

## PERSPECTIVES

### A JUDICIAL TRADITIONALIST CONFRONTS UNIQUE QUESTIONS OF STATE CONSTITUTIONAL LAW ADJUDICATION

*Robert P. Young, Jr.\**

In *Federalist No. 46*, James Madison acknowledged that there are “different modes” by which federal and state governments are constituted: while both have their common root in the people, the federal and state governments are “but different agents and trustees of the people, instituted with different powers, and designated for different purposes.”<sup>1</sup> Because of this, state constitutions have significant independent meaning from the U.S. Constitution. In no place do state constitutions have greater independent meaning than where the people of some states have retained powers of plebiscite—direct democracy—that they have not retained vis-à-vis the federal government.<sup>2</sup> As a consequence, cases that concern the constitutional dimensions of these direct democracy provisions offer a unique opportunity to examine state

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<sup>1</sup> THE FEDERALIST No. 46, at 315 (James Madison) (Jacob E. Cooke ed., 8th prtg. 1977).

<sup>2</sup> Twenty-one states provide for an initiative procedure by which the people may propose statutes for a statewide vote; twenty-four states allow the people to call a statewide referendum on laws enacted by the state legislature; and eighteen states allow the people to propose constitutional amendments for a statewide vote. *What Are Ballot Propositions, Initiatives, and Referendums?*, INITIATIVE & REFERENDUM INST. AT THE UNIV. S. CAL., <http://www.iandrinstute.org/Quick%20Fact%20-%20What%20is%20I&R.htm> (last visited July 27, 2013). Moreover, forty-nine states require all proposed constitutional amendments to be approved by the people. *Id.*

constitutional adjudication in isolation and free of the normal influences of federal constitutional practices that apply when there are state and federal constitutional analogues.

Like any state court of last resort, the Michigan Supreme Court's interpretations of the Michigan Constitution are controlling.<sup>3</sup> Accordingly, state judges wield an awesome power in interpreting constitutional provisions for which there is no federal counterpart. During my fifteen years of service on the Michigan Supreme Court, I have had occasion to examine provisions of Michigan's constitutional protection of the various rights of our citizens to participate directly in government. As I have seen, certain tensions in the law require that judges exercise great care to ensure that such rights are interpreted consistently with the common understanding of the ratifiers, the people. I am proud to say that the Michigan Supreme Court takes this responsibility seriously. In this article, I will explain why. After introducing general principles of constitutional interpretation, I will illustrate how the Michigan Supreme Court has applied those principles in three recent cases interpreting the direct democracy provisions of the Michigan Constitution.

## I. PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

Before delving into some of these provisions, I want to explain some first principles of constitutional interpretation and judicial philosophy. I, and a majority of the members of my court, consider ourselves "judicial traditionalists."<sup>4</sup> As such, we believe that a constitution has "an ascertainable meaning that is rooted in the history of its creation."<sup>5</sup> In interpreting the Michigan Constitution, we believe that we "must give meaning to the text as it was

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<sup>3</sup> *In re Apportionment of State Legislature*—1982, 321 N.W.2d 565, 572 n.11 (Mich. 1982) ("[T]he Michigan Supreme Court has the ultimate responsibility for determining a question of state law.").

<sup>4</sup> Elsewhere I have generally defined a "judicial traditionalist" as a jurist who is respectful of the republican form of government assured to the states by the federal Constitution and the primacy of the policy-making role of the two other branches of government to make policy in the majoritarian political process. Robert P. Young, Jr., *A Judicial Traditionalist Confronts Justice Brennan's School of Judicial Philosophy*, 33 OKLA. CITY U. L. REV. 263, 265 n.4 (2008) [hereinafter *Judicial Philosophy*]. The common law is a notable exception. See Robert P. Young, Jr., *A Judicial Traditionalist Confronts the Common Law*, 8 TEX. REV. L. & POL. 299, 300–01 (2004). Here, we deal with another unique exception to the preeminent policy-making role of the legislative process where the people have reserved to themselves the right directly to make legislative policy.

<sup>5</sup> *Judicial Philosophy*, *supra* note 4, at 265.

