"DICE LOADING" RULES OF STATUTORY INTERPRETATION

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"Rule Forty-two. All persons more than a mile high to leave the court.*" Everybody looked at Alice.*

"I'm *not a mile high," said Alice . . ., "besides, that's not a regular rule: You invented it just now."*

"It's the oldest rule in the book," said the King.

"Then it ought to be Number One," said Alice.

The King turned pale, and shut his notebook hastily.[1]

In our government of separated powers, it is axiomatic that the legislature makes the laws, the executive branch enforces the laws, and the judiciary interprets the laws. Judges, however, sometimes use preferential, or "dice-loading,"[2] rules to "interpret" laws without regard to the plain meaning of the language in a statute. This mode of interpretation often permits judges to usurp legislative power. The proper method of interpretation requires a judge to try to discern the fair meaning of the statutory text, free from dice-loading rules.

The use of preferential rules is one of a handful of practices that allows interpreters to disregard the text of a statute. A better known—but equally illegitimate—practice is the use of legislative history. The United States Supreme Court itself has recently repudiated the use of legislative history to discern the meaning of a clear statute: "We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text."[3] This is a basic tenet of textualism, an interpretive philosophy that promotes adherence to the actual text of statutes. Justice Antonin Scalia has explained that "[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasona-

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1. LEWIS CARROLL, THE ANNOTATED ALICE, 156 (Martin Gardner ed., Wings Books 1998) (1960).

2. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws, in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, 27–29 (Amy Gutmann ed., 1997).

3. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 457 (2002).

bly, to contain all that it fairly means."[4] When a statute is unambiguous, it does not "require a narrowing construction or application of any other canon or interpretive tool."[5]

In addition to legislative history, Justice Scalia has characterized many so-called dice-loading rules of construction as illegitimate. These preferential rules include the rule of lenity,[6] the rule that statutes in derogation of the common law are narrowly construed, and the rule that remedial statutes are broadly construed. Justice Scalia states:

> To the honest textualist, all of these preferential rules and presumptions are a lot of trouble. It is hard enough to provide a uniform, objective answer to the question whether a statute, on balance, more reasonably means one thing than another. But it is virtually impossible . . . when there is added, on one or the other side of the balance, a thumb of indeterminate weight. . . . How implausible an implausibility can be justified by the 'liberal construction' that is supposed to be accorded remedial statutes? And how clear is an 'unmistakably clear' statement? There are no answers to these questions, which is why these artificial rules increase the unpredictability, if not the arbitrariness, of judicial decisions.[7]

We share Justice Scalia's distrust of certain dice-loading rules, particularly the rule that remedial legislation should be liberally construed. Justice Scalia questions the ability of judges to apply the remedial rule of preference in a principled manner. For instance, exactly what *is* remedial?[8] Everything that is not penal? How liberal is a liberal construction? Is a liberal construction one that "makes the statutory rule or principle apply to more things or in more situations than would be the case under a strict construction"?[9] Or is it one in which "the intention of a remedial statute will always prevail over the literal sense of its terms"?[10] The latter view particularly should trouble anyone who values our democratic system of government. Judges lack authority to employ a "liberal

4. Scalia, *supra* note 2, at 23. R

5. *Barnhart*, 534 U.S. at 461.

6. Scalia, *supra* note 2, at 28. Justice Scalia concedes that the rule of lenity may be "validated by sheer antiquity." *Id.* at 29. R

7. *Id.* at 28.

8. *See* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 583 (1990).

9. 3 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 60.1 (6th ed. 2001).

10. Robinson v. Harmon, 117 N.W. 664, 665 (Mich. 1908).

construction" as an excuse to subvert the plain, unambiguous legislative text.

Part I of this paper discusses Michigan cases dating from the 1970s in which a "remedial" statute was construed "liberally" at the expense of the statute's plain meaning. Part II contends that the Michigan Supreme Court has recently moved towards a textualist approach that consciously avoids use of dice-loading rules. A recent Michigan case, *State Farm Fire & Casualty Co. v. Old Republic Insurance Co.*[11] is a helpful case study in assigning meaning to every word in a statute's text. Finally, Part III explains that one so-called preferential rule "can be considered merely an exaggerated statement of what normal, no-thumb-on-the-scales interpretation would produce anyway."[12] In particular, the rule that statutes involving waivers of governmental immunity should be construed narrowly falls into this category, and, we argue, does not actually load the dice at all.

