WHAT THE MICHIGAN SUPREME COURT WROUGHT IN THE NAME OF TEXTUALISM AND PLAIN MEANING: A STUDY OF CASES OVERRULED, 2000–2015

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I. INTRODUCTION

The charts at the end of this article will not surprise Michigan lawyers: they know what direction the Supreme Court has taken for most of these last 15 years (as I begin writing). But they may not appreciate the full extent of it. Thus, the charts should serve two purposes: (1) to confirm how starkly unwavering that course has been with Republican justices in the majority and (2) to demonstrate how textualism—that supposedly objective, impartial theory of interpretation—operates in practice.

The terms *Republican* and *Democratic* refer, of course, to the party that nominated a justice to run for the office or to the governor who appointed the justice. Republicans have been in the majority on the Supreme Court for almost all this time.

After I prepared the two charts, I discovered, embarrassingly, that Professor Robert Sedler had collected and analyzed cases overruled by

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the Supreme Court in a 2009 article.[1] At least, though, I was able to compare my list with his through 2009. (My list begins in 2000, the first full year after the appointment of Justices Robert Young and Stephen Markman solidified the Republican majority on the Court.) I have coded the cases—almost a hundred of them—rather than analyzed each one; the coding is explained in the next two sections. Though my methods differ from Professor Sedler's, our conclusions are (as we'll see) remarkably similar.

I included cases that overruled decisions of the court of appeals if the precedent was at least ten years old. True, the Supreme Court is supposed to correct error by the court of appeals. Still: (1) an overruling is an overruling, and if a case used the word *overruled*, I took that description at face value; (2) Michigan, unlike some other states, gives court of appeals decisions statewide effect, binding all lower courts; (3) after ten years, it seems that a case can fairly be considered settled law; and (4) there's no reason to think that the Supreme Court's proclivities would vary depending on whose decisions it was overruling, and indeed they don't.

At any rate, the great majority of the overruled cases—79%—were decided by the Supreme Court. That figure is even higher—81.5%—for the cases that this study centers on, the ones in which the overruling cases are marked with asterisks. (More on that in a moment.)

I don't claim to have found every overruling case in the last 15 years. But I included all that I could find, without any picking and choosing. A case is included only if the Court wrote an opinion; any overruling done through actions on applications for leave does not show up. There are 96 total. That will be more than enough to draw some conclusions about the proclivities I just mentioned.

One last preliminary point. The 2009 article by Professor Sedler was followed by one that responded to it. I'll discuss the response later in this article.

II. CIVIL CASES

The first chart lists 59 civil cases, along with the cases and years of precedent they overruled. Most of the cases are tort cases—another nonsurprise to Michigan lawyers. They are marked according to whether the overruling made it harder to sue and recover or get relief, or made it easier to sue. One asterisk stands for "harder to sue"; two asterisks stand

1. Robert A. Sedler, *The Michigan Supreme Court, Stare Decisis, and Overruling the Overrulings, 2009 Ann. Survey of Mich. Law*, 55 WAYNE L. REV. 1911 (2009) (analyzing cases overruled from 1999 through 2008).

for "easier to sue." At least one other person independently checked the coding.

In 11 of the 59 cases, marked N/A, the harder-vs.-easier analysis did not apply. For instance, *Mudel* (2000)[2] dealt with the standards for reviewing decisions of a magistrate and the Worker's Compensation Appellate Commission. In *Jones* (2003), the issue was whether someone accused of a parole violation was entitled to discharge from prison because of a late fact-finding hearing. *In re Sanders* (2014) involved due-process limitations on interfering with parental rights. A couple of the decisions are close calls, but recategorizing them wouldn't begin to affect the import of the overall numbers.

Deducting the 11 N/A cases leaves a total of 48. Of those, 7 made it easier for plaintiffs, and 41 made it harder. Five of the 7 pro-plaintiff cases were decided in 2010, when justices nominated by the Democrats either held a majority on the Court or were joined by Justice Weaver to form a majority. (Her disaffection with her fellow Republicans was well known.) The other 2 cases of the 7 were unanimous decisions—*Haynes* (2007) and *Miller-Davis Co.* (2011). In total, then, the Republican contingent voted in a way that favors plaintiffs in 2 of the 48 cases.

To put it another way, 41 times the Court overruled precedent and made it harder for plaintiffs to successfully sue. And in every instance, the Republican justices made the difference.

Nor was there much crossover in voting. A Democratic justice joined in 2 of the 44 Republican-led overrulings, *Taylor* (2003) and *Speicher* (2014), and two joined in *Gladych* (2003). Four votes total. No Republican justice other than Weaver joined in any of the 7 Democratic-led overrulings, except in the two unanimous decisions (*Haynes* and *Miller-Davis Co.*).

All in all, even if a few of the 59 characterizations might be debated, the picture is still clear: political parties matter in how cases—especially important ones—are decided. Republican justices have uniformly narrowed possible tort claims, in line with conservative "tort reform" attitudes; Democratic justices have done the opposite.

No doubt there are other cases, outside this study's scope, that don't fit the pattern. But it would take a load of them, from another cross-section of cases, to counter or qualify the singular pattern we've seen.

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2. [Editors' note: See the charts for citations to the cases in this section and the next two. Citations have been omitted at the author's request, here and in some other places.]

III. CRIMINAL CASES

For more of the same, we have only to look at the chart of criminal cases overruled.

There are 37 total. One asterisk indicates that the overruling favored the prosecution by making it easier to convict, harder to get a charge dismissed, harder to appeal, harder to get a resentencing, and so on. Two asterisks indicate that the overruling favored the defendants in some way. That distinction did not apply in 4 cases, marked N/A. I again had all the coding checked by at least one other person, and the close calls (as we saw them) were reviewed by a criminal-law professor.

Of the 33 cases with asterisks, 31 favored the prosecution, and 2 favored the defendants. The 31 pro-prosecution cases were all decided by Republican majorities. The 2 pro-defendant (or defendants'-rights) cases were decided by the Democratic justices plus at least one Republican. Here's the breakdown for the 2 cases in the latter group (the first number below shows Democrats, the second Republicans):

- *Feezel* (2010), 3 + 1
- *Chenault* (2014), 2 + 5

(Note that *Chenault* was unanimous and said to be dictated by United States Supreme Court precedent.)

So in 32 of the 33 cases—the 31 pro-prosecution cases plus *Feezel*—a majority of Republicans voted in a way that favors the prosecution. Only in *Chenault* did a majority vote in a way that favors defendants.

Just as an incidental piece, we might look more closely at the crossover votes and total votes in these criminal cases. (I did not calculate total votes in the civil cases.)

In the 31 pro-prosecution cases, there were 3 Republican crossover votes:

- *Moore* (2004), 1 vote to not overrule
- *Lively* (2004), 1 vote to avoid a decision on overruling
- *Starks* (2005), 1 vote to not overrule

And there were 9 Democratic crossover votes:

- *Hardiman* (2002), 1 vote to overrule

- *Petit* (2002), 1 vote to overrule
- *Schaefer* (2005), 2 votes to overrule
- *Taylor* (2008), 2 votes to partially overrule
- *Houthoofd* (2010), 1 vote to overrule
- *Harris* (2014), 1 vote to overrule
- *Smith* (2014), 1 vote to overrule

In the 2 pro-defendants'-rights cases, there were 6 Republican crossovers—votes favoring the overruling—as shown in the first of the three sets of bullets above. And there were no Democratic crossovers, no votes against overruling.

All told: 9 Republican crossovers (3 + 6), and 9 Democratic (9 + 0).

The total votes of the justices in all 33 cases is hard to figure because some justices were not accounted for in some cases. Roughly, though, I count 158 votes by Republican justices in the 33 cases, 9 of which favored defendants (the 9 crossovers). That's 5.7%. I count roughly 73 votes by Democratic justices, 9 of which favored the prosecution (the 9 crossovers). That's 12.3%. Somewhat higher, but still a small percentage.

IV. PUTTING THE NUMBERS TOGETHER

To round out the calculations, we might compare my numbers and conclusions with those of Professor Sedler. He collected cases from 1999 to 2008 and did not include court of appeals decisions. Out of 38 decisions to overrule, he considered 4 to be "non-ideological."[3] He said of the remaining 34:

> 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 constitutional or statutory claim.[4]

3. Sedler, *supra* note 1, at 1911.
4. *Id.*

Professor Sedler's 34 of 38 produces an ideology rating of 89.5%. Using essentially the same criteria—although I didn't know it at the time—I arrived at these numbers for a majority of Republicans: 46 of 48 civil cases, plus 32 of 33 criminal cases, totaling 78 of 81, or 96.3%. How about we split the small difference and say that Republican majorities have voted along ideological lines 93% of the time. Although Democrats formed a majority in only a handful of these 81 cases, the same charge can be leveled at them if you look at their individual votes in the criminal cases (only 12.3% crossovers).

One point of difference is that, arguably, the Republican majorities overruled somewhat firmer, more settled precedent. On average, the cases they overruled were 25.75 years old (1,854 years total ÷ 72 cases with an asterisk); the average for the Democratic-led overrulings was 10 years (90 years total ÷ 9 cases with two asterisks). The Republicans were also more inclined to overrule unanimous precedent—unanimous in the sense that no justice or judge dissented on the point that was later overruled. Those cases are identified with a check mark in the second column of the charts. If you eliminate the court of appeals decisions (which involve only 3 judges), the Republican majorities overruled unanimous Supreme Court precedent 46.6% of the time (28 of 60 cases); none of the 6 Supreme Court cases that the Democrats overruled were unanimous. Admittedly, though, because of the much smaller Democratic sampling, these comparisons may be only suggestive.

At any rate, my purpose is to examine 15 years' worth of work done in the name of textualism. To repeat, a Republican majority voted in favor of civil defendants in 46 of the 48 cases, and in favor of the prosecution in 32 of 33 cases. The 3 atypical decisions were all unanimous:

- *Haynes* (2007)
- *Miller-Davis Co.* (2011)
- *People v. Chenault* (2014)

During this 15-year period, why were there so few opposite-side cases (favoring civil defendants or the prosecution) that warranted overruling? Any chance that the granting of leave and the overruling were selective? The numbers are telling.

