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Supreme Court Term in Review: OT 2016

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Abstract

"Even though the Court is expected to be apolitical, there are many who assume that the judges are beholden to party politics."

Posting about recent major cases before the U.S. Supreme Court from *In All Things* - an online journal for critical reflection on faith, culture, art, and every ordinary-yet-graced square inch of God's creation.

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August 1,
2017

Donald Roth

Have you thought about starting your own knock-off fashion company? Planning to buy up print cartridges and resell them for extra cash? Did you finally start that band you've always been thinking about and you wonder if you'd be able to trademark that edgy name you thought of back in high school? Stay tuned for answers to all of these questions, and more, as we travel together through my annual review of the previous term of the Supreme Court of the United States!

Alright, full disclosure—our editor said we don't do enough clickbait articles, so I thought I'd try to come out big this time around. If I'm honest, the last term of the Supreme Court was quieter than usual. That doesn't mean nothing interesting happened; we just didn't experience any big set-piece issues that have been common in the past few terms. Still—hey, at least we finally have nine justices on the bench again, and (while there were only a couple of cases that really stick out by themselves) there were a few groups of cases that represent interesting developments in important areas. Let's take a look.

On the Horizon: Gerrymandering

Unlike Iowa road systems, we can't just divide up the citizens of every state into mile-by-mile squares when it comes to making electoral districts. Seeking to achieve acceptable balances of numbers, demographics, and other important factors is a complicated process that is always mired in litigation. Case in point: we're still resolving on-going litigation resulting from redistricting that took place after the 2010 census.

This time around, two cases, *Cooper* and *Bethune-Hill*, came before the Court that dealt with how much race can be a factor in apportioning districts. The complication around race is that the Voting Rights Act requires that districts be drawn while paying attention to race, but the 14th Amendment to the Constitution says that we can't consider it *too much*. Add in that the African-American population tends to almost unanimously vote for Democratic candidates, and things get messy.

The problem is that there's currently no law against drawing districts in a way that favors your own political party. The Court has yet to properly resolve the wrinkles that racial voting blocs and partisan gerrymandering create, but the two cases this term did suggest that the Court will not accept the creation of lopsided racial districts purely on the stated rationale that the lines were supposedly partisan rather than racial. And yet, when a state creates a district using race as a primary criterion because of a good faith belief that the Voting Rights Act compels them to do so, *Bethune-Hill* clarifies that it is constitutional to do so.

This means that states will still wrestle with how much race can be a factor in redistricting until a case (possibly next term) which succeeds in ironing out how this important issue interacts with the currently permissible practice of redrawing districts to favor one's own party.

The Court and Donald Trump

With President Trump's nominee added to the Supreme Court this term, observers expected a rightward shift in the rulings that were issued. Even though the Court is expected to be apolitical, there are many who assume that the judges are beholden to party politics, and this might have created an expectation that some of Trump's policy priorities would sail through the Court. However, such an expectation was not born out during the term.

While Trump has pushed an aggressive agenda in several areas of immigration law, he has faced substantial setbacks in the high court. The Supreme Court did agree to hear challenges to the travel ban, but [on July 19](#) they

upheld the portions of a Hawaii judge's order that exempted a broader group of family members from the ban. Further, the Court decided a number of cases holding the government to a stricter standard in seeking to deport individuals charged with crimes or with making false statements in pursuit of asylum.¹ It wasn't all good news for those seeking softer immigration rules, however, as the Court also **struck down** preferential treatment in the citizenship applications of the children of unwed citizen mothers on the basis of gender discrimination, defaulting the rule to the more difficult standard applied to the children of unwed citizen fathers and married couples.

Overall, however, the fact that the Court is even taking these sorts of cases is notable, because it suggests that the Court is willing to reconsider what has typically been a very deferential view of government regulation with respect to immigration. This fact lies at the heart of why Trump's travel ban could possibly be constitutional, and it could be addressed in challenge to that ban itself or either of the two cases pushed off until next term, *Dimaya* (dealing with the applicability of the "void for vagueness" doctrine² to immigration law) and *Jennings* (dealing with extended detention of immigrants).

Trump was also disappointed in *NLRB v. SW General Inc.*, which limited the president's ability to work around Congressional approval by appointing people to serve in an "acting" role while intentionally leaving the permanent role unfilled. This stemmed from a law passed in 1998 after President Clinton tried to push Bill Lann Lee into an Acting Assistant Attorney General role after failing to appoint him to the position on a permanent basis directly. The Court's decision read the law broadly, significantly curbing President Trump's ability to potentially do something similar.

