

TO *ERIE* OR NOT TO *ERIE*: DO FEDERAL COURTS FOLLOW STATE STATUTORY INTERPRETATION METHODOLOGIES?

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ABSTRACT

The Erie doctrine requires federal courts sitting in diversity jurisdiction to apply state substantive law if applying federal law would change the outcome of the case. If statutory interpretation methodologies affect the outcomes of cases and state courts give them stare decisis effect, does Erie require federal courts to use state interpretation methodologies when applying state substantive law? This Note examines whether federal courts are already applying state interpretation methodologies when they interpret state statutes by examining state statutory interpretation cases heard in Michigan federal courts interpreting Michigan statutes. This Note examines Michigan state cases because its supreme court established a distinct statutory interpretation methodology that it uses as precedent for all cases. For the most part, federal courts do not appear to use Michigan statutory interpretation techniques when they interpret Michigan law. Instead, they use a variety of inconsistent tests. This Note argues that a better approach would be for the federal courts to apply Erie to statutory interpretation and use state interpretation methods to interpret state statutes. This Note adds to the current statutory interpretation literature by examining how lower federal courts interpret federal and state statutes and investigating whether they treat both sets differently. Because more than 99 percent of statutory interpretation cases do not reach the U.S. Supreme Court, how lower courts interpret statutes matters for case outcomes and for litigants gauging their likelihood of success.

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INTRODUCTION

Erie Railroad Co. v. Tompkins,¹ whether praised² or criticized,³ continues to guide federal courts' interpretation of state-law questions.⁴ There, the Supreme Court interpreted the Rules of Decision Act⁵ to mean that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."⁶ The decision directs federal courts to examine questions of federal law and questions of state law differently. For questions of state law in federal court (*Erie* questions), the federal court must "apply the unwritten law of the state as declared by its highest court."⁷

When it comes to statutory interpretation, commentators disagree about whether *Erie* requires federal judges to use different methods of statutory interpretation when interpreting federal or state statutes because they disagree about whether statutory interpretation is

1. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

2. See, e.g., Ernest A. Young, *A General Defense of Erie Railroad Co. v. Tompkins*, 10 J.L. ECON. & POL'Y 17, 18–21 (2013) (defending *Erie*'s constitutional rationale by arguing that it "correctly wove together notions of federalism and separation of powers").

3. See, e.g., MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 373 (2012) (stating that *Erie* has a "slender intellectual basis" that is "bereft of serious intellectual or constitutional support"); Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 132 (2013) (arguing that *Erie* is the worst U.S. Supreme Court case of all time because "it is wrong, it cannot be described as a product of its time, and it had—and continues to have—significant detrimental effects").

4. See Young, *supra* note 2, at 123 ("However 'unassailable' *Erie* may be in its original context of choice of law in diversity cases, the decision's import sweeps far more broadly. It is . . . the most important federalism decision of the twentieth century.").

5. 28 U.S.C. § 1652 (2012) (corresponds to the Judiciary Act of 1789, Ch. 20, § 34, 1 stat. 73, 92).

6. *Erie*, 304 U.S. at 78.

7. *Id.* at 71. Cases presenting *Erie* questions fall under one of the federal courts' types of original jurisdiction. First, a case can invoke the court's federal question jurisdiction by arising under federal law. 28 U.S.C. § 1331. Here, the court interprets the law like the U.S. Supreme Court. Second, a case can arise under the court's diversity jurisdiction when the parties are citizens of different states and the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332. Here, the court interprets state law as the highest court of the state interprets it. Typically, *Erie* questions arise in diversity jurisdiction because they involve state statutes while federal question jurisdiction involves federal statutes. But *Erie* still applies when federal question cases involve issues of state law. Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 YALE L.J. 1898, 1926 (2011) [hereinafter Gluck, *Intersystemic Statutory Interpretation*]; see also *Martinez v. Bloomberg LP*, 740 F.3d 211, 221 (2d Cir. 2014) (stating that the case's *Erie* question "arises under federal question jurisdiction"); *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1274–75 (11th Cir. 2004) ("[W]e are *Erie*-bound to apply Florida law in evaluating the plaintiffs' supplemental state-law claims . . .").

“unwritten law.”⁸ Although *Erie* held that federal courts must apply state common law, the Supreme Court did not examine whether federal courts must interpret state statutes in the same way as state supreme courts interpret them.⁹ Although the U.S. Supreme Court has developed clear statutory interpretation rules in some situations,¹⁰ it has never answered whether federal courts must use state-court statutory interpretation methodology when interpreting state statutes.¹¹ Without guidance, federal courts may not know whether they should apply federal or state methods of statutory interpretation.¹²

Take Michigan for example. From 1998 to 1999, the composition of the Michigan Supreme Court changed drastically. In those two years, John Engler, Michigan’s governor, appointed¹³ four justices to the seven-justice state supreme court¹⁴—each an avowed textualist.¹⁵ Over the next several years, the Michigan Supreme Court revised its interpretation methodology and overruled more precedent than the

8. *Erie*, 304 U.S. at 71. Compare Gluck, *Intersystemic Statutory Interpretation*, *supra* note 7, at 1997 (“[H]opefully the reader is now convinced that *Erie* requires federal courts, in most cases, to apply state interpretative methodology to state statutory questions.”), with Jennifer M. Bandy, Note, *Interpretive Freedom: A Necessary Component of Article III Judging*, 61 DUKE L.J. 651, 682, 685 (2011) (arguing that a federal judge’s constitutional role “preempt[s] any application of state interpretive principles” and “that proposed methodological constraints are a threat to judicial independence”).

9. Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 755 & n.2 (2013) [hereinafter Gluck, *Age of Statutes*].

10. See, e.g., *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (invoking the rule of lenity: when a criminal statute is ambiguous, the Court must construe the text in the way most favorable to the defendant); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (establishing the *Chevron* “two-step” method wherein courts first look to whether the statute has spoken clearly on the text, and “if the statute is silent or ambiguous with respect to the specific issue,” the court examines whether the agency’s construction of the statute is “permissible”).

11. Gluck, *Age of Statutes*, *supra* note 9, at 756.

12. Indeed, courts are split about whether they should apply federal or state methodology. See *infra* notes 157–84 and accompanying text.

13. Michigan selects its supreme court justices through nonpartisan elections, and each justice’s term lasts for a period of eight years. MICH. CONST. art. VI, § 2. But if a vacancy on the court occurs because of a justice’s “death, removal, resignation or vacating of the office,” then the governor will appoint another justice as a replacement. *Id.* art. VI, § 23.

14. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1804 (2010) [hereinafter Gluck, *The States as Laboratories*].

15. *Id.*

court had at any other point in history.¹⁶ In 2009, purposivist¹⁷ justices took the majority after a close judicial election, and they reinstated some of the precedents that the textualists had overruled. By 2011, the textualists were back in control, and they followed the prior textualist majority's interpretive methodology.¹⁸ Based on *Erie*, this Note examines whether federal courts, interpreting Michigan statutes, adopted similar statutory interpretation methods during this hectic period. And if not, whether these courts should have used those interpretation methods.

Erie only applies to statutory interpretation methodology if it is part of the state's law.¹⁹ Many scholars have debated whether federal courts should treat state statutory interpretation methods as precedent, a doctrine known as "methodological stare decisis." Methodological stare decisis occurs when courts give precedential effect to judicial statements about methodology.²⁰ Proponents of methodological stare decisis argue that interpretation methodologies should have stare decisis effect like any other precedent.²¹ In contrast, interpretive-freedom advocates argue that methodologies are "individual judicial

16. See Robert A. Sedler, *The Michigan Supreme Court, Stare Decisis, and Overruling the Overrulings*, 55 WAYNE L. REV. 1911, 1933–39 (2009) (listing the more than thirty decisions that the Michigan Supreme Court overruled from 1999 to 2008).

17. I use the term purposivist, like other scholars have, as a broad term that encompasses judges who are willing to look at more sources for interpretation than textualists to understand the legislature's purpose behind the statute. See Gluck, *The States as Laboratories*, *supra* note 14, at 1764 ("Purposivists' salient difference from textualists is their focus on 'interpret[ing] the words of the statute . . . so as to carry out the purpose as best [they] can' . . ." (alterations in original) (quoting STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005))).

18. See *infra* Figure 1.

19. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 71–73 (1938) (explaining that prior precedent was wrongly decided because it allowed federal courts to apply a federal unwritten law instead of following "the unwritten law of the state as declared by its highest court" and because section 34 of the Federal Judiciary Act was created "merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state, unwritten as well as written").

20. Gluck, *The States as Laboratories*, *supra* note 14, at 1754.

21. See, e.g., *id.* at 1822–24 (discussing the problem with judges applying an ever-changing framework to statutory interpretation and the benefits of giving stare decisis effect to interpretive methodology).

philosoph[ies].”²² Except for a few canons,²³ federal statutory interpretation does not appear to use methodological stare decisis.²⁴ Federal judges seem to be “more reluctant to relinquish . . . interpretive power in this context than they do in other areas of law,” perhaps because judges want to retain interpretive flexibility and because of the lack of consensus on a single set of interpretive rules.²⁵ This practice contrasts with the treatment of statutory interpretation methodology by many state supreme courts.²⁶ These courts often bind other judges’ methodological choices as they do with respect to substantive precedents.²⁷

Some authors have examined how lower federal courts react to the U.S. Supreme Court as it uses more purposivist or more textualist techniques,²⁸ how elected judges interpret statutes differently from appointed judges,²⁹ and how state supreme courts have developed their own statutory interpretation methodological regimes.³⁰ There has been little discussion, however, about what lower federal courts, especially

22. Gluck, *Intersystemic Statutory Interpretation*, *supra* note 7, at 1902; *see* Bandy, *supra* note 8, at 685 (“The methods of interpretation they use to decide the case are neither wholly procedural nor wholly substantive. They are best thought of as philosophical approaches to the art of interpretation.”).

23. *See* Gregory v. Ashcroft, 501 U.S. 452, 469 (1991) (establishing a federalism canon); Gluck, *The States as Laboratories*, *supra* note 14, at 1817 (discussing how *Chevron*’s methodology has stare decisis power).

24. Gluck, *The States as Laboratories*, *supra* note 14, at 1754 (citing Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863 (2008)). *But see, e.g.*, Forte v. Wal-Mart Stores, Inc., 780 F.3d 272, 277 (5th Cir. 2015) (“When we interpret a Texas statute, we follow the same rules of construction that a Texas court would apply” (quoting Wright v. Ford Motor Co., 508 F.3d 263, 269 (5th Cir. 2007))); Weeks Tractor & Supply Co. v. Arctic Cat Inc., 784 F. Supp. 2d 642, 647–48 (W.D. La. 2011) (“A federal court sitting in diversity applies state substantive law, including the state’s choice of law rules and method of statutory interpretation.”).

25. Gluck, *Age of Statutes*, *supra* note 9, at 804.

26. *See* Gluck, *The States as Laboratories*, *supra* note 14, at 1771 (discussing how Oregon, Connecticut, Texas, and Michigan use methodological stare decisis).

27. *Id.* at 1823; *see also* Donajkowski v. Alpena Power Co., 596 N.W.2d 574, 583 (Mich. 1999) (establishing a methodological regime in Michigan); Portland Gen. Elec. Co. v. Bureau of Labor & Indus., 859 P.2d 1143, 1145–46 (Or. 1993) (establishing a methodological regime in Oregon), *superseded by statute as stated in* State v. Gaines, 206 P.3d 1042, 1046–50 (Or. 2009).

28. *See* Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481, 485 (2015) (finding that lower courts have adopted linguistic canons in a manner that is roughly parallel with the U.S. Supreme Court).

29. *E.g.*, Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 440 n.15 (2012).

30. *E.g.*, Gluck, *The States as Laboratories*, *supra* note 14, at 1757.

federal district courts, do when they interpret both federal and state statutes.³¹ Because the lower courts are the final authority in more than 99 percent of all federal statutory interpretation cases,³² how they interpret statutes affects case outcomes.

This Note examines whether lower federal courts use *Erie* for statutory interpretation purposes.³³ In this pursuit, this Note analyzes how federal courts have interpreted Michigan statutes since 2004, because the Michigan Supreme Court wrote a seminal decision that year that changed the meaning of when a statute is “ambiguous.”³⁴ This definition changed how often the court looked to legislative history because Michigan courts have to find that a term is “ambiguous” to look past the plain meaning of a statute.³⁵ To determine if federal courts reacted to these changes, this Note surveys all of the federal cases from 2004 to the present that examined the Michigan Code and

31. At least one scholar has looked at how the federal circuits interpret state statutes when the state supreme court has given a specific statutory interpretation methodology regime. *See, e.g., id.* at 1791 (discussing whether the Fifth and Ninth Circuits follow state statutory interpretation methodology). The Fifth Circuit is currently the only circuit to “expressly and consistently . . . hold that *Erie* requires it to use state methodology for state statutes in diversity.” Gluck, *Intersystemic Statutory Interpretation*, *supra* note 7, at 1931.

32. *See* Gluck, *The States as Laboratories*, *supra* note 14, at 1753 (stating that less than 1 percent of federal cases make it to the U.S. Supreme Court (citing ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR 46 tbl.S-1, 84 tbl.A-1 (2008))).

33. This Note does not examine whether legislatures may require courts to use specific interpretation methods. For interesting discussions related to whether legislatures should be able to dictate judicial methodology, compare Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2103 (2002) (arguing that a judge’s interpretive methodology is a common lawmaking power instead of an inherent judicial power, so it “may be trumped by Congress”), with Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1581 (2014) (arguing that methodological stare decisis is a bad idea, especially if Congress determines the methodology because congressional staff do not understand the canons that courts use), and Bandy, *supra* note 8, at 680 (arguing that methodological constraints would lead to “a constitutional dilemma” and “would make it impossible for some judges to fulfill their oath to uphold the Constitution”). *See also* Gluck, *The States as Laboratories*, *supra* note 14, at 1785–97 (discussing how the Texas and Connecticut legislatures’ efforts to determine statutory methodology largely failed because the state supreme courts mostly ignored the statutes and, at times, questioned their constitutional validity). Additionally, when the states’ legislatures and highest courts conflict, most circuits have followed the highest state court rather than the legislature. *See id.* at 1791 (discussing how the Fifth Circuit follows Texas courts instead of the legislature when the two are in conflict).

34. *Mayor of Lansing v. Mich. Pub. Serv. Comm’n*, 680 N.W.2d 840, 847 (Mich. 2004). For a discussion of how the Michigan Supreme Court developed a new definition of “ambiguous” that changed how it decided cases, see *infra* Part II.B.

35. *See infra* notes 85–88 and accompanying text.

interpreted whether a statute was ambiguous.³⁶ Ultimately, this Note finds that federal courts used a wide variety of methods in determining which precedent they should use and which tests they should employ for statutory interpretation and ambiguity.³⁷ This practice is problematic because, unlike if a party presented a question in state court, litigants do not know how the federal court will interpret the statute. Accordingly, this Note argues that because statutory interpretation should be considered substantive law, federal courts should use *Erie* for statutory interpretation so that both federal and state courts apply the same legal rules to state statutes no matter the venue.

Part I begins with a discussion of the relevant background of the *Erie* doctrine and the debate about whether courts should apply methodological stare decisis. Part II explores the volatile history of the Michigan Supreme Court's statutory interpretation methodologies and explains the court's development of a strict statutory interpretation regime where the definition of "ambiguity" could decide the outcome of a case. Part III examines the response, or lack thereof, of lower federal courts to Michigan's varying interpretations and investigates whether those courts applied Michigan's methodology. It analyzes cases from 2004 to the present, as that is the period when the Michigan Supreme Court's statutory interpretation regime and definition of ambiguity, both discussed in Part II, were in place. Part III concludes that the federal courts that interpreted Michigan statutes largely did not apply state statutory interpretation precedent; instead, they applied a variety of inconsistent tests, which exhibits the need for some uniformity. Although federal courts seem to rarely apply state statutory interpretation precedent when interpreting statutes, they surprisingly use state techniques for interpreting contracts. Part IV theorizes that the lower federal courts, applying Michigan law, should use Michigan's statutory interpretation regime to fulfill *Erie*'s twin aims of "discouragement of forum-shopping and avoidance of inequitable administration of the laws."³⁸

36. See *infra* notes 144–55 and accompanying text.

37. See *infra* notes 156–244 and accompanying text.

38. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

I. BACKGROUND OF THE *ERIE* DOCTRINE AND METHODOLOGICAL STARE DECISIS

Erie may apply to the Michigan Supreme Court's statutory interpretation methodology, but to comprehend why, one must understand both the *Erie* doctrine and the debate about whether interpretive methodology should be considered "law." This Part provides a brief background of each. Section A explains the *Erie* doctrine's key holdings for statutory interpretation while Section B discusses the debate over whether federal courts should give interpretive methodology stare decisis effect.

