

IS THE LIVING WAGE DEAD IN DETROIT? THE ROLE OF
STARE DECISIS, HOME RULE, AND POLICY PREFERENCES
IN THE MICHIGAN SUPREME COURT

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Does a municipality have the authority to enact and enforce a minimum wage law for employers contracting with the city? This question, rather than being a simple policy question to be decided by local authorities, can implicate state constitutional law and stare decisis concerns. Living wage ordinances establish compensation for employees that enables them to earn at or above the poverty line. A recent trial court case in Michigan struck down the implementation of a living wage ordinance in Detroit. The trial court struck down the ordinance based on a case decided by the Michigan Supreme Court in 1923, during a time when state and federal authorities could not regulate wage rates or the number of hours an employee worked. In this Note, the author analyzes whether the Michigan Supreme Court should uphold the trial court's decision. He begins by providing a brief overview of the living wage movement, including arguments both in support of and in opposition to such ordinances. The propriety of enacting a living wage ordinance is a contested and politicized issue, which may play an important role in the Michigan Supreme Court's decision.

The author next examines the impact of a state's constitution on whether municipalities even have the ability to pass such ordinances. Many state constitutions give municipalities some form of home rule power, which permits a municipality to implement unique ordinances based on their policy preferences. There are two types of home rule power: imperio and legislative. If a municipality has imperio home rule power, it is capable of enacting ordinances governing matters of local concern, and these ordinances are immune from state legislation. In an imperio system, municipalities are unable to ascertain the extent of their control over matters that are not clearly matters of local concern. Legislative home rule provides municipalities the authority to regulate all matters, unless the state legislature has taken that power away. The legislative system provides municipalities confidence in

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their ability to regulate in the absence of the state's veto of such power. There is not a clear dichotomy between the two systems; instead, they fall along a spectrum. Over the years, the Michigan legislature has increased the authority given to municipalities, and it is with this evolution that the author argues Detroit's ability to enact a living wage ordinance.

Despite the authority that the Michigan legislature has given to municipalities, the Michigan trial court struck down the living wage ordinance based on precedent and the principle of stare decisis. Nonetheless, the author argues that the Michigan Supreme Court should not follow precedent based on its own standard for when it is appropriate to overrule prior cases. When presented with the argument that a case should be overturned, the Michigan Supreme Court will consider four factors: whether the earlier case was wrongly decided, whether the decision defies practical workability, whether changes in the law or facts no longer justify the earlier case, and whether reliance interests would create an undue hardship. Finding that all of these factors are present, the author concludes that the principle of stare decisis and the earlier Michigan Supreme Court case should not preclude a municipality's initiative of enacting a living wage ordinance.

In conclusion, the author finds that the intersection of policy considerations, home rule power, and stare decisis does not necessarily lead to the affirmation of the trial court's ruling. The Supreme Court of the United States has upheld the power of the federal legislature to regulate wage levels and working conditions and the Michigan legislature has amended the state constitution, two important factors in the author's analysis. In addition to recommending that the Michigan Supreme Court uphold the ability of municipalities to enact living wage ordinances, the author provides advice on how to overcome the obstacles supporters of living wage ordinances face.

I. INTRODUCTION

The living wage movement, the campaign for fixing wages at a level that keeps workers out of poverty, is alive and well in the United States.¹ So too is support for autonomous local government² and for the principle that stare decisis is not, and cannot be, absolute.³ Support for one of these movements, however, certainly does not translate into support for all. So what happens when a case or controversy involves all three? When policy preferences (living wage), state power vs. local autonomy (home rule), and tenets of judicial practice (stare decisis) all intersect, there is both a potential for unintuitive alliances and for abandonment of

1. See *infra* Part II.A.

2. See *infra* Part II.C.

3. See *infra* Part II.E.

principled positions.⁴ How one analyzes a case in which these three strands converge could indicate something about one's priorities in law, policy, and politics. Such a case exists.

In June 2007, the Third Circuit Court for the County of Wayne, Michigan issued an opinion striking down Detroit's living wage ordinance.⁵ The court based its opinion on *Attorney General ex rel. Lennane v. City of Detroit*,⁶ a 1923 Michigan case that held that local governments have no power to regulate the wages and hours of day laborers.⁷ The holding may present a conflict for the Michigan Supreme Court. The court, widely recognized as one of the most highly politicized and conservative state courts in the United States,⁸ has articulated a standard to determine when it should jettison a particular precedent.⁹

This Note demonstrates that under its own standard, the Michigan Supreme Court should overrule the *Lennane* case on which the Third Circuit Court for the County of Wayne based its opinion striking down the living wage ordinance. Furthermore, this Note suggests that on this issue the Michigan Supreme Court will be forced to choose between adhering to its own standard of reversing precedent by upholding Detroit's ordinance and keeping faith with its alleged conservative political leanings by striking down the city's attempt to mandate a living wage. Part II

4. For example, mayors and city councils that would not want to pass living wage ordinances, for ideological or economic reasons, may nonetheless support other cities' efforts simply because they seek to protect their own municipal power and prerogatives. In other cases, city officials who may support broad municipal power may nonetheless favor striking down a living wage ordinance for ideological reasons.

5. See *Rudolph v. Guardian Protective Servs., Inc.*, No. 06-622199-CZ (3d Cir. Ct. for the County of Wayne, Mich. June 13, 2007); see *infra* Part III.A.

6. 196 N.W. 391 (Mich. 1923).

7. *Id.* at 394.

8. See Sarah K. Delaney, *Stare Decisis vs. the "New Majority": The Michigan Supreme Court's Practice of Overruling Precedent*, 66 ALB. L. REV. 871 (2003); see also David Adamany & Philip Dubois, *Electing State Judges*, 1976 WIS. L. REV. 731, 767 ("Michigan has the greatest partisan cleavage on its high court."); Rudolph A. Serra, *Civil Rights: "Rights Without Remedies—Wrongs Un-Righted,"* 50 WAYNE L. REV. 933, 959 (2004) (criticizing the "transparent efforts of the Michigan Supreme Court to reach conservative results that limit and weaken human rights protection"); William C. Whitbeck, *Politics Overrules Legal Philosophy*, SAGINAW NEWS, Aug. 21, 2007, at 5A; Jack Lessenberry's Essays and Interviews, *Essay: Court Reform*, <http://jackshow.blogs.com/jack/2008/01/essay-court-ref.html> (Jan. 22, 2008, 13:59 EST). It is worth noting that each of these sources were written prior to the November 2008 election in which Democratic Wayne County Circuit Judge Diane Marie Hathaway defeated then-Chief Justice Clifford Taylor. Taylor was a member of the Michigan Supreme Court's conservative bloc. Although the election changes the partisan composition of the court, Republicans still constitute a majority of the court, and it is as yet unclear whether the change will significantly affect the court's deliberations. At least one journalist has suggested that given Republican Justice Elizabeth Weaver's disagreements with other Republican justices, Weaver will serve as a swing vote on certain issues. See Dawson Bell, *Upset Win Shakes Conservative Bloc*, DETROIT FREE PRESS, Nov. 6, 2008, at 4A. On the issue of stare decisis, one commentator argues that Weaver has been reluctant to use the practice of overruling cases as a means to an end. Delaney, *supra*, at 897. That reluctance, combined with Justice Hathaway's election, may serve to change the outcome in those cases. In any case, my intention is to provide a test for the court and to demonstrate that, regardless of the result, positions taken by each justice regarding Detroit's living wage ordinance will be a strong indication of whether or not the above political arguments have merit.

9. See, e.g., *Robinson v. City of Detroit*, 613 N.W.2d 307, 320 (Mich. 2000).

of this Note lays out the background of the living wage movement, home rule authority, and stare decisis, both in general and in the state of Michigan. Part III discusses the case that serves as a test of the Michigan Supreme Court's approach to stare decisis, and discusses how the living wage movement and home rule authority have converged in other jurisdictions throughout the United States. Part IV recommends that the Michigan Supreme Court adhere to its jurisprudential principles rather than any ideological principles and uphold Detroit's living wage ordinance. Finally, Part IV also provides guidance to living wage advocates who may face similar, pre-minimum wage era precedent in other jurisdictions and who are themselves looking for ways to overcome those decades-old decisions.

II. BACKGROUND

To better understand the complex interaction among home rule, the campaign for a living wage, and the doctrine of stare decisis that the Michigan Supreme Court may soon evaluate, one must understand each of its component parts. This Part discusses a brief history of each area of law and policy at issue before it begins to examine any inherent tensions that exist among the three.

A. *The Living Wage Movement*

The living wage movement rests upon the premise that workers who are employed full-time for a forty-hour week should earn enough to keep their families above the federal poverty line.¹⁰ More directly, proponents argue that businesses that benefit from public contracts have an obligation to provide a living wage because failure to do so results in an increased demand for public services such as food stamps, soup kitchens, homeless shelters, and public health care assistance.¹¹ Living wage supporters contend that businesses benefit from "municipal subsidization of poverty" because local government, not business, is essentially forced to cover the gap between wages and the poverty rate.¹² Under a living wage ordinance, a municipality need not pay a "double bill"¹³—the contract for services up front and the back end hidden cost of public assistance for workers who cannot make ends meet on wages alone.

10. See William Quigley, *Full-Time Workers Should Not Be Poor: The Living Wage Movement*, 70 Miss. L.J. 889, 892 (2001).

11. See *id.* at 893; Rachel I. Rosen, Note, *The Rise and Fall of Living Wage Laws: Missouri Hotel and Motel Association v. City of St. Louis*, 21 J.L. & COM. 131, 132 (2001).

12. Quigley, *supra* note 10, at 893.

13. Living Wage Resource Center, *Building Power in Our Workplaces and Neighborhoods*, <http://www.livingwagecampaign.org/index.php?id=2071> (last visited Apr. 3, 2009) [hereinafter LWRC: The National Movement].

Thus, the living wage movement seeks to persuade municipalities to adopt ordinances that mandate wage levels capable of keeping a working family at or slightly above the poverty line, usually by pegging the wage to that federal level.¹⁴ The targets of living wage efforts vary. Different living wage campaigns attempt to reach different employers, targeting companies that directly contract with the municipality, their subcontractors, companies receiving municipal tax breaks or other financial assistance, or, in the broadest case of wage regulation, any employer registered or licensed within the municipality's territorial jurisdiction.¹⁵

The first success of the living wage movement is generally considered to be the coalition of labor unions and religious organizations, who in 1994 persuaded the City of Baltimore to enact an ordinance requiring businesses with city contracts to pay its workers a living wage.¹⁶ Since then, the living wage movement is "taking nationwide cities by storm."¹⁷ Across the United States, coalitions similar to that in Baltimore have brought the total number of local government living wage ordinances to 140.¹⁸

Critiques of living wage ordinances generally echo arguments against basic minimum wage laws.¹⁹ Critics claim that forcing businesses to pay higher wages will result in stagnating job creation or increased layoffs, or that businesses will have to pass on those increased costs to consumers.²⁰ In some cases, critics argue, consumers may not be able to bear the increases and will cease purchasing the product, forcing the

14. See MaryBeth Lipp, Note, *Legislators' Obligation to Support a Living Wage: A Comparative Constitutional Vision of Justice*, 75 S. CAL. L. REV. 475, 488 (2002).

15. See *id.* at 487-88; LWRC: The National Movement, *supra* note 13.

16. See Angela Yvonne Jones, *Bittersweet Victory: Non-Enforcement of Detroit's Living Wage Ordinance Plagues the Community's Living Wage Standard*, 5 J.L. SOC'Y 617, 624 (2004); Quigley, *supra* note 10, at 893; Rosen, *supra* note 11, at 133. In 1996, when the Baltimore ordinance went into effect, the living wage was calculated at \$6.10 per hour. Quigley, *supra* note 10, at 893. As of July 1, 2008, the city calculated its living wage at \$9.93 per hour. The city will raise it to \$10.19 effective July 1, 2009. City of Baltimore, Minimum Wage Commission, <http://baltimorecity.gov/government/wage/programs.php> (last visited Apr. 3, 2009).

