

STARE DECISIS IN A CLASSICAL AND CONSTITUTIONAL SETTING: A COMMENT ON THE SYMPOSIUM

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The doctrine of stare decisis presents puzzles wherever it appears. Why should a court give “weight” to—or regard itself as “bound” by¹—an earlier decision rendered by the same court, or a court of equal stature?² It seems that there are two possibilities. The later court will think that the earlier decision got the law right, or it will think the earlier decision got the law wrong. In the first case, it seems that there is no need to talk of following the earlier decision or of being “bound” by it; the later court can simply decide the current case in accordance with what it thinks the law is. And in the second case, it is not clear why the error of the earlier decision should be perpetuated. Two wrongs famously do not make a right. So why commit injustice just because injustice has been committed before?³

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1. These metaphors, ubiquitous in discussions of stare decisis, present mysteries of their own. A precedent is not the sort of thing that can actually be put on a scale, so what does it really mean for a precedent to have little or much “weight”? A precedent is not a cord or a rope, so how can a court actually be “bound” by a decision rendered long ago by persons long since dead? Happily or unhappily, the present discussion will have to leave these metaphors uninvestigated.

2. This question presents the problem of what is sometimes called “horizontal” stare decisis. “Vertical” stare decisis, or the understanding that lower courts in a hierarchical system are obligated to follow the decisions of higher courts, seems less problematic.

3. Jonathan Swift posed the issue in satirical terms (of course):

It is a maxim among these lawyers, that whatever hath been done before may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind. These, under the name of *precedents*, they produce as authorities, to justify the most iniquitous opinions; and the judges never fail of decreeing accordingly.

JONATHAN SWIFT, *GULLIVER'S TRAVELS* (1726), *reprinted in* *GULLIVER'S TRAVELS AND OTHER WRITINGS* 39, 241 (Clement Hawes ed., Houghton Mifflin Co. 2004).

These are familiar, even perennial, questions.⁴ The present symposium does not ask its contributors to address these questions across the board; its more focused topic (which, respecting the venerable conventions of academic symposia, the various contributors have addressed or neglected in varying degrees) concerns the relation between *stare decisis* and the originalist approach to constitutional interpretation. In responding to these contributions, I will begin by briefly reviewing the prudential concerns discussed by some of the symposiasts, concerns that have led many courts and scholars to favor a modest doctrine or policy of *stare decisis*. Then, focusing in particular on the challenging articles by Charles J. Reid, Jr., and Gary Lawson, I will ask what difference it makes, if any, if the question of *stare decisis* is considered with reference to the text and historical context of the United States Constitution.

I. THE PRUDENCE OF PRECEDENT

As several of the articles in this symposium note, American courts, both in the Founding period and more recently, have typically embraced a modest doctrine of *stare decisis*. The presumption is that a court should respect and follow previous decisions,⁵ but the presumption is not categorical: courts have been quite willing to disregard or overrule particularly objectionable precedents.

From a purely practical standpoint, this modest use of *stare decisis* seems to make good prudential sense. Suppose you are a judge assigned to a case that closely resembles another case decided previously. The sensible course, it may seem, is to see how the earlier case came out and then do likewise. Your time is limited, after all, so if a respected and presumptively competent judge has already studied the issues and reached a considered conclusion, why should you duplicate those labors? Moreover, citizens in the community may have learned of the earlier decision and relied on it in conducting their affairs. To revisit the issue and decide it differently could

4. For a careful assessment of the various issues raised by the practice of precedent, see LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES* 136–56 (2001).

5. This bland statement studiously ignores the well-known difficulties that attend the effort to decide just what an earlier decision means. I have elsewhere discussed the implications of the effort—by now largely abandoned—to articulate a method of distinguishing between a decision’s “holding” (which is said to bind later courts, presumptively anyway) and its “dicta” (which supposedly does not carry the force of precedent). See STEVEN D. SMITH, *LAW’S QUANDARY* 55–58 (2004).

frustrate their expectations; to make a practice of such rethinking could undermine the whole basis by which lawyers advise clients on what “the law” is and thus subvert the community’s commitment to the “rule of law.” Departure from precedent may also seem to entail disparate treatment of litigants, thus offending commitments to equality.⁶

Still, you would not want to make the rule of precedent absolute. Judges are fallible human beings, after all, who occasionally commit serious and obvious blunders, and you would want to reserve the ability to discard such misguided decisions. Or the times, they may have been a-changin’, so that a decision that was sensible enough when rendered may have become anachronistic. Once again, you would want to preserve the ability to retire such honorable but outdated precedents from ongoing service.

These considerations, it seems, point to a practice whereby courts normally and presumptively follow precedent while reserving the right to overrule decisions that are incongruent with the requirements of law, or of life. Polly J. Price’s article in this symposium describes a practice of *stare decisis* by early American state courts that largely conformed to this commonsensical prescription.⁷ Courts derived the authority of precedent, Price explains, from a concern to protect expectations, and they applied the doctrine most earnestly in areas—property and contracts in particular—in which the protection of expectations has been deemed a paramount concern.⁸ But this prudential approach also led courts to depart from precedent “if they were first satisfied that the change would improve the law, usually in the sense that it would better reflect community practice, and if they were also satisfied that the change would not greatly disturb settled expectations.”⁹

It may be that such prudential considerations are all there is to *stare decisis*. Does anything more really need to be said? Still, this

6. Larry Alexander and Emily Sherwin refer to this account of precedent as “the natural model.” ALEXANDER & SHERWIN, *supra* note 4, at 137–40. For a defense of precedent in constitutional cases along these prudential lines, see Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 278, 288 (2005).

