

ON LAWSON ON PRECEDENT

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Gary Lawson has done it again.¹ He's given us an obviously elegant, apparently logical, and yet utterly perverse argument. Indeed I think it's that combination that gives Gary so much pleasure.

Now, far be it from me today to try to refute Gary's argument. I'm not that smart, or perhaps not that dumb. I do believe Gary has very usefully focused attention on the status of precedent for those of us who subscribe to *Marbury's* vision of constitutionalism.² At the very least, he's fixed our gaze on the tension between *stare decisis* and quite common modes of constitutional argument today.

Let me sketch out four possible responses that people who might not be convinced might try to pursue. I'm not going to develop any of these in completeness, but I think this is where the debate should go if we take Gary's argument seriously, as I think we should.

First, let us begin, as did Charles Fried,³ with the practice of precedent in England and America at the time the Constitution was adopted. As I read him and hear him, Gary seems to concede that courts sometimes misinterpreted statutes, and yet in subsequent cases gave effect to those misinterpretations, even after the courts were convinced that the earlier pronouncements were indeed incorrect. If that understanding of the judicial role was imbedded in the notion of "judicial Power"—a prominent phrase in Article III of the U.S. Constitution—Gary's argument would run into trouble. Gary's response, as I understand it, is to remind us that the Constitution is supreme law: It trumps statutes, so, for sure, it trumps incorrect judicial decisions.⁴

The possible problem with that argument, however, is that in England statutes are supreme law. Parliament is sovereign. If a

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1. Cf. Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639 (1993) (making a similar point about another author).

2. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

3. Charles Fried, *Reply to Lawson*, 17 HARV. J.L. & PUB. POL'Y 35 (1994).

4. See Lawson, *supra* note 1, at 29-30.

judicial misconstruction can trump a sovereign statute—the highest law promulgated by the sovereign Parliament—then one might ask why the same thing might not be true for the Constitution in America. Let me also note that because Gary's analysis focuses so much on the unique status of the Constitution, it is less than clear to me that his argument would equally apply to *stare decisis* in American statutory cases. Even though he said that he thought it would,⁵ he did not defend that claim here today. I think one would need to go beyond his remarks in order to do that. That's the first possible line of attack.

A second and connected line would focus on the possibility (to coin a rather awkward phrase) of "blessing enactments." The basic concept in the statutory context would be as follows. A statute is passed at time *T1*, and misinterpreted by a court at time *T2*, yet the legislature at some later time *T3* passes another statute that seems to accept the misinterpretation: to embrace it, to bless it. Then at time *T4*, when a court revisits the initial statute, perhaps the court is perfectly legitimate to stick with its initial misinterpretation because the legislature has blessed it with a subsequent enactment. (Some people, for example, might argue that such was the case with *Runyon v. McCrary*,⁶ which might have been wrongly decided in 1976, but which was reaffirmed by *Patterson v. McLean Credit Union*⁷ in 1989, possibly in reliance on intervening congressional legislation that seemed to bless the *Runyon* decision.)⁸

Whether that argument from the statutory context could be applied to the constitutional context is an interesting question. I once took a course from Judge Bork and I floated, rather thoughtlessly, an argument that perhaps if the Warren Court had not rendered certain constitutional decisions in the 1960s, the Constitution at that time would have been amended to embrace some of those readings. So, I argued, perhaps those precedents should be followed today because they were the functional equivalent of an amendment. Judge Bork looked at me and said—I remember this quite vividly—"That is not an argument in our legal culture." It may not be, but I would note that Justice

5. *See id.* at 24.

6. 427 U.S. 160, 168 (1976).

7. 491 U.S. 164, 170 (1989).

8. For more discussion of the possible importance of this intervening legislation, see Paul Gewirtz, *Reverse Discrimination: Precedent and the Rehnquist Court*, NEW REPUBLIC, Oct. 24, 1988, at 13.

Scalia in the *Union Gas*⁹ case a few years ago seemed to make a rather similar argument. He suggested that in *Hans v. Louisiana*¹⁰ in 1890, perhaps the Eleventh Amendment was misinterpreted, but that nevertheless, judges today should probably stick with that misinterpretation because the Seventeenth Amendment, modifying the rules for how Senators are selected, might have been predicated on the then-prevalent misunderstanding that *Hans* represented.¹¹ So, Justice Scalia, if I read him correctly in *Union Gas*, suggested the possibility of blessing enactments at the level of subsequent constitutional amendments that have presupposed the earlier judicial case law.

A third possible line of attack would put some pressure on Gary's effort to distinguish sharply between vertical and horizontal precedent. Vertical precedent, you will recall, involves a situation where a lower judge thinks that the higher court is wrong. Gary says that perhaps the lower judge is obliged to follow not her own oath of office and best understanding of the Constitution, but rather the (hypothesized) misinterpretation¹² of a higher court. If we take seriously the idea that the Constitution is the supreme law, however, and perhaps that every person should interpret it directly and follow it, it is not clear that vertical precedent should be distinguished from horizontal precedent. Fred Schauer has made this point as well.¹³ Mike Paulsen, for example, has argued that in some situations a lower judge should simply say to a higher court: "Go ahead, make my day: reverse me. You're wrong about the Constitution. You've taken your oath of office, but that's no excuse for my violating mine. I'm going to follow my oath of office and decide the Constitution correctly as I understand it. If you don't like it, take cert."¹⁴

If we don't buy the "make my day" argument, which is compatible in many ways with Gary's overall approach, it might be because we see an implicit hierarchy that is at least permitted—perhaps compelled—by Article III, where the oaths of office and the interpretations of higher courts trump those of lower judges. Yet if we see an implicit vertical hierarchy, perhaps we could

9. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

10. 134 U.S. 1 (1890).