A. *Erie's Importance to Statutory Interpretation*

Erie's key holding is that "the law to be applied in any case is the law of the State . . . whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision There is no federal general common law."³⁹ *Erie* encompasses the idea that the federal government is one of limited and enumerated powers, reserving any unenumerated powers to the states.⁴⁰ To fulfill these federalist aims, federal courts must "apply the unwritten law of the State as declared by its highest court."⁴¹

The *Erie* question in statutory interpretation involves methodology, examining how a court should construe a statute once it chooses which state's law applies.⁴² Those who think *Erie* applies to statutory interpretation argue that statutory interpretation methodologies are part of a governing body's general common law.⁴³ After *Erie*, a general common law legal interpretation "must attach to

39. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

40. *See id.* at 79 ("Supervision over . . . the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State"); *Hanna*, 380 U.S. at 471 ("Neither Congress nor the federal courts can . . . fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution"); *see also* John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 702 (1974) (arguing that, since the late 1930s, the Supreme Court has left to the states all powers not enumerated in the Constitution).

41. *See Erie*, 304 U.S. at 71 (stating that *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 1 (1842) was wrongly decided because it allowed federal courts to apply a federal unwritten law instead of following "the unwritten law of the State as declared by its highest court"). For a discussion of whether statutory interpretation methodology is law, *see infra* Part I.B.

42. Gluck, *Age of Statutes*, *supra* note 9, at 781 n.104.

43. *See id.* at 771–73, 773 n.72 (arguing that before *Erie*, statutory interpretation was part of the general common law, which *Erie* abolished).

a particular sovereign” and be either within the state general common law or federal general common law.⁴⁴ Because *Erie* declared that “[t]here is no federal general common law,”⁴⁵ any interpretation of a state statute must fall within the state general common law: federal courts should follow the interpretation methods used by state courts when interpreting state statutes while state courts should follow the interpretation methods used by federal courts when interpreting federal statutes.⁴⁶

But another question is whether statutory interpretation is substantive or procedural. Under *Erie*, “federal courts sitting in diversity apply state substantive law and federal procedural law.”⁴⁷ Discerning whether a court’s holding is substantive or procedural is not always easy, but federal courts must examine whether the law “prescribe[s] housekeeping rules for federal courts”—making it procedural—or “alters the mode of enforcing state-created rights”—making it substantive.⁴⁸ To decide whether a law is procedural or substantive, courts have eschewed formal tests in favor of looking at the consequences of certain rules, examining whether a federal practice fulfills *Erie*’s twin aims: “discouragement of forum-shopping” and “avoidance of inequitable administration of the laws.”⁴⁹ If the practice does not fulfill these aims and changes the outcome of a case, then the court must use the state practice.⁵⁰

U.S. Supreme Court cases decided after *Erie* suggest that interpretation methodology should be treated as substantive law. *Klaxon Co. v. Stentor Electric Manufacturing Co.*⁵¹ held that federal courts must examine choice-of-law principles as part of the state’s common law because “the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side” and “would do violence to the

44. Gluck, *Intersystemic Statutory Interpretation*, *supra* note 7, at 1913.

45. *Erie*, 304 U.S. at 78.

46. Gluck also notes that many state judges do not consider themselves bound to federal interpretive principles. See Gluck, *Age of Statutes*, *supra* note 9, at 770. She highlights how federal statutory interpretation could become a complete mess if all fifty states interpreted a federal statute differently. *Id.* at 774.

47. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996).

48. *Hanna v. Plumer*, 380 U.S. 460, 473 (1965).

49. *Id.* at 468.

50. *Id.* at 468–69. Examples of what the U.S. Supreme Court has found as “substantive” law include who has the burden of proving an element of a case, *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 249 (1942), and a statutory cap on damages, *Gasperini*, 518 U.S. at 428.

51. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

principle of uniformity within a state.”⁵² Similarly, *Hanna v. Plumer*⁵³ held that litigation in federal court should not *materially* differ from litigation in state court and established that federal courts should look to *Erie*’s twin aims when deciding whether to apply a federal or state rule.⁵⁴ Both signify that federal courts should try to act like state courts when interpreting state statutes except in matters that govern the practice and pleading of courts.⁵⁵

B. Should Federal Courts Give Interpretive Methodology Stare Decisis Effect?

Erie is about the choice between whether state or federal law applies. Scholars have considered that question primarily through the lens of stare decisis. This Section briefly discusses some leading positions about whether methodology should have stare decisis effect.

Over fifty years ago, Henry Hart and Albert Sacks observed, “The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.”⁵⁶ Many scholars agree that this is a problem but have proposed different ways to expand methodological stare decisis. One proposed solution is to treat statutory interpretation like other interpretive precedents⁵⁷ by giving it “extra-strong” stare decisis effect.⁵⁸ In this approach, higher courts strictly bind lower courts, and higher courts operate under the established statutory interpretation

52. *Id.* at 496.

53. *Hanna v. Plumer*, 380 U.S. 460 (1965).

54. *Id.* at 467–68. Although the Court in *Hanna* announced that these were the twin aims of *Erie*, some argue that the Court’s view was incorrect because *Erie* was about federalism rather than uniformity between the state and federal systems. Michael Steven Green, *The Twin Aims of Erie*, 88 NOTRE DAME L. REV. 1865, 1879 (2013) (arguing that Justice Brandeis, the author of the *Erie* majority opinion, “was concerned about federalism—that is, showing respect for the regulatory authority of the state whose law he thought governed the matter,” rather than vertical uniformity).

55. *Hanna*, 380 U.S. at 472.

56. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

57. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228, 237 (1995) (holding that courts must examine all racial classifications under a strict scrutiny analysis, meaning that a statute or regulation must be narrowly tailored to achieve a significant governmental purpose); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (establishing that courts must review all agency decisions by examining first whether Congress spoke directly on the issue and second, if a statute is ambiguous, whether the agency’s construction was permissible).

58. *Foster, supra* note 24, at 1884.

methodological framework unless “special justification[s]” call for departure from the structure.⁵⁹ Another proposition is to treat statutory interpretation principles like contract interpretation.⁶⁰ Although (unlike contract interpretation) statutory interpretation was not considered a separate type of law before *Erie*,⁶¹ the analogy is reasonable because both involve bodies of rules that help “resolve disputes over ambiguous language in previously negotiated text[s].”⁶² Scholars and judges use contract and statutory interpretation to try to understand the meaning of the writing’s words and context to determine the true interpretation of the writing and use default rules to understand what the text means.⁶³ The contrary argument says the comparison fails because contract interpretation rests on discerning the intent of the parties, so it can exist without any text, whereas statutes cannot exist absent the text.⁶⁴ Thus, contract and statutory interpretation are not comparable because they have fundamentally different goals and contain different qualities to fulfill these goals.⁶⁵ A third, more controversial approach argues that Congress should codify a “Federal Rules of Statutory Interpretation” because interpretive methodology is “common lawmaking power, which may be trumped by Congress.”⁶⁶

But scholars theorize that federal judges do not believe that statutory interpretation methods are law that must be applied from

59. *Id.*

60. See Gluck, *Intersystemic Statutory Interpretation*, *supra* note 7, at 1970–76 (discussing the similarities between statutory interpretation and contract interpretation law).

61. *Id.* at 1969.

62. *Id.* at 1970.

63. Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195, 222 (1998).

64. Mark L. Movsesian, *Are Statutes Really “Legislative Bargains”? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145, 1181 (1998).

65. See *id.* at 1171–72 (discussing how “[c]ontracts and statutes are fundamentally different sorts of legal texts” because contracts determine the intent of two parties while statutes are directed at third parties). The purpose of this Note is not to take a side about whether contract and statutory interpretation are the same, but it is worth noting that some federal courts have used Michigan Supreme Court contract and statutory interpretation precedent interchangeably. For a discussion of how federal courts use statutory interpretation precedent for contracts, see *infra* Part III.B.4.

66. Rosenkranz, *supra* note 33, at 2088, 2090; see also William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. (forthcoming 2017) (manuscript at 24–28) (“Congress can establish statutory defaults on interpretation no less than on substance—and these continue to operate, of their own force, until expressly or impliedly . . . Just as a legislature can establish substantive defaults . . . it can also establish default rules of interpretation.”).

case to case.⁶⁷ For the most part, federal judges “do not give interpretive principles stare decisis effect,” nor do they “view themselves obligated by *Erie* to apply state methodology when interpreting state statutes.”⁶⁸ Many commentators similarly argue that judges should not import state interpretation methodologies, citing *Marbury v. Madison*’s⁶⁹ mandate that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”⁷⁰ Some think that the Founders gave interpretive freedom to federal judges in the Constitution and that “methodological choices are so intimately connected with judges’ thought processes that limits on them raise serious constitutional questions.”⁷¹ Others argue that simplifying statutory interpretation and creating uniformity would “dumb down” statutory interpretation⁷² and that giving stare decisis effect to interpretive methodology is problematic because “rules of statutory interpretation have much higher stakes than substantive rules of law” and flexibility in interpretation creates a more responsive legal system.⁷³

But a core problem with these arguments is that there are already limits to federal judges’ ability to interpret texts as they please. Constitutional frameworks,⁷⁴ federal statutes,⁷⁵ and state-court choice-

67. Gluck, *The States as Laboratories*, *supra* note 14, at 1757 (arguing that federal judges are willing to be bound in methodological choices in some areas, but “these principles have failed to translate to the federal statutory interpretation context, without much explanation of why statutory interpretation should be any different”). *But see, e.g.*, *Forte v. Wal-Mart Stores, Inc.*, 780 F.3d 272, 277 (5th Cir. 2015) (“When we interpret a Texas statute, we follow the same rules of construction that a Texas court would apply” (quoting *Wright v. Ford Motor Co.*, 508 F.3d 263, 269 (5th Cir. 2007))).

68. Gluck, *Age of Statutes*, *supra* note 9, at 770. For an extensive discussion about both types of evidence that show that statutory interpretation is not understood as law, see *id.*

69. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)

70. *Id.* at 177.

71. Bandy, *supra* note 8, at 682, 684; see also Jerry Mashaw, *As-If-Republican Interpretation*, 97 *YALE L.J.* 1685, 1686–87 (1988) (“Any theory of statutory interpretation is at base a theory about constitutional law,” which must “assume a set of legitimate institutional roles and legitimate institutional procedures that inform interpretation.”).

72. Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 *B.U. L. REV.* 209, 212–13 & n.18 (2015).

73. Criddle & Staszewski, *supra* note 33, at 1594–96.

74. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (stating that all content-based regulations on expression must survive a strict scrutiny analysis); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995) (stating the same for racial classifications).

75. See, e.g., 42 U.S.C. § 2000bb-1 (2012) (providing that for all impositions on religious freedom, the government may only substantially burden a person’s exercise of religion if the burden is (1) “in furtherance of a compelling governmental interest” and (2) the government uses “the least restrictive means of furthering” that interest). Although there seems to be no

of-law and contract interpretation rules⁷⁶ all limit federal judges' freedom. Besides, the U.S. government is one of enumerated powers, reserving for the states all powers that are not found in the Constitution.⁷⁷

In short, *Erie* provides the goals for federal courts when interpreting state statutes and the methodological stare decisis arguments provide important reasons why courts should or should not consider statutory interpretation methods as law.

II. METHODOLOGICAL STARE DECISIS IN MICHIGAN STATUTORY INTERPRETATION

Michigan provides a unique example of interpretive methodology. The Michigan Supreme Court's textualist majority, settled by 1999, created a strict methodological system, in which most cases were resolved on the plain text of the statutes.⁷⁸ In 2009, the purposivist minority became the majority and kept the interpretive framework established by the textualist majority,⁷⁹ but it attempted to modify the test to allow more use of legislative history to consider the legislature's intent.⁸⁰ In 2011, the textualists regained power and solidified a framework where the court rarely reviewed legislative history.

This Note examines Michigan because it provides a clear statutory interpretation framework that federal courts could follow if they

scholarship or case law about the issue, it also seems likely that federal courts must consider state Religious Freedom Restoration Acts when a diversity case involves an issue of free exercise. Most of these statutes have strict scrutiny language similar to that of the federal statute. *See, e.g.*, TENN. CODE ANN. § 4-1-407(c) (West 2015) (“No government entity shall substantially burden a person’s free exercise of religion unless it demonstrates that application of the burden to the person is: (1) [e]ssential to further a compelling governmental interest; and (2) [t]he least restrictive means of furthering that compelling governmental interest.”).

76. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (holding that federal courts must apply the conflict-of-laws rules of the state courts in the state where the federal court sits); *Trident Ctr. v. Conn. Gen. Life Ins. Co.*, 847 F.2d 564, 570 (9th Cir. 1988) (applying, begrudgingly, a state’s contract interpretation rules even though the federal court thought they were wrongly decided (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938))).

77. *See U.S. CONST.* amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

78. *See infra* notes 88–105, 110–22 and accompanying text.

79. For a discussion of the textualist majority’s test, which first examines the plain meaning of the text, then looks to “high quality” legislative history if the text is ambiguous, and then applies substantive canons if the text and the legislative history are ambiguous, *see infra* notes 84–88 and accompanying text.

80. *See infra* notes 105–08, 123–35 and accompanying text.

applied *Erie* to statutory interpretation. This Part examines the history of the Michigan Supreme Court’s interpretive methodology. Section A provides a background of the changes to the Michigan Supreme Court’s interpretive methodology. Section B focuses on the Michigan Supreme Court’s fluctuating definition of the word “ambiguity” because, under Michigan’s framework, a statute must be ambiguous for the court to look past its plain meaning.

A. *The Michigan Supreme Court: Choosing Methodology over Substance*

Rarely does a court change its interpretive methodology and overrule as many cases as the Michigan Supreme Court did during the 2000s.⁸¹ After the appointment⁸² of four textualist⁸³ justices between 1999 and 2000—Justices Clifford Taylor, Maura Corrigan, Stephen Markman, and Robert Young—the Michigan Supreme Court changed its interpretive methodology. The newly comprised court developed a

81. See, e.g., *People v. Hawkins*, 668 N.W.2d 602, 609, 615 (Mich. 2003) (overruling a construction of a state statute because previous opinions did not apply a literal approach to the plain meaning rule); see also Sedler, *supra* note 16, at 1933–39 (listing more than thirty decisions that the Michigan Supreme Court overruled from 1999 to 2008).

82. In Michigan, judges are elected, but the governor can appoint one if a judge resigns or dies before his or her term ends. *Methods of Judicial Selection: Michigan*, AM. JUDICATURE SOC’Y, http://judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=MI [<https://perma.cc/YU6R-3ZQD>].

