Should the Michigan Supreme Court Adopt a Non-Majority Vote Rule for Granting Leave to Appeal?

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SHOULD THE MICHIGAN SUPREME COURT ADOPT A NON-MAJORITY VOTE RULE FOR GRANTING LEAVE TO APPEAL?

I. INTRODUCTION

The Michigan Supreme Court enjoyed a reputation for activism and innovation in recent decades. The court took an active role in the development of civil liberties issues and tort law innovations.¹ During the past decade, however, the reputation of the Michigan Supreme Court has changed somewhat.² This shift appears to encompass not only a decline in the general reputation of the court for activism, but a more troublesome erosion of the court’s reputation concerning its more fundamental role of providing guidance to lower courts and the bar. Specifically, critics accuse the court of failing to produce an adequate number of opinions, and failing to provide adequate guidance for resolving inter-panel conflicts within the Michigan Court of Appeals. Finding a means to compel the court to review a greater number of cases each term is touted as a possible solution to both problems. Some would have the Michigan Supreme Court adopt a non-majority vote rule, a so-called “Rule of Three,” which would allow the court to grant leave to appeal upon the vote of only three of the seven justices. In theory, a non-majority vote rule increases the total number of cases a court reviews, reducing the risk of a court abusing its discretionary review power.³

This Note examines the evolution of Michigan’s appellate court

2. P. F. Kluge rendered an astute observation about the value of a reputation when he noted that you can either live up to it or you can live off of it. P. F. KLUGE, ALMA MATER: A COLLEGE HOMECOMING 8 (1993).
3. Such a rule could be promulgated by the supreme court under its constitutional grant of rule-making ability. MICH. CONST. of 1963, art. VI, § 5. The court presently grants leave to appeal when at least four of its seven justices so vote. MICH. CT. R. 7.316(C).
system, the role of a modern supreme court, and the rationale for giving a court discretionary jurisdiction. It also reviews the theory of the non-majority vote rule as a procedural safeguard against abuse of the discretionary review power. The Note also assesses current problems faced by the Michigan Supreme Court which are driven to a large extent by escalating appellate caseloads, and whether adoption of a non-majority vote rule would be an improvement over the status quo. This Note concludes that adoption by the Michigan Supreme Court of a “Rule of Three,” while not inconsistent with the role of a modern supreme court, would not significantly impact Michigan jurisprudence to the extent its proponents hope. The solutions to the court’s problems lie elsewhere.

II. BACKGROUND

A. The Evolution of Michigan’s Appellate Court System

Michigan first established an appellate court, the Michigan Supreme Court, with the adoption of the Michigan Constitution of 1835. While it vested the state’s judicial power “in one supreme court, and in such other courts as the legislature may from time to time establish,” the constitution was silent as to the supreme court’s jurisdiction, powers, and rule-making ability. However, with the adoption of the Michigan Constitution of 1850, these issues were removed from the purview of the legislature. In addition to cementing the supreme court’s jurisdiction and giving the court superintending control over all inferior courts, the Constitution of 1850 granted the supreme court rule-making power. This basic

4. Throughout this Note, the author will follow the majority practice of referring to a state tribunal of last resort as a supreme court.
5. MICH. CONST. of 1835, art. VI, § 1. See generally CITIZENS RESEARCH COUNCIL OF MICHIGAN, 1 A COMPARATIVE ANALYSIS OF THE MICHIGAN CONSTITUTION ch. vii (1961) [hereinafter CITIZENS RESEARCH COUNCIL].
6. MICH. CONST. of 1835.
7. The constitution of 1850 granted the supreme court original jurisdiction
appellate court structure of one supreme court remained in existence in Michigan for more than a century. Any structural changes in the supreme court’s caseload during this period resulted from legislation which expanded or limited appealable issues.

By the late 1950s, Michigan’s appellate court structure no longer worked to the satisfaction of many members of the bar. Social activists of the era believed in an absolute guarantee to an appeal in all criminal cases. The desire to provide appeals of right, together to issue and hear “writs of error, habeas corpus, mandamus, quo warranto, procedendo and other original and remedial writs.” In all other matters, the court had appellate jurisdiction only. MICH. CONST. of 1850, art. VI, § 3. The constitution also granted the supreme court “superintending control over all inferior courts.” Id. In addition, the supreme court received the power to “establish, modify, and amend the practice in such court and in the circuit courts” by general rules. MICH. CONST. of 1850, art. VI, § 5. See generally CITIZENS RESEARCH COUNCIL, supra note 5, at vii-10.

However, some tinkering did occur. The Michigan Constitution of 1908 expanded the court’s rule-making power to “all other courts of record;” the court’s rule-making power previously extended to the supreme court and the circuit courts only. MICH. CONST. of 1908, art. VII, §§ 4, 5. See generally CITIZENS RESEARCH COUNCIL, supra note 5, at vii-7 to -10.

Robert A. Kagan et al., The Evolution of State Supreme Courts, 76 MICH. L. REV. 961, 977-78 (1978). The legislature determines what issues of law may be appealed. The authors point out that during this period, the Michigan Legislature enacted several changes that affected the supreme court, usually in an attempt to address increasing caseloads. In 1917, for example, the Michigan Supreme Court was freed “of its duty to hear appeals from civil cases” when less than $500 was disputed. In 1927, the court was given discretionary jurisdiction over criminal appeals which were then averaging 22% of its caseload. The court controlled its caseload from 1945 to 1960 by holding criminal appeals to 12% of the docket while averaging 256 opinions per year. Id.

At this juncture, it is worth noting that an appeal is not a fundamental right
and is thus not guaranteed by the United States Constitution. The Michigan Constitution of 1963, however, gives criminal defendants a constitutional right to appeal. See, e.g., MICH. CONST. of 1963, art. 1, § 2; Jenson v. Menominee Circuit Judge, 382 Mich. 535, 540 (1969). However, the right to an appeal did not exist at common law and could only be created by statute. See Bishop v. Wilkins, 174 N.W. 602, 603 (Mich. 1919). Nevertheless, our legal system cherishes the right to an appeal and all states in the union, as well as the federal government, provide the citizenry with some form of appellate court system. See, e.g., J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433 (1994).

