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Restoring the Michigan Referendum

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Restoring the Michigan Referendum
by
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Submitted in partial fulfillment of the requirements of the
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under the direction of
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I. INTRODUCTION – MICHIGAN’S EMERGENCY MANAGER LAW

“[D]ue to the emergency conditions in the area affected by contaminated water,” President Obama declared a state of emergency within the city of Flint, Michigan on January 16, 2016.¹ This “man-made disaster,” as described by President Obama,² was caused by the switch of Flint’s water supply to the Flint River and the resulting corrosion of Flint’s water infrastructure.³ Since the switch on April 25, 2014,⁴ Flint’s water has been connected to numerous public health emergencies- most notably high lead blood levels in children and an outbreak of Legionnaires’ disease.⁵ In his application for emergency aid, Governor Snyder anticipated the cost of replacing Flint’s water infrastructure at approximately \$767 million.⁶

Adding to the intrigue behind the Flint water crisis is the fact that all the decisions leading to the switch to the Flint River were not made by elected officials, but by emergency managers empowered by a law that had been rejected by the Michigan electorate.⁷ The first “Emergency Manager Law,” P.A. 4 of 2011, was signed by Governor Snyder on March 16, 2011.⁸ The act granted various new powers to financial managers appointed to municipal governments such as the power to modify union contracts, order elections to raise property taxes, or even to dissolve a municipality.⁹ Called an “assault on democracy” by its opponents,¹⁰ the act

¹ Press Release, The White House, President Obama Signs Michigan Emergency Declaration (January 16, 2016), *available at* <https://www.whitehouse.gov/the-press-office/2016/01/16/president-obama-signs-michigan-emergency-declaration>. (last visited May 7, 2012).

² WWJ Newsradio 950, *President Obama in Flint: ‘This Was a Man-Made Disaster’*, CBS DETROIT (May 4, 2016) <http://detroit.cbslocal.com/2016/05/04/president-obama-in-flint-this-was-a-man-made-disaster/> (last visited May 7, 2016).

³ Jonathan Oostling, *White House to Decide Soon on \$96M Flint Aid Request*, THE DETROIT NEWS (January 16, 2016) <http://www.detroitnews.com/story/news/politics/2016/01/14/snyder-asks-obama-declare-federal-emergency-flint/78831312/> (last visited May 7, 2016).

⁴ Mark Brush et. al., *Timeline: Here’s How the Flint Water Crisis Unfolded*, MICHIGAN RADIO (Dec. 21, 2015) <http://michiganradio.org/post/timeline-heres-how-flint-water-crisis-unfolded> (last visited Mar. 15, 2016).

⁵ Jonathan Oostling, *White House to Decide Soon on \$96M Flint Aid Request*, THE DETROIT NEWS (January 16, 2016) <http://www.detroitnews.com/story/news/politics/2016/01/14/snyder-asks-obama-declare-federal-emergency-flint/78831312/> (last visited May 7, 2016).

⁶ *Id.*

⁷ Gary Ridley, *Flint Water Emails Show Flint City Council Never Approved Switch*, MLIVE (Feb. 26, 2016) http://www.mlive.com/news/flint/index.ssf/2016/02/snyders_staff_signed_off_on_ed.html.

⁸ 2011 Mich. Pub. Acts 4.

⁹ Associated Press, *Controversial Emergency Financial Manager Bill Headed to Michigan Gov. Snyder’s Desk*, MLIVE, (March

was subjected to a referendum vote and was rejected by the general electorate on November 7, 2012.¹¹ However, by December 13, 2012, the Michigan House and Senate had both passed a new Emergency Manager Law, P.A. 436 of 2012.¹² While this new act had some differences from the prior law,¹³ opponents protested that P.A. 436 was “substantially similar to Public Act 4 of 2011” and that “the new act contain[ed] an appropriation which bars any referendum.”¹⁴ Despite these protests, Governor Snyder signed the new, “immune to referendum,” Emergency Manager Law on December 27, 2012.¹⁵

Without the Emergency Manager Law enabling Flint’s emergency managers, it is doubtful that the switch of Flint’s water supply, and the resulting emergency, would have occurred. While Michigan’s people were able to use their referendum to reject the first version of this law, the simple addition of an appropriation to the second version barred them from doing so again. In fact, the Michigan Legislature has, with increasing frequency, made a habit of ensuring that many of its controversial acts pass with an appropriation.¹⁶ This practice of referendum-proofing laws through the addition of appropriations is undemocratic and is encouraged by an over-broad interpretation to the appropriations exemption to the referendum within Michigan’s Constitution. Accordingly, this essay explores two different ways in which the people’s referendum power can be restored: 1) through reconstruction of the Michigan Supreme Court current interpretation of the referendum language or 2) by amending the Michigan Constitution.

¹⁵, 2011) http://www.mlive.com/politics/index.ssf/2011/03/bill_expanding_emergency_finan.html (last visited Mar. 15, 2016).

¹⁰ Chris Savage, *Viewpoint: Emergency Manager Law an Assault On Democracy*, MLIVE, (January 8, 2012)

http://www.mlive.com/opinion/muskegon/index.ssf/2012/01/viewpoint_11.html (last visited May 7, 2016).

¹¹ Steven Yaccino, *Michigan Voters Repeal a Financial Law*, THE NEW YORK TIMES (Nov. 7, 2012)

http://www.nytimes.com/2012/11/08/us/michigan-voters-kill-emergency-managers-for-city-finances.html?_r=0 (last visited Mar. 15, 2016).

¹² H.R. Jour., 2012 Reg. Sess. No. 81 (Mich. 2012); S. Jour., 2012 Reg. Sess. No. 80 (Mich. 2012).

¹³ Mich. Comp. Laws §§ 141.1541 et seq. (2016).

¹⁴ H.R. Jour., 2012 Reg. Sess. No. 82 (Mich. 2012).

¹⁵ Jonathan Oosting, *Snyder Signs Replacement Emergency Manager Law*, MLIVE (Dec. 27, 2012)

http://www.mlive.com/politics/index.ssf/2012/12/snyder_signs_replacement_emerg.html (last visited Mar. 15, 2016).

¹⁶ Zoe Clark & Rick Pluta, *Why Your Vote on a Wolf-hunt Referendum Might Not Matter*, MICHIGAN RADIO (Apr.12, 2013), <http://michiganradio.org/post/why-your-vote-wolf-hunt-referendum-might-not-matter> (last visited Mar. 15, 2016).

II. JUDICIAL RECONSIDERATION

A. Current Interpretation

The current state of the appropriation exemption to Michigan’s referendum was decided in the landmark case *Michigan United Conservation Clubs v. Secretary of State*.¹⁷ The case involved P.A. 381 of 2000,¹⁸ an act that both significantly changed the standards for attaining concealed weapons permits and made an appropriation of \$1,000,000 to support programs within the act.¹⁹ The Michigan Constitution states that an act “making appropriations for state institutions” is not subject to referendum.²⁰ Choosing to decide the case as succinctly as possible, the Michigan Supreme Court’s 227 word majority opinion was decided utilizing the following syllogism:

(1) The power of referendum of the Michigan Constitution “does not extend to acts making appropriations for state institutions....” Const. 1963, art. 2, § 9.

(2) 2000 PA 381 states that “one million dollars is appropriated from the general fund to the department of state police....” M.C.L. § 28.425w(1).

(3) An appropriation of \$1,000,000 is an “appropriation,” and the Department of State Police is a “state institution.”

(4) Therefore, the power of referendum of the Michigan Constitution does not extend to 2000 PA 381.²¹

The majority argued that its broad interpretation of the appropriations exemption was supported by both an “unbroken line of decisions of this Court interpreting [the] provision”²² and a lack of evidence supporting a different interpretation of the provision.²³ While the language used by the majority opinion seems unequivocal, the three concurrences and three dissents that accompany

¹⁷ *Michigan United Conservation Clubs v. Secretary of State*, 630 N.W.2d 297, 298 (Mich. 2001).

¹⁸ *Id.*

¹⁹ 2000 Mich. Pub. Acts 381.

²⁰ Mich. Const. art. 2 § 9.

²¹ *Michigan United Conservation Clubs*, 630 N.W.2d at 298.

²² *Id.*

²³ *Id.* at 305 (Young, J., concurring); *Id.* at 314 (Markman, J., concurring).

it²⁴ indicate that the majority's conclusion was just one of several that it could have arrived at.