17. Lipp, *supra* note 14, at 487.

18. See Living Wage Resource Center, *Living Wage Successes: A Compilation of Living Wage Policies on the Books*, <http://www.livingwagecampaign.org/index.php?id=1958> (last visited Apr. 3, 2009) [hereinafter LWRC: Successes] (listing city, county, educational and other enacted living wages, of which twelve have been repealed). One particular coalition has been highly active in living wage campaigns. ACORN, the Association of Community Organizations for Reform Now, established the Living Wage Resource Center to "track the living wage movement" and serve as a clearinghouse for materials and strategies for successful wage campaigns. ACORN, *Living Wage*, <http://www.acorn.org/index.php?id=2762> (last visited Apr. 3, 2009).

19. The difference between a minimum wage and a living wage is that a minimum wage is mandated without being tied to any particular standard of living, even if it is pegged to some other index, such as inflation. A living wage is a requirement that a full-time, forty-hour per week worker will earn at least enough to stay at or above the federal poverty line. See *supra* note 10 and accompanying text. Thus, all living wages are minimum wages, but not all minimum wages are living wages.

20. See DAVID MACPHERSON, EMPLOYMENT POLICIES INST., *THE EFFECTS OF THE PROPOSED CALIFORNIA MINIMUM WAGE INCREASE 3-5* (2002), http://www.epionline.org/studies/macpherson_ca_06-2002.pdf; Steven Malanga, *How the "Living Wage" Sneaks Socialism into Cities*, CITY J., Winter 2003, at 60, 60-69, available at http://www.city-journal.org/html/13_1_how_the_living_wage.html.

business to close its doors.²¹ Critics further predict that rather than lay off employees or increase prices, businesses will simply relocate to a community with a lower wage floor.²²

Other critics suggest that municipalities that pass living wage ordinances will also suffer from increased costs. These critics argue the costs will take the form of fewer and more expensive bids for public contracts and diminished tax revenues, as well as increased monitoring and enforcement costs.²³ The first two of these critiques simply extend those arguments decrying the ordinance's effect on business: when the business passes its cost on to the consumer, the city who is contracting for a service, or in the case of fewer bids, when the business is "fleeing" rather than continuing to provide services. The third claim, however, refers to costs that only the municipality will bear, as monitoring and enforcement costs are its responsibility alone.²⁴

A final set of critiques centers less on a living wage ordinance's economic effect on businesses or the municipality and instead contends that the ordinance does not reach those workers that municipalities intend to reach. For instance, some studies emphasize that a "large fraction" of minimum wage earners are aged sixteen to twenty-four,²⁵ are less likely than a typical worker to be supporting a family,²⁶ and are less likely to be working full-time.²⁷ Thus, critics suggest that not only do living wage ordinances result in the negative consequences noted above, but do not actually help keep full-time workers, especially those who are trying to support a family, above the poverty line.²⁸

Debate continues over whether living wage ordinances have any of the effects that either supporters or opponents claim they have. New studies are now emerging that specifically evaluate the impact of enacted living wage ordinances.²⁹ It is these studies that are most relevant to the

21. See Jessica Dickler, *Minimum Wage Hike Could Sting Small Businesses*, CNNMONEY, Jan. 23, 2007, http://money.cnn.com/2007/01/22/smbusiness/minimum_wage/index.htm (quoting International Franchise Association President Matthew Shay as saying minimum wages "may ultimately force [businesses] to close their doors permanently").

22. See Malanga, *supra* note 20, at 66 (claiming that living wage laws will "send businesses fleeing to other locales").

23. See DAVID REYNOLDS, CTR. FOR URBAN STUDIES & LABOR STUDIES CTR., WAYNE STATE UNIV., *THE IMPACT OF THE DETROIT LIVING WAGE ORDINANCE 9 (1999)* [hereinafter REYNOLDS, IMPACT], <http://www.laborstudies.wayne.edu/research/1999report.pdf> (outlining claims of the Detroit Chamber of Commerce).

24. Incidentally, several pro-ordinance commentators have criticized the City of Detroit for its failure to do *enough* monitoring and enforcement, making the city's living wage ordinance toothless. See, e.g., Jones, *supra* note 16.

25. MACPHERSON, *supra* note 20, at 2.

26. See *id.* at 3.

27. See *id.*

28. See *id.*

29. See, e.g., JEFF CHAPMAN & JEFF THOMPSON, ECON. POLICY INST., Briefing Paper, *THE ECONOMIC IMPACT OF LOCAL LIVING WAGES (2006)*, available at <http://www.epi.org/publications/entry/bp170>; NICHOLAS POTTER, UNIV. OF N.M. BUREAU OF BUS. AND ECON. RESEARCH, *EARNINGS AND EMPLOYMENT: THE EFFECTS OF THE LIVING WAGE ORDINANCE IN SANTA FE, NEW MEXICO (2006)*, <http://www.unm.edu/~bber/pubs/>

living wage policy debate.³⁰ The results of such studies are not particularly important here except to demonstrate that conflicts among post-implementation studies divide along the same ideological lines as pre-implementation predictions. The coalition of organized labor, churches, and advocates for low-income families tout studies that demonstrably refute job loss claims, demonstrate increases in individual earnings, and show signs of lessening poverty.³¹ Likewise, organizations such as the Employment Policies Institute cite studies³² that confirm job loss and reduced hours of employment for low-wage earners,³³ and attempt to discredit studies which demonstrate little or no negative impact on the economies of living wage cities.³⁴

Recognition of an ideological split regarding living wage ordinances is essential for the purposes of this Note. The policy debate over living wage ordinances falls squarely into traditional notions of “liberalism” and “conservatism,” with organized labor and community activists constituting the “liberal” policy position, and business interests and economists

SantaFeEarningsFinalReport.pdf; REYNOLDS, IMPACT, *supra* note 23; DAVID REYNOLDS, CTR. FOR URBAN STUDIES & LABOR STUDIES CTR., IMPACT OF DETROIT'S LIVING WAGE LAW ON NON-PROFIT ORGANIZATIONS (2000), <http://www.laborstudies.wayne.edu/research/2000report.pdf>.

30. Although the underlying debate is similar, minimum wage increases tend to be incremental. *See, e.g.*, 820 ILL. COMP. STAT. ANN. 105/4-(a)(1) (2008) (gradually raising minimum wage from \$2.30 prior to 1984 to \$8.25 by 2010). Minimum wage increases also have not kept up with inflation, and so the minimum wage's impact on businesses, even as the wage level increases, is less significant. *See* JARED BERNSTEIN & ISAAC SHAPIRO, CTR. ON BUDGET AND POLICY PRIORITIES, BUYING POWER OF MINIMUM WAGE AT 51 YEAR LOW: CONGRESS COULD BREAK RECORD FOR LONGEST PERIOD WITHOUT AN INCREASE 1 (2006), <http://www.cbpp.org/6-20-06mw.pdf> (noting that federal minimum wage purchasing power has fallen drastically). The report addresses only the federal minimum wage, but state markets do not differ significantly from the national economy in this respect, nor do the principles discussed in the Bernstein and Shapiro report. In contrast, increases from a traditional minimum wage (or no minimum wage at all) to a living wage tend to involve “sharp spikes.” *See* Matthew T. Hall, *Wage Law Costs Less than Some Predicted*, S.D. UNION-TRIB., Oct. 21, 2007, at B1. Studies of those increases are therefore applicable.

31. *See* sources cited *supra* note 29.

32. Curiously, the Employment Policies Institute cites only one post-implementation empirical study. Most of the organization's published studies are predictive and, therefore, do not compare pre- and post-implementation employment statistics. *See* Employment Policies Institute Publications, http://www.epionline.org/study_list.cfm?group=lw (last visited Apr. 3, 2009). This dearth of studies exists despite the fact that over one hundred local governments enacted their living wage ordinances prior to Santa Fe. *See* Living Wage Resource Center: Living Wage Wins, <http://www.livingwagecampaign.org/index.php?id=1959> (last visited Apr. 3, 2009) [hereinafter LWRC: Living Wage Wins]. Living wage opponents' lack of empirical evidence is not a new phenomenon. *See* REYNOLDS, IMPACT, *supra* note 23, at 9 (noting that the Chamber of Commerce's conclusions “are not based on any concrete analysis of empirical data on Detroit and covered employers” and that “the report is entirely theoretical”).

33. *See, e.g.*, AARON S. YELOWITZ, UNIV. OF KY., SANTA FE'S LIVING WAGE ORDINANCE AND THE LABOR MARKET 1–3 (2005), http://www.epionline.org/studies/yelowitz_09-2005.pdf.

34. *See, e.g.*, EMPLOYMENT POLICIES INST., LIVING WAGE POLICIES: THE BASICS 11–18 (2000), http://www.epionline.org/studies/epi_livingwage_08-2000.pdf; EMPLOYMENT POLICIES INST., THE BALTIMORE LIVING WAGE STUDY: OMISSIONS, FABRICATIONS AND FLAWS 1–10 (1998), http://www.epionline.org/studies/epi_baltimore_10-1998.pdf. These critiques have in turn been rebutted. *See, e.g.*, THOMPSON & CHAPMAN, *supra* note 29, at 3–4 (responding to criticisms of the Baltimore living wage study conducted by the Preamble Center for Public Policy).

reflecting the a “conservative” ideology.³⁵ The history of Detroit’s campaign for a living wage ordinance further delineates these ideologies and sets the stage for the choice the Michigan Supreme Court may have to make on appeal.

B. *Detroit’s Living Wage Ordinance*

The campaign to pass a living wage ordinance in Detroit followed the same trajectory as others across the United States. Detroit’s Metropolitan AFL-CIO led a successful effort to place a living wage proposal on the November 1998 ballot.³⁶ A coalition of church groups, nonprofits, and community and civil rights activists joined that effort.³⁷ The ballot initiative passed with a four-to-one margin³⁸ despite attempts by business interests to paint the proposal as economic suicide,³⁹ and despite an endorsement of a “NO” vote by the Detroit Free Press.⁴⁰

The text of Detroit’s living wage ordinance is similar to those in other cities. The ordinance covers all vendors who contract with the city to provide services in excess of \$50,000.⁴¹ This threshold is identical to that of ordinances currently in force in St. Louis⁴² and elsewhere,⁴³ and falls in the middle range of successfully enacted ordinances.⁴⁴ The ordinance mandates an hourly wage that, on an annual basis, is equivalent to 100 percent of the federal poverty level if health benefits are paid, and

35. See Delaney, *supra* note 8, at 873–74 (citing THE OXFORD COMPANION TO PHILOSOPHY 157 (Ted Honderich ed., 1995) for definitions of conservatism and liberalism). This Note adopts those definitions, particularly those emphasizing that “conservatism embraces capitalism” and favors “limiting the power of government” whereas liberalism requires “regulation of the market . . . to ensure . . . the general welfare of the population.” *Id.*

36. See REYNOLDS, IMPACT, *supra* note 23, at 1.

37. See *id.*

38. See *id.*

39. See Press Release, Detroit Regional Chamber Opposes Living Wage Ordinance (Oct. 21, 1998), <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/10-21-1998/0000777017&EDATE=> (“This could result in business relocations, layoffs and business closings, thus hampering job creation and hurting regional Detroit’s image as a desirable place to do business.” (quoting Richard E. Blouse Jr., Detroit Regional Chamber President)).

40. See Editorial, *The Free Press Endorses . . .*, DETROIT FREE PRESS, Nov. 1, 1998, at 2E. Barely more than a month earlier, the newspaper supported a statewide increase of Michigan’s then minimum wage of \$5.15. See Editorial, *Minimum Wage: Poor Deserve a Hike; Senate Votes Against Fairness*, DETROIT FREE PRESS, Sept. 27, 1998, at 2H (noting “[t]he purchasing power of the minimum wage has dropped by more than 10 percent, making it tough for many hard-working Americans to get by” and that “[a]dvocates for an increase in the minimum wage inside and outside of Washington, D.C., must continue to agitate for this issue of fundamental fairness”). The newspaper also called claims of “dire [economic] consequences . . . alarmist and flat-out wrong.” *Id.*

41. DETROIT, MICH., REV. ORDINANCES § 18-5-82(a)(i) (2007).

42. ST. LOUIS, MO., REV. CODE § 3.99.010(A)(1) (2007). The city passed this ordinance in response to a circuit court decision striking down the city’s previous attempt at passing a living wage ordinance. See *infra* notes 167–73 and accompanying text.

