10th Annual

Supreme Court Term in Review

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Thursday, July 23, 2020 • 10:30 a.m. - 12:00 p.m.

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Panelists

Ariane de Vogue
Supreme Court Reporter, CNN
Ariane de Vogue serves as a reporter for CNN covering the Supreme Court and legal issues, chronicling everything from breaking news about major rulings to the evolving politics of personality among the justices. She works closely with CNN's justice team and guides network-wide reporting on Supreme Court cases and other legal developments.
Since joining the network, de Vogue has covered the sudden death of Justice Antonin Scalia and the nominations of Judges Merrick Garland, Neil Gorsuch and Brett Kavanaugh to the Supreme Court. She has also covered groundbreaking Supreme Court decisions on gay marriage, health care, religious freedom and abortion. During and after the 2016 election cycle, she has followed voting rights challenges across the country and has explored legal issues surrounding the President's executive orders.
de Vogue joined CNN in 2015. Prior to joining the network, de Vogue covered the Court and the nominations of several justices for ABC News. As an investigative producer for ABC News, she also worked on stories concerning terrorism, the aftermath of September 11th, the presidential impeachment proceedings, campaign finance regulations, and legal challenges during national elections.
She grew up in Westville, Indiana, and is a graduate of The George Washington University.

Erwin Chemerinsky
Dean and Jesse H. Choper Distinguished Professor of Law, Berkeley Law
Erwin Chemerinsky became the 13th Dean of Berkeley Law on July 1, 2017, when he joined the faculty as the Jesse H. Choper Distinguished Professor of Law. Prior to assuming this position, from 2008-2017, he was the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at University of California, Irvine School of Law. Before that he was a professor at Duke University from 2004-2008, and from 1983-2004 was a professor at the University of Southern California Law School.
He is the author of 10 books, including two books published by Yale University Press in 2017, *Closing the Courthouse Doors: How Your Constitutional Rights Became Unenforceable* and *Free Speech on Campus* (with UCI Chancellor Howard Gillman). He frequently argues appellate cases, including in the U.S. Supreme Court. In 2016, he was named a fellow of the American Academy of Arts and Sciences. In January 2017, National Jurist magazine named Chemerinsky the most influential person in legal education in the United States for the second time.

Rachel Moran
Distinguished Professor of Law, UCI Law
Rachel Moran is a Distinguished Professor of Law at UCI Law. Prior to her appointment, she was the Michael J. Connell Distinguished Professor of Law and Dean Emerita at UCLA Law. Before that, Prof. Moran was the Robert D. and Leslie-Kay Raven Professor of Law at UC Berkeley School of Law. She also was a founding faculty member of UCI Law from July 2008 to June 2010. Prof. Moran's expertise includes educational policy-making and the law, Latino -related law and policy, race and the law, legal education and the legal profession, and torts. She has been a visiting law professor at Fordham University, Harvard University, New York University, Stanford University, UCLA, the University of Miami and the University of Texas.

In 2011, she was selected by President Obama to serve on the Permanent Committee for the Oliver Wendell Holmes Devise. Prof. Moran also has previously served as President and Executive Committee member of the Association of American Law Schools (AALS). In 2015, she became the inaugural Neukom Fellows Research Chair in Diversity and Law at the American Bar Foundation. She is a member of the American Bar Foundation and the American Law Institute, and she is a Fellow of the Civil Rights Project/*Proyecto Derechos Civiles*. Prof. Moran has been inducted into the Chancery Club of Los Angeles and the Lincoln Club, and she was elected to the Beverly Hills Bar Association's Board of Governors. Prof. Moran received her A.B. in psychology from Stanford University and her J.D. from Yale Law School.

Michael T. Morley
Assistant Professor, Florida State University College of Law
Professor Morley joined FSU Law in 2018, and teaches and writes in the areas of election law, constitutional law, remedies, and the federal courts. He is best known for his work on election emergencies and post-election litigation, nationwide and other defendant-oriented injunctions, the jurisdiction of the federal courts and their equitable powers more generally. He has testified before congressional committees, made presentations to election officials for the U.S. Election Assistance Commission and participated in bipartisan blue-ribbon groups to develop election reforms. The governor of Florida also appointed Professor Morley to the Criminal Punishment Code Task Force, to propose potential revisions to the legislature.