7. Polly J. Price, *A Constitutional Significance for Precedent: Originalism, Stare Decisis, and Property Rights*, 5 AVE MARIA L. REV. 113, 114–15, 142–47 (2007).

8. *Id.* at 114–15, 140–47.

9. *Id.* at 120.

modestly pragmatic account will leave some critics dissatisfied.¹⁰ Some scholars dispute the claim that stare decisis promotes rule-of-law values, at least in the constitutional context.¹¹ Moreover, the platitudinous prescription that arises from the prudential considerations may appear singularly unhelpful. It has proven devilishly difficult to articulate any formula for determining when a past decision is sufficiently defective or outdated so as to warrant overruling, or indeed even to be specific about the criteria that should govern this judgment.¹² But in the absence of clear guidelines, the doctrine of stare decisis may come to seem vacuous: “A court should follow past decisions—except when it shouldn’t.”

And the elasticity of the doctrine may invite abuses. A practice of standing on precedent on an ad hoc, now-and-then basis may allow courts to shirk responsibility for their decisions: the joint opinion in *Planned Parenthood v. Casey*¹³ is a case in point. In a similar vein, Stephen B. Presser’s article in this symposium points to the possibility that stare decisis may serve as a pretext for opportunistic hypocrisy.¹⁴ Criticizing Cass Sunstein’s recent embrace of a precedent-respecting, Burkean “minimalism,” Presser suggests that Sunstein is a hanger-on in the company of Burke’s foul-weather friends—people who take shelter in precedent and tradition when the political winds are against

10. One sort of criticism that I will not pursue here comes from an analytical and jurisprudential perspective: the criticism suggests that even if prudential considerations justify the sort of respect for precedent described above, they do not explain how or why precedent is *legally authoritative*. If protecting expectations is an important legal policy, for example, and if precedents give rise to expectations, then that is a reason to follow precedent; but in this respect, previous judicial decisions are no different than any number of other factors that may influence expectations. Prior judicial decisions, in short, are not legally “binding” or “authoritative”; they are simply facts in the world that, along with other facts, should be taken into account by courts insofar as they are relevant. See ALEXANDER & SHERWIN, *supra* note 4, at 137 (“A prior decision has no *authoritative* effect as a precedent unless the decision itself, and not just its effects in the world, causes future judges to make decisions they would not otherwise make, all things considered.”). This criticism, though powerful as a jurisprudential matter, may be less than impressive to the sort of person who is drawn to prudential rationales in the first place. If the objective of law is to further sound policies, as the prudentially-minded may say, and if presumptively following precedent serves that objective, then what practical difference does it make whether precedent is being treated as “legally authoritative” in some technical sense?

11. 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, 312–14 (2005).

12. For an analysis of the difficulties, see ALEXANDER & SHERWIN, *supra* note 4, at 151–56.

13. 505 U.S. 833, 843 (1992).

14. Stephen B. Presser, *Was Ann Coulter Right? Some Realism about “Minimalism”*, 5 AVE MARIA L. REV. 23, 23–24, 40–44 (2007).

them, but will blithely abandon precedent as soon as the jurisprudential forecast turns more favorable.¹⁵

Two of the contributors to this symposium raise more specific doubts about the prudential account of precedent. Reid suggests that at least in the period of the Founding and the early Republic—the period in which our constitutional regime was instituted—precedent was understood not in purely prudential terms but rather from a natural law framework within which lawyers thought and worked.¹⁶ Lawson argues that however powerful the prudential justifications for following precedent may (or may not) be in common law adjudication, they are ruled out in the constitutional context by the Constitution itself.¹⁷ Let us consider these arguments in turn.

II. PRECEDENT AND THE “EVIDENTIARY” CONCEPTION OF JUDICIAL DECISIONS

Reid’s erudite article marshals impressive evidence in support of his contention that, for early American lawyers working in the common law tradition, the practice of *stare decisis* was more than a matter of prudence; it was the product of a natural law conception of the law. This conception is manifest in the recurring claim from that period (and earlier) that judicial decisions are not law “of themselves,” as Justice Joseph Story put it, but instead merely “evidence” of law.¹⁸ The view of prior decisions as “evidence,” Reid explains, was a corollary to the classical belief in “a preexisting body of ‘law’ that reflected a transcendent reason that stood outside and above the positive enactments of legislatures and the particular decisions of judges, and that courts might discover but could not

15. *Id.* at 39–45. For similar criticism, see Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Law Professors Are Wrong for America*, 106 COLUM. L. REV. 2207, 2217–18, 2223 (2006) (reviewing CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005)). For Sunstein’s response, see Cass R. Sunstein, *Of Snakes and Butterflies: A Reply*, 106 COLUM. L. REV. 2234, 2241–43 (2006).