83. This Note does not examine the merits of textualism or purposivism. It assumes that Gluck’s analysis is correct about which judges were purposivist or textualist during the time period of her study. See Gluck, *The States as Laboratories*, *supra* note 14, at 1803. For the newer textualist judges, I take them at their word that they ascribe to a certain methodology. See *Judicial Incumbents Seek Support on November Non-Partisan Ballot*, EASTSIDE REPUBLICAN CLUB, <http://www.eastside-republican-club.org/judges143.htm> [<https://perma.cc/VTP9-EY76>] (“Zahra said he aims to search for the rule of law and respects the separation of powers, ‘Leaving to the legislature the significant policy questions of the day.’”); *Welcome, JUSTICE DAVID VIVIANO—SUPREME COURT*, <http://vivianooforjustice.com> [<https://perma.cc/U26R-B8VK>] (“We are fortunate in Michigan to have judges who understand that the Legislature makes the law – and judges interpret and apply it fairly to the cases that come before the court.”); *JUSTICE JOAN LARSEN FOR MICHIGAN SUPREME COURT*, <http://justicejoan.com/judicial-philosophy> [<https://perma.cc/5UPA-VUDH>] (“[J]udges should interpret the laws according to what they say, not according to what the judges wish they would say. Judges are supposed to interpret the laws; they are not supposed to make them.”). Neither of the two recent Democrats have clearly said whether they subscribe to purposivist or textualist views even though the prior Democrats were purposivists. But at least one recent case suggests that the two judges could be more textualist than their predecessors. See *Yono v. Dep’t of Transp.*, No. 150364, 2016 WL 4016839 (Mich. July 27, 2016) (McCormack, J., dissenting) (emphasizing, in an opinion joined by Justice Bernstein, that the majority had misconstrued the plain language of the statute’s text). In the context of Michigan, the main difference between the two are that purposivist judges are more likely to turn to legislative history while textualist judges are more likely to examine only the text of the statute.

methodological approach where it first examined the text to determine whether the plain meaning⁸⁴ was clear and unambiguous. If (and only if) the text was ambiguous,⁸⁵ the court looked to “high quality” legislative history, including staff-made legislative history.⁸⁶ Finally, if (and only if) both the text and the legislative history were unclear, the court looked to substantive canons⁸⁷ as a “last resort.”⁸⁸

After it adopted this methodology, the court subsequently overruled many of its precedents. In *Donajkowski v. Alpena Power Co.*,⁸⁹ the court banned the “legislative acquiescence” canon⁹⁰ because it was “an exceedingly poor indicator of legislative intent” and because “sound principles of statutory construction require that Michigan courts determine the Legislature’s intent from its *words*, not from its silence.”⁹¹

The decision signaled a shift in the court’s interpretive methodology because “[t]he Michigan Supreme Court traditionally has been especially respectful of precedent addressing statutory

84. For the purposes of this Note, plain meaning is interchangeable with the maxim that the plain and unambiguous text controls the statute. The plain-meaning rule only looks to other statutory maxims if the text is ambiguous.

85. Because the text of a statute must be ambiguous for the court to look at legislative history or substantive canons, the definition of ambiguity became a divisive issue. For a discussion of this debate, see *infra* Part II.B.

86. Gluck, *The States as Laboratories*, *supra* note 14, at 1806.

87. Substantive canons include the constitutional avoidance canon, the presumption against preemption, the rule of lenity, the presumption against extraterritorial application, and the clear statement rule against retroactivity. Note, *Chevron and the Substantive Canons: A Categorical Distinction*, 124 HARV. L. REV. 594, 596–97 (2010).

88. Gluck, *The States as Laboratories*, *supra* note 14, at 1806; see, e.g., *Mich. Fed’n of Teachers v. Univ. of Mich.*, 753 N.W.2d 28, 33 (Mich. 2008) (“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.”); *Mayor of Lansing v. Mich. Pub. Serv. Comm’n*, 680 N.W.2d 840, 846 (Mich. 2004) (stating that finding ambiguity allows the court to examine legislative history and rules of policy (substantive canons) through a “largely subjective” lens); *Crowe v. City of Detroit*, 631 N.W.2d 293, 300 (Mich. 2001) (“[I]f the statutory language were ambiguous, our first duty is to attempt to discern the legislative intent underlying the ambiguous words. Only if that inquiry is fruitless, or produces no clear demonstration of intent, does a court resort to the remedial preferential rule . . .”).

89. *Donajkowski v. Alpena Power Co.*, 596 N.W.2d 574, 582 (Mich. 1999).

90. “Legislative acquiescence” means a court infers that the legislature approves of a judicial construction by failing to pass legislation to modify the construction after its enactment. Courts sometimes rely on inaction when deciding whether a previous decision was the appropriate construction. See, e.g., *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488 (1940) (“The long time failure of Congress to alter the [Sherman] Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one.”).

91. *Donajkowski*, 596 N.W.2d at 581, 583 (Mich. 1999).

interpretation, largely based upon the notion of legislative acquiescence.”⁹² Following this opinion, the court banned the rule against absurdities,⁹³ because it invites “judicial lawmaking” and allows the court to install what it “believes the Legislature *must really have meant* despite the language it used.”⁹⁴ Additionally, the court rejected bringing the *Chevron* principle into state practice⁹⁵ and overruled at least thirty-six other cases within ten years,⁹⁶ sometimes only because the cases were based on a purposivist approach.⁹⁷ To justify its approach, the court stated that it cannot be “constrained to follow precedent when governing decisions are unworkable or are badly reasoned.”⁹⁸

The justices in the majority defended their textualist approach, arguing that textualism secured democratic principles better than purposivist approaches. When he became chief justice, Clifford Taylor said that he “must be disciplined enough to have [a case] turn out a different way if the law requires it. . . . [e]ven though [he] may want

92. Hon. Christopher P. Yates, *Stare Decisis: Charting a Course in the Michigan Supreme Court of 2009*, 25 T.M. COOLEY L. REV. 463, 469 (2008); *see, e.g.*, *Dean v. Chrysler Corp.*, 455 N.W.2d 699, 703 (Mich. 1990) (“When, over a period of many years, the Legislature has acquiesced in this Court’s construction of a statute, the judicial power to change that interpretation ought to be exercised with great restraint.”).

93. The rule against absurdities is an interpretation canon that says “a thing may be within the letter of the statute and yet not within the statute, because [it is] not within its spirit nor within the intention of its makers.” *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892). Textualists typically criticize this canon because they believe it overreaches the judiciary’s constitutional authority by substituting its own judgment over that of the legislature. *See, e.g.*, *Great-W. Life & Annuity Ins. v. Knudson*, 534 U.S. 204, 217–18 (2002) (stating it is the job of the courts to make decisions based upon the words of the statute instead of what judges think the statute should be).

94. *People v. McIntire*, 599 N.W.2d 102, 107–08 & 107 n.8 (Mich. 1999) (citing ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 21 (1997)). The Court of Appeals of Michigan said that the Michigan Supreme Court has reinstated the rule against absurdities in a later case, supporting its assertion that “a majority of Supreme Court justices repudiated” banning the rule against absurdities by compiling the opinions of four justices in four different cases, *Detroit Int’l Bridge Co. v. Commodities Exp. Co.*, 760 N.W.2d 565, 573 (Mich. Ct. App. 2008), but no Michigan Supreme Court opinion has adopted the appellate court’s reasoning.

95. *SBC Mich. v. Pub. Serv. Comm’n*, 754 N.W.2d 259, 271–72 (Mich. 2008).

96. Sedler, *supra* note 16, at 1929. Sedler argues that the overrulings were based on ideology, but regardless of the merits of that argument, he provides a helpful list of all the Michigan Supreme Court’s overrulings from 1998–2008. *Id.* at 1933–41.

97. Gluck, *The States as Laboratories*, *supra* note 14, at 1806; *see also* *People v. Gardner*, 753 N.W.2d 78, 89 (Mich. 2008) (overruling a precedent partially because the previous court improperly “constru[ed] an unambiguous statute by relying on legislative history”).

98. *Robinson v. City of Detroit*, 613 N.W.2d 307, 320 (Mich. 2000).

[the case] to turn out a certain way.”⁹⁹ Equating purposivism with judicial activism, Justice Corrigan wrote that activist approaches were “anti-democratic” and encouraged judges to rule the people instead of be governed by the people.¹⁰⁰ Further, she argued that the court should avoid looking at legislative history when possible because legislative history allows judges to “cherry-pick the outcome” to align with policy preferences.¹⁰¹

The justices in the purposivist minority—Justices Michael Cavanagh, Elizabeth Weaver, and Marilyn Kelly—criticized the majority’s approach, arguing that the majority ignored fundamental principles of stare decisis.¹⁰² Still, they conceded that the Michigan Supreme Court’s holdings “require *lower* Michigan courts to generally adhere to a rigidly literal application of the language of Michigan statutes”¹⁰³ In fact, Justice Kelly went so far as to write a majority opinion for a unanimous court using the textualism-based hierarchy¹⁰⁴ while issuing a concurrence in the same opinion arguing that a purposivist framework worked better.¹⁰⁵

In 2009, the composition of the majority of the Michigan Supreme Court switched from a textualist to a purposivist approach when Diane Hathaway defeated Chief Justice Clifford Taylor.¹⁰⁶ Some wondered

99. Todd C. Berg, *Chief Justice Clifford Taylor of Michigan Supreme Court to Carry on Court’s Textualist Tradition*, MICH. LAW. WKLY., (Mar. 14, 2005) http://go.galegroup.com/ps/i.do?id=GALE%7CA134518172&v=2.1&u=duke_perkins&it=r&p=AONE&sw=w&asid=0b78e0e6e04521a400e012eb2013fc58 [<https://perma.cc/H52A-5GBG>] (quoting Justice Taylor).

100. See Maura D. Corrigan, *Textualism in Action: Judicial Restraint on the Michigan Supreme Court*, 8 TEX. REV. L. & POL. 261, 262 (2004) (“[A]n activist approach rests on an anti-democratic premise that judges just know better—that we are somehow smarter and wiser than the people we govern and serve—that we on the bench are the new philosopher-kings.”).

101. *Id.* at 264; see also SCALIA, *supra* note 94, at 36 (“As Judge Harold Leventhal used to say, the trick [to legislative history] is to look over the heads of the crowd and pick out your friends.”).

102. See *People v. Gardner*, 753 N.W.2d 78, 102–03 (Mich. 2008) (Kelly, J., dissenting) (criticizing the majority for ignoring stare decisis); *Robertson v. DaimlerChrysler Corp.*, 641 N.W.2d 567, 587 (Mich. 2002) (Cavanagh, J., dissenting) (stating that he doubted whether the textualist majority could decide the plain meaning of the text based on lawyers playing around with it any better than it could by using precedent).

103. *Cameron v. Auto Club Ins. Ass’n*, 718 N.W.2d 784, 821 n.56 (Mich. 2006) (emphasis added), *overruled by* *Regents of Univ. of Mich. v. Titan Ins.*, 791 N.W.2d 897 (Mich. 2010).

104. *Haynes v. Neshewat*, 729 N.W.2d 488, 490 (Mich. 2007).

105. *Id.* at 495 (Kelly, J., concurring); Gluck, *The States as Laboratories*, *supra* note 14, at 1804.

106. *GOP’s Taylor Loses High Court Bid*, TRAVERSE CITY REC.-EAGLE (Nov. 4, 2008), https://www.record-eagle.com/news/state_news/gop-s-taylor-loses-high-court-bid/article_4870ec48-8774-5336-8ae8-d0b87c58dfbc.html [<https://perma.cc/RQC8-BKP6>]. Justice Hathaway campaigned against Justice Taylor and emphasized that his methodology was not right for the

whether the change would disrupt the court's interpretive framework,¹⁰⁷ but the framework is still in effect and the court will not examine legislative history unless there is ambiguity in the text.¹⁰⁸

B. What Does "Ambiguous" Mean?

Having agreed that there was a specific interpretive methodological framework, the justices naturally began to argue about what the word "ambiguous" means. As a reminder, Michigan requires ambiguity in a statute to move beyond the plain meaning of the statutory language and look at legislative history and substantive canons. Although the early cases in the textualist court's tenure encouraged focusing on the language of the text of statutes and criticized the use of legislative history,¹⁰⁹ the court did not endorse a specific definition of ambiguity until 2004 when it decided *Mayor of the City of Lansing v. Michigan Public Service Commission*.¹¹⁰

The previous standard for ambiguity was known as the "reasonable minds" standard.¹¹¹ In *Mayor of Lansing*, the Michigan Supreme Court changed that test.¹¹² The majority first stated that the

people of Michigan, and they agreed with her. See Todd C. Berg, *Hathaway sworn in as MSC's 104th Justice*, MICH. LAW. WKLY. (Jan. 12, 2009), <http://www.michiganautolaw.com/wp-content/uploads/2010/08/Diane-Hathaway-sworn-in-on-Michigan-Supreme-Court-00196093.pdf> [<https://perma.cc/H4DV-3TCD>] (quoting a judge, who implied that the past Michigan Supreme Court did not have common sense, saying "Justice Hathaway will abide by a 'reasonable person standard' because 'words don't always have to be looked up in the dictionary'").

107. E.g., Gluck, *The States as Laboratories*, *supra* note 14, at 1809–10; see also Ron Bretz, *New Era or Will High Court Retain Its "Radical" Ways?*, DOME MAG. (Feb. 16, 2009), <http://domemagazine.com/blogs/highcourt> [<https://perma.cc/72TU-8QC2>] (speculating whether the 2009 supreme court would overrule recent precedent and arguing that it should "seek to overturn those precedents from the Taylor court that are inconsistent with basic notions of justice").

108. See, e.g., *People v. Hall*, No. 150677, 2016 WL 3544119, at *3 (Mich. June 29, 2016) ("When the Legislature has unambiguously conveyed its intent in a statute . . . judicial construction is not permitted." (quoting *Koontz v. Ameritech Servs.*, 645 N.W.2d 34, 39 (Mich. 2002))); *id.* ("A statute is ambiguous if two provisions irreconcilably conflict or if the text is equally susceptible to more than one meaning." (citing *Mayor of Lansing v. Mich. Pub. Serv. Comm'n*, 680 N.W.2d 840, 847 (Mich. 2004))); *In re Application of Ind. Mich. Power Co. for a Certificate of Necessity*, 869 N.W.2d 276, 277 (Mich. 2015) ("A provision of law is ambiguous only if it 'irreconcilably conflict[s]' with another provision or 'when it is *equally* susceptible to more than a single meaning.'" (alteration in original) (quoting *Mayor of Lansing*, 680 N.W.2d at 847)).

109. See *supra* notes 84–88 and accompanying text.

110. *Mayor of Lansing v. Mich. Pub. Serv. Comm'n*, 680 N.W.2d 840, 846 (Mich. 2004).

111. See *People v. Adair*, 550 N.W.2d 505, 509 (Mich. 1996) ("When faced with two alternative reasonable interpretations of a word in a statute, [the court] should give effect to the interpretation that more faithfully advances the legislative purpose behind the statute.").

112. *Mayor of Lansing*, 680 N.W.2d at 842.

court's purpose in statutory construction is "to give effect to the Legislature's intent" and that intent is clear when "the statutory language is unambiguous."¹¹³ Next, the majority established a new standard to determine whether a statute is ambiguous.¹¹⁴ To be ambiguous, the statutory provision must either "irreconcilably conflict[]" with another provision, or be "equally susceptible to more than a single meaning."¹¹⁵ In developing this test, the majority relied on a contract interpretation case, *Klapp v. United Insurance Group Agency, Inc.*¹¹⁶ The majority reasoned that cases that parties argue all the way to the state supreme court already fulfilled the reasonable minds standard, relied on by the dissent, because people would not pay the money—and attorneys would not spend the time—litigating the case if reasonable minds could not differ on the correct outcome.¹¹⁷ The majority said that the "reasonable minds" standard "necessarily [led to] a result-oriented analysis" that is "not a legal analysis at all," but a policy-related choice.¹¹⁸ Further, even if the court reached a decision with undesirable policy implications, the court maintained that its constitutional role is to perform "the important, but . . . limited, duty to read into and interpret what the Legislature has actually made the law," meaning the court did not believe it had a right to change the law.¹¹⁹

The dissenters, Justices Cavanagh and Kelly,¹²⁰ vehemently disagreed with the majority's approach and insisted that "[a] statute is ambiguous when reasonable minds can differ regarding its meaning." In other words, a statute is ambiguous "when [it] is capable of being understood by reasonably well-informed persons in two or more

113. *Id.* at 842–43.

