LAWSON'S AWESOME (ALSO WRONG, SOME)

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It is always fun, and a rare treat (for me, at least), to be attacked *from the right.* Professor Gary Lawson has me down as a stark-raving *moderate.* According to Professor Lawson, my proposition—that Congress may abrogate the judicial doctrine of *stare decisis* in constitutional cases[1]—is, absolutely sound as a matter of present doctrine(!)[2] but wrong as a matter of the original meaning of Article III and the Necessary and Proper Clause (which Lawson calls the "Sweeping Clause," after founding-era practice rather than current shorthand).

Professor Lawson's argument, in a nutshell, is as follows. Major premise: The Sweeping Clause precludes enactment of laws that are not "proper" for carrying into execution the powers of another department, including (and this is the key) laws that interfere with those departments' autonomous exercise of their enumerated functions, unless the Constitution specifically permits it.[3] Minor premise: "The judicial Power" of Article III includes "the power to reason to the outcome of a case."[4] Conclusion: "Even if the courts are applying a wrongheaded, or even unconstitutionally wrongheaded, method of decision-making, the Sweeping Clause does not empower Congress to prescribe a different process."[5]

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1. Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 Yale L.J. 1535 (2000).

2. Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 Const. Comm. 191, 200 (2001). ("Professor Paulsen devotes much of his analysis to a demonstration that his proposed precedent-restricting statute is consistent with long-established doctrinal understandings about congressional power to regulate the judicial process. *He is entirely right about this.*") (emphasis added, footnote omitted).

3. Id. at 199.

4. Id. at 210.

5. Id. at 211.

Under Lawson's admirably relentless reasoning, Congress cannot "properly" pass a statute forbidding courts to decide cases on the basis of coin flips, or the color of litigants' skin, or on the basis of vote-swapping or vote-selling. Congress simply has no power to pass *any* laws that affect the process of judicial case-deciding, other than to prescribe (some) rules of procedure.[6] (This is an important concession, as we shall see.)

This does not mean that courts can do whatever they want. It just means that the only constitutionally permitted *remedies* for outrageous or even unconstitutional misuses of the judicial power by the courts are, according to Lawson, (1) impeachment; and (2) executive refusal to enforce such decisions (in some circumstances). These are big sticks, and, judging from his other writings, Lawson apparently would wield them quite aggressively: He thinks that *stare decisis* is unconstitutional,[7] that the impeachment power is quite broad,[8] and that the President rightfully may refuse to execute clearly unconstitutional decisions of the judiciary.[9] Putting these views together, it would seem to follow that it is constitutionally "proper" (in Lawson's world) for Congress to impeach a judge who regularly follows prior precedent rather than the original public meaning of the Constitution's text, where the conflict between precedent and original meaning is clear. Put starkly, Congress may impeach judges for following *stare decisis* to reach results that they otherwise would be persuaded are wrong on originalist premises. In addition, the executive legitimately may refuse to enforce wrong judicial decisions that rely, wrongly, on *stare decisis*.[10]

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6. Id. at 210, 224.

7. Id. at 228-29. For Professor Lawson's argument that the doctrine of *stare decisis* is unconstitutional, see Gary Lawson, *The Constitutional Case Against Precedent*, 17 Harv. J.L. & Pub. Pol'y 23 (1994). Cf. Paulsen, 109 Yale L.J. at 1548-49 n.38 (cited in note 1) (distilling this argument and collecting authorities).

