



## Kennedy, Gorsuch Hold Keys to Blockbuster Supreme Court Cases

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October 9, 2017

The Supreme Court this term will address prior rulings that bakers must produce cakes for gay weddings, that laws banning sports gambling are illegal, that mandatory detention for some immigrants is unconstitutional, and that President Donald Trump's travel ban is discriminatory.

The common denominators on many of these cases will be two key justices — Anthony Kennedy and Neil Gorsuch.

For Kennedy, it is familiar territory. Since Sandra Day O'Connor retired in 2006, he has been the deciding vote more often than not in the court's 5-4 splits.

Gorsuch is thought to be a more reliable vote for the conservative wing. But he has only a handful of cases under his belt on the high court. And some legal experts on a conference call arranged by the Federalist Society last week said they will be watching to see if the new justice has any real impact on persuading his fellow justices to rein in federal agencies.

"What I'm really going to be looking for is to see, with the first full term with Gorsuch on the court, whether there's going to be pushback on judicial deference doctrine to the administrative state," said Ilya Shapiro, a senior fellow in constitutional studies at the libertarian Cato Institute.

Louis Michael Seidman, a constitutional law professor at Georgetown University, said Gorsuch and one to three more justices Trump might be able to name could give the conservative wing of the court more power than it has had in decades.

"The real question is what they will do with that power," he said.

Here is a look at some of the biggest cases of the current term:

**Gay weddings — *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*.** This is perhaps the highest-profile case of the term. A baker is *challenging sanctions* imposed by the Colorado Civil Rights Commission for refusing to bake a wedding cake for a gay couple.

Richard Garnett, a law school professor at the University of Notre Dame, said the courts usually do not recognize religious exemptions from laws that apply generally. And he added that the Religious Freedom Restoration Act — which allowed religious exemptions from the Obamacare mandate on businesses to provide birth control to their employees — is not in play because Colorado has no state version of the statute.

Instead, Garnett said, the plaintiff argues that the Colorado law is a violation of bakers' free speech rights. Forcing a baker to design a wedding cake is fundamentally different from merely requiring that any customer be allowed to purchase a cake in the store, the lawyers argue. They say designing a cake for a wedding is a fundamentally expressive endeavor. The plaintiff's lawyers argue that the law amounts to unconstitutional compelled speech.

Shapiro noted that an organization of bakers filed a friend-of-the court brief with colorful pictures of cakes at various stages of design to underscore the individuality of wedding cakes.

"There's a lot that could happen in this case ... Most people expect that the case comes down to whether Justice Kennedy's very strong commitment to free speech trump or outweigh his very consistent record in cases involving gay rights," Garnett said.

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John Eastman, a Chapman University School of Law professor and founding member of The Claremont Institute's Center for Constitutional Jurisprudence, said he hopes at least some of the justices use the case to argue for overruling a 1990 case called *Employment Division, Department of Human Resources of Oregon v. Smith*. In that case, the justices split 5-4 in ruling that an Indian tribe was not entitled to a religious exemption from a law banning possession of the drug peyote.

Beyond that, he said, an increasingly broad definition of what constitutes a "public accommodation" has allowed for a dramatic expansion of the power of government. Compelling a baker to participate in a gay wedding that violates his deeply held religious beliefs is distinctly different from requiring theaters or restaurants to serve all comers, he said.

"This is not your typical lunch-counter discrimination case," he said.

**Political gerrymandering — *Gill v. Whitford*.** Drawing political boundaries to favor the party in power is nearly as old as the republic itself, and the Supreme Court generally has taken a hands-off approach.

But in recent years, the high court has shown a greater willingness to strike down so-called gerrymandering that is based on race. In ***Gill v. Whitford***, the court could extend that principle to political gerrymandering, which could have a profound impact on state legislatures and the makeup of the House of Representatives.

The plaintiffs challenge a map drawn by Wisconsin Republicans that dramatically increased the GOP's strength in the state legislature, even though overall votes cast statewide generally are split fairly evenly between the two parties.

"This is a relatively extreme but not unusual example of something that's going on all across the country," said Louis Michael Seidman, a constitutional law professor at Georgetown University. "Both parties are guilty of it. And it really threatens our status as a representative democracy."

Shapiro said the plaintiffs want the court to adopt a standard based on a political science theory known as the "efficiency gap" — the difference between a party's predicted and actual strength in a legislature based on its statewide vote.

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"It's an enticing political theory, debate on policy and things like this," he said. "I wonder how the Constitution can constitutionalize whatever the proper efficiency gap might be."

As with so many other cases, this one will come down to Kennedy. In the past, he has rejected challenges to political gerrymandering out of concern that there was no practical standard that a court could apply. But he has held open the possibility of striking down maps in the future. Seidman said there are standards the court could impose.

"The question is whether it will want to," he said. "And ... that, as is so often the case, turns on what Justice Kennedy is thinking."

Shapiro said a ruling in favor of the plaintiffs would be an "election lawyer full-employment act."

**The Immigration Cases.** The court will hear at least two — and possibly three — important immigration cases.

In *Jennings v. Rodriguez*, the justices will determine the constitutionality of a law requiring the detention of certain classes of illegal immigrants. In *Sessions v. Dimaya*, the court will decide whether a list of crimes that can trigger deportation of legal immigrants is unconstitutionally vague.

The court previously heard arguments in both cases but scheduled them for new hearings after a vacancy created by Justice Antonin Scalia's death was filled. That is a sign that the justices were evenly divided, making Gorsuch the key vote.

"We're gonna find a rather significant impact from the new justice, Neil Gorsuch, relatively quickly," Eastman said.

The third case, *Trump v. International Refugee Assistance Project*, is the battle over the president's temporary travel ban. But since Trump has issued a new order that includes different countries, most experts **believe the court will dismiss** the current case as moot.

Seidman said Barack Obama could have issued the exact same travel ban order as Trump with little controversy. But Trump's statements and actions as president have caused the courts to apply greater scrutiny to his decisions. He added that the approach taken by the justices in cases like these will be an important predictor of the legal fights he foresees will be triggered by special counsel Robert Mueller's Russia election meddling investigation.

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"This case is over, but my strong hunch is that we are moving pretty quickly to a constitutional crisis of really epic proportions that will arise out of the Mueller investigation," he said.

The Jennings case, Seidman said, could potentially affect about 500,000 people detained each year for a variety of immigration violations. Some are quite sympathetic, he said. For instance, people show up at the U.S. border claiming asylum and are judged by a customs officer to have a "credible fear" of returning to their homeland often are detained for months, even though two-thirds of them eventually win their asylum claims.

"If they lose, I think it will be a shame and will say something quite negative about our country," he said.

**Sports gambling — Christie v. NCAA.** The case challenges a 1992 federal law banning gambling on athletic events but strangely exempts four states that already had sports betting.

The NCAA and four professional sports leagues sued to block New Jersey from repealing a state law prohibiting sports betting in its casinos. Eastman said allowing some states to run sports gambling operations but not others seems to make it vulnerable to challenge under the 10th Amendment.

"Our states are supposed to be on equal footing with each other," he said.

Shapiro said the lawsuit is part of a "healthy development" in recent years in which both Republican and Democratic states have used their "sovereignty to push back on federal overreach."

It is an important case, Shapiro said — even if neither party is particularly sympathetic.

"Chris Christie vs the NCAA is kind of like the Iran-Iraq War, where you want both sides to lose," he quipped.