CONSTITUTIONAL LAW: A SURVEY OF MICHIGAN CASES

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I. INTRODUCTION

Constitutional cases coming out of Michigan during the *Survey* period tended to involve topics that will be in the fronts of the minds of U.S. Supreme Court watchers for the next several years: analytical approaches to religion, equal protection, and due process that may morph as Justice Brett Kavanaugh takes the seat vacated by former Justice Anthony M. Kennedy.[1] As the reader will see, cases were heavier on

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federal constitutional law than state constitutional law; this article therefore focuses more heavily on the former.

In Part II of this Article, we survey cases involving enumerated rights—namely, cases involving speech and religion under the First Amendment.[2] In Part III, we examine cases involving unenumerated rights under the Equal Protection and Due Process Clauses.[3] Part IV reviews cases involving the scope and other limits on government power, generally.[4] The reader will note throughout the Article unavoidable overlap in some cases, but we have tried to organize cases by reference to the primary substantive claim or claims involved in each case. We have also tried to avoid topics better covered in other survey areas, like criminal law and criminal procedure (although we do note some interesting *ex post facto* decisions), civil procedure, and property.

This *Survey* Article includes, of course, coverage of cases from Michigan state courts, but because some of the most interesting cases during the *Survey* period were litigated in federal courts, we also discuss cases from federal district courts in Michigan and, when appropriate, cases from the Sixth Circuit U.S. Court of Appeals involving Michigan parties.

II. FIRST AMENDMENT FREE SPEECH AND RELIGION CASES

A. Speech Cases

Not all the First Amendment speech cases around Michigan during the *Survey* period involved novel or intricate issues. *Harcz v. Boucher*,[5] for example, involved garden-variety First Amendment issues: public forums, time-place-manner restrictions, and qualified immunity.[6] In *Harcz*, several protesters were displeased with the organizers of a demonstration commemorating the passage of the Americans with Disabilities Act (ADA); the protesters were especially concerned that demonstration organizers were paying subpar wages and that the State

1. *See, e.g.*, Brendan T. Beery, *Rational Basis Loses Its Bite: Justice Kennedy's Retirement Removes the Most Lethal Quill from LGBT Advocates' Equal-Protection Quiver*, 69 SYRACUSE L. REV. (forthcoming 2019); Brendan T. Beery, *Tiered Balancing and the Fate of Roe v. Wade: How the New Supreme Court Majority Could Turn the Undue-Burden Standard into a Deferential Pike Test*, 28 KAN. J. L. & PUB. POL'Y (forthcoming 2019); Brendan Beery, *Prophylactic Free Exercise: The First Amendment and Religion in a Post-Kennedy World*, 82 ALB. L. REV. 121 (2019).

2. *See infra* Part II and accompanying notes 5–173.

3. *See infra* Part III and accompanying notes 174–326.

4. *See infra* Part IV and accompanying notes 327–385.

5. 300 F. Supp. 3d 945 (W.D. Mich. 2018).

6. *See generally* Harcz v. Boucher, 300 F. Supp. 3d 945 (W.D. Mich. 2018).

Capitol Building, where the event was taking place, was not ADA-compliant.[7] Event organizers were aware of the protesters' presence and asked state police to bar them from the event, which state police did.[8] The protesters sued, alleging they had wanted to distribute literature at the event and were prevented from doing so in violation of their First Amendment and equal protection rights.[9]

As a threshold matter, the district court tackled the issue of state action, as the protester-plaintiffs sued not only several state police officers, but also the private parties involved in organizing the event.[10] Plaintiffs argued that the private parties had conspired with state police officers, thereby rendering themselves state actors for purposes of 42 U.S.C § 1983.[11] The court, however, held that the conversation between event organizers and police officers did not constitute a "meeting of the minds" as to any "approaches . . . the police should take."[12]

Predictably, the state defendants—police officers—claimed qualified immunity.[13] "Under the doctrine of qualified immunity, 'government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[14] Because the qualified immunity test involves the question of whether state officials violated a "clearly established statutory or constitutional right," a court must consider the substantive issue of whether the plaintiffs had a constitutional right and, if they did, whether state officials had some constitutionally permissible reason for burdening that right.[15] One of those permissible reasons would be "a reasonable time, place, or manner restriction," which permits state officials to regulate speech when the regulation is "content neutral, narrowly tailored to serve a significant government interest, and leave[s] open ample alternatives of communication."[16]

The *Harcz* court reasoned that the police officers behaved in a content-neutral way because they barred plaintiffs from the demonstration (past a certain point on the Capitol grounds) to prevent a

7. *Id.* at 949.
8. *See id.*
9. *Id.*
10. *Id.* at 949–51.
11. *Id.* at 951; *see* 42 U.S.C. § 1983 (2018).
12. Harcz v. Boucher, 300 F. Supp. 3d 945, 952 (W.D. Mich. 2018).
13. *Id.*
14. *Id.* (quoting Phillips v. Roane Cty., 534 F.3d 531, 538 (6th Cir. 2008)).
15. *See id.* at 952–53.
16. *Id.* at 954 (citation omitted).

disturbance rather than because they disagreed with plaintiffs' message.[17] Furthermore, in a sweeping discussion of the competing interests of event organizers (in getting their own message or messages across without disruption) and would-be event protesters (in making their case against event organizers), the court recognized a legitimate interest in preventing protesters from causing a disturbance—even before any disturbance has occurred[18]—particularly in a limited space like "the East half of the Michigan Capitol Grounds, the area covered by the permit where the . . . ADA event was held."[19]

Based on this analysis, the court dismissed plaintiffs' First Amendment claims.[20] Finding that plaintiffs' equal protection claims were little more than a restatement of their First Amendment claims based on the same operative facts, the court dismissed plaintiffs' equal protection claims as well.[21]

Other cases were more interesting, either for their novelty or their political sensitivity. In *Garcetti v. Ceballos*,[22] the United States Supreme Court ruled that speech by a public employee on a matter within the scope of the employee's duties does not enjoy First Amendment protection. [23] Does the same rule apply when the speaker is an elected public official instead of an employee? *Aquilina v. Wrigglesworth*,[24] a case involving an elected state court judge, said yes. [25]

Aquilina, an elected judge of the Thirtieth Circuit Court at Ingham County, Michigan, claimed that she and other judges were dissatisfied with courthouse security.[26] Wrigglesworth was the Ingham County Sheriff, and his duties included courthouse security.[27] After an attack by a prisoner in a different judge's courtroom, Aquilina allowed a reporter from the local paper to view and copy a recorded video of the attack.[28] When he learned about the judge's actions, Wrigglesworth launched an investigation into Aquilina's release of the video and eventually referred the matter to the Ingham County prosecutor for possible criminal

17. *Id.*
18. Harcz v. Boucher, 300 F. Supp. 3d 945, 957 (W.D. Mich. 2018).
19. *Id.* at 958.
20. *Id.* at 951.
21. *Id.* at 958.
22. 547 U.S. 410, 422 (2006).
23. *Id.* at 421–22.
24. 298 F. Supp. 3d 1110 (W.D. Mich. 2018).
25. *Id.* at 1115.
26. *Id.* at 1112–13.
27. *Id.* at 1113.
28. *Id.*

charges.[29] The prosecutor decided not to charge, and the matter was dropped.[30]

Aquilina later sued Wrigglesworth and a deputy sheriff, claiming, among other things, First Amendment retaliation.[31] As a threshold matter, the federal district court had to decide whether Aquilina's speech or expressive activity qualified for First Amendment protection.[32] The Court, finding Aquilina's activity to be within *Garcetti*, granted defendants' motion for summary judgment.[33]

To make a successful First Amendment retaliation claim, Aquilina had to show that (1) her constitutionally-protected speech was (2) a substantial or motivating factor resulting in (3) adverse or retaliatory action by Wrigglesworth.[34] To satisfy the first element, Aquilina had to show that her release of the video was First Amendment protected activity.[35] A government employee's speech gets First Amendment protection when the employee speaks as a "private citizen" about a matter of "public concern."[36] "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[37] The parties agreed that courthouse security was a matter of public concern.[38] But Aquilina's release of the video was made possible by, and was done in connection with, her official duties, and not as a citizen.[39] Under *Garcetti*, Aquilina's speech did not get First Amendment protection and she could not make out a First Amendment retaliation claim.[40] There was, the court said, no reason to deviate from *Garcetti* just because Aquilina was an elected public official and not an employee.[41]

Qualified immunity also came up in an important Sixth Circuit case involving First Amendment retaliation in the context of prisoner complaints.[42] In *Maben v. Thelen*,[43] a prisoner alleged that he had

29. *Id.*
30. *Id.*
31. *Id.* at 1112–14.
32. *See id.* at 1114.
33. *Id.* at 1114–16; *see also* Garcetti v. Ceballos, 547 U.S. 410 (2006).
34. *Aquilina*, 298 F. Supp. 3d at 1114.
35. *Id.*
36. *Id.* at 1115 (citing *Garcetti*, 547 U.S. at 420).
37. *Garcetti*, 547 U.S. at 421.
38. *Aquilina*, 298 F. Supp. 3d at 1115.
39. *Id.*
40. *Id.*
41. *Id.* at 1115–16.
42. Maben v. Thelen, 887 F.3d 252, 258 (6th Cir. 2018).
43. *Id.*

politely asked why he had been served an inadequate portion of food in the cafeteria when a prison guard became belligerent, cursed at him, and cited him for causing a disturbance.[44] A Michigan Department of Corrections (MDOC) hearing officer later found that the prisoner had committed an infraction, and the officer imposed a punishment.[45] The prisoner sued, claiming that he had a First Amendment right to complain and to invoke the MDOC's grievance procedures, and that the prison guard's conduct amounted to unlawful retaliation for protected speech.[46]

The district court dismissed the prisoner's complaint, holding that the hearing officer's findings of fact were conclusive and precluded the prisoner's claim in a federal court.[47] The Sixth Circuit disagreed:

> To determine whether we must give preclusive effect to "factfinding from Michigan prison hearings," we look to four requirements, all of which must be met: (1) the state agency "act[ed] in a 'judicial capacity'"; (2) the hearing officer "resolved a disputed issue of fact that was properly before it"; (3) the prisoner "had an adequate opportunity to litigate the factual dispute"; and, (4) if these other three requirements are met, we must "give the agency's finding of fact the same preclusive effect it would be given in state courts."[48]

