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STATE JURISPRUDENCE, THE ROLE OF THE COURTS, AND THE RULE OF LAW: THE FEDERALIST SOCIETY: PANEL II: A Judicial Traditionalist Confronts the Common Law

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BIO: *Justice, Michigan Supreme Court. Justice Young received his bachelor's degree with honors from Harvard College in 1974 and his Juris Doctorate from Harvard Law School in 1977. Justice Young practiced law for fifteen years with the Law Firm of Dickinson, Wright, Moon, Van Dusen & Freeman, and then in 1992, he was named Vice President, Corporate Secretary, and General Counsel of AAA of Michigan. Among other public offices, he has served as a member of the Michigan Civil Service Commission and the Central Michigan University Board of Trustees. Justice Young was appointed to the Michigan Court of Appeals in 1995. On January 3, 1999, he was appointed to the Michigan Supreme Court. Most recently Justice Young was elected in 2002 to a term that expires in January of 2011. This article is based upon remarks Justice Young delivered on September 16, 2003 at the Joint Federalist Society/Ave Maria Law School Symposium: State Jurisprudence, the Role of Courts, and the Rule of Law.

SUMMARY:

... I consider myself a disciplined judicial traditionalist. ... I am certainly not the first jurist to express anxiety about the judiciary's capacity to pass upon questions of public policy. ... Now, this screed from a jurist who obviously has participated in decisions altering Michigan's common law may seem surprising. ... So what should a conscientious judicial traditionalist "do" with Grandpa? In Michigan, my Court is evolving a few principles that collectively amount to a theory of "conservancy" for the common law. ... I also take comfort in the fact that those who preceded my custody of Grandpa did not manage to sunder us, despite giving him freer range to roam than I and the majority of my colleagues on the current Michigan Supreme Court would have preferred. ... Finally, it is of some consolation to remember that, if Grandpa becomes unbearably frisky under the judiciary's care, the People's legislature has the power to corral, quiet and correct him until he is no longer a danger to the public's sensibilities. ...

TEXT:

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I. The Common-law Tradition as Cause for Anxiety

I consider myself a disciplined judicial traditionalist. This means, in short, that I view my role as a jurist through the lens of three fundamental principles. The first is respect for the republican form of government assured to us by Article IV, Section 4 of our Constitution. n1 The second is acknowledgement, in light of the exclusive grant of legislative powers to Congress in Article I, Section 1, of the fact that it is the legislature that serves as the People's lawgiver in matters of public policy. n2 The third, building on the second, is recognition within the architectural structure of our constitution that, beyond the rights enumerated in the Bill of Rights that specifically protect individuals, public policy is properly a product of the majoritarian process of the political branches of government - the executive and legislative branches.

While the Michigan Supreme Court has the institutional power to invade the constitutional prerogatives of the other branches of government and make the state's policy, we do not, in light of the principles outlined above, have the constitutional authority to do so. Consequently, as a member of the judicial branch, my role is to give the policy preferences of the legislature meaning by construing the words of statutes in a manner consistent with their clear import. n3

The common law, however, is an entirely different beast. The ideas and practices that form the common-law tradition - at least as the [*301] tradition has been received and practiced in the United States to date - run counter to

the core principles described above and thrust the jurist into the odd role of lawgiver. n4 As a starchy judicial traditionalist, I would ordinarily feel compelled to begin any discussion of the common law by exploring the provenance of judicial authority to change extant common-law rules. n5 But I think Professor Stephen Presser in his remarks at this symposium and in his writings has made a substantial contribution to that end. n6 I am therefore simply going to take as my starting point the proposition that the established common-law tradition, with any number of dodges and sleights of hand, allows judges to "discover" or make common-law rules that address evolving social concerns. n7

Consequently, I want to focus my remarks here on the embarrassment that the common law presents - or ought to present - to a conscientious judicial traditionalist. This idea that the common law authorizes judicial law making - and I believe this to be a fairly uniform understanding in contemporary judicial circles in America - has been regnant in Michigan in fact, if not in self-description, since we entered the Union. n8 Yet this so-called warrant to make law should [*302] make any self-confessed judicial traditionalist extremely uncomfortable.

