

Op-ed | **Justices Defy Labels. We're All Better Off Because of That.**

by Peter G. Verniero

One of America's principal founders believed the judiciary would be the weakest of the three governmental branches. The president would command the military, Congress would write the laws and control how the federal treasury was spent, but what power would judges have?

Alexander Hamilton's answer came in Federalist Paper No. 78: Judges would have "neither Force nor Will, but merely judgment." And one other thing: Courts would have independent authority to interpret statutes and the Constitution.

In a pair of rulings, the U.S. Supreme Court displayed that authority this month, and the country is better for it.

Anyone who cares deeply about equal rights for all Americans should embrace the court's decision in *Bostock v. Clayton County*. In that case, the justices ruled, 6-3, that Title VII of the Civil Rights Act of 1964 protects gay, lesbian and transgender employees from workplace discrimination.

The court's opinion is so straightforward and plainly written, the answer to the specific question presented — whether the statute's prohibition against discrimination "because of sex" includes discrimination based on sexual orientation or transgender identity — seems an obvious yes.

The decision is a momentous advancement for LGBTQ rights and in that sense, it's a landmark ruling. But in another sense, it reflects the unremarkable task of the court offering its reasoned judgment without fear or favor — precisely what the founders had designed.

The court's decision is notable in another way — it was authored by Justice Neil Gorsuch and presumably assigned to him by Chief Justice John Roberts, who also joined the opinion. Both jurists are known as

conservatives, and many had predicted that their appointments to the court would lead to a restriction of individual rights.

The *Bostock* decision proved those predictions to be wrong, at least in that case. To be sure, the labels we place on judges sometimes are accurate predictors of how they will decide cases.

But I have long held the view that we should dispense with such short-hand references, which too often suggest that judges are no different than elected officials from one political party or the other — which is decidedly not the case.

Indeed, Chief Justice Roberts has tried to depoliticize the manner in which we refer to judges. In an unusual public statement released in 2018, he said: "We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them."

Which brings me to the court's second major ruling, this one written by the chief justice himself. In *Department of Homeland Security v. Regents of the University of California*, the court held, by a 5-4 vote, that the current administration improperly rescinded the prior administration's immigration relief program for young people known as DACA.

Like the *Bostock* decision, the *Homeland Security* opinion goes directly to the point. One administration is free to rescind the policies of a predecessor administration but only when certain procedural requirements are satisfied. And one of those basic requirements is that agencies must justify their actions with reasons that are not arbitrary or capricious.

In other words, the rule of law governs. Words in a statute govern. An agency's stated rationale for taking action and adherence to regulatory procedure govern.

And when a legislative enactment requires interpretation as in the *Bostock* case or an executive agency cannot reasonably justify its actions as in the *Homeland Security* case, the judicial branch is there to discharge its function — sometimes in unanimous fashion and sometimes with principled dissents.

Another lesson: Despite the labels we too often place on judges, they have the capacity to surprise us with their rulings. Which is why, perhaps, we should stop labeling judges altogether, relying instead on their intellect, temperament, integrity and diversity of opinion as hallmarks of their service.

Although both of these rulings are a victory for the rule of law, they arrive at a time when Americans are hardly in a mood to celebrate. We are in the midst of a worldwide pandemic and too many among us remain victims of hate and racism, with devastating consequences.

Still, amidst the drive for justice and reform, the Supreme Court has reminded us that our constitutional framework retains the capacity to deliver on the promise of equal rights and fundamental fairness, if we allow it to happen.

Peter G. Verniero formerly served as a justice of the New Jersey Supreme Court and state attorney general. He practices law in Newark.