MOSTLY UNCONSTITUTIONAL: THE CASE AGAINST PRECEDENT REVISITED

Gary Lawson[†]

In the American legal system, it is commonplace for actors to give varying degrees of legal weight to the decisions of prior actors. The generic name for this pervasive and familiar practice is the doctrine of *precedent*.[1] Although all legal actors must consider the extent to which they ought to follow the prior decisions of others,[2] the concept of precedent is associated most closely with the decision-making processes of judges. A court facing a legal problem must consider the weight, if any, that it will give to, inter alia, (1) prior executive or legislative decisions,[3] (2) decisions by courts situated above the

† Professor, Boston University School of Law. I am grateful to the Abraham and Lillian Benton Fund for support. I would like to thank the staff at the *Ave Maria Law Review* for a sterling edit—including, but not limited to, finding sources for some of my more colorful references.

1. The literature on precedent is too voluminous to make a string citation useful. For helpful and classic introductions to the topic, see generally Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989) and Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

2. The President, for instance, must decide the extent to which his or her constitutional deliberations should be affected by decisions of courts, legislatures, or prior Presidents. For differing views on the President's obligations, compare Gary Lawson, *Everything I Need to Know About Presidents I Learned from Dr. Seuss*, 24 HARV. J.L. & PUB. POL'Y 381 (2001) [hereinafter Lawson, *Everything I Need to Know*] (arguing that the President should not generally give weight to prior decisions simply because they are prior decisions), with David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113 (1993) (suggesting that the President should generally give prior Supreme Court decisions the same weight that the Supreme Court gives them). And on a more mundane level, under governing law, officials in federal administrative agencies who depart from the precedents of their predecessors have an obligation to explain why they are doing so. LeMoyne-Owen Coll. v. NLRB, 357 F.3d 55, 61 (D.C. Cir. 2004).

3. The practice of giving weight to executive or legislative actors often goes under the heading of "deference," but it is actually a form of precedent that is conceptually indistinguishable from deference to prior judicial actors. Judicial deference to executive and legislative precedent is commonplace in many contexts. Federal courts routinely give weight to prior decisions of federal administrative agencies on issues of both fact and law. *See, e.g.*, 5 U.S.C. § 706(2)(A) (2000) (instructing courts to overturn "findings . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" in informal agency proceedings); *id.* § 706(2)(E) (providing for reversal of agency factual determinations that are

deciding court in the judicial hierarchy (vertical precedent),[4] (3) decisions by courts situated at the same level as the deciding court in the judicial hierarchy (horizontal precedent),[5] and (4) decisions by courts or legal actors from foreign legal systems.[6] The consensus view in the modern American legal culture is that some form of precedent is "part of our understanding of what law is."[7]

In this short Article, I want to (re)examine one specific but important aspect of the doctrine of precedent: the weight that the Constitution requires or permits the United States Supreme Court to give to prior United States Supreme Court decisions in constitutional cases. Thus, I am putting aside for now all questions of vertical precedent, all issues of horizontal precedent at the district court and court of appeals levels (and across departments within the national government), all issues of precedent in cases involving statutory interpretation, and all problems unique to common law cases. The question remaining after these other issues are tabled is, how much weight is the Supreme Court obliged or permitted to give to its own

---

"unsupported by substantial evidence" in formal proceedings); Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984) (prescribing deference to a range of agency interpretations of statutes); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (prescribing deference to a range of agency interpretations of regulations). Federal courts also often defer to executive interpretations of treaties. *See* O'Connor v. United States, 479 U.S. 27, 33–35 (1986). *But see* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2793–98 (2006) (plurality opinion) (rejecting the government's construction of treaties without mentioning the doctrine of deference). And a venerable tradition holds that courts should give great weight to prior legislative and executive judgments about the constitutionality of legislation. *See* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 13–44 (1990); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); *cf.* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1274–79 (1996) (criticizing this tradition).

4. For a good introduction to this problem, see Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994).

5. If there is a default meaning for the general term "precedent," this would likely be the one. Even in this context, however, the precise meaning of "precedent" varies with the level of court that one is discussing. Federal district courts generally do not give much weight to decisions of their fellow district courts. Panels of federal courts of appeals, by contrast, generally treat decisions of prior panels within the same circuit as binding until altered by en banc proceedings. And the Supreme Court generally gives its prior decisions something between binding force and benign neglect.

6. For an illuminating treatment of the role that foreign precedents have played and should play in American law, see Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005).

7. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 748 (1988).

prior interpretations of the Constitution?[8] Conventional wisdom, in keeping with the view that precedent is an essential part of our understanding of law itself, holds that the Court is permitted, though not necessarily obliged, to give considerable, though not necessarily conclusive, weight to its prior decisions. The standard formulation is that the Court should not reject prior decisions, even when a current majority believes them on balance to be mistaken, without some "special justification"[9] beyond the mere belief of error.[10]

Nearly fifteen years ago, I suggested that the Court, if it wants to conform to the Constitution, should *never* choose precedent over direct examination of constitutional meaning.[11] After considering the issue further, and digesting a decade and a half of criticism of my argument by the legal academy,[12] I want to change my conclusion

---

8. At all times in this Article, when I discuss what courts are obliged or permitted to do, I mean obliged or permitted *by the Constitution*. I *do not* mean to prescribe, as a matter of political morality, how public officials—whose actions determine who gets shot by soldiers, federal marshals, or police—should do their jobs. One of my principal academic bugaboos is the persistent conflation of questions of legal *interpretation* with questions of political *morality*. It is one thing to establish the meaning of the Constitution. It is quite another thing to say that the meaning of the Constitution should, as a normative matter, guide conduct. All manner of mischief comes from confusing the two distinct enterprises. *See* Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997). So that there is no mistake: my argument is designed *only* to establish what the Constitution says, not the extent (if any) to which anyone should care what the Constitution says.

