New American

Written by **Steve Byas** on July 25, 2023

Published in the August 14, 2023 issue of the New American magazine. Vol. 39, No. 15

Reviewing the Court

AP Images

The U.S. Supreme Court has issued a series of important rulings in the first half of 2023. Included in this year's decisions were cases involving affirmative action for admission into American colleges and universities, the Biden administration's attempt to unilaterally forgive student loans, the right of a Christian graphic artist to determine what type of artwork matched her religious beliefs, the authority of state legislatures to redraw the boundaries of congressional districts, and whether "transgender" individuals have protections under the Americans with Disabilities Act (ADA).

For those who favor fidelity to the Constitution, the rulings were a mixed bag. But for those on the Left who have come to expect Supreme Court rulings that advance their progressive agenda, any defeat before the High Court is a cause to condemn not only the rulings, but the legitimacy of the Court itself.

Leading the attack upon the Supreme Court was President Joe Biden. "This is not a normal court," Biden said, responding to a question of whether the Supreme Court had become a "rogue court" after its decision striking down the use of race to determine admissions criteria to colleges and universities.

Some on the Left have even advocated "packing" — increasing the number of justices on the Supreme Court to make the overall composition of the Court more liberal. Senator Edward Markey (D-Mass.) recently sponsored legislation to expand the number of justices (nine since 1869) to 13. "Republicans have hijacked the confirmation process," Markey said in a press release, so they could "roll back fundamental rights." Biden, however, said court expansion would be a "mistake," arguing that this would lead to increased "politicization" of the Court, noting that Republicans would do the same if they were to regain the presidency and both houses of Congress.

The Role of the Federal Judiciary

The Framers of the Constitution viewed the role of the courts, including the Supreme Court, as applying the law to cases coming before them. However, the powers and purposes of the federal judiciary are largely misunderstood today, even by many on the Right who express their dedication to following the U.S. Constitution. Many view the Supreme Court as some sort of super-legislature that can make law on its own, or at least strike down laws it simply does not like. Some even mistakenly believe that the original purpose of the Supreme Court was somehow modified by Chief Justice John Marshall and the rest of the Supreme Court, when, in 1803, they issued the famous decision of *Marbury v. Madison*, asserting the "power of judicial review."

The words "judicial review" are not found in *Marbury v. Madison*, and Marshall did not use the word "power" to describe what the Court did, but rather said that it was the justices' "duty" to follow the Constitution. "It is emphatically the province and duty of the judicial department to say what the law

is," Marshall wrote in the opinion. Unfortunately, some have taken this to mean that Marshall and his fellow justices were arguing that they have a right to make law from the bench. Rather, they were simply stating the obvious — it was their duty to apply the Constitution and the laws of Congress to cases coming before their court.

Alexander Hamilton argued that the federal judiciary was the "least dangerous" branch, as it had "no influence over either the sword [the power of the executive branch] or the purse [the power of the legislative branch]." Instead, they could only issue a "judgment" in a case before them. They had no authority to make general laws, but only laws of the case before them.

The reason rulings in cases that come before the Supreme Court are so important in our system is because of *precedent*. Once the Supreme Court has made a ruling in a case, other judges are likely to follow that precedent in similar cases that come before them. The problem is that those on the Left tend to elevate such precedent to the level of the Constitution itself — at least in cases in which they agree with the ruling. But all judges, indeed all public officials in the country, take an oath not to judicial rulings, but to the Constitution.

As Marshall put it, "If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

Members of the Supreme Court should also regard the Constitution as superior to their own precedents. If a precedent is believed by a justice of the Supreme Court to be in conflict with the Constitution, then that judge has a "duty," in the words of Chief Justice Marshall, to follow the Constitution, and not an unconstitutional precedent.

Ending Affirmative Action

Following the Constitution rather than precedent is exactly what happened with the 2022 *Dobbs* ruling, which reversed the "precedent" of *Roe v. Wade*. This year, the case that has caused the most consternation among the Left is the decision to strike down affirmative action in college admissions. Chief Justice John Roberts wrote in the 6-3 decision that the affirmative action policies that were part of the admissions programs at Harvard University and the University of North Carolina "lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points," and that "those admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause."