114. See Marilyn Kelly & John Postulka, *The Fatal Weakness in the Michigan Supreme Court Majority's Textualist Approach to Statutory Construction*, 10 T.M. COOLEY J. PRAC. & CLINICAL L. 287, 289 (2008) (pointing out that the majority first articulated its definition of ambiguity in *Mayor of Lansing*).

115. *Mayor of Lansing*, 680 N.W.2d at 847.

116. See *Klapp v. United Ins. Grp. Agency*, 663 N.W.2d 447, 453 (Mich. 2003) ("[I]f two provisions of the same contract irreconcilably conflict with each other, the language of the contract is ambiguous.").

117. *Mayor of Lansing*, 680 N.W.2d at 846.

118. *Id.*

119. *Id.* at 844.

120. Justice Weaver did not join either the majority or dissent's interpretation of ambiguity; instead, she concurred in the judgment of the majority in every section except for its ambiguity analysis. See *id.* at 851 (Weaver, J., concurring).

different senses.”¹²¹ Justice Kelly explicitly admonished the majority for changing the definition of ambiguity and “seemingly creat[ing] the test out of thin air, without reference to a single case, legal journal article, or treatise.”¹²²

In 2009, five years after *Mayor of Lansing*, the new purposivist majority had a chance to change the definition of ambiguity. In *Petersen v. Magna Corp.*,¹²³ the court examined whether a workers’ compensation statute required payment of attorney’s fees.¹²⁴ A majority of the judges agreed with the result of the case, finding that the statute applied only to employers and insurance carriers.¹²⁵ But only a plurality of the judges—Chief Justice Kelly and Justice Cavanagh—thought that the court should change the definition of “ambiguous” back to the “reasonable minds” standard.¹²⁶ Justices Hathaway and Weaver did not want to change the definition of ambiguity in *Petersen*.¹²⁷

Writing for the plurality, Chief Justice Kelly—joined by Justice Cavanagh—framed the opinion as one of statutory interpretation in which the court has the duty to construe ambiguous statutory text.¹²⁸ Realizing the opportunity to change the definition of ambiguity, the plurality adopted the position of the dissent in *Mayor of Lansing*, agreeing that *Mayor of Lansing*’s “definition of ‘ambiguity’ is unsupported by any Michigan law whatsoever, having been derived, as it were, from thin air.”¹²⁹ The plurality opinion next articulated two reasons why *Mayor of Lansing* was wrongly decided. First, *Mayor of Lansing* improperly used *Klapp*—a contracts case—to say that ambiguity should be used as a last resort.¹³⁰ Second, *Mayor of Lansing* improperly rejected the “reasonable minds” standard to discern

121. *Id.* at 851–52 (Cavanagh, J., dissenting).

122. Kelly & Postulka, *supra* note 114, at 289.

123. *Petersen v. Magna Corp.*, 773 N.W.2d 564 (Mich. 2009).

124. *Id.* at 567; see MICH. COMP. LAWS ANN. § 418.315 (West 2015) (“The worker’s compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee.”).

125. *Petersen*, 773 N.W.2d at 565; *id.* at 585 (Hathaway, J., concurring).

126. See *id.* at 569–81 (discussing why Michigan should use a “reasonable minds may differ” approach for the definition of ambiguity instead of the *Mayor of Lansing* approach).

127. See *id.* at 585–86 (Hathaway, J., concurring) (stating that Justice Hathaway wrote separately because she did not think the statute was ambiguous).

128. *Id.* at 567.

129. *Id.* at 569.

130. *Id.* at 569–70.

ambiguity, making a finding of ambiguity almost impossible.¹³¹ The plurality opinion then overruled *Mayor of Lansing*'s definition of ambiguity.¹³²

Using the “reasonable minds” standard, the plurality described the definition of “ambiguity” as a “tool of judicial construction” used only to discern ambiguity or lack of it in a statute.¹³³ The plurality’s primary justifications for overruling the definition were that (1) judges who seek guidance from only a statute’s language retain greater discretion than judges who seek guidance from all reliable sources, (2) the *Mayor of Lansing* definition never led to the court finding ambiguity in statutory language, and (3) no other jurisdictions used a similar definition of ambiguity.¹³⁴ Finally, the plurality adopted a different definition of ambiguity that was previously espoused by Justice Cavanagh, saying, “[W]hen there can be reasonable disagreement over a statute’s meaning, or, as others have put it, when a statute is capable of being understood by reasonably well-informed persons in two or more different senses, [a] statute is ambiguous.”¹³⁵

But, surprisingly, two of the purposivist judges—Justices Hathaway and Weaver—did not join the plurality’s view that the statute was ambiguous and that *Robinson v. City of Detroit*¹³⁶ and *Mayor of Lansing* should be overruled. In a concurrence, Justice Hathaway, joined by Justice Weaver, wrote that she thought the statute was *not* ambiguous and that she only concurred in the lead opinion to the extent that the statute applied exclusively to employers and their insurance carriers.¹³⁷ She believed that when read within the entirety of the statutory scheme, the provision had a single meaning.¹³⁸ Hathaway

131. *Id.*

132. *Id.* at 570. The plurality also stated that it was installing a new stare decisis test that gave stronger stare decisis effect to precedent than the textualist majority’s test. *See id.* at 570–74 (“These facts alone suffice to show that *Robinson* is insufficiently respectful of precedent. Therefore, I would modify it by shifting the balance back in favor of precedent and expanding on *Robinson*’s] list of factors to consider in applying stare decisis.”).

133. *Id.* at 577.

134. *Id.* at 575–77.

135. *Id.* at 579 (alterations in original) (quoting *Yellow Freight Sys., Inc. v. Michigan*, 627 N.W.2d 236, 244 (Mich. 2001) (Cavanagh, J., dissenting), *rev’d sub nom.* *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36 (2002)).

136. *Robinson v. City of Detroit*, 613 N.W.2d 307 (Mich. 2000). *Robinson* established a relatively lenient test for when the court should overrule precedent. The plurality in *Petersen* thought that *Robinson* was “insufficiently respectful of precedent.” *Petersen*, 773 N.W.2d at 572.

137. *Petersen*, 773 N.W.2d. at 585 (Hathaway, J., concurring).

138. *Id.*

did not give her standard of ambiguity, but she emphasized the importance of relying first on the statutory language.¹³⁹ Because only two justices agreed with the plurality's new definition of ambiguity, it was unclear whether Chief Justice Kelly's opinion was binding.

Indeed, in 2011, once the textualists were back in control, the court implied that *Petersen's* definition of ambiguity meant nothing. In *Hamed v. Wayne County*,¹⁴⁰ the court indicated that it was challenging the entire holding of *Petersen* by saying that the "stare decisis test set forth in *Petersen* . . . is not the law of this state."¹⁴¹ As of the writing of this Note, no other precedent has challenged *Mayor of Lansing*; in fact, recent opinions indicate that it is still the law of Michigan.¹⁴²

Michigan methodology has gone through tumultuous times, but throughout this period, the Michigan Supreme Court has maintained that it is bound by this statutory interpretation methodological framework. The next Part examines whether the federal courts followed their example.

III. DO FEDERAL COURTS IMPLEMENT THE MICHIGAN SUPREME COURT'S STATUTORY INTERPRETATION METHODOLOGY?

Although other articles have argued that *Erie* applies to statutory interpretation,¹⁴³ few have looked at whether federal courts already use state interpretation methods when examining state statutes. This Part examines whether federal courts follow the Michigan Supreme Court's interpretive methodology and concludes that they do not. Section A explains the methodology this Note uses to examine the federal courts' interpretations of the Michigan Code since 2004. The period from 2004 to the present was chosen because that was the period where both Michigan's methodological stare decisis and ambiguity tests were in

139. *See id.* ("The Court must, first and foremost, interpret the language of a statute in a manner that is consistent with the intent of the Legislature.").

140. *Hamed v. Wayne Cnty.*, 803 N.W.2d 237 (Mich. 2011).

141. *Id.* at 257 (footnote omitted).

142. *See, e.g., In re Application of Ind. Mich. Power Co. for a Certificate of Necessity*, 869 N.W.2d 276, 277 (Mich. 2015) ("A provision of law is ambiguous only if it 'irreconcilably conflict[s]' with another provision or 'when it is *equally* susceptible to more than a single meaning.'" (alteration in original) (quoting *Mayor of Lansing v. Mich. Pub. Serv. Comm'n*, 680 N.W.2d 840, 847 (Mich. 2004))); *Hardaway v. Wayne Cnty.*, 835 N.W.2d 336, 338 (Mich. 2013) (endorsing the court of appeals' test for resolving ambiguity by determining whether the statute was "equally susceptible of more than one meaning," but ultimately concluding that the statute was not ambiguous under the *Mayor of Lansing* test).

143. *E.g., Gluck, Intersystemic Statutory Interpretation, supra* note 7, at 1907; *Foster, supra* note 24, at 1867.

effect, creating a relatively stable baseline from which to assess whether federal courts in fact implemented the state framework. Section B explains the results of my research and examines the multiple tests that the federal courts use for statutory interpretation purposes.

A. *Methodology for Examining Cases and Expected Findings*

To examine whether federal courts give stare decisis effect to the Michigan Supreme Court's definition of ambiguity, this Note examines federal district and appellate cases that have examined the Michigan Code from June 9, 2004 to the present.¹⁴⁴ There were 477 cases in total. Results were narrowed to 118 cases by (1) eliminating unpublished cases, because those opinions are not given precedential value;¹⁴⁵ (2) removing criminal cases in federal court because they turn on federal statutes instead of state statutes; and (3) focusing only on the Sixth Circuit and the federal district courts located in Michigan to avoid choice-of-law issues.¹⁴⁶ Next, it was determined whether the remaining cases (1) thoroughly examined a Michigan statute, (2) used a definition of ambiguity, (3) used any canons (if so, which ones), and (4) relied on state or federal precedent to interpret the statute. From the Westlaw search, eighty-eight cases were irrelevant¹⁴⁷ and thirty were relevant.¹⁴⁸

Also, to make sure that all federal cases that relied upon Michigan Supreme Court precedents about ambiguity were found, I examined every federal court decision, including unpublished ones, that cited

144. I used Westlaw with the search terms “adv: (“M.C.L. §” or “MCL §” or “Mich. Comp. Laws §”) and ((statut! or M.C.L. or MCL or “Mich. Comp. Laws”) /s interpret!) and (ambigu! or vague! or unclear or obscur!).”

145. Erica S. Weisgerber, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 GEO. L.J. 621, 622 (2009); see also 1st Cir. R. 36.0(c) (“[A] panel’s decision to issue an unpublished opinion means that the panel sees no precedential value in that opinion.”). Although the initial study only consisted of published cases, I later looked at unpublished cases within the Sixth Circuit and the federal district courts located in Michigan to see if those cases followed a similar pattern to the original study. The cases seemed to consider the federal and state statutory interpretation precedent similarly to the published cases, so I did not include them for brevity purposes. For anyone interested in looking at appendices of those cases, they are on file with the *Duke Law Journal* and the author.

146. *Klaxon Co. v. Stentor Electric Manufacturing Co.* mandates that federal courts apply the choice-of-law rules of the state in which they sit. *Klaxon Co. v. Stentor Elec. Mfg. Co.* 313 U.S. 487, 496 (1941). This could be problematic in the statutory interpretation context because it is unclear whether a court outside of Michigan should interpret a statute in the same way as a Michigan court or if they should interpret it as a local state court would.

147. For a list of all of the irrelevant cases from Westlaw, see *infra* Appendix 1.

148. For a list of all of the relevant cases from Westlaw, see *infra* Appendix 3.

Mayor of Lansing,¹⁴⁹ *Petersen*,¹⁵⁰ or *Hamed*.¹⁵¹ This added twenty-seven total cases: thirteen were irrelevant because they did not interpret a state statute,¹⁵² three cases cited *Mayor of Lansing*, *Petersen*, or *Hamed* for statutory interpretation reasons,¹⁵³ and eleven cases cited these Michigan Supreme Court cases for contract interpretation reasons.¹⁵⁴ Thus, the total number of relevant cases was forty-four, and the total number of irrelevant cases was 101.

If federal courts are following the *Erie* doctrine in regard to the Michigan Supreme Court's definition of ambiguity, then these courts should either (1) cite to *Mayor of Lansing*, *Petersen*, or *Hamed* when giving the standard by which it will interpret the Michigan statute or (2) use similar language to the "equally susceptible" test established in *Mayor of Lansing*—from 2004 to 2009 and 2011 to the present—and the "reasonable minds" standard established in *Petersen* from 2009 to 2011.¹⁵⁵ Similarly, if federal courts use the state court's definition of ambiguity, the expectation is that they will treat these cases' interpretive methodology as substantive holdings rather than procedural ones. If the federal courts are not using *Erie* in their definition of ambiguity, then the courts should (1) cite primarily to federal precedent for interpretation principles and (2) treat statutory interpretation as more of a procedural holding than a substantive one.

B. Results: Inconsistent Use of Precedent

Overall, the federal courts do not seem to pay attention to Michigan's statutory interpretation framework. Although all the decisions start with some sort of textualist analysis by examining the plain language of the statute and applying textual canons,¹⁵⁶ the federal

149. *Mayor of Lansing v. Mich. Pub. Serv. Comm'n*, 680 N.W.2d 840 (Mich. 2004).

150. *Petersen v. Magna Corp.*, 773 N.W.2d 564 (Mich. 2009).

151. *Hamed v. Wayne Cnty.*, 803 N.W.2d 237 (Mich. 2011).

152. For a list of all of the irrelevant cases that cited Michigan Supreme Court precedent, see *infra* Appendix 2.

153. For a list of all of the relevant cases that cited Michigan Supreme Court precedent for statutory interpretation purposes, see *infra* Appendix 4.

154. For a list of all of the relevant cases that cited Michigan Supreme Court precedent for contract interpretation purposes, see *infra* Appendix 5.

155. Of course, one could equally predict that federal courts never would follow the "reasonable minds" standard from *Petersen* since a majority of the court never joined that opinion. See *supra* notes 137–39 and accompanying text.

156. See generally Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 352 (2010) ("Textual canons focus on the language of the statute itself and the relationships between statutory provisions."). Textual canons include logical canons, grammar

courts that have interpreted state statutes used divergent tests without explaining why they chose their methods. This Section discusses three problems with the federal courts' interpretations. Additionally, it explains how federal courts use the Michigan statutory interpretation framework for contract law, even though they mostly seem to ignore the statutory interpretation cases in other contexts. Subsection 1 shows that federal courts do not agree about whether they should use federal precedent, state precedent, or no precedent to construe state statutes. Subsection 2 demonstrates that federal courts use many different tests for statutory interpretation that do not align with each other and can lead to inconsistent results. Subsection 3 explains how federal courts use inconsistent definitions of ambiguity. Subsection 4 describes how federal courts currently apply state statutory interpretation precedent to contract interpretation, using the two lines of precedent interchangeably.

1. *Federal Courts Cannot Agree About Whether to Apply Federal or State Cases to Statutory Interpretation.* The first problem with the federal courts' methodology is that courts disagree about whether to apply federal or state precedent to statutory interpretation. Although the courts consistently use both sets of precedent to start with the text of the statute, they seem confused about which system's statutory interpretation principles and tests they should apply. Overall, the cases are split almost equally between citing either exclusively state precedent or exclusively federal precedent for statutory interpretation principles. Of the thirty-three statutory interpretation cases, thirteen cases cited exclusively to federal precedent¹⁵⁷ and sixteen cases cited exclusively to state precedent for their general interpretation

and syntax canons, and textual-integrity canons. *See id.* at 352–71 (discussing many different textual canons and how to apply them).

