphasis added); MICH. CONST. 1963, art. 1, § 16 (emphasis added)).

In an evolving arena addressing whether requiring particular convicted criminal defendants and adjudicated juvenile respondents to register as sex offenders pursuant to Michigan's Sex Offenders Registration Act (SORA)[118] constitutes cruel *or* unusual punishment under the Michigan Constitution, the court of appeals in *In re TD*[119] determined that requiring a juvenile respondent who was found to have committed criminal sexual conduct (CSC II)[120] when he was 15 years old did not constitute cruel or unusual punishment.[121] The respondent was adjudicated as a juvenile offender, placed on SORA, and successfully completed probation.[122] He was ineligible under the applicable statute to be removed from the SORA mandate, but the circuit court found that SORA's continued application constituted impermissible cruel or unusual punishment.[123]

In addressing this issue, the Michigan Court of Appeals reasoned that "it must first determine whether the challenged government action is actually a form of punishment."[124] The court found that evaluation of this issue "'requires consideration of the totality of circumstances, and particularly (1) legislative intent, (2) design of the legislation, (3) historical treatment of analogous measures, and (4) effects of the legislation.'"[125] After an extensive review of several prior cases involving the constitutionality of the SORA requirements, the court determined that the legislature's intent in this case "weighs in favor of finding the registration requirements to be nonpunitive because the Legislature specifically set forth a nonpunitive intent in the statute."[126] Distinguishing the recent prior case of *People v. Dipiazza*,[127] which found that registration was cruel or unusual punishment to a juvenile, the *In re TD* court found that the SORA "notification scheme is regulatory and remedial and does not cause a punitive release of previously sealed information."[128] Likewise, the "historical treatment of analogous

118. MICH. COMP. LAWS ANN. § 28.721 (West 2006).

119. *In re* TD, 292 Mich. App. 678, -- N.W.2d -- (2011).

120. MICH. COMP. LAWS ANN. § 750.520c(1)(d)(ii) (West 2006).

121. *In re TD*, 292 Mich. App. at 691.

122. *Id.* at 680-81.

123. *Id.* at 682.

124. *Id.*

125. *Id.* at 686 (quoting People v. Dipiazza, 286 Mich. App. 137, 147, 778 N.W.2d 264 (2009)).

126. *Id.* at 687.

127. 286 Mich. App. 137.

128. *In re TD*, 292 Mich. App. at 688 (footnote omitted). In *Dipiazza,* the defendant's conviction was otherwise nonpublic due to his being sentenced under the Holmes Youthful Trainee Act (HYTA) pursuant to MICH. COMP. LAWS ANN. § 762.11-.16 (West 2000). *See Dipiazza*, 286 Mich. App. at 140.

measures" factor "weighs in favor of finding that the SORA's registration requirements are not punishment because they are not equivalent to historical practices such as branding, shaming, and banishment."[129] With regard to the last factor, the court acknowledged that a registrant could experience negative social consequences such as "harassment, assault, job loss, eviction, and dislocation," but determined that such consequences are only indirectly caused by public registration; rather, they flow from actions by the public.[130] Thus, any negative social "consequences flowing from registration are not punishment in the present case."[131] In the course of its opinion, the court found that "the majority of the binding precedent holds that the SORA does not cause punishment, and the *Dipiazza* Court's holding to the contrary appears confined to the specific facts of that case."[132]

The court quickly dispensed with the defendant's remaining constitutional arguments. Specifically, it rejected arguments that the law (1) violated separation of powers,[133] (2) had no rational relationship to any legitimate governmental interest,[134] (3) was arbitrary and capricious,[135] and (4) violative of public policy.[136]

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129. *In re TD*, 292 Mich. App. at 690 (citing *In re* Ayres, 239 Mich. App. 8, 15, 608 N.W.2d 132 (1999)).

130. *Id.* at 690-91 (citing *Ayres*, 239 Mich. App. at 16).

131. *Id.* at 691.

132. *Id.* In *Dipiazza*, (1) the offense occurred when the defendant was eighteen, (2) there was a consensual sexual relationship, (3) the victim was nearly fifteen years old, (4) the defendant pleaded guilty to attempted third-degree criminal sexual conduct, (5) the defendant was sentenced under HYTA, (6) the defendant and the victim eventually married, (7) the defendant and victim subsequently had a child together, and (8) the defendant was unable to obtain work because of the registration requirement under the SORA, thereby again victimizing the victim and their child. *Dipiazza*, 286 Mich. App. at 137.

133. *In re TD*, 292 Mich. App. at 691-92.

134. *Id.* at 692. Without identifying the origin of the challenge (due process, equal protection, or some other constitutional provision; federal or state), the court rejected a challenge that the "SORA's registration requirements do not bear a rational relationship to any legitimate governmental interest" because "[i]t is rational to require registration of sex offenders to enable the public to protect themselves, even if the risk of recidivism could be considered low in some cases." *Id.* Citing only Michigan jurisprudence, the court explained that "[r]ational-basis review 'tests only whether the legislation is reasonably related to a legitimate governmental purpose.'" *Id.* (quoting TIG Ins. Co., Inc. v. Dep't of Treasury, 464 Mich. 548, 557, 629 N.W.2d 402 (2001)). The court also added that "a statute is constitutional 'if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable.'" *Id.* (quoting *TIG*, 464 Mich. at 557 (internal citation and quotation marks omitted)). The court ruled that the SORA met these minimal requirements. *Id.*

135. *Id.* at 692-93. The court determined that an argument that the SORA is "arbitrary and capricious" was abandoned for lack of citation to authorities and, in any event, "the

Judge Krause concurred with the majority's holding that the SORA was not punishment, but wrote separately "because I believe the trial court expressed very well-founded concerns that merit further discussion."[137] In particular, Judge Krause highlighted concerns about the public disclosure of SORA registration in connection with juvenile cases, concluding that the SORA's "efficacy is drastically impaired by the registration of people known not to be likely predators and of juvenile offenders who were not deemed sufficiently dangerous to warrant even an attempt to have them waived to an adult court; the latter undermines the purposes of our juvenile justice system . . . ."[138] Judge Krause ended her opinion with a plea to the legislature to revise the SORA to allow trial courts "discretion to deregister or decline to register people who can be shown to be non-dangerous."[139]

### *D. The Right to Bear Arms*

Although an unpublished decision with no precedential value,[140] in light of recent United States Supreme Court jurisprudence,[141] the defendant in *People v Schwartz*[142] raised an important challenge to his conviction as a felon in possession of a firearm.[143] Specifically, the defendant claimed his conviction violated the right to bear arms under the Second Amendment to the United States Constitution and Section 6 of the Michigan Declaration of Rights.[144] Because the issue was not raised at trial, the court of appeals reviewed the "claim of constitutional error for plain error affecting the defendant's substantial rights."[145] The

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Legislature made reasoned policy decisions in crafting the law, and we find nothing arbitrary or capricious in its wording." *Id.* at 693.

136. *Id.* The court found that the arguments made by amici curiae that the SORA should be declared unconstitutional as applied to the respondent as violating various public polices, because "[p]olicy decisions . . . are for the Legislature." *Id.* (citing *In re* Juvenile Commitment Costs, 240 Mich. App. 420, 437, 613 N.W.2d 348 (2000)).

137. *Id.* at 693 (Krause, J., concurring).

138. *Id.* at 697-98 (Krause, J., concurring).

139. *In re TD*, 292 Mich. App. at 698 (Krause, J., concurring).

140. MICH. CT. R. 7.215(C)(1).

141. *See* City of D.C. v. Heller, 554 U.S. 570 (2008) (finding that the Second Amendment to the United States Constitution protects an individual's right to bear arms (as opposed to a militia-grounded right)); McDonald v. Chicago, 130 S. Ct. 3020 (2010) (incorporating the Second Amendment into the Fourteenth Amendment of the United States Constitution, thereby applying the Second Amendment against the states).

142. No. 291303, 2010 WL 4137453 (Mich. Ct. App. Oct. 21, 2010).

143. *See* MICH. COMP. LAWS ANN. § 750.224f (West 2006).

144. MICH. CONST. art. 1, § 6.

145. *Schwartz*, 2010 WL 4137453, at *2 (citing People v. Cairnes, 460 Mich. 750, 764, 597 N.W.2d 130 (1999)).

court explained that, "[i]n order to avoid forfeiture of an unpreserved claim of error, the defendant must show that there was an error that was plain—that is, clear or obvious—and that the error affected his or her substantial rights."[146] Because "[a]t the time of [the defendant's] offense and conviction for being a felon-in-possession, it was well-settled that the right to bear arms under Michigan's Constitution did not guarantee felons the right to possess a firearm," and "it was commonly understood that the second amendment to the United States Constitution did not apply to the States," any error could not have been "clear or obvious."[147]

Although the foregoing ruling could have concluded the decision, the court nevertheless undertook a separate review "on the merits . . . ."[148] The court began its analysis of the Michigan-based claim by quoting article 1, section 6 of the Michigan Constitution, that "'[e]very person has a right to keep and bear arms for the defense of himself and for the state.'"[149] Explaining that prior jurisprudence held that this right is not absolute, and that "the Legislature's power to regulate this right includes the power to preclude certain types of criminal offenders from possessing firearms," the court simply rejected the defendant's argument.[150]

Although the Michigan provision appears stronger than the parallel federal provision,[151] the court ignored the textual differences. However, the court explained that

> The recent decisions by the Supreme Court of the United States do not implicate the proper interpretation and scope of this state's guarantee of the right to bear arms; the courts of this state are free to interpret our own constitution without regard to the interpretation of analogous provisions of the United States Constitution."[152]

Thus, the court was "bound to follow" Michigan precedent until "our Supreme Court reexamines the proper scope of this state's guarantee of the right to bear arms . . . ."[153] If the right to bear arms is more broadly protected in the Federal Constitution, the court would necessarily need to follow that interpretation, but the court "would not be enforcing a right

146. *Id.* at *2 (citation omitted).
147. *Id.* at *3 (citations omitted).
148. *Id.*
149. *Id.*
150. *Id.* (citations omitted).
151. U.S. CONST. amend. II ("A well regulated militia being necessary to the security of a free State, the right of the People to keep and bear arms shall not be infringed.").
152. *Schwartz*, 2010 WL 4137453, at *4.
153. *Id.*

guaranteed under our constitution—we would be enforcing a right guaranteed under the federal constitution."[154] This analysis was unnecessary, however, because the United States Supreme Court had definitely rejected the defendant's position in connection with the Second Amendment of the Federal Constitution.[155] None of this analysis employed any rules of constitutional construction.

