

## AN INTERPRETIVIST JUDGE AND THE MEDIA

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The debate over the role of the judiciary has been particularly intense in Michigan for the past decade. With four of the seven justices on the Michigan Supreme Court committed to a traditional jurisprudence—one that views the responsibility of the courts to say what the law “is” rather than what it “ought” to be<sup>1</sup>—there is no state judiciary in which this debate has been more directly engaged than in Michigan. This debate is reflected by majority opinions containing strong counter-responses to dissents in which issues of jurisprudence are central;<sup>2</sup> it is reflected by opinions according careful attention to a broad range of interpretative issues such as the merits of an “absurd results” rule,<sup>3</sup> the uses and abuses of legislative history,<sup>4</sup> the hazards of premature invocations of ambiguity,<sup>5</sup> and

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1. See *Am. Trucking Ass’n v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment) (stating that the role of the judiciary “is to say what the law is, not to prescribe what it shall be”); *Mich. United Conservation Clubs v. Sec’y of State*, 630 N.W.2d 297, 313 (Mich. 2001) (Markman, J., concurring) (“[I]t is the responsibility of the judiciary to say what the law ‘is,’ not what it believes that it ‘ought’ to be.” (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

2. See, e.g., *Stokes v. Chrysler L.L.C.*, 750 N.W.2d 129, 142–46 (Mich. 2008); *Nat’l Wildlife Fed’n v. Cleveland Cliffs Iron Co.*, 684 N.W.2d 800, 815–25 (Mich. 2004); *Terrien v. Zwit*, 648 N.W.2d 602, 611–16 (Mich. 2002); *Robertson v. DaimlerChrysler Corp.*, 641 N.W.2d 567, 581–83 (Mich. 2002).

3. See, e.g., *Cameron v. Auto Club Ins. Ass’n*, 718 N.W.2d 784, 797–98 (Mich. 2006) (Markman, J., concurring); *id.* at 810 n.12 (Cavanagh, J., dissenting); *id.* at 811 n.1 (Weaver, J., dissenting); *id.* at 814–16 (Kelly, J., dissenting).

4. See, e.g., *Nat’l Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524, 541–42 n.23 (Mich. 2008) (“The dissent inadvertently illustrates the principal infirmity of reliance upon legislative history, namely that it affords a judge essentially unchecked discretion to pick and choose among competing histories in order to select those that best support his own predilections.”).

5. See, e.g., *Mayor of Lansing v. Mich. Pub. Serv. Comm’n*, 680 N.W.2d 840, 846 (Mich. 2004) (“The dissent avoids the difficult task of having to read the actual language of the law and determine its best interpretation by peremptorily concluding that [the statute] is ‘ambiguous.’ A finding of ambiguity, of course, enables an appellate

the propriety of “broad” and “narrow” interpretations of the law;<sup>6</sup> and it is also reflected by some of the most costly and contentious state judicial elections in the nation’s history.<sup>7</sup>

What most obviously distinguishes the judicial debate within Michigan—and increasingly within other states—from that within the federal judiciary is the reality of periodic election. Although this reality properly should have *no* impact on judicial analysis or the substantive results of decisions, it does, as a practical matter, impose some greater obligation on state judges to identify their judicial principles as clearly as possible so that the people can understand their differing attitudes toward the exercise of the “judicial power.” As it becomes increasingly evident to the people that judges are not fungible, and that differences among them are of considerable consequence to the public policies and legal cultures of their states, it becomes increasingly important that the elected judge communicates the values and philosophies underlying his decisions. After all, the people are entitled to know that Circuit Judge “Scalia” and District Judge “Breyer,” for example, are competing for an open position on the state supreme court.

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judge to bypass traditional approaches to interpretation and either substitute presumptive ‘rule[s] of policy,’ or else to engage in a largely subjective and perambulatory reading of ‘legislative history.’” (citations omitted)).

6. See, e.g., *Grebner v. State*, 744 N.W.2d 123, 126 (Mich. 2007) (“The consideration and balancing of ‘public’ and ‘private’ interests in this case do not require that this Court construe these or any other terms in a ‘broad’ or ‘narrow’ manner, as asserted by the Court of Appeals dissent. Rather, such terms need only be interpreted in a reasonable manner.”); *Melson v. Prime Ins. Syndicate*, 696 N.W.2d 687, 701 (Mich. 2005) (Markman, J., dissenting) (“[The concurrence] not only misapprehends this Court’s ‘judicial power’ by defining it in an overly narrow fashion, but arguably manages at the same time to define this power in what some may view an overly broad fashion . . . .”); *Brown v. Genesee County Bd. of Comm’rs*, 628 N.W.2d 471, 480 n.5 (Mich. 2001) (Markman, J., concurring) (stating that a particular case “was decided during a period in which this Court gave the term ‘governmental function’ a narrow reading, while giving broad readings of the statutory exceptions to governmental immunity” and that “[i]n contrast with that prior era, we now interpret the term ‘governmental function’ broadly and construe the exceptions narrowly”).

