UNDERSTANDING THE OVERRULINGS: A RESPONSE TO ROBERT SEDLER

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I. INTRODUCTION

In *The Michigan Supreme Court, Stare Decisis and Overruling the Overrulings,*[1] Wayne State University Law School Professor Robert Sedler takes the Michigan Supreme Court to task for abandoning the concept of *stare decisis*, or the principle that courts should follow their prior opinions. He attributes this abandonment to current Justices Robert Young and Stephen Markman, and to former Justices Maura Corrigan and Clifford Taylor,[2] each of whom was originally appointed to the

1. Robert A. Sedler, *The Michigan Supreme Court, Stare Decisis and Overruling the Overrulings,* 55 WAYNE L. REV. 1911 (2010) [hereinafter "*Overruling the Overrulings*"].

2. Sedler uses the term "former majority" to refer to current Chief Justice Robert P. Young Jr., current Justice Stephen Markman, former Justice Clifford Taylor and former Justice Maura Corrigan. This "former majority" label suggests these justices voted as a bloc when each member was on the Court and that a new "majority" took over in 2008 when then-Chief Justice Clifford Taylor was defeated in his reelection campaign by current Justice Diane Hathaway. We have eschewed the term "former majority" for four main reasons.

First, there have been a number of major changes in the Michigan Supreme Court's membership since *Overruling the Overrulings* was published: Justice Elizabeth Weaver retired (for the second and apparently final time); former Justice Alton Davis was appointed as her replacement, only to be defeated by current Justice Mary Beth Kelly in the 2010 election; former Justice Maura Corrigan resigned to serve as director of the Michigan Department of Human Services; and current Justice Brian Zahra was appointed to replace her. Thus, to the extent there was a "current majority" when Sedler wrote of the "former majority," that majority has disbanded.

Second, this term falsely suggests that Justices Corrigan, Markman, Taylor and Young always voted together. In fact, these justices often took different sides in matters before the Court. *See, e.g.,* Mich. Dep't of Transp. v. Haggerty Corridor Partners, L.P., 700 N.W.2d 380 (Mich. 2005) (majority opinion by Young, J., and dissent by Markman, J.).

Third, the term "former majority" carries a pejorative connotation, suggesting as it does that the justices who comprised the "former majority" always voted as a unified body and therefore lacked independence and judicial integrity. This kind of charge must not be made recklessly. *See* MICH. R. PROF'L CONDUCT 8.2(a).

Last, the use of the "former majority" term overlooks the critical fact that majorities exist on a case-by-case basis. It is meaningless to talk about a "majority" in the abstract. *See* Section IV, *infra.* Each opinion, each "majority," must be examined on its own, according to the strength of the reasoning in each particular majority opinion. Of course one can attempt to discern trends and themes in a court's jurisprudence. But to talk of a "majority" without carefully analyzing majority opinions, as Sedler does in *Overruling the Overrulings,* is to discourse about straw men and phantoms.

bench by a Republican governor and each of whom is a self-proclaimed judicial traditionalist.[3]

Sedler's thesis in *Overruling the Overrulings* is that the Court routinely disregarded any precedents with which it disagreed, and that it did so for what he calls "ideological reasons": to benefit corporations and prosecutors while making life more difficult for plaintiffs and criminal defendants.[4] He goes so far as to claim (albeit without citation to data from other courts or meaningful discussion of the issue) that the Court's record of overruling precedent "is truly extraordinary, and likely unmatched by any other state court[.]"[5]

This assertion leads to Sedler's *coup de grace:* his contention that the Court's "overruling" opinions need not be given precedential effect.[6] In his view, these opinions are so numerous and so ideological that they can simply be ignored.[7]

Overruling the Overrulings is deeply flawed. Its problems begin at the outset, where Sedler opines that, unlike the Michigan Supreme Court, the U.S. Supreme Court has a coherent and consistent approach to stare decisis.[8] He then offers the U.S. Supreme Court's jurisprudence as a model for how a court should deal with precedent, in contrast with what he views as the Michigan Supreme Court's ideologicallydriven disregard for precedent.[9] What Sedler offers, however, is a superficial and slanted take on the Supreme Court's *stare decisis* jurisprudence—one that ignores the complexity of the applicable case law, uncritically relies on dicta, and offers an ahistorical view of the cases Sedler selects to illustrate his claims. In fact, the Supreme Court's *stare decisis*

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3. *See* Maura D. Corrigan, *Textualism In Action: Judicial Restraint On the Michigan Supreme Court,* 8 TEX. REV. L. & POL. 261 (2004); Stephen Markman, *Precedent: Tension Between Continuity In the Law and the Perpetuation of Wrong Decisions,* 8 TEX. REV. L. & POL. 283 (2004); Stephen J. Markman, *Resisting the Ratchet,* 31 HARV. J.L. & PUB. POL'Y 983 (2008); Clifford W. Taylor, *Construing the Text of Constitutions and Statutes,* 8 Texas Rev. L. & Politics 365 (2004); Robert P. Young, Jr., *A Judicial Traditionalist Confronts the Common Law,* 8 TEX. REV. L. & POL. 299 (2004).

4. *Overruling the Overrulings*, 55 WAYNE L. REV. at 1912.

5. *Id.* at 1939. Professor Sedler went even further during the 2010 campaign to unseat Justice Robert Young. In an interview posted on Youtube.com by the Michigan Democratic Party, Professor Sedler states that his "research"—ostensibly the "research" described in *Overruling the Overrulings*—shows that, "if there was [sic] a Guinness Book of World Records for overruling decisions in a limited period of time, the Michigan Supreme Court from 1999 to 2008 would set the record." *See Prof. Robert Sedler on Why Bob Young is Bad for Michigan,* YOUTUBE (Mar. 16, 2010), http://www.youtube.com/watch?v=8fXYNbstLQE.

6. *Id.*

7. *Id.* at 1914.

8. *Id,* at 1914.

9. *Id.* at 1915.

jurisprudence is every bit as complex and open to debate as that of the Michigan Supreme Court.

With this flimsy foundation, Sedler makes an even more egregious error. The Michigan Supreme Court's thirty-four overrulings over nine years is not "unmatched by any other state court" by any stretch.[10] In fact, it takes just a quick search of Lexis or Westlaw to discover studies showing that other courts have overturned precedent at equal or even higher rates. Sedler's thesis, therefore, is utterly false.

Sedler's analysis in *Overruling the Overrulings* is haphazard in another sense. His thesis is based on a simple tally of the Court's "overrulings" and a quick review of which party won in each "overruling": plaintiff or defendant, prosecution or defense.[11] In the process, Sedler only skims the surface of the relevant case law, never taking the time to delve into the Court's rationales. Sedler therefore fails to note that, when the Court overturned opinions that raised issues of statutory construction, it consistently enforced the *Legislature*'s policy preferences, not its own. He also overlooks the extent to which the Court actually enforced stare decisis by overruling opinions that radically departed from previous law.[12] At the same time, he fails to note the extent to which the Court's "overruling" decisions brought Michigan back in line with Supreme Court precedent on constitutional questions.[13] As a result, his simple tally of who "won" each overruling opinion is not only superficial but ultimately pointless. It provides no meaningful insight into the Court's jurisprudence.

The goal of this article is not simply to rebut *Overruling the Overrulings*. Examining the defects in Sedler's article also provides an opportunity to consider the way in which critics discuss judicial traditionalists and to take a closer look at the kinds of arguments and assumptions that are made about opinions written by jurists who align themselves with textualism, originalism and skepticism toward the common law.

It is high time that legal academics and commentators acknowledged that it is impossible to determine anything meaningful about a decision, or about the decision-maker, for that matter, simply by looking at which side won. As demonstrated below, for example, Sedler's blanket assertions about the Court fall apart once one takes the time to study the relevant opinions and understand the governing rationale. Indeed, it is

10. This figure of thirty-four "overrulings" is taken from *Overruling the Overrulings*. The authors have not independently verified this number.

11. Sedler, *supra* note 4, at 1939.

12. *See, e.g.*, Pick v. Szymczak, 451 Mich. 607 (1996).

13. *See, e.g.*, People v. Davis, 472 Mich. 156 (2005).

impossible to draw any meaningful conclusions about judicial traditionalism simply by focusing on who "won" because, for a judicial traditionalist, it is the *process,* not the *outcome*, that matters.[14] Until critics of judicial traditionalism understand and take this view seriously, a thoughtful dialogue about judicial philosophy is unlikely.

There is much to be gained, even for those opposed to judicial traditionalism, by shifting from the kind of outcome-driven and superficial analysis exemplified by *Overruling the Overrulings* to one that takes judicial philosophy seriously. For one thing, by attempting to understand judicial traditionalism and to see how it plays out in case law, critics of conservative jurists can become better interlocutors, perhaps raising questions that might place others' assumptions in sharper relief. For another, a more engaged inquiry with judicial traditionalism might lay the groundwork for critical self-reflection and, with luck, a more genuine dialogue.

This article addresses these points in order. Sections II, III and IV address three of the main fallacies underlying *Overruling the Overrulings*: Sedler's contentions that stare decisis is straightforward for the U.S. Supreme Court; that the Michigan Supreme Court overruled a record number of cases during the period he examined; and that all of the "overrulings" are the product of the Court's favoring corporations and prosecutors. Section V turns from these flaws in Sedler's analysis to the broader implications of *Overruling the Overrulings*.

II. STARE DECISIS IS COMPLICATED, EVEN FOR THE U.S. SUPREME COURT.

It is important to begin with an understanding of what is at stake in this discussion of stare decisis. Stare decisis is an abbreviated form of the Latin phrase, "*Stare decisis et non quieta movere*—to abide by the precedents and not to disturb settled points."[15] It is, as now-retired Justice John Paul Stevens more whimsically put it, "the doctrine that teaches judges that it is often wise to let sleeping dogs lie."[16] It takes only a passing familiarity with the history of the U.S. Supreme Court, however, to know that stare decisis does not *always* require fealty to settled precedents. *Plessy v. Ferguson*[17] may have been relevant

14. *See* Frederick Schaver, *Precedent,* 39 STAN. L. REV. 571 (1987).

15. Henry C. Black, *The Principle of Stare Decisis,* 34 AM. L. REG. 745 (1886).

16. John Paul Stevens, *The Life Span of a Judge-Made Rule,* 58 N.Y.U. L. REV. 1, 1 (1983).

17. 163 U.S. 537 (1896).

precedent when *Brown v. Board of Education*[18] was decided, for instance, but the Supreme Court did not find itself to be constrained by *Plessy*'s deeply flawed holding.

Overruling the Overrulings begins by attempting to set forth exactly what stare decisis means in practice and, to this end, turns to the U.S. Supreme Court.[19] The Supreme Court, according to Sedler, has a coherent approach to precedent, and "[i]t has been very rare of [sic] the Supreme Court to overrule a prior decision on the ground that a majority of the Court as currently constituted believes that the prior decision was wrongly decided."[20] Rather, Sedler contends, the Supreme Court has followed the rule, as stated in *Planned Parenthood of Southeastern v. Casey*, that an opinion should be overruled only if the Court has "some special reason over and above the belief that a prior case was wrongly decided."[21]

Overruling the Overrulings provides examples of these "special justifications." A court might legitimately overrule a prior decision if it "was not consistent with other prior decisions or with subsequent decisions in the same area of law, so that the decision is an 'outlier' in the line of growth of legal doctrine."[22] One example of an "outlier" that was legitimately overruled, in Sedler's view, is *Bowers v. Hardwick*,[23] which held that the due process clause does not prohibit state laws banning sodomy.[24] Sedler posits that this opinion "went counter to a line of decisions ... that recognized the right of individuals, married and single, to make personal decisions regarding sexual conduct, free from governmental interference."[25] He asserts, therefore, that *Bowers* was correctly overruled by *Lawrence v. Texas*[26] in 2003.[27]

A second "special justification," according to *Overruling the Overrulings*, is "where the Court has concluded that over a period of time, a series of prior decisions and the resulting doctrine and precedent that they represent are no longer consistent with conditions prevailing in contemporary American society."[28] He offers another familiar example

18. 347 U.S. 483 (1954).
19. Sedler, *supra* note 4, at 1914.
20. *Id.*
21. *Id.* at 1915 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992)). *See also* Sedler, *supra* note 4, at 1918.
22. Sedler, *supra* note 4, at 1917.
23. *Id.*; 478 U.S. 186 (1986).
24. *Id.* at 196.
25. Sedler, *supra* note 4, at 1918.
26. 539 U.S. 558 (2003).
27. *Id.*
28. Sedler, *supra* note 4, at 1920.

of this "special reason": *Brown v. Board of Education*'s overruling of the dubious "separate but equal" standard adopted by *Plessy v. Ferguson.*[29]

A. Stare Decisis At the Supreme Court

Sedler's reliance on *Casey* begs the question: does the Supreme Court really practice what it preaches (or at least what Sedler preaches) about stare decisis? Although *Overruling the Overrulings* provides no empirical data about the Supreme Court's practice of stare decisis, other scholars have examined the Supreme Court's opinions to determine whether precedent is indeed a meaningful constraint on the Court's jurisprudence, and the consensus appears to be that stare decisis is *not* a significant factor in the Supreme Court's decision-making. As Frederick Schauer has noted, "[E]xisting research provides very strong support for the view that, at least in the Supreme Court, there exists no strong norm of stare decisis."[30] Nor is the Supreme Court's checkered history with stare decisis a secret: "The struggles in the U.S. Supreme Court over questions of precedent have been so public and so prolonged, that they have shaped the attitudes of lawyers and judges throughout the American federation."[31]

This conclusion, that stare decisis is not especially important in the Supreme Court's jurisprudence, appears to have been the consensus about the Supreme Court for decades. *"Overruling" Opinions in the Supreme Court,* a 1958 study of the Supreme Court's practice of *stare decisis* by Albert P. Blaustein and Albert H. Field, begins:

> Despite its vaunted reputation for rectitude, the U.S. Supreme Court has been the first to deny its own judicial infallibility. For in at least ninety decisions, dating as far back as 1810 and as recent as its 1956 Term, the Supreme Court has made public confession of error by overruling its previous determinations.[32]

These ninety opinions "expressly or impliedly overruled 122 decisions."[33] And even this figure is an underestimate of the number of

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29. 163 U.S. 537 (1896).

