



No, Gay Marriage Isn't Going to Be Overturned After *Roe v Wade*

Brad Polumbo

June 24th, 2022

The Supreme Court handed down an anticipated but nonetheless seismic 6-3 decision today overturning *Roe v. Wade*, the 1973 precedent declaring a constitutional right to abortion. Frantic debate has and will ensue about the proper interpretation of the Constitution on abortion and abortion policy on its merits.

Make of all that what you will—but **don't fall for the widespread panic porn** about how this decision means other rights, like the *Obergefell v. Hodges* case enshrining gay marriage nationwide, are on the chopping block next.

It is true that one justice, Clarence Thomas, specifically calls for the legal basis of *Obergefell* to be revisited. It's complicated, but it seems likely that Thomas would probably support overturning gay marriage.

But Thomas is alone in this call, not joined by any of the other justices. In fact, several others are quick to distance themselves from this rhetoric.

Writing for the majority, Justice Samuel Alito specifically decries the “unfounded fear that our decision will imperil those other rights [like *Obergefell*]” and draws a sharp distinction between abortion, which involves the taking of a life, and other cases and rights.

“To ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right,” he writes for the majority. “**Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.**”

“It is hard to see how we could be clearer,” Alito concludes. “Moreover, even putting aside that these cases are distinguishable, there is a further point that the dissent ignores: Each precedent is subject to its own stare decisis analysis, and the factors that our doctrine instructs us to consider like reliance and workability are different for these cases than for our abortion jurisprudence.”

Justice Brett Kavanaugh, writing separately, also pours cold water on this alarmism.

“I emphasize what the Court today states: Overruling Roe does not mean the overruling of those precedents [such as *Obergefell*], and does not threaten or cast doubt on those precedents,” Kavanaugh writes.

You can also safely assume that Chief Justice John Roberts would not be on board with overturning *Obergefell*, an established precedent with countless thousands of Americans now thoroughly relying on it. That goes against everything in his “institutionalist” approach to jurisprudence.

Where Justices Neil Gorsuch and Amy Coney Barrett are on this issue is perhaps less clear, but they signed on to Alito’s opinion and all its reassurances. Gorsuch also wrote a landmark gay rights decision just last year. And, unlike during confirmation hearings, they have little reason to hide their real ambitions or views now that they have lifetime appointments to the high court.

You would need 5 justices to vote to revisit *Obergefell*. There’s simply no reason to believe we’re anywhere close to that.

“While much of Justice Thomas’s critique of substantive due process (SDP) is well taken—the way our current jurisprudence considers unenumerated rights is constitutionally unsound—there’s no way same-sex marriage is in any danger,” Manhattan Institute Director of Constitutional Studies [Ilya Shapiro](#) told **BASEDPolitics**.

“For one thing, despite Justice Kennedy’s mushy prose in *Obergefell*, the right sounds much more under equal protection (like the right to interracial marriage) than SDP,” Shapiro said. “For another, Justice Alito’s majority opinion distinguishes abortion from all other SDP issues. And finally, unlike with abortion, popular opinion regarding same-sex marriage has shifted significantly, even in red states, so it’s unlikely that any legislature would even try changing its marriage law in that manner.”

The Cato Institute’s [Walter Olson](#) concurred.

“The Court opinion emphasizes, and Kavanaugh writes separately to double-underline, that this decision does not imply the overturning of any rights beyond that of abortion,” Olson told **BASEDPolitics**. “Justice Thomas writes alone to make clear that he would like to go after other substantive due process rights. It’s not clear even Alito is on board with that, and even

more unclear where Thomas gets a third—let alone fourth and fifth—vote for that project, as he would have to.”

So, let’s all take several deep breaths.

We can and should have a robust debate over abortion rights. But let’s do it without needlessly scaring people that other core rights are under attack when they simply are not.