Kate Shaw
Professor of Law, Cardozo Law and Supreme Court Contributor, ABC News
Kate Shaw is a Professor of Law and the Co-Director of the Floersheimer Center for Constitutional Democracy. Before joining Cardozo, Professor Shaw worked in the White House Counsel's Office as a Special Assistant to the President and Associate Counsel to the President. She clerked for Justice John Paul Stevens of the U.S. Supreme Court and Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit.
Professor Shaw graduated with a B.A. magna cum laude from Brown University and with a J.D. magna cum laude and Order of the Coif from Northwestern University, where she served as the Editor-in-Chief of the Northwestern University Law Review and won the John Paul Stevens Award. Her scholarly work has appeared, among other places, in the Northwestern University Law Review, the Columbia Law Review, the Cornell Law Review, the Texas Law Review, and the Georgetown Law Journal, and her popular writing has appeared in the New York Times, Slate, and the Take Care blog. She recently edited the book *Reproductive Rights and Justice Stories*, with Reva Siegel and Melissa Murray. She also serves as a contributor with ABC News, co-hosts the Supreme Court podcast Strict Scrutiny, and serves as a Public Member of the Administrative Conference of the United States (ACUS).

MODERATOR

Rick Hasen
Chancellor's Professor of Law and Political Science, UCI Law
Professor Richard L. Hasen is a nationally recognized expert in election law and campaign finance regulation, writing as well in the areas of legislation and statutory interpretation, remedies, and torts. He is co-author of leading casebooks in election law and remedies.
From 2001-2010, he served (with Dan Lowenstein) as founding co-editor of the quarterly peer-reviewed publication, Election Law Journal. He is the author of over 100 articles on election law issues, published in numerous journals including the *Harvard Law Review*, *Stanford Law Review* and *Supreme Court Review*. He was elected to The American Law Institute in 2009 and serves as Reporter (with Professor Douglas Laycock) on the ALI's law reform project: Restatement (Third) of Torts: Remedies. He also is an adviser on the Restatement (Third) of Torts: Concluding Provisions.
Professor Hasen was named one of the 100 most influential lawyers in America by *The National Law Journal* in 2013, and one of the Top 100 Lawyers in California in 2005 and 2016 by the *Los Angeles* and *San Francisco Daily Journal*.
His op-eds and commentaries have appeared in many publications, including The New York Times, The Washington Post, Politico, and Slate. Hasen also writes the often-quoted Election Law Blog, which the *ABA Journal* named to its "Blawg 100 Hall of Fame" in 2015. The *Green Bag* recognized his 2018 book, *The Justice of Contradictions: Antonin Scalia and the Politics of Disruption*, for exemplary legal writing, and his 2016 book, *Plutocrats United*, received a Scribes Book Award Honorable Mention. His newest book, Election Meltdown: Dirty Tricks, Distrust, and the Threat to American Democracy was published by Yale University Press in 2020.

An Amazing Term in the Supreme Court: October Term 2019
University of California, Irvine School of Law
July 23, 2020

Erwin Chemerinsky
Dean and Jesse H. Choper Distinguished Professor of Law
University of California, Berkeley School of Law

I. Abortion rights

June Medical Services LLC v. Russo, 140 S.Ct. ___ (June 29, 2020). Louisiana's Unsafe Abortion Protection Act, which required doctors who perform abortions to have admitting privileges at a nearby hospital, is unconstitutional.

II. Civil Rights Litigation

A. Employment discrimination

Bostock v. Clayton County, Georgia, 140 S.Ct. ___ (June 15, 2020). The prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), against employment discrimination "because of . . . sex" encompasses discrimination based on an individual's sexual orientation or gender identity.

B. Section 1981

Comcast Corp. v. National Association of African American-Owned Media

National Association of African American-Owned Media v. Comcast Corp., 140 U.S. 1009 (2020). A claim of race discrimination under 42 U.S.C. § 1981 requires allegations and proof of but-for causation.

C. *Bivens* claims

Hernandez v. Mesa, 140 S.Ct. 735 (2020). No claim exists under *Bivens* for a shooting by a border agent in Texas that killed a boy in Mexico.

III. COVID-19 and the Constitution

Republican National Committee v. Democratic National Committee, 140 S.Ct. 1205 (2020). The District Court's order granting a preliminary injunction is stayed to the extent it requires Wisconsin to count absentee ballots postmarked after April 7, 2020, the date of the state's election.