However, this term has not generally been bad news for conservatives. For example, Neil Gorsuch's **first opinion** shows signs that he will live up to expectations of literary flair and a careful consideration of issues which provokes comparisons to the late Justice Scalia. More importantly, Justice Scalia spent more time than other conservative justices working to sway Justice Anthony Kennedy's crucial swing vote, and Gorsuch, as a former clerk for Kennedy (demonstrating the **first time** that a justice and his clerk have been on the court together) may fill this critical role for those hoping for a continued conservative jurisprudence coming out of the Court.

A Vigorous First Amendment

The Court seems to take pride in showing its respect for the Free Speech clause of the 1st Amendment by its willingness to defend its application to tough cases. This term was no different. In *Packingham v. North Carolina*, the Court unanimously invoked the 1st Amendment to strike down that state's law banning social media access by registered sex offenders. Similarly, the Court made the (most likely) landmark ruling of the term with its decision in *Matal v. Tam*, which struck down the portion of the Lanham Act that prohibited registering offensive trademarks. This directly allowed Asian-American dance-rock band "The Slants" to register their name, but the decision is also likely to resolve one avenue of challenge in defense of the name of the embattled Washington Redskins.

The Court has not always been as friendly to religious freedom issues as freedom of speech issues, but this term did mark a significant victory for the cause of freedom of religion with *Trinity Lutheran Church of Columbia v. Comer*. There has always been some tension between the Free Exercise Clause, which limits the government's regulation of religion, and the Establishment Clause, which limits its promotion of it. This means there are certain actions which state governments are allowed to take without violating the Establishment Clause (while not being forced to do so by the Free Exercise Clause). This case struck down a Missouri law which categorically denied government benefits to religious organizations, holding that it violated the Free Exercise Clause to deny access to certain generally-available benefits (in this case a grant for resurfacing a playground) solely on the basis of religious affiliation.

Upheaval for Intellectual Property

Admittedly, I teased a few answers at the beginning, and if you've hung around this long, I owe them to you before we're done. One of the most significant themes coming out of this term was the Supreme Court's on-going battle

with the Federal Circuit over the contours of patent law. For the last several years, the Supreme Court has taken on far more patent cases than it has historically done, and consideration of these issues almost always results in reversal of the decisions by the Federal Circuit, which has been given special jurisdiction over patent cases since 1982. This term, the Federal Circuit went 0-6 in patent cases, including being scolded by Justice Alito in [a decision](#) overturning 100+ years of precedent in patent law and [a reversal](#) of an attempt to modernize where patent suits could originate.³ Overall, patent lawyers now face the more complicated task of structuring their cases to achieve victory in front of (potentially) two courts with significantly different priorities and points of view.

Things were not all just about shaking up intellectual property law, as some of the decisions in this area will likely have an impact for the average consumer, too. In [one case](#), the Court took a broader view of what can be legally copyrighted which may kill the fashion knock-off industry, saying that anything that could be copyrighted if it were affixed to a canvas can still be copyrighted as part of a garment or other useful article.⁴ In [another](#), the Court significantly limited the rights a patent-holder retains in their patent once they've sold a tangible good to a consumer—in this case, meaning victory for companies that buy, refill, and resell printer toner and ink cartridges. Finally, the Court cleared some of the hurdles that keep makers of generic medicines from bringing [biosimilar](#) products to market quickly.

There you have it: amidst the gripping world of intellectual property, a few remarkable 1st Amendment issues, and a whole lot of uncertain buildup and wait-and-see in other areas, these are the major cases of OT 2016 in the Supreme Court. With the immigration cases mentioned above, the travel ban case, [a suit](#) about seizing Iranian property to compensate victims of terrorism, [a suit](#) dealing with warrantless searches of cellphone data, and at least [a few more](#) patent cases on the docket for next term, we should have another exciting roundup for you next July.

Footnotes

1. See, [Equivel-Quintana v. Sessions](#), [Lee v. U.S.](#), and [Maslenjak v. U.S.](#) ↩
2. As applied in general Constitutional Law, this doctrine means that penalty clauses which do not sufficiently clarify *what* is being prohibited are unconstitutional. That is, if you don't know what exactly constitutes committing a crime, it's unclear what law-abiding behavior looks like, and the law cannot penalize you for failing to follow the law. ↩
3. The Federal Circuit's practice had the unintended consequence of seeing 25% of all patent cases in the past three years originate with just one judge in Marshall, Texas. ↩
4. Copyright law is about protecting the work of artistry, which means it is not available for objects that have a useful function, like tools or vehicles. Creators of these things must instead look to patent law, which protects the work of invention. ↩