

HIGH COURT STUDIES

STARE DECISIS v. THE “NEW MAJORITY”: THE MICHIGAN SUPREME COURT’S PRACTICE OF OVERRULING PRECEDENT, 1998–2002

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I. INTRODUCTION

The 2000 election for the Michigan Supreme Court went down in history as Michigan’s most expensive judicial race ever.¹ In addition to having spent in excess of fifteen million dollars, the campaign was tarnished by vicious mud-slinging and accusations by both the Republican and Democratic parties.² Three open seats on the Michigan Supreme Court, previously held by conservative justices appointed by Governor John Engler, spurred this unprecedented battle.³ Although Michigan Supreme Court Justices are elected in a

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¹ See Judy Putnam, *Michigan Supreme Court Justices Will Return to Bench: The Costly and Controversial Challenge to Unseat Engler-Appointed Judges Fails*, GRAND RAPIDS PRESS, Nov. 8, 2000, at A21, available at 2000 WL 29127305.

² See Peter Luke, *Biting Campaigns Eat Away at Supreme Court’s Prestige*, GRAND RAPIDS PRESS, Nov. 19, 2000, at A29 (recanting the television advertising for the 2000 judicial race where both Democrats and Republicans accused the other side of being “either paid stooges for the insurance industry, or menaces to society in general and children in particular”), available at 2000 WL 29129396; Peter Luke, *Lawsuit Ruling Reveals Changes at High Court: The Engler Appointees Turn the Court in a Different Direction, Much to the Disdain of Democrats*, GRAND RAPIDS PRESS, Sept. 17, 2000, at A23 (noting the Democratic Party’s attempt at discrediting Governor Engler’s appointees by labeling the three incumbent Justices “tools of corporate Michigan”), available at 2000 WL 25166250.

³ Governor Engler appointed Justice Clifford W. Taylor to replace Justice Dorothy Comstock Riley, Justice Robert P. Young, Jr. to fill the seat vacated by Chief Justice Conrad L. Mallett, Jr., and Justice Stephen J. Markman to fill the vacancy left by Justice James H. Brickley. See MICHIGAN COURTS, BIOGRAPHIES OF THE JUSTICES, at <http://courts.michigan.gov/supremecourt/aboutcourt/biography.htm> (last visited Feb. 18, 2003)

nonpartisan election, they are nominated at party conventions, and they receive the support of the Republican and Democratic parties.⁴ When the dust settled from the 2000 election, the Republican incumbents had prevailed over their Democratic-backed counterparts, and a conservative bloc remained in the Michigan Supreme Court.⁵

During the election, the Democratic party's attacks focused on the court's practice of overturning precedent, a trend that increased dramatically from 1998 to 2002.⁶ The Democratic Party contended that this increase reflected a conservative shift in the Michigan Supreme Court created by the Engler-appointed justices, and that these conservative justices were overturning precedent to change the law to favor corporations—especially insurance companies.⁷

The criticism directed toward the conservative majority remained after the 2000 election, and was voiced not only by politicians but also through dissent within the court chambers.⁸ Why has the new court, beginning with the Engler-appointed justices, felt the need to overturn precedent at nearly twice the rate of the era before them? What do these opinions tell Michigan constituents about the ideologies of the justices sitting on their highest court? Is there truth behind the allegations made by the Democratic Party during the 2000 election, or is the conservative majority simply returning the Michigan Supreme Court to its “proper role of interpreting the law, not creating it”?⁹

This study seeks to answer these questions by examining cases from 1998 to 2002 in which the majority chose to overturn past case law.¹⁰ By analyzing the majority, concurring, and dissenting

[hereinafter BIOGRAPHIES OF THE JUSTICES].

⁴ See Putnam, *supra* note 1, at A21 (explaining that, although a Justice's party affiliation does not appear on the ballot, incumbent Justices' parties are identified).

⁵ See *id.* (noting that the appointment of three conservative Justices by Governor Engler gave the Michigan Supreme Court a five-to-two conservative majority).

⁶ See *Sington v. Chrysler Corp.*, 648 N.W.2d 624, 643 (Mich. 2002) (Kelly, J., dissenting) (comparing the years from 1993 to 1997, during which the Michigan Supreme Court ruled on 13,682 cases and overturned precedent in approximately twelve cases, to the time period from 1998 to June 30, 2002, during which the court disposed of 11,190 cases and overturned precedent in at least twenty-two cases).

⁷ See Judy Putnam, *Appointee of Engler Denies Slant on Court*, GRAND RAPIDS PRESS, Oct. 29, 2000, at D1, available at 2000 WL 25174084.

⁸ See, e.g., *Sington*, 648 N.W.2d at 646 (Kelly, J., dissenting) (questioning whether “reasoned adherence to stare decisis may properly be considered a policy” of the Michigan Supreme Court).

⁹ Judy Putnam, *Justice Proud of His Role in ‘Redirecting’ State Courts*, GRAND RAPIDS PRESS, Oct. 22, 2000, at F1 (citing Justice Taylor), available at 2000 WL 25172695.

¹⁰ The cases for this study were chosen by employing a Westlaw search within the five-year

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opinions written by each Michigan Supreme Court Justice, this study will identify individual Justices' voting patterns and the ideologies that underlie their respective decisions.

II. DEFINING CONSERVATISM AND LIBERALISM

Before categorizing the Michigan Supreme Court decisions and their authors as conservative or liberal, it is necessary to define these terms as they exist as political ideologies. Conservatism embodies the principle that individuals hold inherent rights that are best protected by limiting the power of the government.¹¹ Therefore, conservative values include limited government, autonomous institutions, and individual freedom.¹² Limited government interference enables a society to establish cultural entities over generations, which, in turn, produces institutions "shaped in accordance with the demands made on them; their defects and unintended consequences will become apparent and, under pressure for reform, reshaped."¹³ Reflecting the belief that social institutions evolve from the demands placed on them by individuals, conservatism embraces capitalism, based on its proven success over time in promoting the ideals of democracy.¹⁴ Conservative values include the right to retain the fruits of one's labor, individual initiative, and the duties one has to his society based on tradition.¹⁵

In contrast to conservatism, liberalism places the greatest emphasis on the civil and political rights of each individual.¹⁶

time span from 1998 to 2002. By searching through the Michigan Supreme Court case law during this time period, twenty-five cases emerged that involved overruling precedent. For a list of these cases, see Appendix 1, *infra*.

¹¹ See American Conservative Union, *Statement of Principles*, available at <http://www.conservative.org/about/principles.asp> (last visited Feb. 18, 2003) [hereinafter American Conservative Union].

¹² THE OXFORD COMPANION TO PHILOSOPHY 157 (Ted Honderich ed., 1995) (noting the conservative emphasis on the autonomy of the family, churches, the armed forces, and schools).

¹³ *Id.* at 156.

¹⁴ See American Conservative Union, *supra* note 11 (exalting capitalism as bringing "a higher standard of living to a greater number of people than any other economic system in the history of mankind," and "preserving freedom through maintaining private control of economic power and thus limiting the power of government").

¹⁵ See THE OXFORD COMPANION TO PHILOSOPHY, *supra* note 12, at 157 (rebutting the perception that conservatism encourages selfishness with the conservative belief that individuals constitute the "best judges of their own interests").

¹⁶ See *id.* at 483 (listing such rights as liberty of the individual, "including freedom of conscience, speech, association, occupation, and, more recently, sexuality," in addition to equality of opportunity).

Liberalism values individual freedom over traditional community values and “demand[s] a substantial realm of personal freedom . . . which the state should not intrude upon, except to protect others from harm.”¹⁷ While liberalism traditionally supported limited governmental interference and laissez-faire capitalism, contemporary liberalism has shifted, and now promotes the government’s role in advancing individual rights.¹⁸ This principle translates to regulation of the market and initiation of social programs to ensure equal opportunity and the general welfare of the population.¹⁹ In their debates regarding stare decisis and overturning precedent, the decisions of the current Michigan Supreme Court have reflected the conflicts between liberalism and conservatism.

III. STARE DECISIS

The Michigan Supreme Court addressed the underlying principles of stare decisis throughout the cases involved in this study. Stare decisis is defined as “[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.”²⁰ The rationale behind the doctrine of stare decisis rests on the values that it promotes—efficiency of the court, consistency in the law, fairness, and legitimacy.²¹ All of the cases in this study involved overruling precedent, and therefore, the Michigan Supreme Court was compelled to examine this doctrine in order to reach the intended result in these cases.²² In doing so they recognized that, although

¹⁷ *Id.* (internal cross-references omitted).

¹⁸ *See id.*; Michael P. Zuckert, *Is Modern Liberalism Compatible with Limited Government? The Case of Rawls*, in *NATURAL LAW, LIBERALISM, AND MORALITY* 49–50 (Robert P. George ed., 1996) (explaining that classical liberalism emphasized liberty, and thus, limited government, while contemporary liberalism stresses the importance of egalitarianism, and “[t]he more we insist on equality beyond equality of rights, the more government must intrude in order to assure [the] existence of what does not arise or persist spontaneously”); JAMES P. YOUNG, *RECONSIDERING AMERICAN LIBERALISM* 6–7 (1996).

¹⁹ *See* Zuckert, *supra* note 18, at 49 (noting that contemporary liberalism’s emphasis on equality “require[s] major intrusions by the state into the social, economic, and personal spheres of the community”).

²⁰ *BLACK’S LAW DICTIONARY* 1414 (7th ed. 1999). An illustrative quote elaborates, explaining that the doctrine of stare decisis demands that once a principle of law has been decided by a “competent court . . . it will no longer be considered as open to examination or to a new ruling by the same tribunal . . . unless it be for urgent reasons and in exceptional cases.” *Id.*

²¹ *See* SAUL BRENNER & HAROLD J. SPAETH, *STARE INDECISIS* 2 (1995).

²² For the purposes of this study, phrases such as “intended result” or “desired result” are employed to mean the result that the majority ultimately determined. It is not meant to infer

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the doctrine of stare decisis “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process,” it nevertheless does not rise to the status of “an inexorable command.”²³

In response to accusations by the dissent contending that the majority failed to adhere to precedent and the doctrine of stare decisis,²⁴ Justice Taylor directly addressed the doctrine and set out a test that the court must follow in determining whether to overrule a prior decision.²⁵ The court held that in determining whether to overturn a decision, it must consider (1) whether the earlier decision of the court was incorrectly decided and (2) whether overruling the decision would work an undue hardship because of reliance interests or expectations that have arisen.²⁶ In answering the second part of this test, the court must determine “whether the previous decision has become so embedded, so accepted, so fundamental, to everyone’s expectations that to change it would produce not just readjustments, but practical real-world dislocations.”²⁷ This test enables the majority to overcome the doctrine of stare decisis in many instances, particularly in cases concerning statutory interpretation.²⁸ Once the court determines that a case has been “wrongly decided,” the doctrine of stare decisis protects that previous holding only to the extent that reliance

that the members of the Michigan Supreme Court are result-driven in their decision making. The fact that personal beliefs and values often influence judicial decisions, however, is hardly a surprise. See ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 5 (1997) (remarking that judges have “policy preferences” that may be compelling enough to influence the judges’ interpretation of statutory language). Considering the number of cases from 1998 to 2002 in which the majority of the court chose to call into question a decision made by an earlier court and overrule the decision—a deliberative process involving the court’s most valuable judicial resources—an assumption can be made that the results reached by the majority were intended because to assume otherwise would be to cast doubt on the efficiency of Michigan’s highest court.

²³ *Robertson v. DaimlerChrysler Corp.*, 641 N.W.2d 567, 580 (Mich. 2002) (quoting *Hohn v. United States*, 524 U.S. 236, 251 (1998)).

²⁴ See *Robinson v. City of Detroit*, 613 N.W.2d 307, 333–34 (Mich. 2000) (Cavanagh, J., dissenting) (asserting that the court had developed a “recent routine practice of ignoring precedent and overruling our cases”).

²⁵ See *id.* at 320–21.