In applying these four elements, the district court relied on case law suggesting that a *major* misconduct hearing might produce factual findings that preclude further litigation in federal court.[49] But the proceeding in *Maben* was a *minor* misconduct hearing.[50] Factfinding at such a hearing, the court held, should not have a preclusive effect because a hearing officer at a minor misconduct hearing does not act in a "judicial capacity"; minor misconduct hearings differ from major misconduct hearings in significant ways, "like that [in a major misconduct proceeding] there be a formal hearing, that there be a written final decision that is subject to direct appeal in state court, or that the prisoner be able to present written arguments or submit rebuttal evidence."[51] For the same reasons (and because the hearing officer

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44. *Id.* at 257.
45. *Id.* at 257–58.
46. *Id.* at 258.
47. *Id.*
48. *Id.* at 259 (citing Peterson v. Johnson, 714 F.3d 905, 911–13 (6th Cir. 2013) (internal citations and quotations omitted)).
49. *Id.*
50. *Id.* at 260.
51. *Id.* at 261 (citing *Peterson*, 714 F.3d at 912).

refused to watch video evidence the prisoner wanted the officer to consider), the court also held that the hearing did not afford the prisoner an adequate opportunity to litigate the factual dispute underlying his misconduct charge.[52]

The court next considered whether the Sixth Circuit should apply "checkmate doctrine."[53] Under the doctrine, a finding of misconduct in a prison proceeding "checkmates" any First Amendment retaliation claim.[54] The court expressly rejected this approach, finding that it was "irreconcilable with the burden-shifting framework" under which the burden *shifts to the government* once a prisoner has established that protected First Amendment expression was a motivating factor behind an adverse action taken against the prisoner.[55] Under a framework in which the defendant ultimately bears some burden, the notion that a prisoner's retaliation claim is simply checkmated makes little sense.[56]

On the substance of the prisoner's retaliation claim, the court said that a prisoner has a right to pursue a non-frivolous grievance.[57] Here, the Michigan Department of Corrections denied the prisoner privileges for seven days as a result of the misconduct ticket they issued him, and this constituted a cognizable adverse action.[58] Finally, the prisoner alleged facts sufficient to establish causation: he produced corroborating witnesses, and the closeness in time between his complaint about the portion of food he had been given and the misconduct ticket supported an inference that the former caused the latter.[59] The district court erred in dismissing the prisoner's complaint on the ground that the prisoner had failed to allege facts sufficient to establish a retaliation claim.[60]

In *Maben*, the defendant also claimed qualified immunity and that the Eleventh Amendment barred the prisoner's claim.[61] Citing the qualified immunity rules summarized above (in reference to the *Harcz* case), the court held that existing federal court rulings clearly established constitutional rules governing retaliation claims, and that the guard was therefore not immune from liability.[62] This was an important holding, as the court did dismiss the prisoner's claim against the prison guard in the

52. *Id.*
53. *Id.* at 261–62.
54. *Id.* at 261–62.
55. *Id.* at 262.
56. *See id.* at 262–63.
57. *Id.* at 264–65.
58. *Id.* at 266–67.
59. *Id.* at 268.
60. *Id.* at 269.
61. *Id.* at 269–70.
62. *Id.* at 269–71.

prison guard's official capacity—on the ground that a claim against the prison guard for damages payable from the state violated the Eleventh Amendment.[63] The court allowed the lawsuit against the prison guard in his personal capacity to proceed.[64]

In an age of pervasively hostile political speech, one of the more interesting emerging First Amendment issues is the issue of true threats. In *Thames v. City of Westland*,[65] police arrested the plaintiff, a protester at an abortion clinic, for allegedly making terroristic threats involving bombs.[66] Plaintiff denied making any threats, and at least one witness corroborated plaintiff's denial.[67] Officers on the scene searched the plaintiff's car but did not find any explosives.[68] They did not search the parking lot, the clinic grounds, or anywhere else for a bomb, nor did they call for a bomb-sniffing dog to sweep the area.[69] Authorities did not evacuate the clinic.[70] Police did not impound plaintiff's car.[71] A police supervisor later made the decision not to charge plaintiff, finding that plaintiff did not make a "direct threat . . . to bomb the clinic."[72]

Plaintiff sued the city and several police officers, among others.[73] She claimed that her arrest violated the First, Fourth, and Fourteenth Amendments.[74] The police officers said qualified immunity shielded their conduct.[75] To resolve the immunity claim, the court had to decide whether the police had probable cause to arrest plaintiff based on the statements attributed to her.[76]

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63. *Id.* at 270–71.

64. *Id.* at 271.

65. 310 F. Supp. 3d 783 (E.D. Mich. 2018).

66. *Id.* at 789. A security officer on the scene reported to police that plaintiff said, "I prophesy bombs are going to fall and they're going to fall in the near future." *Id.* The plaintiff also allegedly said, "I prophesy bombs are going to fall and they're going to fall on you people." *Id.* After the plaintiff was arrested, the security guard's version of events changed. *Id.* at 793. He claimed the plaintiff said "bombs, bombs, on America, and bombs will blow up this building." *Id.*

67. *Id.* at 789–90.

68. *Id.* at 790.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 791.

73. *Id.*

74. *Id.*

75. *Id.* at 792. A government official is immune from damages liability for discretionary acts unless the official (1) violated a clearly established constitutional or statutory right (2) of which a reasonable official would have known. *Id.*

76. *Id.* at 793.

Police arrested the plaintiff because her alleged threats ran afoul of Michigan's terroristic threat statute, MCLA § 750.543m.[77] According to the Michigan Court of Appeals, this statute bars only "true threats" because it concerns (1) "the communication of a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals" (2) made with an intent to intimidate or coerce.[78] Because the court was ruling on cross motions for summary judgment, it did not need to resolve, definitively, the true threat question.[79] But the facts present were enough, the court found, to raise an issue for the jury.[80]

Plaintiff also claimed that her arrest was in retaliation for her protected First Amendment speech and religious activities.[81] As discussed above, to state a First Amendment retaliation claim, a plaintiff must allege that:

> (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by the plaintiff's protected conduct.[82]

Plaintiff easily met the first two requirements.[83] She was protesting on a public sidewalk on a matter of public concern.[84] Plaintiff's arrest and detention would be enough, the court said, to "deter a person of ordinary firmness" from engaging in the same activity.[85] Pointing to what it said could be seen as evidence of retaliatory animus, the court found enough of a dispute over the material facts to deny summary judgment as to two of the police officers.[86]

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77. *Id.* at 793–94; *see* MICH. COMP. LAWS ANN. § 750.543m (West 2018).

78. *Thames*, 310 F. Supp. 3d at 794 (quoting People v. Osantowski, 274 Mich. App. 593, 603, 736 N.W.2d 289, 298 (2007), *rev'd in part on other grounds*, 481 Mich. 103, 748 N.W.2d 799 (2008)).

79. *See id* at 788, 791–92.

80. *Id.* at 795. So, too, was the question of whether a reasonable officer would have believed the arrest to be lawful. *Id.* at 795–96.

81. *Id.* at 796–99.

82. *Id.* at 796 (quoting Kennedy v. City of Villa Hills, 635 F.3d 210, 217 (6th Cir. 2011)).

83. *Id.* at 797.

84. *Id.*.

85. *Id.*

86. *Id.* This concern over potential discriminatory animus was also enough to get plaintiff's equal protection claim past summary judgment and to a jury. *Id.* at 799–800.

Finally, plaintiff brought a claim against the city.[87] She alleged that her wrongful arrest happened because the city failed to provide adequate training to its police officers on how to recognize a true threat.[88] A municipality can be held liable for a constitutional violation if the plaintiff can show (1) her rights were violated and (2) some municipal custom or policy was the "moving force" behind the violation.[89] A systemic failure to train can rise to the level of a municipal custom or policy.[90] But to be actionable, the failure to train must reflect a "*deliberate indifference* to the rights of persons with whom the police come into contact."[91] Showing a pattern of deliberate indifference requires proving a pattern of similar, pre-existing violations.[92] Plaintiff's claim against the city failed here: she could not demonstrate the required pattern of activity needed to prove deliberate indifference.[93]

B. The Religion Clauses

Significant free exercise cases from courts with jurisdiction in Michigan during the *Survey* period involved the seemingly intractable tension between LGBTQ equality and claims by religious adherents that their sincerely held religious beliefs require discrimination against LGBTQ Americans;[94] the state's interest in child vaccination and children's health as against the religious objections of parents;[95] and the future application of the "ecclesiastical abstention doctrine" in Michigan courts.[96] The most significant Establishment Clause case involved the issue of prayer at public meetings.[97]

87. *Id.* at 800.

88. *Id.*

89. *Id.* (quoting Brown v. Battle Creek Police Dep't, 844 F.3d 556, 573 (6th Cir. 2016)).

90. *Id.* (citing Miller v. Sanilac Cty., 606 F.3d 240, 255 (6th Cir. 2010)).

91. *Id.* at 800 (emphasis in original) (quoting Slusher v. Carson, 540 F.3d 449, 457 (6th Cir. 2008)).

92. *See id.* at 800–01.

93. *Id.*

94. *See* Cty. Mills Farms v. City of E. Lansing, 280 F. Supp. 3d 1029 (W.D. Mich. 2017).

95. *See* Nikolao v. Lyon, 875 F.3d 310 (6th Cir. 2017).

96. *See* Winkler v. Marist Fathers of Detroit, Inc., 500 Mich. 327, 901 N.W.2d 566 (2017).

97. *See* Bormuth v. County of Jackson, 870 F.3d 494 (6th Cir. 2017).

1. LGBTQ Equality Principle Versus Free Exercise

In *County Mills Farms v. City of East Lansing*,[98] plaintiff was a farmers' market vendor and the owner of a farm who marketed his farm as a venue for weddings.[99] Plaintiff let it be known through social media outlets that because of his religious beliefs, he would not accommodate same-sex weddings.[100] Allegedly, as a result of this policy, the city denied the plaintiff a permit to participate in the East Lansing Farmers' Market; the vendor sued and the city moved to dismiss.[101] The U.S. District Court for the Western District denied the motion in part, holding that the vendor had pleaded facts from which a factfinder could infer that the city had "targeted [plaintiff's] speech and religious beliefs."[102]

The court dismissed the vendor's as-applied First Amendment claim, rejecting the notion that denying services to same-sex couples constituted expression rather than pure conduct.[103] But the court also held that, as to the vendor's claim that the city's ordinance was facially invalid, he had stated a plausible claim:

> The City may be correct that Plaintiffs' application was denied because of their conduct. The City is wrong that the Ordinance regulates only conduct. The Ordinance also regulates speech . . . [T]he Code defines "harass" as including "communication which refers to an individual protected under this article." [The Ordinance also] prohibits harassment of any person based on a list of characteristics. And [it] prohibits the printing and publishing of certain statements and signs based on their content.[104]

Relying on Sixth Circuit precedent which held an anti-harassment policy unconstitutionally overbroad,[105] the court noted potentially similar deficiencies in East Lansing's ordinance:

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98. 280 F. Supp. 3d 1029 (W.D. Mich. 2017).
99. *Id.* at 1038.
100. *Id.*
101. *Id.*
102. *Id.* The defendant's motion to dismiss the as-applied challenge, the overbreadth of the public accommodations provision and equal protection claim was successful. *Id.* at 1056. However, many of the 9 counts were not dismissed. *See id.* at 1038–39.
103. *Id.* at 1044–45.
104. *Id.* at 1045.
105. *Id.* at 1046 (citing Dambrot v. Cent. Mich. Univ., 55 F.3d 1177 (6th Cir. 1995)).

