CONSTITUTIONAL LAW

JUDGE MICHAEL WARREN†

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I. INTRODUCTION

The development of Michigan constitutional law during the *Survey* period was robust and widespread. In particular, the court of appeals was very active in addressing various provisions of the Michigan Constitution that have no Federal Constitution equivalent. This jurisprudence involved areas as diverse as the governor's commutation authority, the funding of state mandates on local units of government, the separation of powers between the legislative and judicial branches, the authority to impose court costs on criminal defendants, legislative authority to amend legislation by reference, and judicial elections and terms of office.

In a parallel fashion, there was substantial development of constitutional jurisprudence in connection with the Michigan Constitution and analogous provisions of the Federal Constitution. These areas included free speech, the right to bear arms, the Contracts Clause, separation of powers, criminal due process, civil due process, the right to counsel, and double jeopardy. Michigan courts also contributed to the development of constitutional analysis of the Federal Constitution, most especially in the areas of free speech, the right to counsel, due process during civil asset forfeiture proceedings, and the right to a jury trial in connection with juvenile sentencing.

Michigan jurisprudence continued to firmly embrace long-standing doctrines of constitutional law, including the presumption of constitutionality, the burden of proof, de novo review on appeal, and rules of constitutional construction.

Overall, the *Survey* period was marked by the potent flourishing of Michigan-centric constitutional jurisprudence, especially involving unique aspects of the Michigan Constitution, as well as an energetic fleshing out of various aspects of the Federal Constitution.

II. MICHIGAN CONSTITUTIONAL LAW GENERALLY

The fact that the Michigan Supreme Court has the authority to develop independent constitutional jurisprudence of the Michigan Constitution is axiomatic. That court has stated the proposition succinctly: "In 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."[1] Chief Justice

1. People v. Goldston, 470 Mich. 523, 534, 682 N.W.2d 479, 485 (2004); *see also* Harvey v. State, 469 Mich.1, 6–7 n.3, 664 N.W.2d 767, 770 n.3 (2003). Chief Justice Cavanagh has elaborated:

Stephen Markman made a similar observation during the *Survey* period: "'[W]hile the Federal supreme court is the final judge of violations of the Federal Constitution, the decision of the Supreme Court of this State is final on the question of whether or not a State statute conflicts with the State Constitution . . . .'"[2] Indeed, in light of Michigan's long-standing faithfulness to more traditional modes of constitutional interpretation,[3]

> 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.

People v. Collins, 438 Mich. 8, 43, 475 N.W.2d 684, 699 (1991) (Cavanagh, C.J., dissenting).

2. Lubrizol Corp. v. Dep't of Treasury, 880 N.W.2d 523, 525 (Mich. 2016) (Markman, C.J., dissenting) (quoting People v. Victor, 287 Mich. 506, 514, 283 N.W. 666 (1939)).

3. Indeed, in *Committee for Constitutional Reform v. Secretary of State*, 425 Mich. 336, 340–42, 389 N.W.2d 430, 431–33 (Mich. 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," *Carmen v. Secretary of State*, 185 N.W.2d 1, 14 (Mich. 1971); *Advisory Opinion on the Constitutionality of 1978 PA 426*, 272 N.W.2d 495, 497–498 (Mich. 1978). "The cardinal rule of construction, concerning language, is to apply to it that meaning which it would naturally convey to the popular mind . . . ." *People v. Dean*, 14 Mich 406, 417 (1866). 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." *Traverse City School District v. Attorney General*, 185 N.W.2d 9, 27 (Mich. 1971), citing *Kearney v. Bd of State Auditors*, 189 Mich. 666, 673, 155 N.W. 510 (1915).
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> In *Regents*, *supra*, 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. "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

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), it is not surprising that the Michigan Constitution and Federal Constitution could have substantively different meanings even with parallel language.[4]

> 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." (Emphasis added) 395 Mich. 59–60, 235 N.W.2d 1, 4–5 (Mich. 1975).
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> In *Pfeiffer v. Detroit Board of Education*, 118 Mich. 560, 564, 77 N.W. 250, 254 (1898), this Court stated:
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> > 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. *McPherson v. Sec'y of State*, 92 Mich. 277 52 N.W. 469 (1892).
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> The intent of the framers, however, must be used as part of the primary rule of "common understanding" described by Justice Cooley:
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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." Cooley's CONST. LIM. (6th ed. 81).

4. Justice Cooley explained when examining the issue of double jeopardy under the Michigan Constitution of 1850, article VI, section 29:

> But it is argued 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

III. INDEPENDENT MICHIGAN CONSTITUTIONAL JURISPRUDENCE

Michigan courts rendered several significant cases based entirely on the Michigan Constitution during the *Survey* period.[5] Cases involved the structure and funding of state government (i.e., the prohibition on unfunded mandates and the funding requirements between the state and local governments),[6] gubernatorial power over commutations,[7] legislative authority regarding tax exemptions[8] and imposing taxes,[9] legislative authority to amend statutes by reference,[10] judicial elections and terms of office,[11] gubernatorial authority to reorganize state government and the impairment of contracts,[12] and the separation of powers between the legislative and judicial branches.[13] Each of these

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> 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.

People v. Harding, 53 Mich. 481, 485, 19 N.W. 155, 157 (Mich. 1884).

5. *See infra* notes 7–14.

6. Adair v. State, 317 Mich. App. 355, 894 N.W.2d 665 (2016) [*Adair III*] (per curiam), *appeal denied sub nom*, Adair v. Dep't of Educ., 500 Mich. 991, 894 N.W.2d 594 (2017).

7. Makowski v. Governor, 317 Mich. App. 434, 438, 894 N.W.2d 753 (2016) (per curiam) *appeal denied*, 500 Mich. 988, 894 N.W.2d 547 (2017), *and appeal denied*, 501 Mich. 866, 901 N.W.2d 389 (2017).

8. SBC Health Midwest Inc. v. City of Kentwood, 500 Mich. 65, 894 N.W.2d 535, 542 (2017).

9. People v. Cameron, 319 Mich. App. 215, 900 N.W.2d 658 (2017) (per curiam).

10. Coal. Protecting Auto No-Fault v. Michigan. Catastrophic Claims Ass'n, 317 Mich. App. 1, 894 N.W.2d 758 (2016), *appeal denied*, 500 Mich. 991, 894 N.W.2d 594 (2017).

11. O'Connell v. Dir. of Elections, 317 Mich. App. 82, 85, 894 N.W.2d 113, 115 (per curiam), *appeal denied sub nom.* O'Connell v. Dir. of Elections, Bureau of Elections, 499 Mich. 1002, 883 N.W.2d 747 (2016).

12. Aguirre v. State, 315 Mich. App. 706, 891 N.W.2d 516 (2016) (per curiam), *appeal denied sub nom.* Aguirre v. State, 500 Mich. 946, 890 N.W.2d 368 (2017).

13. *In re* Petition of Tuscola Cty. Treasurer for Foreclosure, 317 Mich. App. 688, 895 N.W.2d 569 (2016), *appeal denied sub nom. In re* Petition of Tuscola Cty. Treasurer, 501 Mich. 859, 900 N.W.2d 879 (2017).

opinions have far-reaching consequences for the structure, authority, and processes of Michigan's state government.

A. The Headlee Amendment

In *Adair v. State of Michigan* [*Adair III*],[14] 465 public school districts and a representative taxpayer from each district brought suit against the State of Michigan.[15] The suit claimed that certain state-mandated school district reporting requirements violated Sections 25 and 29 of article IX of the Michigan Constitution (the Headlee Amendment) because they were not specifically funded by the state.[16] The plaintiffs also alleged that

> the Legislature violated the Headlee Amendment by imposing a new or an increased level of activities on the school districts through amendments of certain provisions of the Revised School Code, MCL 38.71 *et seq.*, and the Teacher Tenure Act, MCL 38.71 *et seq.*, without appropriating any funding to reimburse the school districts for the necessary costs associated with the new mandates.[17]

The same plaintiffs had previously brought a successful suit against the state, alleging the State violated the "prohibition on unfunded mandates" (the POUM provision) set forth in article IX, Section 29 of the Michigan Constitution of 1963, when the state required the plaintiff school districts to engage in reporting requirements "without providing funds to reimburse school districts for the necessary costs incurred by the districts in order to comply with the new mandates."[18] In response, the "Legislature appropriated $25,624,500 for the 2010–2011 school year 'to be used solely for the purpose of paying necessary costs related to the state-mandated collection, maintenance, and reporting of data to this state.'"[19]

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14. Adair v. State, 317 Mich. App. 355, 894 N.W.2d 665 (2016) [*Adair III*] (per curiam), *appeal denied sub nom.* Adair v. Dep't of Educ., 500 Mich. 991, 894 N.W.2d 594 (2017).

15. *Id.* at 358 n.1, 894 N.W.2d at 667 n.1.

16. *Id.* at 358–59, 894 N.W.2d at 667.

17. *Id.* at 359, 894 N.W.2d at 667.

18. *Id.* at 360, 894 N.W.2d at 667 (citing Adair v. State, 486 Mich. 468, 494, 785 N.W.2d 119, 134 (2010) [*Adair I*]).

19. *Id.* (quoting 2010 PA 217, § 152a).

Unsatisfied with the amount of funds allocated, the plaintiffs filed a second lawsuit under the Headlee Amendment, *Adair II*.[20] In *Adair II*, the plaintiffs alleged that the Legislature failed to meet the funding requirements of the Headlee Amendment for a variety of reasons, including failing to fully fund reporting requirements, inappropriately reallocating funds of discretionary funding to shift taxes onto local taxpayers, and imposing new unfunded mandates in connection with teacher and administrator evaluation.[21] The Michigan Court of Appeals referred the case to a special master (a trial court)[22] to conduct evidentiary proceedings regarding the matter.[23] The special master summarily dismissed several of the plaintiffs' claims because they had either already been "definitively rejected" by the court of appeals[24] or, in the case of the employee evaluations, did not trigger the Headlee Amendment because they were the "provision of a benefit for employees" which was exempt from the amendment.[25] At trial, the special master involuntarily dismissed the remainder of the case involving the remaining POUM claims when the plaintiffs declared that they would not specify the amount of the alleged underfunding of the mandates during their opening statement.[26]

The Michigan Court of Appeals affirmed the special master's summary dismissal rulings but vacated the special master's involuntary dismissal at trial and remanded for trial.[27] The Michigan Supreme Court reversed the court of appeals with regard to the claims involuntarily dismissed (thereby affirming the special master's involuntary dismissal) and affirmed the court of appeals and special master regarding the summarily dismissed claims.[28]

Not yet content, the plaintiffs filed *Adair III*, again arguing that the Legislature underfunded mandated school district reporting and other

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20. *Id.* at 360, 894 N.W.2d at 667–68 (citing Adair v. State, 497 Mich. 89, 860 N.W.2d 93 (2014); Adair v. State, 302 Mich. App. 305, 839 N.W.2d 681 (2013), *rev'd in part* 497 Mich. 89, 860 N.W.2d 93 (2014)).

21. *Id.* at 360–61, 894 N.W.2d at 667–68.

22. The Court of Appeals referred the case specifically to the trial court of Judge Michael Warren, the author of this Survey.

23. *Adair III*, 317 Mich. App. at 361, 894 N.W.2d at 668.

24. *Id.* (first quoting Durant v. Michigan, 251 Mich. App. 297, 650 N.W.2d 380 (2002); and then quoting Durant v. Michigan, 238 Mich. App. 185, 605 N.W.2d 66 (1999)).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 361–62, 894 N.W.2d at 668 (citing Adair v. State, 497 Mich. 89, 111 n.54, 860 N.W.2d 93, 105 n.54 (2014)).

requirements.[29] In a case of "déjà vu, all over again,"[30] the Michigan Court of Appeals appointed a special master[31] to preside over an evidentiary hearing and provide a report.[32] The special master recommended that the case be dismissed because it was barred by the doctrines of res judicata and collateral estoppel.[33]

The Michigan Court of Appeals affirmed the special master's decision, finding that the underfunding claims were barred by res judicata, and that the remaining claims had been definitively rejected as a matter of law.[34] The court of appeals rejected the plaintiffs' argument that res judicata would eviscerate the POUM provision of the Headlee Amendment.[35] The court elaborated:

> Our Supreme Court authoritatively rejected plaintiffs' position in *Adair*, 470 Mich. 105, 680 N.W.2d 386. The Court definitively ruled that the ratifiers of the Headlee Amendment "would have thought, as with all litigation, there would be the traditional rules that would preclude relitigation of similar issues by similar parties" and that an application of the doctrine was essential to making the amendment "workable" and to preventing the amendment from becoming a "Frankensteinian monster." *Id.* at 120–121, 126–127, 680 N.W.2d 386. Therefore, we "must . . . consider res judicata and apply it to this unique Headlee situation." Id. at 121, 680 N.W.2d 386. We are "bound by the rule of stare decisis to follow the decisions of our Supreme Court." *Tenneco Inc. v. Amerisure Mut. Ins. Co.*, 281 Mich.App. 429, 447, 761 N.W.2d 846 (2008).[36]

B. Governor's Commutation Power & Parole Board Authority

Matthew Makowsi, convicted of first-degree murder in 1988, was sentenced to life in prison without the possibility of parole.[37] In 2010, the

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29. *Id.* at 362, 894 N.W.2d at 668.

30. *Yoggi Berra Quotes*, BRAINYQUOTES, https://www.brainyquote.com/quotes/yogi_berra_135233 (last visited Dec. 10, 2017).

31. Confirming the power of Berra, the Court of Appeals again appointed Judge Michael Warren, the author of this Survey, as special master.

32. *Adair III*, 317 Mich. App. at 362, 894 N.W.2d at 668.

33. *Id.* at 363, 894 N.W.2d at 669.

34. *Id.* at 359, 364, 894 N.W.2d at 667, 669.

35. *Id.* at 369–70 n.3, 894 N.W.2d at 669 n.3.

36. *Id.* at 364 n.3, 894 N.W.2d at 669 n.3.

37. Makowski v. Governor, 317 Mich. App. 434, 438, 894 N.W.2d 753 (2016) (per curiam) *appeal denied*, 500 Mich. 988, 894 N.W.2d 547, *and appeal denied*, 501 Mich. 866, 901 N.W.2d 389 (2017).

parole board recommended that Makowski's sentence be commuted and sent his "application to the Governor with a favorable recommendation."[38] Former Governor Jennifer Granholm agreed with the recommendation and "signed the commutation. It was then signed by the Secretary of State, who affixed the Great Seal. After the family of the victim expressed opposition, the Governor revoked the commutation."[39] However, the Michigan Supreme Court struck down this attempt to revoke the commutation because Governor Granholm lacked the authority to revoke the commutation.[40]

The commutation did not immediately release Makowski.[41] Rather it simply provided the parole board with the authority to release him on parole.[42] The Supreme Court ordered that Makowski's sentence be amended from a minimum of life in prison to minimum of a term of years equivalent to the time he already served at the time of the commutation; the maximum was set at life and the parole board then had the jurisdiction to release Makowski if it so chose.[43] In a move, perhaps unforeseen by all but the keenest of observers, the parole board denied Makowski parole.[44] Makowski then filed suit in the Michigan Court of Claims, arguing he should be released on parole as the commutation entitled him to be immediately released and the parole board only had a ministerial duty to release him.[45] In other words, the governor had the exclusive power to issue a commutation and the parole board violated that decision.[46] The governor and secretary of state contended that the language of the commutation and the applicable law only made Makowski eligible for parole—not entitled to it.[47]

Both the Michigan Court of Claims and the Michigan Court of Appeals rejected Makowski's argument.[48] The court of appeals noted that article V, section 14 of the Michigan Constitution of 1963 grants the governor the power "to grant reprieves, commutations and pardons after convictions . . . upon such conditions and limitations as he may direct, subject to the procedures and regulations prescribed by law."[49] Because

38. *Id.* at 438, 894 N.W.2d at 754.
39. *Id.* (citations omitted).
40. *Id.*
41. *Id.* at 438–39, 894 N.W.2d at 755.
42. *Id.*
43. *Id.* at 439, 894 N.W.2d at 755 (quoting Makowski, 497 Mich. at 863, __ N.W.2d ___, *amended on reh'g*, 495 Mich. at 490, 852 N.W.2d 61).
44. *Id.* at 439–40, 442, 894 N.W.2d at 755–56.
45. *Id.* at 440, 894 N.W.2d at 756.
46. *Id.*
47. *Id.* at 440–41, 894 N.W.2d at 756.
48. *Id.* at 440–41, 445, 894 N.W.2d at 755–56, 758.
49. *Id.* at 442, 894 N.W.2d at 756–57.

