

Previewing the October 2017 Supreme Court Term

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After a 2016 Supreme Court term that at times seemed nearly at a standstill waiting for the late Justice Antonin Scalia's spot to be filled, the October 2017 term was expected to start in high-gear, and will likely remain there for most of the year. Moreover, the presence of Justice Neil Gorsuch on the bench has the potential to energize the Court's more conservative wing and heighten the written debate between justices. The October oral argument session, which began on October 2, will no doubt place the Supreme Court in the media spotlight, and possibly the president's twitter-feed focus. The upcoming term allows the justices to dive deeply into the fundamental structures of American democracy, particularly as they relate to elections and immigration.

Voting and Elections

Gill v. Whitford (Docket No. 16-1161) presents the Court with the issue of partisan gerrymandering, a topic that has been bubbling up from the lower courts for decades. *Gill* involves a challenge to the redistricting map drawn by Wisconsin Republicans following the 2010 Census on the basis that the drawing of the new map was politically motivated. The trial court ordered Wisconsin to redraw the map (although that order has been on hold while the case is before the Supreme Court). The specific questions before the Court go beyond the simple issue of drawing electoral districts, and get at the heart of voting rights and political power. The state claims that challenges to electoral maps must be brought on a district-by-district basis; challengers cannot point to an entire electoral map to show partisan gerrymandering. The parties also disagree on the necessary factors and evidence required to prove gerrymandering. In addition, Wisconsin refutes the challengers' claim that this issue even rises to the level of partisan gerrymandering, since the state followed traditional redistricting practices. And

perhaps most importantly, the state questions whether such gerrymandering claims are even justiciable. If the Court decides to tackle this last issue, its ruling might clarify which branch of the government has the final say in voting disputes, an obviously important topic going into the 2018 election cycle.

Marriage Equality and Religious Freedom

Same-sex marriage will once again be before the justices, although in a more narrow and nuanced way than in recent terms. The current case, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (Docket No. 16-111), sits at the intersection of marriage equality and freedom of religion and expression. The cake shop gained media attention when, in 2012, the shop owner, Jack Phillips, refused to bake a cake for Charlie Craig and David Mullins, a same-sex couple married in Massachusetts who planned a celebration in Colorado. Craig and Mullins filed a complaint with the Colorado Civil Rights Commission, citing the state's public accommodations law, the Colorado Anti-Discrimination

Act, which prohibits businesses open to the public from discriminating against customers on the basis of race, religion, gender, or sexual orientation. The complaint led to a lawsuit, which the couple won. The cake shop was ordered to provide cakes to same-sex customers, change its policies to prevent future discrimination, and submit regular reports to the Colorado Civil Rights Commission about any customers it turns away. Masterpiece Cakeshop appealed the decision, and ultimately chose to leave the cake business. Phillips, in appealing the decision, argued that being forced to bake cakes, or "create expression," violates his sincerely held religious beliefs about marriage. The Colorado Supreme Court upheld the decision, and ruled that making a custom cake, despite its artistic nature, constituted expected conduct in Phillips' business, not free expression or freedom of religious expression.

Masterpiece Cakeshop looks to refine and define the broad sweeping statements made by the court in *Obergefell v. Hodges*, 576 U.S. ___ (2015), guaranteeing all couples the "constellation of benefits the state has linked to marriage[.]" In the initial commentary after the *Obergefell* decision, many legal experts noted that lower courts may struggle with balancing the religious beliefs of small business owners and the rights of same-sex couples in accessing marriage-related services. *Masterpiece Cakeshop* puts the issue squarely before the Court by asking whether Colorado's public accom-



In this March 10, 2014, file photo, Masterpiece Cakeshop owner Jack Phillips decorates a cake inside his Lakewood, Colo., store. (AP Photo/Brennan Linsley, File)

modations law, which requires business owners to provide services to all customers, is unconstitutional. *Masterpiece Cakeshop* presents the Court with two First Amendments arguments to find in the petitioner’s favor: free speech and free exercise. The petitioner argues that the state law compels them to create expression that violates their religious beliefs, thereby violating both their rights to free speech and free exercise of their religion.

