The Supreme Court in Review: 2019–2020 Term
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Lawless officials threaten ordered liberty. That is why our framers gave us state and federal governments ruled by law, not by men. We, the people, make the law as we order our communities, and we gather through our elected representatives in legislatures to deliberate about which laws need to be changed.

Those who hold public office do not make the law. They must obey the law and secure our civil liberties. That is the only reason that we allow them to hold power.

Among the three branches of government, the judiciary is supposed to be the most naturally lawful, and the least dangerous to liberty. According to Alexander Hamilton, who advocated in the Federalist Papers for an independent Supreme Court of the United States, the judiciary “will always be the least dangerous to the political rights of the Constitution” because it does not wield the sword, as the executive does, nor determine spending nor change the law, as the legislature does. “It may truly be said to have neither FORCE nor WILL, but merely JUDGMENT.”

Judges are duty-bound to render judgment according to what the law is, Hamilton insisted, and not according to what the judges themselves would prefer the law to be. And “if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.”

Law is not whatever the judges say it is. The law is what it is. If it needs to be changed, we the people change it. Judges have no lawful power to change the law.

Less than a century later, in 1857, the U.S. Supreme Court arrogated to itself new powers to destroy and create law, to invent facts, and to re-write the Constitution. In Dred Scott v. Sandford, the Court refused to enforce the long-standing common law rule, declared and specified in a provision of the Missouri Compromise, that a slave who escapes to free land from a slave state becomes free. The Court reasoned that black people are not persons and cannot be citizens within the meaning of the Constitution. In its opinion explaining the judgment, a majority of the Court rewrote American history to erase all those black persons who had exercised their rights, privileges, and immunities from the time of the Founding.

Both before and after his election as President, Abraham Lincoln observed that the Dred Scott decision was never the law. It was a binding judgment, to be sure, and resolved the particular dispute between the particular parties in the case. But, Lincoln continued,

At the same time, the candid citizen must confess that if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.

Lincoln’s official rejection of judicial supremacy was neither a Republican innovation nor a Northern usurpation. Southerners and grandfathers of the Democratic party, Thomas Jefferson and Andrew Jackson, both expressed similar views about the independent
duty and right of elected officials to say what the law is and what the Constitution means. Nor were they unique. For the first 300 years of the law’s rule in British North America and the United States, right up until less than a century ago, every lawyer and jurist understood that a judge’s duty is to find the law and declare it, rather than to make it up.

Judicial opinions are not law. They are persuasive only insofar as they provide accurate statements of what the law actually is. But even a false judicial opinion has great power to shape public understanding and to provide cover to lawless officials. The Dred Scott decision rested on false statements of law and facts. Yet few other than Lincoln had the courage to say candidly that the decision was unlawful. To overrule Dred Scott required the American people to ratify the Thirteenth, Fourteenth, and Fifteenth Amendments and to enact scores of civil rights acts at the state and federal levels between 1865 and 1965.

On other occasions since the Civil War, the U.S. Supreme Court has issued erroneous rulings and has unlawfully deprived people of their civil rights. The Court gutted the Civil Rights Act of 1875 by redefining the Fourteenth Amendment term “privileges and immunities.” By redefining “due process,” the Court later infringed the fundamental rights of Americans of Japanese descent and those with mental disabilities. In recent years, the Court has taken away the rights of children, mothers, fathers, and the unborn by redefining “person,” “standing,” “marriage,” and “paternity.” Increasingly, our elected officials defer to those unlawful judgments, not only with respect to the parties in the cases decided, but also on vital questions of law and policy that affect the whole people.

Imagine what might happen if we, the people, were to reclaim our rightful power to learn, declare, and vindicate the law. And what if we were to insist that our judges and elected officials do the same? We would need to begin by reading Supreme Court opinions carefully and studying the legal and jurisprudential questions for ourselves. We would then need to hold accountable those legislators and executives who have sworn an oath to uphold and defend the laws and constitutions of the United States. If we took those responsibilities upon ourselves then the people might once again be their own rulers.

Let us try, shall we? Let us begin with a first step, examining a few of the decisions that the Court handed down just this term. In the pages that follow, you will find concise summaries of those cases and of the opinions of the Justices explaining their judgments. Read carefully. Study the issues and the laws. Don’t automatically defer to that eminent tribunal on the vital questions that are at stake. Make up your own mind. Then call your elected officials and encourage them to do the same.