In Michigan today, many civil litigants and most criminal defendants enjoy a statutory appeal of right to Michigan's intermediate appellate court system, the Michigan Court of Appeals. This appeal of right was created from the following orders and judgments:

(a) All final judgments from the circuit court, court of claims, and recorder's court, except judgments on ordinance violations in the traffic and ordinance division of recorder's court and final judgments and orders described in subsection (2).

(b) Those orders of the probate court from which an appeal as of right may be taken under section 861. 

MICH. COMP. LAWS ANN. § 600.308(1) (West Supp. 1996). Appeal to the court of appeals upon successful application for leave is also available from the following orders and judgments:

(a) A final judgment or order made by the circuit court under any of the following circumstances:

(i) In an appeal from an order, sentence, or judgment of the probate court under section 863(1) and (2).

(ii) In an appeal from a final judgment or order of the district court appealed to the circuit court under section 8342.

(iii) An appeal from a final judgment or order of a municipal court.

(iv) In an appeal from an ordinance violation conviction in the traffic and ordinance division of recorder's court of the city of Detroit if the conviction occurred before September 1, 1981.

(b) An order, sentence, or judgment of the probate court if the probate court certifies the issue or issues under section 863(3).

(c) A final judgment or order made by the recorder's court of the city of Detroit in an appeal from the district court in the thirty-sixth district pursuant to section 8342(2).

(d) A final order or judgment from the circuit court or recorder's court for the city of Detroit based upon a defendant's plea of guilty or nolo contendre.

(e) Any other judgment or interlocutory order as determined by court rule.

MICH. COMP. LAWS ANN. § 600.308(2) (West Supp. 1996).
with the desire to reduce the supreme court’s caseload, were powerful arguments for establishing an intermediate court of appeals.\(^{11}\)

The Constitutional Convention of 1961 gave the citizens of Michigan an opportunity to restructure Michigan’s appellate court system.\(^{12}\) The question at the convention was not whether appellate reforms would occur, but rather what form they would take. Few wanted to alter the court’s superintending and rule-making powers.\(^{13}\) Instead, the most pressing questions at the Constitutional Convention concerned whether an intermediate appellate court would be created and the supreme court’s jurisdiction in the event an intermediate court of appeals was created. The delegates’ choices for supreme court jurisdiction included compelling it to hear all cases, just certain cases, or granting it the discretion to “select only cases of substantial significance or cases which will resolve conflicts which may develop among the lower courts.”\(^{14}\)

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11. Joiner, \textit{supra} note 10, at 529-30. Professor Joiner observed: The work of the Michigan Supreme Court is as heavy as that of any other supreme court in a state of its size. Michigan is the only state of the heavily populated states that does not have an intermediate court of appeals. In 1959 a study was made which recommended and documented the need for an intermediate court of appeals as the means of providing a sound system of judicial administration at the appellate level. . . . If it were to be provided, all appeals should go from the circuit courts to the intermediate court of appeals. All appeals from the intermediate court of appeals to the Supreme Court would be by leave . . . . This would . . . provide a method whereby the function of lawmaking by the judiciary could be supervised effectively at the highest level.

\textit{Id.}

12. \textit{See generally \textsc{Citizens Research Council}, \textit{supra} note 5, at vii-7 to -10.}

13. \textit{Id.} at vii-7 to -11. Commentators observed that those powers helped to fix responsibility with the supreme court for the smooth administration of justice and allowed the court to effectively manage the judicial business of the state.


This is basically a question of determining which litigants can appeal as a matter of right. . . . Obviously, if there is an intermediate court of appeals so that all litigants can get at least one appeal . . . as a
The Michigan Constitution of 1963 created an intermediate appellate court,\textsuperscript{15} and with it the hope that the supreme court could now more effectively supervise the lawmaking function of the judiciary.\textsuperscript{16} The convention delegates wanted the supreme court to be able to concentrate "on those cases in which guidance is needed in the development of the law . . . or in which conflicts exist between the various courts at the intermediate level or trial level," in addition to supervising judicial administration.\textsuperscript{17} In keeping with the supreme court's newly emphasized law-giving function, its appellate jurisdiction was altered. As a result, since 1963, the Michigan Supreme Court has enjoyed a subject matter jurisdiction which is almost completely discretionary.\textsuperscript{18}

matter of right, then it is easier to provide for discretionary jurisdiction in the highest court, and to limit the compulsory jurisdiction.

\textit{Id.}

\textsuperscript{15.} MICH. CONST. of 1963, art. VI, § 8. "The jurisdiction of the court of appeals shall be provided by law and the practice and procedure therein shall be prescribed by rules of the supreme court." MICH. CONST. of 1963, art. VI, § 10. \textit{See also supra} note 10 (detailing court of appeals jurisdiction pursuant to MICH. COMP. LAWS ANN. § 600.308).

\textsuperscript{16.} See \textit{infra} notes 22-30 and accompanying text.

