

Is *Lawrence* Still Good Law?

EDWARD B. FOLEY*

Whether Lawrence is overruled by a future Court, as Bowers was in Lawrence, depends on whether President Bush is successful in appointing to the Court justices who share Justice Scalia's jurisprudence. It would be preferable to have a more robust doctrine of stare decisis, which would require all justices to abide by precedents that they consider incorrect. Otherwise, constitutional law will lose its ability to serve as a check against a tyranny of the majority, because the public will perceive constitutional law as dependent on the identity of the justices who sit on the Court and will insist that the justices share the public's prevailing sentiments.

Is *Lawrence v. Texas*¹ still good law? In a sense, what an odd question to ask. *Lawrence* is the most recent pronouncement by the U.S. Supreme Court on one of the most basic principles of American constitutional law, as that case was decided the very last day of the October 2002 Term. Yet, in a much more important and fundamental sense, none of us today has any idea whether *Lawrence* is still good law because that decision—like any decision in which Justices Scalia and Thomas dissented—is inherently unstable (and thus unreliable as precedent), pending the outcome of the presidential election. If President Bush is reelected and true to his word about his intent to appoint more Scalias and Thomases to the Supreme Court, then—pending the outcome of the intense confirmation battles that inevitably will follow—all could change.²

Lawrence overruled *Bowers v. Hardwick*,³ but there is no doubt that Scalia and Thomas, if given the opportunity, would quickly overrule *Lawrence* and reinstate *Bowers*. And there is no doubt that Scalia and Thomas will get this opportunity if three justices who share their jurisprudential views join the Court, as replacements for Justices O'Connor and Stevens and Chief Justice Rehnquist. They may not get this opportunity in another sodomy case right away. Rather, the opportunity could come in a gay adoption case,⁴ or a military case,⁵ or some other fact pattern. But in any such event, a five-member majority comprised of Scalia,

* Robert M. Duncan/Jones Day Designated Professor of Law, Moritz College of Law at The Ohio State University.

¹ *Lawrence v. Texas*, 39 U.S. 558 (2003).

² This essay, written before the election, goes to press shortly after President Bush's victory. Its contemplation of a five-member majority of the Court sharing a Scalia/Thomas jurisprudence is even more appropriate now that the Republicans have secured 55 seats in the Senate, and the difficulty of a Democratic filibuster even greater.

³ *Lawrence*, 539 U.S. at 578 (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

⁴ See, e.g., *Lofton v. Sec'y of the Dep't of Children & Family Services*, 358 F.3d 804 (11th Cir. 2004).

⁵ See, e.g., *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).

Thomas, and like-minded justices would eviscerate *Lawrence* and, most probably, even overrule it explicitly.

Thus, the only way to protect *Lawrence* from being overruled the way *Bowers* was—apart from making sure that Senator John Kerry defeats Bush—is for the Democrats in the Senate to be successful in using the filibuster, or the threat of a filibuster, to stop a reelected President Bush from appointing more Scalias and Thomases to the Supreme Court. But even if such a filibuster strategy is successful in the short term, it is an unpalatable prospect to think that the future of American constitutional law depends on the exercise of an inherently obstructionist device. There are several reasons for this:

First, filibusters are inherently contentious, with the expectation that they are reserved for, as Thomas Mann has put it, “extreme” situations.⁶ As a result, whichever party is using the filibuster is necessarily on the defensive. Contrast this situation with one in which the Constitution clearly specifies that the President needs two-thirds vote of the Senate in order to get his way (as with a treaty).⁷ In that situation, there is nothing wrong with the Senators insisting that the President get the requisite supramajority support: in doing so, the Senate is exercising its expected constitutional function. By contrast, when the Constitution calls for advice and consent by a basic majority vote of the Senate,⁸ then the use of the filibuster—even if constitutionally permissible as part of the Senate’s internal deliberative process—is out of step with the Constitution’s expectations and thus is an inherently defensive and precarious posture, to be reserved for exceptional circumstances.

