PRECEDENT AND THE NECESSARY EXTERNALITY OF CONSTITUTIONAL NORMS

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In *The Constitutional Case Against Precedent*,[1] Gary Lawson argues that it is unconstitutional, and not merely inadvisable, for the Supreme Court to give authoritative, as opposed to persuasive, weight to its own previous decisions. Such a practice, he maintains, would violate Articles III and VI of the Constitution, as well as *Marbury v. Madison*,[2] by elevating a non-textually privileged source of law—Supreme Court opinions—above the sources, most notably the Constitution itself, privileged and rendered supreme by Article VI.[3]

It is not entirely clear whether my task in this Symposium is to comment on Lawson's intriguing paper, or instead to discuss the topic of precedent and *stare decisis* in constitutional adjudication. From the title of Lawson's article, it is not immediately apparent that these two tasks would conflict; yet they do conflict, and that is because, appearances notwithstanding, in an important way Lawson's article is *not* about constitutional precedent. I will first attempt to explain why this is so, and then attempt to show that Lawson's mistake in conceiving what the Constitution *is* leads to his mistaken account of the use of precedent in constitutional adjudication. Lawson's mistake, I will argue, lies in his assumption that the text of the Constitution provides all of the resources necessary to answer a question about the status of the sources of constitutional guidance. This assumption is wholly mistaken, for not only does the constitutional text not provide all of the resources necessary to determine what the Constitution is; in fact, it provides none of those resources. I will thus try to show that neither the constitutional text, nor any other internal conception

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

2. 5 U.S. (1 Cranch) 137 (1803).

3. Lawson, *supra* note 1. U.S. CONST. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .").

of what the Constitution is, can provide, without fatal circularity, *any* guidance in determining what constitutes the Constitution.

I.

Toward the end of his article, Lawson admirably acknowledges that his account of constitutional precedent is parasitic on his account of constitutional interpretation.[4] Yet even with this acknowledgment Lawson does not go far enough. The keystone of his argument is the proposition that the Supremacy Clause of Article VI privileges the Constitution over other sources of law, as *Marbury* made so notoriously clear.[5] Insofar as sources of law are *part of* the Constitution, therefore, they will get the benefit of the privileged position accorded to *the* Constitution by the Supremacy Clause. Conversely, however, insofar as sources of law or other potential sources of judicial guidance or judicial constraint are not part of "the Constitution," they are subordinate to the Constitution, and thus, according to Lawson, impermissible sources for constitutional interpretation. To conclude otherwise, he maintains, would be to elevate non-constitutional sources of law above the Constitution, which is just what both *Marbury* and Article VI do not countenance.

Because anything that is part of "the Constitution" will thus be privileged over anything that is not, Lawson's account of the status of precedent is not only parasitic on a particular conception of constitutional interpretation, but also on a particular conception of just what the "Constitution" *is* as that term is used in Articles III and VI. These references presuppose some conception of what the Constitution comprises; indeed, this question of what the Constitution is pervades every use of the term "the Constitution." Thus the question of horizontal prececent (*stare decisis*) in the Supreme Court of the United States, Lawson's primary concern, is in fact but one small corner of this larger question.

Consider, for example, the oath of office. When the President swears to "preserve, protect, and defend the Constitution of the United States,"[6] and when public officials swear "to support this

4. Lawson, *supra* note 1, at 31.

5. *See* U.S. CONST. art. VI, cl. 2 (declaring the Constitution, U.S. treaties, and U.S. laws made pursuant to the Constitution to be the supreme law of the land); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (recognizing the paramount status of the Constitution).

6. U.S. CONST. art. II, § 1, cl. 8.

Constitution,"[7] we must ask what it is that they are swearing to support, preserve, protect, and defend. Have they sworn to support, preserve, protect, and defend only the text? Or have they sworn to support, preserve, protect, and defend the original intentions of the drafters? Or have they sworn to support, preserve, protect, and defend their conception of the Constitution as it has developed over time in response to changing social conditions?

