

Sodomy Laws

Can the Supreme Court Change Its Mind?

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By Kenji Yoshino

NEW HAVEN—How does the United States Supreme Court correct its mistakes? On Monday the court agreed to hear *Lawrence v. Texas*, a case involving the conviction of two men for private consensual sexual conduct under a Texas sodomy statute. In doing so, the court signaled its willingness to reconsider the 1986 case of *Bowers v. Hardwick*, which held that the constitutional right of privacy does not protect such conduct. The current case thus raises interesting questions about when the Supreme Court can overrule its own precedents.

Many believed the *Bowers* case to be wrong the day it was decided. Two days after the decision was rendered, *The New York Times* called it "a gratuitous and petty ruling." Protesters staged demonstrations throughout the United States, including what was at the time the largest act of civil disobedience ever at the Supreme Court. Even Justice Lewis Powell, who cast the deciding vote in the 5-4 decision, admitted several years later that he believed he made a mistake in joining the majority.

Assuming the *Bowers* case was wrongly decided, how should the court respond? The American judicial system requires lower courts to follow Supreme Court pronouncements even if they believe they are wrongly decided. Judge Stephen Reinhardt, who serves on the United States Court of Appeals for the Ninth Circuit, complied with the *Bowers* decision in a 1988 opinion—even though he likened *Bowers* to *Plessy v. Ferguson*, the infamous 1896 case that upheld the constitutionality of "separate but equal" accommodations on the basis of race.

The question then arises whether there are any practical constraints on the capacity of the Supreme Court to overrule itself. Can the court overrule a precedent simply because it believes the prior case to have been incorrectly decided?

In a 1992 case, *Planned Parenthood v. Casey*, the court answered no, stating that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." The court went on to outline four factors to be considered in making the decision to overrule itself: the workability of the rule, the extent

to which the public has relied on the rule, relevant changes in legal doctrine, and changes in facts or perceptions of facts.

But these constraints are less relevant—and less restrictive—than they appear. First, there is something puzzling about requiring more of the court than a frank admission that it incorrectly interpreted the Constitution in a prior case. No court can be infallible, and public confidence in the court will not diminish if the court admits this fact.

Second, it is doubtful that the test described in the *Casey* case will ever actually constrain the Supreme Court from overruling a case it finds patently erroneous. In looking not just at whether facts have changed but whether perceptions of facts have changed, this test arguably permits the Supreme Court to overrule precedent whenever the justices come to see things differently. Thus the court need not admit past mistakes explicitly. The *Casey* test will be problematic if it constrains—and obfuscatory if it does not.

When Justice Powell admitted that he made a mistake in the *Bowers* case, the man who argued and lost the case for the gay plaintiff reacted generously. "I think it's an admirable thing," observed Laurence Tribe. "All of us make mistakes, and not all of us are willing to admit them."

It may be that it is easier for an individual to admit error than it is for an institution. This reluctance to confess past mistakes is especially pronounced in the judiciary, whose legitimacy and power depend on public trust in its pronouncements. Yet it needn't be so. While acknowledging the importance of consistency, we can also ask whether the court's authority would be diminished through greater candor. The answer is no.

Americans know that fallible individuals cannot come together to form infallible institutions. If the current Supreme Court agrees with Justice Powell that the *Bowers* case was incorrectly decided, that should be enough reason for it to say so.

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