South Bay Pentacostal Church v. Newsom, 140 S.Ct. 1613 (2020). Denying relief to church challenging closure orders limiting assembly for religious purposes.

IV. Criminal cases

A. Fourth Amendment

Kansas v. Glover, 140 S.Ct. 1183 (2020). For purposes of an investigative stop under the Fourth Amendment, it is reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle absent any information to the contrary.

B. Insanity defense

Kahler v. Kansas, 140 S.Ct. 1021 (2020). A state, consistent with the Eighth and 14th Amendments, may abolish the insanity defense.

C. Capital punishment

McKinney v. Arizona, 140 S.Ct. 702 (2020). When a capital sentencing error under *Eddings v. Oklahoma* is found on collateral review, a state appellate court may conduct the reweighing of aggravating and mitigating evidence, as permitted by *Clemons v. Mississippi*.

V. Deferred Action for Childhood Arrivals

Department of Homeland Security v. Regents of the University of California, 140 S.Ct. ___ (June 19, 2020). (1) The Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals policy is judicially reviewable; and (2) The Department of Homeland Security's decision to rescind the Deferred Action for Childhood Arrivals program was arbitrary and capricious under the Administrative Procedure Act.

VI. First Amendment – freedom of speech

Chiafalo v. Washington, 140 S.Ct. ___ (2020). A state may legally enforce how a presidential elector casts his or her ballot and a state penalizing an elector for exercising his or her constitutional discretion to vote does not violate the First Amendment.

VII. Free exercise of religion

Espinoza v. Mont. Dep't of Rev., 140 S.Ct. ___ (2020). It violates the free exercise clause to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools.

Our Lady of Guadalupe School v. Morrissey Beru, 140 S.Ct. ___ (2020). The "ministerial exception" under the religion clauses of the First Amendment forecloses the adjudication of employment-discrimination claims by Catholic school teachers against their employers.

Little Sisters of the Poor Saint Peters and Paul Home v. Pennsylvania, 140 S.Ct. ___ (2020). The Departments of Health and Human Services, Labor and the Treasury had authority under the Affordable Care Act to promulgate rules exempting employers with religious or moral objections from providing contraceptive coverage to their employees

VIII. Indian Law

McGirt v. Oklahoma, 140 S.Ct. ___ (2020). For purposes of the Major Crimes Act, land throughout much of eastern Oklahoma reserved for the Creek Nation since the 19th century remains a Native American territory.

IX. Presidential immunity from subpoenas

Trump v. Vance, 140 S.Ct. ___ (2020). Article II and the supremacy clause of the Constitution do not categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting president.

Trump v. Mazars USA, LLP, 140 S.Ct. ___ (2020). Although congressional subpoenas for the president's information may be enforceable, the court below in this case did not take adequate account of the significant separation of powers concerns implicated by subpoenas from the House of Representatives seeking President Donald Trump's financial records.

X. Separation of powers

Sheila Law LLC v. Consumer Financial Protection Board, 140 S.Ct. ___ (June 29, 2020). The vesting of substantial executive authority in the Consumer Financial Protection Bureau, an independent agency led by a single director who cannot be removed by the President, violates the separation of powers.

Blockbuster decisions in 6 areas of law made this a SCOTUS term to remember

By Erwin Chemerinsky
ABA Journal, July 15, 2020
https://www.abajournal.com/news/article/chemerinsky-a-term-to-remember

The most important lesson from the Supreme Court's just completed term is that it is truly the John Roberts court. Since the retirement of Justice Anthony Kennedy two years ago, Roberts has been ideologically in the middle of the court and thus, its “swing justice." This was powerfully evident this term. Roberts voted with the majority in 97% of the cases; he dissented only twice all term. As chief justice, he assigns the opinion when he is in the majority and he wrote the majority opinion in many of the most important cases of the term.

It was an unusual term in so many ways. The court decided only 53 cases with signed opinions after briefing and oral argument; that is the fewest number since 1862, when the court issued 41 opinions during the Civil War. Because of the COVID-19 pandemic, the court canceled oral arguments in March and April; it was the first time that had happened since the court canceled arguments because of the Spanish flu in October 1918. In May, the court held telephonic oral arguments for the first time in its history and allowed live broadcasts, which also was a first.

