

FROM: IDIBON

JUSTICE KENNEDY'S FAVORITE PHRASES

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In the chambers of the United States Supreme Court, nine men and women are deciding what's going to happen with same-sex marriage in America. Will a widow get back taxes from her wife's estate? Will same-sex marriage be reinstated in California? Or if they rule more broadly, will same-sex marriage be made legal across all 50 states, not just 12?

The decisions are likely come down to one single person: Supreme Court Justice Anthony Kennedy. Expert court-watchers agree that it's clear how the other eight justices will vote (four inclined to support same-sex marriage, four disinclined).

If we could predict the outcome of court cases, we would have retired to our own islands long ago. But what we *can* do, is look at the communications of Kennedy in this court case, and see if his patterns of communication significantly differ from how he has communicated in past court proceedings.

First let's look at some of the phrases that Justice Kennedy uses a lot more than all the other justices (relative to how much he's speaking overall). Again, this is relative to all the justices but I'll put in notes for how Scalia and Ginsburg use the phrase for comparison. In the infographic, the way you get "expected" values is to take the total number of times anyone on the Court says a word/phrase and then multiply it by how much a particular justice is speaking overall. If there were 100 uses of "foo" across all the justices and Justice X

[†] Co-founder and Senior Data Scientist, Idibon; twitter.com/TSchnoebelen. Original at idibon.com/justice-kennedy-speaking-patterns/ (June 12, 2013; vis. Aug. 30, 2013). © 2013. Reproduced with permission from Idibon, Inc.

spoke 10% of all the words, we'd expect them to have 10 "foo"s. We want to pay attention to when observed/expected ratios are particularly high or low: those are phrases worth further inquiry.

Kennedy also seems to like *in this case, I take it, can you tell, you want us, let me ask, and so forth*, and *I'm not sure* relative to all the other justices. Compared to all the other justices, he seems to avoid *I don't, you don't, don't know, and you're saying*.

Most of these top phrases are the kinds of things you might be inclined to toss away if you were trying to do "topic detection". But in opinion detection and sentiment analysis, they are much more likely to carry an important signal. Take *well*. *Well* is one of the most frequent "discourse markers" to pop up in English speech. Certainly it pops up a lot in Kennedy's speech. What's it doing?

Well often indicates a topic change but it can also mark an elaboration or explanation – in that way it's kind of like a *be that as it may* or *that said*. *Well* can mark a kind of insufficiency in what's been said/what's about to be said. It can serve as a pause filler (like *um* or *uh*). It often marks the introduction of reported speech. My own favorite (though wordy) definition is from Andreas Jucker (1993):

[*Well* is] a signpost that directs the addressees to renegotiate the relevant background assumptions, either because a new set of assumptions becomes relevant or because some of the manifest assumptions are mistaken.

And if we look at how Kennedy is using *well* in the same-sex marriage cases, that seems about right (note that these cases were not included in the data in the chart above). I should probably give you the preceding context since they are so clearly responsive to what's come before. But in the interest of space, I'm just going to give the utterances:

- *Well, that – that assumes the premise. We didn't – the House didn't know it was unconstitutional. I mean –*
- *Well, why not? They're concerned about the argument and you say that the House of Representatives standing alone can come into the court. Why can't the Senate standing alone come into court and intervene on the other side?*

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- *Well, it applies to over what, 1,100 Federal laws, I think we're are saying.* {This is a lengthy comment/question by Kennedy that is worth reading – he's grappling with the fact that marriage is clearly a power for the states but the Federal government has all sorts of stuff going on in the citizen's lives regarding marriage.}
- *Well, but it's not really uniformity because it regulates only one aspect of marriage. It doesn't regulate all of marriage.*
- *Well, then are – are you conceding the point that there is no harm or denigration to traditional opposite-sex marriage couples. So you're conceding that.*
- *Well, but, then it – then it seems to me that you should have to address Justice Kagan's question.*
- *Well, the Chief – the Chief Justice and Justice Kagan have given a proper hypothetical to test your theory.* {This quote also goes on as Kennedy lays out test again to think through the issue of "standing" – that is, who has the right to bring a case forward.}

This does seem to signal Kennedy challenging what's been said and it matches Jucker's definition reasonably well.

But of course, we're most curious about how Kennedy speaks in the oral arguments based on how he's ultimately going to vote. When Kennedy is going to end up voting with Ginsburg and against Scalia, he tends to use the phrasing *whether or not* (he uses this phrase over 8 times more often than we'd expect when he's going to vote with Ginsburg). He also tends to use the words *can*, *can't*, *or*, *your*, *I'm*, *is that*, and *argument* when he's ultimately going to end up voting with Ginsburg.