²⁶ *Id.*

²⁷ *Id.* at 321.

²⁸ See, e.g., *Mack v. City of Detroit*, 649 N.W.2d 47, 55–56 (Mich. 2002) (holding that the court previously misinterpreted the Governmental Tort Liability Act); *Sington v. Chrysler Corp.*, 648 N.W.2d 624, 634 (Mich. 2002) (overruling an earlier court decision as inconsistent with the plain language of a statute).

interests meet the high standard set by the court.²⁹

IV. THE ENGLER APPOINTMENTS

A. Justice Clifford W. Taylor

Governor John Engler appointed Justice Taylor to the Michigan Supreme Court on September 1, 1997 to fill the seat vacated by Justice Dorothy Comstock Riley.³⁰ In 1998, Justice Taylor was elected to complete the remainder of Justice Riley's term and, in 2000, won the race for re-election for a full eight-year term.³¹ At this time, Justice Taylor is considered to be one of the most conservative Justices on the Michigan Supreme Court.³² Out of the twenty-five cases examined in this study, Justice Taylor signed his name to seven, including *Robinson*, making him the author of the greatest number of majority opinions overturning precedent.³³

In each of these cases, Justice Taylor overruled a prior Michigan Supreme Court decision in order to reach the majority's intended result. In his earlier opinions, Justice Taylor planted a seed: "When it becomes apparent that the reasoning of an opinion is erroneous, and that less mischief will result from overruling the case rather than following it, it becomes the *duty* of the court to correct it."³⁴ By characterizing the departure from *stare decisis* as a "duty" of the court, whereas generally *adherence* to the doctrine of *stare decisis* weighs heavily on the list of the court's duties, Justice Taylor creates an interest to balance against the doctrine of *stare decisis*. The duty to overrule erroneous holdings repeatedly materializes in

²⁹ See *Sington*, 648 N.W.2d at 635 (overruling a previous workers compensation decision because there was a "lack of a significant reliance interest" in the decision); *Robinson*, 613 N.W.2d at 321 (addressing reliance in the realm of statutes by observing that citizens look to the statute's language before referring to a court's interpretation of that statute).

³⁰ BIOGRAPHIES OF THE JUSTICES, *supra* note 3.

³¹ *Id.*

³² See *Court Gives Juries More Options*, DETROIT NEWS, July 15, 2002, at A6 (noting, in an editorial, that Justice Taylor and Justice Robert Young are often viewed as the court's most conservative justices), available at 2002 WL 22177414; see also Putnam, *supra* note 9 (quoting Justice Taylor, who referred to himself as a "judicial conservative" who strives to "bring common sense to the civil law" and to "return criminal law to a body of law that protects the citizens from criminal predators").

³³ See *Sington*, 648 N.W.2d 624; *People v. Hardiman*, 646 N.W.2d 158 (Mich. 2002); *Robinson*, 613 N.W.2d 307; *People v. Kazmierczak*, 605 N.W.2d 667 (Mich. 2000); *People v. Lukity*, 596 N.W.2d 607 (Mich. 1999); *People v. Graves*, 581 N.W.2d 229 (Mich. 1998); *McKenzie v. Auto Club Ins. Ass'n*, 580 N.W.2d 424 (Mich. 1998).

³⁴ *Graves*, 581 N.W.2d at 232 (emphasis added).

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Justice Taylor's decisions—often in response to the dissent's accusations of judicial activism and to justify the possibility of unfair results that may occur from the court's decisions.³⁵

Throughout Justice Taylor's opinions, two distinct rationales emerge that highlight how the prior terms of the Michigan Supreme Court made an erroneous decision. Justice Taylor's first rationale asserts that where a previous court's decision rested on false presumptions, or failed to take into account practical considerations, the current court should reexamine such a case, and, upon finding it erroneous, overrule it.³⁶ This rationale implies that the previous court lacked the wisdom and practicality that the current majority now possesses. The three cases written by Justice Taylor that use this rationale concern criminal situations³⁷ and shed light on the presumptions of the current conservative majority, which are in conflict with those *false* presumptions of the previous liberal court. In *People v. Graves*, Justice Taylor employed this rationale to overcome a previous decision which created an automatic reversal rule in criminal cases in which the judge permitted the jury to consider a charge that the prosecution failed to establish by sufficient proof.³⁸ Justice Taylor determined that the prior court's foundation for the automatic reversal rule rested on the flawed belief that such an error always causes prejudice to the defendant.³⁹ He concluded that the unsound reasoning of the prior court was based on its "unwarranted assumption that jurors do not follow their instructions not to compromise their views" and "a supposition

³⁵ See, e.g., *Sington*, 648 N.W.2d at 638 (stating that "[t]he majority's view is that its approach to stare decisis, in overruling our prior erroneous interpretations of statutes, respects the democratic process by yielding to the constitutional authority of the Legislature its right to establish the state's policy"); *Lukity*, 596 N.W.2d at 613 n.4 (overruling precedent that interpreted an evidentiary statute and insisting that, despite the fact that the majority's holding might produce unfair results, the constitutional mandates governing the relationship between the different branches of government outweigh such considerations because the "court's duty is to follow the law articulated by the Legislature rather than to adopt a standard that a majority of the court merely prefers in contravention of the plain language of an applicable statute").

³⁶ See, e.g., *Graves*, 581 N.W.2d at 232 (asserting that "our reexamination of [the previous decision] . . . and the subsequent decision to overrule it, is proper because it is informed by a judgment premised on prudential and pragmatic considerations").

³⁷ See *Hardiman*, 646 N.W.2d at 164 (pronouncing that the governing precedent was difficult and is now "held in 'ill repute'"); *Kazmierczak*, 605 N.W.2d at 671–72 (ruling that the prior court confused the probable cause standard and search warrant exceptions); *Graves*, 581 N.W.2d at 233–35 (overruling precedent due to the fact that the prior court had wrongly presumed that jurors do not follow the instructions of the court).

³⁸ See *Graves*, 581 N.W.2d at 233–34.

³⁹ See *id.* at 234 (noting that the presumption of prejudice cannot co-exist with the presumption that the jury will obey the instructions of the court).

that can only be equated with rough guesswork regarding what happened in the jury room."⁴⁰ Whereas the earlier liberal court deemed it necessary to apply an automatic reversal rule in such a situation to protect the defendant's right to receive a fair trial,⁴¹ the current majority found to the contrary.⁴² Underlying Justice Taylor's holding was the presumption that a jury instruction informing jurors not to compromise their views establishes a sufficient safety device for minimizing the possibility of prejudice to the accused.⁴³ This deference to the jury allowed Justice Taylor to remove the protectionist measures instituted by the previous liberal majority and further limit the scope of the judiciary's authority.⁴⁴

Similarly, Justice Taylor found fault with the failure of past courts to take into account practical considerations. This conclusion surfaced when Justice Taylor balanced the right of the accused to receive a fair trial with the desire to keep "social costs" low.⁴⁵ The balance weighs in favor of disregarding a previous decision where, as in the case of the automatic reversal rule discussed above, "in practice it may reward the accused with complete freedom from prosecution,' and thereby 'cost society the right to punish admitted offenders.'"⁴⁶

Defining the punishment of admitted offenders as a right of society reflects the value Justice Taylor places on ensuring the prosecution and conviction of criminals. In contrast with the prior court, for Justice Taylor, this value carries more weight than does the right of the accused to receive a fair trial. Rendering the automatic reversal rule null and replacing it with the lesser standard warranted by modern harmless-error jurisprudence

⁴⁰ *Id.* at 233-34.

⁴¹ See *People v. Vail*, 227 N.W.2d 535, 536 (Mich. 1975) (holding that it is reversible error for a judge to reject a directed verdict when the prosecution has not introduced evidence from which the jury could discern all of the elements of the crime).

⁴² See *Graves*, 581 N.W.2d at 233-34 (noting that "[a]utomatic reversal represents, at best, a rough guess at the psychological dynamic at work during jury deliberations").

⁴³ See *id.* at 234 (noting that "[i]t is well established that jurors are presumed to follow their instructions").

⁴⁴ In *People v. Hardiman*, Justice Taylor overruled a prior court and held that circumstantial evidence did not carry less of a probative value than direct evidence, and a presumption may be built upon an inference to establish an element of the prosecution's case. See 646 N.W.2d at 164-65. The majority opinion implied that the prior court's reasoning was flawed because it usurped of the role of the jury by assuming that a reasonable inference could not be made based on circumstantial evidence. See *id.*

⁴⁵ The "social costs" contemplated by Justice Taylor include time, energy, and other resources spent by the jurors, witnesses, courts, prosecution, and defendants. See *Graves*, 581 N.W.2d at 232 n.4 (quoting *United States v. Mechanik*, 475 U.S. 66, 72 (1986)).

⁴⁶ *Graves*, 581 N.W.2d at 232 n.4.

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dramatically decreases the number of reversals for errors such as those in *Graves* and advances the majority's desire to minimize the social costs incurred in criminal cases.⁴⁷ The fact that the prior court failed to provide the same weight to the policies valued by the current majority was interpreted by Justice Taylor to mean that the prior court failed to contemplate practical considerations, such as social costs.⁴⁸

The second approach taken by Justice Taylor to determine whether a prior case resulted in an erroneous decision arises in the context of statutory interpretation. In these situations, Justice Taylor often found that the previous decision failed to comport with the plain language of the controlling statute.⁴⁹ In articulating the guiding principles of statutory interpretation followed by the majority, Justice Taylor states:

First and foremost, we must give effect to the Legislature's intent. If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted. Further, we are to give statutory language its ordinary and generally accepted meaning.⁵⁰

Additionally, in cases involving governmental immunity, the court emphasized that the legislature intended to grant broad immunity, and therefore statutory exceptions to immunity must be

⁴⁷ See *id.* (explaining that a second trial will make a conviction much harder to obtain because, as time passes, the memory of witnesses may wane).

⁴⁸ See Putnam, *supra* note 9 (quoting Justice Taylor as he voiced his desire to "return criminal law to a body of law that protects the citizens from criminal predators").

⁴⁹ This is a principle canon of statutory interpretation known as the plain meaning rule. See MIKVA & LANE, *supra* note 22, at 10 (stating that the function of the courts is to enforce the law in accordance with the language of the law). The majority of the cases involved in this study concerned overruling a previous decision based on statutory interpretation, each employing the plain meaning rule. Four of the seven cases authored by Justice Taylor overruled a previous decision based on an erroneous interpretation of a controlling statute. See *Sington v. Chrysler Corp.*, 648 N.W.2d 624, 631–33 (Mich. 2002) (overruling the prior definition of the statutory term "disability" because the previous definition was not in accordance with the statute's plain language); *Robinson v. City of Detroit*, 613 N.W.2d 307, 316 (Mich. 2000) (using a dictionary to determine the plain meaning of the controlling statute); *People v. Lukity*, 596 N.W.2d 607, 613 n.4 (Mich. 1999) (stating that if the language of the statute produces unfair results, the solution is for the Legislature to modify the statute, not for the court to "adopt a standard that a majority of the court merely prefers in contravention of the plain language of an applicable statute"); *McKenzie v. Auto Club Ins. Ass'n.*, 580 N.W.2d 424, 426 (Mich. 1998) (utilizing *Webster's New World Dictionary* to determine the plain meaning of the term "motor vehicle").