Judge Murphy concurred, finding that the court majority needlessly examined the merits of the defendant's right to bear arms argument when it clearly was not plain error.[156]

## IV. RETREAT FROM INDEPENDENT MICHIGAN CONSTITUTIONAL ANALYSIS

Addressing one major arena, the Michigan Supreme Court retreated from independent Michigan constitutional analysis in *Kyser v. Kasson Township*.[157] *Kyser* found that a rule established in *Silva v. Ada Township*,[158] "which held that a zoning ordinance is unreasonable if the person challenging the ordinance can show that there are natural resources on the property and that 'no very serious consequences' would result from extracting such resources" was "not a constitutional requirement . . . ."[159] The court also found that "the rule is superseded by the exclusionary zoning provision, MCL 125.297a of the TZA, now MCL 125.3207 of the Zoning Enabling Act (ZEA)."[160]

Just the year before, the court of appeals summarized the long-standing state of the law by explaining that the "very serious consequences test" was "unique to Michigan law and only applied in situations where a zoning ordinance affects a landowner's ability to extract natural resources . . . ."[161] Under this test, "such zoning regulations are invalid, and therefore unconstitutional, unless very serious consequences would result from permitting the excavation of those natural resources."[162] Thus, "[i]n this context, federal and state rights are not coextensive. Rather, in Michigan the landowner is afforded more protection under the Michigan Constitution than under the federal

154. *Id.* at *8 n.2.
155. *Id.* at *4-5.
156. *Id.* at *8 (Murphy, J., concurring).
157. 486 Mich. 514, 786 N.W.2d 543 (2010).
158. 416 Mich. 153, 330 N.W.2d 663 (2010).
159. *Kyser*, 486 Mich. at 517.
160. *Id.*
161. Velting v. Cascade Charter Twp., No. 283638, 2009 WL 3013202, at *7 (Mich. Ct. App. Sept. 22, 2009).
162. *Id.* at *11 (citation omitted).

constitution."[163] Because this was so, in a case implicating the very serious consequences test, a Michigan court would first examine the propriety of the zoning regulation under the Michigan Constitution, and could determine that, because the zoning ordinance survived the more exacting Michigan test, no independent federal analysis would be necessary.[164]

In reversing this line of unique Michigan constitutional law, the supreme court in *Kyser* explained that "[z]oning constitutes a legislative function" that is embedded in the state's police power and, therefore, the court "does not sit as a superzoning commission."[165] Nevertheless, "the local power to zone is not absolute. When the government exercises its police power in a way that affects individual constitutional rights, a citizen is entitled to due process of law."[166] After quoting the Due Process Clause of article I, section 17 of the Michigan Constitution,[167] the court further explained that "'[t]he test to determine whether legislation enacted pursuant to the police power comports with due process is whether the legislation bears a reasonable relation to a permissible legislative objective.'"[168] Because zoning ordinances are "presumed to be reasonable . . . . the burden is upon the person challenging such an ordinance to overcome this presumption by proving that there is no reasonable governmental interest being advanced by the zoning ordinance."[169] The court clarified that, "[u]nder this standard, a zoning ordinance will be struck down only if it constitutes 'an arbitrary fiat, a whimsical *ipse dixit*, and . . . there is no room for a legitimate difference of opinion concerning its [un]reasonableness.'"[170]

Rejecting the argument that the "no very serious consequences" test was "simply a variation upon the 'reasonableness'" test or "simply a

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163. *Id.* at *7.

164. *Id.* at *11 ("If there is no constitutional violation under the heightened standard of the no very serious consequences test, then it necessarily follows that there can be no violation under the lesser standard of the rational basis test. In other words, if the township's decision in this matter passed constitutional muster under the no very serious consequences test, then the township's action also necessarily met the less stringent standard of the rational basis test. That is the case in the instant matter.").

165. *Kyser*, 486 Mich. at 520 (citations and internal quotations omitted).

166. *Id.* at 521 (citing Brae Burn Inc. v. Bloomfield Hills, 350 Mich. 425, 437, 86 N.W.2d 166 (1957)).

167. This provision states that "[n]o 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." MICH. CONST. art. I, § 17.

168. *Kyser*, 486 Mich. at 521 (quoting Shavers v. Attorney General, 402 Mich. 554, 612, 267 N.W.2d 72 (1978)).

169. *Id.* at 521 (citing *Brae Burn*, 350 Mich. at 432).

170. *Id.* at 521-22 (alterations in original) (quoting *Brae Burn*, 350 Mich. at 432).

'species' of the reasonableness standard,"[171] the court traced the origin and development of the test in Michigan jurisprudence over the decades,[172] and found that it was "not based on traditional due process considerations."[173] Although the test began "as but a single factor in determining whether a zoning ordinance that regulates the extraction of natural resources is reasonable,"[174] it was "transformed" over the decades into a free standing rule, un-rooted from any constitutional moorings.[175] Because the test was not required by due process, its adoption by the Michigan Supreme Court violated the separation of powers by usurping the role of the legislature;[176] and it was superseded by the legislature when the legislature adopted the exclusionary zoning provision established in MCL section 125.297a.[177]

Chief Justice Kelly dissented, finding that the "no very serious consequences test" is rooted in constitutional due process.[178] She took the majority to task, finding that,

> The majority opinion dismisses over 80 years of precedent holding that minerals on property implicate unique due process concerns . . . . In so doing, it ignores the constitutional underpinnings of the test . . . and the fact that the Due Process Clause is the bedrock upon which the test was built. Notably, the majority opinion does not adequately consider whether the doctrine of stare decisis warrants overruling the test."[179]

Chief Justice Kelly also disagreed with the majority's holding that the ZEA superseded the "no very serious consequences test.[180]

## V. CONSTITUTIONAL ANALYSIS INVOLVING THE MICHIGAN CONSTITUTION AND PARALLEL PROVISIONS OF THE FEDERAL CONSTITUTION WITH NO DISCERNABLE DIFFERENCE

Michigan courts have faced a wide array of cases involving constitutional analysis in which both the Michigan and Federal

171. *Id.* at 533.
172. *Id.* at 527-33.
173. *Id.* at 529.
174. *Kyser*, 486 Mich. at 528.
175. *Id.* at 528-29.
176. *Id.* at 534-38.
177. *Id.* at 540.
178. *Id.* at 544 (Kelly, C.J., dissenting).
179. *Id.* at 544-45 (Kelly, C.J., dissenting).
180. *Kyser*, 486 Mich. at 552-53 (2010) (Kelly, C.J., dissenting).

Constitutions were addressed because of parallel provisions resulting in no discernable difference in the constitutional analysis. These cases dealt with double jeopardy,[181] confrontation,[182] due process,[183] the effective assistance of counsel,[184] jury selection and composition,[185] the right to bear arms,[186] zoning and ripeness,[187] the right against self-incrimination,[188] separation of powers,[189] the void for vagueness doctrine,[190] and search and seizure.[191]

*A. Separation of Powers*

In *Kyser v. Kasson Township*,[192] the Michigan Supreme Court reversed itself by finding that a rule established in *Silva v. Ada Township*,[193] "which held that a zoning ordinance is unreasonable if the person challenging the ordinance can show that there are natural resources on the property and that 'no very serious consequences' would result from extracting such resources" was "not a constitutional requirement, and, in fact, violates the constitutional separation of powers."[194] This most interesting case, therefore, addressed the constitutional provisions regarding due process and separation of powers.

Prior to engaging in its separation of powers analysis, the court held that the "no serious consequences rule" previously adopted by the court was not required by the Michigan Constitution's guarantee of due process of law, but instead was a judicially created rule with no constitutional grounding.[195] Although the court began its separation of powers analysis by quoting the separation of powers provision of the

181. People v. Szalma, 487 Mich. 708, 790 N.W.2d 662 (2010).

182. People v. Rose, 289 Mich. App. 499, 506, 808 N.W.2d 301 (2010).

183. *Id.* at 509-12.

184. *Id.* at 515-17; *see also* People v. Gioglio, 292 Mich. App. 173, 807 N.W.2d 372 (2011), *rev'd*, 490 Mich. 868 (2011).

185. People v. Bryant, 289 Mich. App. 260, 796 N.W.2d 135 (2010), *appeal granted*, 489 Mich. 924, 797 N.W.2d 135 (2011).

186. People v. Schwartz, No. 29313, 2010 WL 4137453, at *2 (Mich. Ct. App. Oct. 21, 2010) (citing People v. Cairnes, 460 Mich. 750, 597 N.W.2d 130 (1999)).

187. Hendee v. Putnam Twp., 486 Mich. 556, 786 N.W.2d 521 (2010).

188. *Ristich*, 292 Mich. App. 376, 808 N.W.2d 511 (2011).

189. Kyser v. Kasson Twp., 486 Mich. 514; *In re* TD, 292 Mich. App. 678, -- N.W.2d -- (2011).

190. People v. Roberts, 292 Mich. App. 492, 808 N.W.2d 290 (2011), *appeal denied*, 490 Mich. 193, 804 N.W.2d 325 (2011).

191. People v. Steele, 292 Mich. App. 308, 806 N.W.2d 753 (2011).

192. 486 Mich. 514.

193. 416 Mich 153, 330 N.W.2d 663 (1982).

194. *Kyser*, 486 Mich. at 517.

195. *Id.* at 524-25.

