



# Questions To Watch For In The Gay-Marriage Arguments

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The U.S. Supreme Court today hears arguments in the most controversial case since the challenge to Obamacare, the question of whether same-sex couples have a constitutional right to be married.

The four cases to be argued today are grouped under the title [\*Obergefell v. Hodges\*](#), an appeal of the Sixth Circuit Court of Appeals decision last November upholding same-sex bans in four states. In that decision, Judge Jeffrey Sutton acknowledged the wave of public support for gay marriage but said the decision over whether to make it legal shouldn't be resolved by [“a poll of the three judges on this panel, or for that matter all federal judges, about whether gay marriage is a good idea.”](#)

Why is everybody directing their questions at me? (Pete Marovich/Bloomberg via Getty Images)

That poll will happen at the Supreme Court, most likely ending in a 5-4 vote with Justice Anthony Kennedy in the majority. But how they get there is still unknown, and questions today might illuminate the thinking of the majority. Here's what I'm looking for, based on previous arguments and briefs of amici, including [an excellent summary of the case and most likely winning arguments written for the libertarian Cato Institute](#) by William Eskridge of Yale Law School and Cato's Ilya Shapiro.

- **Is there a constitutional right to marriage?** This question opens uncomfortable questions, most critically whether same-sex marriage will lead to other unconventional unions like polygamy. [Sonia Sotomayor asked this very question in oral arguments](#) over the federal Defense of Marriage Act, and expect it to be raised again, although Eskridge and other scholars think there are relatively easy ways for the court to sidestep the issue.

- **Does the Equal Protection Clause of the 14th Amendment protect gay marriage?** This is one of two questions the court actually asked lawyers to answer and the key to any decision. Eskridge and Shapiro argue equal protection can explain why state laws banning gay marriage are unconstitutional, because they target a minority group with a history of oppression for different treatment. Such “caste legislation” has been illegal since the Constitution was written, at least in theory, they say, and while no one could argue the original *intent* of the men who wrote that document was to protect same-sex couples, the original *meaning* of the Bill of Rights and the 14th Amendment was just that. Watch for how Justice Kennedy draws out this particular argument today; he’s a huge fan of individual liberty and Michigan, in particular, passed a package of laws that diminish the rights of same-sex couples when it comes to health insurance, adoption and other benefits.
- **What about tradition?** Justice Antonin Scalia isn’t likely to vote for gay marriage, but one of his main objections has a lot of intellectual clout. Marriage is a custom with thousands of years of tradition behind it, which elected representatives wrote into state law. Should a collection of unelected judges make such a substantial modification in the popular understanding of marriage, or allow the democratic process to work that change over time?
- **What about states’ rights?** In oral arguments in *U.S. vs. Windsor*, the DOMA challenge, Kennedy asked U.S. Solicitor General Donald Verrilli if Congress could “use its powers to supercede the traditional authority and prerogative of the states to regulate marriage in all respects?” “No, I’m not saying that, Your Honor,” Verrilli said. “Then there is a federalism interest at stake here,” Kennedy concluded, and his decision overturning the federal law had a strong states’ rights element in it. Expect well-crafted arguments about states’ rights today, and sardonic questioning from Scalia about whether voters have any say in the legal definition of marriage or it should be decided by the wise men and women on the court in [Washington](#).
- **Can the court stop at ordering states to recognize all out-of-state marriages?** The court asked for separate arguments on whether the Equal Protection Clause requires recognition of same-sex marriages from other states, and this would be a convenient compromise for the court. But gay-rights advocates aren’t likely to suggest it because it denies them a universal right to marry.

Most of the arguments today will be crafted to appeal to Kennedy and his passion for individual liberty, the freedom to be protected against arbitrary treatment by the state. The advocates will also try to remind more conservative justices of the liberty issues at stake here, but really all they have to do is win over Kennedy and they’ve won the case. I am skeptical the court will find a fundamental right to marry, as that threatens all manner of state laws regulating other aspects of marriage including bans on polygamy and cousins marrying, and it may well stop at requiring states to recognize all valid marriages. More likely it finds the Equal Protection Clause requires states to treat same-sex couples exactly as they treat heterosexual couples, no more and no less, thus striking down gay-marriage bans but leaving the rest of the legal infrastructure in the states intact.