157. *See* Miller v. Mylan Inc., 741 F.3d 674, 677–78 (6th Cir. 2014); Molosky v. Wash. Mut., Inc., 664 F.3d 109, 116–18 (6th Cir. 2011); Does v. Snyder, 101 F. Supp. 3d 672, 681–83 (E.D. Mich. 2015), *rev'd*, Nos. 15-1536, 15-2346, 15-2486, 2016 WL 4473231 (6th Cir. Aug. 25, 2016); Does v. Snyder, 932 F. Supp. 2d 803, 813 (E.D. Mich. 2013); Mt. Clemens Auto Ctr. Inc. v. Hyundai Motor Am., 897 F. Supp. 2d 570, 575 (E.D. Mich. 2012); Mich. Bldg. and Const. Trades Council v. Snyder, 846 F. Supp. 2d 766, 789 (E.D. Mich. 2012); Lowden v. Cty. of Clare, 709 F. Supp. 2d 569, 581–83 (E.D. Mich. 2010); Lowden v. Cty. of Clare, 709 F. Supp. 2d 540, 553–56 (E.D. Mich. 2010); Shapiro v. Sassak (*In re* Sassak), 426 B.R. 680, 684 (E.D. Mich. 2010); Glover v. Nationwide Mut. Fire Ins., 676 F. Supp. 2d 602, 617–19 (W.D. Mich. 2009); John Richard Homes Bldg. Co. v. Adell Broad. Corp. (*In re* John Richards Homes Bldg. Co.), 402 B.R. 780, 789–94 (E.D. Mich. 2009); Accu-Tech Corp. v. Jackson, 352 F. Supp. 2d 831, 837–39 (E.D. Mich. 2005); Athenaco, Ltd. v. Cox, 335 F. Supp. 2d 773, 784–87 (E.D. Mich. 2004).

principles.¹⁵⁸ One case did not cite any precedent for its interpretation of a state statute's definition; instead, it looked to the facts of the case and reasoned what it thought was an appropriate interpretation.¹⁵⁹ There are also some outlier cases that do not fit neatly into either category. Three cases used both state and federal precedent.¹⁶⁰

The cases do not appear to follow a specific pattern: the first case applying federal precedent was decided in 2004¹⁶¹ and the last one was in 2015.¹⁶² Conversely, the first case to apply state precedent was in 2007¹⁶³ and the last was in 2015.¹⁶⁴

The failure to solidify whether state or federal precedent applies to statutory interpretation has led to some confusing results. For example, in *Mount Clemens Auto Center Inc. v. Hyundai Motor America*,¹⁶⁵ a federal district court cited federal precedent for statutory interpretation principles, and then articulated the same principle using

158. See *Mitchell v. City of Warren*, 803 F.3d 223, 234 (6th Cir. 2015); *Borman, LLC v. 18718 Borman, LLC*, 777 F.3d 816, 821–22 (6th Cir. 2015); *Performance Contracting Inc. v. DynaSteel Corp.*, 750 F.3d 608, 611 (6th Cir. 2014); *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428, 435–37 (6th Cir. 2012); *Dawda, Mann, Mulcahy & Sadler, P.L.C. v. Bank of Am., N.A.*, 62 F. Supp. 3d 651, 656–58 (E.D. Mich. 2014); *Mich. State AFL-CIO v. Callaghan*, 15 F. Supp. 3d 712, 718–22 (E.D. Mich. 2014); *Sedgwick Ins. v. F.A.B.E. Custom Downstream Sys., Inc.*, 47 F. Supp. 3d 536, 539–40 (E.D. Mich. 2014); *Bryanton v. Johnson*, 902 F. Supp. 2d 983, 1002–03 (E.D. Mich. 2012); *Austin v. Redford Twp. Police Dep't*, 859 F. Supp. 2d 883, 911 (E.D. Mich. 2011); *Casias v. Wal-Mart Stores, Inc.*, 764 F. Supp. 2d 914, 921 (W.D. Mich. 2011), *aff'd*, 695 F.3d 428 (6th Cir. 2012); *Mich. Chamber of Commerce v. Land*, 725 F. Supp. 2d 665, 671 (W.D. Mich. 2010); *State Farm Fire & Cas. Co. v. Liberty Ins. Underwriters*, 613 F. Supp. 2d 945, 969 (W.D. Mich. 2009), *aff'd*, 398 F. App'x 128 (6th Cir. 2010); *J.B. Hunt Transp., Inc. v. Adams*, 537 F. Supp. 2d 880, 884–85 (E.D. Mich. 2007); *Chiaverini, Inc. v. Frenchie's Fine Jewelry, Coins & Stamps, Inc.*, No. 04-CV-74891-DT, 2007 WL 1344183, at *2 (E.D. Mich. May 4, 2007); *Frantz v. City of Pontiac*, 432 F. Supp. 2d 717, 720 (E.D. Mich. 2006), *vacated in part by* No. 04-CV-72904, 2006 U.S. Dist. LEXIS 66054 (E.D. Mich. Sept. 15, 2006); *In re Dzierzawski*, 528 B.R. 397, 414 (Bankr. E.D. Mich. 2015).

159. See *Erard v. Johnson*, 905 F. Supp. 2d 782, 810–14 (E.D. Mich. 2012) (“The Court is reluctant to interpret the requalification scheme in this way when there is a much more plausible reason for legislature to have removed the ‘party column’ reference: the language became surplusage when ‘principal candidate’ was redefined” (quoting MICH. COMP. LAWS ANN. § 168.685(6) (West 1989))).

160. *First Am. Title Co. v. Devaugh*, 480 F.3d 438, 450–54 (6th Cir. 2007); *Jimenez v. Allstate Indem. Co.*, 765 F. Supp. 2d 986, 994–96 (E.D. Mich. 2011); *In re Vinson*, 337 B.R. 147, 148–49 (Bankr. E.D. Mich. 2006) *rev'd sub nom.* *Vinson v. Dakmak*, 347 B.R. 620 (E.D. Mich. 2006).

161. *Athenaco*, 335 F. Supp. 2d at 784–87.

162. *Does*, 101 F. Supp. 3d at 681–83.

163. *Frantz*, 432 F. Supp. 2d at 720.

164. *Mitchell v. City of Warren*, 803 F.3d 223, 234 (6th Cir. 2015).

165. *Mt. Clemens Auto Ctr. Inc. v. Hyundai Motor Am.*, 897 F. Supp. 2d 570 (E.D. Mich. 2012).

state precedent for contract interpretation principles.¹⁶⁶ The court cited two cases interpreting federal statutes that use federal statutory interpretation precedent.¹⁶⁷ Then, it switched to a case that interpreted a state statute and used Sixth Circuit and Tennessee Supreme Court precedent that provided Tennessee’s approach to statutory interpretation, signifying that it may be different from the Sixth Circuit standard.¹⁶⁸

Two of the cases where federal courts used both federal and state statutory interpretation principles also show the confusion courts face because there is not a consistent standard for when to apply federal and state precedent. *First American Title Co. v. Devaugh*¹⁶⁹ used federal precedent to cite the canon that “‘a more specific provision takes precedence over a more general one’ . . . even when there is no direct conflict between the general statute and the specific one.”¹⁷⁰ Then, because the question was one of state law, the court explained, “Michigan courts follow this same rule of statutory construction,” so it cited to state precedent as well.¹⁷¹ A few paragraphs later, the federal court did the same thing for the *expressio unius est exclusio alterius* canon¹⁷² by first citing to federal precedent¹⁷³ and then citing to state precedent to point out that “Michigan courts also follow this canon of

166. See *id.* at 575 (“In construing the meaning of a statute, the court must seek the intent of the legislature and refer first to the statute’s plain language.” (first citing *Chrysler Corp. v. Comm’r*, 436 F.3d 644, 654 (6th Cir. 2006); then citing *Herman v. Fabri-Ctrs. of Am., Inc.*, 308 F.3d 580, 585 (6th Cir. 2002))); *id.* (“Similarly, when construing a contract or one of its provisions, the intentions of the parties govern.” (citing *First Nat’l Bank of Ypsilanti v. Redford Chevrolet Co.*, 258 N.W. 221, 223 (Mich. 1935))); *id.* (“Contractual language is construed according to its plain and ordinary meaning, and technical or constrained constructions are to be avoided.” (citing *Dillon v. DeNooyer Chevrolet Geo.*, 550 N.W.2d 846, 848 (Mich. Ct. App. 1996))); *id.* (“The same holds true for statutory construction. (citing *First Am. Nat’l Bank–E. v. FDIC*, 782 F.2d 633, 636 (6th Cir.1986)).

167. See *Chrysler Corp. v. Comm’r*, 436 F.3d 644, 654 (6th Cir. 2006) (using federal statutory interpretation precedent); *Fabri-Ctrs.*, 308 F.3d at 585–86 (same).

168. See *First Am. Nat’l Bank–E.*, 782 F.2d at 636 (using precedent that provides Tennessee’s approach to statutory interpretation instead of how federal courts typically interpret statutes).

169. *First Am. Title Co. v. Devaugh*, 480 F.3d 438 (E.D. Mich. 2011).

170. *Id.* at 450–51 (citing *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1989); *Simpson v. United States*, 435 U.S. 6, 15 (1978); *United States v. Perry*, 360 F.3d 519, 535 (6th Cir. 2004)).

171. *Id.* at 451 (citing *People v. Bewersdorf*, 450 N.W.2d 271, 272 (Mich. Ct. App. 1989), *aff’d in part, rev’d in part on other grounds*, 475 N.W.2d 231 (Mich. 1991)).

172. This canon means “the mention of one thing implies the exclusion of another.” *Id.* at 453 (quoting *Millsaps v. Thompson*, 259 F.3d 535, 546 (6th Cir. 2001)).

173. See *id.* (citing *Millsaps*, 259 F.3d at 546) (“This reasoning comports with the long-established canon of statutory construction, *expressio unius est exclusio alterius* . . .”).

construction.”¹⁷⁴ Although the court indicated that a state rule of construction may trump a federal rule of construction,¹⁷⁵ the court never established which statutory interpretation principles govern, possibly indicating that it wanted to cover its bases by citing both.

The second case, *Jimenez v. Allstate Indemnity Co.*,¹⁷⁶ illustrates how the problem of inconsistently using state and federal precedent can change the outcome of a case. First, the court acknowledged the defendant’s argument that a court should not construe a statute in a way that leads to absurd results, citing federal precedent.¹⁷⁷ The district court seemingly did not consider whether this state rule applied and cited state precedent for the proposition that the absurd results canon “is always secondary to the command that the plain and unambiguous language of the statute controls.”¹⁷⁸ Although the court ultimately ruled that “[t]he plain and unambiguous language” controls the outcome,¹⁷⁹ it still returned to the absurd results canon to solidify its analysis, justifying its reasoning because “the [c]ourt’s reading of the statute does not lead to absurd results.”¹⁸⁰ The court did not mention that Michigan does not allow this canon of construction.

The interpretations embraced in these cases are problematic because there is no clarity about whether federal or state legal principles guide the case. For example, take the classic illustration of a sign that prohibits vehicles in the park.¹⁸¹ Assume that a person rides a bicycle into the park or a small child brings her dog into the park riding a small cart. Using federal precedent for the rule against absurdities, the *Jimenez* court could determine that the legislature did not intend to cover bicycles even though the definition of a bicycle is “a *vehicle*

174. *Id.* (citing *People v. Jahner*, 446 N.W.2d 151, 155 n.3 (Mich. 1989)).

175. *See id.* at 451 (“Because the question of whether the [state statute] applies to county registers is a question of state law, we note that the Michigan courts follow this same rule of statutory construction.”).

176. *Jimenez v. Allstate Indem. Co.*, 765 F. Supp. 2d 986, 994–96 (E.D. Mich 2011).

177. *Id.* at 994. Recall that the Michigan Supreme Court banned the rule against absurdities in 1999, *People v. McIntire*, 599 N.W.2d 102, 107–08 & n.8 (Mich. 1999), and *Jimenez* was decided in 2011.

178. *Jimenez*, 765 F. Supp. 2d at 994 (citing *Mich. Dep’t of Transp. v. Tomkins*, 749 N.W.2d 716 (Mich. 2008)).

179. *Id.* at 995.

180. *Id.*

181. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607–11 (1958).

with two wheels in tandem”¹⁸² and a cart is defined as “any small *vehicle* pushed or pulled by hand.”¹⁸³ Michigan courts, on the other hand, would look solely to the text of the statute and could determine that neither bicycles nor carts are allowed, even though that may not be wise policy. Thus, the method of interpretation a court chooses could change the outcome of a case, meaning that federal courts should follow state practice under *Erie*.¹⁸⁴

2. *Federal Courts Use Inconsistent Tests When Interpreting Statutes.* The second problem with current lower federal court statutory interpretation techniques is that the courts use a variety of inconsistent tests to determine the meaning of the statute. As a reminder, Michigan follows a three-part framework wherein a court (1) examines whether the plain text is clear and unambiguous, (2) looks to “high quality” legislative history if the text is not clear, and (3) uses substantive canons if the first two do not lead to a clear result.¹⁸⁵ In this limited study, the lower federal courts did not appear to follow this framework, and only a few cases cite to it. Instead, the federal courts apply different tests with little rhyme or reason—some mimic the Michigan test and others do not.

a. *The Detour Approach.* The most prevalent approach is one that this Note calls the detour approach. When a federal court uses the detour approach, it sets out the plain-meaning rule—that the court will not look to anything else if the statute is plain and unambiguous. But the court does not stop with the plain meaning. Instead, it looks to other statutory interpretation maxims, including legislative history, substantive canons, or other persuasive authority. Finally, the court concludes that it makes its decision because of the plain meaning of the text. The approach detours around what the text of the statute means: it starts with the plain meaning and concludes with the plain meaning but looks at other authority to support its decision.

*Accu-Tech Corp. v. Jackson*¹⁸⁶ is an example of the detour approach. In *Accu-Tech*, a federal district court had to interpret the

182. RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 204 (2d ed. 2001) (emphasis added).

183. *Id.* at 320 (emphasis added).

184. *Hanna v. Plumer*, 380 U.S. 460, 473–74 (1965).

185. *Gluck, The States as Laboratories*, *supra* note 14, at 1806.

186. *Accu-Tech Corp. v. Jackson*, 352 F. Supp. 2d 831 (E.D. Mich. 2005).

scope of the Michigan Builders' Trust Fund Act ("MBTFA").¹⁸⁷ First, the court established that it was using the plain-meaning rule under federal precedent.¹⁸⁸ Then, the court turned to legislative history and determined that the legislative history was ambiguous.¹⁸⁹ After determining that cases examining similar statutes and policy considerations did not help determine the MBTFA's meaning, the court rested its holding on the plain-meaning rule.¹⁹⁰ *Jimenez v. Allstate Indemnity Company* may follow a similar pattern because it started with the plain meaning of the statute, and after examining the rule against absurdities, it ended with the plain meaning.¹⁹¹ However, because federal textualists often use the rule against absurdities,¹⁹² the court's methodology in *Jimenez* could relate to its use of federal precedent.¹⁹³

Another example is *John Richards Homes Building Co. v. Adell Broadcasting Corp.*¹⁹⁴ The court started with the plain meaning rule¹⁹⁵ and said that it ultimately decided the case based upon it.¹⁹⁶ But the court seemed to be unsure what it should do when confronted with an ambiguous statute. The court said that it "look[ed] to other persuasive authority in an attempt to discern legislative meaning."¹⁹⁷ Yet it did not explain what hierarchy of persuasive authority the court used and only provided a list, saying "[p]ersuasive authority can include other statutes, interpretations by other courts, legislative history, policy

187. MICH. COMP. LAWS ANN. § 570.151 (West 2015); *Accu-Tech*, 352 F. Supp. 2d at 832.

188. See *Accu-Tech*, 352 F. Supp. 2d at 835–36 ("For statutory construction, courts begin 'by looking at the language of the statute itself to determine if its meaning is plain. Plain meaning is examined by looking at the language and design of the statute as a whole.'" (quoting *United States v. Wagner*, 382 F.3d 598, 607 (6th Cir. 2004))).

189. See *id.* at 837 ("[E]ven if the MBTFA is ambiguous, the legislative history does not provide any insight.").

190. See *id.* at 839 ("Pursuant to the plain language and design of the MBTFA, a claim under the statute is permitted here.").