11. 491 U.S. at 30-35 (Scalia, J., concurring in part and dissenting in part).

12. See Lawson, *supra* note 1, at 24.

13. See Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms*, 17 HARV. J.L. & PUB. POL'Y 45, 47 (1994).

14. See Michael S. Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7 J. LAW & RELIGION 33, 82-88 (1989).

equally read in an implicit *temporal* hierarchy that endows an earlier court with a certain priority over later courts—especially if the earlier court is much closer in time to the relevant constitutional enactment. James Madison, for example, seemed to think that the Constitution was ambiguous in certain aspects, but those ambiguities would be clarified—his word was “liquidated”¹⁵—by early precedents, both judicial and political (in the executive and legislative branches).¹⁶ Madison’s approach seemed to give priority to the first courts to hear certain issues. That’s the third line of attack—pressing the distinction between vertical and horizontal precedent: If you buy the idea of vertical hierarchy, why not temporal hierarchy?

A final line of attack might push hard on Gary’s effort to distinguish sharply between *stare decisis* on the one hand, and *res judicata* on the other. Gary says that even if a court gets it wrong, perhaps that misinterpretation should be final as between the parties in that case.¹⁷ Under this approach, even if a later court is convinced that, for example, *Plessy v. Ferguson*¹⁸ was an error, *Plessy*’s judgment arguably should stand as the law of the case for the parties involved.

Well, perhaps judicial opinions must be final in the sense of being immune from executive revision in order to satisfy a certain vision of the Constitution. We all learned that from *Hayburn’s Case*.¹⁹ Executives cannot review and reverse judicial opinions. Of course, the judicial power of the United States emphatically does not require that a judge’s decision be immune from reversal by other judges. A decision that lacks finality in the sense that some other judges could overrule you is not an “advisory opinion.” This happens everyday, I suppose; when our moderator, Judge Ginsburg, hears a case, for example, he almost invariably faces the possibility that another set of judges will reverse him.

If you buy the concept that, vertically, there can be reversal by a higher court, why not horizontally and temporally? If you take Gary’s overall approach seriously, you might well believe that a

15. See THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961).

16. For a rich and thoughtful analysis of Madison’s understanding of judicial and political precedent on constitutional issues, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 935-41 (1985).

17. See Lawson, *supra* note 1, at 27.

18. 163 U.S. 537 (1896).

19. 2 U.S. (2 Dall.) 409 (1792).

later court should indeed ignore *res judicata* and undo an incorrect judgment between parties based on an incorrect reading of the Constitution. If, conversely, you *don't* buy that conclusion, if you think—as does Gary, it seems—that *res judicata* actually *does* sometimes bar reconsideration, what you are conceding, it seems to me, is that the very concept of jurisdiction may subsume the power to get it wrong sometimes. Maybe jurisdiction is the right to be wrong in a certain domain. If that is true between the parties, as the *res judicata* issue might suggest and as Gary seems to concede, perhaps that could equally be true when the question is rather the precedential effect of the decision for non-parties: *stare decisis*. The notion of jurisdiction as “the right to get it wrong” sometimes might be analogous to the political question doctrine—a doctrine which seems, in some ways, in tension with the general idea of judicial review. Yet we might think, for example, that it's up to the Senate to decide how to try impeachments. Even if the rules that Senators promulgate are misunderstandings of the Constitution, they have jurisdiction to decide that. They are the relevant court, and no other court should try to overturn their approach. Jurisdiction may subsume, in some cases, the power to get it wrong.

So those are four possible—admittedly sketchy and tentative—responses to Gary's argument. Let me conclude by saying that I'm troubled by these responses too because, although they seem to disagree with Gary's position, they may share a common feature with it. Gary's position is that precedent is affirmatively unconstitutional.²⁰ Some of the counter-arguments I have raised may tend to suggest that precedents *always* have to be followed. So there may be a knife-edged quality to some of the arguments that fails to account for our current practice—which, as Professor Fried reminded us, embraces neither extreme.²¹ Precedents need not always be followed, but they are entitled to some rather than zero weight. Yet some of the arguments marshalled against Gary may share more in common with his approach than one might first think. So we may have a knife-edged quality to the debate which would, if taken seriously, lead us to outlandish and perverse results either at one extreme (precedent counts for nothing) or at the other extreme (it counts for everything, as until recently in the House of Lords).

20. See Lawson, *supra* note 1, at 24.

21. See Fried, *supra* note 3, at 36-37.

There was once a time when I was not troubled by such knife-edged perverse arguments. I am a little bit troubled today. Maybe that just shows that I'm going soft in my old age.