

If Roe Falls, What Civil Rights Precedents Might Be Next?

A conversation with James Obergefell, plaintiff
in the landmark gay marriage case *Obergefell*
v. *Hodges*

May 11, 2022 **by Dan McCue**



James Obergefell

WASHINGTON — James Obergefell, who was in the nation's capital this week to attend a fundraiser and visit with friends, wears the mantle of a civil rights icon lightly.

Warm, often funny, and intelligent, the plaintiff in *Obergefell v. Hodges*, the landmark civil rights case in which the Supreme Court ruled that state bans on same-sex marriage and on recognizing same-sex marriages performed in other jurisdictions were unconstitutional, never grows strident when discussing even the most serious of issues.

On Wednesday morning, The Well News caught up with Obergefell (pronounced Ober-ga-fell), to discuss last week's leak of a draft Supreme Court opinion that suggests the high court is poised to overturn the precedent it set in *Roe v. Wade*, and in one fell swoop eliminate a woman's constitutional right to have an abortion.

First, some background ...

The draft, written by Justice Samuel Alito Jr. and dating from February, has sent a chill through the civil rights community, which fears the decision might only be the start of a domino-like cascade of repealing advances in the rights of Americans granted only in the past 50 years or so.

If Roe can't withstand a challenge to stare decisis — the legal principle that previous Supreme Court rulings should generally be respected and overturned only with the gravest of caution — can *Loving v. Virginia*, the court's 1967 decision striking down all state laws banning interracial marriage? Or *United States v. Windsor*, the 2013 case in which the court struck down the Defense of Marriage Act, which denied federal recognition of same-sex marriages?

And what of Obergefell, a precedent that's only seven years old?

All hinge on what a previous and more centrist court saw as violations of the due process and equal protection clauses of the 14th Amendment, and all cling to the Supreme Court's being beholden to stare decisis for their staying power.

In his draft opinion in *Dobbs, v. Jackson Women's Health Organization*, Alito spends 30 of its 98 pages arguing it is unnecessary for the court to follow the guidance of its previous decision, holding that stare decisis "is not an inexorable command."

“When one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake,” Alito wrote.

Around the country, activists and other defendants of various civil rights cases are bracing for fresh challenges to laws once deemed entirely settled by conservatives of all stripes.

For those who don’t remember James Obergefell’s personal story, it goes like this:

Obergefell, a resident of Ohio, had been in a long-term committed relationship with John Arthur for nearly two decades, when Arthur was diagnosed with amyotrophic lateral sclerosis, so-called Lou Gehrig’s disease, a condition for which there is no cure.

After the Supreme Court’s ruling in *United States v. Windsor*, the couple decided to marry. By this time, both Obergefell and Arthur knew their time was short. The case was decided on June 26, 2013, and Arthur would die just four months later.

Though his ALS made it difficult for Arthur to travel, family and friends rallied to the couple’s support, enabling them to travel to a state — Maryland — where they could legally marry on July 11, 2013.

The actual ceremony took place aboard a medically-equipped plane, on an airport tarmac. They then returned to Ohio where they soon learned Obergefell would not be listed on Arthur’s death certificate as his surviving spouse because Ohio did not recognize same sex marriage.

Thus the court battle began. In late July 2013, a federal district court issued a temporary restraining order, enjoining the state

from

On the morning of June 26, 2015, outside the Supreme Court, the crowd celebrates the Court's decision. (Photo by Ted Eytan, Wikimedia Commons)

enforcing its ban on recognizing same sex marriages, as it applied to the eventual issuance of Arthur's death certificate.

And when John Arthur died, his death certificate did indeed state that he was married and that Obergefell was his surviving spouse.

But the State of Ohio appealed the ruling to the 6th U.S. Circuit Court of Appeals, where the couple's case was consolidated with five other similar legal challenges.

On Nov. 6, 2014, the 6th Circuit ruled Ohio's ban on same-sex marriage did not violate the U.S. Constitution. In doing so it said

it was bound by the Supreme Court's 1972 decision in a similar case, *Baker v. Nelson*, which dismissed a same-sex couple's marriage claim "for want of a substantial federal question."

The case made its way to the Supreme Court in early 2015, with oral arguments heard that spring.

On June 26, 2015, the U.S. Supreme Court held in a 5–4 decision that the 14th Amendment requires all states to grant same-sex marriages and recognize same-sex marriages granted in other states. In doing so, the court also overruled its prior decision in *Baker*.

Justice Anthony Kennedy wrote the majority opinion and was joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan.