By contrast, when Kennedy is going to vote with Scalia and against Ginsburg, he tends to use *there is*, *that's*, *same*, and *government*. He also uses a lot more of the past tense when voting with Scalia (particularly *has*). Kennedy also uses a lot of *this* when he's going to vote with Scalia against Ginsburg – in particular *this case*. (For more about how interesting demonstratives are, see the overview/links in [this post](#).¹)

¹ corplinguistics.wordpress.com/2011/11/17/who-is-the-sarah-palin-of-the-canterbury-tales/.

But notice that these signals are rather weak. That's because across 192 cases that came before the Court before the same-sex marriage cases, Kennedy, Scalia, and Ginsburg voted together in 108 of them (Kennedy voted with Scalia and against Ginsburg in 43, and with Ginsburg against Scalia in 28. And with neither one of them in 13).

So how is Kennedy going to vote? Well . . .

APPENDIX: OTHER TEXT ANALYSES

Here's a collection of links with legal scholars, journalists and others interpreting Kennedy:

- Erwin Chemerinsky: [ABAJournal](#)² and [SCOTUSblog](#)³
- Dana Milbank: [Washington Post](#)⁴
- Sahil Kapur: Talking Points Memo [here](#)⁵ and [here](#)⁶
- Nina Totenberg: NPR [here](#)⁷ and [here](#)⁸
- Dylan Scott: [Governing](#)⁹
- John Bursch: SCOTUSblog [here](#)¹⁰ and [here](#)¹¹
- Lyle Denniston: SCOTUSblog [here](#)¹² and [here](#)¹³
- Ilya Somin: [The Volokh Conspiracy](#)¹⁴

² www.abajournal.com/news/article/chemerinsky_another_look_at_same-sex_marriage_cases/.

³ www.scotusblog.com/2013/03/commentary-what-might-happen/.

⁴ www.washingtonpost.com/opinions/the-swing-vote-is-in-so-stop-kissing-up/2013/03/27/87b0803c-9726-11e2-b68f-dc5c4b47e519_story.html.

⁵ tpmdc.talkingpointsmemo.com/2013/04/john-roberts-anthony-kennedy-doma-trap.php.

⁶ tpmdc.talkingpointsmemo.com/2013/03/anthony-kennedy-gay-marriage-middle-path.php.

⁷ www.npr.org/2013/03/30/175765569/gay-marriage-recap-will-justices-rule-on-constitutionality.

⁸ www.npr.org/2013/03/27/175476904/justices-cast-doubt-on-federal-defense-of-marriage-act.

⁹ www.governing.com/blogs/fedwatch/gov-the-most-important-moment-in-the-supreme-courts-doma-hearing.html.

¹⁰ www.scotusblog.com/2013/03/more-tea-leaves-why-domas-demise-will-support-prop-8-surprise/.

¹¹ www.scotusblog.com/2013/03/reading-tea-leaves-why-the-court-will-uphold-proposition-8/.

¹² www.scotusblog.com/2013/03/argument-recap-doma-is-in-trouble/.

¹³ www.scotusblog.com/2013/03/argument-recap-on-marriage-kennedy-in-control/.

¹⁴ www.volokh.com/2013/03/26/justice-kennedy-on-proposition-8-and-sex-discrimination/.

- Amy Howe: [SCOTUSblog](#)¹⁵
- Marty Lederman: [SCOTUSblog](#)¹⁶
- Adam Liptak: [NYTimes](#)¹⁷
- Jeffrey Rosen: [The New Republic](#)¹⁸
- Peter Dreier: [Huffington Post](#)¹⁹

Notice that one of the things a few of the people comment on is “tone of voice” – Nina Totenberg mentions Kennedy sounding “ticked off”. That’s a reminder that using transcripts alone wipes out a lot of powerful phonetic cues. //

¹⁵ www.scotusblog.com/2013/03/what-will-the-court-do-with-proposition-8-todays-oral-argument-in-plain-english/.

¹⁶ www.scotusblog.com/2013/03/revisiting-the-courts-several-options-in-the-california-marriage-case/.

¹⁷ www.nytimes.com/2013/03/30/us/supreme-courts-glimpse-at-thinking-on-same-sex-marriage.html?pagewanted=all&_r=0.

¹⁸ www.newrepublic.com/article/112800/supreme-court-doma-case-federalism-comes-back-haunt-conservatives#.

¹⁹ www.huffingtonpost.com/peter-dreier/supreme-court-states-rights_b_3027484.html?utm_hp_ref=politics.