B. Rules of Constitutional Construction

The “primary rule” of constitutional construction in Michigan is the rule of “common understanding.”²⁵ As explained by Justice Cooley:

the constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.²⁶

This passage is cited by both the concurrences and dissents in *Michigan United Conservation Clubs* as the underlying rule for constitutional construction.²⁷ Despite this passage, however, Justice Cooley did not completely discount the value of constitutional drafting history.²⁸ Within the same chapter, Justice Cooley explains that when interpreting a provision, “it may be proper to examine the proceedings of the convention which framed the instrument” and when the “proceedings clearly point out the purpose of the provision, the aid will be valuable and satisfactory.”²⁹ Further, the Michigan Supreme Court has also acknowledged two other rules for interpreting the Michigan constitution: 1) where a provision has multiple interpretations, the “circumstances surrounding the adoption . . . and the purpose sought to be accomplished may be considered,” and 2) “an interpretation that does not create constitutional invalidity is preferred to one that does.”³⁰ In short, while “common understanding” is the primary rule of constitutional interpretation, if the text is not clear on its face, a court may look at other factors like drafting

²⁴ *Id.* at 298 (Corrigan, C.J., concurring); *Id.* at 299 (Young, J., concurring); *Id.* at 310 (Markman, J., concurring); *Id.* at 317 (Cavanaugh, J., dissenting); *Id.* at 322 (Weaver, J., dissenting); *Id.* at 325 (Kelly, J., concurring).

²⁵ *In re Proposal C*, 185 N.W.2d 9, 14 (Mich. 1971).

²⁶ Thomas M. Cooley, LL.D., *A Treatise on the Constitutional Limitations* 143 (Walter Carrington ed., 8th ed. 1927).

²⁷ *Michigan United Conservation Clubs*, 630 N.W.2d at 301-02 (Young, J., concurring); *Id.* at 314 (Markman, J., concurring); *Id.* at 319 (Cavanaugh, J., dissenting).

²⁸ Thomas M. Cooley, LL.D., *A Treatise on the Constitutional Limitations* 142-43 (Walter Carrington ed., 8th ed. 1927).

²⁹ *Id.*

³⁰ *In re Proposal C*, 185 N.W.2d at 14.

history, surrounding circumstances, and word constructions that avoid creating constitutional invalidities.³¹

C. Support for Reconsideration

The disparate interpretations of the word “for” in the phrase “appropriations for state institutions” by Justices Markman and Kelly provide strong evidence that the appropriations exemption is not clear on its face.³² Justice Markman believed that “the relevant meaning of ‘for’ in the instant context is ‘intended to belong to’” and that the majority’s interpretation was consistent with that definition.³³ Justice Kelly, on the other hand, believed the majority’s interpretation equated “for” with “to.”³⁴ She understood “for” to mean “‘suiting the purposes or needs of’” or “‘with the object or purpose of’” and accordingly believed that an appropriation must be “aimed at satisfying the purpose or reason for which a state institution exists” in order to make an act referendum-proof.³⁵ Interestingly enough, the 1963 Webster’s dictionary has over a dozen different definitions for the word “for;” including both “a function word to indicate a recipient” and “a function word to indicate purpose.”³⁶

Considering that dictionary analysis alone cannot produce a decisive “common understanding” of the appropriations exemption, one must move past the face of the text in order to determine its intended extent. After reviewing the drafting history, prior case law, other state referendum provisions, textual canons, and substantive canons; it seems that the current interpretation of the appropriations exemption is broader than intended by the ratifiers of Michigan’s Constitution.

³¹ *Id.*

³² *Michigan United Conservation Clubs*, 630 N.W.2d .at 315-16 (Markman, J., concurring); *Id.* at 326 (Kelly, J., dissenting).

³³ *Id.* at 315 (Markman, J., concurring) (*quoting* Random House Webster’s College Dictionary (1991) at 519).

³⁴ *Id.* at 326 (Kelly, J., dissenting).

³⁵ *Id.* at 326-27 (Kelly, J., dissenting) (*quoting* Random House Webster’s College Dictionary, p. 519 (1995)).

³⁶ G. & C. Merriam Co., Webster’s Seventh New Collegiate Dictionary 325 (H. Bosley Woolf et al. eds., 14th ed. 1963). I used the 1963 version of the dictionary because the current Michigan Constitution was adopted on April 1, 1963. Michigan, Michigan Manual 583 (James M. Hare ed. 1964).

1. *Drafting History*

Justice Young's concurrence in *Michigan United Conservation Clubs*, was the only opinion of the seven to consider drafting history.³⁷ Justice Young insisted that, unless there is sufficient evidence to prove that the 1963 electorate meant the language to have another meaning, the majority's interpretation is a "plain and natural" reading of the language and must be given effect.³⁸ Noting that none of the dissents, party briefs, or amici curiae provided any historical evidence and acknowledging the "limited time constraints" in conducting his own historical research, Justice Young based his historical argument on the "Address to the People" that accompanied the 1963 constitution when it was proposed to the electorate.³⁹ Finding that the address did not provide "any explanation" on how the referendum "limitations were expected to function in practice," he found that the historical record could not support any interpretation but the majority's.⁴⁰ However, considering this dearth of historical research on the Michigan referendum, Justice Young may have come to a different conclusion had he been able to review the entire historical record.

a) 1913 Constitutional Amendment

Speaking at the January 2, 1913 joint convention of the Michigan Legislature, newly elected Governor Woodbridge Ferris set the wheels in motion for the inclusion of initiative and referendum provisions in the Michigan Constitution.⁴¹ Calling the initiative and referendum the most important tools in ensuring the rule of the people, Governor Ferris called on the legislature to pass a constitutional amendment giving these tools to the people of Michigan.⁴² Noting that

³⁷ *Michigan United Conservation Clubs*, 630 N.W.2d at 303 (Young J., concurring).

³⁸ *Id.* (Young, J., concurring).

³⁹ *Id.* at 303-04 (Young, J., concurring).

⁴⁰ *Id.* at 305 (Young, J., concurring).

⁴¹ H.R. Jour., 1913 Reg. Sess. 27, 35 (Mich. 1913).

⁴² *Id.* at 27.

initiative and referendum provisions in other states have been rendered ineffective due to poor drafting, he asked that the amendment be modeled after Oregon's language where the "amendment is self-operating."⁴³ Accordingly, on January 7, 1913, representative Kappler introduced House concurrent resolution No. 21, which proposed to add initiative and referendum to the Michigan constitution.⁴⁴ On March 4, 1913, the House unanimously reported the resolution to the Michigan Senate with no limitations on the types of laws subject to the referendum power.⁴⁵

While in the Senate, however, the referendum language was given two exceptions that survived into the final resolution. First, the Senate's version included new language that impliedly exempted acts that have been given immediate effect.⁴⁶ This is due to the fact that the language 1) allows "such acts making appropriations and such acts immediately necessary for the preservation of the public peace, health, or safety" to be given immediate effect and 2) suggests that the referendum procedure only applies to acts that are not yet effective.⁴⁷ The language mirrored the pre-existing immediate effect provision, which also requires a 2/3 vote in each chamber of the legislature.⁴⁸ Second, the new language included an explicit exemption from the referendum for "acts making appropriations for state institutions and to meet deficiencies in state funds" was added to the resolution language.⁴⁹ Objecting to the new language, Senator James stated that the "exemption[s] would leave a loophole by which the whole purpose of the referendum might be defeated" and worried that a future legislature might exploit the exemptions to "defeat the will of the people by attaching a small appropriation or calling a bill a measure for

⁴³ *Id.*

⁴⁴ *Id.* at 76.

⁴⁵ *Id.* at 698-700.

⁴⁶ S. Jour., 1913 Reg. Sess. 813 (Mich. 1913).

⁴⁷ *Id.*

⁴⁸ Mich. Const. of 1908, art. 5, § 21.

⁴⁹ S. Jour., 1913 Reg. Sess. 812-13 (Mich. 1913).

the preservation of the public health, peace or safety.”⁵⁰ Despite these concerns, on March 13, 1913, Senator James and the rest of the Senate unanimously passed the amendment language with both of these exemptions to the referendum power.⁵¹ The House adopted the Senate’s language on the same day.⁵² On April 7, 1913, the people of Michigan adopted the initiative and referendum by a vote of 219,907 to 152,388.⁵³

b) Referendum-Proofing from 1913-1961

In the years after the adoption of the referendum, it seems that many of Senator James’s concerns regarding the possibility of the legislature exploiting the referendum exemptions came true. While the Michigan Supreme Court confirmed that both acts given immediate effect and acts appropriating funds are not subject to the people’s referendum power,⁵⁴ the far more popular method of referendum-proofing legislation was through giving them immediate effect.⁵⁵ In order to suit their purposes, legislators would regularly stretch meaning of the “public peace, health or safety” requirement of the immediate effect clause in order to give their acts immediate effect.⁵⁶ As a result, from 1913 to 1961, nearly a third to a half of all legislation passed with immediate effect and the referendum was exercised by the people only nine times.⁵⁷

c) 1961-62 Constitutional Convention

On April 3, 1961, the people of Michigan voted in favor of authorizing a constitutional

⁵⁰ H. H. Tinkham, *Short Ballot and Recall Measures Pass the Senate: Initiative and Referendum Favorably Considered by Members of the Upper House*, The State Journal, March 13, 1913, at 3.