"The Constitution promises liberty to all within its reach," Kennedy wrote early on in the decision, "a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."

He concluded with this passage:

"No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death," Kennedy wrote.

"It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions.

They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”

Now, the interview ...

TWN: So let’s dive right in and talk about the leak of the Supreme Court’s preliminary decision on *Dobbs*. What was your immediate reaction when you heard about it?

JO: My immediate reaction was what a horrible day for women and pregnant people in our nation ... to know that the highest court in the land is planning to take away their bodily autonomy.

So that’s what my immediate reaction was — what a terrible day. For that reason alone. And then reading it further, just understanding how dangerous, to my mind, this leaked decision is when it comes to other civil rights ... for the LGBTQ+ community, you name it. It just terrifies me to know how this could be used. If this is indeed the final decision.

TWN: What was it in your reading of the draft decision that set off those alarm bells?

JO: Well, a couple of things. One was just the originalist bent of this decision, saying that the Constitution can only be interpreted as of the time it was written.

For anyone who cares about our nation and the values we supposedly hold — We the People, Equal Justice Under the Law — that should be terrifying. Because all you have to do is look, well, back to 1788, when the Constitution was ratified; Black people were the property of White people ... women were the property of their husbands without the right to vote.

So to say we should only interpret the Constitution as of the time it was written is an absolutely terrifying statement that implies it is a static document that doesn’t change with the times as we

learn more and as we grow as a people. To me, that attitude, and again, this is just my opinion, does not give our nation the ability to become a more perfect union. So that's one part of my concern.

The other is this additional logic that's being applied that says fundamental rights, including the right to marry, should not be considered fundamental rights unless they have a long history or tradition in our nation.

So now they're planning to overturn *Roe v. Wade*, which has been in place almost 50 years and *Loving v. Virginia* is only six years older.

If
they
can

The White House illuminated in rainbow colors, which appear on the gay pride flag, on the evening of the Obergefell ruling. (Photo by Ted Eytan, Wikimedia Commons)

overturn a woman's right to control her own body and to make decisions that should only be between her and her medical professionals, how is *Loving* safe? I mean those cases were decided based on the exact same reasoning.

And I strongly object to people who say, 'Well what the court is saying is that this is a states' rights issue.' What that immediately reminds me of is the people who contend the Civil War wasn't about slavery, but about states' rights. Well, no, it's wasn't about states' rights, the Civil War was about slavery, about people owning people.

So those are all the things that just really terrified me about this. And I also can't help but think of, well, *Lawrence vs. Texas*, which struck down anti-sodomy laws in 2003. That's not a long history or tradition. So will sexual intimacy between consenting adults, once again, be made illegal?

TWN: Right. And you know, one of my reporters shared something with me yesterday about actions on the state front. It seems a lawmaker in Tennessee has proposed a law that would define common law marriages as marriage only between a man and a woman. But this raises an interesting question. I'm assuming, as in the abortion case, we might start seeing a rash of legislation limiting marriage rights. But a lot of these new state abortion laws deputize the public to enforce them, so where do you fear the momentum coming from if gay marriage is challenged anew, certain states? Or the citizens within them?

JO: From all of those areas? I mean, just this whole concept of states deputizing everyday citizens to snitch on people ... Wow. I can't even put into words how harmful I believe that is.

But when it comes to the states, there's good and bad. If precedents are going to be overturned, whether it's *Roe* or whatever comes down the road regarding LGBTQ+ rights, we're going to have to rely on state legislatures to do things to help protect these rights we deserve as human beings, and that we deserve as Americans.

So both sides of the coin are there when you talk about the states. It's where these harmful things attacking and targeting people are coming from, but it's also where we have an opportunity to protect some of these rights.

The thing I just don't understand is why people can't just get along. Why does a woman making decisions over her own body, or my marriage, bother anyone? How does it harm anyone? Let's actually do things that make life better for people instead of actively harming them.

TWN: I understand what you're saying. I mean, I live in a townhome community in Alexandria. We're pretty tightly packed compared to a single-family home community, but I don't know or care what people do in their homes. What matters is how we treat one another when we do interact.

JO: Right. I mean, we should care about each other as human beings, but at the same time a lot of people get worked up over things that don't harm or have anything to do with them.

Now, another thing that concerns me about this draft opinion is the things that's really at the root of the *Roe v. Wade* debate and the continued attacks on the LGBTQ+ community ... and it's this

twisted or perverted concept of religious freedom that people are now demanding and what it means.

