



## Ep. 8: SCOTUS: Looking Back and Looking Forward

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**Jose Garriga:**

Hello, and welcome to *OnAir with Akin Gump*. I'm your host, Jose Garriga.

The U.S. Supreme Court is no stranger to the spotlight. As the highest court in the land, its decisions invite scrutiny and provoke discussion. That said, in 2018 so far, Brett Kavanaugh's confirmation hearings and a series of decisions involving volatile issues have generated intense interest by the media and general public in the Court and its workings.

We have with us today Pratik Shah, co-head of Akin Gump's Supreme Court and appellate practice. Before joining the firm in 2013, Pratik served with distinction for over five years as an Assistant to the Solicitor General at the U.S. Department of Justice, receiving a number of awards for his advocacy, including the Attorney General's Distinguished Service Award for his role as lead drafter of the successful and historic challenge to the Defense of Marriage Act in *United States v. Windsor*.

We'll be discussing the Court's decisions last Term, looking at the difference that Justice Kavanaugh may make and previewing the big cases of the new Term.

Welcome to the podcast.

Pratik, thank you for appearing on the show today. And let's start by talking about the last Term. Cases involving a host of hot-button topics—immigration, privacy, LGBT rights, partisan gerrymandering—were decided. So, what would you say are some of the takeaways for listeners from the last Court session?

**Pratik Shah:**

Sure, Jose. As you mentioned, there were a number of big cases last Term. But one of the interesting things from last Term is not all of those big cases resulted in big or blockbuster decisions. And I think two of them are helpful to keep in mind and follow that theme because they will presumably reemerge, if not this Term, in future years to come. And I'll mention just two of those. One is the *Masterpiece Cakes* decision. And that's the case that really pitted First Amendment-based religious objections to same-sex marriage against state antidiscrimination and public accommodation laws. That was the case involving the baker who refused service to a same-sex couple who wanted to get married.

And the other case is the partisan gerrymandering cases, in which the Court was presented with the big question of whether there are constitutional limits to partisan gerrymandering. In both of those cases, the Court, essentially, kicked the can down the road on resolving those big questions and, instead, decided them on much narrower grounds and, therefore, getting a greater consensus within the Court to resolve those cases.

Now in the wake of Justice Kennedy's retirement, of course, that turns out maybe to have been a better strategy for the more conservative justices on the Court than the more liberal justices. But that's how those cases were resolved, really without a conclusive determination.

One of the other things I would mention, and it does flow in part from those cases, is, at least in my view, we saw Justice Kagan taking a more assertive role. She's always been a force to be reckoned with on the Court, but in both of those cases, for example, she wrote separate opinions, really, I think, emphasizing particular points, I think, both to Justice Kennedy in trying to, I think, garner his vote in a future case, but also to litigants because those cases are going to come up again on how they might better shape their case to get a favorable outcome. And her concurring opinion in both of those cases are pretty remarkable, because she seems to really go out of her way to provide a strategy for litigants in a way that might appeal to a swing vote, which, of course, won't be Justice Kennedy any more.

A few other things that I think are just noteworthy from last Term—one is, of course, it was Justice Gorsuch's first full Term on the Court. And I think you saw him distinguishing himself a little bit more than in the first partial Term. For example, in his initial few months on the Court from the carryover Term, he had voted identically with Justice Thomas in every case.

That, of course, changed last Term, where he had significant votes that departed not only from Justice Thomas but from the other conservatives, for example, in the immigration case where he voted with the four more-liberal Justices in favor of the immigrant and striking down a law that would remove criminal aliens as void for vagueness. And *Carpenter*, the Fourth Amendment privacy case about, essentially, the communications between your cellphone and cellphone provider. There he laid out his own view in a significant concurring dissenting opinion, laying out his own property rights view of the Fourth Amendment. So, I think we learned more about Justice Gorsuch.

The last thing I'll mention about last Term, since there was a lot going on last Term, the last thing I'll mention is we got a glimpse of the government strategy, meaning the Trump administration, with respect to the Supreme Court. And, in particular through the travel ban case, I think it really was a harbinger of sorts of how the Solicitor General will not be shy about going to the Supreme Court, not only as a court of last resort, but in earlier instances. And, in that case, it went to the Supreme Court for emergency stays. It was successful. It ultimately won on the merits.