> [The Ordinance] defines "to harass" as (1) communication (2) that demeans or dehumanizes (3) and has the purpose or effect of (a) interfering with public accommodations or (b) creating an intimidating, hostile or offensive public accommodations environment. Under [the Ordinance], harassing communication because of the person's religion, race, color, national origin, age, height, weight, disability, sex, marital status, sexual orientation, gender identity or expression, student status, or use of an adaptive aid or device is against the public policy of the City. The Ordinance would be implicated by negative statements made by [farmers-market] vendors against same-sex couples and interracial couples and negative statements against evangelical Christians and Muslims, to name a few possible verboten topics. The statements would be communicative. The statements could be demeaning. The statements would have the effect of making the [farmers' market] a hostile or intimidating environment. And, the statements would implicate characteristics listed in the Ordinance.[106]

On this analysis, the vendor had stated a colorable claim that the ordinance was facially overbroad and could have the effect of chilling constitutionally protected speech.[107] In addition, the vendor had pled a plausible cause of action for retaliation, in that the city's denial of his permit could have been based on statements he posted on Facebook—posts that expressed religious views protected under the First Amendment.[108]

The vendor had pled a plausible Free Exercise claim because the city's ordinance, although generally applicable and neutral on its face, might have provided "veiled cover for targeting belief or a faith-based practice."[109] Finally, the court held that the vendor had made out a plausible case that the city had conditioned a benefit on the vendor surrendering a constitutional right—namely, to practice his religion by denying same-sex couples his wedding-ceremony services.[110]

After briefly noting that the Michigan Constitution should be interpreted largely the same way as the federal Constitution, the court declined to dismiss the vendor's state constitutional claims.[111]

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106. *Id.* at 1047 (footnote omitted).
107. *Id.*
108. *Id.* at 1048.
109. *Id.* at 1050 (quoting Ward v. Polite, 667 F.3d 727, 738 (6th Cir. 2012)).
110. *Id.* at 1053.
111. *See id.* at 1055–56.

2. Vaccinations and Medical Care for Children

Michigan law requires that children receive the usual childhood vaccinations before entering public school.[112] Tara Nikolao, a devout Catholic, objected on religious grounds to having her children vaccinated.[113] Michigan law allowed Nikolao, an objecting parent, to get a waiver, but she first had to meet with a local health official and explain the reason for her objection.[114] Two health department nurses tried, without success, to convince Nikolao to have her children vaccinated.[115] After getting the waiver, Nikolao sued, claiming that the exemption process—called the Certification Rule[116]—ran afoul of the Free Exercise Clause and the Establishment Clause.[117] Before turning to the merits of Nikolao's constitutional claims, the appeals court reviewed her standing to sue.[118]

To have Article III standing to sue, a plaintiff must show (1) "she has suffered an 'injury in fact'" (2) that was caused by some wrongful conduct by the defendant, and (3) that will be redressed by the relief she seeks.[119] Under Sixth Circuit precedent, standing to assert a free exercise claim is grounded in coercion.[120] "[A] litigant suffers an injury to her free exercise rights when the state compels her 'to do or refrain from doing an act forbidden or required by [her] religion, or to affirm or disavow a belief forbidden or required by [her] religion.'"[121]

Nikolao could not clear the free exercise injury-in-fact hurdle, although she disagreed with the information disclosed.[122] Nikolao had to go through the exemption process, and, in that process, among other things, she was given a document called the Religious Waiver Note.[123] The Religious Waiver Note was a list of responses to common religion-based objections to vaccines.[124] Nikolao gave "no indication that the

112. Nikolao v. Lyon, 875 F.3d 310, 314 (6th Cir. 2017).
113. *Id.* at 313–14.
114. *Id.* at 314.
115. *Id.*
116. The "Certification Rule" is an administrative rule created by the Michigan Department of Health and Human Services that spells out the exemption process. *See id.*
117. *Id.* at 315–16.
118. *Id.*
119. *Id.*
120. *Id.* at 316.
121. *Id.* (quoting Mozert v. Hawkins Cty. Bd. of Educ., 827 F.2d 1058, 1066 (6th Cir. 1987)).
122. *Id.*
123. *Id.* at 314.
124. *Id.*

information *coerced* her into doing or not doing anything."[125] Nikolao was not denied any right on account of her religion, because there is no constitutional right to a vaccine exemption.[126] None of the information the county gave Nikolao forced her to change her religious beliefs.[127] Further, the court stated, "Nikolao has not presented any facts to suggest that the state has coerced her in her religious practices. As such, she has not suffered an injury-in-fact under the Free Exercise Clause and does not have standing to pursue that claim."[128]

Under the Establishment Clause, injury-in-fact is made out by proving "direct and unwelcome contact with a government-sponsored religious object."[129] Nikolao did not welcome the information she got during the exemption process; she did her best to avoid it.[130] This was enough, said the court, to support an Establishment Clause injury.[131] The Certification Rule caused Nikolao's alleged injury.[132] Nikolao asked for injunctive relief and damages, relief that would redress her claimed harms.[133] Nikolao had standing to bring her Establishment Clause claims.[134]

Applying the familiar *Lemon* test,[135] the appeals court found that Nikolao's Establishment Clause claims failed.[136] Nikolao argued that both the Certification Rule—the exemption process itself—and the Religious Waiver Note were impermissible religious establishments.[137]

The legislature created the Certification Rule to promote "the health and safety of public school children."[138] True, Michigan hoped to convince parents to have their children vaccinated, but only to prevent the spread of disease.[139] "We are hard-pressed to envision a more secular purpose than this."[140] Because it was concerned with educating parents

125. *Id.* at 316 (emphasis in original).
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 317 (quoting Am. Civil Liberties Union of Ky. v. Grayson Cty., 591 F.3d 837, 843 (6th Cir. 2010)).
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. A law or practice must (1) have a secular purpose, (2) not impermissibly advance or inhibit religion, and (3) not excessively entangle government with religion. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).
136. *Nikolao*, 875 F.3d at 318–20.
137. *Id.* at 318–19.
138. *Id.* at 318.
139. *See id.* at 318–19.
140. *Id.* at 318.

about the health importance of vaccinations and did not target religious exercise, the Certification Rule did not impermissibly advance or inhibit religion.[141] Finally, no excessive entanglement resulted from the fact that county officials spoke to parents about their objections.[142] "[T]he state is merely voicing its own opinion on religious objections in an effort [to] prevent the outbreak of communicable diseases. This does not rise to the level of excessive entanglement needed to sustain an Establishment Clause challenge."[143]

A similar analysis took care of Nikolao's objection to the Religious Waiver Note.[144] It was designed to allow state officials to respond to parents' religious concerns, but only for the secular purpose of promoting student health.[145] The Religious Waiver Note did not disparage religion, did nothing to entangle state officials with religious institutions, and did not require those officials to decide whether a parent's religious views were sincerely held.[146] Nikolao failed to state viable Establishment Clause claims.[147]

In *In re Piland*, the Michigan Court of Appeals considered whether parents defending themselves in a child protection proceeding were entitled to a jury instruction that a finding of parental negligence could not be based on parental decision making that in turn was based on religious beliefs alone.[148] Indeed, under Michigan law, "[a] parent . . . legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child, for that reason alone shall not be considered a negligent parent."[149] In *In re Piland*, parents refused to seek medical treatment for a newborn child suffering from jaundice, and the child eventually died.[150]

Fearing that the parents might fail to provide medical care for their remaining children, the state filed a petition to terminate the parents' custodial rights, and the matter was ultimately set for a jury trial.[151] The trial court refused to provide the requested jury instruction, reasoning that a child-protection proceeding is not a negligence action.[152] The

141. *Id.*
142. *Id.* at 318–19.
143. *Id.* at 319.
144. *Id.*
145. *Id.*
146. *Id.* at 319–20.
147. *Id.* at 320.
148. 324 Mich. App. 337, 339–42, 920 N.W.2d 403, 404–06 (2018).
149. *Id.* at 342, 920 N.W.2d at 406 (quoting MICH. COMP. LAWS ANN. § 722.634 (West 2018)).
150. *Id.* at 340, 920 N.W.2d at 404–05.
151. *Id.* at 341–42, 920 N.W.2d at 405.
152. *Id.* at 342–43, 920 N.W.2d at 406.

parents argued that they were entitled to the requested jury instruction based both on the Michigan statute and on the First Amendment's promise of "religious liberty."[153] The Court of Appeals held that as a statutory matter, the parents were entitled to the requested instruction.[154] But the court was also careful to point out that as a constitutional matter, "'[t]he right to practice religion freely does not include the liberty to expose the community or the child to communicable diseases or the latter to ill health or death.'"[155]

3. The Ecclesiastical Abstention Doctrine

It seems an unremarkable proposition that civil courts should not be called on to interpret scriptural strictures.[156] Under the "ecclesiastical abstention doctrine," which "arises from the Religion Clauses of the First Amendment of the United States Constitution," courts may not get themselves tangled up in questions of religious doctrine or canonical law.[157] In a 1994 case called *Dlaikan v. Roodbeen*,[158] the Michigan Court of Appeals held that, under this doctrine, Michigan courts lacked subject matter jurisdiction to entertain any case involving admission decisions of a private parochial school.[159]

In *Winkler v. Marist Fathers of Detroit, Inc.*, the Michigan Supreme Court overruled *Dlaikan*.[160] The court suggested in its reasoning that admission decisions might not be subject to the ecclesiastical abstention doctrine. As the court stated, the doctrine determines "how a court must adjudicate certain claims within its subject matter jurisdiction," not whether a court has subject matter jurisdiction to begin with; and the legal and factual issues involved in whether a claim would require resolution of an ecclesiastical question should be left to the trial court.[161] Therefore, nothing about the ecclesiastical abstention doctrine requires courts to avoid cases involving parochial school admission decisions when those decisions do not involve religious rules or canons.[162] In *Winkler*, for example, the plaintiffs claimed that the parochial school's