To give a graphic illustration of my feelings on the subject, I tend to think of the common law as a drunken, toothless ancient relative, sprawled prominently and in a state of nature on a settee in the middle of one's genteel garden party. Grandpa's presence is undoubtedly a cause of mortification to the host. But since only the most ill-bred of guests would be coarse enough to comment on Grandpa's presence and condition, all concerned simply try ignore him.

Like the attendees at my imaginary garden party, common-law apologists have spent centuries denying that Grandpa was actually in attendance or, if so acknowledged, vigorously asserting that he was actually clothed and sober. n9 Indeed, some jurists like Justice Cardozo actually celebrate Grandpa and his condition and enthusiastically urge all of us to relax, undress, and join Grandpa in his inebriated communion with nature. n10

As is the case with young children unschooled in social niceties, legal realists have been pointing and making a regular fuss about the fact that there is a frightening, drunken old man laying about with no clothes on. And like that child, I too acknowledge that this modern conception of the common law that authorizes jurists to discover, create, or modify common-law rules - or policy - is entirely inconsistent with normative constitutional policies and principles, according to which prerogatives of policymaking are given to other branches of government. n11

I am certainly not the first jurist to express anxiety about the judiciary's capacity to pass upon questions of public policy. Over two centuries ago, in his dissenting opinion in *Calder v. Bull*, n12 Justice James Iredell expressed similar disquietude in describing the Supreme Court's "delicate and awful" power to engage in judicial review of legislation passed within the constitutional scope of the legislature's authority:

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The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. n13

The same might easily be said of common-law adjudication, a task every bit as "delicate and awful" as that contemplated by Justice Iredell. Indeed, I find that my unease is amplified by the fact that an esteemed American jurist like Justice Iredell - who lived in an age when jurists and legal scholars seemed intimate and comfortable with the idea that common law was founded on ineluctably discoverable natural law principles - could so openly acknowledge that the judiciary's capability to apply amorphous principles of "natural justice" was dubious.

I happen to reject, as judicial conceit, the notions that common-law jurists have been discovering natural or immutable principles, n14 or that we have any real calculus for discovering such principles and consistently applying them in the cases before us. I equally reject, as inconsistent with traditional economic theory (and probably any available empirical data), the Posnerian view that we common-law judges inexorably enhance efficiency in our decisions. n15 Most of us in the judiciary would not know a transactional cost if it slapped us in the face, and we certainly seem blissfully unaware that there are economic tradeoffs associated with each of our decisions.

Indeed, it is hard for me, a jurist of the 21st Century, to consider that the common law is "law" in any conventional sense. n16 This common-law tradition is different in its character from virtually every other species of law. First, in our American common-law tradition, one is advised that one's actions do or do not comport with the law only after action has been taken, presumably in reliance on legal rules that were thought to have been in effect when the action was taken. This retrospective aspect of common law makes it more analogous to "rules of thumb" than to the typically

prospective character of lawmaking by legislatures. For example, a common-law jurist feels comfortable saying that doing "X" would have been fine under the [*304] existing common-law rule, but, in the case at bar, the court concludes that a party should have done "Y." I find that my teenagers are far less accepting of my post hoc "common-law" parenting rules than society is of this very practice in our judiciary. In short, I find this feature of common-law tradition to be doctrinally incontinent.

Second, I believe that the judiciary is largely institutionally incompetent - or at the very least, severely "challenged" - to make sound policy choices. Because the executive and legislative branches are specifically designed to create policy, it is entirely desirable, and most consistent with our constitutional values, that important public and social policy be made by these political branches of government instead of the judiciary. n17 The political branches are designed and suited for public debate, discussion, and, yes, compromise.