And we've seen that continue this Term. And more so than I think in past administrations, where you see the Solicitor General very aggressively turning to the Supreme Court again not only as a court of last resort but, for example, leapfrogging the Court of Appeals.

We've seen that in the census discovery case, in the census challenge in which the plaintiffs have sought discovery from high-level administration officials. We've seen it in the climate change challenge brought against the administration, where the Solicitor General is seeking mandamus from the Supreme Court. We saw it in the DACA [*Deferred Action for Childhood Arrivals*] cases, where they went straight to the Supreme Court. And, so, in a host of different circumstances.

And they met with varying levels of success, which, I think, has only emboldened the government to do that. And I think that's been a takeaway from last Term that's carried into this Term and is something worth noting.

**Jose Garriga:** As someone with experience in the Solicitor General's office, you mentioned that they had mixed success. Do you think that now having perhaps a more conservative-leaning Court is going to further play into the strategy of this early and aggressive use of Supreme Court review?

**Pratik Shah:** Yes, I definitely think so. When I say they've had mixed results, I mean mostly successful. Maybe not home runs each time, but for example just taking the most recent request to the government in the census challenge, they didn't get a total stay, but they did get the deposition of Secretary Ross stayed. And so I do think they will continue that tack. And as you pointed out, the replacement of Justice Kennedy with Justice Kavanaugh presumably will only further embolden the government to continue that tactic.

**Jose Garriga:** Well, let's talk about Brett Kavanaugh for a bit now. His nomination and confirmation were the most politicized and fractious, really, in a generation, harkening back to his now-fellow Justice Clarence Thomas. What impact do you think his ascension to the Court is going to have on the other Justices and on the Court's jurisprudence in general?

**Pratik Shah:** Sure, so to start with the first half of your question about what effect on the other justices, it is, I think, a significant change to the composition of the Court when you're replacing Justice Kennedy with Justice Kavanaugh. Because I think by all accounts, and if we use his decision in the lower Court and compared it to Justice Kennedy, I think he is going to be to the right of Justice Kennedy. I think what that does is it makes the Chief Justice, Chief Justice Roberts, the new median Justice.

And I wouldn't use the word "swing Justice" because I don't view the Chief Justice, unlike a Justice Kennedy or a Justice O'Connor, as really a swing vote. But I do view him as a potentially more moderate vote on certain issues. And we've seen a little bit, we've gotten a little bit of a preview of that in the past with the Chief Justice, for example, in the first original major challenges to the Affordable Care Act, the challenge to the individual mandate on constitutional grounds, you saw the Chief Justice joining with the four more-liberal Justices to really cast the decisive vote to uphold the Affordable Care Act.

And I think votes like that are motivated in part by the Chief's strong institutionalist bent—that he cares a lot about the Court as an institution and how the public perceives it—and I think that drives some of his more-moderate votes. And we also saw it just this past Term in several cases. In fact, last Term was the first in several Terms in which Justice Kennedy was not the Justice most often in the majority, as he had been. In fact, it was the Chief Justice. And you saw that in cases like *Carpenter*, where again he joined

with the more-liberal Justices in upholding a Fourth Amendment challenge to a search and seizure in that case.

So, I do think that there will be a significant change with the Chief being in the middle as a moderating effect. But, despite his moderating effect, I think you are in for a rightward tilt. I think the question really is how far and how fast. And I think that's where we are. And I think that's going to really depend, to turn to the second half of your question, is on what area of jurisprudence are you talking about.

And, for me, I kind of think of it in three buckets. The biggest bucket is, really, it's not going to have a big effect on the vast majority of cases, right? Most cases the Court hears are not 5-4 decisions. And, in fact, even in the areas that are closer calls, Justice Kennedy often voted with the more-conservative Justices. So, on business issues involving class actions and arbitrations, issues involving the Fourth Amendment, issues involving administrative law, Justice Kennedy wasn't really a swing vote in those cases.

And, so, I wouldn't expect major shifts to happen in those areas of the jurisprudence. Now, there may be other areas, of course, and these are the areas that have gotten a lot of attention in the press, where there will be changes. I think, for the most part, those will at least start off in the next couple years to be incremental changes. And there I'm thinking most particularly about reproductive rights, in which I think the Court will not move to overturn *Roe v. Wade* in one fell swoop, but I think will take incremental cases in which they may start to cut back on that.