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Case by Case Survey

Parker Snider, Director of Policy Analysis
with Josh Barker and John Pace
I. The Court Redefines “Sex” in *Bostock v. Clayton County, Georgia*

**Case Background**

*Bostock v. Clayton County, Georgia* is a decision on multiple cases that involved an employer allegedly firing a long-term employee because they identified as homosexual or transgender. In the Clayton County, Georgia, case, a county employee was fired for “unbecoming” conduct after he began playing softball with a gay recreational league. In this case and the others involved in the decision, each employee sued under Title VII of the Civil Rights Act of 1964, which bans discrimination on the basis of sex. The Eleventh Circuit ruled that Title VII did not protect gay employees from sex-based discrimination while the Second and Sixth Circuits allowed the claims to proceed. The disagreement in the Circuit Courts led to the Supreme Court’s taking up of the cases.

**How the Court Ruled**

The Court ruled, by a vote of 6-3, that discriminating on the basis of sexual orientation or transgender status is in fact discrimination on the basis of sex, and therefore is prohibited by Title VII of the Civil Rights Act of 1964. Justice Gorsuch, a Trump-appointee, wrote the ruling opinion and was joined by Chief Justice Roberts as well as the Court’s entire liberal wing.

**Republican Appointees**

Roberts  
Kavanaugh  
Alito  
Gorsuch  
Thomas

**Democratic Appointees**

Sotomayor  
Ginsburg  
Kagan  
Breyer

**The Court’s Reasoning**

The Court’s ruling hinges on the idea that, when discriminating on the basis of homosexual or transgender status, employers inherently discriminate on the basis of sex. Justice Gorsuch attempts to explain the argument this way:

“Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer’s mind, materially identical in all respects, except that one is a man and the other is a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.”

Thus, we have discrimination based, at least partially, on sex and, since even partial cause is disallowed by the Civil Rights Act, the Court argues that discrimination based on homosexual or transgender status is prohibited.
Implications

The implications of this ruling are two-fold. First, the Court has yet again taken the authority to create law from Congress and allocated it to itself. As Justice Kavanaugh points out in his dissent, the Court disregards the fact that, since Congress enacted Title VII in 1964, they have “never treated sexual orientation discrimination the same as, or as a form of, sex discrimination” but as “legally distinct categories of discrimination.” The Court’s usurping of legislative power in this case hints at a unconstitutional desire to rule by edict and personal philosophy instead of judging based on the Constitution.

Secondly are the potential widespread effects on anything based, at least partially, on sex. Dress codes and sex-segregated bathrooms may subject employers to legal action. Confusion regarding race and age dysphoria may abound. Privately held companies may be forced to disregard their religious beliefs in exchange for what has been determined as socially acceptable by the State. This decision, unfortunately, is even more sweeping and the full effects may not be realized for years.

II. Louisiana Law Requiring Abortionists to Have Admitting Privileges at Local Hospitals Struck Down in June Medical Services v. Russo

Case Background

June Medical Services v. Russo involved a Louisiana law that required abortion providers in the state to have admitting privileges at a hospital within thirty miles. The law, which Louisiana passed as Act 620 in 2014, was almost identical to a Texas law that was struck down by the Supreme Court in 2016 in Whole Women’s Health v. Hellerstedt because it placed an “undue burden” on women seeking an abortion. The Louisiana law was originally deemed unconstitutional by a district court, but the Fifth Circuit reversed that ruling. It was then sent to the Supreme Court.

How the Court Ruled

The Court ruled by a vote of 5-4 that, just like the Texas law in Whole Women’s Health, Louisiana’s Act 620 placed an undue burden on women seeking an abortion.
The Court’s Reasoning

Justice Breyer wrote the majority opinion while Chief Justice Roberts wrote a concurring opinion. In the majority opinion the Court argues, as the District Court did before, that Louisiana’s Act 620 imposed a “substantial obstacle,” as it would likely result in shuttered abortion clinics, and that it did not have “any health-related benefit.” The law, just like in Whole Women’s Health, imposed an “unconstitutional undue burden” and could not stand.