Similarly, does the oath incorporate a promise to support, preserve, protect, and defend the Constitution as authoritatively interpreted, as *Cooper v. Aaron*[8] suggests? Or do those supposedly authoritative interpretations have a status different from and lesser than "the Constitution," as contemporary critics of *Cooper*[9] would have it? When an official follows a judicial opinion she believes mistaken, does she *violate* her oath of office, as Lawson's argument appears to entail? Or does she violate that oath by following her own good faith understanding of what the Constitution commands, even in the face of a contrary judicial opinion? And when lower court judges, whether state or federal, follow Supreme Court opinions they think erroneous (the question of vertical precedent), have they, in elevating the opinions of Supreme Court Justices (or, if they are District Judges, of Court of Appeals Judges) above "the Constitution" thereby violated both their oath of office and the Supremacy Clause of the Constitution?[10]

It is not my goal here to answer any of these questions, for the ones that are not frivolous are among the most enduring and most intractable in constitutional law. Yet I present this panoply of issues simply to show that the question of *stare decisis* is but one instantiation of an argument that is much larger than Lawson suggests. So although I will return at the conclusion of this response to the particular question of precedent, I want to look at

7. U.S. CONST. art. VI, cl. 3.

8. 358 U.S. 1, 17-18 (1958).

9. For the most famous recent critique of Cooper v. Aaron, *see* Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987).

10. Lawson seeks to take the question of vertical precedent off the immediate agenda, but that effort is unavailing. If it is not merely politically undesirable but also unconstitutional for a Supreme Court Justice to treat a horizontal precedent as authoritative, then it is also unconstitutional for lower court judges to treat higher court decisions as authoritative. The lever of Lawson's argument is the proposition that only "the Constitution" but not judicial interpretations of it can be treated as authoritative under Article VI. Yet nothing about this argument can draw any distinction between vertical and horizontal precedent. That is, Lawson would surely not wish to maintain that lower court judges are less bound by Article VI than are the Justices of the Supreme Court.

the larger question that arises out of Lawson's approach to the narrow issue of *stare decisis*. Thus I want to examine more deeply the conception of "the Constitution" that undergirds Lawson's argument, because its implications are far broader than Lawson seems willing to acknowledge.

II.

Lawson maintains that, although there will be cases where that to which he refers as "the Constitution" is unclear, "[t]he use of precedent will still be unconstitutional in any case in which a right answer is ascertainable."[11] This claim is curious, however, for it is far from apparent why Lawson should expect there ever to *be* a precedent when the Constitution is clear. As Lawson properly acknowledges,[12] the interesting and important form of argument from precedent takes the precedent as *authoritative*, providing a content-independent reason for action by virtue of the source of some directive (such as a prior case) rather than by virtue of its soundness.[13] As perceived by a decisionmaker, therefore, the authoritativeness of a directive will be relevant when, *and only when*, the directive is perceived by the decisionmaker as unsound. Where the decisionmaker perceives the directive as substantively sound, the question of its source-based and content-independent authoritativeness will never arise. Authority, and therefore the authority of precedent, matters when and only when the precedent (as perceived by the current decisionmaker) is mistaken—only when past wrong decisions can provide reasons for decision despite their wrongness, and therefore precisely and only because of their pastness.

Thus, it seems implausible to suppose that the use of precedent will be unconstitutional in any case in which a clear answer is available, as Lawson would have it; rather, it is more plausible to suppose that there will not *be* a precedent (that matters) in any case in which a clear answer is available. As an empirical matter, it seems highly unlikely that, where there is a clear answer, there will be cases refusing to recognize it. If, however, my empirical suppositions are mistaken and precedents that Lawson believes

11. Lawson, *supra* note 1, at 31.

12. *Id.* at 25.

13. For full explanations of the ideas underlying the argument that precedent is necessarily content-independent, see Larry A. Alexander, *Constrained By Precedent*, 63 S. CAL. L. REV. 1 (1989); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

erroneous are available, then that will be because there are differences of opinion about whether there is a clear answer in the first instance. If we recognize that there will be a precedent only when there is disagreement, then the initial question is whether the Constitution permits judges to be persuaded in this area of uncertainty by the conclusions of other judges.

If the answer to this question is in the affirmative, as Lawson acknowledges as one of his initial qualifications,[14] and judges can take guidance (although not orders) from their forebears, then it is hard to see why the persuasion that Lawson allows at the retail level suddenly becomes unconstitutional at the wholesale level. If some judge can be persuaded, even if not bound, by *this* prior case, then why cannot some judge adopt as a heuristic the principle that, rather than examining each prior case separately for its persuasiveness, she will instead assume that all cases coming from a particular source will be treated as presumptively persuasive?

