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U.S. Supreme Court 2017 Year-in-Review: The Nine Again, and Upcoming Cases

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Supreme Court

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As the year winds down, the U.S. Supreme Court motors full steam ahead as it begins unpacking some of the most contentious cases of the new term—the first full term with newly appointed Justice Neil Gorsuch.

Unlike last term, when Justice Antonin Scalia's unexpected death led to a series of 4-4 splits, minimalist rulings, and few landmark decisions, Court watchers expect fireworks this year, and perhaps the beginning of a new conservative majority.

Court Welcomes Justice Garland Gorsuch, Likely to Tilt Right This time last year, Judge Merrick Garland's nomination to the Supreme Court quietly expired some eight months after President Barack Obama announced it. The Republican-controlled Senate had stalled the Garland nomination without holding confirmation hearings to keep Scalia's seat open in the hopes that a Republican would win the 2016 Presidential election.

The gamble paid off. Donald Trump won the election and appointed Gorsuch, then a Tenth Circuit Judge and a former Supreme Court clerk, less than a month after taking office.

After Senate Republicans invoked the ''nuclear option''—the term used for eliminating the 60-vote requirement to end a filibuster—Gorsuch cleared confirmation by a 54-45 vote and took his seat at the high court in April of this year.

So far, in the handful of cases in which he has participated, Gorsuch has voted most frequently with Justice Clarence Thomas. He has also been a prolific writer, despite authoring a single majority opinion on a merits case, showing a willingness to write separate opinions expressing both substantial and minor differences with his colleagues.

Though few expect the substitution of Gorsuch for Scalia to shift the ideological balance on the Court significantly, at a minimum, it should cement the conservative bloc for another generation. And with possible retirements looming in the near future for the Court's moderate and left-leaning Justices Anthony Kennedy, Ruth Bader Ginsburg, and Stephen G. Breyer, the youngest of whom turns 80 next year, this could be the beginning of a new and long-lasting conservative majority, with President Trump poised to appoint more conservative justices.

Whenever that vacancy arises, one can count on a combative confirmation process, with Senate Republicans presently clinging to a narrow majority and Democrats still ruing both the GOP stonewalling of Garland's nomination and its use of the nuclear option to dissolve their strongest confirmation bargaining chip, the filibuster.

First Amendment Things First: Free Speech, Religious Liberty Cases Abound Despite the rather subdued denouement to the 2016 term, the Court demonstrated a renewed commitment to First Amendment free speech and religious liberty. For instance, in *Matal v. Tam*, all eight participating Justices agreed (though for different reasons) that the denial of trademark protection for Asian American band The Slants under the Lanham Act's disparagement clause violated the band's freedom of expression.

And in *Trinity Lutheran Church of Columbia Inc. v. Comer*, seven Justices rejected Missouri's policy of excluding church-related entities from applying for generally available public benefits as an improper disability upon religious groups in violation of the Free Exercise Clause. In that case, the state had prohibited a religious institution from applying for subsidies promoting the

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use of recycled tires in playground resurfacing. Though the impact was modest—in the Chief Justice's words, ''a few extra scraped knees''—''the exclusion of [the group] from a public benefit for which it [was] otherwise qualified, solely because it is a church, [wa]s odious to our Constitution.''

The upcoming First Amendment docket should prove more prolific and enlightening of the direction of the Court. On the last day of the last term, the Court surprised many by granting *certiorari* in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission.* The five-year old case had languished in the Court's ''relist'' loop for more than a dozen conference votes, but was finally granted review. The Court heard argument Dec. 5.

Also known as the ''wedding cake'' case, *Masterpiece Cakeshop* arose from a bakery's religious objection to selling a wedding cake to a same-sex couple, which the Colorado Civil Rights Commission determined violated the state's antidiscrimination public accommodations law. Now, just two years after deciding marriage equality in *Obergefell v. Hodges*, and three years after declining to review a similar religious liberty case involving photography at a same-sex ceremony in *Elane Photography LLC v. Willock*, the Court must decide whether vendors have a First Amendment free speech and/or religious liberty right to refuse generally available goods and services to LGBT persons, and how far a state may go in enacting legal protections for LGBT persons in the marketplace.