"only trial courts have the authority to issue a judgment of sentence . . . The governor's power to commute . . . is the power to alter or amend an existing sentence to one that is less severe."[50] The governor's commutation did not expressly release, parole, or terminate Makowski's imprisonment but only provided that Makowski was eligible for parole.[51] As such, Makowski remained under the jurisdiction of the parole board.[52] Although the parole board voted to recommend that the governor commute his sentence, the recommendation was not an order of parole.[53] In other words, despite having previously recommended parole, the parole board's recommendation was not binding and did not release Makowski—the parole board still retained the authority to ultimately deny parole.[54] The fact that the parole board had a historical practice of granting parole to those whose sentences had been commuted based on the parole board's recommendation did not mean that Makowski had some "constitutional or inherent right" for parole.[55] To the contrary, no such right was "grounded in state law . . . ."[56] Furthermore, there was no violation of due process because a potential parolee's hope for parole "'is too general and uncertain, and therefore, is not protected by due process.'"[57]

C. Taxation—Exemptions

In a well-drafted opinion authored by Justice Brian Zahra, the Michigan Supreme Court determined that Michigan's statutory tax exemption for all educational entities—both nonprofit and nonprofit—was constitutional.[58] The unanimous court held that the lLegislature was

50. *Id.* (citing MICH. COMP. LAWS. ANN. § 769.1(1) (West 2006) and Kent Co. Prosecutor v. Kent Co. Sheriff, 425 Mich. 718, 725, 391 N.W.2d 341 (1986)).

51. *Id.* at 442–43, 894 N.W.2d at 757.

52. *Id.* at 442–43, 894 N.W.2d at 756–57.

53. *Id.* at 443–44, 894 N.W.2d at 757.

54. *Id.* at 444, 894 N.W.2d at 757.

55. *Id.* (citing Connecticut Bd. of Pardons v. Drumschat, 452 U.S. 458, 465 (1981)).

56. *Id.*

57. *Id.* at 445 n.2, 894 N.W.2d at 758 n.2 (quoting *In re* Parole of Haeger, 294 Mich. App. 549, 575, 813 N.W.2d 313, 328 (2011)).

58. SBC Health Midwest Inc. v. City of Kentwood, 500 Mich. 65, 894 N.W.2d 535, 542 (2017). Justice Zahra explained that leave was

> [G]ranted [] to address whether the personal property tax exemptions set forth under MCL 211.9(1)(a) are available to for-profit educational institutions. We hold that the text of MCL 211.9(1)(a) plainly exempts from taxation "[t]he personal property of charity, educational, and scientific institutions incorporated under the laws of this state." Nothing in this language requires that an educational institution demonstrate nonprofit status to claim the exemption. We decline to import a nonprofit requirement into MCL

free to expand such tax exemptions to include for-profit organizations.[59] The court noted that article IX, section 4 of the Michigan Constitution of 1963 provides that "[p]roperty owned and occupied by nonprofit religious or educational organizations and used exclusively for religious or educational purposes, as defined by law, shall be exempt from real and personal property taxes." Simply put, because the language of the constitutional exemption did not limit the exemptions to only nonprofit organizations, "the Legislature is constitutionally vested with the broad power to tax and with that power comes the power to exempt from tax. The Legislature was free to enact the exemption at issue in this case."[60]

D. Taxation—Authority to Tax

In *People v. Cameron,*[61] the Michigan Court of Appeals affirmed the constitutionality of imposing court costs on a convicted criminal defendant.[62] As part of his judgment of sentence, the court ordered the defendant to pay $1,611 in court costs under MCL section 769.1k(1)(b)(iii).[63] Section 769.1k(1)(b)(iii) allows the assessment against a convicted defendant of "any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case, including, but not limited to the following: salaries; and benefits; goods and services necessary for court; and necessary expenses for maintaining court buildings and facilities."[64] The defendant's challenge to the statute was two-fold: (1) the court costs were actually a tax; and (2) the tax violated the Michigan Constitution by (a) violating the Michigan Constitution's Distinct Statement Clause and (b) the separation of powers.[65]

211.9(1)(a), because it would contravene a well-established rule of statutory construction preventing this Court from reading into a statute words that the Legislature has not included.

Id. at __, 894 N.W.2d at 536–37.

59. *Id.* at __, 894 N.W.2d at 542.

60. *Id.* (footnote omitted).

61. People v. Cameron, 319 Mich. App. 215, 900 N.W.2d 658 (2017) (per curiam).

62. *Id.* at 218, 900 N.W.2d at 662.

63. *Id.*

64. *Id.* at 221, 900 N.W.2d at 663.

65. Interestingly, the defendant failed to raise the constitutional issues in the trial court and consequently, the issue was not preserved. *Id.* at 220 n.1, 900 N.W.2d at 663 n.1. Nevertheless, the court chose to examine the issue, reasoning that it "may overlook preservation requirements if 'an important constitutional question is involved. . . .'" *Id.* (quoting People v. Gezelman, 202 Mich. App. 172, 174, 507 N.W.2d 744, 745 (1993)).

Although the court agreed that the court costs were indeed a tax (and not a fee),[66] it rejected the defendant's two constitutional challenges.[67]

The first challenge addressed the Distinct Statement Clause of the Michigan Constitution.[68] That clause provides: "Every law which imposes, continues or revives a tax shall distinctly state the tax."[69] Its "purpose . . . is to prevent the Legislature from being deceived in regard to any measure for levying taxes, and from furnishing money that might by some indirection be used for objects not approved by the Legislature."[70] As such, "[t]he Distinct Statement Clause is violated if a statue imposes an obscure or deceitful tax, such as when a tax is disguised as a regulatory fee."[71] The defendant asserted that MCL 769.1k(1)(b)(iii) ran afoul of the clause "because it does not reveal that it is creating a tax, does not establish a 'rate of calculation,' does not specify or limit the amount a court may charge, and does not clarify what proportion of the court's operating and maintenance costs criminal

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66. The court explained that:

> When determining whether a charge constitutes a fee or a tax, a court must consider three questions: "(1) whether the charge serves a regulatory purpose rather than operates as means of raising revenue, (2) whether the charge is proportionate to the necessary costs of the service to which it is related, and (3) whether the payor has the ability refuse or limit its use of the service to which the charge is related."

Cameron, 319 Mich. App. at 222, 900 N.W.2d at 664 (quoting Westlake Transp., Inc. v. Pub. Serv. Comm'n., 255 Mich. App. 589, 612, 662 N.W.2d 784, 799 (2003)).

The court further concluded that:

> MCL 769.1k(1)(b)(iii) clearly raises revenue rather than regulates behavior. Although the statute was written to ensure that costs impose on criminal defendants are proportional to the costs incurred by the trial court, the costs lack important hallmarks of a fee. Mainly, the benefactor of a successful felony prosecution is the general public, not the defendant who is paying for that service. . . . And, once charged with a felony, a defendant lacks "the ability to refuse or limit its use of the service to which the charge is related." Considering the factors "in their totality," the costs at issue should be considered a tax, not a fee.

Id. at 228, 900 N.W.2d at 667 (citations and footnote omitted).

See also id. at 236, 900 N.W.2d at 761 ("MCL 769.1k(1)(b)(iii) is a revenue-generating measure and the courts forcibly impose the assessment against unwilling individuals. As such, it is a tax, rather than a governmental fee.").

67. *Id.* at 218, 900 N.W.2d at 662.

68. *Id.* at 219, 900 N.W.2d at 663.

69. MICH. CONST. of 1963, art. IV, § 32.

70. *Cameron,* 319 Mich. App. at 229, 900 N.W.2d at 668 (quoting Gillette Commercial Operations N. Am. & Subsidiaries v. Dep't of Treasury, 312 Mich. App. 394, 447, 878 N.W.2d 891, 924 (2015)).

71. *Id.*

defendants will bear."[72] The court of appeals, however, found that the statute provided sufficient guidance, implicitly established a requirement that a factual basis support the costs imposed, clearly declared its purpose, and contained provisions "ensuring transparency and accountability in connection with the costs imposed, which weigh against a result that is obscure or deceitful."[73] The statutory provision granted trial courts "some discretion in calculating the costs" and failing to include the word "tax" was not fatal under the Distinct Statement Clause because it encouraged courts "to use a formula to determine the average cost of a criminal case."[74] It required a factual basis for the assessment and the defendant failed to present any evidence "indicating that the Legislature did not intend MCL 769.1k(1)(b)(iii) to raise revenue for the courts, or that the court costs collected are misdirected to a use unintended by the Legislature."[75] Put more simply, "[a]lthough the statute does not expressly state that it imposes a tax, the statute is neither obscure nor deceitful, and thus, it does not run afoul of the Distinct Statement Clause of Michigan's Constitution."[76]

The defendant also argued that the statutory costs violated Michigan Constitution's separation of powers provision.[77] Article III, section 2 of the Michigan Constitution of 1963 provides that "[t]he 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."[78] The defendant abandoned the argument by only cursory briefing the issue, yet the court of appeals overlooked this defect and examined the merits.[79] In particular, the defendant claimed that the statute unconstitutionally "delegates to the trial court the authority to determine the amount of the tax" when "the power to tax rests solely with the Legislature."[80] In fact, the court recognized that

> [r]egarding the imposition of taxes, the Michigan Constitution provides that "[t]he legislature shall impose taxes sufficient with other resources to pay the expenses of state government," and that "[t]he power of taxation

72. *Id.*
73. *Id.* at 230, 900 N.W.2d at 668.
74. *Id.* at 231, 900 N.W.2d at 669.
75. *Id.* (citing *Gillette*, 312 Mich. App. at 447, 878 N.W.2d at 924).
76. *Id.* at 236, 900 N.W.2d at 671.
77. *Id.* at 232, 900 N.W.2d at 669.
78. *Id.* (quoting MICH. CONST. of 1963, art. III, § 2).
79. *Id.*
80. *Id.* at 232, 900 N.W.2d at 669.

> shall never be surrendered, suspended or contracted away." Const. 1963, art 9, §§ 1, 2. Thus, the power to tax and appropriate generally rests exclusively with the Legislature.[81]

However, the separation of powers is not absolute,[82] and the legislature "may delegate its powers."[83] To conform with the separation of powers, any delegation by the Legislature requires that it "provide guidelines and standards to the body to which power is delegated. The Legislature's delegation of authority is proper if the standards are 'reasonably as precise as the subject matter requires or permits.'"[84] Thus, the directives of MCL 769.1k(1)(b)(iii) regarding calculating court costs were sufficient to meet the constitutional delegation and separation of power provisions.[85]

E. Prohibition of Amendments by Reference

In *Coalition Protecting Auto No-Fault v. Michigan Catastrophic Claims Ass'n*,[86] the Michigan Court of Appeals found that a statutory provision that exempted the Michigan Catastrophic Claims Association (MCCA) from complying with the Freedom of Information Act (FOIA)[87] did not violate a Michigan constitutional provision prohibiting legislative amendments by reference.[88]

At issue was article IV, section 25 of the Michigan Constitution of 1963, which provides, "No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length."[89]

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81. *Id.* at 233, 900 N.W.2d at 669–70 (citations omitted) (quoting UAW v. Green, 498 Mich. 282, 290, 870 N.W.2d 867, 872 (2015)).

82. *Id.* at 232, 900 N.W.2d at 670 ("[T]he separation-of-powers doctrine does not require an absolute separation between the branches of government.").

83. *Id.* at 233, 900 N.W.2d at 670.

84. *Id.* (citations omitted).

85. *Id.* at 235–36, 900 N.W.2d at 670–71.

86. Coal. Protecting Auto No-Fault v. Michigan Catastrophic Claims Ass'n, 317 Mich. App. 1, 894 N.W.2d 758 (2016), *appeal denied,* 500 Mich. 991, 894 N.W.2d 594 (2017).

87. MICH. COMP. LAWS. ANN. § 15.231 (West 2004).

88. MICH. CONST. of 1963, art. IV, § 25.

89. MICH. CONST. of 1963, art. III, § 2.

The court explained that "[t]his constitutional provision has a longstanding history having appeared in the state's 1850 Constitution."[90] Quoting an opinion written by Justice Cooley, the court elaborated:

> The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that the legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws.[91]

The court further stated that:

> The language in § 25 is clear: "[i]t says succinctly and straightforwardly that no law . . . shall be revised, altered or amended by reference to its title only. The constitutional language then proceeds to state how [the revision] should be done (*i.e.*, the section[s]) of the act in question shall be amended by reenacting and republishing at length."[92]

The court also noted "that amendment 'by implication' and amendments to an 'act complete in itself' do not violate article IV, § 25."[93]

At issue was whether the 1988 amendments to the Insurance Code,[94] exempting the MCCA from FOIA, violated the constitutional provision. In particular, one amendment provided: "A record of an association or faculty shall be exempted from disclosure pursuant to section 13 of the freedom of information act, Act No. 442 of the Public Acts of 1976, being section 15.243 of the Michigan Compiled Laws."[95] A second amendment defined the term "'association' to include the MCAA."[96] Together, the amendments exempted the MCAA from FOIA.[97]

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90. Coal. Protecting Auto No-Fault v. Michigan Catastrophic Claims Ass'n, 317 Mich. App. 1, 25, 894 N.W.2d 758, 772 (2016), *appeal denied*, 500 Mich. 991, 894 N.W.2d 594 (2017) (citing *In re* Requests of Governor & Senate on Constitutionality of Act No. 294 of Pub. Acts of 1972, 389 Mich. 441, 469, 208 N.W.2d 469, 477 (1973)).

91. *Id.* at 25, 894 N.W.2d at 772 (quoting People ex rel Drake v. Mahaney, 13 Mich. 481, 497 (1865)).

92. *Id.* (quoting *In re Requests of Governor & Senate*, 389 Mich. at 470, 469, 208 N.W.2d at 477).

93. *Id.* at 25–26, 894 N.W.2d at 772 (citing *Drake*, 13 Mich. at 496–97).

94. MICH. COMP. LAWS. ANN. § 500.134 (West 2002).

95. *Coal. Protecting Auto No-Fault*, 317 Mich. App. at 31, 894 N.W.2d at 555.

96. *Id.* (citing MICH. COMP. LAWS. ANN. § 500.134(6) (West 2006)).

97. *Id.*

The amendments did not violate article IV, section 25 because the amendments (1) did not create conflicting statutes, (2) did not constitute a "piecemeal amendment to an existing comprehensive statutory scheme," and (3) did not "'attempt to amend [an] old law by intermingling new and different provisions with the old ones found' in FOIA."[98] To the contrary, the amendments "work[] in concert with FOIA because" FOIA specifically allows exemptions via other statutes.[99] Thus, "because MCL 500.134(4) did not alter, amend, change, or dispense with any provisions of FOIA, the Legislature was not required to reenact or republish FOIA under Const. 1963, art. IV, Section 25."[100]

Judge Gleicher wrote a separate opinion, concurring in part and dissenting in part.[101] In particular, she vigorously dissented the court's application of article 4, section 25—she would have found that the amendment violated the provision because, among other things, she believed it was "piecemeal" and "the Legislature obscured from public view its significant diminution of the FOIA's reach."[102]

F. Judicial Elections & Term of Office

Court of Appeals Judge Michael Gadola's term of office was expiring on January 1, 2017.[103] Under article VI, sections 22 and 24 of the Michigan Constitution of 1963, Judge Gadola filed the necessary documentation to be placed on the ballot in the November 2016 election, with an incumbency designation on the ballot as "Judge of the Court of Appeals."[104] These constitutional provisions also allowed Judge Gadola to be placed on the ballot simply by filing affidavits, not gathering signatures via petitions.[105] His colleague, Judge Peter O'Connell, had a term of office expiring January 1, 2019. Because article VI, section 19(3) of the Michigan Constitution of 1963 prohibits judges who are seventy

98. *Id.* at 31–32, 894 N.W.2d at 775 (citations omitted).

99. *Id.* at 32, 894 N.W.2d at 776 (citations omitted).

100. *Id.* at 33, 894 N.W.2d at 776.

101. *Id.* (Gleicher, J., concurring in part and dissenting in part).

102. *Id.* at 34, 894 N.W.2d at 776 (Gleicher, J., concurring in part and dissenting in part).

