

Is Same-Sex Marriage in Jeopardy?

June 21, 2022

By Lee Carpenter



This article has been updated.

The Supreme Court's decision overturning *Roe v. Wade* has sent abortion-rights advocates reeling. In a 6–3 opinion, the Court ended a constitutional right that was the law of the land for nearly half a century.

The ruling could put other constitutional rights in jeopardy as well. Many in the LGBTQ community are asking, "Is same-sex marriage next?"

Like the right to abortion, the right to same-sex marriage hinges on the Due Process clause of the Constitution's 14th Amendment. This amendment was adopted after the Civil War as part of Reconstruction. Over the years, the Supreme Court has interpreted the amendment to guarantee the right to use birth control (*Griswold v. Connecticut*, 1965), to be intimate with someone of the same sex (*Lawrence v. Texas*, 2003), and to marry a person of one's choosing (*Obergefell v. Hodges*, 2015).

Writing for the majority in *Dobbs v. Jackson*, Justice Samuel Alito doesn't mince words. He argues that *Roe v. Wade* was wrongly decided because the Constitution doesn't explicitly mention abortion, and because a woman's right to end a pregnancy isn't "deeply rooted in this nation's history."

This argument is misguided, if only because it runs afoul of *stare decisis*, the legal doctrine that obliges a court of law to follow prior court decisions when making a ruling on a similar case. The reasoning behind Justice Alito's opinion may nevertheless form a road map for overturning same-sex marriage and other 14th Amendment rights.

For those of us in the LGBTQ community, the question is what we can do to protect ourselves and our hard-won right to marriage.

Those of us in same-sex relationships should prepare for the unexpected by drawing up estate plans.

It is important to remember that a Supreme Court decision overturning *Obergefell* would not make same-sex marriage illegal. It would simply leave it to states legislatures to determine whether to allow gay marriages in their state.

The Maryland Legislature has already done this. In 2012, it passed a bill legalizing same-sex marriage in the Free State. The law took effect on January 1, 2013, after winning approval from a majority of Marylanders in a statewide ballot referendum.

Maryland's same-sex couples who are already married can therefore take comfort. In the wake of a Supreme Court decision

overturning Obergefell, our unions should survive, at least at the state level. But continued federal recognition of gay marriage would be less certain, and a national patchwork of laws and policies might necessarily develop.

A marriage recognized in Maryland could suddenly be considered invalid in other states, and by the federal government. That could mean the end of important federal benefits, such increased Social Security payments to a surviving spouse.

With that in mind, many same-sex couples are rushing to tie the knot. This is especially true of couples whose marriage plans were delayed by the Covid-19 pandemic.

Whether we are disposed toward marriage or not, those of us in same-sex relationships should prepare for the unexpected by drawing up estate plans. Most plans include a will, financial power of attorney, and advance medical directive for each partner.

These essential documents will authorize your partner or someone else you trust to manage your finances and health care if you ever become incapacitated. They will also help to ensure the efficient transfer of your assets upon your death.

Marriage confers significant legal benefits, but a marriage license alone isn't enough. No matter what the future holds for same-sex unions, an estate plan will help protect your relationship from some of life's most significant uncertainties.