⁵¹ Michigan, Journal of the Senate 836-840 (Dennis E. Alward ed. 1913).

⁵² Michigan, Journal of the House of Representatives 921 (Charles S. Pierce ed. 1913).

⁵³ Michigan, Michigan Official Directory and Legislative Manual 56 (Coleman C. Vaughan ed. 1916).

⁵⁴ See *Thompson v. Vaughan*, 159 N.W. 65, 68 (Mich. 1916) and *Detroit Automobile Club v. Deland*, 203 N.W. 529, 530 (Mich. 1925).

⁵⁵ Daniel S. McHargue, *Direct Government in Michigan: Initiative, Referendum, Recall, Amendment, and Revision in the Michigan Constitution 19-20* (Constitutional Convention Preparatory Comm’n ed., 1961).

⁵⁶ Michigan Constitutional Convention, *Official Record 2954-55* (Austin C. Knapp ed., 1964).

⁵⁷ Daniel S. McHargue, *Direct Government in Michigan: Initiative, Referendum, Recall, Amendment, and Revision in the Michigan Constitution 19-20* (Constitutional Convention Preparatory Comm’n ed., 1961).

convention to draft a new constitution.⁵⁸ In order to prepare the delegates of this convention, the Constitutional Convention Preparatory Commission (“CCPC”) produced numerous studies on the different topics and problems that could be taken up at the convention.⁵⁹ One such study, on direct government in Michigan, detailed the widespread use of the immediate effect clause and its impact on preventing referendums.⁶⁰ It seems that this information guided the decision making of the convention delegates.

When the convention delegates took up discussion on the immediate effect clause, for example, a primary concern of the delegates was to end the legislature’s “abuse” of the immediate effect clause.⁶¹ In one particularly important exchange, Delegate Hutchinson proposed ending the legislature’s stretching of the appropriation and public peace, health, or safety requirements by removing them from the immediate effect clause all together, arguing that a 2/3’s vote requirement would be enough of a safeguard.⁶² In response, Delegate Kuhn said that such a change would “[do] away with the right of initiative or referendum” because it would further broaden the types of legislation that could be made referendum-proof through immediate effect.⁶³ Acknowledging that the current constitution prevented acts given immediate effect from being subject to referendum, Delegate Hutchinson argued that it didn’t have to be that way – “the right of the people to a referendum on a legislative act could be exercised if the constitution so provided, even though an act had been given immediate effect.”⁶⁴ Accordingly, when the committee on style and drafting returned the referendum language to the convention floor, amendments had been made to allow for acts with immediate effect to be subject to the

⁵⁸ Michigan, Michigan Manual 72 (James M. Hare ed. 1964).

⁵⁹ Daniel S. McHargue, Direct Government in Michigan: Initiative, Referendum, Recall, Amendment, and Revision in the Michigan Constitution iii (Constitutional Convention Preparatory Comm’n ed., 1961).

⁶⁰ *Id.* at 19-20.

⁶¹ Michigan Constitutional Convention, Official Record 2954-55 (Austin C. Knapp ed., 1964).

⁶² *Id.* at 2955.

⁶³ *Id.*

⁶⁴ *Id.*

referendum.⁶⁵

While the primary concern of convention delegates was to remove language of a “purely legislative character” from the referendum language,⁶⁶ the delegates’ discussions provide substantial evidence that the delegates believed the provision should be self-executing and free from impairment by the legislature. For instance, when the committee on legislative powers first introduced the committee’s draft of the referendum language, committee chairman Hoxie indicated that it was the intent of the committee that the “section [be] self executing and [that] the legislature cannot thwart popular will.”⁶⁷ Committee member Kuhn added that while “we did cut out many, many words . . . we left it so it would be self executing and so it would be strong.”⁶⁸

Further, these concerns also surfaced in another exchange regarding an amendment that would have the legislature designate an official to receive referendum petitions.⁶⁹ Some delegates expressed concern that the amendment would empower the legislature to undermine the provision by deliberately failing to act.⁷⁰ Delegate Nord argued that “the theory behind this initiative and referendum is that [the people] want to be absolutely certain that it is to be self executing and that it is not indispensable that the legislature do anything.”⁷¹ Delegate Norris further asserted that “[o]ne can foresee occasion when considerable difference between the legislature and the people may exist” and that by utilizing such “uncertain language,” “the legislature may defeat the will of the people.”⁷² Attempting to alleviate these concerns, Delegate Hutchinson noted that a statute already exists delegating an official to receive petitions and that it

⁶⁵ *Id.* at 3049.

⁶⁶ *Id.* at 2392.

⁶⁷ Michigan Constitutional Convention, Official Record 2392 (Austin C. Knapp ed., 1964).

⁶⁸ *Id.* at 2394.

⁶⁹ *Id.* at 2393.

⁷⁰ *Id.* at 2393.

⁷¹ *Id.*

⁷² *Id.* at 2928.

would be “the height of suspicion and distrust of the legislature, if [we] wouldn’t even leave to the legislature this responsibility.”⁷³ After the amendment was adopted, Delegate Kuhn further reassured Delegate Nord that “no one on the committee has any idea that this will not be a self executing proposal” and that if the legislature did deliberately fail to designate an official, he would like the courts to empower the Secretary of State to receive the petitions.⁷⁴

d) Historical Record Analysis

After reviewing the full historical record, it seems that Justice Young, and the other justices in the majority, missed a lot of the evidence supporting a more narrow interpretation of the appropriations exemption. While Justice Young did cite to the record of the 1961-62 constitutional convention, and was the only Justice to do so, he did not cite to any of the CCPC’s reports or to the convention discussions regarding the immediate effect clause or the amendment granting the legislature the power to designate the receiver of petitions.⁷⁵ Further, none of the Justices looked at or discussed the drafting history of the 1913 amendment. Considering that the court has bound itself to follow the precedent arising from the 1913 amendment,⁷⁶ it follows that the legislative history of the 1913 amendment would also be relevant in determining the appropriations exemption’s meaning.

In retrospect, it seems that there is more evidence to refute the majority’s interpretation than to support it. First, when proposing the addition of initiative and referendum to Michigan’s constitution, Governor Ferris specifically mentioned that he did not want to model after states that have initiative and referendum but where “the system is ineffective because of some ‘joker’

⁷³ Michigan Constitutional Convention, Official Record 2393 (Austin C. Knapp ed., 1964).

⁷⁴ *Id.* at 2393-94.

⁷⁵ *Michigan United Conservation Clubs*, 630 N.W.2d at 304 n. 10 (Young, J., concurring).

⁷⁶ *Riley*, 218 N.W. at 148.

inserted into the amendment.”⁷⁷ Second, while some legislators worried that “the whole purpose of the referendum might be defeated” by the immediate effect and appropriations exemptions in the 1913 amendment,⁷⁸ these concerns must have been assuaged as the language was approved by the legislature with near unanimity.⁷⁹ Third, considering that the delegates of the 1961-62 convention knew that the immediate effect exemption had become the most common method of referendum-proofing legislation,⁸⁰ their decision to remove this exemption from the constitution demonstrates an intent to protect the referendum.⁸¹ Finally, throughout the convention, multiple delegates expressed their intent that the referendum section be “self executing”⁸² and not able to be thwarted by the legislature.⁸³ Delegate Kuhn even went so far to assert that, should the legislature attempt to deliberately thwart the referendum, the courts should interpret the referendum provision to keep it self-executing.⁸⁴

2. *Case Law*

The 1913 amendment exempted “acts making appropriations for state institutions and to meet deficiencies in state funds” from being subject to the people’s referendum power.⁸⁵ The 1963 constitution adopted these exemptions almost identically except it replaced the word “and” with “or.”⁸⁶ Regardless of this wording change, however, the clause has always been interpreted by Michigan courts to provide two different avenues for an act to become exempt from

⁷⁷ H.R. Jour., 1913 Reg. Sess. 27 (Mich. 1913).

⁷⁸ H. H. Tinkham, *Short Ballot and Recall Measures Pass the Senate: Initiative and Referendum Favorably Considered by Members of the Upper House*, *The State Journal*, March 13, 1913, at 3.

⁷⁹ S. Jour., 1913 Reg. Sess. 836-40 (Mich. 1913); H.R. Jour., 1913 Reg. Sess. 921 (Mich. 1913).