V. A JUDGE'S "PRIORS" AND THE CLAIMS OF TEXTUALISM

The subject of how judges decide cases is extremely complex and endlessly debated. My sense is that the debate is essentially about the degree to which cases at different levels involve the straightforward, fairly routine application of law to facts. That is, to what extent, and how, are judges truly constrained in their decision-making?

What seems undeniable, though, is that *some* significant percentage of appellate cases involve open questions—and that judges in those cases are influenced by their "priors," as they've been called. Judge Richard Posner explains in his recent book *Divergent Paths*:

> A prior is a belief or inclination, conscious or (frequently) unconscious, that one brings to an issue before obtaining any evidence concerning it. . . . Those priors . . . derive from politics and ideology, religious upbringing and belief, ambition . . . , race and gender, temperament (authoritarian or empathetic), collegiality, personal history, career experiences, and strategic considerations, as in *Bush v. Gore* . . . . One almost always has an initial leaning or "take" on a new issue while generally being open to modifying one's initial take as one learns more about the issue.[5]

Judge Posner's book returns in several places to the distinction he has made between legal realism and legal formalism, which he argues "engenders an exaggerated belief in the existence of objectively correct answers to all legal questions."[6] And formalism depends heavily on the textualist theory of interpretation and the associated canons of construction.[7]

Anyway, putting aside the "realism" vs. "formalism" labels, the Republican justices in Michigan are certainly exponents of textualism:

> • "[T]he overrulings of precedent occurring during the past seven terms have overwhelmingly come in cases involving what the justices in the majority view as the misinterpretation of straightforward words and phrases in statutes and contracts, in

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5. RICHARD POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY 17, 22, 185 (2016).

6. *Id.* at 76. For articles that question Judge Posner's views on legal realism, see *id.* at 177 n.142.

7. *Id.* at 98–104, 115–17 (criticizing "modern formalism" for, among other things, its excessive reliance on canons).

which words that were *not* there were read into the law or words that *were* there were read out of the law."[8]

- "A critical strength of a judicial philosophy committed to exercising only the Constitution's 'judicial power' is that reasonably clear rules of decision-making are established *before the fact*. That is, a judge essentially promises the parties that he or she will decide their case as with all others, by attempting to discern the reasonable meaning of relevant statutes or contracts and that this will be done by relying upon recognized rules, and tools, of interpretation."[9]

- "Judges, as neutral arbiters whose function is merely to interpret the laws enacted through the democratic process, should not be agents of 'societal change' they desire . . . ."[10]

Textualism, then, purports to operate on a higher plane. It's neutral and objective. It's a rule-of-law method that does not impinge on the legislature's role. It respects the democratic process. It adheres to established and well-founded canons of construction in merely "interpreting" law. It provides greater predictability and certainty in the law. It's fair to all sides because they know the interpretive "rules," or canons, from the outset.

However true or untrue these claims may be in theory, they are not true in practice. They were not true for the decisions of textualism's best-known advocate, the late Justice Antonin Scalia—decisions that were overwhelmingly conservative.[11] And the claims are not true for decisions of the Republican majority on the Michigan Supreme Court—decisions that disproportionately favor defendants in tort cases and the prosecution in criminal cases. Remember that all the cases overruled previous majorities and virtually all of them provoked dissents, so they were at least arguable, if not close. Yet they all came out the same way. How can any fair reading of law be that one-sided?

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8. Rowland v. Washtenaw Cty. Rd. Comm'n, 477 Mich. 197, 226, 731 N.W.2d 41, 58 (2007) (Markman, J., concurring).

9. Petersen v. Magna Corp., 484 Mich. 300, 381, 773 N.W.2d 564, 608 (2009) (Markman, J., dissenting).

10. O'Neal v. St. John Hosp. & Med. Ctr., 487 Mich. 485, 566–67, 791 N.W.2d 853, 897 (2010) (Young, J., dissenting).

11. *See* Joseph Kimble, *The Doctrine of the Last Antecedent, the Example in* Barnhart, *Why Both Are Weak, and How Textualism Postures*, 16 SCRIBES J. LEGAL WRITING 5, 30–35 (2015) (summarizing 6 empirical studies and citing 11 other sources that show a strong ideological bent in Justice Scalia's opinions).

The canons of construction that textualists swear by are often conflicting and are highly malleable.[12] And we have strong evidence that many times in the real world of decision-making, they are put to ideological ends.

VI. THE TEXTUALISTS RESPOND: WE HEW TO PLAIN MEANING

In the year after Professor Sedler's article appeared, two distinguished lawyers and former clerks to Justice Young published a response.[13] They described Sedler's study as "deeply flawed."[14] I'm afraid, though, that their criticisms and their characterization do not hold up.

The authors argue that a "simple tally of who 'won' each overruling is not only superficial, but ultimately pointless. It provides no meaningful insight into the Court's jurisprudence."[15] I disagree. Lopsided numbers matter. That civil plaintiffs and criminal defendants "won" in just 3 of 81 overruling cases is damning on its face—and cannot be rationalized by any "jurisprudence" that's evenhanded.

The jurisprudence that the authors refer to is, of course, textualism and the plain-meaning approach that they ally it with:

- "[R]egard for precedent must be balanced with a commitment to interpreting the words of the law in accordance with their meaning" (quoting Justice Markman).[16]

- "[A]n examination of the . . . Court's 'overrulings' reveals that the Court was successful in adhering to the plain meaning of the law . . . ."[17]

- "Perhaps the only real conclusion one can draw [about the overrulings] is that the Court consistently rejected precedent that departed from the plain language of statutes."[18]

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12. *See, e.g.*, Joseph Kimble, Ejusdem Generis: *What Is It Good For?*, 100 JUDICATURE 48 *passim* (Summer 2016); *The Puzzle of Trailing Modifiers*, MICH. B.J., Jan. 2016, at 38.

13. Trent B. Collier & Phillip J. DeRosier, *Understanding the Overrulings: A Response to Robert Sedler*, 56 WAYNE L. REV. 1761 (2010).

14. *Id.* at 1763.

15. *Id.* at 1764.

16. *Id.* at 1775.

17. *Id.*

18. *Id.* at 1800.

- "[T]his usurpation [of the legislative function] is the *result* when a Court does not apply the plain meaning of a statute . . . ."[19]

The authors analyze a number of Supreme Court cases to illustrate their point of view, and I'll take up the cases in the next section. But first a few words about plain meaning.

Incidentally, don't confuse this theory of interpretation with the laudable push for plain legal writing. A court's reference to a statute's "plain meaning" or "plain language" has nothing to do with the plain-language movement—a worldwide effort to promote greater clarity and simplicity in legal and official communication.

As for plain meaning, first consider the warning delivered by the great contracts scholar Arthur Corbin:

> It is sometimes said, in a case in which the written words seem plain and clear and unambiguous, that the words are not subject to interpretation or construction. One who makes this statement has of necessity already given the words an interpretation—the one that is to him plain and clear . . . . We must, indeed, be wary of this first impression, since language conceals many a pitfall.[20]

Corbin is quoted in Robert Benson's book *The Interpretation Game*, which deserves wider circulation and attention than it has received. Benson explores at great length the notion that there are reliable rules, or canons, for uncovering the fixed, objective meaning of a text. After reviewing modern theories of language, he describes the plain-meaning rule as "impossible to credit as a serious attempt to understand legal texts."[21]

Let's get a little more specific. Below is a sampling of criticisms, some of which draw on a forthcoming article by William Baude and Ryan David Doerfler.[22] The authors examine the puzzle of why a court

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19. *Id.* at 1777.

20. Arthur Corbin, *The Interpretation of Words and the Parole Evidence Rule*, 50 CORNELL L.Q. 161, 171–72 (1965).

21. ROBERT BENSON, THE INTERPRETATION GAME: HOW JUDGES AND LAWYERS MAKE THE LAW 35 (2008); *see also* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 67 (1994) ("'Plain meaning' as a way to understand language is silly. In interesting cases, meaning is not 'plain'; it must be imputed; and the choice among meanings must have a footing more solid than a dictionary . . . .").

22. William Baude & Ryan David Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. (forthcoming 2017), http://ssrn.com/abstract=2805431.

should consider nontextual information only if the text is ambiguous; they thoughtfully explore five possible justifications; and they find all of them to be problematic. So what's the trouble with the plain-meaning rule (or canon, or theory)?

One: "[T]he word *plain* is (ironically) itself ambiguous."[23] Does it mean (1) ordinary, normal or (2) obvious, clear, unambiguous? In their treatise *Reading Law*, the late Justice Antonin Scalia and Bryan Garner subscribe to the first, the rule of "ordinary meaning."[24] They say that the plain-meaning rule—in the second sense of *plain*—"is essentially sound but largely unhelpful, since determining what is ambiguous is eminently debatable."[25] Indeed it is, as the next two points demonstrate. Yet many courts, including the Michigan Supreme Court, do not sharply distinguish between the two meanings of *plain* and tend to use it in that second sense.[26]

Two: "[T]he plain meaning threshold is highly vulnerable to dispute (good-faith and otherwise)."[27] Baude and Doerfler cite two empirical studies about readers' overestimating whether it's met. In the first one, law students with strong policy preferences "tend[ed] to say that [a] statute is unambiguous, or that only one reading of it is plausible."[28] When asked to predict whether other readers, ordinary readers, would find a statute ambiguous, they were less biased but still almost evenly divided.[29] In the second study, involving contracts, "both judges and laypeople exhibited . . . an exaggerated sense of how many people agreed with their [interpretations]."[30]

What's more, one sitting judge acknowledges that even his colleagues on the same court, the D.C. Circuit, cannot agree on the plain-

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23. *Id.* (manuscript at 6).

24. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 69–77 (2012).

25. *Id.* at 436.