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understood by its ratifiers.”<sup>6</sup>

Determining the ratifiers’ understanding of *any* constitutional text must start with the plain language of the text, and I use the following tools, in descending order, to determine the meaning of a constitutional provision:

- (1) The actual words used in the constitution according to their plain meaning as might be revealed in contemporary dictionaries;
- (2) Address to the People (distributed to every voter by the Constitutional Convention that drafted the constitution and which described in simple terms what each provision meant);<sup>7</sup>
- (3) Michigan Supreme Court cases construing an analogous provision in previous constitutions;
- (4) when there is uncertainty about a term’s plain meaning, contemporaneous commentaries about the provision or conditions that might have given rise to the need for such a provision; and
- (5) where doubt remains, anything else that might provide an historical context shedding light on whether a particular text has a meaning other than that which seems most apparent, including the record of the Constitutional Convention that drafted the constitution.<sup>8</sup>

In Michigan law, this judicial traditionalist approach was most famously articulated by Justice Thomas M. Cooley, who introduced the concept of “common understanding,” which he developed in his influential nineteenth century constitutional law treatise and applied during his tenure on the Michigan Supreme Court.<sup>9</sup> Justice Cooley explained that “[t]he object of construction, as applied to a written constitution, is *to give effect to the intent of the people in adopting it.*”<sup>10</sup> Most importantly, the ratifiers’ “intent is to be found in the instrument itself” because “[i]t is to be presumed that language has been employed with sufficient precision to convey it.”<sup>11</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 276 (citing Mich. United Conservation Clubs v. Sec’y of State, 630 N.W.2d 297, 304 (Mich. 2001) (Young, J., concurring)).

<sup>8</sup> *Judicial Philosophy*, *supra* note 4, at 276.

<sup>9</sup> See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 55–71 (1868).

<sup>10</sup> *Id.* at 55.

<sup>11</sup> *Id.*

Interpreting a written constitution requires courts to “presume that *words have been employed in their natural and ordinary meaning.*”<sup>12</sup> As a result, “[t]he meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.”<sup>13</sup> In applying these principles of constitutional adjudication to cases before him, Justice Cooley explained that the Michigan Supreme Court’s “duty is to enforce the law which the people have made, and not some other law which the words of the constitution may possibly be made to express.”<sup>14</sup>

Justice Cooley’s approach contrasts with the approach that Justice William Brennan promoted over a century later during his tenure on the Supreme Court of the United States. In a controversial article in the *Harvard Law Review*, Justice Brennan advocated for the concept of a “living constitution” and promoted the view that constitutional interpretation “cannot be only of what has been but of what may be.”<sup>15</sup> Disappointed that a majority of his Supreme Court colleagues did not share his flexible view of the U.S. Constitution, he called on state courts not to allow his colleagues’ “crabbed” interpretation of the U.S. Constitution “to inhibit the independent protective force of state law.”<sup>16</sup>

While I have previously criticized Justice Brennan’s “encouragement for state courts to use their state constitutions to invade the province of their state legislatures and to advance judicially favored social policy,”<sup>17</sup> he nevertheless “correctly observed that state constitutional exegesis is a serious, legitimate enterprise.”<sup>18</sup> This enterprise is perhaps no more important than in the examination of a state constitution’s guarantee of rights beyond those provided in the U.S. Constitution. Such rights in Michigan include those provisions that establish characteristics of direct democracy, but these rights exist in tension with the rights delegated to the political branches of government. As a result,

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<sup>12</sup> *Id.* at 58.

<sup>13</sup> *Id.* at 55 (citing *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127, 138 (1865) (Campbell, J.)).

<sup>14</sup> *People v. Harding*, 19 N.W. 155, 156 (Mich. 1884).

<sup>15</sup> William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

<sup>16</sup> *Id.* at 491; *see also id.* at 500 (“[E]xamples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased.”).

<sup>17</sup> *Judicial Philosophy*, *supra* note 4, at 264.

<sup>18</sup> *Id.* at 263–64.

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interpretive methodology becomes vitally important to ensure the balance of powers and rights that the constitution's ratifiers intended.