In contrast, the judicial process, though public in name, is private in essence. The public cannot broadly petition the court to urge it to reach a particular result. If the public attempted to do so, the court is obligated to rebuff and ignore such importuning. We common-law jurists cannot consult experts like Professor Stephen Presser about the policy choices before us, take testimony from all the persons or factions who may have an interest, or effectively weigh the competing interests that they may have. Instead, we must make common-law policy decisions in the splendid isolation of our judicial chambers.

Third, the artifact of our adversarial system further undermines the ability of courts to make sensible public policy choices. In my experience on both sides of the bench, the litigants almost always boldly purport to "represent" the public's interest in their arguments for public policy-based changes. Instead, what we usually have are two parties that so desperately desire to win that they frame common-law issues in "policy" terms that will uniquely benefit them. (Indeed, the urgency with which "public policy" is offered up by a party as a basis for deciding a case is frequently inversely proportionate to the merits of the party's case.)

I have found that it is particularly difficult, even when I am in my zone of comfort (when anchored to and involved in construing statutory or contractual texts), to anticipate the unintended consequences of my decisions. It is immeasurably harder to foresee, much less assess, the economic and social consequences of even a minor change in, for example, tort law. As is almost universally recognized, we are certainly now a part of a global economy. Judge [*305] Posner may purport to be able to determine which rules will maximize efficiency, but, as I have suggested, it would appear from decisions I have seen from across the country that many common-law judges are economic illiterates.

In sum, whether called on to make, discover, or modify the common law, I believe we jurists are institutionally handicapped to do so in an informed fashion - in a way that includes consideration of even the likely relevant competing interests or tradeoffs.

Now, this screed from a jurist who obviously has participated in decisions altering Michigan's common law may seem surprising. But I believe that we jurists ought to be candid with the public about what we do and how we do it. The fact is, the common-law tradition I inherited provides my colleagues and me with little more than our own personal instincts and judgments about when, how, and how much to address common-law issues. This reality is - and should be - a profoundly unsettling thing to all but those who believe that judges should be our society's philosopher kings.

II. Toward a Theory of Conservancy in Common-law Adjudication

Notwithstanding all of my discomfort, Grandpa, both naked and drunk, is a legal ward entrusted to my care. He does not come with an instruction manual to provide guidance on how I should manage him. So what should a conscientious judicial traditionalist "do" with Grandpa? In Michigan, my Court is evolving a few principles that collectively amount to a theory of "conservancy" for the common law.

A. First, Do No Harm

Any supreme court possessing the authority to alter the common law has enormous institutional power to do pretty much what it darn well pleases in that arena - and thus the corresponding ability, unwittingly or otherwise, to do great mischief. Because of the described institutional weakness of courts to develop sound policy choices, when it comes to the common law, jurists ought to religiously follow Hippocrates' advice to physicians: first, do no harm.

One of the more obvious ways to avoid harm is the view, articulated by Professor Presser, that the weight of precedent ought [*306] ordinarily to stay the hand of common-law jurists. n18 It is only when a jurist is willing to be a conservator - that is, willing to be humble enough to recognize how ill-equipped he is to engage in the vast, complicated

considerations of the policy implicated in any change of the common law - that he can avoid the most egregious, however well-intentioned, excesses and errors of judicial lawmaking.

Among the principles of conservancy that my Court is developing and following is the notion that, if the common-law rule being challenged is one of long standing, and if that rule does not appear to be creating significant turbulence in the legal environment (e.g., difficulty of consistent application), one ought not make a change in the absence of the most Herculean showing of need. This approach is exemplified by *Terrien v. Zwit*, n19 a 2002 opinion of the Michigan Supreme Court.