Implications

June Medical was predicted to be a bellwether ruling by Court watchers this term with many expecting the majority GOP-appointed Court to signal its appetite to overturn Roe v. Wade. This ruling, however, has not offered a clear indication. Chief Justice Roberts siding with the liberal wing of the Court is, of course, worrisome to pro-life advocates. The degree to which conservatives ought to be disappointed in Chief Justice Roberts, however, is not settled. A quick read of Roberts’ concurring opinion, where he writes that he “continues to believe [Whole Women’s Health] was wrongly decided” but that stare decisis “requires us, absent special circumstances, to treat like cases alike,” raises an important question. What special circumstances, in Chief Justice Roberts’ opinion, would allow the court to overrule the past precedents it has set in regards to abortion, specifically the precedents in Roe v. Wade (1973) and Casey v. Planned Parenthood (1992)? This is not yet known.

Justice Thomas is the only Justice to explicitly detail the problems with the pro-abortion decisions in Roe and Casey in his dissent. That neither Alito, Kavanuagh, nor Gorsuch argued against those precedents in their dissents may be some cause for alarm for pro-life advocates. Is the bench truly 8-1 in favor of abortion rights? Or is it closer to 4-5? And which, if any, Justice might join the liberal wing of the Court in a more sweeping ruling? This ruling, unfortunately, has offered more questions than answers.

III. Eastern Oklahoma, Including Most of Tulsa, Ruled Indian Country in McGirt v. Oklahoma

Case Background

In 1997, Jimmy McGirt was convicted by the State of Oklahoma of molesting, raping, and sodomizing a 4-year-old girl, earning a sentence of 1,000 years plus life in prison. In postconviction proceedings, McGirt attempted to argue that he was not subject to the laws of Oklahoma because he is a member of the Seminole nation and the crimes happened on the Creek Reservation. Only a federal court, McGirt contends, could convict him of crimes committed in Indian Country.

About 10% of Oklahoma’s residents are Native American, or 390,000 people. The state entered the Union in 1907, over 70 years after the Indian Removal Act of 1830 relocated Native American tribes, who had previously been in Alabama and Georgia, into the unsettled lands west of Mississippi.

How the Court Ruled

The Court ruled by a vote of 5-4 that the land held for the Creek Nation since the 19th century remains to this day “Indian country.” The Court’s Opinion was authored by Justice Neil Gorsuch, who was appointed by President Trump after the death of the late Antonin Scalia.
The Court begins by stating that Congress established a Creek Reservation in an 1833 Treaty that had specific boundaries and was a “permanent home to the whole Creek Nation of Indians.” An 1856 Treaty where Congress stated that no Creek lands would be annexed by a state or territory is also mentioned. Congress, the Court argues, has never disestablished the federal reservation, at least not with “clear congressional intent.” Clear congressional intent is required, Gorsuch writes, and the lack of such intent forces the United States to continue to recognize the land as Indian Country, where state authorities lack the jurisdiction to prosecute crimes, even crimes as heinous as those perpetrated by Mr. McGirt.

Implications

In the ruling, the Supreme Court “rediscovered”—as Chief Justice John Roberts writes in his dissent—an Indian reservation 19 million acres large. The entire eastern half of Oklahoma, home to 1.8 million people, now faces a multitude of questions that comes with declaring the land, “unbeknownst to anyone for the past century,” to be Indian Territory. Chief Justice Roberts explains in his dissent the implications this way:

“Across this vast area, the State’s ability to prosecute serious crimes will be hobbled and decades of past convictions could well be thrown out. On top of that, the Court has profoundly destabilized the governance of eastern Oklahoma. The decision today creates significant uncertainty for the State’s continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law.”

This opinion is Gorsuch’s second from this term in which he applies what appears to be a textualist argument in support of the Court’s ruling that ignores the context of the case itself (the first being the ruling in Bostock v. Clayton County, Georgia). This blooming tendency in the Justice that replaced the late Antonin Scalia could signal similar outcomes in future cases, much to the chagrin of conservative court-watchers.

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IV. Court Protects Rights of Religious Organizations to Deny Contraception Coverage in *Little Sisters of the Poor v. Pennsylvania*

**Case Background**

Administrative rules authorized by the Affordable Care Act of 2010 required covered employers to offer contraception coverage and did not originally include exemptions for those who would be forced to go against their sincerely held religious beliefs. After years of litigation and a previous ruling in favor of the Little Sisters of the Poor by the Supreme Court in *Little Sisters of the Poor v. Azar* (2016), the federal government through the Departments of Health and Human Services, Labor, and the Treasury exempted certain religious employers from the requirement.

