The Supreme Court's Libertarian Moment?

By Ilya Shapiro – July 2nd, 2013

The casual observer of the Supreme Court must have been quite confused last week. First, the Court punted on an affirmative action case, making it harder to use race in college admissions decisions without prohibiting the practice altogether. It then won plaudits from conservatives by striking down key parts of the Voting Rights Act -- but disappointed many of them the very next day by gutting the Defense of Marriage Act.

What is going on? Is the Court liberal or conservative?

None of the above. The theme of last week's cases was captured by President Obama's reaction to the same-sex marriage rulings: "We are all equal under the law." If we're all equal, then we shouldn't be judged by skin color or sexual orientation, and the machinery of democracy shouldn't be gummed up by outdated racial classifications.

In other words, the Supreme Court is increasingly embracing the Constitution's structural and rights-based protections for individual freedom and self-governance. Not in every case, not always with one voice, and not without fits and starts, but as a whole the justices are moving in a libertarian direction.

It's therefore no coincidence that the Cato Institute is the only organization to have filed briefs supporting the winning side in each of the three big cases (or that we went 15-3 on the year). Even beyond racial preferences and gay rights, this Court is coming to be defined by what Justice Kennedy has called "equal liberty."

Part of that is Justice Kennedy himself, the swing vote ever since Justice O'Connor retired in 2006. Anthony Kennedy was appointed by a Republican president, of course, but his jurisprudence is about as libertarian as we've had on the Court since before the New Deal. How else do you reconcile his votes in hot-button cases ranging from presidential wartime powers to social issues to campaign finance?

Kennedy often frustrates legal scholars, but it's not fair to say that he lacks a coherent legal theory. He's a strong federalist who believes in the inherent dignity of the individual -- and that constitutional structures protect that personal liberty. Hence his emotional reading of both the

joint dissent in the Obamacare case last year and the majority opinion in the DOMA case now.

But it's more than just Kennedy's vote in 5-4 rulings or any other idiosyncrasies among the justices. Again invoking President Obama's political tropes, to appreciate the Supreme Court dynamic, you have to transcend the old ideological divisions and reject the "false choice" between liberal and conservative.

Instead, to understand this brave new Court, you have to know that it doesn't rule in a vacuum but rather on the laws and government actions that come before it.

Of late, many of the Court's cases involve appeals of restrictions on various freedoms or radical assertions of power by the federal government. Accordingly, the Court unanimously reversed lower courts on criminal law, environmental regulation, class actions, and more. And the government won less than 40 percent of its cases this year -- down from a historic norm of 70 percent -- including unanimous losses on issues including property rights, securities regulation, tax law, and administrative procedure.

Moreover, most laws have some defect, constitutional or otherwise, and government officials often err in applying them. Prosecutors are overzealous, regulators and bureaucrats overreach, and the Department of Justice pushes the envelope in its legal arguments.

The more that these issues are presented to the Court, the more the Court will strike down laws and official actions, thus enhancing its libertarian quotient.

Returning to the term's "big three" cases, the real surprise should be that most people find themselves on opposite sides of the affirmative action (or voting rights) and gay marriage debates. The Constitution is quite clear in its protection of "due process" and "equal protection" of the laws, which means that the government has to treat people fairly and equally.

There is thus no justification for a public university to vary admissions standards based on race -- much less, as the University of Texas does, to defend preferences to Hispanics by pointing to the need for a "critical mass" of such students, even as it discriminates against Asians, who comprise a smaller part of the student body.

Similarly, while it would be best for the government to get out of the marriage business altogether -- and let churches and other private organizations celebrate the institution however they like -- if there is to be civil marriage, at the very least the federal government should recognize the lawful marriages that states do.

The Supreme Court has now vindicated these ideas. In these and so many other cases this term, it has made our country freer.