At its core, *Terrien* was a case about freedom of contract. The case involved a restrictive covenant in a residential subdivision in which the defendant had set up a for-profit home daycare. n20 The plaintiffs (the defendant's neighbors) were attempting to enforce the restrictive covenant that precluded the operation of commercial businesses in their residential home development. n21 The covenant at issue was patently clear - for there was no doubt that it precluded the home-based operation of a for-profit business. n22 However, the defendant argued that, given the increasing numbers of women in the workforce, public policy should favor the development of day care centers. n23 Thus, the question before the Court was whether the long-standing common-law principles supporting enforcement of unambiguous restrictive covenants should be trumped by the "public policy" urged by defendant. n24

Terrien rejected this public policy rationale and, in a fairly stentorian manner, upheld and enforced the clear contractual terms of the covenant. We acknowledged that freedom of contract had been sewn indelibly into the fabric of our legal tradition and that we could void the covenant at issue only by suddenly, and quite unexpectedly, [*307] subordinating this tradition to our own subjective notions of public policy. n25 *Terrien* therefore repudiated the notion, seized upon by many common-law jurists, that courts may rely upon free-floating policy considerations as a basis for departing from well-established common-law principles. n26 It also reaffirmed the principle that common-law jurists must avoid capricious departures from bedrock legal rules as such tectonic shifts might produce unforeseen and undesirable consequences. n27

B. Take Small Steps

Even when "turbulence" is apparent in the common-law rule at issue, the judicial traditionalist ought make change cautiously - and then only in tiny increments. Good intentions, unsupported by well informed policy choices, often result in bad law. After all, courts are typically handicapped in assessing the real policy tradeoffs inherent in changing common-law rules. Again, my experience is that litigants are quite effective in asserting the public good that will arise from the rule change they want but are not especially helpful in explaining to the court the full ramifications of the common-law rule changes they advocate. Consequently, courts accept litigants' invitations to create new common-law doctrines at their peril.

One of the most striking examples in Michigan jurisprudence of an opinion taking Bunyanesque strides where smaller steps would have sufficed is *Toussaint v. Blue Cross Blue Shield of Michigan*. n28 The default rule in Michigan was that employment for an indefinite term was terminable at the will of either party in the absence of a [*308] contractual agreement to the contrary. n29 In *Toussaint*, the plaintiff had been hired for an indefinite term and therefore would have been terminable at-will under the preexisting common-law rule. n30 However, plaintiff had also been given an employee handbook stating that his employer's policy was to terminate employment only for "just cause." n31 Plaintiff argued that this handbook gave rise to enforceable contractual rights. n32 The Michigan Supreme Court agreed, and held that a "statement of policy" in an employer's handbook could "give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee." n33 The Court adopted this startling new contract doctrine despite the fact that legal principles of much older provenance - detrimental reliance, for example - would have supported the same result. n34

I have noted elsewhere n35 that the bench and bar in Michigan struggled for more than a dozen years in *Toussaint*'s wake to determine what exactly this new doctrine of employment contract law entailed. n36 This expense and confusion could have been avoided, or at least substantially mitigated, had the *Toussaint* Court applied familiar common-law principles to reach the same outcome. The current majority of the Michigan Supreme Court has, I think, attempted to steer clear of rationales that produce sea changes in the common law with vast and unforeseeable consequences.

C. Be Wary of Fashionable Trends in the Law

In changing common-law rules, judges are fond of looking to and relying on other jurisdictions and scholarly articles to discern trends in the law. When jurists rely on such authorities uncritically, the common law can become unpredictable

and quite unstable. My Court confronted this problem recently in *Wilkie v. Auto-Owners Insurance* [*309] Co. n37 We were asked in *Wilkie* to adopt a rule that an insurance contract should be read according to the "reasonable expectations" of the insured rather than according to the plain terms of the contract. n38 The Court began by acknowledging, as we did in *Terrien, supra*, that freedom of contract is "an unmistakable and ineradicable part of the legal fabric of our society." n39 The rule of "reasonable expectations," by contrast, arose quite recently - and by accident at that. n40 The rule had its origins in a 1970 Harvard Law Review article that attempted to rationalize a number of cases interpreting insurance contracts. n41 The article concluded that those opinions focused on the "reasonable expectations" of the parties rather than on the contractual language itself. n42 We noted that this scholarly assessment had been recast as a substantive legal doctrine by a number of courts, including Michigan lower courts, and was eventually treated as a "rule" of reasonable expectations. n43