But most of all, it was a term of blockbuster decisions, almost all of which saw Chief Justice John G. Roberts Jr. in the majority.

Abortion rights

In *June Medical Services, LLC v. Russo*, the court declared unconstitutional a Louisiana law that required a doctor to have admitting privileges at a hospital within 30 miles in order to perform an abortion. In one sense, this was not remarkable because four years earlier in *Whole Women’s Health v. Hellerstedt* (2016), the court struck down an identical Texas law. Justice Stephen G. Breyer wrote for the plurality in *June Medical Services* and said the Louisiana law, like the Texas one, would do little to protect women’s health but would significantly decrease access to abortion in that state.

In *Whole Women’s Health*, Justice Anthony Kennedy was the fifth vote in the majority joining Justices Breyer, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan. What is most notable about *June Medical Services* is that Chief Justice Roberts was the fifth vote to invalidate the Louisiana law. Roberts concurred in the judgment and said although he dissented and disagreed with the decision in *Whole Women’s Health*, he felt bound to follow precedent. This is the first time since coming on the court in 2005 that Roberts has voted to strike down an abortion restriction. Of course, everyone now wonders whether this is a signal as to how he will vote when the issue of overruling *Roe v. Wade* and *Planned Parenthood v. Casey* is squarely before the court.

Civil rights litigation

In *Bostock v. Clayton County, Georgia*, the court held that Title VII of the 1964 Civil Rights Act prohibits employment discrimination based on sexual orientation or gender identity. Justice Neil M. Gorsuch wrote the opinion, joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor and Kagan. Justice Neil Gorsuch focused on the plain language of Title VII, which prohibits employment discrimination “because of sex.” He explained that the gay men who were fired would have kept their jobs if they were women; the transgender woman who was fired would have kept her job if she were male. This is discrimination because of sex.

In addition to Title VII, there are more than 100 federal laws that prohibit discrimination because of sex. This case likely means that all of them must be interpreted to prohibit discrimination based on sexual orientation or gender identity.

Deferred Action for Childhood Arrivals

The DACA program created by President Barack Obama in 2012 applies to individuals who were brought to the United States before age 16 and who were under the age of 31. The person must be in school or have graduated high school, or be in the military or have been honorably discharged from it. The individual must not have a conviction for a felony or a serious misdemeanor or three misdemeanors of any kind. Pursuant to federal immigration law, these individuals are given deferred deportation status for a period of two years, which can be renewed. This means they do not need to fear being deported during this time and are eligible for work permits. There are many Dreamers in my law school and on my campus.

President Donald Trump repealed this program as part of his strong anti-immigrant policies. In *Department of Homeland Security v. Regents of the University of California*, the Supreme Court found, 5 -4, that President Trump's rescission of DACA violated the Administrative Procedures Act. In an opinion by Chief Justice Roberts, the court held that there was not an articulated, legitimate justification that considered alternatives when DACA was rescinded and put 700,000 individuals in danger of deportation. President Trump can try again to rescind DACA, but for now the program remains in effect.

Free exercise of religion

The most important triumphs for the conservative justices were in the area of religious freedom. The court clearly signaled a major change in the law and a much greater protection for religious institutions under the Constitution.

Espinoza v. Montana Department of Revenue involved a Montana law that allowed parents sending their children to private school to receive a $150 tax credit. In Montana, almost all of the private schools are religious. The Montana Supreme Court invalidated the tax credit law as violating the Montana state constitution, which forbids direct or indirect government aid to religion.

But the Supreme Court, 5-4, concluded that the Montana Supreme Court violated free exercise of religion in invalidating the Montana program. Chief Justice Roberts wrote the opinion for the court and said that the Montana constitution prevented parents from receiving aid if they sent their children to religious as opposed to secular private schools. This, the court concluded, violated free exercise of religion. The court said that the government must have a compelling reason and no other alternative any time it denies benefits to religious institutions that it allows to secular ones.

The practical effect of this decision, which follows from the court's ruling in *Trinity Lutheran of Columbia, Missouri v. Comer* in 2017, is that whenever the government gives benefits to secular private schools it must provide them to religious schools unless it can be shown that doing so would violate the Establishment Clause of the First Amendment.