9. Arizona v. Rumsey, 467 U.S. 203, 212 (1984).

10. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000) (summarizing the conventional view).

11. Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994) [hereinafter Lawson, *Case Against Precedent*]. The article adapted a speech delivered at a Federalist Society conference on March 13, 1993.

12. Actually, to the best of my knowledge, the only sustained scholarly attempts to rebut the argument were offered by the conference panelists that I had specifically hand-picked to comment on the argument. *See* Akhil Reed Amar, *On Lawson on Precedent*, 17 HARV. J.L. & PUB. POL'Y 39 (1994); Charles Fried, *Reply to Lawson*, 17 HARV. J.L. & PUB. POL'Y 35 (1994); Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms*, 17 HARV. J.L. & PUB. POL'Y 45 (1994). Otherwise, the argument seems to have acquired the status of an obligatory "*but cf.*" citation, to the effect of: "Yes, there is that nutty Lawson out there, but let's get back to real business." A few hardy souls agree with me. *See* Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257 (2005); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005); John Tuskey, *Do as We Say and Not (Necessarily) as We Do: The Constitution, Federalism, and the Supreme Court's Exercise of Judicial Power*, 34 CAP. U. L. REV. 153, 180–81 (2005). Amy Coney Barrett has independently argued that, given the effect of precedent on non-parties, considerations of due process may place constitutional constraints on the application of precedent. *See* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011 (2003).

(with apologies to Ford Prefect[13]) from "never" to "mostly never." It turns out to be a bit of an overstatement to claim that the Supreme Court should *never* rely on past decisions in preference to direct, unmediated examination of the Constitution. But only a bit.

In Part I of this Article, I will briefly recap the argument against precedent that I sketched in *The Constitutional Case Against Precedent*.[14] Although my purpose here is to refine that argument, I still think that the original argument is right in most particulars, and it still functions as a prima facie case against the use of precedent in constitutional interpretation. In Part II, I survey, hopefully more carefully than I did fifteen years ago, different possible grounds for the practice of precedent. One might choose to follow precedent because some controlling legal authority requires it, because it is useful for determining the right answer, or because it is easier and cheaper than figuring out the right answer from scratch. A full assessment of the constitutionality of precedent must independently consider each possible ground. In Part III, I will quickly dismiss the possibility (which very few people actually advance) that the Constitution or some other controlling legal source affirmatively commands the use of precedent in constitutional cases. In Part IV, which focuses on epistemological and consequentialist arguments for precedent, I argue that the Constitution only *permits* the use of precedent in constitutional cases in very limited circumstances. A court may properly use precedent if, but only if, the precedent is the best available evidence of the right answer to constitutional questions. In order to be good evidence of the right answer, a precedent must be the product of an honest, skilled effort that poses the right questions and tries to solve them through the right methods. It is theoretically possible that there could be some circumstances in which prior judicial decisions might qualify for weight under this standard, but it is inconceivable that those circumstances could hold for any significant subclass of judicial decisions, much less for judicial decisions as a class. Indeed, the best categorical case for precedent involves judicial deference to certain *executive* or *legislative* judgments in limited circumstances, though the case for any such deference requires some very strong assumptions that will not always be justified.

---

13. *See* DOUGLAS ADAMS, THE HITCHHIKER'S GUIDE TO THE GALAXY 63 (1980).
14. Lawson, *The Case Against Precedent*, *supra* note 11.

In sum, there is at best a very weak constitutional case for the doctrine of precedent, and it is at best a case for a very weak doctrine of precedent.

I. REVISITING THE CASE AGAINST PRECEDENT

The federal Constitution grants to the federal courts one and only one power: "[t]he judicial Power of the United States."[15] Federal courts have the capacity to receive power to appoint inferior officers if Congress chooses to grant it,[16] and the chief justice personally has the power and duty to preside over presidential impeachment trials in the Senate,[17] but the only power actually granted to the federal courts as an institution is the judicial power. It is remarkably difficult to give a full account of the original meaning of the phrase "[t]he judicial Power," but fortunately the dispute focuses on the periphery, rather than the core. The central feature of the judicial power is clearly the power to decide cases according to governing law;[18] the question that divides scholars is what ancillary powers go along with the basic power to decide cases.[19]

In order to decide cases in accordance with governing law, one must know what law governs. That inquiry requires interpretation of the relevant sources of law—which is why the power of law interpretation is a necessary concomitant of the judicial power, just as it is a necessary concomitant of the legislative and executive powers[20]—and also determination of which law governs in the case of conflict. In any given case, many different legal norms from many different sources—including constitutions, statutes, treaties,

15. U.S. CONST. art. III, § 1.

16. *Id.* art. II, § 2, cl. 2.

17. *Id.* art. I, § 3, cl. 6.

18. This is so clearly the core of the judicial power that it is difficult to find specific authority stating the obvious. If authority is deemed obligatory, see 1 JAMES WILSON, *Of Government, in* THE WORKS OF JAMES WILSON 343, 363 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896) ("The judicial authority consists in applying, according to the principles of right and justice, the constitution and laws to facts and transactions in cases, in which the manner or principles of this application are disputed by the parties interested in them.").

19. *See, e.g.*, Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324 (2006); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433 (2000); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001).

