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April 27, 2015

## When Should the Supreme Court Justices 'Decide' a Right?

Alan E Garfield



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# When should the Supreme Court justices 'decide' a right?



ALAN GARFIELD

Who decides? That is the central question in the same-sex marriage cases being heard by the Supreme Court on Tuesday.

On the one hand, the justices could decide the same-sex marriage issue themselves. If they declare that gays and lesbians have a constitutional right to marry, their decision will be binding on the entire country. It wouldn't matter if the decision was made by a slim 5-4 majority. It wouldn't matter if the majority of Americans disliked the decision. Absent a constitutional amendment, the court's ruling would be the law of the land.

On the other hand, the justices could let the same-sex marriage issue be decided by the political process. That's what would happen if the court failed to find a constitutional right. Such a ruling would leave the same-sex marriage issue to individual state legislatures. Some states might permit same-sex marriages. Some might not. But the issue would be left to the people and their elected representatives to decide (except in states where state constitutions gave gays and lesbians the right to marry).

This "who decides" question lies at the core of all constitutional law cases. When the Supreme Court declared flag burning to be protected speech, the justices removed this issue from the political process. It didn't matter if most Americans wanted flag desecrators punished. Flag burners were protected.

Conversely, when the Supreme Court decided that there is no constitutional right to assisted suicide, it left this issue to be resolved through the political process. Some states decided to permit assisted suicide. Others continued to forbid it. But the matter was left to the citizens and their representatives.

How do justices decide which issues to resolve themselves and which to leave to the political process? If you think the Constitution provides them with an answer, think again.

Same-sex marriage is a perfect example. The Constitution nowhere mentions a right to same-sex marriage. But it does mention "liberty" and "equal protection." Any justice inclined to stretch these concepts to encompass same-sex marriage could easily do so. Any disinclined justice

could easily do the opposite.

Which brings us back to the original question: When should justices find something a constitutional right and remove it from the political process? Surely, most issues in a democracy should be decided by the people. But some should not.

The public should not decide which ideas people can express. The public should not vote on what religion citizens must follow, or which punishments are cruel and unusual. There should be no public referenda on which races can be treated more favorably.

All of these rights – freedom of speech, freedom of religion, the ban on cruel and unusual punishments, and racial equality – must be beyond popular control in any society committed to human dignity. These rights are not negotiable. They're inalienable. And the courts should remove them from the political process.

Most decisions about limiting people's liberties are left to the political process. Our elected representatives are free to pass laws that make us pay a minimum wage, wear a seat belt, refrain from using controlled substances and shovel our sidewalks.

But the Supreme Court has said some liberties are so "central to personal dignity and autonomy" that they should be removed from political control. In particular, the court has identified decisions about marriage, procreation, contraception, family relationships and child rearing as being beyond popular control, because they concern "the most intimate and personal choices a person may make in a lifetime."

By this measure, the decision of gays and lesbians to marry should also be free from popular control. The public has no business deciding whom someone should love. It has no right to specify who should be a person's life partner or who is sufficiently trustworthy to be a co-parent. The public shouldn't vote on who sits by a loved one's deathbed or who decides when to withdraw life-support.

Absent compelling reasons, people should be free to choose their own companions on life's journey. If they select a person of the same sex, that's absolutely their choice. The decision "to love and to cherish" another is not something the rest of us should vote on.

Alan Garfield is a professor at Widener University School of Law.