⁵⁰ *McKenzie*, 580 N.W.2d at 425 (quoting *Tryc v. Michigan Veterans' Facility*, 545 N.W.2d 642, 646 (Mich. 1996)).

narrowly construed.⁵¹ Justice Taylor's emphasis on the plain language of the controlling statute constituted an effective tool to reign in prior liberal statutory interpretations by stating that the previous court had applied a statute where it was not intended by the legislature.⁵²

In the criminal context, this technique enabled Justice Taylor to reach the intended result of reinstating a defendant's conviction, and in the future, limiting the number of convictions overturned based on nonconstitutional error.⁵³ In *People v. Lukity*,⁵⁴ the majority overruled a prior Michigan Supreme Court decision that established the standard for overturning a conviction based on a nonconstitutional error and announced a new standard, which was based on the plain language of the controlling harmless-error statute.⁵⁵ Whereas the previously established standard placed the burden on the prosecutor to show that it was "highly probable" that the tainted evidence did not influence the verdict,⁵⁶ the new standard shifted the burden to the defendant to show that it was "more probable than not" that the error was outcome determinative.⁵⁷ Stating that the "language speaks for itself,"⁵⁸ Justice Taylor concluded that the statute created a presumption that preserved nonconstitutional errors were harmless.⁵⁹ The defendant, however, may rebut this presumption by showing that the "error resulted in a miscarriage of justice."⁶⁰ The result of the adoption of this presumption was that the prior test conflicted with the burden of proof that Justice Taylor determined that the Legislature intended.⁶¹ Therefore, by using the plain-language approach to statutory interpretation, Justice Taylor overruled *People v. Gearns*.⁶² This effectively made it more difficult in future

⁵¹ See *Robinson*, 613 N.W.2d at 315–16.

⁵² See, e.g., *id.* at 318 (explaining that it should be assumed that a legislature means what it says when it incorporates specific language into a statute).

⁵³ See *Lukity*, 596 N.W.2d at 612.

⁵⁴ 596 N.W.2d 607 (Mich. 1999).

⁵⁵ See *id.* at 611–12.

⁵⁶ *Id.*

⁵⁷ See *id.* at 613. The controlling statute analyzed by Justice Taylor stated that "[n]o judgment or verdict shall be . . . reversed . . . in any criminal case, on the ground of . . . [the improper admission of evidence] unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." *Id.* at 612 n.1.

⁵⁸ *Id.* at 612 n.1.

⁵⁹ *Id.* at 612.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See *id.*

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cases for the defendant to challenge his or her conviction based on a preserved nonconstitutional error. This reflects Justice Taylor's exercise of judicial conservatism by establishing stricter criminal laws to ensure the protection of citizens.⁶³

In the civil context, Justice Taylor used a similar rationale to overrule a previous decision that interpreted a provision of the Worker's Disability Compensation Act (WDCA).⁶⁴ The issue facing the court in *Sington* turned on the definition of "disability" as used in the statute.⁶⁵ *Sington* overruled *Haske v. Transport Leasing, Inc., Indiana*, which interpreted "disability" to mean "a personal injury or work-related disease that prevents an employee from performing any work, even a single job, within his qualifications and training"⁶⁶ Under *Haske*, the plaintiff in *Sington* would have been considered disabled, and thus would have recovered significant workers' compensation benefits under the Act's "reasonable employment" provisions.⁶⁷ Justice Taylor examined the language of the statute and concluded that the *Haske* court erroneously interpreted the controlling statute.⁶⁸ Rather than giving deference to the earlier court, Justice Taylor overruled the previous decision. Justice Taylor began first with the "common dictionary" meaning of "capacity," as taken from the *Webster's New World Dictionary*, as he has in many statutory interpretation cases.⁶⁹ Justice Taylor then

⁶³ See Putnam, *supra* note 9, at F1.

⁶⁴ See *Sington v. Chrysler Corp.*, 648 N.W.2d 624, 627 (Mich. 2002) (overruling prior caselaw and narrowing the definition of "disability" under the Act).

⁶⁵ *Id.* at 628–29. WDCA defines disability as "a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss." MICH. COMP. LAWS § 418.301(4) (2001).

⁶⁶ *Haske v. Transp. Leasing, Inc., Indiana*, 566 N.W.2d 896, 898 (Mich. 1997).

⁶⁷ See *Sington*, 648 N.W.2d at 630–31. The "reasonable employment" provisions of the WDCA allow an employee who has suffered a work-related injury that limits his ability to perform some, but not all, work activities to participate in "reasonable employment" to mitigate the worker's compensation payments. See MICH. COMP. LAWS § 418.301(9). Such employees who participate in "reasonable employment" are entitled to substantial statutory protections, including a provision for continuation of worker's compensation benefits after an employee loses reasonable employment. *Sington*, 648 N.W.2d at 629. A prerequisite to participation in "reasonable employment" is that the employee must suffer a disability as defined by the Act. *Id.* at 628–29.

⁶⁸ See *Sington*, 648 N.W.2d at 633 (holding that the *Haske* definition, which would include a person whose disability would prevent them from performing a particular job, but which does not prevent them from performing equally-paid work, is "untenable").

⁶⁹ See *id.* at 631 (defining "capacity" as "maximum output or producing ability" (quoting WEBSTER'S NEW WORLD DICTIONARY 207 (3rd ed. 1994))); see also *Robinson v. City of Detroit*, 613 N.W.2d 307, 316 n.13 (Mich. 2000) (justifying the use of a lay dictionary to determine the plain meaning of words in a statute because "the common and approved usage of a nonlegal term is most likely to be found in a standard dictionary and not a legal dictionary" (quoting

examined decisions made by the prior court.⁷⁰ Examination of those prior cases allowed Justice Taylor to retreat from the full evolution of the case law that the prior court developed, and utilize case law that lends support to his desired interpretation. Justice Taylor supported his argument with the partial dissent from *Haske*, authored by Justice Weaver—a member of the current majority.⁷¹ The current court's reliance on opinions that previous courts considered and disregarded reflects the shift in the court's ideology, as those prior dissenting opinions have now become the assertions of the majority.⁷² This process inevitably led Justice Taylor to overrule the previous decision and "return to the proper understanding of disability in case law that preceded *Haske* and that, in our judgment, was more faithful to the WDCA's statutory language."⁷³ Thus, through Justice Taylor's rationale of correcting an erroneous interpretation of statutory language, the majority succeeded in reaching their desired conservative result. These decisions comport with the conservative values of limited government concerning social issues and individual initiative as opposed to government assistance.⁷⁴

For those cases decided after *Robinson*, after determining whether a prior case was wrongly decided, Justice Taylor turned to

Horace v. City of Pontiac, 575 N.W.2d 762, 767 (Mich. 1998)); *McKenzie v. Auto Club Ins. Assoc.*, 580 N.W.2d 424, 426 (Mich. 1998) (providing the dictionary meaning of "vehicle" for the purpose of determining the meaning of the word as it related to the no-fault insurance act). *But c.f.*, *Robinson*, 613 N.W.2d at 328 n.8 (Kelly, J., concurring in part and dissenting in part). Justice Kelly inquired into the majority's use of Black's Law Dictionary to determine the legislative meaning of the word "the," where "the majority states that '[t]he Legislature's use of the definite article 'the' clearly evinces an intent to focus on one cause.' If that were truly the 'clear' case, then resort to a dictionary would be unnecessary".

⁷⁰ See *Sington*, 648 N.W.2d at 632 (noting that the interpretation of "disability" made by the court in two previous cases, one decided in 1966, before the statute at issue was enacted, and one in 1995, after the statute was enacted, is consistent with the plain language interpretation given to the term by the current court).

⁷¹ See *Sington*, 648 N.W.2d at 633 (utilizing Justice Weaver's partial dissent in *Haske*, which concluded that the prior majority's interpretation of wage earning capacity "is not true to the plain language" of the controlling statute (quoting *Haske v. Transp. Leasing, Inc.*, Indiana, 566 N.W.2d 896, 914 (Mich. 1997) (Weaver, J., concurring in part and dissenting in part))).

⁷² The adoption by the current majority of the dissenting opinions of past cases constitutes an interesting trend throughout the cases examined in this study. See, e.g., *Koontz v. Ameritech Serv's, Inc.*, 645 N.W.2d 34, 44–45 (adopting a prior dissenting opinion because it was "better reasoned," and overruling precedent); *Robertson v. DaimlerChrysler*, 641 N.W.2d 567, 576 (adopting Justice Brickley's dissenting opinion as the correct analysis of the statutory language at issue); *Pohutski v. City of Allen Park*, 641 N.W.2d 219, 227–29 (quoting a prior Justice's dissenting opinion and ultimately implementing it as the majority opinion).

⁷³ *Sington*, 648 N.W.2d at 634.

⁷⁴ See *infra* notes 11–19 and accompanying text.

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the second part of the *Robinson* test and determined whether overruling the decision would work an undue hardship because of reliance interests or expectations that might have arisen.⁷⁵ Under his first rationale, Justice Taylor uses two arguments to overcome this prong. The first argument focuses on the relatively short period of time in which the prior decision constituted the controlling law to determine that no reasonable reliance interests have had time to accrue.⁷⁶ In *People v. Kazmierczak*, a case that allowed greater police discretion in finding probable cause to search an automobile, Justice Taylor deemed certain reliance interests insignificant, explaining that “the only reliance interest that may be adversely affected is the expectation of an illicit substance transporter. This is not a reliance interest worthy of our sympathy.”⁷⁷ Justice Taylor’s statement reflects his concern with the prosecution and conviction of criminals. This concern, as we have seen, may outweigh a defendant’s constitutional right to a fair trial.⁷⁸ As a result, in the criminal context, the Michigan Supreme Court will rarely find a reliance interest great enough to stave off overruling a prior decision.

In those cases concerning statutory interpretation, Justice Taylor focused on the second prong and determined that where a prior court failed to apply the plain language of a statute, there was a strong rationale for overruling the prior decision.⁷⁹ Quoting his own opinion in *Robinson*, Justice Taylor reasoned that “it is to the words of the statute itself that a citizen first looks for guidance in directing his actions” and that “when a court confounds the legitimate expectations of a citizen by misreading a statute, ‘it is that court

⁷⁵ See, e.g., *Sington*, 648 N.W.2d at 635 (finding that “in light of the lack of a significant reliance interest in the [previous] . . . decision, we are impelled to overrule it”).

⁷⁶ See *People v. Lukity*, 596 N.W.2d 607, 612 n.2 (Mich. 1999) (overruling *People v. Earns*, 577 N.W.2d 422 (Mich. 1998), and reasoning that to do so would not be prejudicial because it was of such “recent vintage” that it could not have been heavily relied upon). But see *People v. Graves*, 581 N.W.2d 229, 231–32 (Mich. 1998) (insisting that “the standards we apply in deciding whether to overrule a case do not rest upon the length of time that the rule has been in effect”).

⁷⁷ 605 N.W.2d 667, 674 (Mich. 2000).

⁷⁸ See *infra* notes 37–48 and accompanying text (discussing how the application of Justice Taylor’s first rationale may impinge on a defendant’s right to a fair trial).

⁷⁹ See *Sington*, 648 N.W.2d at 635 (explaining that “it is particularly appropriate to overrule a prior erroneous decision of this Court that has failed to apply the plain language of a statute”); *Robinson v. City of Detroit*, 613 N.W.2d 307, 321 (Mich. 2000) (indicating that when a prior court misreads a statute, a subsequent court should refrain from merely following the prior court’s misinterpretation on the grounds of stare decisis and should instead overrule the misconstruction set forth by the previous court).

itself that has disrupted the reliance interest.”⁸⁰ Justice Taylor’s determination that the court itself disrupts reliance interests when it misconstrues a statute renders nugatory the second prong of the *Robinson* test in cases where the court overrules precedent based on an erroneous interpretation of a statute.⁸¹

B. Justice Robert P. Young, Jr.

Justice Young was appointed by Governor Engler on January 3, 1999 to fill the vacancy left by Chief Justice Conrad L. Mallett, Jr. and was elected in 2000 to carry out the remainder of the term.⁸² Justices Young and Taylor are viewed as the two most conservative justices on the court.⁸³ Justice Young authored six of the opinions overruling precedent⁸⁴ and did not write or join in any dissenting opinions in the cases used for this study. When overruling precedent, Justice Young has utilized the rationale that the prior court based its decision on an erroneously applied standard or that the prior court failed to take into account practical considerations.⁸⁵ Justice Young has also employed the rationale that the prior court’s decision turned on an erroneous interpretation of a statute.⁸⁶

Justice Young’s opinions, however, depart from those of his brethren in many ways. First, throughout his decisions, Justice Young failed to undertake even one *Robinson* analysis when deciding to overrule a case.⁸⁷ Indeed, in two of the six cases

⁸⁰ *Sington*, 648 N.W.2d at 635 (quoting *Robinson*, 613 N.W.2d at 321).

