

Op-ed | Roberts On Solid Ground As Swing Vote

by Peter G. Verniero

In his engaging new biography of former U.S. Supreme Court Justice Sandra Day O'Connor, Evan Thomas writes that O'Connor "bridled at being called 'the swing vote,' a term suggestive of fickleness and expediency." I wonder if Chief Justice John Roberts is having a similar reaction these days.

Roberts supplied the pivotal fifth vote in the two most prominent cases announced at the end of the court's term.

In one, the chief justice decided that the government is constitutionally authorized to include a question about citizenship on the decennial census. But, he and the four so-called liberal justices also held that the record in the case before them did not sufficiently explain a legitimate governmental rationale for wanting to do so.

In the second case, Roberts again cast the fifth vote in a 5-4 decision, this time siding with the so-called conservative justices. In that case, the chief justice wrote that partisan gerrymandering – the practice of drawing legislative districts to favor one political party over the other – itself presented a political question, meaning it was beyond the role of federal judges to evaluate.

I'm not fond of labeling judges as conservative, liberal or anything else. Such labels are in the eye of the beholder and do not accurately describe the judicial function. That said, if we must use a label to explain the chief justice's most recent decisions, it should be "institutionalist."

In the census case, the government's stated rationale for the citizenship question was that data derived from the question would assist the Department of Justice in enforcing the Voting Rights Act.

In reviewing the record as a whole, the court concluded that the government's rationale seemed "contrived." As the chief justice stated, the evidence "tells a story that does not match" the government's explanation.

Roberts further explained, "If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case." In other words, because the judicial function was at stake, the chief justice appeared to insist on more exacting proof before sustaining the government's position.

In the redistricting case, the chief justice also displayed his institutional impulses. He acknowledged that partisan gerrymandering, in the extreme, can reflect antidemocratic principles. Still, that was not enough for him and the four other justices in the majority to review the merits of the case. The chief justice declined to insert federal judges into the role of evaluating a legislative map, "in the absence of a constitutional directive or legal standards to guide (those judges) in the exercise of such authority."

Put differently, the chief justice seemed to recoil at the thought of judges being thrust into what he perceived to be the thicket of legislative line-drawing.

And whom did he quote as support for his position? Justice Sandra Day O'Connor, who had noted in a prior opinion that the drawing of legislative districts is a "traditional part of politics in the United States."

Thus, Roberts appeared to be saying that partisan gerrymandering, as objectionable as it might be, is a function of politics. If so, then to remain apolitical, the judiciary should not be involved. (Courts still are authorized to evaluate allegations of racial gerrymandering because, as noted by Roberts, such conduct lends itself to judicial review based on discernible standards, unlike partisan gerrymandering.) Whether we agree with Roberts on these two opinions, we should respect what looks to be his concern for the court's proper role as an institution. Judicial decisions, of course, should be based on controlling legal standards and the facts of each case.

But when the standards are unclear or nonexistent, it is understandable that a judge – especially the chief justice of the United States - would want to write a principled decision consistent with the judiciary’s standing as an institution.

In that setting, Roberts was not reflecting the fickleness or expediency of a “swing” jurist, but rather demonstrating that leading the court requires an institutional perspective.

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