43. See, e.g., BUFFALO, N.Y., CODE § 96-19(C) (2007); HARTFORD, CONN., CODE § 2-762 (2007).

44. See LWRC: Successes, *supra* note 18 (listing \$50,000 thresholds for St. Louis, Missouri; Warren, Michigan; Hartford, Connecticut; Buffalo, New York; and Somerville, Massachusetts, among others). The triggering amounts range from \$2,000 (Denver) to \$100,000 (Boston, Miami-Dade County, and Eau Claire County (Wisconsin)). *Id.*

125 percent of the federal poverty level if the employer does not provide benefits.⁴⁵ These provisions, too, are typical.⁴⁶

Beyond triggering thresholds and mandated wages, the Detroit ordinance includes enforcement provisions and penalties. A willful or repeated violation by a contractor can result in the city's termination of the contract.⁴⁷ Other penalties include proper payment to affected employees and, for willful violations, a \$50 per day fine for as long as the violation continues.⁴⁸ The strictest penalty, however, is a ten-year debarment from bidding on future contracts, or from receiving city assistance, when an employer is assessed the \$50 penalty on more than three incidents in a two-year period.⁴⁹ If any of these administrative remedies fail to ensure compliance, the ordinance creates a private right of action in the county circuit court and authorizes the court to award reasonable attorneys' fees and costs to an employee who prevails.⁵⁰

Passage of Detroit's ordinance did not end debate over Michigan municipalities' power to set wage levels above the state's minimum. With the prospect of other cities and counties following Detroit's lead,⁵¹ living wage opponents sponsored bills in the next session of the state legislature that would expressly preempt a municipality's power to approve a living wage ordinance.⁵² Although some bills progressed further through the legislative process than others, as of February 2008 all such efforts were unsuccessful.⁵³ Having failed in the legislature, opponents then challenged the ordinance in court, arguing that state law limited Detroit's home rule power so as to prevent it from requiring a living wage. The next Section provides a brief history of American home rule and discusses the home rule framework the Michigan Supreme Court will use to analyze such a challenge.

C. Home Rule Authority

Home rule, the authority of local government to exercise police powers, has been part of local governance from as early as 1875, when

45. DETROIT, MICH., REV. ORDINANCES § 18-5-83(b)(i)–(ii). Health benefits are defined as “fully paid comprehensive family medical coverage.” *Id.* § 18-5-83(b)(ii).

46. See Lipp, *supra* note 14 (“Many ordinances employ official poverty levels as a measure for fixing an indexed living wage . . .”).

47. DETROIT, MICH., REV. ORDINANCES § 18-5-84(a).

48. *Id.* § 18-5-84(c).

49. *Id.* § 18-5-84(d). An incident is one “payroll, payday, or date of payment, regardless of the number of employees affected by each incident.” *Id.*

50. *Id.* § 18-5-84(e).

51. As of 2006, fourteen other Michigan municipalities adopted ordinances, two of which have been repealed. See LWRC: Living Wage Wins, *supra* note 32.

52. See H.B. 4777, 90th Leg., Reg. Sess. (Mich. 1999); H.B. 4766, 90th Leg., Reg. Sess. (Mich. 1999).

53. See H.B. 4160, 92d Leg., Reg. Sess. (Mich. 2003) (passing House, Senate, and conference, but vetoed by the Governor); H.B. 4328, 91st Leg., Reg. Sess. (Mich. 2001) (never leaving committee); S.B. 0122, 91st Leg., Reg. Sess. (Mich. 2001) (never leaving committee); Mich. H.B. 4777 (never leaving committee); Mich. H.B. 4766 (passing House and Senate, but not passing enrolled bill).

Missouri granted its largest city, St. Louis, powers to be “liberally construed.”⁵⁴ By 1990, forty-eight states had given their cities and towns some form of home rule.⁵⁵ Despite its widespread use, however, home rule is not one-size-fits-all. Home rule varies significantly in form and scope.⁵⁶ Many states provide for home rule in their constitutions.⁵⁷ Others rely on statutory delegation of power to local governments.⁵⁸ Under either system, the powers conferred upon municipalities can also vary in breadth, limiting the scope of local government home rule power. Based on these considerations, an analysis of home rule power by courts typically consists of two parts. First, a court will determine the scope of local power. Second, it will consider whether state law preempts exercise of that power.

1. *The Scope of Local Power*

Traditionally, Dillon’s Rule was the starting point in considering the scope of home rule power.⁵⁹ The rule comes from an 1868 case considering whether a city had the power to prevent a railroad company from building track “through or upon” any street within the city limits.⁶⁰ Judge John F. Dillon severely limited local powers in order to prevent wasteful investment practices, instead vesting nearly total authority in the states.⁶¹ Specifically, Dillon declared that cities “owe their origin to, and derive their powers and rights wholly from, the legislature. . . . As it creates, so it may destroy. If it may destroy, it may abridge and control.”⁶² Based on this interpretation of the origin of local governments, Dillon elsewhere recognized three categories of powers local government could exercise: “First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable.”⁶³ Dillon’s final blow to local government was to explain that “[a]ny fair, reasonable, substantial doubt concerning the existence of power is

54. RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 268–69 (6th ed. 2004).

55. *Id.*

56. *See id.* at 281–85; *see also infra* notes 67–75 and accompanying text.

57. *See* DALE KRANE ET AL., *HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK* 476–77 (2001).

58. *See id.*

59. Since before the founding of the United States, cities and states have struggled with the scope of local power, but Judge Dillon’s ruling in 1868 settled those disputes authoritatively. For a brief history of home rule before and after Dillon’s Rule, *see id.* at 7–14.

60. *Clinton v. Cedar Rapids & Mo. R.R.*, 24 Iowa 455, 456 (1868).

61. *See* KRANE ET AL., *supra* note 57, at 10. This view contrasts sharply with that of the pre-Revolutionary period, where cities and towns enjoyed significant autonomy and “the custom and practice of local self-governance was strong and pervasive.” *Id.* at 8 (citation omitted).

62. *Clinton*, 24 Iowa at 475.

63. 1 JOHN F. DILLON, *COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS* 449 (5th ed., rev. vol. 1911) (emphasis omitted).

resolved by the courts against the [local government], and the power is denied.”⁶⁴ The Supreme Court subsequently upheld Dillon’s Rule.⁶⁵ Although Dillon’s Rule limited local governments’ independent power to pass laws and regulations, and set the context in which later home rule systems have been adopted, the rule does not place anything beyond the city’s power to exercise so long as the authority to exercise it has first come from the legislature. Legislatures, for the most part, have been willing to grant that authority.⁶⁶

State legislatures have not all granted their cities that authority in the same way, however. Instead, the scope of local government home rule power is properly viewed as a spectrum between two systems, each with its own advantages and disadvantages. Under an “*imperio*”⁶⁷ scheme, the state confers broad initiative and immunity powers upon local governments to address matters of local concern.⁶⁸ Initiative powers allow municipalities to pass a variety of regulations without first asking for legislative authorization.⁶⁹ Immunity powers generally shield the municipality from general legislation passed by state government, so long as that general legislation does not address exclusively local matters.⁷⁰ Under an *imperio* system, the validity of a local regulation turns on whether the regulation addresses a matter of local or statewide concern.⁷¹ The benefit of an *imperio* system is that the municipality has ultimate control over matters of exclusively local concern, while a significant drawback is the municipality’s inability to know in advance whether it has power to act on issues where the state/local distinction is unclear.

In contrast to an *imperio* system, “legislative” home rule⁷² refers to a system where the municipality is presumed to have authority to regulate unless that power is explicitly taken away by the state legislature.⁷³ In the context of initiative and immunity powers, legislative home rule expands initiative powers allowing the municipality to exercise all powers not already prohibited, but offers no immunity from state action.⁷⁴ The benefit of a legislative home rule system is that although the state has

64. *Id.* at 449–50.

65. *See* *Atkin v. Kansas*, 191 U.S. 207, 221 (1903).

66. *See* KRANE ET AL., *supra* note 57, at 471–78. Even Iowa, where Dillon’s Rule began, has abandoned Judge Dillon’s approach and given home rule authority to its local governments. *See, e.g., Berent v. City of Iowa City*, 738 N.W.2d 193, 196–97 (Iowa 2007).

67. The term “*imperio*” comes from the Supreme Court’s description of St. Louis as an “*imperium in imperio*,” a government within a government. BRIFFAULT & REYNOLDS, *supra* note 54, at 282 (citing *St. Louis v. W. Union Tel. Co.*, 149 U.S. 465, 468 (1893)).

68. *Id.*

69. *Id.* at 281.

70. *Id.*

71. *Id.* at 282.

72. Legislative home rule is also known as a “devolution of powers” system. *See* KRANE ET AL., *supra* note 57, at 12. The term “legislative” comes from recognition that under such a system, the legislature ultimately decides what is a state, and therefore not local, power. *Id.* at 21 n.92.

73. *See* BRIFFAULT & REYNOLDS, *supra* note 54, at 283.

74. *See id.*

what amounts to a veto authority over a municipality's regulations, a municipality can be confident in its ability to operate with a free hand. The second major effect of a legislative home rule system is how it shifts power from the courts to the legislature in determining the scope of local power. Where under an *imperio* system courts must generally define what matters are exclusively local, a legislative home rule system grants the legislature the power to determine the areas over which a municipality may exercise its authority.

As mentioned above, these two systems are not exclusive, and instead fall along a spectrum. Thus, labeling a particular system may not be easy, and even if it is possible, it will not determine the outcome. State courts are less likely to determine the scope of home rule authority based on the spectrum of systems across the United States, but rather based on the history and evolution of its own particular system.⁷⁵

2. Preemption

If the power a city seeks to exercise is within the scope of its authority, the city's power may still be revoked under the doctrine of preemption. Whether a system is *imperio* or legislative, home rule has an impact on this second stage of analysis, determining which branch of government will ultimately determine the scope of local home rule power. There are several types of preemption. The first is outright conflict, to which both systems are susceptible.⁷⁶ Outright conflict is best summarized by the proposition that a local government may not require what the state prohibits.⁷⁷ For example, a local government may not require developers to create a specific amount of affordable housing when state law bans all rent control ordinances.⁷⁸ Conflict preemption of local government by state government is analogous to preemption of state law by federal law.⁷⁹ As the Maryland Court of Appeals noted, conflict preemption occurs when "compliance with both federal and state law is a physical impossibility."⁸⁰

When a local ordinance does not directly conflict with state law, state law may preempt in two ways. The first is express preemption. Ex-

75. See JOSEPH F. ZIMMERMAN, *STATE-LOCAL RELATIONS: A PARTNERSHIP APPROACH* 37 (2d ed. 1995) ("Power is granted to political subdivisions by a complex mosaic of constitutional provisions, general laws, and special laws, which typically have been interpreted by the courts.").

76. See OSBORNE M. REYNOLDS, JR., *LOCAL GOVERNMENT LAW* § 42, at 127–28 (2d ed. 2001) (discussing how the issue of conflict should be addressed before determining whether a particular matter is of statewide or purely local concern).

77. See *id.* § 42, at 128.

78. See *Town of Telluride v. Lot Thirty-Four Venture*, 3 P.3d 30, 32 (Colo. 2000) (cited in BRIFFAULT & REYNOLDS, *supra* note 54, at 362).