I.

> *"Why, if a fish came to* me*, and told me he was going on a journey, I should say 'With what porpoise?' "*
> *"Don't you mean 'purpose'?" said Alice.*
> *"I mean what I say," the Mock Turtle replied in an offended tone.*[13]

Most judges agree that statutory interpretation begins with the text. When the words of a statute are unambiguous, the task *should* end there—if the legislature has clearly spoken, nothing is left to construe. If, on the other hand, the text is internally inconsistent or ambiguous, "traditional tools of statutory construction" may be employed to resolve the ambiguity.[14]

Unfortunately, some judges use dice-loading rules to avoid grappling with the actual text of a statute. That is, even when faced with an unambiguous statute, some judges nonetheless employ preferential rules. This disregard for statutory text is a hallmark of judicial legislation.

Two 1970s-era cases, one decided by the Michigan Court of Appeals and the other by the Michigan Supreme Court, elevated the rule that remedial statutes are to be liberally construed above the

11. 644 N.W.2d 715 (Mich. 2002).

12. Scalia, *supra* note 2, at 29. R

13. CARROLL, *supra* note 1, at 137.

14. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council Inc., 467 U.S. 837, 842–43 & n.9 (1984); *see also* People v. McIntire, 599 N.W.2d 102 (Mich. 1999).

actual text of statutes: *White v. Motor Wheel Corp.*[15] and *Deziel v. Difco Laboratories, Inc.*[16]

A. White v. Motor Wheel Corp.

At issue in *White v. Motor Wheel Corp.* was whether the plaintiff's claim of employment discrimination was timely filed under the Michigan State Fair Employment Practices Act (FEPA).[17] Section 7(b) of FEPA provided:

> Any individual claiming to be aggrieved by an alleged unlawful employment practice may, by himself or his agent, make, sign and file with the board, *within 90 days after the alleged act of discrimination, a verified complaint in writing*, which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful employment practice complained of . . . .[18]

White sent an unsworn letter to the Michigan Civil Rights Commission claiming that he had been unlawfully terminated within the prescribed 90-day time period. He did not, however, verify his complaint until more than five months after his termination.[19]

The Commission initially determined that White's unverified letter satisfied the statutory requirement. A referee thereafter ruled in White's favor and the defendant-employer appealed. The circuit court "felt bound by the 90-day requirement of the FEPA," and reversed.[20]

On review, the Michigan Court of Appeals reversed, disregarding the statutory language's requirement of a verified complaint. In its opinion, the majority discovered a "major conflict" over the meaning of the term "verified complaint."[21] Incredibly, the majority did not identify any conflict in the statutory term itself. In fact, the appellate court and the defendant apparently agreed on the meaning of the term.

The real conflict revolved around the meaning of the term "file." Specifically, the court stated, "We find that the 'charge' was filed [within the statutory period] . . . not . . . the date of the verifi-

15. 236 N.W.2d 709 (Mich. Ct. App. 1975).

16. 268 N.W.2d 1 (Mich. 1978).

17. *White*, 236 N.W.2d at 710; MICH. COMP. LAWS ANN. § 423.301-.311 (West 2000), *repealed by* P.A.1976, No. 453, § 804.

18. *White*, 236 N.W.2d at 710 (quoting MICH. COMP. LAWS ANN. § 423.307 (West 2000), *repealed by* P.A.1976, No. 453, § 804).

19. *Id.*

20. *Id.* at 711.

21. *Id.*

cation."[22] In other words, the plaintiff had submitted an unverified complaint within the statutory period, which the majority held had been "filed." Despite the clear statutory language requiring a plaintiff to file a "verified complaint" within 90 days, the majority decided that an unverified complaint sufficed.

In essence, the majority rewrote the plain language of the statute to validate an untimely filing. To justify its reasoning, the majority stated that "[a]s a remedial statute, we must construe the FEPA liberally so as to assure the effectuation of its stated remedial purposes."[23] The court divined an unstated statutory purpose and elevated it above the clear text requiring the timely filing of a verified complaint. Thus, the court subverted unambiguous legislation by applying a dice-loading rule at the expense of the plain statutory language.