## II. THE MICHIGAN CONSTITUTION'S DIRECT DEMOCRACY PROVISIONS

The Michigan Constitution states that “[a]ll political power is inherent in the people.”<sup>19</sup> And in Michigan, the people have chosen to retain some of this political power outside that which they had delegated to state government. Thus, Michigan citizens may directly amend the Michigan Constitution,<sup>20</sup> propose laws by initiative,<sup>21</sup> approve or reject legislative enactments by referendum,<sup>22</sup> and recall the elected officials of the executive and legislative branches.<sup>23</sup> The people who ratified the U.S. Constitution retained none of these powers as they relate to the federal government.<sup>24</sup> Thus, when Michigan judges interpret the direct democracy provisions of the Michigan Constitution, we do so without reference to *any* federal counterpart. This is unlike, for instance, several provisions in the Michigan Constitution's declaration of rights that parallel rights guaranteed in the U.S. Constitution.<sup>25</sup>

Article IV, section four of the U.S. Constitution states that “[t]he

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<sup>19</sup> MICH. CONST. art. I, § 1. This provision also existed in MICH. CONST. of 1835, art. I, § 1 and MICH. CONST. of 1908, art. II, § 1. MICH. CONST. of 1850, preamble, simply stated: “The People of the State of Michigan do ordain this Constitution.”

<sup>20</sup> MICH. CONST. art. XII, § 1.

<sup>21</sup> MICH. CONST. art. II, § 9.

<sup>22</sup> *Id.*

<sup>23</sup> MICH. CONST. art. II, § 8.

<sup>24</sup> U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . . .”); U.S. CONST. art. V (authorizing Congress to propose constitutional amendments for the states’ ratification, either through their legislatures or through separate constitutional conventions and allowing a constitutional convention to be held when two-thirds of the states call for a convention).

<sup>25</sup> Compare, e.g., MICH. CONST. art. I, § 3 (“The people have the right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the government for redress of grievances.”), MICH. CONST. art. I, § 8 (“No soldier shall, in time of peace, be quartered in any house without the consent of the owner or occupant, nor in time of war, except in a manner prescribed by law.”), and MICH. CONST. art. I, § 16 (“Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted . . . .”), with U.S. CONST. amend. I (“Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”), U.S. CONST. amend. III (“No Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”), and U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

United States shall guarantee to every State in this Union a Republican Form of Government . . . .”<sup>26</sup> In *Federalist No. 39*, Madison defined a republic as “a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour.”<sup>27</sup> When the people of Michigan retained the rights of referendum, initiative, and constitutional amendment, they created a tension with the core constitutional principle that “[w]e are a constitutional *republic* in which we, as Michigan citizens, elect our representatives to local and state legislative bodies to enact our laws.”<sup>28</sup> In light of this tension, judges must consider carefully the text and original understanding of the democratic constitutional provisions in order to ensure, as always, that we neither enlarge nor restrict their scope.

In recent years, the Michigan Supreme Court has been called upon to interpret several of the Michigan Constitution’s direct democracy provisions. Each case was high profile and hotly contested, and thus our court’s decisions were subject not only to legal scrutiny, but also to immediate public scrutiny.

#### A. Michigan United Conservation Clubs v. Secretary of State

More than a decade before the current national debate over gun laws, the Michigan legislature liberalized the state’s concealed weapons laws.<sup>29</sup> That decision immediately caused uproar among various groups in Michigan and eventually led to a referendum to repeal the statute by which the Michigan Legislature effected the legal change.<sup>30</sup> As with many such questions of public moment, the

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<sup>26</sup> U.S. CONST. art. IV, § 4. While the initiative and referendum, as examples of direct democracy, are at first glance in apparent tension with article IV, section four, the U.S. Supreme Court has held that whether the initiative and referendum violates the Guarantee Clause is a nonjusticiable political question. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133 (1912). *See also* Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution’s Guarantee Clause*, 80 TEX. L. REV. 807, 814–15 (2002) (“Citizen lawmaking as practiced in the United States today does not violate the Guarantee Clause. On the contrary, a much broader realm for citizen lawmaking would be consistent with the republican form—and was characteristic of most prior and existing governments that all participants in the constitutional debates agreed were republican in form.”).

<sup>27</sup> THE FEDERALIST NO. 39, at 251 (James Madison) (Jacob E. Cooke ed., 2d prtg. 1962).

<sup>28</sup> *Stand Up for Democracy v. Sec’y of State*, 822 N.W.2d 159, 163 (Mich. 2012).

<sup>29</sup> *See* Act of Jan. 1, 2001, 2000 Mich. Pub. Acts 1819.

<sup>30</sup> *Mich. United Conservation Clubs v. Sec’y of State*, 630 N.W.2d 297, 299–300 (Mich. 2001) (Young, J., concurring).