153. *Id.* at 342, 920 N.W.2d at 406.
154. *Id.* at 343–45, 920 N.W.2d at 406–07.
155. *Id.* at 345 n.7, 920 N.W.2d at 407 n.7 (quoting Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944)).
156. *See generally* Winkler v. Marist Fathers of Detroit, Inc., 500 Mich. 327, 337–41, 901 N.W.2d 566, 573–75 (2017).
157. *Id.* at 337–38, 901 N.W.2d at 573.
158. 206 Mich. App. 591, 522 N.W.2d 719 (1994).
159. *Winkler*, 500 Mich. at 332, 901 N.W.2d at 570.
160. *Id.* at 330, 901 N.W.2d at 569.
161. *See id.* at 341–44, 901 N.W.2d at 575–76.
162. *See Winkler*, 500 Mich. at 343, 901 N.W.2d at 576.

refusal to admit a student with a learning disability violated Michigan's Persons With Disabilities Civil Rights Act (PWDCRA).[163] As the Court noted, the issue of whether the parochial school violated the PWDCRA might or might not require the construction of sectarian rules or principles.[164] The circuit court, therefore, had jurisdiction to entertain the case and would likely avoid the ecclesiastical abstention doctrine so long the resolution of the factual and legal issues did not require any such construction.[165]

4. Public Prayer and the Establishment Clause

"The Jackson County Board of Commissioners . . . opens its monthly meetings with Commissioner-led prayers."[166] The invocation at each meeting is preceded by some kind of request that those in attendance "assume a reverent position."[167] Sitting *en banc* in *Bormuth v. County of Jackson*, the Sixth Circuit considered a challenge to this practice by a "self-professed Pagan and Animist."[168]

Invocations, the court said, are offered on a rotating basis by each of the nine commissioners on the board, and invocations are not screened or approved and may be based on the "dictates of [each commissioner's] own conscience."[169] The court found no evidence of "any discriminatory intent" undergirding the practice.[170] The county's prayer practice was on all fours with *Town of Greece v. Gallow*ay,[171] in which the U.S. Supreme Court upheld town board invocations when "[t]he town permitted any person of any faith to give the invocation, did not review the prayers in advance, and did not provide any guidance as to tone or content."[172] *Bormuth* takes its place in a long line of cases reasoning that the nation's history and traditions must be taken into account in public-body prayer cases, and that history and tradition support the practice, within limits.[173]

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163. *Id.* at 331, 901 N.W.2d at 569 (citing MICH. COMP. LAWS ANN. §§ 37.1101–37.1607 (West 2018)).

164. *Id.* at 343–44, 901 N.W.2d at 575–76.

165. *Id.*

166. Bormuth v. Cty. of Jackson, 870 F.3d 494, 498 (6th Cir. 2017).

167. *Id.*

168. *Id.* at 498–99.

169. *Id.* at 498.

170. *Id.*

171. Town of Greece v. Galloway, 572 U.S. 565 (2014).

172. Bormuth v. Cty. of Jackson, 870 F.3d 494, 505–06 (6th Cir. 2017) (citing *Town of Greece*, 565 U.S. at 570–71).

173. *Id.* at 503–06 (citing *Town of Greece*, 565 U.S. at 576–87; Marsh v. Chambers, 463 U.S. 783, 786 (1983); Zorach v. Clauson, 343 U.S. 306, 313 (1952); Lynch v.

III. EQUAL PROTECTION AND DUE PROCESS

A. Cases Based Predominantly on Equal Protection

As same-sex marriage in particular and LGBT rights more generally have come to the fore around the nation, a Michigan Court of Appeals opinion tackled the issue whether the former romantic partner in a same-sex relationship, whose romantic relationship ended before Michigan recognized the right to same-sex marriage or any similar union, had standing to claim visitation rights with a the biological child of the former romantic partner.[174] *Sheardown v. Guastella* held that the former same-sex partner was not treated differently than similarly situated former partners in opposite-sex relationships; in either case, a former romantic partner who was not the natural or adoptive parent of a child has no standing to claim custody of the natural or adoptive child of the former partner.[175] The question, of course, was whether the former partner in a same-sex relationship should be classed among similarly situated former partners in opposite-sex relationships when, unlike those former partners in opposite-sex relationships, the partners in the same-sex relationship had no right to marry at the time their relationship dissolved or before that time.[176]

Obergefell v. Hodges,[177] the Supreme Court case recognizing the right of same-sex couples to marry, did "not apply."[178] According to the court, *Obergefell* only applied to those rights afforded to married couples, and the couple in *Sheardown* never married.[179] And, although Michigan did not allow same-sex couples to marry before the relationship between the parties in *Sheardown* disintegrated, the court said, "[t]hey had the option to marry in several different states while they were in a relationship, but for whatever reason (and they offer conflicting ones), they did not. Nor did plaintiff ever seek to adopt [the child]."[180] The majority found it inapposite that the couple could not have married in Michigan because the couple could have married in another state.[181]

Donnelly, 465 U.S. 668, 674–78 (1984); Smith v. Jefferson Cty. Bd. of Sch. Comm'rs, 788 F.3d 580, 588 (6th Cir. 2015)).

174. Sheardown v. Guastella, 324 Mich. App. 251, 253–55, 920 N.W.2d 172, 174–75 (2018).

175. *Id.* at 260–61, 920 N.W.2d at 177–78.

176. *See id.* at 270–271, 920 N.W.2d at 183 (Fort Hood, J., dissenting).

177. 135 S. Ct. 2584 (2015).

178. *Sheardown*, 324 Mich. App. at 258, 920 N.W.2d at 176.

179. *Id.* at 258–59, 920 N.W.2d at 176–77.

180. *Id.* at 259, 920 N.W.2d at 177.

181. *Id.*

In a powerful dissent, Judge Fort Hood argued:

> [T]he pivotal and very unfortunate fact not in dispute in this case is that plaintiff and defendant were legally forbidden by the state of Michigan from entering into a legally recognized marriage (1) before [the child] was born, (2) on the date of his birth . . . and (3) in the time thereafter, before the breakdown of their romantic relationship. It was not until June 26, 2015, when the United States Supreme Court recognized that no person should be denied the fundamental right to marry, that members of same-sex relationships were afforded the basic human right to join in marriage, and all its attendant benefits, rights that all other Americans enjoyed before this date. As a result of the injustice that . . . Obergefell . . . sought to remedy, plaintiff was legally foreclosed from taking the necessary steps to protect her relationship with [the child]. The one that bears the bitter consequence of his parents' legal inability to marry is [the child], and the end result of this case . . . is that plaintiff will play no part in [the child's] life, and [the child] will have no further relationship with his biological sibling. I cannot countenance such a result, particularly in light of the controlling United States Supreme Court precedent recognizing the right of same-sex couples to marry and to avail themselves of the concomitant benefits, and . . . I would reverse and remand for further proceedings.[182]

The disagreement among the judges in *Sheardown* distills quite well the debate around the issue of custodial rights of unmarried persons whose romantic same-sex relationships ended before the Supreme Court's ruling in *Obergefell*.[183]

In a less contentious and simpler case, the Sixth Circuit Court of Appeals reaffirmed that age classifications do not implicate a suspect classification or heightened scrutiny for equal protection purposes.[184] In *Theile v. Michigan*, a Genesee County judge challenged the Michigan Constitution's requirement that "[n]o person shall be elected or appointed to judicial office after reaching the age of 70 years."[185] The

182. *Id.* at 264–65, 920 N.W.2d at 179–80 (Fort Hood, J., dissenting).

183. For a thorough discussion of this issue, see generally Frank C. Aiello, *Would've, Could've, Should've: Custodial Standing of Non-Biological Parents for Children Born Before Marriage Equality*, 24 AM. U. J. GENDER SOC. POL'Y & L. 469 (2016).

184. Theile v. Michigan, 891 F.3d 240, 241–43 (6th Cir. 2018).

185. *Id.* at 242 (quoting MICH. CONST. art. VI, § 19(3)).

court noted the long-standing rule that age restrictions are subject only to rational basis review, and it emphasized the deferential nature of the rational basis standard: the government "need not offer any rational basis so long as [a] [c]ourt can conceive of one."[186]

In its analysis, the court largely ignored this standard and expressed sympathy for the plight of Judge Theile.[187] Nonetheless, the court considered itself bound by cases upholding identical laws in other states on the ground that rational reasons did exist for imposing age limitations for judges.[188] The court upheld Michigan's age restriction.[189]

Finally, the U.S. District Court for the Western District of Michigan considered an equal protection claim based on a deliberate indifference theory.[190] In *Kollaritsch v. Michigan State University Board. of Trustees*, four female students alleged that "they were sexually harassed or assaulted by other students while they were students at Michigan State University (MSU)" and that officials at MSU failed to respond appropriately.[191] In a case that turned largely on evidentiary matters and the plaintiffs' failure to state myriad different claims, the court recognized that an equal protection claim can be made out on either a theory of disparate treatment of one class of students as compared with another, *or* of deliberate indifference to discrimination or harassment.[192]

The district court found that only one plaintiff had alleged facts sufficient to establish deliberate indifference on the part of one defendant.[193] That plaintiff alleged that MSU's vice president for student affairs told the plaintiff that an investigation involving her claims of harassment had been dismissed despite the allegation that a fellow student had sexually assaulted the plaintiff three times.[194] The court concluded that the alleged conduct by the vice president for student affairs might have been "unreasonable under the circumstances as a response to [plaintiff's] allegation of a sexual assault."[195]

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186. *Id.* at 243 (quoting Ziss Bros. Constr. Co. v. City of Independence, 439 F. App'x 467, 476 (6th Cir. 2011)).

187. *See id.* at 244–45.

188. *Id.* at 245.

189. *Id.*

190. *See generally* Kollaritsch v. Mich. State Univ. Bd. of Trs., 298 F. Supp. 3d 1089 (2017).

191. *Id.* at 1096.

192. *Id.* at 1105 (citations omitted).

193. *Id.* at 1107. That official was MSU's Vice-President of Student Affairs. *Id.* at 1096.

194. *Id.* at 1100, 1107.

195. *Id.* at 1107.