The Court will also hear free-speech claims in the context of abortion and voting regulations, as well as a challenge to a 40-year-old precedent that enables public unions to collect dues from conscientious objectors.

In *NIFLA v. Becerra*, a pro-life pregnancy counseling center challenges a California law that requires crisis pregnancy centers to post notices informing women (i) about the availability of abortion services, and (ii) that the center is not a licensed medical facility. If the Court sustains the compelled-speech claim, the decision may benefit both pro-choice and pro-life organizations seeking to avoid state regulations requiring the dissemination of various pregnancy- and abortion-related messages that are contrary to those groups' viewpoints.

In *Minnesota Voters Alliance v. Mansky*, an election reform group and voters challenge Minnesota's designation of polling places as speech-free zones where voters cannot wear political badges, buttons, or insignia. The Eighth Circuit upheld the restriction, deeming it a permissible, viewpoint neutral regulation of a nonpublic forum. A speech-free polling location permits voters to cast their ballots without outside pressure. Yet, challengers have claimed that the law permits discriminatory enforcement by giving election officials too much discretion in identifying offending political apparel. If the Court strikes down the Minnesota law, states may have a difficult time insulating certain places from political influence.

Meanwhile, in *Janus v. AFSCME Council 31*, the Court revisits the agency-shop rule established in *Abood v. Detroit Board of Education*,—an issue the Court sought to resolve two terms ago in *Freidrichs v. California Teachers Association*, until Scalia's sudden passing left the Court with a 4-4 split.

Abood held that public sector unions could impose mandatory dues on all employees represented by the union (an agency-shop arrangement), notwithstanding certain employees' objections, so long as the dues financed the union's non-political activities (i.e., collective bargaining, contract administration, and grievance procedures). The mandatory-fee arrangement enabled unions to minimize the ''free rider'' problem in which many benefit from union representation but would refuse to pay for that representation.

If the votes from *Friedrichs* hold steady and Gorsuch shares Scalia's First Amendment reservations about the agency shop rule, then *Abood* will fall and unions nationwide would need to reassess their finances and capabilities under the new paradigm. Such a ruling may well portend the declining influence of public sector unions in American labor relations.

Procedural Trends: Cutting Back on Forum-Shopping, Divining Jurisdictional Requirements, Enforcing Arbitration Agreements Less headline-grabbing but no less consequential, the Court issued a number of procedural decisions last term that will impact litigation strategy and spur policy debates and countless civil procedure articles.

At the end of last term, the Court issued two new personal jurisdiction decisions that should rein in forum-shopping.

In *BNSF Railway Co. v. Tyrrell*, the Court reaffirmed the rule from *Daimler AG v. Bauman*: a corporation is ''at home,'' for purposes of general jurisdiction, in its state of incorporation and its principal place of business. Mere claims of continuous and systematic contacts with a forum will not give rise to all-purpose jurisdiction.

The other shoe fell in *Bristol-Myers Squibb Co. v. Superior Ct. of California*, with the Court rejecting an expansive interpretation of specific jurisdiction that would have allowed a company to be sued based on its substantial instate contacts, even though the legal claims arose elsewhere. Both decisions marshalled substantial majorities with only Justice Sonia Sotomayor dissenting.

The Court kicked off the 2017 term with a unanimous decision concerning filing deadlines. In *Hamer v. Neighborhood Housing Services of Chicago*, the Court determined that a provision of the Federal Rules of Appellate Procedure governing extensions to the notice-of-appeal deadline was a waivable claims-filing rule as opposed to a jurisdictional limitation that a court lacked power to excuse. ''Only Congress,'' the Court explained, ''may determine a lower federal court's subject-matter jurisdiction.''

The Court also continues to adhere to the strong policy of enforcing arbitration agreements under the Federal Arbitration Act (FAA).