79. See BRIFFAULT & REYNOLDS, *supra* note 54, at 377.

80. *Wells v. Chevy Chase Bank*, 832 A.2d 812, 819 (Md. 2003). Incidentally, in the living wage context, direct conflict preemption is usually irrelevant, as the only example of direct conflict would be if the state mandated a minimum wage of \$6 per hour while a city forbid employers from paying more than \$5 per hour. This is direct conflict because compliance with both laws is impossible.

press preemption occurs when state law explicitly precludes municipalities from regulating certain areas.⁸¹ For example, New Mexico allows cities to exercise all powers “not expressly denied by general law or charter.”⁸² In certain states, such as Illinois, this is the only way to preempt an ordinance or regulation that does not conflict with state law.⁸³ The Illinois Constitution provides that home rule units may exercise powers “concurrently with the State . . . to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State’s exercise to be exclusive.”⁸⁴ Express preemption of a living wage ordinance would occur when a legislature passes a statute that reads: “No home rule municipality may require employers to pay a minimum wage greater than a wage established by this body.” States that require express preemption accordingly offer great deference to the decisions of local government in areas where the legislature cannot reach a consensus on whether to preempt. Conversely, city councils and county boards can know, up front, what regulations are permissible. They do not have to guess which regulations state law will or will not preempt.

Municipalities may need to resort to guesswork in *imperio* states, which provide for the second type of preemption—implied preemption. Where the legislature has not expressly prohibited a city’s exercise of power and where a local ordinance does not directly conflict with state law, that local ordinance may still be preempted when it is “inconsistent” with state law, or where the state has “occupied the field” with regulation.⁸⁵ Municipalities must risk passing ordinances that may fall into one of these categories because courts must determine whether state law preempts the ordinance, and they can only do so after the fact.⁸⁶ A court may find a local ordinance inconsistent if the state fails to prohibit a particular activity in a way that implies intent to permit that activity.⁸⁷ Thus, a municipality could not prevent a state-licensed professional from performing the function the professional is licensed to do.⁸⁸

81. See BRIFFAULT & REYNOLDS, *supra* note 54, at 362.

82. N.M. CONST. art. X, § 6(D).

83. Yet, there is always an exception that proves the rule. See *Bernardi v. City of Highland Park*, 520 N.E.2d 316, 323 (Ill. 1988) (holding local government must adhere to state prevailing wage act, despite lack of express preemption).

84. ILL. CONST. art. VII, § 6(i). In Illinois a typical statute preempts local action with boilerplate language, that

[i]t is declared to be the public policy of this State, pursuant to paragraphs (h) and (i) of Section 6 of Article VII of the Illinois Constitution of 1970, that any power or function set forth in this Act to be exercised by the State is an exclusive State power or function. Such power or function shall not be exercised concurrently, either directly or indirectly, by any unit of local government, including home rule units, except as otherwise provided in this Act.

Medical Practice Act of 1987, 225 ILL. COMP. STAT. 60/6 (2006).

85. DAVID J. MCCARTHY, JR. & LAURIE REYNOLDS, *LOCAL GOVERNMENT LAW IN A NUTSHELL* 60 (5th ed. 2003).

86. See *id.* at 59 (noting the “doctrine of implied preemption is exclusively judicial”).

87. See *id.* at 60.

88. *Id.*

State law will also preempt a local ordinance where state law occupies the field the municipality seeks to regulate. The key considerations for this analysis are the “comprehensiveness and pervasiveness of the state regulation,” and the “need for uniform treatment throughout the state.”⁸⁹ For example, a court might find that state environmental laws and regulations governing solid waste management preempt local efforts to prevent construction of new solid waste incinerators.⁹⁰ The greater the need for uniformity, the more likely a court will find that state law preempts local ordinances.⁹¹

Generally, if an exercise of power is within the scope of a city’s home rule power, and if state law does not preempt its exercise, the city may properly exercise that authority. As noted above, however, states have not uniformly decided how to determine issues of scope and preemption, and instead rely on state-specific approaches to these questions. What follows next is an examination of how Michigan has answered these two questions, which is necessary to inform an analysis of Detroit’s authority to impose its living wage.

D. Home Rule Power in Michigan

Michigan’s home rule scheme consists of a complex mix of constitutional, statutory, and judicial principles. As such, the scheme defies simple categorization. Still, examining Michigan’s home rule provisions does reveal answers to two important questions—what is the scope of Detroit’s home rule power, and when will state law preempt local action?

1. Closer to Legislative or Imperio?

Home rule in Michigan is not unique, and does not fall neatly into either of the traditional models of home rule authority. The Michigan Constitution provides that:

[E]ach city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law.⁹²

89. REYNOLDS, *supra* note 76, at 133. Although these key considerations are generally applicable across the United States, Michigan has developed more specific standards in analyzing preemption questions. See *Rental Prop. Owners Ass’n v. City of Grand Rapids*, 566 N.W.2d 514, 519 (Mich. 1997) (citing *People v. Llewellyn*, 257 N.W.2d 902, 905 (Mich. 1977)); see also discussion *infra* Part II.D.2.

90. See *Baltimore v. New Pulaski Co.*, 684 A.2d 888, 894 (Md. 1996).

91. MCCARTHY & REYNOLDS, *supra* note 85, at 61.

92. MICH. CONST. art. VII, § 22.

The Michigan Constitution's grant of power to local government does not dramatically differ from some of the examples noted earlier. It expressly confers broad powers to address "municipal concerns."⁹³ This language, originally enacted in Michigan's 1908 Constitution, indicates an *imperio* system. Michigan's current constitution goes even further, however, providing that "[t]he provisions of this constitution and law concerning counties, township, cities and villages shall be liberally construed in their favor."⁹⁴ Michigan added this provision in 1963, after legislative home rule began to be more popular among the states.⁹⁵ This amendment to the Michigan Constitution signified the state's desire to expand the use and power of home rule and leave more decisions in control of local government.⁹⁶ The Michigan Constitution also expressly rejects limiting home rule authority to those powers enumerated elsewhere in the document.⁹⁷ Rather, the home rule provision "grants general rights and powers subject to enumerated restrictions."⁹⁸

In addition to Michigan's constitutional framework, both state statutes and case law support broad local government powers. The Home Rule City Act allows city charters to provide "for any act to advance the interests of the city, [and] the good government and prosperity of the municipality and its inhabitants."⁹⁹ The Michigan Supreme Court likewise has stated, "It is clear that home rule cities enjoy not only those powers specifically granted, but they may exercise all powers not expressly denied."¹⁰⁰ If Michigan home rule began in 1908 resembling an *imperio* scheme, these subsequent enactments have greatly broadened local government power in Michigan.¹⁰¹ Yet, by retaining the original "municipal concerns" language from the 1908 Constitution, Michigan's system is not quite home rule either. Regardless of the label, the Michigan home rule scheme does allow for state preemption of local laws. What follows now is a discussion of Michigan's preemption analysis.

2. Preemption

The Michigan Supreme Court articulated its preemption analysis with respect to municipal ordinances in *People v. Llewellyn*.¹⁰² *Llewellyn*

93. *Id.*; see *Rental Prop. Owners Ass'n*, 566 N.W.2d at 517.

94. MICH. CONST. art. VII, § 34; see *Rental Prop. Owners Ass'n*, 566 N.W.2d at 518.

95. See KRANE ET AL., *supra* note 57, at 213.

96. See SUSAN P. FINO, THE MICHIGAN STATE CONSTITUTION: A REFERENCE GUIDE 154 (1996).

97. MICH. CONST. art. VII, § 22 ("No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.").

98. *Rental Prop. Owners Ass'n*, 566 N.W. 2d at 518; see *Detroit v. Walker*, 520 N.W.2d 135, 138 (Mich. 1994); *Conroy v. Battle Creek*, 22 N.W.2d 275, 278 (Mich. 1946).

99. Home Rule City Act, MICH. COMP. LAWS ANN. § 117.4(j) (West 2008).

100. *Walker*, 520 N.W.2d at 138.

101. In fact, a landmark study by Joseph Zimmerman ranked Michigan as among those states with the broadest local authority. See ZIMMERMAN, *supra* note 75, at 39–40.

102. 257 N.W.2d 902 (Mich. 1977).

held that a municipality may not enact an ordinance if “the ordinance is in direct conflict with the state statutory scheme, or . . . the state statutory scheme preempts the ordinance by occupying the field of regulation which the municipality seeks to enter . . . even where there is no direct conflict.”¹⁰³

According to the court, direct conflict, as in most states, means that “[t]he ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits.”¹⁰⁴ The preemption standard is somewhat more complex, consisting of four guidelines. First, the state may expressly preempt local regulation in a specified area of the law.¹⁰⁵ Second, legislative history may serve as evidence of implied preemption.¹⁰⁶ Third, the court will consider the “the pervasiveness of the state regulatory scheme.”¹⁰⁷ The final consideration for Michigan courts is the need for uniformity throughout the state.¹⁰⁸ These four guidelines allow the court to determine whether state law limits a municipality’s otherwise broad powers. These factors feature prominently in an analysis of whether state law prevents local governments, such as Detroit, from enacting local living wage ordinances.

As with most legal issues, courts have the ability to construe a home rule provision in a way that satisfies its judges’ personal policy preferences. This is particularly true in jurisdictions that allow implied preemption. Even so, home rule in most cases does not fall along traditional ideological lines. For instance, conservatism traditionally embraces limited government and little regulation,¹⁰⁹ but it also supports “local control” of issues rather than legislating on a national, or even statewide, basis.¹¹⁰ Likewise, home rule has not occupied a prominent place in the “liberal” ideological agenda.¹¹¹ Judges who rigidly interpret home rule authority will likely vote against their policy preference regarding the ordinance’s underlying issue, and they may not necessarily be expected to

103. *Id.* at 904.

104. *Id.* at 904 n.4.

105. *Id.* at 905 (“[W]here the state law expressly provides that the state’s authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is preempted.”). Contrast this with the Illinois approach, which *requires* express preemption. See *supra* notes 83–84 and accompanying text.

106. *Llewellyn*, 257 N.W.2d at 905 (“[P]reemption of a field of regulation may be implied upon an examination of legislative history.”).

107. *Id.*

108. *Id.* (“[T]he nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state’s purpose or interest.”).

109. See BRIAN FARMER, *AMERICAN CONSERVATISM: HISTORY, THEORY, AND PRACTICE* 152 (2005) (noting limited government has been “standard fare” for conservatives “from the Civil War Reconstruction era to the present”).

110. See A. James Reichley, *The Conservative Roots of the Nixon, Ford, and Reagan Administrations*, 96 POL. SCI. Q. 537, 549 (1981) (noting Nixon, Ford, and Reagan all “aligned themselves firmly with . . . local control of social services”).

111. Some commentators have justified autonomous local governments on liberalism grounds, however. See, e.g., J.A. Chandler, *The Liberal Justification for Local Government: Values and Administrative Expediency*, 37 POL. STUD. 605, 605–08 (1989).

favor a particular interpretation of home rule authority in a given case.¹¹² Conversely, the issue of home rule, and the extent of local government flexibility in enacting laws, likely will not determine the outcome for a judge or justice who, purposefully or not, rules in ways reflecting his or her own ideological policy preferences.¹¹³ Instead, the underlying policy issue of the local law may determine the outcome. A party line vote¹¹⁴ in a home rule case that intersects an ideological policy issue may indicate that ideological considerations *are* at work.¹¹⁵ This is critical in the Michigan context, as the home rule issue serves as a control in a test case. If the Michigan Supreme Court's decision whether to overturn precedent is ideologically driven, it will be clear that the living wage issue, and not home rule authority, is the driving ideology. Before reaching that discussion, however, there is one last area of background to address—*stare decisis*.

E. *Stare Decisis*

Stare decisis is the “doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.”¹¹⁶ Under the doctrine, a matter of law “will no longer be considered as open to examination or to a new ruling.”¹¹⁷ The doctrine applies both to the court that originally settled the point of law and to any courts that are “bound to follow [that court’s] adjudications.”¹¹⁸

The rationale behind the doctrine is that the rule of law is served by consistency, and therefore predictability of decisions.¹¹⁹ *Stare decisis* “promotes the evenhanded, predictable, and consistent development of legal principles.”¹²⁰ *Stare decisis* allows decision makers to know the

112. See FARMER, *supra* note 109; Chandler, *supra* note 111, at 605; Reichley, *supra* note 110.

113. See FARMER, *supra* note 109; Chandler, *supra* note 111, at 605; Reichley, *supra* note 110.

114. For the purposes of this Note, the judge’s party, or for nonpartisan appointments, the party of the elected official or officials making the appointment, would indicate a party line vote.

