Supreme Court ruled modestly in major cases

Richard Wolf

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Supreme Court decision-making has become a game of inches. Or so it seemed during the 2013 term completed this week.

On one illustrative day during the final flurry of decisions, the justices ruled that 72 hours was too brief to qualify as a congressional recess and 35 feet was too wide to serve as a buffer zone around abortion clinics. Ten days and 8 feet, they said, might be OK.

Such were the narrow grounds on which the court ruled — against women, minorities and labor unions in some cases and in favor of corporations, religious believers and wealthy campaign donors in others. They did so not as conservative advocates wanted but in bite-sized increments, without striking down prior precedents.

"They didn't pull the trigger on any of the big precedents they were asked to overrule," said Thomas Goldstein, a veteran Supreme Court litigator and publisher of SCOTUSblog. "The question is, is it all a game of chess that's directed at five or 10 years down the road?"

Time and again under Chief Justice John Roberts, the high court has done only as much as necessary to solve a legal question or constitutional conundrum. Given the chance to go further, a majority of justices usually demurs.

Many of the court's top cases since October reflected that trend:

• **Campaign finance:** The court struck down the aggregate limits on individual donations to political candidates, committees and parties, but kept in place the ceiling on each donation. Only Justice Clarence Thomas would have gone further and overturned the court's 1976 precedent.

• **Affirmative action:** The justices upheld Michigan's ban on racial preferences in university admissions, but it did not overrule two prior rulings against similar voter-approved initiatives. In those cases, the majority said, the initiatives upheld discriminatory rather than race-neutral practices. Justices Thomas and Antonin Scalia wanted to go further.

• **Federal treaty power:** In one of the term's most unusual cases, the court struck down the federal government's use of an international chemical weapons treaty to prosecute a Pennsylvania woman seeking revenge on her husband's lover. But it left intact a 1920 precedent upholding the use of treaties to supersede state laws. Thomas, Scalia and Justice Samuel Alito would have jettisoned it.

• **Legislative prayer:** The court's conservatives upheld a New York town's practice of opening board meetings with a prayer, even when Christian clergy dominate the proceedings. But then they refused to reconsider a lower court's decision barring a Wisconsin school district from holding graduation ceremonies in a church; Scalia and Thomas wanted to take the case.

Those cases were heard in the fall and largely forgotten in the court's final flurry in June, when the trend toward baby steps became even bigger:

• **Religious freedom:** The court's final-day ruling that corporations cannot be forced to offer health insurance coverage for birth control methods they equate with abortion was a narrow one. It applied only to "closely held" corporations and to certain forms of contraception, and it was decided on statutory rather than constitutional grounds.

• **Labor union membership:** The court ruled in favor of home-care workers in Illinois who sought to opt out of a public employees union, but only because they are not typical state employees. Going further could have overruled a landmark "fair share" precedent that public employees must contribute to the unions representing them at the bargaining table.

• **Presidential power:** In one of several "faux" unanimous rulings, the justices agreed that President Obama violated the Constitution by filling labor board vacancies without Senate approval. But four conservative justices said they would have gone further and blocked nearly all use of the recess appointments power in the future.

• **Abortion buffer zones:** In another such unanimous verdict, the court ruled that Massachusetts cannot ban abortion opponents from public sidewalks within 35 feet of abortion clinics. Five justices based the ruling on specific distances; four conservatives would have labeled it viewpoint discrimination and barred the state from singling out abortion clinics in the future.

• **Securities fraud:** Another precedent that appeared ripe for the taking allows class action lawsuits against companies for securities fraud that are based solely on market prices. The justices gave corporations a better chance of refuting that standard but did not prohibit it altogether.

What remains a mystery is why the court did what it did — often with one or more conservative justices joining the four liberals in the majority. Was it because conservatives could not muster the votes for a stronger ruling? Or because of a genuine effort to compromise and act modestly?

"This term has been characterized by narrow and unanimous opinions," said Neal Katyal, a former acting solicitor general in the Obama administration. "This is at least partially a reflection of the fact that the court this year placed a large emphasis on building consensus."

More than 60% of the court's cases were decided unanimously, the largest percentage in recent decades. Only 10 of 67 argued cases were decided 5-4, a modern-era low. Justices with something to add to the majority decision did so more often in concurrences than dissents, a reversal from the past.

There were some bigger decisions, such as the court's unanimous ruling for digital privacy; police must get warrants before searching the contents of cellphones and smartphones during arrests, all nine justices said. The ruling went further than most court-watchers had expected.

And the court's conservative majority did manage some traditional victories, including the two on religious liberty and labor rights on the term's last day. But such 5-4 verdicts were more the exception than the rule — much to the chagrin of conservatives and the surprise of liberals.

"I'm certainly frustrated," said Ilya Shapiro, senior fellow in constitutional studies at the Cato Institute, a libertarian think tank. "Roberts simply wants to take the court out of the conversation as much as possible."

Tom Donnelly, counsel at the liberal Constitutional Accountability Center, said the limited rulings could be where the justices ultimately draw the line — or they're not done yet. On labor rights, for instance, Alito's opinion clearly opened the door for a broader challenge to public employee unions.

"Who knows how that will play out going forward?" Donnelly said.