STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Markey, P.J., Murphy and Boonstra, JJ.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff/Appellant,

v.

Supreme Court No. 146211
Court of Appeals No. 310668
Livingston County
Circuit Court Case No. 12-020466-FC

GEORGE ROBERT TANNER,
Defendant/Appellee.
_____/

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_____/

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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I.

The judicial oath requires that justices swear or affirm they will support the constitution of this state. Faced with a judicial interpretation of a constitutional provision that cannot be justified by the text as it would commonly have been understood by the ratifiers—the People at the time of ratification—the judicial oath requires that the prior decision be overruled. Is the creation in *People v Bender* of a rule, the violation of which by the police requires suppression of a confession obtained without violation of Article 1, § 17 of the Michigan Constitution, unjustifiable by the text and history of that provision, so that it should be overruled?

Amicus answers "YES"

Statement of Facts

Amicus joins the Statement of Facts of the People of the State of Michigan.

Summary of the Argument

The court has asked whether *People v Bender*[1] should be overruled. That case requires that the police notify an in-custody individual that an attorney wishes to see him or her—it being somewhat unclear as to whether this duty exists whether that request comes over the police station counter, over the telephone, or via messenger, and what degree of certainty there must be that it *is* an attorney who wishes to see the individual in custody—and a voluntary confession, taken after advice of Miranda warnings, and without the assertion of any Miranda right, including the right to counsel, is to be suppressed if the *Bender* rule is violated.

The task is to determine the common understanding of the ratifiers of the constitutional text, the understanding that "reasonable minds, the great mass of the people themselves, would give it." The text is "no person shall be compelled in any criminal case to be a witness against himself." A review of the meaning of the words employed in provision at the time of ratification, the Constitutional Convention Record, and the jurisprudential interpretation of the provision in previous Michigan Constitutions, reveals that the provision was understood to preclude forcing a person to be a witness against himself against his or will, either by legal compulsion, or by the admission of a statement taken by the use of force or coercion. If, the defendant's statement was voluntary, it is admissible under the Michigan Constitution. *Bender* requires the suppression of voluntary statements. It should be overruled.

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[1] *People v Bender*, 452 Mich 594 (1996).

Argument

I.

The judicial oath requires that justices swear or affirm they will support the constitution of this state. Faced with a judicial interpretation of a constitutional provision that cannot be justified by the text as it would commonly have been understood by the ratifiers—the People at the time of ratification—the judicial oath requires that the prior decision be overruled. The creation in *People v Bender* of a rule, the violation of which by the police requires suppression of a confession obtained without violation of Article 1, § 17 of the Michigan Constitution, cannot be justified by the text and history of that provision, and should be overruled.

> *I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of justice of the Michigan Supreme Court according to the best of my ability.*[2]

> *In order for the constitution to be legally binding, judges must be able to determine that a given action either is or is not allowed by its terms....interpretation . . . represents a search for meaning already in the text.* ***Interpretation is discovery.***[3]

I. Introduction

In its order granting leave to appeal, this court directed that "The parties shall address whether *People v. Bender,* 452 Mich. 594, 551 N.W.2d 71 (1996), should be overruled."[4] The question of overruling an existing precedent necessarily involves consideration of principles of stare decisis. Amicus will address those principles, and then turn to the substantive question, but

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[2] Const. 1963, Art. XI, § 1.

[3], p. 5 (emphasis supplied).

[4] *People v. Tanner*, 493 Mich 958 (2013).

before principles of stare decisis can be addressed it is necessary to consider the proper task of a court when it undertakes to interpret a constitutional provision in the first instance.

II. The Task of Interpreting the Law the People Have Made

A. Interpreting the Michigan Constitution

Our state constitution, no less than our federal constitution, is a durable expression of the will of the People, both authorizing and limiting government, and standing outside of and superior to all agencies of government. Its source of authority is the People of the State.[5] The judicial branch is as much an agent or servant of the sovereign People as are the legislative and executive branches. It does not stand outside of government, but is a part of it. The judge as servant of the People should search for the public meaning of a constitutional text as understood by the lawgiver. As Madison said, concerning our federal constitution:

> I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful, exercise of its powers.[6]

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[5] See Mich. Const. 1963, Art. I, § 1: "All political power is inherent in the people. Government is instituted for their equal benefit, security and protection." The same provision appears in Mich. Const. 1908, Art. II, § 1. In our first State Constitution, this language is divided between Article I, § 1 and § 2, § 1 providing that "First. All political power is inherent in the people" and Art. § 2 providing that "Government is instituted for the protection, security, and benefit of the people; and they have the right at all times to alter or reform the same, and to abolish one form of government and establish another, whenever the public good requires it."

[6] Letter from Madison to Henry Lee (June 25, 1824), reprinted in 9 *The Writings of James Madison* 191-192 (G. Hunt ed., 1910). In this context, when it is the interpretation of a provision of the federal constitutional that is at issue, the views of the Framers, though not authoritative, are hardly irrelevant, constituting circumstantial evidence of the public meaning of the document at the time of ratification. See Chief Justice Marshall dissenting in *Ogden v. Saunders*, 25 US 213, 332, 6 L Ed 606 (1827): "Much. . . has been said concerning the principles of construction which ought to be applied to the constitution of the United States. On this subject

It has been established since the early days of our State that our state constitution is law through the act of ratification by the People, and that the task of the judge is to determine what the provisions of the constitution meant to the ordinary people who made it law. A court interpreting a constitutional text should endeavor to place itself

> in the position of the Framers of the Constitution, and ascertain what was meant at the time; for, if we are successful in doing this, we have solved the question of its meaning for all time. It could not mean one thing at the time of its adoption, and another thing today, when public sentiments have undergone a change.[7]

Certainly new circumstances to which a provision must be applied may arise, but as Justice Campbell said long ago, "That the constitution means nothing now that it did not mean when it was adopted, I regard as true beyond doubt. But it must be regarded as meant to apply to the present state of things as well as to all other past or future circumstances."[8]

As tools to aid in the interpretation of our state constitution, this court has consistently held that the Address to the People and the constitutional convention debates may be highly

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. . . the Court has taken such frequent occasion to declare its opinion, as to make it unnecessary, at least, to enter again into an elaborate discussion of it. To say that the intention of the instrument must prevail; that this intention must be collected from its words; that *its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended*; that its provisions are neither to be restricted into insignificance, *nor extended to objects not comprehended in them, nor contemplated by its framers*;—to repeat what has been already said more at large, and is all that can be necessary" (emphasis supplied). The same holds true for interpretations of the Michigan Constitution.

[7] *Pfieffer v Board of Education of Detroit*, 118 Mich 560, 564 (1898). See also *Holland v Clerk of Garden City*, 299 Mich 465, 470-471 (1941)("It is a fundamental principle of constitutional construction that we determine the intent of the framers of the Constitution and of the People adopting it") and *Burdick v Secretary of State*, 373 Mich 578, 584 (1964)("Courts on numerous occasions have gone to the constitutional convention debates and addresses to the people to decide the meaning of the Constitution").

[8] *People v Blodgett*, 13 Mich 127, 140 (1865)(Campbell, J.).

relevant in determining the meaning to the *ratifiers* of particular constitutional provisions.[9] The Address is particularly important in this regard because it represents what the ratifiers, the People, were told about the proposed constitution *before* they voted to adopt it.[10] This court has emphasized that "the proper objective in consulting constitutional convention debates is not to discern the intent of the framers in proposing or supporting a specific provision, but to determine the intent of the ratifiers in adopting the provision," and so "the primary focus ... should not [be] on the intentions of the delegates . . . but, rather, on any statements they may have made that would have shed light on why they chose to employ the particular terms they used in drafting the provision to aid in discerning what the common understanding of those terms would have been when the provision was ratified by the *people.*"[11]

As perhaps our greatest justice, Justice Cooley, put the matter, "A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them

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[9] See, e.g., *Studier v. Mich. Pub. Sch. Employees' Retirement Bd.*, 472 Mich. 642, 655–656 (2005).

