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REFLECTIONS ON STARE DECISIS IN MICHIGAN: THE RISE AND FALL OF THE "REZONING AS ADMINISTRATIVE ACT" DOCTRINE

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In an earlier article in this law review,[1] I discussed the new doctrine that in certain municipalities a decision by the local governing body to rezone or not to rezone land should be deemed an "administrative" or "quasi-judicial," rather than a "legislative," act.[2] This doctrine was introduced into Michigan law several years ago in a series of opinions signed by only three justices of the Michigan Supreme Court.[3] The earlier article dealt principally with the merits of the new "rezoning as administrative act" doctrine. The present article discusses troublesome aspects of the Michigan Supreme Court's attitude toward the principle of stare decisis, as reflected in the opinions previously discussed and several more recent opinions. The article also reports on the demise of the "rezoning as administrative act" doctrine in Michigan law.

Stare decisis is, of course, one of the foundations of the Anglo-American legal system, a principle designed to maintain the stability, predictability, and harmony of the law. The principle dictates that a rule of law that has become settled by a series of decisions of the highest court within a given jurisdiction is held to be binding even on that highest court, absent a substantial change in conditions that would justify the court's reconsideration and rejection or reformulation of the rule. The Michigan Supreme Court decisions to be discussed here—mostly decisions in zoning cases—suggest that the proper scope and application of stare decisis is now an unsettled question in Michigan.

In *Kropf v. City of Sterling Heights*,[4] the plaintiffs had filed a petition with the local governing body seeking to have their property

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1. Cunningham, *Rezoning by Amendment as an Administrative or Quasi-Judicial Act: The "New Look" in Michigan Zoning*, 73 MICH. L. REV. 1341 (1975).

2. This will hereafter be called the "rezoning as administrative act" doctrine.

3. Nickola v. Grand Blanc Township, 394 Mich. 589, 232 N.W.2d 604 (1975); Smookler v. Wheatfield Township, 394 Mich. 574, 232 N.W.2d 616 (1975); Sabo v. Monroe Township, 394 Mich. 531, 232 N.W.2d 584 (1975).

4. 391 Mich. 139, 215 N.W.2d 179 (1974).

rezoned from single-family zoning to a use classification that would permit multiple-family dwellings to be constructed on the site. "Failing in this endeavor, the plaintiffs then brought suit in the circuit court . . . [asserting] that . . . [the ordinance in question] was unreasonable, unconstitutional, and confiscatory as it applied to their property."[5] The circuit court denied relief to the plaintiffs, but the court of appeals reversed and remanded. A four-member majority of the supreme court[6] then reversed the court of appeals and held that the burden rested on the plaintiffs to prove that the exclusion of multiple-family dwellings was unreasonable, arbitrary, and confiscatory;[7] that the plaintiffs had failed to carry their burden of proof;[8] and that the evidence supported the trial judge's finding that "the instant property was suitable for, could be developed for, and was salable when used for single family residential purposes."[9]

This holding was based on the traditional Michigan judicial approach to such zoning cases, under which the existing zoning regulations are presumed to be valid and the landowner who has failed to obtain a rezoning is limited to a constitutional attack on the regulations—an attack that carries a heavy burden of proof. The presumption of validity and the allocation of the burden of establishing by clear and convincing evidence the unconstitutionality of the regulations as applied to the land in question are, of course, premised on the traditional (and still almost universally accepted) rule that rezoning by amendment is a "legislative act" of the local governing body. It is clear that the principle of stare decisis dictated the approach adopted by the majority in *Kropf*.[10]

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5. 391 Mich. at 147-48, 215 N.W.2d at 181.

6. Justices Levin and T.G. Kavanagh concurred in the result; Justice Fitzgerald did not participate.

7. 391 Mich. at 156-57, 215 N.W.2d at 186.

8. 391 Mich. at 159-63, 215 N.W.2d at 187-89.

9. 391 Mich. at 163-64, 215 N.W.2d at 189.