**How the Court Ruled**

The Court ruled, by a vote of 7-2, that the Administration did have the legal authority to promulgate the exemption for religious employers. The opinion was written by Justice Thomas, with Justices Kagan and Breyer joining the conservative wing of the Court.

**Republican Appointees**

Roberts  
Kavanaugh  
Alito  
Gorsuch  
Thomas

**Democratic Appointees**

Sotomayor  
Ginsburg  
Kagan  
Breyer

**The Court’s Reasoning**

The Court begins by detailing how the contraceptive mandate was itself not a part of the Affordable Care Act but a result of interim final rules. The Court argues that the Affordable Care Act granted the power to determine appropriate “preventive care” to the Health Resources and Services Administration. “That same grant of authority empowers it to identify and create exemptions within its own Guidelines,” the Court ruled. In other words, because the original rules requiring contraception coverage were promulgated by an agency and not the law itself, the agency has the authority to change those rules and to exempt certain employers from them.

**Implications**

Justice Alito writes in his concurring opinion that he would “bring the Little Sisters’ odyssey to an end.” Unfortunately, the ruling is not as sweeping as religious freedom activists might hope. Alito mentions
in his opinion that Pennsylvania and New Jersey are likely to pursue a different argument against the exemption, that it is “arbitrary and capricious.” Since the Court did not rule on that question but on the question of whether the Administration had the legal authority to exempt certain employers from the mandate, another Supreme Court case is likely.

Truthfully, the Court did nothing more than allow the Trump Administration’s exemption to stand. An administration less appreciative of religious inclinations could easily remove the exemption. In this case, the Court did not create law out of thin air. That, on this topic at least, remains the responsibility of the Congress.

V. Religious Liberty in Hiring Practices Maintained in Our Lady of Guadalupe School v. Morrissey-Berru

Case Background

Our Lady of Guadalupe School is a traditional Catholic school in Hermosa Beach, California. Ms. Morrisey-Berru, the plaintiff, was a teacher at the school with some responsibilities teaching religion and preparing students for mass. Even so, Morrisey-Berru was unable to adjust to new curriculum and became ineffective in the classroom and was moved to a part-time teaching position. When her contract ended, the school did not renew.

Morrisey-Berru sued the school for age discrimination. A federal judge sided with the school, as did the Ninth Circuit on appeal. Morrisey-Berru was joined by another teacher with similar circumstances, Kristin Biel, when the case reached the Supreme Court.

How the Court Ruled

The Court ruled, by a vote of 7-2, that the government cannot insert itself into the employment decisions of religious schools and teachers who are tasked with instructing students in the faith. The opinion was written by Justice Alito, with Justices Kagan and Breyer joining the conservative wing of the Court.
In 2012, the Court ruled in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission* that the judiciary was barred from entertaining an employment discrimination suit brought by an elementary school teacher, Cheryl Perich, against the religious school where she taught by the First Amendment. This became known as the “ministerial exception.”

The Court’s work, it argued, was to determine whether the ministerial exception applied in the case of teachers at religious schools who did not have the title “minister” yet still served a religious function. The Court argued that, since religious schools largely exist for education in the faith and spiritual formation, teachers employed by religious schools likewise fall under the ministerial exception. Employment disputes between religious schools and their teachers, therefore, are not to be entertained by the judiciary because doing so would “undermine the independence of religious institutions in a way that the First Amendment does not tolerate.”

**Implications**

*Bostock v. Clayton County*, in which the Court redefined the term “sex,” heightened worries that discrimination by religious institutions in employment would be subject to legal action. Soon, religious liberty advocates worried, a church may not be able to remove a pastor who has revealed himself to be attracted to the same-sex.