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tumult eventually wound its way into our judicial system.

Article II, section nine of the Michigan Constitution governs the people's exercise of the referendum.<sup>31</sup> To invoke the referendum power, citizens must submit petitions signed by at least five percent of the electors at the last gubernatorial election.<sup>32</sup> While many legislative acts are subject to referendum, the constitution explicitly states that "[t]he power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds."<sup>33</sup> The significance of this limitation on the power of referendum became evident in *Michigan United Conservation Clubs v. Secretary of State*. Opponents of the statute that broadened the right to carry concealed weapons (CCW) sought immediately to suspend and eventually invalidate that enactment by referendum.<sup>34</sup> However, also in the CCW statute, the legislature appropriated one million dollars from the state's general fund to the state police to facilitate implementation of its provisions.<sup>35</sup> The court's one-page opinion applied the text of article II, section nine and concluded that the power of referendum did not extend to the CCW law because it appropriated funds to a state institution.<sup>36</sup>

In our decision, the court reversed the contrary decision of the court of appeals, which asserted that "the overarching right of the people to their 'direct legislative voice,' . . . requires that [the CCW law] be subject to referendum."<sup>37</sup> Several of my colleagues in dissent would have affirmed the decision of the court of appeals, claiming that the people should decide this question of public policy themselves, and that article II, section nine did not bar the referendum because the appropriation was not essential to the state police's core function.<sup>38</sup> My concurring opinion highlighted this

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<sup>31</sup> MICH. CONST. art. II, § 9. While both initiatives and referenda permit Michigan citizens to invalidate laws with which they disagree, a referendum immediately suspends the law until the election. MICH. CONST. art. II, § 9 states that "[n]o law as to which the power of referendum properly has been invoked shall be effective thereafter unless approved by a majority of the electors voting thereon at the next general election." It is likely for that reason, a very powerful tool in the direct democracy arsenal, why the opponents of the CCW law chose to challenge it with a referendum rather than an initiative.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Conservation Clubs*, 630 N.W.2d at 299–300 (Young, J., concurring).

<sup>35</sup> *Id.* at 298 (majority opinion).

<sup>36</sup> *Id.*

<sup>37</sup> *Mich. United Conservation Clubs v. Sec'y of State*, 630 N.W.2d 376, 382 (Mich. Ct. App.) (quoting *Kuhn v. Dep't of Treasury*, 183 N.W.2d 796, 799 (Mich. 1971)), *rev'd*, 630 N.W.2d 297 (Mich. 2001).

<sup>38</sup> *See Conservation Clubs*, 630 N.W.2d at 329 (Kelly, J., dissenting) ("[W]here the

tension between the text of the constitution and the rights implicated: “In the current charged political environment, the dissent makes an emotionally appealing argument: Why not just let the people decide? Simply answered, the people’s ability to decide by the referendum process is not infinite; rather, it is circumscribed by the limitations placed in the Michigan Constitution.”<sup>39</sup> Similarly, Justice Stephen Markman’s concurrence emphasized that “[t]here is, in fact, an ‘overarching right’ to a referendum, but only in accordance with the standards of the constitution; otherwise, there is an ‘overarching right’ to have public policy determined by a majority of the people’s democratically elected representatives.”<sup>40</sup> Where the people specifically limited the referendum power, the judicial traditionalists on the court would not use the judicial power to expand it. Notably, I explained in my concurrence that:

[T]he 1963 constitutional record provides no basis for concluding that the people were led to believe (or actually entertained the notion) that the art. 2, [section] 9 limitation on the right of referral—“acts making appropriations for state institutions”—meant or was intended to mean anything other than what it plainly says.<sup>41</sup>

Moreover, I emphasized that there remained other ways for the people to assert their policy preferences:

While perhaps less satisfying to those who oppose [the CCW law], our answer is that the people are still free to directly challenge the propriety of the legislation by initiative.<sup>42</sup> Additionally, if the people believe that the Legislature has abused its powers by capriciously precluding their power of referral, the traditional means of voter sanction remain recall and the ballot box. However, the limitations imposed in art. 2, [section] 9 on the people’s right of referral preclude that they do so by means of referendum.<sup>43</sup>

Thus, even given this plain limitation on the power of referendum, other direct democracy provisions in the Michigan

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appropriation provision is for a lesser function, not essential to the purpose of the department, . . . the people’s right to decide policy issues for themselves, which is the core purpose for which the people reserved the referendum power, should survive.”).