103. O'Connell v. Dir. of Elections, 317 Mich. App. 82, 86, 894 N.W.2d 113, 115 (per curiam), *appeal denied sub nom.* O'Connell v. Dir. of Elections, Bureau of Elections, 499 Mich. 1002, 883 N.W.2d 747 (2016).

104. "Const. 1963, art. 6, § 22 permits an incumbent judge to become a candidate in the primary election by filing an affidavit of candidacy, rather than nominating petitions . . . ." *Id.* at 93, 894 N.W.2d at 119. "Const. 1963, art 6; § 24 requires that a judge who is seeking reelection 'to the same office' he or she currently holds be designated as 'Judge of the Court of Appeals' on the ballot." *Id.*

105. *Id.* at 93, 894 N.W.2d at 120.

years old and older from standing for reelection, Judge O'Connell was ineligible to stand for reelection in 2018.[106] Faced with retirement, Judge O'Connell filed the affidavits necessary under article VI, sections 22 and 24, claiming that he was an incumbent eligible for reelection in the November 2016 election—i.e., he attempted to run against Judge Gadola, with the same incumbency designation.[107] This would have resulted in the peculiar situation of two incumbents running for a single spot.[108] When the Director of Elections refused to place Judge O'Connell on the November 2016 ballot, Judge O'Connell sought a writ of mandamus to compel the Director of Elections to place him on the ballot as an incumbent in connection with the upcoming judicial election for Judge Gadola's seat.[109]

Judge O'Connell's novel argument that any incumbent court of appeals judge could file the affidavits and be designated as an incumbent for any upcoming court of appeals election was found to be meritless.[110] The Michigan Court of Appeals explained that the plain language of "[t]he controlling constitutional provision permits a judge of the Court of Appeals to run for '*the* office of which he is *the* incumbent' by filing an affidavit of candidacy."[111] Contrary to Judge O'Connell's argument, "[t]he definite article 'the' has consistently denoted a specific, particular thing. In this case, 'the' makes all the difference."[112] In other words, "[o]ur Constitution links the term 'incumbent' to a definite and specific office. The office for which Judge O'CONNELL seeks to run as an incumbent is now held by Judge GADOLA. Judge O'CONNELL is not 'the incumbent' for 'the office' held by Judge GADOLA."[113] As further support for its holding, the court noted that the constitution "deliberate[ly] stagger[ed] the terms of our Court of Appeals judges . . . ."[114] As such,

> [T]he seats on this Court are not akin to those at a picnic table or a game of musical chairs—indistinct and interchangeable. Rather, by defining and regulating "[t]he terms of office" for the judges of this Court, the drafters [of the Constitution] intended

106. *Id.* at 86, 894 N.W.2d at 115.
107. *Id.*
108. *Id.* at 86–87, 894 N.W.2d at 116.
109. *Id.*
110. *Id.* at 93, 894 N.W.2d at 119.
111. *Id.* at 85, 894 N.W.2d at 115 (citing MICH. CONST. of 1963, art. VI, § 22) (emphasis added).
112. *Id.*
113. *Id.* at 85–86, 894 N.W.2d at 115.
114. *Id.* at 95, 894 N.W.2d at 120.

> that judicial office would be segregated and distinguished by distinct terms of office.[115]

Finally, "because '[i]t is axiomatic that two persons cannot occupy the same office at the same time,' it is impossible for two judges to serve in the same term of office for which only one was originally elected."[116] The court concluded:

> This axiom was undoubtedly known to the drafters of our Constitution, as it reflects the teaching of Professor Floyd R. Mechem in his treatise on Public Officers: "[I]t is 'evident that two different persons cannot, at the same time, be in the actual occupation and exercise of an office for which one incumbent only is provided by law.'"[117]

G. Executive Reorganization & the Contracts Clause

In 2011, Governor Rick Snyder issued Executive Reorganization Order (ERO) 2011-3, replacing the then-existing Parole and Commutation Board with a new Parole Board.[118] Several members of the abolished Parole and Commutation Board were not appointed to the new Parole Board and sued on a variety of theories based on the fact that they had contracts for employment as board members which had not been completed.[119] Before the Michigan Court of Appeals in *Aguirre v. State of Michigan*[120] was whether the executive order violated the Contracts Clause of the Michigan Constitution.[121] The plaintiffs did not challenge the authority of the governor to issue ERO 2011-3; instead they argued that "the State is liable for monetary damages when the governor exercise[d] his constitutional authority to eliminate executive positions, thereby purportedly impairing the members' contractual right to their positions—and their related employment benefits—for the period defined in the letters of appointment."[122]

Citing Article I, Section 10 of the United States Constitution and article I, section 10 of the Michigan Constitution of 1963, the court of

115. *Id.*
116. *Id.* (citations omitted).
117. *Id.* (citations omitted).
118. Aguirre v. Michigan, 315 Mich. App. 706, 891 N.W. 2d 516 (2016) (per curiam), *appeal denied sub nom.* 500 Mich. 946, 890 N.W.2d 368 (2017).
119. *Id.* at 709–10, 891 N.W.2d at 520–21.
120. See *id.*
121. *Id.* at 711, 891 N.W.2d at 521.
122. *Id.* at 714, 891 N.W.2d at 523.

appeals explained that the federal and state constitutions both bar the state passing legislation that impairs a contract.[123] The Michigan Constitution provides that "[n]o bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted."[124] Citing Michigan vis-à-vis federal case law throughout the opinion, the court explained that challenges to the Contracts Clause required the application of "a three-pronged balancing test, 'with the first prong being a determination whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'"[125] If an impairment exists, the "courts must then examine the second and third prongs, as follows: by determining whether the legislative disruption of contract expectancies [is] necessary to the public good, and whether 'the means chosen by the Legislature to address the public need are reasonable.'"[126] Treating ERO 2011-3 as the equivalent of state law,[127] the court explained that the first prong of the test involved determining examining "three factors: [1] whether there is a contractual relationship, [2] whether a change in law impairs that contractual relationship, and [3] whether the impairment is substantial. For purposes of this analysis, an impairment takes on constitutional dimensions only when it interferes with reasonably expected contractual benefits."[128]

To determine whether the first prong was triggered, an examination of the nature of the defunct Parole and Commutation Board members was required. In particular, they were public office holders—not mere contract employees.[129] As such, the members did not have "a contractual right to hold that office" because "any holder of public office necessarily accepts the position with the knowledge that he or she may be removed as provided by law, and an express contract interfering with the power to

123. *Id.* at 714–15, 891 N.W.2d at 523.

124. MICH. CONST. of 1963, art. I, § 10.

125. *Aguirre,* 315 Mich. App. at 715, 891 N.W.2d at 523.

126. *Id.* at 716, 891 N.W. 2d at 523–24 (citations omitted) (internal quotation marks omitted).

127. *Id.* at 715 n.5, 891 N.W. 2d at 523 n.5 (quoting Health Care Ass'n Workers Comp. Fund v. Dir. of the Bureau of Worker's Comp., Dep't of Consumer & Indus. Servs., 265 Mich. App. 236, 250, 694 N.W.2d 761, 771 (2005).

128. *Id.* at 716, 891 N.W. 2d at 523 (citations omitted) (internal quotation marks omitted).

129. *Id.* at 717, 891 N.W.2d at 524. The court reached this result because the positions (1) were created under "the governor's authority under Const. 1963, art 5, § 2, which, in the absence of a legislative veto, has the same status as enacted legislation"; (2) "exercised sovereign power while engaged in the discretionary discharge of their duties," (3) exercised "powers and duties . . . set forth by statute as conferred by executive order," (4) "were created and placed within the Department [of Corrections] as provided by law", and (5) "required . . . [the] tak[ing] an oath of office." *Id.* at 717 n.6, 891 N.W.2d. at 524 n.6 (citations omitted).

abolish an office in the manner provided by law would be void as against public policy."[130] In fact, appointment or election to a public office does not create a contract, there is no property right in holding a public office, public officers are revocable agencies of the state, and the legislature has inherent authority to modify or abolish public offices even when incumbents have not completed their terms.[131] Thus,

> [b]ecause an officer has no vested property right to the office, the constitutional protections of the Contracts Clause do not apply and, when an office is abolished or an officer is lawfully removed, he or she is not entitled to payment for future services which would have been rendered but for the elimination of the office.[132]

Stated more simply, "an individual who accepts a public office takes that position 'subject to the contingency that it may be abolished lawfully.'"[133]

The court also explained that pursuant to article V, section 2 of the Michigan Constitution of 1963, the governor's power is "nearly plenary" to reorganize the executive branch.[134] As such, the plaintiffs accepted their positions "necessarily . . . subject to the contingency that their positions could be lawfully abolished in the future, even during the term of their appointments."[135] Indeed:

> Governor Granholm was without authority to contractually surrender or impede a future governor's constitutional authority to reorganize the Department by guaranteeing the members a set term of appointment in contravention of a future governor's reorganization power. When conducting business with the state,

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130. *Id.*

131. *Id.* at 717–19, 891 N.W.2d at 524–25.

132. *Id.* at 719, 891 N.W.2d at 525 (citing Butler v. Pennsylvania, 51 U.S. 402, 416–17 (1850)).

133. *Id.* at 720, 891 N.W.2d at 525–26 (citing Sprister v. City of Sturgis, 242 Mich. 68, 72, 218 N.W. 96, 98 (1928)). The court also noted that

> when the power of appointment or removal is provided for by the law, the future exercise of this governmental power of appointment or removal typically cannot be bargained away by contract. A contract to limit a future governing body's lawful power of removal or appointment of a public officer is considered void as a matter of public policy.

Id. at 720, 891 N.W.2.d at 526 (citations omitted).

134. *Id.* at 721, 891 N.W.2d at 526 (quoting Straus v. Governor, 459 Mich. 526, 534, 592 N.W.2d 53, 57 (1999)).

135. *Id.* at 722, 891 N.W.2d at 527.

> the members were charged with knowledge of such limitations on Governor Granholm's authority.[136]

Since the plaintiffs have "no vested contractual right to the continued existence of the Parole and Commutation Board, or to hold a position on the board for a set period of time in contravention of the governor's reorganizational power, there can be no impairment of a contract by ERO 2011-3."[137]

H. Separation of Powers

In *In re Petition of Tuscola County Treasurer for Foreclosure*,[138] the Michigan Court of Appeals found that the separation of powers doctrine was not violated by the statutory foreclosure procedure, which divested the circuit court of jurisdiction once a judgment of foreclosure was entered.[139] At issue was the interplay between MCR 2.612(C)(1)(f), which "authorizes a circuit court to relieve a party from a final judgment when such relief is justified,"[140] and MCL section 211.78k(6), which deprives courts of jurisdiction after a final judgment is entered.[141]

The respondent's failure to pay his property taxes prompted the county to file a petition for foreclosure.[142] In return, the trial court eventually entered a judgment of foreclosure that was effective on March 31, 2015.[143] The property was set to be auctioned on August 26, 2015.[144] On August 3, 2015—i.e., months after the entry of the default judgment but a few weeks before auction—the respondent filed a motion to set aside the judgment and to pay the taxes.[145] Invoking equitable authority and relying on MCR 2.612(C)(1)(f), the circuit court granted the motion, and the county appealed.[146] The Michigan Court of Appeals reversed, finding that MCL section 211.78k(6) divested the trial court of the authority to set aside the judgment, despite MCR 2.612(C)(1)(f).[147] The respondent, however, argued that MCL section 211.78(k) was an

136. *Id.* at 723, 891 N.W.2d at 527.
137. *Id.*
138. *In re* Petition of Tuscola Cty. Treasurer, 317 Mich. App. 688, 895 N.W.2d 569 (2016), *appeal denied sub nom.* 501 Mich. 859, 900 N.W.2d 879 (2017).
139. *Id.* at 701, 900 N.W.2d at 575.
140. *Id.* at 699–700, 895 N.W.2d at 575.
141. *Id.* at 700–01, 895 N.W.2d at 575.
142. *Id.* at 691–92, 895 N.W.2d at 570–71.
143. *Id.*
144. *Id.* at 693, 895 N.W.2d at 571.
145. *Id.*
146. *Id.* at 693–94, 895 N.W.2d at 571–72.
147. *Id.* at 694–700, 895 N.W.2d at 572–75.

unconstitutional violation of the separation of powers because the statutory provision infringed on the supreme court's rule making authority as embodied in MCR 2.612(C)(1)(f).[148]

The court of appeals explained that "[t]he Separation of Powers Clause of the Michigan Constitution provides that '[p]owers 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.'"[149] In addition, the court noted that article VI, section 5 of the Michigan Constitution of 1963 provides that "'[t]he supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.'"[150] As such, "[w]hile the Michigan Supreme Court 'retains the authority and duty to prescribe general rules that "establish, modify, amend, and simplify the practice and procedure in all courts of this state,"' issues of '"substantive law are left to the Legislature."'[151]

Rejecting the respondent's challenge, the court of appeals explained that the supreme court may not promulgate "court rules that establish, abrogate, or modify the substantive law."[152] Furthermore, "the Supreme Court's rule-making power is constitutionally supreme in matters of practice and procedure *only* when the conflicting statute embodying putative procedural rules reflects no legislative policy consideration other than judicial dispatch of litigation."[153] Because MCL section 211.78(k) constitutes "substantive law," the statutory provision prevailed and did not violate the separation of powers.[154] This finding was bolstered by the fact that MCL section 211.78k ensured finality of judgments as well as "demonstrate[d] a clear legislative policy reflecting considerations other than judicial dispatch of litigation.[155]

148. *Id.* at 702–03, 895 N.W.2d at 576.

149. *Id.* at 701, 895 N.W.2d at 575 (quoting MICH. CONST. of 1963, art. III, § 2).

150. *Id.* (quoting MICH. CONST. of 1963, art. VI, § 5).

151. *Id.* at 701, 895 N.W.2d at 576 (quoting People v. Jones, 497 Mich. 155, 166, 860 N.W.2d 112, 119 (2014)).

152. *Id.* (citations omitted).

153. *Id.* at 702, 895 N.W.2d at 576 (quoting *In re* Gordon Estate, 222 Mich. App. 148, 153, 654 N.W.2d 497, 500 (1997)) (internal quotation marks omitted).

154. *Id.* at 703–04, 895 N.W.2d at 577.

155. *Id.* (citing *Gordon*, 222 Mich. App. at 153, 564 N.W.2d at 500).

IV. CONSTITUTIONAL ANALYSIS INVOLVING THE MICHIGAN CONSTITUTION AND PARALLEL PROVISIONS OF THE FEDERAL CONSTITUTION

Michigan courts have faced a wide array of cases involving constitutional analysis in which both the Michigan and Federal Constitutions were addressed because of parallel provisions resulting in no discernable difference in the constitutional analysis. These cases dealt with the impairment of contracts,[156] criminal due process,[157] right to counsel,[158] double jeopardy,[159] civil due process,[160] free speech,[161] the impairment of contracts,[162] free speech,[163] and the right to bear arms.[164]

A. Contracts Clause

In *AFT Michigan v. State of Michigan* (*AFT Mich. III*),[165] the Michigan Court of Appeals addressed whether legislative reforms to the Public School Employees Retirement Act (PERA), MCL 38.101 *et seq.* were constitutional. In 2010, the Legislature amended the PERA to require "all current public school employees to contribute [three percent] of their salaries to the Michigan Public Schools Employees' Retirement System (MPSERS)."[166] In a previous Michigan Court of Appeals

156. AFT Mich. v. State, 315 Mich. App. 602, 893 N.W.2d 90 (2016) [AFT Mich. III] (on remand), *appeal granted sub nom.* 500 Mich. 999, 895 N.W.2d 539, *and aff'd in part, vacated in part sub nom.* 501 Mich. 939, 904 N.W.2d 417 (2017).

157. People v. Perry, 317 Mich. App. 589, 895 N.W.2d 216 (2016) (per curiam), *appeal denied*, 500 Mich. 1009, 896 N.W.2d 6 (2017).

158. *See generally id.*

159. *Id.*

160. Lamkin v. Hamburg Twp. Bd. of Trustees, 318 Mich. App. 546, 899 N.W.2d 408, *review denied*, 500 Mich. 1018, 896 N.W.2d 422 (2017).

161. Sarkar v. Doe, 318 Mich. App. 156, 897 N.W.2d 207 (2016).

162. *See* Aguirre v. State, 315 Mich. App. 706, 891 N.W.2d 516 (2016) (per curiam), *appeal denied sub nom.* 500 Mich. 946, 890 N.W.2d 368 (2017).