⁸¹ For example, in *Sington*, the court refused to find legitimate expectation interests based on the contemporaneous nature of a work-related injury and the lack of an expectation interest in receiving benefits where no reduction in wage earning capacity had occurred.

⁸² See BIOGRAPHIES OF THE JUSTICES, *supra* note 3.

⁸³ See *Court Gives Juries More Options*, *supra* note 32.

⁸⁴ See *Mack v. City of Detroit*, 649 N.W.2d 47 (Mich. 2002); *Lesner v. Liquid Disposal, Inc.*, 643 N.W.2d 553 (Mich. 2002); *MacDonald v. PKT, Inc.*, 628 N.W.2d 33 (Mich. 2001); *Stitt v. Holland Abundant Life Fellowship*, 614 N.W.2d 88 (Mich. 2000); *McDougall v. Schanz*, 597 N.W.2d 148 (Mich. 1999); *Smith v. Globe Life Ins. Co.*, 597 N.W.2d 28 (Mich. 1999).

⁸⁵ See, e.g., *Mack*, 649 N.W.2d at 55–56 (overruling a prior decision and noting that the earlier court “relied on a substantively flawed analysis in reaching the contrary opinion”); *McDougall*, 597 N.W.2d at 155 (stating that a prior court “failed to consider the constitutionally required distinction between ‘practice and procedure’” and thus overstepped the bounds of the Court’s rule-making powers).

⁸⁶ See, e.g., *Lesner*, 643 N.W.2d at 559 (holding that the precedential formula for the calculation of benefits for a partial dependent was “inconsistent with the plain language” of the statute, and was therefore overruled); *McDougall*, 597 N.W.2d at 157 (explaining that by quoting only select parts of the debate over the meaning of an amendment, the dissent inaccurately portrayed the substance of the debate); *Smith*, 597 N.W.2d at 38 (overruling the Court of Appeals for failing to grasp the intended breadth of the statute).

⁸⁷ For a discussion of the *Robinson* analysis, see *infra* notes 24–27 and accompanying text.

authored, the Justice overruled a previous decision in a *footnote* to his opinion.⁸⁸ In another case, Justice Young revealed his perception of the doctrine of stare decisis in a footnote.⁸⁹ The value that Justice Young placed on stare decisis parallels that given by Justice Taylor—that the doctrine “is not meant to be mechanically applied to prevent the court from overruling earlier erroneous decisions . . . [r]ather, stare decisis is a ‘principle of policy’ not ‘an inexorable command,’ and the Court is not constrained to follow precedent when governing decisions are badly reasoned.”⁹⁰ Through this depiction it is clear that Justice Young affords the doctrine of stare decisis a relatively slight value, enabling him to easily disregard precedent.

In contrast to Justice Taylor’s laborious process of first examining the language of a statute, its English syntax, and its plain meaning to arrive at the ultimate decision to overrule a prior decision based on statutory interpretation, Justice Young simply employs a historical and policy-based approach. In *Mack v. City of Detroit*,⁹¹ the court held that governmental immunity was a “characteristic of government,” rather than an affirmative defense, thus requiring the plaintiff to plead in avoidance of governmental immunity in their prima facie case.⁹² To arrive at that conclusion, Justice Young was forced to reconcile *Mack* with *McCummings v. Hurley Medical Center*, which held to the contrary.⁹³ To overcome this obstacle, Justice Young employed a historical approach, stating first the general principles of governmental immunity and then tracking common-law decisions that refer to the doctrine as a characteristic of government.⁹⁴

As support for his determination that the legislature intended to preserve the common-law doctrine of government immunity, Justice Young turned to the statutory language.⁹⁵ Justice Young cited the

⁸⁸ See *MacDonald*, 628 N.W.2d at 39 n.10 (finding that merchants have a duty to respond to dangerous situations, but that they do not have to provide police-like protection for their customers); *Smith*, 597 N.W.2d at 33 n.2 (determining that courts had been applying an erroneous standard to summary judgment motions).

⁸⁹ See *Mack*, 649 N.W.2d at 56 n.19 (concluding that it was appropriate to overrule a decision despite stare decisis principles due to the decision’s poor reasoning).

⁹⁰ *Id.*

⁹¹ 649 N.W.2d 47 (Mich. 2002).

⁹² *Id.* at 54.

⁹³ 446 N.W.2d 114, 117 (Mich. 1989) (placing the burden of pleading governmental immunity on the governmental agency being sued as an affirmative defense).

⁹⁴ See *Mack*, 649 N.W.2d at 51–57 (describing the nature of governmental immunity and its statutory origins).

⁹⁵ See *id.* at 52.

controlling governmental immunity statute and asserted, without elaboration, that the language creates a rebuttable presumption that a governmental agency is protected by immunity.⁹⁶ Explaining that *McCummings* “was both badly reasoned and inconsistent with a more intrinsically sound prior doctrine and the actual text” of the statute, Justice Young overruled the decision, and in doing so, disregarded the doctrine of *stare decisis*.⁹⁷ This conclusion mirrors Justice Taylor’s assertion that the “language speaks for itself”⁹⁸ and similarly implies that the prior court lacked the ability to discern the intent of the legislature as evidenced by clear statutory language, and, further, that the current majority now possesses this ability. This conclusion, however, merely reflects the underlying conservative ideology of its author, and leads, inevitably, to the replacement of a previous liberal interpretation with a more conservative statutory interpretation.

Echoing Justice Taylor’s contentions that a prior court failed to take into account practical considerations, Justice Young consistently sets forth policy arguments which provide a clear understanding of how he weighs conflicting interest. In *Stitt v. Holland Abundant Life Fellowship*⁹⁹ and *MacDonald v. PKT, Inc.*,¹⁰⁰ Justice Young focused on policy considerations to reconcile conflicting authority governing the issue at bar. Both of these cases involved determining the proper standard of care owed by premises owners to third parties, and in both decisions, Justice Young overruled a prior decision that had relied on a section of the Second Restatement of Torts.¹⁰¹ In *Stitt*, the issue centered on the standard of care owed to individuals on church property for noncommercial purposes.¹⁰² A previous case, *Preston v. Sleziak*, had relied on a provision in the Restatement and had held that the definition of an

⁹⁶ See *id.* at 55–56 (stating that the presumption can be rebutted if the plaintiff can show that one of the five statutory exceptions contained in the Act applies).

⁹⁷ *Id.* at 57 n.19.

⁹⁸ *People v. Lukity*, 596 N.W.2d 607, 612 n.1 (Mich. 1999).

⁹⁹ 614 N.W.2d 88 (Mich. 2000).

¹⁰⁰ 628 N.W.2d 33 (Mich. 2001).

¹⁰¹ See *Stitt*, 614 N.W.2d at 95 (refusing to adopt the Second Restatement of Torts’ definition of “invitee,” and instead, held that “[i]n order to establish invitee status, a plaintiff must show that the premises were held open for a *commercial* purpose,” and overruling *Preston v. Sleziak*, 175 N.W.2d 759 (Mich. 1970)); *MacDonald*, 628 N.W.2d at 39 n.10 (holding that a merchant’s duty to respond to situations does not extend to anticipated incidents, but rather only to situations actually occurring on the premises, overruling *Mason v. Royal Dequindre, Inc.*, 566 N.W.3d 199 (Mich. 1997)).

¹⁰² See *Stitt*, 614 N.W.2d at 91 (noting that, under Michigan common law, trespassers, licensees, and invitees are each owed a different standard of care).

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invitee does not solely depend on a commercial purpose.¹⁰³ This holding, however, did not square with the policy considerations valued by Justice Young.¹⁰⁴

In arriving at the contrary decision, Justice Young first undertook a historical journey through Michigan's common-law and determined that invitee status traditionally referred to those individuals who enter another's property for a business purpose.¹⁰⁵ To harmonize this conflict, Justice Young looked to the relevant policy considerations.¹⁰⁶ He argued that the "additional expense and effort" that a landowner must endure in order to inspect the premises and render it safe for visitors, "must be directly tied to the owner's commercial business interests."¹⁰⁷ Justice Young reasoned that the desire to reap a pecuniary gain encourages a landowner to invite persons onto his or her property and therefore justifies requiring such landowners who hold their property out for a commercial use to meet a higher duty.¹⁰⁸ Justice Young's assertion allowed the court to return to the traditional definition of an invitee, thereby limiting the liability of premises owners where third persons enter onto property for noncommercial purposes, despite the fact that such owners hold their property open for public use.¹⁰⁹

In *MacDonald v. PKT, Inc.*,¹¹⁰ a case involving the duty of premises owners regarding the criminal acts of third parties, Justice Young once again utilized public policy arguments to reject a previous decision that had relied on a Restatement provision.¹¹¹ Establishing that a merchant may rely on the assumption that an invitee will follow the law, the court concluded that this presumption continues until a situation arises on the premises to alert a reasonable person of "a risk of imminent harm to an

¹⁰³ 175 N.W.2d at 761-63.

¹⁰⁴ See *Stitt*, 614 N.W.2d at 95 (using a landowner's pecuniary interest in inviting persons onto his or her land as the basis for that landowner's higher duty of care).

¹⁰⁵ See *Stitt*, 614 N.W.2d at 94 (analyzing the issue by first citing a case from 1907, progressing to one decided in 1956, and finally citing a 1997 case to illustrate Michigan's case law concerning the issue of whether to confer invitee status on a "public invitee" as defined in the Restatement).

¹⁰⁶ See *id.* at 95.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See *id.* at 95-96 (finding that persons who are on church premises a noncommercial purpose are licensees, not invitees).

¹¹⁰ 628 N.W.2d 33 (Mich. 2001).

¹¹¹ See *Mason v. Royal Dequindre, Inc.*, 566 N.W.2d 199, 203 (Mich. 1997). The relevant Restatement provision states that the standard of care owed by a merchant includes the duty to take precautions to protect invitees from the reasonably anticipated criminal conduct of third persons. See *MacDonald*, 628 N.W.2d at 39 n.10.

identifiable invitee.”¹¹² Therefore, the merchant’s duty arises only from a present situation on the premises, not from past occurrences that may be reasonably anticipated in the future.¹¹³ By rejecting a prior decision that sought to protect invitees from the foreseeable criminal conduct of third parties, Justice Young reveals his concern for protecting businesses from increased liability. Retention of the rule promulgated by the earlier case, in his opinion, “would have its most pernicious and devastating effect on the many commercial businesses that are located in Michigan’s urban and high-crime areas.”¹¹⁴ Inflicting a broader concept of liability on such business owners would not only encourage them to relocate their businesses away from high-crime areas, but it would levy a heavier insurance burden on business owners that remained in such areas.¹¹⁵

These policy considerations reflect the value that Justice Young places on the protection of the economic interests of businesses, and how this conservative value outweighs the prior liberal court’s emphasis on the protection of invitees from foreseeable hazards at the expense of business owners.¹¹⁶ Through his use of conservative policy considerations, Justice Young succeeds in reaching the desired result of the majority, which consisted in both *Stitt* and *MacDonald* of limiting the premises owners’ liability.

C. Justice Stephen J. Markman

Justice Markman’s appointment on October 1, 1999 to replace Justice James H. Brickley¹¹⁷ constituted a landmark in the history of the Michigan Supreme Court. This third appointment by

¹¹² See *MacDonald*, 628 N.W.2d. at 39 (insisting that to require merchants to anticipate and take measures to prevent criminal activity would unjustifiably place them in virtually the same position as police officers and render them vicariously liable for the criminal acts of third parties).

¹¹³ See *id.*

¹¹⁴ *Id.* at 43–44.

¹¹⁵ *Id.* at 44 n.16.