8. Gary Lawson and Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L. Rev. 1267, 1309-13 (1996).

9. Id. at 1324-26.

10. I am not absolutely sure whether Lawson would find it legitimate to decline to enforce judicial judgments that rest on *stare decisis*, because he does not explicitly say so. But this conclusion seems to follow from the clarity of the constitutional case against precedent, as sketched by Lawson (and Lawson generally can be counted on to follow his premises where they lead him): Professor Lawson's standard for "executive review" of judicial judgments is whether the President has "*a very high degree of confidence*" that they are unconstitutional. Lawson, 18 Const. Comm. at 42 (cited in note 2). See also Lawson and Moore, 81 Iowa L. Rev. at 1324-26 (cited in note 8). And Professor Lawson has a very high degree of confidence that the doctrine of *stare decisis* is unconstitutional. See Lawson, 17 Harv. J.L. & Pub. Pol. at 24 (cited in note 7). A fully informed Lawsonian President therefore would seem authorized (if not obliged) to nullify judicial decisions that rely on *stare decisis* to reach results contrary to the original public meaning of

But nonetheless—now, let me get this straight, Gary—Congress and the President *cannot* enact a statute purporting to oblige the judiciary to decide federal cases in conformity with these principles, the violation of which properly could subject the judges to impeachment and lead the executive to refuse to enforce the judgments thus rendered?! It is an *unconstitutional* intrusion on the province of the judiciary to pass a statute stating correct principles of constitutional law, but *constitutional* to hang the judges for departing from those principles?

Professor Lawson is also forced by his view of the Sweeping Clause to conclude, quite cheerfully, that many congressional regulations of judicial practice, including standard-of-review provisions of the Federal Rules of Civil Procedure, the Administrative Procedure Act, and the organic acts of many agencies, are all probably unconstitutional, the product of twentieth-century legislative adventurism.[11] Also unconstitutional are Federalist-era congressional usurpations like the Full Faith and Credit Act (1790) and the Anti-Injunction Act (1793). Only the Rules of Decision Act escapes the sweep of Lawson's sweepingly narrow view of the Sweeping Clause, but only because Lawson thinks it "an exhortation rather than a regulation," being merely "declaratory" of what the Constitution requires in any event.[12] Thus it is that I have betrayed true principles of originalist constitutional interpretation and fallen into the abyss of mere sound doctrinal exposition, by saying that Congress can abrogate *stare decisis*: "Professor Paulsen has history, practice, and doctrine on his side. Indeed, he has everything except the Constitution."[13]

As usual, Professor Lawson's writing is brimming with brilliant insights. I suppose I should be satisfied with Lawson's conclusion that the legal world can reject my position that Congress may abrogate *stare decisis* by statute only by repudiating so much else it holds dear, and just leave it at that. With enemies like Lawson, who needs friends?

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the Constitution.

(I actually agree with Lawson on all of these points—except, of course, for his weak-kneed limitation of executive review to cases of "clear" judicial error. See Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 Minn. L. Rev. 1337, 1357 n.67 (1999). My argument that Congress possesses power to abrogate *stare decisis* by statute does not, however, depend on these premises. I am engaging Lawson here on his own premises.)

11. Lawson, 18 Const. Comm. at 223 (cited in note 2).

12. Id. at 217.

13. Id. at 200.

But I'm greedy. I want more: I want the originalist-purists, too. And I think I should be able to get them, because this time I've got Lawson dead to rights: His two key concessions—first, the nuclear alternatives of impeachment and nonexecution as constitutionally *legitimate* checks on the courts; and second, the legitimacy (or at least harmlessness) of the Rules of Decision Act as a statute declaratory of what should be understood as the proper constitutional rule in any event—give away the whole ballgame.

I. THE IMPEACHMENT AND NONEXECUTION CONCESSIONS

I wish Lawson had said more about his wildly provocative, but eminently defensible, twin points that Congress may impeach federal judges for disregarding the Constitution in favor of erroneous judicial precedents, and that the President may disregard judicial decisions that reflect such disregard, at least in fairly clear cases. But I will leave these points to the provocateur, for present purposes.[14]

My point here is less sweeping (so to speak): Why could not a statute directing federal judges to apply the Constitution, statutes, and treaties of the United States, rather than erroneous judicial interpretations of them, be thought "necessary and proper" for carrying into execution the *impeachment* and *nonexecution* powers *of Congress and the President*, respectively, by laying the groundwork, or predicate, for the exercise of these more drastic checks on an errant judiciary? Isn't it "proper" to fire a warning shot across the bow, before dropping The Big One on the judiciary? Isn't the judgment of the necessity for doing so pretty much committed to Congress, under the approach of *McCulloch v. Maryland*?[15] Isn't the message implicitly conveyed by a statute abrogating *stare decisis* that it is Congress's view that such a statute, not the judicial doctrine of *stare decisis*, marks the true path of judicial duty? Does such a message have to come coupled with an overt threat of impeachment in order to fall within Congress's constitutional power to legislate?