Wilkie suggests, therefore, that endeavoring to uncover the doctrinal underpinnings of common-law rules can be an effective - if not essential - way of determining whether a suggested change is warranted. It is common in Michigan, as it presumably is in other jurisdictions, that common-law rules acquire years of accretions, so that the principles underlying those rules are no longer apparent. Clearing away the layers of varnish that attach to a common-law rule may help clarify the policies actually served by the rule, and therefore illuminate the decision whether to alter that rule. n44

D. Use Positive Law as a Backstop and Anchor

Perhaps the most important feature of the Michigan Supreme Court's approach to common-law adjudication has been its attempt to anchor our common-law jurisprudence in positive law. Simply put, we have endeavored, when called upon to act in matters of common-law policy, to follow the legislature's lead. In *Van v. Zahorik*, n45 for [*310] example, the plaintiff requested that we extend the doctrine of equitable parenthood, a common-law principle typically invoked to confer parental rights on a "husband who is not the biological father of a child born or conceived during the marriage." n46 Plaintiff could not rely upon this doctrine in seeking parental rights because he was neither the biological nor adoptive parent of the children and had lived with, but never married, the children's mother at the time they were born. n47

We acknowledged in *Van* that our state legislature had enacted a "comprehensive statutory scheme" to regulate child custody and parental rights and had abolished common-law marriage. n48 Thus, we concluded that we were required to determine the common-law issue presented by the parties in light of the positive law enacted by the legislative branch. n49 Because our legislature had declined to confer either marital or parental rights upon individuals in the plaintiff's position, we similarly refused to do so through the extension of a judicially created doctrine. n50 In essence, we declined to extend porous "equitable" rights beyond the boundaries previously erected in positive law. The legislature had provided us with some direction on how to manage Grandpa, and our task as Grandpa's custodian was to acknowledge and to follow those directions.

III. Conclusion

Although I have stressed the anxiety that the common law produces - or, at least, ought to produce - for the judicial traditionalist, the picture is not entirely a bleak one. Certainly in Michigan, the current Michigan Supreme Court has a profound understanding of the need to use restraint in its approach the common law. As irritating and scary as Grandpa may be, I take some comfort in viewing his role in the long sweep of American legal history. Whatever the excesses committed by Grandpa over the years under judicial aegis, our nation has in fact grown from a series of coastal villages to become a continental country. Whether despite or because of Grandpa, our economy and society have flourished. I also take comfort in the fact that those who preceded my custody of Grandpa did not manage to sunder us, despite giving him freer range to roam [*311] than I and the majority of my colleagues on the current Michigan Supreme Court would have preferred.

Finally, it is of some consolation to remember that, if Grandpa becomes unbearably frisky under the judiciary's care, the People's legislature has the power to corral, quiet and correct him until he is no longer a danger to the public's sensibilities. n51

FOOTNOTES:

n1. U.S. Const. art. IV, 4.

n2. U.S. Const. art. I, 1.

n3. See, e.g., *Roberts v. Mecosta City Gen. Hosp.*, 642 N.W.2d 663, 667 (Mich. 2002) (explaining the Court's constitutionally limited role in statutory construction).

My judicial philosophy (and that of the current majority of the Michigan Supreme Court) stands in marked contrast with one that is far more expansive concerning the proper role of the judiciary in a constitutional Republic. One of the best expositions of the rival philosophy was provided by the late Chief Justice Walter Schaefer of the Illinois Supreme Court:

If I were to attempt to generalize, as indeed I should not, I should say that most depends upon the judge's unspoken notion as to the function of his court. If he views the role of the court as a passive one, he will be willing to delegate the responsibility for change, and he will not greatly care whether the delegated authority is exercised or not. If he views the court as an instrument of society designed to reflect in its decisions the morality of the community, he will be more likely to look precedent in the teeth and to measure it against the ideals and the aspirations of his time.