B. Cases Based Primarily on Due Process

1. Procedural Due Process

The threshold question in any case involving a procedural due process claim is whether the party challenging the government has suffered a deprivation of life, liberty, or property.[196] In *In re Estate of Rasmer*, the Michigan Supreme Court considered the scope and application of this principle.[197] In 1993, Congress enacted legislation requiring states to establish estate-recovery programs to recoup amounts paid for certain Medicaid services after the recipient has died.[198] Michigan did so in 2007.[199] The program was not effective, however, until 2010, and it was not implemented until 2011.[200] When the state tried to recoup Medicaid benefit expenditures pursuant to the estate-recovery program, several estates denied the collection attempts and actions in probate courts were instituted.[201] The estates claimed that the estate decedents were never properly put on notice of the program, and that the state's efforts to recoup the benefit money from each estate violated due process under both the federal and state constitutions.[202]

The Michigan Supreme Court noted that statutory entitlements have been treated as property interests for due process purposes by both state and federal courts.[203] The estates argued , however, that the estate-recovery program did not deprive the decedents of Medicaid benefits in the first instance; it merely deprived them (arguably, at any rate) of the opportunity to plan the disposition of their estates with the estate-recovery program in mind.[204] As to that interest, the court sidestepped the question of whether the program constituted a property or liberty interest by holding that the State's notice was constitutionally adequate.[205]

First, the court stated that plaintiffs had failed to explain how they would have changed their behaviors with more specific notice—and that in this sense plaintiffs had failed to allege an injury that would implicate due process.[206] Second, the court noted the well-worn principle that

196. *See In re* Estate of Rasmer, 501 Mich. 18, 42–43, 903 N.W.2d 800, 812 (2018).
197. *Id.* at 42–51, 903 N.W.2d at 812–16.
198. *Id.* at 25, 903 N.W.2d at 803 (citations omitted).
199. *Id.* at 25–26, 903 N.W.2d at 803.
200. *Id.* at 26, 903 N.W.2d at 803.
201. *Id.* at 18–28, 903 N.W.2d at 800–04.
202. *Id.* at 42–43, 903 N.W.2d at 812 (citing U.S. CONST. amend. XIV, § 1; MICH. CONST. art. I, § 17).
203. *Id.* at 42–43, 903 N.W.2d at 812.
204. *Id.* at 43, 903 N.W.2d at 812.
205. *Id.* at 43–46, 903 N.W.2d at 812–13.
206. *Id.* at 44–45, 903 N.W.2d at 812–13.

citizens are presumed to know what the law is once a law is published in the statute books.[207] Notice of the estate-recovery program, although it may not have been individualized, was quite specific and easily understood.[208] Finally, the court rejected plaintiffs' argument that the law was impermissibly retroactive, reasoning that although notice might have been given after the effective date of the statute, the statute itself operated only prospectively.[209]

The issue of due process interests also arose in a more notorious case, *Gamrat v. Allard*.[210] *Gamrat* involved an extra-marital affair involving two Michigan legislators and the salacious misadventures attendant to that affair.[211] Gamrat was ultimately expelled from the Legislature, and she claimed, among other things, that her expulsion violated her procedural due process rights.[212]

The federal district court rejected Gamrat's due process claim.[213] Gamrat was not a state employee, but an elected official.[214] Both federal and Michigan courts have held that an elected officer has no property interest in serving out her term of office.[215] Aside from being fatal to the substance of Gamrat's due process claim, this distinction also meant that the legislators Gamrat named as defendants had qualified immunity from her suit, because none of them deprived her of a clearly established right.[216] Legislators also enjoyed immunity under Michigan's constitutional Speech or Debate Clause.[217] As to the Michigan House of Representatives itself, the Eleventh Amendment barred Gamrat's action in federal court.[218]

Although an elected official may not have a property interest in finishing his or her term of office, it is well settled that a tenured state employee does have a property interest in continued employment.[219] In *Southfield Education Association v. Board of Education of Southfield*

207. *Id.* at 45, 903 N.W.2d at 813 (citations omitted).
208. *Id.* at 47–48, 903 N.W.2d at 814–15 (citations omitted).
209. *Id.* at 48–49, 903 N.W.2d at 815.
210. 320 F. Supp. 3d 927 (W.D. Mich. 2018).
211. *Id.* at 932–33.
212. *Id.* at 933–35.
213. *Id.* at 944.
214. *Id.* at 935.
215. *Id.* at 937–38 (citing Taylor v. Beckham, 178 U.S. 548 (1900); Attorney Gen. v. Jochim, 99 Mich. 358, 367, 58 N.W.2d 611, 613 (1894)).
216. *Id.*
217. *Id.* at 935–36.
218. *Id.* at 934–35.
219. *See* Southfield Educ. Ass'n v. Bd. of Educ. of Southfield Pub. Sch., 320 Mich. App. 353, 375, 909 N.W.2d 1, 15 (2017) (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985)).

Public Schools, however, the Michigan Court of Appeals held that a once-tenured teacher whose position was eliminated had no property interest in later being recalled, even if she was certified and qualified to take a newly created position after being laid off.[220]

In contrast, in *In re BGP*, the Michigan Court of Appeals found that a private adoption agency had a property interest in an administrative fee that it was denied when a Michigan trial court rejected the fee.[221] The agency was not a party to the case and alleged that it therefore had no opportunity defend its own interest.[222] The court reasoned that because the adoption agency was contractually entitled to collect the administrative fees from adoptive parents, the agency had a cognizable property interest implicating due process protections.[223] The court further held, however, that the agency had not established a clear violation of its due process rights because, even though it was not a party to the trial court proceeding, it had an opportunity to protect its interest by drafting explanatory letters that were made part of the trial court record.[224] The court emphasized that due process does not always require a formal hearing.[225]

Likewise, recipients of public welfare benefits have a cognizable property interest in their benefits.[226] The Michigan Unemployment Insurance Agency (UIA), working with private contractors, developed and implemented an automated fraud detection system designed to find and punish claimants who submitted false or fraudulent unemployment claims.[227] The system, according to the plaintiffs who brought a class action suit in *Cahoo v. SAS Institute, Inc.*, left much to be desired: it falsely flagged claims as fraudulent[228] and did not provide adequate procedures for claimants to challenge the system's findings.[229] Worse yet, plaintiffs claimed, many of the individual defendants knew that the

220. *Id.*

221. *In re* BGP, 320 Mich. App. 338, 341–43, 906 N.W.2d 228, 231–32 (2017).

222. *Id.* at 342, 906 N.W.2d at 232.

223. *Id.* at 343, 906 N.W.2d at 232.

224. *Id.* at 343–44, 906 N.W.2d at 232–33.

225. *Id.* at 344, 906 N.W.2d 233 (citation omitted).

226. Goldberg v. Kelly, 397 U.S. 254 (1970); *see* Cahoo v. SAS Inst., Inc., 322 F. Supp. 3d 772, 797–99 (E.D. Mich. 2018), *rev'd in part,* Cahoo v. SAS Analytics Inc., 912 F.3d 887 (6th Cir. 2019).

227. *SAS Inst.*, 322 F. Supp. 3d at 784.

228. *See, e.g.*, *id.* at 784 (stating the system "detected fraud by certain claimants where none existed"). "[T]he Michigan Auditor General eventually determined that of the 22,427 robo-adjudications reviewed, over 93% did not involve fraud at all." *Id.* at 787.

229. *See id.* at 785–87 (describing how system detected alleged fraud and procedures available to challenge findings).

system did not work properly but persisted with collection efforts anyway.[230] Defendants moved to dismiss on several grounds.[231]

Before reaching the merits of plaintiffs' due process claims, the court considered the issue of state action.[232] To state a claim under 42 U.S.C § 1983, the plaintiff must show that a state actor deprived her of some federally protected right.[233] Most of the private contractors denied that they were state actors.[234] State action may be found when the defendant undertakes some government function, or when the defendant and the state are so entangled that it is difficult or impossible to say when the action of one ends and the other begins.[235] Courts will be on the lookout for entanglement "when the state has affirmatively authorized, encouraged, or facilitated the private unconstitutional conduct," or a private actor is allowed to exercise some power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[236] Judged by this standard, said the court, two private corporate defendants could be found to be state actors, but plaintiffs had not pleaded with enough specificity to show that the individual employees of any corporate defendant should be held liable.[237]

Defendants also claimed that the plaintiffs' procedural due process claims failed because the plaintiffs did not exhaust available administrative remedies.[238] Stating a *prima facie* procedural due process claim requires the plaintiff to plead (1) a constitutionally protected life, liberty, or property interest, (2) that was deprived by a state actor, (3) without adequate notice or an opportunity to be heard.[239] Plaintiffs here easily met the mark.[240]

The district court rejected defendants' exhaustion of administrative remedies argument.[241] "[P]laintiffs alleging a procedural due process violation are not required to exhaust state remedies. They are only

230. *See, e.g., id.* at 795–97 (discussing actions of various UIA employees).

231. *Id.* at 789. For the sake of brevity, we omit textual discussion of some findings. The court dismissed the plaintiffs' substantive due process claims, finding there was no fundamental right to government benefits. *Id.* at 799–800. We have also left out the court's analyses of standing and personal jurisdiction. *See id.* at 807–09.

232. Cahoo v. SAS Inst., Inc., 322 F. Supp. 3d 772, 791–92 (E.D. Mich. 2018), *rev'd in part,* Cahoo v. SAS Analytics Inc., 912 F.3d 887 (6th Cir. 2019).

233. *Id.*; *see* 42 U.S.C. § 1983 (2018).

234. *SAS Inst.*, 322 F. Supp. 3d at 791–92.

235. *See id.* at 792–793.

236. *Id.* at 792–93 (quoting West v. Atkins, 487 U.S. 42, 49 (1988)).

237. *Id.* at 793–95.

238. *Id.* at 797.

239. *Id.*

240. *See id.* at 797-99.