26. *See, e.g.*, People v. Duncan, 494 Mich. 713, 723, 835 N.W.2d 399, 404–05 (2013) ("When construing court rules, . . . this Court applies the same principles applicable to the construction of statutes. . . . When the language of the rules is unambiguous, we enforce the plain meaning without further judicial construction."); McCormick v. Carrier, 487 Mich. 180, 195, 795 N.W.2d 517, 526 (2010) ("[B]ecause . . . each of these prongs' meaning is clear from the plain and unambiguous statutory language, judicial construction is neither required nor permitted."); People v. Gardner, 482 Mich. 41, 59, 753 N.W.2d 78, 90 (2008) ("When the Legislature's language is clear, we are bound to follow its plain meaning.").

27. Baude & Doerfler, *supra* note 22 (manuscript at 20).

28. Ward Farnsworth, Dustin F. Guizor & Anup Malani, *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257, 259 (2010).

29. *Id.* at 272 (reporting that "55 percent [were] likely to say the statute is ambiguous when asked for an external judgment").

30. Lawrence Solan, Terri Rosenblatt & Daniel Osheron, *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268, 1270 (2008).

meaning threshold: he applies a 65–35 rule for clarity (there's no ambiguity if the interpretation is at least 65% clear); most of his colleagues require more of a 90–10 rule; others, remarkably, appear to accept a 55–45 rule.[31]

Three: The general standard for what is and isn't ambiguous has also become tinged with disagreement. Courts outside Michigan are virtually unanimous that the test is whether language is susceptible of more than one reasonable interpretation.[32] But the majority on the Michigan Supreme Court has adopted a much stricter test: whether language is "equally susceptible" of more than one meaning.[33] The Court's definition is plain-meaning-friendly. How would a 55% certainty play out? No ambiguity even then?

Four: Also murky is how other canons of construction—beloved by textualists—relate to plain meaning. If the text is plain (unambiguous), are other canons off-limits? Or may other canons be invoked to determine whether the text is plain? That is, which comes first: an assessment of plain meaning or application of the canons? A fairly recent Fifth Circuit case acknowledged that precedent from the United States Supreme Court and the Fifth Circuit itself "is not entirely clear on this point."[34]

This point is important because the ostensibly plain meaning will often be at odds with some other textual canon. Consider *Yates v. United States*.[35] The Supreme Court had to decide whether *any record, document, or tangible object* included a fish. Obviously, a fish is a tangible object, but five justices applied the *noscitur a sociis* and *ejusdem*

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31. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2137–38 (2016); *see also* Matthew J. Hertko, *Statutory Interpretation in Illinois: Abandoning the Plain Meaning Rule for an Extratextual Approach*, 2005 U. ILL. L. REV. 377, 386 (2005) ("Jurisdictions adhering to the plain meaning rule have not developed a consistent . . . definition of ambiguity, and thus the line-drawing [is] arbitrary and unguided . . . .").

32. Marilyn Kelly & John Postulka, *The Fatal Weakness in the Michigan Supreme Court Majority's Textualist Approach to Statutory Construction*, 10 T.M. COOLEY J. PRAC. & CLINICAL L. 287 *passim* (2008).

33. *Id.* at 289 (asserting that the majority "created the test out of thin air, without reference to a single case, legal journal article, or treatise"); *see also* WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 82 (2016) (criticizing the test as "[in]consistent with centuries of American judicial practice"); Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 800 (2010) (describing the test as "too narrow to be taken literally").

34. United States v. Kaluza, 780 F.3d 647, 658 n.34 (5th Cir. 2015).

35. Yates v. United States, 135 S. Ct. 1074 (2015).

generis canons to limit the literal meaning of *tangible object*. The dissent said those canons should be used "to resolve ambiguity, not create it."[36]

Five: Very often, plain language that's vague cannot be sensibly applied without your knowing the law's purpose. In *Yates*, for instance, the statute was "designed to protect investors . . . [from] corporate and accounting deception" by prohibiting the destruction of records used to preserve information.[37] To include a fisherman's destruction of fish would "cut [the statute] loose from its financial-fraud mooring."[38] Or take the famous example of "No person may bring a vehicle into the park." Whether *vehicle* should include a bicycle may well depend on whether the city council was responding to complaints about noise or safety.[39]

Six: Dictionaries are especially suspect as guides to plain meaning. To begin with, in a study of 137 congressional drafters, more than 50% said they never or rarely used dictionaries when drafting; only 15% used them often.[40] As one drafter exclaimed, "[N]o one uses a freaking dictionary."[41] Most of them don't, anyway.

Seven: As a matter of language theory, reliance on dictionaries is said to be "fundamentally flawed" because judges typically treat definitions as setting forth "necessary and sufficient conditions of meaning."[42] That is the classical approach: whether something falls within a category (is a burrito a sandwich?) depends on whether it meets the conditions, or properties, described in a dictionary. The classical approach is attractive to courts that "are motivated to portray the law as . . . objective and determinate," but it "comes at the cost of accuracy about meaning."[43] Modern theory, called prototype theory, looks to whether an item satisfies a high number of a set of properties associated with a category.[44] Although this kind of analysis is significantly more

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36. *Id.* at 1097 (Kagan, J., dissenting).

37. *Id.* at 1079.

38. *Id.*

39. *See* William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 560–61 (2013) (describing a purely linguistic analysis of the example as a "crazy legal analysis").

40. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 938 & n.111 (2013).

41. *Id.* at 938.

42. BRIAN G. SLOCUM, ORDINARY MEANING 215 (2016).

43. *Id.* at 215, 222.

44. *Id.* at 224–32; *cf.* Neal Goldfarb, *Words, Meanings, Corpora: A Lawyer's Introduction to Meaning in the Framework of Corpus Linguistics* (discussion draft, Jan. 26, 2017) *passim*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2907485 (stating that there are generally not clear boundaries between the different senses of a word; that

difficult than plucking out a dictionary definition, it acknowledges that "vagueness is an endemic aspect of meaning."[45]

Eight: Dictionaries are open to the same criticisms that textualists direct at legislative history: they are an external source of interpretation that *can* give rise to manipulation.[46] (In my view, though, legislative history has just as much claim to legitimacy and reliability as canons of construction.[47])

Nine: Although the Scalia–Garner treatise offers "primary principles to remember in using dictionaries,"[48] judges' actual performance has been dismal. Extensive scholarly review of many decisions makes it clear that "judges have devised no consistent, objective method for determining which dictionary to use and which definition to apply."[49] Another expression of the same refrain was based on a ten-year study: "the [Supreme] Court continues to use dictionaries at a high rate with little guidance [on] when to turn to dictionaries, which dictionaries to use, and how to use [them]."[50]

Even more disturbing are the conclusions from an in-depth empirical study: the Court's use of dictionaries is "strikingly ad hoc and subjective"; the justices tend "to cherry-pick definitions that support results reached on other grounds"; "the image of dictionary usage as . . . authoritative is little more than a mirage"; "dictionaries add at most modest value to the interpretive enterprise"; and "the Court has failed to engage with interested legal audiences who have expressed skepticism regarding [its] dictionary practices."[51]

Let me ask two questions. Do you think a similar study of the Michigan Supreme Court's use of dictionaries would produce different results? Do you expect, anytime soon, that the Court will become more restrained and principled in its own resort to dictionaries?

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phrases (not individual words), and more particularly the close association of words into contextual patterns, generally form the basic unit of meaning; and that traditional dictionaries are inadequate guides to these word "collocations").

45. SLOCUM, *supra* note 42, at 232.

46. Phillip A. Rubin, *War of the Words: How Courts Can Use Dictionaries in Accordance with Textualist Principles*, 60 DUKE L.J. 167, 172–77 (2010).

47. Kimble, *supra* note 11, at 37–41.

48. SCALIA & GARNER, *supra* note 24, at 418.

49. Rickie Sonpal, *Old Dictionaries and New Textualists*, 71 FORDHAM L. REV. 2177, 2197 (2003) (citing several previous articles).

50. Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77, 78 (2010).

51. James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Era*, 55 WM. & MARY L. REV. 483, 483, 491, 492, 493, 578 (2013).

A final word, along with a caveat. No one would suggest that courts should not be engaged in trying to determine the ordinary meaning of words in legal texts. To the contrary, William Eskridge, in his new book *Interpreting Law*, describes ordinary meaning as "the linchpin of statutory interpretation."[52] The trouble lies in a strictly textual approach to deciding on ordinary meaning and exaggerated notions of how often that undertaking admits of positive or right answers. As Eskridge puts it (and forcefully illustrates through multiple variations on the no-vehicles-in-the-park law):

> [*B*]*oth* statutory text *and* legislative purpose are critically important to a proper application of statutes—and they naturally operate together and not as competing approaches. . . . Text and purpose are like the two blades of a scissors: neither does the job without the operation of the other.[53]

As for certitude about ordinary meaning:

> [O]rdinary meaning is a *continuum*, and not an on–off switch. . . . A majority of the [Michigan Supreme] Court insists that few statutory provisions are truly ambiguous and claims that ambiguity only exists when two provisions are irreconcilably in conflict or there is a grammatical tie. . . . That is too narrow a view to take in statutory interpretation . . . .[54]

VII. THE TEXTUALISTS RESPOND FURTHER: LOOK AT THE CASES

In a section called "A Closer Look at the Overrulings," the response to Professor Sedler's article reviewed several groups of cases in an effort to rebut his contention that the overrulings "were ideologically driven."[55] I won't consider the entire lot, but only four cases in the first group, on the theory that equally good counterarguments could be made in all the cases. These four cases all involved issues of statutory interpretation, and in all of them, the Michigan Supreme Court was supposedly just "apply[ing] the statute's plain language"—so as not to "'usurp' . . . the legislative function."[56]

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52. ESKRIDGE, *supra* note 33, at 81.
53. *Id.* at 9.
54. *Id.* at 82.
55. Collier & DeRosier, *supra* note 13, at 1776.
56. *Id.* at 1777–78.