Roberts added that universities have "concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice." Associate Justice Clarence Thomas zeroed in on the issue with laser-like clarity, writing in a separate opinion that the decision "sees the universities admissions policies for what they are: rudderless, race-based preferences designed to ensure a particular racial mix in their entering classes."

Associate Justice Sonia Sotomayor dissented, and predictably cited precedent as her main legal argument, while adding a results-based "reasoning," saying that the decision "rolls back decades of precedent and momentous progress." The newest member of the court, Associate Justice Ketanji Brown Jackson, denounced the decision as a "tragedy." She insisted that "deeming race irrelevant in law does

not make it so in life."

The ethnic group that has arguably been hurt the most by affirmative action is Americans of Asian ancestry. Asian-Americans with higher scores on entrance exams are routinely passed over to make room for favored minority candidates. Without such race-based admissions policies as required by affirmative action, it is possible that a majority of the enrolling classes at Harvard and other Ivy League schools would be of Asian ancestry.

The reality is that while affirmative action policies might help lower-income students get admitted to colleges, they do not help them to succeed once they are admitted if they are not qualified to do the work. On the other hand, because of "legacy" considerations, affirmative action policies rarely keep out students from elite and wealthy families. If a prospective student's parents attended an Ivy League school such as Harvard or Yale, then that student is likely to be admitted as well, resulting in self-perpetuating elitism at these schools. Those most likely to be denied admission, besides Asian students, are middle-class and lower-income students of European ancestry, especially males.

This explains why many Democratic politicians, such as former President Barack Obama, railed against the Court's affirmative-action decision. Support for affirmative action appeals to black voters, or at least Democrats believe that it does. Obama issued a statement asserting that affirmative action policies "allowed generations of students like Michelle and me to prove we belonged." Obama, however, like most presidents, did not come from a lower-income background.

Religious Liberty Victory

Another Court decision that angered the progressive Left was that of *303 Creative v. Elenis*, in which the Court ruled in favor of a web designer, Lorie Smith, who refused to create a wedding site for a same-sex couple. Smith, a Christian, said that forcing her to do such creative work for something she considered sinful would violate her religious liberty. Justice Ketanji Brown Jackson dissented from the majority, saying the decision meant that "a particular kind of business, though open to the public, has a constitutional right to refuse to serve members of a protected class."

As could be expected, the mainstream media mischaracterized the issues involved in the case. CBS, for example, claimed that the Supreme Court had ruled in favor of a "Colorado web designer who said her religious beliefs prevent her from taking on same-sex couples as clients," while CNN used the headline, "Supreme Court limits LGBTQ protections."

Smith, however, was not refusing to provide a service to the homosexual couple because they were a homosexual couple. If they had needed creative work for, say, a plumbing business, she undoubtedly would have been willing to do that. What she objected to was being asked to promote a lifestyle with which she did not agree — in fact, a lifestyle she considered to be a violation of the biblical injunction that sex should only be between a married man and woman.

Free expression: Lorie Smith, a Christian graphic artist and website designer, won a victory for religious liberty in the Supreme Court this term. (AP Images)

Associate Justice Neil Gorsuch argued in the *303 Creative* ruling, "All manner of speech — from 'pictures, films, paintings, drawings, and engravings,' to 'oral utterance and the printed word' — qualify for the First Amendment's protection; no less can hold true when it comes to speech like Mrs. Smith's conveyed over the Internet."

Smith's lawyer, Kristen Waggoner, celebrated the decision: "The U.S. Supreme Court rightly reaffirmed that the government can't force Americans to say things they don't believe. The court reiterated that it's unconstitutional for the state to eliminate from the public square ideas it dislikes, including the belief that marriage is the union of husband and wife."

Student-loan "Forgiveness"

Two cases — *Biden v. Nebraska* and *Department of Education v. Brown* — well illustrate how willing Biden and his fellow progressives are to ignore the Constitution if they believe it will help them politically. The two cases involved Biden's executive action to "forgive" student-loan debt, a total of $430 billion. By "forgiving" the student-loan debt of millions of borrowers who have not yet paid off their college loans, or at least part of the debt, Biden was probably hoping to gain their support in next year's elections for president and Congress.