\textsuperscript{17.} Joiner, \textit{supra} note 10, at 530. "The Supreme Court could concentrate on those cases in which guidance is needed in the development of the law of the state or in which conflicts exist between the various courts at the intermediate level or trial level." \textit{Id.}

\textsuperscript{18.} MICH. CONST. of 1963, art. VI, § 4. The Michigan Constitution provides: "[T]he supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; and appellate jurisdiction as provided by rules of the supreme court . . . ." \textit{Id.} The Revised Judicature Act of 1961 codified the supreme court's discretionary jurisdiction and power to set forth the criteria under which it would review a case:

The supreme court has jurisdiction and power over:

(1) any matter brought before it by any appropriate writ to any inferior court, magistrate, or other officer;

(2) any question of law brought before it in accordance with court rules, by certification by any trial judge of any cause pending or tried before him;

(3) any case brought before it for review in accordance with the court rules promulgated by the supreme court.
Michigan’s creation of an intermediate court of appeals and the
grant of discretionary jurisdiction to its court of last resort were
consistent with the national trend, and paralleled the evolution of

MICH. COMP. LAWS ANN. § 600.215 (West 1981). See also MICH. COMP. LAWS
ANN. § 600.217 (West 1981) (for supreme court jurisdiction as to writs); MICH.
COMP. LAWS ANN. § 600.219 (West 1981) (for the court’s superintending control
over all inferior courts). Finally, the Appellate Rules promulgated by the
supreme court make the following jurisdictional statement:

Rule 7.301 Jurisdiction and Term
(A) Jurisdiction. The Supreme Court may:
(1) review a Judicial Tenure Commission order recommending
discipline, removal, retirement, or suspension;
(2) review by appeal a case pending in the Court of Appeals or
after decision by the Court of Appeals;
(3) review by appeal a final order of the Attorney Discipline
Board;
(4) give an advisory opinion;
(5) respond to a certified question;
(6) exercise superintending control over a lower court or
tribunal;
(7) exercise other jurisdiction as provided by the constitution
or by law.
MICH. CT. R. 7.301 (citations omitted). See also ROBERT T. ROPER ET AL., 1984
STATE APPELLATE COURT JURISDICTION GUIDE FOR STATISTICAL REPORTING
36-45 (1985) [hereinafter STATE APPELLATE COURT JURISDICTION] (illustrating
the only vestige of mandatory subject matter jurisdiction that exists for the
Michigan Supreme Court arises out of judicial disciplinary proceedings).

19. CITIZENS RESEARCH COUNCIL, supra note 5, at vii-3 to -4. By 1961,
thirteen states constitutionally provided for an intermediate appellate court.
These states also had significant populations and large urban centers. Michigan
followed that pattern with the adoption of the Constitution of 1963. The study
of the structure and business of state supreme courts from 1870 to 1970 reiterated
the above findings:

[A]s a state’s population grew, its supreme court’s caseload ... grew
along with it, sometimes quite dramatically. The increase in caseload
naturally evoked efforts to reorganize the judiciary system to relieve the
pressure on the court. ... [S]tates with heavy caseloads introduced
structural reforms, principally intermediate appellate courts, and
increased the supreme court’s control over its docket. These changes ... 
seemed to affect the supreme courts’ legal role, for they coincided with
changes in the type of case heard, the way courts made decisions, and
the results of cases.
the federal appellate court structure. Michigan's present appellate court structure is also consistent with current American Bar Association Standards Relating to Court Administration.

B. Discretionary Review and the Role of a Modern Supreme Court

Nationally, the growing dockets of the post-war and Great Society years, in addition to serving as an impetus for the creation of intermediate appellate courts, ushered in an era of state appellate court discretionary jurisdiction. Discretionary jurisdiction, as it is presently exercised by both the United States Supreme Court and nearly all state supreme courts, cannot be separated from the creation of intermediate courts of appeal. Until a supreme court is freed of the burden of mandatory jurisdiction, its role as lawgiver is constrained by the more burdensome, traditional role of error correction. In this respect, state courts followed in the footsteps of the United States Supreme Court, which received a partial grant of discretionary review power with the creation of the federal appellate courts in 1891. Discretionary review also eliminated the

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Kagan, supra note 9, at 962. The appellate court structure that Michigan adopted in 1963 was the most common model found among the more heavily populated, urban-centered states.


21. ABA STANDARDS RELATING TO COURT ORGANIZATION § 1.13(a) (1990).

22. Kagan, supra note 9, at 966. State supreme courts: [C]onfronted with rising caseloads, changed in rather similar and predictable ways. . . . The crucial developments have been in court structure and jurisdiction. Two changes are especially important: grants of power to supreme courts to select their own cases from petitions for review, and the establishment of intermediate appellate courts between the trial courts and the supreme courts.

Id.

23. Stevens, supra note 20, at 11 n.53. Concurrent with the creation of intermediate appellate courts in 1891, the Circuit Court of Appeals Act of 1891
possibility that litigants might be entitled to a second appeal as a matter of right, a situation which would occur if a supreme court was required to hear appeals under some form of mandatory jurisdiction, despite the existence of an intermediate court of appeal which also had mandatory jurisdiction. Presently, thirty-nine states have intermediate appellate courts and all of those states have granted their courts of last resort at least partial discretionary jurisdiction. Few state supreme courts, however, enjoy the degree of discretionary subject matter jurisdiction that the Michigan Supreme Court now enjoys.

Justice McReynolds, testifying on December 18, 1924, before the Committee on the Judiciary of the House of Representatives, stated:

The more Federal acts there are the more opportunities there are of bringing cases to us, and it has been growing and growing until it is utterly impossible for us to try every case in which there is a Federal question involved. So it must be determined whether . . . the number of cases presented to the court shall be restricted.

Following enactment of the Judiciary Act of 1925, an increasing number of cases came before the United States Supreme Court by way of petition for a writ of certiorari, rather than by mandatory jurisdiction. A writ of certiorari is "a petition which requests the Court to exercise its discretion to hear the case on the merits - rather than by a writ of error or an appeal requiring the Court to decide the merits." Stevens, supra note 20, at 10. With the enactment of Public Law 100-352 in 1988, the Supreme Court's evolution to essentially discretionary jurisdiction was complete. See Tom Staunton, How to Decide: Case Selection and Judicial Review, 1992/1993 ANN. SURV. AM. J. 347, 347-52 (1993).
believed that the Court adopted it as a procedural aid to ensure a sound result after receiving a grant of partial discretionary jurisdiction under the Court of Appeals Act of 1891. The rule was firmly in operation when it was discussed publicly for the first time during hearings on the Judiciary Act of 1925, which further expanded the Court's discretionary jurisdiction. The rule was proffered as a means of ensuring that disputes over whether or not an issue deserved review would be resolved in favor of assuming jurisdiction. The rule serves to reassure the public that the Court is not abusing its discretion, despite the fact that the Court denies the vast majority of petitions for review.