Second, and somewhat related, it will be difficult for Democrats to sustain a successful filibuster strategy over the long term. The Democrats, after all, did not filibuster the nomination of Justice Thomas, and he made it to the Court. The public may not tolerate the Senate’s refusal to vote up or down on the President’s nominees to the Supreme Court. The Democrats’ successful use of the filibuster over circuit court nominees,⁹ which has proceeded below the public’s radar

⁶ Thomas E. Mann, *Estrada Caught in ‘Poisonous’ War Based on Ideology*, ROLL CALL, Mar. 5, 2003, at 8.

⁷ U.S. CONST. art. II, § 2 (“He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”); *see also* U.S. CONST. art. I, § 3 (“The Senate shall have the sole Power to try all Impeachments. . . . And no Person shall be convicted without the Concurrence of two thirds of the Members present.”).

⁸ U.S. CONST. art. II, § 2 (“[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”).

⁹ The ability to block the President’s nomination of Miguel Estrada to the D.C. Circuit, despite his exemplary background (former Assistant to the Solicitor General, etc.), was the most muscle-flexing use of the filibuster so far. *Compare* Editorial, *Victory for a Smear*, WASH.

screen by and large, does not necessarily mean that the Democrats will be equally successful in blocking Bush's nominations to the Supreme Court. And, of course, the Democrats might simply make a mistake in letting slip through a nominee who turns out to be—contrary to their predictions—another Scalia rather than another Kennedy. Thus, the odds of sustaining a successful filibuster strategy diminish over time, and if Bush (or a similarly conservative Republican President) gets to appoint Ginsburg's replacement, as well as the replacements of the three others I mentioned, the odds of *Lawrence* remaining good law grow ever slimmer.

Third, and much more fundamentally, depending on the filibuster to protect the future of *Lawrence* exposes American constitutional law—at least its current form—as entirely dependent on the identity of the individuals who happen to sit on the Supreme Court. If we get our folks on the bench, then we get constitutional law to be the way we want it, but if we do not—and the other side gets to put its people on the Court—then constitutional law looks altogether different. Ultimately, the complete personification of constitutional law is not a sustainable vision, certainly not if constitutional law is supposed to perform its high—perhaps highest—function of protecting the rights of individuals and minorities against tyrannies of the majority.¹⁰ This is true because one of two things will occur to prevent the Court from exercising its crucial countermajoritarian function. One possibility is that the People simply will not tolerate the continued exercise of a countermajoritarian judicial review on the ground that the outcome of this review is altogether subjective and dependent on the identity of the particular judges doing the reviewing. (If the justices disagree about the outcome of constitutional cases simply because of their differing personal views, then the personal views of the People themselves are just as valid and are entitled to prevail.) Alternatively, judicial review will lose its countermajoritarian character by virtue of the fact that the selection process for appointing new justices will have devolved into an intensely majoritarian political dynamic. The fight between the President and the Senate—as a result of the polarizing forces within each party canceling each other out—will end up in the confirmation of middle-of-the-road consensus nominees who reflect majoritarian sentiment about the content of individual and minority rights.

A bench full of centrists who accurately reflect the median voter's vision of constitutional rights is not necessarily a bad form of democracy, but it is not the kind of republic our Constitution, with its written Bill of Rights, was designed to secure. The whole point of putting the Bill of Rights into the Constitution was so

POST, Sept. 5, 2003, at A20; with Editorial, *Miguel Estrada Bows Out*, N.Y. TIMES, Sept. 5, 2003, at A18.

¹⁰ The literature on the countermajoritarian function of the Court is large. Jim Fleming's thoughtful essay on "deliberate autonomy" would be as good as any place to begin. See James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1 (1995).

that it would be enforced, by honest judges immune from political pressure and exercising the relatively objective craft of legal interpretation, against majoritarian sentiment that might conflict with those rights.¹¹ A bunch of centrist judges who simply enforce the prevailing majority view does not conform to the animating vision of our Bill of Rights.