Since more than a few readers might not accept the idea that *stare decisis* is actually unconstitutional, let me return to my

14. His arguments are laid out fairly extensively in Lawson and Moore, 81 Iowa L. Rev. at 1311, 1324-29 (cited in note 8). You can look it up.

15. 17 U.S. (4 Wheat.) 316 (1819).

more humble example: Congress passes a statute prohibiting coin-flips as a way of deciding judicial cases. If one prefers, make the hypothetical sharper by adding a provision declaring that deciding a case in such a manner may well be regarded by Congress as an impeachable offense. (Congress probably can't *bind* in advance, by statute, the separate judgments of the House, to impeach, and the Senate, to convict, for such an offense, but just play along with the hypothetical for a moment.) Does the no-coin-flips statute exceed Congress's power under the Sweeping Clause? If not, what distinguishes a statute abrogating *stare decisis*?[16]

I can't think of a way for Lawson to wriggle out of this trap, but he's a clever guy, and I'd like to see him try. The short point is this: Once one concedes that some modes of judicial decisionmaking are so out-of-bounds as to be grounds for executive nonenforcement and even impeachment, then a law regulating or prohibiting such modes of judicial decisionmaking can readily be conceived as falling within the Sweeping Clause, as necessary and proper for carrying into execution these other powers for checking judicial violations of the Constitution. And if *stare decisis* is thought to be one of those unconstitutional modes (as Lawson argues), then a law prohibiting it is likewise necessary and proper for carrying into execution these other powers. Thus, under my premise that *stare decisis* is not constitutionally required, Congress may abrogate the mere judicial policy of *stare decisis*. And under Lawson's premise that *stare decisis* is affirmatively unconstitutional, it is surely "proper" for Congress to enact a statute barring its use by the judiciary.

II. THE RULES OF DECISION ACT CONCESSION

Just about every congressional statute ever passed that regulates how cases are decided by courts is unconstitutional,

16. Just as Congress could pass a statute barring coin flips, on the ground that it would regard such a process of judicial decision-making as quite possibly presenting an occasion for exercise of the impeachment power (notwithstanding that the process of deciding cases is an exclusively judicial power), so too it could pass a statute banning the president from exercising one of *his* plenary powers in what Congress regards as an arbitrary or corrupt manner (such as, the granting of presidential pardons in return for campaign contributions or silence in a criminal investigation of the president, to conjure examples of equally unimaginable misuse of constitutional prerogative). In either case, the act of Congress wouldn't preclude defiance by the other branches, but would fall within the scope of the Sweeping Clause power of Congress to enact laws "necessary and proper" for carrying into execution its impeachment power.

Lawson argues.[17] The Rules of Decision Act[18] survives, however, because it is "an exhortation rather than a regulation, along the lines of 'decide cases correctly' or 'observe National Vinegar Month.'"[19] Such a declaration "does not change the legal landscape" and thus "does not implicate the principle of decisional independence."[20] It is therefore not unconstitutional for Congress to have passed such a *purely declaratory* law.

