



State Democracy Research Initiative

UNIVERSITY OF WISCONSIN LAW SCHOOL

Michigan Supreme Court Strikes Down Legislature's Attempt to Thwart State's Direct Democracy Power

Derek Clinger, Senior Staff Attorney

Published: July 31, 2024

Today, in a highly anticipated decision, the Michigan Supreme Court held that the Michigan Legislature violated the state constitution when it used a hardball tactic known as “adopt and amend” to thwart two citizen-proposed initiated statutes in 2018.

The case is [Mothering Justice v. Attorney General](#). Its most immediate effect is that the thwarted initiatives—one increases the state’s minimum wage and the other provides some guarantees for workers to earn paid sick leave—will take effect in February 2025. In the long term, the case could help safeguard direct democracy rights in Michigan and around the country.

Background on ‘Adopt and Amend’

Michigan is [one of 21 states](#) that allow citizens to propose statutes to voters by initiative petition—a process meant to enable the people to pursue popular policies when their state legislatures will not. However, the “adopt and amend” tactic at issue in *Mothering Justice* risked nullifying this right as state legislators sought to exploit what they viewed as a loophole in the state’s statutory initiative process.

Under the [Michigan Constitution](#), a statute proposed by initiative petition is first presented to the Michigan Legislature, which has 40 days to reject it, propose an alternative to the voters, or enact it without changes. If the legislature rejects the proposal or offers an alternative, then the proposal is submitted to the voters at a statewide election for their approval or rejection. If the legislature enacts the proposal without changes, then the law takes effect 90 days after the final adjournment of the legislative session.

In 2018, initiative petitions proposing a minimum wage increase to \$12 per hour (plus adjustments for inflation) and guarantees for workers to earn paid sick leave were presented to the Michigan Legislature. Most legislators opposed the policies at the time, but, in a twist, the legislature *adopted* both proposals. However, during the same legislative session—and before the newly adopted policies could take effect—the legislature *amended* the policies with

separate legislation, heavily watering them down. Those two steps define the “adopt and amend” tactic.

Through “adopt and amend,” the legislature effectively rejected the initiated proposals. But it did so without giving voters an opportunity to approve or reject them in a statewide election, as the state constitution would have required had the legislature rejected the proposals outright.

‘Adopt and Amend’ Goes to Court

The constitutionality of the adopt and amend tactic was unsettled prior to this decision. The Michigan Constitution does not expressly address the “adopt and amend” tactic. Adding to the legal uncertainty were conflicting opinions from the Michigan Attorney General’s office. [A 1964 opinion](#), issued shortly after the modern version of the state constitution was adopted in 1963, advised that such a maneuver would violate the constitutional right of initiative. [A 2018 Attorney General opinion](#), however, overruled the 1964 opinion and concluded that the legislature could adopt an initiative and substantively amend it during the same legislative session. (Michigan’s current Attorney General, who took office shortly after the 2018 opinion was released, later announced her [personal support for the *Mothering Justice* plaintiffs](#) and her view that “adopt and amend” was unconstitutional.)

While the legislature embraced the 2018 opinion, it also sought validation of “adopt and amend” from the Michigan Supreme Court. In 2019, the legislature requested an advisory opinion from the court addressing the constitutionality of the tactic. But the court [declined the request](#), leaving the issue unresolved.

After the Michigan Supreme Court declined to issue an advisory opinion, backers of the minimum wage and paid sick leave initiatives—the *Mothering Justice* plaintiffs—filed a lawsuit challenging “adopt and amend” in the state’s Court of Claims. They argued that the Michigan Constitution’s procedural requirements for the statutory initiative limit the legislature to the options expressly set forth in the constitution: (1) reject the proposal and send it to the voters, (2) offer a competing alternative to the voters, or (3) enact it without changes. Because “adopt and amend” is not an option in the constitution, the plaintiffs argued that the legislature’s use of the tactic was unconstitutional.

In contrast, the legislature viewed the constitution’s silence on “adopt and amend” as tacit approval. They argued that the Michigan Constitution more generally authorizes the legislature to do anything not otherwise prohibited by the constitution and that “adopt and amend” is therefore permissible because it is not expressly prohibited.

The [Court of Claims agreed with the plaintiffs](#) in 2022, holding that “adopt and amend” violated the Michigan Constitution’s protections for the right of initiative. However, this decision was [reversed by the Michigan Court of Appeals](#) in 2023, which took the view that once the initiated proposals were enacted into law, they were “on the same footing as any other legislation passed

by the Legislature . . . meaning they are subject to amendment at any time[.]” The plaintiffs then appealed to the Michigan Supreme Court.

The Michigan Supreme Court Strikes Down ‘Adopt and Amend’

In [agreeing to review](#) the Court of Appeals’ decision, the Michigan Supreme Court identified two primary issues: whether “adopt and amend” violated the state constitution’s protections for the right of initiative, and if so, what remedy was appropriate. The court held an [oral argument](#) in December 2023.

On the question of whether “adopt and amend” violated the state constitution, the court split 4-3. The majority opinion, written by Justice Elizabeth Welch, held that the Michigan Constitution does *not* allow the legislature to reject an initiative without sending it to the voters. The opinion drew upon the text, structure, history, and spirit of the Michigan Constitution’s initiative provision as supporting this conclusion.