163. Dawson v. City of Grand Haven, No. 329154, 2016 WL 7611556, at *1 (Mich. Ct. App. Dec. 29, 2016) (per curiam), *appeal denied*, 901 N.W.2d 904 (Mich. 2017).

164. *See* People v. Brady, No. 329037, 2017 WL 127745 (Mich. Ct. App. Jan. 12, 2017) (per curiam), *appeal denied*, 500 Mich. 1024, 896 N.W.2d 451 (2017).

165. AFT Michigan v. State, 315 Mich. App. 602, 893 N.W.2d 90, (2016) [AFT Mich III] (on remand), *appeal granted sub nom.* 500 Mich. 999, 895 N.W.2d 539, *and aff'd in part, vacated in part sub nom.* 501 Mich. 939, 904 N.W.2d 417 (2017).

166. *Id.* at 609, 893 N.W.2d at 92–93 (footnote omitted). "These contributions, which were classified as 'employer contributions' to a nonvoting retiree health benefit program, constituted a mandatory deduction from the employees' contracted-for compensation with their respective employers." *Id.*

decision, *AFT Michigan v. State* (*AFT Mich. I*),[167] the court struck down 2010 PA 75 as violating the contracts clauses of the Michigan and Federal Constitutions;[168] the Takings Clauses of the Michigan and Federal Constitutions;[169] and substantive due process under the Michigan and Federal Constitutions.[170] While leave to appeal *AFT Mich. I* was pending,[171] "and in response" to *AFT Mich. I,* the Legislature enacted 2012 PA 300 in 2012, which again amended the PERA.[172] The 2012 amendments made the previously mandated health care payments voluntary, and allowed a refund for past payments into the system that did not vest, and eliminated health benefits under MPSERS for all new employees hired after September 4, 2012.[173] The court of appeals found 2012 PA 300 constitutional, "reasoning that the voluntary nature of the contributions and refund mechanism served to remedy the constitutional defects identified in *AFT Mich. I.*"[174] The Michigan Supreme Court affirmed in *AFT Mich. II*;[175] vacated the Michigan Court of Appeals decision in *AFT Mich. I*; and remanded the case to the Michigan Court of Appeals to determine "what issues . . . have been superseded by" 2012 PA 300 and *AFT Mich. II* and "address any outstanding issues the parties may raise regarding 2010 PA 75 that were not superseded or otherwise rendered moot by that enactment and decision."[176]

On remand, the Michigan Court of Appeals determined that because 2012 PA 300 did not apply retroactively, it did not supersede *AFT Mich. I*, and the mandatory pay deductions made between the passage of 2010 PA 75 and 2012 PA 300 (dubbed the "mandatory period") were unconstitutional for the reasons previously articulated in *AFT Mich. I.*[177] In particular, the court found that the mandatory payments remained unconstitutional under both the Michigan and federal Constitutions by

167. AFT Michigan v. State (AFT Mich. I), 297 Mich. App. 597, 825 N.W.2d 595 (2012), *vacated*, 498 Mich. 851, 864 N.W.2d 55 (2015).

168. *AFT Mich. III*, 315 Mich. App. at 609–10, 893 N.W.2d at 93 (citing MICH. CONST. of 1963, art. I, § 10; and then citing U.S. CONST. art. I, § 10).

169. *Id.* (citing MICH. CONST. of 1963, art. X, § 2; and then citing U.S. CONST. amends. V & XIV).

170. *Id.* (citing MICH. CONST. of 1963, art. I, § 17; and then citing U.S. CONST. amend. XIV, § 1).

171. *Id.* at 610, 893 N.W.2d at 93 (The Michigan Supreme Court "took no action on the application for nearly two years.").

172. *Id.* (citing AFT Michigan v. State (*AFT Mich II*), 497 Mich. 197, 205, 866 N.W.2d 782, 787 (2015)).

173. *Id.* at 610–11, 893 N.W.2d at 93–94.

174. *Id.* at 611, 893 N.W. 2d at 93.

175. *Id.*

176. *Id.* at 611, 893 N.W.2d at 94.

177. *Id.* at 611–28, 893 N.W.2d at 93–103.

impairing contracts,[178] violating the Takings Clauses,[179] and violating substantive due process.[180]

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178. The Michigan Court of Appeals found that "[d]uring the mandatory period, Section 43e of 2010 PA 75 operated as a substantial impairment of the employment contracts between the plaintiffs and the employing educational entities. The employment contracts provided for a particular amount of wages, and 2010 PA 75 required the employers not pay the contracted-for wages." *Id.* at 615–16, 893 N.W.2d at 96. (footnote omitted). Nevertheless, the court recognized that mere impairment was insufficient for a constitutional violation. *Id.* at 617, 893 N.W.2d at 97. The court elaborated:

> In order to determine whether that impairment violates the Contracts Clause, we must determine whether the state has shown that it did not: "(1) 'consider impairing the . . . contracts on par with other policy alternatives' or (2) 'impose a drastic impairment when an evident anymore moderate course would serve its purpose equally as well,' nor (3) act unreasonably 'in light of the surrounding circumstances[.]'" *Buffalo Teachers [Federation v.] Tobe,* 464 F.3d [362] at 371 (quoting *US Trust Co. of New York v. New Jersey,* 431 U.S. 1, 30–31 (1977). Put more generally, we are to determine whether the particular impairment is "*necessary* to the public good."

Id. at 617, 893 N.W.2d. at 97 (quoting *In re Certified Question,* 447 Mich. 765, 527 N.W.2d 468 (1994) (emphasis added)). A "heightened level of scrutiny" applied because the impairment benefited a government actor, and the impairment was a reasonable and necessary impairment as the "consequence of remedial legislation intended to correct systematic imbalances in the marketplace." *Id.* at 618, 893 N.W.2d at 97 (citations omitted).

179. The court explained that "[u]nder the Takings Clauses of the state and federal Constitutions, Const. 1963, art. X, § 2 and U.S. Const. Am. V, '[t]he government may not take private property for public use without providing just compensation to the owner.'" *Id.* at 62, 893 N.W.2d at 100 (citations omitted). Because the mandatory payments did not "merely impose an assessment or requirement payment of an amount of money without consideration, but instead asserts ownership of specific and identifiable 'parcel' of money, it does implicate the Takings Clause. Indeed, the United States Supreme Court has termed such actions 'per se' violations of the Takings Clause." *Id.* at 622, 893 N.W.2d at 99–100 (citations omitted).

180. The court explained that:

> The Fourteenth Amendment to the United States Constitution and Const. 1963, art. 1, § 17 guarantee that no state shall deprive any person of "life, liberty or property, without due process of law." Textually, only procedural due process is guaranteed by the Fourteenth Amendment; however, under the aegis of substantive due process, individual liberty interests likewise have been protected against certain government actions regardless of the fairness of the procedures used to implement them. The underlying purpose of substantive due process is to secure the individual from the arbitrary exercise of governmental power.

Id. at 625–26, 893 N.W.2d at 101 (citations omitted) (quoting People v. Sierb, 456 Mich. 519, 522–23, 581 N.W.2d 219 (1988)) (internal quotation marks omitted). The court rejected arguments that the legislation met due process concerns because it was remedial legislation intending to address structural fiscal imbalances in state retirement plans:

> The instant case is wholly different. Payment of healthcare benefits owed by the government to a particular set of its retired employees is not analogous to the maintenance of a statewide risk-sharing system to assure market and

Although 2012 PA 300 provided a "refund mechanism" of their mandatory period payments to employees who did not eventually become vested in their retirement plan, it did not salvage the act because the refund mechanism was subject to later statutory elimination, and

> [t]he constitutional problem was, and is, that the mandated employee contributions were to a system *in which the employee contributors have no vested rights*. . . . The sums withheld during the mandatory period were taken involuntarily, and the state retains the right to reduce or eliminate retiree health benefits for those who were compelled to surrender their wages.[181]

Since the funds collected during the mandatory period—more than $550 million—were escrowed[182] pending adjudication in the courts, the court of appeals ordered the trial court to "return the subject funds, with interest, to the relevant employees."[183]

Judge Saad concurred in part and dissented in part. In a vigorous and comprehensive dissent, he agreed that the issues were not moot, but would have ruled that the statutory scheme was constitutional.[184]

B. Due Process—Criminal Procedure

In *People v. Perry*,[185] the Michigan Court of Appeals rejected the defendant's argument that his right to due process was violated because the trial court allowed the prosecutor to add charges during the trial. The

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economic stability in the private sector. Rather, it is a question of various levels of government meeting their own fiscal obligations. Defendants posit no evidence or even argument to suggest that the funding of these retirement benefits couldn't have been satisfied by measures that do not raise due process concerns. The mechanism defined in Section 43e of 2010 PA 75 was *neither* one involving general taxation for a general fund with pacify uses or the monies later determined by the Legislature *nor* one imposing a fee for service to the payee. It was also not a mechanism that required individuals to fund benefits that they themselves had a vested right to receive. For these reasons, we conclude the 2010 PA 75 was unreasonable, arbitrary, and capricious and violated the state and federal Due Process Clauses, Cont. 1963, art 1, § 17 and U.S. Const. Am. XIV, § 1.

Id. at 627–28, 893N.W.2d at 102–03.

181. *Id.* at 614–15, 893 N.W.2d at 95–96 (footnote omitted).

182. *Id.* at 612, 893 N.W.2d at 94.

183. *Id.*

184. *Id.* at 629–46, 893 N.W. 2d at 103–12 (Saad, J., concurring in part and dissenting in part).

185. People v. Perry, 317 Mich. App. 589, 895 N.W.2d 216 (2016) (per curiam), *appeal denied*, 500 Mich. 1009, 896 N.W.2d 6 (2017).

defendant had a burden to show that the charges were added as a result of vindictiveness for exercising his right to go trial. However, he could not meet that burden because "[t]he record contain[ed] no indication of actual vindictiveness on the part of the prosecution. The record was absent of any expressed hostility or threats that would suggest that the prosecution deliberately penalized defendant for exercising his right to trial."[186]

C. Right to Counsel

In *People v. Perry,*[187] the Michigan Court of Appeals rejected the defendant's argument that his right to counsel was violated when he was identified out of a photographic line-up without counsel present in connection with two counts of uttering counterfeit notes, one count of false pretenses involving $100 but less than $20,000,[188] and one count of identity theft.[189] The defendant was identified in the photographic line-up prior to any "adversarial judicial proceedings" with regard to those charges but was already in custody for unrelated charges.[190] The defendant relied on *People v. Anderson,*[191] which had found that when a defendant is in custody, investigators must use a corporeal lineup and the defendant was entitled to counsel.[192] However, the supreme court overruled *Anderson* in *People v. Hickman*[193] "to the extent that the *Anderson* decision went '*beyond the constitutional text* and extend[ed] the right to counsel to a time before the initiation of federal criminal proceedings.'"[194] As such, the defendant's argument was baseless.[195]

D. Double Jeopardy

People v. Perry[196] addressed yet another issue—double jeopardy. The Michigan Court of Appeals rejected the defendant's argument that his conviction for two counts of uttering counterfeit bills violated his

186. *Id.* at 596, 895 N.W.2d at 221.
187. *Id.* at 589, 895 N.W.2d at 216.
188. *Id.* at 591–92, 895 N.W.2d 219.
189. *Id.*
190. *Id.* at 597, 895 N.W.2d at 222.
191. People v. Anderson, 389 Mich. 155, 205 N.W.2d 461 (1973), *overruled by* People v. Hickman, 470 Mich. 602, 684 N.W.2d 267 (2004).
192. *Perry,* 317 Mich. App. at 597, 895 N.W.2d at 221–22, (citations omitted).
193. People v. Hickman, 470 Mich. 602, 684 N.W.2d 267 (2004).
194. *Perry,* 317 Mich. App. at 597, 895 N.W.2d at 222.
195. *Id.* at 597–98, 895 N.W.2d at 222.
196. *See Perry,* 317 Mich. App. 587, 895 N.W.2d 216 (2017).

right against double jeopardy.[197] Interestingly, the court made this ruling despite the prosecutor's concession of error.[198] The defendant was convicted of two counts of passing two counterfeit bills in the same transaction and argued that "the 'unit of prosecution' for a violation of the statute is the number of *transactions* using counterfeit currency and not the number of counterfeit *bills* used in a single transaction."[199]

The court of appeals noted that "[b]oth the United States and the Michigan constitutions protect a defendant from being placed twice in jeopardy, or subject to multiple punishments for the same offense."[200] The court further explained that "[t]he state and federal constitutional guarantees are substantially identical and should be similarly construed."[201] At issue here was whether the defendant was subjected to "multiple punishments for the same offense."[202] If multiple punishment was intended by the legislature, there would be no double jeopardy violation.[203] "When the dispositive question is whether the Legislature intended two convictions to result from a single statute, it presents a 'unit of prosecution' issue. The question is whether the Legislature intended a single criminal transaction to give rise to multiple convictions under a

197. *Id.* at 600, 895 N.W.2d at 223.

198. *Id.* at 601, 895 N.W.2d at 224.

> The prosecution, citing the rule of lenity, concedes error. However, we are not beholden to the prosecution's concession and conclude that the plain language of the statute permits multiple convictions for uttering multiple notes during only one transaction. Given the plain reading of the state, the rule of lenity is inapplicable.

Id.

199. *Id.*

200. *Id.* at 601–02, 895 N.W.2d at 224. (citing People v. McGee, 280 Mich. App. 680, 682, 761 N.W.2d 743, 745 (2008) (citations omitted)).

201. *Id.* at 602, 895 N.W.2d at 224 (quoting People v. Ackah-Essien, 311 Mich. App. 13, 31, 874 N.W.2d 172, 184 (2005)).

202. *Id.* (quoting People v. Nutt, 469 Mich. 565, 574, 677 N.W.2d 1, 6 (2004)).

203. *Id.*

> To determine whether a defendant has been subjected to multiple punishments for the "same offense," [this Court] must first look to determine whether the Legislature expressed a clear intention that multiple punishments be imposed. *People v. Garland,* 286 Mich. App. 1, 4, 777 N.W.2d 732 (2009). If "the Legislature clearly intends to impose such multiple punishments, there is no double jeopardy violation." *Id.;* see also *People v. Miller,* 498 Mich. 13, 17–18, 869 N.W.2d 204 (2015) (explaining that the double jeopardy analysis under the multiple punishment strand is controlled by the parameters set forth by the Legislature and that there is no double jeopardy violation when the Legislature specifically authorizes multiple punishments).

single statute."[204] To make this determination, courts should examine the statutory text, including the "harm . . . [it] intended to prevent . . . ."[205]

The court of appeals found that the statutory text supported a conviction for each counterfeit bill:

> [T]he clear purpose of MCL 750.253 is to punish the use of counterfeit money to obtain property, but using counterfeit money to deceive a seller is just one evil the statute addresses. We hold that the clear intent of the statute, as expressed by the Legislature's use of the singular "note," is to address placing counterfeit and false bills into the stream of commerce. Not only was [the victim] deceived into turning property over in exchange for counterfeit money, but 40 counterfeit bills were then potentially part of the stream of commerce with the potential to harm others. . . . The harm as contemplated in the statute is placing false money into the public commerce. The statutory text of MCL 750.253 indicates the Legislature's intent to punish a defendant for each counterfeit bill that was introduced, uttered, passed, or tendered because the text reflects an intent to prevent counterfeit bills from being used.[206]

E. Due Process—Civil Procedure

Even a litigious plaintiff with what appears to be a facially defective complaint is entitled to a hearing before his or her case is dismissed.[207] The Michigan Court of Appeals in *Lamkin v. Hamburg Township Board of Trustees*[208] reversed a trial court's sua sponte dismissal of a complaint.[209] "Six days after Lamkin filed her complaint and before it was served, the circuit court sua sponte dismissed it, invoking MCR 2.116(C)(5) ('[t]he party asserting the claim lacks the legal capacity to sue'), and MCR 2.1116(I)(1), which permits a court to render summary disposition on the pleadings."[210]

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204. *Id.* at 114, 895 N.W.2d at 224–25 (citations omitted).

205. *Id.* at 603, 895 N.W.2d at 225 (citation omitted).

206. *Id.* at 605, 895 N.W.2d at 226. As such, the prosecutor's reliance on the rule lenity was inapposite. *Id.* at 605–06, 895 N.W.2d at 226 ("Given the clear indication of legislative intent and the absence of ambiguity, the rule of lenity does not apply.").