In Michigan, the supreme court presently requires a majority vote rule for granting leave to appeal, as do most other states' supreme courts. Several state courts of last resort do follow the federal model and apply a non-majority vote rule for granting leave
to appeal.\textsuperscript{42}

\textit{D. The Michigan Supreme Court Today}

\textbf{1. Expanding Dockets}

Michigan's trial and appellate courts have recently been forced
to cope with an expanding caseload. Increased trial court and court
of appeals caseloads have also contributed to the supreme court's
workload by virtue of the supreme court's rule-making and
supervisory roles. The existence of an intermediate appellate court
and discretionary jurisdiction enable the supreme court to control
the number of cases it reviews, but neither solve the problem of
supreme court workload because the justices must still screen the
ever-increasing number of petitions for review which the court
receives.\textsuperscript{43}

The Michigan Supreme Court experienced a 21.7\% increase in
annual new filings in 1988.\textsuperscript{44} Supreme court filings increased again
in 1989,\textsuperscript{45} and court of appeals filings that year increased 28.14\%
over the 1988 level. By 1993, as the court of appeals made its way through a huge backlog of cases, commentators were predicting that there would be even more pressure on the supreme court to grant leave. That hypothesis was validated by the 1993 and 1994 numbers. During the past decade, the number of new supreme court petitions filed on an annual basis has increased by 53.34%.

Table 1. Michigan Supreme Court Caseload

<table>
<thead>
<tr>
<th>Year</th>
<th>New Cases Filed</th>
<th>% Increase/Decrease Over Previous Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>1985</td>
<td>2,079</td>
<td>-5.53</td>
</tr>
<tr>
<td>1986</td>
<td>2,007</td>
<td>-3.46</td>
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<tr>
<td>1987</td>
<td>2,190</td>
<td>9.12</td>
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<tr>
<td>1988</td>
<td>2,666</td>
<td>21.74</td>
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<tr>
<td>1989</td>
<td>2,809</td>
<td>5.36</td>
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<tr>
<td>1990</td>
<td>2,509</td>
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<tr>
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<td>2,235</td>
<td>-10.92</td>
</tr>
<tr>
<td>1992</td>
<td>2,427</td>
<td>8.60</td>
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<tr>
<td>1993</td>
<td>2,749</td>
<td>13.27</td>
</tr>
<tr>
<td>1994</td>
<td>3,188</td>
<td>15.97</td>
</tr>
</tbody>
</table>

The court of appeals' experience paralleled that of the supreme court with a 51.79% increase during the course of the same decade.

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49. 1994 Annual Report, supra note 48, at 11, Table 2.1.
2. Legislative Response

In 1988, the year in which the supreme court experienced its single highest increase in filings to date, then Chief Justice Dorothy Comstock Riley took advantage of the opportunity provided by her State of the Judiciary address to urge the legislature to take action. She called for the creation of "a joint commission responsible for drawing a comprehensive blueprint for a more effective judiciary."50 As a result, Senate Concurrent Resolution Number Nine of the 85th Legislature was enacted on April 5, 1990, creating "a commission on the courts in the twenty-first century to study and recommend changes to maximize the resources and efficiency of Michigan's Judicial System."51 Part of the Commission's comprehensive examination of the courts included

scrutiny of appellate court jurisdiction.\textsuperscript{52}

The Commission's Report is relevant to the present discussion more for what it does not contain than for its actual recommendations. With the exception of suggestions for improving the supreme court's procedure for resolving court of appeals conflicts,\textsuperscript{53} none of the Commission's recommendations involved the workings of the supreme court.\textsuperscript{54} When the supreme court did play a role in the Commission's recommendations, it did so only in conjunction with its constitutional role of supervising the court of appeals.\textsuperscript{55} There were no recommendations calling for the supreme court to issue more opinions or to grant leave to appeal more frequently. There was no suggestion that the court should adopt a non-majority vote rule. The Report implies that as of 1990, the supreme court's only perceived failing lay within the procedural structure it established for resolving court of appeals conflicts.\textsuperscript{56}

\textsuperscript{52} Id.

\textsuperscript{53} Id. at 13. The commission recommended revision of the court of appeals conflict resolution procedure, then in existence under Administrative Order 1984-2, which required that conflicts be certified to the supreme court for resolution. See Julia R. Hathaway, Note, Conflict Resolution Among Panels of the Michigan Court of Appeals Under Administrative Order 1994-1, \textit{41 Wayne L. Rev.} 1409, 1415 (1995). To that end, the Commission urged the supreme court: [T]o establish a procedure for an \textit{en banc} determination of the Court of Appeals, along the following lines. When a panel of the Court of Appeals certifies before issuance of the opinion that its opinion in a case conflicts with a prior published opinion of the Court of Appeals, the chief judge of the Court of Appeals would invoke the procedures of an \textit{en banc} determination of the sitting judges of the Court on the conflict. The \textit{en banc} determination would be reached without a formal hearing and would not require the sitting judges to convene in one location to reach the determination. Unless a majority of the sitting judges voted affirmatively for the second opinion, the first opinion would prevail and the second opinion would be revised accordingly. The \textit{en banc} panel could determine that no conflict existed ... \textsuperscript{54} MICHIGAN'S COURTS IN THE 21ST CENTURY, \textit{supra} note 51, at 13-16. \textsuperscript{55} Id. \textsuperscript{56} Hathaway, \textit{supra} note 53, at 1416. While the commission was considering the issue of conflict resolution, the supreme court adopted Administrative Order
3. State Bar Initiatives