A pattern runs through the authors' case summaries: the statutory language, the ruling in the overruled case, an assertion that the previous ruling obviously ignored the plain text, and possibly an admonition about the judiciary's proper rule. The authors never mention the dissents, which were not based solely or even primarily on the dictates of *stare decisis* but disagreed with the majority on textual points as well. Nor did the authors mention the article coauthored by Justice Marilyn Kelly explaining why the majority's definition of ambiguity is "far outside of the legal mainstream."[57] Again, the Michigan Supreme Court has an unusually expansive view of what is plain.

Now, needless to say, a certain number of overrulings—and the authors' defense of them—were not grounded in textualism. I haven't tried to identify the purely or primarily textual decisions and separate them from the others. But those others are no doubt just as open to criticism for their one-sided results. Two broad nontextual reasons given for the overrulings are that the Michigan Supreme Court (1) was "address[ing] areas of genuine confusion in Michigan law"[58] or (2) was (ironically) "reinforc[ing] stare decisis by returning to earlier precedent."[59] Almost by definition, both of these reasons imply that the result could easily have gone the other way.

Take just one example, *Stitt v. Holland Abundant Life Fellowship*.[60] The plaintiff tripped in a church parking lot. The Court declined to treat her as a "public invitee"; only a commercial business visitor can be an invitee. The Court lamented that its "prior decisions have proven to be less than clear" and that it had to "provide some form of reconciliation."[61] The Court acknowledged that "a majority of jurisdictions . . . have adopted the public invitee definition set forth in § 332 of the Restatement."[62] But the Court was persuaded otherwise by one line of cases and *Cooley on Torts*. The extra effort and expense to make the premises safe for invitees "must be directly tied to the owner's commercial business interests."[63] In so ruling, the Court said that it "best serve[d] the interests of Michigan citizens."[64] As in virtually all of the Republican majority's civil cases, the best interests of the citizen–plaintiff, and other potential plaintiffs, counted for something less.

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57. Kelly & Postulka, *supra* note 32, at 288.

58. Collier & DeRosier, *supra* note 13, at 1792.

59. *Id.* at 1800.

60. Stitt v. Holland Abundant Life Fellowship, 462 Mich. 591, 614 N.W.2d 88 (2000).

61. *Id.* at 598, 603, 614 N.W.2d at 92, 95.

62. *Id.* at 607, 614 N.W.2d at 96.

63. *Id.* at 604, 614 N.W.2d at 95.

64. *Id.* at 607, 614 N.W.2d at 96.

Toward the end of their response, the authors quote Professor Sedler's statement that for 30 years the Court had "expand[ed] significantly the scope of tort liability."[65] The authors then say: "As Sedler admits, prior Courts had tipped the scales of justice in favor of plaintiffs for the previous three decades. Not only that, but . . . prior Courts did so by routinely departing from the plain language of governing statutes."[66] But if the latter-day Court was contracting tort law on the premise that it had tilted toward plaintiffs, that in itself was a policy-driven, not to say ideological, move. Whether the overruled cases had "routinely depart[ed] from the plain language of governing statutes" is another matter. That's the authors' refrain. Let's see about it.

A. Nawrocki v. Macomb County Road Commission[67]

This case (actually, consolidated cases) involved the defective-highway exception to governmental immunity. In the second case, a plaintiff alleged that the county had negligently failed to install additional stop signs or traffic signals. The statute creates a duty—or duties—and adds a limitation:

> Each governmental agency having jurisdiction over any highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. Any person sustaining bodily injury or damage to his or her property by reason of failure of any governmental agency to keep any highway under its jurisdiction in reasonable repair, and in condition reasonably safe and fit for travel, may recover the damages suffered by him or her from the governmental agency. . . . The duty of the state and county road commissions to repair and maintain highways, and the liability therefor, shall extend only to the improved portion of the highway designed for vehicular travel and shall not include sidewalks, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.[68]

The majority fractured the first sentence to conclude that it establishes a duty only to maintain and repair highways, not to keep them

65. Collier & DeRosier, *supra* note 13, at 1803 (quoting Sedler, *supra* note 1, at 1924).

66. *Id.*

67. Nawrocki v. Macomb Cty. Rd. Comm'n, 463 Mich. 143, 615 N.W.2d 702 (2000).

68. MICH. COMP. LAWS ANN. § 691.1402(1) (West 1999) (as it read at the time; later amended in ways not relevant to this decision).

reasonably safe.[69] Nor did the second sentence create a duty to keep them reasonably safe; it merely described the persons who could recover for a breach of the duty to repair. The dissent by Justice Kelly accused the majority of "render[ing] the second sentence nugatory."[70] She argued that the second sentence creates a duty to keep a highway "in reasonable repair *and* in a condition reasonably safe and fit for travel" and that "[i]t is illogical to . . . impose liability where there is no duty."[71]

You read those first two sentences. Is it altogether plain that they create only a single duty? The difference is important because the limitation in the last sentence above (the fourth in the statute) goes just to the duty to repair.

But even if there's no general duty to keep highways reasonably safe for travel, how do we interpret the limitation? The majority emphasized that exceptions to governmental immunity should be narrowly construed[72] (the kind of prescription, by the way, that even some committed textualists reject[73]). And, using the term *plain language* no fewer than 12 times, the majority decided that *improved portion of the highway designed for vehicular travel* denotes "the actual physical structure of the roadbed surface."[74] So the duty to repair does not extend to traffic signals. The dissent pointed out that the statute uses *improved* portion of the highway, not *surface portion* or *surface*: "'improved portion . . . designed for vehicular travel' connotes a broader concept than just the surface of the road, itself."[75]

Naturally, the opinions also brought related statutes to bear. Justice Kelly cited the two statutes that require state and county agencies to place traffic-control devices "upon" highways.[76] This indicates that they can be part of the highway without being literally part of the surface. She also cited a statute that, at the time, made municipalities potentially liable for known defects "outside of the improved portion of the highway."[77] She described as "senseless" a statutory scheme that would make it the duty of the state and county to place and maintain traffic-control devices

69. *Nawrocki*, 463 Mich. at 160, 615 N.W.2d at 711–12.

70. *Id.* at 192, 615 N.W.2d at 727 (Kelly, J., dissenting).

71. *Id.* at 192–93, 615 N.W.2d at 727.

72. *Id.* at 158, 615 N.W.2d at 711.

73. *See* SCALIA & GARNER, *supra* note 24, at 363 ("Without some textual indication, there is no reason to give statutory exceptions anything other than a fair (rather than a 'narrow') interpretation.").

74. *Nawrocki*, 463 Mich. at 183, 615 N.W.2d at 723.

75. *Id.* at 188, 615 N.W.2d at 725 (Kelly, J., dissenting).

76. *Id.* at 190, 615 N.W.2d at 726 (citing MICH. COMP. LAWS ANN. §§ 257.609(a) (West 1968), 257.610(a) (West 1972)).

77. *Id.* at 194, 615 N.W.2d at 728 (citing MICH. COMP. LAWS ANN. § 691.1402a(1) (West 1999)).

but place liability for defective devices on municipalities.[78] Even more senseless, it seems to me, is that the state and county would apparently not be liable for injuries if they never installed a traffic device on a single Michigan highway.[79]

The majority frankly acknowledged that "any number of interpretations of the [statute] might be—and have been—argued."[80] In a footnote to that concession, the majority noted the Court's previous ruling that the "improved portion" sentence, read in full, was meant to distinguish between dangers to vehicular travel and pedestrian travel. (Note the exclusion: "sidewalks, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.") But the majority insisted that its interpretation was "most compatible" with the statutory language and that previous decisions had fallen prey to "misreading."[81]

In the latter part of its opinion, the majority put forward a nontextual argument—the specter of lawsuits run wild. I suspect that this apprehension had as much to do with the result as did all the parsing.

B. Robertson v. DaimlerChrysler Corp.[82]

The plaintiff, Robertson, had worked for more than a decade as an artist in the defendant employer's Product Quality Improvement Department. When a new supervisor asked him to "redo"—on company time—some paintings on the supervisor's boat, Robertson refused. When he was moved to a new department, he had a falling-out with the supervisor, threatened him on one occasion, was disciplined, and wound up checking into a mental facility, where he stayed for six weeks. He continued to receive psychiatric care after his release and never returned to work. At the hearing on his disability claim, he testified that his trouble at work and his ensuing depression were caused by his refusal to work on the supervisor's boat. The defendant employer testified that he was in fact reassigned because the Product Quality Improvement Department had been shut down. There was apparently no question that he suffered from depression and that it was caused by events at work.

One sentence in the worker's compensation statute, § 301(2), controlled: "Mental disabilities shall be compensable when arising out of

78. *Id.* at 196, 615 N.W.2d at 728.

79. *Id.* at 185, 615 N.W.2d at 724 (Under the heading "Traffic Signs and Signals": "The state and county road commissions' duty, under the highway exception, . . . does not include signage.").

80. *Id.* at 167, 615 N.W.2d at 715.

81. *Id.* at 167 n.25, 615 N.W.2d at 715 n.25.

82. Robertson v. DaimlerChrysler Corp., 465 Mich. 732, 641 N.W.2d 567 (2002).

actual events of employment, not unfounded perceptions thereof."[83] So does Robertson recover?

The justices on one side concluded that a claimant needs to show that his or her perception of the employment event was grounded in fact or reality. The other justices argued that the claimant must show that the employment event actually occurred; he or she did not imagine it. Again, you decide: is the statute so altogether plain that an overruling was called for? A confident majority asserted that the overruled case "clearly misconstru[ed] the plain language of § 301(2)."[84] As you might have guessed, what those justices viewed as the manifestly correct reading was the one that favors employers: the claimant's perception must be grounded in fact. Otherwise, the words would not "mean what they say."[85]

The majority leaned on the surplusage canon: the second part of the sentence—*not unfounded perceptions thereof*—stated "an additional precondition that must be satisfied by claimants."[86] Otherwise, it would be extraneous. But the surplusage canon is generally weak and ill-founded to begin with.[87] To the extent that courts give it credence, they

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83. MICH. COMP. LAWS ANN. § 418.301(2) (West 2011).