In *Our Lady of Guadalupe School v. Morrissey-Berru*, the court held that a religious school cannot be held liable under employment discrimination laws for the choices it makes as to its teachers. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012), the court concluded that a fifth-grade teacher who had been a commissioned minister in the faith could not sue a religious school for employment discrimination.

In *Our Lady of Guadalupe School*, the court in a 7-2 decision with Chief Justice Roberts writing for the majority, held that religious schools are exempt from employment discrimination laws for the choices they make as to their teachers. This means that religious schools are free to discriminate on the basis of race, sex, religion, sexual orientation, age and disability in hiring and firing teachers.

Finally, in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, the court upheld the authority of the Trump administration under the Affordable Care Act to promulgate rules exempting employers with religious or moral objections from providing contraceptive coverage to their employees.

Presidential immunity from subpoenas

In two cases, the court held that the president does not have absolute immunity from subpoenas of information from financial institutions with whom he does business. Both cases were 7-2, and Chief Justice Roberts wrote the majority opinion in each. Both were remanded for further proceedings.

In *Trump v. Vance*, the court concluded that the president does not have immunity from state grand jury subpoenas and that there is no need for a heightened showing of need for such subpoenas. The court stressed that the law has a right to every person's evidence, including from the president. The case involved a subpoena to President Trump's accountants in connection with a criminal investigation of whether there were campaign finance violations in hush money paid to porn actress Stormy Daniels to not reveal her sexual relationship with Trump.

In *Trump v. Mazars USA, LLP*, the court held that congressional subpoenas for the financial information concerning the president may be enforced, but there has to be sensitivity to separation of powers concerns. The court said on remand, courts must consider the importance of the information and the availability of it through other sources, the narrowness of the subpoena, the legislative purpose and the burdens imposed on the president by the subpoena.

Federal agencies

In *Seila Law LLC v. Consumer Financial Protection Bureau*, the court held that it violated separation of powers to have the Consumer Financial Protection Bureau led by a single director who cannot be removed by the president except for cause. Chief Justice Roberts wrote the opinion for the court in the 5-4 decision and so narrowly to focus just on the unconstitutionality of limiting presidential removal in an agency headed by a single director; the court did not disturb precedents upholding limits on removal for commissions of multimember bodies.

One year does not make a trend. And I am not among those who is convinced that Chief Justice Roberts decided these cases to make the court less of an election year issue, or to lessen the likelihood of court packing or to preserve the legitimacy of the court. All of those are possible explanations, but it also is possible that he was just calling each case on the merits as he saw them.

Gorsuch wrote his 'most important opinion' in SCOTUS ruling protecting LGBTQ workers

By Erwin Chemerinsky
ABA Journal, July 1, 2020
https://www.abajournal.com/news/article/chemerinsky-justice-gorsuch-just-wrote-his-most-important-opinion

There are many important implications to the U.S. Supreme Court's stunning decision June 15 that Title VII of the Civil Rights Act prohibits employment discrimination based on sexual orientation and gender identity.

In *Bostock v. Clayton County*, the Supreme Court ruled 6-3 that Title VII's prohibition of employment discrimination "because of sex" protects gay, lesbian and transgender individuals.

Justice Neil M. Gorsuch wrote for the court, joined by Chief Justice John G. Roberts Jr. and Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan.

The decision

Actually, there were three cases before the court, though all were decided in one opinion. *Bostock* and *Altitude Express v. Zarda* involved men who were fired for being gay. *R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission* involved Aimee Stephens, a funeral home director, who was fired for being a transgender woman.

The court's holding was clear and emphatic. The court declared: "In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law."

Gorsuch's majority opinion stressed the plain meaning of the prohibition of discrimination "because of sex" in Title VII. A simple example illustrates the basis for this conclusion.

Imagine an employee named Chris who never has met the employer. Chris and the employer communicate by text and email but never have met in person or talked by phone. Chris often has referred to a husband in discussing evening or weekend plans. When Chris and the employer meet, the employer is surprised that Chris is a man. The employer fires Chris, saying he does not want to employ gay people. If Chris was a woman, Chris would still have the job. That, by definition, is employment discrimination because of sex.

Likewise, Gorsuch said Stephens would have continued to have the position as a funeral director at R.G. & G.R. Harris Funeral Homes if she hadn't transitioned. But she lost the job for being a trans woman. That, too, is employment discrimination because of sex.

