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Gay Marriage Is Here to Stay, Even With a Conservative Court

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No matter who replaces Justice Anthony Kennedy, gay marriage isn't going anywhere: The court won't overturn Justice Kennedy's 5-4 decision in *Obergefell v. Hodges* (2015). Don't believe me? Let's count eight reasons:

1. Most closely fought landmark decisions don't get overturned when the losing faction becomes a majority. When they do, there's usually foreshadowing, in which justices in the minority have conspicuously challenged the ruling's legitimacy. At least two post-*Obergefell* decisions have now gone by in which conservative justices have refrained from such challenges: *Pavan v. Smith* (2017) and *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018).
2. In deciding whether to respect *stare decisis* and follow a precedent deemed wrongly decided, justices apply standards that can appear wobbly and uncertain. But whatever else is on their minds, they always claim to take seriously the practical dangers of upending a decision on which many people have relied.

Few legal strokes would be as disruptive, yet fully avoidable, as trying to unscramble the *Obergefell* omelet. Large numbers of marriages would be legally nullified in a moment, imperiling everyday rights of inheritance, custody, pensions, tax status and much more. These effects would hit on day one because an earlier generation of social conservatives managed to write bans on same-sex marriage and equivalents into many state constitutions. Those bans would prevent elected officials from finding legal half-measures to avert massive dislocation for innocent persons.

3. The American public would not view all this turmoil as somehow worth enduring in order to get rid of a widely detested decision. Since the *Obergefell* ruling, as per [Pew Research](#) last year, the longstanding trend toward acceptance of same-sex marriage has continued, with support rising from 55% in 2015 to 62% in 2017. Just 32% of Americans opposed gay marriage as of last

year. Opposition to legal recognition of same-sex marriage commands less than a majority even among those who vote or lean Republican. University of Virginia legal scholar Sai Prakash writes that in this area Justice Kennedy’s “opinions seem secure because his jurisprudence largely mirrors changes in society.”

4. Nor would the chaos be likely to please President Trump, who went on “60 Minutes” days after his election and said of the gay-marriage legal cases: “They’ve been settled, and I’m fine with that.”

5. Since *Obergefell* came down, cooler heads on the social-conservative side have urged pivoting away from vain attempts to block the transformation in public opinion, in favor of finding an accommodation for religious minorities who object—the theme of *Masterpiece Cakeshop* and several pending cases.

6. The one high-court decision to test *Obergefell*’s limits is *Pavan*, a somewhat technical case on the issuance of amended birth certificates. After the Arkansas Supreme Court seemed less than fully on board with *Obergefell*’s spirit, the high court swatted it down in a six-justice per curiam summary reversal—legalese for telling a balky teen, “We don’t even want to hear your story about this, now go clean up what you did.” Widely noted on *Pavan*: Chief Justice John Roberts crossed over to join the four liberals and Justice Kennedy. Equally notable: Justice Neil Gorsuch, writing for the three dissenters who wanted to hear the state’s argument, stayed well away from culture-war implications and framed the dispute as about how best to implement *Obergefell*, not whether to retreat from it.

7. The Arkansas case aside, *Obergefell* has been logistically easy to administer; in general, states know what is expected of them, they’ve done it, and life goes on.

8. In *Masterpiece Cakeshop* last month, every conservative justice save Clarence Thomas signed onto Justice Kennedy’s language as follows: “Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts.”

If there is a danger for *Obergefell* over the longer term, it lies in some critics’ claim that gay marriage is somehow in unavoidable future tension with religious liberty. As Justice Samuel Alito noted in last month’s *Janus* decision, *stare decisis* is easier to abandon when a challenged precedent is thought itself to impinge on a constitutional right.

This “inevitable conflict with religious liberty” argument—which Justice Alito touched on in his *Obergefell* dissent—is unsound, most notably because any high-court majority inclined to overturn *Obergefell* would also have the votes to apply the First Amendment directly to secure whatever religious objectors’ rights it thought necessary to vindicate. Still, the argument underscores an additional reason to hope that in its consideration of objectors—bakers, florists, photographers and the rest—the court takes care to respect both pluralism and liberty.

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