

Sent: Sat, 27 Jun 2015 11:25:31 -0400
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I thought the constitutional lawyer in you might appreciate the below...congrats on a hell of a stretch.

From: Cass Sunstein [mailto:csunstei@law.harvard.edu]
Sent: Saturday, June 27, 2015 11:05 AM
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GAY RIGHTS

Gay Marriage Shows Court at Its Best

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By [Cass R. Sunstein](#)

In his powerful [dissenting opinion](#) from Friday's same-sex marriage decision, Chief Justice John Roberts asks an excellent question: "Just who do we think we are?" That question deserves an answer.

Gay Rights

If we look at the arc of the court's history, we might be able to offer one. Contrary to appearances, the court usually pays attention to an actual or emerging moral consensus, certainly with respect to fundamental rights. It follows public opinion; it does not lead it. When Justice Anthony Kennedy wrote that the Constitution protects "the right of all persons to enjoy liberty as we learn its meaning," he didn't mean the justices consult philosophical texts or make things up. He meant to refer instead to an emphatically social process, in which the justices learn from their fellow citizens.

A survey of the court's major decisions, at least since World War II, attests to this conclusion. In establishing basic rights, the justices have reflected widespread moral convictions. The gay-marriage decision is no outlier. It stands in a long line of prior decisions, all of which were highly controversial at the time, but most of which are now widely celebrated, even taken as iconic.

The court didn't strike down school segregation until 1954, when a strong majority of Americans was committed to integration (and not incidentally, six years after President Harry Truman had desegregated the armed forces). It didn't take a firm stand against sex discrimination until the 1970s, in direct response to the movement for sex equality and to rapidly changing social norms.

When the court invalidated Connecticut's ban on the use of contraception in 1965, it was well aware that Connecticut was an outlier, and that the overwhelming majority of states took a different path. *Roe v. Wade* in 1973 is often seen to exemplify the court's willingness to defy democratic will, but it took place in a nation in which many states had been rapidly moving to liberalize their abortion laws.

To be sure, there is one context in which the post-World War II court seems to have acted in clear opposition to the views of an overwhelming majority, and that is school prayer, which the court struck down in 1962. But as the University of Richmond's Corinna Barrett Lain has recently [demonstrated](#), the court sincerely believed that in so ruling, it was reflecting the emerging views of the American people. By the late 1950s and early 1960s, religious pluralism was on the rise, and the court itself thought that the case was relatively easy.

To the justices, the views of the American people seem to matter for two reasons. The first is that they give a kind of permission slip: If most people agree with what the court wishes to do, it is less likely to risk its own prestige, or to put its own role in question, if it acts on its wishes.

The second and perhaps more fundamental reason, directly related to the same-sex marriage issue, is that the views of the American people provide valuable information: If most people have come to share a moral commitment, or if the arc of history is clearly on one side, then judges are likely to pay respectful attention. That is the only way to understand the agreement of five members of the court with these remarkable sentences: "They ask for equal dignity in the eyes of the law. The Constitution grants them that right."

But is all this an adequate response to the chief justice? His best

rejoinder is that if political majorities have really come to embrace new moral commitments, they should entrench those commitments through democratic means, not through the courts. In his words, those who favor same-sex marriage should “celebrate the achievement of a desired goal,” but they should “not celebrate the Constitution. It had nothing to do with it.”

It’s a worthy argument. But the [arc of American history](#) -- including the arc of constitutional law -- suggests that it is wrong. In decisions that we now applaud, and even take as part of our national fabric, the court’s understanding of the Constitution has been influenced by the emerging moral commitments of We the People. The meaning of our founding document, as we live it, is a product not only of text and history, but also of social movements and struggles, dissents and sometimes deaths, changing hearts and minds.

Celebrate the Constitution. It had everything to do with it.