ORIGINALISM AND STARE DECISIS

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The extent to which originalism can be harmonized with precedent is an issue I have confronted regularly during my tenure as a justice on the Michigan Supreme Court. This article outlines several observations that have informed my thinking on this topic, drawn from my decade or so on that court.[1]

I view myself as an originalist judge, sometimes lapsing into self-descriptions as a "textualist," an "interpretivist," a believer in "original meaning," or even a "judicial conservative." Nuances of differences in these terms aside, I take seriously what I view as my obligation to give reasonable meaning to the language of the drafters of constitutions, statutes, contracts, and deeds. I have taken oaths to the United States Constitution and to the Michigan Constitution, and I take these oaths seriously. On the other hand, I have not taken an oath to abide by the judgments of my predecessors. Yet, on a number of occasions, I have sustained precedents I have disagreed with, and which did not, in my judgment, conform to the intentions of the lawmaker. Despite this, the primary criticism of my court during the eight years when I served with three other originalists as a majority of our seven-member court, was that we were insufficiently respectful of precedent.[2] Throughout my time on the court, I have

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1. The author was appointed to the Michigan Supreme Court on October 1, 1999, and reelected in 2000 and 2004.

2. *See, e.g.*, Robert A. Sedler, *The Michigan Supreme Court, Stare Decisis, and Overruling the Overrulings*, 55 WAYNE L. REV. 1911, 1911–12 (2009) (arguing that Justices Taylor, Corrigan, Markman, and Young frequently abandoned stare decisis from 1999 to 2008). *But see* Rowland v. Washtenaw Co. Rd. Comm'n, 731 N.W.2d 41, 58 (Mich. 2007) (Markman, J., concurring) (explaining that these overrulings of precedent overwhelmingly occurred in cases involving the "misinterpretation of straightforward words and phrases in statutes and contracts, in which words that were *not* there were read into the law or words that *were* there were read out of the law"); *see also* Petersen v. Magna Corp., 773 N.W.2d

approached my obligation to reconcile originalist jurisprudence with stare decisis through consideration of the following precepts.

First, the burden of proof rests with the party seeking to overturn precedent[3] because precedent reflects existing law and the status quo. Moreover, a judge is obligated to demonstrate some reasonable measure of institutional humility in the face of interpretations of the law that may have their pedigree in past judicial decisions, and which have withstood the scrutiny of ensuing generations of judges.[4] It is hubristic and injudicious to approach precedents in any other manner, if only because precedents are likely to assist a court in getting the law right.[5] Earlier decisions deserve deference, and to think otherwise—essentially to begin the analysis of each case de novo—is judicial solipsism.[6]

Second, an originalist understanding of the court's "judicial power" in Michigan—the only power that my court wields—reinforces these views.[7] Although dispute concerning the precise extent to which the judicial power encompasses a reasonable regard for precedent is possible,[8] based upon the historical evi-

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564, 613 (Mich. 2009) (Markman, J., dissenting) ("[W]hen the previous majority overruled a precedent, it was to ensure that the decisions of this Court more closely reflected the judgments of the people's elected legislative representatives and it was to more closely align case law and statutory law. By contrast, when the new majority has overruled, or at least ignored, a precedent, it has been to create a greater disparity between that case law and the statutory law.").

3. CHRISTOPHER WOLFE, HOW TO READ THE CONSTITUTION: ORIGINALISM, CONSTITUTIONAL INTERPRETATION, AND JUDICIAL POWER 188 (1996).

4. *See, e.g.*, Hohn v. United States, 524 U.S. 236, 251 (1998) ("*Stare decisis* is 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'").

5. Akhil Amar, *Speech for Panel on Originalism and Precedent*, *in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE 210, 215 (Steven G. Calabresi ed., 2007) ("The mere fact that our predecessors, thoughtful men and women, came to a certain result might be a reason for thinking that that result is actually the right one.").

6. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 169 (1999) ("Simply beginning consideration of each case de novo, as if a body of prior consideration did not exist, strains the bounds of even judicial hubris. Thus, as a mechanism for focusing issues, weighing evidence, and formulating questions, precedent cannot and should not be abandoned by an originalist judge but should be used as an interpretive tool along with others.").

7. *See* MICH. CONST. art. VI, § 1 ("The judicial power of the state is vested exclusively in one court of justice . . . .").

8. *See, e.g.*, Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ., No. 138401, 2010 WL 3037733, at *16 (Mich. July 31, 2010) (Corrigan, J., dissenting) ("Critically, in

dence thoroughly amassed by Professors McGinnis and Rappaport,[9] such regard is implicit. There are approving references to precedent, for example, in the Federalist Papers when addressing the role of the judiciary,[10] and similar references can be found in cases interpreting the Michigan Constitution. At the federal level, certain forms of judicial self-restraint, such as the avoidance of "political questions," and the preconditions of standing and ripeness, are part of Article III's Case or Controversy Clause.[11] Although Michigan does not have an analogous clause, such constraints are fairly understood as a function of the judicial power,[12] as is the constraint of precedent, a practice so engrained in the judicial history of our state that early interpretive decisions by the Michigan Supreme Court routinely focused on the existence of relevant precedents.[13]

Third, a responsible court must not unnecessarily unsettle the law, or wreak chaos upon that law.[14] If there is any realm within which the values of stability, predictability, and continuity must be held in high regard, and in which such values should most certainly be maintained and preserved, it must be within the realm of our legal institutions, which define the rights and obligations of our citizens. Not only does regard for precedent serve these values, but by assuring that equivalently situated persons are treated in a reasonably equivalent manner, precedent also serves to promote the equal rule of law.

Fourth, a judge is obligated to recognize other historical constraints upon the exercise of the judicial power: to do "justice

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overruling the entire body of Michigan's existing standing jurisprudence, the majority eschews the clear understanding of the 'judicial power' held by the framers of our state constitution.").

9. *See* John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803 (2009).

10. *E.g.*, THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (Henry Cabot Lodge ed., 1902).

11. *See, e.g.*, SEC v. Med. Comm. for Human Rights, 404 U.S. 403, 406 (1972) (moot controversy doctrine); Baker v. Carr, 369 U.S. 186, 217 (1962) (political question doctrine); Pub. Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 242–45 (1952) (ripeness doctrine).

12. *See* Nat'l Wildlife Fed. v. Cleveland Cliffs Iron Co., 684 N.W.2d 800, 806 (Mich. 2004); *Lansing Sch.*, 2010 WL 3037733, at *31 (Corrigan, J., dissenting).

13. *See, e.g.*, Bomier v. Caldwell, 8 Mich. 463 (1841); In re Palmer's Appeal, 1 Doug 422 (1844); Morgan v. Butterfield, 3 Mich. 615 (1855).

14. *See, e.g.*, THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 10, at 487.

under law,"[15] rather than a disembodied form of personal justice; to say what the law is, rather than what it ought to be;[16] to remain cognizant of the limited authority of the judge within our system of separated powers; and to adhere faithfully to proper methods so as to give meaning to the law.[17] To the extent that I view myself as an originalist, I attempt to bring these necessary principles to bear in my reading of the law.[18] I exercise exclusively the authority of my office, not a personal authority. Moreover, I take care to avoid the perpetual judicial temptations of either confusing my personal predilections with those of the law, or correcting or "improving" laws that are nonetheless compatible with the Constitution.[19] Judges are not the "adult supervisors" of our representative institutions, and I am not the last line of defense against what I might view as unwise or imprudent public policies chosen by "we the people" and their elected representatives. Lawyers exclusively serve on the bench in Michigan, not because lawyers are better able to organize society than are salesmen or truck drivers, not because lawyers have a more refined sense of right and wrong than tool-and-die makers or

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15. *E.g.*, Caldwell v. Texas, 137 U.S. 692, 697 (1891) ("[N]o State can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requisition is satisfied.").

16. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

17. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 10, at 496 ("Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them.").