10. *See, e.g.*, Biske v. City of Troy, 381 Mich. 611, 166 N.W.2d 453 (1969); Bowman v. City of Southfield, 377 Mich. 237, 140 N.W.2d 504 (1966); Padover v. Township of Farmington, 374 Mich. 622, 132 N.W.2d 687 (1965); Roll v. City of Troy, 370 Mich. 94, 120 N.W.2d 804 (1963); Christine Bldg. Co. v. City of Troy, 367 Mich. 508, 116 N.W.2d 816 (1962); Alderton v. City of Saginaw, 367 Mich. 28, 116 N.W.2d 53 (1962); Tireman-Joy-Chicago Improvement Assn. v. Chernick, 361 Mich. 211, 105 N.W.2d 57 (1960); Dequindre Dev. Co. v. Charter Township, 359 Mich. 634, 103 N.W.2d 600 (1960); Lamb v. City of Monroe, 358 Mich. 136, 99 N.W.2d 566 (1959); Uday v. Dearborn, 356 Mich. 542, 96 N.W.2d 775 (1959); Cook v. Bandeen, 356 Mich. 328, 96 N.W.2d 743 (1959); Roberts v. City of Three Rivers, 352 Mich. 463, 90 N.W.2d 696 (1958); Robinson v. City of Bloomfield Hills, 350 Mich. 425, 86 N.W.2d 166 (1957) (commonly cited as Brae Burn, Inc. v. Bloomfield Hills).

In *Kropf*, Justice Levin, supported by Justice T. G. Kavanagh, concurred in the result[11] but advanced a new view of the nature of at least some rezoning amendments. In many localities, he stated, "there have been dozens, hundreds and, in some cases, thousands of zoning map changes, exceptions and variances granted";[12] in such communities, the process of passing upon applications for rezoning amendments should be treated *not* as a "legislative act" but rather as an "administrative act." This being the case, Justice Levin argued, the criterion for granting or denying the requested rezoning should *not* be whether the *existing* zoning regulations meet the constitutional test of "reasonableness," with the burden on the landowner to establish that they do not permit *any* reasonable use of his land. Instead, the test should be whether the *proposed* zoning classification is "reasonable in light of all the circumstances,"[13] with the landowner having the burden of proof on this issue. Justice Levin concluded that the decision of the court of appeals therefore should be reversed "without prejudice to an application to the legislative body of the City of Sterling Heights seeking an administrative hearing with regard to the reasonableness of the proposed use."[14] He further concluded that, under the applicable court rule,[15]

> [i]f the local authorities deny a change in zoning then a writ of superintending control could be sought; similarly, a nearby property owner might seek superintending relief against a change granted. If the property owner also claims that the presently permitted use is unreasonable, he may, to avoid a multiplicity of actions, assert that additional ground for relief.[16]

Justice Levin's *Kropf* opinion, supported by only one other member of the court, might have been dismissed as unlikely to have any practical effect on the development of Michigan law. But in *West v. City of Portage*,[17] even though the issue was not the same as in *Kropf*, the views advanced by Justice Levin in *Kropf* on the "administrative" character of local decisions on rezoning obtained additional support. By a 4-3 decision, the court in *West* held that an amendment to a city zoning ordinance which changes the zoning of a particular property is not subject to a referendary vote of the

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11. 391 Mich. at 164, 215 N.W.2d at 190 (Levin, J., concurring).
12. 391 Mich. at 168, 215 N.W.2d at 192.
13. 391 Mich. at 172, 215 N.W.2d at 194.
14. 391 Mich. at 173, 215 N.W.2d at 194.
15. MICH. GEN. CT. R. 711.
16. 391 Mich. at 173 n.8, 215 N.W.2d at 194 n.8.
17. 392 Mich. 458, 221 N.W.2d 303 (1974).

electors of the city.[18] Justice Levin's opinion for the court, holding that rezoning is an "administrative act," was signed by Justice Fitzgerald as well as by Justice T. G. Kavanagh. Although Justice Coleman originally signed the Levin opinion, she withdrew her signature prior to publication and merely concurred in the result. Justices Williams, Swainson, and T. M. Kavanagh dissented.

Under traditional analysis, the *West* case did not establish as new Michigan law the views advanced by Justice Levin in his concurring opinion in *Kropf*. As the Michigan Supreme Court had reaffirmed only a year before *West*,

> [t]he clear rule in Michigan is that a majority of the court must agree on a ground for decision in order to make that [a] binding precedent for future cases. If there is merely a majority for a particular result, then the parties to the case are bound by the judgment but the case is not authority beyond the immediate parties.[19]

