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The Sharpest Dissents From The Supreme Court Term

By **Andrew Strickler**

Law360 (July 6, 2021, 1:09 PM EDT) -- Despite a U.S. Supreme Court term marked by the pandemic, a presidential election unlike any in modern history and a fortified conservative majority that sparked controversy, the justices seemed to be vibing pretty well — until the end of the session.

Last fall, the court looked at least somewhat unified in its approach to GOP efforts to challenge COVID-related voting changes. A seven-member majority turned back the latest attempt to garrote the Affordable Care Act. And in a case involving religion on campus, the consensus-building Chief Justice John Roberts Jr. was the lone holdout.

But if there were some rounds of "Kumbaya" in chambers, not everyone joined in, with Justices Samuel Alito, Elena Kagan and Neil Gorsuch all writing incensed, peeved or otherwise outraged dissents.

Here, Law360 looks at the four sharpest dissents of the term, and one concurrence that might as well be a dissent.

Justice Kagan Blasts Voting Restriction Decision

Shaking things up on its last day before summer break, the court on Thursday upheld a pair of GOP-backed Arizona voting regulations critics say amount to minority voter suppression.

In the 6-3 vote, Justice Alito wrote that an en banc Ninth Circuit decision last year "misunderstood and misapplied" Section 2 of the Voting Rights Act, which bans discrimination in election procedures regardless of a rule's intended purpose. The decision promises to ease the way for more states to make changes with the potential to drive down minority voting.

In response, Justice Kagan, writing for the liberal wing, blasted the majority for a "tragic" weakening of the Voting Rights Act.

Evoking the late Justice Ruth Bader Ginsburg's famous dissent in Shelby County and her warning about the enduring risk of racist voter suppression, Kagan said the majority "hails the 'good news' that legislative efforts had mostly shifted by the 1980s from vote denial to vote dilution."

"What is tragic here is that the court has (yet again) rewritten — in order to weaken — a statute that stands as a monument to American's greatness, and protects against its basest impulses," Justice Kagan

wrote. "What is tragic is that the court has damaged a statute designed to bring about 'the end of discrimination in voting.'"

Justice Alito Knocks 'Concocted' Obamacare Ruling

In one of the biggest decisions of the term, the court in June turned back a third GOP-led challenge to the Affordable Care Act to reach the high court since 2012.

Ruling against 18 states led by Texas, a 7-2 bloc that included the court's newest member, Justice Amy Coney Barrett, dropped a narrow ruling that the states didn't have standing to challenge an insurance coverage requirement.

Justice Stephen Breyer in the majority opinion said the states and individual challengers hadn't shown how the coverage mandate, following the nullification of a monetary penalty, "will harm them by leading more individuals to enroll in these programs."

In a frustration-laden dissent joined by Justice Gorsuch, Justice Alito said the court had again "pulled off an improbable rescue" by distorting the court's jurisprudence on standing and damages. Describing the decision as "deeply flawed," "concocted," and a "flat-out misstatement of the law," Justice Alito employed a sarcastic flourish, concluding that "fans of judicial inventiveness" would cheer the ruling.

"No one can fail to be impressed by the lengths to which this court has been willing to go to defend the ACA against all threats. A penalty is a tax. The United States is a state," Justice Alito said. "And 18 states who bear costly burdens under the ACA cannot even get a foot in the door to raise a constitutional challenge."

Justice Gorsuch and the 'Mysticism' of Arthrex

Going deep on the question of the constitutionality of administrative patent judge appointments, the high court stripped the judges of final decision-making power and gave the director of the U.S. Patent and Trademark Office more control over rulings.

The justices managed to reach a 5-4 decision on the fundamental question of constitutionality, with Justice Roberts writing the opinion. But in a group of cases with major ramifications for independent administrative and regulatory schemes, they knocked heads on how to fix the problem.

In one dissent, Justice Clarence Thomas said the PTO judges had always been properly appointed, and that a decision putting administrative patent judges "on the side of ambassadors, Supreme Court justices, and department heads suggests that something is not quite right."

Justice Gorsuch separately suggested his colleagues were using "mysticism" to interpret legislation and sever a Patent Act section on review authority on PTAB decisions.

"Short of summoning ghosts and spirits, how are we to know what those in a past Congress might think about a question they never expressed any view on — and may have never foreseen?" he asked. "Let's be honest, too. These legislative séances usually wind up producing only the results intended by those conducting the performance."

William Milliken, a partner in the trial and appellate practice at Sterne Kessler Goldstein & Fox PLLC, said

the dissent effectively illustrated the justice's views on the problems with modern severability doctrine.

