

Same-sex marriage is absolutely on the chopping block

written by Imani Gandy
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A majority support same-sex marriage. It may not matter.

We've had a decade of marriage equality—and that may be all we're going to get.

When the Supreme Court decided [*Dobbs v. Jackson Women's Health Organization*](#) in 2022, it didn't just reverse *Roe v. Wade* and eliminate the constitutional right to an abortion, it opened the door for challenges to all substantive due process rights cases. These are cases that relate to the intimate areas of a person's life: sex, birth, and marriage, mostly.

That means that [*Obergefell v. Hodges*](#)—the landmark case that legalized same-sex marriage in 2015—is squarely in the crosshairs. But people don't want to believe it. And it's making me want to walk into the mountains with no water supply.

I've been active on social media for almost 15 years, and for years before *Roe* was overturned, irate Twitter mobs would descend upon me whenever I warned that abortion rights were on the chopping block. People said I was being dramatic. That I should stop fearmongering. *The Supreme Court would never take away the right to abortion*, they cried. *It's been settled law for almost 50 years!*

And then [*Dobbs*](#) came along, and the Court did exactly that.

You'd think being right about *Roe* would earn me some benefit of the doubt. But no.

Once again, I see people arguing that marriage equality is safe. Even some well-regarded [lawyers](#) and legal scholars have [contended that there "aren't five votes" to overturn it](#).

They're wrong. The votes are there.

And when the conservatives on the Court train their sights on the other renowned substantive due process cases—*Griswold v. Connecticut* which legalized the right to contraception for married couples, *Loving v. Virginia*, which decriminalized interracial marriage, and *Lawrence v. Texas*, which decriminalized same-sex intimacy—it's a pretty solid bet that the votes to overturn those cases will be there, too.

No ‘history and tradition’ of same-sex marriage

The six conservatives on the Court have signaled either that substantive due process rights don’t exist, or that they should be limited to whatever white, property-owning men thought was fine in the late 1700s.

Substantive due process rights are unenumerated rights, meaning they’re not spelled out in the Bill of Rights or elsewhere in the U.S. Constitution. For the conservatives on this Court, if a right didn’t exist when powdered wigs were in style and the founders didn’t list it in the Constitution, then it can be tossed out because it’s not “deeply rooted in the nation’s history and tradition”—and gee whiz that’s just too bad.

If the “history and tradition” language sounds familiar, that’s because it’s the same test Justice Samuel Alito used in *Dobbs* to overturn *Roe*. And it’s the same blueprint the conservatives on the Court will use to reverse *Obergefell* and eliminate the federal right to same-sex marriage.

In his *Dobbs* concurrence, Justice Clarence Thomas explicitly said that *Obergefell*, *Griswold*, and *Lawrence* were “‘demonstrably erroneous’” and should be reconsidered. He wasn’t being coy. (Perhaps he was being coy when he omitted *Loving v. Virginia*, which struck down laws banning interracial marriage, from his list of substantive due process cases to axe. After all, it would make for awkward pillow talk with his wife, Ginni, who is white.)

“As I have previously explained, ‘substantive due process’ is an oxymoron that ‘lack[s] any basis in the Constitution.’”

That’s what Justice Thomas [wrote](#) in *Dobbs* in reference to *Obergefell*, *Griswold*, and *Lawrence*. He was referring to the rights to same-sex marriage, contraception, and consensual sex that those cases established.

Enter Kim Davis. She's the former county clerk from Kentucky who turned her refusal to issue marriage licenses to same-sex couples into a decade-long martyrdom tour, [complete with a jail stint](#) and endless whinging about "religious freedom." She's back at the Supreme Court asking the justices for a second time to overturn *Obergefell v. Hodges* and eliminate nationwide marriage equality.

Davis has been locked in a battle with David Ermold and David Moore—the couple to



whom she notoriously refused to provide a marriage license in the days immediately following the Court's decision in *Obergefell* in 2015. Five years later—after some rulings didn't go her way—she filed a petition asking the Supreme Court to overturn *Obergefell* in 2020.