16. Charles J. Reid, Jr., *Judicial Precedent in the Late Eighteenth and Early Nineteenth Centuries: A Commentary on Chancellor Kent’s Commentaries*, 5 AVE MARIA L. REV. 47 (2007).

17. Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007).

18. *Swift v. Tyson*, 41 U.S. 1, 18 (1842) (“[I]t will hardly be contended that the decisions of Courts constitute laws. They are, at most, only *evidence* of what the laws are; and are not of themselves laws.” (emphasis added)), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79–80 (1938).

make.”¹⁹ This view, Reid suggests, was part of “a thought-world that was already beginning to vanish.”²⁰ In his conclusion, Reid shows how many modern scholars have failed to notice this jurisprudential transformation and, as a result, have systematically misunderstood the thinking of early American jurists on the subject of *stare decisis*.²¹

Reid is convincing in his description of the natural law framework of classical and early American legal thought.²² But to say that lawyers *understood* precedent in natural law terms is not equivalent to saying that they deduced or derived their views of precedent *from* natural law assumptions. The point is in one sense a small one, but it is relevant to the topic of the symposium and hence worth pursuing.

Here is one way to think of the difficulty: the modest practice of following precedent employed by American courts and described by Reid raises two kinds of questions. First, why follow precedent at all? Why give past decisions any “weight,” in other words, in deciding a pending case? Second, assuming there is a satisfactory answer to the first question, why is it permissible in some cases *not* to follow precedent? Reid’s exposition of the natural law presuppositions of early American lawyers seems responsive to the second kind of question, but his account gives less satisfaction with respect to the first.

It is understandable, that is, how lawyers who regard judicial decisions not as law “of themselves” but instead merely as “evidence” of some independent or preexisting law would feel authorized to depart from those decisions when the decisions seem to have gotten the law wrong. It is the law, after all, that should govern—not the mere (fallible) evidence. This is the recurring theme of Reid’s article, and it is convincing. But the natural law framework provides no obvious explanation for why courts would presumptively follow precedent in the first place—other than perhaps for the sorts of prudential considerations noticed already.²³ If a previous decision

19. Reid, *supra* note 16, at 51; see also *id.* at 56 (describing “a jurisprudence that believed, fundamentally, in the existence of a transcendent body of principles and right reason that constitute the source of all law”).

20. *Id.* at 57.

21. *Id.* at 100–11.

22. He is convincing to me at least. I have elsewhere argued, though with considerably less learning, for something much like Reid’s interpretation. See SMITH, *supra* note 5, at 45–48.

23. Reid does suggest that common law lawyers were committed to following precedent in part for the same types of prudential reasons—protection of expectations, mainly—discussed by Price. See Reid, *supra* note 16, at 88–93; Price, *supra* note 7, at 114–20, 125–37, 142–47.

was only evidence of the law and “was only good to the extent that it conformed to transcendent principles of justice,”²⁴ then why would that decision be deserving of any greater presumptive respect than, say, a carefully researched and well-written legal treatise or brief?

So far as I can see, Reid’s article sheds little light on that question. This is not a shortcoming in his article; it may be that the legal thinkers he is reporting on—James Kent, William Blackstone, James Wilson, and company—did not offer much illumination on the question either. Still, the question is important to our topic; so although our reflection will necessarily be somewhat conjectural, we might ask why classical legal thinkers would have assumed that judicial precedent was binding or authoritative, even presumptively, for later courts.

We might approach that question by asking another: how, or in what sense, were judicial opinions deemed to be “evidence” of the real law that preexisted and transcended them? The most obvious answer, we might suppose, is that judicial precedents would have been viewed (as they still are) as a sort of expert testimony with respect to the legal issues they addressed.²⁵ The cases had been decided by judges who were presumably competent in the practice and discourse of law. So perhaps it was as if the later courts, in pondering and deferring to previous decisions, were in effect calling in (or calling up?) the illustrious judges of former years to serve as expert witnesses in the present cases.²⁶

No doubt this “expert testimony” function was—and is—part of the reason for respecting precedent. Even Lawson, who is the least subservient to precedent of the contributors to this symposium, admits that constitutional decisions may permissibly serve this function, at least in principle.²⁷ Still, this consideration by itself seems insufficient to explain the overall practice of *stare decisis*, because the value of past decisions as expert testimony is likely to be slight. After all, not every judge who has decided a previous case will have been a

24. Reid, *supra* note 16, at 67.

25. In this vein, Reid quotes James Wilson’s statement that precedent should serve as “a skilful guide.” *Id.* at 54 (quoting 2 JAMES WILSON, *Of the Constituent Parts of Courts—Of the Judges*, in THE WORKS OF JAMES WILSON 157, 160 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896)).

26. *Cf. id.* at 52 (suggesting that common law “required fidelity to the law understood not merely as the positive enactments of the state, but also as the ageless wisdom of transcendent truth”).