207. Lamkin v. Hamburg Twp. Bd. of Trustees, 318 Mich. App. 546, 549, 899 N.W.2d 408, 410, *review denied*, 500 Mich. 1018, 896 N.W.2d 422 (2017).

208. *Id.*

209. *Id.* at 548–49, 899 N.W.2d at 410.

210. *Id.* at 549, 899 N.W.2d at 410.

Without providing the plaintiff notice or the opportunity to be heard on the complaint, the circuit court issued a written opinion ruling that she did not have standing because her complaint was facially defective for failing to plead special damages.[211] Although the complaint was unquestionably facially defective for the reasons articulated by the trial court, the trial court erred by dismissing "the complaint without affording Lamkin notice and an opportunity to be heard."[212] Even though a trial court has the authority under MCR 2.116(I)(2) to sua sponte dismiss a complaint, "the trial court may not do so in contravention of a party's due process rights."[213] Again citing both Michigan and federal case law, the court of appeals explained that due process requires notice and an opportunity to be heard.[214] "Here, the circuit court's failure to notify Lamkin that it was contemplating summary disposition of her claims constitutes a fatal procedural flaw necessitating reversal."[215] Judge O'Connell concurred with no differing substantive legal analysis.[216]

Judge Krause, concurring in part and dissenting in part, found that the complaint was facially defective and that no prior notice was necessary before the dismissal.[217] Judge Krause would have ruled that "[d]ue process can be satisfied by affording an opportunity for rehearing."[218] Because there were allegations that the judge's staff prevented the plaintiff from filing a motion for reconsideration—thereby precluding any hearing on the issue—she would have remanded the case

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211. *Id.*

212. *Id.*, 899 N.W.2d at 411.

213. *Id.* at 549–50, 899 N.W.2d at 411 (quoting Al-Maliki v. LaGrant, 286 Mich. App. 483, 489, 781 N.W.2d 853, 856 (2009)).

214. *Id.* at 550, 899 N.W.2d at 411 (citing Bonner v. Brighton, 495 Mich. 209, 235, 848 N.W.2d 380, 396 (2014)); DKT Mem'l Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 301 n.3 (D.C. Cir. 1989) (Ginsberg, J., concurring in part and dissenting in part).

215. *Lamkin*, 318 Mich. App. at 550–51, 899 N.W.2d at 411 (footnote omitted).

216. *Id.* at 552–53, 899 N.W.2d at 412–13 (O'Connell, J., concurring).

> I write separately to state that the trial court, in its effort to be efficient, may have set a new land speed record of disposing of a case. . . . Clearly, the trial court was frustrated by the numerous (and possibly frivolous) lawsuits the plaintiff has filed. While I appreciate efficiency, I conclude that the plaintiff was completely denied her day in court and her opportunity to present her case in a reasonable manner. Though due process may take a little time and patience on the part of the trial court, it is necessary to a fundamentally fair court system.

Id.

217. *Id.* at 555–56, 899 N.W.2d at 414 (Krause, J., concurring in part and dissenting in part).

218. *Id.* at 557, 899 N.W.2d at 414 (quoting Al-Maliki, 286 Mich. App. at 485–86, 781 N.W.2d at 855).

on that sole issue.[219] If those allegations were proven, Judge Krause "would [have found] it impossible to deem such a denial of due process harmless, no matter how overwhelmingly meritless the complaint might appear."[220]

F. Free Speech

"Are the identities of anonymous scientists who comment on other scientists' research online protected by the First Amendment?"[221] This was the issue joined by the Michigan Court of Appeals in *Sarkar v. Doe*.[222] "Plaintiff Fazlul H. Sarker was "undisputed[ly] . . . [a] well-accomplished"[223] professor of pathology in "the cancer-research community."[224] A tenured professor at Karmanos Cancer Center, Wayne State University, he accepted a rich job offer to work at the University of Mississippi—but his job offer was scuttled because of allegations made on pubpeer.com, "which were apparently made known to the University of Mississippi by an anonymous individual."[225] Sarkar was able to return to Wayne State University, but he lost his tenure.[226] "After Sarkar learned he would be returning to Wayne State University, however, either the same or a different anonymous individual also distributed a flyer containing a screenshot from pubpeer.com to Wayne State University personnel," which included allegedly false allegations about Sarkar's career.[227]

Sarkar responded by filing a five-count complaint alleging defamation, intentional interference with a business expectancy, intentional interference with a business relationship, invasion of privacy, and intentional infliction of emotional distress.[228] He named the defendants as "John and/or Jane Doe(s)."[229] Sakar then served a subpoena on the PubPeer Foundation, seeking to learn the identity of the individuals who posted "approximately 30 comments made on pubpeer.com about his research."[230] Relying on the First Amendment,

219. *Id.* at 557, 899 N.W.2d at 415.
220. *Id.*
221. Sarkar v. Doe, 318 Mich. App. 156, 161, 897 N.W.2d 207, 211 (2016).
222. *Id.*
223. *Id.* at 162, 897 N.W.2d at 211.
224. *Id.*
225. *Id.* at 163, 897 N.W.2d at 211–12.
226. *Id.*, 897 N.W.2d at 212.
227. *Id.* at 165, 897N.W.2d at 213 (footnote omitted).
228. *Id.*
229. *Id.*
230. *Id.*

PubPeer moved to quash the subpoena.[231] The trial court quashed the subpoena except with regard to one comment set forth in Paragraph 40(c) of the complaint.[232]

When beginning its analysis, the Court of Appeals noted that:

> Because "[t]he United States and Michigan Constitutions provide the same protections of the freedom of speech," and Michigan's Constitution is not interpreted more broadly than that of the Federal Constitution on this issue, "this Court may consider federal authority when interpreting the extent of Michigan's protections of free speech."[233]

The Free Speech Clause protects anonymous speech made on the internet to the same extent such speech is protected in other media[234]—which also means that anonymous defamatory speech made on the Internet is not protected.[235] Because the defendants were anonymous and were not served, the procedural context of the case was unique and delicate. After all, when an anonymous defendant has not appeared, he or she cannot seek summary disposition.[236] However, summary disposition is one of the two major ways to protect the First Amendment rights of defendants under these circumstances.[237] As such:

> [W]hen an anonymous defendant in a defamation suit is not shown to be a aware of or involved with the lawsuit, some showing by the plaintiff and review by the trial court are required in order to balance the plaintiff's right to pursue a

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231. *Id.*

232. *Id.* at 166, 897 N.W.2d at 213.

233. *Id.* at 174 n.8, 897 N.W.2d at 217 n.8 (quoting Thomas M. Cooley Law Sch. v. Doe 1, 300 Mich. App. 245, 256, 833 N.W.2d 331, 338 (2013)). See also *Id.* at 217, 833 N.W.2d at 217 ("The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech. . . ." *Id.* at 174, 897 N.W.2d at 217 (quoting *Cooley,* 300 Mich. App. at 255–56, 833 N.W.2d 331; and then quoting U.S. CONST. Am. I). "Similarly, our 'Michigan Constitution provides that "[e]very person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech . . ."'").
Id. (quoting *Cooley,* 300 Mich. App. at 256, 833 N.W.2d at 338).

234. *Id.* at 174, 897 N.W.2d at 217.

235. *Id.* (quoting Ghanam v. Does, 303 Mich. App. 522, 534, 845 N.W.2d 128, 137 (2014)).

236. *Id.* at 176, 897 N.W.2d at 218.

237. *Id.*

meritorious defamation claim against an anonymous critic's First Amendment rights.[238]

To meet these requirements, Sarkar was required to overcome two challenges: (1) the plaintiff was required to make "reasonable efforts to provide the anonymous commentator with reasonable notice that he or she is the subject of a subpoena or motion seeking disclosure of the commenter's identity,"[239] and (2) the plaintiff's "claims must be evaluated by the court so that a determination is made as to whether the claims are sufficient to survive a motion for summary disposition under MCR 2.116(C)(8)."[240]

The second major way to protect the free speech rights of anonymous commentators was "Michigan's procedures for a protective order."[241]

Turning to the summary disposition test, the court of appeals found that several paragraphs of the complaint "[wer]e facially deficient" and could not survive summary disposition under MCR 2.116(C)(8), since they fell short of the specific pleading requirements for defamation.[242] Moreover, Sarkar abandoned his argument: "Sarkar apparently relie[d] on the trial [and appellate courts] to visit pubpeer.com and learn the underlying science at issue to determine whether the statement constitute[d] a potentially defamatory accusation."[243] Left in such a position, the courts would "[i]n essence . . . be left searching the cited webpages with the hope of finding comments that do or do not support his claim."[244] As emphasized by the court of appeals, "[t]his is his, not our, burden, and we decline do so for him."[245]

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238. *Id.* at 177, 897 N.W.2d at 219 (quoting *Ghanam,* 303 Mich. App. at 540, 845 N.W.2d at 140).

239. *Id.* at 172, 897 N.W.2d at 216. In this case "there [was] no dispute that reasonable notice was provided . . . ." *Id.* at 177, 897 N.W.2d at 219. Such notice included posting Sarkar's complaint on pubpeer.com, and that the fact "that this lawsuit, as well as the underlying allegation, [had] generated significant publicity in the cancer-research community." *Id.* at 177, 897 N.W.2d at 219 n.11.

240. *Id.* at 172, 897 N.W.2d at 216 (quoting *Ghanam,* 303 Mich. App. at 541, 845 N.W.2d at 141).

241. *Id.* (quoting Thomas M. Cooley Law Sch. v. Doe 1, 300 Mich. App. 245, 264, 833 N.W.2d 331 (2013)).

242. *Id.* at 184–85, 897 N.W.2d at 223–24.

243. *Id.* at 185, 897 N.W.2d at 223 (footnote omitted); *see also id.* at 185 n.15, 897 N.W.2d at 233 n.15 ("To be clear, we are holding that Michigan law requires a plaintiff to specifically identify *every* statement that he or she claims is capable of defamatory meaning. In this case, Sarkar quotes certain words, some phrases, and provides citations to various webpages. This is insufficient.").

244. *Id.* at 185, 897 N.W.2d at 223 (citations omitted).

245. *Id.* (footnote omitted).

Although other paragraphs of the complaint were not facially defective for lack of specificity, the court of appeals, relying on federal and foreign authority, found that because "when a speaker outlines the factual basis for his conclusion, his statement is protected by the First Amendment."[246] "[T]hese paragraphs reflect[] the speaker's opinion based on the underlying facts that are available to the reader," and consequently that they are protected speech.[247] The court elaborated:

> In short, Sarkar is asking this Court to hold that the anonymity of individuals who engage in critical discussions of his work is not protected by the First Amendment, and we simply cannot do so. Had this been a situation in which, for example, speakers had falsely stated that he was found guilty of research misconduct, our conclusion may well have been different. *But that is not what is before us.* Rather, the situation before us involves discussions between anonymous individuals who are, at least to some extent, critical of Sarkar's research. At best, some of the speakers opine that Sarkar *should* be investigated for research misconduct, and their opinions in that regard are protected by the First Amendment. Indeed, their discussions repeatedly invite readers to review Sarkar's research for themselves and reach their own conclusions, and we are not inclined to chill this type of constitutionally protected speech.[248]

However, because the flyer circulated at Wayne State University falsely suggested that Sarkar was under senatorial investigation, that specific allegation survived summary disposition under MCR 2.116(C)(8).[249] Nonetheless, quashing the subpoena was still appropriate because there was "no reasonable connection between the flyer and pubpeer.com."[250] The court rebuffed Sarkar's request that it should simply "assume the flyer was likely distributed by someone who criticized his research on pubpeer.com and therefore unmasked the identities of all the individuals who commented on that website . . . ."[251] After all, the "individuals are entitled under the First Amendment to make anonymous statements, and the mere fact that someone later prints

246. *Id.* at 194, 897 N.W.2d at 228 (citations omitted).
247. *Id.* at 192, 897 N.W.2d at 227.
248. *Id.* at 196, 897 N.W.2d at 229 (emphasis in original).
249. *Id.* at 197, 897 N.W.2d at 230.
250. *Id.*
251. *Id.*

some of those anonymous statements and distributes them does not suddenly destroy that protection."[252]

Furthermore, the fact that the other four counts survived did not resurrect the subpoena. In fact, quashing the subpoena about the entire case was warranted because:

> [L]ike with the flyer, any conduct that is completely separate from the comments on pubpeer.com is not reasonably connected so as to allow discovery of the anonymous speakers' identities. Therefore, while the other claims may proceed, PubPeer's motion to quash with respect to those claims was nevertheless properly granted.[253]

G. Contracts Clause

As stated earlier, the Michigan Court of Appeals in *Aguirre v. State of Michigan*[254] affirmed the constitutionality of the Executive Reorganization Order (ERO) 2011-3 under the Contracts Clause of both the Michigan and Federal Constitutions.[255]

H. Free Speech—Government Speech

In the unpublished opinion of *Dawson v. City of Grand Haven*,[256] the Michigan Court of Appeals found that a municipality was not required to allow a church to use an otherwise hidden cross which was part of a Vietnam War monument[257] and that was owned and controlled by the

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252. *Id.* at 197–98, 897 N.W.2d at 230.

253. *Id.* at 202, 897 N.W.2d at 232 (citations and footnote omitted). The court elaborated:

> [W]e completely reject the idea that only the defamation claim is subject to First Amendment limitations. Using that logic, if Sarkar simply dismissed his defamation claim and continued with the other four claims with respect to the statements on pubpeer.com, there would be no First Amendment protection, and that is directly contrary to the United States and Michigan Constitutions as well as case law from Michigan, other states, and the federal courts, including the United States Supreme Court.

Id. at 202 n.26, 897 N.W.2d at 232 n.26.

254. Aguirre v. State 315 Mich. App. 706, 891 N.W.2d 516 (2016) (per curiam).

255. *Id.* at 708, 891 N.W.2d at 519.

256. Dawson v. City of Grand Haven, No. 329154, 2016 WL 7611556, at *1 (Mich. Ct. App. Dec. 29, 2016) (per curiam), *appeal denied,* 901 N.W.2d 904 (Mich. 2017).

257. The court explained the innovative monument:

> More than 50 years ago, the "Dewey Hill monument" was donated to defendant as a memorial for those who served and died in the Vietnam War. . . . The Dewey Hill monument consisted of an elaborate lifting mechanism and

municipality.[258] This was because the monument was government speech and "the Free Speech Clause does not regulate government speech, and . . . the freedom of government to speak includes the right to removal of speech with which the government disapproves. . . ."[259] As such, the municipality did not violate the free speech rights of the church which wished to require the municipality to display the cross for the church's purposes.[260]

Although the decision was based on the Michigan Constitution's Free Speech Clause,[261] the court explained that binding precedent held that "[b]ecause the Michigan Constitution provides the same protection for the freedom of speech as the United States Constitution, this [c]ourt may consider federal authority when determining the extent of Michigan's free speech protection."[262] In fact, the analysis is almost entirely based on federal supreme court and court of appeals precedent.[263]

I. Right to Bear Arms

In the unpublished opinion of *People v. Brady*,[264] the Michigan Court of Appeals addressed whether Michigan's criminal statute,[265] barring convicted felons from possessing firearms (felon-in-possession), violated the Second Amendment of the United States Constitution or article I, section 6 of the Michigan Constitution of 1963. Following United States

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> foundation. . . . When the lifting mechanism is raised, a cross is displayed. The cross can be made into an anchor by placing attachments on the bottom and top of the cross. For many years, defendant raised the lifting mechanism to display the anchor or the cross when requested by individuals in the community.

Id. at *1.

258. *Id.* at *5 More specifically, "by accepting the Dewey Hill monument and exercising authority over the messages conveyed by it, it is clear that defendant was speaking through the monument." *Id.* (citation omitted).

259. *Id.* (citations omitted).

260. *Id.* The court also found that the plaintiff had abandoned an equal protection claim on appeal. *Id.* at *2 n.1.

261. The court explained that "[t]he Michigan Constitution guarantees the freedom of speech: 'Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press.'" *Id.* at *2 (quoting MICH. CONST. of 1963, art. I, § 5).

262. *Id.* at *2 n.2 (citing Thomas M. Cooley Law School v. Doe, 300 Mich. App. 245, 256, 833 N.W.2d 331, 338 (2013)).

263. *Id.* at *2–*5.

264. *See* People v. Brady, No. 329037, 2017 WL 127745 (Mich. Ct. App. Jan. 12, 2017) (per curiam), *appeal denied,* 500 Mich. 1024, 896 N.W.2d 451 (2017).