Of course, the debt is not really "forgiven." It will still be paid. It is simply being shifted from the person who owes the debt to millions of Americans who either have already paid off their student loans or never went to college in the first place.

Nineteenth-century political philosopher Frédéric Bastiat, in his book *The Law*, called this taking of money from one person, or a group of persons, and giving it to another person or persons "legal plunder." In other words, it is simply theft by another name. It is government doing the stealing for individuals.

Chief Justice Roberts dismissed the Biden administration's argument that the debt-forgiveness program was part of the government's response to the Covid-19 "national emergency." Roberts said Biden could not legally take such action on his own via executive order, but that the program would require an act of Congress. "The plan has 'modified' the cited provisions only in the same sense that the French

Revolution 'modified' the status of the French nobility — it has abolished them and supplanted them with a new regime entirely. From a few narrowly delineated situations specified by Congress, the [education secretary] has expanded forgiveness to nearly every borrower in the country."

The Supreme Court had previously curtailed Biden's unconstitutional efforts to legislate from the executive branch in cases involving pandemic-era eviction protections for residential renters and the mandate for vaccinations for large businesses.

Legislative Redistricting

Unfortunately, the Supreme Court did not stand up for the Constitution in every case this term. One glaring example of a ruling that undercut the principle of federalism and the wording of the Constitution itself was the 6-3 decision on congressional redistricting in North Carolina. Tar Heel State Republicans had argued that state legislatures have the constitutional authority to make rules for federal elections, without interference by state courts.

Article I of the Constitution states, "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except to the choosing of senators."

In other words, it is up to the legislature of the state to draw congressional district boundaries, subject to any general laws passed by Congress (such as the requirement that the districts must be equal in population and be contiguous). Nothing in the Constitution hints that state courts can play any role whatsoever in this process.

In the case known as *Moore v. Harper*, Roberts — joined by Associate Justices Brett Kavanaugh and Amy Coney Barrett and (of course) all three liberal justices — held that "state courts retain the authority to apply state constitutional restraints when the legislatures act under the power conferred upon them by the Elections Clause." Roberts then added, predictably, "But federal courts must not abandon their own duty to exercise judicial review."

Roberts did state, however, "Interpreting state law in this area, state courts may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures."

The case had a twist in that after North Carolina House Speaker Tim Moore filed a petition arguing that the Constitution is "crystal clear: State legislatures are responsible for drawing congressional maps, not state-court judges," the membership of the North Carolina Supreme Court flipped from Democrat to Republican. The new Republican majority decided to rehear the case — known in North Carolina as *Harper v. Hall* — and reversed the previous ruling. The new court held for Moore's position that the legislature, known as the General Assembly, had sole authority over redistricting, arguing that the courts "are not intended to meddle in policy matters."

Justice Clarence Thomas wrote a dissenting opinion that the case should have been dismissed as "indisputably moot." *Moot* means that the case has already been resolved and any action by a court would change nothing. Thomas added, "By its own lights, the majority is acting not as a court organized under Article III of the Constitution but as an ad hoc branch of a state legislature. That is emphatically not our job." Justices Neil Gorsuch and Samuel Alito joined Thomas in dissent.

Finally, the Supreme Court declined to review a ruling by the Fourth U.S. Circuit Court of Appeals that held that people with "gender dysphoria" qualified as a protected class under the Americans with Disabilities Act (ADA). This means that "transgender" and "nonbinary" individuals cannot be discriminated against on that basis. They must receive "reasonable accommodations" because of their "disability." The significance of this ruling is that it could be used to challenge state legislation restricting access to "gender reassignment" surgeries. It could also be used as the basis to challenge laws barring biological males from participating in women's or girls' sports. Because of this, Alito said he considered the failure to hear the case "troubling."

At this point, however, because of the Court's decision not to hear the case, the ruling only affects those states in the Fourth Circuit — Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

While Hamilton's view that the courts are the "least dangerous branch" may be true, these cases illustrate that the federal judiciary can most assuredly pose serious challenges to our daily lives.

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