30. Frederick Schauer, *Has Precedent Ever Really Mattered In the Supreme Court?,* 24 GA. ST. U.L. REV. 381, 392 (2007).

31. Mortimer N.S. Sellers, *The Doctrine of Precedent in the United States of America,* 54 AM. J. COMP. L. 67, 77 (2006).

32. Albert P. Blaustein & Andrew H. Field, *"Overruling" Opinions In the Supreme Court,* 57 MICH. L. REV. 151 (1958).

33. *Id.* at 161.

opinions that the Supreme Court overruled according to Blaustein and Field:

> While these ninety examples of Supreme Court overrulings constitute the largest list ever compiled on the subject, they do not encompass every instance in which the Court has specifically changed its collective mind. There are also fifteen cases in which the Court reversed prior orders denying certiorari. And there are hundreds of cases in which the Supreme Court has taken at least a 'departure' from former dictates.[34]

Blaustein and Field break these overrulings down by chief justice, demonstrating, for example, that the Supreme Court overruled twenty-one cases under Harlan Stone's five-year tenure as chief justice from 1941 to 1946.[35]

Sedler has therefore exaggerated the Supreme Court's fidelity to precedent. Moreover, he overlooks the historical context of the "special justification" rule announced in *Casey*. Michael Stokes Paulsen has described this context succinctly:

> *Planned Parenthood of Southeastern Pennsylvania v. Casey,* decided in 1992, is, somewhat surprisingly, the Supreme Court's first systematic attempt to set forth a general theory of the role of precedent and 'stare decisis' in constitutional adjudication. The Court had, of course, discussed the idea of *stare decisis*, and had invoked precedent, many, many times before. But one searches the first 500 volumes of the U.S. Reports in vain for a full-blown theory or doctrine of precedent. Think about it: after over 200 years in operation, *Casey,* in 1992, is the Court's first grand theology of precedent![36]

The notion that one can rely on the Supreme Court for concrete guidance in applying stare decisis is, to say the least, suspect. As Paulsen has observed, the Supreme Court operated for *two centuries* with this doctrine largely unarticulated.[37]

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34. *Id.* at 155-156.

35. *Id.* at 161.

36. Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1168-69 (2008).

37. *Id.*

That does not mean, of course, that the Supreme Court did not adhere to a tacit policy of stare decisis before *Casey*. There is no doubt that stare decisis has been a consideration in Anglo-American jurisprudence since Blackstone.[38] But the "special justification" approach to overruling precedent appears to be of fairly recent vintage. Emery G. Lee traced the origins of this approach in *Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases*, concluding that "the Court has only recently adopted this approach to stare decisis in constitutional cases."[39] According to Lee, the "special justification" rule was first adopted in the Court's 1984 opinion in *Arizona v. Rumsey*[40] as a means of insulating the Court from the critique that new appointments to the bench and the political will behind those appointments were the primary factors shaping constitutional law.[41]

How, then, does *Overruling the Overrulings* conclude that the Supreme Court "generally will not overrule a prior decision on the ground that a majority of the Court as currently constituted believes that the prior decision was wrongly decided"?[42] It would seem that, by relying on dicta in *Casey*, Sedler's analysis falls prey to an old trap, one that was observed by Thomas Lee in *Stare Decisis In Historical Perspective: From the Founding Era to the Rehnquist Court*: "General dicta about the importance of adherence to precedent—either in cases in which the Court abides by a former decision or where the Court has not directly confronted the issue at hand—may provide a jaundiced view of the actual state of the doctrine."[43] The Supreme Court may have emphasized the need to adhere to precedent but it does not follow that it actually *has* honored precedent.

Indeed, Sedler's analysis also suffers because he fails to take an empirical look at the Supreme Court's practice of stare decisis, or at least consider empirical analyses already published by other legal scholars. One must take pronouncements about fidelity to precedent in Supreme Court opinions with a grain of salt—and, better yet, with a healthy dose of data.[44]

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38. *See generally* Sellers, *supra* note 31.

39. Emery G. Lee III, *Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 582 (2002).

40. 467 U.S. 203 (1984).

41. *See, e.g., Rhetoric, supra* note 39, at 583.

42. Sedler, *supra* note 4, at 1919.

43. Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 675 (1999).

44. According to Schauer, "Instead of being causal of Supreme Court outcomes, the Court's prior decisions appear to provide, consistent with the standard Legal Realist picture of the effect of precedent in general, primarily ex post justifications and

B. Subjective "Special Justifications"

As an objective matter, then, the Supreme Court does not offer a clear guidepost against which to measure lower courts' practice of stare decisis. And the problems with Sedler's reliance on the Supreme Court as a model for stare decisis do not end there. On closer inspection, the "special justifications" provide little assurance that departures from stare decisis are not driven primarily by one court's conclusion that an earlier court was simply wrong.

In offering the Supreme Court's "special justification" jurisprudence as an example for the Michigan Supreme Court,[45] Sedler illustrates these justifications with a few landmark decisions from the Court.[46] In each instance, *Overruling the Overrulings* suggests that it was fairly obvious that the case at hand presented a special justification for departing from stare decisis.[47] *Bowers v. Hardwick* was properly overruled as an "outlier,"[48] writes Sedler, because it was "somewhat surprising" when issued and "went counter to a line of decisions ... that recognized the right of individuals, married and single, to make personal decisions regarding sexual conduct, free from governmental interference."[49] *Plessy v. Ferguson* was properly overruled because it was "no longer consistent with conditions prevailing in contemporary American society."[50] Sedler's analysis of these exceptions is deficient both because it gives short shrift to the level of subjectivity inherent in applying these justifications, and because it is inconsistent with the overruling opinions themselves, as well as their historical context.

Beginning with *Lawrence v. Texas* and its overruling of *Bowers v. Hardwick,* it is hard to claim, as Sedler seems to, that *Bowers* was really an "outlier" in the Court's jurisprudence when it was decided. None of the cases cited by Sedler considered laws criminalizing homosexual conduct and, thus, none truly militated against the *Bowers* Court's conclusion at the time.[51] In fact, the only pre-*Bowers* authority cited in *Lawrence* that runs counter to the holding in *Bowers* is a decision by the

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rationalizations for decisions that have actually been reached on grounds other than precedent." Schauer, *supra* note 30, at 392.

45. Sedler, *supra* note 4, at 1912-13.

46. *Id.* at 1918.

47. *Id.*

48. *Id.* at 1920.

49. *Id.* at 1918.

50. *Id.* at 1920.

51. *See* Sedler, *supra* note 4, at 1918 (citing Eisenstadt v. Baird, 405 U.S. 438 (1972), Roe v. Wade, 410 U.S. 113 (1973), Carey v. Population Servs. Int'l, 431 U.S. 678 (1977)).

European Court of Human Rights.[52] This hardly makes *Bowers* an "outlier" in the Supreme Court's constitutional jurisprudence.

To be sure, the *Lawrence* Court held that *Bowers* was inconsistent with its *post-Bowers* opinions in *Casey* and *Romer v. Evans*.[53] But *Overruling the Overrulings* fails to mention other factors that played just as prominent a role in the *Lawrence* Court's reasoning, such as an "emerging recognition" of liberty interests in sexual matters, as demonstrated by revisions to the ALI Model Penal Code[54] and changes in the laws of other nations, particularly those in Europe.[55] It is misleading, therefore, to characterize *Bowers* as a simple "outlier." The *Lawrence* court actively reached beyond its own constitutional jurisprudence to overrule an opinion with which it disagreed.

In the end, there was nothing in the Supreme Court's precedent that *compelled* the result in *Lawrence* and no demonstration that *Bowers* was incompatible with the other legal precedents cited. Reading *Lawrence,* one might agree with Edward B. Foley that it "overruled *Bowers* essentially for the simple reason that *Bowers* was wrong."[56] In other words, *Lawrence* can be read as doing exactly what Sedler criticizes the Michigan Supreme Court for doing: overruling precedent, not because the precedent qualifies for overruling under some legalistic formula, but solely because it was, in the Court's view, *wrong.*

Brown v. Board of Education raises another problem with the "special justifications" proposed by *Casey* and echoed in *Overruling the Overrulings. Brown,* according to Sedler, is a case in which "the Court has concluded that over a period of time, a series of prior decisions and the resulting doctrine and precedent that they represent are no longer consistent with conditions prevailing in contemporary American society."[57] As *Casey* put it, *Brown v. Board of Education* and *West Coast Hotel Co.* v. *Parrish,*[58] another departure from precedent, were "comprehensible as the Court's response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive."[59] In other words, *Brown*, as interpreted by Sedler and *Casey*,

52. *Lawrence*, 539 U.S. at 573 (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (1981)).

53. 517 U.S. 620 (1996).

54. *Lawrence,* 539 U.S. at 572 (citing Model Penal Code § 213.2 cmt. at 372 (1980).

55. *Id.* at 576-77.

56. Edward B. Foley, *Is Lawrence Still Good Law?,* 65 OHIO ST. L.J. 1133, 1136 (2004).

57. Sedler, *supra* note 4, at 1920.

58. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

59. *Casey,* 505 U.S. at 863.

is an example of a departure from precedent based on society having become more enlightened and more accustomed to seeing facts that were unavailable to the Court's predecessors.

Brown demonstrates one of the problems with this "special justification" framework: it can give earlier opinions such as *Plessy* an air of legitimacy that they often (and certainly in the case of *Plessy*) do not deserve. Recall the central rationale of *Plessy*: that nothing in an act requiring segregation in public transportation "stamp[ed] the colored race with a badge of inferiority" and that, if this was the result, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[60]

If Sedler and *Casey* are to be believed, the *Plessy* Court did not have facts before it that would have allowed it to conclude that this rationale was at odds with the Thirteenth and Fourteenth amendments. That is a hard proposition to swallow. *Plessy* was decided just thirty years after the Civil War's bloody struggle to end slavery and was entered into the U.S. Reports when Jim Crow laws, and all the bigotry and violence they entailed, were in full swing. It is unimaginable that the *Plessy* court was really incapable of understanding that the system of "separate but equal" was discriminatory. Even the *Casey* Court flinched when attempting to argue that its predecessors were unaware of the odious discrimination that *Plessy* sanctioned.[61]

To suggest that *Plessy* was somehow compelled by the record before the Court, therefore, is to let the *Plessy* Court off the hook much too easily. *Plessy* is and always has been wrong, and the *Brown* Court required no other reason to overrule it.[62]

This "changed circumstances" justification is also problematic because it is ahistorical. The notion that *Brown* was simply the product of the Court's conclusion that *Plessy* was "no longer consistent with conditions prevailing in contemporary American society"[63] overlooks the prevalence of racism when *Brown* was decided. A long struggle lay ahead even in *Brown*'s wake. Professor Charles J. Ogletree, Jr., for example, has written that *Brown* "served to fuel the civil rights movement and to challenge the legitimacy of all public institutions that embraced segregation. However, there was significant political and legal

60. *Plessy*, 163 U.S. at 551 (quoted in *Casey*, 505 U.S. at 862-63).

61. *Casey*, 505 U.S. at 862-63 ("Whether, as a matter of historical fact, the Justices in the *Plessy* majority believe this or not, this understanding of the implication of segregation was the stated justification for the Court's opinion.").

62. *See* Brown v. Board, 347 U.S. 483 (1954).

63. Sedler, *supra* note 4, at 1920.

resistance to *Brown*'s mandate."[64] The Court *itself* was certainly more enlightened than its predecessors in *Plessy* but one need only recall images of George Wallace combating post-*Brown* integration in Alabama to see that *Brown* was part of the vanguard of the civil rights movement as much as it was a reaction to changes already affected by that movement.

The examples adduced by *Overruling the Overrulings* and *Casey* therefore do not provide clear support for Sedler's contention that "the Court generally will not overrule a prior decision on the ground that a majority of the Court as currently constituted believes that the prior decision was wrongly decided."[65] To the contrary, the Court has indeed corrected its predecessors' errors simply because they were errors.

III. CANCEL THE CALL TO THE GUINNESS BOOK OF WORLD RECORDS

So much for the notion that the U.S. Supreme Court's stare decisis jurisprudence provides an easy benchmark against which to measure the Michigan Supreme Court's "overrulings." Stare decisis is never straightforward and few if any cases provide the kind of special justification that can ensure judges are doing more than correcting their predecessors' errors, real or perceived.

Although stare decisis may be more complicated and ambiguous than *Overruling the Overrulings* suggests, that does not necessarily belie Sedler's claim that the Court overruled a record number of cases during its nine-year tenure and adopted a practice of stare decisis that was "completely inconsistent with the meaning of *stare decisis* as applied by all of the other American state courts."[66] To determine the veracity of that claim, one must examine the practices of other courts. And it does not take long to discover that Sedler's central claim—that the Court's record of overruling precedent is "likely unmatched by any other state court"[67]—is false. If there is a world record for overruling cases in a limited period of time, it was not set by the Michigan Supreme Court, contrary to Professor Sedler's express claim in partisan campaign materials and his only slightly more tempered assertion in *Overruling the Overrulings*.[68]

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64. CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF *BROWN V. BOARD OF EDUCATION* 124 (W.W. Norton & Co., 2005).

65. Sedler, *supra* note 4, at 1919.

66. *Id.* at 1930.

67. *Id.* at 1939.

68. *See supra* note 5 (noting that Professor Sedler claimed in campaign materials posted on the internet by the Michigan Democratic Party that "if there was [sic] a

Scholars have been analyzing the application of stare decisis for years. It is not necessary, therefore, to undertake an exhaustive analysis of each state in the Union to determine whether Sedler's claim that the Michigan Supreme Court set a record in overturning precedent is accurate. The yeoman's work has been done for us, and a brief survey of this scholarship shows that the Michigan Supreme Court's thirty-four overruled cases over nine years is not exactly an extraordinary number.