In three zoning cases decided by the court shortly after *West*, however, Justices Levin, Fitzgerald, and T. G. Kavanagh constituted a majority of the five sitting justices. In these three cases, *Sabo v. Township of Monroe*,[20] *Smookler v. Township of Wheatfield*,[21] and *Nickola v. Township of Grand Blanc*,[22] Justice Levin (with Justices Fitzgerald and T. G. Kavanagh signing the opinion) treated the local rezoning decisions as "administrative acts" and applied the "reasonableness of the proposed use" test;[23] he relied on the *Kropf* concurring opinion, even though the applicability of the new doctrines was not argued or briefed in the trial court, the court of appeals, or the supreme court.[24] In all three cases, the supreme court affirmed court of appeals' decisions that the uses proposed by landowners or developers should be allowed because "[t]he record in each [case] establishes that the proposed use (which happens to be a partially or totally excluded use) is reasonable."[25] Although Justice Levin stated that "the proofs now adduced in circuit court [should] be presented administratively" and that judicial review should be restricted "to whether the record evidence supports the

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18. 392 Mich. at 467-68, 472, 221 N.W.2d at 307-08, 310.

19. People v. Anderson, 389 Mich. 155, 170, 205 N.W.2d 461, 467 (1973).

20. 394 Mich. 531, 232 N.W.2d 584 (1975).

21. 394 Mich. 574, 232 N.W.2d 616 (1975).

22. 394 Mich. 589, 232 N.W.2d 604 (1975).

23. *E.g.*, Sabo v. Township of Monroe, 394 Mich. 531, 536-37, 232 N.W.2d 584, 585-86 (1975).

24. Justice Williams concurred separately in each case. Justice Coleman dissented in *Sabo* and *Smookler* and dissented in part in *Nickola*.

25. 394 Mich. at 537, 232 N.W.2d at 586.

administrative finding on the issue whether the proposed use is reasonable," he held that it was unnecessary to reverse and remand, because the record supported the supreme court's finding that the proposed use was "reasonable."[26]

The three-justice majority opinions in *Sabo, Smookler*, and *Nickola* are disturbing for a number of reasons. In the first place, the three "majority" justices never indicate why the rezoning decisions in those cases should be deemed "administrative" rather than "legislative." There is no indication that the record showed that the townships of Monroe, Wheatfield, or Grand Blanc were subject to the "rezoning as administrative act" doctrine by virtue of their past zoning practices.[27] More importantly, nothing in the opinions in these three cases suggests that the "majority" seriously considered the propriety of overruling the long line of Michigan cases[28] holding—as the majority in *Kropf* had held—that a landowner's only recourse, upon failure to persuade the local governing body to rezone his land, was a constitutional challenge to the validity of the zoning regulations as applied to his land, with the zoning regulations presumed to be valid. Since there has been general agreement that the principle of stare decisis is an important element of Michigan jurisprudence, one would have expected some statement in *Sabo, Smookler,* or *Nickola* explaining why the long-settled rule was being overturned in favor of the new "rezoning as administrative act" doctrine and the "reasonableness of the proposed use" test of the validity of local government decisions to grant or refuse rezoning.[29] The absence of any such statement is particularly disturbing because, even if the three-justice "majority" in *Sabo, Smookler*, and *Nickola* strongly believed that the old rule was not working well and that a new rule should be adopted, one would have expected them to feel some hesitancy about changing the law when circumstances temporarily reduced the active membership of the court from seven to five. Such reluctance would have been especially appropriate in cases that were argued and briefed on the assumption that the old rule was applicable.

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26. 394 Mich. at 537, 232 N.W.2d at 586.

27. *See* Cunningham, *supra* note 1, at 1351.

28. *See* note 10 *supra.*

29. Justice Levin's concurring opinion in *Kropf* seems to be based on the theory that continued characterization of such decisions as "legislative" would violate the Michigan Constitution. *See* 391 Mich. at 165-69 nn.2-5, 215 N.W.2d at 190 nn.2-5. But this idea is not developed in the *Kropf* concurring opinion, nor in *West, Sabo, Smookler,* or *Nickola.*

Vigorous opposition to the court's new direction was voiced by Justice Coleman. She rejected the "administrative act" doctrine on two general grounds: (1) the standard of "reasonableness of the proposed use" is not "workable"; and (2) the new doctrine usurps the zoning power properly delegated to local governing bodies, makes the court a "super zoning board," and imposes the court's social policies on local communities.[30]

As 1975 drew to a close, Michigan law governing the characterization of local governing body action on proposed rezoning amendments was clearly unsettled. In *Turkish v. City of Warren*,[31] division 2 of the court of appeals accepted the "rezoning as administrative act" doctrine. In a number of subsequent cases, however, divisions 2 and 3 of that court applied the *Kropf* majority rule in cases where the landowners had sought and been denied rezoning and had then sued to establish the unconstitutionality of the zoning regulations as applied to their lands. In at least two of these cases—*Palmer v. Township of Superior*[32] and *Ettinger v. Avon Township*[33]—the court expressly held that the *Kropf* majority rule was still "the law" in Michigan and that the "plurality" opinions in *Sabo, Smookler*, and *Nickola* did not furnish any precedent to govern future decisions because less than a majority of the entire membership of the supreme court had concurred in those opinions.