How then do we get out of this situation and, instead, secure for the Bill of Rights—and for *Lawrence* as an interpretation of the Bill of Rights writ large—a firmer footing? (This firmer footing would not require use of the filibuster to prevent a President from repealing a Supreme Court decision that interprets the Bill of Rights in a way with which he disagrees.) The only way out that I see is to strengthen considerably the doctrine of *stare decisis* in constitutional cases. If there could develop a norm that justices are not permitted to overrule previous interpretations of the Bill of Rights simply because they disagree with those interpretations—no matter how strongly they disagree with those interpretations—and the justices themselves feel compelled to abide by this norm, then the norm would thwart the ability of a President to appoint a justice with the view of overturning a decision the President and his party dislikes.

Ironically, *Lawrence* itself does not look so good from the perspective of a robust doctrine of *stare decisis* in constitutional cases. After all, *Lawrence* overruled *Bowers* essentially for the simple reason that *Bowers* was wrong. Really, really wrong, to be sure. But, essentially, for no other reason than that it was a serious misinterpretation of the Bill of Rights, properly understood.

Given more time, I could offer several arguments about why overruling *Bowers* in *Lawrence* was actually consistent with a robust doctrine of *stare decisis*, in much the same way that overruling *Gobitis*¹² in *Barnette*¹³ was.¹⁴ But I know that my arguments would not convince the likes of Justices Scalia and Thomas, who saw *Lawrence* as a wholly unprincipled and inconsistent manipulation of the doctrine of *stare decisis*. If *stare decisis* is to work as a norm that truly prevents justices from overruling cases with which they strongly

¹¹ James Madison himself made this point when he introduced the Bill of Rights in Congress:

If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

1 ANNALS OF CONG. 457 (1789).

¹² *Minersville School Dist. v. Gobbitis*, 310 U.S. 586 (1940).

¹³ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

¹⁴ Those were the two flag salute cases from the 1940s, and *Barnette* is the single most important case for setting forth the vision of judicial protection of individual and minority rights, as enshrined in the Bill of Rights, from tyrannies of the majority.

disagree, then these justices must perceive their ideological opponents on the Court as being equally bound by precedents they find abhorrent.

Thus, the only hope for securing *Lawrence* as a fixed feature of American constitutional law in the same way that *Barnette* is—so that Scalia and Thomas cannot overrule it no matter how strongly they might disagree with it—is for *Lawrence* to become woven into the fabric of constitutional law so tightly that it cannot be pulled out. A cluster of decisions needs to be built up around *Lawrence*, relying upon *Lawrence*, so that it is unassailable—like the incorporation doctrine is today. If that happens, and it also happens that the norm of a robust doctrine of *stare decisis* develops, then it is possible that future constitutional precedents interpreting the Bill of Rights will become protected against presidential assaults by virtue of this norm of *stare decisis*. Judicial interpretation of the Bill of Rights could then return to its intended countermajoritarian character, protecting individuals and minorities from tyrannies of the majority. To be sure, the body of precedent protected by *stare decisis* would have started with a majoritarian pedigree; it would have been put in place initially by centrist justices, like Kennedy and Breyer. But the written Bill of Rights itself had an initial majoritarian pedigree, as a result of the ratifying conventions. The whole point is to install a body of constitutional law that protects individual rights from future majorities that might become tyrannical, and that is a function a robust doctrine of *stare decisis* could perform with respect to a body of constitutional law that develops over time and includes *Lawrence*.

However, and this is the essential point, for the norm of *stare decisis* to protect the countermajoritarian character of judicial review, then in the future liberal justices as well as conservative justices need to abide by—and be perceived as abiding by—this norm. In this sense, there can be no more decisions like *Lawrence*, overruling a precedent (like *Bowers*) that the liberals dislike. Otherwise, the gloves will come off again, so to speak, and constitutional law will be up for grabs, depending entirely on who wins the presidency and whether liberals in the Senate can block a conservative president's nominations. And then, any judicial decision that interprets the Bill of Rights to protect individuals or minorities from majoritarian tyranny will become precarious once more, and the Bill of Rights will not be able to serve the function it was designed to serve. And it may not get another chance.