B. Deziel v. Difco Laboratories, Inc.

The same type of judicial legislation that was evident in *White* is also apparent in *Deziel*. Three cases were consolidated in *Deziel* to consider "when and under what conditions alleged mental disorders . . . are compensable under [Michigan's] Worker's Disability Compensation Act of 1969."[24] The three plaintiffs believed they were physically unable to work although none of them were *actually* physically unable to work.

The facts of these consolidated cases follow:[25]

1. *Mary Deziel* handled test tubes, mixtures and chemicals in the course of her employment. She claimed to suffer headaches, tension, anxiety, and dizziness after dropping a tube of iodine. She had suffered no physical injury.

2. *Yusuf Bahu* experienced "cultural dissonance" after immigrating to this country. He had assumed "the position of a child" to his wife's "position of the de facto parent."[26] He claimed that he was too physically incapacitated for a stressful job at a Chrysler stamping machine.

3. *Harold McKenzie* became nervous when other workers took defective parts that he was responsible for counting and put them on new vehicles. His compulsive perfectionism allegedly rendered him physically unable to work.

22. *Id.*
23. *Id.*
24. Deziel v. Difco Labs., Inc., 268 N.W.2d 1, 2 (Mich. 1978).
25. *Id.* at 3–6.
26. *Id.* at 22.

No medical evidence established that the three plaintiffs were physically unable to work. Rather, they subjectively *perceived* themselves as unable to work because of a mental condition. The statute at issue in *Deziel* (quoted for the first time by the *Deziel* dissent) provided:

> An employee, *who receives a personal injury arising out of and in the course of his employment* by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act. In case of death resulting from the personal injury to the employee, compensation shall be paid to the employee's dependents as provided in this act. Time of injury or date of injury as used in this act in the case of a disease or in the case of an injury not attributable to a single event shall be the last day of work in the employment in which the employee was last subjected to the conditions resulting in disability or death.[27]

The majority focused on the "plaintiff's *own* perception of reality."[28] The majority was not concerned that the statute did not contain the words "an employee who receives *or perceives* a personal injury." The majority held:

> [A]s a matter of law, that in cases involving mental (including psychoneurotic or psychotic) injuries, once a plaintiff is found disabled and a personal injury is established, it is sufficient that a strictly *subjective* causal nexus be utilized by referees and the WCAB to determine compensability. Under a "strictly *subjective* causal nexus" standard, a claimant is entitled to compensation if it is factually established that claimant *honestly perceives* some personal injury incurred during the ordinary work of his employment "caused" his disability.[29]

The court supported its conclusion by reasoning that "a subjective standard is mandated by the requirement that remedial legislation be construed liberally."[30] In addition, the court stated, the "very general notion of causation was and should always be read progressively or liberally."[31] Further, the court said, "[t]he spirit in which compensation laws were enacted should not be lost in legalistic tort niceties. It is with these equitable concepts in mind that this

27. MICH. COMP. LAWS ANN. § 418.301(1) (West 2000), *quoted in Deziel*, 268 N.W.2d at 20 n.2 (Coleman, J., dissenting) (emphasis added).

28. *Deziel*, 268 N.W.2d at 11.

29. *Id.*

30. *Id.*

31. *Id.* at 14–15.

court adopts the subjective standard in cases involving mental disabilities and injuries."[32]

The majority never identified any ambiguity in the statute itself to justify its resort to the dice-loading rule of liberal construction. As the dissent pointed out, the majority *injected* ambiguity by inventing a vague "honest perception" standard,[33] which could "only invite confusion, difficulty for the finder of fact and increased arbitrariness."[34]

These two cases demonstrate the problems that arise from casual use of the rule that remedial statutes should be liberally construed. Applying the preferential rule without regard to whether a statute is ambiguous inevitably leads to judicial legislation. Preferential rules grant judges a license to elevate their own policy preferences above the clear meaning of the legislation. When judges ignore the statutory text, clear guidelines are lost. No standards exist to govern how "liberally" the statute is to be construed. The remedial rule of preference is thus difficult—if not impossible—to apply in a principled, consistent manner.

II.

"[A] hill can't be a valley, you know. That would be nonsense—" The Red Queen shook her head. "You may call it 'nonsense' if you like," she said, "but I've *heard nonsense, compared with which that would be as sensible as a dictionary!"*[35]

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32. *Id.* at 15.