115. See FARMER, *supra* note 109; Chandler, *supra* note 111; Reichley, *supra* note 110.

116. BLACK’S LAW DICTIONARY 1443 (8th ed. 2004).

117. *Id.* (quoting WILLIAM M. LILE ET AL., BRIEF MAKING AND THE USE OF LAW BOOKS 321 (3d ed. 1914)).

118. *Id.*; see also D. NEIL MACCORMICK & ROBERT S. SUMMERS, INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 364 (1997) (noting precedent is “binding decisions of higher courts of the same jurisdiction as well as decisions of the same appellate court”).

119. MACCORMICK & SUMMERS, *supra* note 118, at 334 (“[C]onsiderations of legal certainty and predictability are generally acknowledged to back at least a presumption in favour of *stare decisis*.”); 20 AM. JUR. 2D *Courts* § 129 (2005) (“[S]tare decisis is the most important application of a theory of decisionmaking consistency in our legal culture and it is an obvious manifestation of the notion that decisionmaking consistency itself has normative value.” (citing *State v. Ferguson*, 796 A.2d 1118, 1138 n.18 (Conn. 2002))).

120. *Robertson v. DaimlerChrysler Corp.*, 641 N.W.2d 567, 580 (Mich. 2002) (internal quotation and citation omitted).

“likely legal consequences of different choices and infer the possible range of outcomes.”¹²¹

Alongside this lofty rationale is a more practical one. Stare decisis reduces litigation and often speeds up the cases that remain.¹²² When the weight of precedent dictates a particular outcome under a particular set of facts, that weight may dissuade plaintiffs from filing a lawsuit.¹²³ Likewise, faced with ironclad precedent, and bound by that precedent, lower courts need not redecide each case on the merits, saving courts valuable time. Instead, it is left to the courts that set precedent to reexamine their decisions, and they can select which cases to review more efficiently.¹²⁴ Greater predictability and consistency therefore translates into greater efficiency for both litigants and the judiciary.

Although stare decisis occupies an important and essential place in the canon of legal theory, it is not, as the Supreme Court has noted, an “inexorable command.”¹²⁵ There is a strong presumption in favor of stare decisis, but precedent may be overruled “for urgent reasons and in exceptional cases.”¹²⁶ In addition to these broad principles of stare decisis, many states have articulated specific standards to be used when considering whether to overturn a prior decision. These individual analyses are generally variations on a theme, consisting of many common elements. The Ohio Supreme Court succinctly summarized several states’ guidelines for overturning precedent:

The Idaho Supreme Court will reverse itself when a decision has proven over time to be unjust or unwise. Maine abandons precedent that lacks vitality and the capacity to serve the interests of justice. Arkansas will break from precedent where adherence to the rule would cause great injury or injustice. Many states will part from cases that were wrong when decided. Others will not follow past decisions that are unworkable or poorly reasoned.¹²⁷

Other states are more specific in their analysis. For example, the New Mexico Supreme Court considers:

- 1) whether the precedent is so unworkable as to be intolerable; 2) whether parties justifiably relied on the precedent so that reversing

121. THOMAS G. HANSFORD & JAMES F. SPRIGGS II, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* 5 (2006).

122. See Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 *CHI.-KENT L. REV.* 93, 106 (1989) (noting precedent “provides a valuable signal to future litigants”).

123. See *id.* at 107 (“Rational economic actors will not litigate a case if they are certain about the outcome.”).

124. See *id.* at 108 (noting that those cases that “depart dramatically from established precedent can be easily identified and singled out for special attention”).

125. See *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); *Robertson*, 641 N.W.2d at 580; *Padilla v. State Farm Mut. Auto. Ins.*, 68 P.3d 901, 904 (N.M. 2003); *Rocky River v. State Employment Relations Bd.*, 539 N.E.2d 103, 107 (Ohio 1989).

126. HENRY CAMPBELL BLACK, *HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS OR THE SCIENCE OF CASE LAW* 182 (1912).

127. *Westfield Ins. Co. v. Galatis*, 797 N.E.2d 1256, 1268 (Ohio 2003) (internal citations and quotations omitted).

it would create an undue hardship; 3) whether the principles of law have developed to such an extent as to leave the old rule no more than a remnant of abandoned doctrine; and 4) whether the facts have changed in the interval from the old rule to reconsideration so as to have robbed the old rule of justification.¹²⁸

Similarly, the Ohio Supreme Court's own standard is to overturn one of its prior decisions when: (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision; (2) the decision defies practical workability; and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.¹²⁹

One might wonder why specific standards such as these are necessary when a jurisdiction's highest court is naturally free to reverse itself at any time. The purpose of specific analytical frameworks is to demonstrate rational and objective reasons for overturning precedent, because "[t]he overruling of precedents cannot simply be regarded as arbitrary."¹³⁰ If courts do not establish standards, they open themselves to charges of judicial activism, and could be accused of promulgating their personal policy preferences rather than interpreting the law.¹³¹

The Michigan Supreme Court's approach to stare decisis and overturning precedent is not dramatically different than that of the jurisdictions discussed above. In fact, Michigan's articulated standard was the basis for that of Ohio.¹³² But, as noted earlier with respect to the Ohio standard,¹³³ there are slight differences in the analytical framework between the approach taken by the Michigan court and that taken by the Supreme Court and other jurisdictions.¹³⁴

In 2000, the Michigan Supreme Court adopted its most recent considerations for overturning precedent in *Robinson v. City of Detroit*.¹³⁵ The *Robinson* factors were further clarified in *Pohutski v. Allen Park*.¹³⁶ First, the court must ask whether the earlier case was wrongly decided, and second, whether the decision defies "practical workability."¹³⁷ The court will then ask whether changes in the law or facts no longer justify

128. *Herrera v. Quality Pontiac*, 73 P.3d 181, 188 (N.M. 2003).

129. *Galatis*, 797 N.E.2d at 1268. The Ohio standard is a modified version of Michigan's standard, discussed *infra* notes 132–34 and accompanying text.

130. Theodore M. Benditt, *The Rule of Precedent*, in PRECEDENT IN LAW 89, 101 (Laurence Goldstein ed., 1987).

131. Even if a court has specific standards, however, it may not prevent political criticism. Michigan is a case in point. See generally Delaney, *supra* note 8.

132. See *State v. Mathis*, 846 N.E.2d 1, 6 (Ohio 2006). Although the Ohio test in *Mathis* has only three prongs, its first prong merges the Michigan court's first and fourth questions. Compare *id.* at 6, with *Pohutski v. City of Allen Park*, 641 N.W.2d 219, 231 (Mich. 2002).

133. See *supra* note 129 and accompanying text.

134. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992); *Herrera v. Quality Pontiac*, 73 P.3d 181, 188 (N.M. 2003).

135. 613 N.W.2d 307 (Mich. 2000).

136. 641 N.W.2d 219 (Mich. 2002).

137. *Id.* at 231.

the questioned decision.¹³⁸ Finally, the court will inquire whether reliance interests would work an undue hardship—whether the previous decision has become “so embedded, so accepted, so fundamental, to everyone’s expectations that to change it would produce not just readjustments, but practical real-world dislocations.”¹³⁹

The Michigan Supreme Court has used the *Robinson* factors to strike down a number of decisions on issues ranging from automatic reversal of convictions in criminal cases to the distribution of workers’ compensation benefits.¹⁴⁰ These cases reflect what critics say is an increasing trend of an ideologically motivated unraveling of state law precedent.¹⁴¹ The purpose of this Note is to identify a case that the Michigan Supreme Court should overturn under *Robinson*, but which results in promoting a liberal policy preference. *Rudolph v. Guardian Protective Services*¹⁴² is such a case, and it is to that case that this Note now turns.

III. ANALYSIS

Having addressed the general background and history of the three policies at issue, this Part turns to the specific facts and law that will likely be presented to the Michigan Supreme Court in the near future. This Part begins with a discussion of the *Rudolph* case soon to face the Michigan Supreme Court and concludes by discussing how other states have addressed the same issue that *Rudolph* presents.

A. *Rudolph v. Guardian Protective Services—The Test Case*

Opponents of Detroit’s living wage ordinance have sought to nullify the decision of the city’s voters by turning to the courts on the theory that although the state legislature was unable to pass a bill preempting local living wage ordinances, perhaps such legislation was not necessary.¹⁴³ The defendants in *Rudolph v. Guardian Protective Services* sought to have a court declare that living wage ordinances were already beyond the power of municipal governments.¹⁴⁴

In *Rudolph*, Guardian Protective Services entered into a contract with the city to provide security services at an exhibition center, a con-

138. *Id.*

139. *Id.* Michigan is not alone in considering this factor. See *supra* notes 126–28 and accompanying text. “A court usually will not overrule a precedent even if it is convinced that the precedent is unsound when the hardship caused by a retroactive change would not be offset by its benefits.” WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 649 (4th ed. 2007).

140. See Delaney, *supra* note 8, at 880–82.

141. The Michigan Supreme Court noted this trend in *Singleton v. Chrysler Corp.*, 648 N.W.2d 624, 643 (Mich. 2002) (Kelly, J., dissenting).

142. *Rudolph v. Guardian Protective Servs.*, No. 06-622199-CZ (3d Cir. for the County of Wayne, Mich., June 13, 2007).

143. *Id.* at 3.

144. *Id.* at 4.

tract which exceeded the \$50,000 threshold and triggered the living wage ordinance.¹⁴⁵ Guardian expressly agreed to comply with the ordinance.¹⁴⁶ The plaintiffs who brought suit, Guardian employees, alleged Guardian had not paid the required wages, and that they, the employees, had exhausted administrative remedies.¹⁴⁷

In response, Guardian claimed that under the holding in *Attorney General ex rel. Lennane v. City of Detroit*,¹⁴⁸ a local government in Michigan may not fix the wages or hours of city employees or of employees of businesses which contract services for the city, because such power is a matter of state concern.¹⁴⁹ The court agreed that *Lennane* was on point, and that “[t]he principles underlying the holding . . . are still very much alive.”¹⁵⁰ The court therefore found that *Lennane* was controlling authority on the issue of “whether a city may, absent an express legislative authorization, enact an ordinance that regulates the wages municipal contractors must pay their employees,” and that “such an ordinance is invalid since it is beyond the municipality’s power.”¹⁵¹

The court’s opinion, however, contained an important footnote. In striking down Detroit’s ordinance, the court noted its research “uncovered a considerable difference of opinion” among jurisdictions, and that *Lennane* “cannot be deemed the only rational conclusion.”¹⁵² The court reiterated that it “is not free to depart” from *Lennane* and suggested that arguments for overturning it “are more properly directed to [the Michigan] Supreme Court.”¹⁵³ Whether or not the court indicated a desire to depart from *Lennane* and only grudgingly followed precedent, the opinion’s language suggested the possibility of an appeal on the grounds that the holding in *Lennane* “cannot be deemed the only rational conclusion on the issue.”¹⁵⁴

145. *Id.* at 3.

146. *Id.*

147. *Id.*

148. 196 N.W. 391 (Mich. 1923).

149. *Id.* at 394.

150. *Rudolph*, No. 06-622199-CZ, at 8.

151. *Id.* at 13.

152. *Id.* at 13 n.8 (citing J.T.W., Annotation, *Power of Municipality to Fix Specific Scale of Wages or Hours for Employees of Contractors or Subcontractors for Municipal Contracts*, 81 A.L.R. 349 (1932)).