[10] See *People v. Nutt,* 469 Mich. 565, 590 n. 26 (2004) ("The Address to the People, widely distributed to the public prior to the ratification vote in order to explain the import of the ... proposals, 'is a valuable tool....' "). And see *Mich. United Conservation Clubs v. Secretary of State (After Remand),* 464 Mich. 359, 378 (2001) (Young, J., concurring), noting that the Address was "officially approved by the members of the constitutional convention ...."

[11] *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38,* 490 Mich. 295, 309-310 (2011).

in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed."[12]

In sum, as this court has unanimously put it, "For over a century, [the] Court has followed a number of consistent, 'dovetailing rules of constitutional construction,'" including:

- The cardinal rule of construction, concerning language, is to apply to it that meaning which it would naturally convey to the popular mind.

- When interpreting a constitutional text, a court should endeavor to place itself in the position of the framers of the Constitution, and ascertain what was meant at the time; for, if in doing that, it has solved the question of its meaning for all time. It could not mean one thing at the time of its adoption, and another thing today, when public sentiments have undergone a change.

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

- As aids in interpretation, the "Address to the People"' and the convention debates may be consulted. The reliability of the "Address to the People" lies in the fact that it was approved by the general convention as an explanation of the proposed constitution,

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[12] Cooley, *A Treatise on the Constitutional Limitations* (1886), p. 81. And see *People v. Smith,* 478 Mich. 292, 298-299 (2007); *Attorney General v. Renihan,* 184 Mich. 272, 281 (1915).

and was widely disseminated prior to adoption of the constitution by vote of the people.[13]

The task of the judge when confronting the meaning of a state constitutional text is, then, as a matter of long-established Michigan precedent, to ascertain what the ratifiers "understood themselves to be enacting." As one commentator has said, the text "must be taken to be what the public of that time would have understood the words to mean. . . . In other words, the objective or publicly-accessible meaning of the terms is sought."[14] Whether an interpretation of a provision of our state constitution is entitled to adherence under principles of stare decisis thus involves consideration of whether that decision was itself faithful to the task of the court as established in the decisions of this court described above.

B. Interpreting Michigan Constitutional Provisions that are Identical to Provisions of the Federal Constitution

In *Sitz v. Dep't of State Police*[15] this court reaffirmed that it is its duty to interpret the Michigan Constitution, and that this review may lead to an interpretation of a particular provision of the state constitution that provides greater, equal, or lesser protection that its federal counterpart. But this court has repeatedly held that where the state provision is identical to a provision of the federal constitution, the Michigan provision will be interpreted differently from the corresponding federal provision only if there is a compelling reason to do so.[16] And in

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[13] See *Committee for Constitutional Reform v. Secretary of State of Mich.*, 425 Mich. 336, 340-342 (1986), a unanimous opinion of this court.

[14] See Randy Barnett, "An Originalism for Nonoriginalists," 45 Loy L Rev 611, 636 (1999).

[15] *Sitz v. Dep't of State Police*, 443 Mich. 744 (1993).

[16] *People v. Nash*, 418 Mich. 196 (1983). See also *People v Collier,* 426 Mich 23 (1986); *People v Collins*, 438 Mich 8 (1991); *People v. Pickens*, 446 Mich 298, 315-316 (1994)("In

determining whether a compelling reason exists to depart from the interpretation given a parallel provision by the United States Supreme Court, this court has identified factors critical to the inquiry:

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accordance with our time-honored rules of constitutional construction, to justify an expansion of the Michigan Constitution beyond federal protections for identically worded phrases and provisions, such protections must be deeply rooted in the document"); *People v Champion*, 452 Mich 92 (1996); *People v Goldston*, 470 Mich 523 (2004).

One commentator has stated that the *least* defensible method of determining the meaning of state constitutional provisions that track the language of corresponding provisions of the federal constitution is to interpret the state constitutional provision in the identical manner as does the United States Supreme in construing the parallel federal provision. The claim is that this view "renders a state bill of rights utterly functionless ...." Kelman, "Foreword: Rediscovering the State Constitutional Bill of Rights," 27 Wayne L Rev 413, 414-415 (1981). But this argument fails to take account of history. It is *Mapp v Ohio*, 367 US 643, 655, 81 S Ct 1684, 6 L Ed 2d 1081 (1961) that rendered the state constitutional bill of rights to some extent rhetorical, not a view that would hold such guarantees to be presumptively coextensive with the federal guarantees. It must be remembered that *Mapp* was decided in 1961, and that even in 1963 at the Michigan Constitutional Convention the effect of *Mapp* on state criminal procedure was unclear to the delegates. See I Official Record, Constitutional Convention 1963 at 488-533, 674-688, revealing uncertainty regarding the affect of *Mapp* on the state law of search and seizure. Because the federal Bill of Rights was not applicable in *any* measure until 1961, and because complete "selective incorporation" did not occur until after 1963, even if the framers of the Michigan Constitutions intended to mirror the federal Constitution, their purpose can in no way be described as rhetorical rather than prescriptive. Given the inapplicability of the federal Bill of Rights, the *absence* of a state Bill of Rights would have left state citizens with virtually *no* constitutional protection of individual liberties as against state government of *any* sort. For over 125 years, the state constitution necessarily formed *the* basis for protection of individual liberties. If the framers choose to form the basis of that protection by extending the very guarantees of the federal Constitution to the residents of the state, those state guarantees were rendered no less prescriptive by that choice of method. To provide the same protections and rights to state citizens as against the state government as provided all citizens by the federal Bill of Rights as against, at that time, *only* the federal government, can scarcely be viewed as a functionless accomplishment.

- the textual language of the state constitution,
- significant textual differences between parallel provisions of the two constitutions,
- state constitutional and common-law history,
- state law preexisting adoption of the relevant constitutional provision,
- structural differences between the state and federal constitutions, and
- matters of peculiar state or local interest.[17]

Amicus turns, then, to the matter of stare decisis.

III. Stare Decisis: An Oath-Based View

A. The Justifications for Stare Decisis

Stare decisis is, in a number of ways, an odd doctrine, at least when considered in the context of horizontal overruling.[18] Judges of courts of last resort, where the question of reconsidering prior precedent arises, take an oath—as do all legislative, executive, and judicial officers—to support the constitution.[19] Their decisions, then, are to be faithful to constitutional provisions involved in the case before them. And yet stare decisis, the principal office of which

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[17] *People v. Collins*, 438 Mich. 8, 31, 39 (1991), *People v. Catania*, 427 Mich. 447, 466 (1986); *Sitz*, supra at 763, n. 14.

[18] The principle that an inferior court is bound by the rulings of a superior court is actually one of power and authority in a hierarchical system, not stare decisis.

[19] Const. Art. VI cl. 3: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution...."; 1963 Mich Const. Art. 11, § 1: "All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of ..... according to the best of my ability."

is to shelter error from correction,[20] counsels a violation of that oath in particular cases. What justification can there be for this rather extraordinary doctrine?

The standard justifications for refusing to correct error have been categorized by a perceptive commentator as deontological and consequentialist justifications.[21] Since no judge should knowingly do an injustice, both categories defend stare decisis on the ground that the sheltering of error can in fact *achieve* justice. The consequentialist justification posits that the injustice that might be entailed in an individual case is trumped by the justice-serving interests protected by stare decisis, focusing on predictability of the law so as to allow the ordering of conduct, stability of the law, and avoidance of frustration of expectations, as well as efficiency in the use of public resources. The end or consequence—the promotion of these more general or "long term" justice-serving interests—justifies the means—the sacrifice of justice in the individual case.[22] The deontological justification, on the other hand, is unconcerned with any arguable justice-serving consequences of adherence to an erroneous precedent; rather, that adherence is an end in itself.[23] That adjudicative consistency is an end itself is often expressed by the statement that, as a matter of justice, "like cases should be treated alike."[24]

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[20] See e.g. Cooper, "Stare Decisis: Precedent and Principle in Constitutional Adjudication," 73 Cornell L Rev 401, 404 (1988).