⁸⁰ Daniel S. McHargue, *Direct Government in Michigan: Initiative, Referendum, Recall, Amendment, and Revision in the Michigan Constitution 19-20* (Constitutional Convention Preparatory Comm’n ed., 1961).

⁸¹ Michigan Constitutional Convention, Official Record 2955, 3049 (Austin C. Knapp ed., 1964).

⁸² *Id.* at 2392-94.

⁸³ *Id.* at 2392-94, 2928, 2955.

⁸⁴ *Id.* at 2393-94.

⁸⁵ Mich. Const. of 1908, art. 5, § 1 (1913).

⁸⁶ Mich. Const. art. 2, § 9.

referendum – the appropriations exemption and the deficiencies in state funds exemption.⁸⁷ For now this essay will examine the appropriation’s exemption precedent.

Before *Michigan United Conservation Clubs*, the only cases to take up the “appropriations for state institutions” exemption were the five “gas tax cases.”⁸⁸ Citing these cases, the majority in *Michigan United Conservation Clubs* asserted that its conclusion is consistent with “an unbroken line of decisions of this Court.”⁸⁹ However, neither the majority nor the concurring opinions do much to explain this assertion. Only Justice Markman cited these cases in his opinion and he did so to make two assertions: 1) that the framers of the 1963 constitution did not explicitly overrule the “gas tax” cases and 2) that *Detroit Automobile Club v. Deland* “merely stands for the proposition that the Michigan Highway Department is a ‘state institution.’”⁹⁰ Upon further review of these cases however, it seems that the “gas tax” cases provide more support for a narrow interpretation of the appropriations exemption than what the majority was willing to admit.

Deland, the first of the “gas tax” cases, involved a referendum petition against an act that levied a 2 cent per gallon tax on gasoline and appropriated the proceeds to the state highway department.⁹¹ Despite Justice Markman’s attempt to limit *Deland*,⁹² the *Deland* majority explicitly stated that “[t]he question is not solely whether the highway department may be correctly termed a state institution, but rather whether, *in view of the functions which it exercises*,

⁸⁷ *Deland*, 203 N.W. at 529.

⁸⁸ See *County Rd. Ass’n v. Board of State Canvassers*, 282 N.W.2d 774 (Mich. 1979); *Boards of County Rd. Comm’rs of Van Buren et al. Counties v. Riley*, 218 N.W.2d 144 (Mich. 1974); *Good Raods Federation v. State Bd. Of Canvassers*, 53 N.W.2d 481 (Mich. 1952); *Moreton v. Haggerty*, 216 N.W 450 (Mich. 1927); *Deland*, 203 N.W. at 529. The cases are named as such because they all involve referendums of acts that increase gasoline taxes and appropriate money to support road construction and maintenance.

⁸⁹ *Michigan United Conservation Clubs*, 630 N.W.2d at 298.

⁹⁰ *Id.* at 314-15 (Markman, J., concurring).

⁹¹ *Id.* at 529-30.

⁹² *Id.*

it comes within the meaning of that term as used in the Constitution.”⁹³ Further noting that the purpose of the exemption is to “enable the state to exercise its various functions free from financial embarrassment” the court considered the appropriation and the functions of the highway department in light of that purpose.⁹⁴ The court looked at several factors: 1) whether the department exercised state functions, 2) if it was created for that purpose, and 3) whether the appropriation was necessary for it “to carry on its activities.”⁹⁵ Defining “state institutions” to include “all organized departments of the state to which the Legislature had delegated or should delegate the exercise of state functions,” the court found that the highway department fit this definition.⁹⁶ In making this conclusion, the court noted that “[w]ithout the money appropriated by this act for its immediate use, [the highway department] would cease to function.”⁹⁷

The remaining “gas tax” cases built on the foundation laid out by *Deland*. In *Moreton*, the court extended the definition of “state institutions” to include political subdivisions, such as counties and cities, which carry out state functions.⁹⁸ The court reasoned that while political subdivisions are not typically state institutions, in this case the “appropriations were made to enable [the counties] to function [as state institutions] . . . and, *being made for that purpose*, they are not subject to referendum.”⁹⁹ Further, while the remaining three “gas tax” cases primarily considered, and answered affirmatively, the question of whether the appropriations exemption applied to acts passed in *pari materia* with other legislation that did fit the exemption,¹⁰⁰ it must

⁹³ *Deland*, 203 N.W. at 530 (emphasis added).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Moreton v. Haggerty*, 216 N.W. 450, 453 (Mich. 1927).

⁹⁹ *Id.* at 453 (emphasis added).

¹⁰⁰ *Michigan Good Roads Federation v. Alger*, 53 N.W.2d 481, 484-85 (Mich. 1952); *Boards of County Road Commissioners of Van Buren et al. Counties v. Riley*, 218 N.W.2d 144, 148-49 (Mich. 1974); *County Road Ass'n v. Board of State Canvassers*, 282 N.W.2d 774, 780 (Mich. 1979).

be noted that the *Deland* reasoning is quoted verbatim in both *Alger* and *County Road Ass'n*.¹⁰¹ Finally, in *Riley*, the court made sure to note that, without the appropriation, the highway fund would not be able “to finance previously authorized and contemplated programs.”¹⁰²

While the majority in *Michigan United Conservation Clubs* was correct that all five “gas tax” cases found their acts in question to be exempt from the referendum,¹⁰³ the majority misses the fact that all five cases took consideration of the purpose and significance of the appropriation to the state institution.¹⁰⁴ Further, there are several takeaways from the “gas tax” cases which suggest a more narrow interpretation of the appropriations exemption than the one arrived at by the *Michigan United Conservation Clubs* majority. First, that the determination of a state institution is done by considering the state functions which it carries out.¹⁰⁵ Even non-state entities can become state institutions if they are carrying out a state function.¹⁰⁶ Second, that the appropriation within an exempt act must be one that supports the continuance of the state function.¹⁰⁷ Third, and finally, that the size of the appropriation may be relevant in determining whether the appropriation supports the state function.¹⁰⁸

3. *Other State Comparison*

Comparing Michigan’s referendum exemption language to other states can be a helpful, though non-binding, tool for interpreting the language’s meaning. Though Justice Kelly compares Michigan’s provision to Arizona’s in her dissent,¹⁰⁹ for the most part comparison analysis with the other states is ignored within the opinions of *Michigan United Conservation*

¹⁰¹ See *County Road Ass'n*, 282 N.W.2d at 777; *Alger*, 53 N.W.2d at 484.

¹⁰² *Riley*, 218 N.W.2d at 148.

¹⁰³ *Michigan United Conservation Clubs*, 630 N.W.2d at 328. (Kelly, J., dissenting).

¹⁰⁴ *Deland*, 203 N.W. at 530; *County Road Ass'n*, 282 N.W.2d at 777; *Alger*, 53 N.W.2d at 484; *Moreton*, 216 N.W. at 453; *Riley*, 218 N.W.2d at 148.

¹⁰⁵ *Deland*, 203 N.W. at 530.

¹⁰⁶ *Moreton*, 216 N.W. at 453.

¹⁰⁷ *Deland*, 203 N.W. at 530; *Riley*, 218 N.W.2d at 148.

¹⁰⁸ *Deland*, 203 N.W. at 530.

¹⁰⁹ *Michigan United Conservation Clubs*, 630 N.W.2d at 327, 330.

Clubs. After reviewing the provisions of other states, it seems that Michigan is unique for how broadly it has tailored its appropriations exemption.

Twenty-two states other than Michigan have constitutional provisions allowing for popular referendum.¹¹⁰ Of those states, five have no limitation whatsoever one the types of legislation can be subject to the referendum.¹¹¹ Four have referendum limitations, such as immediate effect or public safety exceptions, but do not have an appropriations exception.¹¹² Five more states have an appropriation exemption, but the language is not referenced often due to other constitutional provisions which provide an easier method of referendum-proofing.¹¹³ The remaining eight states have appropriations exceptions and, on their face, generally fit into one of three categories when compared to Michigan's language: those that are 1) facially broader, 2) facially narrower, and 3) facially similar to Michigan's appropriations exemptions. Closer examination of the constitutional language used by these eight states can provide a better understanding of how Michigan's provision should be interpreted.

The two states with facially broad appropriations exemptions, Alaska and Montana, both exempt "appropriations," without qualification, from being subject to the referendum.¹¹⁴ Specifically, Alaska's constitution states that "[t]he referendum shall not be applied . . . to appropriations" and Montana's states that "[t]he people may approve or reject by referendum any act of the legislature except an appropriation of money."¹¹⁵ Despite the broad language, however, the courts in each state has construed the language in these provisions in a limited way. In Alaska, the term "appropriation," in the context of the referendum's purpose, has been

¹¹⁰ M. Dane Waters, *Initiative and Referendum Almanac* 12 (2003).