265. MICH. COMP. LAWS. ANN. § 750.224f (West Supp. 2014).

Supreme Court dicta, the court rejected the defendant's argument that the felon-in-possession criminal statute violated the Second Amendment.[266] However, the defendant also argued that "the felon-in-possession statute violates Michigan's constitution because it 'deprives felons of the fundamental right of self-defense by firearm.'"[267] The defendant relied heavily on *People v. Dupree,*[268] in which the Michigan Supreme Court "held that common law self-defense was a valid defense to a charge of felon in possession of firearm."[269] In language materially different from the Second Amendment, Michigan's constitutional provision provides that "'[e]very person has a right to keep and bear arms for the defense of himself and the state.'"[270] Distinguishing *Dupree,* in which a defendant was "actively defending himself from an attacker,"[271] the court of appeals found the defendant's argument unpersuasive because the felon-in-possession statute was "a reasonable exercise of the state's police power to protect the health, safety, and welfare of its citizens."[272]

V. CONSTITUTIONAL ANALYSIS OF THE FEDERAL CONSTITUTION

Michigan cases also furthered the development of federal constitutional jurisprudence when addressing federal constitutional issues (i.e., when no Michigan constitutional provision was invoked by the parties or addressed by the court) involving the right to counsel,[273] right to a jury trial,[274] the prohibition of cruel and unusual punishment,[275] civil

266. People v. Brady, No. 329037, 2017 WL 127745, at *2 (Mich. Ct. App. Jan. 12, 2017) (per curiam), *appeal denied,* 500 Mich. 1024, 896 N.W.2d 451 (2017) ("[T]his Court follows the dicta of *[District of Columbia v.] Heller,* [554 U.S. 570] and concludes, in conformity with our decision in *[People v.] Swint,* [225 Mich. App. 353, 572 N.W.2d 666 (1997)], that Michigan's felon-in-possession statute, MCL 750.224f, does not violate the Second Amendment.").

267. *Id.* at *2.

268. 486 Mich. 693, 712, 788 N.W.2d 399, 409–10 (2010).

269. *Brady,* 2017 WL 127745, at *2.

270. *Id.* at *1 (quoting MICH. CONST. of 1963, art. I, § 6).

271. *Id.*

272. *Id.* at *2 (quoting People v. Swing, 225 Mich. App. 353, 363, 572 N.W.2d 666 (1997)).

273. *See* People v. Biddles, 316 Mich. App. 148, 896 N.W.2d 461 (2016).

274. *See* People v. Hyatt, 316 Mich. App. 368, 891 N.W.2d 549 (2016).

275. *Id.*

due process,[276] equal protection and due process,[277] First Amendment vagueness, [278] and criminal due process.[279]

A. Sixth Amendment Right to Counsel

In *People v. Biddles,*[280] the defendant raised two sentencing issues: (1) an evidentiary issue challenging "the adequacy of evidence supporting the court's scoring of several offense variables," and (2) a constitutional issue rooted in the Sixth Amendment right to a trial by jury,[281] "contending that the trial court engaged in impermissible judicial fact-finding with regard to the same" offense variables.[282] The Michigan Court of Appeals explained that if there was an evidentiary error, the defendant would be unquestionably entitled to resentencing.[283] However, as determined in *People v. Lockridge,*[284] the constitutional challenge would only entitle the defendant to a potential resentencing[285] under the procedure outlined in *United States v. Crosby.*[286] The court explained this procedure:

> [O]n a *Crosby* remand, a trial court should first allow a defendant an opportunity to inform the court that he or she will not seek resentencing. If notification is not received in a timely manner, the court (1) should obtain the views of counsel in some

276. *In re* Forfeiture of 2000 GMC Denali & Contents, 316 Mich. App. 562, 570, 892 N.W.2d 388, 393 (2016).

277. Lake v. Putnam, 316 Mich. App. 247, 894 N.W.2d 62 (2016); Ward v. Oaks Correctional Facility Warden, 879 N.W.2d 641 (Mich. 2016) (mem) (equal protection).

278. *See* People v. Pinkney, 316 Mich. App. 450, 465, 891 N.W.2d 891 (2016), *overruled on other grounds*, No. 154374, 2018 WL 2025819 (Mich. May 1, 2018); *People v. Assy*, 316 Mich. App. 302, 891 N.W.2d 280 (2016) (per curiam).

279. *See Pinkney*, 316 Mich. App. 450, 891 N.W.2d 891.

280. *See* People v. Biddles, 316 Mich. App. 148, 896 N.W.2d 461 (2016).

281. *Id.* at 168, 896 N.W.2d at 474 (Ronanyne Krause, J., concurring in part and dissenting in part) (citing People v. Lockridge, 498 Mich. 358, 364–65, 870 N.W.2d 502, 506–07 (2015) ("[O]ur Supreme Court held that Michigan's mandatory sentencing guidelines violated a defendant's Sixth Amendment right to a jury trial to the extent that the guidelines required judicial fact-finding beyond facts admitted by a defendant or found by the jury beyond a reasonable doubt and that this judicial fact-finding improperly increased the floor of a defendant's minimum sentencing range.")).

282. *Id.* at 156, 896 N.W.2d at 968.

283. *Id.* (citation omitted) ("[I]f the trial court clearly erred by finding that a preponderance of the evidence supported one or more of the OV scores or otherwise erred by applying the facts to the OVs, and if the scoring error resulted in alteration of the minimum sentence range, he would be entitled to resentencing.").

284. *People v. Lockridge*, 498 Mich. 358, 870 N.W.2d 502 (2015).

285. *Biddles,* 316 Mich. App. at 157, 896 N.W.2d at 468.

286. United States v. Crosby, 397 F.3d 103 (2d Cir. 2005).

> form, (2) may but is not required to hold a hearing on the matter, and (3) need not have the defendant present when it decides whether to resentence the defendant, but (4) must have the defendant present, as required by law, if it decides to resentence the defendant. Further, in determining whether the court would have imposed a materially different sentence but for the unconstitutional constraint, the court should consider only the circumstances existing at the time of the original sentence.[287]

The court explained that when faced "with an evidentiary *and* a constitutional challenge regarding the scoring of the guidelines, the evidentiary challenge must initially be entertained, because if it has merit and requires resentencing, the constitutional or *Lockridge* challenge becomes moot—a defendant will receive the protections of *Lockridge* when he or she is resentenced."[288] In fact, because the court found that the trial court clearly erred by assessing 100 points for Offense Variable 3 (e.g., the trial court found that the defendant's conviction of felon-in-possession resulted in the death of the victim) and that error required resentencing, "his constitutional challenge under *Lockridge* [was] now moot and need not be addressed."[289]

Judge Ronayne Krause concurred in part and dissented in part confessing that she "did not understand the majority's resolution of defendant's sentencing issue."[290] In particular, she "did not understand the majority's construction of a framework for evaluating 'evidentiary' as opposed to 'constitutional' challenges."[291]

B. Sixth Amendment & Eighth Amendment—Juvenile Sentencing

In *People v. Hyatt*,[292] the Michigan Court of Appeals convened a special conflict panel under MCR 7.215(J) to address conflicts between *People v. Perkins*[293] and *People v. Skinner*,[294] regarding who would determine whether a juvenile defendant would be sentenced to life without parole—a judge or a jury.[295] Under MCL 769.25(2), when a

287. *Biddles*, 316 Mich. App. at 157, 896 N.W.2d at 468 (internal citations omitted).
288. *Id.* at 157–58, 896 N.W.2d at 468 (emphasis in original).
289. *Id.* at 166, 896 N.W.2d at 473.
290. *Id.* at 168, 896 N.W.2d at 474 (Ronayne Krause, J., concurring in part and dissenting in part).
291. *Id.*
292. People v. Hyatt, 316 Mich. App. 368, 891 N.W.2d 549 (2016).
293. People v. Perkins, 314 Mich. App. 140, 885 N.W.2d 900 (2016).
294. People v. Skinner, 312 Mich. App. 15, 877 N.W.2d 482 (2015).
295. *Hyatt*, 316 Mich. App. at 376, 891 N.W.2d at 552.

juvenile is convicted of certain homicide charges, the prosecutor may file a motion to sentence the defendant to life in prison without the possibility of parole.[296] When a petition is filed, the trial court is to:

> [C]onduct a hearing on the motion as part of the sentencing process. At the hearing, the trial court shall consider the factors listed in *Miller v. Alabama,* [567] U.S. [460], 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), and may consider any other criteria relevant to its decision, including the individual's record while incarcerated.[297]

Relying heavily on *Apprendi v. New Jersey*,[298] the defendant argued that MCL 769.25(2) was unconstitutional because the Sixth Amendment required a jury (not a judge) to find any facts that were used to increase his maximum possible penalty.[299]

The court found that the statutory framework did not infringe the Sixth Amendment.[300] The court reasoned:

> Neither *Miller* nor MCL 769.25 implicates the right to a jury trial under *Apprendi* and its progeny. Rather . . . the Legislature simply established a procedural framework for protecting a juvenile's Eighth Amendment rights at sentencing. The sentencing procedure . . . does not involve the concern that was issue at in *Apprendi,* 530 U.S. at 490, 120 S.Ct. 2348—fact-finding that increases the maximum penalty for juvenile homicide offenders. In other words, the instant case is not one in which the finding of a particular fact increases the maximum penalty. Nor does the instant case involve a statutory scheme that makes the imposition of life without parole contingent on any particular finding. Under MCL 769.25, the statutory maximum for juvenile offenders—assuming the requisite motion has been filed—is a life-without-parole sentence, and when imposing that rare sentence, the sentencing authority is not tasked with finding any particular fact before making its decision. A careful examination of *Miller* and MCL 769.25 compels this result.[301]

Stated another way

296. *Id.* at 384, 891 N.W.2d at 556.
297. *Id.* (quoting MICH. COMP. LAWS. ANN. § 769.25(6) (West Supp. 2018)).
298. Apprendi v. New Jersey, 530 U.S. 466 (2000).
299. *Hyatt*, 316 Mich. App. at 398, 891 N.W.2d at 563.
300. *Id.* at 399, 891 N.W.2d at 564.
301. *Id.*

> *Miller* simply holds that a framework of protections required by the Eighth Amendment must be implemented to ensure that the imposition of the maximum possible available penalty—life without parole—is proportionate to the particular offender and particular offense. In short, the remodeling that *Miller* performed on life-without-parole sentences for juveniles did not touch the ceiling—or floor, for that matter—of the available sentence for juvenile offenders.[302]

Although the foregoing resolved the key issue, the court felt compelled to reiterate at great length how the trial courts should approach the hearing at issue to ensure compliance with the Eighth Amendment.[303] For example, the court explained that "when a sentencing a juvenile offender, a trial court must begin with the understanding that in all but the rarest of circumstances, a life-without-parole sentence will be disproportionate for the juvenile offender at issue."[304] The court elaborated:

> We note that nearly every situation in which a sentencing court is asked to weigh in on the appropriateness of a life-without-parole sentence will involve heinous and oftentimes abhorrent details. After all, the sentence can only be imposed for the worst homicide offenses. However, the fact that a vile offense occurred is not enough, by itself, to warrant imposition of a life-without-parole sentence. The court must undertake a searching inquiry into the particular juvenile, as well as the particular offense, and make the admittedly difficult decision of determining whether this is the truly rare juvenile for whom life with parole is constitutionally proportionate as compared to the more common and constitutionally protected juvenile whose conduct was due to transient immaturity for the reasons addressed by our United States Supreme Court. And in making this determination in a way that implements the stern rebuke of *Miller* and *Montgomery,* the sentencing court must operate under the notion that more likely than not, life without parole is not proportionate.[305]

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302. *Id.* at 400–01, 891 N.W.2d at 564–65.
303. *Id.* at 419–22, 891 N.W.2d at 574–76.
304. *Id.* at 419, 891 N.W.2d at 574.
305. *Id.* at 420–21, 891 N.W.2d at 575.

The court of appeals also addressed the issue of the appellate standard of review for sentencing lifetime juvenile offenders.[306] The court answered by applying "a common three-fold standard"[307] as follows: "[a]ny fact-finding by the trial court is to be reviewed for clear error, any questions of law are to be reviewed de novo, and the court's ultimate determination regarding the sentence imposed is for an abuse of discretion."[308] Despite the commonality of the standard, because of the substantial constitutional concerns with sentencing juvenile offenders, the court held that "the imposition of a life-without-parole sentence on a juvenile requires a heightened degree of scrutiny regarding whether a life-without-parole sentence is proportionate to a particular juvenile offender, and even under this deferential standard, an appellate court should view such a sentence as inherently suspect."[309] The court further clarified that "[w]hile we do not suggest a presumption against the constitutionality of that sentence, we would be remiss not to note that review of that sentence requires a searching inquiry into the record with the understanding that, more likely than not, a life-without-parole sentence imposed on a juvenile is disproportionate."[310] The court found "instructive" the framework articulated in *United States v. Haack*,[311] highlighting situations in which an abuse of discretion can occur:

> "A discretionary sentencing ruling, similarly, may be [an abuse of discretion] if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case."[312]

The court of appeals then took the trial court to task, finding that the trial court did not heed *Miller* and its progeny's exacting standards and focused too heavily on testimony that the defendant was not likely to be rehabilitated within the next five years.[313] Accordingly, the case was

306. *See id.* at 422, 891 N.W.2d at 576.
307. *Id.* at 423, 891 N.W.2d at 576.
308. *Id.* (citations omitted).
309. *Id.* at 424, 891 N.W.2d at 576–77.
310. *Id.* at 425–26, 891 N.W.2d at 577 (citations omitted).
311. United States v. Haack, 403 F.3d 997, 1004 (8th Cir. 2005).
312. *Hyatt*, 316 Mich. App. at 427, 891 N.W.2d at 578 (quoting *Haack*, 403 F.2d at 1004).
313. *Id.* at 428–29, 891 N.W.2d at 589. The court stated:

remanded for resentencing.[314] The court of appeals took care to instruct the trial court to "not only consider the *Miller* factors, but decide whether defendant Hyatt is the truly rare individual mentioned in *Miller* who is incorrigible and incapable of reform . . . . Hence, it should operate with the understanding that, more likely than not, life without parole is a disproportionate sentence for defendant Hyatt."[315]

Judge Beckering, joined by Judge Shapiro, entered a concurrence, explaining that she was inclined to find that sentencing a juvenile to life without parole "constitutes cruel or unusual punishment in violation of the Michigan Constitution."[316] Judge Beckering also urged legislative reform of MCL 769.25.[317]

Judge Meter concurring in part and dissenting in part, joined by Judges M. J. Kelly and Riordan, concurred with the majority regarding the Sixth and Eighth Amendment issues, but would have affirmed the defendant's sentence.[318]

C. Due Process—Civil Asset Forfeiture

Michigan's Civil Asset Forfeiture Scheme[319] provided that property could be seized incident to arrest or per a search warrant if it was used to transport a controlled substance.[320] If the seized property was valued at less than $50,000, the seizing agency was required to provide the owner notice that the government intended to forfeit the property.[321] An

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> [W]e are concerned that the trial court, in concluding that life without parole was warranted in this case, emphasized the opinion of the psychologist who testified at the *Miller* hearing that defendant Hyatt's prognosis for change *in the next five years* was poor. This focus on a short, five-year period for redemption cannot be reconciled with *Miller*, which holds that a life-without-parole sentence will be proportionate for the juvenile who is irreparably corrupt and incapable of change—not one who is incapable of change within the next five years. The capacity for change within five years hardly seems of any relevance to the decision of whether an individual who committed a crime while a minor is *irreparably* corrupt, and thus, will remain corrupt and wholly incapable of rehabilitation for the remainder of his or her life expectancy, which could easily be another 60 to 80 years.

314. *Id.* at 429, 891 N.W.2d at 579.

315. *Id.*

316. *Id.* at 430, 891 N.W.2d at 580 (Beckering, J., concurring) (footnote omitted).

317. *Id.* at 444–47, 891 N.W.2d at 587–88.

318. *Id.* at 447, 891 N.W.2d at 588–89 (Meter, J., concurring in part and dissenting in part).

319. MICH. COMP. LAWS. ANN. § 333.7521(1) (West 2018).

320. *In re* Forfeiture of 2000 GMC Denali & Contents, 316 Mich. App. 562, 570, 892 N.W.2d 388, 393 (2016).