Michigan Constitution,[196] it explained the concept by quoting United States Supreme Court jurisprudence:

> The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other.[197]

Because zoning is a legislative function, the court expounded that the judiciary may "'not substitute [its] judgment for that of the legislative body charged with the duty and responsibility in the premises.'"[198] Indeed, the court found that article IV, section 52 of the Michigan Constitution[199] specifically "directs the Legislature, not the judiciary, to provide for the protection and management of the state's natural resources."[200] Because the "no serious consequences rule" prefers "the extraction of natural resources to competing public policies," the court reasoned that it "usurps the responsibilities belonging to both the Legislature and to self-governing local communities."[201] The court also found that the "no serious consequences rule" required the trial court to engage in a "balancing of factors, line-drawing, policy judgments, and exercise of discretion that belong to legislative bodies . . . . As this case demonstrates, the 'no very serious consequences' rule unavoidably requires a trial court to arrogate unto itself responsibilities akin to that of a super-zoning commission."[202] Furthermore, the rule results in an "ad hoc and piecemeal approach to rezoning [that] undermines the efforts of

196. "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." MICH. CONST. art. 3, § 2.

197. *Kyser*, 486 Mich. at 535 (quoting Massachusetts v. Mellon, 262 U.S. 447, 488 (1923)).

198. *Id.* at 554 (quoting *Brae Burn*, 350 Mich. at 431).

199. "The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The *legislature* shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction." MICH. CONST. art. 4, § 52 (emphasis added).

200. *Kyser*, 486 Mich. at 536 (footnote omitted).

201. *Id.* at 536.

202. *Id.* at 537-38.

local governments to provide stable land-use development."[203] The court also determined that the legislature superseded the "no serious consequences rule" when it adopted the exclusionary zoning provision established in MCL 125.297a.[204]

Chief Justice Kelly's dissent not only found that the "no serious consequences test" was grounded in the constitutional guarantee to due process of law,[205] it also rejected the proposition that the "no serious consequences test" violated the separation of powers.[206] In particular, the dissent advocated that the court has the constitutional duty to "define the contours of constitutional rights. Because this Court has consistently found the 'very serious consequences test' to be grounded in the Due Process Clause of the constitution," the "Court's duty [is] to uphold the constitution above any legislative acts."[207] Relying on *Marbury v. Madison*,[208] the Chief Justice reiterated the axiom of judicial review that "[i]f the constitution and a legislative act conflict, the constitution must govern. It is within the inherent power of the judiciary to determine whether there is such a conflict."[209] Because the "no serious consequences rule" is based on the constitutional guarantee of due process, the dissent concluded that the court, by previously enforcing that rule, had been fulfilling its constitutional role, not denigrating the separation of powers.[210]

The separation of powers was also addressed by the court of appeals when it rejected as meritless a criminal defendant's argument that the "mandatory prohibition" under the Sex Offender Registration Act (SORA) "against granting relief from the registration requirements to certain offenders violates the doctrine of separation of powers."[211] Citing only Michigan jurisprudence, the court determined that "the separation-of-powers doctrine does not mandate complete separation, and overlap between the functions and powers of the branches is permissible."[212] Simply put, the legislature's determination to bar certain offenders from being able to seek exemption from the SORA "is well within the

203. *Id.* at 538.
204. *Id.* at 539.
205. *Id.* at 544 (Kelly, C.J., dissenting).
206. *Kyser*, 486 Mich. at 551-52.
207. *Id.*
208. 5 U.S. 137, 177-78 (1803).
209. *Kyser*, 486 Mich. at 550 (Kelly, C.J., dissenting).
210. *Id.* at 551-52.
211. *In re TD*, 292 Mich. App. at 681.
212. *Id.* at 691 (citing People v. Conat, 238 Mich. App. 134, 146, 605 N.W.2d 49 (1999)).

Legislature's power . . . ."[213] Likewise, the SORA did not infringe on the judiciary's role to "pass on constitutional questions pertaining to the SORA . . . ."[214]

*B. Double Jeopardy*

The Michigan Supreme Court in *People v. Szalma*[215] found that the "double jeopardy clauses of the United States and Michigan Constitutions" prohibited the retrial of the defendant who had been acquitted via a directed verdict[216] because the prosecutor at trial "had conceded the trial court's legal error" which was the basis of the trial court's decision.[217] In particular, the defendant had been acquitted of first-degree criminal sexual conduct (CSC I)[218] based on the trial court's determination that the prosecutor had failed to present any evidence that the defendant father's alleged digital penetration of the victim's anus was done for "sexual gratification."[219] At trial, the prosecutor and defendant both agreed that CSC I required a sexual gratification mens rea.[220] However, as the supreme court found, no such mens rea requirement exists under Michigan law, and the trial court's decision was made "on the basis of this erroneous understanding about the elements of the charged crime . . . ."[221]

In the course of its decision, the Michigan Supreme Court explained that prohibitions against double jeopardy found in the federal Bill of Rights[222] and the Michigan Declaration of Rights[223] are identical.[224] In fact, the court noted that Michigan jurisprudence had found that "the people of this state intended that our double jeopardy provision 'would be construed consistently with Michigan precedent and the Fifth Amendment.'"[225] In addition, the court explained that "[e]ven before the people enacted the 1963 constitution, this Court determined that the Double Jeopardy Clause in previous Michigan constitutions existed

213. *Id.* at 692.
214. *Id.*
215. 487 Mich. 708, 790 N.W.2d 662 (2010).
216. MICH. CT. R. 6.419(A).
217. *Szalma*, 487 Mich. at 709.
218. MICH. COMP. LAWS ANN. § 750.520b (West 2006).
219. *Szalma*, 487 Mich. at 722.
220. *Id.* at 712.
221. *Id.* at 713.
222. U.S. CONST. amend. V.
223. MICH. CONST. art. 1, § 15.
224. *Szalma*, 487 Mich. at 715-16.
225. *Id.* at 716 (quoting People v. Nutt, 469 Mich 565, 591, 677 N.W.2d 1 (2004)).

coterminously with the Fifth Amendment's Double Jeopardy Clause."[226] After quoting Blackstone and "Michigan's own Blackstone, Justice Thomas M. Cooley" for the general understanding of the constitutional guarantee,[227] the court explained that "the double jeopardy prohibition 'is not against twice being punished, but against being twice put in jeopardy; and the accused, whether convicted or not, is equally put in jeopardy at the first trial.'"[228] After an exhaustive analysis of the record, the court found that the trial judge had made a finding, after reviewing all of the evidence, that the defendant was entitled to a directed verdict because "it could not find any evidence that defendant committed the charged offense for a sexual purpose."[229] The supreme court further determined that, "[w]hether or not the trial court's conclusion is *factually* correct is immaterial" to the double jeopardy analysis.[230] Finding that the trial court's decision was not "an improper credibility determination" but rather a finding that no evidence existed, the court found that retrying the defendant was barred.[231]

Because the court had previously determined in *People v. Nix*[232] that "an acquittal retains its finality for double jeopardy purposes even when 'the trial court is factually wrong with respect to whether a particular factor is an element of the charged offense,'"[233] and "[t]his very situation confronts this Court in the instant case," the court of appeals "erred by ruling otherwise."[234]

Furthermore, the court rejected the prosecutor's request to reverse *People v. Nix* because the prosecutor had "conceded the underlying legal error at trial by agreeing with defense counsel that sexual purpose was an element of the charged crime, the prosecution has, undoubtedly inadvertently, created the very error that it wishes to correct on appeal."[235] Stated another way, "a party may not harbor error at trial and then use that error as an appellate parachute . . . ."[236]

Justice Michael Cavanagh filed a short concurrence, opining that whether the "trial court erred in its interpretation of the elements of the

226. *Id.* at 716 n.13 (citing *In re* Asccher, 130 Mich. 540, 545, 90 N.W. 418 (1902)).
227. *Id.* at 716.
228. *Id.* at 717 (quoting Ball v. United States, 163 U.S. 662, 669 (1896)).
229. *Id.* at 723.
230. *Szalma*, 487 Mich. at 723.
231. *Id.* at 724.
232. 453 Mich. 619, 556 N.W.2d 866 (1996).
233. *Szalma*, 487 Mich. at 726 (quoting *Nix*, 453 Mich. at 628).
234. *Id.*
235. *Id.*
236. *Id.*

crime is irrelevant . . . ."[237] Instead, he reasoned that the fact that defendant was acquitted based on a lack of evidence was sufficient to trigger the bar of double jeopardy.[238]

*C. Right to Confrontation*

The defendant in *People v. Rose*[239] argued that his convictions should be reversed because the trial court erred by allowing the minor victim to testify behind a one-way screen that allowed the criminal defendant to see the witness, but prevented the witness from seeing the defendant.[240] The defendant was convicted by a jury of four counts of criminal sexual conduct in the first degree (CSC I)[241] and two counts of disseminating sexually explicit matter to a minor.[242] He was sentenced to twenty-five years to fifty years for the CSC I convictions and sixteen months to twenty-four months for the disseminating sexually explicit matter to a minor convictions (all counts to run concurrently).[243] On appeal, the defendant argued that the use of the witness screen violated his federal and state constitutional rights to confront his accuser, as well as the procedures set forth in MCL section 600.2163a, the statutory provision the trial court relied upon to order the use of the screen.[244]

The trial court found that the screen was necessary because if the victim could see the defendant while testifying, such an experience "would cause" the victim to "'regress in her therapy, have psychological damage' and could cause her to 'possibly not testify.'"[245] The court of appeals agreed with the defendant that the trial court erroneously relied on MCL section 600.2163a to grant the prosecutor's motion.[246] Although MCL section 600.2163a(15) provides that a trial court may make "special arrangements" under certain circumstances to protect "the welfare of the witness,"[247] because the statute did not specifically permit the use of the screen, the trial court erred by relying upon it as the basis for its decision.[248] Nevertheless, the court of appeals found that the trial

237. *Id.* at 727 (Cavanagh, J., concurring).
238. *Id.* at 727-28.
239. 289 Mich. App. 499 (2010).
240. *Id.* at 505.
241. MICH. COMP. LAWS ANN. § 750.520b (West 2006).
242. MICH. COMP. LAWS ANN. § 722.675 (West 2006).
243. *Rose*, 289 Mich. App. at 501.
244. *Id.* at 505.
245. *Id.*
246. *Id.* at 509.
247. MICH. COMP. LAWS ANN. § 600.2163a(15) (West 2006).
248. *Rose*, 289 Mich. App. at 509.