Walter V. Schaefer, *Precedent and Policy*, 34 *U. Chi. L. Rev.* 3, 23 (1966).

Needless to say, adherents of Justice Schaefer's "aspirational" judicial philosophy are unlikely to understand why I contend in these remarks that managing the common law should present a concern of any kind to a judge.

n4. Justice Benjamin N. Cardozo, reflecting on changes in the law "wrought by judges," summarized the common-law lawgiving mindset in this way:

The changes, as they were made in this case or that, may not have seemed momentous in the making. The result, however, when the process was prolonged throughout the years, has been not merely to supplement or modify; it has been to revolutionize and transform. For every tendency, one seems to see a counter-tendency; for every rule its antinomy. Nothing is stable. Nothing absolute. All is fluid and changeable. There is an endless "becoming." We are back with Heraclitus. That, I mean, is the average or aggregate impression which the picture leaves upon the mind. Doubtless in the last three centuries, some lines, once wavering, have become rigid. We leave more to legislatures today, and less perhaps to judges. Yet even now there is change from decade to decade. The glacier still moves.

Benjamin N. Cardozo, *The Nature of the Judicial Process*, 26-28 (1921).

In Michigan, the amplitude of changes made in our common law beginning in earnest during the late 1960s could hardly be described as "glacial." As someone has suggested, a whole encyclopedia of Michigan law was discarded or deranged by my predecessors on the Court during the past forty years.

n5. For a recent analysis of the judicial prerogative to modify extant common-law rules, see *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001) ("The common-law ... presupposes a measure of evolution that is incompatible with stringent application of ex post facto principles.").

n6. See generally Stephen B. Presser, *The Development and Application of Common Law*, 8 Tex. Rev. L. & Pol. 291 (2004).

n7. A number of jurists have denied that judges have the power to create the common law anew, and have insisted instead that judges "discover" a pre-existing common law. See, e.g., *Rogers*, 532 U.S. at 472-73 (Scalia,

J., dissenting) (discussing Blackstone's belief that the opinions of common-law jurists are "evidence" of the law, rather than the law itself).

n8. See *Ames v. Port Huron Log Driving and Booming Co.*, 11 Mich. 139, 154-55 (1863) (Manning, J., concurring); *Gruskin v. Fisher*, 273 N.W.2d 893, 896 (Mich. 1979) ("In all events, it is for this Court to decide whether a common-law rule shall be retained unless the Legislature states a rule that is inconsistent with or precludes a change in the common-law rule.").

n9. In this category, I would include those jurists, like Blackstone, who purport to "discover" the common law. See *supra* note 7.

n10. See, e.g., Cardozo, *supra* note 4, at 23.

Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined.

Id.

n11. See *supra* notes 1-3 and accompanying text.

n12. *3 U.S. 386 (1798)*.

n13. *Id. at 400* (Iredell, J., dissenting).

n14. See *supra* note 7.

n15. See Richard A. Posner, *Jurisprudential Responses to Legal Realism*, 73 *Cornell L. Rev.* 326, 328 (1988).

n16. Frederick Schauer, *Is the Common-law Law?*, 77 *Cal. L. Rev.* 455 (1989) (reviewing Melvin A. Eisenberg, *The Nature of the Common-law* (1988)).

n17. See *supra* note 2 and accompanying text.

n18. Presser, *supra* note 6, at 292-93 (comparing the treatment of the common law in the 20th Century with the more deferential approach of courts in the 19th Century).

n19. *648 N.W.2d 602 (Mich. 2002)*.

n20. *Id. at 604-05*.

n21. *Id. at 606.*

n22. *Id. at 605* (noting that the covenant in question provided that "no part of any premises above described may or shall be used for other than private residential purposes").

