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Weighing One Constitutional Need Against Another

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Supreme Court justices can't just apply the Constitution as written. It's not that simple.

If it were, the same-sex marriage cases and the Voting Rights Act case would have been open and shut. Since the 14th Amendment insists upon the “equal protection of the laws,” any state law denying same-sex couples the right to marry would be automatically unconstitutional because it treats same-sex couples unequally. And the Voting Rights Act would be indisputably constitutional because the 15th Amendment expressly permits Congress to enact laws to ensure that the right to vote is not denied “on account of race.”

I like those results. But I know that applying the Constitution is not so easy. The Equal Protection Clause couldn’t possibly forbid all unequal treatment regarding marriage. Indeed, states commonly prohibit marriages between siblings or cousins and prevent young minors from marrying.

Congress' power to enforce the 15th Amendment must also have limits. Surely, Congress couldn’t use this power to enact Obamacare or to regulate coal plant emissions. Any use of the power must be tied to protecting voters from race discrimination.

Someone has to flesh out the meaning of these amendments, and in our system, the Supreme Court justices get the final say.

The justices have to decide which inequalities are permitted and which are not. They need to determine when Congress has properly used its power and when it has gone too far.

In doing so, the justices inevitably use their discretion. But they also know that law-making should ordinarily be done by elected officials, not by them.

Each justice must therefore develop a philosophy for determining when it’s appropriate for the Court to trump the actions of elected officials.

So let's see what the justices did with their discretion in this year's two blockbuster decisions: the challenge to the Voting Rights Act and the challenge to the Defense of Marriage Act.

In both cases, congressionally enacted legislation was overturned. But the political alignment of the justices and the concerns expressed by them were light years apart.

The conservative justices formed the majority that overturned a key Voting Rights Act provision. These justices were concerned with states' rights. They were troubled that the Act required only some states to get federal permission before making changes to their voting laws. They thought that this infringed on the sovereignty of these states and violated the principle that all states should be treated equally.

The dissenting liberal justices were less concerned with states' rights, especially since members of the Senate, the chamber intended to represent the states, had recently authorized the challenged provision by a vote of 98 to 0.

They were much more concerned that the conservative justices were gutting the Voting Rights Act and leaving minority voters vulnerable to political machinations aimed at marginalizing their influence.

In the DOMA case, the liberal justices, joined by the occasionally liberal Justice Anthony Kennedy, formed the majority. Here the liberals were concerned with the rights of gays and lesbians.

The dissenting conservative justices were concerned that the majority’s “liberty” argument could be used to challenge state laws denying gays and lesbians the right to marry. So they focused on damage control, insisting that the majority’s reasoning was really about respecting the right of states to define marriage however they liked.

So decide for yourself which judicial philosophy is more appealing. Personally, I favor the liberals’ approach of emphasizing individual rights over states’ rights. States are protected in the political process by their congressional representatives. But minorities can get trampled. If the justices are going to invalidate democratically adopted laws, they should do so to help those who truly need the Court’s protection.

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