You may see that with respect to LGBT rights, of course, where Justice Kennedy turned out to be a big champion and the decisive vote in many of those cases. I will add, just from my personal view, is that I think marriage equality is here to stay. Obviously, that has been a fraught issue, but I think that is one where society has moved a lot more quickly and where I think that is here to stay.

But, of course, there are other issues beyond that including the issue in *Masterpiece Cakes* about public accommodation laws with respect to the rights of gay and lesbian individuals, as well as whether Title VII protects against workplace discrimination against gay and lesbian people. And, so, I think there are definitely other areas to be involved there.

And then I think the last bucket I would put is areas where there may be even-faster change to the jurisprudence. And there I think about things like affirmative action. And the reason I bring up that issue is that's an issue where, while the Chief Justice may be a median Justice on a lot of issues, on that issue he's taken a very stark position against affirmative action programs. So, I think when that issue comes before the Court, it could be in for a very different decision than we've had in the past Terms.

**Jose Garriga:**

Thank you, Pratik. A reminder, listeners, that we're here with Akin Gump's Supreme Court and appellate practice co-head Pratik Shah talking about the U.S. Supreme Court in 2018.

So, we now have nine justices installed, and we've just stepped out of October. And, so, what can we expect in this new Term? To start with, is there anything of particular interest in the cases that have already been granted? And then we can look at any pending petitions of note.

**Pratik Shah:**

Sure, Jose. Look, first, I'll say this is a low-key Term so far in terms of the cases that have been granted. Certainly nothing like any of the top six, seven cases from last Term that folks would have called big cases. There really isn't anything like that that has been granted so far. That said, whenever the Supreme Court makes a decision, that's going to have significant impacts on not only the parties but also others in the law. And, so, I think there are a few issues and cases that are worth paying attention to, worth mentioning.

One is from the perspective of the business community, the Court has taken three more arbitration cases. And, in fact, arguments have already happened in all three in October. And, so, the question is whether in those three cases, it'll continue the trend of the Supreme Court often in 5-4 decisions ruling in favor of strong arbitration, pro-arbitration rulings often against plaintiffs in those cases. And we'll see if that holds true.

There's three more cases, as I mentioned, that will be teed up this Term that have already been argued on that. There's an interesting case for constitutional law nerds. It won't make headlines, but it's an interesting case. It's called *Timbs v. Indiana*, and it deals with the question of whether a portion of the Eighth Amendment, the excessive fines clause, is incorporated against the states under the 14th Amendment. And this is a big issue in constitutional law generally, whether the Bill of Rights applies not only to the federal government, which, of course, we all learn in law school it applies to the federal government, but whether it also applies to the states.

Now, over the last several decades and longer, one by one, the Supreme Court has found that virtually all of the individual protections in the Bill of Rights also apply to the states. I think there's only three Bill of Rights provisions not yet incorporated. There's a grand jury clause; there's a Third Amendment limit on the bar on quartering troops, which doesn't come up a whole lot; and then there's this case about excessive fines.

And, so, it really is teeing up; it's an interesting academic question, but also with significant practical ramifications. As you can see from the amicus briefs here, the defendant here rose in the context of a criminal asset forfeiture, but you have amicus briefs not only from typical pro-defendant groups like ACLU and NAACP, but also raised from the Chamber of Commerce and other pro-business groups that are worried about states levying significant fines for minor violations. So, I think that's an interesting case to keep your eye on.

And the last one I'll mention is one that our firm, Akin Gump, is involved in. It's the *Allina* case against the federal government, which involves the issue of the extent of notice-and-comment rulemaking requirements under the Medicare Act, and whether, in fact, they go beyond the Administrative Procedure Act as the text, I would say, suggests strongly. That's an issue in which the government petitioned for cert[iorari] and says three to four billion dollars are at stake for hospitals, like our clients, that serve disproportionately high numbers of low-income individuals. And, so, that's a case that we're currently handling and that, I think, is worth keeping an eye on.

**Jose Garriga:**

So, then, you're saying it's low-key so far. Does the rest of the Term look to be low-key, or are there going to be some firecrackers in there?

**Pratik Shah:**

Right, well, that's ultimately going to be up to the Court as to what else to take. There are certainly some cases in the pipeline that could quickly make this a much more, as you

would say, firecracker of a Term. A couple of those I'll mention to you that are in the pipeline and that will be teed up soon for the Court's consideration.