court's error was just the beginning of the inquiry and did not, in itself, require reversal of the defendant's conviction.[249] The court recognized that the trial court has inherent constitutional authority to "control the mode and order by which witnesses are interrogated."[250] That authority includes the authority to "limit a defendant's right to confront his accusers face-to-face even when the provisions of [MCL section 600.2163a] do not apply."[251] The question, therefore, was whether "the trial court's decision to use a witness screen violated Rose's Sixth Amendment right to confront" the victim "or violated Rose's basic right to due process and a fair trial."[252]

Noting that the court of appeals had previously adopted the United States Supreme Court case of *Maryland v. Craig*[253] as binding jurisprudence,[254] the court analyzed the case under *Craig*.[255] Relying heavily on the trial court's findings, the court determined that the screen "was 'necessary . . . to protect the welfare of the child,'"[256] based on the following factors: (1) the victim "expressed fear" of the defendant, (2) the victim was young, (3) the nature of the offense, (4) "'a high likelihood'" of regression in therapy, causing psychological harm, and (5) seeing the defendant in court might prevent the victim from testifying.[257] The court also found that other than preventing the victim from being able to physically see the defendant, that "the other elements of the confrontation right" were preserved, thereby ensuring "the reliability of the truth-seeking process."[258] Thus, the court concluded that the screen did not infringe on the right to confrontation.[259]

The court of appeals reached the opposite decision in *People v. Buie*,[260] when it reversed the defendant's conviction for three counts of first-degree criminal sexual conduct involving the use of a weapon[261] and possession of a firearm during the commission of a felony.[262] The court found that the use of two-way video-conferencing to present expert

249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. 497 U.S. 836 (1990).
254. *Rose*, 289 Mich. App. at 515.
255. *Id.*
256. *Id.* at 508.
257. *Id.*
258. *Id.* at 517.
259. *Id.*
260. 291 Mich. App. 259, 804 N.W.2d 790 (2011) (on remand).
261. MICH. COMP. LAWS ANN. § 750.520b(1)(e) (West 2006).
262. MICH. COMP. LAWS ANN. § 750.227b (West 2006).

testimony at trial violated the defendant's constitutional right to confront witnesses.[263]

Relying on federal authority, the court of appeals found that to justify the use of video-conferencing technology, "a trial court must hear evidence and make case-specific findings that the use of such technology is necessary to further a public policy or state interest important enough to outweigh the defendant's right of confrontation and that it preserves all of the other elements of the Confrontation Clause."[264] Accordingly, when first presented with the issue by the defendant, the court of appeals remanded the case to the circuit court to hold an evidentiary hearing regarding whether the use of the video-conferencing equipment was constitutionally permissible.[265] Following the evidentiary hearing,

> [T]he trial court held that, given the nature of the witnesses' testimony, the size of the screen on which the witnesses appeared, and the parties' ability to effectively question the witnesses, there were 'state interests or public polices' justifying the use of the video technology in this case, specifically cost savings, efficiency, the convenience of the witnesses, and avoiding delay.[266]

The court of appeals found that these factors fell far short of being "important enough to outweigh defendant's right of confrontation."[267] The court explained that the interests identified by the trial court did not equate to the more substantial interests such as "protecting a victim witness from being traumatized."[268]

The court also determined that the use of the technology did not conform with MCL section 6.006(C). The rule permits the use of such technology if, among other things, "the parties consent."[269] Although recognizing that "a majority of federal courts of appeals and state courts that have considered whether defense counsel may waive a defendant's constitutional right of confrontation have held that counsel may waive the right,"[270] the court also observed that "the courts that have reviewed this issue have overwhelmingly held that defense counsel may only waive a defendant's right of confrontation if the waiver is a legitimate

263. *Buie*, 291 Mich. App. at 261.
264. *Id.* at 264-65.
265. People v. Buie, 285 Mich. App. 401, 775 N.W.2d 817 (2009).
266. *Buie*, 291 Mich. App. at 269.
267. *Id.* at 271.
268. *Id.* at 270.
269. MICH. CT. R. 6.006.
270. *Buie*, 291 Mich. App. at 272.

trial tactic or strategy *and* the defendant does not object to the decision."[271] The court found "the reasoning of the majority of the federal and state courts that have reviewed this issue to be persuasive."[272] At trial, the defense lawyer consented to its use, but cryptically expressed that the defendant "wanted to question the veracity of these proceedings, so I'll leave that to the Court's discretion."[273] However, at the subsequent evidentiary hearing, the defendant testified that he objected to the use of the video-conferencing equipment because it "'didn't feel right' to have witnesses testify from outside the courtroom."[274]

In light of these circumstances, the court of appeals found that the trial court erred by finding that the "defendant consented to the video procedure through counsel."[275] Rejecting the trial court's ruling, the court of appeals found that right of confrontation, as well as the plain language of MCR section 6.006(C), were violated and that the "trial court plainly erred" in allowing the video-conferencing.[276] The plain, forfeited error warranted vacating the convictions because the testimony of the experts "was highly relevant to establishing the essential element of identity in this case."[277] Judge Whitbeck concurred in a most splendid opinion addressing the historical origin and need to vigorously enforce the right to confrontation.[278]

*D. Due Process*

Relying on federal precedent, the court of appeals in *People v. Rose*[279] denied the defendant's claim that the trial court's order permitting a minor victim to testify behind a one-way screen that allowed the defendant to see the witness, but prevented the witness from seeing the defendant, violated due process.[280] The court found that although the right to due process forbids the use of certain "courtroom procedures or arrangements that might undermine the presumption of innocence," the use of the screen was not constitutionally suspect.[281] In so finding, the court rejected the Nebraska Supreme Court's decision in *State v.*

271. *Id.* (citations omitted).
272. *Id.* (footnote omitted).
273. *Id.* at 273.
274. *Id.* at 274.
275. *Id.*
276. *Buie*, 291 Mich. App. at 274.
277. *Id.* at 275.
278. *Id.* at 276-83 (Whitbeck, J., concurring).
279. 289 Mich. App. 499.
280. *Id.* at 522-23.
281. *Id.* at 517.

*Parker*[282] that a screen "is inherently prejudicial" and violated due process.[283] Instead, the court adopted Justice Blackmun's dissent in *Coy v. Iowa*,[284] which found that a screen "did not 'brand [appellant] . . . with an unmistakable mark of guilt.'"[285] Furthermore, noting that the record failed to disclose the screen's appearance or how it was stored or positioned, the court found that the defendant "failed to meet his burden to show that the use of the screen prejudiced his trial."[286] Moreover, citing other federal precedent in the analogous context of shackling defendants during trial, the court found that "the trial court had a duty to take steps that adequately protected [the victim] from the trauma of testifying while minimizing the prejudice to [the defendant]."[287] Because the defendant failed to show that any alternative method would be less prejudicial, the due process claim failed.[288]

In a somewhat parallel fashion, in *People v. Aspy*,[289] the court of appeals rejected the criminal defendant's argument that "the trial court improperly denied his claim of an affirmative defense that the 'victim' in this instant case was actually an adult." [290] In *Aspy*, the defendant was convicted of child sexually abusive activity[291] and using a computer to commit that offense.[292] The defendant's victim, however, was an online adult imposter from "Perverted Justice, a group dedicated to identifying internet 'predators.'"[293]

Quoting a United States Supreme Court case, the court explained the basis of the defendant's argument: "'[u]nder the Due Process Clause of the Fourteenth Amendment [of the United States Constitution], criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense.'"[294]

Finding that the statute at issue did not permit the affirmative defense the defendant wished to posit—i.e., that the victim imposter was an

282. 757 N.W.2d 7 (Neb. 2008).
283. *Rose*, 289 Mich. App. at 519.
284. 487 U.S. 1012 (1988).
285. *Id.* at 1034-35 (Blackmun, J., dissenting) (citations omitted).
286. *Rose*, 289 Mich. App. at 521.
287. *Id.* at 523.
288. *Id.*
289. 292 Mich. App. 36, 808 N.W.2d 569 (2011).
290. *Id.* at 49.
291. MICH. COMP. LAWS ANN. § 750.145c(2) (West 2006).
292. MICH. COMP. LAWS ANN. § 750.145d(2)(f) (West 2006).
293. *Aspy*, 292 Mich. App. at 38.
294. *Id.* at 48-49 (footnote omitted) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)).

adult—the court found that the defendant was not denied due process of law.[295]

*E. Ineffective Assistance of Counsel*

In *People v. Rose*,[296] the Michigan Court of Appeals rejected the defendant's claim of ineffective assistance of counsel based on the trial counsel's decision to wait until the day of trial to move to strike a witness.[297] The court explained that "[t]o establish ineffective assistance of counsel, the defendant must first show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different."[298] No ineffective assistance occurred in the case because the trial counsel "may reasonably have concluded" and "may have thought" that making the motion on the first day of trial was the most tactically advantageous time,[299] and that the motion was likely to be denied whenever it was made.[300]

Likewise, a claim of ineffective assistance of counsel was rejected by the court of appeals in *Aspy*.[301] The defendant was arrested in Michigan when he attempted to meet a person who he thought was going to be a fourteen-year old girl for sexual purposes. In reality, the victim was an adult (the "victim imposter") posing as a minor.[302]

The victim imposter was located in Ohio and the defendant resided in Indiana.[303] Pursuant to long-winding internet communications, they agreed to meet in Michigan at a campground, where he was arrested with evidence strongly suggesting he was meeting for sexual activity.[304] After his conviction, he challenged whether Michigan's statutory territorial jurisdiction scheme enacted under MCL section 762.2 applied to his actions.[305] The court forcefully rejected the defendant's jurisdictional argument.[306] This argument, however, bled into the constitutional issues