In October, 1992, George A. Googasian, President of the Michigan State Bar Association, urged the State Bar Board of Commissioners to appoint a task force to study problems specifically faced by Michigan's appellate courts.57 While concerns about the court of appeals figured prominently in Googasian's mandate to the resulting Task Force on Appellate Courts, Googasian also expressed two concerns about the Michigan Supreme Court: (1) the court's increasingly burdensome administrative responsibilities "resulted in a diminished number of appeals" and (2) the court's procedure for resolving conflicting court of appeals opinions "did not resolve with certainty questions of law that should be heard."58

The end result was several Task Force recommendations concerning the supreme court.59 The Task Force concluded that the 1990-6 which implemented the so-called "first out" rule. The first out rule provides that for all court of appeals cases decided after November 1, 1990, the decision automatically controls all subsequent panel decisions. Administrative Order 1990-6 remained in effect until May 1, 1994, when it was replaced by Administrative Order 1994-4, which retained the first out rule. Both orders were poorly received by the legal community. The rule has been criticized for imposing a form of strict stare decisis on all subsequent panels. Id. at 1421-28. See infra notes 62-63 and accompanying text.

57. Webster, supra note 47, at 895. "The task force was charged with the responsibility of examining the problems, making recommendations and providing suggestions for improvement of the appellate system." Id. See also George A. Googasian, Improving Appellate Justice, and Saying Good-Bye, 72 MICH. BAR J. 880 (1993).

The Michigan Bar has also turned its attention to problems facing trial courts. Its most recent initiative was the formation of the 21st Century Courts Committee. See D. Larkin Chenault, Commonly Asked Questions About the 21st Century Courts - Committee Proposals, 74 MICH. BAR J. 128 (1995).

58. Webster, supra note 47, at 895.

59. Task Force on Appellate Courts - Report and Recommendations, 72 MICH.
court's administrative duties did indeed detract from the court's "decisional responsibilities" and recommended that a Rules and Administrative Council be established to perform non-adjudicative court system functions in conjunction with the State Court Administrator's Office.\textsuperscript{61} The Task Force also criticized the manner in which the Michigan Supreme Court handled conflicts within court of appeals' panels.\textsuperscript{62} In addition to recommending that the supreme court modify the existing conflict resolution procedure, the Task Force recommended that the supreme court adopt a non-majority vote rule for granting leave to appeal in "conflict" cases only.\textsuperscript{63} While the Task Force stopped short of calling for the court to adopt a non-majority vote rule applicable to all petitions for leave, others have not.

\textsuperscript{60} Bar J. 898 (1993) [hereinafter Task Force]; Webster, \textit{supra} note 47, at 896-97.

\textsuperscript{61} See Task Force, \textit{supra} note 59, at 901; Webster, \textit{supra} note 47, at 897. The Rules Council's recommendations would be final unless a majority (four) of the supreme court justices voted against them.

\textsuperscript{62} The Task Force defined "conflict" cases as those which had already been through a conflict resolution process within the court of appeals. The Task Force recommended that the "first out" procedure established by Administrative Order 1990-6 . . . be eliminated, and the court of appeals resolve conflicts by what it called a modified \textit{Sinai Hospital} procedure. Task Force, \textit{supra} note 59, at 900. Under that procedure, when "the presiding judge of a panel . . . agrees that an opinion conflicts with a prior published Court of Appeals opinion," the presiding judge "shall inform the Chief Judge and Chief Clerk and, if the Chief Judge agrees there is a conflict, the entire court shall vote for one of the two opinions." \textit{Id.} at 900-01. The full court of appeals should also be "authorized to decide that no conflict exists." \textit{Id.} at 901. See also Googasian, \textit{supra} note 57, at 881-82.

\textsuperscript{63} See Task Force, \textit{supra} note 59, at 901; Googasian, \textit{supra} note 57, at 882. After the adoption of the Task Force recommendations by the Representative Assembly of the Michigan State Bar Association in September of 1993, the Task Force forwarded them to the Michigan Legislature and Michigan Supreme Court. The Bar continues to "encourage the Supreme Court to give them favorable consideration." Webster, \textit{supra} note 47, at 897.
4. Academic Criticism

In the spring of 1992, Maurice Kelman, Professor of Law at Wayne State University, published an article in the Detroit College of Law Review which was highly critical of the Michigan Supreme Court's opinion output. He charged "the present Michigan Supreme Court is the most miserly of all state courts of final appeal" in granting leave to appeal. Because the number of opinions the court produces is directly tied to the number of cases the court votes to review, Professor Kelman urged the court to adopt a non-majority vote rule when granting leave. The charge that the court was failing to provide adequate guidance to lower courts and the bar was a serious one, and echoed concerns voiced by the State Bar Task Force. However, while the Task Force limited its criticism to the court's procedure for resolving court of appeals conflict cases, Professor Kelman's criticism went to a more fundamental level. The charge that the court was falling significantly short of the mark when it came to granting leave to appeal implied a fundamental abuse of the public trust represented by the court's grant of discretionary jurisdiction. The issues raised in the Kelman article found their way into the popular press and were soon part of the conventional wisdom. The charges surfaced again in the 1994 supreme court elections.