27. Lawson, *supra* note 17, at 4, 10, 18–22.

Coke, a Blackstone, or a Mansfield, and not every decision will reflect careful consideration of the legal issues presented.²⁸ In addition, most of the previous cases will not have decided the precise question presented in a current case, so the expert testimony to be gleaned from those cases will have to be adapted and supplemented for present use. No doubt the insight contained in the precedents might still be of some value. But if precedents are merely a form of expert testimony, then it is hardly clear why they should carry more legal authority than (or even as much as), say, a careful memorandum that is written by a qualified lawyer, scholar, or law clerk and that specifically addresses the legal question in *this* case.

So is there any other sense in which a past judicial decision might be “evidence” of law? We may find a clue in a feature of common law thought that has sometimes puzzled modern scholars: the classical expounders of common law often said that the common law was grounded in custom, but they also said that the law was grounded in reason.²⁹ Custom and reason would seem *to us* to be very different sources. So which is it, we might well ask—custom or reason? Far from perceiving these claims as inconsistent, however, or even independent, the classical expounders seem to have regarded them as perfectly compatible—maybe even as complementary dimensions of a single coherent position. So what could these thinkers have had in mind?

It might be that the classical legal thinkers were simply confused.³⁰ But a more charitable interpretation might attribute to them a view of history and the cosmos in which an overarching reason shapes and becomes instantiated in more particularized custom.³¹ “Reason” in

28. Lawson explains the problem: “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.” *Id.* at 19.

29. See generally Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD U. COMMONWEALTH L.J. 155 (2002) (focusing on common law jurisprudence of the seventeenth century).

30. In this vein, in a wide-ranging historical inquiry, James Q. Whitman argues that “Revolutionary era lawyers unreflectively conflated reason and custom.” James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321, 1323 (1991).

31. See Postema, *supra* note 29, at 178. Postema explains that in the classical common law view:

“[R]eason” was understood in a special way. This was not “natural” reason, as it was often called—the reason of broad, universal principles external to ordinary sources of

the ethereal abstract might be inaccessible and ghostly; “custom” un-inspired by reason would be a meaningless sequence of actions and decisions, signifying nothing, unworthy of respect. But the two married together would be like the union of soul and body that makes a living being. Thus, reason would shape custom, and custom would be an embodiment and manifestation of reason;³² neither could be understood or appealed to wholly independent of the other.

If the classical common law thinkers understood reason and custom in this way, then Reid’s description might invite a friendly amendment: the governing reason would perhaps not be so much “preexisting” or “transcendent”—that is, “outside and above the positive enactments of legislatures and the particular decisions of judges”³³—as it would be immanent in these customary manifestations. And it would not be quite accurate to say that judicial decisions *reflect* a disembodied reason. Rather, they would, in a crucial sense, be partially *constitutive of* a meatier reason-in-custom. So, yes, a legal precedent would be a sort of expert statement of what the law is, but it would be more than that; it would also be, presumptively at least, a constitutive part of the law.

On this view, precedent might be understood as a kind of “real evidence.” A precedent would be evidence of the law in much the same way that a water sample taken from a polluted pond is evidence of the condition of the pond because it is *part* of the pond. In that respect, a past decision would have a stature quite different from that of a mere expert opinion or lawyerly statement *about* the law. It would in an important sense *be* law—though law not “of itself,” and not merely by virtue of having been posited or laid down by someone in an official position. Rather, the decision would be at once *evidence* of law and actually *law* because, and only insofar as, it reflects and participates in the body of reason-in-(developing) custom.

law, accessible to individual rational minds, by which that law is measured—but reason *in* the law. Law, it was thought, contained within itself principles of reason.

Id.

32. Custom in this view would not be *fully* determined by abstract reason alone, but would be a concretization and adaptation of reason in and to particular circumstances—what natural law thinkers have sometimes described as *determinatio*. See, e.g., Patrick McKinley Brennan, *Law, Natural Law, and Human Intelligence: Living the Correlation*, 55 CATH. U. L. REV. 731, 740–46 (2006).

33. Reid, *supra* note 16, at 51.

Consequently, a judicial decision would be presumptively—but only presumptively³⁴—authoritative in later cases.

This interpretation is conjectural, as noted, but it seeks to make sense of the modest practice of stare decisis within a natural law framework. So what relevance, if any, would this interpretation have for stare decisis with respect to *constitutional* decisions?

III. PRECEDENT AND CONSTITUTIONAL LAW

Perhaps none. Gary Lawson argues that however sensible stare decisis may be in common law contexts, it has virtually no place in constitutional adjudication, at least if we actually adhere to the Constitution.³⁵ This is because the Constitution, which Lawson takes to be equivalent to the constitutional *text*,³⁶ declares itself to be supreme over any other form of law. The declaration occurs, Lawson thinks, in the Supremacy Clause of Article VI.³⁷ As Lawson reads it, this clause is a choice-of-law provision, commanding the Constitution's interpreters and servants in case of any conflict to prefer the Constitution (that is, the text) over any other form or source of law, whether state or federal. In this respect, judicial precedents are like statutes: even if we regard the decisions as "law,"³⁸ they are nonetheless subordinate as law to the Constitution/text. So just as the Constitution prevails over an incompatible statute (as *Marbury v.*

34. A judicial decision would be only presumptively authoritative because a decision too far out of line with the overall body of precedent might be simply a mistake—a sort of freak occurrence—and unworthy to be counted as part of the corpus of law.