People fled the Old World because they were being persecuted for their religious beliefs. They came to the New World and our Constitution was written to guarantee freedom of religion because of that persecution.

And yet, now we have people who have decided it is their mission, their goal, their purpose in life, to enforce their particular interpretation of their particular religion on everybody else in our nation. That is not religious freedom.

The Constitution doesn't say you have the freedom of religion and the freedom to enforce your religion on others or the freedom to use your religion as a weapon. And that's what they're doing.

And they don't see it, because in their mind, their particular interpretation is the one and only accurate way. And they have this twisted belief that our nation is a Christian nation, but of course, only their version of Christianity, right? So to me that's where so much of what we're seeing, this drive to push us backward in time, to take us back instead of forward, is based in that perverted understanding, belief, definition of religious freedom. And what it is not is religious freedom in any way, shape or form.

TWN: Now, your court case actually started out as a tangle with a state ...

JO: Yes. The state of Ohio.

TWN: And it was your identification as the surviving spouse on a death certificate — or lack thereof — that started the whole thing.

JO: Well, let me take you back a step. This actually started before John died. He died three months after we won our first hearing. And at the time, so much of what I was going through was focused on John and the end of his life. So I wish I had more distinct memories of that period, but I don't. John was my world. Then he died.

But what I will tell you is that it was infuriating and offensive to be in a courtroom and to hear the things that the state of Ohio was saying about us and then being in the 6th Circuit and having attorneys from Ohio, Kentucky, Tennessee and Michigan all argue that allowing our marriage or recognizing our marriage would cause straight people to stop getting married and even more inexplicably to stop having children.

I mean, these were just utterly ridiculous arguments – and so infuriating. Are we part of “We the People” or are we not? You can't have it both ways. Either we are part of this nation or we are not. And, oh, the arguments they raised were just offensive. It angered me. But from the moment we decided to file that lawsuit, I knew we were right. I knew we were right. And regardless of what horrible things were said in those courtrooms, I knew we were right. And the state was wrong. So that's what I clung to.

TWN: How did you feel about the Supreme Court at that point? What was your concept of the court when it accepted your case?

JO: Well, honestly, like most people, I wasn't a Supreme Court watcher. I wasn't an attorney. I had never really followed the court all that closely. But things changed when the *Windsor* decision came out.

It was the *Windsor* decision that prompted me to spontaneously propose to John. It was that moment of realizing, 'Oh wait, the Supreme Court is saying that, at least at the federal level, we can now get married and be seen by our nation as existing, as a married couple, in the eyes of the federal government. And what a powerful moment that was ... of being seen, of existing.

And then to have to go all the way to the Supreme Court with our case to say, 'Okay, if you have to recognize us at the federal level, then the states should have to recognize this as well.'

And it was just an amazing realization, once it sunk in, on June 26, 2015, that we won. It was an amazing realization that for the first time as an out gay man, I felt like an equal American.

And it was amazing to me that there was a time that I ever had to feel that way. The fact that pretty much all of us in the queer community didn't feel that way. And honestly, today, I still don't feel that way on a certain level.

Because even with the decision, we still don't have marriage equality; because again, back to that perverted way of thinking of freedom of religion, we have county clerks who refuse to issue marriage licenses to gay couples and magistrates, or judges who refuse to officiate weddings between same sex couples ... we have businesses open to the public — bakers, photographers, invitation printers, you name it — who refuse to work with same sex couples because somehow that harms their religious beliefs and their religious freedom. Yet, I don't understand how baking a cake is preventing them from practicing their religion. They can believe what they want to at home or in their house of worship, that to me is what religious freedom is about.

TWN: You just mentioned the elation you felt when the decision came down from the Supreme Court. Did you also

realize how fragile that breakthrough could be?

JO: Yes and no. I mean, I don't remember the timing, but it was right after the ruling was handed down that Kim Davis refused to issue marriage licenses to gay couples.

[Note: Davis is a former county clerk for Rowan County, Kentucky who gained international attention in August 2015 when she defied a U.S. federal court order to issue marriage licenses to same-sex couples.]

Was it within an hour of the decision? I'm exaggerating, of course. But even then I knew. It was "Okay, we just had this right affirmed by the highest court in the land, saying we exist, we deserve this." And then, as soon as Kim Davis hit the scene, I knew ... this wasn't over.