191. *Jimenez v. Allstate Indem. Co.*, 765 F. Supp. 2d 986, 994 (E.D. Mich. 2011).

192. See Gluck, *The States as Laboratories*, *supra* note 14, at 1805 (stating that the rule against absurdities has been associated with Justice Scalia's textualism); see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 234–39 (2012) (discussing and approving of the rule against absurdities as long as no violence is done to the text).

193. See *supra* notes 177–80 and accompanying text.

194. *John Richards Homes Bldg. Co. v. Adell Broad. Corp.* (*In re John Richards Homes Bldg. Co.*), 402 B.R. 780 (E.D. Mich. 2009).

195. See *id.* at 782 ("In conducting statutory interpretation, the statute must be read in a straightforward and commonsense manner.").

196. See *id.* ("In this case, the Court finds that the statute is clear and unambiguous.").

197. *Id.* at 790.

rationales, and the context in which the statute was passed.”¹⁹⁸ Later the court said that it decided the case based upon the plain text,¹⁹⁹ but immediately after looked to persuasive authority—multiple other statutes and policy rationales—to resolve the statute’s language “[t]o the extent that . . . [it was] ambiguous.”²⁰⁰ The court ultimately ruled that the persuasive authority “failed to overcome the plain language of [the statute],”²⁰¹ so the court’s ruling must have relied on the plain meaning of the statute.

b. The Unclear Second-Step Approach. The second approach taken by federal courts is the unclear second-step approach. All of these cases acknowledge that the first step in interpreting the statute is to look at the text itself and determine the plain meaning. They do not explain, however, why they turn to other persuasive authority once they determine that the plain language does not decide the issue. The difference between the unclear second-step approach and the detour approach is that the unclear second-step approach bases its reasoning on something other than the “plain meaning” of the statute.

*Performance Contracting, Inc. v. DynaSteel Corp.*²⁰² shows the unclear second-step approach. Like the other cases, the court first laid out the plain-meaning rule.²⁰³ But then, without examining the text of the statute,²⁰⁴ the court looked to legislative history and federal and state case law interpreting the statute, determining that they “provide little guidance on how to interpret the act.”²⁰⁵ Only after exhausting these methods did the court return to the text of the statute, saying that it is “concededly open-ended.”²⁰⁶ Finally, the court turned to the statute’s preamble and based its holding on the express purpose of the statute.²⁰⁷

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 791.

202. *Performance Contracting, Inc. v. DynaSteel Corp.*, 750 F.3d 608 (6th Cir. 2014).

203. *See id.* at 611 (“Under Michigan law, statutory interpretation requires an examination of the plain language of the statute.” (citing *Kenneth Henes Special Projects Procurement, Mktg. & Consulting Corp. v. Cont’l Biomass Indus. (In re Certified Question from U.S. Ct. App. for the 6th Cir.)*, 659 N.W.2d 597, 600 (Mich. 2003))).

204. The statute was the MBTFA, which is the same statute examined in *Accu-Tech Corp.*

205. *DynaSteel*, 750 F.3d at 612.

206. *Id.* at 614.

207. *See id.* at 615 (basing its conclusion “in light of the legislature’s express purpose as well as all of the case law”).

*Does v. Snyder*²⁰⁸ presents a final example of the unclear second-step approach. There, a federal court examined the definitions of “routinely” and “regularly” under Michigan’s Sex Offenders Registration Act.²⁰⁹ Under the statute, sex offenders had to report all telephone numbers and email addresses “routinely used” and any vehicle “regularly operated.”²¹⁰ The court decided that the statute’s language was ambiguous because the statute did not define either term and their common meaning did not decide the question.²¹¹ For its next step, the court used one substantive canon—the rule of lenity—and two textual ones, *noscitur a sociis*²¹² and *eiusdem generis*,²¹³ to give a broad meaning to the words and declare the statute unconstitutional.²¹⁴ The court never mentioned legislative history.²¹⁵

c. The Plain Meaning Rule. Some courts mimic the Michigan test without explicitly citing the Michigan framework by only looking to the plain meaning of the text. For example, *J.B. Hunt Transport, Inc. v. Adams*²¹⁶ decided the definition of a “calendar year” purely on the plain meaning and did not use any other interpretative tools.²¹⁷ Similarly, the district court in *Casias v. Wal-Mart Stores, Inc.*²¹⁸ decided that a medical-marijuana statute protected individuals from state

208. *Does v. Snyder*, 101 F. Supp. 3d 672 (E.D. Mich. 2015), *rev’d*, Nos. 15-1536, 15-2346, 15-2486, 2016 WL 4473231 (6th Cir. Aug. 25, 2016).

209. *Id.* at 686 (quoting MICH. COMP. LAWS ANN. § 28.727(1)(h)–(j) (West 2015)).

210. *Id.*

211. *See id.* at 689 (discussing how the common meaning of the words at issue “do not provide sufficient guidance” on how to construe the statute).

212. *Noscitur a sociis* means that associated words bear on each other’s meaning. SCALIA & GARNER, *supra* note 192, at 195.

213. *Eiusdem generis* means that general words that follow an enumeration of two or more things only apply to persons or things that are of the same general kind of thing as what is specifically mentioned. SCALIA & GARNER, *supra* note 192, at 199.

214. *See Does*, 101 F. Supp. 3d at 692 (stating that the court interprets the statute to be unconstitutional “in light of the rule of lenity” because the construction is also consistent with the plain reading under the textual “canons of *noscitur a sociis* and *eiusdem generis*” (quoting *Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003))).

215. I examined the legislative history, and it did not mention a definition of “routinely” or “regularly.”

216. *J.B. Hunt Transp., Inc. v. Adams*, 537 F. Supp. 2d 880 (E.D. Mich. 2007).

217. *See id.* at 887 (“Statutory language must be enforced as written and according to the plain meaning of the words.”).

218. *Casias v. Wal-Mart Stores, Inc.*, 764 F. Supp. 2d 914 (W.D. Mich. 2011), *aff’d*, 695 F.3d 428 (6th Cir. 2012).

action, but did not prevent employers from discharging employees,²¹⁹ based on the plain meaning of the statute and textual canons.²²⁰

d. Cases that Do Not Have a Specific Approach. The final set of cases had other considerations that do not allow them to fit clearly in one category. *Athenaco, Ltd. v. Cox*²²¹ involved a constitutional question where the court employed the canon of constitutional avoidance to interpret the statute in a way that did not violate the Constitution if the text was ambiguous.²²² The Michigan Supreme Court did not address this canon before this case was decided, but later precedent indicates that the court approves of the constitutional avoidance canon.²²³ *Dawda, Mann, Mulcahy & Sadler, P.L.C. v. Bank of America, N.A.*²²⁴ interpreted a state statute that Michigan adopted from the Uniform Commercial Code,²²⁵ so the court looked to cases involving the same UCC provision in other jurisdictions.²²⁶

In short, the federal courts use a variety of tests, leading to uncertainty about whether a judge will employ a detour analysis, the unclear second-step approach, or a framework like the Michigan Supreme Court.

3. Federal Courts Do Not Clearly Define Ambiguity. The final problem with federal courts' statutory interpretation is that federal courts do not use a uniform definition of ambiguity. Usually, a court does not consult legislative history unless a statute is ambiguous,²²⁷ so

219. See *id.* at 922 (“Nowhere does the MMMA state that the statute regulates private employment, that private employees are protected from disciplinary action should they use medical marijuana, or that private employers must accommodate the use of medical marijuana outside of the workplace.”).

220. See *id.* at 923–24 (using the plain meaning rule and *noscitur a sociis* to say that the word “business” was a modifier and did not lead to a standalone cause of action).

221. *Athenaco, Ltd. v. Cox*, 335 F. Supp. 2d 773 (E.D. Mich. 2004).

222. *Id.* at 784 (“When more than one statutory interpretation is possible and one of those raises doubts as to constitutional validity, the court must adopt the interpretation that avoids doubt as to constitutionality unless that construction plainly is contrary to the legislature’s intent.”).

223. See *People v. McKinley*, 852 N.W.2d 770, 773 (Mich. 2014) (“[P]ursuant to the widely accepted and venerable rule of constitutional avoidance, we conclude that it is necessary to revisit the [statute].”).

224. *Dawda, Mann, Mulcahy & Sadler, P.L.C. v. Bank of Am., N.A.*, 62 F. Supp. 3d 651 (E.D. Mich. 2014).

225. *Id.* at 655.

226. *Id.* at 659.

227. See, e.g., *Robiner v. Danny’s Mkts., Inc. (In re Danny’s Mkts., Inc.)*, 266 F.3d 523, 525 (6th Cir. 2001) (stating that the court looks to legislative history when a statutory term is

the definition of ambiguity matters. Federal courts did not follow the Michigan Supreme Court when it changed its definition of ambiguity. For example, federal courts use a heightened-ambiguity test—meaning one where it is harder to find that a word is ambiguous—as many times as they used the “reasonable minds” standard during the *Petersen* era.²²⁸ Instead, the courts generally take three approaches that this Note calls the some-uncertainty approach, the unnamed-ambiguity approach, and the heightened-standard approach.

a. The Some-Uncertainty Approach. The some-uncertainty approach is equivalent to the “reasonable minds” standard that the Michigan purposivists championed.²²⁹ This test allows a court to look at legislative history relatively easily. For example, in *In re Sassak*,²³⁰ the federal district court made a fleeting reference to ambiguity, allowing the court to easily bypass the text and examine legislative history. Specifically, the court concluded that the statute was ambiguous, citing a U.S. Supreme Court concurring opinion that reasoned, “Whenever there is *some uncertainty* about the meaning of a statute, it is prudent to examine its legislative history.”²³¹ Similarly, two bankruptcy cases²³²—*In re Vinson*²³³ and *In re Dzierzawski*²³⁴—used the “reasonable minds” standard by citing to the dissent in *Mayor of Lansing* as authoritative.²³⁵ Such methods allow federal courts to find ambiguity more easily than a Michigan court interpreting the same statute.

ambiguous); *Mayor of Lansing v. Mich. Pub. Serv. Comm'n*, 680 N.W.2d 840, 846 (Mich. 2004) (stating that finding ambiguity allows the court to examine legislative history).

228. *Petersen* is the purposivist Michigan Supreme Court opinion that tried to reinstate the “reasonable minds” standard to make it easier for the court to look at legislative history. *Petersen v. Magna Corp.*, 773 N.W.2d 564, 569–81 (Mich. 2009).

229. See *supra* notes 123–32 and accompanying text (discussing the purposivists’ “reasonable minds may differ” approach).

230. *Shapiro v. Sassak (In re Sassak)*, 426 B.R. 680 (E.D. Mich. 2010).

231. *Id.* at 686 (emphasis added) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 255 (1992) (Stevens, J., concurring)).

232. *Erie* applies to bankruptcy law even though Congress may pass bankruptcy legislation. See, e.g., Thomas E. Plank, *The Erie Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633, 642 (2004) (stating that *Erie* “requires federal courts in bankruptcy facing state law outside the scope of the Bankruptcy Clause to find and to apply state statutory or common law”).

233. *In re Vinson*, 337 B.R. 147 (Bankr. E.D. Mich. 2006), *rev'd sub nom.* *Vinson v. Dakmak*, 347 B.R. 620 (E.D. Mich. 2006).

234. *In re Dzierzawski*, 528 B.R. 397 (Bankr. E.D. Mich. 2015).

235. See *id.* at 414 (“A statute is ambiguous when reasonable minds can differ regarding its meaning.” (quoting *Mayor of Lansing v. Mich. Pub. Serv. Comm'n*, 680 N.W.2d 840, 851 (Mich. 2004) (Cavanagh, J., dissenting))); *In re Vinson*, 337 B.R. at 149 (same).

b. The Undefined-Ambiguity Approach. The undefined-ambiguity approach occurs when a court declares that a statute is ambiguous or indicates what the court examines if the statute is ambiguous, without giving any definition of ambiguity. For example, *Does v. Snyder*²³⁶ stated that the statute “do[es] not provide sufficient guidance” and that it was ambiguous whether the statute applied to a certain situation,²³⁷ but it did not explain why the statute was ambiguous or what standard it used. In *Casias v. Wal-Mart Stores, Inc.*,²³⁸ the Sixth Circuit noted that it would only determine legislative intent if the statute was ambiguous,²³⁹ but it similarly did not define ambiguity.

c. The Heightened-Standard Approach. Cases applying the heightened-standard approach have a high threshold for ambiguity and cite to *Mayor of Lansing*,²⁴⁰ but they do not say that a provision must either “irreconcilably conflict” with another provision or be “equally susceptible to more than a single meaning.”²⁴¹ The federal district court in *State Farm Fire & Casualty Co. v. Liberty Insurance Underwriters, Inc.*²⁴² reasoned that “[a] finding of ambiguity is to be reached ‘only after all other conventional means of interpretation have been applied and found wanting.’”²⁴³ The definition presented a high standard to find ambiguity, but it did not specifically indicate how the court determined whether the statute was ambiguous.

Jimenez v. Allstate Indemnity Co. used a different section of *Mayor of Lansing*, but it also conveyed a high standard of ambiguity. The court wrote, “Where a majority finds the law to mean one thing and a dissenter finds it to mean another, neither may have concluded that the law is ‘ambiguous,’ and their disagreement by itself does not transform that which is unambiguous into that which is ambiguous.”²⁴⁴ Again, this is a higher standard than the reasonable minds approach,

236. *Does v. Snyder*, 101 F. Supp. 3d 672 (E.D. Mich. 2015), *rev'd*, Nos. 15-1536, 15-2346, 15-2486, 2016 WL 4473231 (6th Cir. Aug. 25, 2016).

237. *Id.* at 689.

238. *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. 2012).

239. *Id.* at 435.

240. *Mayor of Lansing v. Mich. Pub. Serv. Comm'n*, 680 N.W.2d 840 (Mich. 2004).

241. *Id.* at 847.

242. *State Farm Fire & Cas. Co. v. Liberty Ins. Underwriters, Inc.*, 613 F. Supp. 2d 945 (W.D. Mich. 2009), *aff'd*, 398 F. App'x 128 (6th Cir. 2010).

243. *Id.* at 969 (quoting *Mayor of Lansing*, 680 N.W.2d at 846).

244. *Jimenez v. Allstate Indem. Co.*, 765 F. Supp. 2d 986, 995 (E.D. Mich. 2011) (citing *Mayor of Lansing*, 680 N.W.2d at 847).

but it is unclear whether the court used the same “equally susceptible” test adopted in *Mayor of Lansing*.

Like with the different approaches to statutory interpretation, the different definitions of ambiguity do not give litigants notice about which methods a judge will use to decide a case. When interpreting the same Michigan statute, one federal judge could use a test similar to the *Petersen* approach that the Michigan Supreme Court rejected while another could use a test like the *Mayor of Lansing* test, which differs from what a litigant would expect in the Michigan state courts and indicates that *Erie* should be used for statutory interpretation purposes.

4. *How Are Federal Courts Using Michigan Statutory Interpretation Methodology? For Contracts, of Course.* Although it appears that federal courts are not using the Michigan Supreme Court interpretive methodology to interpret the Michigan Code, several cases cite to *Mayor of Lansing* for the purpose of construing whether a contract is ambiguous.²⁴⁵ And while some Michigan Supreme Court dissents and concurrences, along with some lower Michigan court opinions, have used *Mayor of Lansing*’s definition of ambiguity for contracts,²⁴⁶ the Michigan Supreme Court has never firmly stated that the definition applies to contract interpretation. The court would likely incorporate the same definition of ambiguity into contract law today, but this is because the court seems to perceive its statutory interpretation methodological holding as a substantive one to be applied to future cases.

Numerous federal cases apply the Michigan Supreme Court’s statutory interpretation methodology for contract purposes. For example, in *Profit Pet v. Arthur Dogswell, LLC*,²⁴⁷ the court used the “equally susceptible” test to determine whether a contract was

245. For a list of all of the relevant cases that cited Michigan Supreme Court precedent for contract interpretation purposes, see *infra* Appendix 5.

