

US Supreme Court term begins with new threats to democratic rights

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Last Monday, the Supreme Court of the United States began its 2019-2020 term. The court is slated to hear cases involving a number of democratic and civil rights issues, including the separation of church and state, the right to abortion, equal employment for homosexual and transgender persons, the rights of immigrants and those defending them from state repression, and the rights of criminal defendants.

The term begins under a newly consolidated 5-4 far-right majority, including Trump appointees Neil Gorsuch and Brett Kavanaugh. They join Clarence Thomas, a George H.W. Bush appointee and opponent of democratic rights, and Samuel Alito and Chief Justice John Roberts, both committed reactionaries appointed by George W. Bush.

On October 7, the court heard arguments in two major cases concerning the rights of criminal defendants. Of particular significance is *Kahler v. Kansas*, which considers whether the US Constitution allows states to abolish the insanity defense. The insanity defense, which asserts that the defendant lacked the ability to know right from wrong, dates back hundreds of years, although defense attorneys rarely employ it and courts even more rarely permit it.

The oral arguments revealed the eagerness of Justice Gorsuch to eliminate this already narrow and seldom used legal doctrine. A zealous supporter of capital punishment, Gorsuch wrote the opinion in *Bucklew v. Precythe* in April of this year, which treated legal efforts to oppose the death penalty with unprecedented contempt, even in cases where the mode of execution clearly amounted to cruel and unusual punishment, which is banned under the Constitution's Eighth Amendment.

Also on October 7, the court heard arguments in *Ramos v. Louisiana* concerning the constitutional requirement that a jury verdict in state court for conviction of a criminal offense be unanimous. The Sixth Amendment to the US Constitution guarantees the right to a trial by an impartial jury. Although it does not explicitly call for a unanimous verdict, that concept was so prevalent at the time of ratification that it did not merit a specific mention, and all federal criminal cases afford the defendant the right of a unanimous jury.

This provision is a critical component of the presumption of innocence and the principle that the burden of proof rests with the prosecution. The unanimity requirement enjoins the jury to adopt the appropriate seriousness and intensity in deliberations about a defendant's freedom, or even life. It thus upholds the high burden

of proof for criminal cases, that of guilt beyond a "reasonable doubt."

Nonetheless, most justices at the oral arguments appeared disinclined to rule that the Sixth Amendment requirement had been "incorporated" to apply to state criminal proceedings.

Three cases this term threaten workplace discrimination protections for homosexuals and transgender persons. All three center on the interpretation of Title VII of the Civil Rights Act of 1964, which outlaws employment discrimination on the basis of sex. The question before the court is: Does discrimination against homosexuals (in the cases *Altitude Express Inc. v. Zarda* and *Bostock v. Clayton County, Georgia*) or transgender persons (as in *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*) consist of discrimination on the basis of "sex?"

During oral arguments on October 8, the right-wing bloc appeared ready to hand another victory to the advocates of bigotry. (In the previous term, the 7-2 decision in *Masterpiece Cakeshop* supported a confectioner's "free speech right" to not make a wedding cake for a gay couple. The ostensibly liberal justices Elena Kagan and Stephen Breyer joined the right-wing bloc in that opinion).

Chief Justice Roberts posed the question to the employees' attorney: "What about the response that you do not need to know the sex of the people involved; you can just have a policy against same sex [relationships]? So you don't care whether the participants [in same-sex relationships] are women or men."

A series of Gallup polls conducted in May 2019 show overwhelming public support for the rights of homosexuals and transgender persons. Large percentages answered affirmatively that gays would be suitable for a series of professions—salesperson (95 percent), soldier (83 percent), doctor (91 percent), clergyman (72 percent), elementary school teacher (81 percent), high school teacher (83 percent) and member of the president's cabinet (88 percent)—indicating a narrow base of support for discriminatory employment policies.

Asked whether new laws are needed to protect these groups from discrimination, 53 percent said "yes." Seventy-five percent of respondents said gays and lesbians should be able to adopt children. Likewise, 71 percent said transgender men and women should be able to openly serve in the military.

Several cases to be heard this term have serious implications for the rights of immigrants.