¹¹⁶ See, e.g., *Mason*, 566 N.W.2d at 201 (holding, in 1997, that business owners were liable for failing to protect their invitees from foreseeable hazards). In the context of governmental immunity, Justice Young made a similar argument and concluded that a plaintiff must plead in avoidance of the doctrine. *Mack v. City of Detroit*, 649 N.W.2d 47, 50 (Mich. 2002). He noted that this outcome correlated with the policies behind governmental immunity, especially that of protecting the state’s financial resources, “by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity.” *Id.* at 56 n.18. This argument mirrors that made by Justice Taylor in his consideration of social costs as an interest to balance against the right of an accused to receive a fair trial. See *supra* notes 11–20 and accompanying text.

¹¹⁷ See BIOGRAPHIES OF THE JUSTICES, *supra* note 3.

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Governor Engler established the first conservative Michigan Supreme Court in over fifty years.¹¹⁸ In 2000, Justice Markman was elected to complete the remainder of his term.¹¹⁹ Four of the opinions included in this study were authored by Justice Markman, each of which focused on statutory interpretation.¹²⁰ Justice Markman's treatment of stare decisis undermines the idea of precedent by applying the rationale behind the general policy of adherence to precedent to the argument promulgating the majority's duty to overrule erroneous decisions.¹²¹ He reasoned that the values behind stare decisis

are also furthered by judicial decisions that are neutrally grounded in the language of the law, by a legal regime in which the public may read the plain words of its law and have confidence that such words mean what they say and are not the exclusive province of lawyers.¹²²

Employing the argument used in support of stare decisis renders the strongest argument in favor of the doctrine insignificant in those situations in which the majority determines that a prior decision interpreted a statute incorrectly.

Of the four decisions authored by Justice Markman, two concerned the distribution of worker's compensation benefits.¹²³ Seeking to limit the previous liberal majority's broad interpretation of certain worker's compensation statutes, Justice Markman utilized the plain meaning rule of statutory interpretation.¹²⁴ For example, in *Robertson*, Justice Markman echoed Justice Taylor by

¹¹⁸ See Putnam, *supra* note 7, at D1.

¹¹⁹ See BIOGRAPHIES OF THE JUSTICES, *supra* note 3.

¹²⁰ See *People v. Petit*, 648 N.W.2d 193 (Mich. 2002); *Robertson v. DaimlerChrysler*, 641 N.W.2d 567 (Mich. 2002); *Nawrocki v. Macomb County Rd. Comm'n*, 615 N.W.2d 702 (Mich. 2000); *Mudel v. Great Atl. & Pac. Tea Co.*, 614 N.W.2d 607 (Mich. 2000).

¹²¹ See, e.g., *Robertson*, 641 N.W.2d at 580 (asserting that the very argument made in support of the stare decisis—that it “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process”—can also be made in support of the majority's practice of emphasizing the plain language of controlling statutes (quoting *Robinson v. City of Detroit*, 613 N.W.2d 307, 320 (Mich. 2000) (quoting *Hohn v. U.S.*, 524 U.S. 236, 251 (1998)))).

¹²² *Robertson*, 641 N.W.2d at 580.

¹²³ See *id.* at 571 (determining whether the decision to deny benefits based on the plaintiff's perception of an actual work event was a proper means of determining whether a compensable mental disability exists under the statute); *Mudel*, 614 N.W.2d at 609 (addressing confusion and scrutiny surrounding the standards for reviewing magistrate and Worker's Compensation Appellate Commission decisions).

¹²⁴ See, e.g., *Robertson*, 641 N.W.2d at 576 (asserting that if no ambiguities arise from the specific language of a statute, then “judicial construction is not permitted and the statute must be enforced as written”).

embarking on a plain language analysis.¹²⁵ Justice Markman used a grammatical dissection of the controlling statute to establish a basis for finding that the legislature intended to impose two preconditions on a claimant's ability to receive benefits under the statute, as opposed to the previous court's imposition of only one precondition.¹²⁶ Justice Markman then referenced the *Random House Webster's College Dictionary* to determine each word's plain and ordinary meaning and concluded that "[a]ssimilating these definitions, it is reasonable to conclude that a worker's compensation claimant's perception must be based or grounded in fact."¹²⁷

This analysis allowed Justice Markman to reach the conservative majority's intended result—to restrict the liberal interpretation of the statute established by precedent and to limit the number of future claims brought under this statute. Moreover, even though the prior court, acknowledging that individuals with mental illnesses may misperceive events, rejected a perception analysis as a prerequisite for recovery under the statute,¹²⁸ Justice Markman nevertheless adhered to a strict interpretation of the statute.¹²⁹ When faced with criticism regarding the possible unfair results emanating from this strict interpretation, Justice Markman disregarded the considerations of the prior court, and stated that "[a]lthough 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 appropriate."¹³⁰ Justice Markman, therefore, effectively detached

¹²⁵ See *id.* (stating that the court's "primary purpose is to discern and give effect" to the plain meaning of the Legislature's chosen words).

¹²⁶ See *id.* at 576–77 (explaining that the second sentence of the statute in question contained two principle clauses). According to Justice Markman's analysis, the first clause requires that the mental disability "arise out of the . . . 'actual events of employment.'" *Id.* at 576. Furthermore, the second clause requires that the claimant's perceptions of the events described in the clause are grounded in fact. See *id.* at 577.

¹²⁷ *Id.*

¹²⁸ See *Gardner v. Van Buren Pub. Schs.*, 517 N.W.2d 1, 9 (Mich. 1994) (commenting that "[a]n unfounded perception of reality is the very characteristic that distinguishes a mentally disabled person from a 'normal' person"). The majority reasoned that "if one reads . . . [the statutory provisions in question] as prohibiting compensation for claims based on unfounded perceptions of actual events, as opposed to prohibiting compensation for claims based on imagined or hallucinatory events, then one is left with a statute that makes little sense." *Id.*

¹²⁹ See *Robertson*, 641 N.W.2d. at 578–79 (concluding that a claimant must demonstrate an actual employment event which led to the disability and that the claimant had correctly perceived that event).

¹³⁰ *Id.* at 578.

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himself from any consideration of fairness in his statutory interpretation analysis—allowing him to overrule precedent and formulate the rule preferred by the current majority.

Justice Markman capitalized on Justice Taylor's promulgation of the court's constitutional duty in statutory interpretation cases and additionally demonstrated the fallacy of this argument through several of his opinions. Touting the constitution and its mandated separation of powers doctrine as support for the practice of overruling cases based on erroneous statutory interpretations, Justice Markman announces that "it is the constitutional duty of this Court to interpret the words of the lawmaker, in this case the Legislature, and *not* to substitute our own policy preferences in order to make the law less 'illogical.'"¹³¹ However, as the court has demonstrated in several cases within this study, when faced with conflicting interpretations of a statute, the court's perception as to the overriding policy considerations often dictates which interpretation is adopted.¹³² Therefore, although Justice Markman did not explicitly state it, the conservative ideology of the majority played a substantial role in how the court interpreted statutory language.

Justice Markman illustrates how easily statutory language can lend itself to a variety of interpretations in his concurring opinion in *Brown v. Genesee County Board of Commissioners*.¹³³ There, Justice Markman's concurring opinion revealed that even among the conservative members of the court, the interpretation of the plain language of a statute can yield different results.¹³⁴ Although Justice Markman agreed with the majority that the previous interpretation of the statute was incorrect, he diverged from the majority regarding what the plain language of the statute revealed about the

¹³¹ *Id.* at 581–82.

¹³² *See id.* at 586 (Cavanagh, J., dissenting) (arguing that the only reason the majority overruled the previous interpretation of a statute was because the makeup of the court had changed). Overruling precedent

fosters the undesired practice of rehashing settled debates simply because the majority concludes that someone had a better argument. This is clear because legally, nothing has changed since . . . [the previous case] was decided, and no new arguments were presented to refute its analysis that were not already debated eight years ago.

Id.

¹³³ 628 N.W.2d 471 (Mich. 2001).

¹³⁴ *See id.* at 476–82 (Markman, J., concurring). Although both the majority in this case and Justice Markman employ a plain language analysis, Justice Markman arrives at a slightly broader interpretation of the statute. Justice Markman interpreted the statutory language to include prisons in the public building exception to the doctrine of governmental immunity. *Id.* at 477 (Markman, J., concurring). The majority's interpretation prohibited any jail inmate from bringing suit under the statutory exception. *See id.* at 476.

intent of the legislature.¹³⁵ These conflicting interpretations shed doubt on the principal rationale used by the majority in overruling earlier decisions—that the previous court erroneously interpreted a statute by applying it in a way that is inconsistent with the Legislature’s intent—and illustrates how a plain-language analysis depends largely on the political ideology and the majority’s intended result.

In *People v. Petit*¹³⁶ Justice Markman turned to the second part of the *Robinson* test—whether overruling the previous decision would result in an undue hardship because of reliance interests—and concluded that a previous holding failed to give rise to sufficient reliance or expectation interests so as to preclude the court from overruling the decision.¹³⁷ Despite the fact that, as a result of the previous decision,¹³⁸ trial courts were required to specifically ask defendants if they had anything to add before sentencing, and that the majority agreed that this constituted the best practice to ensure a defendant’s right to allocute, Justice Markman concluded that the prior decision “cannot be said to have caused defendants to alter their conduct in any way” and therefore overruling it would not cause any “practical real-world dislocations.”¹³⁹

Therefore, although Justice Markman concedes that trial courts relied on the rule, evidenced by the fact that they adhered to this practice,¹⁴⁰ Justice Markman concludes that the defendant would not rely on the court to follow the practice.¹⁴¹ This analysis of the reliance interests generated by a previous decision illustrates the conservative majority’s ability to bypass the second prong of the *Robinson* test.

¹³⁵ See *id.* at 478–79 (Markman, J., concurring).

¹³⁶ 648 N.W.2d 193 (Mich. 2002).

¹³⁷ See *id.* at 199 (concluding that the precedent decision was not so essential that overruling it would hinder a citizen’s reliance interests).

¹³⁸ See *People v. Berry*, 298 N.W.2d 434, 437 (Mich. 1980) (requiring that, before sentencing, the defendant be asked if he or she would like to address the court).

¹³⁹ See *Petit*, 648 N.W.2d at 199.

¹⁴⁰ See *id.* at 199–200 (noting that, due to the decision in *Berry*, “courts are now in the practice of specifically asking defendants if they have anything to say before sentencing” and “[a]ccordingly, trial courts should continue this practice because it is the most certain way to ensure that they have acted in compliance” with the statute).

¹⁴¹ See *id.* at 199.

V. ROUNDING OFF THE CONSERVATIVE BLOCK

A. Chief Justice Maura D. Corrigan

Michigan constituents elected Justice Corrigan to the Supreme Court in November of 1998, and she was elevated to Chief Justice in January of 2001.¹⁴² Out of the twenty-five cases examined for this study, Chief Justice Corrigan authored two majority opinions and one plurality opinion, each of which turned on statutory interpretation.¹⁴³ Her perception of stare decisis, as articulated in a separate concurring opinion written in *Robinson v. City of Detroit*, mirrors that of her conservative peers.¹⁴⁴ Justice Corrigan responded to the dissent, which criticized the majority for their high level of judicial activism, by asking if “those who equate activism with a willingness to correct error favor a body of law totally insulated from change? Or does the ‘judicial activist’ label only attach to those who correct erroneous decisions that do not comport with the accuser’s policy preference, whatever that policy may be?”¹⁴⁵ By casting judicial activism as a “willingness to correct error,” Justice Corrigan turned the dissent’s argument around to accuse those Justices in the dissent of adhering to precedent as a way of advancing their personal policy preferences.¹⁴⁶ Justice Corrigan viewed the recent decisions that overruled precedent as not reflecting a “casual disregard” for precedent, as the dissent argues,¹⁴⁷ but rather, as proof of the court’s adherence to their constitutional duty to maintain the separation of powers between the Legislature and the Judiciary by correcting past wrongs and “restor[ing] judicial legitimacy.”¹⁴⁸ Therefore, like Justices Taylor and Markman, the reasoning behind Justice Corrigan’s opinion was

¹⁴² See BIOGRAPHIES OF THE JUSTICES, *supra* note 3.