While there might be arguments that could be marshalled for and against this rule-based or wholesale approach to precedential guidance, it is hard to see that anything in the Constitution permits case-by-case persuasion by prior judicial actions but prohibits less case-specific persuasion by prior judicial actions. So if the Supremacy Clause cannot plausibly be seen to draw a distinction between retail and wholesale persuasiveness, and thus cannot plausibly be seen to allow persuasion on a case-by-case basis but to disallow persuasion based on the presence of certain indicia of persuasiveness (such as by virtue of having been decided by the Supreme Court), then there seems no reason to believe that the Supremacy Clause prevents a society, as it determines the norms of adjudication, from encouraging the use of precedent in this wholesale manner. That is, if a judge can decide for herself to be persuaded not retail but wholesale, then it seems that society can tell her to be persuaded wholesale in just this same way. This, of course, is just what *stare decisis* is—the imposed assumption, without retail inspection, that decisions from some source are to be followed because of *ex ante* presuppositions about their likely content, such as the presupposition that earlier cases were likely to have been decided correctly.

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

This may seem like a silly presupposition, but it underlies much of the very idea of *stare decisis*—the compelled assumption that a prior decision is correct just because of its temporal priority. Thus, once Lawson accepts the possibility, as he does and surely must, that prior decisions can be treated as persuasive, then he can offer no reason why that persuasiveness cannot be determined other than on a case-by-case basis by the individual judge. As a matter of constitutional law, surely case-by-case persuasiveness cannot be constitutional while other approaches to persuasiveness are unconstitutional. Yet that is exactly the implication of Lawson's concession of allowing earlier decisions to be persuasive. Thus Lawson must either give up his conclusion, or take his conclusion to its logical end: Prior decisions cannot be treated by a judge as persuasive. This is the conclusion that is most consistent with the central thread of Lawson's argument. If a prior decision is a constitutionally inferior source, then it is constitutionally inferior to a judge's best reading of a constitutionally superior source, and it is therefore just as unconstitutional for a judge to treat it as persuasive as it is for her to treat it as authoritative.

III.

Lawson's argument for the constitutional inferiority of precedent thus collapses under its own weight. The argument would have to maintain that "the Constitution" is always lexically superior to all other sources of constitutional guidance for all cases. This position is too extravagant for even Lawson to maintain; yet, he must maintain this position if his argument is to have any force. However, it is not enough simply to expose Lawson's mistake. It is better to trace the source of that mistake, for in doing so we may learn much about the foundations of constitutional authority.

With some frequency, Lawson refers to "the Constitution," yet claims that his argument is agnostic about various conceptions of what the Constitution *is*. Yet as he recognizes, one of the conceptions of the Constitution he does not accept is a conception that includes within "the Constitution" what previous courts have said that the Constitution is[15]—to do so would cut the legs out from under his thesis. So although Lawson claims that his argument

15. *Id.* at 29-30.

works even for a "social mores" understanding of the Constitution,[16] it does not work for a "social mores plus prior judicial understanding of social mores" understanding of the Constitution, nor for any other understanding of the Constitution that supplements the bare text with prior judicial opinions. In attempting to be agnostic on questions of constitutional theory, therefore, Lawson risks being arbitrary. For if "the Constitution" referred to in Articles III and VI can include text, original intent, philosophical explication, and social mores, but not prior judicial opinions, Lawson must explain how all of these other sources can escape the force of his argument by being part of—and thus not subordinate to—the Constitution, while prior judicial opinions cannot be seen in just the same way. I would anticipate that Lawson sees "the Constitution" as comprising only the text and original intent.[17] With such a conception assumed *ex ante* we can see how anything else would be subordinate to and thus, according to Lawson, a constitutionally impermissible source of constitutional decisionmaking.

Thus Lawson's entire argument turns on an assumed rather than an argued view that "the Constitution" includes only the text, or only the text plus original intent, or only the text plus some number of other things but not including prior judicial opinions. But why should this be so? We could look to the document, more specifically to Article VI, but we would see only the bare reference to "this Constitution,"[18] and thus would have no assistance from the text in finding out to what "this Constitution" refers. To answer this question we must necessarily look outside of the four corners of the document, for nothing in the document answers the question.