35. Lawson, *supra* note 17, at 11–13. The qualification "virtually" is needed because Lawson admits that prior constitutional decisions might have a sort of epistemic or persuasive authority. Lawson, *supra* note 17, at 10, 18–22. It will be rare that this authority will support a judge in following precedent over what he would independently understand the Constitution to mean. *Id.* at 21 ("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.").

36. Equating "the Constitution" with the constitutional text is, in Lawson's view, commanded by the text itself. *Id.* at 15 ("[B]oth the Preamble and the Supremacy Clause refer to 'this Constitution.' The Constitution self-referentially describes itself as the object to be construed.").

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

38. Lawson concedes, *arguendo* at least, that judicial decisions are law in some sense. See Lawson, *supra* note 17, at 5–6 ("In any given case, many different legal norms from many different sources—including constitutions, statutes, treaties, regulations, court decisions, traditional practices, and theories of justice—might potentially bear on the outcome."); see also *id.* at 12 ("[E]ven if judicial decisions count as law in some contexts . . .").

*Madison*³⁹ famously held), the logic of constitutional supremacy means that a judge can never follow a precedent over the Constitution/text itself. Or at least a judge cannot prefer the precedent while remaining faithful to the Constitution.

This argument amounts to, as Lawson says, a “short and . . . elegantly simple case against the use of precedent in constitutional cases,”⁴⁰ and there is much to admire in it. But is the argument ultimately persuasive?

A. *Does the Supremacy Clause Preclude Stare Decisis?*

Perhaps the most straightforward objection would simply be that Lawson has tried to squeeze more out of the Supremacy Clause⁴¹ than the clause can yield. His construction treats the clause as a choice-of-law measure on two separate levels: the clause commands courts not only to prefer *federal over state law*—up to this point Lawson’s construction seems unassailable and well settled—but also to prefer *constitutional over other forms of federal law*. This “internal hierarchy”⁴² within federal law is also well settled, to be sure. But a close inspection of the text suggests that the superiority of constitutional law over other federal law is not explicitly mandated by the Supremacy Clause itself.⁴³ Nor is the hierarchy of federal law—with the Constitution on top, then congressional statutes, then other forms of law such as administrative regulations and perhaps judicial decisions—explicitly declared anywhere else in the text of the Constitution.

39. 5 U.S. (1 Cranch) 137 (1803).

40. Lawson, *supra* note 17, at 8.

41. The clause provides:

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.

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

42. Lawson, *supra* note 17, at 6.

43. Lawson acknowledges this point in passing. *Id.* at 6–7 (“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 that the Constitution is the ace of trumps and prevails in conflicts with statutes and treaties.” (footnote omitted)). I believe this concession is more damaging to Lawson’s position than Lawson perceives.

It seems, rather, that the hierarchy within federal law is the product of an inference from the nature of the constitutional scheme. Moreover, that inference is supported more by practical good sense than by logical necessity. Imagine (or simply observe, in aspects of our own political history) a legal system in which the constitutional text is assigned a meaningful but less lofty role: the text is accepted, perhaps, as a starting arrangement to set the political enterprise in motion and as a sort of presumptive or default framework for political and legal arrangements. But those arrangements can be modified by, say, congressional legislation.⁴⁴ Would such a system be in conflict with the Supremacy Clause, or with anything else in the text of the Constitution?

Perhaps, but the conflict would be in a practical sense and not in either a literal or strictly logical sense. Nothing in the text *explicitly* declares that the text could not be confined to this sort of limited function. Nor *as a purely logical matter* is such a system incompatible with the constitutional text. A proponent of Lawson's view might appeal to the oath requirement⁴⁵ perhaps, or to Article V,⁴⁶ which provides a particular and deliberately cumbersome method of amending the Constitution. But these appeals would be question begging, at least so long as we are concerned merely with logical incompatibility. The disagreement between the "textual supremacy" and "limited function" constructions, after all, is not precisely over whether officials should be loyal to the text, or whether the text itself can be amended by procedures other than those described in Article V. Everyone might agree (though in fact not everyone *does* agree) that the answers to those questions are, yes,⁴⁷ and no,⁴⁸ respectively. The important disagreement would be over what function the text

44. It is arguable that in many respects the American political system *has* in fact operated in this way, at least in important respects and since the New Deal. For an illuminating and feisty account, see Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233-48 (1994) (discussing five ways in which today's unchallenged administrative state conflicts with the Constitution).

45. See Lawson, *supra* note 17, at 7 & n.25 (citing U.S. CONST. art. II, § 1, cl. 8; *id.* art. VI, cl. 3).

46. U.S. CONST. art. V.

47. Thus, officials other than judges—legislators, sheriffs, agency officials—also take oaths to support the Constitution; but we do not see any difficulty in the idea that they should obey directives, such as judicial opinions, rather than acting on their own independent interpretations of the text.

48. Bruce Ackerman has famously maintained that the Constitution can be amended by procedures other than those spelled out in Article V. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 41-57 (paperback ed. 1993).

serves in the overall political and legal scheme. And the argument against ascribing a more limited function to the text—the function of serving as a start-up arrangement and as a default framework, subject to alteration by Congress—is of a quasi-practical nature. Specifically, the argument is that this limited function reflects a less sensible and faithful elaboration of the purpose and spirit of the sort of enterprise that would feature a written constitution than one that accepts the Constitution as supreme law.