153. *Id.*

154. *Id.* An appeal has been filed in the Michigan Court of Appeals. See *Rudolph v. Guardian Protective Servs.*, No. 279433 (Mich. Ct. App. filed July 13, 2007). The docket is available at <http://courtofappeals.mijud.net/resources/asp/viewdocket.asp?casenumber=279433> (last visited Apr. 3, 2009). At oral argument, the court of appeals asked the parties for supplemental briefs on whether provisions of the Michigan Public Employment Relations Act (PERA), MICH. COMP. LAWS §§ 423.201–217 (1999), serve to preempt Detroit’s living wage ordinance. Of concern to the court was whether Detroit’s ordinance has an impermissible impact on employees subject to a collective bargaining agreement. This may be an attempt by the court to affirm the trial court on grounds that do not implicate stare decisis. As of the time of this publication, the appellate court has not issued an opinion in the case. A holding based on PERA will necessarily reframe the issue before the Michigan Supreme Court. Still, even under such a scenario, if the high court determines PERA does not preempt the ordinance, the court will still have to consider stare decisis.

The court's ruling in *Rudolph* injects stare decisis into the already complex relationship between home rule and living wage policy. Thus, for supporters of Detroit's living wage ordinance to prevail, they must present a home rule analysis that is not only persuasive, but that overcomes the American legal system's historical acceptance of, and presumption in favor of, the principle of stare decisis. This case will be significant in Michigan because it will involve an allegedly politicized court facing this ideological issue, but as the following Section demonstrates, this will not be the first time that business interests have challenged a living wage ordinance under a home rule analysis.

B. *The Convergence of Home Rule and the Living Wage*

Courts have adjudicated legal challenges to local living wage ordinances in several states. Commentators have drawn attention to four cases in particular, addressing the ordinances in New Orleans,¹⁵⁵ Hudson County (New Jersey),¹⁵⁶ Santa Fe,¹⁵⁷ and St. Louis.¹⁵⁸ In these cases, state courts have delivered mixed results to living wage opponents.¹⁵⁹ Each legal challenge, however, addresses the scope of the municipality's home rule authority to regulate wages of workers who are either within its territorial boundaries or employed by businesses with some connection to the municipality.¹⁶⁰

Two cases did not require complicated interpretation. In Hudson County, living wage opponents originally claimed on appeal that the county ordinance was preempted by the New Jersey minimum wage law.¹⁶¹ By the time the New Jersey court decided the case, however, the state legislature had passed a statute explicitly conferring upon localities the power to "establish wage and protection standards greater than those required by state or federal law," rendering moot the plaintiff's argument.¹⁶²

Although upsetting to living wage proponents,¹⁶³ the Louisiana case that struck down New Orleans' living wage¹⁶⁴ rested on firm legal analy-

155. See *New Orleans Campaign for a Living Wage v. City of New Orleans*, 825 So. 2d 1098 (La. 2002).

156. See *Visiting Homemaker Serv. v. Bd. of Chosen Freeholders*, 883 A.2d 1074 (N.J. Super. Ct. App. Div. 2005).

157. See *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149 (N.M. Ct. App. 2005).

158. See *Decision of the Missouri Circuit Court in Missouri Hotel and Motel Ass'n v. City of St. Louis*, [July 31, 2001] DAILY LAB. REP. (BNA), at E-1 [hereinafter *City of St. Louis*].

159. Courts struck down ordinances in St. Louis and New Orleans. See *Campaign for a Living Wage*, 825 So. 2d at 1120; *City of St. Louis*, *supra* note 158, at E-1. Courts upheld the ordinances in Santa Fe and New Jersey. See *New Mexicans for Free Enter.*, 126 P.3d at 1166; *Visiting Homemaker Serv.*, 883 A.2d at 1080.

160. See, e.g., *New Mexicans for Free Enter.*, 126 P.3d at 1157.

161. See *Visiting Homemaker Serv.*, 883 A.2d at 1080.

162. See *id.*

163. See Living Wage Resource Center, Supreme Court Rejects Landslide Living Wage Victory in New Orleans (Sept. 4, 2002), <http://www.acorn.org/index.php?id=982>.

164. See *Campaign for a Living Wage*, 825 So. 2d at 1120 (La. 2002).

sis. The Louisiana Supreme Court determined that the Louisiana Constitution prevented municipalities, even municipalities whose charters predated passage of the present constitution, from enacting living wage regulations in conflict with state law, prohibiting local government from requiring an hourly wage that exceeds the state minimum wage.¹⁶⁵ Thus, although the facts implicated home rule analysis, state law clearly preempted the local ordinance, and the real issue was instead whether the state law itself even applied to New Orleans.¹⁶⁶

The other two cases, however, required an in-depth home rule analysis to determine whether state law mandating a minimum wage preempted a local living wage ordinance. In St. Louis, voters approved the city's proposed living wage ordinance by referendum in August of 2000.¹⁶⁷ The ordinance applied to city contractors and subcontractors, leaseholders, and businesses that benefited from either tax breaks or other public assistance St. Louis provided.¹⁶⁸ Ultimately, the trial court struck down the voter approved ordinance.¹⁶⁹ But, the decision to strike down the entire ordinance, because the court voided substantial portions of it, masks the reality that the court found no state preemption on a critical provision of the ordinance, the provision that applied to contractors and other direct recipients of city financial assistance.¹⁷⁰ Instead, the court only found preemption in the provision requiring payment of living wages by employers with an "attenuated connection"¹⁷¹ to the city, those employers who do not receive direct aid from the city, and do not play any role in "economic development contemplated by the assistance."¹⁷² Still, the court was prepared to uphold the city's power to mandate wages paid by employers dependent on it for taxpayer money.¹⁷³

Similarly, a New Mexico court of appeals upheld Santa Fe's living wage ordinance, as it applied to contractors and its own city employees, against a preemption challenge.¹⁷⁴ Still, the New Mexico holding addressed Santa Fe's amended living wage ordinance, which extended the original ordinance coverage to employers "registered or licensed in Santa

165. *Id.* at 1107.

166. *See id.* at 1102.

167. *See Rosen, supra* note 11, at 135.

168. *See id.*; *City of St. Louis, supra* note 158, at E-1.

169. *See City of St. Louis, supra* note 158, at E-1.

170. *See id.*

171. *Rosen, supra* note 11, at 141.

172. *City of St. Louis, supra* note 158, at E-1. The court also found infirmity in some of the ordinance's procedural provisions. For instance, the court found that requirement of "health benefits" was impermissibly vague and that the enforcement provisions left considerable doubt as to which city agency was even responsible for enforcement. *Id.* That these provisions were struck down is not relevant to this discussion, as those technical points could be addressed in future amendments to the ordinance.

173. In July of 2002, the City of St. Louis passed a new ordinance, limited to employers entering into city contracts of \$50,000 or more, and to employers that receive \$20 million in economic development subsidies. ST. LOUIS, MO., ORDINANCE 65,597 (Oct. 24, 2002), <http://www.mwdbe.org/livingwage/LivWageOrd.pdf>.

174. *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149, 1166 (N.M. Ct. App. 2005).

Fe and that employ twenty-five or more workers.”¹⁷⁵ The court interpreted the state’s Minimum Wage Act as “setting only a wage floor that does not bar higher local minimum wage rates,” and held that the ordinance therefore did not conflict with state law.¹⁷⁶

The Santa Fe and St. Louis cases are instructive. If the Michigan Supreme Court were to overrule *Lennane*, it could either mimic the narrower St. Louis approach, restricting the living wage to city employees and businesses who contract or otherwise do business with the city, or it could take the broader Santa Fe view and hold that Michigan home rule allows municipalities to mandate living wages for all employers within its territorial limits. Limiting the living wage to the former may be tempting for an ideologically driven judge who cannot justify complete rejection of the living wage as a home rule power, but as this Note discusses next, Michigan’s stare decisis standard strongly suggests that the latter is the correct choice.

IV. RECOMMENDATIONS

The question of whether critics of the Michigan Supreme Court are right about its ideological leanings will be tested by the upcoming case focusing on Detroit’s power to impose the citywide living wage discussed earlier.¹⁷⁷ This Part will analyze that case under Michigan home rule and stare decisis standards, ultimately recommending that the relied-upon precedent be overruled and Detroit’s living wage ordinance be upheld. Finally, this Part will suggest ways for living wage advocates and supportive municipalities to maximize the odds of a successful living wage campaign under similar circumstances.

A. *The Michigan Supreme Court Should Overrule Lennane and Uphold Detroit’s Living Wage Ordinance*

Under the *Robinson* factors described earlier,¹⁷⁸ *Attorney General ex rel. Lennane v. City of Detroit* cannot survive and should be overruled. As the following Sections demonstrate, not only was the decision wrongly decided, but changes in law and fact compel replacing it with a modern approach to the powers of Michigan’s home rule municipalities, and no significant reliance interests are implicated by jettisoning its holding.¹⁷⁹

175. *Id.* at 1156.

176. *Id.* at 1166.

177. Although the *Rudolph* case has not yet been heard at the appellate level, because the trial court based its decision on supreme court precedent, an appellate court is unlikely to try to overrule its own supreme court. It is also unlikely that an appellate court would simply decide that *Lennane* is distinguishable.

178. See *supra* Part II.D.

179. The final factor, whether the previous decision “defies practical workability,” is largely irrelevant. The *Lennane* rule does not defy practical workability, as the bright line rule that municipalities

1. *Lennane Was Wrongly Decided*

Lennane's holding that a Michigan city is prohibited from establishing a minimum wage or maximum working day rests upon an assumption that such measures are matters of statewide concern.¹⁸⁰ That determination, however, is only an assumption. The *Lennane* court does not give any reasoning, nor does it cite any authority to support its conclusion. What the court provides as authority are three cases that support the rule that the state alone may regulate matters of statewide concern.¹⁸¹ Although this rule is well-established,¹⁸² it does not follow, at least not without a proper analysis, that setting a local wage rate is necessarily a matter of statewide concern. The *Lennane* court simply failed to conduct this analysis.

One could understand the *Lennane* court's failure to fully analyze the case given the historical context in which the court decided it. The Michigan Supreme Court decided *Lennane* in 1923, less than twenty years after the United States Supreme Court decided *Lochner v. New York*.¹⁸³ *Lochner* famously held that states could not regulate the maximum hours an employee could work in a day or week, or regulate a labor practice that was not a health or safety concern, because such regulation was an impermissible interference with the liberty to contract under the Fourteenth Amendment.¹⁸⁴ As late as 1936, the Supreme Court emphatically denied legislatures the power to establish a minimum wage.¹⁸⁵ It was not until the following year, in *West Coast Hotel Co. v. Parrish*,¹⁸⁶ that the Court upheld a state minimum wage.¹⁸⁷ Then, four years later, the Court unequivocally upheld the minimum wage provisions of the Fair

may not mandate minimum wages is easy to administer. Regardless of how workable *Lennane* may be, however, its workability does not save it from being wrongly decided. See *infra* Part IV.A.1.

180. Attorney General *ex rel. Lennane v. City of Detroit*, 196 N.W. 391, 394 (Mich. 1923) (“[I]t does now follow that [the city] possesses all the police power of the sovereign so as to enable it to legislate generally in fixing a public policy in matters of state concern.”).

181. *Lennane*, 196 N.W. at 393–94 (citing *Clements v. McCabe*, 177 N.W. 722, 725–26 (Mich. 1920); *City of Kalamazoo v. Titus*, 175 N.W. 480 (Mich. 1919); *Coleman v. City of La Grande*, 144 P. 468, 470 (Or. 1914)).

182. See *supra* notes 67–71 and accompanying text.

183. 198 U.S. 45 (1905).

184. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.3, at 443 (7th ed. 2004).

185. See *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 611 (1936) (“This court has been careful in every case where the question has been raised . . . to disclaim any purpose to uphold the legislation as fixing wages, thus recognizing an essential difference between the two. It seems plain that [prior] decisions afford no real support for any form of law establishing minimum wages.”) Although *Morehead* addressed minimum wages for women workers, the court was clear that wages could not be fixed for men either, noting it could not “accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances.” *Id.*

186. 300 U.S. 379 (1937).

187. *Id.* at 399.

Labor Standards Act, which applied to workers regardless of gender.¹⁸⁸ When the Michigan Supreme Court decided *Lennane* in 1923, however, it would have been inconceivable to allow a municipality to enact an ordinance fixing wages. If the Federal Constitution prevented even states from regulating wage policies, with limited exceptions,¹⁸⁹ the *Lennane* court made the assumption that such matters could not be of local concern.