Yet, it would be misleading even to suggest that something in the Constitution *could* tell us to what "this Constitution" refers. I now want to suggest that this is impossible. Suppose I were to

16. *Id.* at 32.

17. Lawson could possibly claim that there is something of deep importance about the fact that both Articles III and VI refer not to "the" Constitution, but to "this" Constitution. Even apart from questions about where the meaning of "this" would come from, questions I take up presently, an attempt to suggest that use of the word "this" rather than "the" indicates the four corners of the document would then have considerable problems in explaining why original intent would be a permissible source of constitutional interpretation. If the response to this is that original intent is part of what "this" refers to, then it is hard to see why, except by simple fiat, original intent comes within the "this" but other outside sources do not.

18. U.S. CONST. art. VI, cls. 1-3.

draft a document entitled "The Constitution of the United States," granting all of the powers of governance over the territory known as "The United States of America" to me and thirty of my closest friends. And suppose I were to include within this document a provision specifying the condition for effectiveness (an analog to Article VII), to be the signing of this document by me and sixteen of the thirty named individuals. And suppose finally that sixteen of the named individuals and I did in fact sign the document in full compliance with *its* specified condition for its own effectiveness.

Were all of this to take place, then there would exist in the United States two (or possibly more) documents, each purporting to be "The Constitution of the United States," and each fully effective according to its own internally specified conditions for effectiveness. But it is equally clear that only one of these "Constitutions" would be *the* Constitution of the United States, because only one of these documents would have been accepted, socially and politically, by the people of the United States as their Constitution. One of these documents would be the Constitution of the United States, while the other would be merely a legally ineffective piece of paper (in the sense that citing it in a court would have no effect on the decision), but an observer would and could never know this by examining just the documents themselves. That examination would yield two legally equivalent documents, and only by looking beyond the texts of those documents to the conditions of their acceptance or non-acceptance by the population could we determine which of these documents was, in fact, the Constitution of the United States.

Although my hypothetical example of an internally valid but externally illegitimate Constitution is silly, it demonstrates the decidedly serious point that, as first Kelsen and then Hart have insisted, the ultimate validity of the law is not and cannot be a legal question.[19] So too, the ultimate validity, the constitutionality (in a loose sense of that word) of the Constitution, is not itself a constitutional question, but a political and sociological one. It is only the raw empirical fact of political acceptance that makes "the Constitution of the United States" and not "Schauer's Constitution of the United States" *the* Constitution of the United States.

19. *See* HANS KELSEN, PURE THEORY OF LAW (Michael Knight trans., 1970) (discussing the idea of *grundnorm*); H.L.A. HART, THE CONCEPT OF LAW 97-120, 245-46 (1961) (discussing the ultimate rule of recognition).

The fact that the constitutionality of the Constitution is not itself a legal question has broad implications for questions of constitutional theory, and for the very kinds of questions that undergird Lawson's argument. Suppose, for example, that my proposed Constitution were a bit more modest, seeking only to grant special privileges, privileges not unlike those enjoyed by the British monarchy, to thirty specified individuals. Then suppose that the American people treated both my new Constitution and the existing Constitution as simultaneously valid. This would be political folly, of course, but again that decision would not be—indeed, could not be—unconstitutional, for the decision to supplement the existing Constitution in this way would be antecedent to questions of constitutionality.

More realistically, the fact that there are documents that have constitutional status in Great Britain—Magna Carta, for example, and the Bill of Rights of 1688—shows that the decision about which documents to treat as constitutional is pre-constitutional. This fact shows as well that there can be nothing unconstitutional in a social and political decision to supplement some constitutional document with other documents that would thereby attain constitutional status.

Just as the Constitution could constitutionally be supplemented by other documents, so could it also be supplemented constitutionally by non-documentary sources. The decision to treat original intent—whether reduced to canonical documents or not—as having constitutional status is of this variety, and so too with many other decisions about which sources to treat as having constitutional status. Nothing *in* the Constitution specifies whether its words are to be interpreted according to the English of 1787 or according to the English of the date of interpretation, just as, to use Wittgenstein's example, nothing in an arrow on a road sign tells us whether to head in the direction of the point or in the direction of the tail.[20] But just as some decision is necessary to determine in which direction to drive upon seeing the sign, so too is some decision necessary (a decision not dictated by the Constitution itself) about how to interpret the language of the Constitution to interpret the document at all.

