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Alito Shrugged: Libertarianism has won over the Supreme Court conservatives

By Simon Lazarus – July 28th, 2013

Supreme Court-watchers were flummoxed by the Court's 2012-2013 term, especially on the left. On its final two days, June 25 and 26, Chief Justice John Roberts and his colleagues—"the most conservative" set of justices ever—delivered four intensely anticipated decisions. When the dust settled, progressives had scored two unambiguous wins: The Court struck down the Federal Defense of Marriage Act, and it left standing a lower court's decision striking down California's ban on same-sex marriage. A third case yielded a stand-off that felt like a win, because a huge loss had been expected: The University of Texas' race-conscious admissions regime was remanded for further review, under ostensibly tightened criteria, but the principle of affirmative action lived to fight another day. In the fourth case, the left did suffer a clear big loss, though the impact was muted, because that result had been expected: A 5-4 majority struck down the 1965 Voting Rights Act's pre-clearance review of election law changes in historically discriminatory states.

What to make of this denouement? Does the public—64 percent of whom told Pew Center pollsters that they consider the Court "liberal" or "middle of the road"—get the justices better than the experts? Insisting otherwise, the major media Court correspondents closed ranks around a common frame: Despite the mixed message finale, Chief Justice Roberts kept "the court on its even keel, inching to the right without appearing to do so."

The pundits' "court inching right" line is not entirely wrong. On high profile issues, the conservative bloc's five members—Chief Justice Roberts and Associate Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito–recycle standard conservative narratives, factoids, and slogans. But the conservative movement is not a monolith. It comprises discrete factions: social and religious conservatives; business conservatives; big-government conservatives; and libertarian conservatives. Furthermore, the balance of power among these jostling ally-competitors is not static. To lump them all together overstates, in some areas, how "conservative" the Court is or is trending, while, on other fronts, seriously understating the Court's rightward velocity.

Specifically, the "inching right" sound-bite overlooks the most obvious, and potentially seismic, current influence on the Supreme Court's conservative bloc. This is the recent surge of libertarianism among conservative academics, advocates, politicians and, of course, voters. For decades, and as recently as Barack Obama's first year in the White House, libertarians were marginalized within the conservative pantheon. Now they rival, and in important areas threaten to displace social conservatives and big-government conservatives. Unsurprisingly, this upheaval has shown up among court-focused conservative constituencies and advocates and begun to register at the Supreme Court. In the 2012-13 term, the leading libertarian think tank, CATO Institute, filed *amicus curiae* briefs in 19 cases—over 24 percent of the Court's total docket, and wound up on the winning side in 15 of them.

Perhaps the most noted of CATO's interventions this term was the brief it filed in the two blockbuster gay rights cases, jointly with the progressive Constitutional Accountability Center. This brief urged the Court to strike down both DOMA and California's referendum banning gay marriage. As noted above, the decisions in these cases gave these left-right collaborators a good deal, though not all, that they asked for. Until the past two or three years, on gay rights as well as other culture war issues, social and religious conservatives had dictated Republican Party positions and conservative jurisprudence. No more.

To be sure, Justice Kennedy, who wrote the Court's opinion overturning DOMA, had in the past, in 1996 and 2003, similarly joined four progressive justices to spurn social conservatives' abhorrence for gay equality. This time, however, his opinion unabashedly signaled a dramatic ultimate goal—to upgrade gays' constitutional protection against discrimination to parity with that of women (and men). As social conservative champion Justice Scalia noted in his acerbic dissent, Kennedy's denigration of laws that "disparage" and "injure" gays as a class "arms well every challenger to a state law restricting marriage to its traditional definition." In 1996 and 2003, Justice Kennedy was vilified by political conservatives. Now it is Justice Scalia, and his social conservative disciples, who seem increasingly out of sync with, and indeed, an embarrassment to, ascendant conservative sentiment.

But rising libertarian influence is not all good news for progressives. On the contrary, the most consequential impact could be the parallel surge of support, among conservatives, for libertarian ambitions to dismantle or cripple landmarks like the environmental laws, the Affordable Care Act, and Medicaid. This is new. Until very recently, mainstream judicial conservatives, like Robert Bork, Antonin Scalia, and even Edwin Meese, had long scorned libertarian demands to roll back the New Deal-Great Society state. They branded the early 20th century Supreme Court's anti-regulatory activism as no less "illegitimate" than the Warren-Burger Court's alleged "liberal activist" excesses.

The Court's conservative bloc has not wholly accepted libertarian conservatives' invitation to junk the "New Deal settlement" that bars constitutional interference with regulatory and safety net legislation. But it came close a year ago, when the Court ruled on the constitutionality of the ACA's individual mandate and expansion of Medicaid. Though Obamacare was upheld, the Supreme Court threatened root-and-branch dismemberment of a major progressive statute. Chief Justice Roberts pulled the Court back from that brink. But, in places, his controlling opinion chipped away at established generous interpretations of Federal authority to regulate commerce. And, in ruling that the ACA's expansion of Medicaid unconstitutionally "coerced" states, Roberts circumscribed Congress' power to tax and spend for the general welfare, in ways that could be cited in future challenges to laws as diverse as long-standing Medicaid provisions, the Clean Air Act, and aid to elementary and secondary education. For their part, his dissenting conservative colleagues elaborated radical libertarian anti-government ideas, thereto confined to law reviews. Most portentous, the four dissenters demonstrated readiness to leverage a few provisions, defective under entirely novel doctrines, to take a complex progressive statutory scheme down in its entirety.

Could John Roberts lead his court down the back-to-the-future path charted by last year's ACA dissent? The term just ended yielded no direct clues. But Roberts has frequently matched the disdain for Congress redolent in his conservative colleagues' dismissal of the ACA—most recently in this year's opinion overturning the pre-clearance provisions of the Voting Rights Act. And devaluation of Congress pervades the epidemic of pro-business decisions throughout his eight terms as Chief Justice, in which, as observed by Senator Patrick Leahy, the conservative majority has "ignored the intent of Congress, oftentimes turning these laws on their heads, and

making them protections for big business rather than for ordinary citizens." This penchant for what former Justice John Paul Stevens called "unabashed law-making" could readily be ratcheted up to forge a new constitutional regime inimical to modern economic protections.

Looking ahead to the Supreme Court's next term, two cases could test the conservative bloc's appetite for doctrinal resets aimed at crippling federal regulatory power. In one case, the Court will consider a District of Columbia Circuit decision that invalidated President Obama's January 4, 2012 "recess" appointments of three members of the National Labor Relations Board; their Senate confirmations had been blocked by Republican filibusters. A second potential bellwether case reviews another D.C. Circuit decision; this one vacated EPA's so-called "Good Neighbor Rule," which set standards for protecting air quality in "downwind" states. As explained by a dissenting judge, the decision "blindsided" EPA, by shredding established procedural safeguards essential for any agency to develop technically and politically complex rules. This result prompted *Washington Post* columnist Steven Pearlstein to note that "a new breed of activist judges are waging a determined war on federal regulatory agencies." We will soon find out if the Supreme Court's conservative bloc is ready to join that war.