¹¹¹ These five states are Arkansas, Idaho, Nevada, North Dakota, and Oregon. *See Id.* at 77-78, 183, 296-97, 326-27, 371.

¹¹² These four states are Maine, Ohio, Oklahoma, and Utah. *See Id.* at 208, 336, 349, 401.

¹¹³ These five states are Colorado, New Mexico, South Dakota, Washington, and Wyoming. *See Id.* at 312-13, 393, 434-35, 446-47 and *Cavanaugh v. State, Dept. of Social Services*, 644 P.2d 1, 4 (Colo. 1982).

¹¹⁴ *See* Alaska. Const. art. 11, § 7 and Mont. Const. art. 3, § 5.

¹¹⁵ *Id.*

“construed to refer only to annual spending decisions.”¹¹⁶ Similarly, in Montana, the definition of an appropriation is “quite limited” and “refers only to the authority given to the legislature to expend money from the state treasury.”¹¹⁷ So, while the face of these constitutional provisions suggest broad exemptions, the courts in both of these states have interpreted to be much narrower.

The facially narrow states, California, Maryland, Massachusetts, and Nebraska, limit the extent of their appropriations exemption to only general or recurring appropriations.¹¹⁸ While California, Massachusetts, and Maryland limit their exemptions in this way explicitly,¹¹⁹ Nebraska’s language was interpreted this way by its Supreme Court.¹²⁰ Specifically, the Nebraska constitution exempts acts “making appropriations for the expense of the state government or a state institution existing at the time of the passage of such act.”¹²¹ Understanding that this language should be “given a strict construction in light of the fundamental purpose of the referendum,” the Nebraska Supreme Court interpreted the exception to only apply to “ordinary running expenses of the state government and existing state institutions” and does not include new appropriations.¹²² As one can see, these states provide examples of some of the most narrow appropriation exceptions in the nation.

The final two states, Arizona and Missouri, have appropriation exemption provisions that, like Michigan’s, exempt appropriations for state institutions.¹²³ Arizona’s constitution exempts laws “for the support and maintenance of the departments of the state government and state

¹¹⁶ *Alaska Legislative Council ex rel. Alaska State Legislature v. Knowles*, 86 P.3d 891, 894 n. 17 (Alaska 2004).

¹¹⁷ *Nicholson v. Cooney*, 877 P.2d 486, 491 (Mont. 1994).

¹¹⁸ M. Dane Waters, *Initiative and Referendum Almanac* 110, 214-15, 223, 284-85 (2003).

¹¹⁹ *Id.* at 110, 214-15.

¹²⁰ *Lawrence v. Beermann*, 222 N.W.2d 809, 810 (Neb. 1974).

¹²¹ Neb. Const. art. 3, § 3.

¹²² *Lawrence*, 222 N.W.2d at 810.

¹²³ M. Dane Waters, *Initiative and Referendum Almanac* 56, 225 (2003).

institutions” from the referendum.¹²⁴ Similarly, Missouri’s constitution excludes “laws making appropriations . . . for the maintenance of state institutions.”¹²⁵ Unfortunately, it seems that only Arizona’s Supreme Court has done much to interpret its provision. Determining what it means for an act to be “for the support and maintenance” of a state institution, the Arizona Supreme Court held that this question turns on whether the funds are “use[d] in carrying out the objects and functions of the department.”¹²⁶ Missouri’s courts, on the other hand, have only gotten as far as determining that an act creating a tax whose proceeds are appropriated by the state constitution is not referendum proof.¹²⁷

In summary, it seems that Michigan’s construction of its appropriation exemption is unique in comparison to the other states. While a good number of states have no referendum exemptions whatsoever, others have adopted so many as to render their referendum provisions ineffective. For those states where their appropriations exemptions are relevant, it seems that the majority have interpreted their provisions in a narrow manner so as to protect the people’s referendum.

4. *Textual Canons*

The textual canons of construction provide another set of tools for understanding the meaning of the appropriations exemption. While these canons may not necessarily apply to constitutional construction,¹²⁸ it is notable that Justice Young utilizes textual canons in his concurrence.¹²⁹ For example, Justice Young uses the presumption against surplusage¹³⁰ and the

¹²⁴ Ariz. Const. art. 4, §1, cl. 3.

¹²⁵ Mo. Const. art. 3, § 52(a).

¹²⁶ *Garvey v. Trew*, 170 P.2d 845, 848 (Ariz. 1946).

¹²⁷ *Heinkel v. Toberman*, 226 S.W.2d 1012, 1016 (Mo. 1950).

¹²⁸ *In re Proposal C*, 185 N.W.2d at 14 (citing *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819)) (Holding that technical rules of statutory construction do not apply to constitutional construction).

¹²⁹ *Michigan United Conservation Clubs*, 630 N.W.2d at 305-308 (Young, J., concurring).

¹³⁰ SURPLUSAGE CANON, Black’s Law Dictionary (10th ed. 2014) (“if possible, every word and every provision in a legal instrument is to be given effect”). See also *Whitman v. City of Burton*, 831 N.W.2d 223, 229 (Mich. 2013).

presumption of consistent usage¹³¹ canons to dispute Justice Cavanagh’s assertion that the term “appropriation” was intended to mean “general appropriations bills containing substantial grants to state agencies.”¹³² Justice Young argues that if the framers intended the referendum exemption to apply only to general appropriations, they would have used language similar to that used in Article 4, § 31, which actually uses the phrase “general appropriations,” or they would have provided some explanation in the Address to the People.¹³³ Noting that the framers did neither of these things, Justice Young argues that the broad interpretation of the appropriations exemption is justified.¹³⁴

However, viewing the use of the term “appropriation” in the full context in the Michigan Constitution, the surplusage and consistent usage canons can be found to support a narrower interpretation of the appropriations exemption. The “general appropriations” described in Art. 4, § 31 of the Michigan Constitution, refer to the large appropriations acts proposed at the beginning of each year and involves all the appropriations set forth in the yearly budget.¹³⁵ Since the appropriations exemption does not use the phrase “general appropriation,” Justice Young was right to conclude that “appropriations for state institutions” must have a different, and more broadly construed meaning than the “general appropriations” in Art. 4, § 31.¹³⁶ However, Justice Young failed to consider the “bill appropriating money” exemption to the legislative referendum within Art. 4, § 34. Under this section, the state legislature may propose bills to the general electorate so long as they are not a “bill appropriating money.”¹³⁷ The majority interpretation within *Michigan United Conservation Clubs* gives the “appropriations for state institutions”

¹³¹ PRESUMPTION OF CONSISTENT USAGE, Black’s Law Dictionary (10th ed. 2014) (“a word or phrase is presumed to bear the same meaning throughout a text, esp. a statute, unless a material variation in terms suggests a variation in meaning”).

¹³² *Michigan United Conservation Clubs*, 630 N.W.2d at 307-08 (Young, J., concurring); *Id.* at 321 (Cavanagh, J., dissenting).

¹³³ *Id.* at 308 (Young, J., concurring); Mich. Const. art. 4 § 31.

¹³⁴ *Michigan United Conservation Clubs*, 630 N.W.2d at 308.

¹³⁵ Mich. Const. art. 4, § 31.

¹³⁶ *Michigan United Conservation Clubs*, 630 N.W.2d at 308.

¹³⁷ Mich. Const. art. 4, § 34.

phrase within Art. 2, § 9 essentially the same meaning as the “bill appropriating money” phrase within Art. 4, § 34.¹³⁸ For the court’s interpretation to adhere to the surplusage and consistent usage canons, it must give the appropriations exemption a meaning that is both broader than the “general appropriation bill” described in Art. 4, §31 and narrower than the “bill appropriating money” described in Art. 4, § 34.¹³⁹

Another textual canon which supports a narrower interpretation of the appropriations exemption is *noscitur a sociis*.¹⁴⁰ Utilizing this canon, one can read the appropriation exemption together with the “deficiencies in state funds” exemption to conclude that both exemptions are similarly limited.¹⁴¹ The extent of the “deficiencies in state funds” exemption is was decided in *Kuhn v. Department of Treasury*.¹⁴² The act in question, the Michigan Income Tax Act of 1967, did not appropriate funds but stated that its purpose was to meet anticipated deficiencies in state funds.¹⁴³ In deciding the case, the court adopted a restrictive interpretation of the “deficiencies in state funds” exemption.¹⁴⁴ Finding it “inescapable” that the clause “refers only to such deficiencies as exist at the time of passage of [an] Act,” the court found that the anticipated deficiencies referred to in the Michigan Income Tax Act did not exempt the act from referendum.¹⁴⁵ Considering that the Michigan Supreme Court placed a temporal limitation on the “deficiencies in state funds” exemption,¹⁴⁶ utilizing *noscitur a sociis*, it follows that a similar limitation should be placed on the appropriations exemption.