Technology and Privacy

Carpenter v. U.S. (Docket No. 16-402) represents the next step in the Court’s evolving doctrine as it relates to cell phones and emerging technologies (sometimes with mixed results). *Carpenter* centers on the FBI’s accessing “cell site” information related to phone numbers dialed from a cell phone with-

out obtaining a search warrant. Cell site information includes the date and time of any phone calls, as well as the general location of the phone when calls began and ended based on its cell tower connections.

Timothy Carpenter, the plaintiff in this case, was convicted at trial, following an investigation of armed robberies in Detroit in 2011. During the investigation, the FBI obtained several months of data related to Carpenter’s cell phone usage, all from cell site information records, and without a warrant. The records revealed 12,898 separate points of location data, averaging approximately 101 locations per day. Carpenter appealed the conviction, arguing that the search of his cell site information without a warrant violated his Fourth Amendment rights.

The Court has now been asked to make this exact determination: whether

such warrantless searches and seizures of cell site information violate the Fourth Amendment. Given the ubiquitous nature of cell phones and their ability to collect vast amounts of personal data, the Court’s decision in *Carpenter* could have wide-ranging implications for police practices and the way we interact with our mobile devices. The crux of the Court’s decision may center around whether cell phone users have “voluntarily” turned over this data to a third party (the cell phone service provider).

Patent Law

The last few terms have seen the justices take up a number of patent law cases, and the 2017 term looks to further this trend. *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC* (Docket No. 16-0712) gives the Court the opportunity to develop its patent law jurisprudence by asking whether inter partes review (IPR), an extremely popular adversarial process used by the U.S. Patent and Trademark Office to analyze the validity of existing patents, violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury. During an IPR, a third party, not the U.S. Patent and Trademark Office, or the original owner of a patent, can challenge an existing patent under certain circumstances. If the review concludes that a patent is not valid, the patent, or the property of the inventor, is revoked, without any court proceedings. The argument that this practice is unconstitutional goes back, in part, to a Supreme Court decision from 1898, *McCormick Harvesting Machine Company v. Aultman & Co.*, which held that once a patent is granted it “is not subject to be revoked or canceled by the president, or any other officer of the Government” because “[i]t has become the property of the patentee, and as such is entitled to the same legal protection as other property.” The right to property is then protected by the Fifth Amendment to the U.S. Constitution.

Although this seems like a fairly tech-

nical issue, a decision holding that IPR trials are unconstitutional could put our current patent system in chaos. Since its creation in 2012, the IPR system has processed over 7,000 invalidity petitions; if the Court finds the system unconstitutional, all such future challenges will need to be brought in district court, a more costly and time-intensive proposition. In addition, such a ruling could spark retroactive battles over patents the IPR previously deemed invalid.

Tax Law

In another business-oriented case, *Marinello v. U.S.* (Docket No. 16-1144), the Court could be poised to create major shake-ups in the IRS and tax law schemes. *Marinello* asks the Court to review the constitutionality of the federal statute that makes it a felony to obstruct or impede the due administration of

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the tax law. According to the petitioner, who was charged with failing to file tax returns for his business and himself, the relevant statute applies only if he acted

with knowledge of the IRS's pending investigation. The petitioner admits to sloppy book-keeping and destroying records, but claims that such acts are not enough to rise to the level of federal prosecution. In the petitioner's view, the lower court's interruption of the statute criminalizes substantial more conduct than Congress intended.

Immigration

Of course, the most high-profile case going into the term is the one that has had the quickest lower court development: *Trump v. International Refugee Assistance Project* and *Trump v. Hawaii* (Docket Nos. 16-1436 and 16-1540). These cases involve challenges to President Trump's Executive Order No. 13780, which altered practices concerning the entry of foreign nationals into the United States by, among other things,

A New Justice Looks to Find His Footing

When Justice Neil Gorsuch took his seat on the bench in early April 2017, he was only present for one oral argument session, and as a more traditionally conservative justice, his vote did little to fundamentally shake-up long standing voting alliances. However, even in his limited time on the bench during the 2016 term, Justice Gorsuch's presence was certainly felt. Even before arriving at the Court, Justice Gorsuch changed the pace at which the Court scheduled and heard cases; a number of cases that had floated on the Court's docket for months without being scheduled were quickly assigned March and April argument dates. And the new justice's presence did more than increase the pace with which the Court disposed of cases. Justice Gorsuch seemed to enliven the written opinions coming from the bench, particularly from its conservative wing. By writing separate opinions (either in concurrence or dissent) in a number of cases, Justice Gorsuch quickly carved out his place as a strong conservative jurist with a witty, sharp writing sense. His concurrence in *Trinity Lutheran v. Comer* seems to exemplify his vibrant writing style while also demonstrating his concern about the Court tipping the balance of powers:

[T]he Court leaves open the possibility a useful distinction might be drawn between laws that discriminate on the basis of religious status and religious use. ... Respectfully, I harbor doubts about the stability of such a line. Does a religious man say grace before dinner? Or does a man begin his meal in a religious manner? Is it a religious group that built the playground? Or did a group build the playground so it might be used to advance a religious mission? The distinction blurs in much the same way the line between acts and omissions can blur when stared at too long, leaving us to ask (for example) whether the man who drowns by awaiting the incoming tide does so by act (coming upon the sea) or omission (allowing the sea to come upon him).

Of course, the new term opens up a great deal of potential for Justice Gorsuch to expand his leadership role; it remains to be seen whether he will spend the term waiting in the wings or expand on the early indications that show him as being a strong and vibrant voice on the Court.

suspending entry of nationals from six countries for 90 days. Respondents challenged the order and obtained preliminary injunctions barring enforcement of several provisions. In late June, the Supreme Court lifted portions of the preliminary injunctions and agreed to hear the challenges and set argument for October. In September, the Court removed the case from the argument calendar following President Trump's issuance of a proclamation pursuant to Executive Order No. 13780. The proclamation detailed revised travel restrictions, and the Court directed the parties to re-evaluate their arguments in light of the new restrictions, and submit new briefs in the case by October 5. The case could be rescheduled pending further review of the Court. If the case proceeds, it would put the normally bland issue of legal standing alongside the contentious topics of presidential powers and immigration law before the Court under the heat of the media spotlight.

The two other immigration cases to be argued in October, *Sessions v. Dimaya* (Docket No. 15-1498) and *Jennings v. Rodriguez* (Docket No. 15-1204), have had significantly longer life-cycles before the Court: both were fully briefed and argued during the 2016 Term. The justices, however, held their decisions in both and have asked the parties for re argument during the 2017 Term (many believe this action is due in part by the Court's desire to avoid 4-4 splits in the area of immigration law). *Dimaya* asks the Court to determine whether 18 U.S.C. § 16(b) of the Immigration and Nationality Act governing deportations is unconstitutionally vague. Section 16(b) allows certain state crimes, in this case burglary, to qualify as "crimes of violence," making defendants eligible for removal from the United States. The *Dimaya* petitioners argue § 16(b) should be overturned as being unconstitutionally vague (a claim usually referred to as "void-for-vagueness"). As it currently stands, § 16(b) gives immigration officials a great deal of latitude to begin deportation pro-

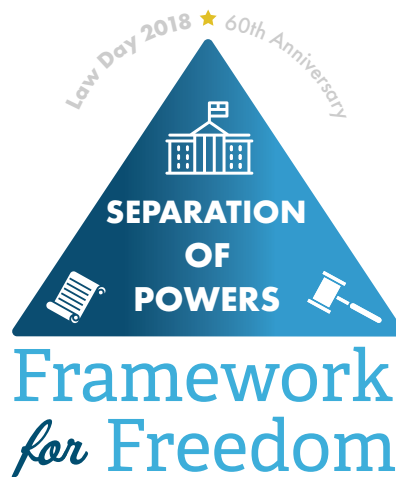
ceedings against immigrants lawfully in the country who have subsequently been convicted of a wide-range of state crimes. *Jennings* deals with the appropriate safeguards and procedures that should be in place for aliens detained at the border. In many of these cases, these immigrants are held for long periods of time without any due-process hearings. The level of safeguards the Court determines to be constitutionally mandated will be of particular importance if the Court upholds President Trump's travel ban. Together, all three of these cases

have the potential to either increase the federal government's power over immigration matters, or in the alternative, to safeguard vital rights and protections for immigrants both in the country and trying to get into the country.

As the new term gets underway, it is sure to garner much attention from court-watchers, the media, and President Trump. However, like many Supreme Court terms, the less discussed cases may end up being as important to our everyday lives. 🌐

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