I am far less convinced than Lawson that the Rules of Decision Act is merely declaratory. But I will again accept his premise for the sake of argument, in order to see where the argument leads. I think it leads to this principle: *If instructions to courts as to how to go about deciding a class of cases are merely declaratory of correct constitutional principles that should apply in any event, it is not "improper" for Congress to embody such instructions in a declaratory statute.* I take this to be what Lawson is saying in his no-harm-no-foul treatment of the Rules of Decision Act. If that is right, and if (as Lawson believes) *stare decisis* is unconstitutional, why is it beyond Congress's power to direct courts to apply the Constitution, rather than judicial interpretations thereof, in the event of a conflict between the two? Isn't such a statute a "choice of law" provision almost precisely analogous to the Rules of Decision Act? Isn't it purely declaratory?[21]

This brings me back to Lawson's interpretation of the Sweeping Clause. Can a law be "necessary and proper for carrying into execution" the judicial Power if it directs the courts to do what the Constitution (rightly construed) directs the courts to do in any event? Yes—certainly yes, if a declaratory Rules of Decision Act is constitutional (and Lawson thinks it is).[22] Such a

17. Lawson, 18 Const. Comm. at 211 (cited in note 2).

18. 28 U.S.C. § 1652 ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.")

19. Lawson, 18 Const. Comm. at 223 (cited in note 2).

20. Id. at 217.

21. A different type of objection might be that a statute abrogating stare decisis would *either* be redundant (if Lawson's views on *stare decisis* are correct) *or* an unconstitutional infringement on judicial autonomy (in any other case of a statute regulating the processes of judicial decisionmaking). But Lawson appears to have no problem with redundancy. Declaratory statutes are just fine. Id. at 217 and n.94 (citing *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 162 (1987) (Scalia, J., concurring) (collecting early cases taking the view that the Rules of Decision Act is declaratory of what would be the proper rule in any event).

22. Id. at 217.

statute is "proper" unless it interferes with decisional independence, and it does not interfere with decisional independence if it does not alter judicial obligation *rightly construed.* Whether it is "necessary" is a different question. But necessity is largely a matter of congressional judgment.[23]

Surely Congress may judge declaratory statutes to be reasonably calculated to assure the legitimate end of courts properly performing their constitutional tasks Sometimes courts need reminders of what should be obvious. Sometimes a point might not be so obvious after all. Sometimes it is good to clarify a point of possible misunderstanding, out of an abundance of caution.[24]

In any event, Congress may deem it "proper" to express its view through enactment of a statute embodying that view. (Once again, doing so could be a first step appropriate to the exercise of more drastic powers, like impeachment.) If the view embodied in Congress's statute is *wrong* as a matter of the constitutional question at hand, the courts of course are free (indeed, obligated) to disregard it. That, of course, is the holding of *Marbury v. Madison.*[25] In such a case, the statute is unconstitutional not because *any and all statutes declaring judicial obligation* exceed Congress's power under the Sweeping Clause, but because *this one* is substantively unconstitutional. And conversely, if the view embodied in Congress's statute is *not wrong*, it does not violate the Constitution for Congress to enact it in the form of a declaratory statute, if Congress thinks it useful to promoting a constitutionally legitimate end to do so.

So, with all due respect to Professor Lawson (and much respect is due), I must quibble with his conclusion that, since

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23. *McCulloch*, 17 U.S. (4 Wheat.) at 413-14. Actually, Professor Lawson might dispute this, too. Lawson, 18 Const. Comm. at 199 n.37 ("All of the relevant inquiries under the sweeping clause are objective; the Constitution does not commit interpretation of the sweeping clause exclusively to Congress."). I am not prepared to dispute his disputation here, and perhaps we do not disagree at all, if I cast the point in more precisely Lawsonian lingo: The Constitution does not supply a rule of law that would justify judicial invalidation of Congress's judgment, within broad bounds, of the necessity of a particular measure for carrying into execution a power of Congress or another Department.

24. Thus the Latin legal maxim, *ex abundanti cautela.* See *Fort Stewart Schools v. Federal Labor Relations Auth.*, 495 U.S. 641, 646 (1990).

25. 5 U.S. (1 Cranch) 137, 176 (1803). Not that anybody (except Gary Lawson!) thinks it necessary, but I have defended the correctness of *Marbury*'s reasoning, as an original matter, in other writings. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Georgetown L.J. 217, 228-62 (1994). See Lawson, 17 Harv. J.L. & Pub. Pol. at 26, n.12 (cited in note 7) (emphasizing that his citing of *Marbury* is for its persuasive value only).

