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Ready For Marriage? Evaluating the Supreme Court's Obergefell Arguments Like A Pro

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READY FOR MARRIAGE? EVALUATING THE SUPREME COURT'S *OBERGEFELL* ARGUMENTS LIKE A PRO

Amateur constitutional law gurus, rejoice! Marriage equality advocates and marriage traditionalists, warm up your commenting keyboards! And, secret Supreme Court junkies, put on your “Notorious RBG” t-shirts and rehearse your favorite Justice Scalia quote! On Tuesday, the United States Supreme Court will hear two and a half hours of arguments on whether the U.S. Constitution permits states to exclude same-sex couples from the rights and responsibilities of marriage. The case, *Obergefell v. Hodges*, is the most eagerly anticipated case of the Court’s current term. And, unlike the last time this court faced the marriage issue, the Justices have very few options other than reaching a substantive decision that will either advance LGBT rights decisively on a national level or undo most of the courtroom victories of the last two years.

The punditry class tells us a decision supporting marriage equality is assured. Even among legal experts, there is ample consensus that Justice Anthony Kennedy will write an opinion for a slim majority of the Court that invalidates the state bans on civil marriage for same-sex couples. But we won’t see any such opinion on Tuesday. (Indeed, we might never see such an opinion because popular expectation has precisely no influence on the Court’s ultimate decision.) But if the conventional wisdom is correct -- and I think it is -- in late June of this year (maybe just in time for some ecstatic end-of-month Gay Pride celebrations), marriage bans in the remaining 13 states and various U.S. territories will be declared unconstitutional for violating the Fourteenth Amendment to the U.S. Constitution.

We won’t have a decision from the Court on Tuesday, but we will have lots to talk about. But we aren’t captive to 24-hour-news sound bites and partisan talking points because we will have, somewhat unusually, same-day release of the transcripts and recordings of the argument. The best indicator we will have in advance of the Court’s June judgment is the comments, questions, and arguments raised on Tuesday, April 28 at the *Obergefell* oral argument. What should we be looking for? Below I try to offer regular folks enough guidance so they can evaluate the proceedings (and the media analysis) for themselves.

But first, an important caveat. Predicting the result in the Court’s eventual decision based only on oral argument is notoriously unreliable. Oral argument binds no judge. Even when the Justices meet in conference later this week to discuss the case and vote, the opinions expressed at that point remain preliminary and nonbinding. A Justice can change her or his mind; it’s happened in the past and will again. Nevertheless, oral argument does give us some indication of how each Justice is leaning on the day the Court hears the case and it can highlight the elements of the parties’ arguments that a particular Justice is unconvinced of or persuadable on.

So, what should you listen for when you listen to the oral argument recording? What should you look for in the same-day transcript? What questions or comments from the Justices indicate -- *might* indicate -- that the conventional wisdom is right or wrong to expect a victory for marriage equality?

Focus on Kennedy, of course.

The questions and challenges from the conservative and liberal wings of the court, like many of the arguments from the advocates themselves, will indirectly target Justice Kennedy. Not only is Kennedy expected to be the decisive vote for a majority, the case directly aligns with his particular interests and his past decisions. Kennedy is protective of state authority (which would support affirming the states’ capacity to define marriage) but is also protective of human dignity and individual liberty (which would incline him to invalidate the bans on same-sex marriage by reversing the decision of the lower court). Moreover, as a 78-year-old, Reagan-appointed conservative who is

the principal author of most of the modern cases affirming gay equality, he is not as predictable as some folks would like.

Watch carefully for Kennedy's reactions when the lawyers allude to his prior decisions. From marriage equality advocates, listen for echoes of "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress," from *Lawrence*, or that the bans' "purpose and effect [is] to disparage and to injure, ... [to] impose a disadvantage, a separate status, and so a stigma" on gay couples, from *Windsor*. The states' lawyers will refer to Kennedy's many affirmations of state authority, including in *Windsor*, where Kennedy discussed the "unquestioned authority of the States" in relation to marriage law. Both sides will try to appropriate his words, "marriage is more than a routine classification for purposes of certain statutory benefits," for their argument. To which uses of his words is Kennedy resistant; to which is he supportive?

And, to Predict Kennedy, Focus on Everyone Other than Kennedy

No one knows the views of any one Justice of the Supreme Court better than that Justice's eight colleagues. So, look for recurring topics of questioning when they come from aligned justices (Breyer asks and Kagan follows up, for example). These patterns identify the areas where the Justices believe their colleagues are susceptible to persuasion. Mostly this will be focused on Kennedy, but some of it may be focused on Roberts (if the more liberal wing of the Court thinks he can be persuaded – perhaps in an area of Supreme Court authority or legitimacy) or Ginsburg and others (if the conservatives think they can effectively evoke worries of a *Roe v. Wade*-type popular backlash). The Justices are the only real experts on the likely behavior of the Court, so understanding their expectations is invaluable.

