Don't be fooled, the Supreme Court is still very conservative

By Adam Serwer – July 1st, 2013

The Supreme Court's landmark gay rights rulings left liberals on cloud nine, but a cursory look at the Supreme Court's most recent term should bring them down to Earth.

The high court's conservative majority, led by Chief Justice John Roberts, has managed to work its will on controversial cases involving civil rights, corporate accountability, and criminal justice. Over the past six months, the Supreme Court has eviscerated a key portion of the Voting Rights Act, made it more difficult for workers to sue for racial discrimination on the job, strengthened corporate protections against legal liability, and made ritual invocation a necessary part of claiming one's Fifth Amendment rights.

Despite all the rhetoric about judicial activism, past administrations have won up to 70% of Supreme Court cases, a percentage that has plummeted to about 37% during the Obama administration. Coverage of the high court's controversial 5-4 rulings were overshadowed by the historic nature of the court's rulings on same-sex marriage. According to a survey by the Pew Research Center, only 34 percent of Americans knew that the Supreme Court's ruling invalidating a key part of the Voting Rights Act.

"It's just like last year, there's a big Obamacare win, and everyone forgets how conservative the court really is," says Adam Winkler, a professor at the University of California School of Law who noted the administration's abysmal win-loss record in a column for the *Daily Beast*. "It's so easy to be distracted by the huge, high profile case, that you forget the smaller decisions that are having a profound impact on the law."

The court's ideological direction can be divined from those organizations that have had the most success in getting the cases they want before the nine justices and winning them, most of which are conservative or libertarian: the Chamber of Commerce, the Pacific Legal Foundation, and the Cato Institute. At the end of the term, the Chamber and Cato had each only lost three cases in which they had filed merits briefs, out of 17 briefs filed by the Chamber and 18 filed by Cato. Ilya Shapiro, a Cato legal scholar, noted shortly after the final decisions were announced that the libertarian think tank had been on the winning side of an overwhelming number of cases it had gotten involved in. So is the court headed in a more libertarian direction?

"I think they're headed in an incoherent libertarian direction," says Shapiro. "It's in fits and starts, and certainly not with one voice, but generally yes, and I think our winning percentage this term is indicative of that." Shapiro ascribes the Obama administration's loss pattern to "the federal government making radical outlandish assertions of power."

Liberal court watchers naturally look at things very differently—seeing the Roberts court as ideologically beholden to corporate interests.

"The one place where we consistently see the conservatives coming together is in these business cases," says Tom Donnelly of the liberal Constitutional Accountability Center. "It's a consistent story we've seen over these last few terms." The CAC has put together a study showing that business interests have seen far greater success before the Roberts court than in prior eras. In making big decisions based on national security or the rights of criminal defendants, the high court reached few decisions that could be described as "libertarian."

Meanwhile, Chief Justice Roberts has amassed a reputation as a kind of tactical genius, a brilliant field marshall for the conservative legal movement whose tendency to defer broad conservative triumphs grants him more legitimacy when he makes big decisions, such as writing the opinion in *Shelby County v Holder* that struck down a key section of the Voting Rights Act. Four years earlier, in a similar case, he had issued a warning to Congress to alter the law or see it struck down. While liberals can point to a few other successes this term, such as a ruling that struck down a strict Arizona election law or the high court's punt on affirmative action, the overwhelming direction of the court is to the right.

"The court is willing, when the chief is they driving force, to be very patient at times, but still move the court in a very conservative direction," says Donnelly. "At a rhetorical level, that does a certain amount of work in making the court appear more moderate."

Roberts' tactical genius however, may be a bit overstated. Put simply, with five Republican appointees on the court for the forseeable future, his forces outnumber those of the opposition. That means Roberts' can take his time with his victories, and that liberal triumphs, no matter how dramatic, will be few and far between.

"The court's outcomes are being driven by the composition of the court, not by Roberts' brilliant strategic choices," says Winkler. That said, *Shelby County* is a good example of how he planted the seed for the decision four or five years ago, and saw those seeds blossom."

This list of key cases decided this term makes clear that despite the outcome of the DOMA and Prop 8 cases, the high court is moving to the right on most other issues:

Shelby County v. Holder

After years of struggle, the South has finally overcome. Chief Justice John Roberts wrote for a 5-4 majority striking down Section 4 of the Voting Rights Act, the part of the law that helps determine which states and localities with histories of racial discrimination in voting must "preclear" their election law changes with the Justice Department. Forty years was enough "punishment" for the South, Roberts wrote in his opinion giving last rites to one of the signature accomplishments of the Civil Rights Movement, and racism is no longer the problem it once was. Shortly afterwards, as part of a celebration of post-racial harmony, several of the states

covered by this section of the VRA announced changes to their election laws that might have previously been prevented as discriminatory.