7. See Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL’Y 273, 275 (2002) (noting that “[i]n Michigan, a contentious race for three supreme court seats cost at least \$16 million” and providing two examples of politicized advertisements from Michigan judicial elections in 2000); Christopher Rapp, Note, *The Will of the People, the Independence of the Judiciary, and Free Speech in Judicial Elections after Republican Party of Minnesota v. White*, 21 J.L. & POL. 103, 118–19 (2005) (offering three examples of politicized television advertisements from recent Michigan Supreme Court races).

A second reality of the state judicial process is that the media plays a critical role in transmitting these communications from judges to the people. Based on my observations as a justice of the Michigan Supreme Court for the past nine years, this intermediary role poses a particular problem for judges committed to a traditional judicial philosophy, termed either “interpretivism,” “textualism,” or “originalism.”<sup>8</sup> Not infrequently, the interpretivist majority of the Michigan Supreme Court has been characterized by the media as partisan, beholden to interests, or otherwise engaged in myriad forms of questionable decision making, simply because of its consistent commitment to read the law as it stands.<sup>9</sup> The interpretivist majority repeatedly refused to avail itself of opportunities to “improve” or to “enhance” the law, and has been determined to respect legislative compromises that may have produced laws that may be less rational and less consistent, and perhaps even in some ways less fair, than doubtlessly could have been achieved by judges unencumbered by the messiness of the democratic process.<sup>10</sup>

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8. My point here is not to defend originalism or interpretivism—the latter being the term I prefer to describe my own judicial philosophy—although I accept either characterization. Rather, my purpose is simply to suggest that those jurists who adhere to these doctrines will generally find themselves disproportionately disadvantaged by media communications to the public. The values and premises that underlie an interpretivist philosophy tend to be less well understood, and less highly regarded, by the media than the values and premises that underlie a noninterpretivist philosophy. In particular, and most obviously, the media’s focus on winning and losing parties—an altogether understandable focus—accords little attention to the process by which a judge or justice reaches his results. As the debate over the judicial role intensifies in this country, these communications become of increasing importance to state appellate judges who must periodically present themselves to the people for retention or reelection.

9. See, e.g., Editorial, *Interest groups battle to influence justices*, TRAVERSE CITY REC.-EAGLE, May 30, 2008, at 4A (“A recent study of judicial elections in Great Lakes states dispels any doubt that a ‘For Sale’ sign figuratively—if not literally—should be nailed to the Michigan Supreme Court chamber.”); Ted Roelofs, *State high court ranks low: GR forum examines its flaws*, GRAND RAPIDS PRESS, June 18, 2008, at B3.

10. See, e.g., *Cameron v. Auto Club Ins. Ass’n*, 718 N.W.2d 784, 790 (Mich. 2006) (“If the statute has provisions that are harsh, they undoubtedly reflect the compromises that were hammered out in the Legislature . . . . It was for them, the legislators, not us, the judges, to weigh the ‘competing interests’ and ‘cho[ose] the result’ . . . .”); *id.* at 800 (Markman, J., concurring) (“This Court lacks the authority to alter a statute simply because it is confident that such alteration will better fulfill some supposed purpose.”); *Robertson v. DaimlerChrysler Corp.*, 641 N.W.2d 567, 581–82 (Mich. 2002) (“[W]e believe that it is the constitutional duty of this Court to interpret the words of the law-maker, in this case the Legislature, and *not* to substitute our own policy preferences in order to make the law less ‘illogical.’”).

The result has been a court that has eschewed the role of “adult supervisor” for the state of Michigan, and has abided instead by the view that it is a function of the country’s experiment in self-government that the people are entitled to enact laws that judges or justices might view as unwise or imprudent, so long as these do not contravene the constitutions of the United States or Michigan. The interpretivist majority has sought to avoid the eternal judicial temptation: to “improve” the law as the judge sees it and thereby to “strengthen” the work-product of the legislature by its own lights.

The following are several not-altogether-random thoughts on the media and interpretivism, recognizing that these are necessarily generalities and that a single description does not necessarily fit all.

#### NOT-ALTOGETHER-RANDOM THOUGHT #1

For interpretivists, the critical aspect of the judicial role consists of the *means* (or the *process*) by which ultimate decisions are reached and not the substantive *results* of such decisions. The interpretivist is committed to a jurisprudence in which the “judicial power”—the only power properly wielded by courts under our federal<sup>11</sup> and state<sup>12</sup> constitutions—must be exercised in accordance with our system of separated powers, and in which it is the “legislative power”<sup>13</sup> that generally determines substantive results, or what the law “ought” to be.<sup>14</sup> Understandably, however, the fine points of legal analysis are of much less interest to the media than is the bottom line of who wins and who loses. Had the Associated Press covered the United States Supreme Court’s decision in *Marbury v. Madison*,<sup>15</sup> it likely would have viewed the decision as a sweeping victory for the Jeffersonians, even though the Federalists

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11. See U.S. CONST. art. III, § 1.

12. See MICH. CONST. art. VI, § 1.

13. See U.S. CONST. art. I, § 1; MICH. CONST. art. IV, § 1.

14. See *FTC v. Jantzen, Inc.*, 386 U.S. 228, 235 (1967) (“The Legislature has the power to decide what the policy of the law shall be.” (quoting *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908))); *Stanard v. Olesen*, 74 S. Ct. 768, 771 (Douglas, Circuit Justice 1954) (“[I]t is for Congress, not the courts, to write the law.”); *Cameron*, 718 N.W.2d at 790 (“It is the legislators who establish the statutory law because the legislative power is exclusively theirs.”).

15. 5 U.S. (1 Cranch) 137 (1803).

emerged as the real prevailing party. What is newsworthy and of public interest is not the parsing of complex sentences, the invocation of dictionary definitions of words and phrases, or the application of Latin maxims of interpretation, but rather the resolution of winners and losers. Thus, what is most important to the interpretivist judge—the assurance of even-handed decision making effected through neutral rules by which laws are given reasonable meaning—is of little interest to the media. In contrast, what is most important to the noninterpretivist judge—the attainment of what he views as pleasant results, effecting social reforms, “enhancing” the work-product of the representative branches of government, and doing “equity”—is of considerable media interest.

#### NOT-ALTOGETHER-RANDOM THOUGHT #2

The adverse impact of the media focus on the interpretivist judge is compounded by the single greatest virtue of interpretivism: the establishment of clear rules of decision making in advance of the decision. The interpretative rules of the game are properly set forth *before* the judge is confronted with particular interests and specific parties with which he may have predispositions. By accepting these rules, the interpretivist judge commits himself to rendering judgments based on the language of a contract, statute, or constitution, and to reaching such judgments through the application of well-understood and consistently-applied principles of construction. Thus, the interpretivist binds himself; he imposes constraints and limitations on himself and thereby serves as a custodian of a limited constitutional government. In the words of President Franklin Roosevelt, such a judge thereby acts “under” the law rather than “over” the law.<sup>16</sup>

Like the interpretivist judge, the noninterpretivist judge reaches his decisions by applying rules of law; the problem is simply that such rules vary from case to case. Because no overarching rule *precedes* the decisions of such judges, the parties cannot be sure that what matters is the *law* and not a judge’s sympathies

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16. Franklin D. Roosevelt, A “Fireside Chat” Discussing the Plan for Reorganization of the Judiciary (Mar. 9, 1937), in 1937 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 122, 126 (1941) (“We want a Supreme Court which will do justice under the Constitution—not over it.”).

or antipathies toward the parties or their causes.<sup>17</sup> Any judge can concoct “rules” or “principles” after the fact; the equal application of the law, however, requires the *consistent* application of clearly articulated rules and principles. On many occasions, I have invited such articulation from my three dissenting colleagues on the Michigan Supreme Court, but they have yet to respond to these solicitations.<sup>18</sup>

Imagine two judges with contrary judicial philosophies. The first judge has bound himself by traditional understandings of the “judicial power,” views it as imperative that he apply the same rules of interpretation today as he did yesterday, believes that the rule of law is principally a function of *consistent* decision making, and believes that a thumb is placed on the scales of justice when a judge may select from either column *A* or column *B* of a menu of interpretive rules. In contrast to this approach, the second judge places a premium on achieving “benevolent” results and “wise” public policies, approaches each case relatively unburdened by any need to apply the same tools of interpretation today that he applied yesterday, views innovation and creativity as greater judicial virtues than adherence to musty dictionary definitions and faithful application of the

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17. No judge would ever be explicit in saying that he construes the law as he wishes notwithstanding what the law says. Noninterpretivist judges, however, will be far more embracing in their decisions of such terms as “ambiguous,” “balancing,” and “spirit,” and far more willing to base conclusions on “legislative history,” “public policy,” “equity,” and “broad” and “narrow” constructions of the law, all of which will sometimes suggest a judicial determination to avoid the constraints of the written law. Such words and phrases ought to be carefully scrutinized to determine if a judicial decision is genuinely compelled by the law or instead by the judge’s own personal sense of justice or conscience.

18. See, e.g., *Rowland v. Washtenaw County Rd. Comm’n*, 731 N.W.2d 41, 58 (Mich. 2007) (Markman, J., concurring) (“Justice Kelly [writing in dissent] would do well to share her *own* standards concerning when she would or would not overrule such obviously distasteful precedents.”); *Terrien v. Zwit*, 648 N.W.2d 602, 614 (Mich. 2002) (Markman, J.) (“[W]e are curious as to the dissent’s basis for asserting that a policy is truly a ‘public’ policy as opposed to merely a judge’s own preferred policy.”); *id.* at 615 (“The dissent offers no factors or criteria for a court to evaluate, it offers no guidance as to the particular circumstances that should be reviewed by a court in its analysis, and it offers no direction regarding when a court should conclude that a [commercial enterprise] has been transformed into a non-‘business’ because of its location.”); *Robertson v. DaimlerChrysler Corp.*, 641 N.W.2d 567, 582 (Mich. 2002) (Markman, J.) (“In support [of its position], the dissent merely reiterates its view that the words of the statute must be subordinated to what the dissent believes are better policy choices, in other words, *its* policy choices. The dissent offers no argument that the four words that [it] would strike from the law are read unreasonably by this majority, or that a reasonable alternative interpretation exists.”).

“last antecedent” rule, and believes that the constitutional architecture must be allowed to “breathe” in terms of the authorities of the separate branches of government. Which of these two judges is more likely to author opinions producing popular outcomes and media-friendly decisions? It does not take a rocket scientist to answer this question. If the judge’s starting premise is that he is seriously circumscribed in the breadth of his decision making by the words of the law, quite assuredly he will be deciding far fewer cases in a manner applauded by the media than the judge whose starting premise is to determine what constitutes the most beneficent outcome in a given case.

One of the great challenges facing any purportedly interpretivist judge is how to address problematic precedents and the exercise of *stare decisis*. It sometimes can be difficult to balance the need for stability and continuity in the law by following precedent with the obligation to remain faithful to one’s oath of office to say what the law means. The Michigan Supreme Court has been criticized for an allegedly cavalier attitude toward precedent. This criticism is unjustified. Rather, the court has merely rejected the view that noninterpretivist courts are entitled to periodic spasms during which they may reject precedents and “evolve” the law in more “modern” directions, and that later interpretivist courts are obliged simply to acquiesce to those new precedents. Instead, the court’s presumptive position has been that it will reasonably interpret the law to the best of its ability and issue opinions consistent with those interpretations, unless there is some compelling reason not to do so.<sup>19</sup> The judge’s first obligation is to the law and the Constitution, not to the wrongly decided precedents of ten years earlier. If the law says “up,” it means “up,” regardless of whether judges a decade ago proclaimed that it really meant “down.”

### NOT-ALTOGETHER-RANDOM THOUGHT #3

Much of the media has little patience with legal doctrines that it views as distracting from the attainment of substantive results. For example, the Michigan Supreme Court received

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19. See *Robinson v. City of Detroit*, 613 N.W.2d 307, 319–22 (Mich. 2000) (stating that, when deciding whether to overrule precedent, the court considers whether the earlier decision was wrongly decided and whether overruling such decision would work an undue hardship because of reliance interests or expectations that have arisen).

almost unanimous media criticism when it called into question a state law authorizing “any person” to sue “any other person” for the redress of a broad range of environmental harms.<sup>20</sup> In reliance on a United States Supreme Court decision, as well as its own precedents, the court invoked the doctrine of “standing” and concluded that the “judicial power” simply did not extend to a lawsuit where a plaintiff in Ann Arbor was dissatisfied with the executive branch’s enforcement of the state’s environmental laws but had suffered no specific harm from the alleged polluting actions of a defendant five hundred miles away in the Upper Peninsula.<sup>21</sup> This Court was repeatedly scorned in the media for not interpreting “any person” to mean “any person.”<sup>22</sup> Although this sudden outburst of interpretivist zeal within the media was admirable, the court’s opinion hastened to remind the reader that it was also incumbent on a court of law to read the *constitution* at the same time that it read the *statute*, that the constitution in this instance limited our authority to the exercise of the “judicial power,” and that such power did not extend to matters in which a plaintiff lacked standing, regardless of what the legislative branch might say. Judicial decisions and analysis focused on standing and other preconditions to the exercise of the judicial power—most of which are fundamental to delineating how the separation of powers as a practical matter will be accorded respect by the judiciary—do not appear to impress many in the media as much as judicial decisions and analysis that cut through all of this “legalistic” underbrush and enable judges to arrogate to themselves as many of society’s important decisions as possible.