[21] Peters, "Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis," 105 Yale L J 2031, 2037 (1996).

[22] See Peters, 2039-2043.

[23] Id.

[24] See e.g. *People v Jones*, 797 NE2d 640 657 (Ill, 2003: "The doctrine of *stare decisis* 'proceeds from the first principle of justice, that, absent powerful countervailing considerations, like cases ought to be decided alike.' "

1. The deontological justification for stare decisis

The deontological justification for stare decisis—the sheltering of error on the basis of a norm of equality—has been dismantled by Professors Westen[25] and Peters. Equality as a justification for adjudicative consistency is empty because it is tautological. To say "things that should be treated alike should be treated alike" is to say, as Professor Peters points out, that the individuals involved in the separate cases must be identically situated in the *appropriate* way, measured by the appropriate standard, so that what is actually meant is that "people identically entitled to the relevant treatment are entitled to be treated identically,"[26] and this is tautological. If a prosecuting attorney considering two cases with prospective defendants who have engaged in virtually identical conduct, and with sufficient proof to charge each, chooses to charge one and not the other, the one charged has no claim to relief *unless* the decision to charge was based on an irrelevant and invidious criterion, such as race or ethnicity.[27] That the two individuals are treated differently is not that which affords relief, but that the treatment of the one is unjust because that individual was burdened solely because of his or her race—an irrelevant characteristic—and that is *itself* unjust. The inequality that exists is "a necessary reflection of the existence of a substantive injustice."[28]

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[25] Peter Westen, "The Empty Idea of Equality," 95 Harv L Rev 537 (1982); Peter Westen, *Speaking of Equality* (1990); Peters, "Foolish Consistency," supra.

[26] Peters, at 2059.

[27] See e.g. *United States v. Armstrong,* 517 US 456, 116 S Ct 1480, 134 L.Ed.2d 687 (1996).

[28] Peters, at 2062.

Equality of treatment is only normative if it is posited as a substantive rule that the simple fact that a person has been treated in a particular manner in a given context requires that a person identically situated be treated in the same manner. Rather than requiring that all persons be treated justly, this principle requires that all persons be treated equally, even if that treatment is unjust. Equality of treatment trumps justice in treatment as a normative matter. This principle supplies a justification for stare decisis; one person having been treated unjustly by a misinterpretation of law, the "equality principle of justice" requires that the second person (and indeed all those who follow) also be treated unjustly. So long as *all* results are unjust, justice is achieved. A principle that requires that one mistake having been made it be repeated *ad infinitum*—that requires that one person having been treated according to criteria irrelevant to the circumstances or according to an appropriate criteria misapplied in some manner, all persons must be treated in the same manner—contradicts nonegalitarian principles of justice, and renders the sequence of events, itself an irrelevant criteria, paramount.[29] And its supplies no rationale for *ever* overruling an existing precedent.

2. The consequentialist justification for stare decisis

The consequentialist justification posits that the injustice that might be entailed in an individual case is trumped by the justice-serving interests protected by stare decisis, rather than finding stare decisis justified solely on the basis of adjudicative consistency as an intrinsic good. This is essentially a utilitarian defense of stare decisis, the notion being that stability in the law is more important than the "right answer," in that stability in the law has intrinsic value, allows the

[29] See Peters, 2066-2072.

ordering of private conduct, and allows judicial resources to be husbanded.[30] The statement of Justice Brandeis that "[*st*]*are decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right," is oft-cited as a shield for erroneous decisions, but Justice Brandeis was referring, and in dissent, to statutory decisions, and he thus limited his statement to situations where "correction can be had by legislation."[31] And stare decisis is a "principle of policy,"[32] and not an "inexorable command,"[33] and has lesser weight when a precedent construing a constitutional provision is considered rather than a statutory provision.[34] There are, after all, right answers to questions of interpretation of constitutional texts.

B. An Oath-Based Principle of Stare Decisis

1. The Oath and the judicial role

When interpreting a constitutional text, that which the court seeks is not private justice, but public justice; that is, to identify accurately the "objectified intent" of the People of the State, who, by ratifying the provision, are the source of the law. When the court has previously

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[30] See e.g. Peters, at 2040.

[31] *Burnett v Coronado Oil and Gas Co.*, 285 US 393, 52 S Ct 443, 76 L Ed 815 (1932) (Brandeis, J. dissenting)(emphasis supplied).

[32] *Helvering v. Hallock,* 309 US 106, 119, 60 S Ct 444, 451, 84 L Ed 604 (1940).

[33] *Payne v Tennessee,* 501 US 808, 828, 111 S Ct 2597, 2609, 115 L Ed 720 (1991).

[34] See e.g. *Kyser v. Township,* 486 Mich. 514, 534 (2010), quoting *Agostini v. Felton,* 521 US 203, 235, 117 S Ct 1997, 138 L Ed 2d 391 (1997): "the policy of stare decisis 'is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.' In fact, it is " our duty to reexamine a precedent where its reasoning or understanding of the Constitution is fairly called into question.' *Robinson,* 462 Mich. at 464, 613 N.W.2d 307 (citations omitted)."

interpreted the provision, but misidentified that which the People made law, it has created a *new* constitutional provision, one other than that ratified and made law by the People, and one which, without self-correction by the court, can only be rectified by constitutional amendment. To effectuate public justice, and to be faithful to the judicial oath, it *is* important that it is the sovereign will of the People and not the judicial will that is enforced. As one scholar has put it, "[w]hat is important in adjudication is reaching the right result—the just result, all things considered. . . . our courts finally must rid themselves of the habit of thinking that adjudicative consistency holds some inherent value tugging them away from what is just."[35] The entire notion of enforcement of judicial interpretation of constitutional provisions, as well as statutes, necessarily presupposes that there are "right answers" to questions of interpretation of these texts. Judge Easterbrook has well stated the point: "judicial review came from a theory of meaning that supposed the possibility of right answers. . . .,"[36] for if there are instead multiple "right" or permissible answers, no choice by any branch of government—including the judiciary—from within the field of permissible right answers can bind anyone else, and without a theory under which everyone must follow one answer, the theory of judicial review expounded by Chief Justice Marshall collapses.[37]

Adherence to the law and not past precedent is required by the judicial oath. Justice Douglas remarked concerning constitutional interpretation that "[a] judge looking at a constitutional decision may have compulsions to revere past history and accept what was once

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[35] Peters, "Foolish Consistency,"at 2113.

[36] Easterbrook, "Alternatives to Originalism?", 19 Harv J L & Pub Pol'y 479, 486 (1995).

[37] See also Symposium, "Discussion: The Role of the Legislative and Executive Branches in Interpreting the Constitution," 73 Cornell L Rev 386, 399 (1988).

written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it."[38] And Justice Scalia has made the same point: "I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face."[39] An oath-based view of a judge or justice's duty to overrule a mistaken interpretation of a constitutional text has been referred to as an attempt to take the "moral high ground of the judicial oath to uphold the Constitution,"[40] and it has been argued that this view fosters chaos. It is claimed that "[t]he logical end of the judicial oath argument . . . is not a reduced standard of deference . . ., but a wholesale abandonment of stare decisis."[41] But is this so? Cannot a justice remain faithful to his or her oath when confronting an interpretation of a constitutional text that the justice is convinced is erroneous, and yet still find a place for stare decisis? The answer, it is submitted, is yes, and is to be found in judicial humility.