295. *Id.*
296. 289 Mich. App. 499.
297. *Id.* at 527.
298. *Id.* (citing People v. Yost, 278 Mich. App. 341, 387, 749 N.W.2d 753 (2008)).
299. *Id.*
300. *Id.*
301. 291 Mich. App. at 46-47.
302. *Id.* at 38-39.
303. *Id.*
304. *Id.*
305. *Id.* at 40-42.
306. *Id.*

raised on appeal.[307] The defendant argued that he was provided ineffective assistance of counsel because his attorney "fail[ed] to present to the jury the factual question whether Michigan had territorial jurisdiction."[308] Without referencing the constitutional provision (or which constitution for that matter) upon which the defendant's claim and the court's analysis was based, the court explained that, to establish ineffective assistance of counsel, "a defendant must show that: (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable."[309] Rejecting the defendant's claim, the court found that the trial court's instruction to the jury that it must "be satisfied that at least some of the activity involved in each count you are considering took place in Kent County" was sufficient to satisfy the jurisdictional question.[310]

In striking contrast to *Rose* and *Apsy*, in *People v. Gioglio*,[311] the court of appeals reversed the defendant's conviction of two counts of criminal sexual conduct in the second degree (CSC II)[312] and one count of attempted CSC II finding that the defense counsel "completely failed to submit the prosecution's case to the meaningful adversarial testing contemplated under the Sixth Amendment to the United States constitution and the Michigan constitution."[313]

The court noted that "[t]he United States and Michigan constitutions protect the right of an accused to have the assistance of counsel."[314] The test articulated in the United States Supreme Court case of *Strickland v. Washington*,[315] the court explained, is employed by Michigan courts for such claims under both constitutions.[316] The *Strickland* "test takes into account the 'variety of circumstances faced by defense counsel' and the wide 'range of legitimate decisions regarding how best to represent a

307. *Aspy*, 292 Mich. App. at 40-42.

308. *Id.* at 43-44.

309. *Id.* at 45-46 (citing People v. Toma, 462 Mich. 281, 302, 613 N.W.2d 694 (2000)).

310. *Id.* at 47.

311. 292 Mich. App. 173, 175, 807 N.W.2d 372 (2011), *rev'd*, 490 Mich. 868, 802 N.W.2d 868 (2011).

312. MICH. COMP. LAWS ANN. § 750.520c(1)(a) (West 2006).

313. *Gioglio*, 292 Mich. App. 173 at 200.

314. *Id.* at 193 (citing U.S. CONST. amend. VI; MICH. CONST. art. 1, § 20).

315. 406 U.S. 668 (1984).

316. *Gioglio*, 292 Mich. App. at 221 (citing People v. Frazier, 478 Mich. 231, 243, 733 N.W.2d 713 (2007); People v. Hoag, 460 Mich. 1, 5, 594 N.W.2d 57 (1999)).

criminal defendant.'"[317] Thus, to prevail in such a claim, "the defendant must show that his or her trial counsel's performance fell below an objective standard of reasonableness and that it is reasonably probable that the result of the proceeding would have been different had it not been for counsel's error."[318] In addition, a "defendant must overcome a 'strong presumption' that his or her trial counsel's action was a matter of trial strategy."[319]

Nevertheless, the court noted that there are "rare situations" where a trial counsel's performance is so poor that the presumption of effective assistance set forth in *Strickland* is replaced by a presumption of prejudice.[320] In the United States Supreme Court case *United States v. Cronic*,[321] the Supreme Court set forth three narrowly defined situations when prejudice is presumed.[322] The court of appeals determined that the defense in *Gioglio* implicated the "second exception" articulated in *Cronic*, i.e., "the failure to meaningfully test the prosecution's case."[323] Thus, the trial court erred because it only viewed the case under *Strickland* and ignored *Cronic*.[324]

In reaching this conclusion, the court examined the trial record with exacting scrutiny, including reviewing the testimony witness-by-witness (including direct, cross, and re-examination), opening statements, closing arguments, and defense counsel's actions—and omissions.[325] The court also exhaustively reviewed the evidentiary hearing conducted by the trial court in connection with whether the defendant had been provided the ineffective assistance of counsel.[326]

Although the defense counsel subjected several witnesses to cross-examination and made a closing argument, the court held that the defense counsel's representation entirely failed to subject the prosecution's case to adversarial testing because the lawyer (1) failed to make an opening statement; (2) failed to cross-examine the child victim; (3) failed to cross-examine several other crucial witnesses; (4) failed to meaningfully challenge the testimony of witnesses whom she did cross-examine; (5) did not object to certain otherwise inadmissible and prejudicial evidence; (6) failed to present any witnesses or other evidence; and (7) provided an

317. *Id.* at 194 (quoting *Strickland*, 466 U.S. at 689).
318. *Id.* (citing *Frazier*, 478 Mich. at 243).
319. *Id.* (citing *Strickland*, 466 U.S. at 489).
320. *Id.* at 194-95.
321. 466 U.S. 648 (1984).
322. *Gioglio*, 292 Mich. App. at 195 (citing *Cronic*, 466 U.S. at 659-60).
323. *Id.* at 195.
324. *Id.* at 195-98.
325. *Id.*
326. *Id.*

ineffective closing argument.[327] The court concluded that, "although an attorney might offer meaningful testing of a prosecution's case through objections, cross-examination, and closing arguments alone, this is not such a case."[328] In the end, the defense lawyer allowed the prosecutor "to present a parade of damaging—and sometimes highly improper—testimony with virtually no objection and no meaningful adversarial testing. She also mounted the feeblest of defenses imaginable under the circumstances . . . ."[329] In light of the trial court's evidentiary hearing on the issue, the court was compelled to emphasize that "the prosecutor herself characterized defendant's trial as one where there were two prosecutors,"[330] and that the prosecutor had actually reported the defense lawyer's deficient representation.[331] In a bit of rhetorical flourish, the court added: "[i]t is, therefore, no wonder that the jury returned a verdict of guilty on all counts after only two hours of deliberation and in a time-span that likely included a break for lunch[!]"[332]

In this light, the court found that defense counsel "threw defendant into the ring with no defense whatsoever."[333] Reviewing the defense counsel's "handling of the defense as a whole," the court "conclude[d] that she completely failed to submit the prosecution's case to the meaningful adversarial testing contemplated under the Sixth Amendment to the United States constitution and the Michigan constitution."[334] Because of presumed prejudice under *Cronic*, the court reversed the defendant's conviction and remanded for a new trial.[335]

Although the case was dispositively addressed under *Cronic*, the court also applied the *Strickland* standard and promptly demurred—finding that the lack of an authentic adversarial trial below made determining whether prejudice resulted by the ineffective assistance of counsel an impossible inquiry.[336] The court also reasoned that "[t]his problem was further exacerbated by the trial court's failure to make

327. *Id.* at 195-202.

328. *Giogilo*, 292 Mich. App. at 196 (footnote omitted).

329. *Id.* at 201.

330. *Id.*

331. *Id.* at 201 n.6 ("Although we believe [defense counsel's] deficient handling of this case is evident on the record alone, we find it particularly noteworthy that [the prosecutor] felt compelled to report [defense counsel]; the first time she felt so compelled in her 17-year career. Prosecutors are not known for challenging the fairness of the trials they prosecute and the fact that [the prosecutor] did so is—besides an act of courage—compelling evidence that defendant did not receive proper representation at trial.").

332. *Id.*

333. *Id.*

334. *Giogilo*, 292 Mich. App. at 201.

335. *Id.* at 202.

336. *Id.* at 202-03.

specific findings of fact after the hearing on defendant's motion for a new trial and specifically decline to resolve the credibility dispute" on several material facts between the defendant and the defense counsel.[337] Despite this profession, the court could not help but find much of the evidence suggesting the ineffective assistance of counsel to be "credible" and that, "[t]he evidence also tends to suggest" that the defense counsel "had an intractable bias against her own client that made it impossible for her to make sound professional decisions on his behalf."[338] The court observed that the resolution of such disputed facts by the trial court "would have gone a long way to aiding this Court in determining whether" the defense counsel's trial tactics "were legitimate and reasonable efforts on behalf of her client,"[339] but determined no remand was necessary for additional findings of fact because the *Cronic* violation rendered such an exercise moot.[340]

The majority rejected the dissent's conclusion that *Cronic* was inapplicable because the defense counsel participated in some adversarial challenge to the prosecutor's case.[341] The majority reasoned that viewing the case as a whole, including examining "every action taken on defendant's behalf *at trial* to determine whether those actions . . . amounted to 'meaningful adversarial testing'" was appropriate, and that the defense counsel failed such analysis.[342]

Judge K. F. Kelly vigorously dissented, reasoning that because defense counsel subjected the prosecutor's case to some meaningful adversarial testing, that the case did not fall in the *Cronic* exceptions from *Strickland.*[343] In addition, the dissent opined that the defense counsel's performance was not deficient under *Strickland,*[344] that no prejudice was suffered,[345] and that the "majority oversteps its authority by refusing to defer to the credibility determinations of the trial court and instead wrongfully substitutes its own preferred version of events to reach an outcome not warranted by either the facts or law."[346]

337. *Id.* at 203.
338. *Id.* at 204 (footnote omitted).
339. *Id.*
340. *Giogilo*, 292 Mich. App. at 205.
341. *Id.* at 205-06.
342. *Id.* at 206.
343. *Id.* at 209-10 (K.F. Kelly, J., dissenting).
344. *Id.* at 228 (K.F. Kelly, J., dissenting).
345. *Id.*
346. *Giogilo*, 292 Mich. App. at 228 (K.F. Kelly, J., dissenting).