In 2004, for example, the *Albany Law Review* published a study of the South Carolina Supreme Court which noted that this court had "overruled its own precedent thirty-six times" in just six years—from 1997 to 2003.[69] In other words, the South Carolina Supreme Court managed to overrule just as many cases as the Michigan Supreme Court but in only two-thirds of the time. The *Montana Law Review* has published a study showing that from 1991 to 2000, a nine-year span comparable to the period at issue in *Overruling the Overrulings,*[70] the Montana Supreme Court overruled *109* of its opinions.[71] This figure, which is readily available in published literature, is nearly *triple* the amount that Sedler claims is "likely unmatched."[72]

Those are just the results that one can quickly find with a targeted word search of law reviews. The claim that the Michigan Supreme Court set a "world record" becomes even more specious when one begins to examine the jurisprudence of other states' high courts for the same nine-year period addressed in *Overruling the Overrulings.* For example, from 1999 to 2008, the Alabama Supreme Court overruled at least sixty-three cases,[73] and the California Supreme Court overruled at least thirty-nine.[74] Not only is the Michigan Supreme Court's thirty-four overrulings unremarkable in the scope of American jurisprudence but it is even unremarkable for the very same nine-year period that *Overruling the Overrulings* examines.

The claim that the Court's record of overruling cases is "likely unmatched" is central to *Overruling the Overrulings.* It lays the foundation for the claim that "the legitimacy of the Court majority's

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Guinness Book of World Records for overruling decisions in a limited period of time, the Michigan Supreme Court from 1999 to 2008 would set the record").

69. Kimberly C. Petillo, *The Untouchables: The Impact of South Carolina's New Judicial Selection System on the South Carolina Supreme Court, 1997-2003*, 67 ALB. L. REV. 937, 938 (2004).

70. Sedler, *supra* note 4, at 1911.

71. Jeffrey T. Renz, *Stare Decsis In Montana*, 65 MONT. L. REV. 41, 53 (2004).

72. Sedler, *supra* note 4, at 1939.

73. *See* Appendix A.

74. *See* Appendix B.

abandonment of *stare decisis* is seriously called into question."[75] If the Court's approach to stare decisis was not particularly unusual then Sedler's call to jettison its jurisprudence loses much of its steam.

If this point is so critical to Sedler's analysis, how did he manage to get it so very wrong? Giving Sedler the benefit of the doubt, we are willing to postulate that he made this statement without verifying its accuracy and not as a deliberate fabrication. This can lead to a number of conclusions, and we leave those to the reader.

None of this is to say that the Court was not active in overruling cases. Justice Markman himself has stated:

> What . . . most differentiates the Michigan Supreme Court from other state courts, including those routinely described as 'conservative' or 'judicially restrained' or 'strict constructionist,' has been the Michigan Supreme Court's treatment of precedent. Although respectful of precedent, as any judicial body must be, in the interests of stability and continuity of the law, the court has also been straightforward in its view that regard for precedent must be balanced with a commitment to interpreting the words of the law in accordance with their meaning.[76]

As Justice Markman's comments suggest, however, the Court's jurisprudence is significant not for the *number* of "overrulings" but for the *candor* and *rationale* of its "overrulings."[77] The Court undertook a deliberate project of expressly rejecting precedent that was at odds with controlling statutory language, that unduly expanded the common law beyond traditional bounds, or that departed from the original understanding of governing constitutional provisions. [78]

Whether or not one agrees with this approach, an examination of the Michigan Supreme Court's "overrulings" reveals that the Court was successful in adhering to the plain meaning of the law, and that its predecessor Courts left it with much work to do.

IV. A CLOSER LOOK AT THE "OVERRULINGS"

Two of the lynchpins of *Overruling the Overrulings*—the reliability of the U.S. Supreme Court's stare decisis jurisprudence and the "likely

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75. Sedler, *supra* note 4, at 1943.

76. ORIGINALISM: A QUARTER-CENTURY OF DEBATE 228 (Stephen G. Calabresi ed., 2007).

77. *Markman*, *supra* note 3, at 983.

78. *Id.* at 984.

unmatched" record set by the Michigan Supreme Court—are demonstrably false. That leaves only Sedler's contention that the Michigan Supreme Court's "overrulings" were ideologically driven, a conclusion he bases on a rough tally of who "won" and "lost" each case.[79] A closer examination of the decisions upon which Sedler relies reveals serious flaws in this methodology and in the conclusions that Sedler draws.

A. The Michigan Supreme Court's "Statutory Interpretation Overruling Decisions"

As Sedler acknowledges, most of the Michigan Supreme Court's "overrulings" address questions of statutory construction.[80] And as Sedler further acknowledges, the Court has been explicit about its rationale for overruling cases that misconstrue statutes. As the Court stated in *Robinson v. City of Detroit*:

> [I]t is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect ... that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. The reason for this is that the court in distorting the statute was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives. Moreover, not only does such a compromising by a court of the citizen's ability to rely on a statute have no constitutional warrant, it can gain no higher pedigree as later courts repeat the error.[81]

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79. Sedler, *supra* note 4, at 1911.

80. *Id.* at 1933.

81. Robinson v. Detroit, 613 N.W.2d 307, 321-22 (Mich. 2000).

"The problem with this line of reasoning," according to Sedler, "is that it ignores the fact that the earlier decisions were based on the assumedly good faith efforts of the Court at that time to ascertain the meaning of the statutes."[82] In his view,

> [t]he Court in the earlier decisions was applying principles of statutory interpretation, as the Court saw them, and the Court at that time interpreted the statutes differently from the way that the Court majority at a later time thought that they should be interpreted. The Court at an earlier time was not trying in any way to 'usurp' or 'nullify' the legislative function.[83]

The first problem with Sedler's assertion is his assumption that speculation about an earlier Court's intentions (i.e., whether it acted in "good faith") should play a part in determining whether a prior decision should be overruled. As the Court explained in *Robinson*, the primary concern is one of informing and honoring citizens' legitimate expectations about what the law requires.[84] How a court's "good faith" should play a role in this process is not clear, and certainly is not explored in *Overruling the Overrulings*.

Second, and more importantly, the Court in *Robinson* never suggested that prior courts were "trying" to "'usurp' or 'nullify' the legislative function."[85] Rather, *Robinson* states that this usurpation is the *result* when a Court does not apply the plain meaning of a statute and instead engages in "interpreting" statutory language through the use of non-textual interpretive "tools"[86] such as giving certain statutes a "broad construction,"[87] assuming that the Legislaturehas "acquiesced" in

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82. Sedler, *supra* note 4, at 1911. Of course, Sedler fails to extend the same assumption of "good faith" to the justices he attacks, instead proceeding on the unsupported assumption that:

> [They] used their power to overrule prior decisions with which they disagreed, in order to make significant changes in Michigan's tort law in favor of defendants over plaintiffs, significant changes in worker's compensation law in favor of employers over workers, and significant changes in criminal law in favor of prosecutors over defendants.

Id. at 1941.

83. *Id.* at 1911.

84. *Robinson*, 613 N.W.2d at 321.

85. Sedler, *supra* note 4, at 1911.

86. *See Robinson*, 613 N.W.2d at 321-22.

87. *See* Mull v. Equitable Life Assurance Soc'y of the U.S., 510 N.W.2d 184, 188-89 (Mich. 1994) (giving a "broad construction" to Michigan's owners liability statute, MICH. COMP. LAWS § 257.401 (2002)).

decisions of the Court to which it has not responded,[88] or declining to apply statutory language as written because to do so would achieve an "absurd result."[89]

Sedler's analysis is unsound at the outset, therefore, because he fails to understand—or, for that matter, to *try* to understand—the Court's approach to stare decisis in cases involving statutory interpretation. It is not surprising, then, that a review of the cases that Sedler accuses the Court of improvidently overruling reveals that the Courts deciding those cases engaged in "interpretation" of statutes that departed from the plain statutory text. The Court did not overrule those decisions simply because it "disagree[d]" with them, but because those decisions failed to apply the statute's plain language.

For example, in *Pick v Szymczak*,[90] the Court was faced with the task of construing the following "highway exception" to governmental immunity:

> The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.[91]

Despite the plain language of the statute limiting its application to defects in the "improved portion of the highway designed for vehicular travel,"[92] the *Pick* Court extended the statute to include any "point of hazard," which the Court "defined" as "any condition that directly affects vehicular travel on the improved portion of the roadway so that such travel is not reasonably safe."[93]

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88. *See* Brown v. Manistee Cnty. Bd. of Road Comm'rs, 550 N.W.2d 215, 221 (Mich. 1996) ("Because the Legislature has not reacted to this Court's interpretation of [MICH. COMP. LAWS. § 691.1401] in the nearly twenty years since *Hobbs* [*v. State Highways Dep't*, 247 N.W.2d 754 (Mich. 1976)] was decided, we conclude that the Legislature has acquiesced in our interpretation of the statute."), *overruled by* Rowland v. Washtenaw Cnty. Rd. Comm'n, 731 N.W.2d 41 (Mich. 2007).

89. *See* Gardner v. Van Buren Pub. Sch., 517 N.W.2d 1, 26 (Mich. 1994) ("A basic maxim of statutory construction is that statutes are to be construed to avoid absurd results.") (quoting Franges v. Gen. Motors Corp., 404 Mich. 580, 612 (1979)).

90. 548 N.W.2d 603, 606 (Mich. 1996), *overruled in* Nawrocki v. Macomb Cnty. Rd. Comm'n, 615 N.W.2d 702 (Mich. 2000).

91. MICH. COMP. LAWS ANN. § 691.1402(1) (West 2002).

92. *Id.* at § 691.1402.

93. *Pick*, 548 N.W.2d at 610.

As the Court observed in overruling *Pick* in *Nawrocki v. Macomb County Road Comm'n*,

> [i]n attempting to place its interpretation of the statute in the 'proper context,' *Pick* failed to simply apply the plain language of the highway exception and, instead, relied on judicially invented phrases nowhere found in the statutory clause, thus thrusting upon the state and county road commissions a duty not contemplated by the Legislature.[94]

Thus, the *Nawrocki* majority relied on far more than mere "disagreement" with *Pick*; it relied on the text of the controlling statute and the policy enacted by the Michigan Legislature.

Another example of a prior case failing to apply a statute's plain text, resulting in its subsequent overruling, is *Gardner v. Van Buren Public Schools*.[95] In *Gardner*, the Court addressed a provision of Michigan's worker's compensation act that limited recovery for "mental disabilities" to those "arising out of actual events of employment, not unfounded perceptions thereof."[96] Because it found such a result to be "absurd," the *Gardner* majority refused to "read" the statute to "prohibit[] compensation for claims based on unfounded perceptions of actual events," even though that was precisely the "result" required by the language of the statute, and instead limited the statute's exclusionary language to situations in which the claim for benefits was based on "imagined or hallucinatory events."[97]

In overruling *Gardner* in *Robertson v. DaimlerChrysler Corp.*,[98] the Court stressed that the judicial role does not include "surmis[ing]" whether a result mandated by statutory language is or is not "absurd." As the *Robertson* majority explained:

> Although it may be true in many instances that mentally disabled individuals will misperceive or lose contact with reality because of some underlying cognitive weakness, the Legislature clearly has the ability to define coverage under its statutes as it deems

94. Nawrocki v. Macomb Cnty. Rd. Comm'n, 615 N.W.2d at 719.
95. 517 N.W.2d 1 (Mich. 1994).
96. *See* MICH. COMP. LAWS § 418.301(2) (West 2002).
97. *Gardner*, 517 N.W.2d at 11-12.
98. 641 N.W.2d 567 (Mich. 2002).

> appropriate. Our 'judicial role precludes imposing different policy choices than those selected by the Legislature.'[99]

Gardner was overruled not because of mere disagreement but because it openly ignored the plain text of the controlling statute. It was the Legislature's policy preferences, not those of the Court that prevailed in *Robertson.*

The Court expressed the same concern about a prior court's displacement of legislative policy in *Trentadue v. Buckler Lawn Sprinkler.*[100] In *Trentadue*, the Court was faced with whether to retain the judicially created "discovery rule" for purposes of determining when a cause of action accrued, thus commencing the statute-of-limitations period.[101] Under the discovery rule, the statute of limitations does not begin to run until a plaintiff discovers, or reasonably should have discovered, that he or she has a possible claim.[102] The *Trentadue* majority determined that the discovery rule conflicted with the statutory scheme, which established clear "limitations periods, times of accrual, and tolling for [certain] civil cases,"[103] and which provided that, except in certain limited circumstances, a claim "accrues at the time the wrong upon which the claim is based was done . . . ."[104] The *Trentadue* majority thus held that, because the statutes already "'designate specific limitations and exceptions' for tolling based on discovery," it would be improper to "apply an extrastatutory discovery rule in any case not addressed by the statutory scheme . . . ."[105] As the *Trentadue* majority explained: "Since the Legislature has exercised its power to establish tolling based on discovery under particular circumstances, but has not provided for a general discovery rule that tolls or delays the time of accrual if a plaintiff fails to discover the elements of a cause of action during the limitations period, no such tolling is allowed."[106]

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99. *Robertson*, 641 N.W.2d at 578 (quoting People v. Sobczak-Obetts, 625 N.W.2d 764, 768 (Mich. 2001)).

100. 738 N.W.2d 664 (Mich. 2007).

101. *Id.* at 668-69.

102. *Id.* at 670.

103. *Id.* at 671.

104. *Trentadue,* 738 N.W.2d at 671 (citing in part MICH. COMP. LAWS ANN. § 600.5827 (West 2002)).

105. *Id.*

106. *Id.* at 672. The *Trentadue* majority thus overruled a series of prior decisions, beginning with *Johnson v. Caldwell*, 123 N.W.2d 785 (Mich. 1963), which had applied a discovery-based analysis in various contexts.