33. *Id.* at 21 (Coleman, J., dissenting). As the dissent states:

> The language chosen to set forth the majority's standard is particularly disturbing because of its ambiguity. If a claimant "honestly perceives" that "some" work-related "personal injury" "caused" his mental disability, then causal nexus is established, regardless of prior psychiatric history. For instance, if a worker "honestly perceives" that a broken finger "caused" his mental disorder, is nexus to be established? What if the injury is a scraped elbow? Surely the statute minimally requires some *medical evidence* connecting the injury and *subsequent* mental disorder before nexus is established.

Id. at 21 n.3.

34. *Id.* at 26 (Coleman, J., dissenting). As the dissent stated, the majority implicitly repealed the statutory requirement that "some *medical evidence* connecting the injury and *subsequent* medical disorder before nexus is established." *Id.* at 21 n.3. Following *Deziel*, the Michigan Legislature amended the Worker's Compensation Act to provide that: "Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof." MICH. COMP. LAWS ANN. § 418.301(2) (West 2000). *See* Robertson v. DaimlerChrysler Corp., 641 N.W.2d 567, 573–74 (Mich. 2002) (clarifying the meaning of this provision and overruling the *Deziel* interpretation).

35. CARROLL, *supra* note 1, at 207.

To avoid the problems that arise from the use of preferential rules, the careful analyst must understand and apply the proper mode of construction. In interpreting statutes, the objective meaning of the text, not the drafter's subjective intent, is the true object of inquiry. Judges cannot depose legislators to ask them what they meant to say. Courts have no institutional capacity to discover what each individual legislator subjectively believed. Even if courts had that ability, they lack the authority to elevate legislators' subjective intentions above the law itself. The law, not the lawmaker's intent, is what matters in our system of government. As Justice Scalia put it: "Men may intend what they will; but it is only the laws that they enact which bind us."[36] Next, we review two recent Michigan cases that adhere to a textualist approach.

A. Maier v. General Telephone Co. of Michigan

In *Maier v. General Telephone Co. of Michigan*, the concurrence to an order denying leave to appeal explained certain problems with the appellate court's interpretation of the statute.[37] The "first principle of statutory interpretation is that *the words expressed in the statute are the law*."[38] When a statute is unambiguous, courts have no authority to resort to legislative history. Instead, the law must be applied *as written*. The words contained in a law passed by the legislature and signed by the governor control. Legislative history does not. We are not governed in a fair, democratic manner if "the meaning of a law [is] determined by what the lawgiver meant, rather than what the lawgiver promulgated."[39]

Cognizant of these fundamental principles, the Michigan Supreme Court no longer subscribes to the so-called "absurd result" doctrine.[40] Under this doctrine, judges ignore the plain language of a statute whenever they deem the result required by the statute to be absurd or unjust. A judge has no authority to disregard a law validly enacted by the representatives of the people merely because the judge dislikes the outcome. A judge's personal predilection regarding what is unjust or absurd simply is not relevant.

The *Maier* concurrence further opined that judges should not apply dice-loading rules to subvert an unambiguous statute. A judge's first obligation is to determine whether a statute has a clear

36. Scalia, *supra* note 2, at 17. R

37. Maier v. Gen. Tel. Co. of Mich., 645 N.W.2d 654, 654 (Mich. 2002) (Corrigan, C.J., concurring).

38. *Id.* at 655 (emphasis in original).

39. *Id.* at 656.

40. *Id.* at 655 (citing People v. McIntire, 599 N.W.2d 102 (Mich. 1999)).

meaning. If it does, then the judge merely applies the language of the statute. If the statute is unclear, the judge should then attempt to determine the "objectified" legislative intent underlying the unclear words. If the statute remains unclear, *only then* may a preferential rule be applied.

B. Crowe v. Detroit

Another Michigan case, *Crowe v. Detroit*, exemplifies that preferential rules have no place in our jurisprudence when a statute is unambiguous.[41] In *Crowe*, the Michigan Supreme Court construed M.C.L. § 418.161, part of the Worker's Disability Compensation Act (WDCA):

> Police officers, fire fighters, or employees of the police or fire departments, or their dependents, in municipalities or villages of this state providing like benefits, may waive the provisions of this act and accept like benefits that are provided by the municipality or village but shall not be entitled to like benefits from both the municipality or village and this act; however, this waiver shall not prohibit such employees or their dependents from being reimbursed under section 315 for the medical expenses or portion of medical expenses that are not otherwise provided for by the municipality or village. This act shall not be construed as limiting, changing, or repealing any of the provisions of a charter of a municipality or village of this state relating to benefits, compensation, pensions, or retirement independent of this act, provided for employees.[42]

The city of Detroit offered an alternative benefits plan to police officers. The plaintiff, Officer Crowe, elected to receive benefits under the alternative plan and thus to waive WDCA benefits. However, benefit payments under the alternative plan after 25 years were typically less than benefits that would have been available at that point under the WDCA.[43] Thus, after receiving benefits for 25 years under the alternative plan, the plaintiffs sought to revoke their prior waivers of WDCA benefits.