20. For a discussion of the parallels between the judicial and executive powers of law interpretation, see Lawson & Moore, *supra* note 3.

regulations, court decisions, traditional practices, and theories of justice—might potentially bear on the outcome. Depending on the legal system in place, any or all of these norms might legitimately claim the status of "law," and if they point in different directions, a court employing "[t]he judicial Power" must determine which sources take priority. As Justice John Marshall succinctly put it in *Marbury v. Madison*, "[i]f two laws conflict with each other, the courts must decide on the operation of each."[21] An essential, and inescapable, feature of the judicial power is the power and duty to resolve conflict-of-laws problems.

The federal Constitution contains only one express conflict-of-laws provision, but it is a doozy. The Supremacy Clause declares:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[22]

This clause is a specific directive to prefer three named federal legal sources over any other legal sources, including state law sources, in the event of a conflict. The clause singles out state court judges for emphasis, but the basic conflict rule expressed in the first part of the clause is not limited to state court judges. By its terms, the Supremacy Clause speaks to *all* legal actors—federal and non-federal, judicial and non-judicial—and asserts the superiority of the Constitution, statutes, and treaties over competing sources of law. The Supremacy Clause conspicuously does not include "decisions by the United States Supreme Court" when naming the sources of law at the top of the legal food chain.

So, right away the Constitution itself establishes a prima facie case against the use of precedent: if a prior judicial decision conflicts with the Constitution, a statute, or a treaty, the prior decision must give way. If even a state constitution cannot prevail over the federal Constitution, it is hard to see how the views of three to five (depending on the size of the Supreme Court) lawyers or hacks (depending on the composition of the Supreme Court) can do so.

---

21. 5 U.S. (1 Cranch) 137, 177 (1803).
22. U.S. CONST. art. VI, cl. 2.

There is more. Within the set of legal trumps spelled out by the Supremacy Clause, there is an internal hierarchy. While the Supremacy Clause seems to place the Constitution, federal statutes, and treaties on the same legal plane, one can infer with a reasonable degree of confidence[23] that the Constitution is the ace of trumps and prevails in conflicts with statutes and treaties.[24] The inferential argument to this effect, based on a combination of the nature of written constitutions—the specific structure of the American Constitution, and the Oath Clauses[25]—is familiar from *Marbury* and will not be rehearsed here.[26] Thus, if the Constitution conflicts with a statute or treaty (including a statute or treaty that purports to place some other legal source, such as precedent, above the Constitution), the Constitution takes the trick.

To see how these principles work, consider a hypothetical statute that flagrantly conflicts with the Constitution. The statute was enacted by both houses of Congress and signed by the President. According to the plain terms of the Constitution, the statute counts as a "Law."[27] If the statute applies to a particular dispute that comes

---

23. One can fairly ask whether a reasonable degree of confidence is enough. And one can fairly—and indeed must—answer: enough for what? The standard of proof that any proposition must meet depends to some extent on the purpose for which the proposition is advanced. This is a huge subject that I have addressed at ghastly length elsewhere and note here only for completeness. *See, e.g.*, Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 (1992); Gary Lawson, *Proving Ownership*, 11 SOC. PHIL. & POL'Y 139 (1994); Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL'Y 411 (1996).

24. There is also a very good case that, contrary to current doctrine that applies a "last in time" rule, statutes must prevail over treaties in cases of conflict, but that is another topic. For a characteristically elegant argument for the priority of federal statutes over treaties, see Vasan Kesavan, *The Three Tiers of Federal Law*, 100 NW. U. L. REV. 1479 (2006).

25. U.S. CONST. art. II, § 1, cl. 8 ("Before he [the President] enter on the Execution of his Office, he shall take the following Oath or Affirmation:—'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'"); *id.* art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ."). Both clauses single out the Constitution for special consideration.

26. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–80 (1803). It is presumably obvious that I am citing *Marbury* because I find its argument on this point persuasive, not because I think it is authoritative. Indeed, I have elsewhere expressly rejected aspects of *Marbury* (such as its specific holding) where they are not persuasive. *See* Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. (forthcoming 2007) (arguing, contrary to *Marbury*, that Congress has power to expand the Supreme Court's original jurisdiction).

27. U.S. CONST. art. I, § 7, cl. 2 (describing the process by which a bill becomes a "Law").

before a court, the court's obligation to decide cases in accordance with governing law creates a prima facie obligation to apply the statute. But, if the opposing side objects that the statute is unconstitutional, and the court agrees, the court is faced with a straightforward conflict between two competing sources of law. The Supremacy Clause identifies the Constitution as law, but the Presentment Clause equally proclaims the statute to be law. What is a judge to do?

The Constitution, like Meredith Grey to Dr. McDreamy, says: "Choose me."[28] Because the Constitution is hierarchically superior to all other competing legal sources, the Constitution must prevail. This does not mean that the statute is not law. It is law by definition, and in any case in which it does not conflict with the Constitution, or in which the conflict is not brought before the court, the statute continues to operate. Its unconstitutionality does not erase it from the pages of the United States Code. But in any head-to-head battle with the Constitution in a specific case, the statute loses.

Now suppose that a prior judicial decision speaks squarely to the resolution of a dispute brought before a court. Let us assume that prior judicial decisions count as law of some sort, even though they do not have the specifically designated legal status of the Constitution, federal statutes, and treaties. That status as law creates a prima facie obligation on the part of the court to apply the decision. But as soon as the other side interposes the Constitution, the court is now faced with two competing sources of law. If the Constitution says, "A," and the prior judicial decision says, "B," the Constitution must prevail. If a statute, which the Constitution specifically declares to be "Law," cannot defeat the Constitution, it is hard to see how a judicial decision could have a more exalted legal status.