This case allows churches and faith organizations to breathe somewhat easier. The ministerial exception continues to stand, and the fact that the ruling was 7–2 suggests that this understanding is unlikely to change in the near future. Religious schools should not be subject to anti-discrimination cases when it comes to their teachers, whether it be age discrimination or discrimination based on their sexual orientation. Neither should churches and other religious institutions, assuming their role is partially religious.
VI. School Choice Affirmed in *Espinoza v. Montana Department of Revenue*

**Case Background**
The Montana Legislature established a tax-credit scholarship program in which taxpayers donate to scholarship granting organizations who then offer scholarships for private school tuition. Like many states, Montana's constitution included a “Blaine amendment,” or “no-aid” provision, that prohibits state funds from going to religious schools. Three mothers sued the Montana Department of Revenue, which had made a rule barring religious schools from participating in the tax-credit scholarship program. The Montana Supreme Court ruled that the entire program was in violation of the Montana Constitution's “no-aid” provision and therefore had to end. The case then moved to the United States Supreme Court.

**How the Court Ruled**
The Court ruled, by a vote of 5-4, that the “no-aid” provision in the Montana Constitution was itself a violation of the Free Exercise Clause of the First Amendment. It was unconstitutional on the federal level, therefore, for the Montana Department of Revenue to establish a rule barring religious schools from participating in the program. The five right-leaning judges served as the majority in the ruling.

**The Court's Reasoning**
In a relatively simple argument, the Court suggests that the Montana Supreme Court was correct in asserting that the scholarship program offering “aid” through scholarships to religious schools was disallowed by the state’s constitution. The question the Court asks, however, is whether excluding religious schools from the program infringes on the free exercise of religion as guaranteed by the First Amendment. The Court argues that its previous ruling in *Trinity Lutheran Church of Columbia, Inc. v. Comer* makes it clear that “laws that impose special disabilities on the basis of religious status” are in violation of the Free Exercise Clause because they place “a penalty on the free exercise of religion.”

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Implications

While the Court’s opinion does not expressly rule all Blaine amendments or “no-aid” provisions within state constitutions void, as Justice Ginsburg writes in her dissent, the Court “seems to treat the [state’s] no aid provision itself as unconstitutional.” Court-watchers are unsure if this spells disaster for “no-aid” provisions in other states because Montana’s “no-aid” provision is especially strict—it disallows “payment from any public fund or monies, or grant of lands or other property for any sectarian purpose or to aid any church, school … controlled in whole or in part by any church, sect, or denomination.”

Regardless, this is another win for religious liberty and an important win for school choice. States should feel more freedom to establish school choice programs. These programs can be sweeping in their scope and goal to provide the education that parents and guardians determine to be best for their children.

The truth, however, is that the Supreme Court continues to have confusing precedents in regards to the Establishment Clause that muddy the ruling’s waters and question the foundation beneath it. Another, less hospitable Court, it seems, could renegade on the precedent set this term. The dissenting opinion, in fact, points to that very desire.

VII. Trump Administration Attempt to End Deferred Action for Childhood Arrivals (DACA) Disallowed in Department of Homeland Security v. Regents of the University of California

Case Background

In 2012, President Obama created the Deferred Action for Childhood Arrivals (DACA) program through an executive order. The program offered eligible minors who came into the United States illegally, also known as Dreamers, legal status. Many considered this to be executive overreach and unconstitutional because it created a new class of immigrants who could receive specific benefits without congressional action. In effect, the president had usurped Congress and changed immigration law. Two years later, Mr. Obama extended this offer of legal status to the parents of Dreamers and other legal immigrants and US citizens who were illegally in the US through Deferred Action for Parents (DAPA), which was ruled illegal by the Supreme Court in 2016 in United States v. Texas.

President Trump had promised to end DACA ever since he announced his candidacy. In 2017, his administration sought to do just that. Attorney General Jeff Sessions wrote to the Department of Homeland Security that, since DAPA was ruled illegal, DACA was also illegal and should be repealed. The Acting Secretary of Homeland Security, Elaine Duke, then issued a memorandum rescinding DACA. Immediately, Dreamers began suing in protest of the decision which would result in them losing protected legal status. DHS v. Regents is a collection of several of these cases. In each case, the district courts ruled in favor of the Dreamers. The Ninth Circuit upheld the lower court ruling against the DACA repeal, so the government appealed to the Supreme Court.