And,
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continued efforts around the country to degrade our marriages,

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Outside the Supreme Court on the morning of June 26, 2015,
James Obergefell (foreground, center) and attorney Al
Gerhardstein (foreground, left) react to its historic decision.
(Elvery Barnes via Wikimedia Commons)

marriage or equal existence, as a married couple. It has been clear from the moment of the decision that opponents of equality and opponents of equal justice under law were not going to let this rest.

Did I think it would be less than seven years before I'd be terrified that this decision could be overturned? No. I mean, I was concerned as the Supreme Court started to change and as new justices were confirmed, but I really found comfort in the fact that this decision by an earlier court was rooted in law. Our attorney and others kept saying the Supreme Court believes in precedent. They believe in precedent. They're typically not willing to take back rights that have been previously affirmed. Well, clearly, this Supreme Court now has no compunction about taking back rights that have been previously affirmed. They really don't believe in precedent no matter what they say. So I'm terrified.

TWN: Now, this is interesting, because people are really taking Sen. Susan Collins to task for supporting former President Trump's conservative nominees because they swore, under oath, that they too believed in precedent. That they believed *Roe* was precedent. But now realize the one thing they weren't asked is, "Would you overturn precedent?" Do you think we need a new confirmation process, or at least someone on hand to parse the language better?

JO: I don't know. I'm hesitant to offer an opinion, but I think allowing a nominee to simply say that, without asking any follow

up ... I mean, I really want to say 'yes, of course,' but you know, I'm not a judge. I am not an attorney. I have never been part of a confirmation process. I'm not in the United States Senate, so I don't know how to respond to that.

TWN: Well, did you begin to have a greater sense of foreboding as one after another of these more conservative judges were confirmed to the court? Going by what they said, the presumption was that they'd stand by precedent. But did you have even an inkling that we'd get to the point of having the conversation we're having today?

JO: Honestly, if I think back, I think if I had those thoughts I pushed them to the back of my mind. I boxed it all up, if you know what I mean.

I thought, okay, these are judges who are going to the highest court in the land and they keep saying they believe in precedent. Well, *Obergefell* is now precedent, *Windsor* is precedent, *Lawrence* is precedent, *Roe v. Wade* is precedent, *Loving* is precedent.

So I think I just forced myself to focus on that, and any sense of foreboding or fear that I had, I think I just kind of locked that up. And I did that at the same time that people were coming to me, with fear in their eyes, and saying after each confirmation, "Jim, are we going to lose this?" So in a sense, I found comfort in something that I now realize was a wrong or misguided assumption.

But I found comfort in this concept of precedents and the high court not taking back rights that they'd previously affirmed. So now I think back and I'm like, "Okay, I should have been much more worried than I was."

TWN: Later today, as we speak, the Senate is going to take up a procedural vote seeking to codify the right to an abortion spelled out in *Roe v Wade*. Could you see a similar vote occurring to codify the right spelled out in *Obergefell*?

JO: I have a very limited understanding of what's going on with this vote, other than that they are attempting to codify the law for abortion rights. But I would say, if they can do it for abortion rights, why not marriage rights? I certainly think that they could.

TWN: You are running for state office in Ohio. Is it possible, if you win, that we'll see as your first bill something codifying the right to same sex marriage in Ohio law?

JO: My first bill? I don't know, but I would be surprised if it weren't something along those lines.

I know one of the very first things I will do is sign on to be one of the co-sponsors of the Ohio Fairness Act, which would be like the Equality Act at a national level. And the reason is, in Ohio we don't have nondiscrimination protections for the LGBTQ+ community. And that's always been something that's important to me.

At the same time, the Ohio Defense of Marriage Act is still on the books. I don't know if most people realize this, but when the Supreme Court strikes down a law because it's unconstitutional, it doesn't disappear. In most, if not all states, state legislatures then have to take action to remove the law from the books. Otherwise the law just hangs out there.

And in those cases, the minute the ruling tossing that law is overturned, the law can go back into effect immediately.

Given the environment in the nation right now, I wouldn't be surprised to see DOMA enforced at the state level if the Supreme

James Obergefell today

Court overturned *Obergefell* because the hatred is just so deep.

TWN: So let's switch gears to hopefully something more pleasant for you. Tell me about your run for the state legislature and what your district is like?

JO: Well, it's District 89 and ... well, the answer to your question about what it's like is complicated because our redistricting is still up in the air.

In 2018, Ohio passed a fair districting ballot issue and amended the state constitution and this was the first election for which those rules went into effect.

The redistricting commission in Ohio is composed of five Republicans and two Democrats, and they didn't even bother starting work on the new maps until less than a week before the due date, if I recall correctly.