241. *Id.* at 798–99.

required to demonstrate why state procedures are inadequate."[242] Plaintiffs complained that the system afforded them no pre-deprivation process and flawed, inadequate post-deprivation process.[243] These allegations, the court said, were enough to state a procedural due process claim.[244]

Although the case seemed mostly to implicate due process concerns, plaintiffs also alleged equal protection violations; defendants argued that plaintiffs' equal protection claims should be dismissed because plaintiffs did not allege unequal treatment.[245] The court disagreed, though it recognized that rational basis review was the controlling standard and that the law was thus entitled to a presumption of constitutionality.[246] The key facts, according to the court, were that plaintiffs' unemployment claims were reviewed and determined to be fraudulent without any human oversight; the UIA made no effort to investigate findings of fraud, and those findings "were made without any factual basis."[247]

> There is no conceivable rational basis for terminating benefits based on a defective system and continuing to do so even after discovering the defect. In alleging a complete failure by the UIA to evaluate and correct deficiencies in its system, the plaintiffs have satisfied their burden of showing the State lacked a rational basis for its actions.[248]

However, the Sixth Circuit Court of Appeals found the plaintiffs could not demonstrate they were intentionally discriminated against and therefore did not plausible state an equal protection claim.[249]

One private contractor and the individual UIA defendants raised the defense of qualified immunity.[250] The private contractor was not entitled to immunity because, the court found, there was no history to support "conferring qualified immunity upon private government contractors[] who compete in the marketplace for outsourced business."[251]

As to the individual UIA defendants, they might be immune from damages liability arising out of their discretionary functions, so long as

242. *Id.* at 798 (citations omitted).
243. *Id.* at 799.
244. *Id.*
245. *Id.* at 800–01.
246. *Id.*
247. *Id.* at 800–01.
248. *Id.* at 801.
249. Cahoo v. SAS Analytics Inc., 912 F.3d 887, 905–06 (6th Cir. 2019).
250. *SAS Inst.*, 322 F. Supp. 3d at 804 (E.D. Mich. 2018).
251. *Id.* at 804–05.

their conduct did not deprive plaintiffs of "clearly established statutory or constitutional rights of which a reasonable person would have known."[252] This standard is not especially demanding; officials are immune "unless it is obvious that no reasonably competent official would have concluded that the actions taken were unlawful."[253]

Unfortunately for the individual UIA defendants, it was a standard they could not meet.[254] Plaintiffs had stated claims for denials of procedural due process and equal protection of the law.[255] "[I]t has been settled law for years that unemployment benefits are a property interest protected by the Due Process Clause, and that terminating such benefits without pre- or post-termination procedure is unlawful."[256] Plaintiffs had "pleaded around the qualified immunity defense at this stage of the case."[257]

One due process case during the *Survey* period implicated a hybrid issue involving both speech and procedural fairness.[258] After being dismissed from Wayne State University Medical School for a variety of academic and disciplinary reasons, plaintiff Jason Yaldo sought reinstatement in a federal court lawsuit against the medical school and several of its staff members.[259] Plaintiff claimed that he was expelled in retaliation for protected speech activities and that his dismissal deprived him of due process of law.[260] On cross motions for summary judgment, the district court found in favor of the Medical School and dismissed Yaldo's claims.[261]

To prove a First Amendment retaliation claim, Yaldo had to show that his constitutionally protected speech was a substantial or motivating factor resulting in an adverse action by the medical school.[262] According to Yaldo, his requests for disability accommodations and his civil rights

252. *Id.* at 805 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

253. *Id.* at 806 (quoting Chappell v. City of Cleveland, 585 F.3d 901, 907 (6th Cir. 2009)).

254. *Id.* at 807.

255. *Id.* at 806.

256. *Id.* at 807.

257. *Id.*

258. *See* Yaldo v. Wayne State Univ., 266 F. Supp. 3d 988 (E.D. Mich. 2017).

259. *Id.* at 993–99. The district court recounted plaintiff's time at the Medical School in painstaking detail. *See id.* at 994–1001. Yaldo's claims against the Medical School staff members failed because he did not show that their actions deprived him of any clearly established federal right. *Id.* at 1007. As a result, the staff members were entitled to qualified immunity. *See id.* at 1007–09.

260. *Id.* at 1002–07.

261. *Id.* at 993–94.

262. *Id.* at 1003.

complaints were protected speech.[263] But Yaldo ran into a causation problem: each of the medical school staff members who voted to dismiss him testified that his speech activities played no role in their decision.[264]

> [The] decision was not motivated by any of Plaintiff's protected speech. Rather, testimony from the voting committee members establishes that they decided based on the combination of Plaintiff's lack of academic success, his failure to complete courses in a timely manner, and his professionalism issues, including submission of a falsified police report to substantiate an absence.[265]

Wayne State dismissed Yaldo from the medical school for reasons that were neither discriminatory nor retaliatory, and he did not show that those reasons were pretextual.[266] The district court summarily dismissed Yaldo's retaliation claim.[267]

The court then addressed Yaldo's procedural due process claim.[268] Given well-known authority recognizing that "continued enrollment" in a public school can be a cognizable due process interest, the district court assumed that Yaldo had a liberty or property interest in his enrollment.[269] Yaldo's expulsion deprived him of that interest.[270] The only contested procedural due process element, then, was whether Yaldo had been afforded the process he was due.[271]

Dismissing a student for academic reasons involves special considerations.[272] In that circumstance, courts should defer to a faculty's professional judgment.[273] "Where dismissals are considered academic in nature, procedural due process does not require a hearing before a decisionmaking body either before or after the termination decision is

263. *Id.* at 1002–03.
264. *Id.* at 1004.
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.* at 1004–06. Yaldo also brought a substantive due process claim which the court disposed of quickly, finding that the Medical School's expulsion of Yaldo was not "arbitrary or capricious." *See id.* at 1007.
269. *Id.* at 1005 (citing Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 222–23 (1985)).
270. *Id.* at 1005.
271. *Id.*
272. *See id.* at 1005–06.
273. *Id.* at 1005 (quoting *Ewing*, 474 U.S. at 225).

made."[274] Yaldo's dismissal was academic, which meant that the school provided him with more procedural protection than he was due.[275] The district court granted summary judgment on this claim.[276]

Constitutional challenges based on vagueness or ambiguity, though commonplace, rarely succeed, which is enough to make *Brang, Inc. v. Liquor Control Commission*[277] noteworthy.[278] Plaintiff Brang appealed a circuit court decision affirming the Commission's determination that Brang sold "narcotics paraphernalia" in violation of a Commission administrative rule.[279] The Michigan appeals court had to decide whether "narcotics paraphernalia," as used in the rule, was impermissibly vague.[280]

A law is unconstitutionally vague if it (1) is substantially overbroad under the First Amendment, (2) does not provide fair notice of what conduct is against the law, or (3) is so indefinite that it vests the trier of fact with too much discretion to find guilt or innocence.[281] Concerns over notice and impermissible discretion are rooted in due process of law.[282] The term "narcotics paraphernalia," the court found, was simply too vague to pass due process muster.[283] "The primary reason . . . [the rule] is unconstitutionally vague is that it fails to supply any parameters, guidance, standards, criteria, or quantifiers in regard to identifying 'narcotics paraphernalia,' other than those necessarily arising out of the term itself, thereby making the rule susceptible to arbitrary and discriminatory enforcement."[284] The rule offered no way to determine whether things that might be used for perfectly lawful purposes like smoking tobacco, but that also could be used with narcotics, were "narcotics paraphernalia."[285]

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274. *Id.* (quoting Fuller v. Schoolcraft Coll., 909 F. Supp. 2d 862, 876 (E.D. Mich. 2012)).

275. *Id.* at 1006.

276. *Id.*

277. Brang Inc. v. Liquor Control Comm'n, 320 Mich. App. 652, 910 N.W.2d 309 (2017).

278. See Ryan McCarl, *Incoherent and Indefensible: An Interdisciplinary Critique of the Supreme Court's "Void-for-Vagueness" Doctrine*, 42 HASTINGS CONST. L. Q. 73, 90–91 (2014).

279. *Brang*, 320 Mich. App. at 654, 910 N.W.2d at 310.

280. *See id.*

281. *Id.* at 663, 910 N.W.2d at 315 (quoting Kotmar, Ltd. v. Liquor Control Comm'n, 207 Mich. App. 687, 696, 525 N.W.2d 921, 926 (1994)).

282. *Id.* at 663–64, 910 N.W.2d at 315.

283. *Id.* at 664–65, 910 N.W.2d at 316.

284. *Id.* at 667, 910 N.W.2d at 317.

285. *Id.* at 668, 910 N.W.2d at 317.

> Does an item need to be primarily or predominantly used in connection with a narcotic in order to be designated as narcotics paraphernalia, or can rare or occasional use suffice? Is it pertinent for identifying narcotics paraphernalia whether the manufacturer specifically designed a product for use in relationship to a narcotic, or is the manufacturer's intent irrelevant? Does a licensee's knowledge, or lack thereof, regarding an item's use or intended use play any role in the equation?[286]

This "indefiniteness, uncertainty, and lack of fair notice and precision" meant that the rule was unconstitutionally vague, and so was void and unenforceable.[287]

In contrast, the Michigan Court of Appeals held that Michigan's third-degree child abuse statute was not unconstitutionally vague.[288] According to the court, due process requires that a statute must put a person of reasonable intelligence on notice of the conduct proscribed by the statute.[289] Outside the First Amendment context, a litigant claiming that a law is unconstitutionally vague would have to show either that "it does not provide fair notice of the conduct proscribed . . . or [that] it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed."[290] Michigan's third-degree child abuse statute makes it a crime to "knowingly or intentionally cause[] physical harm to a child" or "knowingly or intentionally commit[] an act that under the circumstances poses an unreasonable risk of harm or injury to a child, and the act results in physical harm to a child."[291]

In *Lawhorn*, the defendant was accused of third-degree child abuse under the statute for administering a "whupping" that resulted in bleeding, scabbing, bruising, and possibly permanent scarring.[292] The court held that the jury could properly have inferred from the evidence that the defendant caused "physical harm" to the child under the

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286. *Id.*

287. *Id.*, 910 N.W.2d at 318.

288. People v. Lawhorn, 320 Mich. App. 194, 196–97, 907 N.W.2d 832, 836–37 (2017).

289. *Id.* at 198–200, 907 N.W.2d at 838.

290. *Id.* at 199, 907 N.W.2d at 838 (quoting People v. Roberts, 292 Mich. App. 492, 497, 808 N,W.2d 290, 295 (2011)).

291. *Id.* at 197, 907 N.W.2d at 837 (quoting MICH. COMP. LAWS ANN. § 750.136b (West 2018)).