*F. Right Against Self-Incrimination*

In a case affirming the trial court's denial of the "defendant's motion to set aside a default" and default judgment, the court of appeals wrestled with the defendant's right against self-incrimination in a civil suit when a parallel criminal investigation on the same matter was pending.[347] Instead of filing an answer, the defendant in *Huntington National Bank v. Ristich* filed a motion to stay the proceedings and to hold an evidentiary hearing regarding the same, based on the right against self-incrimination, and argued this excused his obligation to file an answer.[348] The issue before the court of appeals was whether a defendant was entirely excused from answering a complaint or timely requesting an extension to file an answer based on an assertion of the right against self-incrimination.[349]

Examining the claim under both the Federal and Michigan Constitutions,[350] the court of appeals briefly explained that "'[t]he privilege against self-incrimination under the Michigan Constitution is no more extensive than the privilege afforded by the Fifth Amendment of the United States Constitution.'"[351]

In addressing the general contours of the right against self-incrimination, the court predominantly cited Michigan cases.[352] However, with regard to the dispositive issue—whether a "defendant in a civil action may raise the privilege against self-incrimination in his answer to the complaint"—the court noted that, "we have not discovered any Michigan law excusing a defendant who invokes the privilege from filing an answer."[353] Thus, the court extensively quoted and relied upon federal court of appeals cases to conclude that the invocation of the right against self-incrimination did not excuse a defendant from filing an answer.[354] In particular, the court

> [A]gree[d] with the federal courts that have addressed this issue and hold that a defendant desiring to invoke the privilege against self-incrimination at the pleading stage of a civil action is not

347. Huntington Nat'l Bank v. Ristich, 292 Mich. App. 376, 378, 808 N.W.2d 511 (2011).

348. *Id.* at 379.

349. *Id.* at 381.

350. *Id.* at 383.

351. *Id.* at 384 (citation omitted).

352. *Id.* at 384-87.

353. *Huntington Nat'l Bank*, 292 Mich. App. at 385.

354. *Id.* at 386-87 (citing North River Ins. Co. v. Stefanou, 831 F.2d 484 (4th Cir. 1987); Rogers v. Webster, 776 F.2d 607, 611 (6th Cir. 1985); Nat'l Acceptance Co. of Am. v. Bathalter, 705 F.2d 924 (7th Cir. 1983)).

> excused from filing a timely answer to the complaint, unless otherwise provided by law. A defendant must answer the allegations in the complaint that he or she can and make a specific claim of privilege to the rest.[355]

Because the defendant did not have good cause to fail to answer the complaint and failed to include an appropriate meritorious defense as required by the applicable rule of court addressing the setting aside of default judgments,[356] the court of appeals affirmed the circuit court's decision to deny the defendant's motion to set aside the default judgment.[357]

*G. Jury Selection & Composition*

In a most interesting case addressing the intersection of the constitutional right to equal protection of the law and the right to a fair and impartial jury, the Michigan Supreme Court in *Pellegrino v. AMPCO System Parking*[358] ruled that a judge may not "deny a party the use of a peremptory challenge on the basis of the court's desire to attain a racially proportionate jury,"[359] and reversed the court of appeals' decision to the contrary.[360] The supreme court found that "[d]ecisions to include, and to exclude, particular jurors must be undertaken without consideration of race."[361] The court explained that the United States Supreme Court has long held that a peremptory challenge in a criminal or civil trial may not be exercised "on the basis of race because such an action violates the Equal Protection Clause of the Fourteenth Amendment."[362] The United States Supreme Court has created a specific procedure—dubbed a "*Batson* challenge" to invoke this constitutional protection.[363] In particular, after a review of federal jurisprudence as well as Michigan precedent involving *Batson* challenges,[364] the Michigan Supreme Court explained that "*Batson* prohibits a trial court from acting to preserve the

355. *Id.* at 387.
356. MICH. CT. R. 2.603(D).
357. *Ristich*, 292 Mich. App. at 389.
358. 486 Mich. 330, 785 N.W.2d 45 (2010).
359. *Id.* at 333.
360. *Id.*
361. *Id.*
362. *Id.* at 338-39 (citing Batson v. Kentucky, 476 U.S. 79, 89, 96-98 (1986); Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991)).
363. *Id.* (citing *Batson*, 476 U.S. at 89, 96-98).
364. *Pellegrino*, 486 Mich. at 339-41.

presence of minority jurors on a jury panel because of a desire to ensure a racially balanced jury."[365]

In a civil jury trial in which liability was conceded and the sole issue was damages for wrongful death and bodily injury,[366] the trial court expressly proclaimed during the jury selection process that "it would be a goal of [the court] to have a jury that represented the racial composition of this county."[367] In fact, when the defense counsel sought to remove a prospective African-American woman juror because she had been widowed twice "and was in the process of grieving over the death of her mother,"[368] the court refused to dismiss the juror. The trial court declared that "[w]e have a jury of eight women. Three are African-American. In my view, it adequately represents the community from which this case arises."[369] In rejecting the defendant's motion to strike the juror or declare a mistrial, the trial court explained that it would not make a finding that the defense lawyer's attempt to use the peremptory challenge was racially motivated (calling it "race baiting").[370] The trial court also refused to apply the standards articulated in federal law because "the federal threshold is dreadful and it renders nugatory the *Batson* challenge."[371] The court then asserted that there were "competing interests" to ensure a "diverse racial composition,"[372] and declared that

> I am until [sic] either removed from the bench by the disciplinary committee or ordered to have a new trial, I am going to seek to have this proportional representation on the juries that hear cases in this court. I can't be clearer. I'm going to do it until I'm ordered not to do it and then when I'm ordered not to do it, then I'll have to decide what's next for me.[373]

Finding that MCR 2.511(F)(2) specifically bars "taking race into consideration in selecting a jury," including "a court's desire to achieve a 'balanced, proportionate, or representative jury,'" the court concluded that the trial court's denial of the "defendant's peremptory challenge" by "expressly" taking the juror's "race into account and expressly evaluat[ing] her race in light of the race of every other juror on the

365. *Id.* at 347.
366. *Id.* at 333.
367. *Id.* at 334.
368. *Id.*
369. *Id.* at 335.
370. *Pellegrino*, 486 Mich. at 335.
371. *Id.*
372. *Id.* at 336.
373. *Id.*

panel" constituted a "flagrant and unambiguous violation of the court rule."[374]

The court also found that MCR 2.511(F)(2) is "altogether consistent with, and indeed premised on, our federal and state constitutions, as well as United States Supreme Court and Michigan Supreme Court precedents."[375] This is so because "[t]hese demonstrate that a purpose or motive of attaining a racially balanced jury does not provide the trial court with the authority to deprive a party of a proper peremptory challenge."[376] In particular, the court found that the race conscious decision to keep at least one juror on the jury because of her race violated *Batson's* requirement that, "'[t]hose on the venire must be 'indifferently chosen' to secure the defendant's right under the Fourteenth Amendment.'"[377] Rejecting the court of appeals' majority decision that "a *Batson* error occurs only when a prospective juror is actually *dismissed* on account of race,"[378] the court found that:

> [T]he wrongful *inclusion* of a juror on account of race should be treated the same as the wrongful *exclusion* of a prospective juror on account of race. Each situation violates the constitutional command that jurors be selected pursuant to criteria that do not take race into account, each deprives a defendant of a jury that has been 'indifferently chosen' in terms of race, and each involves the exercise of judicial power in support of a process in which race becomes dispositive in terms of who can serve on a jury.[379]

In addition, the court rejected the harmless error analysis applied by the court of appeals to affirm the trial verdict because no such analysis was done in *Batson* or its progeny.[380] Stated another way, any such error requires "automatic reversal."[381]

Justice Weaver, joined by Justice Hathaway, filed a two-paragraph dissent finding that "leave to appeal was improvidently granted. I am not

374. *Id.* at 341-43 (quoting MICH. CT. R. 2.511(F)(2)).
375. *Id.* at 343 (footnotes omitted) (citing U.S. CONST. amend. XIV, § 1; MICH. CONST. art. I, § 2).
376. *Pellegrino*, 486 Mich. at 343.
377. *Id.* at 345 (quoting *Batson*, 476 U.S. at 85-87).
378. *Id.* at 346.
379. *Id.* at 347-48.
380. *Id.* at 348.
381. *Id.*

persuaded that the decision of the Court of Appeals was clearly erroneous or that defendant has suffered any injustice in this case."[382]

Similar concerns were addressed by the court of appeals in *People v. Bryant*,[383] when it reversed the defendant's conviction for first degree criminal sexual conduct,[384] armed robbery,[385] and possession of marijuana[386] because the composition of the jury pool was unconstitutional as a result of computer program errors that reduced the number of minority jurors in the venire pool.[387] In a prior decision, the court had affirmed the defendant's conviction in part and remanded the case to the trial court "for the sole purpose of conducting an evidentiary hearing regarding defendant's challenge to the jury venire."[388] In particular, the court of appeals agreed with the defendant's claim that the composition of the forty-two-person venire pool—which only included one African-American—violated his Sixth Amendment right to a fair and impartial jury drawn from a fair cross section of the community.[389]

In the course of its decision, the court noted that, "the Michigan Constitution guarantees the right to trial by jury."[390] Quoting a Michigan Court of Appeals case,[391] the court elaborated on the definition of the "fair-cross-section requirement" of the right to a jury, but did not explain whether that prior definition arose from federal or Michigan law.[392]

In analyzing the case at hand, the court followed the test articulated by the United States Supreme Court in *Duren v. Missouri*[393] in connection with such challenges:

> "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and

382. *Pellegrino*, 486 Mich. at 355 (Weaver, J., dissenting).
383. 289 Mich. App. 260, 796 N.W.2d 135 (2010).
384. MICH. COMP. LAWS ANN. § 750.520b(1)(e) (West 2006).
385. MICH. COMP. LAWS ANN. § 750.529 (West 2006).
386. MICH. COMP. LAWS ANN. § 333.7403(2)(d) (West 2006).
387. *Bryant*, 289 Mich. App. at 263, 273.
388. *Id.* at 263 (quoting People v. Bryant, No. 241442, 2004 WL 513664, at *7 (Mich. Ct. App. Mar. 16, 2004)).
389. *Id.* at 263-64.
390. *Id.* at 261 (citing MICH. CONST. art. I, § 14).
391. People v. Hubbard, 217 Mich. App. 459, 472, 552 N.W.2d 493 (1996).
392. *Id.* at 464.
393. 439 U.S. 357 (1979).