A change in opinion about the supreme court appears to have occurred between the non-critical 1990 report of the Commission on Courts in the Twenty-First Century and the 1992 Kelman article and subsequent State Bar initiatives. While this Note does not seek to imply that the mere presence of a critical academic article could cement the belief among the members of the bar that the supreme court was somehow shirking its duty, the Kelman

65. Id. at 3.
66. Id. at 21-25.
article clearly gave voice to a nagging concern that the court, for whatever reason, was no longer providing adequate guidance to lower courts and the bar. This erosion of the court's reputation may be attributable to the court's opinion output in 1991, which took a sizeable dip even though new filings actually decreased only somewhat that year. While the low output of 1989 may be attributed to the large increase in filings which the court experienced in 1988 and 1989, the explanation did not seem to adequately explain the 1991 numbers.\(^\text{68}\)

### Table 3. Michigan Supreme Court Caseload

<table>
<thead>
<tr>
<th>Year</th>
<th>New Cases Filed</th>
<th>Leave Grants</th>
<th>% of New Cases Granted Leave</th>
</tr>
</thead>
<tbody>
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### III. ANALYSIS

Few would contest the statement that the Michigan Supreme Court does not grant{leave to appeal very often. The percentage of total filings for which leave to appeal is granted is little more than half of what it was ten years ago. Adopting a non-majority vote rule appears to be a simple and effective way to compel the court to

68. 1994 ANNUAL REPORT, supra note 48, at 5, Table 1.4; STATE COURT ADMINISTRATOR'S OFFICE, 1988 MICH. ST. CT. ANN. REP. 5, Table 1.4 (1989).
the court, for guidance to its reputation in 1991, which decreased only 1989 may be which the court did not seem to

Although the percentage of leave grants has decreased, the actual number of cases that the supreme court reviews has remained relatively constant. While some feel that this number is low compared to the output of other state supreme courts, there is no hard evidence that justice is threatened by a low number of opinions, or that sum is more important than substance. A strong argument can be made, however, for the converse effect — that an increase in a court's caseload will adversely affect the quality of its opinions. At the heart of this argument lies the premise that quality, not quantity, should be of paramount importance in any discussion of a court's output. Issues contained in petitions for review often demand sustained study. Once leave to appeal is granted, production of quality opinions requires adequate time to foster the deliberative process. Justices must not only have adequate time to reach their own conclusions, but must also have adequate time to "compose their differences" with the other justices in order to produce a coherent opinion.

The question of whether supreme courts are working up to their full potential has garnered attention at least since the Judges' Bill was passed in 1925. Several commentators have observed the

69. This argument has been explored most frequently in the context of discussing the U.S. Supreme Court's docket, but it is equally applicable to state supreme courts. See, e.g., Henry M. Hart, The Supreme Court 1958 Term — Foreword: The Time Chart of the Justices, 73 HARV. L. REV. 84 (1958); Stevens, supra note 20.
70. Hart, supra note 69, at 96.
71. Id. at 87-90.
72. Id. at 95.
dangers associated with giving credence to sum over substance where U.S. Supreme Court opinions are concerned. More than three decades ago, Henry Hart, Jr., Professor of Law at Harvard Law School, observed that the time allotted to the few opinions produced by the U.S. Supreme Court was already “distressingly short” and calling for the Court to work faster and harder could only further shorten the precious time available. Professor Hart urged that before the Court should be required to hear additional cases, any benefit derived therefrom must be weighed against the cost. Professor Hart also noted that no real evidence demonstrated that the nation would realize any significant gain merely because the Court might succeed in deciding ten additional cases in any given year. Consequently, pushing the Court to review cases which are of no particular importance, except to the litigants involved, is in direct conflict with the policy underlying a grant of discretionary jurisdiction in the first place. Given the increase in petitions for review filed during the past several decades, Professor Hart’s observations seem more relevant today than ever before.

Justice John Paul Stevens expressed the belief that rather than reviewing too few cases, the Court is actually reviewing too many.

73. Id. Professor Hart estimated that two additional weeks of working time would be required for each additional ten cases the Court might hear.

74. We were recently exposed to the day-to-day workings of the Michigan Supreme Court in a Michigan Bar Journal article written by Justice Patricia Boyle. In that article, there is a sense of how little time the court has available for actual deliberations. In 1993, the justices had approximately 2008 hours to make 2473 dispositions. Their duties entail “making decisions on an unrelenting stream of applications for leave to appeal, reading briefs on application, drafting memos, reviewing trial court records, preparing for and hearing oral argument, writing lead opinions and separate opinions, providing input to circulating opinions and dissents, deciding issues related to administrative responsibilities, and performing civic responsibilities. . . .” Patricia J. Boyle, The Michigan Supreme Court: Are We Dancing as Fast as We Can?, 74 MICH. BAR J. 24, 25 (1995).

75. Id., supra note 69, at 96.

76. Id. at 96-97.

77. Stevens, supra note 20, at 15-16.
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Justice John Paul Stevens expressed the belief that rather than reviewing too few cases, the Court is actually reviewing too many.
In reaching this conclusion, Justice Stevens relied on his own experience and the observations of Justice Jackson made more than fifty years ago. Justice Jackson observed that discretionary jurisdiction failed to cure the problem of overloading the Supreme Court because the justices could not always “resist the temptation to correct a perceived error or take on an interesting question despite a lack of general importance” to jurisprudence.78

The application of these arguments to state supreme courts was demonstrated when Justice Patricia Boyle quoted Professor Hart’s observations at length in a recent defense of the Michigan Supreme Court’s productivity level.79 Justice Boyle criticized Professor Kelman’s article for its failure to consider the content of supreme court opinions, as opposed to merely counting the court’s opinion output during the period which Kelman studied.80 Boyle charged that Kelman’s use of statistics provided no meaningful basis for comparison with the output level of other state courts which do not necessarily sit as a whole, in the way the Michigan Supreme Court does.81 She also took Professor Kelman to task for raising the issue of the court’s productivity, and thus the specter that the court might be passing on review-worthy cases, while at the same time ducking the issue of opinion substance by saying it was “beyond the scope” of his article.82 In Justice Boyle’s view, the two are inextricably linked. Justice Boyle argued that the only way to accurately answer both of these questions would be to look at the individual opinions published by the Court.83 She also criticized Professor Kelman’s failure to count the numerous appeals which the Michigan Supreme Court resolves by order rather than by opinion.84 Justice Boyle charged that this failure left a false