18. Chief Justice Marshall perhaps best articulated the responsibilities of an originalist judge in interpreting the law. Ogden v. Saunders, 25 U.S. (12 Wheat) 213, 332 (1827) (Marshall, C.J., dissenting) ("To say that the intention of the [Constitution] must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers;—is to repeat what has been already said more at large, and is all that can be necessary [in constitutional interpretation].").

19. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 155 (1990) ("Obviously, an originalist judge should not deform the Constitution further. Just as obviously, he should not attempt to undo all mistakes made in the past.").

teachers, and not because lawyers have a more elevated conscience than accountants or hardware store owners. Instead, lawyers serve on the bench because they alone have been trained to read the law, and that is what they must restrict themselves to as judges.

Fifth, in confronting the parallel legal universes of originalism and stare decisis, an originalist judge may be legitimately susceptible to the criticism that he can be selectively originalist, committed to its precepts when these serve his interests, and committed to different precepts when those serve his interests. Indeed, this criticism could potentially be directed toward any judge or justice who exercises the discretionary certiorari jurisdiction of his court. In such cases, denials of certiorari or applications for leave to appeal may mask or obscure a lack of commitment to the consistent application of originalist values. This criticism poses valid concerns, for an intermittent originalist is no originalist at all. In the end however the judicial power cannot be understood as a power consisting of a single value. Perhaps I reject this understanding because of my natural conservative antipathy to notions that everything must conform to a unifying idea or principle. A judge can be true to both originalism and the constitutional values reflected therein, as well as give consideration to other jurisprudential values which must sometimes be weighed in the balance. Those who suggest otherwise are often those most engaged in stereotyping originalism, suggesting that an originalist judge must be prepared to jettison long-standing and deeply institutionalized precedents with no consideration of the social harms or turmoil that may arise from doing so. This caricature does not reflect the reality that serious application of originalist principles requires a multitude of judgments, weighing aspects of the constitution's judicial power as well as first principles of the rule of law. At a minimum, in my judgment, these include both getting the law right and applying the law evenhandedly.

Sixth, the tension between originalism and stare decisis does not pose a dilemma exclusive to originalism.[20] A similar tension

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20. Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 129, 139 (Amy Gutmann ed., 1997) ("The whole function of the [stare decisis] doctrine is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability. It is a compromise of all philosophies of interpretation . . . .").

will invariably arise with regard to *any* judicial philosophy that posits *any* standards at all, unless accommodation with precedent, or indeed with any other judicial value, is never served. If these tensions are more pronounced in the case of originalism, this is simply because the standards of originalism are more rigorous and more genuinely binding than those which purportedly characterize alternative judicial philosophies. I admit that I do not fully grasp Justice Breyer's jurisprudence of "active liberty,"[21] but to the extent that his conception of the judicial role ever actually constrains the Justice in the exercise of his authority, it is not immediately apparent why the Justice would not also sometimes have to reconcile these constraints with incompatible precedents. At the heart of any judicial philosophy compatible with the rule of law is the existence of meaningful standards to guide judicial decisionmaking.[22] To the extent that *any* judicial philosophy contains meaningful standards for decisionmaking, tensions will invariably arise between the standards of that judicial philosophy and precedents issued by judges abiding by different standards and judicial philosophies.[23] If balancing competing considerations poses a greater problem for interpretivist judges, it is only because interpretivism establishes clearer and more coherent standards.

Parenthetically, any serious judicial philosophy needs judicial standards—standards that may on occasion come into conflict with the values served by stare decisis. One of the most infrequently recognized virtues of originalism is that it sets forth a clear decision-making standard *before the case is decided*, and thus communicates an appearance of fairness and evenhanded treatment. Both the rules of the game and the tools to be employed in that game are clearly set forth by the originalist judge in advance of the case—he will seek to conform the case law as closely as possible to the actual language of the law, and he will do so through the application of traditional methods of interpretation,

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21. *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING A DEMOCRATIC CONSTITUTION (2008).

22. *See* THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 10, at 490.

23. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) (attacking the "wall of separation" Establishment Clause doctrine because of "its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights," and arguing that, despite the immense amount of precedent supporting it, "no amount of repetition of historical errors in judicial opinions can make the errors true").

taking into consideration word definitions, context, grammar, punctuation, organization, purpose, logical inferences, and drafter intentions. That is, the originalist judge promises to resolve the case before him by looking to all of the evidence available and relevant in discerning the meaning of the language in dispute, and to nothing more.[24] When, on the other hand, the judge is committed merely to a judicial philosophy of resolving disputes "fairly," "justly," or in conformance with a vague extra-constitutional moral principle, there is no similar promise. The precise search the judge engages in and the precise methods he employs tend to be made known only *after* the case has been decided. The nonoriginalist judge may express rules of decision and identify the evidentiary tools relied upon for his decision, but these rules and tools will not necessarily be those expressed in the previous case, or those that will be expressed in the next case. Post-hoc standards are no standards at all. As a result, to at least some parties in litigation, these decision-making standards will appear to be more a function of the judge's own sympathies and values than of the requirements of the law. The originalist vision is clear, with well-understood tools, and neutral appearances; by contrast, the nonoriginalist vision is obscure, its tools are constantly changing, and its appearances are suspect.

Seventh, just as I have submitted myself to external standards in deciding what a proper construction of the law requires, I have also submitted myself to standards in determining when that construction must be tempered by the requirements of stare decisis. Although such standards are hardly mechanical, and necessarily involve judgment and discretion, so too does the exercise of judicial power generally. Whenever possible, I favor minimizing judicial discretion and enhancing external constraints, as, for example, in my support for judicial criminal sentencing guidelines, which lessen the breadth of sentencing disparities incurred by similarly situated defendants being sentenced by The Honorable Maximum Mike and The Honorable Lenient Larry. Minimizing judicial discretion, while reconciling originalism with precedent, requires standards that are as clearly known as possible *before the case*. That is, minimizing judicial discretion requires establishing reasonable standards for when to depart from the standards of originalism.

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24. *See* Ogden v. Saunders, 25 U.S. (12 Wheat) 213, 332 (1827) (Marshall, C.J., dissenting).

In *Robinson v. City of Detroit*, a much-cited four-to-three decision in Michigan, my court stated that, although stare decisis is the "preferred course," it is "not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions."[25] Quoting Justice Powell, we explained that "it is thus not only our prerogative, but also our duty to reexamine a precedent where its reasoning or understanding of the Constitution is fairly called into question."[26] We then set forth the factors that must be considered in determining whether originalist or stare decisis principles would ultimately control.[27] The conflict between originalism and precedent arises only when the court considers the precedent to be incorrect. If the court views the precedent as correct, then there is obviously no conflict. If the court views the precedent as incorrect, the presumption then shifts away from the precedent, and the court will proceed to assess other legitimate rule-of-law interests—in particular, reliance interests drawn from existing law. In one case, for example, reliance interests were determinative because several generations of the plaintiff class had insured themselves against a particular risk on the basis of our earlier precedents, while similar generations of the defendant class, on the same basis, had not done so.[28] We chose to abide by the precedent, rather than abruptly place an unforeseen, and uninsured-against, financial burden upon the defendant class.[29] The court also looks to ascertain whether the precedent has "become so embedded, so accepted, so fundamental, to everyone's legal expectations that to change it would produce not just readjustments, but practical real-world dislocations."[30] Thus, we seek to ascertain whether the predictability and certainty of the law will be furthered more by retention of the precedent or by the recognition that citizens scouring the law in an effort to understand their legal duties and responsibilities also possess a legitimate reliance interest. As we stated in *Robinson*:

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25. Robinson v. City of Detroit, 613 N.W.2d 307, 319–20 (Mich. 2000).

26. *Id.* (quoting Mitchell v. W.T. Grant Co., 416 U.S. 600, 627–28 (1974) (Powell, J., dissenting)).