Similar failures by prior Courts to apply statutory language as written can be found in criminal cases. In *People v. Lardie*,[107] the issue was whether the "OUIL causing death statute"[108] required proof that a defendant's intoxicated state *actually affected* his or her operation of the vehicle causing the victim's death, or whether it was sufficient for the prosecution to show that the defendant's operation of the motor vehicle caused the victim's death and that the defendant was intoxicated at the time. The controlling statutory language provided as follows:

> A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1) [. . . under the influence of alcoholic liquor, a controlled substance . . . or a combination of alcoholic liquor and a controlled substance, or having an unlawful body alcohol content . . .], (3) [. . . visibly impaired by the consumption of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance . . .], or (8) [. . . any body content of a schedule 1 controlled substance . . .] *and by the operation of that motor vehicle causes the death of another person* is guilty of a crime . . . .[109]

Rather than giving this language a natural reading (i.e., requiring proof of (1) intoxication and (2) operation of a motor vehicle causing death), the *Lardie* Court focused on avoiding what it believed to be an "absurd result":

> The Legislature passed [§ 625(4)] in order to reduce the number of alcohol-related traffic fatalities. The Legislature sought to deter drivers who are 'willing to risk current penalties' from drinking and driving. In seeking to reduce fatalities by deterring drunken driving, the statute must have been designed to punish drivers when their *drunken* driving caused another's death. Otherwise, the statute would impose a penalty on a driver even when his wrongful decision to drive while intoxicated had no bearing on the death that resulted. Such an interpretation of the statute would produce an absurd result by divorcing the defendant's fault from the resulting injury. We seek to avoid such an interpretation.[110]

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107. 551 N.W.2d 656 (Mich. 1996).
108. MICH. COMP. LAWS ANN. § 257.625(4) (West 2002).
109. *Id.* (emphasis added).
110. *Lardie*, 551 N.W.2d at 667-68.

The *Lardie* Court thus held that, "in proving causation, the people must establish that the particular defendant's decision to drive while intoxicated produced a *change in that driver's operation of the vehicle* that caused the death of the victim."[111] This holding, of course, departed from the plain language of the statute and, in the process, ratcheted up the prosecution's burden.

Recognizing that such an "interpretation" of MCL 257.525(4) bore little resemblance to what the statute actually said, the Court rejected it in *People v. Schaefer*[112] in favor of the statute's "plain text":

> The plain text of § 625(4) requires no causal link between the defendant's intoxication and the victim's death. Section 625(4) provides, 'A person, whether licensed or not, who operates a motor vehicle [while intoxicated] and *by the operation* of that motor vehicle *causes* the death of another person is guilty of a crime . . . .' Accordingly, it is the defendant's *operation* of the motor vehicle that must cause the victim's death, not the defendant's 'intoxication.' While a defendant's status as 'intoxicated' is certainly an element of the offense of OUIL causing death, it is not a component of the *causation* element of the offense.[113]

The *Schaefer* majority further explained how the *Lardie* Court's "reliance on policy considerations"[114] and concern about preventing what the *Lardie* Court (as opposed to the Legislature) viewed as an "absurd result" was "misplaced":

> It is true that the cardinal rule of statutory interpretation is to give effect to the intent of the Legislature. However, the Legislature's intent must be ascertained from the actual text of the statute, not from extra-textual judicial divinations of 'what the Legislature really meant.'
>
> The *Lardie* Court also erred in assuming that judicial adherence to and application of the actual text of § 625(4) 'would produce an absurd result.' The result that the Court in *Lardie* viewed as 'absurd'—imposing criminal liability under § 625(4) when a victim's death is caused by a defendant's *operation* of the

111. *Id.* at 668 (emphasis added).
112. 703 N.W.2d 774 (Mich. 2005).
113. *Id.* at 782.
114. *Id.* at 783.

> vehicle rather than the defendant's *intoxicated* operation—reflects a policy choice adopted by a majority of the Legislature. A court is not free to cast aside a specific policy choice adopted on behalf of the people of the state by their elected representatives in the Legislature simply because the court would prefer a different policy choice. To do so would be to empower the least politically accountable branch of government with unbridled policymaking power. Such a model of government was not envisioned by the people of Michigan in ratifying our Constitution, and modifying our structure of government by judicial fiat will not be endorsed by this Court.[115]

The Court rectified yet another failure of a prior court to follow the plain language of a criminal statute in *People v. Gardner*.[116] At issue in *Gardner* was "the correct method for counting prior felonies under Michigan's habitual offender statutes," which "establish escalating penalties for offenders who are repeatedly convicted of felonies."[117] The relevant statutory language provided as follows:

> *If a person has been convicted of any combination of 2 or more felonies or attempts to commit felonies*, whether the convictions occurred in this state or would have been for felonies or attempts to commit felonies in this state if obtained in this state, *and that person commits a subsequent felony within this state*, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows . . . .[118]

Interpreting this language in *People v. Stoudemire*[119] and *People v. Preuss*,[120] prior Courts had concluded that it implied a "same-incident or single-transaction method of counting prior felonies for purposes of sentencing enhancement. Accordingly, each predicate felony must 'arise from separate criminal incidents.'"[121] In support of that "interpretation,"

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115. *Id.*

116. 753 N.W.2d 78 (Mich. 2008).

117. *Id.* at 81.

118. MICH. COMP. LAWS ANN. § 769.11(1) (West 2002). (emphasis added).

119. 414 N.W.2d 693 (Mich. 1987).

120. 461 N.W.2d 703 (Mich. 1990).

121. *Gardner*, 753 N.W.2d at 83 (citing *Preuss*, 461 N.W.2d at 703). As the *Gardner* Court observed, there actually are three habitual-offender statutes: MICH. COMP. LAWS ANN. § 769.10 (West 2002) (applicable when there is one prior felony), MICH. COMP. LAWS ANN. § 769.11 (West 2002) (applicable when there are two or more prior felonies),

the *Stoudemire* and *Preuss* Courts relied on such things as the perceived intent behind New York's habitual offender statutes, upon which the Michigan statutes were based, as well as other "sources of legislative intent."[122] The *Preuss* Court went even further, opining that "a literal reading of a statute may be modified if that reading leads to a clear or manifest contradiction of the apparent purpose of the act, or if necessary to correct an absurd and unjust result . . . ."[123]

Overruling *Stoudemire* and *Preuss*, the *Gardner* majority observed that "[n]othing in the statutory text suggests that the felony convictions must have arisen from separate incidents. To the contrary, the statutory language defies the importation of a same-incident test because it states that *any combination* of convictions must be counted." [124] The *Gardner* majority explained that, in concluding otherwise, *Stoudemire* and *Preuss* "explicitly ignored the text, turning instead to legislative history and the Court's own views regarding the intents of the New York and Michigan legislatures."[125] But because "the Legislature's language is clear," the *Gardner* majority held, "we are bound to follow its plain meaning."[126]

As these few examples show, Sedler's criticism of the Court for overruling decisions involving "interpretation of statutes"[127] is deceiving. By pointing to the mere number of such overrulings, Sedler implies that something must be amiss. But while Sedler would have his readers believe that the Court's "long list"[128] of "statutory interpretation overruling decisions"[129] demonstrates an ideological motivation, an actual review of the Court's rationale in those decisions shows that, in each case, the Court was enforcing the plain language of controlling statutes.

The Court never states whether or not it prefers the outcome dictated by the controlling statutory language. In fact, policy preferences are irrelevant under the Court's approach. Thus, *Overruling the Overrulings* is fundamentally wrong in casting these decisions as ideologically-driven. The outcome of each case is largely irrelevant.

Worse, Sedler fails to note that one of the "court majority's" decisions to overrule a prior case because of the earlier Court's failure to

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and MICH. COMP. LAWS ANN. § 769.12 (West 2002) (applicable when there are three or more prior felonies). The relevant language, however, is otherwise the same.

122. *See Gardner*, 753 N.W.2d. at 87-88 (quoting *Preuss*, 461 N.W.2d at 703).

123. *Preuss*, 461 N.W.2d at 706.

124. *Gardner*, 753 N.W.2d at 85.

125. *Id.*

126. *Id.* at 90.

127. Sedler, *supra* note 4, at 1931.

128. *Id.* at 1933.

129. *Id.* at 1911.

apply the plain meaning of a statute was in fact *unanimous*. In *Gladych v. New Family Homes, Inc.*,[130] the Court addressed whether the mere filing of a complaint was sufficient to toll the statute of limitations. In an earlier decision, *Buscaino v. Rhodes*,[131] the Court had held in the affirmative because, under the Michigan Court Rules, an action is commenced by the filing of a complaint.[132] Such a decision, however, was contrary to the plain language of MCL 600.5856(3), which, at the time, provided that the statute of limitations was tolled only when the complaint was *served* on the defendant.[133] In overruling *Buscaino*, the *Gladych* court unanimously held that "the interpretation of § 5856 adopted in *Buscaino* is contrary to the plain language of the statute and should be repudiated."[134] Yet despite the fact that *Gladych* was a unanimous decision, Sedler lumps it together with what he derisively characterizes as a "long list of decisions by the Court majority . . . overruling prior decisions interpreting a statute on the ground that the earlier decision ignored the 'plain meaning' of the statute."[135]

Gladych is therefore further evidence that the Court's approach to stare decisis in statutory interpretation cases was not ideologically-

130. 664 N.W.2d 705, 711 (Mich. 2003).

131. 189 N.W.2d 202, 206 (Mich. 1971).

132. *Id.* at 205-206.

133. The statute has since been amended to provide that the statute of limitations is tolled "[a]t the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules." MICH. COMP. LAWS ANN. § 600.5856 (West 2002). However, when *Buscaino* was decided, MICH COMP. LAWS ANN. § 600.5856(a)(3) provided for tolling only when "the complaint is filed and a copy of the summons and complaint in good faith, are placed in the hands of an officer for immediate service." *Id.*

134. *Gladych*, 664 N.W.2d at 711.

135. Sedler, *supra* note 4, at 1933. Sedler's overarching theme that the "Court majority" inevitably marched in lockstop is further undermined by *People v. Moore*, 679 N.W.2d 41 (Mich. 2004), where in a four-to-three decision the Court addressed the "proper standard for establishing felony-firearm under an aiding and abetting theory." *Id.* at 44. Felony-firearm is "the crime of carrying or possessing a firearm during the commission or attempted commission of a felony." *Id.* At issue in *Moore* was "whether the prosecutor must establish that a defendant assisted in *obtaining or retaining* possession of a firearm" *id.* in order to obtain a conviction for aiding and abetting the crime of felony-firearm, as a prior court held in *People v. Johnson*, 303 N.W.2d 442 (Mich. 1981). A majority of the court rejected *Johnson* and concluded that the statutory language only required that the "defendant's words or deeds 'procure[d], counsel[ed], aid[ed], or abet[ted]' another to carry or have in his possession a firearm during the commission or attempted commission of a felony-firearm offense." *Id.* In citing *Moore* as an example of the "Court majority's" overruling of a prior case on statutory interpretation grounds, Sedler falsely implies that the "Court majority" included Justices Taylor, Corrigan, Markman and Young, when in fact Justice Taylor was among the dissenters in that case. Sedler, *supra* note 4, at 1936.

driven. To the contrary, the Court took great care to avoid decisions that imposed its own policy preferences. In the process, the Court reversed earlier decisions in which the Court had imposed its own policy preferences over those of the Legislature. Although this approach certainly placed a higher premium on fidelity to statutory law than stare decisis, it cannot be said that the Court was result-oriented. What matters in this line of cases is not the result, but the process used to derive that result.

B. The Michigan Supreme Court's Other "Overruling Decisions"

Sedler next takes issue with a sampling of the Court's decisions in other areas that he claims supports his argument that the Court was seeking to advance its so-called "policy objectives of limiting tort liability and worker's compensation recovery, and of making it more difficult for persons charged with crimes to avoid a conviction."[136] Sedler's "analysis," however, consists of nothing more than a running tally of which party prevailed in each case. Once again, a closer examination of the Court's rationale in each of its "overruling decisions" reveals Sedler's "analysis" to be woefully deficient.

1. "Overruling Decisions" Involving the Court's "Constitutional Power"

Sedler first asserts that the Court "limited the scope of its own power under Art. VI, sec. 5 of the Michigan Constitution, which provides that '[t]he supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.'"[137] In support, he cites *McDougall v. Schanz*[138] and *People v. Glass (After Remand)*.[139] Sedler criticizes *McDougall* for overruling the court's prior decision in *Perin v. Peuler*,[140] in which the Court had held that the Legislature is prohibited from enacting rules of evidence.[141] But what Sedler fails to mention is the *McDougall* majority's detailed analysis of Article VI, section 5, which provided the basis for its conclusion that, notwithstanding the court's constitutional authority to determine rules of "practice and procedure," the Legislature may properly enact a "statutory

136. Sedler, *supra* note 4, at 1941.
137. *See id. supra* note 4, at 1937.
138. 597 N.W.2d 148 (Mich. 1999).
139. 627 N.W.2d 261 (Mich. 2001).
140. 130 N.W.2d 4 (Mich. 1964).
141. *Id.*

rule of evidence" so long as it reflects substantive policy considerations and "does not involve the mere dispatch of judicial business."[142] Although Sedler would have his readers believe that the Court simply created this notion out of whole cloth, the *McDougall* Court explained how both the framers of the Michigan Constitution and Michigan legal scholars (including Charles Joiner) had long recognized a "constitutionally required distinction between 'practice and procedure' and substantive law"[143] that the prior court in *Perin* had failed to consider, instead relying on "the 1962 pocket supplement for 1 Wigmore, Evidence (3d ed.)."[144]

As to *People v. Glass*, Sedler claims that the Court gave away its "constitutional power" by upholding a statute (in the face of conflicting court rules) providing that a criminal defendant indicted by a grand jury (as opposed to being charged by way of an "information" filed by the prosecutor)[145] does not have a right to a preliminary examination.[146] But once again, Sedler overlooks the Court's rationale. As the Court observed in *Glass*, although "indicted defendants historically did not receive a preliminary examination," the Court in *People v. Duncan*[147] "declared such a right on the basis of policy" and its "inherent power."[148] Concluding that the *Duncan* Court had exceeded the Court's rulemaking authority, the *Glass* majority reasoned that "[t]he establishment of the right to a preliminary examination is more than a matter of procedure and beyond the powers vested in the Court by Const. 1963, art. 6, § 5; it is a matter of public policy for the legislative branch."[149] Notably, nowhere does Sedler engage in his own analysis of the "practice and procedure" issue or suggest why the *Glass* majority's analysis is flawed. Instead, it is enough for Sedler's "analysis" that the defendant in *Glass* "lost."