Assumptions play an essential role in analyzing precedent under *Robinson*. Embedded within the Michigan Supreme Court's first *Robinson* factor is the idea that a case is wrongly decided if its reasoning is erroneous.¹⁹⁰ As an example, Justice Taylor, writing for the majority in *People v. Graves*,¹⁹¹ explained that precedent providing for the automatic reversal of a conviction was "premised on the unwarranted assumption" that jurors do not follow instructions to not compromise their views.¹⁹² Because of flaws in the prior court's reasoning, the sitting court had a duty to correct it.¹⁹³ The Michigan Supreme Court's ruling in *Lennane*, based on a conclusory statement, is a comparable "unwarranted assumption." This assumption and the failure to conduct a full home rule analysis undermines the court's conclusions. This failure, although understandable given the historical context in which the court decided the case, strongly suggests that its reasoning is erroneous and therefore was wrongly decided. The fact that *Lennane* was wrongly decided is only part of the analysis, however. The next question to consider is whether changes in law and fact no longer justify adherence to *Lennane*.

2. *Changes in Law and Fact No Longer Justify Adherence to Lennane*

The historical context of *Lennane* also informs whether changes in the law or facts no longer justify adhering to a prior decision. Conducting a proper home rule analysis must incorporate over eighty years of evolving labor and municipal law, as well as critical constitutional law mentioned earlier.¹⁹⁴ Conducting such an analysis leads to the conclusion that the law has changed sufficiently to warrant overruling *Lennane*. Under the Michigan Supreme Court's standard, a proper analysis first asks whether establishing a living wage falls within the scope of the city's

188. See *United States v. Darby*, 312 U.S. 100, 125 (1941) ("[I]t is no longer open to question that the fixing of a minimum wage is within the legislative power . . .").

189. States could establish minimum wages and other economic regulation if the business regulated was either (a) under the authority of a public grant or franchise, (b) "from earliest times" subject to regulation, or (c) not public at its inception but had since risen to be of public use. *Charles Wolff Packing Co. v. Court of Indus. Relations of Kan.*, 262 U.S. 522, 535 (1923). *Charles Wolff* was decided only months before *Lennane*.

190. See *People v. Graves*, 581 N.W.2d 229, 232 (Mich. 1998).

191. *Id.*

192. *Id.* at 233–34.

193. See *id.* at 232.

194. See *supra* notes 183–89 and accompanying text.

power, and second, if it is within the city's power, whether state law preempts exercise of that power.

a. Scope of Detroit's Home Rule Power

Courts generally accept that setting minimum wages are within the scope of a state or municipality's police powers, which provides strong evidence that living wage ordinances address municipal concerns.¹⁹⁵ Even in Louisiana, where the Louisiana Supreme Court struck down New Orleans' living wage ordinance, the court recognized both that setting a minimum wage is within the exercise of the state's police power and that a home rule government's powers are "as broad as that of the state."¹⁹⁶ Although widespread support of the proposition that home rule power includes the power to set minimum wages may be instructive, each state construes its own municipalities' powers differently. Obviously, most important to the analysis, then, is whether Michigan law supports that same proposition.

As noted earlier, despite language in the Michigan Constitution authorizing local power over municipal matters, other constitutional provisions, state statutes, and subsequent court decisions have served to broaden the scope of home rule power.¹⁹⁷ The Michigan Constitution provides for liberal construction of local powers, but more importantly, the Michigan Home Rule Cities Act authorizes cities to pass "any act to advance the interests of the city, [and] the good government and prosperity of the municipality and its inhabitants."¹⁹⁸ This provision offers the best guidance as to what constitutes "municipal concerns."

Detroit's living wage ordinance falls into the category of regulation that the Home Rule Cities Act contemplates municipalities will enact. A local living wage ordinance will invariably contribute to the prosperity of its inhabitants, as its workers will earn at least enough to stay above the poverty line. A living wage also contributes to the prosperity of the municipality in that the municipality avoids subsidizing poverty by being forced to serve those workers who previously relied on an array of city services.¹⁹⁹ Additionally, there may be reasons not necessarily related to poverty for identifying living wage laws as a matter of municipal concern.

195. See, e.g., *Baltimore v. Sitnick*, 255 A.2d 376, 378 (Md. 1969) (recognizing minimum wage ordinance as within municipal police power); *Visiting Homemaker Serv. v. Bd. of Chosen Freeholders*, 883 A.2d 1074, 1080–81 (N.J. Super. Ct. App. Div. 2005) (recognizing minimum wage ordinance as proper exercise of police power); *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149, 1162 (N.M. Ct. App. 2005) (concluding that setting a minimum wage is "unquestionably a public purpose and that such legislation is within the police and general welfare power" of a municipality).

196. *New Orleans Campaign for a Living Wage v. City of New Orleans*, 825 So. 2d 1098, 1103–05 (La. 2002). The court still struck down the ordinance because the Louisiana Constitution expressly denied municipalities' power to set minimum wages. *Id.* at 1108.

197. See *supra* Part II.D.1.

198. Home Rule City Act, MICH COMP. LAWS ANN. § 117.4(j) (West 2008).

199. See Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 NW. U. L. REV. 1057, 1094 (2007).

For example, a city may want to advertise its living wage to attract unskilled labor,²⁰⁰ or, as a factor of its size or location, the municipality's cost of living may be significantly higher than other areas of the state, necessitating higher wages.²⁰¹ Enacting a living wage ordinance for any of these reasons would suggest that home rule cities are acting to advance the interests of the city, its good government, and the prosperity of its citizens. In turn, this would certainly suggest that doing so is well within the scope of its home rule power.

The reasons mentioned above motivated efforts to implement the living wage ordinance in Detroit. The prosperity of the city and its citizens, backed by the overwhelming support of the public, guided the city's action. By the language and history of Michigan's constitution and statutes, Detroit's passage of its living wage ordinance was well within the scope of its home rule power. What remains, then, is a discussion of whether Michigan law preempts that ordinance, and if not, whether the ordinance nonetheless conflicts with state law.

b. Preemption Analysis

In Michigan, the appropriate place to begin a preemption analysis is with the test articulated in *Rental Property Owners Ass'n v. City of Grand Rapids*.²⁰² Under that test, three factors in particular indicate whether preemption will apply: (1) state law will not preempt a local ordinance unless state law expressly provides for exclusive state regulatory authority, (2) the scheme is so pervasive as to support preemption, or (3) there is a particular need for uniformity across the state.²⁰³ Looking at each question in turn reveals that Detroit's living wage ordinance survives a preemption challenge.

Under *Rental Property Owners*, one must first ask whether the legislature has expressly prohibited local governments from establishing their own minimum wage.²⁰⁴ A look to the text of Michigan's statutes easily addresses this question. Three statutes within Michigan's body of labor law mention wages, and of these, only two actually set wages.²⁰⁵ The Minimum Wage Act of 1964 prohibits employers from paying less than a certain minimum hourly wage.²⁰⁶ The Prevailing Wage Act mandates a

200. See *id.* at 1093.

201. *Id.*

202. See *supra* notes 101–08 and accompanying text.

203. See *Rental Prop. Owners Ass'n v. City of Grand Rapids*, 566 N.W.2d 514, 519 (Mich. 1997).

204. See *id.* (“First, where the state law expressly provides that the state’s authority to regulate a specified area of the law is to be exclusive, there is no doubt that municipal regulation is preempted.”).

205. Michigan codifies its labor statutes in Chapter 408 of its compiled laws. The three statutes are the Minimum Wage Law of 1964, MICH. COMP. LAWS §§ 408.381–.398 (1999 & Supp. 2008), an act requiring payment of prevailing wages and fringe benefits on state projects, *id.* §§ 408.551–.558, and an act regulating the *time* and *manner* of payment of wages and fringe benefits, *id.* §§ 408.471–.490. This last statute is largely irrelevant, as it does not set wage levels.

206. *Id.* §§ 408.383–.384.

particular minimum wage, but ties that wage to the prevailing wage of the locality in which the employee performs the work.²⁰⁷ Neither statute contains any provision that limits the power of local government to impose a higher minimum wage. More importantly, the Michigan Legislature passed both of these pieces of legislation after the state constitution had been amended in 1963. Knowing that the constitution required home rule powers to be liberally construed,²⁰⁸ the legislature easily could have provided for the express preemption of local wage ordinances. Nevertheless, it did not so provide.

The lack of pervasiveness of these statutes also undermines a preemption argument. As noted earlier, only three Michigan statutes address wages.²⁰⁹ None of these statutes amount to a pervasive regulatory scheme, either individually or taken as a whole. The Wages and Fringe Benefits Law regulates the time and manner of payments to employees.²¹⁰ The Prevailing Wage Act, which regulates wages on state projects, simply sets a minimum wage on those projects according to a defined formula.²¹¹ Finally, the Minimum Wage Law, as its name suggests, sets minimum wages for employees who work in the state, with some specifically identified exceptions.²¹² These three statutes constitute minimal regulation of the field of wages. In contrast, Michigan law regulates other areas of business with significantly more detail and pervasiveness. For example, Michigan has enacted comprehensive legislation governing gaming, alcoholic beverages, and even the dairy industry.²¹³ Even if one assumes that the wage laws *are* pervasive, the Michigan Supreme Court indicated that pervasiveness alone is not generally sufficient to infer preemption.²¹⁴ By implication, one of the other factors must be present to infer preemption.

Finally, with respect to minimum wages, state interests do not require uniformity. A need for uniformity exists when to hold otherwise would “invite the cultivation of a legal thicket.”²¹⁵ In Michigan, different parts of the state already differ significantly in salary. Take for example security guards, the very employees at issue in *Rudolph*. As of May 2007 (the most recent data available), the Detroit-Livonia-Dearborn metropolitan area’s mean annual salary for security guards was \$28,270, higher than Grand Rapids-Wyoming (\$23,430), Holland-Grand Haven (\$24,690), and Kalamazoo-Portage (\$26,640).²¹⁶ A lack of uniformity in

207. *Id.* § 408.552.

208. *See supra* note 94 and accompanying text.

209. *See supra* note 205 and accompanying text.

210. *See* MICH. COMP. LAWS §§ 408.471–490.

211. *See id.* §§ 408.551–558.

212. *See id.* § 408.394.

213. *See id.* §§ 432.1–278 (gaming); *id.* §§ 436.1101–2303 (liquor); *id.* §§ 288.561–740 (dairy).

214. *See* *Rental Prop. Owners Ass’n v. City of Grand Rapids*, 566 N.W.2d 514, 519 (Mich. 1997).

215. *People v. Llewellyn*, 257 N.W.2d 902, 907 (Mich. 1977).

216. Bureau of Labor Statistics, Occupational Employment Statistics, <http://data.bls.gov/oes/search.jsp> (select “one occupation for multiple geographic areas,” select “security guard” from occupa-

salary may partially result from differences between each area's cost of living. For example, for May 2007, Detroit's cost of living was actually 11.7 percent lower than that of Grand Rapids, 2.9 percent lower than Holland-Grand Haven, and 1.2 percent greater than Kalamazoo.²¹⁷ Thus, a uniform state minimum wage may not have the same purchasing power in different geographical areas. Instead, areas with a high cost of living, and where the value of a minimum wage job would not meet basic needs, may require heterogeneity in minimum wages rather than uniformity. To some extent, current heterogeneity among security guards' annual wages may already reflect that influence.²¹⁸

Michigan state law also recognizes the need for heterogeneity in minimum wages. The Prevailing Wage Act, which requires prevailing wage on state contracts, implicitly recognizes differences in prevailing wages as a result of, among other things, the corresponding differences in cost of living.²¹⁹ In addition to recognizing those differences, the prevailing wage law requires employers to pay those prevailing wages when completing work under state contract.²²⁰ A prevailing wage is effectively a minimum wage on particular projects, but the prevailing wage will be higher or lower depending on where the project takes place.²²¹ Rather than cultivate a legal thicket, the Prevailing Wage Act provides state contracts with wages appropriate to the area in which the project is built. Likewise, living wage ordinances recognize disparities in cost of living and protect low-skilled, low-wage workers by preventing them from falling too far below the area's cost of living. Rather than solving a problem with local disparities, as in *Llewellyn*, statewide uniformity of a minimum wage is counterproductive, preventing local governments from meeting the needs of their citizens.