321. *Id.* at 570–71, 892 N.W.2d at 393 (citing MICH. COMP. LAWS. ANN. § 333.7523(1)(a) (West Supp. 2018)).

individual claiming ownership of the property (the claimant) could challenge the propriety of the seizure if they filed a written claim and posted a bond in the amount of ten percent of the value of the property, but in any event, the bond was required to be at least $250 and not more than $5,000.[322] The failure to post a bond within twenty days resulted in the automatic administrative forfeiture of the property.[323] Without exception, a claimant was not entitled to a judicial hearing unless he or she posted the required bond.[324] In *In re Forfeiture of 2000 GMC Denali & Contents*, the claimant lost certain property without a judicial hearing because she was indigent and could not afford to post the required bond. She argued that barring her access to the court constituted an unconstitutional deprivation of due process.[325]

In a comprehensive, thorough, and historically rooted opinion authored by Judge Christopher Murray, which reviewed extensive and exhaustive legal and historical authorities such as John Adams,[326] Arthur Lee,[327] Alexander Hamilton,[328] and John Locke,[329] the court held that Michigan's bond requirement violated due process by effectively denying the claimant the opportunity to be heard.[330] This was so because the claimant "is essentially put in a position similar to that of 'the defendant called upon to defend his interests in court,' in that her resort to the courts was not entirely voluntary, and it was the only available means to resolve her dispute."[331] Furthermore, the court stated:

> [T]here are no "effective" alternatives for claimant to pursue to have her car returned to her. Because of her indigency and inability to pay the required bond, claimant was excluded "from the only forum effectively empowered to settle [her] dispute[]." Therefore, we hold that application of the bond requirement operated to deprive claimant of a significant property interest without an opportunity for a hearing.[332]

322. *Id.* at 571, 892 N.W.2d at 393 (citing § 333.7523(1)(c)).
323. *Id.* (citing § 333.7523(1)(d)).
324. *Id.* at 571, 892 N.W.2d at 393.
325. *Id.* at 567, 892 N.W.2d at 391.
326. *Id.* at 572, 892 N.W.2d at 394.
327. *Id.*
328. *Id.*
329. *Id.* at 573, 892 N.W.2d at 395.
330. *Id.* at 579, 892 N.W.2d at 398.
331. *Id.* at 578–79, 892 N.W.2d at 398.
332. *Id.* at 580, 892 N.W.2d at 398 (citations omitted).

D. Equal Protection & Due Process—Child Custody Act

In *Lake v. Putnam,*[333] a same sex couple had a long-standing romantic relationship, during which the defendant was artificially inseminated and gave birth.[334] After the demise of their relationship, the plaintiff sued for parenting time.[335] The circuit court granted parenting time, and the court of appeals reversed, finding that under the Child Custody Act, MCL 722.26 *et seq.*, the "plaintiff, as an unrelated third party, lacked standing to seek parenting time with the child."[336]

The plaintiff argued that depriving her of standing violated her constitutional rights to equal protection and due process.[337] The court noted that "it is somewhat difficult to discern the basis for" her challenges.[338] Nevertheless, the court characterized the plaintiff's claim as being that "she is being treated unfairly due to her sexual orientation . . . ."[339] The court rejected this argument as being unsupported by the record or legal authority, finding instead that "had she been married to the child's biological parent, regardless of whether the biological parent was male or female, the outcome of this appeal would have been different."[340] The court further stated:

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333. Lake v. Putnam, 316 Mich. App. 247, 894 N.W.2d 62 (2016).

334. *Id.* at 249, 894 N.W.2d at 64.

335. *Id.*

336. *Id.* at 250, 894 N.W.2d at 65. The court also rejected finding standing under the equitable-parent doctrine because the child at issue was not conceived or born during a marriage. *Id.* at 252, 894 N.W.2d at 65–66. The court refused to retroactively "impose, several years later, a marriage on a same-sex unmarried couple simply because one party desires that we do so." *Id.* at 253, 894 N.W.2d at 66.

337. *Id.* at 254, 894 N.W.2d at 66. The court explained that:

> The Fourteenth Amendment of the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *In re Sanders,* 495 Mich. 394, 409, 852 N.W.2d 524 (2014) (quoting U.S. Const. Am. XIV, §1 (alteration in *Sanders*). The Due Process Clause requires, procedurally, "notice and a meaningful opportunity to be heard before an impartial decision-maker," *In re TK,* 306 Mich. App. 698, 706, 859 N.W.2d 208 (2014), and substantively, the "statute need only be rationally related to a legitimate governmental interest," *Landon Holdings, Inc. v. Grattan Twp,* 257 Mich. App. 154, 173, 667 N.W.2d 93 (2003). "The Equal Protection Clause requires that all persons similarly situated be treated alike under the law." *Shepherd Montessori Ctr. Milan v Ann Arbor Charter Twp.,* 486 Mich. 311, 318, 783 N.W.2d 695 (2010).

Id. at 254–55, 894 N.W.2d at 66–67.

338. *Id.* at 255, 894 N.W.2d at 67.

339. *Id.*

340. *Id.* (citing Stankevich v. Miller, 313 Mich. App. 233, 237–40, 882 N.W.2d 194, 196–98 (2015)).

> But she was not [married]. In fact, plaintiff has not presented any evidence to support a conclusion that she and defendant would have been married but for the law in Michigan (or in Florida, where the parties also resided for a period of time). Plaintiff has not presented any evidence reflecting the parties' intent to marry . . . in another jurisdiction, the parties chose not to have plaintiff adopt the child in Florida despite being legally able to do so, and defendant adamantly denies that she would have ever married plaintiff even if legally able to do so.[341]

In a parallel fashion, the plaintiff's argument that the child's right to equal protection was infringed was baseless: "'[g]enerally, persons do not have standing to assert constitutional or statutory rights on behalf of another person.' That is precisely what plaintiff is trying to do, i.e., assert the child's constitutional rights."[342]

Judge Shapiro, concurring in most of the analysis and result, wrote that under different circumstances, the doctrine of the equitable-parent doctrine should be applied to a same-sex couple who wished to marry at the time a child was conceived or born, but were unable to do so because of the unconstitutional ban on same sex marriage.[343]

E. First Amendment—Void for Vagueness Doctrine

1. Election Law

Defendant Edward Pinkney appealed his conviction on five counts of election forgery pursuant to MCL 168.937 regarding his alleged altering of crucial dates on recall petitions, claiming that the statute violated the vagueness doctrine and rule of lenity.[344] The Michigan Court of Appeals in *People v. Pinkney* explained that:

> [u]nder the vagueness doctrine, a statute may be challenged as unconstitutionally vague if it (1) "is over broad and impinges on First Amendment freedoms," (2) "does not provide fair notice of the conduct proscribed," or (3) "is so indefinite that it confers

341. *Id.*

342. *Id.* at 256, 894 N.W.2d at 67 (citation omitted).

343. *Id.* at 256–64, 894 N.W.2d at 69–71 (Shapiro, J., concurring).

344. People v. Pinkney, 316 Mich. App. 450, 465, 891 N.W.2d 891 (2016), *overruled on other grounds*, No. 154374, 2018 WL 2025819 (Mich. May 1, 2018). As a threshold matter, the court rejected the defendant's argument that MCL 168.937 did not create a substantive crime of election forgery. *Id.* at 462–65, 891 N.W.2d at 898–900.

> unstructured and unlimited discretion on the trier of fact to determine whether the law has been violated."[345]

However, a statute is constitutional "if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meaning of words."[346] The court rejected the defendant's argument because "the meaning of MCL 168.937 can be fairly ascertained by reference to the common law."[347] For similar reasons, the court found that the statute was "unambiguous . . . [because] one can easily discern a firm indication of the Legislature's intent," and its enforcement "does not violate the rule of lenity either."[348]

In a novel argument, the defendant claimed that admission of other-acts evidence under MRE 404(b), involving his political and election related conduct violated his First Amendment rights to free association and speech.[349] The court further found that:

> [Although] the First Amendment certainly protects citizens' rights to free speech, including speech involving the criticism of public officials and policies, it 'does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.' Therefore, even if we assume that the defendant's conduct at issue is entitled to First Amendment protection, it is nevertheless admissible so long as it was relevant, not unfairly prejudicial, and otherwise admissible.[350]

Because the evidence met this test,[351] its admission did not violate the First Amendment or otherwise constitute error.[352]

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345. *Id.* at 465, 891 N.W.2d at 900 (quoting People v. Noble, 238 Mich. App. 647, 651, 608 N.W.2d 123, 127 (1999)).

346. *Id.* (citations omitted).

347. *Id.* at 466, 891 N.W.2d at 900. The court explained that "[t]he common-law definition of 'forgery' is 'a false making . . . of any written instrument with intent to defraud.'" *Id.* (quoting People v. Nasir, 255 Mich. App. 38, 42 n.2, 662 N.W.2d 29, 32 n.2 (2003) (citation and quotation marks omitted)).

348. *Id.* at 466, 891 N.W.2d at 900–01

349. *Id.* at 474, 891 N.W.2d at 904.

350. *Id.* at 477, 891 N.W.2d at 906 (quoting Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993)).

351. *Id.* at 478, 891 N.W.2d at 907 ("[T]he other-acts evidence at issue provided evidence of his motive in altering or aiding and encouraging the alteration of the dates on the recall petitions.").

352. *Id.* at 477, 891 N.W.2d at 906.

2. Business Regulation

In *People v. Assy*,[353] the Michigan Court of Appeals examined whether the Tobacco Products Tax Act (the Tobacco Act), MCL 205.421 *et seq.*, was unconstitutionally vague and overbroad as applied against the defendant. The Tobacco Act required each "retailer" of tobacco products to have certain documentation about its tobacco products on its premises, and the defendant in *Assy* was charged with two counts of possessing tobacco products other than cigarettes without keeping the required documentation at the retail location.[354] The trial court dismissed the criminal charges against defendant Fady Yohanna Assy, a store manager, because the Tobacco Act failed to clearly define who was a "retailer" and therefore, subject to documentation requirement.[355] Although the legal basis of the trial court's ruling was less than clear, the court discerned that "it appears that the trial court determined that the statute was unconstitutional because it did not 'provide fair notice of the conduct prescribed' or conferred 'on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed.'"[356] In fact, "courts 'insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly.'"[357] Moreover, "the law must provide explicit standards for those who apply them."[358] These protections are necessary to avoid "danger[s] that the law will be enforced 'on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application,'" and to avoiding "trap[ping]

353. People v. Assy, 316 Mich. App. 302, 891 N.W.2d 280 (2016) (per curiam).

354. *Id.* at 308–09, 891 N.W.2d at 283.

355. *Id.* at 306, 891 N.W.2d at 282.

356. *Id.* at 308, 891 N.W.2d at 283 (quoting People v. Howell, 396 Mich. 16, 20, 238 N.W.2d 148, 149 (1976)). The court first quickly dispatched with the determination by the trial court that the Tobacco Act:

> [D]oes not pass constitutional scrutiny under the rational basis test . . . The statutory scheme does not interfere with any fundamental rights and, given the harmful nature of tobacco products and the possibilities of illicit sales, the Legislature could—if it chose—reasonably require a person who participates in any way in the sale of tobacco products to maintain the requisite invoices.

Id. at 307 n.1, 891 N.W.2d at 283 n.1 (citation omitted). Furthermore, "the statutory scheme plainly does not involve First Amendment freedoms. See *People v. Howell*, 396 Mich. 16, 20–21, 238 N.W.2d 148 (1976) (noting that a statute may be challenged for vagueness on three grounds, one of which is when a statute is overly broad and impinges on First Amendment freedoms." *Id.* at 307–08, 891 N.W.2d at 283.

357. *Id.* at 308, 891 N.W.2d at 283 (citations omitted) (quoting *Howell*, 396 Mich. at 20 n.4, 238 N.W.2d at 150 n.4).

358. *Id.* (citations omitted) (quoting *Howell*, 396 Mich. at 20 n.4, 238 N.W.2d at 150 n.4).

the innocent by not providing fair warning." [359] On the other hand, "[i]f the Legislature identified the conduct proscribed and provided adequate guidance to avoid the potential for arbitrary and discriminatory application," the Tobacco Act would be constitutional.[360]

The plain language of the Tobacco Act required a "retailer . . . keep as part of the records a true copy of all purchase orders, invoices, bills of lading, and other written matter substantiating the purchase or acquisition of each tobacco product at the location. . . ."[361] Contrary to the defendant's argument, "[t]his statutory scheme is unambiguous and provides [a] person of ordinary intelligence reasonable notice of what is prohibited . . ."[362]

The court also rejected the circuit court's determination that the statute was unconstitutionally vague and overbroad because it "did not provide sufficient guidance to those charged with enforcing the law to enable them to ascertain who may be held criminally responsible," because "[a] fair reading of the statutory scheme . . . shows that the Legislature provided sufficient guidance to survive this constitutional challenge."[363] Likewise, the court found unconvincing the circuit court's conclusion that the term "retailer" "could encompass any employee . . . because it was unclear what constitutes operating a business." [364] The court noted that the "retailer" is defined by the act as "'a person other than a transportation company who operates a place of business for the purpose of making sales of tobacco product at retail.'"[365] The statutory definition of "person"[366] in the act included "both individuals and legal entitles."[367] Despite this broad language, the court found that there was no practical confusion of who was covered by the Tobacco Act. After all,

> [i]n ordinary speech, one does not normally refer to a cashier or stocker as the operator of a business. . . . When MCL 205.426(1) and MCL 205.422(q) are read together and in proper context, it is evident that the Legislature intended the term "retailer" to have its more limited meaning; it intended the term to refer to a person who directs or manages the business—to someone who

359. *Id.* (quoting *Howell,* 396 Mich. at 20 n.4, 238 N.W.2d at 150 n.4.)
360. *Id.*
361. *Id.* at 309, 238 N.W.2d at 283 (quoting MICH. COMP. LAWS. ANN. § 205.426(1) (West 2017)).
362. *Id.* at 309, 238 N.W.2d at 284.
363. *Id.*
364. *Id.*
365. *Id.* (quoting MICH. COMP. LAWS. ANN. § 205.422(q) (West 2017)).
366. MICH. COMP. LAWS. ANN. § 205.422(o).
367. *Assy,* 316 Mich. App. at 310, 891 N.W.2d at 284 (2016) (per curiam).

> has control over the business's day-to-day operations. Accordingly, we do not share the circuit court's concern that the statute might be applied to a variety of low-level employees.[368]

As such, the term "retailer" was defined:

> with sufficient precision to place persons of ordinary intelligence on notice that the person or persons who direct or manage the operation of a place of business that makes tobacco sales at retail must maintain proper documentation or possibly face criminal charges. Similarly, the statutory scheme is sufficiently definite to preclude arbitrary or discriminatory enforcement.[369]

F. Due Process—Other-Acts Evidence

In *People v Pinkney,*[370] the defendant claimed that the admission of other-acts evidence involving his political and electioneering activities violated his constitutional right to due process because it was used to "show his propensity to commit election forgery."[371] However, due process is violated only when "'the introduction of this type of evidence [is] so extremely unfair that its admission violates "fundamental conceptions of justice."'"[372] In fact, the Michigan Court of Appeals noted that "[t]here is no clearly established Supreme Court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence."[373] Moreover, in light of the defendant being charged with election forgery, contrary to MCL 168.937, for altering crucial dates on recall petitions, "the other-acts evidence at issue provided evidence of his motive in altering or aiding and encouraging the alteration of the dates on the recall petitions."[374] As such, the admission of other-acts evidence was in conformity with due process.[375]

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368. *Id.* at 310–11, 891 N.W.2d at 284 (citations omitted).

369. *Id.* at 311–12, 891 N.W.2d at 285.

370. People v. Pinkney, 316 Mich. App. 450, 465, 891 N.W.2d 891 (2016), *overruled on other grounds*, No. 154374, 2018 WL 2025819 (Mich. May 1, 2018).

371. *Id.* at 478, 891 N.W.2d at 906 (citation omitted).

372. *Id.* (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)).

373. *Id.* (quoting Bugh v. Mitchell, 329 F.3d 496, 512 (6th Cir. 2003)).

374. *Id.* at 478, 891 N.W.2d at 907.