<sup>39</sup> *Id.* at 310 (Young, J., concurring).

<sup>40</sup> *Id.* at 312 (Markman, J., concurring).

<sup>41</sup> *Id.* at 305 (Young, J., concurring) (quoting MICH. CONST. art. II, § 9).

<sup>42</sup> *Conservation Clubs*, 630 N.W.2d at 310 (citing MICH. CONST. art. II, § 9).

<sup>43</sup> *Conservation Clubs*, 630 N.W.2d at 310.



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Constitution provided opponents of the CCW law with opportunities to reject their elected representatives' policy determinations. The court's decision balanced the rights of the people to engage in direct democracy with the people's delegation of powers to the political branches of government, as plainly communicated in the constitutional text. While a judiciary unconstrained by the constitutional text would have been more willing to impart a meaning that the ratifiers did not intend, to the detriment of the delicate balance of power that the people enshrined in the constitution, the court's traditionalist interpretive methodology ensured the appropriate balance between the people and the political branches of government.

### B. Stand Up for Democracy v. Secretary of State

More recently, the Michigan Supreme Court again scrutinized the power of referendum in *Stand Up for Democracy*, this time concerning the petition process itself. Our constitution mandates that "[t]he power of referendum . . . must be invoked in the manner prescribed by law,"<sup>44</sup> and that "the Legislature [has] prescribe[d] the rules by which such petitions may validly be made."<sup>45</sup> In 2012, opponents of a newly-enacted emergency financial manager (EFM) law collected signatures to assert the right of referendum to suspend and repeal that statute.<sup>46</sup> The Board of State Canvassers refused to certify the referendum because, it claimed, the printed petitions utilized the wrong type size, thereby rendering the petitions ineligible to be placed the ballot.<sup>47</sup> That decision was eventually appealed to our court.

Justice Mary Beth Kelly's lead opinion in the case recognized the tensions between the constitution's direct democracy provisions and

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<sup>44</sup> MICH. CONST. art. II, § 9.

<sup>45</sup> *Stand Up for Democracy v. Sec'y of State*, 822 N.W.2d 159, 163 (Mich. 2012) (citing MICH. CONST. art. II, § 9). *Accord Stand Up for Democracy*, 822 N.W.2d at 174 (Young, C.J., concurring in part and dissenting in part); *id.* at 182 (Markman, J., concurring in part and dissenting in part).

<sup>46</sup> *Stand Up for Democracy*, 822 N.W.2d at 161 (lead opinion). The EFM law expanded the power of emergency financial managers to manage the affairs of distressed municipalities and school districts. *See* Act of Mar. 16, 2011, 2011 Mich. Pub. Acts 4 (repealed 2012).

<sup>47</sup> The Board of State Canvassers is established in article II, section seven of the Michigan Constitution and has the responsibility to "make an official declaration of the sufficiency or insufficiency of a petition" for a referendum, initiative, and constitutional amendment for placement on the ballot. MICH. COMP. LAWS § 168.477(1) (2012). *See also* MICH. CONST. art. II, § 7.

its provisions delegating power to the political branches of government. She explained that “as plaintiff seeks here, it is possible for a small minority of citizens to suspend a validly enacted law and require that that law be voted on in a general election.”<sup>48</sup> Where some previous lower court decisions followed the doctrine of “substantial compliance”<sup>49</sup> concerning statutory ballot petition requirements, the traditionalist majority of the Michigan Supreme Court explained that the relevant statutory provisions “demonstrate[] a clear intent that petitions for referendums, voter initiatives, and constitutional amendments strictly comply with the form and content requirements of the statute.”<sup>50</sup> As I noted in my partial concurrence:

[A]lthough a “technical” requirement—the size of a petition heading—is involved, this is a legally and constitutionally significant matter because compliance with the legal petition requirements is the only means by which a small fraction of Michigan citizens is permitted to countermand the will of the people as expressed through the legislation duly enacted by their elected representatives.<sup>51</sup>

The partial dissent criticized this position as “lack[ing] any sense of the gravity and importance of democracy.”<sup>52</sup> Yet Justice Markman’s partial concurrence rightly noted that:

[T]he very same constitutional provision that provides for the right of referendum also provides that it “must be invoked in the manner prescribed by law,”<sup>53</sup> and it is the very same Constitution that provides for a representative form of government in which legislative majorities, not the views of a small percentage of the electorate, generally

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<sup>48</sup> *Stand Up for Democracy*, 822 N.W.2d at 163.