How the Court Ruled

The Court ruled in the 5-4 decision that the reasoning behind Department of Homeland Security’s decision to rescind DACA was insufficient. Under the Administrative Procedure Act, the courts are allowed to “assess… whether the [agency’s] decision was ‘based on a consideration of the relevant factors and whether there has been a clear error of judgment.’” They ruled the DACA decision did not consider all relevant factors and was, therefore, an error in judgment. Chief Justice Roberts wrote the opinion and was joined by the court’s liberal wing.
Chief Justice Roberts wrote that the case “was not [about] whether Department of Homeland Security may rescind DACA. All parties agree that it may. The dispute instead is primarily about the procedure the agency followed in doing so.” The Court ruled that, even though the Department of Homeland Security “was bound by the Attorney General’s legal determination,” they did not consider all the other alternatives. Roberts writes:

“[T]he rescission memorandum contains no discussion of forbearance or the option of retaining forbearance without benefits. [Acting Secretary of Homeland Security Elaine] Duke “entirely failed to consider [that] important aspect of the problem.” That omission alone renders Acting Secretary Duke’s decision arbitrary and capricious.”

The Court argues that it was possible to amend DACA and only repeal the benefits it offered while maintaining its policy of non-enforcement by refusing to deport DACA-eligible individuals without violating the law. The Court goes on to claim that DHS should have considered the “reliance interests” of the Dreamers who would lose legal status by the DACA repeal, writing, “it would be arbitrary and capricious to ignore such matters.” They believed that DHS never considered this, because, “Had [Secretary] Duke considered reliance interests, she might, for example, have considered a broader renewal period… [or] more accommodating termination dates… [or] instructed immigration officials to give salient weight to any reliance interests… when exercising individualized enforcement discretion.” Since DHS did not consider all these alternatives when making their decision, the Court ruled against the decision.

**Implications**

There are four primary implications of this ruling.

In the short-term, DACA will remain in place. It is possible that the Trump administration could try again after proving that it has considered all the alternatives and other factors. That, however, seems unlikely now that President Trump has shifted his stance and promised “to work on DACA” and “in the
not-too-distant future… [sign] a new immigration action.”

Second, Justice Thomas notes in his dissent that the DOJ and DHS were right: “DACA is substantively unlawful.” Therefore, “the decision to rescind an unlawful agency action is *per se* lawful.” Thomas states that this decision sets a bad precedent, because it forces the President to continue unlawful policy:

“[A]dministrations can bind their successors by unlawfully adopting significant legal changes through Executive Branch agency memoranda. Even if the agency lacked authority to effectuate the changes, the changes cannot be undone by the same agency in a successor administration unless the successor provides sufficient policy justifications to the satisfaction of this Court.”

Thirdly, Justice Kavanaugh is concerned with the Court’s decision because it ignores the DHS explanation. When the District Court asked DHS for a complete explanation for why they rescinded DACA, Secretary Kirstjen Nielsen provided them a memorandum which “expressly addressed the reliance interests of DACA recipients” and also “clarified that even if DACA were lawful, the Department would still rescind DACA for a variety of policy reasons.” These are the specific problems the Court identifies, yet the Court excludes the explanation because it was given after the decision was made and dismissed as a “*post hoc* rationalization.”

Finally, this decision further entrenches the Court’s overreach into policy matters. It establishes that the Court can ignore the law—which shows DACA to be unlawful—and the Constitution—which allows the executive branch to rescind previous executive orders—in favor of maintaining their preferred policy. While Chief Justice Roberts maintains that the court is not “substitut[ing] its policy judgment for that of the agency,” the Court does exactly this by claiming DHS’ policy judgment was insufficient.


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**VIII. States Allowed to Bind Electoral College Votes in *Chiafalo v. Washington***

**Case Background**

Every four years, when millions of Americans go to the ballot box to vote for president, they vote for a slate of electors who will represent their party and state in the Electoral College. Because the Electoral College consists of individual people and is not done automatically, those individuals occasionally will vote for someone other than the person who won their state’s popular vote. These individuals are called faithless electors. States have tried to prevent them from voting contrary to the popular vote for decades. 32 states, in fact, require electors to pledge to cast their ballot of their party’s nominees. 15 states, including Washington state, place sanctions, such as large fines, on faithless electors.