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[38] Douglas, "Stare Decisis," 49 Colum L Rev 735, 736 (1949).

[39] *South Carolina v. Gathers*, 490 US 805, 825, 109 S Ct 2207, 2218, 104 L Ed 2d 876 (1989) (Scalia, J., dissenting), overruled by *Payne v Tennessee*, 501 US 808, 111 S Ct 2597, 115 L Ed 2d 720 (1991).

[40] Thomas R. Lee, "Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court," 52 Vand. L. Rev. 647, 704 (1999). And see Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 Geo. L.J. 217, 319 n.349 (1994) ("The Constitution and federal statutes are written law (not common law); judges are bound by their oaths to interpret that law as they understand it, not as it has been understood by others.").

[41] Lee, at 711.

2. The principle of judicial humility

Courts occasionally rely solely on stare decisis when confronting a previous interpretation of a constitutional text so as to affirm that interpretation, but also occasionally overrule constitutional decisions.[42] And the matter is one which lies solely with the judiciary; neither the following of stare decisis nor its disregard can be compelled. How, then, should a principled jurist act when confronting a previous judicial interpretation of a constitutional text? That jurist must, above all, remain faithful to the oath, but should approach the task of interpretation with an *attitude of humility*.

This attitude has been cogently stated by an eminent jurist: "One entrusted with decision . . . must also rise above the vanity of stubborn preconceptions, sometimes euphemistically called the courage of one's convictions. He knows well enough that he must disconnect his own predilections, of however high grade he regards them, which is to say he must bring to his intellectual labors a cleansing doubt of his omniscience . . . ."[43] Precedent furnishes material for the judge or justice in the process of interpretation of the text, and in obeying his or her oath of office respect for the work of those who have gone before should be expected. If a justice confronts a constitutional precedent that approached the interpretation of the text involved appropriately—by attempting to discern what the common understanding of the text would have

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[42] As recent examples, see *Arizona v Gant*, 556 US 332, 129 S Ct 1710, 173 L Ed 2d 485 (2009), overruling *New York v Belton*, 453 US 454, 101 S Ct 2860, 69 L Ed 2d 768 (1981); *Crawford v Washington*, 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177 (2004), overruling *Ohio v Roberts*, 448 US 56, 100 S Ct 2351, 65 L Ed 597 (1980); *Alleyne v United States*, __US__, 133 S Ct 2151 (2013), overruling *Harris v United States*, 536 US 535, 122 S Ct 2406, 153 L Ed 23d 524 (2002).

[43] R. Traynor, "Reasoning in a Circle of Law," 56 Val L Rev 739, 750-751 (1970).

been when the provision was ratified by the People—and reached a result that is within the range of reasonable outcomes on those terms, then a justice who would reach a different conclusion if viewing the matter in the first instance may defer to his or her predecessors as a matter of humility. That justice, having, as Justice Traynor put it, brought to the task a cleansing doubt of his or her own omniscience, and thus understanding that his or her view of the matter may be mistaken, might, in these circumstances, reasonably defer to the interpretation of his or her predecessors without violation of the judicial oath. But respectful consideration is not slavish obeisance. To uphold demonstrably erroneous interpretations of texts ratified by the People as the fundamental law of the state *does* implicate the judicial oath. If the prior interpretation is in fact flatly contrary to a textual provision, or an unreasonable interpretation in light of the text, ordinary canons of construction, and history, or the prior decision employed inappropriate considerations, such as policy considerations not supportable by the text of the provision— if the constitutional text was, as Chief Justice Marshall put it, "restricted into insignificance" or "extended to objects not comprehended" in the text, "nor contemplated by its framers" and the People as ratifiers—then the court, to be faithful to its oath, must act. And there *are* demonstrably erroneous interpretations of constitutional texts.[44]

3. Conclusion

This court has observed that "laws [are] generally made more 'evenhanded, predictable and consistent' when their words mean what they plainly say"; moreover, "laws are also made more accessible to the people when each of them is able to read the law and thereby understand

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[44] See Caleb Nelson, "Stare Decisis and Demonstrably Erroneous Precedents," 87 Virginia Law Rev 1 (2001).

his or her rights and responsibilities. When the words of the law bear little or no relationship to what courts say the law means . . . , then the law increasingly becomes the exclusive province of lawyers and judges."[45] The judicial oath requires a court to engage in *self* correction when it is demonstrated that in its previous decision it in effect amended a constitutional provision, thereby usurping, albeit inadvertently, the sovereign authority of the People, through an erroneous interpretation.

IV. People v Bender Should Be Overruled

"...the Fifth Amendment actually means what it says."[46]

It is the prudent course to begin consideration of the meaning of a constitutional text by reviewing the actual language of the constitutional provision at issue, for reference only to the judicial gloss which has been given the relevant language can lead one far astray. As has been noted in a different context,

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance.[47]

Amicus thus begins with the relevant texts.

> Article I, § 17, Mich Const 1963: No person shall be compelled in any criminal case to be a witness against himself, ...

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[45] *Garg v. Macomb County Community Mental Health Services,* 472 Mich 263, 285 (2005).

[46] Joseph Grano, *Confessions, Truth, and the Law* (University of Michigan Press: 1993), p.143. Professor Grano's assertion is equally true of the identical Mich. Const. Art. I, § 17.

[47] *United States v. 12 200-Foot Reels of Super 8mm. Film,* 413 US 123, 127, 93 S.Ct. 2665, 668, 37 L Ed 2d 500 (1973).

> Fifth Am., United States Const.: No person shall be . . . compelled in any criminal case to be a witness against himself . . . .
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> Article VI, § 6, Mich Const 1963: The judicial power of the state is vested exclusively in one court of justice . . . .

A. The Burbine and Bender Decisions

1. Moran v Burbine[48]

After Burbine was arrested for a burglary, the local police gained information leading them to believe that he was responsible for an unrelated murder in a different jurisdiction. Detectives from that jurisdiction later arrived to question him regarding the homicide. That same evening, Burbine's sister telephoned the Public Defender's Office seeking to obtain counsel for Burbine in the burglary case, and asked to speak to the attorney who was handling yet another case against Burbine. The attorney who took the sister's call tried to reach the attorney she named, and after failing to reach him called a different public defender and informed her of Burbine's arrest and his sister's call seeking representation for him. That attorney called the police station, and told whoever answered the call that Burbine was represented by an attorney who was not available, and that she would act as his legal counsel for any lineup that might be held. The unidentified person who answered the call told her the police would not that night be placing Burbine in a lineup or questioning him. She was not told that the Providence police were at the station or that Burbine was a suspect in the unrelated homicide, and Burbine was not informed of the call. Less than an hour after the call, Burbine was questioned regarding the murder in several interview sessions. Before each he was given his Miranda warnings, and three times signed a written form acknowledging that he understood his right to the presence of an

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[48] *Moran v Burbine,* 475 US 412, 106 S Ct 1135, 89 L Ed 410 (1986).

attorney and explicitly indicating that he "'[did] not want an attorney called or appointed for [him]' before he gave a statement."[49]

The Supreme Court rejected Burbine's claim that his statement was inadmissible because he had not been informed of the call from the attorney. The police had, said the Court, followed the requirements set forth in Miranda "with precision."[50] The Court concluded that "Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right."[51] While it was true, said the Court that "the additional information would have been useful to respondent; perhaps even it might have affected his decision to confess," the Court had "never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights."[52]

2. People v Bender[53]

Bender was arrested for a series of thefts, and an accomplice confessed to the police and showed them where the stolen items were hidden. After Bender's arrest, an officer called his mother and told her of his arrest. She informed his father, who called the station and asked to speak to Bender. The officer answering the call declined to put him through to his son. Bender's father told the officer he was going to get counsel for his son, and then called an

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[49] 106 S Ct at 1139.