So suppose I assert that *the text itself* (and hence *the Constitution*) cannot be amended except by a specially registered supermajority as provided for in Article V, but that Congress, by simple majority vote, can alter the governmental arrangement set up by the text. There is nothing formally illogical or internally contradictory in this pair of assertions. But what would be the practical point of such a system? Why would the Constitution's Framers go to the effort of putting a constitution in writing, of fretting and haggling over the exact wording, if the writing were of so little consequence? And why would they make the text so difficult to *amend* if it can so easily be *departed from*?

From this reasoning, we might conclude that the constitutional text should be treated as supreme law. Lawson (and *Marbury*) are persuasive on this point. In this view, though, the supremacy of constitutional law is not compelled by *the text itself*, but rather derives more from a practical reflection on the purpose and spirit of the constitutional enterprise. But then that same sort of practical reflection on the constitutional enterprise might likewise support deference to precedent that has served, as Madison put it, to "liquidate[]" the meaning of the text.⁴⁹

In stating these reservations, I do not pretend to have conclusively resolved the question of textual meaning on this point. There are further possible arguments that I have not considered here. It might be argued, for example, that judicial decisions are not mentioned in the Supremacy Clause, and hence are not law at all. Lawson notes this possibility but does not dwell on it; he concedes rather, at least for purpose of argument, that judicial decisions are law in some sense.⁵⁰

49. THE FEDERALIST NO. 37, at 197 (James Madison) (Clinton Rossiter ed., 1991).

50. See Lawson, *supra* note 17, at 5–6.

Asserting that judicial decisions are not law at all would in any case be a different sort of claim than Lawson's conflict-of-laws argument.⁵¹

In sum, Lawson's interpretation of the Constitution as precluding the practice of stare decisis in constitutional law cases is a *possible* interpretation of the constitutional text—possible, but hardly *mandatory*. And insofar as the text permits different interpretations, there is room for consideration of both the practical considerations that may support stare decisis and of the long and settled history of giving judicial decisions—even constitutional decisions—some “weight” (whatever that means).

B. *The Bootstrap Problem*

Let us suppose, though, that Lawson's construction of the text—and of the Supremacy Clause in particular—is fully persuasive. For purposes of argument let us concede, in other words, that the constitutional text explicitly declares itself to be the supreme law, superior to all other forms of law, including federal law. At this point, it seems, we are confronted with a bootstrap problem. How can anyone or anything—an official or institution or legal text—render itself supreme *by its own assertion*?

Suppose the President were to declare, “Henceforth, my decrees shall be supreme law, and every citizen and official shall treat them as such.” When asked, “Why on earth should we do that?” the President responds: “Because I said so!” We would quickly recognize the vitiating circularity in this position. The same conclusion would attend a similar declaration by the Supreme Court,⁵² as Lawson would

51. It might also be argued that judicial decisions *are* law, but only to the extent that they are “made in Pursuance,” U.S. CONST. art. VI, cl. 2, of the Constitution, and that decisions inconsistent with the Constitution fail to meet that condition. The argument (which can equally be made with regard to statutes) is not implausible, but it also seems less than compelling. When the Supremacy Clause refers to “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof,” *id.*, the phrase “in Pursuance thereof” *might* mean something like, “fully compatible with, both substantively and procedurally.” But then again, it might mean something less demanding, such as, “in carrying out the functions assigned by the Constitution.” By that more gentle reading, so long as judicial decisions were rendered in the due performance of the judicial function of resolving cases and controversies within the courts' jurisdiction, those decisions would be “in Pursuance” of the Constitution.

52. As it happens, the Court *has* in fact come close to making such a declaration insofar as the Court has claimed that its decrees are supreme law because the Constitution is supreme law, and the courts are the ultimate interpreters of the Constitution. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (claiming that the case *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), “declared the basic principle that the federal judiciary is supreme in the exposition of the law of

likely be the first on his block to insist. The more general point is that an institution cannot make itself supreme simply by declaring itself to be such. So why is the constitutional text's ostensible declaration of its own supremacy not subject to the same objection? Lawson's position appears to assume that the constitutional text is different in this respect than the President or the Supreme Court or any other instrument or institution. But how?

I am not sure how, or if, Lawson answers this question. Perhaps his assumption is that the constitutional text is not vulnerable to bootstrap objections because its supremacy is not merely a product of its own declaration, but also of the observable fact that there is no law above or beyond that text—there is nothing more fundamental that could be invoked to assess and defeat the claim of supremacy. If the President declares that his decrees are supreme law, we can evaluate this declaration against the constitutional text. But if the text declares itself to be supreme, what higher source or authority could we look to in deciding whether this declaration is correct?

We might put the point in this way: in the classical common law view, judicial decisions were not law “of themselves” but only by virtue of their participation in the ever-developing law-as-custom.⁵³ In a similar vein, it might be argued, presidential declarations and congressional statutes are not law “of themselves”; they have legal status only as it is conferred on them by something more ultimate—namely, the Constitution. But the Constitution itself, the argument might continue, is different. It *is* law—fundamental law, in fact—“of itself.”