246. See, e.g., *Shay v. Aldrich*, 790 N.W.2d 629, 646–47 (Mich. 2010) (Markman, J., dissenting) (“A contract is patently ambiguous only if, after the court has engaged in its judicial duties of giving effect to the contract’s language, the court concludes that a term ‘is *equally* susceptible to more than a single meaning,’ or that ‘two provisions of the same contract irreconcilably conflict with each other.’” (citation omitted)); *Royal Prop. Grp. v. Prime Ins. Syndicate Inc.*, 706 N.W.2d 426, 432 (Mich. Ct. App. 2005) (“A provision in a contract is ambiguous if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning.”).

247. *Profit Pet v. Arthur Dogswell, LLC*, 603 F.3d 308 (6th Cir. 2010).

ambiguous.²⁴⁸ In *Lomree, Inc. v. Pan Gas Storage, LLC*,²⁴⁹ the only federal case to cite both *Mayor of Lansing* and *Petersen*, the Sixth Circuit examined whether a contract was ambiguous.²⁵⁰ In the opinion, the court imputed the statutory interpretation debate to contract interpretation. Writing for the court, Judge Moore used the “reasonable minds” standard for ambiguity²⁵¹ and then noted, “Michigan courts are conflicted regarding whether a *contract* is . . . ambiguous only if it is *equally* susceptible to two reasonable interpretations.”²⁵² There are multiple other examples of federal courts using Michigan Supreme Court statutory interpretation precedent for contracts.²⁵³

Although judges have valid reasons to interpret contracts and statutes in different ways, courts can properly be purposivist in contract interpretation even if they remain textualist in statutory interpretation. Contracts are private bargains— independent of the written language— between two parties who intend to be bound by the contract while statutes cannot operate independently from the text and set rules for many people who did not enact the legislation.²⁵⁴ But arguments for and against distinguishing between contract and statutory interpretation do not matter here. It is strange that the federal courts use Michigan’s statutory interpretation precedent for contract interpretation without using it for statutory interpretation. These cases highlight the need for a clear rule instructing when federal courts should look to state precedent for interpretation purposes.

248. See *id.* at 314 (“If the words in a contract are *equally susceptible* to at least two reasonable interpretations, then the court must reverse the grant of summary judgment.” (emphasis added)).

249. *Lomree, Inc. v. Pan Gas Storage, LLC*, 499 F. App’x 417 (6th Cir. 2012).

250. *Id.* at 420.

251. *Id.* at 422 (“A contract provision is ambiguous if its language may reasonably be interpreted in two or more ways or its ‘provisions cannot be reconciled with each other.’” (quoting *Woodington v. Shokoohi*, 792 N.W.2d 63, 78 (2010))). Even though *Lomree* was decided in 2012, Judge Moore did not mention that *Hamed* called *Petersen* into question.

252. *Id.* at 422 n.4 (first emphasis added).

253. See, e.g., *Macomb Interceptor Drain Drainage Dist. v. Kilpatrick*, 896 F. Supp. 2d 650, 659 (E.D. Mich. 2012) (stating that a contract is ambiguous when two provisions irreconcilably conflict with each other or when terms are equally susceptible to more than one meaning); *Mid-Century Ins. Co. v. Fish*, 749 F. Supp. 2d 657, 673–74 (W.D. Mich. 2010) (expressing that a provision of a contract is ambiguous if it irreconcilably conflicts with another provision).

254. *Movsesian*, *supra* note 64, at 1149.

IV. HOW SHOULD FEDERAL COURTS REACT TO THE MICHIGAN SUPREME COURT'S DECISIONS?

The cases outlined above are difficult to follow, but that is also part of the point. If the federal courts applied the *Erie* doctrine and used the Michigan Supreme Court's statutory interpretation methodology, this Note would be unnecessary. Instead, federal courts interpreting Michigan statutes currently use a variety of tests that make litigants uncertain about what statutory interpretation framework will apply to diversity cases.

Returning to the *Hanna* test,²⁵⁵ litigation in federal court should not *materially* differ from litigation in state court. The experience of litigants traversing into a Michigan federal court can be quite different than if they went into a Michigan state court. If they enter state court, the court will use the definition of ambiguity from *Mayor of Lansing* and the Michigan Supreme Court's tripartite statutory interpretation framework. If litigants wander into the federal court next door, the court could use the rule of lenity;²⁵⁶ the "reasonable minds" standard rejected by the Michigan Supreme Court;²⁵⁷ an approach that uses legislative history or a substantive canon to reach its result;²⁵⁸ or any other number of rationales to decide the case. All of these different approaches to statutory interpretation can meaningfully impact the rationale behind deciding—and thus the outcome of—a case.

Further, the litigants who lose in federal court based on a statutory interpretation framework that is not used by Michigan courts have little chance for relief since they cannot appeal to Michigan state courts. On the other side, differing rules could produce forum shopping: if litigants believe they will lose in state court, they may choose to file in federal court to take advantage of more disparate statutory interpretation methods.

255. As a reminder, the twin aims of *Erie* are "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

256. See *Does v. Snyder*, 101 F. Supp. 3d 672, 692 (E.D. Mich. 2015) (noting that the court makes its decision in light of the rule of lenity), *rev'd*, Nos. 15-1536, 15-2346, 15-2486, 2016 WL 4473231 (6th Cir. Aug. 25, 2016).

257. See *In re Vinson*, 337 B.R. 147, 149 (Bankr. E.D. Mich. 2006) (using the "reasonable minds may differ" standard rejected by *Mayor of Lansing*), *rev'd sub nom.* *Vinson v. Dakmak*, 347 B.R. 620 (E.D. Mich. 2006).

258. See *Jimenez v. Allstate Indem. Co.*, 765 F. Supp. 2d 986, 994 (E.D. Mich. 2011) (using the rule against absurdities to find the plain meaning of the statute); *Accu-Tech Corp. v. Jackson*, 352 F. Supp. 2d 831, 837 (E.D. Mich. 2005) (resting its holding on the plain meaning of the statute but using legislative history and policy considerations to make its decision).

The Michigan Supreme Court's methodological framework and definition of ambiguity *are* substantive holdings that can affect the outcome of litigation. The contract interpretation cases also display why the statutory interpretation precedent should be a substantive holding. The federal courts may use *Mayor of Lansing's* definition of ambiguity because they are performing an *Erie* guess,²⁵⁹ or they may directly apply it because they believe the statutory interpretation principles in the opinion are substantive law applicable to contract. But either way, those courts use statutory interpretation precedent as a substantive holding because they believe that precedent is the law of Michigan. The Sixth Circuit agrees that contract interpretation principles are part of the state's law applied with *Erie*,²⁶⁰ so why do its federal courts not use statutory interpretation precedent as well?

There are plenty of valid arguments about why methodological stare decisis could be problematic.²⁶¹ Methodological stare decisis will limit the flexibility of federal judges by forcing them to adopt statutory interpretation methods that they may not choose otherwise. Judging state statutes may become more difficult as federal courts search for state precedent discerning how a state court has already interpreted a statute while also locating state precedent about how the state generally interprets statutes or if a different rule applies to a specific type of statute. Additionally, deciding which methodology counts as precedent and which does not can be confusing, as exemplified in the Michigan Supreme Court's carousel of definitions of ambiguity.²⁶² Federal courts could lose stability if state courts continually change their approaches to statutory interpretation.

But, under *Erie*, the federal courts' job is to follow the law and act as the highest court of a state, not to decide whether they believe the law is right. If a state's use of methodological stare decisis changes the

259. If there is not a direct decision from the state's highest court on point, a federal court performs an *Erie* guess to try to determine how the supreme court would resolve an issue if presented with it today. *E.g.*, *Conlin v. Mortg. Elec. Registration Sys., Inc.*, 714 F.3d 355, 358–59 (6th Cir. 2013).

260. *See Preferred Capital, Inc. v. Sarasota Kennel Club, Inc.*, 489 F.3d 303, 308 (6th Cir. 2007) (“[W]e conclude that [state] law should apply to the interpretation of this forum selection clause. To apply federal law would undercut both aims of the *Erie* test—it would encourage forum shopping by providing differing outcomes in federal and state court.” (citing *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 39–40 (1988) (Scalia, J., dissenting))).

261. *See supra* notes 71–73 and accompanying text.

262. *See supra* notes 111–42 and accompanying text.

outcome of the case in federal court, then *Erie* must apply.²⁶³ One can imagine a parade of horrors to advocate against creating an interpretive rule, but the problems with a methodological regime do not change the law.

Erie binds federal courts in ways that they do not like, including contract interpretation,²⁶⁴ constitutional interpretation,²⁶⁵ choice-of-law rules,²⁶⁶ and burden-allocation regimes.²⁶⁷ Thus, the fact that interpretive methodology binds the way that judges may look at an issue does not mean that a federal court should not apply the state's interpretive methodology. In fact, applying *Erie* to statutory interpretation could help federal judges. One reason that these judges apply different precedent and use different tests to discern the meaning of the statute could be that they do not know how they should make their decisions. Applying *Erie* to statutory interpretation would provide clarity to what federal courts should do.

Of course, one remaining question is how far federal courts should have to look to determine how a state supreme court would determine the issue. Some have suggested that federal courts should model the state supreme court in every decision and take a more textualist or purposivist approach depending on what the court generally does.²⁶⁸ In

263. However, the issue changes completely when the question is whether Congress or another legislature tries to tell courts how to construe statutes. *See supra* note 33. There is a strong argument that mandating interpretive methodology is a violation of the separation of powers doctrine. *See, e.g.,* Bandy, *supra* note 8, at 680 (arguing that a mandate would “make it impossible for some judges to fulfill their oath to uphold the Constitution”).

264. *See, e.g.,* Trident Ctr. v. Conn. Gen. Life Ins. Co., 847 F.2d 564, 569, 571 (9th Cir. 1988) (complaining that a California parol evidence precedent “chips away at the foundation of our legal system” but applying the rule because “it is a rule that binds [the court]” (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938))).

265. *See, e.g.,* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (stating that federal courts review racial classifications under a strict scrutiny analysis, meaning that the classification must be “narrowly tailored” to achieve a “compelling” state interest).

266. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (“The conflict of laws rules to be applied by the federal court[s] in [a state] must conform to those prevailing in [that] state[’s] courts.”).

267. *See Gluck, Age of Statutes, supra* note 9, at 797–98 (discussing how burden allocation rules, like the negligence regime and the presumption against preemption, are considered rules of decision by federal courts).

268. *See Gluck, Intersystemic Statutory Interpretation, supra* note 7, at 1931–33 (suggesting that, in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393 (2010), the U.S. Supreme Court should have taken a different approach to statutory interpretation because the New York Court of Appeals typically uses a more purposivist approach and may have resolved the question differently).

this scenario, it could be difficult to apply how a state supreme court “generally” interprets a statute. But at a minimum, federal courts should use statutory interpretation precedent if a state supreme court established a clear structure that uses or rejects certain types of methodology, like in Michigan.

CONCLUSION

Erie’s twin aims were to discourage forum shopping and prevent inequitable administration of the laws. Differing statutory interpretation methodologies in federal and state courts for questions of state law go against both of these aims. As shown in Part III, the interpretation of Michigan statutes in federal courts is muddled to say the least. Because interpretive methodology changes the outcome of cases, federal courts should follow the interpretive methodology of each state if the state has a specific way that it interprets statutes.

APPENDIX 1: CASES FROM WESTLAW THAT DID NOT INTERPRET A
MICHIGAN STATUTE

Number	Case
1	Barry v. Lyon, No. 15-1390, 2016 WL 4473233 (6th Cir. Aug. 25, 2016)
2	Robinson v. V&S Detroit Galvanizing, LLC, No. 16-10589, 2016 WL 3902997 (E.D. Mich. July 19, 2016)
3	Self-Ins. Inst. of Am., Inc. v. Snyder, No. 12-2264, 2016 WL 3606849 (6th Cir. July 1, 2016)
4	Koprowski v. Baker, 822 F.3d 248 (6th Cir. 2016)
5	Zynda v. Arwood, No. 15-11449, 2016 WL 1223352 (E.D. Mich. Mar. 29, 2016)
6	Leonor v. Provident Life & Accident Co., 790 F.3d 682 (6th Cir. 2015)
7	Etts v. Deutsche Bank Nat'l Tr. Co., 126 F. Supp. 3d 889 (E.D. Mich. 2015)
8	Kreipke v. Wayne State Univ., 807 F.3d 768 (6th Cir. 2015)
9	Buchwalk Capital Advisors, LLC v. Papas (<i>In re</i> Greektown Holdings LLC), 532 B.R. 680 (E.D. Mich. 2015)
10	State Farm Mut. Auto. Ins. v. Pointe Physical Therapy, LLC, 107 F. Supp. 3d 772 (E.D. Mich. 2015)
11	Barry v. Corrigan, 79 F. Supp. 3d 712 (E.D. Mich. 2015)
12	Forest City Residential Mgmt., Inc. <i>ex rel.</i> Plymouth Square Ltd. Dividend Hous. Ass'n v. Beasley, 71 F. Supp. 3d 715 (E.D. Mich. 2014)
13	Veasley v. Fed. Nat'l Mortg. Ass'n, 48 F. Supp. 3d 1008 (E.D. Mich. 2014)
14	Self-Ins. Inst. of Am., Inc. v. Snyder, 761 F.3d 631 (6th Cir. 2014), <i>vacated</i> , 136 S. Ct. 1355 (2016)
15	Llewellyn-Jones v. Metro Prop. Grp., LLC, 22 F. Supp. 3d 760 (E.D. Mich. 2014)
16	Z Techs. Corp. v. Lubrizol Corp., 753 F.3d 594 (6th Cir. 2014)
17	Leonor v. Provident Life and Accident Co., 18 F. Supp. 3d 863 (E.D. Mich. 2014), <i>amended by</i> 2014 WL 3845922 No. 12-15343 (E.D. Mich. Aug. 5, 2014), <i>aff'd in part, rev'd in part</i> , 790 F.3d 682 (6th Cir. 2015)
18	Matwyuk v. Johnson, 22 F. Supp. 3d 812 (W.D. Mich. 2014)
19	Masck v. Sports Illustrated, 5 F. Supp. 3d 881 (E.D. Mich. 2014)
20	Jackson v. Sedgwick Claims Mgmt. Servs., Inc., 731 F.3d 556 (6th Cir. 2013)
21	Cty. of Oakland v. Fed. Hous. Fin. Agency, 716 F.3d 935 (6th Cir. 2013)
22	Brody v. Genpact Servs., LLC, 980 F. Supp. 2d 817 (E.D. Mich. 2013)
23	Harris v. Heritage Home Health Care, 939 F. Supp. 2d 793 (E.D. Mich. 2013)
24	Keyes v. Deutsche Bank Nat'l Tr. Co., 921 F. Supp. 2d 749 (E.D. Mich. 2013)
25	Smith v. Detroit Entm't, LLC, 919 F. Supp. 2d 883 (E.D. Mich. 2013)
26	Mobley v. City of Detroit, 938 F. Supp. 2d 669 (E.D. Mich. 2012)
27	Fuller v. Schoolcraft Coll., 909 F. Supp. 2d 862 (E.D. Mich. 2012)