In *Werkhoven v. City of Grandville*,[34] the court of appeals initially applied the *Kropf* majority rule without reference to the Levin concurring opinion and found against the landowner. However, with six justices sitting, the Michigan Supreme Court then issued a brief order remanding the *Werkhoven* case to the court of appeals "for reconsideration in light of the opinions of the Justices of this Court in *Sabo* . . . *Smookler* . . . and *Nickola*."[35] On remand, the appeals court said:

> While we are extremely tempted to hold that *Kropf* still controls since *Sabo* is not binding as precedent, we nevertheless believe that the Supreme Court's order left us with no other choice but to apply *Sabo*. . . . The Supreme Court's remand order is, in our view, express and unambiguous in directing us to apply *Sabo* rather then *Kropf* to the present case. It would be illogical to assume that the

30. *See, e.g.*, Sabo v. Monroe Township, 394 Mich. at 572, 232 N.W.2d at 603-04.

31. 61 Mich. App. 435, 232 N.W.2d 732 (1975).

32. 60 Mich. App. 664, 233 N.W.2d 14 (1975).

33. 64 Mich. App. 529, 236 N.W.2d 129 (1975).

34. 61 Mich. App. 200, 232 N.W.2d 356 (1975).

35. 395 Mich. 753, 753, 232 N.W.2d 671, 671 (1975).

Supreme Court intended otherwise since our original opinion had already decided this case on the basis of *Kropf*.[36]

The terms upon which the appeals court then remanded the case to the circuit court clearly show that it was making a good-faith attempt to follow the supreme court's remand order, despite the court of appeals' belief that "by applying *Sabo* . . . we are ignoring binding Supreme Court precedent and, in effect, deciding this case on the basis of the wrong law."[37] This statement was based, in part, on the appeals court's reading of *In re Curzenski Estate*.[38] There the majority of the supreme court (four out of seven justices) rejected an earlier case as precedent because the then eight-member supreme court which had decided the case had split 4-3, with one member not sitting; the *Curzenski* court held that a majority of five in an eight-member court would be required for the establishment of a precedent.

It was surely reasonable to interpret the supreme court's remand order in *Werkhoven* to mean that *Sabo* and its companion cases had established the rule of decision in Michigan, pending reconsideration of the "rezoning as administrative act" doctrine by the full bench of the supreme court after its return to full strength with the addition of Justice Lindemer. This reading of *Werkhoven* was reinforced by the 6-1 decision of the supreme court in *Negri v. Slotkin*,[39] which held that the appeals court was bound by a 3-2 supreme court

36. 65 Mich. App. 741, 744, 238 N.W.2d 392, 394 (1975), *leave to appeal denied*, 396 Mich. 850 (1976).

37. 65 Mich. App. at 744 n.5, 238 N.W.2d at 394 n.5. In its opinion in *Werkhoven* on remand, the appeals court said:

> (1) We remand to the circuit court for the determination of whether the defendant, in fact as well as in theory, exercises legislative rather than administrative powers in respect to zoning. . . . In making this determination the court shall consider the following questions: (a) Has the legislative body of the defendant adopted, on general not individualized grounds, a plan of general application to all the lands in the community? (b) Does the defendant's zoning authority reject all applications for change in zoning without reaching the merits? (c) Does the defendant have a history of granting variances to individual property owners only when constitutionally necessary?
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> (2) If, after applying these standards, the circuit judge finds that the defendant does, in fact, exercise legislative power in respect to zoning, then he shall return his findings to this Court where our previous decision will be affirmed.
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> (3) If the circuit judge finds, however, that the zoning authorities of the defendant act administratively, then he shall remand to the City of Grandville for an administrative hearing on the question of whether the plaintiff's proposed use is reasonable under all the circumstances. At this hearing, the factors listed in *Kropf* . . . (concurring opinion) . . . shall be considered along with all other pertinent factors. We will not retain jurisdiction should this situation arise.
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> (4) Judicial review of this hearing, if sought by any aggrieved party, . . . shall be restricted to the determination of whether the record evidence supports the administrative findings. . . .

65 Mich. App. at 745-46, 238 N.W.2d at 394-95.

38. 384 Mich. 334, 183 N.W.2d 220 (1971).