So far, the maps they have drawn have been found unconstitutional four times because despite the fair districting mandate, the map keeps coming up as dominated by Republicans while the statewide voter registration numbers show there's more of a 50/50 split in the electorate.

A federal district court said a couple of weeks ago that if Ohio can't come up with a fair map by May 28, it would impose a map. Well, last week, instead of trying again, the redistricting commission simply **resubmitted** one of the maps that had already been rejected. So we still don't know exactly what the district I'm running in will look like.

The belief is that the federal court will ultimately accept the map from the commission, so I'm trying to wrap my head around how a court can enforce something that another court has found unconstitutional.

What I can tell you is historically the district has been Democratic or Democrat-leaning, and that it encompasses an area with a lot of union membership. This district is one of those that used to have a lot of industry, but now they are all gone, and with them went jobs and opportunities and living wages. This is a big issue in the district. I mean, we used to have all three major automakers in Sandusky, my hometown, and we don't really have those anymore. So that's the issue that's really hit home in the district.

At present, and since 2014, the district has been represented by a Republican. So a big issue for me, as we've seen across the

country, is getting people out to vote. I see that as my biggest challenge because even in the county where I live, some 60% of the registered voters are undeclared, with about 15% registered as Democrats and 12% as Republicans.

That tells you right there that there's this enormous group of voters who want their lives to be better and are looking for someone who will actually help make their lives better.

TWN: What made you run, and how have you found the experience so far?

JO: The idea of running for office was planted in my mind on July 4, 2015. That's about a week after the *Obergefell* decision. I was in Philadelphia at an event. And someone I met at that event, an elected official in Pennsylvania, said, "Jim, do me a favor, when people start coming up and mentioning public service to you, promise me you won't just immediately say no ... Just please think about it." And he was right, because after a while I started hearing regularly from people — people I know and complete strangers — who would say, "You should run for office."

So that was in 2015. The seed was planted. But in the interim, seeing the way things are going in our nation, this ember kept smoldering. Think about it. You should run for office.

But the turning point was returning to my hometown of Sandusky and going back to my roots and becoming reacquainted with people I knew in the area who were struggling and feeling underserved.

Once that happened, it was kind of an easy decision. And to be completely honest, if it weren't for my experience with marriage equality, running for office would have never entered my mind.

But having done that, having been through what I've already experienced, that made me feel comfortable considering it.

I've learned firsthand what it means to be part of making things better for people. And in my mind, that's what public service is all about. And it seems like far too many of our elected officials have forgotten. They're supposed to be serving the public, not their egos and not their pocketbooks, and not serving the sole purpose of getting and holding on to power.

So all those things made me decide to run. Of course, not knowing the parameters of the district, it's been hard doing as much door to door as I'd like to. I've done some, knocking on the doors of voters close to my home, and it has been interesting. Many have said, "Wow, I haven't had a candidate knock on my door in a long time."

And they seem surprised when I ask what issues they care about and what things are important to them. So the campaign, at its heart, is about connecting with the public and helping them see I'm doing this for the right reason.

I never once thought I would be running for office. I wasn't one of those grade school kids who said, "I want to grow up to be president." I wanted to be an archaeologist. I mean, could you pick something any more diametrically opposed to politics? So I'm just going to be me, and I'm going to meet people and really listen to them.

TWN: A lot of first time candidates say the thing they're most uncomfortable with is the fundraising. How have you found it?

JO: Because I've worked in development for nonprofit family equality, I've helped raise money for a lot of organizations and causes I believe in. But that's different. That's asking someone to

support an idea or a concept or a cause. It is very different asking for someone's support for you, as an individual.

Now, I realize I have this kind of rarefied place in the country's consciousness right now. So what I've found is people see me and my name, and they immediately think of what I was part of, and they see me as somebody who shares their values and helped make the nation a better place. And, a lot of them say, "Yeah, I want to support him."

I can't tell you how gratifying it is for me and how gratifying it is that people look at me and see me as someone who does the right thing, because that's how I tried to lead my life. That's been really nice to see.

At the same time, I know that the incumbent or whoever I end up running against is going to try to use the fact that I get money from people all over the nation against me. Well, so what? I represent something people believe in and respect. Is that a bad thing? I don't think so.

But back to your specific question, asking people to donate money to my candidacy is very, very strange for me, and I just have to get over it because it's part of the process. I wish it weren't, but if I want to be a public servant, if I want to fight for the people at the statehouse, it's a necessary evil.

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