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Supreme Court argument on same-sex marriage clouds predictions

Court should come down on the right side of history, but the decision likely rests with Justice Kennedy

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by [Lauren Carasik](#) @LCarasik

On April 28 the U.S. Supreme Court [heard arguments](#) to determine whether marriage is a constitutional right for same-sex couples in the United States. It must rule on two issues: whether the Constitution requires states to issue marriage licenses to same-sex couples and whether states must recognize same-sex marriages performed in other states.

The hearing provided little clarity on how the justices would rule. They expressed concern about getting too far ahead of public opinion and circumventing the democratic process through judicial fiat. Yet undue caution can run contrary to the court's responsibility to protect minority rights.

The Constitution is designed to protect against majoritarian rule when it infringes on minority rights. But this function sometimes conflicts with the court's preference to reflect evolving norms rather than impose change through the decision of nine unelected judges. This reasoning is in line with the position of same-sex marriage opponents who insist on the importance of citizen participation and the legislative process instead of litigation.

As expected, the justices toed the line of questioning reflected by their political leanings. Justice Anthony Kennedy, who is widely expected to be the swing vote in the case, asked questions that gave both sides cause for optimism.

"This definition has been with us for millennia," said Kennedy, a champion of states' rights, underlining the heavy weight of marriage's long-standing opposite-sex history. "It's very difficult for the court to say, 'Oh, well, we know better.'"

Conservative Justice John Roberts suggested that the plaintiffs were seeking to redefine marriage. “Every definition that I looked up, prior to about a dozen years ago, defined marriage as unity between a man and a woman as husband and wife,” he said.

But as Justice Ruth Bader Ginsburg pointed out, marriage has evolved over time. For centuries men were deemed dominant and women subordinate, a conception that no longer applies. And some states [prohibited](#) interracial marriage until the court intervened in 1967. The last decade has ushered in a rapid change for marriage equality. In May 2004, Massachusetts became the first state to allow same-sex marriage. It is now permitted in [38 states](#) and the District of Columbia. Today more than 70 percent of Americans live in states in which same-sex marriage is legal. This change coincides with dramatic shift in public opinion on gay marriage. According to a recent [Washington Post/ABC News poll](#), 61 percent of Americans surveyed said they support gay marriage, compared with 37 percent in 2003.

However, same-sex couples living in the states where they cannot marry continue to endure irreparable emotional and financial harm. For example, Jim Obergefell, one of the plaintiffs in the Supreme Court case, traveled from Ohio to Maryland to marry his gravely ill partner, John Arthur, because their state did not allow same-sex couples to wed. Arthur later died, and Ohio refused to recognize the marriage on his death certificate, compelling Obergefell to file suit.

“The stain of unworthiness that follows on individuals and families contravenes the basic constitutional commitment [of] equal dignity,” the plaintiffs’ lawyer, Mary Bonauto, said on Tuesday.

Public opinion is changing rapidly in favor of same sex marriage, giving the court cover to issue a decisive ruling that reflects those evolving norms.

Liberal justices suggested that access to marriage is a fundamental right and that granting same-sex couples the right to wed does not harm traditional marriages. And they questioned how limiting the definition of marriage to opposite-sex couples protects children, since the children of same-sex couples would also benefit from social legitimacy and stability. Kennedy appeared equally moved by the issue of legitimacy. “Same-sex couples say, of course, ‘We understand the nobility and the sacredness of the marriage. We know we can’t procreate, but we want the other attributes of it in order to show that we, too, have a dignity that can be fulfilled.’” Conservative justices insist on the rights of states to regulate marriage and the importance of deferring to the political process and social discourse on social issues that bend tradition.

All eyes are now on Kennedy, who penned the court’s 2013 decision in [United States v. Windsor](#), which struck down provisions of the Defense of Marriage Act — the federal law that defined marriage as the union of a man and a woman, prohibiting federal benefits for legally married same-sex couples. How he resolves the conflicting considerations of social legitimacy and the tradition of opposite-sex marriage will likely dictate the outcome of the case.

“The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the state, by its marriage laws, sought to protect in personhood and dignity,” Kennedy opined in 2013.

The court issued its decision on narrow legal grounds, declining to rule on gay marriage as a constitutional issue. In another close decision, the court [avoided](#) ruling on the merits of California’s gay marriage ban, known as Proposition 8, finding that the parties did not have the standing to bring the suit. Kennedy also authored three other watershed opinions on gay rights.

But [a decision by the](#) 6th U.S. Circuit Court of Appeals in November in Ohio upholding same-sex marriage bans in Kentucky, Michigan, Ohio and Tennessee created a split among the lower courts and forced the Supreme Court’s hand. The judge in the Ohio case reasoned that voters and elected representatives and not judges should be the ultimate arbiters of marriage equality.

But many states that now permit same-sex marriage do so because lower courts read the Windsor decision as affirming that marriage for gay and lesbian couples is an issue of equal protection under the Constitution, not one to be decided by legislatures or referendums. Roberts, however, cited Maine's reversal of its gay marriage ban in 2012, suggesting that the democratic process could and should be entrusted to usher in change.

"Closing of debate can close minds, and it will have a consequence on how this new institution is accepted," he said, cautioning against cutting off the public discourse. "People feel very differently about something if they have a chance to vote on it than if it's imposed on them by the courts." For example, abortion opponents have questioned whether the Supreme Court's decision in *Roe v. Wade* created a backlash that set back rather than promoted consensus on abortion.

Public opinion is changing rapidly in favor of same sex marriage, giving the court cover to issue a decisive ruling that reflects those evolving norms. And principles of liberty and equality should further embolden the court to weigh in on the right side of history by enshrining protections for same-sex couples and their children, whose dignity and equality cannot wait any longer.

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