Written by **Raven Clabough** on April 29, 2015

Supreme Court Justice Weighs Sex Discrimination Consideration in Same-sex "Marriage" Arguments

During Tuesday's Supreme Court arguments over same-sex "marriage," Chief Justice John Roberts, Jr. made a point that may have revealed exactly which way he intends to vote in the case.

"I'm not sure it's necessary to get into sexual orientation to resolve this case," he said. "I mean, if Sue loves Joe and Tom loves Joe, Sue can marry him and Tom can't. And the difference is based upon their different sex. Why isn't that a straightforward question of sexual discrimination?"

According to the *New York Times*, that very same theory had been advanced in a brief filed by Professor Andrew Koppelman, law professor at Northwestern University, and several other scholars, urging the court to strike down same-sex marriage bans in Kentucky, Michigan, Ohio, and Tennessee.

The brief made a similar argument: "If Ann is permitted to marry Bob, but Charles may not marry Bob, then Charles is being discriminated against on the basis of sex."

Koppelman asserts that it would be a simple solution for Justice Roberts to apply existing sex discrimination law to the case. "This would be a clean, formalistic way for the court to resolve the case," Andrew Koppelman, a law professor at Northwestern University, said in an interview. "It could just apply existing sex discrimination law."

But John J. Bursch, a lawyer defending the same-sex marriage bans, responded to Justice Roberts' inquiry by stating that it is not sex discrimination because the two sexes are not being treated differently, since the bans place the same burden on men and women.

Such a stance may not pass judicial muster, however.

In the law blog The Volokh Conspiracy, George Mason University law professor Ilya Somin wrote that the problem with this argument "is that, by the same reasoning, laws banning interracial marriage don't discriminate on the basis of race."

Justice Roberts did not pursue his theory further, but as noted by the *New York Times*, his question reveals that, were his intention to vote in favor of same-sex marriage, "he may have found a modest path that would not require revision of constitutional standards for discrimination based on sexual orientation."

In fact, Georgia State University law professor Eric Segal predicts that Justice Roberts "will concur in the result striking down the same-sex marriage bans on the basis that they amount to unconstitutional gender discrimination."

The very same point regarding gender discrimination was raised by Justice Kennedy in 2013, when he asked a lawyer defending California's same-sex marriage ban, "Do you believe this can be treated as a

gender-based classification?"

Before the lawyer could answer, Kennedy continued, "It's a difficult question, and I've been trying to wrestle with it."

There is already some legal precedent to use gender discrimination against same-sex marriage bans. In November, a federal judge in Missouri used language much like the chief justice's. "The state would permit Jack and Jill to be married but not Jack and John," Judge Ortrie D. Smith wrote. "Why? Because in the latter example, the person Jack wishes to marry is male. The state's permission to marry depends on the genders of the participants."

Suzanne B. Goldberg, a law professor at Columbia University who has written an article on "sex discrimination and marriage equality," said in an interview that the argument had force.

"I was delighted that Chief Justice Roberts highlighted the sex discrimination in laws that forbid same-sex couples from marrying," she said. "This important point has been made by judges in the lower courts and deserves the high court's attention in these cases."

For the justices, voting against same-sex marriage bans without having to legally change the definition of marriage would certainly makes their decisions easier.

Most believe Justice Anthony Kennedy's vote to be the crucial one, and during Tuesday's arguments, it became clear that he struggled with the notion of the court changing the meaning of marriage, when its definition has persisted for thousands of years. "I don't even know how to count the decimals when we talk about millennia," he said. "This definition has been with us for millennia. And it's very difficult for the court to say, 'Oh, well, we know better.' " He added that "the social science on this" — the value and perils of same-sex marriage — is "too new."

He stated that "there has not been really time" to allow the federal system "to engage in this debate."

Justice Antonin Scalia expressed similar sentiments. He asked, "Do you know of any society, prior to the Netherlands in 2001, that permitted same-sex marriage?" he asked Mary L. Bonauto, who is representing more than a dozen gay and lesbian couples.

Chief Justice John G. Roberts Jr. suggested that Bonauto was asking the court to do something radical. "You're not seeking to join the institution," he said. "You're seeking to change what the institution is."

Justice Scalia added, "The issue, of course, is not whether there should be same-sex marriage, but who should decide the point." The right answer, he said, was the people or their elected representatives, not the courts.

Even Justice Stephen Breyer, one of the more liberal justices, seemed to agree with this point. "Suddenly you want nine people outside the ballot box to require states that don't want to do it to change what marriage is to include gay people," he said. "Why cannot those states at least wait and see whether in fact doing so in the other states is or is not harmful to marriage?"

Justice Roberts also asserted that if the court were to change the definition of marriage to allow room for same-sex couples, it could breed further resentment against same-sex marriage. He argued that the longer this subject remains in public discussion, the more accepting people have become on it. A court ruling one way or another on this could stifle that conversation. "If you prevail here, there will be no more debate," Roberts told Bonauto. "Closing off debate can close minds, and it will have a consequence on how this new institution is accepted. People feel very differently about something if they have a chance to vote on it."

"One of the things that's truly extraordinary about this whole issue is how quickly has been the acceptance of your position across broad elements of society," he said.

The court is expected to rule at the end of June.