One there is a couple of Title VII cases which involve the question...essentially, Title VII is the antidiscrimination law that protects against workplace discrimination based on various grounds. One of those grounds is based on sex. And, so, the question is does that protection under Title VII based on sex, which has always been understood to cover gender discrimination, does that extend to discrimination based on sexual orientation? And to take it one step further, does it extend to discrimination based on transgender status?

The interesting thing about these cases, not only have they created a split amongst the Court of Appeals, but they've also created a split amongst the government itself, the federal government itself, in which you now have, interestingly, the Department of Justice on the opposite side of the case from the EEOC [*Equal Employment Opportunity Commission*], which typically administers Title VII and enforces Title VII.

And that's a pretty unusual thing, to have the government on both sides of a case. And, so, that's something to keep an eye on where the Department of Justice has taken the position under the Trump administration that, in fact, Title VII does not protect against sexual orientation discrimination. Whereas the EEOC has continued its position from the Obama administration that it does, in fact, extend to sexual orientation discrimination. So, that's certainly a significant case to keep an eye on.

Another petition in the pipeline involves, people call it "the cross case." It's another one of these cases involving memorials. This one is a World War I memorial, but it's in the shape of a giant 40-foot cross that's sitting nearby here in Maryland, sitting at an intersection in Maryland on park-owned land, so, public land. And the question is whether the Establishment Clause permits that 93-year-old world war memorial to stand.

And the Fourth Circuit, in an en banc decision, highly divided, 8-6, said no. When you have that large of a memorial in the shape of a Latin cross, that that sends an impermissible message of religious endorsement. And, so, now the state commission as well as the American Legion have petitioned for cert. So, that one is pending as well.

There's a couple of Planned Parenthood cases that are pending before the Court. And whenever you say "Planned Parenthood," that ends up being a charged issue. Now, these are not abortion cases, and I want to make that clear. But they do involve states' decisions to defund, essentially, Planned Parenthood, try to take them out of Medicaid. And, so, it deals with whether plaintiffs can sue about that.

And, then, I'll mention that the partisan gerrymandering and *Masterpiece Cakes* issues that I mentioned earlier, there are already petitions trying to put those same issues before the Court again. So, those will be teed up as well for the Court potentially.

And the last one I'll mention didn't actually materialize in a cert petition. I wish it would have, because the issue there was whether a deceased judge could issue an opinion. And that came out of the Ninth Circuit, where Judge Reinhardt—of course the lion of the Ninth Circuit's bench for decades—passed away. And then, a few months later, an opinion issued from the Ninth Circuit in which he joined the opinion. And, so, there were challenges there immediately saying, wait a minute, how can he join the opinion after

he's passed away? But the Ninth Circuit fixed that on its own by taking back the opinion and substituting another judge. So, we won't see that issue reach the Court.

**Jose Garriga:**

While on the topic of traditional vacancies, the passing of Justice Scalia and the retirement of Justice Kennedy, engendered tremendous change on the Court, as you've discussed, opening the door to its rightward shift. So, based on your experience, can we expect to see any retirements at the end of this upcoming Term?

**Pratik Shah:**

Well, I wouldn't say expect, I would say no. Look, just to give it some historical context, we've had six new Justices in the last 13 years. That's a remarkable amount of change for the Supreme Court. And just to put it in context, there were exactly zero new Justices in the prior 11 years before that. It was Chief Justice Roberts coming on the bench which started that 13 years ago, and, since then, five others after the Chief. And, so, the Court has changed quite a bit in the last decade. And, so, that leaves three of the original Justices from that Court. That's Justice Thomas, who's only 70. Justice Ginsberg, who is 85 but has made very clear in every address, both public and private, that she doesn't plan on retiring as long as her health permits. And Justice Breyer, who's now 80 but also hasn't indicated any intent of stepping down.

And, so, I don't think we would expect any retirements barring any significant changes.

**Jose Garriga:**

Thank you, Pratik, for a very interesting *tour d'horizon* for the Court. Listeners, you've been listening to Akin Gump Supreme Court and appellate practice co-head Pratik Shah. Thank you for bringing us up to date and up to speed on how to understand and what to expect in terms of the Court's decisions and direction.

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Until next time.

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