That, in a nutshell, is the short and (I think) elegantly simple case against the use of precedent in constitutional cases. If I am permitted the conceit of self-quotation:

> Thus, the case for judicial review of legislative or executive action is precisely coterminous with the case for judicial review of prior judicial action. What's sauce for the legislative or executive goose is

28. *Grey's Anatomy: Bring the Pain* (ABC television broadcast Oct. 23, 2005).

> also sauce for the judicial gander. At least as a prima facie matter, the reasoning of *Marbury* thoroughly de-legitimizes precedent.[29]

The question is whether anything can overcome that prima facie case.

II. WHY PRECEDENT?

The key to understanding the possible responses to this prima facie case against precedent is to recognize and keep clear (as I did not always do fifteen years ago)[30] three distinct grounds on which one might give weight to the decision of a prior legal actor. I have elsewhere labeled those grounds *legal*, *epistemological*, and *economic*.[31] The labels are not necessarily the most descriptive that one might imagine, but I will stick with them for now.

Legal deference involves giving weight to another actor's decision because some controlling legal authority requires it.[32] Consider, for example, the role of jury verdicts in federal court. The Constitution contains provisions that specifically require subsequent decision makers to give a certain measure of respect to jury verdicts. In the case of acquittals by criminal juries, the Double Jeopardy Clause makes the jury decision *absolutely conclusive* on subsequent decision makers.[33] If a federal jury acquits a criminal defendant, the judge cannot alter the verdict and executive officials cannot lawfully confine the defendant. Even if the judge, the lawyers, the Attorney General, and the President all believe—and even believe correctly—that the jury was incompetent, stupid, and biased and has blatantly

---

29. Lawson, *Case Against Precedent*, *supra* note 11, at 28.

30. The comments on my earlier article by Fried, *see* Fried, *supra* note 12, were especially helpful in prodding my further thoughts on the different varieties of precedent.

31. The distinction between legal and epistemological deference was articulated in Lawson & Moore, *supra* note 3, at 1271, 1278–79. The concept of economic deference was added in Lawson, *Everything I Need to Know*, *supra* note 2, at 384, 386.

32. In previous work, I have used the term "legal deference" to describe *status-based* deference, in which prior decisions are given weight because of the position of the prior actor in the legal system. Lawson, *Everything I Need to Know*, *supra* note 2, at 384–85. I now want to use the term in a different sense to mean deference that is commanded by some authoritative legal source. Normally, a command to defer to someone else will translate pretty directly into status-based deference (the "someone else" will almost always be identified by his or her position in the legal system), but strictly speaking that relationship is theoretically contingent.

33. U.S. CONST. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb").

disregarded the law, including the applicable law of the Constitution, the acquittal still stands.[34] Acquittals by criminal juries are legally conclusive, not because of any case-specific determinations of the wisdom or competence of the particular jury in the case, but simply because the Constitution says that acquittals by criminal juries are legally conclusive.

If the federal jury was sitting in a civil case, its verdict would not be conclusive, but would nonetheless be legally entitled to considerable weight by subsequent actors, such as a judge entering judgment in the case, by virtue of the Seventh Amendment.[35] A judge cannot enter judgment contrary to a civil jury verdict simply because the judge thinks that the jury made a mistake, but can only enter judgment as a matter of law if the jury behaved unreasonably. Again, this legal rule does not depend on particular facts about particular juries; a jury verdict is entitled to a measure of legal weight simply because the Constitution commands deference to jury verdicts.[36] Thus, one very good reason for giving precedential weight to a prior judicial decision would be that an authoritative legal source, such as the Constitution, commanded it.

Epistemological deference, by contrast, results when one treats prior decisions as good evidence of the right answer. If one starts with the idea of independently determining the right answer to a question, it is possible that, along the way, one might run across someone else who has already thought about the question carefully, was in a good position to get the right answer, and has relevant indicia of reliability. The fact that this other actor has reached a

---

34. *See* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 48–49 (2003); Margaret H. Lemos, *The Commerce Power and Criminal Punishment: Presumption of Constitutionality or Presumption of Innocence?*, 84 TEX. L. REV. 1203, 1229–31 (2006).

35. *See* U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."). In all likelihood, most of the substance of the Seventh Amendment was also part of the constitutional structure even before 1791, but that is a topic for another day. *See* Gary Lawson, *The Bill of Rights as an Exclamation Point*, 33 U. RICH. L. REV. 511, 514 (1999).

36. Other sources of law besides the Constitution also sometimes purport to command deference to precedent. Federal Rule of Civil Procedure 52(a), for example, commands federal appellate courts to defer to (that is, attach precedential weight to) prior factual determinations by district judges by permitting rejection of those findings only when they are "clearly erroneous." For other examples of legal deference grounded in non-constitutional sources, see *supra* note 3.

particular conclusion might well constitute good evidence, and perhaps even the best available evidence, of the right answer. Giving weight to that prior answer would simply be common sense, even in the absence of any legal command to do so. Unlike legal deference, epistemological deference focuses on case-specific reasons for thinking that a particular actor is a good source of guidance, though one can imagine general rules that might flow from these case-specific judgments.

Economic deference results from a cost-benefit analysis that suggests that giving weight to a prior decision is so much easier and cheaper (however "cheaper" is defined) than reconsidering the matter from scratch that deference to the prior decision is appropriate. This model of precedent recognizes that prior decisions may or may not be very good evidence of the right answer, but holds that figuring out either the right answer or whether the prior decision is good evidence of the right answer may be too expensive to be worthwhile. Such judgments can get very complicated; the "costs" of not having the right answer vary greatly with the context, as do the costs of determining right answers, the costs of determining the costs of right answers, and the comparative costs of figuring out the right answer and figuring out the answer that is supposedly prescribed by precedent. Defenses of precedent that rely on the good consequences supposedly produced by the practice, such as predictability, stability, and objectivity, are forms of arguments for economic deference: they argue, in essence, that wrong answers are better than right answers when the social costs (however those are measured) of wrong answers are lower.

