RESISTING THE RATCHET

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Descending for a moment from the rarefied atmosphere of our panel's discussion of the United States Supreme Court, I would like to offer several perspectives on the role of precedent from my vantage point as a Justice of the Michigan Supreme Court for the past nine years. What may render this perspective of some interest in the present venue is that a majority of this court, four of its seven justices, are self-described "Federalists" and are committed to the judicial values that are often identified with the Federalist Society—in particular, a commitment to giving faithful meaning to the words of the law and to operating within the restraints of a constitution in which the separation of powers is fundamental. Moreover, ours is a court on which fine jurisprudential matters, such as the existence of an "absurd results" rule, the significance of legislative acquiescence as an interpretative tool, the virtues of the "last antecedent" rule, and uses and abuses of legislative history are routinely, and I believe thoughtfully, addressed at our conferences and in our opinions.

What in my experience most differentiates the Michigan Supreme Court from other state courts, including those routinely described as "conservative," "judicially restrained," or "strict constructionist," has been the court's treatment of precedent. Although respectful of precedent, as any judicial body must be, in the interests of stability and continuity of the law, the court has also been straightforward in its insistence that regard for precedent must be balanced with a commitment to interpreting the words of the law in accordance with their meaning.[1] That is, what most distinguishes the Michigan Supreme Court from other even conservative state courts of last resort has been its unwillingness to institutionalize the precedents of earlier jus-

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1. *See, e.g.*, Rowland v. Washtenaw County Rd. Comm'n, 477 Mich. 197, 223–47; 731 N.W.2d 41, 57–66 (Mich. 2007) (Markman, J., concurring) (identifying and assessing decisions since 1999 in which the "Federalist" majority on the Michigan Supreme Court had reversed precedents).

tices who, like Justice William Douglas on the United States Supreme Court, expressed their preference "to make, rather than to follow precedent."[2] We have resisted becoming a participant in such a ratcheting process, by which periods of punctuated equilibrium periodically occur in which the law lurches in the direction favored by Justice Douglas and his philosophical allies, during which new precedents arise bearing little more than a random relationship to the written law, only to be followed by periods of conservative judicial rule in which these new precedents are affirmed in the interests of *stare decisis* and become a permanent fixture of the law.

Instead, the Michigan Supreme Court has set as its priority the proper exercise of the "judicial power," to read the law evenhandedly and give it meaning by assessing its words, its grammar and syntax, its context, and its legislative purpose. The court's dominant premise has been on "getting the law right"—moving toward the best and most faithful interpretations of the law—rather than in reflexively acquiescing in prior case law that essentially reflected little more than the personal preferences of predecessor justices.

The perspective of the court in addressing questions of constitutional, statutory, and contractual interpretation has been that, in exercising the "judicial power" of Michigan, it is our primary responsibility to say what the law "is," not what it "ought" to be. This responsibility derives from *Marbury v. Madison*,[3] from the Preambles to the United States and Michigan Constitutions, which direct us that it is "this" Constitution to which "we the people" have assented, from our "oath of office" in support of "this" Constitution, and from the inferences drawn from Article V, the amending provision of the Constitution. This primary responsibility also derives from our sense of constitutionalism—that to exceed this limited authority is necessarily to trespass upon the authority of the executive and legislative branches of government. Moreover, there is no alternative rule of interpretation, of giving meaning to the law, that both *precedes the decision* and better communicates that the decision is something more than a function of a judge's own personal predilections. After the fact, any modestly innovative and creative judge can

2. *See* William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949).
3. 5 U.S. (1 Cranch) 137, 177 (1803).

justify almost any outcome by the application of assorted rules and maxims. But, unless judges are prepared to announce these rules in advance and apply them in a *consistent* fashion, it is something other than the rule of law that they are administering.

Also underlying this view of the judicial role is the sense that a more genuine long-term stability and continuity in the law—the very rationales for respecting precedent—are best achieved when the law means what it says, rather than merely what Justice Doe imagined it to say fifteen years ago; when "up" means "up," not "down"; when "public use" means "public use," not "public purpose";[4] when the interpretations of the law increasingly converge with its actual language.

As the meaning of the law comes to track what the lawmaker has actually written—as the "judicial power" is exercised to elevate the product of the lawmaker rather than that of the judge—it seems to me that the law also becomes increasingly accessible to "we the people," and less exclusively the domain of lawyers and judges. When, to use a mundane illustration, the law requires that a person must file a certain type of lien within "thirty days," and when "thirty days" means thirty days, that law remains relatively accessible to the ordinary citizen. He or she can read the law and more or less understand their rights and responsibilities under this law. When, on the other hand, "thirty days" means "thirty-one days" if there has been an intervening holiday, "thirty-two days" if your car has broken down on your way to the registration office, "thirty-three days" if you have been in the hospital, and "thirty-four days" if you are a particularly sympathetic character, then the only way to understand this law and its various unwritten exceptions is to consult an attorney. That is, to read the law consistently with its language, rather than with its judicial gloss, is not to be "harsh" or "crabbed" or "Dickensian," but is to give the people at least a fighting chance to comprehend the rules by which they are governed.