"[t]his declaratory role was understood in the founding era . . . the Rules of Decision Act therefore does not reflect any underlying theory of the sweeping clause."[26] Huh? Sure it does: The fact that such a declaratory statute would have been widely understood as not improper means that congressional statutes declaratory of constitutionally proper rules of judicial decision-making are within the power of Congress to enact. The Rules of Decision Act demonstrates that the Sweeping Clause permits Congress to enact statutes that declare and enforce correct constitutional rules, including rules that touch on the exercise of the judicial office. And if *that* principle is correct, Lawson should have no problem with a statute declaring that judges should not apply what Lawson believes is the unconstitutional doctrine of *stare decisis*.

My original argument was a bit narrower: that, whether or not the doctrine of stare decisis is unconstitutional, it is at least *not constitutionally required*, and is thus a matter of mere judicial policy that Congress has authority to alter by statute.[27] But if Lawson is right in saying that the practice of *stare decisis* is not only constitutionally unnecessary, but constitutionally improper, then the case for the validity of a statute abrogating *stare decisis* is all the stronger. And if he is right in saying that the Constitution permits impeachment and nonenforcement as remedies for clearly wrong judicial decisions, then the case for the validity of a mere statute seems all the stronger yet. In short, Lawson's premises, if accepted, only *strengthen* my argument, at every point (in addition to making it seem "moderate" by comparison).

III. WHY, GARY, WHY?

Why does Awesome Lawson, whose infidelity to conventional constitutional wisdom is otherwise so impressive, worship at the idol of judicial autonomy to employ even "unconstitutionally wrong"[28] methods of constitutional decision-making, at least as far as Congress's power to do anything about it through legislation passed pursuant to the Necessary and Proper Clause is concerned? Why does Lawson, whose formalism is otherwise so relentless, become the most fuzzy-wuzzy of functionalist-pragmatist-balancers (if I may be so insulting) when he says that

26. Lawson, 18 Const. Comm. at 217, n.94 (cited in note 2).
27. Paulsen, 109 Yale L.J. at 1543 (cited in note 1).
28. Lawson, 18 Const. Comm. at 194-95 (cited in note 2) (emphasis deleted).

"circularity is common, and unavoidable, in many separation-of-powers contexts"?[29] I barely recognize the Pharaoh of Formalism when he concedes, in a string of situations, that "one cannot avoid the exercise of judgment based on shades and degrees."[30]

Shades and degrees?! Under Lawson's fuzzy Constitution, the "nondelegation doctrine" forbids the delegation by Congress of policy decisions that are important enough that Congress should make them.[31] An "officer" or "principal officer" under Article II is someone whose responsibilities are important enough to deserve such a label.[32] Whether procedural rules "slip into substantive regulations of judicial decision-making . . . must be assessed on a case-by-case basis to determine whether they *unduly regulate* the decision-making process."[33] Whether a statute interferes with executive power depends on whether it "unduly interfere[s]" with executive power. And adjudication of substantive due process claims calls on courts "to exercise that same capacity which by tradition courts always have exercised: reasoned judgment."

Okay, Lawson did not actually say these last two. I made them up, just to be mean. Only the Supreme Court possibly could say such things and really mean them.[34] But the logic of Lawson's "proper"-means-in-accord-with-background-understandings-of-separation-of-powers-and-federalism-and-individual-rights reading of the Sweeping Clause *does*—as he comes dangerously close to conceding—tend to create a free-float of "constitutional values" for deciding cases.[35] It is hard to distinguish such a "springboard" methodology from that which liberal-activist judges have used with the Due Process Clause. Say it ain't so, Gary!