84. *Robertson*, 465 Mich. at 757, 641 N.W.2d at 581.

85. *Id.* at 760, 641 N.W.2d at 582.

86. *Id.* at 749, 641 N.W.2d at 577.

87. LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 133 (2d ed. 2013) ("Statutes are not always carefully drafted. Legal drafters often intend to include redundant language to cover any unforeseen gaps or they simply fail to identify the redundancy timely. . . . Thus, the presumptions [underlying the canon] simply do not match political reality."); *see also* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1448, 1469 (2014) (citing strong evidence—the survey in the next footnote—that "repetition (i.e., surplusage) is typically what supporting institutions and groups want from the legislative process," so the canon is "antidemocratic in a serious way"); Eskridge, *supra* note 39, at 579 ("[T]he rule against surplusage . . . is especially problematic because the legislative process operates under the opposite assumption and so that canon will often thwart legislative deals rather than enforce them."); Brett M. Kavanaugh, *The Courts and the Administrative State*, 64 CASE W. RES. L. REV. 711, 718 (2014) ("[M]embers of Congress often want to be redundant [because] they want to 'make doubly sure.'"); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 812 (1983) ("[A] statute that is the product of compromise may contain redundant language as a by-product of the strains of the negotiating process."); Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural–Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 38 (2008) ("[T]he canon presuming the absence of surplus has long been criticized for assuming . . . that legislators are aware of how the various parts of [a] statute intertwine."); Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 572 (1992) (suggesting that the canon is "so contrary to real life experience that courts should simply stop using it"). *But see* SCALIA & GARNER, *supra* note 24, at 179

are out of tune with legislative drafters—the composers of statutes—who reject the canon as not reflecting how they actually draft.[88] At best, the canon states an interpretive preference[89]—and one that should rarely tilt the scales.

Perhaps in § 301(2) the second part of the sentence restates (rather than adds to) the first part, as in "the proposal must be written, not oral." That kind of construction does appear in Michigan statutes—abundantly. Here are some examples just from the Vehicle Code:

- "A lessee in possession of an off lease vehicle, and not the dealer of the vehicle, is liable as the owner of the vehicle for . . ."[90]

- "by permission of the owner and not as a matter of right . . ."[91]

- "at a careful and prudent speed, not greater than nor less than is reasonable and proper, . . ."[92]

- "shall serve as a supplement to, and not as a replacement for, . . ."[93]

- "The lessee or renter of a motor vehicle and not the leased vehicle owner is liable for . . ."[94]

(defending the canon on grounds that it is well known; it promotes better drafting; and "the retrograde practice of stringing out synonyms and near-synonyms . . . is so easily detectable that the canon can be appropriately discounted" [comment: if so, then why the endless cases debating its application?]).

88. *See* Gluck & Bressman, *supra* note 40, at 932, 933–36 (describing a survey of 137 congressional staffers in which about two-thirds said that, for practical and political reasons, the canon rarely or only sometimes applies to the work they produce); *see also* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. (forthcoming 2017) (manuscript at 59), http://ssrn.com/abstract=2783398 (arguing that "[i]t's no answer to say, as some defenders of the surplusage canon do, that '[s]tatutes *should* be carefully drafted,'" when the canon does not accord with actual usage and practice) (quoting SCALIA & GARNER, *supra* note 24, at 179).

89. *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2492 (2015) ("[O]ur preference for avoiding surplusage constructions is not absolute.") (quoting Lamie v. U.S. Trustee, 540 U.S. 526, 536 (2004)).

90. MICH. COMP. LAWS ANN. § 257.401(7) (West 2003).

91. *Id.* § 257.607 (West 2016).

92. *Id.* § 257.627(1) (West 2006).

93. *Id.* § 257.629e(2) (West 2003).

94. *Id.* § 257.675b(1) (West 2000).

- "each privately owned truck used to tow a trailer for recreational purposes only and not involved in a profit making venture . . ."[95]

- "motor vehicle . . . used exclusively in connection with the farmer's farming operations or for the transportation of the farmer and the farmer's family and not used for hire."[96]

And a handful more from different codes:

- "the facts and circumstances that exist at the time of a fiduciary's decision or action, and not by hindsight."[97]

- "Multiple owners . . . hold as joint tenants with right of survivorship or as tenants by the entireties, and not as tenants in common."[98]

- "shall become effective prospectively and not retroactively . . ."[99]

- "The assignor and not the assignee is responsible for . . ."[100]

- "The gift card is redeemable only for goods and services available from the retailer or retailers and not for cash."[101]

- "the commitment or sentence shall be to the county jail . . . and not to a state penal institution."[102]

Finding examples like these is not a challenge.

Back to *Robertson*. The trouble in the second half of the sentence in § 301(2) is fundamentally caused by the word *thereof*—that classic instance of pseudoprecise legalese. Does it mean perceptions *about* the employment event, that is, perceptions about what happened (the majority's view)? Or does it mean perceptions *of* the event, that is, perceptions of its having happened, as in "actual historical events, not

95. *Id.* § 257.801(j) (West 2014).
96. *Id.* § 257.802(10) (West 2015).
97. *Id.* § 700.1509 (West 2000).
98. *Id.* § 700.6302.
99. *Id.* § 500.1615(6) (West 2003).
100. *Id.* § 500.2080(6)(i) (West 2009).
101. *Id.* § 750.310b(c)(iii) (West 2010).
102. *Id.* § 769.28 (West 1999).

unfounded perceptions thereof"? Who knows for sure? The clipped drafting created ambiguity.

The dissent argued that the overruled case had correctly analyzed the legislative history of the statute: the legislature was responding to previous decisions that allowed claims for honest perceptions of imagined or hallucinatory events.[103] The dissent also questioned whether, under the majority's approach, "compensability for any mental disabilities would ever exist"[104]—because persons with mental disabilities regularly misconstrue events. But the majority thought it was none of the Court's business to interpret the statute in a way that would give it appreciable real-world value. As the response to Professor Sedler put it, "[T]he Court stressed that the judicial role does not include 'surmis[ing]' whether a result mandated [!] by statutory language is or is not 'absurd.'"[105]

A last, incidental observation. The majority ran through dictionary definitions of *actual*, *perception*, *apprehend*, *found*[*ed*], *base*, *ground*, and *thereof*.[106] It was a useless exercise, but one that textualists, especially, fancy as giving heft to their work.[107]

C. Trentadue v. Gorton[108]

In this case, the Court overturned a common-law discovery rule that Michigan courts had applied for over 50 years. The arguments involved a complicated interplay between statutes and decisions, and can only be summarized here.

A woman was murdered in 1986, but her murderer was not identified until 2002. In 1986, he had been an employee of one of the defendants. The victim's estate brought a wrongful-death action against the murderer, his employer, and other defendants. The estate, of course, contended that the statute of limitations was tolled during those years when the murderer's identity could not have been discovered.

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103. Robertson v. DaimlerChrysler Corp., 465 Mich. 732, 766, 641 N.W.2d 567, 585 (2002) (Cavanaugh, J., dissenting).

104. *Id.*

105. Collier & DeRosier, *supra* note 13, at 1779.

106. *Robertson*, 465 Mich. at 749–50, 641 N.W.2d at 576–77.

107. *See* Haynes v. Neshewat, 477 Mich. 29, 49, 729 N.W.2d 488, 500 (2007) (Markman, J., concurring) (commending dictionaries as "an essential tool in the interpretative process"); SLOCUM, *supra* note 42, at 23 ("[A] main (perhaps *the* main) tool of interpretation used by textualists is the dictionary."). But for an important case in which Democratic justices relied heavily on dictionaries, see McCormick v. Carrier, 487 Mich. 180, 795 N.W.2d 517 (2010).

108. Trentadue v. Gorton, 479 Mich. 378, 738 N.W.2d 664 (2007).

But the Court held that the statutory scheme for limitations periods, times of accrual, and tolling was comprehensive and exclusive[109]—thus abrogating any common-law discovery rule that tolls the time of accrual. In so holding, the majority overruled a line of cases going back to 1963.[110] Three justices dissented.

The general accrual statute provides that "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results."[111] A large part of the dispute was over the implication of express tolling provisions in several statutes that didn't apply in this case. To take one as an example, a medical-malpractice statute sets out its own discovery provisions:

> (1) [A] claim based on . . . medical malpractice . . . accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. . . .
>
> (2) [A]n action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in [the general statute of limitations], or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.[112]

The back-and-forth went something like this:

- Dissent: When the legislature abrogates the common law, "it should speak in no uncertain terms. . . . [N]owhere in [the statutory limitations chapter] . . . is there any language evidencing an intent by the Legislature to abolish the common-law discovery rule . . . ."[113]

- Majority: The legislature is not "bound to use certain language to convey its intent to abrogate the common law . . . . To the contrary, the[] cases direct us to examine the scheme as a whole and ask if it constitutes 'comprehensive legislation . . . .'"[114]

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109. *Id.* at 390–91, 738 N.W.2d at 671.
110. Johnson v. Caldwell, 371 Mich. 368, 123 N.W.2d 785 (1963).
111. MICH. COMP. LAWS ANN. § 600.5827 (West 2016).
112. *Id.* § 600.5838a.
113. *Trentadue*, 479 Mich. at 423, 738 N.W.2d at 688–89 (Weaver, J., dissenting).
114. *Id.* at 390 n.12, 738 N.W.2d at 671 n.12.