The practice of precedent could, in principle, be justified by any or all of these grounds. The precise shape of the doctrine obviously depends on the grounds by which it is justified.

III. DOES THE CONSTITUTION *COMMAND* RELIANCE ON PRECEDENT?

Jury verdicts must operate as precedent (of varying weight depending on the context) because the Constitution says that they must. If the Constitution similarly directs courts to give weight to prior judicial decisions, that would end the matter.

With one modest but important exception (involving the finality of judgments) that does not bear on the limited topic of Supreme

Court adherence to Supreme Court precedent,[37] the Constitution has no express clauses assigning weight to judicial decisions comparable to the provisions concerning juries. The Constitution says only that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[38] The idea has occasionally been floated that the "judicial Power" includes a general obligation to prefer judicial decisions to the Constitution in at least some cases,[39] but there is not much to support the claim.

The judicial power is the power to decide cases according to governing law. In the course of that task, courts must determine which law governs, which includes making conflict-of-laws judgments when multiple sources of law are brought into play. But, textually and structurally, even if judicial decisions count as law in some contexts (as they surely do in common law adjudication), one would need something as explicit as the jury clauses, or as structurally clear as the principle of finality of judgments, to permit any other consideration to leapfrog the Constitution in the conflict-of-laws hierarchy.[40] The bare grant of the "judicial Power," with its

37. In order for the "judicial Power" vested in the federal courts to be an actual power, it must have the capacity to bind other actors, including executive actors who are charged with enforcement of judgments. As a result, judicial decisions have a constitutionally-based precedential effect of sorts *as judgments in specific cases*. The precise contours of this finality-based doctrine of precedent are a topic for another time (as the contours were fifteen years ago, *see* Lawson, *Case Against Precedent*, *supra* note 11, at 30 & n.22), as they primarily implicate issues of vertical or interdepartmental precedent that are beyond the scope of this Article. For a preliminary exploration, see Lawson & Moore, *supra* note 3, at 1313–26.

38. U.S. CONST. art. III, § 1.

39. A panel of the Eighth Circuit advanced a position with these implications some years ago, holding that courts could not refuse to give precedential weight to unpublished opinions, *see* Anastasoff v. United States, 223 F.3d 898, 899–903 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc), but the argument was very thin and has not been well received. *See, e.g.*, Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43 (2001). A few academics have suggested that the obligation to follow precedent might be part and parcel of the Article III "judicial Power," but those arguments are also very thin. *See, e.g.*, Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 577 (2001); Monaghan, *supra* note 7, at 754. The fullest argument that Article III incorporates some theory of precedent relies largely on history. *See* Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419 (2006). But while the concept of precedent was certainly familiar to the Founding generation, *see id.* at 462–67, there was no tradition of precedent in the face of an express Supremacy Clause that declared the hierarchical superiority of certain sources of law.

40. Even the finality of judgments principle generates at most a presumption in favor of enforcement. If the President is genuinely convinced, with a high degree of confidence, that the

accompanying inference of the power of judicial review, no more requires courts to prefer their prior legal conclusions to the Constitution than the grant of the "executive Power," with its accompanying inference of the power of executive review, requires the President to prefer his or her prior legal conclusions to the Constitution. And if one wishes to resort to history, the doctrine of precedent was certainly familiar in the Founding era, but not so well established and developed to be a part of the "judicial Power" in the super-strong sense that would be necessary to give judicial decisions preference over the Constitution.[41] In sum, there is little to be said for a general constitutional *obligation* to follow precedent, and little is in fact said about it.

IV. DOES THE CONSTITUTION *PERMIT* RELIANCE ON PRECEDENT?

Very few people seriously maintain that courts are constitutionally *required* to follow precedent. The standard account of precedent holds that it is a *policy* rather than a legal command (though that position has implications that many of its adherents have not yet recognized[42]). Accordingly, my earlier argument in *The Constitutional Case Against Precedent* did not contend merely that the Constitution does not *require* courts to follow precedent, but contended that the Constitution affirmatively *forbids* reliance on precedent in constitutional cases—where "reliance on precedent" is understood as treating precedent as something that can, in principle, change the outcome that would be reached by unmediated interpretation of the Constitution.[43] That argument requires some modest revisions, which I provide here.

---

judgment reflects constitutional error, the President should not enforce the judgment. *See* Lawson & Moore, *supra* note 3, at 1325–26.

41. *See generally* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999).

42. For an exploration of some of these consequences, which include requiring the Court to overrule precedent when the political branches express strong disagreement with the decision, see Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling* Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 CONST. COMMENT. 311, 314, 335–48 (2005).

43. *See generally* Lawson, *The Case Against Precedent*, *supra* note 11.

A. *The Case Against Permissive Legal Deference*

The prima facie case against *requiring* adherence to precedent also functions as a prima facie case against *permitting* adherence to precedent. Courts have an obligation to decide cases in accordance with governing law. Once it is acknowledged that the Constitution is supreme law, and thus is *always* the governing law when it applies, a court would fail to exercise the "judicial Power" properly if it decided a case in accordance with some other source of law that conflicted with the Constitution. For the same reasons that Article III does not *require* courts to follow precedent (and Article II does not *require* Presidents to follow precedent), Article III does not *authorize* courts to follow precedent (and Article II does not *authorize* Presidents to follow precedent). The conflict-of-laws rule stated in the Supremacy Clause and implicit in the entire constitutional structure is *incorporated* into Article III's grant of the "judicial Power" and is not *altered* or *superseded* by that grant.[44] The power to apply governing law ordinarily also carries with it the power to determine which law governs, but not when the Constitution has already made that decision.

