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SundayReview | OPINION

John Roberts, the Umpire in Chief

By JEFFREY ROSEN JUNE 27, 2015

LIBERALS and conservatives were exercised and confused by the combination of Chief Justice John G. Roberts Jr.'s vote to uphold the Affordable Care Act's tax subsidies on Thursday and his dissent from the Supreme Court's decision recognizing a constitutional right of same-sex marriage on Friday. Both sides accused him of voting politically: On Thursday he was taken to task by the right, and on Friday by the left.

In fact, the chief justice's votes in both cases were entirely consistent and constitutionally principled. He embraced a bipartisan vision of judicial restraint based on the idea that the Supreme Court should generally defer to the choices of Congress and state legislatures. His insistence that the court should hesitate to second-guess the political branches regardless of whether liberals or conservatives win is based on his conception of the limited institutional role of the court in relation to the president, Congress and the states.

On Thursday, when Chief Justice Roberts wrote a 6-to-3 decision preserving a key part of the Affordable Care Act (for the second time), Justice Antonin Scalia accused him once again of engaging in liberal judicial activism. "The somersaults of statutory interpretation" the chief justice had performed in both health care cases, Justice Scalia wrote, signaled to America "the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites."

The Roberts-Scalia debate is part of a longstanding argument about how judges should interpret laws passed by Congress. As Chief Judge Robert A. Katzmann of the United States Court of Appeals for the Second Circuit in New York argues in his recent book, "Judging Statutes," the chief justice embraces an approach called "purposivism," while Justice Scalia prefers "textualism." In Judge Katzmann's account, purposivism has been the approach favored for most of American history by conservative and liberal judges, senators, and representatives, as well as administrative agencies. Purposivism holds that judges shouldn't confine themselves to the words of a law but should try to discern Congress's broader purposes.

In the 1980s, when he was a lower court judge, Justice Scalia began to champion a competing view of statutory interpretation, textualism, which holds that judges should confine themselves to interpreting the words that Congress chose *without* trying to discern Congress's broader purposes. (By contrast, originalism, which Justice Scalia also embraces, holds that judges should consult both text and history to understand constitutional meaning.) Textualism, in this view, promises to constrain judicial activism by preventing judges from roving through legislative history in search of evidence that supports their own policy preferences. But in the view of its critics, like Chief Judge Katzmann, textualism "increases the probability that a judge will construe a law in a manner that the legislators did not intend." Chief Judge Katzmann, who was appointed by President Bill Clinton, also accuses Justice Scalia of inconsistency for consulting the intent of the framers in the case of constitutional interpretation but not statutory interpretation.

Chief Justice Roberts echoed these criticisms of textualism in his decision holding that federally created health exchanges were eligible for tax subsidies. "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them," the chief justice wrote, in a line that enraged conservatives. "If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter."

The chief justice's embrace of bipartisan judicial restraint in the second Affordable Care Act case was consistent with his embrace of the same philosophy in the first Affordable Care Act case in 2012, where he quoted one of his heroes, Justice Oliver Wendell Holmes Jr: "The rule is settled that as between two possible

interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act."

By construing the Affordable Care Act, twice, in ways that respect Congress's broader purposes rather than thwarting them, Chief Justice Roberts was not, as Justice Scalia charged, rewriting the law. Instead he was advancing the view that he championed soon after his confirmation: In a polarized age, it is important for the Supreme Court to maintain its institutional legitimacy by deferring to the political branches.

The chief justice's dissent on Friday from the court's 5-to-4 decision recognizing a right of same-sex marriage defended precisely the same vision. Once again, he quoted Justice Holmes for the same proposition that he invoked in the Affordable Care Act cases: "As this Court has been reminded throughout our history, the Constitution 'is made for people of fundamentally differing views.' "

His dissent in the marriage equality case is undoubtedly the fieriest opinion the chief justice has written on the court. "Five lawyers have closed the debate and enacted their own vision of marriage," he writes. He compares Justice Anthony M. Kennedy's same-sex marriage opinion to Roe v. Wade and to Lochner v. New York, a 1905 case striking down maximum hour laws for bakers, both of which he considers prime examples of judicial activism.

CHIEF JUSTICE ROBERTS insists that his passionate opposition to Justice Kennedy's majority opinion is based on his commitment to judicial restraint, not on his personal disagreement with same-sex marriage. In his dissent on Friday, the chief justice said he would not "begrudge" the celebrations that would follow. Instead, his passions were engaged by his commitment to the court's limited role in American politics.

However, the chief justice's commitment to judicial restraint and a limited conception of the court's institutional role is not unvarying. He has written or joined opinions striking down federal campaign finance laws and voting rights laws. Earlier last week, he wrote an opinion for the court that removes one of the last New Deal farm programs propping up price supports for raisins as a violation of the Fifth Amendments prohibition on takings of property without just compensation. In all of

these cases, however, Chief Justice Roberts identified a particular clause of the Constitution — the First Amendment, the Fifth Amendment or the 14th Amendment — that he believed invalidated the federal law in question. In the marriage equality case, he concluded that no clause of the Constitution clearly protected a right of marriage equality, which is why he accused the majority of substituting its own policy preferences for those of the people, as reflected in state legislation.

It's understandable that liberals and conservatives are disappointed with the chief justice for rejecting positions they deeply favor. But Chief Justice Roberts's relatively consistent embrace of judicial deference to democratic decisions supports his statement during his confirmation hearings that judges should be like umpires calling "balls and strikes." As he put it then: "Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ballgame to see the umpire."

Although the chief justice's statement was subsequently mocked, both the Affordable Care Act cases and the marriage equality case show that he meant what he said. Whether writing for the majority or in dissent, he believes that judges should set aside their policy views and generally uphold laws unless they clash with clear prohibitions in the Constitution. In the long term, if he continues to pursue this conception of the deferential role of the court, he may help liberals and conservatives more readily accept their Supreme Court defeats.

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