39. 397 Mich. 105, 244 N.W.2d 98 (1976).

decision which invalidated the Michigan "guest passenger act" on constitutional grounds.[40] The court of appeals had held in *Negri* that the 3-2 supreme court decision was "applicable as the law of that case only," and not binding on the appeals court under the principle of stare decisis.[41] Speaking for the majority in *Negri*, Justice Williams said:

> Were we to hold that 3-2 or 3-1 decisions are not binding on the Court of Appeals and trial courts, the functioning of our judicial system would be adversely affected. Urgent matters would be held in limbo until such time as a majority of four justices could be mustered.
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> . . . .
>
> We [therefore] hold that a three-to-two decision of this court . . . is binding on the Court of Appeals and the trial courts until overruled by a later decision of this Court, including, if that be the case, a later three-to-two decision of this Court.[42]

The lone dissenter in *Negri*, Justice Coleman, argued that the majority's holding that 3-2 or 3-1 decisions are "binding on the Court of Appeals and trial courts" in fact gives such decisions precedential effect under the principle of stare decisis and that "[g]iving stare decisis effect to a decision signed by less than a majority of the whole Court defeats the purpose of the rule," which is "to bring about certainty, stability and predictability of the law."[43] Justice Coleman was especially concerned by the prospect that the 3-2 decisions in *Sabo* and its companion cases, which had overturned well-settled precedent, were being given stare decisis effect by *Negri* even though the full membership of the court had not reconsidered the issue raised in these cases.[44]

A court of appeals panel in *Jamens v. Avon Township*[45] concluded that *Negri* made *Sabo* and the other 3-2 decisions binding precedents, "[e]ven though *Sabo* and its progeny would appear to eviscerate most zoning ordinances by requiring a showing of the mere reasonableness of the proposed use."[46] We now know, however, that if the court of appeals had only delayed another three months in deciding *Jamens*, it would have learned that a majority of the entire membership of the supreme court disapproves of the

40. Manistee Bank & Trust Co. v. McGowan, 394 Mich. 655, 232 N.W.2d 636 (1975).

41. Negri v. Slotkin, 397 Mich. 105, 107, 244 N.W.2d 98, 98 (1976).

42. 397 Mich. at 108, 244 N.W.2d at 99-100.

43. 397 Mich. at 110, 244 N.W.2d at 100.

44. 397 Mich. at 113-14, 244 N.W.2d at 101-02.

45. 71 Mich. App. 70, 246 N.W.2d 410 (1976).

46. 71 Mich. App. at 76, 246 N.W.2d at 413 (1976).

Sabo doctrine and prefers to apply the "old rule," which requires a landowner whose request for rezoning has been rejected to establish that the existing zoning regulations as applied to his land are so "arbitrary and unreasonable" as to be unconstitutional. Speaking for a majority of four in *Kirk v. Tyrone Township*,[47] Justice Williams explained the court's decision:

> Upon reflection, it does not seem wise as *Sabo* did to attempt to engraft upon the established legislative scheme of zoning and rezoning, a new system which admittedly requires new legislative action to operate optimally. Should the Legislature choose to revise the approach to zoning amendments in our state [by enacting "an administrative procedure act providing for review of local agency action in contested cases" for use if local authorities deny a change in zoning], this Court would, of course, view matters differently. But, as of the present time, it seems wisest to return to the philosophy expressed in *Brae Burn, Inc. v. Bloomfield Hills* . . . and the *Kropf* majority. As we said in *Brae Burn*, and quoted again in *Kropf*, "The people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life."[48]

In a concurring opinion in *Kirk*,[49] Justice Levin argued that the majority had improperly raised the *Sabo* issue *sua sponte*, since the issue was not raised at the trial level, in the court of appeals, or in the briefs or oral argument in the supreme court. (The *Kirk* case had been fully briefed in the supreme court prior to the court's decisions in *Sabo* and its companion cases.) This is a rather ironic argument since in *Sabo* and its companion cases the question of adopting Justice Levin's "rezoning as administrative act" doctrine and "reasonableness of the proposed use" test had not been raised before any court. Justice Fitzgerald, joined by Chief Justice T. G. Kavanagh, dissented[50] on the ground that the majority's action in "overruling" *Sabo* and the other 3-2 decisions was "precipitous and ill-advised in light of the short passage of time since these cases were declared to be the view of this Court on zoning changes."[51] However, Justice Fitzgerald did not discuss the propriety of three members of a seven-member court undertaking to overturn a well-settled rule of law when the temporary absence of two members of

47. 398 Mich. 429, 247 N.W.2d 848 (1976).