Frederick Schauer has responded that my argument depends upon the Constitution containing its own rules of interpretation, which he considers a logical impossibility.[45] If the "meaning" of the Constitution is in fact what judges say it is, or what most actors in the legal system think it is, then there is a very good case that the "meaning" of Article III (or some other aspect of the Constitution) is that precedent may, on some nontrivial set of occasions, rule the day. Indeed, if practice determines constitutional meaning, my argument is obviously frivolous.

Schauer is partly right, but not in a way that saves precedent. One does, of course, need to bring extraconstitutional interpretative norms to bear in reading the Constitution, just as one must bring extra-Schauerian norms to bear in reading Schauer.

---

44. Hence, Peter J. Smith is simply wrong when he says, in a quite conclusory fashion, that Article III "can reasonably be read to authorize reliance on precedent in constitutional adjudication." Peter J. Smith, *The Marshall Court and the Originalist's Dilemma*, 90 MINN. L. REV. 612, 636 (2006). Smith's only support for his claim about the meaning of the judicial power, *see id.* at 636 n.104, is an argument by Fallon that expressly *does not* employ anything remotely resembling originalist analysis (as originalism is understood by all of its prominent modern practitioners). *See* Fallon, *supra* note 39, at 577–81.

45. Schauer, *supra* note 12, at 54–55.

But those extraconstitutional (and extra-Schauerian) norms are objectively discoverable, and they do not involve the *ipse dixit* of judges, lawyers, or any other concrete historical individuals. The Constitution means what a hypothetical reasonable observer at the time of its ratification, in possession of all relevant information, would have understood it to mean. This conclusion about constitutional meaning flows from reflection on background principles of human communication, the kind of document that one is interpreting (an instruction manual for a particular governmental structure), the character of jointly authored products, and the specific instructions for interpretation contained in the document (which one can readily understand through the application of the extraconstitutional norms that I have just described).[46] When the Constitution is interpreted the same way that any normal person would interpret an eighteenth-century manual for constructing a compost heap, it follows that Article III does not authorize courts to prefer precedent, or anything else, to the Constitution in cases of conflict.[47]

But might not Article III at least authorize courts to look to precedent to determine *whether there is a conflict between precedent and the Constitution*? My argument, after all, centers on conflict-of-laws principles. How does one tell, in any given case, whether the claims of precedent and the claims of the Constitution are in fact in conflict?

A full answer to this conundrum would require a general theory of interpretation, but it is enough for now to point out several considerations that require direct examination of the Constitution in order to determine its meaning. First, both the Preamble and the Supremacy Clause refer to "this Constitution." The Constitution self-referentially describes itself as the object to be construed. Second, Article III does not specifically grant to courts an interpretative power

---

46. On background norms of communication, see Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529 (1998). On everything else, see Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1127–48 (2003); Lawson, *On Reading Recipes . . . and Constitutions*, *supra* note 8; Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47 (2006).

47. I would have to have a long conversation with Schauer about this to be certain, but I suspect that he is much more interested in the Constitution's *authority* than he is in the Constitution's *original meaning*. From the standpoint of authority, it is entirely possible that precedent in some form will play a major role. But I am not making any claims about the Constitution's authority. I am simply describing its meaning.

superior to, or different from, the interpretative power vested in the President or Congress, or residually possessed by state officials. Indeed, the Constitution does not expressly grant interpretative power to *anyone*; all powers of interpretation in the Constitution arise by inference. The Constitution pretty clearly assumes that it has a meaning independent of the act of interpretation, and it does not charge any particular actor with either the creation or discovery of that meaning. The bottom line of all of these considerations (and many others) is that it would make no sense to construe Article III (or, for that matter, Article II) to make the meaning of the Constitution for conflict-of-laws purposes dependent on the act of interpretation of the actor charged with determining whether its actions conflict with the Constitution. The Constitution means what it means. Precedents mean what they mean. If they conflict, the Constitution itself says to prefer the Constitution.

B. *The Case Against Permissive Economic Deference*

At the risk of grossly over-generalizing about a voluminous body of scholarship, I suspect that most advocates of precedent ground their position not in some construction of Article III, but in the *practical* consequences that result from reliance on precedent. After all, if one is not arguing that the Constitution *requires* adherence to precedent as a legal rule, but merely that the Constitution *permits* adherence to precedent as a legal policy, it is natural to look at the justifications for that policy.[48]

Fifteen years ago, I brushed aside those kinds of arguments as unworthy of serious consideration in a study of original meaning:

> The class of pro-precedent arguments that does not deserve careful attention involves the claim that following precedent serves important prudential interests, such as stability, predictability, judicial economy, fairness, and legitimacy. Even if the practice of following precedent in fact promotes these interests, that would at most establish that a well-crafted constitution would permit, or require, courts to follow precedent. I have no strong view, and do not mean to imply one here, on how a well-crafted constitution

48. For a few random examples of consequentialist arguments for precedent, see Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173 (2006); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368–72 (1988); Smith, *supra* note 44, at 636–37.

> should handle precedent. My present concern is with the actual Constitution, however well- or ill-crafted it may be, and arguments from prudence go nowhere unless they are tied to the interpretation of some provision of the constitutional text.[49]

I would say essentially the same thing today. There may very well be plenty of statutes and executive actions that are flatly inconsistent with the Constitution but which are normatively superior to the Constitution. Their normative superiority does not make them constitutional. Similarly, the practice of following precedent may well be, in many circumstances, a nice idea. But the Constitution does not contain a "Nice Idea" clause.