Justice Samuel A. Alito Jr. wrote a lengthy dissent, joined by Justice Clarence Thomas. Alito took a different view of the plain meaning of Title VII. He said discrimination based on sex, sexual orientation and gender identity have different meanings, and Title VII forbids only the former. Also, he argued, as did Justice Brett M. Kavanaugh in a separate dissent, that this should be for Congress to accomplish by amending Title VII, not for the judiciary to do.

The implications

First, and most obviously, employment discrimination based on sexual orientation or gender identity is now illegal in the United States. Only about half the states have laws that prohibit such discrimination.

In other words, prior to this decision, in about half the country, gay, lesbian and transgender individuals had no protection from employment discrimination. This is thus a huge change in the law providing protection from discrimination for millions of people.

Second, this decision likely means that other federal laws that prohibit discrimination because of sex also apply to forbid discrimination based on sexual orientation or gender identity. There are over 100 federal laws that prohibit sex discrimination in many contexts, according to Alito in the Supreme Court decision. The Obama administration adopted rules and guidance letters saying that they should be interpreted to also outlaw discrimination based on sexual orientation or gender identity. The Trump administration has rescinded most of these.

For example, Title IX of the Civil Rights Act prohibits educational institutions receiving federal funds from discriminating on the basis of sex. During the Obama administration, the assistant attorney general for civil rights and the assistant secretary of education for civil rights sent out a guidance letter to schools that Title IX applied to gender identity and required that schools allow students to use restrooms and locker rooms that correspond to their gender identity. The Trump administration has rescinded this.

Now, there is a strong argument based on *Bostock* that the statute must be interpreted to protect gay, lesbian and transgender students from discrimination.

Third, the court's decision is likely to lead to litigation over the ability of employers to discriminate based on their religious beliefs. Title VII has a very narrow exception that permits employment discrimination on account of religion.

Employers who wish to discriminate based on sexual orientation and gender identity are likely to invoke the Religious Freedom Restoration Act. Also, they may raise free exercise of religion claims under the First Amendment.

Finally, *Bostock* has interesting implications for the level of scrutiny to be used for sexual orientation and gender identity discrimination under equal protection.

The Supreme Court has used intermediate scrutiny for sex discrimination since *Craig v. Boren* in 1976. Under intermediate scrutiny, a law is upheld if it is substantially related to an important government purpose. In 1996, in *United States v. Virginia*, the court also said sex discrimination would be allowed only if there is an "exceedingly persuasive justification."

Only once has the high court articulated a level of scrutiny for sexual orientation discrimination. In *Romer v. Evans*, in 1996, the court expressly used rational basis review in striking down a Colorado initiative that repealed all laws protecting gay and lesbian people from discrimination and that prohibited the enactment of any new laws forbidding such discrimination.

In the cases involving marriage equality—*United States v. Windsor* in 2013 and *Obergefell v. Hodges* in 2015—the court found violations of equal protection but did not say what level of scrutiny was being used.

If discrimination based on sexual orientation and gender identity are seen as sex discrimination, then it would seem that intermediate scrutiny should be used under the Constitution when there is a challenge to government discrimination against gay, lesbian and transgender individuals.

It is possible that the court will say *Bostock* was just about interpreting the language of Title VII, and that it is different under equal protection. But there seems to be little basis for such a distinction once the court held that a prohibition against sex discrimination includes outlawing discrimination based on sexual orientation and gender identity.

By any measure, *Bostock* is an enormously important case. It certainly is the most important opinion written by Gorsuch since coming on to the court three years ago. It is a huge step to protecting gay, lesbian and transgender individuals from discrimination.

Bring On the 28th Amendment

Efforts by Trump and his allies to suppress the vote are only part of the problem.

By Richard L. Hasen
NY Times, June 29, 2020
https://www.nytimes.com/2020/06/29/opinion/sunday/voting-rights.html?searchResultPosition=1

What if we made voting an agent of equality, not inequality? And how can we get there?