What is to count as "the Constitution" for Article VI purposes, therefore, is plainly the product of a large number of pre-consti-

20. LUDWIG L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., 3d ed. 1958).

tutional (in the logical and not the temporal sense) social and political decisions that cannot themselves be considered either constitutional or unconstitutional. They just are. They can be politically or socially good or bad, moral or immoral, wise or improvident, but they can be neither constitutional nor unconstitutional. Moreover, we can debate empirically whether there has been sufficient public acceptance for these decisions to be considered to have been *made* (by a judge, by another public official, or by the public). The one thing we cannot do is measure a pre-constitutional decision against the standards of the very Constitution whose status and contours are determined by those pre-constitutional decisions.

Although Lawson makes the mistakes of constitutional interpretation sketched above, his deeper mistake is thus not a mistake of constitutional interpretation at all. Rather, it is the mistake of supposing that the norms of constitutional interpretation are or can be determined by the Constitution itself.[21] Contrary to what Lawson imagines, these norms are logically prior to the Constitution, and determine just what the Constitution is. When theorists debate whether the Constitution should be interpreted according to original intent, or changing social mores, or the best moral and political theories, they are debating social and political questions of constitutionalism. They are not and cannot be debating questions for which there are technically legal or internally constitutional answers.

This argument also applies to the question of precedent. According to one account, which appears to be Lawson's, "the Constitution" consists of some number of sources not including the prior decisions of judges interpreting the Constitution. According to another account, which is plainly not Lawson's, "the Constitution" consists of some number of sources, specifically including the prior decisions of judges interpreting the Constitution.

Under this latter interpretation of what "the Constitution" comprises, Lawson's argument is a total non-starter, for judicial

21. I do not mean here to make the lesser but still relevant point that the document does not specify its norms of interpretation, although other legal documents often do. Rather, even if the Constitution did contain its own internal norms of interpretation (for example, an Article specifying that the document was to be interpreted according to the expressed intentions of its drafters), this provision, along with the rest of the document, would depend for its constitutional status on a pre-constitutional social and political decision; one that could, for example, decide to treat this provision as ineffective.

precedents are within the domain of sources that, even according to Article VI, reign supreme over other sources. If judicial interpretations of the Constitution are part of "this Constitution," then there is no Supremacy Clause problem whatsoever. Lawson's argument, therefore, must presuppose the social and political rejection of a conception of "the Constitution" that includes judicial precedent. Rather than arguing why this *should* be the case, Lawson instead announces that it *is* the case, and then spins out from that his conclusion about the unconstitutionality of a reliance on precedent.

As I have tried to show, however, whether this is the case is a question of contingent empirical fact, and not a question of constitutional law. Further, whether it should be the case is a question that cannot be answered by recourse to textual sources. Therefore, Lawson has committed the logical error of couching, in an analysis of constitutional text, a question that is necessarily pre-textual and extra-textual. Should the American people, or American judges, decide that judicial precedents should be authoritative in constitutional decisionmaking, and should count as part of what "the Constitution" *is*, nothing in the Constitution itself could preclude such a social and political decision. Similarly, should the American people and American judges decide for reasons of policy, prudence, or political morality that judicial precedents should *not* be treated as authoritative, and should not be treated as part of what "the Constitution" is, they would have permissibly (as a constitutional matter) adopted a rule of recognition that did not recognize judicial precedents as part of the stuff of constitutional law.

The important point, therefore, is that the choice between these alternatives is not itself a question of law, and thus not itself a question of constitutional law. No decision about what the ultimate rule of recognition does or should recognize as law can be thought of as a legal decision, in the sense of a decision dictated (or even guided) by legal materials. We can and should debate whether precedent *should* matter in constitutional law, and the results of that debate will help to determine what is to count as a legitimate and recognized source of constitutional law. But in committing the logical error of supposing that this pre-constitutional decision is or can be determined according to logically subsequent textual materials, Lawson fails even to enter the debate.