If this is Lawson's view, it invites objections. This is because, upon reflection, the claim that the Constitution *is* supreme law “of itself” seems untenable. “Of itself,” the constitutional text is *not* supreme law; it is nothing more than a piece of paper with marks on it—suitable for starting a fire, perhaps, or making a paper airplane. The Constitution acquires its status of law from something else, something more ultimate in the chain of authority.

Explanations differ for what that “something else” is, to be sure. By one account, the Constitution is law because it reflects the will of “We the People”;⁵⁴ by another (not necessarily incompatible) theory, it

the Constitution” and then going on to claim that “[i]t follows that the interpretation of the Fourteenth Amendment enunciated by this Court . . . is the supreme law of the land”).

53. See *supra* text accompanying notes 31–34.

54. U.S. CONST. pmb1.

is law because it is designated as such in a “rule of recognition” accepted by officials.⁵⁵ The natural law view described by Reid appears to assert that the constitutional text is law only because, and insofar as, it is an instantiation of the “preexisting body of ‘law’ that . . . [stands] outside and above the positive enactments of legislatures and the particular decisions of judges.”⁵⁶ Or, as we have amiably amended Reid’s description, the constitutional text is law only insofar as—and is entitled to respect only to the extent that—it is a partially constitutive embodiment of the immanent reason that gives positive human enactments their status *as law*. By any of these accounts, the Constitution gets its status as law from something more ultimate or authoritative. And it would seem to follow that the Constitution is no more able than the President or the Supreme Court to render itself supreme by its own declaration.

This observation might seem to present a minor wrinkle that is easily smoothed over. Fine, Lawson might acknowledge, if we want to be finicky, it is true that the supreme authority in this country is, say, “We the People”—not the constitutional text itself. But that acknowledgment does not affect the present argument, because the fact is that “We the People” *have* declared that the Constitution/text is the supreme law; we have declared it *in the text itself* (as Lawson construes it). Or he might acknowledge that the Constitution is law because a “rule of recognition” deems it such; but the important point is that in the American legal system, the “rule of recognition” *does* deem the Constitution to be fundamental law.

This adjustment or clarification, however, is not as trivial as it may seem. This is because as soon as we acknowledge that the Constitution obtains its status as law from something more authoritative, then it follows that we can no longer dispose of the question of *stare decisis* merely by looking to the constitutional text and nothing else. We would need, it seems, to ask whether the practice of *stare decisis* is itself authorized by whatever it is that gives the Constitution its authority.

55. The “rule of recognition” account of legal validity is associated with Hart’s seminal work. See H.L.A. HART, *THE CONCEPT OF LAW* 94–95 (2d ed. 1994). For an effort to identify the rule of recognition operative in the American constitutional system, see generally Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621 (1987) (exploring and amplifying Hart’s theory).

56. Reid, *supra* note 16, at 51.

Suppose, for example, that we think the Constitution is authoritative because it is recognized as such by a “rule of recognition” discernible in the behavior of officials. That same complicated rule, discernible in that same behavior, might (and almost surely *does*) also assign a limited legal authority to judicial precedent; and Lawson effectively admits as much.⁵⁷ But in that case, it would seem that stare decisis is legally secured on the same basis as the Constitution itself.⁵⁸ Or suppose that the Constitution is authoritative because it expresses the will of “We the People.” If “We the People” have approved of the practice of stare decisis, then once again the legitimacy of the practice would be grounded in the same source in which the Constitution itself is grounded.⁵⁹

It is possible, of course, that this deeper or more ultimate authority would itself disapprove of stare decisis; in that case, Lawson’s conclusion would be correct, though not for quite the reasons he himself gives. Steven G. Calabresi argues, for example, that the American constitutional tradition, as reflected in modern Supreme Court precedent, itself establishes the priority of the constitutional text over inconsistent precedent.⁶⁰ Though paradoxical (because it amounts to saying that text prevails over precedent because the precedents say so), this argument, *if* persuasive,⁶¹ might still lead us to Lawson’s conclusion. But even if one accepts Calabresi’s (and Lawson’s) conclusion, that conclusion would no longer be derived from the kind of purely textual argument advanced by Lawson.

57. See Lawson, *supra* note 17, at 3–6, 9–11.

58. It is conceivable that a rule of recognition might support subordinate rules of validity that contradict each other. The rule might (and arguably *does*) prescribe that the Constitution be treated as supreme law but also that constitutional precedents should be given weight, even when the precedents misconstrue the Constitution. Lawson offers no recommendations for resolving this sort of conflict and neither will I.

59. Kurt T. Lash argues that constitutional stare decisis is justified (subject to a variety of qualifications that Lash discusses) on popular sovereignty grounds, and he explains that Madison himself favored deference to precedent on such grounds. Kurt T. Lash, *Popular Sovereignty, Originalism, and Reverse Stare Decisis* 3–5 (Loyola-L.A. Law Sch. Legal Studies, Paper No. 2006-43, 2006), available at <http://ssrn.com/abstract=948584>.

60. Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 637 (2006).