78. Id. at 16. See also Robert H. Jackson, Decisional Law and Stare Decisis, 30 A.B.A. J. 334, 335 (1944).
79. Boyle, supra note 73, at 28.
80. Id. at 26.
81. Id. at 25.
82. Id. at 26.
83. Id.
84. Id. at 27.
impression that the court was underutilizing its capacity. Furthermore, Justice Boyle states that when the court’s dispositive orders are factored into the equation, the court’s productivity is on par with similarly situated state supreme courts.\(^8\)

Justice Cavanagh has also defended the court’s output, arguing that the real issue is not the number of opinions produced, but whether the court is failing to consider important issues.\(^8\) In Justice Cavanagh’s view, any attempt to review a supreme court’s opinions simply by the number issued is “simplistic and short-sighted.”\(^8\) He rejected such an approach as impossible when discretionary jurisdiction is involved, emphasizing that leave should never be granted on a quota system, but only on the merits of the individual cases.\(^8\) In Cavanagh’s view, the only rational criticism of a supreme court is whether the court is failing to address important issues.\(^8\)

That question is not easy to resolve. Professor Kelman and the State Bar Task Force imply it might be doing just that. The justices involved vigorously deny that they are passing on important issues. The question is important because it affects the reputation of the court and the public’s confidence therein. It might be possible to definitively resolve this question if someone undertakes a close examination of the issues presented in cases which did not receive leave grants. The scope of such research would necessitate a systematic dissection of the court’s activities and is beyond the scope of this Note.\(^8\) Nothing less can provide a definitive answer. Merely counting opinions without considering which issues the court passed on in any given year is a meaningless endeavor.

85. \textit{Id.}
87. \textit{Id.}
88. \textit{Id.}
89. \textit{Id.}
90. Justice Stevens suggested such a study as a means to test the validity of his argument that the Rule of Four had contributed little or nothing to the development of the national jurisprudence. Stevens, \textit{supra} note 20, at 17. It must be said, however, that it may prove impossible to come up with a workable standard for which issues are deemed "important," and to determine whether those issues have been adequately covered in the past.
B. Theory Versus Application

The only legitimate reason for seeking to increase the output of a court with discretionary jurisdiction is when the court in question has failed to review all of the cases that it should. In Michigan, cases in which three of the seven justices would have granted leave to appeal are presumably more likely to fall into the category of cases presenting review-worthy issues wrongly passed over for review. Although the issue has not been adequately explored and thus remains unresolved, this Note assumes for the sake of argument that it is desirable to increase the court’s output. The question then becomes whether adopting a non-majority vote rule would achieve the desired effect. The jurisprudence of the rule recognizes it as a procedural device to guard against any potential for abuse of power associated with a grant of discretionary jurisdiction. In this respect, the rule is essentially pessimistic. It is a response to the nagging fear that somehow, in giving a court complete or nearly complete discretion over its subject matter jurisdiction, the court will permit review-worthy issues to slip through the cracks. But like any highly theoretical premise, application often falls short of expectations.

As noted above, the theory first received significant public attention in conjunction with passage of the so-called Judges’ Bill of 1925.91 Congress at that time was aware that if it eliminated the bulk of the Supreme Court’s mandatory jurisdiction, the Court might abuse its discretion and review too few cases.92 Congress passed the Judges’ Bill only after receiving the Court’s assurance that it had devised a rule to assist the court in exercising judicial discretion. Under this “Rule of Four,” the traditional majority vote rule was relaxed and votes to grant leave required only a “substantial minority.”93 Thus, if the court was to err, it would err on the side of caution. The rule was based on the belief that if “so substantial a number of Justices . . . wanted to hear a given case, a

91. See supra notes 35-40 and accompanying text.
92. Stevens, supra note 20, at 10-11, 14-16.
grant [of certiorari] was an appropriate act of discretion for the Court as a whole. The Court has acknowledged that without the Rule of Four, “the vast discretion which Congress allowed us in granting or denying certiorari might not be tolerable.” Commentators for whom the Rule of Four has become an ingrained part of the legal culture see efforts to change the Rule as an “invidious effort to reduce access to the Court.”

The most interesting aspect about the non-majority vote rule is that so few states have adopted it. Many states followed the federal model in establishing an intermediate appellate court and giving their courts of last resort discretionary jurisdiction. Yet few courts have found it necessary to include the non-majority vote rule as part of the package. Perhaps some of the explanation lies in the fact that seventy years ago, Congress entered into uncharted territory when it gave the Supreme Court mostly discretionary jurisdiction. Presumably, by the time the states started to follow suit, the fear that discretionary review powers would be abused had apparently been largely disproved by the federal experience.

The Supreme Court Justices who developed the Rule of Four undoubtedly felt the weight of great responsibility as they explored the outer reaches of discretionary jurisdiction. However, Justice Stevens’s historical analysis of the rule has shown that it was only a small part of the process by which certiorari was granted during

94. Id. at 606.
96. Supreme Court Study Group, supra note 93, at 607.
97. State level non-majority vote rules are not without advocates. Justice Mosk of the California Supreme Court, for example, expresses a desire to see his court adopt a non-majority vote rule. Justice Mosk feels that the discretionary review process makes it “likely” or even inevitable that courts are passing on issues of significance, although he acknowledged that there is no way to know with any certainty. Mosk found no known historical basis for California to retain a majority vote rule and believes switching to a substantial minority vote rule would help eliminate apprehension among the public and the bar as the percentage of leave grants continues to decrease, while the total number of petitions continues to rise. Mosk, supra note 34, at 2-3, 5.
the 1920s.\textsuperscript{98} Other aspects of the process— the individual attention which each justice gave to the petitions— were possibly given far more weight by the Court and by Congress when deciding to grant the Court discretionary review.\textsuperscript{99} Viewed in that light, the non-majority vote rule takes on an aspect of being more of a public relations gimmick to assuage public fears about the review process, rather than a significant factor in Congress’ decision. The rule by itself provides no guarantee of a sound outcome, either in the decision to grant leave or in the court’s ultimate opinions. Thus, reliance on the rule is illusory. While advocates of the rule will certainly discount this theory, it is undeniable that Congress did not require the Court to adopt the Rule of Four, but instead left the final decision to the Court.\textsuperscript{100}

Since the first congressional hearing on this issue, debate over the application of the non-majority vote rule has continued. It resurfaces most often when concern is expressed over an increasing U.S. Supreme Court caseload, for such concern inevitably leads to the suggestion that the Court should revert to a majority vote rule.\textsuperscript{101} In the Michigan context, we have seen the opposite application of the rule when concern is expressed over a decreasing output.

