



In Supreme Court's gay marriage case, words of Justice Anthony Kennedy, potential swing vote, under microscope

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As the lawyers say these days around 1 First St. NE — the Supreme Court building — it's Anthony Kennedy's world, we just live in it.

The swing justice [can make Tuesday's marriage cases come out however he likes](#). Four liberal colleagues are likely to join any plausible theory he wants to use to get to a full-fledged constitutional right to same-sex marriage, if that's where he wants to go.

If. Some liberals' hearts jumped into their throats Tuesday morning when Kennedy seemed to channel colleague Samuel Alito, asking whether the court could alter an institution that's been around for "millennia."

Justice Ruth Bader Ginsburg jumped in right away to challenge the premise. She pointed out that marriage law has changed continuously as society's ideas have changed.

It was probably a false alarm. Like some others on the court, Kennedy likes to try on the "other" side's points at oral argument, and he later reverted to form, describing exclusion from marriage as an infringement of human dignity. That fits his record as the author of the court's major gay rights advances.

Still, both sides should be nervous about a 5-to-4 outcome with Kennedy as pivot:

— He's mortal. More precisely, all justices are mortal, and the court is one liberal retirement away from a newcomer appointed by, say, President Scott Walker or Mario Rubio.

— He's cautious. Any theory he picks under which the challengers win — equal protection, sex discrimination — opens doors for challenges to other laws, with results he and others might find uncomfortable.

Public opinion is moving fast. According to a Williams Institute poll, in only five states — Utah, Mississippi, Tennessee, West Virginia, and Alabama — is support for same-sex marriage still under 40%.

Those polls, not the court's chancy politics, represent the surest hope for gay-marriage supporters.

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