142. *McDougall*, 597 N.W.2d at 155-58.

143. *Id.* at 156.

144. *Id.* at 155.

145. As the *Glass* Court observed, "Michigan law provides that criminal prosecutions may be initiated in the court having jurisdiction to hear the cause by either indictment or information." *Glass*, 627 N.W.2d at 266.

146. As Sedler notes, the *Glass* Court overruled *People v. Duncan*, 201 N.W.2d 629 (Mich. 1972), which "established the right to a preliminary hearing for grand jury indictees and issued implementing rules." *See* Sedler, *supra* note 4, at 1937.

147. 201 N.W.2d 629 (Mich. 1972).

148. *Glass*, 627 N.W.2d at 269.

149. *Id.* at 269-70.

2. "Overruling Decisions" in "Civil Cases"

Sedler next turns his attention to "four other overruling decisions involving civil cases"[150] — *Mack v. City of Detroit*,[151] *Mudel v. Great Atlantic and Pacific Tea Co.*,[152] *Rory v. Continental Insurance Co.*,[153] and *Stitt v. Holland Abundant Life Fellowship*,[154]—in which, according to Sedler, the Court held that:

> [I]n a suit against a governmental agency, the burden is on the plaintiff to plead the avoidance of governmental immunity and that the government cannot waive the defense of governmental immunity [*Mack*]; that in reviewing decisions of the Worker's Compensation Commission, the Court must uphold that decision if supported by any factual basis [*Mudel*]; that the courts could not void a contractual limitations period contained in an insurance policy on the ground that the provision was unreasonable [*Rory*]; and that with respect to the duty of care owed by landowners, a person who entered upon church property for a noncommercial purpose was a public invitee rather than a business visitor [*Stitt*].[155]

Again, Sedler criticizes the Court's decisions in these cases based solely on their end results, implying that the Court must have arrived at its decisions through ideology rather than analysis of the issues and legal principles involved.[156] But careful scrutiny of those decisions tells a different story.

The first of the four "overruling decisions involving civil cases" mentioned by Sedler is *Mack v. City of Detroit*,[157] in which the Court held that governmental immunity is a "characteristic of government" such that a plaintiff must "plead [facts] in avoidance of immunity," and that it is not merely an affirmative defense that may be waived.[158] In reaching that decision, and overruling a prior court's contrary holding in *McCummings v. Hurley Medical Center*,[159] the *Mack* majority observed

150. Sedler, *supra* note 4, at 1937.
151. 649 N.W.2d 47 (Mich. 2002).
152. 614 N.W.2d 607 (Mich. 2000).
153. 703 N.W.2d 23 (Mich. 2005).
154. 614 N.W.2d 88 (Mich. 2000).
155. Sedler, *supra* note 4, at 1937-38.
156. *Id.* at 1939.
157. 649 N.W.2d 47 (Mich. 2002).
158. *Id.* at 54.
159. 446 N.W.2d 114 (Mich. 1989).

that until the Court's decision in *McCummings*, it had been well established under Michigan law that governmental immunity was a characteristic of government and that a plaintiff must therefore "plead [and prove facts] in avoidance of immunity."[160] In *McCummings*, the Court "departed from years of precedent and concluded that governmental immunity is an affirmative defense rather than a characteristic of government."[161] It was for this reason that the *Mack* majority overruled *McCummings* and "return[ed] to the longstanding principle extant before *McCummings* that, governmental immunity being a characteristic of government, a party suing a unit of government must plead in avoidance of governmental immunity."[162] If anything, *Mack* reaffirmed and applied stare decisis.

Sedler's next target is *Mudel v. Great Atlantic and Pacific Tea Co.*,[163] in which the Court sought to clarify "[c]onsiderable confusion . . . in the Michigan judiciary in a significant area of worker's compensation law—the standards for reviewing decisions of the magistrate and the Worker's Compensation Appellate Commission (WCAC)."[164] As the *Mudel* majority explained, the Court in *Holden v. Ford Motor Co.*[165] had held that the judiciary reviews the WCAC's findings under the "any evidence" standard.[166] Yet in a later decision in *Goff v. Bil-Mar Foods, Inc. (After Remand)*,[167] the Court "implicitly contradicted" *Holden* by articulating a higher standard requiring that the WCAC's findings be supported by "substantial evidence."[168]

Because such conflicting standards would inevitably lead to different results, the *Mudel* majority overruled *Goff* in favor of the "any evidence" standard of *Holden*, which, unlike *Goff*'s "substantial evidence" standard, was derived from the actual language of the Worker's Compensation Act providing that the findings of the WCAC "acting within its powers, in the absence of fraud, shall be conclusive."[169] In addition, the *Mudel* majority found it necessary to address *Layman v.*

160. *Mack*, 649 N.W.2d at 54 (citing Canon v. Thumudo, 422 N.W.2d 688 (Mich. 1988); Hyde v. Univ. of Mich. Bd. of Regents, 393 N.W.2d 847 (Mich. 1986); McCann v. Michigan, 247 N.W.2d 521 (Mich. 1976)).

161. *Id.* at 55.

162. *Id.* at 56-57.

163. 614 N.W.2d 607 (Mich. 2000).

164. *Id.* at 609.

165. 484 N.W.2d 227 (Mich. 1992).

166. *Mudel*, 614 N.W.2d at 612.

167. 563 N.W.2d 214 (Mich. 1997).

168. *Mudel*, 614 N.W.2d at 610.

169. Mudel v. Great Atl. & Pac. Tea Co., 614 N.W.2d at 614-15 (citing in part MICH. COMP. LAWS § 418.861a(14)).

Newkirk Elec. Assoc.,[170] which held that the WCAC could not make its own factual findings even though MCL 418.861a(14) expressly contemplated "findings of fact made by the Commission."[171] Thus, because *Layman*'s contrary holding "expressly contradict[ed] the text of the WDCA," the *Mudel* majority understandably overruled it.[172] Again, *Mudel* was hardly a departure from stare decisis. It actually overruled an "outlier," which Sedler himself contends is a legitimate exception to stare decisis.

In *Rory v. Continental Insurance Co.*,[173] the Court considered whether there was any basis in contract law for a court to refuse to enforce a contractual limitations period contained in an insurance policy on the ground that it was "unfair." Noting that "[a] fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*,"[174] the *Rory* majority concluded that "an unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy,"[175] and that "[a] mere judicial assessment of 'reasonableness' is an invalid basis upon which to refuse to enforce contractual provisions."[176] Moreover, the Court held, it is not sufficient merely to label such a contract an "adhesion contract"; rather, "[a] party may avoid enforcement of an 'adhesive' contract only by establishing one of the traditional contract defenses, such as fraud, duress, unconscionability, or waiver."[177]

Although it recognized that prior courts had determined otherwise,[178] the *Rory* majority concluded that the stability of Michigan contract law would be better served by following the "traditional contract principles our state has historically honored."[179]

The fourth "overruling decision" involving a civil case criticized by Sedler is *Stitt v. Holland Abundant Life Fellowship*.[180] In *Stitt*, the plaintiff was visiting the defendant church to attend bible study when she

170. 581 N.W.2d 244 (Mich. 1998).
171. *Id.*
172. *Mudel*, 614 N.W.2d at 618.
173. 703 N.W.2d 23 (Mich. 2005).
174. *Id.* at 33.
175. *Id.*at 35.
176. *Id.* at 31.
177. *Id.* at 41-42.
178. *See* Tom Thomas Org., Inc. v. Reliance Ins. Co., 242 N.W.2d 396 (Mich. 1976); Herweyer v. Clark Hwy. Serv., Inc., 564 N.W.2d 857 (Mich. 1997).
179. *Rory*, 703 N.W.2d at 41.
180. 614 N.W.2d 88 (Mich. 2000).

"tripped over a concrete tire stop" in the church's parking lot.[181] The Court was thus called on to determine the plaintiff's "status" for purposes of the church's liability as the owner of the property.[182] Once again, Michigan law was not clear on the issue. As the *Stitt* majority explained, "our prior decisions have proven to be less than clear in defining the precise circumstances under which a sufficient invitation has been extended to a visitor to confer 'invitee' status," which is the category of persons to whom the highest duty is owed by a property owner.[183] On the one hand, there was a line of cases appearing to "support the requirement that the landowner's premises be held open for a commercial business purpose."[184] Indeed, the *Stitt* majority observed that even secondary authorities included Michigan "among those jurisdictions conferring invitee status only on business visitors."[185]

At the same time, however, some of the Court's prior decisions were "replete with broad language suggestive of the Restatement's 'public invitee' definition," under which all members of the public coming on a person's property by "invitation" are owed the same duty as business visitors.[186] But even then, at least one of the Court's prior decisions, *Preston v. Sleziak*,[187] was "internally inconsistent on this point."[188] While appearing to adopt the Restatement definition of "public invitee," the *Preston* Court also quoted at length from Professor Cooley's seminal treatise on torts, in which he explained that

> [t]o come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business with which the occupant of the premises is engaged, or which he permits to be carried on there. There must be some mutuality of interest in the subject to which the visitor's business relates, although the particular business which is the object of the visit may not be for the benefit of the occupant.[189]

This passage from Cooley's treatise, the *Stitt* majority observed, demonstrated that "Michigan has historically, if not uniformly,

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181. *Id.* at 90.
182. *Id.*
183. *Id.* at 92.
184. *Id.*
185. *Id.* at 93 (citing 95 A.L.R. 2d 992, § 4, p 1014).
186. *Stitt*, 614 N.W.2d at 93.
187. 175 N.W.2d 759 (Mich. 1970).
188. *Stitt*, 614 N.W.2d at 93.
189. *Id.* (quoting 3 COOLEY ON TORTS, § 440 (4th ed.) at 193-94 (internal citations and quotation marks omitted)).

recognized a commercial business purpose as a precondition for establishing invitee status."[190]

In light of the "divergence" of the Court's "cases on what circumstances create invitee status," the *Stitt* majority recognized that it had to "provide some form of reconciliation."[191] Observing that "[a] person who attends church as a guest enjoys the 'unrecompensed hospitality' provided by the church in the same way that a person entering the home of a friend would,"[192] the *Stitt* majority concluded, consistent with Professor Cooley's treatise, that "church visitors who are attending church for religious worship are more like social guests (licensees) than business visitors (invitees)."[193]

As a review of *Mack*, *Mudel*, *Rory* and *Stitt* demonstrates, the Court not only struggled mightily to reach the decisions it did, but did so based on far more than any purported "policy objectives." In *Mack*, *Mudel* and *Stitt*, the Court addressed areas of genuine confusion in Michigan law. And in *Rory*, the Court affirmed one of the bedrock principles of Michigan contract law. As a result, Sedler's assertion that the Court's decisions can only be explained by ideological motivation is sustainable only if one ignores the actual rationale of these decisions and applies a superficial, cursory analysis.

3. "Overruling Decisions" Involving "Constitutional Rights of Persons Accused of Crime"

The flaws in Sedler's thesis are further exposed upon review of the "overruling decisions" he attacks as undermining the "[c]onstitutional rights of persons accused of crime."[194] The first of these decisions is *People v. Davis*.[195] As Sedler observes, the majority in *Davis* did indeed hold that "the double jeopardy clause did not prohibit successive prosecutions for the same act where the first prosecution took place in another state."[196] Moreover, in doing so, the *Davis* majority overruled *People v. Cooper*,[197] which held otherwise. But what Sedler fails to mention is that *Cooper* had deviated from existing precedent from the U.S. Supreme Court, *Bartkus v. Illinois*, holding that the "dual

190. *Id.*
191. *Id.* at 95.
192. *Id.* at 98.
193. *Id.* at 96.
194. Sedler, *supra* note 4, at 1929.
195. 695 N.W.2d 45 (Mich. 2005).
196. Sedler, *supra* note 4, at 1929.
197. 247 N.W.2d 866 (Mich. 1976).

sovereignty" doctrine did not prohibit successive state and federal prosecutions based on the same transaction.[198] Although the *Cooper* Court said that it perceived a "trend" suggesting that this was "open to reassessment,"[199] it turned out that the *Cooper* Court was mistaken. The U.S. Supreme Court in *Heath v. Alabama* concluded that "[t]he dual sovereignty doctrine, as originally articulated and consistently applied by this Court, compels the conclusion that successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause."[200] Given that development, as well as the "common understanding of the people at the time that our double jeopardy provision was ratified . . . that the provision would be construed consistently with the federal double jeopardy jurisprudence that then existed," the *Davis* majority concluded that *Cooper* had to be overruled as being inconsistent with U.S. Supreme Court precedent.[201] This case is hardly evidence of an ideologically driven majority.

Sedler next addresses three "overruling decisions"—*People v. Nutt*,[202] *People v. Ream*[203] and *People v. Smith*[204]—in which the Court held the following:

> [T]hat where the defendant had committed a series of crimes with different elements, the defendant could be prosecuted serially for each crime, notwithstanding that the crimes were committed in a single crime spree, and that convicting and sentencing a defendant both for first degree felony murder and for the predicate felony did not violate the multiple punishment strand of the double jeopardy clause, where each of the offenses of which the defendant was convicted contained an element that the other did not.[205]

But other than reciting the holdings of those "overruling decisions" in a way so as to suggest that the Court was simply imposing its own policy preference, Sedler fails to address the Court's rationale for its decisions. It is not surprising that a closer reading of these cases undermines Sedler's thesis.

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198. 359 U.S. 121 (1959).
199. *Cooper*, 247 N.W.2d at 869.
200. 474 U.S. 82, 88 (1985).
201. People v. Davis, 695 N.W.2d 45, 51-52 (2005).
202. 677 N.W.2d 1 (Mich. 2004).
203. 750 N.W.2d 536 (Mich. 2008).
204. 733 N.W.2d 351 (Mich. 2007).
205. Sedler, *supra* note 4, at 1929.