If you are a college student or a working recent high school graduate, poor, Latino, or someone who moves more frequently, you are less likely to vote. Seniors are much more likely to vote than young people, in some elections at twice their rate. Those with college degrees vote in higher numbers than the less educated. Minority voters are more likely to wait longer in line to vote in person, sometimes for hours, and they, young people, and first-time voters are more likely to have an absentee ballot rejected for nonconformity with technical rules. Poor voters are less likely to have the time off work to vote at all, much less wait in a long line to vote. Voters in big cities, who tend to be younger, poorer and browner, have coped with more serious election problems than others in voting in person and by mail during our coronavirus-laden primary season, like the voters in Milwaukee who saw 175 out of 180 polling places closed during the April 7 Wisconsin primaries.

In a democratic system, we expect our elected officials to be responsive to the views and interests of the voters. If the universe of voters — and, of course, campaign donors — is skewed toward older, wealthier, better educated whiter voters, political decisions will be as well. We need equality in voting rights and turnout to assure responsive representation and social policy that reflects everyone's needs, not just those most likely to turn out with their votes and dollars.

Let's start with the causes of the problem. The Covid-19 pandemic has laid bare three pathologies with how we protect voting rights in the United States, and why the skew in voter turnout remains persistent.

First, the United States election system features deep fragmentation of governmental authority over elections. Not only does the United States use a highly decentralized and localized election system that gives many powers over national elections to state and local bodies, but also, even within the approximately 10,500 bodies expected to run the 2020 election, there is sometimes disagreement over who has decision making authority over voting rights decisions. In the recent chaos of the June 9 Georgia primary, for example, the secretary of state and counties including the area around Atlanta pointed fingers at one another as to who was to blame for long lines, inoperable new voting machines rolled out for the first time in a presidential election year and closed polling places.

Second, protection of voting rights in the United States is marked by polarized and judicialized decision making. Some Republican decision makers controlling some aspects of American election machinery have pushed for laws and policies that make it harder for students, the poor and minority voters to register and vote, leading to a pushback by Democrats and voting rights groups to loosen those restrictions. Often this battle takes the form of unsubstantiated claims of voter fraud, such as President Trump's recent false claims about vote-by-mail, a method of voting he and his closest friends and advisers are comfortable using themselves. These politicians often use antifraud messages to justify restrictive voting laws or, in the case of the pandemic, a refusal to modify laws to assure continued access to the ballot. Mr. Trump's irresponsible tirades against mail-in balloting during the pandemic are particularly confounding, and make it more likely that his own rural and poorer supporters will either not vote or not be able to vote safely.

Given the highly litigious nature of American society and American election law in particular, these political fights often wind up in court, and sometimes break along party lines in the courts as well. Protecting voting rights in 2020 America requires a state-by-state slog and often litigation in an uncertain legal environment. These battles have been especially intense since the Supreme Court in its 2013 decision in Shelby County v. Holder killed off a key protection for minority voters in the Voting rights Act.

Finally, and related to this last point, constitutional protections for voting rights remain weak. The U.S. Constitution contains no affirmative right to vote. It speaks of voting rights mostly in the negative: thanks to a number of constitutional amendments, it is now illegal to bar someone from voting on the basis of race, gender, age of at least 18, or through the use of a poll tax.

The Constitution does guarantee equal protection of the laws in the 14th Amendment, and equal protection lawsuits have become the primary method by which those seeking to protect voting rights get federal court relief. Courts sometimes protect voting rights and sometimes they don't, through application of an ad hoc and uncertain balancing test. For example, the United States Court of Appeals for the Fifth Circuit, headquartered in Louisiana, recently rejected age-discrimination and equal-protection arguments that it is unconstitutional for Texas to allow voters over the age of 65 to vote by mail without an excuse, while barring from the vote-by-mail option others who lack immunity from the coronavirus and fear going to a polling place to vote. The Texas Democratic Party appealed for emergency relief from the Supreme Court. On Friday, it lost.

A decentralized, federalist approach to voting rights has led to a self-perpetuating system of voting inequality, where in some places you may be disenfranchised even if you do everything right. For example, some voters in Georgia, including the 2018 Democratic candidate for governor, Stacey Abrams, requested the chance to vote by mail back in April, but had problems with their June primary ballots and had to wait in long lines at polling places to vote instead.