> (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process."[394]

The court explained that if the defendant made a prima facie showing that a fair-cross-section had not been met, "the government may overcome the right to a proper jury by proffering a significant state interest that manifestly and primarily advances those aspects of the jury selection process that would result in the disproportionate exclusion of a distinctive group . . . ."[395]

During the course of the opinion, the court followed mostly federal precedent. However, the *Bryant* court explained that in *People v. Smith,*[396] the Michigan Supreme Court adopted a case-by-case approach to determine whether "a distinctive group is substantially underrepresented in the jury pool."[397] This inquiry is the second prong of a four-part inquiry established by United States Supreme Court in *Duren*, and adopted by the Michigan courts.[398] The *Bryant* court explained that when confronted with three distinct federal tests, the Michigan Supreme Court previously demurred and proceeded to adopt a case-by-case approach.[399] Noting that the United States Supreme Court likewise had recently refused to adopt a specific test,[400] the *Bryant* court followed the *Smith* case-by-case test.[401]

The court of appeals then rejected the application of the absolute-disparity test (which "measures the difference between the percentage of the distinctive group in the population eligible for jury duty and the percentage of the group who actually appear in venire"),[402] and the standard deviation test (which "is calculated 'by multiplying the number of prospective jurors in the jury pool by the percentage of the distinct group in the population by the percentage of the population that is not in the distinct group, and then taking the square root of that product").[403] Instead, the court adopted the comparative-disparity test (which

394. *Bryant*, 289 Mich. App. at 266 (quoting Duren v. Missouri, 439 U.S. 357, 364 (1979)).
395. *Id.* (alteration in original) (quoting *Hubbard*, 217 Mich. App. at 473).
396. 493 Mich. 199, 615 N.W.2d 1 (2000).
397. *Bryant*, 289 Mich. App. at 267 (quoting *Hubbard*, 217 Mich. App. at 474).
398. *Id.* (quoting *Smith*, 463 Mich. at 204).
399. *Id.*
400. Berghuis v. Smith, 130 S. Ct. 1382, 1393-94 (2010).
401. *Bryant*, 289 Mich. App. at 267.
402. *Id.* at 268.
403. *Id.* at 272 (quoting *Smith*, 463 Mich. at 272).

"measures the diminished likelihood that members of an underrepresented group, when compared to the population as a whole, will be called for jury service").[404] Employing that test, the court found that there were "73.1 percent fewer African-Americans than could have been expected in Kent County" in the venire,[405] and that this was "sufficient to demonstrate that the representation of African-Americans in the venire for defendant's trial was unfair and unreasonable."[406]

In examining the third prong, the court mostly cited federal precedent when it determined that the underrepresentation of minorities in the venire was "due to systematic exclusion of the group in the jury-selection process."[407] In particular, the court found that "the underrepresentation in this case was the result of the system by which juries in Kent County were selected because jurors from zip codes with small minority populations were routinely overselected and jurors from zip codes with large minority populations were routinely underselected as the result of a glitch or problem with the computer program that selected jurors."[408] In addition, the problem persisted for at least sixteen months.[409]

Having found that the defendant made a prima facie showing (via all three prongs) of a fair-cross-section violation, the court also found that there was no conceivable, significant state interest that would warrant the defective venire process.[410] In fact, "[t]he prosecution . . . failed to proffer any significant state interest that would be advanced by the errors and computer glitch that resulted in the systematic underrepresentation of African-Americans in Kent County jury venires."[411] Hence, the defendant's constitutional right was violated, his conviction reversed, and the case "remanded for a new trial before an impartial jury . . . drawn from a fair cross section of the community."[412]

### *H. Void for Vagueness*

Rejecting a defendant's constitutional challenge to his conviction on three counts of child sexually abusive activity[413] as void for vagueness,

404. *Id.* at 263 (citing Ramseur v. Beyer, 983 F.2d 1215, 1231-32 (3d Cir. 1992)).
405. *Id.* at 269.
406. *Id.* at 271.
407. *Bryant*, 289 Mich. App. at 273 (quoting *Duren*, 439 U.S. at 364).
408. *Id.* at 274.
409. *Id.*
410. *Id.*
411. *Id.*
412. *Id.*
413. MICH. COMP. LAWS ANN. § 750.145c(2) (West 2006).

the court of appeals affirmed the defendant's conviction in *People v. Roberts*.[414] Noting that "[t]he 'void for vagueness' doctrine is derived from the constitutional guarantee that the state may not deprive a person of life, liberty, or property, without due process of law,"[415] the court explained that '[a] statute may be challenged for vagueness on three grounds: (1) it is overbroad and impinges on First Amendment freedoms; (2) it does not provide fair notice of the conduct proscribed; or (3) it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed."[416] Citing Michigan jurisprudence and statutory definitions, the court concluded that the "ordinary language" of the pertinent Michigan statutory provisions regarding whether the act applied to a "child" (including the definition of an emancipated minor) "is not vague, but rather provides specific criteria that must be met for a minor to be considered emancipated by operation of law."[417] Thus, the court rejected the defendant's argument that the criminal statute at issue failed to provide "fair notice" of the proscribed conduct.[418] Similarly, citing United States Supreme Court precedent,[419] the court found that as a law targeting child pornography, the criminal provision did not target materials protected by the First Amendment of the United States Constitution,[420] and "does not impinge on any privacy interest because the statute does not criminalize consensual activity engaged in by persons between 16 and 18 years of age, but only criminalizes the recording and photographing of such activity."[421]

*I. Zoning & Ripeness*

Reversing the court of appeals and trial court in three separate opinions, the Michigan Supreme Court in *Hendee v. Putnam Township*[422] found that a zoning ordinance was not facially unconstitutional simply because it did not provide a zone for a manufactured housing

414. 292 Mich. App. 492, 494, 808 N.W.2d 290 (2011).

415. *Id.* at 497 (quoting U.S. CONST. amend. XIV; MICH. CONST. art. 1, § 17; State Treas. v. Wilson, 150 Mich. App. 78, 80, 388 N.W.2d 312 (1986)).

416. *Id.* (citation and internal quotation marks omitted).

417. *Id.* at 500 (citing MICH. COMP. LAWS ANN. § 722.4; People v. Sands, 261 Mich. App. 158, 161, 680 N.W.2d 500 (2004)).

418. *Id.*

419. New York v. Ferber, 458 U.S. 747, 757-58, 764 (1982).

420. *Roberts*, 292 Mich. App. at 501.

421. *Id.*

422. 486 Mich. 556, 786 N.W.2d 52 (2010).

community.[423] In *Hendee*, the plaintiffs desired to develop a 498-unit manufactured housing community (MHC) at a 144-acre parcel that was then zoned for agricultural uses.[424] The plaintiffs had originally submitted a plan for a 95-unit MHC and a subsequent request for the 498-unit MHC, but withdrew the 498-unit MHC request when the original 95-unit MHC application was denied.[425] The plaintiffs abandoned the 95-unit MHC development because of its economic infeasibility, and sued the township to allow them to develop the 498-unit MHC development.[426] Both the trial court (after a nine-day bench trial) and the court of appeals found, for differing reasons, that the township zoning scheme was unconstitutional.[427]

Reversing the lower courts, the lead opinion, written by Justice Weaver and joined by Justice Hathaway, found that "[a]n ordinance is not facially invalid merely because it does not authorize every conceivable lawful use . . . ."[428] Indeed, the lead opinion also held that "[b]ecause plaintiffs never submitted an application to the township for the MHC rezoning or for a use variance that permitted construction of an MHC, plaintiffs' claim was not ripe for judicial review."[429] If the plaintiffs had filed suit on the 95-unit MHC denial, the lead opinion reasoned, the denial would have been a final decision ripe for review.[430] The plaintiffs, however, did not file suit on such a claim—but rather filed a lawsuit based on the theory "that the township had wrongfully engaged in exclusionary zoning by enacting an ordinance that did not, on its face, permit *development of a 498-unit MHC* on plaintiffs' property."[431] Thus, the lead opinion found that "the trial court had no authority to review plaintiffs' complaint alleging that the township's ordinance was a facially invalid exercise in exclusionary zoning because the ordinance did not permit plaintiffs to develop an MHC."[432] In the course of its decision, the lead opinion also found that "a plaintiff's complaint is not ripe for judicial review until the zoning authority has reached a final decision and the plaintiff has exhausted every administrative appeal."[433]

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423. *Id.* at 560.
424. *Id.* at 561.
425. *Id.* at 562-63.
426. *Id.* at 563.
427. *Id.* at 563-64.
428. *Hendee*, 486 Mich. at 560.
429. *Id.* at 561.
430. *Id.* at 572-73.
431. *Id.* at 568.
432. *Id.* at 569.
433. *Id.* at 569 (citing Paragon Properties Co. v. City of Novi, 452 Mich. 568, 580-83, 550 N.W.2d 772 (1996)).