I submit that the "proper" approach to separation-of-powers questions is to ascertain whether the text of the Constitution supplies a *rule*, either through a specific provision or as a necessary deduction from its structural arrangements, that invalidates a particular political choice or that commits that choice

29. Lawson, 18 Const. Comm. at 225 (cited in note 2).
30. Id.
31. Id.
32. Id.
33. Id. (emphasis added).
34. Compare *Morrison v. Olson*, 487 U.S. 654, 693-696 (1988); *Planned Parenthood v. Casey*, 505 U.S. at 849.
35. Lawson, 18 Const. Comm. at 199 (cited in note 2). For a more detailed criticism of this methodology, as applied to separation-of-powers questions, see Paulsen, 109 Yale L.J. at 1580-82 & n.121 (cited in note 1).

to a different decisionmaker, and then to apply the logic of such rule rigorously and relentlessly. This is what I would have thought my sometime hero, Gary Lawson, would do. A true Lawsonian formalist would find an independent counsel statute (or independent agencies) unconstitutional, not because they interfere "too much" with executive power, but because the power violates the clear constitutional text that the executive power is to be vested solely in "a President" and because law-execution is almost incontestably an executive power.[36] A true Lawsonian formalist would find that there *isn't* any "nondelegation doctrine" in the Constitution because the document contains no rule that states how specific Congress's policy determinations need be and how much may be left to execution by the Article II branch.[37] A true Lawsonian formalist would conclude that the Constitution fails to state a rule concerning what is required for "officer" or "principal officer" status, leaving Congress lots of room to decide these things as it thinks best. And a true Lawsonian formalist would conclude that there is no line distinguishing Congress's power to regulate matters of judicial "procedure" from power concerning "decision-making methodology," but only a sweeping power of Congress to enact laws for carrying into execution the judicial power.

The answers to separation-of-powers questions do not call for "the exercise of judgment based on shades and degrees." They call for the principled derivation of sound categories and for categorical, deductive reasoning.

This is exactly what Professor Lawson used to say. Consider this passage from a 1990 article in part about good formalist methodology:

> *Formalism*, at least in my hands, is an application of originalist textualism to questions of constitutional structure. Defined more precisely, formalism consists of a substantive principle of interpretation ('Resolve separation of powers questions using only the text, structure, and background of

36. Steven G. Calabresi and Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541 (1994). It is a significant concession on Lawson's part to say that there is no comparable clear rule as to the meaning of "the judicial Power." Lawson, 18 Const. Comm. at 202-03 (cited in note 2). If it cannot be said that the Article III judicial power entails an autonomous power to prescribe a doctrine of *stare decisis*, or itself provides a rule of *stare decisis*, a congressional statute abrogating the doctrine is simply not analogous to an (unconstitutional) act vesting unreviewable executive power in someone other than the President of the United States.

37. Such a delegation must be *to* the Article III branch, however. *Mistretta v. United States*, 488 U.S. 361, 416-17 (1989) (Scalia, J., dissenting).

> the Constitution, applying late eighteenth-century America as the locus of meaning for those interpretative variables') and a primary inference ('The vesting clauses divide otherwise unallocated federal governmental authority into three kinds of functions and fully distribute it among three distinct sets of institutions').[38]

Lawson then proceeded to contrast formalism with functionalism, where "the question of blending is treated as one of degree rather than, as with formalism, one of kind."[39] How far Cro-Magnon, Formalist Lawson has "evolved" in just a decade to Balancer Lawson! Apparently, constant bathing in the pool of legal academia has resulted in a certain degree of softening of the skin.

Truth be told, I do not really fear that Lawson has grown squishy in his principles. I say these things only to needle and provoke my friend, and to make a closing point: True formalist principles lead to my conclusion, not Lawson's. The Constitution simply does not create an autonomous power of judicial policy-making that authorizes courts to place matters of judicial policy and administration ahead of decision in accordance with the law. And if the Constitution doesn't confer such a power on the courts, then it is both proper and necessary for Congress to pass a statute telling the courts that they can't just go off and make up such a power on their own.

38. Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 Cal. L. Rev. 853, 859-60 (1990).

39. Id. at 860.