

Is Same-Sex 'Marriage' Next in the Supreme Court's Crosshairs?

Before the Court's official decision to overturn *Roe v. Wade* was released, President Biden was already warning that same-sex "marriage" would be next.

As he said in May, "It's not just the brutality of taking away a woman's right to her body ... but it also, if you read the opinion ... basically says there's no such thing as the right to privacy. If that holds ... mark my words: They are going to go after the Supreme Court decision on same-sex marriage." Was he right?

On the one hand, Justice Samuel Alito made clear in his opinion for the majority that the overturning of *Roe* was different than other cases the Court could one day revisit, since *Roe* involved "potential life." As David French explained, "In plain English, Alito argues that abortion is dramatically different from cases involving marriage, because abortion involves harm to a non-consenting party, the 'potential life' (to use the language from *Roe*) of the unborn child. Interracial marriage involves consenting adults. So does gay marriage. A person consents to using contraception. Prior cases protect consensual adult sexual activity."

On the other hand, in his concurring opinion in the *Dobbs* case, Justice Clarence Thomas urged the Court to revisit previous rulings on same-sex "marriage" and the use of contraception. He wrote, "In future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell* ..." This is, "Because any substantive due process decision is 'demonstrably erroneous,' [...] we have a duty to 'correct the

error' established in those precedents."

Personally, regardless of whose legal argument is right (in terms of Alito or Thomas), I do hope that the Court revisits the *Obergefell* ruling. But that is not because of animus I have toward gays and lesbians. It is simply because the Court had no business redefining marriage.

That decision should never have been in the hands of nine justices, nor is there any way under the sun our Founders would have countenanced such a thing. Could you even imagine how the signers of the Constitution would react to such a scenario?

"Gentlemen, are you comfortable with the idea that, based on the division of powers you have outlined, the Supreme Court could one day redefine marriage so that two men or two women could marry each other?"

The question itself would not have even qualified as a poor joke. It would have been too ridiculous (and, plainly, distasteful) even to draw a smile.

Not only so, but Justice Anthony Kennedy clearly underestimated the degree of backlash that would come against those who did not recognize same-sex "marriage" because of their religious convictions.

As Adam Freeman wrote already on July 1, 2015 (just one week after *Obergefell*), "During oral argument in *Obergefell*, Solicitor General Donald B. Verrilli, Jr., conceded that colleges and universities that oppose same-sex marriage could lose their tax-exempt status. 'It is going to be an issue,' he acknowledged. Justice Kennedy's opinion offered little solace on this front: a single paragraph of a 28-page opinion, in which he promises merely that religious individuals and organizations 'may continue to advocate' traditional marriage. But the First Amendment guarantees the right to the free exercise of religion, not merely the freedom to espouse a

religious view. If traditional churches are required to perform same-sex wedding ceremonies and religious schools are required to countenance same-sex marriage, surely they are not enjoying free religious exercise.”

He continued, “Already, a movement is afoot to silence religious opponents of same-sex marriage. Just two days after the Court’s ruling, journalist Mark Oppenheimer took to the pages of *Time* to argue for the total abolition of tax-exempt status for religious institutions. The American Civil Liberties Union, meanwhile, announced that it would no longer support the Religious Freedom Restoration Act (RFRA), a federal statute designed to protect Americans against laws that ‘substantially burden’ the free exercise of religion, for fear that RFRA will be ‘used as a sword to discriminate against women, gay and transgender people.’ Liberal outlets such as the Think Progress website, calling the law an expression of ‘anti-gay backlash,’ denounced Indiana’s recent attempt to enact its own version of RFRA.”

Freeman’s concerns have been realized, most of all in the court of public opinion. You have been codified by law as a bigot and a homophobe if you differ with the high Court’s ruling. It’s as simple as that.

Not only so, but the Court’s ruling went a long way in normalizing the very concept of same-sex “marriage,” backed, of course, by President Obama’s decision to light up the White House in rainbow colors in celebration.

To be sure, there would be a host of legal issues to address should same-sex “marriage” be reversed, perhaps going back to state-by-state votes on the issue, as with abortion in the aftermath of *Roe*. Some changes might even have to be grandfathered in. It would really be a massive conundrum, and I can’t imagine that couples who are recognized as legal today (many of them raising children together) would be deemed illegal tomorrow.

But, to repeat, the Supreme Court had no business redefining marriage, and like the *Roe* and *Casey* rulings, this was bad law, too.

As for the argument that “love is love,” that is not the issue here, since it’s not up to the Court to determine what is and is not loving. Plus, most all of us would agree that some relationships should not be recognized by the courts or by society, no matter how loving they might be. (Included in this list would be adult, consensual, incestuous relationships, such as two gay brothers or a father and his adult daughter.)

And as far as loving relationships go, I have no doubt that there are thousands of gay couples who love each other dearly and deeply, even sacrificially. In fact, the *Obergefell* case itself involves a very touching story.

I am also acutely aware of how much the Court’s ruling meant to same-sex couples throughout America, giving them a feeling of legitimization and respect.

I do not minimize any of this, especially as a follower of Jesus who genuinely cares about those who identify as LGBTQ. They hurt and suffer pain and feel rejection like anyone else, and I don’t relish the fact that my words seem hateful to them on the most visceral level.

But I am even more committed to honoring the God who created us male and female and who never intended for men to be with men and women to be with women. And I am sure that the Court’s ruling in 2015 was a massive step in the wrong direction.

My hope is that it will not take almost 50 years to reverse *Obergefell* and, more fundamentally, that, just as America has shifted radically towards LGBTQ activism in recent years, the tide will turn here as well. {eo}

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