The Meaning of *Windsor*

The June 2013 *Windsor* case, where Kennedy's opinion invalidated the federal government's discriminatory Defense of Marriage Act ("DOMA," listen for it), has been the legal basis for the lower courts' decisions. The Circuit Courts have disagreed on its meaning and that conflict is why the *Obergefell* case is now at the Supreme Court. But unlike all other courts, the Supreme Court doesn't need to wrestle with the proper interpretation of *Windsor*. It's theirs and they decide its meaning. The *Windsor* opinion meant *then* whatever the majority of the Court says it means *now*. Was it a preemptive statement of the requirements of equality and the right to marry for gay people, a dress rehearsal for full marriage rights for same-sex couples? Or, was it a strong assertion of state authority to define marriage through their normal legal processes?

If Kennedy indicates that *Windsor* was primarily a case about restricting federal encroachment in an area of traditional state authority, there is a significant likelihood the equality/fundamental rights issue is undecided in his mind. An indication from him that "*Windsor* relied on federal or Congressional overreach" or that *Windsor* addressed "an entirely different issue from the present case" should make marriage equality advocates exceedingly nervous.

No Need to Reach the Central Issue.

The conservatives, especially Chief Justice Roberts, are likely to push strenuously for significant "judicial modesty," that the Court should decide as little as possible (in this case at least). It is a very bad sign for marriage equality advocates if Kennedy or any of the more liberal Justices (Breyer, Ginsburg, Sotomayor, or Kagan) express support for postponing the core marriage equality issue and only addressing the secondary issue of whether states must recognize out-of-state marriages by same sex couples. But note: the last hour of argument is set aside for this issue, so don't jump to conclusions at the mere fact that discussion of that issue occurs. In fact, it's worth evaluating how engaged the Justices are at the second stage of the oral argument. If the Justices ask fewer questions

after the first 15 minutes of each advocates time, they don't expect the recognition issue to matter because the Court is leaning toward full marriage equality.

Will No One Think of the Children?

Kennedy's reference, in the 2013 Proposition 8 case, to his concern for the 40,000 Californian children with same-sex parents was an electric moment in that oral argument. Not only did it inject some much-needed reality into the conventional "best interests of the child" discussion, but it offered an indication of one of the things he found persuasive: legally stabilizing gay families for the benefit of their children. On Tuesday, both sides are likely to question the lawyers about the impacts on children. In general, this is an argument likely to support the twelve couples that are bringing Tuesday's challenge to the marriage bans because so many of them are parents and were motivated to challenge their state bans because of uncertainty related to custody, adoption, or recognition of their mutual parenthood. All the references to children will be insightful for predictions of the ultimate outcome.

"Alabama"

Any reference to the on-going legal mayhem in Alabama (or the rumblings of "nullification" from states like Texas) by Kennedy or anyone more conservative than he, probably supports the Court affirming marriage equality. Populist rejection of federal court rulings by state legislatures or elected judges (the ideological media pranks of Chief Justice Roy Moore in Alabama are the best example) has the potential to unite members of the Court more than any other element of these cases. Those who know the Court well, know better than to doubt they will be protective of Supreme Court authority and its prerogatives. Any reference state resistance is likely to support arguments against deference to the states.

Even more pointedly, the confusion in the counties of Alabama is a cautionary tale of what could happen if the Court affirms the bans on same-sex marriage and allows states to set divergent rules. Because most of the current 37 full marriage states received same-sex marriage through a federal court decision, if the Supreme Court upholds the bans a great deal of legal uncertainty will follow. In most states (not including those where the legislatures have acted), the impact would have to be further tested in the courts for many years in the future. The Court will be forced to imagine the whole country being a patchwork of different and unsettled legal rules related to marriage.

A Final Note on Strongly Ideological Arguments

There's a final class of questions that are worth looking for as a predictor of the Court's leanings. Some questions indicate greater insecurity on the part of the Justice asking them. Instead of asking legally-focused questions to advocates, or even posing (indirectly) challenges to their colleagues' positions, some questions seem targeted at a broader audience, intended to rally the culture warriors directly. For example, in *Hollingsworth*, Scalia said "I'm just curious... when did it become unconstitutional to exclude homosexual couples from marrying?" And when he didn't get an answer he liked (he was in fact offered a question in response to his question – a daring gambit for any Supreme Court advocate), he asked the same question again. No one on the Court, even Justice Scalia himself, imagined that there was a relevant answer that would further rational legal argument about the marriage issue. Instead, his argument was pitched at a populist understanding of constitutional interpretation that not even he shares. It was a cheap shot by an originalist who feared he had lost the argument about the purposes and reach of the equal protection clause.

If the Court's conservatives have given up on persuading Justice Kennedy, they may instead address their ideological communities and popular opinion. Justices Alito and Scalia in particular may be tempted to raise irrational fears of gay parenting, unknowable harms to heterosexual marriages, and other arguments that are unsupportive of legal reasoning. Typically, such questions make the

lawyers very uncomfortable. Such questions (and the more liberal justices are not innocent of this tactic either) diminish respect for the Court, but more importantly for our purposes, the perceived losing side of the issue is far more likely to be tempted to engage in this behavior. Look for it.

If we are lucky and have the kind of judicial process our Constitution deserves, the advocates and Supreme Court Justices will stay focused on their collective task, judiciously evaluating the legal justifications for excluding same-sex couples from civil marriage. My advice to you is to assess and critique the arguments for yourself... and wait patiently for late June.

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