Vance v. Ball State University

Maetta Vance, a catering assistant at Ball State University in Indiana, alleged that one of her co-workers, Saundra Davis would harass her with racial epithets like "sambo" and "porch monkey," and according to Vance, even once physically slapped her upside the head. She filed a lawsuit under Title VII of the Civil Rights Act, which holds companies liable for the actions of a supervisor. The Supreme Court however, ruled 5-4 that Davis, although she outranked Vance, was not technically a "supervisor" for the purposes of the law. The high court's decision, Justice Ruth Bader Ginsburg wrote in her dissent, "embraces a position that relieves scores of employers of responsibility for the behavior of the supervisors they employ."

University of Texas Southwestern Medical Center v. Nassar

Similar to the Vance case, Dr. Naiel Nassar filed suit under Title VII of the Civil Rights Act alleging his supervisor discriminated against him, and that the University of Texas Southwestern Medical Center laid him off because he threatened to file a lawsuit. Nasser alleged that his supervisor, Dr. Beth Levine, held him to different standards than other medical staff because she held dim views of people of Middle Eastern descent. The high court ruled 5-4 in the University of Texas' favor, and in so doing significantly narrowed the criteria under which employees can sue for racial discrimination.

Mutual Pharmaceutical Co. v. Bartlett

When a pharmacist provided New Hampshire resident Karen Bartlett with the generic version of a medication for her rare skin condition, she ended up with horrible burns over much of her body. She sued the manufacturer, but the Supreme Court, in a 5-4 decision, overruled a lower court's verdict in her favor. The high court's ruling held that New Hampshire's stricter regulations on pharmaceutical drugs were preempted by federal law, meaning that since the FDA had approved the drug the manufacturer couldn't be sued.

American Express v. Italian Colors Restaurant

A group of local merchants attempted to file a class action lawsuit against American Express, alleging that the credit card company was violating anti-trust laws by charging them steep fees and preventing them from taking effective action against the company through a forced arbitration agreement that the merchants had agreed to as part of their contract with the company. The upshot of the Supreme Court's 5-3 verdict siding with American Express (Justice Sonia Sotomayor recused herself) is that it'll be harder for smaller companies to band together to file class action lawsuits against larger ones. Justice Elena Kagan, in a terse dissent, wrote that the conservative majority's approach meant that "[t]he monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse."

Salinas v. Texas

Like Beetlejuice, your right to remain silent now only appears if you speak it—at least, under certain circumstances. That's because the high court ruled 5-4 that it was fine for prosecutors to use a shooting suspect's silence as evidence of his guilt because he had not specifically said that

he was invoking his Fifth Amendment rights. Since the suspect, Genovevo Salinas, was not technically under arrest at the time, Justice Alito wrote, and Salinas didn't explicitly say he was invoking his Fifth Amendment rights, his silence could be used against him. The ruling could encourage police to exploit "informal" interrogations of suspects prior to arrest to get around rules governing admission of evidence and even coerce confessions—legitimate or not—out of suspects.

Maryland v. King

DNA can tell you an immense amount about a person's family ties or medical history, but according to the Supreme Court, the police taking a DNA sample after arrest isn't much different from taking fingerprints. In a 5-4 ruling in which Justices Stephen Breyer and Antonin Scalia switched sides (as they sometimes do in criminal justice cases), the court ruled that police can take your DNA without a warrant if you're under arrest. That may sound reasonable, except that people are arrested without ultimately being charged for crimes all the time, and police still have to get warrants to, say, search your home even if you are suspected of a crime. Now they don't even need a warrant to get your genetic code and keep it, whether or not you are ever charged.

Amnesty v. Clapper

Human Rights activists and civil libertarians challenged the 2008 law retroactively legalizing the Bush administration's warrantless wiretapping program. Justice Samuel Alito wrote for a 5-4 majority that the plaintiffs couldn't challenge the law because they couldn't prove that they'd been spied on—a catch-22 because, if they had been spied on, they wouldn't know about it since it would be a government secret. Or at least the spying was secret, until *The Guardian* and *The Washington Post* revealed that the NSA had requested the phone records of millions of Americans, including those of some of the plaintiffs. Oops. The ACLU has already filed a new lawsuit against the law.