<sup>49</sup> *See, e.g.*, *Charter Twp. of Bloomfield v. Oakland Co. Clerk*, 654 N.W.2d 610, 624 (Mich. Ct. App. 2002), *overruled by Stand Up for Democracy*, 822 N.W.2d 159.

<sup>50</sup> *Stand Up for Democracy*, 822 N.W.2d at 165. *Accord id.* at 174 (Young, C.J., concurring in part and dissenting in part); *id.* at 182 (Markman, J., concurring in part and dissenting in part). A separate majority of the court held that proponents of the referendum were entitled to a writ of mandamus directing the Board of State Canvassers to certify the referendum petitions as sufficient. *See id.* at 161 (lead opinion); *id.* at 181 (Cavanagh, Marilyn Kelly, and Hathaway, JJ., concurring in part and dissenting in part).

<sup>51</sup> *Id.* at 175 (Young, C.J., concurring in part and dissenting in part).

<sup>52</sup> *Id.* at 181 (Cavanagh, Marilyn Kelly, and Hathaway, JJ., concurring in part and dissenting in part).

<sup>53</sup> *Id.* at 182 (Markman, J., concurring in part and dissenting in part) (quoting MICH. CONST. art. II, § 9).

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determine the course of public policy.<sup>54</sup>

This has been a longstanding principle of Michigan constitutional law, extending back to the time that the direct democracy provisions of the constitution were added.<sup>55</sup> The Michigan Supreme Court explained as early as 1916 that:

Under the referendum clause of the Constitution, one-fifth of the electors of the state may suspend the operation, until the next general election, of any act of the Legislature, however important, except acts making appropriations and such as are immediately necessary for the preservation of the public peace, health, and safety. . . . Where a power so great as this is vested in a minority of the people, every safeguard provided by law against its irregular or fraudulent exercise should be carefully maintained.<sup>56</sup>

That some lower courts later applied the doctrine of “substantial compliance” until *Stand Up for Democracy* illustrates the challenges of interpreting the direct democracy provisions of the Michigan Constitution in a way that does not infringe on the delegated powers of the political branches of government.<sup>57</sup>

### C. Protect Our Jobs v. Board of State Canvassers

A judicial traditionalist’s duty to ensure the textually mandated balance of the direct democracy provisions within our republican form of government does not mean that we must give these provisions of the Michigan Constitution a *stricter* meaning than the text mandates. Rather, a judicial traditionalist’s duty is to give a *reasonable* interpretation of the constitutional text to reflect the common understanding of the ratifiers.

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<sup>54</sup> *Stand Up for Democracy*, 822 N.W.2d at 182 (Markman, J., concurring in part and dissenting in part) (citing MICH. CONST. art. IV, § 1) (“The legislative power of the State of Michigan is vested in a senate and a house of representatives.”).

<sup>55</sup> The people first retained the right to propose and vote on constitutional amendments when they ratified the 1908 Constitution, and they expanded that right in 1913. MICH. CONST. of 1908, art. XVII, § 2; 1913 Mich. Pub. Acts 780–82; 2 PAUL H. KING, JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MICHIGAN 1347–53 (1908). The 1908 Michigan Constitution did not initially contain initiative or referendum provisions, but they were added by constitutional amendment in 1913. MICH. CONST. of 1908, art. V, § 1; 1913 Mich. Pub. Acts 782–86; KING, *supra*, at 1482–87.

<sup>56</sup> *Thompson v. Vaughn*, 159 N.W. 65, 68 (Mich. 1916).

<sup>57</sup> See, e.g., *Charter Twp. of Bloomfield v. Oakland Co. Clerk*, 654 N.W.2d 610, 625 (Mich. Ct. App. 2002) (holding that petitions were sufficiently clear to allow people signing their name to understand what they were signing), *overruled by Stand Up for Democracy*, 822 N.W.2d 159.