In *Department of Homeland Security v. Regents of the University* rights instead.

of *California*, the Supreme Court will decide the fate of the Obama-era Deferred Action for Childhood Arrivals (DACA) program, which gave limited legal protections to some 800,000 young people who immigrated to the United States as undocumented children. President Trump nixed the program in September 2017 as part of his administration's xenophobic agenda. There is a high probability that the court will find Trump's action a permissible exercise of his executive powers over administrative agencies, in this case, the Department of Homeland Security .

Another important immigration case involves the federal prosecution of immigration attorney Evelyn Sineneng-Smith because she allegedly "encourages or induces an alien to come to, enter, or reside in the United States" illegally, and profits from it.

The US Court of Appeals for the Ninth Circuit found that the language "encourages or induces" infringement of protected speech and violates the First Amendment. Should the Supreme Court reverse, federal authorities would have an even freer hand to harass and prosecute not just immigrants, but those who speak up for them.

Additionally, in *Kansas v. Garcia*, the Supreme Court will rule on the relationship between federal immigration law and state criminal law. The state of Kansas is seeking to overturn a Kansas Supreme Court decision barring it from enforcing its own state law penalties against immigrant workers in addition to the penalties provided under the federal Immigration Reform and Control Act. In a legal issue that runs parallel to that presented in *Sineneng-Smith*, a victory for Kansas would pave the way for a race to the bottom among the states in the persecution of undocumented workers.

The case *Espinoza v. Montana Department of Revenue* raises the constitutionality of a state scholarship fund that allocates 94 percent of its revenues to religious schools. The scholarship fund offers a dollar-for-dollar state tax deduction, thus serving a twofold reactionary purpose of subsidizing religion and starving public schools of tax dollars. The Supreme Court of Montana ruled that the scholarship scheme violated the state's strict constitutional ban on state funding of religious schools.

The US Supreme Court reviews only a tiny portion of petitions, and in the case of *Espinoza* it appears that the case was carefully selected as yet another opportunity to undercut what Thomas Jefferson famously called the "wall of separation between church and state."

Recent Supreme Court jurisprudence greatly favors the extension of religion into public life. See our analysis of *Town of Greece v. Galloway*.

The court will review drastic restrictions on reproductive rights in *June Medical Services v. Gee*, which concerns new statutory regulations in Louisiana that threaten to shut down two of only three abortion service providers in the state of 4.5 million people. The right-wing majority is poised to approve such restrictions, which would encourage more legislation at the state level along the lines of "fetal heartbeat" bills. Many commentators express concern that the new majority will overturn *Roe v. Wade* outright, but the inclusion of *June Medical Services v. Gee* in the current term is consistent with an approach that whittles away abortion

In addition to *Kahler v. Kansas* and *Ramos v. Louisiana*, discussed above, two other cases this term carry menacing implications for those charged with criminal offenses.

Kansas v. Glover takes up the legality of a traffic stop, implicating the constitutional protections against unwarranted searches and seizures. *McKinney v. Arizona* concerns the right of a criminal defendant to offer mitigating evidence—that which tends to humanize the defendant or give some context to his crimes—in order to avoid a death sentence.

Two cases with oral arguments scheduled later in the term present environmental law issues. The case *County of Maui, Hawaii v. Hawaii Wildlife Fund* concerns the discharge of treated sewage into groundwater that eventually ends up in the Pacific Ocean. *Atlantic Richfield Co. v. Christian* considers the responsibility for cleanup costs after an environmental disaster. A predecessor company of Atlantic Richfield (ARCO) released heavy metals and arsenic into the soil and water around Butte, Montana for a number of years as a byproduct of mining and smelting operations. The Butte-Anaconda-Clark Fork River area comprises the largest "Superfund" site, a designation from the Environmental Protection Agency that makes federal money available for cleanup. In the case before the court, private landowners seek additional money from ARCO under a state law claim. ARCO argues that the state law claim is preempted by federal environmental laws.

On environmental issues, Justice Kavanaugh made a name for himself as an appellate justice by handing down decision after decision for giant energy corporations. His addition to the right-wing majority bodes ill for these two cases.

In reviewing the selection of cases and the tenor of oral arguments so far, one sees a certain amount of judicial writing on the wall. The Roberts court has already granted enormous leeway to discrimination and other forms of backwardness when couched in terms of religious freedom. The replacement of Justice Anthony Kennedy by Brett Kavanaugh portends further movement in this direction.

The author also recommends:

On the Basis of Sex and *Ruth Bader Ginsburg: The manufacturing of a "living legend"*
[2 March 2019]



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