48. 398 Mich. at 441, 247 N.W.2d at 853.

49. 398 Mich. at 448, 247 N.W.2d at 855.

50. 398 Mich. at 448, 247 N.W.2d at 856. Chief Justice Kavanagh concurred in both the Levin concurrence and the Fitzgerald dissent.

51. 398 Mich. at 444, 247 N.W.2d at 857. In support of this view, Justice Fitzgerald quoted from Justice Stewart's dissenting opinion in Mitchell v. W.T. Grant Co., 416 U.S. 600, 634-36 (1974) (Stewart, J., dissenting).

the court gave them an opportunity to do so, in cases where the "new rule" had never been briefed or argued.

It would seem that the "rezoning as administrative act" doctrine is dead in Michigan, at least until it is embraced by the legislature or revived by at least four members of the supreme court. It is unfortunate that, on the basis of a doctrine now repudiated by a majority of the full bench of the supreme court, Monroe, Wheatfield, and Grand Blanc townships and perhaps the City of Grandville[52] have been forced by a temporary three-member majority of that court to permit real estate developments in violation of their zoning ordinances. But the short, unhappy history of the "rezoning as administrative act" doctrine does, at least, provide an opportunity for reflection upon the proper criteria for application of the principle of stare decisis.

Such reflection leads me to conclude that an existing, well-established rule of law should not be overturned by less than a majority of the full bench of the supreme court. If for any reason the court is at less than full strength when it considers a case, it should follow the precedents unless a majority of the full bench of the court is prepared to vote to overrule; this should be the practice even if a majority of the justices sitting is strongly in favor of overruling the precedents and changing the existing rule of law. As we have seen, if a temporary majority gives effect to its own views, it is likely that the new rule of law will be repudiated as soon as the court is again at full strength. Adherence to the proposed principle of self-restraint will not, of course, require that "urgent matters . . . be held in limbo until such time as a majority of four justices could be mustered," as suggested in *Negri v. Slotkin*.[53] It will only require the court to follow precedents if sitting justices constituting a majority of the court's full membership cannot be persuaded to overrule the precedents. If a question of first impression is presented to the court when it is not at full strength, the court should, of course, decide the question by majority vote of the sitting justices.

Where the overruling decision arises out of a constitutional challenge to a statute, the proposed principle of self-restraint seems especially desirable in the light of *Manistee Bank & Trust Co. v.*

52. *See* Nickola v. Grand Blanc Township, 394 Mich. 589, 232 N.W.2d 604 (1975); Smookler v. Wheatfield Township, 394 Mich. 574, 232 N.W.2d 616 (1975); Sabo v. Monroe Township, 394 Mich. 531, 232 N.W.2d 584; Werkhoven v. City of Grandville, 65 Mich. App. 741, 238 N.W.2d 392 (1975).

53. 397 Mich. at 108, 244 N.W.2d at 99.

McGowan[54] and *Negri v. Slotkin.*[55] In *Manistee Bank*, the Michigan Supreme Court overruled *Naudzius v. Lahr*[56] and held the 1929 Michigan "guest passenger act"[57] partially unconstitutional by a 3-2 vote. In *Negri*, the court by a 6-1 vote held that *Manistee Bank* was binding on the court of appeals unless and until it was overruled by the supreme court, but deliberately refused to deal with the constitutional question on the merits.[58] The practical result of such an approach is that the constitutionality of the statute remains in doubt for an indefinite period, until the full bench of the supreme court has an opportunity to review it on the merits. This seems highly undesirable. Judicial deference to the legislative branch of the government does not necessitate adoption of the statutory or constitutional requirement found in some states that an extraordinary majority of the full membership of the court must concur in a decison holding a statute unconstitutional. Nevertheless, the Michigan Supreme Court *should* adopt a rule of self-restraint requiring at least a bare majority of the full bench to concur in order to overrule a prior decision upholding the constitutionality of a statute.

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54. 394 Mich. 655, 232 N.W.2d 636 (1975).

55. 397 Mich. 105, 244 N.W.2d 98 (1976).

56. 253 Mich. 216, 234 N.W. 581 (1931). In *Manistee Bank*, the circuit court rejected the constitutional challenge; the supreme court allowed an appeal prior to any decision by the court of appeals.

57. The statute in question is MICH. COMP. LAWS § 257.401 (1970).

58. 397 Mich. at 106, 244 N.W.2d at 98.