61. I italicize the “if” because Calabresi’s argument asks much of the reader; among other things, it asks the reader to believe that *Lawrence v. Texas*, 539 U.S. 558, 563, 578 (2003), was a departure from precedent and a return to a stricter adherence to the constitutional text. Calabresi, *supra* note 60, at 680–83.

C. *Meaning Versus Authority?*

But perhaps Lawson would brush away these ruminations with a disdainful sweep of the hand. He is not purporting to say, he might insist, whether courts should practice stare decisis in constitutional cases, or whether stare decisis is authorized by whatever it is that gives the Constitution its status as law. Those questions relate to the problem of *governance*, perhaps, or to the question of *authority*. His own more humble inquiry, by contrast, is merely into the question of *meaning*.⁶² So it might turn out that “We the People”—or the natural law, or the “rule of recognition”—permit or even command the practice of stare decisis. That conclusion would simply mean that in this respect, courts are perhaps required to disregard what the Constitution says and to take their marching orders from some other source. But the constitutional meaning itself would be unaffected. “The Constitution means what it means,”⁶³ and Lawson declares himself interested only in discovering what that meaning is.

Lawson’s proffered distinction between the *authority* and the *meaning* of the Constitution raises complicated questions that cannot be fully explored here. On one level, the distinction seems intuitively sound. We can talk about the meaning of various writings—the newspaper, the grocery list, Lawson’s article—without supposing that those writings have any legal authority at all. So what a writing means and whether that writing has legal authority *appear* to present separate questions.

But then we must always remember that it is *the Constitution* we are expounding, or at least expounding on. As Lawson himself tacitly concedes, the fact that the document under consideration is the Constitution must inform our approach to interpretation itself.⁶⁴

62. See Lawson, *supra* note 17, at 14–15 & n.47 (distinguishing between questions of “meaning” and questions of “authority”); *id.* at 17–18 (distinguishing between questions of “interpretation” and questions of “governance”).

63. *Id.* at 15.

64. See *id.* at 14–16.

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).

More specifically, with respect to a document drafted to be and accepted as a legally authoritative instrument, any sharp distinction between authority and meaning becomes problematic.

This is because the Constitution gains legal authority, in one common view, from the fact that it was enacted by the People. But what the People enacted was not a set of marks on a page, but rather a legal instrument—a *meaningful* legal instrument.

Indeed, hardly anyone who voted for or accepted the Constitution (including any of the various amendments) as law will even have seen the exact page with the exact marks of any official document. Ratifiers and citizens generally may have seen the words written in any number of forms, typescripts (or calligraphy), or colors of ink. Some may not have read the precise words at all, but rather may have voted yea or nay on the basis of summaries, paraphrases, or explanations. Some, more fluent in French or German or Spanish, may have read and pondered the Constitution in translation. None of that mattered—not in any essential way—because what was being enacted was not the *marks*, but rather the *meanings*: it was those meanings that were elevated to the status of law. To abstract the text from the source of its authority, therefore, has the result that it is no longer *the Constitution*—the legal bearer of *meanings* that goes by that name—that is being interpreted.

This statement of the problem makes the point from the perspective of the Constitution's enactors and ratifiers, but we can just as easily express the problem from our own perspective. If we are interested in the Constitution not as a random text but rather *as an authoritative legal instrument*, and if it gets its quality as an authoritative legal instrument from its status as an expression of enactors, or of "We the People," then to separate meaning from authority is to separate the text from what made it interesting to us in the first place. To insist on the distinction is tantamount to changing the subject of discussion—to saying, in effect, that "a document written in 1787 and worded similarly to the Constitution, but not

Id. at 14–15 (emphasis added). Later in the same paragraph, however, Lawson seems to relinquish the insight, suggesting that "the Constitution [should be] interpreted the same way that any normal person would interpret an eighteenth-century manual for constructing a compost heap." *Id.* at 15. But a manual for constructing a compost heap is a radically different sort of thing, it would seem, and would likely have quite a different character, than a document establishing a complicated and enduring governmental structure.

operating as a legal instrument with legal authority, would mean X.”⁶⁵ But of course no one is interested in *that* (fictional) Constitution; lawyers, judges, and scholars are interested only in *the legal Constitution*—or, in other words, the Constitution viewed as an expression of the meanings adopted by “We the People.”

This brief comment can hardly claim to settle the issues raised by Lawson’s *prima facie* plausible distinction between authority and meaning. But it is enough to suggest, I hope, that we should be wary about allowing that and related distinctions deployed by Lawson to alienate the question of constitutional meaning from everything that motivates us to ask about, and care about, constitutional meaning in the first place.

CONCLUSION

Just how *stare decisis* ought to be practiced—and when, and why—will surely remain debated matters. The Articles in this symposium constitute a valuable contribution to that debate. There is one thing, however, that they do not seek to do or, in any event, do not succeed in doing: for better or worse, the articles do not demonstrate that the practice of precedent in constitutional cases is exempt from the same considerations that govern the general debate.

65. The point is engagingly developed in Paul F. Campos, *Against Constitutional Theory*, in *AGAINST THE LAW* 116 (Paul F. Campos, Pierre Schlag & Steven D. Smith eds., 1996).