n23. *Id. at 607-08.*

n24. *Terrien, 648 N.W.2d at 605.*

n25. *Id. at 614.* Responding to the dissenting opinion's contention that judicial notions of "public policy" should trump the clear terms of a binding covenant, Justice Stephen Markman, writing for the majority, asserted:

[Our] opinion merely sets forth the unexceptional proposition that an assertion of public policy as a basis for nullifying a contract must, in fact, be grounded in a public policy. If not grounded in the constitution, the statutes, or the common-law of this state, we are curious as to the dissent's basis for asserting that a policy is truly a "public" policy as opposed to merely a judge's own preferred policy. It is hard to think of a proposition less compatible with the "rule of law" and more compatible with the "rule of men" than that a judge may concoct "public policies" from whole cloth, rather than from actual sources of the law.

Id.

n26. *Id. at 608* ("The public policy of Michigan is not merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law. There is no other proper means of ascertaining what constitutes our public policy."); *id. at 611.*

n27. See *id. at 614 n.28.*

n28. *292 N.W.2d 880 (Mich. 1980).*

n29. See, e.g., *Lynas v. Maxwell Farms, 273 N.W.2d 315, 317 (Mich. 1937).*

n30. *Toussaint, 292 N.W.2d at 884.*

n31. *Id.*

n32. *Id. at 890.*

n33. *Id. at 892.* The Toussaint Court even declared that an employee's knowledge of the policy or reliance on that policy were unnecessary preconditions for establishing this new form of contractual obligation! *Id. at 895* ("Having announced the policy, presumably with a view to obtaining the benefit of improved employee attitudes and behavior and improved quality of the work force, the employer may not treat its promise as illusory.").

n34. See *Shield Benefit Adm'rs, Inc. v. Univ. of Mich. Bd. of Regents*, 571 N.W.2d 556, 560 n.3 (Mich. Ct. App. 1997) (Young, J., dissenting).

n35. See *id.* (Young, J., dissenting) (citing *Lytle v. Malady*, 566 N.W.2d 582 (Mich. 1997)).

n36. See, e.g., *Rowe v. Montgomery Ward & Co.*, 473 N.W.2d 268 (Mich. 1990).

n37. 664 N.W.2d 776 (Mich. 2003).

n38. *Id.* at 782.

n39. *Id.*

n40. *Id.* at 782-83.

n41. *Id.* at 782 (citing Robert E. Keeton, Insurance Law Rights at Variance with Policy Provisions, 83 *Harv. L. Rev.* 961, 967 (1970)).

n42. *Wilkie*, 664 N.W.2d at 782-83.

n43. *Id.*

n44. See, e.g., *Stitt v. Holland Abundant Life Fellowship*, 614 N.W.2d 88 (Mich. 2000) (concluding, based on an analysis of case law, that invitee status ought to apply only when an injured party is on defendant's land for commercial purposes).

n45. 597 N.W.2d 15 (1999).

n46. *Id.* at 20 (quoting *Atkinson v. Atkinson*, 408 N.W.2d 516, 519 (1987)).

n47. *Id.* at 17.

n48. *Id.*

n49. *Id.* at 19-20 (citing the Child Custody Act, *Mich. Comp. Laws* 722.21-.31 (2002)).

n50. *Van*, 597 N.W.2d at 21-22.

n51. Perhaps the more dangerous development is the extension of the loose common-law tradition discussed herein to constitutional exegesis. When Grandpa becomes a creature of constitutional dimension, legislative correction by the People's representatives is impossible. See also *Mich. United Conservation Clubs v. Sec'y of State*, 630 N.W.2d 297, 299 (Mich. 2001) (Young, J., concurring) (stressing that constitutional text must be given its plain meaning as originally understood by those ratifying the document rather than be interpreted in accordance with the policy preferences of judges). See generally Antonin Scalia, *A Matter of Interpretation* (1997).