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July 13, 2015

Will 'Rule of Five' End Marriage Debate?

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BENCH PRESS

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They did it.

Five justices on the Supreme Court, a bare majority, decided for the rest of the country that gays and lesbians have a right to marry.

It no longer matters what the majority of voters in a state thinks. It doesn't matter what their elected representatives believe. It doesn't even matter if a state constitution declares marriage to be limited to a man and a woman.

All that matters is what those five justices thought. Even the blistering dissents of their four colleagues are irrelevant. As Justice William Brennan used to tell his clerks, the most important rule of constitutional law is the rule of five. With five justices, you can do anything.

And five justices did it. But were they wrong to have done so?

The four dissenting justices – Roberts, Scalia, Thomas and Alito – blasted the five for abusing their power. They said that a right to same-sex marriage “has no basis in the Constitution,” and that the issue should have been left to the people and their elected representatives.

Roberts acknowledged that many people would rejoice in the majority's decision, and he did not “be-grudge” their celebration. “But for those who believe in a government of laws, not of men,” he warned, “the majority's approach is deeply disheartening.”

Ouch!

So why did Anthony Kennedy, who authored the majority opinion, believe that his ruling was an appropriate use of judicial power?

Kennedy readily acknowledged that most policy issues in a democracy should be decided by the people and their elected representatives. “Of course,” he said, “the Constitution contemplates that democracy is the appropriate process for change.”

But he also wrote that the Constitution shelters certain fundamental individual rights from political control. Quoting from an earlier Supreme Court decision, he said that the “idea of the Constitution ‘was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.’”

This is clearly true with regard to some constitutional rights. No justice would say that “We the People” get to vote on what ideas a person can express or what faith a person must adhere to. All recognize that these are fundamental rights which the Constitution immunizes from political control.

But should the right to choose one's partner in marriage, including a person of the same sex, be among those fundamental rights?

Admittedly, there is no express right to marry in the Constitution as there are express rights of freedom of speech and religion in the First Amendment. But the Fourteenth Amendment does expressly prohibit depriving people of “liberty” without due process of law and denying people the “equal protection of the laws.” Could these concepts of “liberty” and “equality” encompass an individual's decision about

whom to marry?

Kennedy said they could. He recognized that most of our liberties are subject to political control. But he said that some personal choices are so “central to individual dignity and autonomy” that they have been treated as fundamental rights under the Constitution.

Indeed, the Court long ago recognized the right to marry as one of these fundamental rights when it struck down a state ban on interracial marriages. The only question was whether this right included the right to choose a partner of the same sex.

Kennedy acknowledged that most historic references to marriage referred to a union between a man and a woman. But he said marriage has always been an evolving concept. At one time, most marriages were arranged by a person's parents, and for many centuries a married woman's rights were subordinate to those of her husband's.

Gays and lesbians, Kennedy said, were not trying to devalue traditional marriage. To the contrary, they seek it for themselves “because of their respect – and need – for its privileges and responsibilities.” And because of their “immutable nature,” marrying someone of the same sex is “their only real path to this profound commitment.”

So how would you characterize Kennedy's opinion? Did Kennedy and his fellow four justices “rob” the public of its right to define marriage, or did they rightfully shelter gays and lesbians from having their personal decisions about choosing a life partner be subjected to popular control?

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