In *Nutt*, the Court's holding that a criminal defendant may be prosecuted serially for each crime committed during a crime spree was—once again and contrary to Sedler's suggestion—based on established U.S. Supreme Court precedents,[206] which provided that such a serial prosecution does not violate the double jeopardy clause's prohibition against successive prosecutions so long as each crime requires "'proof of a fact which the other does not.'"[207] Commonly known as the "*Blockburger* test,"[208] this "same-elements" test provides that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[209]

In arriving at its decision, the *Nutt* majority was required to overrule its prior decision in *People v. White*.[210] But *White* had adopted a far more expansive "same transaction" test that ran directly contrary to the U.S. Supreme Court's longstanding decisions.[211] The *White* majority did so based not on any purported difference between the respective double jeopardy clauses in the United States and Michigan Constitutions, but rather on its own view of sound policy:

> The use of the same transaction test in Michigan will promote the best interests of justice and sound judicial administration. In a time of overcrowded criminal dockets, prosecutors and judges should attempt to bring to trial a defendant as expeditiously and economically as possible. A far more basic reason for adopting the same transaction test is to prevent harassment of a defendant. The joining of all charges arising out of the same criminal episode at one trial ". . . will enable a defendant to consider the matter closed and save the costs of redundant litigation." It will also help ". . . to equalize the adversary capabilities of grossly unequal litigants" and prevent prosecutorial sentence shopping. "In doing so, it recognizes that the prohibition of double jeopardy is for the defendant's protection."[212]

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206. *See* Gavieres v. United States, 220 U.S. 338, 345, (1911); Blockburger v. United States, 284 U.S. 299, 304 (1932).

207. *Nutt*, 677 N.W.2d at 8 (quoting *Blockburger*, 284 U.S. at 304).

208. *See Blockburger*, 284 U.S. 299.

209. *Blockburger*, 284 U.S. at 304.

210. 212 N.W.2d 222 (Mich. 1973).

211. *Id.* at 227-28.

212. *Id.* at 228 (citations omitted).

Moreover, in adopting a "same transaction" test, the *White* majority overruled one of the Court's own prior decisions that had already *rejected* the "same transaction" test.[213] Consequently, when the Court in *Nutt* overruled *White*, it returned Michigan's view of double jeopardy to its historical roots. *Nutt* was a vindication of stare decisis and a rejection of *White's* imposition of the Court's policy preferences.

Consistent with its return to the *Blockburger* "same-elements" test in *Nutt* for purposes of the "successive prosecutions" strand of the double jeopardy clause, the Court in *Ream* followed established decisions of the U.S. Supreme Court in reinstituting the same-elements test for purposes of the clause's "multiple punishments" strand. At issue in *Ream* was whether the defendant could properly be convicted for both "first-degree felony murder and first-degree criminal sexual conduct, where the latter constituted the predicate felony for the former."[214] Concluding that this did not violate the double jeopardy clause's prohibition against multiple punishments for the same offense, the *Ream* majority explained that "[b]ecause each of the offenses for which defendant was convicted, felony murder and first-degree criminal sexual conduct, contains an element that the other does not, they are not the 'same offense' and, therefore, defendant may be punished for both."[215] Though the *Ream* majority was required to overrule its prior decision in *People v. Wilder*,[216] the *Wilder* Court had erroneously rejected the *Blockburger* "same-elements" test that was re-adopted in *Nutt*.

The Court reached the same result in *Smith*, this time applying the *Blockburger* "same-elements" test in a slightly different context. Whereas *Ream* involved a defendant convicted of both first-degree felony murder and the underlying predicate felony,[217] the defendant in *Smith* was convicted of felony murder, with larceny as the predicate felony, and armed robbery.[218] Thus, in *Smith*, unlike *Ream*, the defendant was not convicted of the predicate felony itself.[219]

Again following *Nutt*'s return to the *Blockburger* test, the *Smith* majority held that "[b]ecause each of the crimes for which defendant here was convicted, first-degree felony murder and armed robbery, has an element that the other does not, they are not the 'same offense' and, therefore, defendant may be punished for each."[220] Further, the *Smith*

213. *See* People v. Grimmett, 202 N.W.2d 278 (Mich. 1972).
214. People v. Ream, 750 N.W.2d 536, 538 (Mich. 2008).
215. *Id.*
216. 308 N.W.2d 112 (Mich. 1981).
217. *Ream*, 750 N.W.2d at 536.
218. People v. Smith, 733 N.W.2d 351, 352 (Mich. 2007).
219. *Id.*
220. *Id.* at 353.

majority felt "compelled to overrule [*People v.*]*Robideau*[221] and preceding decisions" that were based on the erroneous view that the Michigan Constitution's prohibition against double jeopardy should be interpreted differently than the federal double jeopardy provision, a view that the *Smith* majority observed has no basis in either the text or history of the Michigan Constitution.[222]

Reading Sedler's article, one might assume (as Sedler clearly intended) that the Court's decisions in *Davis*, *Nutt*, *Ream*, and *Smith* were based on nothing more than its whim and caprice. But as the preceding discussion reveals, that is simply not an accurate, or fair, portrayal of the Court's double jeopardy jurisprudence.

The same can be said of Sedler's criticism of two decisions by the Court addressing "claims of illegal search and seizure under the Michigan Constitution."[223] Sedler characterizes the first of these decisions, *People v. Hawkins*,[224] as holding "that the exclusionary rule did not apply to preclude the introduction of evidence obtained under a warrant issued in violation of statutory affidavit requirements."[225] While that is true as far as it goes, it does not tell the whole story.

Contrary to Sedler's assertion, *Hawkins* did not involve a claim of "illegal search and seizure under the Michigan Constitution." That much is obvious from Sedler's own description of the case. Right off the bat, Sedler's attack on the Court as somehow chipping away at constitutional rights is misleading. As to the *actual* issue addressed in *Hawkins*, the *Hawkins* majority observed that "[t]he exclusionary rule is a judicially created remedy that originated as a means to protect the *Fourth Amendment right* of citizens to be free from unreasonable searches and seizures."[226] But when it comes to alleged *statutory* violations, such as the violation of statutory affidavit requirements, "[w]hether the exclusionary rule should be applied . . . is purely a matter of legislative intent."[227]

Analyzing the statute at issue in *Hawkins*, the Court reasoned that, unless there is statutory language requiring such a result, it would be a usurpation of legislative power for the Court to apply the exclusionary rule to preclude the introduction of evidence obtained pursuant to a duly-issued search warrant, even if the statutory requirements for the warrant

221. 355 N.W.2d 592 (Mich. 1984).
222. *Smith*, 733 N.W.2d at 363-64.
223. Sedler, *supra* note 4, at 1929.
224. 668 N.W.2d 602 (Mich. 2003).
225. Sedler, *supra* note 4, at 1929.
226. *Hawkins*, 668 N.W.2d at 608 (emphasis added).
227. *Id.* at 609.

are later shown not to have been met.[228] Adopting Justice Boyle's dissents in *People v. Sloan*[229] and *People v. Sherbine,*[230] the *Hawkins* majority reasoned that, in the absence of statutory language indicating otherwise, a technical violation of the search warrant statute does not justify the exclusion of evidence. As the *Hawkins* Court explained:

> The exclusionary rule is intended to serve a deterrent purpose, and loses any useful force and effect when applied to technical errors that do not rise to the level of negligent or willful conduct [by the police], serving then only to deprive the trier of fact of relevant and probative evidence.[231]

The other search and seizure decision with which Sedler takes issue is *People v Kazmierczak.*[232] There, the Court held that "the smell of marijuana alone by a person qualified to know the odor may establish probable cause to search a motor vehicle, pursuant to the motor vehicle exception to the warrant requirement."[233] But once again, and despite Sedler's suggestion, the Court did not reach that decision in a vacuum. Rather, it relied on the U.S. Supreme Court's decisions in *Taylor v. United States*[234] and *Johnson v. United States,*[235] in which the Court observed "that when a qualified person smells an odor sufficiently distinctive to identify contraband, the odor alone may provide probable cause to believe that contraband is present."[236] Though the *Kazmierczak* majority acknowledged that *Taylor* and *Johnson* held that "odor alone" was not sufficient to justify the search of a *building*, it pointed out that there is a critical distinction between the search of a building and the search of an automobile following a valid traffic stop: "[T]here is no building exception to the warrant requirement, whereas there is an automobile exception to the warrant requirement."[237] Thus, while probable cause alone is not sufficient to justify the warrantless search of a building, it *is* sufficient to justify the warrantless search of an

228. *See id.* at 612-13.
229. 538 N.W.2d 380 (Mich. 1995).
230. 364 N.W.2d 658 (Mich. 1984).
231. *Hawkins*, 688 N.W.2d at 612 (quoting *Sloan*, 538 N.W.2d at 397 (Boyle, J., dissenting)).
232. 605 N.W.2d 667 (Mich. 2000).
233. *Id.* at 668.
234. 286 U.S. 1 (1932).
235. 333 U.S. 10 (1948).
236. *Kazmierczak,* 605 N.W.2d at 672.
237. *Id.* at 673.

automobile.[238] Consequently, the *Kazmierczak* rejected as fundamentally flawed the Court's earlier 4-to-3 decision in *People v. Taylor*,[239] in which the Court concluded that odor alone is not sufficient for a warrantless search of an automobile, because it "neglected to consider this key distinction."[240]

4. "Overruling Decisions" in "Non-Constitutional Criminal Cases"

Finally, Sedler takes on "two non-constitutional criminal cases that resulted in overrulings."[241] In the first one, *People v. Hawthorne*,[242] Sedler correctly states that the majority in that case held that a trial court's "failure to instruct the jury on the defense of accident where accident was a central issue in the case did not require automatic reversal and instead required the defendant to demonstrate that the error affected the outcome of the proceedings."[243] What Sedler ignores, however, is that, when it comes to errors in criminal trials that are not of constitutional magnitude, the Legislature has provided in MCL 769.26 that "no judgment or verdict shall be set aside . . . unless . . . it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."[244] Accordingly, the *Hawthorne* majority's analysis followed directly from the unambiguous language of the statute. Moreover, because the Court's prior decisions providing for automatic reversal in *People v. Lester*[245] and *People v. Ora Jones*[246] conflicted with MCL 796.26,[247] they were properly overruled.

In the other "non-constitutional criminal case[] that resulted in [an] overruling,"[248] *People v. Anstey*,[249] the Court addressed the proper

238. *See id.* at 672-73 (observing that under controlling U.S. Supreme Court precedent, "if probable cause exists to believe a car contains contraband, the Fourth Amendment permits police to search the vehicle without more") (citing Pennsylvania v. Labron, 518 U.S. 938 (1996)).

239. 564 N.W.2d 24 (Mich. 1997).

240. *Kazmierczak*, 605 N.W.2d at 673.

241. Sedler, *supra* note 4, at 1939.

242. 713 N.W.2d 724 (Mich. 2006).

243. Sedler, *supra* note 4, at 1939.

244. *See also* People v. Rodriguez, 620 N.W.2d 13 (Mich. 2000) (explaining that a harmless-error analysis applies to a preserved, nonconstitutional error involving the failure to provide the jury with an applicable instruction).

245. 277 N.W.2d 633 (Mich. 1979).

246. 236 N.W.2d 461 (Mich. 1975).

247. Indeed, neither *Lester* nor *Ora Jones* even mentioned MCLA section 769.26, much less attempt to reconcile their holdings with its plain text.

248. Sedler, *supra* note 4, at 1939.

249. 719 N.W.2d 579 (Mich. 2006).

remedy when a criminal defendant charged with drunk driving has been deprived of the statutory right to an independent chemical test of his or her blood alcohol level.[250] Although the Court had previously held in *People v. Koval*[251] that failure to comply with a prior version of the statute "rendered the conviction of the defendant improper,"[252] the *Anstey* majority overruled *Koval* because the statute did not provide for dismissal, and there was no indication in the statute that such a remedy was intended:

> The language of MCL 257.625a does not reveal that the Legislature intended to impose the drastic remedy of dismissal or suppression of the evidence when an officer fails to give a defendant a reasonable opportunity for an independent chemical test. Accordingly, neither of these remedies is appropriate for a violation of MCL 257.625a(6). We overrule *Koval*'s holding to the contrary.[253]

Instead, held the *Anstey* majority, "[t]he jury should be permitted to weigh the police officer's wrongful conduct as well as the statutory right that the officer denied."[254]

In adopting that remedy, the *Anstey* majority reasoned that a jury instruction "is an appropriate consequence for the violation of a mandatory statutory right to a reasonable opportunity for an independent chemical test because it will accord meaning to the right created in subsection 6(d) without creating a remedy that the Legislature did not intend."[255] As the *Anstey* majority explained, such an instruction "falls within the court's inherent authority to instruct the jury on the law applicable to the case and the discretionary power to comment on the evidence:"[256]

> A defendant who is denied the statutory right to a reasonable opportunity for an independent chemical test administered by a person of his or her own choosing may advance the defense that the police-administered test was inaccurate, and that the police deprived him or her of the opportunity to raise a reasonable

250. *Id.*; *see also* MICH. COMP. LAWS ANN. § 257.625a(6)(d) (West 2002).
251. 124 N.W.2d 274 (Mich. 1963).
252. *Id.* at 277.
253. *Anstey*, 719 N.W.2d at 587-88.
254. *Id.* at 588.
255. *Id.*
256. *Id.* at 593.

> doubt of guilt through an independent test. The trial court may instruct and inform the jury on the requirements of MCL 257.625a(6)(d) and properly comment on the evidence by bringing to the jury's attention that the defendant's statutory right has been violated.[257]

5. The "Overrulings" At a Glance

As this overview of some of the Court's "overrulings" shows, it is difficult to draw any global conclusions about the overrulings. Perhaps the only real conclusion one can draw is that the Court consistently rejected precedent that departed from the plain language of statutes. In many ways, the Court reinforced stare decisis by returning to earlier precedent. At a minimum, then, Sedler's claims do not withstand careful review of the applicable case law.