Restoring discipline to the law of a state that in many instances had become a patchwork of judicial decisions lacking any discernible consistency, often marked by multiple and inconsistent precedents on a single matter of law, essentially allowing judges to pick from precedent A or precedent B in the manner of a Chinese restaurant menu, can have dislocations. Although I believe

4. County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

that such dislocations are more fairly attributable to the court twenty years ago that said that "up" means "down," rather than to the court today that corrects this and says that "up" means "up," the reality is that the later court must recognize that the law cannot always move from flawed to ideal in one fell swoop, that sometimes it must first move to less flawed and less imperfect.

But getting the law "right" must necessarily be balanced with considerations of precedent. For, just as it seems to me the "liberal" judicial temptation is to do "justice," rather than "justice under law," the "conservative" judicial temptation, one that sometimes must be resisted, is to define perfectly that law. I say this not to denigrate that position, because it is one to which I myself generally subscribe. But the Michigan Supreme Court, properly I believe, has recognized that there are considerations that occasionally argue in favor of adherence to precedent, even when that precedent is wrong. These include the venerability of a precedent, the extent to which a precedent has become institutionalized or embedded within the law, and the recognition of *bona fide* reliance interests, such as where one class of persons has been encouraged by a precedent to purchase insurance against some hazard and another class of persons has not.[5]

Professor Calabresi raises legitimate concerns that the mere calculation of these and similar factors itself constitutes an essentially discretionary exercise of the judicial power, appearing in some ways to resemble the kind of balancing that is more properly a part of the legislative power.[6] I take this point seriously and do not have a fully satisfactory answer. I can only state, uncertainly, that in attempting to responsibly restore the law and the courts to their proper realm, the judiciary cannot be a force for turbulence or chaos. Although the law should never be moved by a court further from the design of the lawmaker, and a court should never stray further from its assigned role than its predecessors have already done, prudence and judgment must also be exercised. The more generations of judges that have concurred in a legal proposition, the more modest and cautious I believe I must be in discarding those propositions, and the more cognizance that I must give to the possibility that there has been

5. *See, e.g.*, Robinson v. City of Detroit, 613 N.W.2d 307 (Mich. 2000); Pohutski v. City of Allen Park, 641 N.W.2d 219 (Mich. 2002).

6. Steven G. Calabresi, *Text vs. Precedent in Constitutional Law*, 31 HARV. J.L. & PUB. POL'Y 947, 958 (2008).

some genuine acquiescence on the part of the legislature and the people in that proposition. As Justice Frankfurter once said, respect for precedents sometimes reveals "the wisdom of [a] [c]ourt as an institution transcending the moment."[7] Perhaps it is my conservative impulses coming to the fore.

Perhaps, more than anything else, it has been the Michigan Supreme Court's attitudes toward precedent that have been the impetus for several multi-million dollar campaigns directed against the four "Federalist" justices. My court has been the subject of academic and popular studies focused upon our alleged lack of regard for precedent, we have been characterized as "judicial activists," and we have been subject to extraordinary invective from our dissenting colleagues and the media. And, of course, we have been accused of being corrupt, partisan, and beholden to special interests. Most dastardly, we have even been accused of being members of a conspiratorial legal cabal known as the Federalist Society.

Yet, anyone who carefully reads our decisions would, I hope, find an intellectually vigorous court, an honest and conscientious tribunal, an even-handed and impartial body, struggling everyday to accord reasonable meaning to the law—whether that law be the Constitution of Michigan or of the United States, the enactments of the state legislature, the ordinances of Kalamazoo or Flint, or the contracts and deeds and bills of sale of our ten million citizens. We are attempting responsibly to bring to bear in our decision making in 250 cases each month the constitutional values that the Federalist Society has done so much to reinvigorate—the constitutional values that have given this nation the freest, the most prosperous, and the most stable republic in the history of the world.

Although there are many difficult issues that must be confronted by a court committed to a federalist jurisprudence, any such body that hopes to contribute seriously to the restoration of a legal culture that is in accord with traditional constitutional values must *first* confront the issue of how to reach an equilibrium between respect for text and respect for precedent. I suspect that the Michigan Supreme Court has not yet achieved a perfect solution in this regard, but, to its credit, I believe it has been thoughtfully engaged in this critical debate.

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7. Green v. United States, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting).