

# REPLY TO LAWSON

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It is a high accolade to say of a fellow theorist that though he is wrong, he is clearly wrong, and so his error sheds light where it does not convince.

Professor Lawson's argument is clearly wrong, though not for the reason he acknowledges in his conclusion: that no court, no advocate, and no counselor, does now or ever has practiced law as if his argument were true.<sup>1</sup> That reason is vulgar, but it leads us to wonder whether Professor Lawson's argument may be wrong for a more intellectually satisfying reason.

Lawson's argument is simply stated: If courts have the duty under the Supremacy Clause<sup>2</sup> to decide cases according to the Constitution, and not according to legislative or executive determinations that conflict with the Constitution, then courts also have the duty to decide cases according to the Constitution and not according to prior (horizontal) precedent.<sup>3</sup> If the Constitution trumps one, it must trump the other. Professor Lawson is quite right to scorn arguments of mere convenience and practicality<sup>4</sup>—the whole practice of judicial review might well be abandoned on such grounds.

One may not, however, waive aside quite as easily the argument Lawson describes as "tempting"—that adherence to precedent is drawn from Anglo-American judicial practice preceding, contemporaneous with, and subsequent to the founding of our legal system.<sup>5</sup> Lawson refutes the argument as follows: Precedent was indeed a principal source of law at the time of the framing, but the Supremacy Clause, in placing the Constitution above even more potent sources of law, such as formally correct legislative and executive action, surely did not intend to leave just one source, precedent, insubordinate.<sup>6</sup> Though I think his conclusion is wrong, I think his argument is certainly right that the peculiar institution of judicial review would be undermined, not

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1. Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994).

2. U.S. CONST. art. VI, cl. 2.

3. Lawson, *supra* note 1, at 24.

4. *Id.* at 28.

5. *Id.* at 29-30.

6. *Id.*

strengthened, if prior judicial decisions alone among sources of law could survive a challenge in the name of the Constitution itself.

The fatal flaw in Lawson's argument is that he has articulated no clear definition of what it is that he is arguing against. Indeed, he offers us everything but a clear statement of the doctrine of precedent he attacks. There are three available versions,<sup>7</sup> and Lawson describes only one of them with sufficient particularity that we may evaluate it.<sup>8</sup> This is the practice of "giving prior decisions weight because of the persuasiveness of their reasoning."<sup>9</sup> This is not what he has in mind as the doctrine of precedent, and he is quite right to put that conception aside. It is so unproblematical as to be uninteresting. But then what does Lawson mean to attack?

The rule of *stare decisis*, which he equates with treating precedent as a source of law,<sup>10</sup> evolved in Great Britain into a sharp rule (until very recently) against what Lawson calls horizontal overruling.<sup>11</sup> But that has never been the rule in the Supreme Court for constitutional questions.<sup>12</sup> The Supreme Court has always acknowledged a power in constitutional questions—great or small—to revisit its past decisions, and alter or abandon them altogether.<sup>13</sup> If Lawson had attended to that fact, his argument would no longer have the lovely simplicity it presently displays.

7. These three models, using the nomenclature of Larry Alexander, are the natural model, the rule model, and the result model. In the natural model, a court applies a precedent regardless of any formal rule requiring that it be applied. Under the rule model, a court has the power to decide the case before it and to offer a general rule that will bind equal and inferior courts. Finally, the result model has two different formulations. In the first, a court decides in favor of a litigant because his case is most analogous to a decision rendered by a superior court. In the second formulation, derived from the writings of Ronald Dworkin, a court correctly decides a case by first collecting basic legal materials, and then deciding which group of moral and political principles best justifies most of the legal materials. All three of these models are described and analyzed in Larry A. Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 1-48 (1989).

8. Lawson, *supra* note 1, at 25.

9. *Id.*

10. *Id.* at 30, 33.

11. *Cf.* Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1346 n.14 (1990) ("[T]he English employed a rigid doctrine of *stare decisis* from the late nineteenth century through the mid-twentieth . . ."); *see also* JOHN C. GRAY, *THE NATURE AND SOURCES OF THE LAW* 242 (1927) (observing that "the weight attached to Judicial Precedents is somewhat greater in England than in America").

12. *See* Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 757 (1988) (noting that "the [English rule] has never existed in American law").

13. *See* *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (White, J., dissenting):

It is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsidera-

Since the Supreme Court recognizes its duty, at least in principle, to reconsider any of its past decisions and revise them according to its best view of what the Constitution demands, I wonder just what conception of precedent Professor Lawson seeks to refute. Lawson comes close to defining his adversary conception of precedent when he refers to precedent as the doctrine according to which a court treats its past decisions as “a source of law.”<sup>14</sup> Although Lawson’s argument against *stare decisis* has considerable plausibility if viewed in the old British way, that plausibility does not transfer readily to the Supreme Court’s practice of treating its prior decisions as one—not the only and not the supreme—source of law. What would Lawson’s argument have looked like if he had confronted this directly? He would have had to argue that in constitutional cases the only source of law must be the Constitution itself. Fine, but what would that mean?

Lawson does not say, for instance, that the text of the Constitution is both necessary and sufficient to supply its interpretations—indeed, Lawson himself supplements the text throughout his argument by references to the structure of the Constitution.<sup>15</sup> Nor does he even whisper the words “intent of the Framers” or “originalism.” All he requires is the conviction that there is a right answer to constitutional questions, and that the Constitution provides it.<sup>16</sup> This is not very constraining. In fact, it leaves all the room needed by the practice of precedent as we have always known it. For, if some provision of the Constitution—say the Due Process Clause, or the Interstate Commerce Clause, or the strictures against unreasonable searches and seizures—is sufficiently general that it will require reflection on the Constitution’s background principles and their interaction with social practices

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tion, are found to be mistaken. The Court has therefore adhered to the rule that *stare decisis* is not rigidly applied in cases involving constitutional issues . . . and has not hesitated to overrule decisions, or even whole lines of cases, where experience, scholarship, and reflection demonstrated that their fundamental premises were not to be found in the Constitution.

*Id.* at 786-88.

See also *Brown v. Board of Education*, 347 U.S. 483 (1954), *overruling Plessy v. Ferguson*, 163 U.S. 537 (1896); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), *overruling Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). Cf. *Graves v. New York*, 306 U.S. 466, 491-92 (1938) (Frankfurter, J., concurring) (stating that “[t]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it”). But see Benjamin P. Friedman, *Fishkin and Precedent: Liberal Political Theory and the Normative Uses of History*, 42 EMORY L.J. 647, 683 (1993) (arguing that the Court has usually narrowed rather than overruled decisions it later believed were incorrect).

14. Lawson, *supra* note 1, at 30.

15. *Id.* at 29-30.

16. *Id.* at 31-33.

and expectations to arrive at its *correct* reading (yes, I too am what Lawson calls a “right answerist”<sup>17</sup>—though whether a “naive” one I must leave to others to say), then there is no reason in principle why prior decisions should not figure prominently in that reflection. Moreover, there is no reason why past decisions should not figure in that reflection in a way that outruns the force of their reasoning. If Lawson allows constitutional decisions to take into account anything other than the text of the Constitution itself, such as data about the subsequent world to which the Constitution must be applied, then by what rationale must the Court’s prior decisions alone be excluded?

Consider also the doctrines working out the Constitution’s free speech guarantee: public, private, and designated forum doctrine;<sup>18</sup> speech-related conduct;<sup>19</sup> the time, place, and manner rule;<sup>20</sup> and least restrictive alternative tests.<sup>21</sup> I am not saying that any court starting afresh with only the text of the Constitution would have come up with precisely this array of doctrines. That is just the point. It simply is not possible to adjudicate the many cases implicating free speech concerns, much less to provide guidance and consistency to lower courts and state courts, without the elaboration of some such body of doctrine. The same is true of search and seizure law,<sup>22</sup> state action law,<sup>23</sup> equal protection doctrine,<sup>24</sup> and volumes more. But in constitutional law, doctrine and precedent are merely different names for the same thing.

17. See *id.* at 31 & n.23.

18. See, e.g., *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983) (outlining the distinctions between public, private, and designated fora).

19. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 406-10 (1989) (holding that flag burning is a form of protected expression under the First Amendment); *United States v. O’Brien*, 391 U.S. 367, 376-83 (1968) (declaring that draft card burning is not within the aegis of the First Amendment).

20. See, e.g., *Heffron v. Int’l Soc’y for Krishna Consciousness*, 452 U.S. 640, 648 (1981) (holding that time, place, and manner restrictions are reasonable when it can be shown that they “are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information”) (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976)).

21. See, e.g., *Shelton v. Tucker*, 364 U.S. 479 (1960) (holding that even if a legislative purpose in restricting speech is legitimate, that purpose cannot be pursued by broad means when a less restrictive method is available).

22. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (extending the exclusionary rule to state courts); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (establishing the exclusionary rule in federal courts).

23. See, e.g., *Parker v. Brown*, 317 U.S. 341, 357 (1943) (establishing states’ immunity from antitrust liability under the state action doctrine).

24. See, e.g., *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 612 (1990) (discussing the equal protection methodology employed by the Court).