¹⁴³ See *Koontz v. Ameritech Servs., Inc.*, 645 N.W.2d 34 (Mich. 2002); *Pohutski v. City of Allen Park*, 641 N.W.2d 219 (Mich. 2002); *Brown v. Genesee County Bd. of Comm’rs*, 628 N.W.2d 471 (Mich. 2001).

¹⁴⁴ 613 N.W.2d 307, 322–25 (Mich. 2000) (Corrigan, J., concurring).

¹⁴⁵ *Id.* at 323 (Corrigan, J., concurring).

¹⁴⁶ See *id.* at 323–24 (Corrigan, J., concurring).

¹⁴⁷ *Id.* at 322 (Corrigan, J., concurring).

¹⁴⁸ *Id.* at 325 (Corrigan, J., concurring). Justice Cavanagh responded to this assertion:

I cannot disagree more with the concurrence that today’s decision “restores judicial legitimacy by overruling decisions that wrongly usurped the power of the Legislature.” . . . To suggest that legitimacy has been restored is to suggest that legitimacy had been lost. One need only review the decisions cast aside by today’s decision in order to discover that they were firmly rooted in the law.

Id. at 334 (Cavanagh, J., dissenting).

her commitment to her constitutional duty to maintain the separation of powers¹⁴⁹—a commitment apparently overlooked by the prior court in its decision-making process. This logic allowed Justice Corrigan, like her conservative companions on the bench, to employ a strict and narrow reading of the statutes, and ultimately, to overturn previous decisions that did not comport with the new majority's desired results.

In the context of governmental immunity, Chief Justice Corrigan wrote two opinions employing a plain language analysis which overruled precedent and, ultimately, expanded governmental immunity.¹⁵⁰ In setting out the principles of statutory interpretation, Chief Justice Corrigan asserted that an unambiguous statute bars the court from looking outside the plain language used by the legislature.¹⁵¹ She further demanded that the court presume that the legislature intended a purpose for every word used, and therefore, must give effect to every clause and sentence.¹⁵²

Chief Justice Corrigan did not adhere to those canons of statutory construction, however, in *Koontz v. Ameritech Services, Inc.*¹⁵³ *Koontz* involved an issue of first impression for the Michigan Supreme Court in the unemployment context.¹⁵⁴ Chief Justice Corrigan first emphasized the unambiguous nature of the statute, which governed the management of pension benefits and unemployment benefits.¹⁵⁵ She continued her analysis by examining *White v. McLouth Steel Products*, in which the court addressed the same question in the context of worker's compensation.¹⁵⁶ Three Justices in *White* dissented and concluded that the majority rejected

¹⁴⁹ See *id.* at 324–25 (Corrigan, J., concurring).

¹⁵⁰ See *Pohutski*, 641 N.W.2d at 227, 232 (overruling a case that had created a nuisance exception to government immunity because the prior court had interpreted the word “state” to mean “government”); *Brown*, 628 N.W.2d at 476 (holding that the legislature intended to limit the duty owed by government agencies only to members of the public—thus excluding prison inmates).

¹⁵¹ See *Pohutski*, 641 N.W.2d at 226.

¹⁵² *Id.*

¹⁵³ 645 N.W.2d 34 (Mich. 2002).

¹⁵⁴ The statute at issue governed the coordination of pension benefits with unemployment benefits, specifically questioning whether a plaintiff could receive her pension in a lump sum amount and later apply for, and receive, unemployment compensation. See *id.* at 36.

¹⁵⁵ See *id.* at 40.

¹⁵⁶ 556 N.W.2d 478 (Mich. 1996). *White* interpreted the WDCA to preclude coordination of retirement payments with worker's compensation benefits where the employee rolled his lump-sum pension distribution into an IRA. See *id.* at 480. The rationale for the court's decision was based on reconciling the phrases “received or being received” and “after-tax amount.” *Id.* at 487–88.

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the plain meaning of the statute.¹⁵⁷

Chief Justice Corrigan took the dissenting opinion from *White*, which was considered and rejected by the earlier court, and applied it in *Koontz*.¹⁵⁸ By adopting the dissent's approach, Chief Justice Corrigan overruled the previous interpretation and reached the majority's intended result—requiring unemployment benefits to be coordinated with any other retirement benefits received by an individual.¹⁵⁹

The statute at issue in *Koontz*, although analogous to the statute in *White*, did not contain the exact same language as the statute interpreted by the previous court.¹⁶⁰ By relying on the dissenting opinion in *White* to determine the meaning of a different statute, Chief Justice Corrigan went beyond the plain language of the statute. Chief Justice Corrigan succeeded in not only creating a conservative precedent in *Koontz* but also unnecessarily overruling the *White* line of cases in the worker's compensation context.¹⁶¹ These actions thus conflict with Justice Corrigan's articulated principles of statutory interpretation by first, looking outside of the statute,¹⁶² despite the statute's purported "unambiguous" nature, and second, failing to give effect to every clause and sentence of the statute.¹⁶³

Chief Justice Corrigan's *Robinson* analyses reflect the illusory nature of the test. In *Puhutski v. City of Allen Park*,¹⁶⁴ after deciding that an earlier case turned on an erroneous statutory interpretation,¹⁶⁵ Chief Justice Corrigan proceeded to the second part of the analysis concerning the coexisting reliance interests attached to the decision.¹⁶⁶ Chief Justice Corrigan reasoned that citizens rely on the words of the statute, and when the statute is clear, citizens expect that those words will be executed by the court.

¹⁵⁷ *White*, 556 N.W.2d at 494 (Riley, J., dissenting).

¹⁵⁸ See *Koontz*, 645 N.W.2d at 44–45 (determining that "the dissenting opinion in *White* is better reasoned").

¹⁵⁹ See *id.* at 45.

¹⁶⁰ See *id.* at 44. The statute at issue in *Koontz* does not contain the "after-tax amount" language partially relied on by the *White* court. See *id.*

¹⁶¹ See *id.* at 49 n.7 (Kelly, J., dissenting) (noting that the majority did not need to overrule *White* because the two statutes were distinguishable).

¹⁶² See *id.* at 43–45 (analogizing the present case to *White*).

¹⁶³ See *id.* at 44–45 (adopting the *White* dissent's findings, even after acknowledging that the statutes were not identical).

¹⁶⁴ 641 N.W.2d 219 (Mich. 2002).

¹⁶⁵ See *id.* at 227–29 (finding that the court has "struggled" with the meaning of a "clear and unambiguous" word).

¹⁶⁶ See *id.* at 231–32.

¹⁶⁷ If a previous court has misconstrued the statute, it is the duty of the present court to correct that mistake because “such a compromising by a court of the citizen’s ability to rely on a statute [has] no constitutional warrant.”¹⁶⁸ Therefore, a previous decision that failed, in the majority’s view, to interpret a statute correctly raises no reliance interests.¹⁶⁹ The second prong of the test established by Justice Taylor is thus rendered meaningless when applied in the statutory interpretation context, and the majority’s determination that a prior decision was incorrectly decided effectively ends the court’s analysis.

B. Justice Elizabeth Weaver

Justice Weaver, although voting a majority of the time with the conservative Justices, wrote only two majority opinions during this five-year time span. Both opinions utilized similar rationales as those used by the other conservative members of the majority for overruling earlier cases.¹⁷⁰ Nevertheless, she occasionally disagrees with the majority, as indicated by her two separate concurrences and three dissenting opinions.¹⁷¹ While Justice Weaver’s concurring opinions merely chastised the majority and the dissenting opinion because they contained “some inappropriate and unnecessary assertions,”¹⁷² the Justice’s dissenting opinions go further in her criticism of the majority and come close to those criticisms found in the dissenting opinions written by Justice Cavanagh and Justice Kelly.

For example, in *Mack v. City of Detroit*, Justice Weaver responded to the majority’s holding that governmental immunity constitutes a characteristic of government rather than an affirmative defense, and its subsequent overruling of a case which held otherwise: “[t]he

¹⁶⁷ See *id.* at 232 (noting that if a court does not follow the plain meaning of the statute, “it is that court itself that has disrupted the [citizen’s] reliance interest”).

¹⁶⁸ *Id.*

¹⁶⁹ See *id.*

¹⁷⁰ See *People v. Cornell*, 646 N.W.2d 127, 140 n.14 (Mich. 2002) (stating that it is proper to overrule erroneous precedent); *People v. Glass*, 627 N.W.2d 261, 269 (Mich. 2001) (finding that the previous court had overstepped its “rulemaking authority”).

¹⁷¹ See *Mack v. City of Detroit*, 649 N.W.2d 47, 68 (Mich. 2002) (Weaver, J., dissenting); *Sington v. Chrysler Corp.*, 648 N.W.2d 624, 640 (Mich. 2002) (Weaver, J., concurring); *Lesner v. Liquid Disposal, Inc.*, 643 N.W.2d 553, 564 (Mich. 2002) (Weaver, J., dissenting); *Robertson v. DaimlerChrysler Corp.*, 641 N.W.2d 567, 584 (Mich. 2002) (Weaver, J., concurring); *Am. Fed’n of State, County and Mun. Employees v. Bd. of Educ. of Highland Park*, 577 N.W.2d 79, 89 (Mich.1998) (Weaver, J., dissenting).

¹⁷² *Sington*, 648 N.W.2d at 640 (Weaver, J., concurring).

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majority's decision to reach out and overrule a case that was not raised, briefed, or argued is certainly efficient. However, the majority's efficiency in this case forsakes procedural fairness."¹⁷³

This dissenting opinion reveals Justice Weaver's disapproval of the practice of overruling cases as a means to an end. As previously noted, both Justice Taylor and Justice Young take into account judicial efficiency when balancing competing interests, exposing the value they place on this interest.¹⁷⁴ Justice Weaver does not value this interest to the same degree as the more conservative Justices, and Justice Weaver advances a more cautious approach to disregarding precedent to reach the desired result of the majority.¹⁷⁵

VII. THE LIBERAL DISSENT

A. Justice Michael F. Cavanagh

Justice Cavanagh, along with Justice Kelly, represents the liberal voting bloc on the Michigan Supreme Court. Throughout his ten dissenting opinions, Justice Cavanagh attacked the conservative majority for their failure to adhere to the principles of stare decisis.¹⁷⁶ He criticized the majority for their level of judicial activism.¹⁷⁷ He also promoted the principle of legislative

¹⁷³ See *Mack*, 649 N.W.2d at 68 (Weaver, J., dissenting). Justice Young, writing for the majority, had argued that if the court had to rely solely on the "parties' failure or refusal to offer correct solutions to the issue," the court's ability to function effectively would be limited. *Id.* at 58–59.

¹⁷⁴ See *supra* notes 45–48, 173 and accompanying text.

¹⁷⁵ See *Mack*, 649 N.W.2d at 68–69 (Weaver, J., dissenting) (noting that the court overruled a prior case that had not been raised by either party, and thus, was not properly briefed or argued).

¹⁷⁶ See *Mack v. City of Detroit*, 649 N.W.2d 47, 61 (Mich. 2002) (Cavanagh, J., dissenting); *Sington v. Chrysler Corp.*, 648 N.W.2d 624, 641 (Mich. 2002) (Cavanagh, J., concurring in part, dissenting in part); *People v. Hardiman*, 646 N.W.2d 158, 166 (Mich. 2002) (Cavanagh, J., concurring in part and dissenting in part); *Lesner v. Liquid Disposal, Inc.*, 643 N.W.2d 553, 563 (Mich. 2002) (Cavanagh, J., concurring in part, dissenting in part); *Robertson v. DaimlerChrysler Corp.*, 641 N.W.2d 567, 584 (Mich. 2002) (Cavanagh, J., dissenting); *People v. Glass*, 627 N.W.2d 261, 273 (Mich. 2001) (Cavanagh, J., dissenting); *Robinson v. City of Detroit*, 613 N.W.2d 307, 333 (Mich. 2000) (Cavanagh, J., dissenting); *People v. Lukity*, 596 N.W.2d 607, 617 (Mich. 1999) (Cavanagh, J., dissenting); *McKenzie v. Auto Club Ins. Ass'n.*, 580 N.W.2d 424, 429 (Mich. 1998) (Cavanagh, J., dissenting); *People v. Graves*, 581 N.W.2d 229, 235 (Mich. 1998) (Cavanagh, J., dissenting). For the purposes of this study, partial dissenting/concurring opinions in which the justice disagrees with the majority regarding overruling precedent are treated as dissenting opinions.