The issue in *Crowe* was whether the plaintiffs could revoke their prior waivers of WDCA benefits. Both the court of appeals and the supreme court decided that the plaintiffs could not. The supreme court reasoned that the plain language of the statute provided that

41. Crowe v. City of Detroit, 631 N.W.2d 293 (Mich. 2001).

42. MICH. COMP. LAWS ANN. § 418.161(1)(c) (West 2000), *quoted in Crowe*, 631 N.W.2d at 295 n.1.

43. *Crowe*, 631 N.W.2d at 295.

the beneficiaries' elections of an alternative plan waived their rights under the WDCA.[44] Further, claimants are not "entitled to like benefits from both the municipality or village and [the WDCA] . . . ."[45]

The dissent in *Crowe* argued that the court should have applied the preferential rule construing remedial statutes liberally.[46] The majority, however, declined to apply the preferential rule because the statute was not ambiguous. The majority explained that even "if 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 relied on in the dissent."[47]

Crowe thus makes clear that the remedial rule of preference may be used only as a last resort, *even where a statute is ambiguous*. Judges should not load the dice for or against a particular result unless and until they have exhausted all possible means of discerning the objective meaning of the text.

C. State Farm & Casualty Co. v. Old Republic Insurance Co.

Discerning the fair meaning of a text is often challenging. It requires a rigorous, careful examination of simple, everyday words. Judges should honor the well-known principle that they "must give effect to every word, phrase, and clause in a statute, and avoid an interpretation that would render any part of the statute surplusage or nugatory."[48] When choosing between competing interpretations of a statute, a court must determine which interpretation is best supported by the entire text, not merely cherry-picking phrases favored by one party or the other. A careful analysis of the text is essential to this approach.

State Farm & Casualty Co. v. Old Republic Insurance Co. illustrates that even the smallest word can be of paramount importance.[49] In that case, the driver of a rented truck crashed the vehicle into his own bakery. A dispute arose between the respective insurers of the

44. *Id.* at 297.

45. *Id.* (quoting Mich. Comp. Laws § 418.161(1)(c) (2002)).

46. *Crowe*, 631 N.W.2d at 304 (Cavanagh, J., dissenting).

47. *Id.* at 300.

48. State Farm Fire & Cas. Co. v. Old Republic Ins. Co., 644 N.W.2d 715, 717 (Mich. 2002) (citing Wickens v. Oakwood Healthcare Sys., 631 N.W.2d 686, 690 (Mich. 2002)).

49. *State Farm Fire & Cas. Co.*, 644 N.W.2d 715. The facts which follow are derived from the discussion in the case. *See id.* at 716.

truck and the bakery. The truck was insured by Old Republic, in a policy in which the driver was not named, while State Farm insured the bakery. State Farm paid the driver for the damages and then sued Old Republic for indemnification.

Michigan insurance law recognizes a "household exclusion."[50] It excludes from insurance coverage any damages to "[p]roperty owned by a person named in a property protection insurance policy . . . if the person named . . . was the . . . operator of a vehicle involved in the motor vehicle accident out of which the property damage arose."[51] The supreme court examined the statute to determine whether the driver had to be named in "the" (particular) insurance policy covering the vehicle, or merely in "a" property protection policy.[52]

The court held that the text of the statutory household exclusion was unambiguous. The driver had to be named in "a" property protection insurance policy and be "the" operator of an involved vehicle.[53] The court ultimately remanded to determine whether the driver was named in any no-fault property protection policy.

The dissent opined otherwise, arguing that the phrase "by a person named in a property protection insurance policy" refers to the situation "when the individual has a policy for the vehicle involved in the accident. . . . [U]se of the article 'a' is dictated by grammatical construction of the sentence."[54] The majority rejected the dissent's interpretation—an interpretation that rewrote the statute: "The Legislature chose the specific construction of the sentence and was not bound by any particular language or structure."[55] If the word "the" would have more clearly expressed what the legislature was attempting to say, the sentence could have been easily rewritten.