The Court declined, over the [pointed dissent of Justices Clarence Thomas and Samuel Alito](#). Her case went to trial in 2023, and Davis was ultimately ordered to pay Ermold and Moore [\\$360,000 in damages and legal fees](#).

She doesn't want to pay, of course—so back to the Supreme Court she goes. Davis [filed a new petition](#) with the Supreme Court on July 24 asking the justices—for a second time—to pretty please overturn *Obergefell*.

I'm tempted to ignore Davis' efforts because, frankly, the woman needs a hobby. But it's not the halcyon days of 2015 anymore, and the current political climate is ripe for shenanigans when it comes to LGBTQ+ rights—so this petition sets off warning

bells in my head.

Marriage equality is not safe

When I caution folks that *Obergefell* is not as untouchable as they think, I get the same tired cocktail of denial and delusion: *It would be too complicated to undo. The [polling is too strong](#). What about the Respect for Marriage Act?*

Yeah, well, a majority of Americans liked abortion rights, too—[about 61 percent](#). The Court eliminated federal abortion protections anyway.

Here's the reality: Conservatives want to send same-sex marriage back to the states—the same way they sent abortion rights back to the states. And the way they're going to do it is to claim that there's no "history and tradition" of marriage equality in the United States and therefore it should be left up to "the people."

The "history and tradition" language comes from a 1997 case called [Washington v. Glucksberg](#).

In *Glucksberg*, the Supreme Court unanimously ruled that the Due Process Clause of the U.S. Constitution—which [says](#) that "No State shall ... deprive any person of life, liberty, or property, without due process of law"—does not protect a right to physician-assisted suicide. Why? In an opinion penned by William Rehnquist (one of the two dissenters in *Roe*), the Court ruled that physician-assisted suicide was not "'deeply rooted in this nation's history and tradition'" or "'implicit in the concept of ordered liberty.'"

Conservatives' reliance on "history and tradition" language to strike down modern laws [has proliferated in recent years](#).

In 2022, Clarence Thomas writing for the majority in [New York State Rifle & Pistol Association v. Bruen](#) invoked "history and tradition" to strike down a New York gun

law that infringed on an enumerated right—the Second Amendment right to bear arms. And in 2023, right-wing Trump judge [Matthew Kacsmaryk cited “history and tradition”](#) in upholding West Texas A&M’s cancellation of a student drag show [because historically, drag shows weren’t protected expressive conduct](#) under the First Amendment.

‘Christian conservatives are coming for *Obergefell*’

[It’s no secret that Christian conservatives are coming for *Obergefell*.](#)

They’ve been telegraphing it for years—through court filings, state legislation, and those [not-so-subtle speeches at Federalist Society events](#). With the Supreme Court stacked with conservatives who are already comfortable tossing out precedent, Christian conservatives are just waiting for the right case to tee up the question of whether marriage equality should survive at all.

And with Kim Davis’ latest appeal to the Supreme Court, that case may have just landed in the justices’ laps.

Of course, they may turn Davis down again. But if there’s one thing right-wing culture warriors are, it’s persistent. It took 49 years to overturn *Roe*; anti-abortion advocates started campaigning against legalized abortion as soon as *Roe* was decided, and they never stopped. Opponents of same-sex marriage are just as fervent. If the Court won’t take Davis’ case, Christian conservatives will find a better one.

And when that case makes its way to the Supreme Court, the six Federalist Society darlings on the bench will rely on *Glucksberg*, the physician assisted suicide case, to take down *Obergefell*—just like they relied on *Glucksberg* to take down *Roe*.

Their reasoning will boil down to the same claim: There’s no “history and tradition” of same-sex marriage in this country.

They have six votes to end marriage equality

Why am I so convinced there are six Supreme Court justices willing to overturn *Obergefell*? Let's start with the obvious ones.

Alito and Thomas have been blatant in their contempt for *Obergefell* since the day it was decided a decade ago.

In his *Obergefell* dissent, Alito referenced *Glucksberg* and complained that same-sex marriage is not “‘deeply rooted in this nation’s history and tradition.’” (Hey, Sam? The Constitution doesn’t actually mention marriage at all.)