¹⁷⁷ See *Mack*, 649 N.W.2d at 62 ("Never before have I witnessed such overreaching conduct from members of this Court.").

acquiescence as an indicator of legislative intent.¹⁷⁸ Justice Cavanagh purported to regard the adherence to precedent as essentially mandatory rather than discretionary, especially where the legislature approves of the interpretation given to it by failing to refute it. Justice Cavanagh's disapproval of the majority's departure from precedent led him to charge the majority with engaging in judicial activism.¹⁷⁹

In the criminal context, Justice Cavanagh authored the dissenting opinions in three cases in which the majority overruled precedent at the detriment of the accused.¹⁸⁰ In *People v. Lukity*,¹⁸¹ Justice Cavanagh accused the majority of replacing a previous court's decision-making process—including the discussion of each argument, full deliberation, and either the adoption or rejection of such arguments—with a decision based solely on the make-up of the court.¹⁸² This argument was supported by noting that the majority adopted an argument heard and rejected by the court only a year earlier, and the very justice that supported the argument then, now presents that stance as the majority opinion.¹⁸³ Justice Cavanagh rejected the majority's purported plain reading of the statute, and hinted that the court supplemented the statute with its own preferences to reach their desired result.¹⁸⁴ In his analysis of the

¹⁷⁸ See, e.g., *Mack*, 649 N.W.2d at 66 (Cavanagh, J., dissenting) (noting that the fact that the Legislature had revised the relevant statute three times since the overruled decision without changing the section in question indicated that the legislature was in agreement with the prior court's interpretation); *Robertson*, 641 N.W.2d at 586 (Cavanagh, J., dissenting) (viewing the majority's new interpretation of the statute as "unnecessary" in light of the legislature's acquiescence for the eight years since the prior decision).

¹⁷⁹ See *Mack*, 649 N.W.2d at 67 n.9 (Cavanagh, J., dissenting) (asserting that the majority repeatedly overturned precedent, directed parties to argue issues which they had not initially raised, and "holding dispositive issues neither raised nor argued before this Court").

¹⁸⁰ *Id.* at 61 (Cavanagh, J., dissenting); *Lukity*, 596 N.W.2d at 617 (Cavanagh, J., dissenting); *Graves*, 581 N.W.2d at 235 (Cavanagh, J., dissenting).

¹⁸¹ 596 N.W.2d 607 (Mich. 1999).

¹⁸² See *id.* at 617 (Cavanagh, J., dissenting) (stating that the court had debated and decided the issue just the year before). According to Justice Cavanagh, overturning that case was likely to suggest that the decisions of this Court are only as stable as its composition, and that changes in it might be presumed by some to evidence a mandate for wholesale changes in the other, even in the absence of the passage of time, changes in circumstances, or any other of the more noble reasons to reevaluate our past decisions.
Id. at 617 n.1

¹⁸³ See *People v. Gearns*, 577 N.W.2d 422, 438 (Mich. 1998) (holding that the prosecution has the burden to prove that it was highly probable that erroneously admitted evidence did not effect the verdict). Justice Taylor, who wrote the majority opinion in *Lukity*, dissented in *Gearns*, and argued that the defendant should have the burden of proof. *Id.* at 446 (Weaver, J., concurring in part, dissenting in part). This argument was adopted by the majority in *Lukity*. See 596 N.W.2d at 613.

¹⁸⁴ *Lukity*, 598 N.W.2d at 618–19 (Cavanagh, J., dissenting) (posturing that the majority, in effect, added a large amount of text to the statute and "craft[ed]" a presumption in order to

statute, he employed the same techniques used by the majority in most of the cases concerning statutory interpretation. He turned first to the *American Heritage Dictionary* to define the word “affirmatively”—the phrase which enabled the majority to declare that the harmless-error statute created a rebuttable presumption of harmlessness.¹⁸⁵ Justice Cavanagh admonished the majority for rejecting any of these “literal” meanings of the term in arriving at their conclusion.¹⁸⁶

This argument, much like Justice Markman’s concurring opinion in *Brown*, exposes the fallacy of the plain language rationale used by the majority in most cases. Although both claim to adhere to the plain language of the statute, two different results occur. For the majority, these results have often conflicted with the meaning assigned to them by a previous court, and, because citizens rely on the plain language of statutes, the majority has stated that it is their duty to correct such a wrong.¹⁸⁷ Conveniently, the result of both the majority’s and the dissent’s plain language analysis comports with their ideological views.¹⁸⁸

Justice Cavanagh’s argument reflects the ideological differences between a liberal Justice and a more conservative member of the bench. While the criminal cases that overruled precedent during this five-year case study generally removed the protective rules established by the previous liberal majority, Justice Cavanagh argues that these protections should remain.¹⁸⁹ These opinions

reach its result).

¹⁸⁵ *Id.* at 618 n.3.

¹⁸⁶ *See id.* (Cavanagh, J., dissenting) (finding that the majority’s reading of the statute does not allow the word “affirmatively” to be interpreted in a literal and logical manner).

¹⁸⁷ *See Pohutski v. City of Allen Park*, 641 N.W.2d 219, 232 (Mich. 2002) (noting that if a court does not follow the plain language of the statute, it has disturbed the citizen’s reliance interest).

¹⁸⁸ For example, in *Lukity*, the majority created a rule that, in effect, decreases the possibility of overturned convictions by placing the burden on the defendant to show that the inclusion of unconstitutional evidence was outcome determinative—a result that Justice Cavanagh argues, constitutes a “hurdle that cannot be cleared, not because of its height, but because of the wall on the other side.” *Lukity*, 596 N.W.2d. at 619 (Cavanagh, J., dissenting). That wall, Justice Cavanagh insists, constitutes the ability of the court to virtually always find that “a reasonable jury *could* have found” the defendant guilty based on the untainted evidence, thus effectively precluding a defendant’s appeal in such a situation. *Id.* (Cavanagh, J., dissenting) (emphasis added).

¹⁸⁹ *See, e.g., People v. Glass*, 627 N.W.2d 261, 273 (Mich. 2001) (Cavanagh, J., dissenting) (arguing that the majority, in overruling the case that established an indictee’s right to a preliminary examination, “stripped criminal defendants of a necessary procedure in Michigan’s criminal process”); *People v. Graves*, 581 N.W. 2d 229, 236 (Mich. 1998) (Cavanagh, J., dissenting) (contending that the majority was wrong in overturning precedent and treating a jury’s consideration of a criminal charge unsupported by evidence as harmless

reflect the fact that Justice Cavanagh values an individual's rights as granted to them by the government—such as the right to a fair trial.

Like the conservative majority, Justice Cavanagh often claimed to adhere to the literal meaning of the statute's text.¹⁹⁰ Additionally, he frequently criticized the majority for failing to follow the precedent of previous court's interpretations of statutory language.¹⁹¹ Justice Cavanagh's arguments in favor of following *stare decisis* may stem, however, from the fact that he agrees with the policy considerations of the past liberal courts. For this reason, he may be considered as result-driven as he accuses the majority of being.¹⁹²

B. Justice Marilyn Kelly

Justice Kelly authored twelve dissenting opinions in the cases included in this study, each of which criticized the majority for departing from precedent.¹⁹³ In contrast to the majority, Justice

error).

¹⁹⁰ See *Mack v. City of Detroit*, 649 N.W.2d 47, 63 (Mich. 2002) (Cavanagh, J., dissenting) (finding that the Detroit city charter's use of the word "and," as well as the word "may" rather than "shall," to be incompatible with the majority's interpretation); *Smith v. Globe Life Ins. Co.*, 597 N.W.2d 28, 44 (Mich. 1999) (Cavanagh, J., dissenting) (arguing that if the legislature wanted a subsection of a statute to be construed as an exception, as the majority held, the legislature would have included limiting language similar to that which appears in other subsections); *Lukity*, 596 N.W.2d at 618 (Cavanagh, J., dissenting).

¹⁹¹ See *Sington v. Chrysler Corp.*, 648 N.W.2d 624, 641 (Mich. 2002) (Cavanagh, J., dissenting) (disagreeing with the decision to overturn a previous court's consideration of an ambiguous statute); *Robertson v. DaimlerChrysler Corp.*, 641 N.W.2d 567, 584, 586 (Mich. 2002) (Cavanagh, J., dissenting) (insisting that a previous court's statutory comprehension properly followed "the applicable rules of statutory construction" and that the majority's conclusion that it was an incorrect interpretation failed to follow the principles of *stare decisis*).

¹⁹² The precedents that Justice Cavanagh advocated upholding would have allowed: a gender and sexual-orientation discrimination suit to avoid preemption by governmental immunity, *Mack*, 649 N.W.2d 47; a claim under the Worker's Disability Compensation Act to proceed with the showing of lost wages rather than reduced earning capacity, *Sington*, 648 N.W.2d 624; and greater consumer personal-injury protection under Michigan's no-fault act, *McKenzie*, 580 N.W.2d 424. In the context of criminal cases, Justice Cavanagh preferred precedents that would have: allowed a defendant to unseal grand jury records to search for evidence to support his constitutional claims, *Glass*, 627 N.W.2d 261; relieved a defendant from the burden of overcoming the presumption that an error was not outcome determinative, *Lukity*, 596 N.W.2d 607; and held that when a jury received a charge that did not have all of its elements plausibly supported by evidence, it could be grounds for reversible error, *Graves*, 581 N.W.2d 229. All of these results would conform with common ideals of contemporary liberalism's desire to protect the rights of the individual through government action. See *infra* notes 17–21 and accompanying text.

¹⁹³ See *Mack v. City of Detroit*, 649 N.W.2d 47, 68 (Mich. 2002) (Kelly, J., dissenting); *Sington v. Chrysler Corp.*, 648 N.W.2d 624, 642 (Mich. 2002) (Kelly, J., dissenting) (criticizing

Kelly has developed a much different characterization of the doctrine of stare decisis. Unlike her conservative counterparts, she declines to depart from the principles that give this doctrine its force.¹⁹⁴ Describing stare decisis as a necessary safety valve to ensure that the court does not resort to arbitrary decision making, Justice Kelly insisted that overruling an earlier decision requires a “special justification.”¹⁹⁵ Such a justification arises where “subsequent legislative alterations of the law or changing customs and practices unforeseen by an earlier court” render the decision invalid, the prior decision causes an “unexpected hardship,” or, in rare instances, “a drastic error may be shown to have been made by a prior court in its reasoning or reading of a statute.”¹⁹⁶ The difference between Justice Kelly’s view of stare decisis and the test established in *Robinson* for overruling precedent is clear in her dissent in *Sington*.¹⁹⁷ She attacked the “simplicity” of the court’s initial inquiry—whether the decision at issue turned on an

the majority for overruling a previous decision and “replac[ing] it with its preferred interpretation of the law”); *People v. Petit*, 648 N.W.2d 193, 200 (Mich. 2002) (Kelly, J., dissenting); *People v. Hardiman*, 646 N.W.2d 158, 168 (Mich. 2002) (Kelly, J., dissenting) (arguing that “[i]n erasing that twenty-eight-year-old precedent, the majority has increased the likelihood that future criminal convictions will be based more on speculation than on facts”); *People v. Cornell* 646 N.W.2d 127, 145 (Mich. 2002) (Kelly, J., dissenting); *Koontz v. Ameritech Servs., Inc.*, 645 N.W.2d 34, 46 (Mich. 2002) (Kelly, J., dissenting); *Pohutski v. City of Allen Park*, 641 N.W.2d 219, 235 (Mich. 2002) (Kelly, J., dissenting); *Mudel v. Great Atl. & Pac. Tea Co.*, 614 N.W.2d 607, 626 (Mich. 2000) (Kelly, J., concurring in part, dissenting in part); *Stitt v. Holland Abundant Life Fellowship*, 614 N.W.2d 88, 97 (Mich. 2000) (Kelly, J., dissenting); *Robinson v. City of Detroit*, 613 N.W.2d 307, 325 (Kelly, J., concurring in part, dissenting in part); *People v. Kazmierczak*, 605 N.W.2d 667, 675 (Mich. 2000) (Kelly, J., dissenting in part, concurring in part); *Smith v. Globe Life Ins. Co.*, 597 N.W.2d 28, 39 (Mich. 1999) (Kelly, J., concurring in part, dissenting in part).