In the end, my disagreement with "pragmatists" who defend precedent on consequentialist grounds most likely results from the fact that we are asking different questions. I am asking what the Constitution means. They are (I believe) asking how courts should decide cases. Those two sets of questions are only contingently related and require application of very different disciplines. Questions about the Constitution's meaning are the province of legal interpretation. Questions about how courts should decide cases are the province of moral and political theory. It is entirely possible that modern American legal actors should, as a matter of political morality, make decisions without reference to the meaning of the Constitution. As an empirical matter, that is essentially what happens most of the time. If that is what pragmatic arguments for precedent are saying, I have no comment on them (other than the perhaps tendentious suggestion that legal scholars, even very smart legal scholars, are unlikely to have much of anything useful to say about political morality).[50]

The same distinction between questions of *interpretation* and questions of *governance* surely also underlies my disagreement with most of my fellow originalists on this score. As Justice Antonin Scalia aptly put it, "almost every originalist would adulterate [originalism] with the doctrine of *stare decisis*,"[51] because "most originalists are

---

49. Lawson, *Case Against Precedent*, *supra* note 11, at 28–29 (footnotes omitted).

50. For an argument that more directly addresses the consequences of following precedent, see Paulsen, *supra* note 12. And for a straightforward consequentialist argument for abandoning precedent in constitutional cases, see William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis:* Casey*,* Dickerson *and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 92–106.

51. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989).

faint-hearted."[52] That is, strict adherence to originalism—which Justice Scalia acknowledges is incompatible with stare decisis—would generate consequences that most originalists regard as unacceptable. For example, it is relatively easy to demonstrate that federal laws requiring the public acceptance of fiat currency as payment for debts are unconstitutional, but, as Judge Bork put it with characteristic elegance: "[I]f a judge today were to decide that paper money is unconstitutional, we would think he ought to be accompanied not by a law clerk but by a guardian."[53] These are not arguments about the meaning of the Constitution; they are arguments about when the meaning of the Constitution should, in real-world decision making, give way to something else. Resolution of the latter argument is the province of moral and political theory, and I am not a moral and political theorist. Indeed, I am barely a lawyer.[54]

C. *The Case Against—Well, Mostly Against—Epistemological Deference*

In everyday life, we frequently rely on the views of others. Sometimes, we do so for reasons of convenience (economic deference). Other times, we do so because we recognize, or at least believe, that others know more than we do. When physicists tell me that gravity is not a force exerted by one object upon another, but rather is the result of the warping of the space-time continuum by mass,[55] I take their word for it. I assume that they could prove their claim if I spent enough years learning the mathematics necessary to understand their arguments, and it is very hard for me to see how it would be in their interests to deceive me. I am willing to accept their prior decisions on the question of the nature of gravity as precedent. May courts, consistently with the Constitution, similarly rely on prior decisions when there is good reason to view those prior decisions as reliable?

The answer is that of course they may. The primary obligation of a court exercising the judicial power is to decide cases in accordance

52. *Id.* at 862.

53. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 155 (1990).

54. J.D. 1983, Yale Law(?) School.

55. STEPHEN HAWKING, A BRIEF HISTORY OF TIME 15–35 (updated and expanded 10th anniv. ed. 1998).

with governing law. That task requires discerning the content of the governing law. When the law in question is the Constitution, the proper way to discern its meaning is to ask how the relevant provisions, in context, would have been understood by a hypothetical reasonable observer at the time of their ratification. If someone else has already made that inquiry, and this someone else likely knows more about the subject than the judge in question, and there is good reason to think that this someone else applied the correct methodology honestly, and there is no good reason to think that this someone else would have cause to skew the result, then it makes perfectly good sense to defer to this someone else. If that is all that precedent involved, there would be a perfectly sensible constitutional case for it: judges have the obligation to get the right answer, and if the best evidence of the right answer is what someone else has already come up with, then go with it.[56]

Precedent of this sort, however, is highly dependent on a wide range of conditions that frequently are not satisfied. For starters, it requires that the previous decision maker be better situated to get the right answer than the present decision maker. If the previous decision maker was none too bright, an obligation to get the right answer would counsel strongly against giving that person's conclusions much, if any, weight. In addition, even the smartest person may not be a reliable guide if he or she is using the wrong method. Brilliant people asking the wrong questions are unlikely to get the right answers. Thus, for example, even though Justice Stephen Breyer is one of the smartest people ever to walk the planet, it would be foolhardy to rely on prior conclusions that he has reached about constitutional meaning because he is not actually looking for *original* constitutional meaning. Finally, even very smart people applying a correct method may be unreliable if they have motives to reach a particular result, and if there is reason to suspect that they have, consciously or not, yielded to those motives. In order to justify giving weight to a prior decision, many indicia of reliability have to align.

The chances of such an alignment in the modern world roughly approximate the chances of my beloved Seattle Mariners, Seattle Seahawks, and (at least as of 2006) Seattle Supersonics all winning a

56. *See* Lawson, *Case Against Precedent*, *supra* note 11, at 25 ("Courts are free to give weight, and even decisive weight, to prior decisions because of the persuasiveness of their reasoning—just as they may give weight, and even decisive weight, to persuasive arguments in briefs, law review articles, or newspaper columns.").

world championship in the same season. Even if one goes back to earlier times—times without Justices Earl Warren and Harry Blackmun or Ivy League law clerks eager to get their (and their professors') elitist liberal prejudices enshrined in the United States Reports—there was never a golden age in which courts faithfully sought the original meaning of the Constitution through dispassionate application of a sound methodology. If one were interested in the original meaning of the Constitution, one would not first turn to the collected works of the United States Supreme Court.