5. *Substantive Canons*

¹³⁸ *Michigan United Conservation Clubs*, 630 N.W.2d at 298; Mich. Const. art. 2, § 9; art. 4, § 34.

¹³⁹ Mich. Const. art. 2, § 9; art. 4, §§ 31, 34.

¹⁴⁰ *NOSCITUR A SOCIIS*, Black's Law Dictionary (10th ed. 2014) (“the meaning of an unclear word or phrase . . . should be determined by the words immediately surrounding it.”).

¹⁴¹ Mich. Const. art. 2, § 9.

¹⁴² *Kuhn v. Department of Treasury*, 183 N.W.2d 796, 799-800 (Mich. 1971).

¹⁴³ *Id.* at 798.

¹⁴⁴ *Id.* at 799-800.

¹⁴⁵ *Id.* at 800.

¹⁴⁶ *Id.*

Substantive canons of interpretation can help with interpreting constitutional language. The Michigan Supreme Court has previously acknowledged a substantive canon relating to the referendum in *Kuhn*.¹⁴⁷ In this case the court found that “constitutional provisions by which the people reserve to themselves a direct legislative voice ought to be liberally construed” and, in turn, opted to narrowly interpret the “deficiencies in state funds” exemption to the referendum.¹⁴⁸ Other states, such as Alaska, Arizona, and Nebraska, have also used similar versions of this canon to narrowly interpret their referendum exemptions.¹⁴⁹ However, despite the adoption of this canon in Michigan and similarly situated states, only the Cavanagh and Kelly dissents in *Michigan United Conservation Clubs* made reference to it.¹⁵⁰ It is not clear if those in the majority intended to overturn this substantive canon, but it is clear that their broad conceptualization of the appropriations exemption does not serve to preserve the people’s referendum.

6. *Presumption Against Invalidation*

The presumption against constitutional invalidation states that “an interpretation that does not create constitutional invalidity is preferred to one that does.”¹⁵¹ In his concurrence in *Michigan United Conservation Clubs*, Justice Young argued that the majority has only given the exemption its “natural import” and has not invalidated the referendum provision.¹⁵² However, looking at the practical effect the majority’s decision has had on the referendum, it is difficult to conclude that the referendum provision that was ratified in 1963 is still in effect today.

¹⁴⁷ *Kuhn*, 183 N.W.2d at 799-800.

¹⁴⁸ *Id.*

¹⁴⁹ See *City of Fairbanks v. Fairbanks Convention & Visitors Bureau*, 818 P.2d 1153, 1157 (Alaska 1991) (“[T]he general rule that the initiative power will be construed broadly should control in the repeal context.”); *Pioneer Trust Co. of Arizona v. Pima County*, 811 P.2d 22, 27 (Ariz. 1991) (Holding that legislative review by the people is strongly encouraged by the Arizona Constitution); *Lawrence*, 222 N.W.2d at 810 (Holding that exemption language “should be given a strict construction in light of the fundamental purpose of the referendum”).

¹⁵⁰ *Michigan United Conservation Clubs*, 630 N.W.2d at 321 (Cavanagh, J., dissenting); *Id.* at 327 (Kelly, J., dissenting).

¹⁵¹ *In re Proposal C*, 185 N.W.2d at 14.

¹⁵² *Michigan United Conservation Clubs*, 630 N.W.2d at 303 n. 9 (Young, J., concurring).

Instead of a people's check on the legislature intended by the drafters and ratifiers of the 1963 constitution,¹⁵³ the majority's interpretation has resulted in a limited referendum power which "exists at the Legislature's pleasure."¹⁵⁴ The Michigan "Legislature now regularly makes its controversial work immune to referendums" through the addition of appropriations.¹⁵⁵ Further, the Michigan constitution already provides for a statutory referendum initiated by the legislature in Article 4, § 34.¹⁵⁶ Instead of avoiding the creation of a constitutional invalidity,¹⁵⁷ the majority seems to have invalidated the people's referendum and replaced it with a modified legislative referendum.

Another argument made by Justices Corrigan and Young in their concurrences is that the people's power to reject offensive laws has not been invalidated because the initiative, which does not have the same exemptions, is a viable alternative.¹⁵⁸ This assertion, however, ignores the substantial differences in the operation of the initiative and referendum procedures. First, the initiative requires 60% more valid petition signatures than a referendum.¹⁵⁹ Second, proponents of a referendum need only win a "no vote" to be successful while proponents of an initiative need to win a "yes vote" to succeed.¹⁶⁰ This difference is significant when taking status quo bias into account.¹⁶¹ In elections where voters are given a choice between "yes" or "no," voters, particularly less informed voters, are significantly more likely to vote "no" than "yes."¹⁶² This is because a "yes" vote represents an uncertain change while a "no" vote is perceived to maintain

¹⁵³ Michigan Constitutional Convention, Official Record 2394 (Austin C. Knapp ed., 1964).

¹⁵⁴ *Michigan United Conservation Clubs*, 630 N.W.2d at 321 (Cavanagh, J., dissenting).

¹⁵⁵ Zoe Clark & Rick Pluta, Why Your Vote on a Wolf-hunt Referendum Might Not Matter, MICHIGAN RADIO (Apr. 12, 2013), <http://michiganradio.org/post/why-your-vote-wolf-hunt-referendum-might-not-matter> (last visited Mar. 15, 2016).

¹⁵⁶ Mich. Const. art. 4 § 34.

¹⁵⁷ *In re Proposal C*, 185 N.W.2d at 14.

¹⁵⁸ *Michigan United Conservation Clubs*, 630 N.W.2d at 298 (Corrigan, C.J., concurring); *Id.* at 306, 310 (Young, J., concurring).

¹⁵⁹ Mich. Const. art. 2, § 9.

¹⁶⁰ *Id.*

¹⁶¹ Peter Selb, *Supersized Votes: Ballot Length, Uncertainty, and Choice in Direct Legislation Elections*, 135 Pub. Choice 319, 323 (2008).

¹⁶² *Id.*

the status quo.¹⁶³ Instead of placing the burden of overcoming this status quo bias on the legislature, the initiative process places this burden on the initiative proponents. Finally, while the referendum suspends the effective date of contested legislation, an initiative is not given effect until ten days after it is approved by the voters in an election.¹⁶⁴ As noted by Justice Kelly, had the proponents of the referendum in *Michigan United Conservation Clubs* pursued an initiative instead, the disputed act would have been in effect for at least sixteen months before being voted on by the people.¹⁶⁵

D. Alternative Constructions

In Michigan “stare decisis is a principle of policy, not an inexorable command.”¹⁶⁶ When overturning prior decisions, the court considers four factors: “1) whether the earlier case was wrongly decided, 2) whether the decision defies “practical workability,” 3) whether reliance interests would work an undue hardship, and 4) whether changes in the law or facts no longer justify the questioned decision.”¹⁶⁷

A decision to overturn *Michigan United Conservation Clubs* would be supported by all four of these factors. First, considering the numerous factors previously discussed supporting a narrower interpretation of the appropriations exemption, a strong argument can be made that it was wrongly decided. Second, the decision “defies ‘practical workability’”¹⁶⁸ because it makes it more difficult for referendum proponents to get a petition on the ballot and encourages the legislature to shoehorn appropriations into acts which do not require them. Third, overturn of the

¹⁶³ *Id.*

¹⁶⁴ Mich. Const. art. 2, § 9.

¹⁶⁵ *Michigan United Conservation Clubs*, 630 N.W.2d at 330 (Kelly, J., dissenting).

¹⁶⁶ *Pohutski v. City of Allen Park*, 641 N.W.2d 219, 231 (Mich. 2002).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

decision would only create an “undue hardship”¹⁶⁹ for the legislature in trying to referendum-proof its legislation. Finally, considering the Legislature’s increasing abuse of the appropriations exemption to referendum-proof controversial legislation,¹⁷⁰ the facts no longer support continued adherence to *Michigan Untied Conservation Clubs*.¹⁷¹

This essay will consider three alternative constructions of the appropriations exemption.

1. General Appropriations

The first construction that warrants consideration is the “general appropriations” construction of the appropriations exemption. Under this model, the phrase “acts making appropriations for state institutions” would refer only to the general appropriation acts described in Art. 4, § 31.¹⁷² Since this interpretation provides the narrowest possible construction of the appropriations exemption, it is most in line with the substantive canon supporting liberal construction of “constitutional provisions by which the people reserve to themselves a direct legislative voice.”¹⁷³ Unfortunately, considering that none of the “gas tax” cases involved general appropriations acts¹⁷⁴ and that the phrase “general appropriation” does not appear in Art. 2, § 9,¹⁷⁵ the “general appropriations” construction is neither supported by case law nor the text of the constitution.