These three cases together reflect that statutory interpretation in Michigan adheres to the principles consistently articulated by Justice Scalia. The court applies statutes as written if they are unambiguous, even where the result may appear absurd and use of a dice-loading rule would yield a different result. Even where a statute's plain meaning is ambiguous, a court should attempt to discern the objective legislative intent reflected in the ambiguous words rather than resort immediately to preferential rules. Each

50. *See, e.g.*, *id.*
51. MICH. COMP. LAWS ANN. § 500.3123(1)(b) (West 2000).
52. *State Farm Fire & Cas. Co.*, 644 N.W.2d at 717.
53. *Id.* at 717–18.
54. *Id.* at 720.
55. *Id.* at 718.

"word, phrase, and clause in a statute" must be given effect, even to the point of analyzing the differences between minute words such as "a" and "the" in a statute, as in *State Farm Fire & Casualty Co.*[56]

III.

Humpty Dumpty began again. "They've a temper, some of them—particularly verbs: they're the proudest—adjectives you can do anything with, but not verbs—however, I *can manage the whole lot of them! Impenetrability! That's what* I *say!*[57]

Some courts use phrases that imply use of a dice-loading rule when, in truth, the courts are merely couching a textualist analysis in preferential terminology. This phenomenon has arisen in the context of governmental immunity and the exceptions to it.

Courts often state that governmental immunity "is to be broadly construed and the statutory exceptions . . . are to be narrowly construed."[58] While this proposition sounds like a dice-loading rule, it arguably misstates what the court is actually doing. Recognizing that exceptions to governmental immunity are narrowly drawn is a valid mode of textual interpretation because the court is not imposing non-textual values into the statute. In other words, this maxim is not a preferential rule created out of thin air. It is preferential only in the sense that the text of the statute itself is preferential. The plain language of Michigan's immunity statutes reveals that *the legislature itself* has made a policy choice in favor of immunity and against exceptions. The immunity granted to the government *is* very broad while the statutory exceptions are narrowly drawn. Two Michigan cases demonstrate this proposition.

A. Nawrocki v. Macomb County Road Commission

In *Nawrocki*, the Michigan Supreme Court considered Michigan's "highway exception" to governmental immunity.[59] In deciding the case, the court analyzed the statutory language granting immunity. The statute provides: "Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function."[60] This grant of immunity is broadly worded. The government is immune from any tort liability any

56. *See id.* at 717.
57. CARROLL, *supra* note 1, at 269.
58. *See, e.g.*, Horace v. City of Pontiac, 575 N.W.2d 762, 764 (Mich. 1998).
59. Nawrocki v. Macomb County Rd. Comm'n, 615 N.W.2d 702 (Mich. 2000).
60. MICH. COMP. LAWS ANN. § 691.1407(1) (West 2000).

time the government performs government functions, unless the immunity statutes provide otherwise.

Five statutory exceptions to immunity exist in Michigan: the highway exception,[61] the motor vehicle exception,[62] the public building exception,[63] the proprietary function exception,[64] and the governmental hospital exception.[65] The highway exception is drawn very narrowly as it applies to the state and county road commissions. It "extends only to the improved portion of the highway designed for vehicular travel and shall not include sidewalks, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel."[66]

In *Nawrocki*, the Michigan Supreme Court stated that it was "compelled to strictly abide by these statutory conditions and restrictions in deciding the instant cases."[67] This analysis is not earth shattering. The court merely applied the unambiguous terms of the highway exception statute. Courts must give the words of the statutes their fair, ordinary meaning.[68] If clear conditions and restrictions on the availability of the exception exist, then courts may apply the exception only if those conditions are met. Thus, in *Nawrocki*, the court held that the government cannot be liable for failing to "install, maintain, repair, or improve traffic control devices" since they were not part of the road itself as required by the statutory exception.[69]

B. Stanton v. City of Battle Creek

Stanton v. City of Battle Creek analyzed the narrow motor vehicle exception to governmental immunity; specifically, it considered whether a forklift is a "motor vehicle" under the statute.[70] The plaintiff sued the city of Battle Creek, claiming to have suffered injuries as a result of faulty brakes on a city-owned forklift. The plaintiff was unloading hardware for the city and had closed his truck door when the forklift suddenly rolled forward and struck him.

