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The Supreme Court's unlikely allies

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The Supreme Court led by Chief Justice John G. Roberts Jr. certainly seems like a conservative juggernaut. And, yes, from campaign finance to affirmative action to religion, it has moved the law dramatically to the right. But this week's decision on cellphone 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 Roberts, writing on behalf of his unanimous colleagues, concluded that police may generally not search an arrestee's cellphone without a warrant: "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." 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 libertarian Cato Institute.

Riley is just the latest case in which the court's relatively liberal justices join with at least one conservative. Most often that justice has been Anthony Kennedy, who leans libertarian on many issues, or Antonin Scalia, who sometimes engages in expansive readings of the Bill of Rights. The result can be 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 *U.S. v. Jones*, a 2012 case in which the same coalition persuaded 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 search cases. In *Boumediene v. Bush* in 2008, a five-justice majority held that the constitutional protection of habeas corpus extended to the detainees at Guantanamo Bay, reaching a result urged by both liberals and libertarians. Last year in *U.S. v. Windsor*, the court held 5 to 4 that Section 3 of the Defense of Marriage Act, which defined marriage as solely between a man and a woman for purposes of federal law, violated the 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 discrimination and inequality (a triumph for liberals). In another case, liberal and libertarian groups urged the court to hold that the government could not require that nongovernmental organizations seeking federal funding for HIV and AIDS programs overseas adopt a policy explicitly opposing prostitution. The justices agreed in a 6 to 2 decision.

So if the reliably conservative Roberts court isn't necessarily so reliable, what might we expect in the years ahead? Three major issues working their way through lower courts could lead to more such liberal- libertarian results. The first is same-sex marriage. Last year, the court declined to decide whether state laws similar to the Defense of Marriage Act are likewise unconstitutional. So courts across the country are fielding those questions and, so far, saying that they are. As these decisions are 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 our organization, for example, have jointly filed briefs in six cases challenging states' same-sex marriage bans.

Another case that could reach 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 to rein in this invasion of privacy. Voter ID laws present a third possibility.

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, they often agree on questions of individual rights. Sometimes these individual rights are more fully embraced by the left (such as the right to marry) but not always.

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