27. Although Professors McGinnis and Rappaport prefer more rigid rules to factors, see McGinnis & Rappaport, *supra* note 9, at 804, I do not see much practical consequence between these two concepts.

28. Pohutski v. City of Allen Park, 641 N.W.2d 219, 232–33 (Mich. 2002).

29. *Id.*

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

> [I]t is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations, by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest.[31]

Reasonable persons may well disagree with our application of the *Robinson* factors in a particular case, just as reasonable persons can also disagree about the application of originalist principles themselves in a particular case. Originalist judges routinely disagree with one another, as they have on the United States Supreme Court and my court.[32] Although a relatively small number of cases have clearly been insulated from reversal on the basis of the *Robinson* factors, such factors nonetheless give proper cognizance to important rule-of-law values that must be weighed by any responsible judicial body. In short, these factors have enabled a reasonable and workable reconciliation between the values of originalism and respect for stare decisis.

Over the course of a decade and more than 30,000 cases, the Michigan Supreme Court has moved unwaveringly in the direction of conforming our case law with the language of the positive law. There have been fits and starts and junctures at which the law needed to move forward more gradually and with greater deference to precedent. In our application of the judge's Hippocratic Oath, however, we sought never to do harm to the law, never to widen the gap between our decisions and the positive law, and never to call into question as our limiting objective the pursuit of an identity between the case law and the written law. Given our current legal culture, this was no small contribu-

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31. *Id.*

32. *Compare* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 370–71 (1995) (Thomas, J., concurring) (finding that the historical evidence shows that the Framers understood the First Amendment to protect anonymous political speech), *with id.* at 371–72 (Scalia, J., dissenting) (finding that the historical evidence did not establish that the Framers though that anonymous political speech was protected, only that it was used frequently). Also, in a coincidence of names, compare People v. McIntire, 599 N.W.2d 102, 110 (Mich. 1999) (finding that immunity is not completely forfeited "upon the giving of false testimony) with People v. McIntire, 591 N.W.2d 231 (Mich. App. 1998) (finding that immunity agreements are void if based on untruthful testimony).

tion to the rule of law in Michigan. We also squarely rejected the premise of the "ratchet theory," which has persuaded many conservative judges over the years that only nonconservative judges get to make new precedents, while the conservative judges must be content merely to institutionalize these precedents.

One final thought: On my court, as well as on many other courts through roughly the late 1960s, almost all judges were effectively interpretivists, even if they were not identified by this nomenclature. As a result, there were relatively few dissents, separate opinions, and precedents with which a judge could take strong exception. This, of course, is no longer the case. There are now clear-cut and consistent lines of division among the judges of courts like my own; there are now many dissents and separate opinions. Just as our representative institutions seem to be more polarized between Republican and Democrat, so too our judicial institutions seem to be increasingly polarized between originalists and nonoriginalists. With each new judicial generation, there are new precedents that one camp of judges or the other finds intolerable and unacceptable. In just one year, for example, since the nonoriginalists on my court regained a majority, they have been aggressive in rejecting the precedents of the last decade, the period of originalist dominance, and in restoring the status quo ante by reinstalling their preferred decisions of the 1980s and 1990s.[33]

These developments lead to several important questions. What are the consequences and implications of an increasingly polarized judiciary for the stability and integrity of state legal systems and their precedents? What is the future of stare decisis as the rough fungibility that once existed among judges dissipates further? What will be the impact of oscillating periods of originalist and nonoriginalist dominance in which different precedents, and indeed different bodies of law, are recognized? Just as originalists must grapple with the need to reconcile originalist interpretations with precedent, so too must our legal system and the citizens it serves grapple with the need to reconcile originalist and nonoriginalist elements of our law.

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33. *See, e.g.*, Bezeau v. Palace Sports, 487 Mich. 455 (2010); Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ., 487 Mich. 349 (2010); University of Michigan v. Titan Ins. Co., 487 Mich. 289 (2010); McCormick v. Carrier, 487 Mich. 180 (2010); People v. Feezel, 783 N.W.2d 67 (Mich. 2010).