To put this another way, the more “passive” judicial virtues of restraint in decision making—deference to the determina-

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20. Mich. *Citizens for Water Conservation v. Nestlé Waters N. Am., Inc.*, 737 N.W.2d 447, 449, 452–53 (Mich. 2007); see, e.g., Peter Luke, *Court takes rights from citizens*, KALAMAZOO GAZETTE, July 29, 2007, at A18 (“A Supreme Court that often says cases should be decided strictly on the plain language in a statute, said in this case that ‘any person’ doesn’t mean ‘any person’ at all.”).

21. See Mich. *Citizens*, 737 N.W.2d at 449–50.

22. See, e.g., Pat Shellenbarger, *Milliken: Water ruling ‘major setback’: Former governor says decision destroys intention of state’s Environmental Protection Act*, GRAND RAPIDS PRESS, Aug. 5, 2007, at A1 (“To former Michigan Gov. William Milliken, ‘anyone’ means ‘anyone.’”); Editorial, *Supreme Court turns State Environmental law on its ear*, BAY CITY TIMES, Aug. 26, 2007, at 8A (“[T]he Supreme Court in a 4-3 ruling twists state environmental law into something the original signers of the Michigan Environmental Protection Act don’t recognize.”).

tions of other public institutions, respect for the limits of the judicial power, and regard for the ability of the private sector to manage its own affairs—seem to be considerably less admired by the media than more “aggressive” judicial understandings that dictate action, that “get things done” (albeit by creative and innovative methods), that repair the flaws and shortcomings of the popular branches, and that do not allow “technicalities” like standing, mootness, ripeness, and “political questions” to stand in the way of achieving pleasant results. When, for example, the interpretivists of the Michigan Supreme Court are accused of being a “rubber stamp” for the legislature,<sup>23</sup> a pejorative cast is placed on a constitutional relationship that the Founders viewed as indispensable to the achievement and maintenance of a free society.

#### NOT-ALTOGETHER-RANDOM THOUGHT #4

Finally, the media often fails to distinguish between the judicial and legislative roles. One cannot count the number of instances in which the Michigan Supreme Court has been on the wrong end of editorials, commentaries, and news stories that have neglected to mention that there were statutes or ordinances that were dispositive of an issue, as if the judiciary simply possessed *carte blanche* to reach a particular result. Yet, in a system in which judges are elected, it is essential that the media provide leadership in reminding the citizenry of first principles of civics, such as how the institutions of our system of government interact and how each is bound in different ways by the Constitution. Too often this leadership has not been forthcoming. The detrimental impact of this failure once again falls disproportionately on the judge whose approach to his responsibilities is premised on the binding nature of the law, rather than on the judge who essentially views himself as having a shared legislative role.

Moreover, the media, quite understandably, tends to focus on outcomes in *today's* decision while failing to recognize that an appellate court's decision—particularly a decision of the Michigan Supreme Court, which serves as the court of last resort in

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23. See, e.g., *Harvey v. State*, 664 N.W.2d 767, 776 (Mich. 2003) (Weaver, J., dissenting) (“This Court is not simply a rubber stamp for anything the Legislature enacts.”).

the state and whose docket is entirely discretionary—may control not only the instant case, but the resolution of five hundred future cases as well. Thus, the most important aspect of an appellate opinion is, almost always, the *principle of law* that is articulated. For it is this principle of law that must be applied equally to these succeeding five hundred cases if the rule of law is to constitute more than lip service. Yet media coverage often fails to convey this aspect of appellate decisions. And, once again, the interpretivist judge, who is conscious of his obligation to render a decision in tomorrow's case in a fashion consistent with his decision in today's case, is derided for his judicial integrity. The noninterpretivist, on the other hand, will deal with later cases as they arise.

#### CONCLUSION

More often than not, the media does not set out to treat interpretivist judges unfairly. There is simply much that remains to be done by organizations such as the Federalist Society and by interpretivist judges themselves to better and more effectively communicate the nature of the judicial role and the parameters of the present judicial debate. The Federalist Society's extraordinary success should not obscure the reality that the dominant legal culture remains defined by a contrary point of view that is, not surprisingly, reflected throughout much of the media.