The Roberts Court is less conservative than you think

Doug Kendall and Brianne Gorod
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WASHINGTON — The Roberts Court certainly seems like a conservative juggernaut. And, yes, from campaign finance to race to religion, it has moved the law dramatically to the right. But this week's Supreme Court decision on cell-phone privacy shows that this isn't the entire story. In a number of significant areas of law, a majority of the Roberts Court will line up behind rulings that are not so much conservative as libertarian, often with a surprisingly progressive bent.

That is certainly true of Riley v. California, in which Chief Justice John Roberts, on behalf of his unanimous colleagues, concluded this week that police may generally not search an arrestee's cell phone without due process. "Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple — get a warrant," wrote the chief justice. This finding echoes arguments about the Constitution's text and history made by both liberal organizations, such as the American Civil Liberties Union and the Constitutional Accountability Center, and the libertarian Cato Institute.

And it's only the latest case in which the court's relatively liberal justices have peeled off one of the court's conservatives — most often Justice Anthony Kennedy, who leans libertarian on many issues, or Justice Antonin Scalia, whose originalism sometimes leads him to expansive readings of the protections provided by the Bill of Rights — to craft a majority in favor of a libertarian-liberal outcome. Consider, for example, Safford v. Redding, a 2009 case in which liberal and libertarian organizations successfully argued that the strip search of a schoolgirl violated the Fourth Amendment. Or United States v. Jones, a 2012 case in which the same coalition convinced the court that attaching a GPS tracking device to a car to monitor its location violates the Fourth Amendment.

The court's libertarian-liberal decisions are not limited to traditional search cases. For example, in Boumediene v. Bush in 2008, a five-justice majority held that the constitutional protection of habeas corpus extended to the detainees held at Guantanamo, reaching a result urged by both liberals and libertarians. Last year in United States v. Windsor, the court held 5-4 that Section 3 of the Defense of Marriage Act, which defined marriage to be solely between a man and a woman for purposes of federal law, violated the basic constitutional requirement of equality under the law. The decision at once struck a blow against government regulation of people's private lives (a triumph for libertarians) and against discrimination and inequality (a triumph for liberals). In another case, Agency for International Development v. Alliance for Open Society International Inc., liberal and libertarian groups urged the court to hold that the government could not require nongovernmental organizations that wanted to receive federal funding for HIV and AIDS programs overseas to adopt a policy explicitly opposing prostitution. The court agreed in a 6-2 decision.

So if the reliably conservative Roberts Court isn't so reliable across an important range of issues, what might we might expect in the years ahead?

Three major issues working their way through the lower courts could produce more liberal-libertarian results when the justices hear them.

The first is same-sex marriage. Last year when the Court struck down DOMA's Section 3, it declined to decide whether similar state laws are also unconstitutional. So now courts across the country are fielding those questions and, so far, saying that they are unconstitutional. As these district court decisions are now being appealed, liberals and libertarians are coming together to explain why the Constitution's sweeping guarantee of equality unambiguously applies to all persons and prohibits discriminatory marriage laws. Cato and CAC, for example, have jointly filed briefs in six cases challenging different states' same-sex marriage bans.

Another case that may end up at the court is ACLU v. Clapper, which challenges the constitutionality of the National Security Agency's collection of Americans' phone records. Libertarians will definitely join liberals to urge the court in fighting this invasion of Americans' privacy.

Meanwhile, voter ID laws offer another area for cooperation. Liberals and libertarians disagree about the constitutionality of the Voting Rights Act. But Cato has expressed general opposition to voter ID laws, suggesting that this is another area in which common ground may be forged, first among advocates and ultimately among the justices if Frank v. Walker — in which a Wisconsin district judge struck down that state's voter ID law — gets that far. The court upheld a different voter ID law (one in Indiana) in 2008, but the Wisconsin judge concluded that that the 6-3 ruling didn't prevent him from striking down the Wisconsin law.

This collaboration across a broad range of issues illustrates that while libertarians and liberals differ sharply in areas such as the powers of the federal government, these groups often agree on questions of individual rights. Often these individual rights are

more fully embraced by the left (such as the right to marry), but not always. Because they approached the issue as a legal rather than a political matter, CAC and Cato sided together in McDonald v. City of Chicago, a case holding that the Second Amendment, like other provisions of the Bill of Rights, applies against state laws.

The alliance of liberal and libertarian advocates will only get stronger in future terms because obviously the justices are listening. Even one of the most conservative courts in our country's history has moments when it's not so conservative.

Kendall, who has co-authored more than two dozen briefs filed before the Supreme Court, is founder and president of Constitutional Accountability Center. Gorod, who clerked for Justice Stephen Breyer and worked in the Justice Department's Office of Legal Counsel, is appellate counsel at Constitutional Accountability Center.