

Clarence Thomas Signals Willingness to Overturn Obergefell v. Hodges

Much attention has been devoted to the potential role a Justice Amy Coney Barrett might play in overturning *Roe v. Wade* and ending the nationwide legalization of abortion. Now current Justice Clarence Thomas is also raising the possibility of overturning *Obergefell v. Hodges* and returning the legalization of gay marriage to the states.

The Supreme Court was unanimous in its decision not to hear former Rowan County Clerk Kim Davis' appeal of a lower court ruling that allowed lawsuits against her to proceed. [These lawsuits](#) revolve around Davis' refusal to grant marriage licenses to homosexual couples in 2015, as Kentucky law at the time required her to issue such licenses in her own name. Davis refused on religious objections, eventually serving five days in jail.

Thomas' actual refusal of Davis' case rests in that while it "implicates important questions about the scope of our decision in *Obergefell*" it fails to "cleanly present them." Yet [Thomas' four pages](#) on this case largely condemn the *Obergefell v. Hodges* decision, with several sympathetic notes towards Davis who Thomas wrote "may have been one of the first victims of this court's cavalier treatment of religion in its *Obergefell* decision," also warning that "she will not be the last."

The media is widely viewing Thomas' arguments, with which Justice Alito joined, as a signal that the court may take up the issue of gay marriage again and overrule *Obergefell*. It's hard to argue otherwise, since Thomas writes (among other

things):

- “In *Obergefell v. Hodges*, 576 U. S. 644 (2015), the Court read a right to same-sex marriage into the Fourteenth Amendment, even though that right is found nowhere in the text.”
- “*Obergefell* enables courts and governments to brand religious adherents who believe that marriage is between one man and one woman as bigots, making their religious liberty concerns that much easier to dismiss.”
- “By choosing to privilege a novel constitutional right over the religious liberty interests explicitly protected in the First Amendment, and by doing so undemocratically, the Court has created a problem that only it can fix. Until then, *Obergefell* will continue to have ‘ruinous consequences for religious liberty.’”

So, if Amy Coney Barrett is appointed to the Supreme Court, should those of liberal persuasion worry not just about the overturning of *Roe v. Wade*, but of *Obergefell* as well?

Stare decisis is the legal principle of ruling on litigation by staying in accord with prevailing precedent. While not without criticism in its application, this principle is the predominant method for justifying legal decisions.

The most major criticism of *stare decisis* however is its ability to see small errors grow larger and larger with passing years, as the precedent is applied to new and larger areas of law. Thomas and Alito clearly view *Obergefell* as an error, and not a small one either. But what is the history of the Supreme Court overturning itself?

Most people think a case is truly settled when the Supreme Court makes its initial ruling. But this is not always the case. [CNN reported in 2018](#) that America’s highest court has

overruled itself more than 300 times, with 60 of these cases overturned after 46 years, the age of the *Roe v. Wade* decision in 2019.

In 1991, the Court's decision in [*Exxon Corp. v. Central Gulf Lines, Inc.*](#) overturned [*Minturn v. Maynard*](#), nearly 137 years prior! The *Exxon Corp* case involved a dispute between two companies over a marine fuel requirements contract.

On the flip side, the 1982 decision in [*United States v. Ross*](#) overturned the [*Robbins v. California*](#) decision issued just 11 months prior. If you thought shipping contracts were the ho-hum sort of thing that might get overturned, *United States v. Ross* held that:

Police officers who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it may conduct a warrantless search of the vehicle that is as thorough as a magistrate could authorize by warrant.

Perhaps due to the recent nature of the *Robbins* decision, the Court also specifically noted that, "The doctrine of stare decisis does not preclude rejection here of the holding in *Robbins v. California*, 453 U. S. 420, and some of the reasoning in *Arkansas v. Sanders*."

It's hard to say if the Supreme Court will overturn either *Roe* or *Obergefell*, but the possibility is there. It's perhaps more likely if Thomas is leading the charge.

In his book [*The Nine*](#), Jeffrey Toobin wrote that the greatest difference between Thomas and other justices "was that he fundamentally did not believe in stare decisis, the law of precedent. If a decision was wrong, Thomas thought it should be overturned, however long the case may have been on the books."

However, for her part Amy Coney Barrett disagrees with

Toobin's assessment, [as she wrote in 2005](#) that "Most commentators consider Justices Scalia and Thomas the Court's most committed textualists. Both Justice Scalia and Justice Thomas embrace statutory stare decisis."

Thomas and Alito clearly think Obergefell was decided in error. The degree to which they will overturn precedent on both this case and Roe, and how much Barrett would join them in such decisions, remains to be seen. In order for this to be revealed, Barrett would need to be confirmed, and cases more pertinent than Kim Davis' will need to come before the Supreme Court.

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