- Dissents: "[W]hen the Legislature wanted to supersede the common-law discovery rule, it did so specifically with regard to certain claims."[115] "By specifically limiting the discovery rule in professional negligence cases, the Legislature has implicitly acknowledged the applicability of the rule in other types of cases."[116]

- Majority: Just because the legislature approved the discovery rule in some instances doesn't mean "approval of every application of the rule."[117]

- Dissent: If there is no common-law discovery rule, then what's the point of excluding professional-negligence claims? The legislature would be removing those claims from the scope of a rule that the legislature "never recognized as existing."[118]

- Majority: The medical-malpractice statute "simultaneously authorizes [in § 2] *and* limits [in § 1] the circumstances under which tolling is appropriate."[119] So it does more than "take professional negligence claims outside the scope of the common-law discovery rule."[120] As for the limiting part in § 1, the legislature was "pointedly clarify[ing] that a malpractice claim *accrues* regardless of when it is discovered, consistent with the mandate in [the general accrual statute] . . . ."[121]

- Dissent: By authorizing a (short) discovery rule for the limitations period in § 2 of that statute, the legislature merely "took some of the sting out of removing professional negligence claims from the scope of the common-law rule."[122]

The two sides argued a number of other points as well, including the definition of "wrong" in the general accrual statute, whether that statute even applies to personal-injury actions, due process, the constitutionality of unreasonably short statutes of limitations, and the unfairness to plaintiffs in general—and this plaintiff in particular—of abolishing the

115. *Id.* at 425, 738 N.W.2d at 690 (Weaver, J., dissenting).
116. *Id.* at 440, 738 N.W.2d at 698 (Kelly, J., dissenting) (citation omitted).
117. *Id.* at 395, 738 N.W.2d at 674.
118. *Id.* at 440 n.7, 738 N.W.2d at 698 n.7 (Kelly, J., dissenting).
119. *Id.* at 396, 738 N.W.2d at 674.
120. *Id.* at 397, 738 N.W.2d at 675 (quoting Justice Kelly).
121. *Id.*
122. *Id.* at 440 n.7, 738 N.W.2d at 698 n.7 (Kelly, J., dissenting).

common-law rule. But the central question was whether the legislature had abrogated the discovery rule. And that was hotly debated, if not highly debatable.

Finally, the majority referred several times to the *plain language* of the general accrual statute.[123] Those references were largely gratuitous. The case did not turn on what the words of the statute meant, but on the survival of an associated rule.

D. People v. Gardner[124]

This time the Court explicitly overruled cases from 1987 and 1990, and arguably overturned interpretations of a statute first passed in 1927.

The defendant had been convicted of two crimes that he committed simultaneously (felonious assault and felony-firearm). When he was later convicted of additional crimes, the judge sentenced him as a third-offense habitual offender—counting the earlier crimes as two offenses instead of one.

Here's the part of the statute at issue: "If a person has been convicted of any combination of 2 or more felonies . . . and that person commits a subsequent felony . . . , the person shall be punished upon conviction . . . ."[125] The majority isolated the phrase *any combination of two or more felonies* and, once again, repeatedly trotted out the terms *clear*, *unambiguous*, *plain text*, and *plain meaning*. (For variety, perhaps, it added one *perfectly forthright*.[126]) The Court held that the two previous felonies need not have occurred in separate incidents; they could occur simultaneously.[127]

One of the dissenting opinions, by Justice Cavanagh, looked at the bigger picture, beyond just the statute's first clause. He pointed out that the statute is the first of three consecutive statutes "that together allow enhanced penalties on an increasing scale for an offender's second, third, and fourth offenses."[128] Because those statutes enhance the penalties for *subsequent* felonies, the defendant could not have been sentenced as a second-offense habitual offender when he was convicted of his original two simultaneous felonies. "But now, without intervening convictions, defendant has been sentenced as a third-offense habitual offender because of simultaneous, not subsequent, convictions."[129] This defeats

123. *Id.* at 392 & n.14, 407, 738 N.W.2d at 672 & n.14, 680.
124. People v. Gardner, 482 Mich. 41, 753 N.W.2d 78 (2008).
125. MICH. COMP. LAWS ANN. § 769.11(1) (West 2007).
126. *Gardner*, 482 Mich. at 65, 753 N.W.2d at 93.
127. *Id.* at 68, 753 N.W.2d at 95.
128. *Id.* at 71–72, 753 N.W.2d at 96 (citations omitted).
129. *Id.* at 73, 753 N.W.2d at 97.

the legislative intent of enhancing the punishment for someone who is a persistent, repeat offender.

Much of the debate centered on the history of the statute and the case interpretations. The justices in the majority were critical of the use of legislative history by the overruled cases.[130] Of course, textualists are generally dismissive of legislative history. I believe they are mistaken.[131] As for the common objection that legislative history lends itself to cherry-picking, Justice Cavanagh had this to say: "If this were so, one imagines the majority could marshal evidence from legislative history supporting its interpretation . . . . The majority cannot. Such evidence does not exist."[132]

Of particular interest in this case were the 1978 amendments to the habitual-offender statutes. The majority fastened on the change in the disputed first clause and how the change was treated in one of the overruled cases, *People v. Stoudemire*:[133]

> Significantly, *Stoudemire* avoided the import of the statutory text, in part, by dismissing the Legislature's 1978 revisions of the text in 1978 PA 77. . . . [T]he Court dismissed this significant change [to the first clause], concluding that "when considered in the context of the other changes made in the statute it is clear that the Legislature intended only to improve the statute's grammar, not to alter its underlying meaning."[134]

But by isolating the first clause, the majority missed the main purpose of the 1978 amendments.

The *Stoudemire* Court had it right: the 1978 change in the first clause "was primarily an editing amendment as part of changes made concerning controlled substance offenses."[135] The 1978 Public Act 77 added a definition of *major controlled substance offense* in Mich. Comp. Laws § 761.2 and then amended ten statutes—including the three habitual-offender statutes—to include that term. Here is the third-offense statute, § 769.11, before the amendments (apologies for the length):

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130. *See id.* at 55–57, 753 N.W.2d at 88–89.

131. *See* Kimble, *supra* note 11, at 37–41 (listing a dozen arguments for the value of legislative history and concluding that "[c]anons as a group have no superior claim to legitimacy, orderliness, reliability, or acceptance").

132. *Gardner*, 482 Mich. at 74, 753 N.W.2d at 98.

133. People v. Stoudemire, 429 Mich. 262, 414 N.W.2d 693 (1987) (dealing with the fourth-offense statute).

134. *Gardner*, 482 Mich. at 53, 753 N.W.2d at 86 (quoting *Stoudemire*, 429 Mich. at 278, 414 N.W.2d at 700).

135. *Stoudemire*, 429 Mich. at 276, 414 N.W.2d at 700.

> A person who after having been twice convicted within this state of a felony or an attempt to commit a felony, or under the laws of any other states, governments or countries, of a crime which if committed within this state would be a felony, commits any felony within this state, is punishable upon conviction as follows: If the felony for which such offender is tried is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then such person may be sentenced to imprisonment for a term not more than twice the longest term prescribed by law for a first conviction of such offense or for any lesser term in the discretion of the court; if the subsequent felony is such that, upon a first conviction the offender might be punished by imprisonment for life then such person may be sentenced to imprisonment for life or for any lesser term in the discretion of the court.[136]

Notice: no mention of *major controlled substance offense.*

The revised § 769.11 (which I'll put in a footnote if you really want to read it[137]) was broken into two subsections, with a vertical list—(a),

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136. MICH. COMP. LAWS § 769.11 (1970).

137. (1) If a person has been convicted of 2 or more felonies, attempts to commit felonies, or both, whether the convictions occurred in this state or would have been for felonies in this state if the convictions obtained outside this state had been obtained in this state, and that person commits a subsequent felony within this state, the person shall be punished upon conviction as follows:

(a) If the subsequent felony is punishable upon a first conviction by imprisonment for a term less than life, then the Court, except as otherwise provided in this section or section 1 of chapter 11, may sentence the person to imprisonment for a maximum term which is not more than twice the longest term prescribed by law for a first conviction of that offense or for a lesser term.

(b) If the subsequent felony is punishable upon a first conviction by imprisonment for life, then the Court, except as otherwise provided in this section or section 1 of chapter 11, may sentence the person to imprisonment for life or for a lesser term.

(c) If the subsequent felony is a major controlled substance offense, the person shall be punished as provided by Act No. 196 of the Public Acts of 1971, as amended.

(2) If the Court pursuant to this section imposes a sentence of imprisonment for any term of years, the Court shall fix the length of both the minimum and maximum sentence within any specified limits in terms of years or fraction thereof, and the sentence so imposed shall be considered an indeterminate sentence.

[The statute has since been further amended; the version at issue in *Gardner* was slightly but insignificantly different.]

(b), (c)—in subsection (1). And the third item in the list, item (1)(c), was entirely new: "If the subsequent felony is a major controlled substance offense, the person shall be punished as provided by Act No. 196 of the Public Acts of 1971, as amended."[138] That's why the statute was amended in 1978—to add that controlled-substance piece. It had nothing to do with the first clause.

At the same time, the drafters did what drafters do—tried to improve the style, tried to perform some cleanup.[139] For example:

- The silly uses of *such* in *If the felony for which such offender is tried is such that upon a first conviction* were changed to *If the subsequent felony is punishable upon a first conviction.*

- In that same example, *offender* was changed to *person*, presumably for internal consistency.

- The pronoun *his* was eliminated.

- The passive voice was changed to active voice: not *such person may be sentenced*, but *the court . . . may sentence the person.*

- Two uses of *in the discretion of* [the court] were dropped because the expression is surplus. The word *may* means "is permitted to," "has the authority to," "has the discretion to." (And you don't need a dictionary to tell you that.)

- Three uses of *any* were changed to *a.*

- A comma was added after the next-to-last use of *imprisonment for life.*

Were any of these changes substantive? Of course not. And neither were the changes in the first part of the statute. Look again at the pre-1978 version, everything before the colon. It's a drafting muddle, mainly because of the 49-word gap between the main subject (*person*) and its verb (*is*). The drafters made it better by converting to a conditional clause (*If a person has been convicted*) and then repeating *person* (*and that person*). Not great, but better.

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138. *Id.* § 769.11(1)(c).
139. *See supra* note 137.

In the end, as Justice Cavanagh said in his dissent, "The majority's overruling of a century and a half of Michigan jurisprudence is not based on the 1978 revisions."[140] It was based on a reading that is all too typical of textualism: narrow, mechanical, hyperliteral, and full of self-assurance about "plain meaning" and "plain language."