Another recent case illustrates how this balance can be struck. During the spring and summer of 2012, several advocacy groups sought to place a variety of constitutional amendments on the November 2012 statewide ballot.<sup>58</sup> In *Protect Our Jobs v. Board of State Canvassers*, the matter in dispute was whether each of those several ballot proposals complied with the constitutional requirement that the circulating petitions reprinted existing constitutional provisions that would be “altered or abrogated” by the ballot proposal.<sup>59</sup> The reason for the republication requirement is obvious: those being asked to sign the petition and support the ballot proposal should be able to see how the proposal affects the current constitution.

Upon submission of the signed petitions to the Board of State Canvassers for certification, the Board deadlocked on whether to place four of the proposed amendments on the ballot.<sup>60</sup> Two of the four members of the Board claimed that the petitions did not reprint existing provisions of the constitution that would be altered or abrogated by the proposed amendment, as required by law.<sup>61</sup> The other two members of the Board—members of the opposing political party—disagreed and concluded that the petitions satisfied the republication requirement.<sup>62</sup>

Proponents of the amendments sought a writ of mandamus to require that the Board certify the petitions as valid.<sup>63</sup> Certain opponents of the measures argued that the republication rule was broad and required republication if the amendment merely *affected* an existing constitutional provision.<sup>64</sup> But in September 2012, the Michigan Supreme Court rejected that interpretation as improperly narrowing the people’s right to propose constitutional amendments, and ordered the Board of State Canvassers to place three of the proposed amendments on the ballot because they sufficiently and fully complied with the constitutional requirements.<sup>65</sup>

Justice Brian Zahra’s majority opinion in *Protect Our Jobs*

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<sup>58</sup> See *id.* at 538–39.

<sup>59</sup> *Id.* at 537 (citing MICH. CONST. art. XII, § 2).

<sup>60</sup> *Protect Our Jobs v. Bd. of State Canvassers*, No. 311828, 2012 WL 3660260, at \*1 (Mich. Ct. App. Aug. 27, 2012) (per curiam).

<sup>61</sup> See *id.* at \*1, \*2.

<sup>62</sup> See *id.* at \*1; see also MICH. COMP. LAWS § 168.22d(2) (2012) (“[A]n action of the board of state canvassers shall only be effective upon concurrence of at least 1 member of each major political party appointed to the board.”).

<sup>63</sup> *Protect Our Jobs v. Bd. of State Canvassers*, 822 N.W.2d 534, 538 (Mich. 2012).

<sup>64</sup> *Protect Our Jobs*, 2012 WL 3660260, at \*3.

<sup>65</sup> *Protect Our Jobs*, 822 N.W.2d at 548.

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reiterated that the Michigan Supreme Court “has consistently protected the right of the people to amend their Constitution . . . [by petition and popular vote], while enforcing constitutional and statutory safeguards that the people placed on the exercise of that right.”<sup>66</sup> To interpret the constitutional requirement that a petition proposing a constitutional amendment republish “existing provisions of the constitution which would be altered or abrogated” by the amendment,<sup>67</sup> it was necessary to determine the common understanding of the terms “altered” and “abrogated.”<sup>68</sup> The court applied decades of precedent that interpreted the phrase to mean that “an existing provision is only ‘altered or abrogated if the proposed amendment would add to, delete from, or change the existing wording of the provision, or would render it wholly inoperative.”<sup>69</sup> The court further explained that “[a]n existing constitutional provision is rendered wholly inoperative if the proposed amendment would make the existing provision a nullity or if it would be impossible for the amendment to be harmonized with the existing provision when the two provisions are considered together.”<sup>70</sup> The court thus gave a text-based understanding consistent with settled definitions to delineate the legal requirements and ensure that those requirements were enforced, but not unreasonably so.

In applying these standards, the court held that three of the four proposed constitutional amendments satisfied the republication requirement because they would not have added to, deleted from, or changed the existing wording of a provision, and because they could be harmonized with the existing constitutional text.<sup>71</sup> However, the fourth did not satisfy the republication requirement because the proposed amendment would have rendered inoperative a constitutional provision granting the State Liquor Control Commission exclusive control over “alcoholic beverage traffic” within Michigan.<sup>72</sup>

A number of opponents of the ballot initiatives, and thus of the decision that allowed them on the ballot, complained that the court

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<sup>66</sup> *Id.* at 537.

<sup>67</sup> *Id.* at 540.

<sup>68</sup> *Id.* at 541.