[50] 106 S Ct at 1140.

[51] 106 S Ct at 1141.

[52] 106 S Ct at 1141.

[53] The case also involve an accomplice, but to simplify maters amicus will refer in the main to those facts concerning Burbine.

attorney who agreed to represent Bender. The attorney called the station and asked to speak with Bender and the detective in charge as soon as possible. The officer who answered the phone told the attorney that Bender was being held, and he would inform the detective that she wished to speak with him and with Bender. Bender was later questioned, and not told of the attorney's call. He was given his Miranda warnings, signed a form so indicating, and made incriminating statements.

Three members of this court would have found that the police violated Article I, § 17 of the Michigan Constitution: "on the basis of Const 1963, art 1, § 17, neither defendant Bender nor defendant Zeigler made a knowing and intelligent waiver of his rights to remain silent and to counsel, because the police failed to so inform them [of an attorney's call] before they confessed. In so holding, we reiterate that our state constitution affords defendants a greater degree of protection in this regard than does the federal constitution."[54] But the fourth vote for suppression was supplied by Justice Brickley, whose "concurring" opinion was joined by three justices, so as actually to constitute a majority. In his opinion, it was not necessary to conclude that the police violated a provision of the Michigan Constitution in order to find that the conduct of the police could be prohibited by the court by making any confession taken in these circumstances inadmissible. Rather, said Justice Brickley, the court had the authority to govern police conduct in this regard by announcing a rule, called a "prophylactic rule," governing police behavior: "I conclude that rather than interpreting these provisions, it would be more appropriate to approach the law enforcement practices that are at the core of this case . . . by announcing a prophylactic rule. . . . I agree that we invite much mischief if we afford police officers 'engaged in the often

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[54] 452 Mich at 615.

competitive enterprise of ferreting out crime' the discretion to decide when a suspect can and cannot see an attorney who has been retained for a suspect's benefit."[55] Neither the lead opinion or the four-justice opinion by Justice Brickley explained why there was a "compelling reason" to depart from *Moran v Burbine*.

In a dissent expressing the views of three justices, Justice Boyle pointed out that the two opinions for suppression had, "without a single foundation in the language, historical context, or the jurisprudence of this Court," engrafted their "own 'enlightened' view of the Constitution of 1963, art. 1, § 17, on the citizens of the State of Michigan." Justice Boyle noted that the assertion that '"[t]he Fifth and Fourteenth Amendments of the United States Constitution protect a defendant's federal rights to remain silent and to counsel'" was unsupportable by the text of the Fifth Amendment, which protects against *compelled* self-incrimination, neither creating a "right to remain silent" nor providing a right to counsel.[56] Justice Boyle concluded that there was "no justification, compelling or otherwise, for construing" Article I, § 17 differently than the Fifth Amendment.[57]

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[55] 452 Mich at 622.

[56] 452 Mich at 627.

[57] 452 Mich at 629.

B. Application of an Oath-Based Principle of Stare Decisis to the Bender Decision

As this court stated in *Robinson*—a statutory case—"The first question, of course, should be whether the earlier decision was wrongly decided."[58] But when reviewing an earlier decision interpreting a constitutional text, this first question should also be the *last* question,[59] tempered by the principle of judicial humility, which may take into account such matters as "whether the [prior] decision at issue defies 'practical workability,' whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision,"[60] but only insofar as they inform the justice's evaluation of whether the prior decision, if it approached the constitutional text appropriately—that is, by a diligent attempt to discern what the common understanding of the text involved would have been when the provision was ratified by the People—reached a result within a range of principled outcomes.

The opinions for suppression in *Bender* made no attempt to ascertain whether their departure from the interpretation of the Fifth Amendment by the United States Supreme Court in

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[58] *Robinson v. City of Detroit*, 462 Mich. 439, 464 (2000).

[59] It must be remembered that Justice Brandeis's famous statement that "in most matters it is more important the applicable rule of law be settled than it be settled right" concerned only statutory precedents. Justice Brandeis limited his statement to situations where "correction can be had by legislation." Stare decisis has always been carried lesser force in constitutional cases, as an erroneous constitutional decision has the effect of amending the constitution, and is subject to correction only by an actual amendment to the constitution. See *Kyser v. Township*, supra. And see *Robinson v. City of Detroit*, 462 Mic at 472-473: "the act of correcting past rulings that usurp power properly belonging to the legislative branch does not threaten legitimacy. Rather, it restores legitimacy. Simply put, our duty to act within our constitutional grant of authority is paramount. If a prior decision of this Court reflects an abuse of judicial power at the expense of legislative authority, a failure to recognize and correct that excess, even if done in the name of stare decisis, would perpetuate an unacceptable abuse of judicial power." The duty of the court to act in this regard is heightened even more when the prior decision has usurped the sovereign authority of the People by judicially amending the state constitution, however inadvertently.

[60] 462 Mich at 464.

Burbine was supported by a "compelling reason," nor did they explore whether the rule created was one discoverable in the text of the Michigan Constitution as that text would have commonly been understood by the People of the State at the time of ratification. Indeed, Justice Brickley's concurring opinion, which establishes the rule of the case, is not based on *any* state constitutional or statutory provision, but constitutes a raw exercise of judicial power, to which amicus will return. But three justices found justification for departure from *Burbine* in Article I, § 17 of the Michigan Constitution. The three-justice opinion stands the "compelling reason to depart" principle on its head. That opinion would apply the principle only to situations where the drafting history and Address to the People of the Michigan provision that corresponds to a provision of the United States Constitution demonstrate an intent on the ratifiers *not* to depart, observing that such an intent can be found with regard to Mich. Const. 1963, Article I, § 11, as the "proviso" reveals an intent not to depart from United States Supreme Court interpretations of the Fourth Amendment, except to provide *less* protection in some circumstances.[61] The principle of the three-justice opinion, then, appears to be one of complete freedom to depart unless the drafting history and the Address to the People in some way indicate an intent that there should be no such departure.[62] No opinion of this court has taken that view; rather, the provision that parallels the federal provision is to be interpreted in the same manner unless there is a compelling reason to depart. But it is certainly true that, as the court said in *Sitz*, that

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[61] 452 Mich at 617, fn 17.

[62] ". . . when interpreting art. 1, § 17, there is an absence of a direct link to federal interpretation of the Fifth Amendment. Thus, it does not logically follow that in interpreting art. 1, § 17, we must find compelling reasons to interpret our constitution more liberally than the federal constitution." *People v Bender*, at 613.

> "[C]ompelling reason" should not be understood as establishing a *conclusive presumption* artificially linking state constitutional interpretation to federal law. As illustrated by the question presented today, a literal application of the term would force us to ignore the jurisprudential history of this Court in favor of the analysis of the United States Supreme Court announced in *Sitz*. Properly understood, the *Nash* rule compels neither the acceptance of federal interpretation nor its rejection. In each instance, *what is required of this Court is a searching examination to discover what law "the people have made."*
>
> The judiciary of this state is *not free to simply engraft onto art 1, § 11 more "enlightened" rights than the framers intended* . By the same token, we may not disregard the guarantees that our constitution confers on Michigan citizens merely because the United States Supreme Court has withdrawn or not extended such protection.[63]

But the three-justice opinion in *Bender*—and the four-justice "concurring opinion"— *did* "engraft" onto § 17 what they viewed as the "more enlightened" view, rather that making a "searching examination" of what "law the People have made," so as to interpret the text "in the sense most obvious to the common understanding" of the ratifiers, who "ratified the instrument in the belief that that was the sense designed to be conveyed."[64] Applying the principles set out in *Nash* and consistently followed by this court, there is no "compelling reason" to interpret § 17 differently from the interpretation given the Fifth Amendment by the United States Supreme Court in *Burbine*.