V. FROM DIATRIBE TO DIALOGUE

The preceding sections demonstrate that *Overruling the Overrulings* contains three fundamental fallacies: (1) the U.S. Supreme Court's approach to stare decisis is not as coherent or straightforward as *Overruling the Overrulings* suggests; (2) Sedler's claim that the Michigan Supreme Court set a "record" by overruling thirty-four cases between 1999 and 2008 is demonstrably false; and (3) a careful reading of the "overrulings" demonstrates that the Court was not simply imposing its political will over that of its predecessor Courts.

These are essentially empirical errors, misstatements of fact that can be addressed with a bit of research and a more careful reading of the case law. But these errors also point to deeper problems in Sedler's analysis.

A. It Doesn't Matter Whether You Win Or Lose

Overruling the Overrulings is predicated on the belief—one that is certainly held by others besides Sedler—that one can determine something meaningful about an opinion's majority and its rationale simply by looking at which party won. If an appeal pits an insured against an insurance company, a decision in the insurance company's favor, according to this view, means that the judge somehow favors the insurance company over the insured. If the victim of a drunk driving accident loses her appeal against the drunk driver, then the court preferred the drunk driver to the victim. To find in favor of a polluter is

257. 719 N.W.2d at 591.

to endorse pollution rather than neutral legal principles applicable in that case. A decision that a certain party wins as a matter of law is a decision that the victor and its actions are *right* in every sense of the word.

Sedler adopts this view expressly, writing:

> In every civil case, the result of the overruling of the prior decision was to favor defendants over plaintiffs by limiting liability or by making it more difficult for the plaintiffs to assert a claim. In every criminal case, the result of the overruling of the prior decision was to favor the prosecution over the defendant and to uphold a conviction against the defendant's statutory or constitutional claim.[258]

From this overview of which party prevailed in each case, Sedler makes a sweeping pronouncement: "It may fairly be suggested, therefore, that the Court majority's unprecedented overruling of a large number of prior decisions advanced the Court majority's policy objectives of limiting tort liability and worker's compensation recovery and of making it more difficult for persons charged with crimes to avoid a conviction."[259]

In other words, Sedler simply looks at which side won in each case and, from this record alone, reaches a broad conclusion about the factors driving the Court's decision-making.

This mode of analysis, such as it is, certainly has a superficial appeal. For one thing, it obviates the need to do the hard work of reading and analyzing judicial opinions. One can simply skip to the last paragraph to determine whether the opinion is "good" or "bad," and reach a final conclusion about the opinion's author. For another, it makes for dramatic political theater.[260] An ad that proclaims that a judge "sides with insurance companies" is much more attention-grabbing than one that, say, questions a judge's application of *noscitur a sociis* to statutes governing the insurance industry.[261]

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258. Sedler, *supra* note 4, at 1911.

259. *Id.* (emphasis in original).

260. *Overruling the Overrulings* was released via the Social Science Research Network (SSRN) just as the 2010 campaign for two seats on the Michigan Supreme Court got underway. One of those seats was held by Justice Young, who is one of the justices Sedler derides throughout *Overruling the Overrulings*. As previously noted, the Michigan Democratic Party featured an interview with Professor Sedler in its anti-Young materials in which Sedler claimed that his "research" showed that the Court set a "world record" for overruling cases. *See supra*, note 5.

261. *Id.*

But this approach misses the point. As an alternative to simply looking at which side of the "v" prevailed, one might look at the principles applied by the court and assess (a) whether those principles are sound in the abstract and (b) whether they were applied in a sound fashion. Indeed, the point of judicial traditionalism is that courts must eschew *outcome*-driven decision-making in favor of *process*-driven decision-making. From the perspective of a judicial conservative, it matters not whether the court's decision favors the plaintiff or the defendant, David or Goliath. What matters is whether the court arrived at that decision in a manner that is *empirically* sound and driven by positive law rather than a court's subjective beliefs about wrong and right. Sedler's analysis fails not only because of the empirical errors noted above but because it never considers the fundamental point of the Court's judicial philosophy.

What, then, explains the pattern that Sedler perceives in the Court's decision-making—that of making "significant changes in Michigan's tort law in favor of defendants over plaintiffs, significant changes in worker's compensation law in favor of employers over workers, and significant changes in criminal law in favor of prosecutors over defendants"?[262] Part of the answer lies in the fact that many "overrulings" do not really fit within this pattern—and it is only when one engages in the sort of superficial analysis exemplified by *Overruling the Overrulings* that these decisions seem to favor one class of litigants.

Indeed, certain "overrulings" announce neutral principles. *McDougall,*[263] for example, held that the Legislature can make substantive rules that bear on procedural and evidentiary matters. This holding is content-neutral: its impact is left up to the Legislature. Likewise, *Mudel* merely clarified an issue regarding the standard of appellate review in workers' compensation cases. Whether this rule favors workers or employers will vary from case to case. There is no substitute for actually reading and analyzing these cases. Sedler's method of simply looking at which party prevailed in a given case provides no meaningful insight.

Another part of the answer is suggested by *Overruling the Overrulings* itself. Sedler writes:

> [B]eginning in the middle of the twentieth century, the courts started to make changes in the common law to reflect changed conditions in contemporary American society. In approximately

262. Sedler, *supra* note 4, at 1941.

263. McDougall v. Schanz, 597 N.W.2d 148, 156-58 (Mich. 2000).

> a thirty-year year period, the Michigan Supreme Court, like many other state courts, *changed the common law rules to expand significantly the scope of tort liability.* In so doing, the Court recognized its responsibility to develop the common law of the state, emphasizing that "rules created by the court could be altered by the court," and that the court had a "corrective responsibility" when dealing with judge-made law.[264]

Thus, Justices Corrigan, Markman, Taylor and Young took their seats at the Michigan Supreme Court after a thirty-year period in which their predecessors, in Sedler's words, "significantly" expanded tort liability.[265]

It is no wonder, then, that the Court's overrulings often sided with defendants in civil cases. As Sedler admits, prior Courts had tipped the scales of justice in favor of plaintiffs for the previous three decades. Not only that, but, as the preceding summary of the Court's "overrulings" shows, prior Courts did so by routinely departing from the plain language of governing statutes This was a deliberate usurpation of the Legislature's law-making role. The Court had much work to do in order to return the common law to its state before the thirty-year expansion of tort liability and to restore respect for the Legislature's authority in creating positive law.

B. Better Questions Beget Better Questions

By focusing on outcome rather than process, *Overruling the Overrulings* simply misses the point of judicial traditionalism.[266] It fails in another and equally important respect. By skimming the surface of the "overrulings" instead of digging into the Court's rationales, *Overruling the Overrulings* misses the opportunity to ask more probing questions

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264. Sedler, *supra* note 4, at 1924 (emphasis added). The implications of this passage are startling. If the Court *expands* tort liability, it is, according to Sedler, exercising a "corrective responsibility" and is to be lauded. But if the Court *constricts* tort liability, it is, according to *Overuling the Overrulings,* violating principles of stare decisis to advance its own policy objectives.

265. *Id.*

266. At the same time, Sedler endorses a very jaundiced view of the judiciary's role. By endorsing the Court's pre-2000 expansion of tort liability and railing against the Court's adherence to the plain language of governing statutes, Sedler suggests that courts *ought* to be favoring one class of litigants over another, without respect to the merits of individual cases. This view is hard to square with the notion that the judiciary should be independent and impartial.

about the Court's jurisprudence—questions that might lead to more thoughtful dialogue.

For example, although Sedler notes that the vast majority of the Court's "overrulings" concern cases in which the Court concluded that its predecessors departed from the plain language of statutes,[267] he never seems to consider why that might be the case. Sedler writes: "[T]he approach of the Michigan Supreme Court during this period has been to overrule a prior decision solely because the Court majority has concluded that the prior case was wrongly decided."[268] That statement is misleading.

Overruling the Overrulings itself shows that, in most cases, the Court overruled prior decisions *because they departed from the plain language of governing statutes.* That is quite different from Sedler's contention that the Court was imposing its own policy views. And it is one that raises fundamental questions about the respective positions of the legislature and the judiciary in Michigan's government. The Court obviously believed that the plain language of governing statutes should carry the day, even when misconstrued in previous, ostensibly binding, opinions. Stare decisis, in their view, must yield to the legislature's will. This is a serious point, and one that warrants more careful engagement than *Overruling the Overrulings* provides.[269]

One might also ask whether the Michigan Supreme Court has, at times, overruled cases less expressly than in the Court's "overrulings." It is no secret, either among practicing lawyers or academics, that courts can and do overrule cases without explanation or justification. Cases can be distinguished or altogether ignored. In *How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis,* for example, Pintip Dunn explores the ways in which the Supreme Court tacitly overrules cases or, worse, purports to adhere to precedent even while overruling it.[270] Sedler

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267. Sedler, *supra* note 4, at 1930.

268. *Id.*

269. Justice Lewis Powell, who was not a judicial conservative by any measure, acknowledged that correct statutory interpretation should occasionally trump stare decisis:

> Correction of erroneous statutory interpretations in some cases may be vital to the effective administration of justice and the coherence of the law. But correction may have little political constituency in Congress. The Court, therefore, has a responsibility to ensure that its statutory interpretations follow the intent of the drafting Congress as well as to ensure that erroneous interpretations do not damage the fabric of the law.

Justice Lewis F. Powell Jr., *Stare Decisis and Judicial Restraint,* 47 WASH. & LEE L. REV. 281, 287 (1990).

270. Pintip Hompluem Dunn, *How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis,* 113 YALE L. J. 493 (2003-2004).

pays no mind to the possibility that the Michigan Supreme Court could have similarly violated principles of stare decisis without expressly acknowledging that they were doing so.

By the same token, *Overruling the Overrulings* misses the opportunity to consider how stare decisis ought to be measured in the first place. Sedler settles for examining obvious departures from precedent. An arguably better measure of a court's fidelity to precedent is the degree to which precedent actually serves as a predominant factor in the Court's decision-making. In one notable study, Harold J. Spaeth and Jeffrey A. Segal posited that, if stare decisis is truly a driving force in a justice's decision-making, a justice will follow cases in which he or she previously dissented.[271] If stare decisis is of little importance in a justice's jurisprudence, on the other hand, he or she will continue to dissent.[272] When Segal and Spaeth applied this methodology to the U.S. Supreme Court, they discovered that "the vast majority of Justices did not let the intervening precedent alter their votes."[273] Unfortunately, *Overruling the Overrulings* does not look beyond the Michigan Supreme Court's express overrulings in measuring its adherence to stare decisis. As a result, it barely scratches the surface.

Finally, and perhaps most importantly, a more careful approach to the Court's jurisprudence might raise questions about Sedler's ultimate conclusion: that the Court's 1999-2008 jurisprudence can be rejected, not because it is wrong, but because it is, in Sedler's view, ideological:

> [The Court's] overruling decisions lack the legitimacy of other decisions of the Michigan Supreme Court, because they were decisions by a Court majority that had abandoned the principle of stare decisis in order to advance the Court majority's policy objections. It is my submission that these overruling decisions should not be given stare decisis effect by the Michigan Supreme Court, and that as far as the Court itself is concerned, these decisions should stand on no stronger footing than the decisions that they overruled.[274]

Sedler's argument, in other words, is that a future majority should adopt an "eye for an eye" approach: if one majority rejects precedent, then—for that reason alone—a new majority can do so as well.

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271. Frank B. Cross, *Chief Justice Roberts and Precedent: A Preliminary Study*, 86 N.C. L. REV. 1251, 1259-60 (2008)

272. *Id.* at 1260.

273. *Id.*

274. Sedler, *supra* note 4, at 1950-51.

But it does not take a great deal of analysis to see the flaw in Sedler's theory. "An eye for an eye," as Mohandas Gandhi observed, leaves the whole world blind.[275] If a new majority were to overrule prior decisions for no other reason than that the new majority finds its predecessors to be "ideological," then Sedler's rule gives license for subsequent majorities to do the same thing, and so on and so on, until stare decisis has no meaning at all. If the purpose of *Overruling the Overrulings* is to defend and reinforce stare decisis, that purpose is utterly defeated by Sedler's invocation of *lex talonis* as a jurisprudential theory.

VI. CONCLUSION

Overruling the Overrulings is not the first article to attack the Michigan Supreme Court,[276] and it certainly won't be the last. Nor would we ask that critics of the Court still their pens. Democracy depends upon vigorous debate and opponents of judicial conservatism have every right, if not the duty, to challenge this approach if they view it to be misguided.

We do hope, however, that future discussions can avoid some of the fallacious arguments that *Overruling the Overrulings* entertains. It does little good to pretend that complex doctrines like stare decisis are easy or straightforward. Nor is there anything to be gained by skimming case law, looking only at which party prevailed, instead of digging into the majority's rationale and taking its judicial philosophy seriously. Both the quality and tenor of the dialogue between judicial traditionalists and those opposing judicial traditionalism will be improved once we look at the merits of decisions rather than just which side of the "v" was victorious. This kind of nuanced dialogue may not lend itself to easy sound bites about "world records" and ideology, but it may facilitate genuine respect and greater tolerance for philosophical differences.

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275. This criticism of the famous "an eye for an eye, a tooth for a tooth . . . " injunction from the Book of Exodus is widely attributed to Mohandas Gandhi, although the true source is not known. *See generally* MOHANDAS K. GANDHI. AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH (Mahadev Desai trans., Dover ed. 1983) (1948).

276. *See, e.g.*, Sarah K. Delaney, *Stare Decisis v. The "New Majority": The Michigan Supreme Court's Practice of Overruling Precedent, 1998-2002*, 66 ALB. L. REV. 871 (2003).