As to the constitution’s text and structure, the majority noted that the document provides the legislature with “three discrete options upon receiving a valid initiative petition,” two of which require the initiative to go directly to the voters, and one of which—adoption—does not. Given these explicit options, the majority reasoned that “it is implausible that the ratifiers [of the constitution] understood their inclusion of three discrete options for the Legislature as allowing a *contradictory* fourth option [i.e., adopt and amend].” (Emphasis original.) The majority added that allowing “adopt and amend” would treat the text allowing the legislature to submit an alternative policy to the voters as mere surplusage, and that to the extent the constitutional provision is ambiguous, it must be liberally construed in favor of the people. Based on these factors, the majority concluded that the “adopt and amend” tactic “deprived the people of access to the process that is guaranteed to them” by the Michigan Constitution.

Turning to the history and spirit of the initiative power in the Michigan Constitution, the majority observed that the people of Michigan reserved the initiative power to themselves in the early twentieth century “through sheer desperation” after politicians had repeatedly failed to deliver on promises to enact popularly supported policies. The initiative, they wrote, was intended “to make our government more responsive to our people.” The majority then cited contemporaneous observations suggesting an understanding that “adopt and amend” contradicted the state constitution, including statements by delegates at Michigan’s 1963 constitutional convention, as well as the Michigan Attorney General’s 1964 opinion that advised that “adopt and amend” would violate the letter and spirit of the Michigan Constitution.

The majority also rejected the legislature’s argument that because the Michigan Constitution does not expressly prohibit “adopt and amend,” the tactic is permissible. The majority wrote that to the extent that the legislature’s power is plenary under the state constitution, it does

not apply to the initiative because the constitution expressly reserves the right of initiative to the people. Pointing again to the constitution's three explicit options for the legislature when presented with an initiative, the majority explained that "[b]y reserving the initiative power to the people, the Constitution limits the legislature's role with respect to the initiatives to the powers expressly conferred upon it." (A dissenting opinion written by Chief Justice Elizabeth Clement and joined by two other justices embraced the legislature's plenary power argument.)

How to Remedy 'Adopt and Amend'

Turning to the appropriate remedy, the court again split 4-3. The majority voided the legislature's amendments to the initiatives, but it allowed the initiatives as originally proposed and adopted by the legislature to go into effect.

Explaining that the court "must fashion equitable relief that remedies the Legislature's constitutional mischief while remaining mindful of employers' reasonable reliance on the Legislature's unconstitutional acts," the majority held that the initiatives would go into effect 205 days from the decision, on February 21, 2025. This, the majority reasoned, equals the amount of time it would have taken for the initiatives to go into effect if they had not been unconstitutionally amended by the legislature.

The minimum wage initiative presented another timing issue. It envisioned phasing in an increased minimum wage over four years based on dates that had already passed. Specifically, it provided for an increase in the minimum wage rate to \$10 per hour in 2019, \$10.65 per hour in 2020, \$11.35 in 2021, and then \$12.00 in 2022, and also provided for adjustments based on inflation.

Addressing this issue, the majority ultimately held that a gradual phase-in mirroring the structure of the original initiative was most consistent with its intent and adopted a remedy that links wage increases to the same annual schedule. At the same time, the majority also ordered the state treasurer to calculate the inflation-adjusted rates. Thus, on February 21, 2025, the minimum wage will be \$10 per hour plus the state treasurer's inflation adjustment, on February 21, 2026, it will be \$10.65 per hour plus the state treasurer's inflation adjustment, and so forth.

A dissenting opinion written by Justice Brian Zahra and joined by two others argued that the proper remedy would have been to submit the initiatives to the voters for their approval or rejection.

Implications of the Court's Decision

While the Michigan Supreme Court's decision most immediately affects Michigan workers who will see increases in the state's minimum wage and have some guarantees for paid sick leave beginning in February 2025, the decision could have broader implications for direct democracy rights in Michigan and around the country.

For Michiganders, the decision suggests that the court, at least in its current composition, will view laws that undermine the right of initiative with great skepticism. The majority stated that the initiative power reflects the Michigan Constitution’s commitment to “[the democracy principle](#)” –the notion that state constitutions were drafted to prioritize popular sovereignty, majority rule, and political equality—and that this principle provides a “helpful tool to analyze our laws—especially those statutes and constitutional provisions that implicate elections and direct democracy.” Future litigation in Michigan involving democracy-related issues will likely return to this principle.

The decision in *Mothering Justice* could also help direct democracy proponents in other states as it adds to a growing body of recent state supreme court decisions that safeguarded these rights from interference by the other branches of government. Earlier this month, the Utah Supreme Court dealt a likely fatal blow to a legislative effort to repeal a voter-approved initiative to reform the state’s redistricting process in [League of Women Voters of Utah v. Utah State Legislature](#). Also citing “the democracy principle,” the court concluded that the state constitution requires strict judicial scrutiny of legislation impairing government reforms enacted through the initiative. Decisions in the past decade from [Arizona](#), [Idaho](#), [Missouri](#), and [Washington](#), among others, have similarly underscored their state constitutional commitments to safeguarding the people’s initiative power.

Although state courts do not have to follow decisions from other states, they often look to such decisions for guidance, especially when facing a question of first impression for the state. The Michigan Supreme Court’s opinion in *Mothering Justice* may therefore persuade courts in other states to not allow technicalities or machinations to frustrate the people’s initiative and referendum powers.

The State Democracy Research Initiative contributed to [amici curiae briefs in the case](#) on behalf of a group of legal scholars arguing that the “adopt and amend” tactic contravened the Michigan Constitution’s democratic commitments.