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[63] *Sitz*, at 758-759 (emphasis supplied).

[64] Cooley, supra.

1. "The law the people have made" and article 1, § 17: the text of the provision

The constitutional text is "No person shall be compelled in any criminal case to be a witness against himself, ..." What, then, would "compelled to be a witness against himself" in a criminal case have meant to the ratifiers, understanding that they did not look for any dark or abstruse meaning in the words employed, but rather accepted them in the sense most obvious to the common understanding, and in the belief that that was the sense designed to be conveyed? Some words change meaning dramatically over time. For example, in the 1828 edition of Webster's Dictionary of the English Language, the principal definition of "awful" was "That strikes with awe; that fills with profound reverence; as the awful majesty of Jehovah." Today, "awful" is commonly understood to mean "very bad, or unpleasant."[65] But "compel" is not such a word; its meaning has remained constant for centuries. *The New and Complete Dictionary of the English Language* by John Ash defined "compel" in 1775 as "To constrain, to oblige to some act, to take by force." The 1828 edition of Webster's *An American Dictionary of the English Language* defined "compel" as "To drive or urge with force, or irresistibly; to constrain; to oblige; to necessitate, either by physical or moral force," giving as an example "And they compel one Simon--to bear his cross. Mark 15." The 1913 edition defined it identically. John Boag's 1850 *A Popular and Complete English Dictionary* defines "compel" as "To drive or urge with force, or irresistibly; to constrain; to oblige; to necessitate. To force; to take by force, ..." And the *Oxford English Dictionary* defines "compel" as "to force or oblige (someone) to do something."

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[65] *Oxford English Dictionary*.

Those who ratified Article I, § 17, then, would have understood the text to denote that an individual cannot be "constrained" or "obliged" by either physical or moral force—or legal force, such as by the use of contempt—to take the witness stand, or to give statements against his or her will; that is, involuntarily.

2. "The law the people have made" and article 1, § 17: the convention history of the provision

The Michigan Constitution of 1835 had no compulsory self-incrimination provision; in the Constitution of 1850 language identical to the Fifth Amendment appears in Article 6, § 32. There appears to have been no debate[66] on the provision, which appears in the "Judicial Department" section of the constitution. The identical language also appears in the Constitution of 1908 in Article 2, § 16. The address to the People—which is highly relevant in determining the meaning to the ratifiers of a particular constitutional provision—stated "No change from section 32, Article VI of the present constitution."[67] Thus, the 1908 Constitutional carried forward the compulsory self-incrimination clause from the 1850 Constitution, with no intent to change its understood meaning. Similarly, there is nothing in the convention record which would suggest that when the People of this State ratified Article 1, § 17 they were ratifying anything other than a text that had an understood meaning at that time. The only change in the

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[66] By way of contrast, the jeopardy provision, which as proposed mirrored the federal provision, was modified. See Journal of the Constitutional Convention of 1850, p. 65: "the words 'for the same offence shall be put twice in jeopardy of punishment,' were stricken out. The words 'after acquittal on the merits shall be tried for the same offence,' were then inserted." Again, at this time the Bill of Rights of the United States Constitution was inapplicable to the states, and so by this provision Michigan citizens had less protection regarding double jeopardy from state government than from the federal government.

[67] Journal of the Constitutional Convention, 1907-1908, p. 1542.

1963 Constitution was the addition of language that "The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed." It was this language which was the subject of some discussion and debate in the Convention,[68] the compulsory self-incrimination portion of the provision receiving no attention. The Convention Comment to the People also concerns this added language, as the comment begins by noting that "This is a revision of Sec. 16, Article II, of the present (1908) constitution. The second sentence incorporates a new guarantee. . . . ," the comment proceeding to discuss the additional section, but *not* the compulsory self-incrimination provision. In sum, then, nothing in the Convention Records exist that would in any way suggest that Article 1, § 17 does not mean what it says, nor meant anything different to the ratifiers of the 1963 Constitutional than the same text meant to the ratifiers of the 1850 and 1908 constitutions. And our own jurisprudential history existing at the time of the ratification of Article 1, § 17, necessary to interpretation of our "our own organic instrument of government,"[69] also reveals that the only inquiry with regard to admissibility of a confession under Article 1, § 17 is that of the voluntariness of the statement.

3. "The law the people have made" and article 1, § 17: the jurisprudential history of the provision

Nothing in Michigan's jurisprudential history suggests that Article 1,§ 17, ratified before the *Miranda* decision, concerns anything other than the voluntariness of statements by those questioned by the police. Indeed, on several occasions, this court has discussed the meaning of

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[68] See I Constitutional Convention Record, 1961, 546-553.

[69] *Sitz,* supra, 443 Mich at 763.

the Michigan prohibition against compulsory self-incrimination in comparison to the meaning of the Fifth Amendment protection against compulsory self-incrimination, and observed that "The provision in each Constitution is the same."[70] This is because in fact they *are* the same, and, as observed previously, if the ratifiers of the 1850, 1908, and 1963 Michigan Constitutions intended, by ratifying identical language, to extend to the People of the State the same protections against state government that they enjoyed against the federal government, this was no functionless accomplishment, given that the Fifth Amendment had not at any of these times been held applicable to the States. And before *Miranda*,[71] the inquiry as to the admissibility of a confession under both the Fifth Amendment and the Michigan Constitution was as to voluntariness, and voluntariness was the sole criteria for admission of a confession at the time of the ratification of the 1963 Michigan Constitution under Michigan decisions.

In *People v Simpson*,[72] for example, it was held that a statement taken by the police after defendant's arrest was admissible because no "undue influence was resorted to, in order to obtain evidence from the respondent. . . ." Similarly, in *People v Swetland*,[73] the court stated that "It is only when statements are drawn out by some artifice, promise, or threat which includes the hope of benefit, or acts upon the fears of the accused, or made under compulsion, that the law precludes their being used as admissions." The instructions were held erroneous in *People v*

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[70] See e.g. *Paramount Corp v Miskinis*, 418 Mich 708, 726 (1984); *In re Moser*, 138 Mich 302, 305 (1904).

[71] *Miranda v Arizona*, 384 US 436, 86 S Ct 1602, 16 Led 2d 694 (1966).

[72] *People v Simpson*, 48 Mich 474, 480 (1882).

[73] *People v Swetland*, 77 Mich 53, 60-61 (1889).

Howes,[74] at a time where when the evidence was disputed, the jury determined the question of voluntariness; the error was that the instruction failed to inform the jury that it was its duty to "leave out of consideration these statements, if they found that they were made under compulsion, or duress. . . ." In *People v Taylor*,[75] the court held admissible confessions of the defendant where the evidence on the part of the People "tended to show that these confessions were made voluntarily, and not under any threats, duress, or promises."

The court in *People v Owen*[76] considered a confession where "No threats were made; no inducements held out. There was no duress, *unless the mere fact that he was under arrest and in the presence of some police officers constitutes duress*." The court found that the presence of the police did not render a statement inadmissible, as "*Only when confessions are obtained by threats or promises, or under circumstances which legally constitute duress are they inadmissible.* Otherwise they are admissible for the consideration of the jury under proper instructions by the court. *This rule is sustained by an unbroken line of authorities. . . . This court has so uniformly held.*"[77] An opposite result was reached, but the same test—voluntariness—employed in *People v Brockett*,[78] where the court stated that a confession is "never admissible unless it is voluntarily made," which precludes the use by the police of any

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[74] *People v Howes*, 81 Mich 396, 402 (1890). See also *People v Dudgeon*, 229 Mich 26, 33 (1924), where a similar error occurred.

[75] *People v Taylor*, 93 Mich 638, 641 (1892).

[76] *People v Owen*, 154 Mich 571, 573 (1908) (emphasis added).

[77] 154 Mich at 574 (emphasis supplied).