¹⁹⁴ See, e.g., *Sington*, 648 N.W.2d at 644 (Kelly, J., dissenting) (stressing that the doctrine of stare decisis “promotes the evenhanded, predictable, and consistent development of legal principles and contributes to the integrity of the judicial process, both actual and perceived”); *Pohutski*, 641 N.W.2d at 240 (Kelly, J., dissenting) (stating that if each new court, thinking that only its constructions are correct, overturns previous decisions, “then the law will fluctuate from year to year, rendering our jurisprudence dangerously unstable”); *Mudel*, 614 N.W.2d at 626–27 (Kelly, J., concurring in part, dissenting in part) (asserting that overturning decisions will cause, not resolve, confusion).

¹⁹⁵ See *Robinson*, 613 N.W.2d at 326 (Kelly, J., concurring in part, dissenting in part) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)) (noting that such justifications include developments in the law subsequent to the precedential decision, the need to reconcile a decision with new facts, and a showing that the precedent had become a deterrent to predictability in the law).

¹⁹⁶ *Sington*, 648 N.W.2d at 646 (Kelly, J., dissenting). For example, *Lesner v. Liquid Disposal, Inc.*, 643 N.W.2d 553 (Mich. 2002), overturned a prior case because the earlier court had “provided a formula for the calculation of death benefits that was utterly nonsensical when multiple partial dependents were considered.” *Sington*, 648 N.W.2d at 646 n.9 (Kelly, J., dissenting).

¹⁹⁷ See *id.* at 643 n.8 (Kelly, J., dissenting).

erroneous determination—and commented that

[i]t appears that the majority believes itself gifted with prodigious and unprecedented insight into the mind of the Legislature. The recent sharp increase in reversals of precedent is alarming because it suggests that this majority believes that only it, not present dissenters nor many past majorities of this Court, can discern the true intent of the Legislature.¹⁹⁸

The simplicity of this first prong enables the majority to quickly overrule decisions of previous courts, especially in the context of statutory interpretation in which the majority insists that the constitution imputes a duty on them to correct the balance between the judicial and legislative branches.¹⁹⁹ Justice Kelly, however, asserted that the role of the court is not to reexamine previous decisions made by experienced justices, but rather, to exercise judicial restraint.²⁰⁰ In opposition to the majority's characterization of the doctrine of stare decisis as a policy consideration Justice Kelly portrayed the doctrine as a "bedrock principle" that preserves the integrity of the court.²⁰¹

Although conceding both the importance of determining and effectuating the legislative intent, and the general rule that unambiguous statutory language bars judicial construction, Justice Kelly diverged from the majority by adding principles not addressed in its opinion. In her view, the general rule that judicial interpretation is prohibited when the statutory language is unambiguous, should capitulate when a "literal" interpretation

¹⁹⁸ *Id.* (Kelly, J., dissenting).

¹⁹⁹ *See id.* at 638 (explaining that the majority's approach to stare decisis comports with both the state's, and the nation's, constitution, and responds to its changing interpretations).

²⁰⁰ *See id.* at 643-44 n.8 (Kelly, J., dissenting). Further, Justice Kelly asserted that:

It is a matter of not falling prey to a zealot's conviction that what has been done in the past by others has been simply wrong. Stare decisis is not an argument intended to resuscitate the dead hand of the judiciary. Adherence to it contributes to, not detracts from, the integrity of our constitutional system.

Id. (Kelly, J., dissenting). Justice Taylor, however, viewed Justice Kelly's approach to the issue of overruling past decisions, and her perception of the proper role of stare decisis, as "flawed" in that it places too much power in earlier courts. *See id.* at 638. Moreover, in response to Justice Kelly's assertions in this case, Justice Taylor noted that :

Justice Kelly feels less obligation to adhere to the direction of the people's representatives in the Legislature, and more obligation to defend past judges' errors. We respectfully believe that this approach of Justice Kelly misunderstands who governs in a republic. It is not judges; rather, it is the people. In this case, we have restored the law to what was enacted by the people's representatives. It is our duty to do so.

Id. at 638-39.

²⁰¹ *See id.* at 644 (Kelly, J., dissenting).

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would lead to “absurd and unjust results.”²⁰² Moreover, this general rule does not limit the court where reasonable minds could differ as to the meaning of the statute’s language.²⁰³ In such a case, the court must determine the legislative intent by interpreting the statute reasonably and in a way that “best accomplishes the purpose of the statute.”²⁰⁴ These principles allow Justice Kelly to reach results that differ from the majority in cases concerning statutory interpretation.

Both the majority and the dissent, when interpreting a statute, understand the effects of their particular interpretation, and allow these effects to influence their decisions. The difference between the majority and the dissenters is not in their means, but in their desired ends, based on their respective and differing underlying political ideologies.

VII. CONCLUSION

The new majority of the Michigan Supreme Court reflects a conservative shift in the law of that state. The doctrine of stare decisis has buckled under the presumptions, values, and beliefs of the conservative majority, and has been effectively reduced to a mere policy consideration. Characterizing stare decisis in this manner has enabled the majority to favor policy considerations over the duty of the court to follow precedent. This has allowed the majority to overrule past decisions that reflect the liberal ideology of the prior court.

Unhampered by the court’s duty to adhere to an earlier decision, the majority has employed several rationales that enable it to call into question the holdings of certain previous cases, reexamine the prior court’s rationale, and ultimately overrule the earlier decision in favor of a more conservative holding. The majority utilized the separation of powers doctrine to create a duty to overrule past decisions which interpret statutes outside their plain meaning. Although the majority insists that every statutory interpretation case can be decided under a plain language analysis, they failed to take into consideration the difficulty that previous courts have had interpreting the statutory language—an indicator that the language is ambiguous. By the majority labeling each controlling statute as

²⁰² *Koontz v. Ameritech Services, Inc.*, 645 N.W.2d 34, 46 (Mich. 2002) (Kelly, J., dissenting).

²⁰³ *Id.* (Kelly, J., dissenting).

²⁰⁴ *Id.* (Kelly, J., dissenting).

unambiguous, it was able to assert that, because the past court failed to comport with the plain meaning of the statute, the present court had a constitutional duty to correct the wrong. This allows the majority to escape the accusations of judicial activism set forth by the dissent. It appears that the court has determined what decision they desire to reach, and when a previous opinion bars them from so holding, they rely on the argument that the previous court interpreted a statute incorrectly. Overruling these past cases enables the court to return to a decision based on their conservative presumptions—a more limited interpretation of these statutes.

The decisions of the new majority result in less protection of defendants' rights—including the diminished possibility of overturned convictions,²⁰⁵ a stricter standard for receiving worker's disability compensation and no-fault insurance benefits,²⁰⁶ broader protections of immunity for the government,²⁰⁷ removal of the burden from the prosecution of proving that a trial error was harmless,²⁰⁸ and providing greater police protection under warrant exceptions.²⁰⁹

The new majority's practice of overruling precedent, however, does not necessarily turn on a desire to promote big business to the detriment of individual rights, as the Democratic Party claimed during the 2000 election. Rather, the shift in ideology within the court reflects the new conservative presumptions and beliefs that now dominate the Michigan Supreme Court as a result of the Engler appointees. This shift in Michigan's case law signals a change in the state's highest court, one that will most likely occur again, producing the same controversy and similar accusations, only directed at a different majority.

²⁰⁵ See *People v. Hardiman*, 646 N.W.2d 158, 163–65 (Mich. 2002) (dismissing the prior court's rule that "an inference cannot be built upon an inference to establish an element of the offense" and upholding convictions based on such presumptions).

²⁰⁶ See *Robertson v. DaimlerChrysler Corp.*, 641 N.W.2d 567, 574–76, 578–79 (Mich. 2002) (overruling precedent to now require that a person seeking worker's compensation benefits on the basis of a mental disability show that there has been some actual event at work that caused the mental disability and that the perception of the debilitating event was not unfounded).

²⁰⁷ See *Mack v. City of Detroit*, 649 N.W.2d 47, 54 (Mich. 2002) (requiring a plaintiff to "plead and prove facts in avoidance of immunity" when bringing a claim against the state or one of its agencies, which is contrary to prior law).

²⁰⁸ See *People v. Lukity*, 596 N.W.2d 607, 611–12 (Mich. 1999) (overruling prior case law, which placed the burden on the prosecution to show that an evidentiary error was harmless, and instead required the defendant to show that the error was harmful).

²⁰⁹ See *People v. Kazmierczak*, 605 N.W.2d 667, 668 (Mich. 2000) (overruling precedent by holding that "the smell of marijuana alone by a person qualified to know the odor may establish probable cause to search a motor vehicle").

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APPENDIX 1

Cases Overturning Precedent Analyzed: 1998–2002

Mack v. City of Detroit, 649 N.W.2d 47 (Mich. 2002).
Sington v. Chrysler Corp., 648 N.W.2d 624 (Mich. 2002).
People v. Petit, 648 N.W.2d 193 (Mich. 2002).
People v. Hardiman, 646 N.W.2d 158 (Mich. 2002).
People v. Cornell, 646 N.W.2d 127 (Mich. 2002).
Koontz v. Ameritech Services, Inc., 645 N.W.2d 34 (Mich. 2002).
Lesner v. Liquid Disposal, Inc., 643 N.W.2d 553 (Mich. 2002).
Robertson v. DaimlerChrysler Corp., 641 N.W.2d 567 (Mich. 2002).
Pohutski v. City of Allen Park, 641 N.W.2d 219 (Mich. 2002).
Brown v. Genesee County Bd. of Comm'rs, 628 N.W.2d 471 (Mich. 2001).
MacDonald v. PKT, Inc., 628 N.W.2d 33 (Mich. 2001).
People v. Glass, 627 N.W.2d 261 (Mich. 2001).
Nawrocki v. Macomb County Rd. Comm'n, 615 N.W.2d 702 (Mich. 2000).
Mudel v. Great Atl. & Pac. Tea Co., 614 N.W.2d 607 (Mich. 2000).
Stitt v. Holland Abundant Life Fellowship, 614 N.W.2d 88 (Mich. 2000).
Robinson v. City of Detroit, 613 N.W.2d 307 (Mich. 2000).
People v. Kazmierczak, 605 N.W.2d 667 (Mich. 2000).
McDougall v. Schanz, 597 N.W.2d 148 (Mich. 1999).
Smith v. Globe Life Ins. Co., 597 N.W.2d 28 (Mich. 1999).
People v. Lukity, 596 N.W.2d 607 (Mich. 1999).
People v. Graves, 581 N.W.2d 229 (Mich. 1998).
McKenzie v. Auto Club Ins. Ass'n, 580 N.W.2d 424 (Mich. 1998).
People v. Kaufman, 577 N.W.2d 466 (Mich. 1998).
Am. Fed'n of State, County and Mun. Employees v. Bd. of Educ. of Highland Park, 577 N.W.2d 79 (Mich. 1998).
People v. Lemmon, 576 N.W.2d 129 (Mich. 1998).