Any change effected by either adopting or eliminating a non-majority vote rule would likely produce only a marginal increase or reduction in a court’s caseload and would come at the cost of sacrificing a court’s traditions.\textsuperscript{102} Finally, by its very nature, the rule will work its effect only in marginal cases. Justice Stevens reminded us that for every “substantial minority” of justices who would grant leave, there exists a majority of justices who did not view the cases as worthy of review.\textsuperscript{103} Whenever proposals are considered which effect only marginal change, one cannot escape the conclusion that

\textsuperscript{98} Stevens, \textit{supra} note 20, at 12 n.59.
\textsuperscript{99} Id.
\textsuperscript{100} Id. at 14-15.
\textsuperscript{101} Supreme Court Study Group, \textit{supra} note 93, at 606.
\textsuperscript{102} Id. at 606-07.
\textsuperscript{103} Stevens, \textit{supra} note 20, at 19.
such change is being effected more for the sake of philosophy, or for appearances, than for any substantive result.

Michigan’s jurisprudence, like most states, venerates majority rule in keeping with our democratic traditions. Justice Cavanagh made this point when arguing for the retention of the majority vote rule in Michigan. He called the Michigan Supreme Court’s majority rule one of its “most sacrosanct traditions,” and argued that it “should not be changed” in light of the court’s process. 104 Nevertheless, Justice Cavanagh acknowledged that it would be a relatively simple matter to grant leave more often in order to placate the court’s critics who focus on a low opinion output. 105 He also conceded that a rule of three might “result in a few more grants of leave.” 106 Likewise, Justice Boyle has admitted adoption of a “rule of three” would “expand the docket to some extent,” but fears it would be at a cost not “worth the benefit of promoting dissenting views.” 107

C. The Root of the Problem

The Michigan Supreme Court’s handling of court of appeals inter-panel conflicts, more than its output of opinions, seems to lie at the heart of the recent call for the supreme court to adopt a non-majority vote rule. The State Bar Task Force (“Task Force”) recommended that the supreme court adopt a minority vote rule for granting leave in court of appeals conflict cases, but this recommendation was secondary to the Task Force’s primary goal of persuading the supreme court to replace the current “first out” rule with the so-called Sinai Hospital procedure in conflict cases. 108 Both procedures can be viewed as ensuring that court of appeals panel conflicts are resolved by the court of appeals without

104. Cavanagh, supra note 86, at 894.
105. Supreme Court Study Group, supra note 93, at 606.
106. Id.
107. Boyle, supra note 73, at 29 n.21.
108. See supra notes 62-63 and accompanying text.
philosophy, or
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Cavanagh
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without
require the supreme court assistance.109 Both procedures are also
consistent with the philosophical view that the supreme court
should not have to resolve inter-panel conflicts in the first place,
“since the appellate court was established in order to lessen the
supreme court’s workload not add to it.”110 The supreme court’s
continued support of the “first out” rule in the face of the fierce
criticism surrounding it seems to reflect an ambivalence on the
court’s part about whether to stay above the fray or become more
involved. Its continued support of the “first out” rule seems certain
to ensure that there will be pressure on the court to ultimately
review more of those cases. On the other hand, adoption of the
Sinai Hospital procedure could represent a more complete grant of
power to the court of appeals to shape Michigan’s future
jurisprudence.

Regardless of which philosophical view the supreme court
ultimately adopts with respect to resolving court of appeals
conflicts, these considerations serve only to emphasize the fact that
the problem that a minority vote rule is designed to address,
namely abuse of the power of discretionary review, is not the
primary problem currently facing the Michigan Supreme Court.
The primary problem is the volume of applications it receives for
leave to appeal. Adoption of the Task Force’s other
recommendations for administrative reforms would likely alleviate
some of the burden on the court, but adoption of a minority vote
rule would more likely add to it. Ultimately, to fully address the
problems the appellate court system faces, the legislature must
either fundamentally alter the definition of what constitutes an
appealable issue or provide an appropriate level of support for court
activities to allow them to adequately address the interpretive
questions posed by legislation.

109. See supra notes 56, 62.
110. Hathaway, supra note 53, at 1413 (citing Edward M. Wise, The Legal
Culture of Troglodytes: Conflicts Between Panels of the Court of Appeals, 37 WAYNE
L. REV. 313, 334 (1991)).
IV. CONCLUSION

Constructive criticism of any government institution, whether executive, legislative, or judicial, is healthy. One-dimensional criticism, or criticism out of context, can be destructive. It is important that the public have confidence in the supreme court as an institution and as our court of last resort. While adoption by the Michigan Supreme Court of a “Rule of Three” might help to restore public confidence in the supreme court as an institution, it would likely have little significant impact on the problems recently faced by the court. Unless and until it can be definitively shown that the court’s present level of output is inadequate, logic dictates that the source of the court’s problems are not of its own making, but rather a function of its continuously expanding caseload and its administrative burdens. In the final analysis, any expansion or curtailment of access to the courts must remain an issue for the legislative arena.

CAROL A. PARKER