And when the Supreme Court declined to hear Davis’ 2020 appeal, Thomas [wrote in a dissent for himself](#)—with Alito joining—that *Obergefell* amounted to “an alteration of the Constitution” and that the Court had “created a problem that only it can fix.”

In his *Dobbs* concurrence, Thomas argued that “liberty” only means freedom from physical restraint—it couldn’t possibly mean the freedom to marry a person of the same sex. He also specifically called for the Court to reconsider *Obergefell*, calling the ruling “demonstrably erroneous.”

Now let’s talk about Justice Neil Gorsuch. Don’t let his [opinion in *Bostock v. Clayton County*](#) protecting LGBTQ+ workers under Title VII of the 1964 Civil Rights Act fool you into thinking he cares about LGBTQ+ rights. Gorsuch also signed on to Alito’s *Dobbs* opinion, which, again, uses the “history and tradition” framework to wipe out abortion. That is the blueprint for reversing *Obergefell* and allowing states to criminalize same-sex marriage again.

Justice Brett Kavanaugh signed onto *Dobbs*, too, and made a big show of saying in his [concurring opinion](#) that the Court’s decision “properly leaves the question of abortion for the people and their elected representatives.” That is exactly the argument conservatives on the Court will use to send the issue of same-sex marriage

back to “the people”—the same way they sent abortion back to “the people” with *Dobbs*. As of 2022, [35 states still had laws criminalizing same-sex marriage on the books](#), by the way.

Justice Amy Coney Barrett is a social conservative [who doesn’t believe the courts should invent rights](#) not grounded in the text or original meaning of the Constitution. She clerked for the late Justice Antonin Scalia, who [dissented in *Obergefell* in his quintessential caustic style](#). And she helped vaporize *Roe* without hesitation. Why would she not do the same to *Obergefell*?

And Chief Justice John Roberts? He may not have joined Alito’s dissent in *Dobbs*—preferring instead to write his own separate opinion—but don’t mistake that for moderation. [Roberts was all-in on dismantling abortion rights](#)—he just wanted to do it more slowly. (And ultimately, he concurred in the *Dobbs* judgment that Mississippi’s 15-week ban was constitutional.)

Roberts exhibited no such restraint about same-sex marriage. In *Obergefell*, Roberts disagreed with the ruling so strongly that he read his [dissent](#) from the bench—a move reserved for when judges are really mad, and they want everybody to know it. The Court’s decision to legalize same-sex marriage had “nothing to do” with the Constitution, Roberts grouched.

The Court doesn’t care much for public opinion

As for polling? Don’t talk to me about polling. Gallup surveys show that [two-thirds of Americans support marriage equality](#), but that doesn’t matter. This Court is not responsive to popular opinion. If [they were, they wouldn’t have overturned *Roe*](#).

And please don’t tell me the [Respect for Marriage Act](#) will save same-sex marriage.

The Respect for Marriage Act, which repealed the Defense of Marriage Act in 2022 and made it clear that the federal government and state governments must

recognize marriages that were legal in the state they were performed—including same-sex and interracial marriages—is riddled with broad religious exemptions. For example, it still allows religious nonprofits to refuse to marry same-sex couples—which is why, I suspect, [some of the 12 Republicans](#) who voted yes ended up supporting the Democrat-sponsored legislation.

In any case, the Respect for Marriage Act would still allow states to refuse to issue marriage licenses for same-sex couples if *Obergefell* were to fall. Those states would only have to recognize same-sex marriages performed in other states. Wonderful. So queer folks in Texas could still get married post-*Obergefell* in California, as a treat.

Finally, [some people have insisted](#) that the Supreme Court wouldn't dare undo marriage equality because it would cause too much political fallout. That's the same argument people made, mistakenly, about *Roe*.

[We know this Court doesn't care much about backlash](#). It doesn't care about democracy. It cares about enshrining a white Christian nationalist agenda into constitutional law. Just look at their recent rulings.

Marriage equality is absolutely on the chopping block. It's not a question of if, but when a clean case challenging *Obergefell* gets filed.

And when that case arrives at the Supreme Court, mark my words: The conservative votes will be there. All six of them.

Source: [Rewire News Group](#)