"I particularly liked the line about how the severability 'crystal ball ends up being more of a mirror' — i.e., in analyzing what Congress would have intended, there might be a tendency for judges to arrive at the solution that they (the judges) would have intended," he told Law360.

"Given that seven justices agreed with the court's remedy, I don't think severability is going anywhere any time soon, but the Gorsuch dissent nonetheless raises some thoughtful points."

Justice Kagan, Nonunanimous Juries, and a Broken Promise

As the coronavirus pandemic spread last spring and the high court moved to telephone arguments, the justices held that the Sixth Amendment's requirement of unanimous juries applied to the states as well.

That 6-3 ruling in Ramos v. Louisiana, penned by Justice Gorsuch, overturned a 1972 precedent that had allowed Louisiana and Oregon to continue to convict people of serious crimes without every juror's vote. The court also quickly took up a question of retroactivity of Ramos through a pending habeas from Thedrick Edwards, a Louisiana prisoner. Edwards was convicted of violent crimes by a jury in which a lone Black juror voted to acquit on all charges.

Writing for the majority, Justice Kavanaugh declined to apply the decision to past convictions, saying the court's call in Ramos did "not qualify as a 'watershed' procedural rule that applies retroactively on federal collateral review" under the 1989 case Teague v. Lane. He went on to declare the watershed exception itself "moribund," nonexistent in practice, and a source of "false hope" for defendants.

While Justice Kagan didn't join the majority in Ramos — a fact Justice Kavanaugh made sure to note — that didn't stop her from a rousing critique highlighting the court's own agreement in Ramos that nonunanimous juries were historically designed to dilute or nullify the influence of Black jurors.

But despite the fundamental fairness at stake and an "airtight" match between Teague and Ramos, the court was "casually" discarding the rule itself in order to dodge responsibility of applying Ramos to past verdicts, she said.

A decision of Ramos' importance to fair criminal trials "comes with a promise, or at any rate should," she said.

The court instead "limits the consequences of any similarly fundamental change in criminal procedure that may emerge in the future. For the first time in many decades ... those convicted under rules found not to produce fair and reliable verdicts will be left without recourse in federal courts."

Tulane University Law School professor Herbert Larson, who filed an amici supporting Edwards, said Justice Kagan recognized that the decision "once and for all removed the element of justice from its concept of retroactivity."

Justice Kagan's view "is much more than a disagreement with the legal reasoning and conclusions of the majority. It is a righteously angry and principled repudiation of every constituent part of the majority opinion," he added. "And, in my view, that repudiation is justified."

New Orleans attorney Jamila Johnson of The Promise of Justice Initiative, which also backed Edwards,

praised Justice Kagan's defense of those in prison "despite having no real conviction at all."

"The back and forth between Justice Kagan and Justice Kavanaugh might feel important as to what may be to come in their ideological and working styles," she said.

Alito's Concurrence That Read Like A Dissent

In another notable decision this term, in Fulton v. Philadelphia, the high court agreed that the city breached a Catholic foster agency's religious rights by denying it a contract over its refusal to work with LGBTQ couples.

The 9-0 decision in a "culture war" case cheered religious organizations, which flocked to the case as amici, and initially caught some court-watchers by surprise.

But a reading of the decision — with concurrences, it hit 110 pages — revealed a narrowly tailored decision and a refusal to overturn Employment Division v. Smith, which prevents people from challenging "generally applicable" laws on freedom-of-religion grounds.

In a lengthy concurrence joined by Justices Thomas and Gorsuch, Justice Alito didn't hold back his displeasure, saying the decision turned on a "superfluous" contract provision and didn't confront Smith, resulting in a decision that "might as well be written on the dissolving paper sold in magic shops."

"The court has emitted a wisp of a decision that leaves religious liberty in a confused and vulnerable state," he said. "Those who count on this court to stand up for the First Amendment have every right to be disappointed — as am I."

Chicago-Kent College of Law professor Carolyn Shapiro, who co-directs the school's Institute on the Supreme Court of the United States, said the tone "suggests to me that he feels somewhat betrayed by what he sees as the defections of his conservative colleagues."

Jim Oleske of Lewis & Clark Law School called the opinion reminiscent of a five-year-old Justice Alito dissent of the court's decision not to review a case about pharmacies, emergency contraception and the First Amendment.

"Justice Alito described the pharmacy's legal loss as an 'ominous sign' and warned that 'those who value religious freedom have cause for great concern,'" Oleske said. "Given the changes on the court since then, some observers thought Alito might have majority support in Fulton for a considerably broader reading of the free exercise clause, but that didn't turn out to be the case."

--Additional reporting by Jimmy Hoover, Dani Kass, Vin Gurrieri, and Andrew Westney. Editing by Marygrace Murphy.