292. *Id.* at 203–04, 907 N.W.2d at 840–41.

statute.[293] Furthermore, the term "physical harm" was not unconstitutionally vague because a person of ordinary intelligence would understand what that term means.[294] The court explained that a provision in the law permitting parents or guardians to use "reasonable force" for disciplinary reasons and the scienter requirement engendered by the words "knowingly or intentionally" mitigated any vagueness concerns.[295]

Finally, the Sixth Circuit reaffirmed the principle that a due process claim will not lie on the basis of a state's failure to act.[296] In *Ryan v. City of Detroit*, plaintiff alleged that two city police agencies violated due process principles when they removed a subject from "a database of wanted or missing persons" and the subject, plaintiff's daughter's husband, ultimately murdered plaintiff's daughter.[297] In *DeShaney v. Winnebago County Department of Social Services*, the U.S. Supreme Court ruled that "[a]s a general matter, . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."[298] Nonetheless, in *Ryan*, the court recognized that a state may be liable for a due process violation when it takes affirmative steps to create a danger that did not exist before.[299] The court found, however, that when the police departments at issue removed the subject from the database, they merely returned the decedent to the status quo; she faced the same danger after the subject was removed from the database with which she faced before he was placed into the database.[300] The court also dismissed the plaintiff's equal protection claim on the ground that there was no evidence that the decedent had been treated differently than others similarly situated.[301]

2. Substantive Due Process

The Michigan Court of Appeals took up a case involving the well-known Flint water crisis during the *Survey* period.[302] In *Mays v. Snyder,* the court considered several constitutional claims, chief among them that state officials had violated the substantive due process right of bodily

293. *Id.* at 204, 907 N.W.2d at 841.
294. People v. Lawhorn, 320 Mich. App. 194, 205, 907 N.W.2d 832, 841 (2017).
295. *Id.* at 203, 907 N.W.2d at 840 (quoting MICH. COMP. LAWS ANN. §§ 750.136b(5), 750.136b(9)).
296. *See* Ryan v. City of Detroit, 698 F. App'x 272 (6th Cir. 2017).
297. *Id.* at 274.
298. *Id.* at 283 (quoting DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 197 (1989)).
299. *Ryan*, 698 F. App'x at 283 (citations omitted).
300. *Id.*
301. *Id.* at 279–83.
302. Mays v. Snyder, 323 Mich. App. 1, 19, 916 N.W.2d 227, 240 (2018).

integrity with regard to the residents of Flint whom ingested tainted water.[303] Citing numerous cases, the court recognized that both the Michigan and federal Constitutions protect the right to bodily integrity.[304] The court emphasized, however, that a claim alleging a violation of this right will be dismissed unless the violation is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."[305] Plaintiffs had alleged facts that, if true, would shock the conscience:

> Plaintiffs allege that defendants made the decision to switch the city of Flint's water source to the Flint River after a period of deliberation, despite knowledge of the hazardous properties of the water. Additionally, plaintiffs allege that defendants neglected to conduct any additional scientific assessments of the suitability of the Flint water for use and consumption before making the switch, which was conducted with knowledge that Flint's water treatment system was inadequate. According to plaintiffs' complaint, various state actors intentionally concealed scientific data and made false assurances to the public regarding the safety of the Flint River water even after they had received information suggesting that the water supply directed to plaintiffs' homes was contaminated with Legionella bacteria and dangerously high levels of toxic lead. At the very least, plaintiffs' allegations are sufficient to support a finding of deliberate indifference on the part of the governmental actors involved here.
>
> Plaintiffs have alleged facts sufficient to support a constitutional violation by defendants of plaintiffs' right to bodily integrity.[306]

The court further found plaintiffs had alleged facts sufficient to show that the violation occurred "pursuant to governmental policy."[307]

While plaintiffs' substantive due process claims for bodily integrity had merit, their substantive due process claims for state-created danger had been correctly dismissed.[308] The court noted that the doctrine of state created danger (discussed above) had never been applied in a case

303. *Id.* at 56–60, 916 N.W.2d at 260–61.

304. *Id.* at 58–60, 916 N.W.2d at 261.

305. *Id.* at 60, 916 N.W.2d at 262 (quoting Villanueva v. City of Scottsbluff, 779 F.3d 507, 513 (8th Cir. 2015)).

306. *Id.* at 61–62, 916 N.W.2d at 262.

307. *Id.* at 64, 916 N.W.2d at 264.

308. *Id.* at 77–78, 916 N.W.2d at 271.

alleging direct harm by the government against citizens rather than harm caused by some third party.[309]

The Sixth Circuit also considered the shocks-the-conscience standard during the *Survey* period.[310] In *Buck v. City of Highland Park*, the court rejected a claim that a police officer's conduct shocked the conscience when the officer accidentally shot a bystander in the officer's line of fire while responding to a crime scene.[311] The officer, said the court, was dealing with a "fluid and dangerous situation" at the time of the shooting.[312]

The Sixth Circuit also considered the due process implications for individuals on the "Selectee List."[313] The "Selectee List" is a federally created and managed list used to identify travelers who, when they travel, are to be selected for enhanced screening and security measures.[314] Plaintiffs Beydoun and Bazzi, both United States citizens, claimed they were on the Selectee List and, as a result, were routinely subjected to time-consuming, intrusive, and embarrassing security protocols.[315] Believing that their inclusion on the Selectee List impermissibly interfered with their constitutionally-protected right to travel and caused them reputational harm, plaintiffs sued.[316]

The Fifth Amendment has long protected the right to travel.[317] In order to make out a fundamental rights claim, the challenger must show that government action significantly or substantially impaired the exercise of a fundamental right.[318] A mere "incidental" or "negligible"

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309. *Id.*

310. Buck v. City of Highland Park, 733 F. App'x 248 (6th Cir. 2018), *reh'g denied*, No. 17–2151, 2018 U.S. App. LEXIS 13805 (6th Cir. May 23, 2018).

311. *See id.* at 253–54.

312. *Id.* at 254.

313. Beydoun v. Sessions, 871 F.3d 459 (6th Cir. 2017), *reh'g denied en banc*, No. 16–2168/2406, 2017 U.S. App. LEXIS 24104 (6th Cir. Nov. 28, 2017).

314. *Id.* at 462–63.

315. *Id.* at 462.

316. *Id.* at 466. There was some confusion over the specifics of plaintiffs' claims. The district court found that plaintiffs had complained about inadequate procedures to have their names removed from the Selectee List (procedural due process claims). *See id.* at 464–65. Plaintiffs insisted they were also challenging the fact that they were included on the Selectee List in the first place (substantive due process claims). *Id.* at 464–65. The appeals court agreed that plaintiffs had raised both claims but found that they had waived their procedural due process claims. *Id.* at 465–66.

317. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 338 (1972) (recognizing the fundamental right to travel). *But see* Haig v. Agee, 453 U.S. 280, 306 (1981) (comparing the right to travel within the United States with the freedom to travel internationally).

318. *See Beydoun* v. Sessions, 871 F.3d 459, 467 (6th Cir. 2017) (quoting Zablocki v. Redhail, 434 U.S. 374, 388 (1978)).

burden fails to state a claim.[319] It was here, on the nature of the burden, that plaintiffs' claims fell short.[320] Any inconvenience plaintiffs experienced as a result of being subjected to extra security measures did not amount to a constitutional violation.[321] Plaintiffs were never prevented from flying or from traveling by other means.[322]

> The burdens alleged by Plaintiffs . . . can only be described as incidental or negligible and therefore do not implicate the right to travel. Plaintiffs point to no authority supporting their claim that a delay of ten minutes, thirty minutes, or even an hour at the airport violates their fundamental right to travel.[323]

Because they could not show that placement on the Selectee List substantially impaired their fundamental right to travel, Plaintiffs failed to state a viable substantive due process claim.[324]

A claim for reputational harm entails a showing that government action (1) caused the plaintiff some reputational harm and (2) deprived the plaintiff of some other recognizable right.[325] Beydoun's and Bazzi's reputational harm claims failed because they were not able to show that their right to travel—the other recognizable right—had been substantially impaired.[326]

IV. OTHER CONSTITUTIONAL ISSUES

A. Ex Post Facto Laws

Although, as noted in the Introduction, we have largely avoided issues involving criminal law and procedure, we thought it worth noting that two cases during the *Survey* period involved the issue of whether a state law violated the Ex Post Facto Clause of the Constitution.[327] Surprisingly, in both cases, the courts said yes.[328]

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319. *Id.* at 467.
320. *Id.* at 467–68.
321. *Id.*
322. *Id.* at 468.
323. *Id.*
324. *Id.*
325. *Id.* at 468–69.
326. *Id.*
327. U.S. CONST. art. I, § 10; Hill v. Snyder, 308 F. Supp. 3d 893 (E.D. Mich. 2018) *aff'd* 900 F.3d 260 (6th Cir. 2018); People v. Wiley, 324 Mich. App. 130, 919 N.W.2d 802 (2018).
328. *Hill*, 308 F. Supp. 3d at 897; *Wiley*, 324 Mich. App. at 149–50, 919 N.W.2d at 813.

In *Miller v. Alabama*,[329] the Supreme Court ruled that states cannot sentence juvenile offenders convicted of murder to life sentences without parole under the Eighth Amendment.[330] The Michigan Legislature, in an effort to abide to the Court's ruling in *Miller*, enacted legislation "that purported to comply with the Court's ruling, which included the possibility of being resentenced to prison for a term of years."[331] But the new legislation "provided that in calculating any such sentence, the youth offenders were not to receive any credit—known as good time or disciplinary credit—even though such credits were earned while the youth offenders served their illegally imposed sentences."[332]

In *Hill v. Snyder*, the federal district court considered whether the new legislation violated the Ex Post Facto Clause, which "prohibits any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'"[333] The court held that because the statutory elimination of good time or disciplinary credits served to increase the punishment that would otherwise have been legal at the time the juvenile offenders' crimes were committed (namely, a life sentence with the possibility of parole), the new legislation violated the Ex Post Facto Clause.[334]

Interestingly, the same issue arose before the Michigan Court of Appeals in *People v. Wiley*.[335] In *Wiley*, the court upheld the Michigan statute that provided for resentencing pre-*Miller* defendants to term-of-years sentences, but expressly endorsed the view of the Eastern District that the part of the law that forbade the future consideration of good behavior credits was unconstitutional.[336]

B. Government Service and "Indian" Tribes

The Michigan Constitution provides as follows:

> A person is ineligible for election or appointment to any state or local elective office of this state and ineligible to hold a position in public employment in this state that is policy-making or that has discretionary authority over public assets if, within the

329. 567 U.S. 460 (2012).
330. *Id.* at 461.
331. *Hill*, 308 F. Supp. 3d at 897.
332. *Id.*
333. *Id.* at 906 (quoting Weaver v. Graham, 450 U.S. 24, 28 (1981)).
334. *See id.* at 911. The Michigan law at issue was codified at MCLA 769.25a(6). *Hill*, 308 F. Supp. 3d at 911; *see* MICH. COMP. LAWS ANN. § 769.25a(6) (West 2018).
335. 324 Mich. App. 130, 134–35, 919 N.W.2d 802, 805 (2018).
336. *Id.* (citations omitted).