[78] *People v Brockett*, 195 Mich 169, 179 (1917).

method of "sweating" out a confession. The case of *People v Lipsczinska*[79] is fascinating with regard to its facts, and consistent with prior cases with regard to the law. Suffice it here to say that the defendant was charged with the 13-year-old murder of a nun. After the defendant was arrested for the murder, a detective who understood Polish, the first language of the defendant, was placed in a jail cell with her. After a few days the defendant asked the detective to do something for her, and the detective said "If you want me to do anything, tell me what and tell me all." The defendant confessed the murder to the detective in detail. The defendant's version of the confession was quite different, containing bizarre tales of both physical and psychological coercion, If the defendant's version of events was correct, then, said the court, her confession "should not have been received." But "her testimony (was) not unchallenged; in fact it was denied *in toto*." While the prosecution's version of events included deceit in the use of an undercover police officer, the court held that this did not render the confession inadmissible, the question being one of voluntariness, with deceit not rendering a confession involuntary. Though defendant was clearly in custody, no duty on the part of the undercover officer to caution the defendant that she could remain silent, or seek the assistance of an attorney, was found.

Finally, *People v Louzon*[80] well expresses the understood doctrine with regard to confessions before the ratification of the 1963 Constitution. The defendant stated that he was questioned seven times while in custody, and requested to see both his mother and to see an attorney, both of which were refused. He also made claims of physical coercion. The court agreed that improper methods such as "sweating" out a confession are improper. Citing Const

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[79] *People v Lipsczinska*, 212 Mich 484,498 (1920).

[80] *People v Louzon*, 338 Mich 146, 153-154 (1953) (emphasis supplied).

1908, Art 2, § 16, the court stated that a confession must be voluntary to be admissible. The court quoted with approval the statement in the United States Supreme Court case of *Stein v New York*[81] that *"interrogation is not inherently coercive*, as is physical violence. Interrogation does have social value in solving a crime, as physical force does not. . . . The duty to disclose knowledge of crime rests upon all citizens. . . . Of course, such inquiries have limits. . . . " Because of a dispute in the evidence, the court held that the trial judge properly submitted the question of voluntariness to the jury, the question being that of voluntariness.

At the time of the promulgation and ratification of Article 1, § 17, then, there was nothing in Michigan decisional authority suggesting that Article 1, § 17's language could require the suppression of a voluntary statement on the ground that the defendant was not informed an attorney wished to see him or her, nor on the ground of a violation of anything like the "Miranda" rules.[82]

4. Note: Changes in the legal landscape federally

The United States Supreme Court in *Miranda* said that "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."[83] This assertion is counterfactual, and the Court does not itself believe it. It cannot plausibly be argued that every confession given in police custody before *Miranda* in the over 220 years after the ratification of

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[81] *Stein v New York*, 346 US 156, 97 L Ed 1522, 73 US 1077 (1953).

[82] As far as amicus can tell, this court has never held that that as a matter of Michigan constitutional interpretation the Miranda warnings are required, nor should it, given an examination of our "own organic instrument of government."

[83] *Miranda*, 86 S Ct at 1619.

the Fifth Amendment was involuntary. Nor is it the case that every confession given today by a person in custody absent Miranda warnings or after defective Miranda warnings is involuntary—the United States Supreme Court has *said so itself.*[84] Confessions taken without required Miranda warnings, or after defective warnings, are admissible for impeachment of the accused if they are nonetheless *voluntary*. The purpose of the required warnings is to dissipate the "inherently coercive" nature of custodial interrogation, so as to insure any confession made is voluntary, but the warnings took on a life of their own under *Miranda*. Though appearing nowhere in the text or the Fifth Amendment, they were referred to in *Miranda* as "rights," though also called prophylactic rules, that the defendant must "knowingly and intelligently" waive.[85] But the law has not stood still. When an individual who is in custody is given and understands the Miranda warnings, any statements thereafter are admissible if voluntary unless that individual unequivocally *asserts* that that he or she does not wish to speak with the police,

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[84] *Harris v New York*, 401 US 222, 91 S Ct 643, 28 L Ed 2d 1 (1971). And see *Oregon v. Elstad*, 470 US 298, 307, 105 S Ct 1285, 1292 (1985): "Despite the fact that patently *voluntary* statements taken in violation of *Miranda* must be excluded from the prosecution's case, the presumption of coercion does not bar their use for impeachment purposes on cross-examination." One unfamiliar with the jurisprudence of the United States Supreme Court concerning the Fifth Amendment would undoubtedly be nonplused by the casual reference in this sentence to the exclusion of "patently voluntary statements" on the basis of a constitutional provision that protects against compulsory self-incrimination.

And see Scalia, J. dissenting, *Dickerson v. United States,* 530 US 428, 446, 120 S Ct 2326, 2337 - 2338 (2000) 'The Court need only go beyond its carefully couched iterations that '*Miranda* is a constitutional decision,' . . . that '*Miranda* is constitutionally based,'. . . , that *Miranda* has 'constitutional underpinnings,'. . . and come out and say quite clearly: 'We reaffirm today that custodial interrogation that is not preceded by *Miranda* warnings or their equivalent violates the Constitution of the United States.' It cannot say that, because a majority of the Court does not believe it."

[85] "The defendant may waive effectuation" of the rights conveyed in the warnings "provided the waiver is made voluntarily, knowingly and intelligently." 384 U.S., at 444, 475, 86 S.Ct., at 1612, 1628.

or wishes not to speak to them without counsel.[86] Here, all information required by Miranda to dispel the inherently coercive nature of custodial interrogation was supplied to the defendant to enable him to make a voluntary choice whether to speak. Even if the Miranda warnings are found to be required as a matter of interpretation of Article I, § 17—a finding that cannot be justified by the text of the article or in the history of its adoption or its application in Michigan jurisprudence up to the time of its ratification—the statement here was voluntary, and thus in properly admissible under § 17.

Under § 17, then, confessions that are found to be involuntary should be excluded, and those that are found to be voluntary should be admitted, no constitutional provision having been violated in obtaining them.

5. *Bender* cannot be justified as a "prophylactic rule"

Justice Brickley's four-justice opinion in *Bender* bypassed the constitutional question completely, saying that "rather than interpreting these provisions, it would be more appropriate to approach the law enforcement practices that are at the core of this case . . . by announcing a prophylactic rule . . . ." This is a remarkably liberating approach for the judiciary. Rather than doing the heavy lifting involved in determining whether the police conduct at issue is prohibited by a provision of the state constitution, though it is not prohibited by the identically worded provision of the United States Constitution, a court may simply announce a rule not itself a part of the constitution, the violation of which requires exclusion of evidence, even if the protected constitutional provision is *not* violated. And in that way police conduct that a court majority

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[86] See *Berghuis v Thompkins*, 560 US 370, 130 S Ct 2250, 176 L Ed 2d 1098 (2010); *Davis v United States*, 512 US 452, 114 S Ct 2350, 129 L Ed 2d 362 (1994).

finds distasteful is prohibited, without regard to whether that result is compelled by the state constitution. A judge or justice who approaches issues of the permissibility under the state constitution of particular police conduct in this way is a happy judge, for police conduct may be required to conform to his or her enlightened view of the way things ought to be, *without regard* to the "law the People have made."[87]

But there is no judicial authority for the state judiciary to exclude evidence in order to force the executive branch to *gather* that evidence in a manner in which the judiciary approves. As Professor Grano has aptly observed, "judicial conduct cannot be its own source of justification . . . ." [88] Even when the conduct of a member of the executive branch violates a statute, a court must still examine whether it has authority to exclude evidence gathered as a result of that violation, as "Courts' creation of exclusionary rules is by nature an exercise of judicial power that demands firm and identifiable authority which is often difficult to establish."[89] And this court has held that where a statute enacted by the process required by the state constitution—in the manner provided by the sovereign People by their ratification of the state constitution—is violated, the exclusion of evidence for that violation does not necessarily follow; an inquiry must be made as to whether that result is intended by the statute.[90]

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[87] As Justice Scalia has said of "living constitution" judges—who are at least undertaking the task of interpreting the text—"It's a wonderful thing to have a constitutional case and you're always happy with the result because it means exactly what you think it ought to mean."

