

No, a conservative Supreme Court would not be ‘catastrophic’ for gay and transgender rights

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When the news broke that President Trump may get another Supreme Court nominee, the sky seemed to be falling in left-wing gay and transgender advocacy circles. The prospect of a 6-3 conservative Supreme Court majority prompted an all-out meltdown among some onlookers.

“Amy Coney Barrett is an Absolute Threat to LGBTQ Rights,” claimed the Human Rights Campaign in a statement responding to Trump’s favored pick. The organization is the largest group in the United States that claims to advocate for gay and transgender rights, but in practice, it acts as a de facto arm of the Democratic Party.

Meanwhile, the left-wing legal advocacy organization Lambda Legal issued a blistering condemnation of Trump’s possible Supreme Court nominees. It referred to them as “dangerous, ultraconservative ideologues.”

“The impact that another anti-LGBTQ nominee could have on the Supreme Court would be catastrophic,” Lambda Legal director Sharon McGowan said.

This hysterical sentiment extended to the very top of the Democratic Party. Senate Minority Leader Chuck Schumer spoke publicly about how he fears a Trump appointee’s confirmation to the Supreme Court would spell doom for his lesbian daughter’s marriage. Schumer said the Supreme Court is to the “far right” and “doesn’t reflect the values of the majority of Americans,” warning this will get worse if Trump is allowed to fill the seat. With so much outrage stirred up, it’s worth assessing these concerns on their merits.

A 6-3 conservative Supreme Court majority would not, in fact, be “catastrophic” for gay and transgender rights. It’s unlikely that a great deal would change on the issue. If anything, gay and transgender rights advocates may simply have to achieve their reforms through the democratic process rather than have them imposed on the nation via judicial activism and unilateral fiat.

First, to take the temperature down, remember that Democratic and liberal gay and transgender rights groups always scream bloody murder when any conservative nominee is put forward. Don’t forget that the Human Rights Campaign viciously opposed the 2017 nomination of Supreme Court Justice Neil Gorsuch. It said he had an “anti-equality record” and that “we cannot afford a justice who will roll back our rights.”

In reality, Gorsuch has pioneered gay and transgender rights. He wrote the court’s majority opinion in the landmark June decision extending federal anti-discrimination law to protect gay and transgender people, using debatable but solidly conservative legal reasoning to reach the pro-gay-rights outcome.

So from the get-go, we have to note that hyperbolic and alarmist claims of “anti-LGBTQ bias” are made about almost every conservative judicial nominee — and they often don’t pan out.

Still, it’s worth asking: Would a 6-3 conservative Supreme Court majority overturn gay marriage? The answer is almost certainly a “no.”

Writing for the *Wall Street Journal*, Cato Institute senior fellow Walter Olson explained that due to a variety of factors, it’s extremely unlikely that even a conservative-majority Supreme Court would overturn the landmark 2015 *Obergefell v. Hodges* ruling that extended gay marriage rights nationwide.

Why? Olson cites the court’s commitment to the principle of stare decisis, a general reluctance to overturn precedent frequently lest its rulings lose legitimacy. The Supreme Court is particularly reluctant when overturning precedent would be enormously disruptive, as revoking the hundreds of thousands of lawful gay marriages since *Obergefell* would certainly be. In fact, Olson explains that the court really only fights to overturn precedent when it feels that precedent directly infringes on some constitutional liberties.

Even critics of the *Obergefell* decision would admit that it doesn’t infringe on anyone’s constitutional rights but rather, in their view, extends rights in a legally unjustified manner. Now, remember that there is widespread public support for gay marriage, even among Republicans such as Trump himself, and you’ll see why there’s little appetite even within the conservative legal movement for overturning *Obergefell*. Revisiting gay marriage just isn’t going to happen.

Conservative legal advocates have largely moved on to issues of religious liberty, such as conscience exemptions for religious individuals and organizations. This is perhaps where a conservative Supreme Court court “threatens” LGBT rights — but only if one takes the leftist, expansionist view of gay rights that includes the right to make others bow to your preferences.

In my view, gay and transgender rights are properly defined as the right to live free from government discrimination, to be treated equally under the law, and to enjoy anti-discrimination protections in secular life. A conservative Supreme Court majority may indeed carve out more religious exemptions from anti-discrimination gay and transgender rights laws for private Catholic schools, groups of nuns, and so on. But I don’t view that as an attack on rights at all.

Such narrow exceptions are what is mandated by the free exercise clause of the First Amendment and are necessary for coexistence of religious people and gay and transgender people in our pluralistic society.

Moreover, it’s wrong to think that a conservative Supreme Court majority will be philosophically opposed to gay and transgender rights. What it will be opposed to is legislating from the bench. Activists will have to make their case for change through the democratic process rather than hope for judges to extend rights via judicial activism in case after case.

Yet if gay and transgender rights reforms are successfully accomplished through the legislative branch and do not infringe on anyone’s constitutional liberties, there is every reason to believe that a conservative Supreme Court would uphold the law as it is written regardless of their personal beliefs. That is the very essence of what it means to be a conservative constitutionalist.