2. Core Functions

Another, more persuasive, construction of the appropriations exemption was advanced in

¹⁶⁹ *Id.*

¹⁷⁰ Zoe Clark & Rick Pluta, Why Your Vote on a Wolf-hunt Referendum Might Not Matter, MICHIGAN RADIO (Apr. 12, 2013), <http://michiganradio.org/post/why-your-vote-wolf-hunt-referendum-might-not-matter> (last visited Mar. 15, 2016).

¹⁷¹¹⁷¹ *Michigan Untied Conservation Clubs*, 630 N.W.2d at 298.

¹⁷² Mich. Const. art. 2, § 9; art. 4, § 31.

¹⁷³ *Id.* at 799-800.

¹⁷⁴ See *County Rd. Ass’n*, 282 N.W.2d at 774; *Riley*, 218 N.W.2d at 144; *Good Raods Federation*, 53 N.W.2d at 481; *Moreton*, 216 N.W. at 450; *Deland*, 203 N.W. at 529.

¹⁷⁵ Mich. Const. art 2, § 9.

Justice Kelly’s dissent in *Michigan United Conservation Clubs*.¹⁷⁶ Justice Kelly’s argument turns on the definition of the word “for” in the phrase “appropriations for state institutions.”¹⁷⁷ As discussed previously, Justice Kelly believed the majority equated the word “for” in this phrase with the word “to.”¹⁷⁸ Instead, she understood this word choice to mean that the framers intended an appropriation for a state institution be related in some way to the purpose of the institution.¹⁷⁹ Accordingly, she interpreted the appropriations exemption to apply only when “the appropriation is intended to support the core function of a state institution.”¹⁸⁰ Noting that the appropriations at issue only supported the “specific substantive provisions of the act,” she concluded that the appropriation should not have exempted the act from referendum.¹⁸¹

A number of the factors discussed support Justice Kelly’s “core functions” interpretation. Since this construction requires both a determination of a state institution’s “core function” and whether the appropriation supports that “core function” in order to find an act exempt from the referendum,¹⁸² it is consistent with the intent of the drafters who wanted to ensure that the referendum could not easily be tampered with by the legislature.¹⁸³ Further, since the “gas tax” cases “demonstrate that the appropriation exception within art. 2, § 9, was prompted by a fear of financial embarrassment,”¹⁸⁴ the “core functions” interpretation is consistent with precedent because it ensures that the only acts that would cause financial embarrassment are exempt from the referendum.¹⁸⁵

However, while Justice Kelly’s “core functions” interpretation may be more strongly

¹⁷⁶ *Michigan United Conservation Clubs*, 630 N.W.2d at 326-27. (Kelly, J., dissenting).

¹⁷⁷ *Id.* at 326. (Kelly, J., dissenting).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 327 (Kelly, J., dissenting).

¹⁸¹ *Id.*

¹⁸² *Michigan United Conservation Clubs*, 630 N.W.2d at 327. (Kelly, J., dissenting).

¹⁸³ Michigan Constitutional Convention, Official Record 2392-94, 2928, 2955 (Austin C. Knapp ed., 1964)

¹⁸⁴ *Michigan United Conservation Clubs*, 630 N.W.2d at 328 (Kelly, J., dissenting); *See also Deland*, 203 N.W. at 530; *Moreton*, 216 N.W. at 453.

¹⁸⁵ *Michigan United Conservation Clubs*, 630 N.W.2d at 328-29 (Kelly, J., dissenting).

supported by the precedent and historical record, this does not mean there are not legitimate critiques of the interpretation. In his concurrence, Justice Young argues that Justice Kelly’s interpretation inserts too much uncertainty into the determination of whether the exemption applies.¹⁸⁶ He argues that leaving the courts so many open questions – such as “what *is* a state agency’s ‘core function?’” or how large must an appropriation be to support a “core function” – will only serve to insert “judges’ personal preferences” into the outcome.¹⁸⁷ Similarly, Justice Markman shared these concerns that Justice Kelly’s interpretation “would engage the judiciary in an exercise far beyond its competence and authority.”¹⁸⁸ Accordingly, a reformulation of Justice Kelly’s argument may need to address these concerns in order to be adopted by the court.

3. *Existing State Function*

The “existing state function” construction reads the phrase “appropriation for state institutions”¹⁸⁹ to mean that only acts which include an appropriation to support a state function that is being carried out by a state institution at the time of the act’s passage. Acts that only include appropriations that support new functions would still be subject to the referendum. Rather than basing its conclusion on a specific individual terms within the appropriations exemption, the “existing state function” construction views the appropriations exemption within the full context of Article 2, § 9 and the rest of the Michigan Constitution. Reading the appropriations exemption language in this full context, and in light of the drafting history, court precedent, and other factors, the “existing state function” construction seems to provide the most persuasive alternative to the majority’s construction in *Michigan United Conservation Clubs*.¹⁹⁰

The first, and primary, rule of constitutional construction is Thomas Cooley’s rule of

¹⁸⁶ *Id.* at 310 (Young, J., concurring).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 317 (Markman, J., concurring).

¹⁸⁹ Mich. Const. art. 2, § 9.

¹⁹⁰ *Michigan United Conservation Clubs*, 630 N.W.2d at 298.

“common understanding,”¹⁹¹ which requires the court to look for the interpretation “most obvious” to the general populace who adopted the constitutional language.¹⁹² Art. 2, § 9 exempts “acts making appropriations for state institutions or to meet deficiencies in state funds.”¹⁹³ In trying to decipher this language’s “common understanding,” it must first be noted that several phrases within in the referendum exemption clause have been defined by the court. A “state institution” is essentially any state department or state subdivision “which the Legislature had delegated or should delegate the exercise of state functions.”¹⁹⁴ As noted in *Moreton*, the determination turns on whether the entity carries out a state function.¹⁹⁵ Further, the exemption for acts “to meet deficiencies in state funds” has been found to apply only to acts that address “such deficiencies as exist at the time of passage of the Act.”¹⁹⁶ Thus, the only phrase in the referendum exemption clause not interpreted by the court before *Michigan United Conservation Clubs* is “appropriation for.”

Rather than interpreting the “appropriation for” phrase in a vacuum, however, it makes more sense to interpret the language in its full context. Considering that it is the “state function” that makes the “state institution,”¹⁹⁷ it follows that an activity is not a “state function” until it is carried out by a “state institution.” Accordingly, an appropriation for a state institution must be an appropriation to support a state function currently being carried out by a state institution. For instance, all five “gas tax” cases involved appropriations to support existing state functions carried out by their respective state institutions.¹⁹⁸ Further, under the textual canon *noscitur a sociis*, one can read the appropriation exemption to be temporally limited in a similar fashion as

¹⁹¹ *Id.*

¹⁹² Thomas M. Cooley, LL.D., *A Treatise on the Constitutional Limitations* 143 (Walter Carrington ed., 8th ed. 1927).

¹⁹³ Mich. Const. art. 2, § 9.

¹⁹⁴ *Deland*, 203 N.W. at 530; *Moreton*, 216 N.W. at 453.

¹⁹⁵ *Moreton*, 216 N.W. at 453.

¹⁹⁶ *Kuhn*, 183 N.W.2d at 800.

¹⁹⁷ *Moreton*, 216 N.W. at 453.

¹⁹⁸ *See County Rd. Ass’n*, 282 N.W.2d at 780; *Riley*, 218 N.W.2d at 146; *Alger*, 53 N.W.2d at 485; *Moreton*, 216 N.W. at 451; *Deland*, 203 N.W. at 529.

the “deficiencies in state funds” exemption was in *Kuhn*.¹⁹⁹ Finally, the constitution’s structure also supports the “existing state function” interpretation of the appropriations exemption as it would be broader than Article 4, § 31’s “general appropriations” and narrower than Article 4, § 34’s “bill appropriating money.”²⁰⁰

Michigan’s second rule of constitutional construction is if the face of the text language does not provide a single clear meaning, the court may then consider the circumstances surrounding the adoption of the provision and the purposes sought by it in order to clarify the text’s meaning.²⁰¹ These factors also support the “existing state function” construction. In *Deland*, the Michigan Supreme Court determined that the purpose of the appropriations exemption is to “enable the state to exercise its various functions free from financial embarrassment.”²⁰² Since the “existing state function” construction only subject appropriations for proposed state functions, it cannot result in financial embarrassment to the state. Further, since this construction would not allow the legislature to referendum-proof legislation that adds or expands state functions, it is consistent with the intent of the constitution’s framers to prevent the legislature from using the referendum exemptions to thwart the will of the people.²⁰³

Third, when interpreting the constitution, the court must give preference to interpretations that avoid creating constitutional invalidities.²⁰⁴ Unlike the majority’s interpretation in *Michigan United Conservation Clubs*, the “existing state function” construction does not invalidate the people’s check on the legislature. Since it empowers the legislature to referendum-proof controversial legislation through mere additions of appropriations, the current interpretation of the appropriations exemption essentially makes the availability of the referendum subject to the

¹⁹⁹ *Kuhn*, 183 N.W.2d at 800.