VII. APPENDICES

A. Alabama Overrulings from 1999 to 2008

Principal Case	Overruled Opinions
Ex parte Cleghorn, 993 So.2d 462 (Ala. 2008).	Ex parte Martin, 961 So.2d 83 (Ala. 2006); Ex parte Peppers, 703 So.2d 299 (Ala. 1997).
Horton Homes, Inc. v. Shaner, 999 So.2d 462 (Ala. 2008).	H & S Homes, L.L.C. v. McDonald, 910 So.2d 79 (Ala. 2004); Birmingham News Co. v. Horn, 901 So.2d 27 (Ala. 2004).
Holiday Isle, L.L.C. v. Adkins, 12 So.3d 1173 (Ala. 2008).	TFT, Inc. v. Warning Sys., Inc., 751 So.2d 1238 (Ala. 1999).
Griffin v. Unocal Corp., 990 So.2d 291 (Ala. 2008).	Garrett v. Raytheon Co., 368 So.2d 516 (Ala. 1979).
State v. Isbell, 985 So.2d 446 (Ala. 2007).	Ex parte Smith, 794 So.2d 1089 (Ala. 2001).
Ex Parte v. Marble City Plaza, Inc., 989 So.2d 1065 (Ala. 2007).	Williams v. Ala. Power Co., 730 So.2d 172 (Ala. 1999).
Ex parte Estelle v. Cunningham, 982 So.2d 1086 (Ala. 2007).	Owens v. Coleman, 520 So.2d 514 (Ala. 1987); Taylor v. S. Bank & Trust Co., 151 So. 357 (Ala. 1933); Barnett v. Boyd, 140 So. 375 (Ala. 1932).
Ex parte Quality Cas. Ins. Co., 962 So.2d 242 (Ala. 2006).	Alfa Mut. Gen. Ins. Co. v. Oglesby, 711 So.2d 938 (Ala. 1998).
Ex parte Howell Eng'g & Surveying, Inc., 981 So.2d 413 (Ala. 2006).	Sevier Ins. Agency, Inc. v. Willis Corroon Corp. of Birmingham, 711 So.2d 995 (Ala. 1998); Defco, Inc. v. Decatur Cylinder, Inc., 595 So.2d 1329 (Ala. 1992); Dyson Conveyor Maint., Inc. v. Young & Vann Supply Co., 529 So.2d 212 (Ala. 1988).
Ex parte Seymour, 946 So.2d 536 (Ala. 2006).	Ex parte Lewis, 811 So.2d 485 (Ala. 2001); Ash v. State,

	843 So.2d 213 (Ala. 2002).
Patriot Mfg. v. Jackson, 929 So.2d 997 (Ala. 2005).	Ex parte Thicklin, 824 So.2d 723 (Ala. 2002).
Ex parte Harris, 947 So.2d 1139 (Ala. 2005).	Ex parte Pierce, 576 So.2d 258 (Ala. 1991).
Goldome Credit Corp. v. Burke, 923 So.2d 282 (Ala. 2005).	Smith v. First Family Fin. Servs., Inc., 626 So.2d 1266 (Ala. 1993).
New Props., L.L.C. v. Stewart, 905 So.2d 797 (Ala. 2004).	Securitronics of Am., Inc., v. Bruno's, Inc., 414 So.2d 950 (Ala. 1982).
Pearson v. Brooks, 883 So.2d 185 (Ala. 2003).	Roberts v. Cochran, 656 So.2d 353 (Ala. 1995).
Ala. Ins. Guar. Ass'n v. Air Tuskegee, Ltd., 883 So.2d 192 (Ala. 2003).	Ala. Ins. Guar. Ass'n v. Colonial Freight Sys., Inc., 537 So.2d 475 (Ala. 1988).
Ex parte First Ala. Bank, 883 So.2d 1236 (Ala. 2003).	Porter v. Jolly, 564 So.2d 434 (Ala. 1990).
Ex parte Carlton, 867 So.2d 332 (Ala. 2003).	Hogan v. State Farm Mut. Auto. Ins. Co., 730 So.2d 1157 (Ala. 1998); State Farm Mut. Auto. Ins. Co. v. Jeffers, 686 So.2d 248 (Ala. 1996); State Farm Auto. Ins. Co. v. Baldwin, 470 So.2d 1230 (Ala. 1985).
Ex parte Deramus, 882 So.2d 878 (Ala. 2003).	Ex parte Conners, 837 So.2d 326 (Ala. 2002).
Eskridge v. Allstate Ins. Co., 855 So.2d 469 (Ala. 2003).	Christian Benevolent Burial Ass'n v. Thornton, 1 So.2d 8 (Ala. 1941)
Bruce v. Cole, 854 So.2d 47 (Ala. 2003).	U.S. Diagnostic v. Shelby Radiology, P.C., 793 So.2d 714 (Ala. 2000); Wilma Corp. v. Fleming Foods of Alabama, Inc., 613 So.2d 359 (Ala. 1993); Hinkle v. Cargill, Inc., 613 So.2d 1216 (Ala. 1992); Dean v. Myers, 466 So.2d 952 (Ala. 1985); Caron v. Teagle, 408 So.2d 494 (Ala. 1981).
Ex parte Healthsouth Corp., 851 So.2d 33 (Ala. 2002).	Loeb v. Cappelluzzo, 583 So.2d 1323 (Ala. 1991).

Ex parte Drummond Co., 837 So.2d 831 (Ala. 2002).	Bell v. Driskill, 213 So.2d 806 (Ala. 1968).
Ryan v. Hayes, 831 So.2d 21 (Ala. 2002).	Donahoo v. State, 479 So.2d 1188 (Ala. 1985).
Lathan Roof Am., Inc. v. Hairston, 828 So.2d 262 (Ala. 2002).	McCord v. McCord, 575 So.2d 1056 (Ala. 1991); Lee v. Shrader, 502 So.2d 741 (Ala. 1987); Parham v. Taylor, 402 So.2d 884 (Ala. 1981); Johnson v. Johns Serv. Funeral Parlor, Inc., 198 So. 357 (Ala. 1940).
Jim Burke Auto., Inc. v. McGrue, 826 So.2d 122 (Ala. 2002).	S. Energy Homes, Inc. v. Gary, 774 So.2d 521 (Ala. 2000).
Ex parte Thicklin, 824 So.2d 723 (Ala. 2002).	Cavalier Mfg., Inc. v. Jackson, 823 So.2d 1237 (Ala. 2001).
City of Orange Beach v. Benjamin, 821 So.2d 193 (Ala. 2002).	Cloverdale Homes v. Town of Cloverdale, 182 Ala. 419, 62 So. 712 (Ala. 1913).
Ex parte Anonymous, 803 So.2d 542 (Ala. 2001).	Ex parte Anonymous, 618 So.2d 722 (Ala. 1993).
Ala. State Docks Terminal Ry. v. Lyles, 797 So.2d 432 (Ala. 2001),	Terminal Ry. of the Ala. State Docks Dep't v. Mason, 620 So.2d 637 (Ala. 1993); Coleman v. Ala. State Docks Terminal Ry., 596 So.2d 912 (Ala. 1992).
Marsh v. Green, 782 So.2d 223 (Ala. 2000).	Am. Legion Post No. 57 v. Leahey, 681 So.2d 1337 (Ala. 1996).
State v. Armstrong, 779 So.2d 1211 (Ala. 2000).	State v. Brennan, 595 So.2d 458 (Ala. 1992).
Ex parte Burgess, 827 So.2d 193 (Ala. 2000).	Ex parte Bayne, 375 So.2d 1239 (Ala. 1979).
Southern Energy Homes, Inc. v. Ard, 772 So.2d 1131 (Ala. 2000).	Southern Energy Homes, Inc. v. Lee, 732 So.2d 994 (Ala. 1999).
Ex parte Achenbach, 783 So.2d 4 (Ala. 2000).	Eastwood Mall Associates, Ltd. v. All American Bowling Corp., 518 So.2d 44 (Ala. 1987).

Bama Budweiser of Montgomery, Inc. v. Anheuser-Busch, Inc., 783 So.2d 792 (Ala. 2000).	City of Birmingham v. Fairview Home Owners Ass'n, 66 So.2d 775 (1953).
Ex parte Ballew, 771 So.2d 1040 (Ala. 2000).	Layman's Sec. Co. v. Water Works & Sewer Bd. , 547 So.2d 533 (Ala. 1989).
Ex parte Henry, 770 So.2d 76 (Ala. 2000).	Ex parte Hicks, 727 So.2d 23 (Ala. 1998); Ex parte Stephens, 676 So.2d 1307 (Ala. 1996).
Ex parte State Farm Fire & Cas. Co., 764 So.2d 543 (Ala. 2000).	Powell v. Blue Cross & Blue Shield of Ala., 581 So.2d 772 (Ala. 1990).
Ex parte Panell, 756 So.2d 862 (Ala. 1999).	Michael v. Beasley, 583 So.2d 245 (Ala. 1991).
Jett v. Carter, 758 So.2d 526 (Ala. 1999).	Schroeder v. McWhite, 569 So.2d 316 (Ala. 1990).
Redmond v. Bankester, 757 So.2d 1145 (Ala. 1999).	Hoiles v. Taylor, 278 Ala. 515, 179 So.2d 148 (Ala. 1965).
State Farm Mut. Auto. Ins. Co. v. Wallace, 743 So.2d 448 (Ala. 1999).	State Farm Auto. Ins. Co. v. Reaves, 292 So.2d 95 (Ala. 1974).
Ex parte Waterjet Sys., Inc., 758 So.2d 505 (Ala. 1999).	Marshall Durbin & Co. of Jasper, Inc. v. Jasper Utils. Bd., 437 So.2d 1014 (Ala. 1983); Churchill v. Bd. of Trs. of the Univ. of Ala. in Birmingham, 409 So.2d 1382 (Ala. 1982).
Ex parte Dennis, 730 So.2d 138 (Ala. 1999).	**All prior cases "contrary to this holding."**
Davis v. State, 737 So.2d 480 (Ala. 1999).	Ex parte Gentry, 689 So.2d 916 (Ala. 1996).

B. California Overrulings from 1999 to 2008

Principal Case	**Overruled Opinions**
Bouton v. USAA Casualty Ins. Co., 186 P.3d 1 (Cal. 2008).	Van Tassel v. Super. Ct. of Fresno Cnty., 526 P.2d 969 (Cal. 1974).
In re Tobacco Cases II, 163 P.3d 106 (Cal. 2007).	Mangini v. R.J. Reynolds Tobacco Co., 875 P.2d 73 (Cal.

	1994).
In re Jaime P., 146 P.3d 965 (Cal. 2006).	In re Tyrell J., 876 P.2d 519 (Cal. 1994)
People v. Braxton, 101 P.3d 994 (Cal. 2004).	People v. Sarazzawski, 161 P.2d 934 (Cal. 1945).
Gates v. Discovery Commc'ns, Inc., 101 P.3d 552 (Cal. 2004).	Briscoe v. Reader's Digest Ass'n, 483 P.2d 34 (Cal. 1971).
People v. Langston, 95 P.3d 865 (Cal. 2004).	In re Kelly, 655 P.2d 1282 (Cal. 1983).
In re Alva, 92 P.3d 311 (Cal. 2004).	In re Reed, 663 P.3d 216 (Cal. 1983).
People v. Holloway, 91 P.3d 164 (Cal. 2004).	Shepherd v. Superior Court, 550 P.2d 161 (Cal. 1976).
People v. Laino, 87 P.3d 27 (Cal. 2004).	People v. Terry, 390 P.2d 381 (Cal. 1964).
People v. Posey, 82 P.3d 755 (Cal. 2004).	People v. Simon, 25 P.3d 598 (Cal. 2001); People v. McGregar, 26 P. 97 (Cal. 1891); People v. More, 9 P. 461 (Cal. 1886); People v. Alviso, 55 Cal. 230 (Cal. 1880).
Edelstein v. City and Cnty. of San Francisco, 56 P.3d 1029 (Cal. 2002).	Canaan v. Abdelnour, 710 P2d 268 (Cal. 1985).
Correa v. Super. Ct., 40 P.3d 739 (Cal. 2002).	People v. Ong Git, 137 P. 283 (Cal. 1913); People v. Luis, 1110 P. 580 (Cal. 1910); People v. John, 69 P. 1063 (Cal. 1902); People v. Ah Yute, 56 Cal. 119 (Cal. 1880); People v. Lee Fat, 54 Cal. 527 (Cal. 1880).
People v. Simon, 25 P.3d 598 (Cal. 2001).	People v. More, 68 Cal. 500 (Cal. 1886); People v. Aleck, 61 Cal. 137 (Cal. 1882); People v. Bevans, 52 Cal. 470 (Cal. 1877); People v. Fisher, 51 Cal. 319 (Cal. 1876); People v. Roach, 48 Cal. 382 (Cal. 1874); People v. Parks, 44 Cal. 105 (Cal. 1872).

Price v. Super. Court, 25 P.3d 618 (Cal. 2001).	People v. Coddington, 2 P.3d 1081 (Cal. 2000); People v. Hill, 839 P.2d 984 (Cal. 1992); People v. Danielson, 883 P.2d 729 (Cal. 1992); Hernandez v. Municipal Court, 781 P.2d 547 (Cal. 1989); Guzman, 755 P.2d 917 (Cal. 1988); O'Hare v. Super. Ct., 729 P.2d 766 (Cal. 1987); People v. Jones, 510 P.2d 705 (Cal. 1973).
People v. Mendoza, 4 P.3d 265 (Cal. 2000).	People v. McDonald, 690 P.2d 709 (Cal. 1984).
People v. Tufunga, 987 P.2d 168 (Cal. 1999).	People v. Butler, 421 P.2d 703 (Cal. 1967).
Sierra Club v. San Joaquin Local Agency Formation Comm'n., 981 P.2d 543 (Cal. 1999).	Alexander v. State Personnel Bd., 137 P.2d 433 (Cal. 1943).
People v. Newman, 981 P.2d 98 (Cal. 1999).	People v. Hall, 616 P.2d 826 (Cal. 1980).
People v. Morante, 975 P.2d 1071 (Cal. 1999).	People v. Burt, 45 Cal.2d 311 (Cal. 1955); People v. Buffum, 256 P.2d 317 (Cal. 1953).
People v. Martinez, 973 P.2d 512 (Cal. 1999).	People v. Caudillo, 580 P.2d 274 (Cal. 1978).