VIII. THE UPSHOT

Presumably, the authors of the response to Professor Sedler's article picked the cases that they thought made their argument most convincingly. After examining four cases in their first category of overrulings, I doubt that many of their other cases are any more unassailable. I don't claim that the Court was wrong every time—only that the calls were much closer than the authors suggest; the disputed language was, in context, anything but plain; and the term *plain language* is becoming little more than a shibboleth. Judges of all dispositions use and abuse it, but textualists more than others. Isn't it remarkable, after all, not only that "plain language" should produce conservative results so regularly but also that previous court majorities should have misread it so often?

In practice, textualism has devolved into a vehicle for ideological judging—disguised as deference to the legislature. The numbers in Michigan, though, blow its cover: 81 cases overruled, and civil plaintiffs and criminal defendants lost in more than 90% of them.

Textualists exaggerate the number of appellate cases in which the text alone yields a singular or self-evident meaning.[141] They figure that if they study hard enough all the various and often conflicting textual clues, they will discover the intended meaning. And they largely discount the value of intuition, common sense, legislative history, real-world consequences, and sensible policy in deciding cases. But if the Michigan overrulings are any indication, too many textualists have convinced themselves that they merely follow the text—instead of backing into the textual analysis that supports the outcome they prefer. Unconsciously or not, they let their priors run away with them.

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140. People v. Gardner, 482 Mich. 41, 78, 753 N.W.2d 78, 100 (2008).

141. Besides the cases discussed earlier, see SLOCUM, *supra* note 42, at 292–97 (listing 55 recent United States Supreme Court cases involving statutory interpretation in which the Court mentioned *ordinary meaning*, and in 38 of which there was a dissenting opinion on the interpretive issue).

IX. NOTES ON THE CHARTS THAT FOLLOW

* For the civil cases, one asterisk designates a case that made it harder to sue and recover or get relief. For the criminal cases, it designates a case that favored the prosecution in some way by making it easier to convict, harder to get a charge dismissed, harder to get a resentencing, and so on.

** Two asterisks indicate the opposite: the overruling case generally favored plaintiffs in civil cases and defendants (or defendants' rights) in criminal cases.

N/A This designates an overruling case in which the distinctions above do not apply.

√ A check mark in the second column indicates that the overruled case was unanimous—no one dissented, at least—on the point that was later overruled. I did not review the N/A cases on that score. I did review and mark the court of appeals cases in the second column, but I did not include them in the calculation (p. 352) that Republican majorities overruled unanimous precedent 46.6% of the time. The check mark refers to the cited case, the first one in the second column, not to the general mention of any "others" that were also overruled.

Citations I first put these charts together in 2008, using the *Michigan Uniform System of Citation* and the state reporter only. I did the same when I brought the charts up to date through 2015, before writing the article itself. The editors have converted the state-reporter citations to *Bluebook* form, and we have agreed to omit the regional-reporter citations.

Civil Cases		
Overruling Case	**Case Overruled**	**Years of Precedent Overruled**
* Robinson v. City of Detroit, 462 Mich. 439 (2000).	Fiser v. City of Ann Arbor, 417 Mich. 461 (1983) & 2 other cases. √	17
* Stitt v. Holland Abundant Life Fellowship, 462 Mich. 591 (2000).	Preston v. Sleziak, 383 Mich. 442 (1970); 3 cases abrogated. √	30
N/A Mudel v. Great Atl. & Pac. Tea Co., 462 Mich. 691 (2000).	Goff v. Bil-Mar Foods, Inc., 454 Mich. 507 (1997) & 1 other case.	3
* Nawrocki v. Macomb Cty. Rd. Comm'n, 463 Mich. 143 (2000).	Pick v. Szymczak, 451 Mich. 607 (1996).	4
* MacDonald v. PKT, Inc., 464 Mich. 322 (2001).	Mason v. Royal Dequindre, Inc., 455 Mich. 391 (1997).	4

Overruling Case	Case Overruled	Years of Precedent Overruled
* Brown v. Genesee Cty. Bd. of Comm'rs, 464 Mich. 430 (2001).	Green v. State Dep't Corr., 386 Mich. 459 (1971). √	30
* Hanson v. Bd. of Cty. Rd. Comm'rs of Cty. of Mecosta, 465 Mich. 492 (2002).	Peters v. State Highway Dep't, 400 Mich. 50 (1977) & 2 other cases (effectively overruled, according to the dissent). √	25
* Pohutski v. City of Allen Park, 465 Mich. 675 (2002).	Hadfield v. Oakland Cty. Drain Comm'r, 430 Mich. 139 (1988) & 1 other case. √	14
* Robertson v. DaimlerChrysler Corp., 465 Mich. 732 (2002).	Gardner v. Van Buren Pub. Sch., 445 Mich. 23 (1994).	8
N/A Lesner v. Liquid Disposal, Inc., 466 Mich. 95 (2002).	Weems v. Chrysler Corp., 448 Mich. 679 (1995).	7
* Koontz v. Ameritech Servs., Inc., 466 Mich. 304 (2002).	Corbett v. Plymouth Twp., 453 Mich. 522 (1996).	6

Overruling Case	Case Overruled	Years of Precedent Overruled
* Sington v. Chrysler Corp., 467 Mich. 144 (2002).	Haske v. Transp. Leasing, Inc., 455 Mich. 628 (1997).	5
* Mack v. City of Detroit, 467 Mich. 186 (2002).	McCummings v. Hurley Med. Ctr., 433 Mich. 404 (1989).	13
* Taylor v. Smithkline Beecham Corp., 468 Mich. 1 (2003).	Dearborn Indep., Inc. v. Dearborn, 331 Mich. 447 (1951). √	52
* Rednour v. Hastings Mut. Ins. Co., 468 Mich. 241 (2003).	Nickerson v. Citizens Mut. Ins. Co., 393 Mich. 324 (1975). √	28
* Haynie v. State, 468 Mich. 302 (2003).	Koester v. City of Novi, 458 Mich. 1 (1998).	5
* Gladych v. New Family Homes, Inc., 468 Mich. 594 (2003).	Buscaino v. Rhodes, 385 Mich. 474 (1971). √	32

Overruling Case	Case Overruled	Years of Precedent Overruled
N/A Jones v. Dep't of Corr., 468 Mich. 646 (2003).	In re Lane, 377 Mich. 695 (1966) & 1 other case.	37
* Wilkie v. Auto-Owners Ins. Co., 469 Mich. 41 (2003).	Powers v. Detroit Auto. Inter-Ins. Exch., 427 Mich. 602 (1986) & 5 other cases.	17
* Rakestraw v. Gen. Dynamics Land Sys., Inc., 469 Mich. 220 (2003).	Carter v. Gen. Motors Corp., 361 Mich. 577 (1960).	43
* Waltz v. Wyse, 469 Mich. 642 (2004).	Omelenchuk v. City of Warren, 461 Mich. 567 (2000). √	4
* Neal v. Wilkes, 470 Mich. 661 (2004).	Wymer v. Holmes, 429 Mich. 66 (1987). √	17
N/A City of Wayne v. Hathcock, 471 Mich. 445 (2004).	Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616 (1981).	23

Overruling Case	Case Overruled	Years of Precedent Overruled
* Echelon Homes, LLC v. Carter Lumber Co., 472 Mich. 192 (2005).	People v. Tantenella, 212 Mich. 614 (1920). √	85
* Garg v. Macomb Cty. Cmty. Mental Health Servs., 472 Mich. 263 (2005).	Sumner v. Goodyear Tire & Rubber Co., 427 Mich. 505 (1986). √	19
* Griffith ex rel. Griffith v. State Farm Mut. Auto. Ins. Co., 472 Mich. 521 (2005).	Reed v. Citizens Ins. Co., 198 Mich. App. 443 (1993). √	12
* Rory v. Cont'l Ins. Co., 473 Mich. 457 (2005).	Tom Thomas Org., Inc. v. Reliance Ins. Co., 396 Mich. 588 (1976) & 2 other cases.	29
* Devillers v. Auto Club Ins. Ass'n, 473 Mich. 562 (2005).	Lewis v. Detroit Auto Inter-Ins. Exch., 426 Mich. 93 (1986).	19
* Joliet v. Pitoniak, 475 Mich. 30 (2006).	Jacobson v. Parda Fed. Credit Union, 457 Mich. 318 (1998).	8

Overruling Case	Case Overruled	Years of Precedent Overruled
* Grimes v. Dep't of Transp., 475 Mich. 72 (2006).	Gregg v. State Highway Dep't, 435 Mich. 307 (1990).	16
* Cameron v. Auto Club Ins. Ass'n, 476 Mich. 55 (2006).	Geiger v. Detroit Auto. Inter-Ins. Exch., 114 Mich. App. 283 (1982). √	24
* Paige v. City of Sterling Heights, 476 Mich. 495 (2006).	Hagerman v. Gencorp Auto., 457 Mich. 720 (1998).	8
** Haynes v. Neshewat, 477 Mich. 29 (2007).	Kassab v. Mich. Basic Prop. Ins. Ass'n, 441 Mich. 433 (1992).	15
* Rowland v. Washtenaw Cty. Rd. Comm'n, 477 Mich. 197 (2007).	Hobbs v. Mich. State Highway Dep't, 398 Mich. 90 (1976) & 1 other case.	31
* Al-Shimmari v. Detroit Med. Ctr., 477 Mich. 280 (2007).	Rogers v. Colonial Fed. Sav. & Loan Ass'n, 405 Mich. 607 (1979) (on one issue); Penny v. ABA Pharm. Co., 203 Mich. App. 178 (1993) (on another).	28