In the short term, we need to take certain steps to assure that millions of voters already at risk of not voting are not disenfranchised through suppression, incompetence, and lack of resources in November. All states need to expand opportunities for online voter registration in time for November. People cannot go door-to-door during a pandemic as they usually would, signing up voters in the summer before a high-stakes election. Although there is some evidence that the George Floyd protests have led to a spike in registrations in some places, voter registration was down 70 percent in April 2020 compared to April 2016 across 11 states, including California and Texas, according to a study by the Center for Election Innovation and Research. California at least has same-day voter registration, but Texas does not. If you can't register, you can't vote.

Congress needs to adequately fund additional expenses related to running an election during the pandemic. Absentee ballot requests will soar, whether states have the resources to process them or not, and fewer resources means more mistakes and a greater risk of disenfranchisement. It is also more expensive to run polling places with good hygiene and social distancing. So far Congress has allocated only $400 million, but estimates are that it will take $2 billion or more to get our system ready.

Even this won't be enough. Lawsuits are going to be necessary to ensure that the kinds of debacles we have seen in Georgia and Wisconsin are not repeated in November. States need to form independent bipartisan task forces to conduct full and independent investigations into why areas with more poor voters and voters of color saw significant problems voting in person during the primaries.

Beyond triage for 2020, longer term change requires bolder thinking. We need a new social movement, that may take a generation or more, pushing a constitutional amendment protecting the right to vote. It would guarantee all adult citizens the right to vote in federal elections, establish a nonpartisan administrative body to run federal elections that would automatically register all eligible voters to vote, and impose basic standards of voting access and competency for state and local elections.

Talking of a constitutional amendment in the current polarized atmosphere may sound like a pipe dream when Congress cannot pass even basic voting rights protections, like restoring the part of the Voting Rights Act that the Supreme Court destroyed. But the current situation is untenable.

We need a 28th Amendment for voter equality around which people can organize and agitate. Organization could emulate the battle for passage of the 19th Amendment, which bars gender discrimination in voting. It took more than a generation for that amendment to pass, and along the way activists for equal women's suffrage got state legislatures to bolster voting rights and the public to change its attitudes about voting.

It has been 100 years since passage of the 19th Amendment and 150 since the passage of the 15th Amendment barring racial discrimination in voting. Despite those accomplishments, every national election features endless angst and litigation over assuring people the right to vote, which puts special burdens on those who already face the greatest barriers. We need to bring that struggle to an end and press forward toward a new voting rights amendment that would assure that our representatives truly reflect the will of the people.

Citizenship, Personhood, and the Constitution in 2020

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UC Irvine School of Law Research Paper No. 2020-35, April 15, 2020

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3577238

Abstract

This essay is a retrospective on a conference on "The Future of the Constitution in 2020," which took place at Yale Law School in 2005. When the conversation began, it became clear that some of the assembled scholars saw citizenship as the key to a reinvigorated progressive agenda. The hope was that appeals to citizenship would revitalize the democratic process and mitigate the class divide through the redistribution of resources. Although I had originally planned to address an entirely different topic, I revised my remarks to insist on claims of personhood as essential to our country's prospects for redemptive constitutionalism. In doing so, I made clear that citizenship can be a sword wielded against immigrant communities, particularly disadvantaged communities of color, as well as a shield for those who fear that the nation-state's bonds are fraying under the political and economic pressures that come with a powerful global economy.

Now that 2020 has arrived, this essay explains why those fears have been vindicated. In 2005, I had grave doubts that a progressive agenda for citizenship would be realized. Because citizenship has been deployed in such profoundly exclusionary and dehumanizing ways, it remains hard to imagine it as the core organizing principle for an inclusive, egalitarian community. As I pointed out at the time, citizenship is an especially fraught concept for a progressive agenda because the United States has been experiencing high levels of immigration, including from Latin America. So, I was convinced then and am even more convinced now that citizenship is likely to be a destructive wedge issue in partisan politics rather than a tool for promoting equality and engagement. Progressive calls for a citizenship agenda legitimate the distinction between citizens and non-citizens, marginalize the claims to personhood that immigrants make, and still fail to deliver much in the way of hoped-for political and economic reforms. Meanwhile, as demonstrated by recent struggles over apportionment and the Census, conservatives have tried to use citizenship to restrict access to meaningful representation for immigrants and the communities of color in which they reside. Drawing on current political developments as well as contemporary litigation, the essay closes by examining how personhood, an increasingly pallid source of constitutional protection, might be revived through a focus on areas of law and policy that necessitate recognition of our common humanity and interdependent fates.

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