



In June 2022, the US Supreme Court reversed a half century of judicial precedent in ruling that there is no longer constitutional right to an abortion in this country. In the weeks after a draft opinion of *Dobbs* leaked, activist and scholarly discourse on the Left quickly turned to the next decisions likely imperiled by the Court's stunning reversal: namely, *Obergefell v. Hodges* (the legalization of gay marriage), *Lawrence v. Texas* (the right to same-sex sexual contact), and *Griswold vs. Connecticut* (the legalization of contraception). And indeed, when the final opinion was

released, Clarence Thomas's concurrence formalized and legitimated those exact fears. One passage in particular has captivated and terrified watchers of the Court:

"In future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is "demonstrably erroneous," we have a duty to "correct the error" established in those precedents."

To be sure, as Zack Beauchamp writes for *Vox*, Thomas's zeal may not herald immediate changes on the horizon. The most senior Justice on the Court, after all, has an extensive history of "unsuccessfully calling for the overturning of longstanding precedent."

My interest in this short provocation is to suggest—if, to be sure, speculatively—that these three precedents (same-sex marriage, same-sex sexual contact, and the right to contraception) do not face an equal threat from the Court's conservative majority. More specifically, I hope to insist that although the threat to *Obergefell*—that is, the right to gay marriage—has drawn the lion's share of concern in progressive spaces, it is actually *Griswold* that faces far more risk, if not necessarily for the reasons most frequently countenanced in elite circles.

Those who—like me—believe *Obergefell* to be essentially safe rest their arguments on two premises. One is cultural: that gay marriage has only risen in popular support since the law's passage, that it is, in other words culturally dominant. The other is jurisprudential: that Neil Gorsuch's decision in *Bostock v. Clayton County* (which outlawed discrimination based on a person's sexuality) draws on and presumes the logic of *Obergefell*, depriving the likely conservative bloc of Alito, Thomas, Barrett, and Kavanaugh the necessary fifth vote (assuming, of course that the court's new swing vote, Roberts, sides with the liberals if only out of his much touted commitment to *stare decisis*—a commitment reiterated in Roberts' queasy partial concurrence in *Dobbs*).

While true, these arguments ignore a deeper—and, I believe, more decisive—reason why *Obergefell* remains safer than *Griswold*. This is a reason that gets at anxieties and fantasies embedded deeply within the recesses of the unconscious of American nationalism. While *Obergefell* notionally bolsters American natality and population growth (through the boon that marriage—even gay marriage—is imagined to confer upon childbirth), the latter (a protection for contraception) quite literally imperils that production of new American life, in this way aligning it, conceptually, with *Roe*. Both, from the vantage of the nationalist Right, facilitate a culture of transience, selfishness, and, ultimately, death.

As a variety of scholars are beginning to show, the current nationalist imagination is so deeply driven by anxieties over the falling American birthrate that it has found strange solace by promoting even nonwhite American births (as in the case, disproportionately, of those born to mothers unable to access abortion), and therefore not phenotypically evocative of "traditional," or, as the arch natalist Tucker Carlson puts it, "legacy" Americanness. Before his ouster from the House, US Representative Steve King (R-IA) famously insisted that "We can't restore our civilization with somebody else's babies." And yet, recent trends have shown that American nationalists are attempting to do just that. After all, the forced births resulting from the reversal of *Roe* are—and

will continue to be—disproportionately nonwhite. It's difficult to understand how a political position committed to the necropolitical sacrifice of Black and brown lives for the (imagined) benefit of whiteness could find its way to perpetrating (via the banning of abortion) the proliferation of such nonwhite bodies. Difficult, that is, until one realizes that the natalist panic in nationalist circles is so intense that it has made peace with the production of more American lives even if they are to be nonwhite. Indeed, as I explore in other writings, such nonwhite babies can be counterfactually incarnated in the natalist unconscious *as* white—born, literally, again—by the imagined cruelty to their mothers that their forced births represent.

So if a white nationalist movement is so desperate for the production of more American life that it can fantasmatically transubstantiate Black and brown babies as white, then I think we can see our way to understanding the strange safety of *Obergefell* and even *Lawrence*. After all, it is a lighter conceptual lift to configure queer couples as potential parents—and therefore producers—of children than it is to literally re- or deracinate a nonwhite baby born to a mother who would have sought an abortion.

The brief analysis I've offered here is of course anything but falsifiable. It charts terrains that are unconscious, counterintuitive, and counterfactual. That does not mean, however, that they aren't real. And it is my hope that by being alert to them—at least to their possibility—we might be better able to allocate our activist resources to preemptively bolster a fundamental human right to contraception that is very much at risk from a judicial nationalism desperate—in Representative King's words—to restore “our” civilization.

Works Cited:

Beauchamp, Zack. “Could Clarence Thomas’s *Dobbs* concurrence signal a future attack on LGBTQ rights?” Vox. 24 June 2022. <https://www.vox.com/2022/6/24/23181723/roe-v-wade-dobbs-clarence-thomas-concurrence>

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(<https://www.pexels.com/photo/pro-choice-protest-in-the-usa-12747250/>)