<sup>69</sup> *Id.* at 542 (quoting *Massey v. Sec’y of State*, 579 N.W.2d 862, 866 (Mich. 1998)).

<sup>70</sup> *Protect Our Jobs*, 822 N.W.2d at 543 (footnote omitted).

<sup>71</sup> *Id.* at 537–38, 547–48.

<sup>72</sup> See MICH. CONST. art. IV, § 40; *Protect Our Jobs*, 822 N.W.2d at 538, 548.

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“made a political decision” by permitting them to be submitted to the voters.<sup>73</sup> Explaining the role of the court, I stated that “[the Court’s] job isn’t to protect us from democracy.”<sup>74</sup> Rather, its job is to apply the text of the constitution in accord with its original understanding. Thus, as a judicial traditionalist, whether I agree or disagree with the policy goals in any of the cases before me is irrelevant to how I decide them. I further stated at the time of the *Protect Our Jobs* decision:

While some may question the wisdom of one or more of these ballot proposals, one cannot, consistent with the principles of a constitutional government, permit or encourage judges to negate the People’s right to decide these policy questions where the proponents have complied with the laws to place them on the ballot.<sup>75</sup>

In the end, the voters not only rejected each of the proposed constitutional amendments placed on the November 2012 ballot, they also rejected the EFM referendum.<sup>76</sup> This was the people’s right, but that right could only be exercised because the court ensured access to the ballot consistent with legal requirements.

### III. CONCLUSION

Difficult high profile cases present unique challenges to jurists, and these challenges are heightened when the cases concern questions of a political nature. In deciding these cases, the question is always whether a judge will be bound by his or her personal values or by fidelity to the law. It was well established in the nineteenth century in Michigan that principles of constitutional adjudication required our courts to apply the original understanding of the constitutional text to ensure that our citizens

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<sup>73</sup> See *MIRS Capitol Capsule, Saturday and Sunday, September 8–9, 2012: GOP Brass Grumble Over Supremes’ Decision On Collective Bargaining*, MIRSNEWS (Sept. 8–9, 2012), <http://www.mirsnews.com/capsule.php?gid=3915>.

<sup>74</sup> *Id.*

<sup>75</sup> Bob Young, *In Defense of Constitutional Government and the People’s Right of Self-Governance – the Right to Vote on Ballot Questions*, CHIEF JUSTICE BOB YOUNG (Sept. 6, 2012), <http://justicebobyong.com/2012/09/in-defense-of-constitutional-government-and-the-people%e2%80%99s-right-of-self-governance-%e2%80%93-the-right-to-vote-on-ballot-questions>.

<sup>76</sup> *List of State Proposals*, MICH. DEP’T OF STATE, <http://miboecfr.nictusa.com/election/results/12GEN/90.HTM> (last visited July 27, 2013) (providing hyperlinks to the voting results).

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are guaranteed the rights contained therein—no more and no less.<sup>77</sup> However, in the mid-twentieth century, Michigan veered off toward the Brennan “living constitution” approach to constitutional adjudication.<sup>78</sup> The current majority of the Michigan Supreme Court has returned the court to the traditional approach as its governing philosophy of legal interpretation.

The above examples illustrate that traditional approach in what could be considered “laboratory conditions” since all relate to the direct democracy provisions in the Michigan Constitution that have no federal analogues, and thus were decided free of the influence of federal decisions.<sup>79</sup> There is a tension between the direct democracy provisions and the delegated power of the political branches. Yet judges can guarantee *both* of these interests and *all* of the people’s rights in spite of this tension. The means to do so, however, is not by promoting a “living” constitution of the judges’ own creation. Rather, as Justice Cooley stated more than a century ago, a court’s fidelity to the constitution requires that it “give effect to the intent of the people in adopting it.”<sup>80</sup> I am proud to serve on a court that takes seriously the responsibility to enforce the law as the people have given it to us, and not some other law that, by obfuscation and judicial gloss, the constitution could be made to express.

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<sup>77</sup> See COOLEY, *supra* note 9, at 67.

<sup>78</sup> See *Judicial Philosophy*, *supra* note 4, at 269.

<sup>79</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) (“[A] state may . . . serve as a laboratory; and try novel social and economic experiments.” (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting))).

<sup>80</sup> COOLEY, *supra* note 9, at 55 (emphasis removed).