Overruling Case	Case Overruled	Years of Precedent Overruled
* Karaczewski v. Farbman Stein & Co., 478 Mich. 28 (2007).	Boyd v. W. G. Wade Shows, 443 Mich. 515 (1993).	14
* Renny v. Mich. Dep't of Transp., 478 Mich. 490 (2007).	Bush v. Oscoda Area Sch., 405 Mich. 716 (1979) & 3 other cases. √	28
* Trentadue v. Gorton, 479 Mich. 378 (2007).	Johnson v. Caldwell, 371 Mich. 368 (1963) & at least 1 other case. √	44
* Wesche v. Mecosta Cty. Rd. Comm'n, 480 Mich. 75 (2008).	Endykiewicz v. State Highway Comm'n, 414 Mich. 377 (1982). √	26
* Moore v. Secura Ins., 482 Mich. 507 (2008).	Liddell v. Detroit Auto. Inter-Ins. Exch., 102 Mich. App. 636 (1981). √	27
N/A Kyser v. Kasson Twp., 486 Mich. 514 (2010).	Silva v. Ada Twp., 416 Mich. 153 (1982).	28

Overruling Case	Case Overruled	Years of Precedent Overruled
N/A Brightwell v. Fifth Third Bank of Mich., 487 Mich. 151 (2010).	Barnes v. Int'l Bus. Machines Corp., 212 Mich. App. 223 (1995).	15
** McCormick v. Carrier, 487 Mich. 180 (2010).	Kreiner v. Fischer, 471 Mich. 109 (2004).	6
** Regents of Univ. of Mich. v. Titan Ins. Co., 487 Mich. 289 (2010).	Cameron v. Auto Club Ins. Ass'n, 476 Mich. 55 (2006) & 1 other case.	4
** Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ., 487 Mich. 349 (2010).	Lee v. Macomb Cty. Bd. of Comm'rs, 464 Mich. 726 (2001) & 5 other cases.	9
N/A Bezeau v. Palace Sports & Entm't, Inc., 487 Mich. 455 (2010).	Karaczewski v. Farbman Stein & Co., 478 Mich. 28 (2007).	3
** Shay v. Aldrich, 487 Mich. 648 (2010).	Romska v. Opper, 234 Mich. App. 512 (1999).	11

Overruling Case	Case Overruled	Years of Precedent Overruled
** Anglers of the AuSable, Inc. v. Dep't of Envtl. Quality, 488 Mich. 69 (2010) (*vacated*, 489 Mich. 884 (2011)).	Preserve the Dunes, Inc. v. Dep't of Envtl. Quality, 471 Mich. 508 (2004).	6
N/A Attorney Gen. v. Clarke, 489 Mich. 61 (2011).	Repudiated plurality opinion in Kelley v. Riley, 417 Mich. 119 (1983).	28
** Miller-Davis Co. v. Ahrens Constr., Inc., 489 Mich. 355 (2011).	Mich. Millers Mut. Ins. Co. v. W. Detroit Bldg. Co., 196 Mich. App. 367 (1992) & 1 other case. √	19
* Hamed v. Wayne Cty., 490 Mich. 1 (2011).	Champion v. Nationwide Sec., Inc., 450 Mich. 702 (1996). √	15
* Joseph v. Auto Club Ins. Ass'n, 491 Mich. 200 (2012).	Regents of Univ. of Mich. v. Titan Ins. Co., 487 Mich. 289 (2010).	2
* Titan Ins. Co. v. Hyten, 491 Mich. 547 (2012).	State Farm Mut. Auto. Ins. Co. v. Kurylowicz, 67 Mich. App. 568 (1976) & 3 other cases. √	36

Overruling Case	Case Overruled	Years of Precedent Overruled
* Spectrum Health Hosps. v. Farm Bureau Mut. Ins. Co. of Mich., 492 Mich. 503 (2012).	Bronson Methodist Hosp. v. Forshee, 198 Mich. App. 617 (1993) & 5 other cases. √	19
N/A Stand Up for Democracy v. Sec'y of State, 492 Mich. 588 (2012).	Charter Twp. of Bloomfield v. Oakland Cty. Clerk, 253 Mich. App. 1 (2002).	10
* Smitter v. Thornapple Twp., 494 Mich. 121 (2013).	Rahman v. Detroit Bd. of Educ., 245 Mich. App. 103 (2001) & 6 other cases. √	12
N/A In re Sanders, 495 Mich. 394 (2014).	In re C.R., 250 Mich. App. 185 (2001).	13
* Speicher v. Columbia Twp. Bd. of Trustees, 497 Mich. 125 (2014).	Ridenour v. Bd. of Educ. of Dearborn Sch. Dist., 111 Mich. App. 798 (1981). √	33
N/A UAW v. Green, 498 Mich. 282 (2015).	Dudkin v. Mich. Civil Serv. Comm'n, 127 Mich. App. 397 (1983).	32

Criminal Cases		
Overruling Case	**Case Overruled**	**Years of Precedent Overruled**
* People v. Kazmierczak, 461 Mich. 411 (2000).	People v. Taylor, 454 Mich. 580 (1997).	3
* People v. Glass, 464 Mich. 266 (2001).	People v. Duncan, 388 Mich. 489 (1972).	29
* People v. Cornell, 466 Mich. 335 (2002).	People v. Jones, 395 Mich. 379 (1975) & 3 other cases.	27
* People v. Hardiman, 466 Mich. 417 (2002).	People v. Atley, 392 Mich. 298 (1974).	28
* People v. Petit, 466 Mich. 624 (2002).	People v. Berry, 409 Mich. 774 (1980). √	22

Overruling Case	Case Overruled	Years of Precedent Overruled
* People v. Hawkins, 468 Mich. 488 (2003).	People v. Sherbine, 421 Mich. 502 (1984) & 1 other case; 1 case abrogated.	19
N/A People v. Mendoza, 468 Mich. 527 (2003).	People v. Van Wyck, 402 Mich. 266 (1978).	25
* People v. Weeder, 469 Mich. 493 (2004).	People v. McIntosh, 400 Mich. 1 (1977). √	27
* People v. Nutt, 469 Mich. 565 (2004).	People v. White, 390 Mich. 245 (1973) & 3 other cases; 1 case abrogated.	31
* People v. Moore, 470 Mich. 56 (2004).	People v. Johnson, 411 Mich. 50 (1981). √	23
* People v. Lively, 470 Mich. 248 (2004).	People v. Collier, 1 Mich. 137 (1848) & 6 other cases; 3 cases abrogated. √	156

Overruling Case	Case Overruled	Years of Precedent Overruled
* People v. Goldston, 470 Mich. 523 (2004) (adopted good-faith exception for first time since exclusionary rule adopted in 1919).	People v. Jackson, 180 Mich. App. 339 (1989) & 1 other case.	15
* People v. Hickman, 470 Mich. 602 (2004).	People v. Anderson, 389 Mich. 155 (1973). √	31
* People v. Young, 472 Mich. 130 (2005).	People v. McCoy, 392 Mich. 231 (1974).	31
* People v. Davis, 472 Mich. 156 (2005).	People v. Cooper, 398 Mich. 450 (1976). √	29
* People v. Starks, 473 Mich. 227 (2005).	People v. Worrell, 417 Mich. 617 (1983).	22

Overruling Case	Case Overruled	Years of Precedent Overruled
* People v. Schaefer, 473 Mich. 418 (2005).	People v. Lardie, 452 Mich. 231 (1996).	9
* People v. Hawthorne, 474 Mich. 174 (2006).	People v. Jones, 395 Mich. 379 (1975) & 4 other cases.	31
* People v. Anstey, 476 Mich. 436 (2006).	People v. Koval, 371 Mich. 453 (1963) & 7 other cases. √	43
* People v. Smith, 478 Mich. 292 (2007).	People v. Robideau, 419 Mich. 458 (1984).	23
N/A People v. Barrett, 480 Mich. 125 (2008).	People v. Burton, 433 Mich. 268 (1989).	19
* People v. Ream, 481 Mich. 223 (2008).	People v. Wilder, 411 Mich. 328 (1981); 1 case abrogated. √	27

Overruling Case	Case Overruled	Years of Precedent Overruled
* People v. Gardner, 482 Mich. 41 (2008).	People v. Stoudemire, 429 Mich. 262 (1987) & 1 other case.	21
* People v. Taylor, 482 Mich. 368 (2008).	People v. Poole, 444 Mich. 151 (1993) (abrogated). √	15
* People v. Williams, 483 Mich. 226 (2009).	People v. Tobey, 401 Mich. 141 (1977) (superseded). √	32
** People v. Feezel, 486 Mich. 184 (2010).	People v. Derror, 475 Mich. 316 (2006).	4
* People v. Houthoofd, 487 Mich. 568 (2010).	People v. Warner, 201 Mich. 547 (1918) & 2 other cases (abrogated). √	92
* People v. Breidenbach, 489 Mich. 1 (2011).	People v. Helzer, 404 Mich. 410 (1978). √	33

Overruling Case	Case Overruled	Years of Precedent Overruled
* People v. Evans, 491 Mich. 1 (2012).	People v. Nix, 453 Mich. 619 (1996) (effectively overruled, according to the dissent).	16
* People v. Buie, 491 Mich. 294 (2012).	People v. Lawson, 124 Mich. App. 371 (1983). √	29
* People v. Bryant, 491 Mich. 575 (2012).	People v. Hubbard (After Remand), 217 Mich. App. 459 (1996). √	16
N/A People v. Minch, 493 Mich. 87 (2012).	Banks v. Detroit Police Dep't, 183 Mich. App. 175 (1990).	22
* People v. Harris, 495 Mich. 120 (2014).	People v. Fobb, 145 Mich. App. 786 (1985) & 1 other case. √	29
** People v. Chenault, 495 Mich. 142 (2014).	People v. Lester, 232 Mich. App. 262 (1998). √	16

Overruling Case	Case Overruled	Years of Precedent Overruled
* People v. Smith, 496 Mich. 133 (2014).	People v. McLott, 70 Mich. App. 524 (1976) & 3 other cases. √	38
* People v. Tanner, 496 Mich. 199 (2014).	People v. Bender, 452 Mich. 594 (1996).	18
N/A People v. McKinley, 496 Mich. 410 (2014).	People v. Gahan, 456 Mich. 264 (1997).	17