It is possible, however, that there are specific instances in which prior judicial actors carefully and honestly applied sound methodologies, and if one can pinpoint those instances, the conclusions reached in those cases would be entitled to some weight in the search for the right constitutional answers. If precedent is being used for epistemological reasons as good evidence of the right answer, and if all of the conditions for believing specific precedents to qualify as such evidence are met, the Constitution permits its use. This is a very thin doctrine of precedent, but it is a doctrine of precedent nonetheless, and I hereby endorse it.

This account of precedent generates some very loose guidelines for the use of prior decisions—some of which do, and some of which do not, cohere with widely held assumptions about precedent. It suggests, for instance, that precedents closer to the Founding period might be more reliable than modern precedents *if* one believes that decision makers at the time of the Founding were better barometers than are modern legal actors of what a hypothetical reasonable observer would have thought during the Founding era. This effect, of course, may be utterly swamped if Founding-era actors did not apply the correct methodology and/or had reasons to skew their results—which was often the case. It also suggests that not all decisions are created equal, because not all authors are created equal. It is a profound mistake in principle to give epistemological deference to all Supreme Court decisions without regard to how they were produced and who produced them. If an opinion is focused not on discovering original meaning, but on parsing past precedents, which themselves were not focused on discovering original meaning, the opinion is worthless as an interpretative guide, regardless of who authored it. Nor is authorship always irrelevant; conclusions reached by Justice Clarence Thomas are not epistemologically interchangeable with conclusions reached by Justice William J. Brennan. Finally, this

account of epistemological precedent also suggests that legislative and executive precedents can be as or more valuable than judicial precedents. Again, it all depends on whether there is good reason to think that capable people were faithfully applying a correct methodology. If one is looking for evidence of original meaning, the work product of the Meese Justice Department[57] is probably a better source than the work product of the Warren Court.

Thus, if all of the epistemological stars align properly—and one suspects that this would be a relatively rare event—there is some constitutional warrant for giving weight to prior decisions. Indeed, if the alignment is proper, there can be an actual constitutional *obligation* to give weight to prior decisions. Given the constitutional obligation to discover and apply governing law, a judge who knows that he or she is not as well situated as someone else to find the right answer might well be *required* to defer to the proper decision maker if that decision maker's prior conclusion is likely to be more reliable than the judge's best efforts independently to get the right answer. And, if there are certain situations where other actors will categorically be better situated than the judge to find the right answer, epistemological deference can shade into a form of status-based legal deference: the judge will be obliged to go with the best possible view, which may require deference to someone because of his or her position in the legal hierarchy.

It is, hopefully, obvious that the Supreme Court does not remotely fill this role. If the Court over time consisted primarily of very smart people faithfully and dispassionately applying a methodology of original meaning without undue reliance on precedent, there might be the makings of some modest case for a general presumption of

57. The Meese Justice Department was hardly a paragon of originalist consistency, but at least it tried on a few occasions. Prominent originalist scholars who worked, at one time or another, in the Meese Justice Department include (in no particular order) Steven G. Calabresi, John Harrison, Mike Rappaport, John McGinnis, and yours truly. The fundamental and decidedly sound originalist idea that each department of the national government has an independent obligation to interpret the Constitution was (re)introduced to the American legal scene by Attorney General Meese, *see* Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987), inspired in large measure by Calabresi, then-Special Assistant to the Attorney General. The Office of Legal Policy in the Meese Justice Department produced a string of originalist analyses (which were not always correct) of such topics as the Ninth Amendment and the Privileges or Immunities Clause. *See, e.g.*, OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION (1988); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK (1987).

epistemological deference. As they used to say on *Saturday Night Live*: "Not!"[58] It is relatively rare that the justices even look for the Constitution's original meaning, much less look for it correctly. There is accordingly no plausible case for granting precedential weight to Supreme Court decisions as a class. One might be able to single out certain decisions as deserving of precedential weight, though it is probably easier just to figure out every right answer from scratch than to hone down the universe of opinions to those few that might make the cut.

Though it is incidental to this analysis, which is focused on the precedential status of Supreme Court decisions, there may be limited contexts in which *legislative* or *executive* actors might categorically be better situated than judges to reach sound constitutional conclusions, and in which legislative or executive decisions might thereby deserve weight as precedent. In another article, I explore one such possible context: Presidents may categorically be in a better position to judge whether measures taken during wartime or other emergencies satisfy constitutional requirements.[59] This kind of argument is very treacherous, as it requires an assessment of the institutional limitations of judges, along with some heroic assumptions about the competence, motives, and methodological predilections of the relevant executive department actors, but one can at least imagine circumstances in which such an argument would work.

In the end, it is not strictly impossible to construct a narrowly tailored argument for affording weight to some especially reliable precedents in constitutional cases, but it is very, very difficult. Certainly there is no constitutional warrant for the broad-based deference currently afforded to past decisions by the Supreme Court simply because they are past decisions of the Supreme Court. The Constitution does not allow itself to be overridden quite so easily. Thus, the constitutional case against precedent is not absolute. But it is mostly absolute.

---

58. *See, e.g.*, *Saturday Night Live* (NBC television broadcast Feb. 17, 1990); *Saturday Night Live* (NBC television broadcast May 19, 1990).

59. *See* Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis*, 87 B.U. L. REV. (forthcoming 2007).