28	Teisman v. United of Omaha Life Ins., 908 F. Supp. 2d 875 (W.D. Mich. 2012)
29	Sexton v. Panel Processing, Inc., 912 F. Supp. 2d 457 (E.D. Mich. 2012)
30	Dice Corp. v. Bold Techs., 913 F. Supp. 2d 389 (E.D. Mich. 2012)
31	T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield, 691 F.3d 794 (6th Cir. 2012)
32	Richardson v. Schafer (<i>In re Schafer</i>), 689 F.3d 601 (6th Cir. 2012)
33	Summit Petroleum Corp. v. EPA, 690 F.3d 733 (6th Cir. 2012)
34	Stryker Corp. v. XL Ins. Am., 735 F.3d 349 (6th Cir. 2012)
35	McNeilly v. Land, 684 F.3d 611 (6th Cir. 2012)
36	Cont'l Cas. Co. v. Mich. Catastrophic Claims Ass'n, 874 F. Supp. 2d 678 (E.D. Mich. 2012)
37	Stryker Corp. v. XL Ins. Am., 681 F.3d 806 (6th Cir. 2012), <i>amended and superseded by</i> 735 F.3d 349 (6th Cir. 2012)
38	Ajuba Int'l, L.L.C. v. Saharia, 871 F. Supp. 2d 671 (E.D. Mich. 2012)
39	Brown v. Cassens Transp. Co., 675 F.3d 946 (6th Cir. 2012), <i>overruled by</i> Jackson v. Sedgwick Claims Mgmt. Servs., Inc., 731 F.3d 556 (6th Cir. 2013)
40	Valenti v. Snyder, 853 F. Supp. 2d 691 (E.D. Mich. 2012)
41	Chrysler Grp. LLC v. S. Holland Dodge, Inc., 862 F. Supp. 2d 661 (E.D. Mich. 2012)
42	Quiroz v. Mich. Dept. of Treasury, 472 B.R. 434 (E.D. Mich. 2012)
43	Talton v. BAC Home Loans Servicing LP, 839 F. Supp. 2d 896 (E.D. Mich. 2012)
44	Pucci v. Somers, 834 F. Supp. 2d 690 (E.D. Mich. 2011)
45	Glenn v. Holder, 738 F. Supp. 2d 718 (E.D. Mich. 2010)
46	El Camino Res., Ltd. v. Huntington Nat'l Bank, 722 F. Supp. 2d 875 (W.D. Mich. 2010)
47	Durmishi v. Nat'l Cas. Co., 720 F. Supp. 2d 862 (E.D. Mich. 2010)
48	Woodland Harvesting, Inc. v. Ga. Pac. Corp., 693 F. Supp. 2d 732 (E.D. Mich. 2010)
49	Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ., 584 F.3d 253 (6th Cir. 2009)
50	LGT Enters., LLC v. Hoffman, 614 F. Supp. 2d 825 (W.D. Mich. 2009)
51	Finnerty v. Wireless Retail, Inc., 624 F. Supp. 2d 642 (E.D. Mich. 2009)
52	John Richards Homes Bldg. Co. v. Adell Broad. Corp. (<i>In re John Richards Homes Bldg. Co.</i>), 405 B.R. 192 (E.D. Mich. 2009)
53	Pucci v. Mich. Supreme Court, 601 F. Supp. 2d 886 (E.D. Mich. 2009)
54	Poly-Flex Constr., Inc. v. Neyer, Tiseo & Hindo, Ltd., 582 F. Supp. 2d 892 (W.D. Mich. 2008)
55	Nuvell Credit Co. v. Muldrew (<i>In re Muldrew</i>), 396 B.R. 915 (E.D. Mich. 2008)

56	Cycle & Marine Land, Inc. v. Polaris Sales, Inc., 614 F. Supp. 2d 782 (E.D. Mich. 2007)
57	Wolf v. Bankers Life & Cas. Co., 519 F. Supp. 2d 674 (W.D. Mich. 2007)
58	Bourgeois v. Strawn, 501 F. Supp. 2d 978 (E.D. Mich. 2007)
59	Northland Family Planning Clinic, Inc. v. Cox, 487 F.3d 323 (6th Cir. 2007)
60	Inverness Holdings, Ltd. v. Schaafsma, 501 F. Supp. 2d 1027 (W.D. Mich. 2007)
61	Leonard v. Robinson, 477 F.3d 347 (6th Cir. 2007)
62	Coal. to Defend Aff. Action v. Granholm, 473 F.3d 237 (6th Cir. 2006)
63	Holz v. City of Sterling Heights, 465 F. Supp. 2d 758 (E.D. Mich. 2006)
64	United States v. Marion L. Kincaid Tr., 463 F. Supp. 2d 680 (E.D. Mich. 2006)
65	Keweenaw Bay Indian Cmty. v. Naftaly, 452 F.3d 514 (6th Cir. 2006)
66	Hughes v. Region VII Area Agency on Aging, 423 F. Supp. 2d 708 (E.D. Mich. 2006)
67	Beattie v. CenturyTel, Inc., 234 F.R.D. 160 (E.D. Mich. 2006), <i>aff'd in part, remanded in part</i> by 511 F.3d 554 (6th Cir. 2007)
68	Wachovia Bank, N.A. v. Watters, 431 F.3d 556 (6th Cir. 2005)
69	Melson v. Prime Ins. Syndicate, Inc., 429 F.3d 633 (6th Cir. 2005)
70	Gen. Motors Corp. v. Hirschfield Steel Serv. Ctr., Inc., 402 F. Supp. 2d 800 (E.D. Mich. 2005)
71	Northland Family Planning Clinic, Inc. v. Cox, 394 F. Supp. 2d 978 (E.D. Mich. 2005)
72	Bates v. Colony Park Ass'n, 393 F. Supp. 2d 578 (E.D. Mich. 2005)
73	Cain v. Wells Fargo Bank, N.A. (<i>In re Cain</i>), 423 F.3d 617 (6th Cir. 2005)
74	Wysong Corp. v. M.I. Indus., 412 F. Supp. 2d 612 (E.D. Mich. 2005)
75	United States <i>ex rel.</i> Scott v. Metro. Health Corp., 375 F. Supp. 2d 626 (W.D. Mich. 2005)
76	Spectrum Health Continuing Care Grp. v. Anna Marie Bowling Irrecoverable Tr. Dated June 27, 2002, 410 F.3d 304 (6th Cir. 2005)
77	Marrs v. Tuckey, 362 F. Supp. 2d 927 (E.D. Mich. 2005), <i>superseded by statute</i> , MICH. COMP. LAWS ANN. § 750.479(8)(9) (West 2016), <i>as recognized in</i> Chesney v. City of Jackson, No. 14-11097, 2016 WL 1090372 (E.D. Mich. Mar. 21, 2016)
78	Superior Bank FSB v. Boyd (<i>In re Lewis</i>), 398 F.3d 735 (6th Cir. 2005)
79	Harper v. AutoAlliance Intern., Inc., 392 F.3d 195 (6th Cir. 2004)
80	Gage Prods. Co. v. Henkel Corp., 393 F.3d 629 (6th Cir. 2004)
81	Sandusky Cty. Democratic Party v. Blackwell, 387 F.3d 565 (6th Cir. 2004)
82	Bay County Democratic Party v. Land, 347 F. Supp. 2d 404 (E.D. Mich. 2004)
83	Garcia v. Wyeth-Ayerst Labs., 385 F.3d 961 (6th Cir. 2004)
84	Olden v. LaFarge Corp., 383 F.3d 495 (6th Cir. 2004)
85	Howard v. Whitbeck, 382 F.3d 633 (6th Cir. 2004)

86	Wachovia Bank, N.A. v. Watters, 334 F. Supp. 2d 957 (W.D. Mich. 2004)
87	O'Donnell v. Brown, 335 F. Supp. 2d 787 (W.D. Mich. 2004)
88	United States v. Rapanos, 376 F.3d 629 (6th Cir. 2004), <i>vacated</i> , 574 U.S. 715 (2006)

APPENDIX 2: CASES CITING MICHIGAN SUPREME COURT
PRECEDENT (*HAMED*, *PETERSEN*, OR *MAYOR OF LANSING*) THAT
DID NOT INTERPRET A MICHIGAN STATUTE

Number	Case
1	K.S. v. Detroit Pub. Sch., No. 14-12214, 2015 WL 5460674 (E.D. Mich. Sept. 16, 2015)
2	Pearce v. Werner Enters., Inc., No. 8:14-CV-290, 2015 WL 4469540 (D. Neb. July 22, 2015)
3	K.S. v. Detroit Pub. Sch., No. 14-12214, 2015 WL 4459340 (E.D. Mich. July 21, 2015)
4	Spigno v. Precision Pipeline, LLC, No. 14-10076, 2015 WL 519182 (E.D. Mich. Feb. 9, 2015)
5	Scarberry v. United States, No. 14-13877, 2015 WL 249300 (E.D. Mich. Jan. 20, 2015)
6	Mais v. Allianz Life Ins. Co. of N. Am., 34 F. Supp. 3d 754 (W.D. Mich. 2014)
7	Delbridge v. United States, No. 12-CV-11510, 2013 WL 4417532 (E.D. Mich. Aug. 15, 2013)
8	Phillip-Stubbs v. WalMart Supercenter, No. 12-10707, 2012 WL 1952444 (E.D. Mich. May 25, 2012)
9	Chandler v. Wackenhut Corp., 465 F. App'x 425 (6th Cir. 2012)
10	Varlesi v. Wayne State Univ., 909 F. Supp. 2d 827 (E.D. Mich. 2012)
11	FDIC v. Katzowitz, No. 10-11057, 2012 WL 368672 (E.D. Mich. Feb. 3, 2012)
12	Finney v. Arch Realty Co., 2011 WL 5507384 (E.D. Mich. Nov. 10, 2011)
13	Fremont Reorg. Corp. v. Duke, 811 F. Supp. 2d 1323 (E.D. Mich. 2011)

APPENDIX 3: CASES FROM WESTLAW THAT INTERPRETED A
MICHIGAN STATUTE

Number	Case
1	Does v. Snyder, 101 F. Supp. 3d 672 (E.D. Mich. 2015), <i>rev'd</i> , Nos. 15-1536, 15-2346, 15-2486, 2016 WL 4473231 (6th Cir. Aug. 25, 2016)
2	<i>In re</i> Dzierzawski, 528 B.R. 397 (Bankr. E.D. Mich. 2015)
3	Borman, LLC v. 18718 Borman, LLC, 777 F.3d 816 (6th Cir. 2015)
4	Miller v. Mylan Inc., 741 F.3d 674 (6th Cir. 2014)
5	Dawda, Mann, Mulcahy & Sadler, P.L.C. v. Bank of Am., N.A., 62 F. Supp. 3d 651 (E.D. Mich. 2014)
6	Sedgwick Ins. v. F.A.B.E. Custom Downstream Sys., Inc., 47 F. Supp. 3d 536 (E.D. Mich. 2014)
7	Performance Contracting Inc. v. DynaSteel Corp., 750 F.3d 608 (6th Cir. 2014)
8	Mich. State AFL-CIO v. Callaghan, 15 F. Supp. 3d 712 (E.D. Mich. 2014)
9	Does v. Snyder, 932 F. Supp. 2d 803 (E.D. Mich. 2013)
10	Erard v. Johnson, 905 F. Supp. 2d 782 (E.D. Mich. 2012)
11	Bryanton v. Johnson, 902 F. Supp. 2d 983 (E.D. Mich. 2012)
12	Mt. Clemens Auto Ctr. Inc. v. Hyundai Motor Am., 897 F. Supp. 2d 570 (E.D. Mich. 2012)
13	Casias v. Wal-Mart Stores, Inc., 695 F.3d 428 (6th Cir. 2012)
14	Mich. Bldg. & Constr. Trades Council v. Snyder, 846 F. Supp. 2d 766 (E.D. Mich. 2012)
15	Molosky v. Washington Mut., Inc., 664 F.3d 109 (6th Cir. 2011)
16	Austin v. Redford Twp. Police Dept., 859 F. Supp. 2d 883 (E.D. Mich. 2011)
17	Jimenez v. Allstate Indem. Co., 765 F. Supp. 2d 986 (E.D. Mich. 2011)
18	Casias v. Wal-Mart Stores, Inc., 764 F. Supp. 2d 914 (W.D. Mich. 2011)
19	Mich. Chamber of Commerce v. Land, 725 F. Supp. 2d 665 (W.D. Mich. 2010)
20	Lowden v. Cty. of Clare, 709 F. Supp. 2d 569 (E.D. Mich. 2010)
21	Lowden v. Cty. of Clare, 709 F. Supp. 2d 540 (E.D. Mich. 2010)
22	Shapiro v. Sassak (<i>In re</i> Sassak), 426 B.R. 680 (E.D. Mich. 2010)
23	Glover v. Nationwide Mut. Fire Ins., 676 F. Supp. 2d 602 (W.D. Mich. 2009)
24	John Richards Homes Bldg. Co. v. Adell Broad. Corp. (<i>In re</i> John Richards Homes Bldg. Co., L.L.C., 402 B.R. 780 (E.D. Mich. 2009)
25	J.B. Hunt Transp., Inc. v. Adams, 537 F. Supp. 2d 880 (E.D. Mich. 2007)
26	First Am. Title Co. v. Devaugh, 480 F.3d 438 (6th Cir. 2007)
27	<i>In re</i> Vinson, 337 B.R. 147 (Bankr. E.D. Mich. 2006)
28	Accu-Tech Corp. v. Jackson, 352 F. Supp. 2d 831 (E.D. Mich. 2005)
29	Athenaco, Ltd. v. Cox, 335 F. Supp. 2d 773 (E.D. Mich. 2004)
30	Frantz v. City of Pontiac, 432 F. Supp. 2d 717 (E.D. Mich. 2006)

APPENDIX 4: CASES CITING MICHIGAN SUPREME COURT
PRECEDENT (*HAMED*, *PETERSEN*, OR *MAYOR OF LANSING*) THAT
INTERPRETED A MICHIGAN STATUTE

Number	Case
1	Mitchell v. City of Warren, 803 F.3d 223 (6th Cir. 2015)
2	State Farm Fire & Cas. Co. v. Liberty Ins. Underwriters, 613 F. Supp. 2d 945 (W.D. Mich. 2009), <i>aff'd</i> , 398 F. App'x 128 (6th Cir. 2010)
3	Chiaverini, Inc. v. Frenchie's Fine Jewelry, Coins & Stamps, Inc., No. 04-CV-74891-DT, 2007 WL 1344183 (E.D. Mich. May 4, 2007)

APPENDIX 5 – CASES THAT USED MICHIGAN SUPREME COURT
STATUTORY INTERPRETATION PRECEDENT FOR CONTRACT
INTERPRETATION

Number	Case
1	Stenger v. Freeman, No. 14-10999 2015 U.S. Dist. LEXIS 127438, (E.D. Mich. Aug. 4, 2015), <i>report and recommendation adopted by</i> No. 14-CV-10999, 2015 U.S. Dist. LEXIS 127072 (E.D. Mich. Sept. 23, 2015)
2	Nationwide Mut. Fire Ins. v. McDermott, No. 12-11863, 2013 WL 3732874 (E.D. Mich. July 15, 2013)
3	Lomree, Inc. v. Pan Gas Storage, LLC, 499 F. App'x. 417 (6th Cir. 2012)
4	Macomb Interceptor Drain Drainage Dist. v. Kilpatrick, 896 F. Supp. 2d 650 (E.D. Mich. 2012)
5	Severstal Dearborn, LLC v. Praxair, Inc., 899 F. Supp. 2d 667 (E.D. Mich. 2012)
6	51382 Gratiot Ave. Holdings, LLC v. Chesterfield Dev. Co., LLC, 835 F. Supp. 2d 384 (E.D. Mich. 2011)
7	Forum Credit Union v. DFCU Credit Union, No. 1:10-CV-1621-SEB-DML, 2011 WL 1157636, (S.D. Ind. Mar. 29, 2011)
8	Profit Pet v. Arthur Dogswell, LLC, 603 F.3d 308 (6th Cir. 2010)
9	Mid-Century Ins. Co. v. Fish, 749 F. Supp. 2d 657 (W.D. Mich. 2010)
10	Transp. Ins. v. Citizens Ins. Co. of Am., No. 08-15018, 2010 WL 3245418 (E.D. Mich. Aug. 17, 2010), <i>report and recommendation adopted by</i> No. 08-15018, 2013 WL 856641 (E.D. Mich. Mar. 7, 2013), <i>aff'd</i> , 574 F. App'x 607 (6th Cir. 2014)
11	Hardy v. Reynolds & Reynolds Co., 311 F. App'x 759 (6th Cir. 2009)