²⁰⁰ Mich. Const. art. 4, §§ 31, 34.

²⁰¹ *In re Proposal C*, 185 N.W.2d at 14.

²⁰² *Deland*, 203 N.W. at 530.

²⁰³ Michigan Constitutional Convention, Official Record 2392-94, 2928, 2955 (Austin C. Knapp ed., 1964).

²⁰⁴ *Id.*

legislature’s consent.²⁰⁵ The existing state function interpretation, on the other hand, would preserve the people’s referendum when the legislature creates new state functions and attaches an appropriation. For example, both P.A. 381 of 2000, the act at issue in *Michigan United Conservation Clubs*, and P.A. 436 of 2012, the Emergency Manager Law, would be subject to the referendum under the “existing state function” construction, because the appropriations in each only supported new functions proposed under the acts.²⁰⁶

Finally, the existing state functions interpretation would also alleviate Justices Young and Markman’s concerns about leaving too much uncertainty in determining whether the appropriations exemption applies.²⁰⁷ Unlike Justice Kelly’s interpretation, the analysis will not require a determination of state institutions’ “core functions” nor will the court need to consider the size of appropriations.²⁰⁸ All that will be required is a determination of what the act says the money is appropriated for. If the appropriation supports pre-existing state functions, the act will be referendum-proof. If the appropriations within an act are to support new or expanded state functions as described in the act, the act is subject to the referendum.

However, an admitted weakness of the “existing state functions” construction is an underlying assumption that Michigan’s single object rule²⁰⁹ would not permit funding for an existing function and a new function to be proposed within the same act. If this is not the case, this construction would leave another loophole through which the legislature could referendum-proof its acts. However, considering that the funding of current state expenses is supposed to be included within a general appropriation act²¹⁰ and that amendments to existing acts must fit

²⁰⁵ *Michigan United Conservation Clubs*, 630 N.W.2d at 322 (Cavanagh, J., dissenting).

²⁰⁶ 2000 Mich. Pub. Acts 381, § 5w; 2012 Mich. Pub. Acts 436, §§ 34-35.

²⁰⁷ *Michigan United Conservation Clubs*, 630 N.W.2d at 310 (Young, J., concurring); *Id.* at 317 (Markman, J., concurring).

²⁰⁸ *Id.* at 310 (Young, J., concurring).

²⁰⁹ Mich. Const. art. 4, § 24.

²¹⁰ Mich. Const. art. 4, § 31.

under the original title of the act,²¹¹ this assumption seems to be a safe one to make.

III. CONSTITUTIONAL AMENDMENT

While judicial reconsideration is the less costly method of changing the effect of constitutional provisions, it can often be more timely and effective to pursue a constitutional amendment. The current referendum exemption provision states that “[t]he power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds.”²¹² There are several different ways to amend this language in order to restore the referendum – this essay will consider two.

A. “General Appropriations”

The first method would be to amend the referendum exemption language so that it is facially narrower. In this way, Michigan would follow the lead of states like California, Maryland, Massachusetts, and Nebraska, which have facially narrow appropriations exemptions.²¹³ Specifically, the amendment proposal could remove the current exemption language within Art. 2, § 9 and replace it with phrases explicitly from Art. 4, § 31. As previously discussed, an appropriations exemption which limits the exemption to the “general appropriations” described in Art. 4, § 31 would allow for the most liberal construction of the referendum power while retaining an exemption. To make this change, the exemption language would be amended to read – “the power of referendum does not extend to general appropriation acts or to acts supplementing appropriations for the current fiscal year's operation.” Accordingly, the appropriations exemption would refer only to the large appropriations acts passed as part of the yearly budgeting process.

²¹¹ *Midland Twp., v. Michigan State Boundary Commission*, 259 N.W.2d 326, 333 (Mich. 1977).

²¹² Mich. Const. art 2, § 9.

²¹³ M. Dane Waters, *Initiative and Referendum Almanac* 110, 214-15, 223, 284-85 (2003).

B. The North Dakota Model

The second option for amending Michigan's referendum would be to model after the language within North Dakota's Constitution. North Dakota has two primary differences from Michigan within its referendum provision. First, North Dakota referendum's does not have any exemptions to its referendum power and instead places limitations on the stay of acts subjected to a referendum.²¹⁴ While several other states also do not have referendum exemptions,²¹⁵ North Dakota's Constitution also exempts "emergency measures and appropriations measures for the support and maintenance of state departments and institutions" from having their effective date suspended due to the submission of a referendum petition.²¹⁶ In this way, North Dakota's people are unrestricted in the types of acts they can bring to a referendum vote and the state cannot be financially embarrassed by the mere filing of a referendum petition. Second, North Dakota's Constitution allows for referendum on portions of acts.²¹⁷ This allows groups advancing a referendum to pinpoint specific controversial provisions to subject to a vote of the general electorate. Numerous other states with referendum provisions allow for this sort of provision specific referendum votes.²¹⁸ While a change to incorporate either one of these differences into the Michigan Constitution would protect the referendum, North Dakota's language has allowed it to become "one of the top five most prolific" users of direct legislative powers.²¹⁹

The Voters for Fair Use of the Ballot Referendum, an organization seeking to amend Michigan's referendum, support an amendment that would essentially incorporate North

²¹⁴ N.D. Const. art. 3, §§ 1, 5.

²¹⁵ Specifically Arkansas, Idaho, Nevada, and Oregon. M. Dane Waters, *Initiative and Referendum Almanac* 77-78, 183, 296-97, 371 (2003).

²¹⁶ N.D. Const. art. 3, § 5.

²¹⁷ N.D. Const. art. 3, § 1

²¹⁸ *See e.g.* Ariz. Const. art. 4, § 1, cl. 3; Ohio Const. art. 2, § 2.01c; Or. Const. art 4, § 1, cl. 3(a).

²¹⁹ M. Dane Waters, *Initiative and Referendum Almanac* 320 (2003).

Dakota’s referendum model.²²⁰ Their proposed amendment to Art. 2, § 9 (with removals struck through and additions in all-caps) reads as follows:

~~The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and~~ must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted. . . .

THE POWER OF REFERENDUM MAY BE INVOKED BY THE PEOPLE AGAINST ONE OR MORE PARTS OR SECTIONS OF ANY LAW IN THE SAME MANNER IN WHICH SUCH POWER MAY BE INVOKED AGAINST A WHOLE LAW. THE FILING OF A REFERENDUM PETITION AGAINST ONE OR MORE PARTS OR SECTIONS OF A LAW SHALL NOT DELAY THE REMAINDER OF SUCH LAW FROM BECOMING EFFECTIVE.

No law OR PORTION THEREOF 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, EXCEPT THAT IF A LAW OR PORTION THEREOF AS TO WHICH THE POWER OF REFERENDUM HAS BEEN INVOKED CONTAINS APPROPRIATIONS FOR STATE INSTITUTIONS OR TO MEET DEFICIENCIES IN STATE FUNDS, SUCH APPROPRIATIONS SHALL BECOME EFFECTIVE AS SPECIFIED IN THE LAW AND WITHOUT REGARD TO THE REFERENDUM. . . .

Any law OR PORTION THEREOF submitted to the people by either initiative or referendum petition and approved by a majority of the votes cast thereon at any election shall take effect 10 days after the date of the official declaration of the vote.²²¹

While it still makes use of the ambiguous “appropriations for state institutions” language, this proposal incorporation of North Dakota’s referendum model makes it a strong alternative to our current constitutional language.

IV. CONCLUSION

The crux of the debate over Michigan’s referendum power is the question of which legislative powers should be given priority – the state legislature’s or the direct legislative

²²⁰ VOTERS FOR FAIR USE OF BALLOT REFERENDUM, <http://www.votersfubr.org/amendment> (last visited April 22, 2016).

²²¹ *Id.*

powers of the general electorate? By empowering the state legislature to easily referendum-proof its legislation, the Michigan Supreme Court's decision in *Michigan United Conservation Clubs*²²² clearly gives the state legislature's will greater priority than that of the people. As we have seen with the Emergency Manager Law and the resulting crisis in Flint, this subordination of the people's will can have dire consequences.

²²² *Michigan United Conservation Clubs*, 630 N.W.2d at 298.