61. MICH. COMP. LAWS ANN. § 691.1402 (West 2000).
62. MICH. COMP. LAWS ANN. § 691.1405 (West 2000).
63. MICH. COMP. LAWS ANN. § 691.1406 (West 2000).
64. MICH. COMP. LAWS ANN. § 691.1413 (West 2000).
65. MICH. COMP. LAWS ANN. § 691.1407(4) (West 2000).
66. MICH. COMP. LAWS ANN. § 691.1402(1) (West 2000), *quoted in* Nawrocki v. Macomb County Rd. Comm'n, 615 N.W.2d 702, 711 (Mich. 2000).
67. *Nawrocki*, 615 N.W.2d at 711.
68. *See* MICH. COMP. LAWS ANN. § 8.3a (West 1994).
69. *Nawrocki*, 615 N.W.2d at 723.
70. Stanton v. City of Battle Creek, 647 N.W.2d 508 (Mich. 2002). The following facts are drawn from the court's discussion of the case. *Id.*

The city sought summary disposition on the basis of governmental immunity. The circuit court granted the motion, and the court of appeals affirmed.

On its review, the Michigan Supreme Court noted that the statute adopting the motor vehicle exception did not define the term "motor vehicle."[71] Turning to lay dictionaries to define the common term, the court then observed that some dictionary definitions of the term include forklifts while others do not.[72] Faced with varying definitions, the court determined that since the motor vehicle exception is narrowly drawn while the statute affords broad immunity to the government, the narrowest definition of "motor vehicle" would "most closely effectuate[ ] the Legislature's intent."[73] Using a narrow definition, the court ruled that a forklift is not a motor vehicle, and upheld governmental immunity.

The dissent in *Stanton* argued that a forklift is a motor vehicle.[74] The dissent opined that competing maxims of statutory construction were involved: (1) words must be given their ordinary meaning, but (2) exceptions to governmental immunity must be construed narrowly.[75] The dissent claimed that the majority had departed from the common meaning of "motor vehicle" by applying a narrow definition.

The majority did not venture from the ordinary meaning of the term "motor vehicle" when it adopted a dictionary definition. The dictionary supplied the common meaning of the term. Since the exception for motor vehicles is narrow, a narrow definition of the term is justified. Thus, the majority adhered to textualist principles.

The *Stanton* and *Nawrocki* cases clarify that the maxim that governmental immunity statutes should be broadly construed while the exceptions to it are construed narrowly is not a true dice-loading rule. Rather, the maxim merely implements the plain meaning of Michigan's immunity statutes.[76] The courts are not *imposing* a preferential approach but are merely discerning the plain meaning of the statute and applying it to the facts of the case.

71. *Id.* at 511.

72. *Id.* at 512.

73. *Id.* at 512.

74. *Id.* at 514 (Kelly, J., concurring in part and dissenting in part).

75. *Id.*

76. Perhaps the rule could be worded differently to avoid the preferential tone. Courts are on firmer ground when they state, e.g., that the statutory *language* granting governmental immunity is broadly worded and the exceptions to it are *drafted* narrowly.

IV.
CONCLUSION

"The cause of lightning," Alice said very decidedly, for she felt quite certain about this, "is the thunder—no, no!" she hastily corrected herself. "I meant the other way."
"It's too late to correct it," said the Red Queen: "When you've once said a thing, that fixes it, and you must take the consequences."[77]

When the judicial branch does not honor the separation of powers but instead usurps the powers of another branch, the stability of our system of government is undermined. As noted in Part I, many problems arise when courts legislate under the guise of a preferential rule by, e.g., construing so-called "remedial" statutes "liberally" rather than reasonably. Judges have a solemn obligation to interpret laws in accordance with their plain meanings, and not to load the dice for a favored result.

Michigan's jurisprudence in recent years has moved away from the use of dice-loading preferential rules, consistent with the mode of statutory interpretation advocated by Justice Scalia. This movement has not been undermined by the language in governmental immunity cases referring to "broad" and "narrow" constructions. While governmental immunity cases sometimes use preferential terminology, they actually reflect a fair reading of the text of the relevant statutory provisions. In doing so, the Michigan Supreme Court has honored separation of powers principles and acted to prevent abuses engendered by dice-loading preferential rules.

77. CARROLL, *supra* note 1, at 323.