375. *Id.*

G. Equal Protection—Access to Courts

In an order issued by Chief Justice Stephen Markman, the plaintiff, an imprisoned criminal defendant who was pursuing a civil case, was permitted to file an application for leave to appeal to the Supreme Court without initially paying the filing fee otherwise required by MCL 600.2963(8).[376] The order explained that:

> [O]rdinarily, MCL 600.2963(8) would preclude plaintiff seeking leave to appeal in this Court because of an inability to provide the initial partial fee. However, applying that statutory section to bar plaintiff from initiating an application for leave to appeal from the original complaint for habeas corpus filed in the circuit court would violate the Equal Protection Clause of the Fourteenth Amendment.[377]

Accordingly, the plaintiff could file the appeal without initially paying the fee.[378] However, instead of waiving the fee, if the plaintiff chose to pursue the appeal, it would be recouped over time by the Department of Corrections, and the "[p]laintiff may not file further appeals in this Court from civil cases initiated by him until the entry fee in this appeal is paid in full. MCL 600.2963(8)."[379]

VI. MICHIGAN DEVELOPMENT OF CONSTITUTIONAL LAW OF UNCERTAIN ORIGIN

The Michigan Court of Appeals addressed the constitutional issue of the right to a fair trial, but did not identify whether it was based on the Michigan or Federal Constitution, or both, or the source of the constitutional issue.

In particular, in *People v. Biddles,*[380] the Michigan Court of Appeals rejected the defendant's contention that a wisecrack by the judge and judicial rulings, regarding the questioning of a witness unconstitutionally denied the defendant of a fair trial. Nowhere does the opinion specifically identify which constitution (state vs. federal) or which provision of the unidentified constitution (due process vs. equal protection, etc.) was at issue. Nevertheless, the court explained that

376. Ward v. Oaks Correctional Facility Warden, 879 N.W.2d 641, 642 (Mich. 2016).
377. *Id.* at 641 (citing Smith v. Bennett, 365 U.S. 708 (1961)).
378. *Id.*
379. *Id.* at 642.
380. People v. Biddles, 316 Mich. App. 148, 896 N.W.2d 461 (2016).

"[t]he question whether judicial misconduct denied defendant a fair trial is a question of constitutional law that this Court reviews de novo."[381] Further, "[a] defendant must overcome 'a heavy presumption of judicial impartiality' when claiming judicial bias."[382] To meet that burden, the defendant must show that "the trial judge's 'conduct pierce[d] the veil of judicial impartiality.'"[383] To evaluate such a claim, the court must "consider[] the totality of the circumstances," and determine whether "it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party."[384] The court explained that under the totality of circumstances analysis, it was to evaluate a variety of factors, including:

> the nature of the judicial conduct, the tone and demeanor of the trial judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions.[385]

The court rejected the defendant's argument that the trial court's "isolated and flippant statement" "made in a jesting manner" that the defense counsel could approach the bench "[j]ust before you get a spanking" influenced the jury in such a manner that it constituted judicial misconduct warranting reversal.[386] The court noted that "the reason for approaching the bench" was based on the "preceding line of questioning" during which "the trial judge had sustained the prosecutor's objections and had intervened on at least nine occasions, attempting to explain to defense counsel why his questions were improper and needed to be rephrased."[387] Likewise, the court found meritless the defendant's argument that the trial court was biased because she "thwarted counsel's attempts to ask the officer in charge if he had made 'a deal' with a witness, if defendant was charged in this case because he was untruthful, and when the arrest warrants was issued."[388] To the contrary, the trial

381. *Id.* at 151–52, 896 N.W.2d at 461 (quoting People v. Stevens, 498 Mich. 162, 168, 869 N.W.2d 233 (2015)).

382. *Id.* at 152, 896 N.W.2d 465 (quoting People v. Jackson, 292 Mich. App 583, 598, 808 N.W.2d 541, 240 (2011)).

383. *Id.* at 152, 896 N.W.2d 465 (quoting *Stevens,* 498 Mich. at 164, 170, 869 N.W.2d at 238, 242.

384. *Id.* (quoting *Stevens,* 498 Mich. at 171, 869 N.W.2d at 242).

385. *Id.* at 152, 896 N.W.2d at 466 (quoting *Stevens,* 498 Mich. at 172, 869 N.W.2d at 243).

386. *Id.* at 152–53, 896 N.W.2d at 466.

387. *Id.* at 153, 896 N.W.2d at 466.

388. *Id.*

judge "appropriately exercised her authority to control the trial and to prevent excessive and improper questioning of officer."[389] The court found that taking into account "the totality of the circumstances, including defense counsel's questions, the trial judge's interruptions and remarks were reasonably measured and were focused on enforcing the rules of evidence. They were not calculated to pierce the veil of judicial impartiality and were unlikely to unduly influence the jury to defendant's detriment."[390]

Judge Ronyane Krause concurred with this analysis.[391]

VII. GENERAL CONSTITUTIONAL RULES

The *Survey* period reinforced several long-standing Michigan principles of constitutional jurisprudence involving the presumption of constitutionality,[392] refusal to evaluate the wisdom of legislation,[393] the burden of proof, [394] the standard of review, [395] the consideration of abandoned issues,[396] and general rules of constitutional construction.[397]

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389. *Id.* at 154, 896 N.W.2d 466–67. The trial court's conduct only excluded testimony without proper personal knowledge, based on speculation or conjecture. *Id.* at 154, 896 N.W.2d at 467. Indeed, the defense counsel had engaged in "unnecessary and inane questions of the officer" and provided an "improper and disrespectful response to the judge's ruling and statements. . . ." *Id.* at 155, 896 N.W.2d at 467.

390. *Id.* The court also added that "[w]e also [could not] help but note that the defendant was acquitted by the jury of murder, assault, and felony-firearm charges, seriously calling into question defendant's claim that judicial bias improperly influenced the jurors to his detriment." *Id.* at 156, 896 N.W.2d at 467.

391. *Id.* at 168, 896 N.W.2d at 474 (Ronayne Krause, J., concurring in part and dissenting in part).

392. *See generally*, Coal. Protecting Auto No-Fault v. Michigan. Catastrophic Claims Ass'n, 317 Mich. App. 1, 894 N.W.2d 758 (2016), *appeal denied*, 500 Mich. 991, 894 N.W.2d 594 (2017).

393. *Id.*

394. *See* People v. Cameron, 319 Mich. App. 215, 900 N.W.2d 658 (2017) (per curiam); People v. Brady, No. 329037, 2017 WL 127745 (Mich. Ct. App. Jan. 12, 2017) (per curiam), *appeal denied*, 500 Mich. 1024, 896 N.W.2d 451 (2017).

395. *See, e.g.*, *Coal. Protecting Auto No-Fault*, 317 Mich. App. at 10, 894 N.W.2d at 772; O'Connell v. Dir. of Elections, 317 Mich. App. 82, 85, 894 N.W.2d 113, 115 (2016), *appeal denied sub nom.* O'Connell v. Dir. of Elections, Bureau of Elections, 499 Mich. 1002, 883 N.W.2d 747 (2016); People v. Pinkney, 316 Mich. App. 450, 465, 891 N.W.2d 891 (2016), *overruled on other grounds*, No. 154374, 2018 WL 2025819 (Mich. May 1, 2018).

396. See People v. Cameron, 319 Mich. App. 215, 900 N.W.2d 658 (2017) (per curiam); *Coal. Protecting Auto No-Fault*, 317 Mich. App. at 1, 894 N.W.2d at 758.

397. *See O'Connell*, 317 Mich. App. at 91–92, 894 N.W.2d at 118–19; *Coal. Protecting Auto No-Fault*, 317 Mich. App. at 37, 894 N.W.2d at 778 (Gleicher, J., concurring in part and dissenting in part).

A. Presumption of Constitutionality

Michigan case law throughout the *Survey* period consistently articulated the premise that "'[s]tatutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.'"[398] Moreover,

> every "reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity."[399]

B. No Evaluation of the Wisdom of Legislation

The Michigan Court of Appeals reiterated the long-standing rule of constitutional construction that when evaluating the constitutionality of a statute or executive action, the court does not "inquire into the wisdom of the legislation."[400]

C. Burden of Proof

Michigan jurisprudence has consistently noted that "'[t]he burden of proving that a statute is unconstitutional rests with the party challenging it.'"[401] Stated another way, "[t]he party initiating the challenge assumes the burden of proving that a statute is unconstitutional."[402]

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398. *See Coal. Protecting Auto No-Fault*, 317 Mich. App. at 24, 894 N.W.2d at 771 (citations omitted) (quoting Taylor v. Smithkline Beecham Corp., 468 Mich. 1, 6, 658 N.W.2d 127, 130 (2003)).

399. *Coal. Protecting Auto No-Fault*, 317 Mich. App. at 24, 894 N.W.2d at 771 (quoting Phillips v. Mirac, Inc., 470 Mich. 415, 423, 685 N.W.2d 174, 179 (2004) (citations omitted) (internal quotation marks omitted)).

400. *Coal. Protecting Auto No-Fault*, 317 Mich. App. at 24, 894 N.W.2d at 771 (quoting *Taylor*, 468 Mich. at 6, 658 N.W.2d at 130).

401. People v. Cameron, 319 Mich. App. 215, 220, 900 N.W.2d 658, 663 (2017) (per curiam) (quoting *In re* Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 479 Mich. 1, 11, 740 N.W.2d 444, 450 (2007)); *see also* People v. Brady, No. 328037, 2017 WL 127745 at *1 ("A statute is presumed to be constitutional, and the party challenging the constitutionality of a statute has the burden of proving its invalidity.").

402. *Coal. Protecting Auto No-Fault*, 317 Mich. App. at 25, 894 N.W.2d at 771 (citing DeRose v. DeRose, 469 Mich. 320, 349, 666 N.W.2d 636, 651 (2003)).

D. De Novo Review

Michigan appellate courts have also consistently explained that "whether a statutory provision violates the state constitution involves a question of law that we review de novo."[403]

E. Considering Abandoned Issues

In *People v. Cameron*,[404] the Michigan Court of Appeals noted that the defendant's argument that the imposition of court fees violated the separation of powers doctrine had been abandoned and need not be addressed.[405] "Nevertheless, because this issue has been raised by several other defendants and is not yet the subject of a published opinion . . ." the court determined to hear it.[406]

On the other hand, the Michigan Court of Appeals in *Sarkar v. Doe*[407] refused to do the plaintiff's work for him in determining whether the plaintiff's complaint could survive summary disposition: "Sarkar apparently relies on the trial court and this Court to visit pubpeer.com and learn the underlying science at issue to determine whether the statement constitutes a potentially defamatory accusation. In essence, we would be left searching the cited webpages with the hope of finding

403. *Id.* at 10, 894 N.W.2d at 764 (quoting Mayor of Cadillac v. Blackburn, 306 Mich. App. 512, 516, 857 N.W.2d 529, 532 (2014)). *See also* O'Connell v. Dir. of Elections, 317 Mich. App. 82, 90, 894 N.W.2d 113, 118 (2016) ("[T]his Court reviews constitutional questions de novo. *In re* AMAC, 269 Mich. App. 533, 536, 711 N.W.2d 426, 428 (2006)"); Aguirre v. State, 315 Mich. App. 706, 713, 891 N.W.2d 516, 522 (2016) (per curiam) (citing Studier v. Mich. Pub. Sch. Employees' Retirement Bd., 472 Mich. 642, 649, 698 N.W.2d 350, 355 (2005) ("Constitutional questions are reviewed de novo.")); People v. Perry, 317 Mich. App. 589, 600, 895 N.W.2d 216, 223 (2016) (per curiam) (quoting People v. Calloway, 469 Mich. 448, 450, 671 N.W.2d 733, 734 (2003) ("Generally, '[a] challenge under the double jeopardy clauses of the federal and state constitutions presents a question of law that this Court reviews de novo.'"); Sarkar v. Doe 318 Mich. App. 156, 167, 897 N.W.2d 207, 213 (2016) (citing Smith v. Anonymous Joint Enter., 487 Mich 102, 111–12, 793 N.W.2d 533, 539 (2010) ("Constitutional issues, including the application of the First Amendment, are also reviewed de novo."); People v. Pinkney, 316 Mich. App. 450, 466, 891 N.W.2d 891, 900 (2016) (citations omitted) ("Constitutional issues, including the constitutionality of a statute, are reviewed de novo."); Dawson v. City of Grand Haven, No. 329154, 2016 WL 7611556 at *1 (Mich. Ct. App. Dec. 29, 2016) (citing Varran v. Granneman, 312 Mich. App. 591, 607, 880 N.W.2d 242, 251 (2015) ("We also review constitutional issues de novo.")).

404. *See Cameron*, 319 Mich. App. at 215, 900 N.W.2d at 658.

405. *Id.* at 233, 900 N.W.2d at 669.

406. *Id.* No authority was cited in support of this action.

407. Sarkar v. Doe, 318 Mich. App. 156, 897 N.W.2d 207 (2016).

comments that do or do not support his claim. This is his, not our, burden, and we decline do so for him."[408]

F. Rules of Constitutional Construction

Although not consistently addressed, the general rules of constitutional construction have remained constant. The most thorough recitation of these rules during the *Survey* period was by the court of appeals in *O'Connell v. Director of Elections*:[409]

> When construing the Constitution, we focus on the will of the people who ratified it. *Adair v. Michigan,* 497 Mich. 89, 101, 860 N.W.2d 93 (2014). "In performing this task, we employ the rule of common understanding." *CVS Caremark v. State Tax Comm.,* 306 Mich. App. 58, 61, 856 N.W.2d 79 (2014). "Under the rule of common understanding, we must apply the meaning that, at the time of ratification, was the most obvious common understanding of the provision, the one that reasonable minds and the great mass of the people themselves would give it." *Id.* We give the operative words "their common and most obvious meaning. . . . " *In re Burnett Estate,* 300 Mich. App. 489, 497–498, 834 N.W.2d 93 (2013). "Further, every provision must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another." *Lapeer Co. Clerk v. Lapeer Circuit Court,* 469 Mich. 146, 156, 665 N.W.2d 452 (2003). The interpretation of a constitutional provision takes into account of the purpose sought to be accomplished by the provision.[410]

Likewise, Judge Gleicher in a more summary fashion articulated these rules in her concurring and dissenting opinion in *Coalition Protecting Auto No-Fault v. Michigan Catastrophic Claims Ass'n*:

> "Our primary goal in construing a constitutional provision is to give effect to the intent of the people of the state of Michigan

408. *Id.* at 185, 897 N.W.2d at 223 (footnote omitted); *see also id.* at 185 n.15, 897 N.W.2d at 233 n.15 ("To be clear, we are holding that Michigan law requires a plaintiff to specifically identify *every* statement that he or she claims is capable of defamatory meaning. In this case, Sarkar quotes certain words, some phrases, and provides citations to various webpages. This is insufficient.").

409. O'Connell v. Director of Elections, 317 Mich. App. 82, 894 N.W.2d 113 (2016) (per curiam).

410. *Id.* at 91–92, 89 N.W.2d at 118.

> who ratified the Constitution, by applying the rule of 'common understanding.'" *UAW v. Green,* 498 Mich. 282, 286–287, 870 N.W.2d 867 (2015). "We identify the common understanding of the constitutional text by applying the plain meaning of the text at the time of ratification." *Id.* at 287, 870 N.W.2d 867.[411]

In connection with related jurisprudence that the Michigan Supreme Court has the final authority to determine the meaning of the Michigan Constitution—especially if there are differences in the text between the Michigan and Federal Constitutions. Chief Justice Markman, joined by Justice Viviano, issued a separate opinion in *Lubrizol Corp. v. Department of Treasury,* dissenting from the Michigan Supreme Court's decision denying leave to appeal in connection with constitutionality of a retroactive tax regime. In particular, Justice Markman noted that he would grant leave to consider the following question:

> [I]s 2014 PA 282 consistent with the Michigan Due Process Clause, Const. 1963, art. 1, § 17, when that clause is worded differently than the federal Due Process Clause and we have held that the state provision may afford heightened protections, *Charter Twp. of Delta v. Dinolfo,* 419 Mich. 253, 276 n.7, 351 N.W.2d 831 (1984), because "while the Federal supreme court is the final judge of violations of the Federal Constitution, the decision of the Supreme Court of this State is final on the question of whether or not a State statute conflicts with the State Constitution," *People v. Victor,* 287 Mich. 506, 514, 283 N.W. 666 (1939)?[412]

411. Coal. Protecting Auto No-Fault v. Michigan Catastrophic Claims Ass'n, 317 Mich. App. 1, 37–38, 894 N.W.2d 758, 778 (2016) (on remand) (Gleicher, J., concurring in part and dissenting in part).

412. Lubrizol Corp. v. Dep't of Treasury, 880 N.W.2d 523, 525 (Mich. 2016) (mem).