Because the plaintiffs had not submitted the 498-unit MHC plan for review to the appropriate township authorities or asked for a zoning variance regarding the same, the claim could not be ripe for judicial review as the plaintiffs had not exhausted all administrative remedies and received a final decision from the township.[434] Like the other two opinions, the lead opinion cited Michigan Supreme Court precedent, especially *Paragon Properties Company v. City of Novi*,[435] regarding the ripeness doctrine, and noted that it is consistent with United States Supreme Court precedent.[436]

Because "this case can be resolved on this narrower ground," the lead opinion opined that, "we need not and do not address the substance of plaintiffs' exclusionary zoning claim."[437] While recognizing that the plaintiff need not exhaust administrative remedies that would otherwise be futile, the lead opinion reasoned that such an exception to the finality doctrine did not apply "[b]ecause plaintiffs have not even made at least one unsuccessful meaningful application for a zoning request . . . so as to permit their proposed 498-unit MHC . . . ."[438] The lead opinion also rejected the court of appeals' apparent finding that finality rule did not apply to a facial challenge to a zoning ordinance.[439]

Justice Cavanagh, joined by Chief Justice Kelly, concurred with the lead opinion, finding that "on the facts of this case, plaintiffs' claims are not ripe for review."[440] Justice Cavanagh wrote separately to reaffirm his adherence to his dissenting opinions in *Paragon* and other cases addressing the finality rule.[441] In particular, Justice Cavanagh found that the Michigan Supreme Court's "finality and ripeness jurisprudence stands in marked contrast to the United States Supreme Court's sensible and reasoned approach."[442] Justice Cavanagh reasoned that the court had previously erred in *Paragon* when it held that a strict ripeness doctrine requiring exhaustion of all administrative remedies applied to all constitutional challenges to zoning ordinances.[443] Nevertheless, because the township never made any decisions refusing the zoning request at

434. *Hendee*, 486 Mich. at 539.
435. 452 Mich. 568.
436. *Hendee*, 486 Mich. at 571-72; *Id.* at 580-81 (Cavanagh, J., concurring); *id.* at 587-89 (Corrigan, J., concurring)).
437. *Id.* at 573 (majority opinion).
438. *Id.* at 575.
439. *Id.*
440. *Id.* at 578 (Cavanagh, J.).
441. *Id.* at 578-79.
442. *Hendee*, 486 Mich. at 580.
443. *Id.* at 581-82.

issue, Justice Cavanagh agreed that the issue was not ripe for judicial review.[444]

Justice Corrigan, joined by Justices Markman and Young, also concurred with the lead opinion, agreeing that the claim was not ripe, but disagreeing with the lead opinion's reasoning.[445] Justice Corrigan found that there is a conceptual difference between the rule of finality and exhaustion of administrative remedies. However, "[t]he interrelation between the ripeness doctrine and the rule of finality is so embedded in our zoning jurisprudence that this Court has occasionally discussed the two concepts interchangeably."[446] The rule of finality requires a final decision before a lawsuit can be filed, Justice Corrigan reasoned, while the exhaustion of remedies doctrine requires that a plaintiff first exhaust all administrative remedies prior to going to court.[447] Justice Corrigan also found a meaningful distinction between an "as applied" challenge versus a "facial" challenge to an ordinance.[448] A facial challenge, Justice Corrigan opined, is not subject to "the rule of finality and the ripeness doctrine" because it challenges the very existence of the ordinance, as opposed to its application to a particular case.[449] Because the plaintiffs' complaint challenged the zoning ordinance's prohibition of the 498-unit MHC development, Justice Corrigan found that the challenge was as applied.[450] Justice Corrigan agreed with the lead opinion that the township's prior denial of the 98-unit MHC did not mean that a subsequent application for the 498-unit MHC was necessarily futile.[451]

*J. Search and Seizure*

In *People v. Steele*,[452] the prosecutor challenged the trial court's suppression of the fruit harvested from a traffic stop which was effectuated when a store's loss prevention officer informed the police that a person "was not a resident of the local area," and purchased "'packages' of Sudafed" and a "gallon of Coleman fuel," which were "precursors for methamphetamine . . . ."[453] The court of appeals

444. *Id.* at 583-84.
445. *Id.* at 585 (Corrigan, J.).
446. *Id.* at 588-89.
447. *Id.* at 587-88.
448. *Hendee*, 486 Mich. at 589-90.
449. *Id.* at 591.
450. *Id.*
451. *Id.* at 594-95.
452. 292 Mich. App. 308, 808 N.W.2d 753 (2011), *appeal denied*, 490 Mich. 861, 801 N.W.2d 882 (2011).
453. *Id.* at 310.

recognized that "[t]he stop of defendant's vehicle implicates defendant's right to be free from unreasonable searches and seizures. Both the United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures."[454] However, the court did not undertake any separate Michigan constitutional analysis.

Taking to task the trial court's finding that "the purchase of only one package of Sudafed and camping fuel is not enough to meet the standard of a particularized suspicion,"[455] the Michigan Court of Appeals found that the trial court "clearly erred when it found that [the officer] had been informed that defendant purchased a single box of Sudafed. The evidence indicated that [the officer] had been advised that defendant had purchased 'packages' of Sudafed."[456] Placing strong emphasis on the fact that more than one package was involved, the court of appeals found that the totality of circumstances warranted a brief investigative stop of the car because there was "a reasonable, articulable suspicion that criminal activity is afoot" which is required for such a stop under federal jurisprudence.[457] Because the officer was entitled to stop the vehicle, he was also "permitted to temporarily detain defendant and make a reasonable inquiry into possible criminal activity. The questions posed by the officer were posed immediately after the stop, were minimal in number, and were posed to [sic] in an attempt to gather information confirming or dispelling the officer's suspicions."[458] Thus, the trial court erred by granting the defendant's motion.[459]

## VI. MICHIGAN DEVELOPMENT OF UNIQUE FEDERAL CONSTITUTIONAL LAW

In two cases involving a federal constitutional provision not found in the Michigan Constitution, the Michigan Court of Appeals clarified the application of the Full Faith and Credit Clause of the Federal Constitution[460] in law suits filed in Michigan.

Quoting the United States Constitution and acts of Congress, the court in *Hare v. Starr Commonwealth Corporation*[461] also cited a combination of Michigan, federal, and foreign cases, as well as a legal

454. *Id.* at 314 (citing U.S. CONST. amend. IV; MICH. CONST. art I, § 11; People v. Kazmierczak, 461 Mich. 411, 417, 605 N.W.2d 667 (2000)).
455. *Id.* at 313.
456. *Id.* at 315.
457. *Id.* at 314 (citing Terry v. Ohio, 392 U.S. 1, 21, 30-31 (1968)).
458. *Steele*, 292 Mich. App. at 318.
459. *Id.*
460. U.S. CONST. art. IV, § 1.
461. 291 Mich. App. 206, -- N.W.2d -- (2011).

treatise, in interpreting the Full Faith and Credit Clause of the United States Constitution.[462]

In the context of whether an insurance company could be subject to a Michigan garnishment, the court of appeals found that an anti-suit order from a New York court barring lawsuits against an insolvent insurance company was not entitled to full faith and credit in Michigan.[463] The New York order at issue had two major provisions: (1) an order that the New York Superintendent of Insurance take over the insolvent company and rehabilitate its business and (2) an injunction against "all persons" from suing the insurance company or attaching any of its assets.[464]

Citing Michigan authority, the court concluded that the first portion of the order was entitled to full faith and credit.[465] Citing federal and foreign authority, the court came to the opposite conclusion with regard to the second portion of the order because such injunctive relief is not considered a "final judgment on the merits" and/or binds the parties, not the courts.[466] "But whatever the reason," the court concluded, relying on a treatise and foreign authority, "it appears well settled that the Full Faith and Credit Clause does not compel a forum state court to recognize and enforce a sister-state antisuit injunction."[467] Nevertheless, the court affirmed the trial court, albeit on different grounds, "on grounds similar to those underlying the doctrine of forum non conveniens"—dismissing the case in favor of "deferring to the courts of New York State . . . ."[468]

In yet another case involving a New York order, *Pecoraro v. Rostagno-Wallat*,[469] the Michigan Court of Appeals found that the foreign order of filiation at issue was not entitled to the Full Faith and Credit of the United States Constitution.[470] In a somewhat surreal (but all too common) factual context, a child was born in Michigan during the course of a Michigan-based marriage,[471] but DNA testing proved that the father was actually an adulterer who resided in New York.[472] Notwithstanding this inconvenient fact, Michigan law presumes that the

462. *Id.* at 216-17.

463. *Id.* at 220.

464. *Id.* at 213 (citing Keehn v. Charles J. Rogers, Inc., 311 Mich. 416, 425, 18 N.W.2d 877 (1945)).

465. *Id.*

466. *Id.* at 217 (relying on Abney v. Abney, 374 N.E.2d 264 (Ind. App. 1978); EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 24.21, at 981 (2d ed. 1991)).

467. *Hare*, 291 Mich. App. at 220.

468. *Id.* at 223.

469. 291 Mich. App. 303, 805 N.W.2d 226 (2011), *appeal denied*, 489 Mich. 951, 798 N.W.2d 27 (2011).

470. *Id.* at 306.

471. *Id.*

472. *Id.* at 307.

husband in a marriage is the legal father "unless there first exists a judicial determination arising from a proceeding between the husband and the wife that declares the child is not the product of the marriage."[473]

In New York, the biological father filed suit to establish paternity, but could not establish personal jurisdiction over the legal father, acknowledged as a necessary party.[474] Nevertheless, the New York court proceeded to judgment and issued an order of filiation declaring the biological father to be the legal father.[475] The biological father then sued in Michigan to seek paternity under Michigan's Paternity Act.[476] However, under Michigan law, "[a] third party may not rebut" the "legal presumption" of parentage to which a husband in a marriage is entitled.[477] At issue was whether the biological father had standing to seek paternity in Michigan or whether the New York order of filiation was entitled to be enforced in Michigan.[478]

After a review of the statutory provisions for standing under the Michigan Paternity Act,[479] the court found that the biological father had no standing to initiate a lawsuit in Michigan to challenge the legal presumption that the child was the issue of the marriage.[480] Undeterred, the biological father also argued that the New York order of filiation was binding in Michigan under the Full Faith and Credit Clause. [481] Citing only Michigan cases, the court of appeals found that "the courts of this state are not obligated under the Federal Constitution to give a foreign judgment full faith and credit where the issuing court lacked jurisdiction over the subject matter or the parties."[482] The court held that the New York order of filiation was not a valid and binding judgment over the presumed legal father because (1) the New York court did not have personal jurisdiction over him, (2) he was a necessary party, and (3) the New York court expressly recognized that the effect of its action would ultimately have to be determined by a Michigan court.[483]

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473. *Id.* at 306.
474. *Id.* at 307.
475. *Pecoraro*, 291 Mich. App. at 307-08.
476. *Id.* at 310.
477. *Id.* at 306.
478. *Id.* at 310-11.
479. MICH. COMP. LAWS ANN. § 722.714 (West 2006).
480. *Pecoraro*, 291 Mich. App. at 310-14.
481. *Id.* at 314.
482. *Id.* at 315 (citing *Hare*, 291 Mich. App. at 217; California v. Max Larsen, Inc., 31 Mich. App. 594, 597-98, 187 N.W.2d 911 (1971)).
483. *Id.* at 316-17.