



Amid blockbuster cases, Supreme Court moving right

Major Supreme Court decisions of the 2012-13 term

By: Richard Wolf – June 30, 2013

Under Chief Justice John Roberts, the court's tenuous conservative majority doesn't act quickly, but it acts eventually - and it doesn't mind uprooting a few precedents or statutes along the way.

Same-sex marriage won the biggest headlines on the last day of the Supreme Court's term, but the two days that preceded it provided the story line.

First came the court's seemingly minimalist decision on college affirmative action programs. After more than eight months of incubation, the ruling kicked the case back to lower federal courts with instructions to scrutinize more closely the University of Texas' system of racial preferences.

Both sides claimed victory, but perhaps only those opposed to affirmative action should have been happy. For the very next day, the court followed a similarly minimalist decision on voting rights issued in 2009 with its successor: a ruling that drove a stake through the heart of the nation's most cherished civil rights legislation.

Taken together, the two race-based cases illustrate the increasingly clear pattern of the court under Chief Justice John Roberts. Its tenuous conservative majority doesn't always act quickly, but it does act eventually — and it doesn't mind uprooting a few precedents or statutes along the way. What happened to the Voting Rights Act this term could happen to affirmative action programs in the future.

"Roberts recognizes that sometimes the best strategy for moving the law is 3 yards and a cloud of dust, rather than a touchdown bomb," says Doug Kendall, president of the liberal Constitutional Accountability Center. "In a lot of the cases this term, you see the court moving slowly but surely to the right."

Not always: The court's 5-4 decision striking down the key section of the Defense of Marriage Act was in many ways the ideological opposite of the voting rights ruling.

What tied the two together was a deference to states' rights — but not to Congress, which passed DOMA in 1996 and reauthorized the Voting Rights Act a decade later, both with overwhelming majorities.

"This continues to be a very confident court," says Paul Clement, a former U.S. solicitor general under President George W. Bush who has argued 69 cases before the justices, including seven during the term that concluded Wednesday. "They're not particularly inclined to be overly deferential."

With one exception, apparently: In most of the business cases that came before the court this term, corporations won and consumers lost. The U.S. Chamber of Commerce emerged victorious in 14 of 17

cases in which it took a position — a testament to the court's conservative tilt since Associate Justice Samuel Alito replaced Sandra Day O'Connor in 2006.

That pattern can be seen in cases involving class action litigation, which the court frowns upon, and mandatory arbitration, which it tends to like.

"The statistics bear out that this term and every term of the Roberts court has been more pro-business than the average Supreme Court over the last 50 years," says Neal Katyal, a former acting solicitor general in the Obama administration who appears frequently at the lectern.

The court also displayed a libertarian streak and a willingness to clamp down on what it sees as the government's expansive use of federal power, says Ilya Shapiro of the Cato Institute, a libertarian think-tank that emerged with a winning percentage similar to the Chamber of Commerce's.

By contrast, the Department of Justice, which represents the Obama administration before the court, was on the winning side less than 40% of the time.

The court is dominated by Associate Justice Anthony Kennedy, the swing vote, who takes a skeptical view of government power and is sympathetic to individual rights. He alone among the nine justices was in the majority on the Defense of Marriage Act, the Voting Rights Act and the affirmative action case.

"Anthony Kennedy is a swing justice who swings against legislation," says Akhil Reed Amar, a constitutional scholar at Yale University. "He basically trusts judges and is skeptical of legislators, including Congress."

Kennedy's vote proved critical in nearly all the cases decided by 5-4 majorities, and there were plenty — nearly 30% of the court's 77 cases. Among them were rulings that police can collect DNA from people arrested but not convicted of serious crimes, as well as two workplace discrimination cases won by employers over employees.

On the other hand, nearly 50% were decided unanimously, including some of the term's most important cases. The justices ruled 9-0 that human genes cannot be patented and corporations cannot be held liable for international human rights violations with no direct link to the United States.

Perhaps it was the bevy of controversial cases, but the justices spent most of the term trying to get a word in edgewise, much to the chagrin of the attorneys standing before them. They asked an average of about 117 questions, or nearly two per minute, during oral arguments, according to meticulous statistics kept by Scotusblog.com — a cacophony that Roberts said has forced him at times to "act like an umpire."

Justice Sonia Sotomayor was the most frequent questioner, while Justice Clarence Thomas, by custom, asked none at all. Justice Antonin Scalia delivered the angriest conservative dissents, while Justice Ruth Bader Ginsburg did so for the court's liberals. Alito and Justice Elena Kagan asked perhaps the most incisive questions of the term.

The bravest justice was Stephen Breyer, who broke his shoulder in a biking accident in late April but didn't miss a beat on the bench.

It was Roberts who kept the court on its even keel, inching it to the right without appearing to do so — at least not to the general public. Polls continue to show that liberals are slightly more satisfied with the court's actions than conservatives.

"He understands public relations," says Caroline Fredrickson, executive director of the liberal American Constitution Society. "The idea that the public is left with a court that's maybe not as conservative as it might be portrayed by the liberal media is probably exactly what he wants."