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Last term, in *Kindred Nursing Centers Ltd. v. Clark*, the Court rejected Kentucky's clear-statement rule, which required an express trial waiver in a power of attorney as a precondition to honoring the arbitration clause in an agreement. Contrary to the FAA's equal-treatment principle, the clear statement rule imposed an additional hurdle to enforcing arbitration agreements.

But what happens when the FAA's policy of enforcing arbitration agreements comes in conflict with another federal statute, such as the National Labor Relations Act provision authorizing protecting employees' right to engage in ''concerted activites''? We will find out soon enough. The Court heard argument on Oct. 2, for a trio of cases presenting this issue, *Epic Systems Corp. v. Lewis*, *Ernst & Young LLP v. Morris*, *NLRB v. Murphy Oil USA, Inc.*

Navigating an Uncertain Map: Political Gerrymandering & the Travel Ban Cases Two other issues involving line-drawing and separation-of-powers may result in either landmark decisions or mere blips on the Court's radar: political gerrymandering and President Trump's recurring travel bans restricting travel from predominantly Muslim-majority Middle East nations.

The Court heard argument on the first issue in *Gill v. Whitford*, on Oct. 3. A three-judge district court had concluded by a 2-1 vote that Wisconsin's 2011 redistricting of the state legislature constituted an impermissible political gerrymander intended to dilute the voting strength of Democratic voters statewide. The district court majority cited statistics showing Republicans' ability to win significantly more legislative seats than their share of the statewide vote, including legislative majorities when the party won less than a majority of the statewide vote. It also cited evidence that drafts of the GOP redistricting plans showed a concerted effort to maximize ''safe'' or Republican-leaning districts at the expense of fewer competitive ''swing'' districts.

Pluralities of the Supreme Court have held that political gerrymanders may be subject to constitutional limitations under the Equal Protection Clause. *See, e.g.*, *Davis v. Bandemer*; *Vieth v. Jubelirer*. The Court—and specifically, Kennedy, who likely represents the deciding fifth vote—has yet to agree on a workable standard for adjudicating those claims, however, leading dissenting Justices to claim that the matter of partisan redistricting should be a nonjusticiable political question. Time will tell whether the Court will finally resolve the justiciability issue or continue to punt. Issues concerning the plaintiffs' standing to challenge Wisconsin's redistricting map also might derail the appeal, rendering the entire case much ado about nothing.

As for the President's travel bans, it seems to be only a matter of time until a case with staying power lands on the Supreme Court bench.

The Court previously granted *certiorari* to hear two cases challenging previous versions of the President's travel bans after the U.S. Courts of Appeals for the Fourth and Ninth Circuits upheld injunctions instituted by district courts in Maryland and Hawaii. *See IRAP v. Trump*; *Hawaii v. Trump*.

The Fourth Circuit held that the travel ban likely violated the First Amendment's Establishment Clause by employing animus towards persons of a particular religious faith (Islam); the Ninth Circuit concluded that the President likely exceeded the scope of his authority to exclude foreign nationals under 8 U.S.C. § 1182(f) by failing to make findings that the entry of persons from the banned countries would be detrimental to the United States. But those appeals were mooted when the underlying Executive Orders expired under their own terms.

The President has since modified and reissued the travel ban without an expiration date, this time including North Korea, Venezuela, and Chad to the list of banned countries. (Proclamation No. 9645.) Yet again, district courts in Hawaii and Maryland have enjoined implementation of the travel ban, concluding that the executive order suffers from essentially the same deficiencies as its predecessors.

On Dec. 4, however, the Supreme Court issued orders staying the district courts' preliminary injunctions in *IRAP* and *Hawaii* while the appeals in both cases move forward.

If and when the Court decides a travel ban case, it likely will need to decide important issues regarding federal courts' ability (if any) to review a President's exclusion decisions under the Immigration and Nationality Act (INA), the degree of fact-finding necessary to effectuate the President's exclusionary power under the INA, and the relevance of disparaging informal pre- and post-election messages (*e.g.*, Twitter posts) to a claim of religious discrimination.