Having addressed *Rental Property Owners'* preemption analysis, the last question to answer is whether state law, even in the absence of express preemption, directly conflicts with Detroit's ordinance. As noted earlier,²²² and within *Rental Property Owners* itself, direct conflict exists when the ordinance prohibits an act that the statute permits or permits

tion list, select "Metropolitan or Nonmetropolitan Area," select desired areas, and select "annual mean wage") (last visited Apr. 3, 2009).

217. Council for Community and Economic Research, 40 ACCRA COST OF LIVING INDEX 1.5–6 (2007).

218. See *supra* notes 216–17 and accompanying text. One may note that the differences in annual wages do not directly correlate with differences in cost of living. Cost of living is only one factor affecting wages, and differences in wages may be more greatly affected by other factors, such as demand for security services.

219. See MICH. COMP. LAWS §§ 408.551–.558 (1999).

220. See *id.*

221. See *id.*

222. See *supra* notes 77–80 and accompanying text.

an act that the statute prohibits.²²³ Unless the two regulations cannot coexist, no conflict between the two exists.²²⁴

The mere existence, however, of two similar statutes does not indicate direct conflict.²²⁵ Instead, there is a traditional rule that the city “may move in the same direction as the state, but not counter thereto.”²²⁶ Thus, local government may generally mandate harsher penalties for criminal acts.²²⁷ In the living wage context, then, the question is whether a municipality, by providing for a higher minimum wage, is moving in the same direction as the state. Put another way, to analyze the issue is to ask whether the state law mandating a minimum wage or a prevailing wage on a state project merely sets a floor for wages, or instead sets a ceiling, prohibiting any minimum wage greater than authorized by the state.²²⁸ Both the New Mexico Supreme Court and the Maryland Court of Appeals have concluded that the state minimum acted as the former.²²⁹

These decisions from other jurisdictions certainly do not bind the Michigan Supreme Court. However, the state’s legislature included in the Minimum Wage Act a provision that exempts employers regulated by the Federal Fair Labor Standards Act²³⁰ unless the Act requires lower wages than the state act requires.²³¹ This language presumes that the state of Michigan has the authority to provide for higher minimum wages than the federal government requires. The only explanation for such a presumption is that the legislature views the federal minimum wage as a floor, and mandating a higher state minimum wage is an effort to move in the same direction as the federal government, and not “counter thereto.” Failure to apply the same presumption to the Michigan Minimum Wage Act and to local living wage ordinances would thus seem incongruent. Instead, that the legislature saw the federal minimum wage as a floor suggests the legislature could have, and possibly should have, foreseen that municipalities would also interpret the Michigan Minimum

223. *People v. Llewellyn*, 257 N.W. 2d 902, 904 n.4 (Mich. 1977); *see also* *Rental Prop. Owners Ass’n v. City of Grand Rapids*, 566 N.W.2d 514, 521 (Mich. 1997); REYNOLDS, *supra* note 77, § 42, at 128.

224. *See Rental Prop. Owners*, 566 N.W.2d at 521; *see also supra* note 78 and accompanying text.

225. *See Rental Prop. Owners*, 566 N.W.2d at 521 (“Parallel subject matter simply does not require a finding of preemption.”).

226. REYNOLDS, *supra* note 77, § 42, at 129 (citations omitted).

227. *Id.* § 42, at 130.

228. *See Gillette*, *supra* note 199, at 1093.

229. *See City of Baltimore v. Sitnick*, 255 A.2d 376, 385 (Md. 1969) (holding that local regulation, rather than being in conflict, supplemented state law); *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149, 1166 (N.M. Ct. App. 2005) (viewing the state wage act as “setting only a wage floor that does not bar higher local minimum wage rates”).

230. Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–219 (2006)).

231. *See* MICH. COMP. LAWS § 408.394(1) (1999 & Supp. 2008). The statute provides:

This act does not apply to an employer who is subject to the minimum wage provisions of the fair labor standards act of 1938, chapter 676, 52 Stat. 1060, 29 U.S.C. 201 to 216 and 201 to 219, unless application of those federal minimum wage provisions would result in a lower minimum wage than provided in this act.

Id.

Wage Act the same way. Knowing this, and failing to expressly prohibit local acts, the Michigan legislature must have contemplated the possibility and approved of it. That the legislature has resisted passing an express preemption in the wake of Detroit's passage of its living wage ordinance further supports this conclusion.²³² Detroit's ordinance, and those like it, is not in direct conflict with state law.

Given the *Lennane* court's unwarranted assumption and erroneous reasoning, *Lennane* was wrongly decided. In addition, modern legal authority and strong policy justifications indicate that local living wage ordinances are matters of local concern, and that state law does not preempt, nor conflict with, such ordinances. Therefore, the last relevant factor under Michigan's *Robinson* test is whether reliance interests would preclude overturning *Lennane* despite its erroneous ruling.

3. *No Significant Reliance Interests Preclude Overturning Lennane*

The purpose of the Michigan Supreme Court's consideration of reliance interests is to prevent "practical real-world dislocations."²³³ Usually this means that the court will not overturn a decision if it is "so embedded, so accepted, so fundamental, to everyone's expectations."²³⁴ Here, however, upholding Detroit's living wage ordinance by overruling state supreme court precedent does not implicate any such reliance interests.

First, employers face changing labor costs every day. Whether those costs result from a newly negotiated bargaining agreement, a new competitor in the area, or an increased demand for an employer's services necessitating higher productivity and thus better skilled workers, employers must adapt to the new set of circumstances. Employers are not counting on wages being stagnant forever. Minimum wage ordinances or living wage ordinances are no different. Employers are continually subject to changing federal, state, and local regulation of wages and benefits. Thus, judicial change in this area would be no more burdensome, nor inflict any greater hardship on employers, than new legislative or executive enactments. It is highly unlikely that businesses operate in Michigan, and in Detroit in particular, because they have relied on a 1923 case's precedential effect to prevent the city from enacting living wage ordinances.

Additionally, *Lennane* is not fundamental to society's expectations because courts generally have not relied on it in the past. The case has only been cited three times since the state revised its Constitution in 1963

232. See *supra* notes 52–53 and accompanying text.

233. *Robinson v. City of Detroit*, 613 N.W.2d 307, 321 (Mich. 2000).

234. *Id.*

to broaden the home rule powers of its cities.²³⁵ The effects of overruling *Lennane* are not such that they fit the rationale the Michigan Supreme Court relies on when refusing to overrule a wrongly decided precedent. Overruling *Lennane* will not affect significant reliance interests to the point of causing significant dislocations. Reliance interests cannot justify keeping *Lennane*'s holding intact.

Because *Lennane* was wrongly decided, circumstances have changed to justify its overruling, and there are no significant reliance interests, the Michigan Supreme Court should overrule its 1923 decision and uphold Detroit's power, and the power of any Michigan municipality, to advance the interests of the city, good government, and the prosperity of its inhabitants. Doing so will acknowledge the continued success of home rule in Michigan and emphasize the importance of local flexibility in addressing the specialized health and welfare demands of its constituents. Having suggested that Michigan restore municipal power to set living wages, this Note provides suggestions for living wage advocates hoping to learn from the Michigan context of the intersection between the living wage and home rule.

B. Recommendations to Living Wage and Home Rule Advocates

As noted earlier, Michigan is not the first state to face questions of home rule power and preemption with respect to minimum or living wages.²³⁶ Nor will Michigan likely be the last jurisdiction to confront this sensitive issue. Others elsewhere have provided suggestions for living wage proponents seeking to prevent state preemption of local wage ordinances.²³⁷ They rightly argue, for instance, that municipalities should exercise home rule authority often, should gather data on how each ordinance affects the city, and should pursue strategies designed to actively avoid state preemption.²³⁸ These suggestions are sound, and it would serve Detroit and other Michigan municipalities well to follow them. But the role of stare decisis in Michigan, and not merely judicial analysis of statutory preemption, should indicate that living wage advocates may need to do more to protect their municipality's home rule authority.

First, advocates should be prepared to research and investigate obsolete precedent, like *Lennane*, that courts decided when labor standards were less commonly accepted at the state, or even national, level and have not kept pace with modern developments in constitutional and mu-

235. See *Arlan's Dept. Stores, Inc. v. Kelley*, 130 N.W.2d 892, 895 (Mich. 1964); *Bendix Safety Restraints Group v. City of Troy*, 537 N.W.2d 459, 463 (Mich. Ct. App. 1995); *Butcher v. City of Detroit*, 347 N.W.2d 702, 704 (Mich. Ct. App. 1984). The state amended its constitution to be "a more positive statement of municipal powers" in order to reflect "Michigan's successful experience with home rule." FINO, *supra* note 96, at 154.

236. See *supra* Part III.B.

237. See, e.g., Kerry A. Burchill, Comment, *Madison's Minimum-Wage Ordinance, Section 104.001, and the Future of Home Rule in Wisconsin*, 2007 WIS. L. REV. 151.

238. See *id.* at 195.

nicipal law. Cities and supporters should articulate clear departures from *Lochner*-era decisions, and emphasize more recent decisions upholding living wages as within the scope of home rule power. Even decisions in Louisiana and Missouri, striking down living wage ordinances, provide support for the initial principle that some regulation at the local level is appropriate.²³⁹

Second, municipalities and living wage supporters should familiarize themselves with their state supreme court's standard for departing from its prior decisions. In the Michigan context, the fact that a prior court wrongly decided a case does not suffice to have that decision overturned. A state supreme court likely will weigh the appropriateness of departing from precedent against any reliance interests that precedent may have created. The ability to refute reliance claims thus may determine the outcome and remove an additional obstacle from the city's path.

Finally, living wage advocates should understand the policy preferences of the judges likely to hear legal challenges to municipal wage ordinances. A future decision of the Michigan Supreme Court addressing Detroit's living wage ordinance may or may not indicate that policy preferences or ideology are at work, but in any given case it is certainly possible that a judge will at least consider policy in making her determination. If that is so, advocates need to rely on more than winning home rule arguments. For example, advocates may want to translate support for home rule power into support of "local control." Following this suggestion and the others above will assist supporters of local living wage ordinances in refuting a variety of arguments against strong home rule power in the field of wages.

V. CONCLUSION

The Michigan Supreme Court may find refuge in the idea that "[t]he rule of law depends in large part on adherence to the doctrine of stare decisis,"²⁴⁰ but failing to depart from old, obsolete precedent would be to abdicate the court's self-imposed duty to "re-examine precedent where its reasoning . . . is fairly called into question."²⁴¹ Instead, the court should reject its *Lennane* decision and hold living wage ordinances to be within the scope of municipal home rule powers. Not only should this be the correct decision under Michigan home rule and stare decisis jurisprudence, but the court can use this case to silence critics who continue to argue that ideology, and not sound legal analysis, is the motivating force behind an increased tendency to overrule its own, sometimes

239. See *New Orleans Campaign for a Living Wage v. City of New Orleans*, 825 So. 2d 1098, 1103, 1105 (La. 2002); *City of St. Louis*, *supra* note 158, at E-1.

240. *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478-79 (1987) (emphasis omitted).

241. *Robinson v. City of Detroit*, 613 N.W.2d 307, 320 (Mich. 2000) (quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 627-28 (1974) (Powell, J. concurring)).

longstanding, precedent. If the court does not overrule *Lennane*, that criticism may only increase, and the court's own legitimacy may suffer. Under that scenario, supporters of a living wage will have to regroup and direct their energies to the legislature, either urging it to adopt a state-wide living wage or to strengthen the already broad home rule powers of Michigan's municipalities by expressly authorizing cities and towns to mandate higher minimum wages than the state requires. Regardless of the outcome in this case, however, home rule advocates and those groups most interested in adopting living wage ordinances likely will, and should, continue to exert pressure on both legislatures and the courts.