[88] Grano, *Confessions, Truth, and the Law*, p.193.

[89] George E. Dix, "Nonconstitutional Exclusionary Rules in Criminal Procedure," 27 Am Crim L Rev 53, 74 (1989).

[90] See, e.g. *People v Hawkins*, 468 Mich 488 (2003).

A prophylactic rule is, after all, a rule designed to protect against the violation of the underlying constitutional provision, and can be violated without violating that provision, or else it would be a *part* of that provision, rather than a prophylactic rule. [91] For example, the Liquor Control Commission of a state might establish a regulation that all bars are to "card" those seeking to purchase alcohol who reasonably appear to be under 30 years of age, as a prophylactic rule to prevent sales of alcohol to minors. If a bar fails to require identification from a person who clearly appears to be younger than 30, but that person is in fact not a minor, the bar has not committed the offense of selling liquor to a minor. If the Commission treats the violation of the prophylactic rule in the same manner in terms of sanction as an actual sale to a minor, then the statute has effectively been amended to prohibit sales of alcohol to those who reasonably appear to be under 30 years of age.

This amendment occurs because there is no such thing as a prophylactic "irrebuttable presumption." A prophylactic rule designed to protect some underlying constitutional value, the violation of which creates an irrebuttable presumption that the underlying constitutional provision has been violated, is simply a rule of law,[92] as are all irrebuttable presumptions. Justice Brickley's irrebuttable presumption in the *Bender* concurrence did not avoid the

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[91] See e.g. *Duckworth v. Eagan,* 492 US 195, 209, 109 S Ct 2875, 2883,106 L Ed 2d 166 (1989), O'Connor, J., concurring: "Like all prophylactic rules, the *Miranda* rule 'overprotects' the value at stake."

[92] See e.g. 2 *McCormick on Evidence* § 342; Duane, James, "The Constitutionality of Irrebuttable Presumptions," 19 Regent U. L. Rev. 149, 160 (2006-2007)("...courts and legal scholars universally agree that any so-called 'irrebuttable presumption,' regardless of whether one chooses as a matter of semantics to call it a true presumption, is not really a rule of evidence at all, but is actually a rule of substantive law masquerading in the traditional language of a presumption. As one leading writer has observed, 'a conclusive or irrebuttable presumption is really an awkwardly expressed rule of law'").

constitutional question involved, but *trumped* it, for if violation of the rule created does not necessarily violate the constitution, and yet a confession must always be suppressed when the rule is violated, the rule has amended the constitution, the supreme law of the State that the People have made, and the court rather than the People has become sovereign in this situation. And nothing in the judicial power conferred by Article VI, § 6 allows the court to impose its will in this manner. Justice Cooley well encapsulated the judicial power, leaving no room for the *creation* of substantive law:

> . . . those inquiries, deliberations, orders, and decrees, which are peculiar to such a department [the judicial department], must in their nature be judicial acts. Nor can they be both judicial and legislative; because a marked difference exists between the employment of judicial and legislative tribunals. The former *decide upon the legality of claims and conduct*, and the latter *make rules* upon which, in connection with the constitution, *those decisions should be found* . It is the province of judges to determine what is the law upon existing cases. In fine, the law is *applied* by the one, and *made* by the other. To do the first, therefore,—to compare the claims of parties with the law of the land before established,—is in its nature a judicial act. But to do the last—to pass new rules for the regulation of new controversies—is in itself a legislative act. . . . [93]

IV. Conclusion

And so, the matter returns to the beginning. *Bender* did not attempt to interpret Article I, § 17 by ascertaining the common understanding of the ratifiers of the text, the understanding that "reasonable minds, the great mass of the people themselves, would give it." Indeed, the four-justice "concurring" opinion of Justice Brickley simply imposed the judicial will, without even the force of a statutory or constitutional provision to justify the rule created. The

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[93] Cooley, p. 91-92 (emphasis added; final two instances of emphasis in the original).

"prophylactic" rule imposed is impractical. The three-justice opinion would have held that a suspect who has been given the proper Miranda information and has neither requested counsel nor remained silent must be informed if an "attorney wishes to see him whether that request comes over the police station counter, over the telephone, or via messenger."[94] Justice Brickley's four-justice opinion did not address this point. But how are the police to know that the individual wishing to contact the defendant, particularly by telephone or even messenger, *is* an attorney, and what steps must they take to confirm or dispel this claim? Anyone can telephone and say they are an attorney, and anyone can send a message or messenger so claiming. And the notion that someone can create an attorney-client relationship for someone else who has been informed they have the right to an attorney and yet has not requested one is peculiar. There is no "relationship" to be interfered with in this situation. Further, a person arranging to provide an attorney that the individual in custody has not requested may have it in his or her own self-interest that the arrestee remain silent. After all, an attorney does not have a right to the arrestee, it is the arrestee who has a Miranda right not to answer questions if he or she wishes an attorney, and if no such desire is expressed after being given this information, no "relationship" exists, and no expression of a desire for counsel is dishonored. And may an attorney leave a list of "clients" at each police precinct, with a statement that he or she wishes to see any of these individuals before they are questioned, and if any individual on the list is arrested he or she should be so informed?

But in the end it matters not if the rule created in *Bender* is "workable." One can imagine all sorts of workable rules not encompassed within the constitution or any statute, and if one

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[94] 452 Mich at 618.

wishes to see the rule imposed on the citizens of the state, he or she must gain amendment of the constitution or the promulgation of a statute. That such an individual is a justice does not change this principle. Constitutional interpretation is a matter of discovery of that which is in the text ratified by the People, that text to be taken as it would commonly have been understood at the time, and not "extended to objects not comprehended in [the text], nor contemplated by its framers"[95] and the ratifiers. Article I, § 17 concerns, when so interpreted, voluntariness. Indeed, in *People v. Hill*[96] Justice Brickley wrote for a unanimous court, rejecting the notion that the Article I, § 17 should be read to require Miranda warnings at noncustodial questioning when the investigation has "focused" on the individual, saying

> At the time of the drafting of our 1963 Constitution (pre-*Miranda*), the self-incrimination provision of the Fifth Amendment *was only implicated when an extrajudicial statement was found to have been elicited involuntarily. It is difficult to imagine that the drafters and ratifiers, having adopted nearly word for word the self-incrimination provision of the Fifth Amendment, would have envisioned that a noncustodial extrajudicial statement, regardless of voluntariness or involuntariness, would result in a violation of that provision, solely because the statement was not preceded by the application of a prophylactic rule that requires a recitation of the defendant's rights*. Absent an indication that a noncustodial setting clearly implicates compulsion, we would not feel at liberty to consider such an expansion of the drafters' most likely understanding of the meaning of self-incrimination.

If, then, the defendant's statement was voluntary, it is admissible under the Michigan Constitution. There should be no other state constitutional inquiry.

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[95] See footnote 6, quoting Chief Justice Marshall.

[96] *People v. Hill,* 429 Mich. 382, 392-393(1987) (emphasis supplied).

Relief

WHEREFORE, the amicus requests that the Court of Appeals be reversed.

Respectfully submitted,

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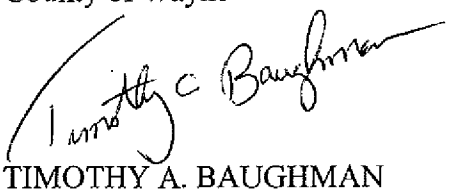

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