Slate

Supreme Court 2013: The Year in Review

Entry 23: What I learned at the Breakfast Table.

By Eric Posner – June 27, 2013

* Supreme Court opinions are indeed very long.

* The ideological rift between the majority and the minority is really, really strong. Judges are supposed to base their decisions on legal materials and the proper roles of the branches of government, but the current justices mostly gesture at them; they can hardly maintain consistency from one day to the next.

* I'm exaggerating a bit. There are plenty of unanimous opinions. But mainly about things no one cares about.

* Scalia really does love rules. But I can't tell how seriously he takes originalism. Compared to the other justices', his decisions are the least predictable based on what appear to be his ideological predilections, though they are still pretty predictable.

* Breyer is also somewhat unpredictable based on ideology. But in contrast to Scalia, I can't tell what drives his counterideological votes. The mirror image of Scalia, he loves to decide cases by balancing things. The more things, the better.

* Kennedy is a libertarian. Meaning that he's (somewhat) liberal on social issues and occasionally skeptical of the executive, and conservative on everything else. He almost certainly thinks that striking down UT's affirmative action program and striking down DOMA are warranted by the same legal principles, and believes that those who celebrated him Wednesday (for gay marriage) and vilified him Monday (for affirmative action) are hypocrites. In opinion after opinion, he tries but fails to explain how he derives his libertarian holdings from the Constitution. His DOMA opinion is the opinion that dare not speak its name.

* In thinking more about the DOMA opinion in response to Emily's post, I now think the problem for Kennedy was that he did not want to rest on due process or equal protection, as that would have implied that marriage laws in 37 states are unconstitutional, creating a possible *Roe v. Wade*-like backlash. (NYU's Rick Pildes makes a similar argument.) And he did not want to rest on federalism, because that would have implied that the state bans on gay marriage are constitutional, which would have marred his legacy as the court's greatest supporter of gay rights. He couldn't commit himself (or possibly couldn't get another four votes), and produced an opinion neither fish nor fowl.

* Because Kennedy is so often the swing vote, it is more accurate to call this court "libertarian" than "right-wing." The Cato Institute, a libertarian think tank, prevailed in 15 of the 18 cases in which it submitted a friend-of-the-court brief this term.

* While Supreme Court opinions are very long, the crucial passage—the argument on which everything turns—is unbelievably short, usually just a paragraph bristling with question-begging assertions.

* Scalia is the only justice who can be a pleasure to read. I like anyone who uses the word "argle-bargle" in an opinion. "Legalistic Argle-Bargle" should be carved into the architrave of the Supreme Court building.

* The three most liberal justices—Ginsburg, Sotomayor, and Kagan—vote nearly in lockstep. Their opinions tend to be most defensible in terms of the normal standards of legal reasoning, in comparison with the opinions of the other justices. But that's because they are fighting a rearguard action, trying to preserve some liberal precedents, unlike the conservatives, who seek to change the law. And they will happily hop onto a Kennedy opinion that rockets into the stratosphere.

* Justice Thomas has integrity, but it's the integrity of a madman. He is the Ron Paul of the Supreme Court.

* The conservative justices really are very, very conservative. I had up until now pooh-poohed liberal constitutional law professors and journalists who argued that the court had gone off the rails. Mea culpa.

* I was struck by the sheer relentlessness with which they drove forward their conservative ideas, even in constitutionally unimportant cases like *Adoptive Couple v. Baby Girl* (the case about adoption and the Indian Child Welfare Act).

* Simply considered as efforts to persuade, using the conventional tools of legal reasoning, the majority opinions in the three blockbuster cases—*Fisher*, *Shelby County*, and *Windsor*—were real failures. That is not the same thing as saying that the court reached the wrong outcomes. For Windsor, I much prefer the 2nd Circuit opinion and this one.

* Did I mention that Supreme Court opinions are very long? They also don't go well with cereal.