> immediately preceding 20 years, the person was convicted of a felony involving dishonesty, deceit, fraud, or a breach of the public trust and the conviction was related to the person's official capacity while the person was holding any elective office or position of employment in local, state, or federal government. This requirement is in addition to any other qualification required under this constitution or by law.
>
> The legislature shall prescribe by law for the implementation of this section.[337]

In *Paquin v. City of St. Ignace*,[338] the Michigan Court of Appeals addressed an issue of first impression under this constitutional provision.[339] Fred Paquin was serving as police chief of the "tribal police department" of a "federally recognized Indian tribe" when he committed the crime of "conspiracy to defraud the United States by dishonest means" by misusing federal funds intended for use by the tribe.[340] After serving his sentence, he sought to run for an elected position on the city council for the City of Ignace.[341] The court found him ineligible under the constitutional provision quoted above.[342]

Quite obviously, Paquin committed a felony involving dishonesty; the question was whether the police chief of a tribal police force was a "position of employment in *local, state, or federal government.*"[343] The court concluded that the tribe was a "local government" within the meaning of the Michigan Constitution.[344] Lacking any definition within the Michigan Constitution itself, the court turned to a dictionary, which defines "local government" as "the government of a specific local area constituting a major political unit (as a nation or state)."[345] The court held that the tribe was a political unit.[346] It further explained that, even though the tribe was under Congress' jurisdiction, it was essentially sovereign over its affairs in the absence of congressional regulation.[347] Paquin, as

337. MICH. CONST. art. XI, § 8.
338. 321 Mich. App. 673, 909 N.W.2d 884 (2017).
339. *Id.* at 679, 909 N.W.2d at 887.
340. *Id.* at 676, 909 N.W.2d at 885.
341. *Id.*
342. *Id.* at 677, 909 N.W.2d at 886.
343. *Id.* at 681, 909 N.W.2d at 888.
344. *Id.*
345. *Id.* at 681–82, 909 N.W.2d at 888 (2017) (quoting *Local Government*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 730 (11th ed. 2007)).
346. *Id.* at 682, 909 N.W.2d at 888.
347. *Id.* at 682–83, 909 N.W.2d at 888–89 (citations omitted).

tribal police chief, was therefore an employee of local government at the time he committed the crime.[348]

C. Contracts Clause

Kaminski v. Coulter[349] is noteworthy because it reached a question of first impression for the Sixth Circuit.[350] The City of Lincoln Park found itself in significant financial difficulty, and problems that were serious enough to warrant the appointment of an emergency financial manager under Michigan law.[351] The designated financial manager issued several orders, at least one of which allegedly interfered with city retiree medical benefits under a collective bargaining agreement.[352] A group of retirees brought a class action claiming, among other things, that the order violated the Contracts Clause and the Due Process Clause.[353] Both claims failed.[354]

Before the court could take up the Contracts Clause question, it first had to decide whether a Contracts Clause claim is within the scope of 42 U.S.C. § 1983.[355] Section 1983 allows claims relating to the "deprivation of any rights, privileges, or immunities secured [to citizens of the United States] by the Constitution and laws."[356] Does the Contracts Clause secure to citizens any "rights, privileges, or immunities?" The court said no.[357]

The circuits are split on this question.[358] In *South California Gas Co. v. City of Santa Ana*,[359] the Ninth Circuit found that Section 1983 includes Contracts Clause Claims.[360] The Fourth Circuit said

348. *Id.* at 682–84, 909 N.W.2d at 889.

349. 865 F.3d 339 (6th Cir. 2017), *reh'g denied en banc*, No. 16–1768, 2017 U.S. App. LEXIS 18966, at *1 (6th Cir. Sept. 29, 2017)

350. *Id.* at 347.

351. *Id.* at 341.

352. *Id.* at 342–43.

353. *Id.* at 343; *see* U.S. CONST. art. I, § 10, cl. 1; U.S. CONST. amend. XIV § 1.

354. *Id.* at 349.

355. *Id.* at 345.

356. 42 U.S.C. § 1983 (2018); Kaminski v. Coulter, 865 F.3d 339, 345 (6th Cir. 2017), *reh'g denied en banc*, No. 16–1768, 2017 U.S. App. LEXIS 18966, at *1 (6th Cir. Sept. 29, 2017).

357. *Kaminski*, 865 F.3d at 347.

358. *See, e.g.*, Kaminiski v. Coulter, 865 F.3d 339 (6th Cir. 2017); Crosby v. City of Gastonia, 635 F.3d 634 (4th Cir. 2011) (arguing Contracts Clause violations do not give rise to a section 1983 cause of action); S. Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885 (9th Cir. 2003) (per curiam) (stating section 1983 includes Contracts Clause claims).

359. 336 F.3d 885 (9th Cir. 2003) (per curiam).

360. *Id.* at 886.

otherwise.[361] The Sixth Circuit found the Fourth Circuit's analysis more persuasive.[362] It also felt obliged to follow *Carter v. Greenhow*,[363] a United States Supreme Court decision which held that a predecessor statute to Section 1983 did not authorize Contracts Clause claims.[364]

Plaintiffs' procedural due process claim also failed on a threshold inquiry.[365] Before turning to questions of liberty or property interests, or deprivations of those interests, the court said it had to decide whether "the state action involve[s] the kind of individualized determination that triggers due-process protections in the first place."[366] Due process protections only come into play when some "relatively small number of persons [are] concerned, who [are] exceptionally affected, in each case upon individual grounds."[367] That was not true here.[368] "Here, the contested orders terminated and replaced retiree health-care benefits for *all* retirees of Lincoln Park. These were not individualized determinations about specific retirees, but rather broad determinations about Lincoln Park retirees as a whole. As such, their procedural-due-process rights were not violated."[369]

D. Certification of Ballot Initiative

In *Protecting Michigan Taxpayer v. Board of State Canvassers*, the Michigan Court of Appeals considered whether the Board of State Canvassers had a clear legal duty to present a ballot initiative to the State Legislature when advocates for the ballot initiative collected more than enough signatures to place the initiative on the ballot, but the Board of State Canvassers nonetheless deadlocked 2 to 2, failing to certify the petition, after an intervenor alleged address irregularities.[370] The court noted that the Michigan Constitution provides for the enactment of laws via the ballot initiative mechanism.[371] The court further stated that the issue whether some of the addresses provided on petition forms were erroneous or fraudulent was inapposite because under Michigan law,

361. *See Crosby*, 635 F.3d at 641.
362. *See Kaminski*, 865 F.3d at 347.
363. 114 U.S. 317 (1885).
364. Kaminski, 865 F.3d at 347–48.
365. *Id.* at 347–48.
366. *Id.* at 347.
367. *Id.* at 348 (quoting Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 446 (1915)).
368. *Id.*
369. *Id.*
370. Protecting Mich. Taxpayers v. Bd. of State Canvassers, 324 Mich. App. 240, 241–44, 919 N.W.2d 677, 678–79 (2018).
371. *Id.* at 242, 919 N.W.2d at 678 (citing MICH. CONST. art. II, § 9).

rejecting an otherwise valid signature is not a remedy for an improper address.[372] Rather, under MCLA section 168.544c(9), a person who makes a false statement on a petition form is guilty of a misdemeanor; the remedy is a fine of up to $500 or a term of incarceration of up to 93 days—not the striking of one's signature from a petition.[373] The court found that the Board of Canvassers' duty to certify the ballot initiative was such a clear legal duty that mandamus was warranted.[374]

E. Seeking Elected Office

In *Gleason v. Kincaid*, defendant William Scott Kincaid sought to run for both a seat on the Flint City Council and Mayor of Flint at the same time.[375] The Genesee County Clerk sought a declaratory judgement in the trial court "regarding whether defendant could run for both city council and mayor in the same election."[376] The trial court held that the case presented a unique problem: Because the sitting Mayor of Flint was subjected to a recall after the deadline had already passed for Kincaid to withdraw from the city council race, Kincaid could not withdraw from that race at the time he decided to run for mayor.[377] The trial court recognized that under MCLA section 168.558(5), the penalty for running for two incompatible offices at the same time was exclusion from both offices.[378] But because of the unique timing issue, and the concern that Kincaid had a "constitutional right to run for public office," the trial court accepted Kincaid's withdrawal from his candidacy for city council even though the deadline had passed.[379]

By the time the Court of Appeals reviewed the case, the election had occurred, Kincaid had lost, and the case was technically moot.[380] Nonetheless, the court stated, it is appropriate to entertain a moot case if the issue "(1) is of public significance, (2) is likely to recur, and (3) may evade judicial review, such that it should be resolved by this Court despite its being moot."[381] Holding that the *Gleason* case met all three

372. *Id.* at 245–46, 919 N.W.2d at 680.

373. *Id.* at 247, 919 N.W.2d at 681; *see* MICH. COMP. LAWS ANN. § 168.544c(9) (West 2018).

374. *Protecting Mich. Taxpayers*, 324 Mich. App. at 250, 919 N.W.2d at 683.

375. Gleason v. Kincaid, 323 Mich. App. 308, 311, 917 N.W.2d 685, 688 (2018).

376. *Id.* at 312, 917 N.W.2d at 688.

377. *Id.* at 313, 917 N.W.2d at 689.

378. *Id.* at 313, 917 N.W.2d at 688; *see* MICH. COMP. LAWS ANN. § 168.558(5) (West 2018)

379. *Gleason*, 323 Mich. App. at 313–14, 917 N.W.2d at 689.

380. *Id.* at 314–15, 917 N.W.2d at 689–90.

381. *Id.* at 315, 917 N.W.2d at 690 (citing *In re* Detmer, 321 Mich. App. 49, 57, 910 N.W.2d 318, 323 (2017)).

elements, the court turned to the merits.[382] The court stated that there is no constitutional right to run for a particular office that would overcome the authority of the state to enforce applicable election laws.[383] Furthermore, Kincaid willfully entered both races knowing that they were incompatible and that he could not legally seek both.[384] The trial court erred, therefore, in exempting Kincaid from statutory election deadline on constitutional grounds.[385]

V. CONCLUSION

The *Survey* period was an active one, particularly for federal courts applying federal constitutional principles in cases involving parties from Michigan. The federal courts and Michigan appellate courts broke new ground, particularly in the areas of free exercise, equal protection, threshold questions around due process rights, the essential political nature of Native American tribes, and the Contracts Clause.

382. *Id.* at 315–18, 917 N.W.2d at 690–91.

383. *Id.* at 322–23, 917 N.W.2d at 693 (citing Grano v. Ortisi, 86 Mich. App. 482, 492, 272 N.W.2d 693, 697 (1978); Green v. McKeon, 468 F.2d 883, 884 (6th Cir. 1972)).

384. *Id.* at 322, 917 N.W.2d at 693.

385. *See id.* at 324, 917 N.W.2d at 694.