After the 2016 election, three Democrat electors from Washington state who had pledged to support Hillary Clinton failed to follow through. Instead, they voted for Colin Powell for president as part of a scheme to attempt to throw the election into the House of Representatives—which would happen if no candidate gains a majority. This attempt failed and the State of Washington fined each elector $1,000. The electors sued, stating that the Constitution allowed electors to vote with their own discretion. The Washington Superior Court disagreed and sided with the State. However, just a few months later, in a similar case in Colorado, the Tenth Circuit Court of Appeals ruled in favor of the electors. The cases were later joined together to appear before the Supreme Court.
How the Court Ruled

The Court ruled unanimously in a rare 9-0 decision that states are allowed to place limits on their electors. Justice Elena Kegan wrote the opinion, which was joined by all the other justices, except Justice Thomas who wrote his own concurring opinion which Justice Gorsuch joined.

Republican Appointees

Roberts  Kavanaugh  Alito  Gorsuch  Thomas

Sotomayor  Ginsburg  Kagan  Breyer

Democratic Appointees

The Court’s Reasoning

In 1952, in Ray v. Blair, the Supreme Court ruled that a state can require electors to make a pledge, so the question at issue in this case was solely “Could a State enforce those pledges through legal sanctions?” This decision reaffirmed Ray, because the language of Article II and the 12th Amendment of the Constitution gives states, not electors, discretion in the selection process. The long-standing practice dates back centuries to 1796 and the early days of our Republic. The Court notes that “[e]lectors have only rarely exercised discretion in casting their ballots for President.”

Justice Kagan writes in that opinion of the Court that “so long as nothing else in the Constitution poses an obstacle—a State can add, as Washington did, an associated condition of appointment… And nothing in the Constitution expressly prohibits States from taking away presidential electors’ voting discretion as Washington does.”

Implications

For now, the Electoral College remains intact and the system is affirmed by the entirety of the Court. By upholding states’ ability to require electors to pledge support for a particular candidate, it is possible that some states would use that power to require electors to pledge support for the winner of the national popular vote, as some are attempting to do. However, the National Popular Vote advocates are put at a disadvantage due to Kagan’s word choice and footnote on the limits on state power. These comments open the door for an argument that the National Popular Vote Interstate Compact violates another part of the US Constitution, Article I, Section 10, which says, “No State shall, without the Consent of Congress ... enter into any Agreement or Compact with another State.”
IX. Remaining Supreme Court Decisions

Kelly v. United States

In this unanimous decision, the Supreme Court remanded the “Bridgegate” case to the lower courts for review. This case surrounded the 2013 controversy concerning New Jersey Governor Chris Christie and his chief of staff Bridget Anne Kelly who allegedly improperly closed lanes on roadways in order to cause traffic and retaliate against local officials. The court overturned the convictions of federal fraud and wire fraud since “the scheme here did not aim to obtain money or property.”

Ramos v. Louisiana

In this 6-3 decision, the Supreme Court argued that the Sixth Amendment requires that a criminal trial must be decided by a unanimous jury in all states. This overturned a previous Supreme Court case that gave states the right to allow juries to not be unanimous to decide a criminal case.

Selia Law, LLC v. Consumer Financial Protection Bureau

In this 5-4 decision, the Supreme Court ruled that Congress’ restrictions on the removal of the Director of the Consumer Financial Protection Bureau to only reasons of “inefficiency, neglect, or malfeasance” was unconstitutional because it violates separation of powers and the Constitution’s system which vests all executive powers in the president. Chief Justice Roberts writes that the leadership structure of the CFPB makes the agency unconstitutional noting, “[Not only is CFPB’s] single-Director structure… sufficient to render the agency unconstitutional, the Director’s five-year term and receipt of funds outside the appropriations process heighten the concern that the agency will ‘slip from the Executive’s control, and thus from that of the people.’”

Trump v. Mazars USA and Trump v. Vance

In a 7-2 decision, the Court overruled the lower court decisions in Trump v. Mazars, requiring the courts to use a higher level of scrutiny for Congressional subpoenas on President Trump’s tax returns and other financial documents. Chief Justice Roberts writes that “Congress may not issue a subpoena for the purpose of ‘law enforcement,’ because ‘those powers are assigned under our Constitution to the Executive and the Judiciary.’ ...The President’s unique constitutional position [also] means that Congress may not look to him as a ‘case study’ for general legislation.” Trump v. Vance was also decided 7-2 and found that President Trump is not immune to state grand jury requests for his tax returns and financial information simply because he is the president. Roberts writes that the Court “hold[s] that the President is neither absolutely immune from state criminal subpoenas seeking his private papers nor entitled to a heightened standard of need.”