SIZING UP THE SUPREME COURT TERM

FACULTY DISCUSS TOP CASES FROM 2017 TERM, JUSTICE ANTHONY KENNEDY'S LAST YEAR

ON JUSTICE KENNEDY

"JUSTICE KENNEDY could be characterized, during his time on the court, as having been a conservative—but one not in lockstep with his colleagues on the court's right flank. Endowed with a strong libertarian streak, he argued eloquently for qualities of dignity and liberty in a free society. Thus, he could come down on the more liberal side of an issue, a striking example being his majority opinion finding constitutional protection for same-sex marriage. ... Justice Kennedy proved himself to be anything but an ideologue. Rebuffing claims of originalism, he was clearly in the 'living Constitution' camp, declaring that the Constitution is capable of protecting claims of liberty which would not have occurred to the document's framers. There is much to admire about Justice Kennedy. As a justice, he was typically open-minded, ready to listen to and weigh competing arguments. Those qualities may at times have frustrated his colleagues, but they added notably to the court's search for justice."

—A. E. DICK HOWARD '61

"JUSTICE KENNEDY'S career on the Supreme Court will also be remembered as illustrating three important features of American constitutional politics. First and perhaps most obvious is that the federal courts respond to political developments through changes in personnel. That is especially true when, as now, the main political parties differ substantially in the constitutional principles they espouse. ...

"Second, because the parties are conduits for popular opinion on constitutional issues, the partisan alignment of the presidency and Senate has profound effects. The seven most recent justices were appointed by presidents whose party controlled the Senate; not since Justice Clarence Thomas has the Senate confirmed a nominee by a president of the opposite party. ... Justice Kennedy was nominated by a Republican president after a Democratic-controlled Senate rejected his first nominee, Judge Robert Bork. Justice Kennedy was acceptable to the Democratic majority and his positions on the Supreme Court have differed from those Judge Bork likely would have taken with respect to some very high-profile issues, notably whether to overrule *Roe v. Wade*. Divided government produced an appointee whose votes on the court have sometimes pleased and sometimes displeased the parties between which government was divided.

"Third, the partisan division between the presidency and the Senate that led to Justice Kennedy's appointment was the result of elections in 1984, when Ronald Reagan was re-elected, and 1986, when control of the Senate shifted from Republicans to Democrats. Justice Kennedy wrote the court's opinion in *Obergefell v. Hodges*, the same-sex marriage case, in 2015. Many of the issues the Supreme Court decides were topics of intense political controversy in the 1980s, but same-sex marriage was not one of them. The consequences of judicial appointments, especially Supreme Court appointments, often long outlast the politics that produce them."

—JOHN HARRISON

EPIC SYSTEMS CORP. v. LEWIS

EMPLOYEE ARBITRATION AGREEMENTS

"THE DECISION in *Epic Systems* continues the onward march of the presumption in favor of arbitration in the Supreme Court. This trend, now several decades old, has extended to fields as varied as employment discrimination, antitrust, consumer protection, admiralty and securities regulation. In each of these fields, the court has interpreted the Federal Arbitration Act to require enforcement of arbitration agreements in the face of arguments that doing so would be inconsistent with competing federal statutes or state law. In *Epic Systems*, ironically enough, this presumption returns to where it began—in labor arbitration decisions from the 1950s. Those earlier decisions, however, favored workers and unions, while *Epic Systems* goes in the opposite direction, favoring employers and management. The court rejected the argument that the right to 'mutual aid and protection' under the National Labor Relations Act prevented the enforcement of arbitration clauses that waived any right to proceed in collective proceedings, such as class actions."

—GEORGE RUTHERGLEN

HUSTED v. A. PHILIP RANDOLPH INSTITUTE

VOTER REGISTRATION

"*HUSTED* lies in the stormy seas of law and politics. Ohio mails cards to registered voters who fail to vote in an election. If voters do not return the cards and do not vote in the subsequent two elections, Ohio removes them from the registration rolls. Does Ohio's voter 'purge' comply with a pair of federal statutes? The conservative majority of the court said yes, emphasizing one slice of statutory language. The liberal minority said no, emphasizing another slice of language and, in the case of Justice Sonia Sotomayor, the sordid history of voter suppression. The meaning of the federal statutes is clearer than before, but the wisdom of Ohio's practice—is it sound governance or partisan gamesmanship?—remains debatable."

—MICHAEL GILBERT

JANUS v. AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES

UNIONS AND THE FIRST AMENDMENT

"IN *JANUS v. AFSCME*, the Supreme Court held that nonunion workers cannot be required to pay agency fees to public-sector unions. The decision was one of the most significant on collective bargaining in decades and overruled 41-year-old Burger Court precedent. That prior decision, *Abood v. Detroit Board of Education*, held that nonmembers could be required to pay agency fees to unions, in order to prevent their benefiting from union negotiations while free-riding off others' dues. (The *Abood* decision also held that agency fees could not be used for political purposes but only for collective bargaining.) The about-face in *Janus* is a sign of the increasing reach of the First Amendment."

—LESLIE KENDRICK '06

MASTERPIECE CAKESHOP, LTD. v. COLORADO CIVIL RIGHTS COMMISSION

RELIGIOUS LIBERTY, CIVIL RIGHTS

"THE GROUND of decision was narrow, but not as narrow as many commentators will claim. It is based exclusively on the free exercise clause; the Supreme Court did not rule on the free speech claim. Exclusive reliance on free exercise narrows the opinion to sincere religious objectors, excluding simple bigots. And it helps narrow the decision to religious contexts, with weddings as the overwhelmingly dominant example. The court made nothing of these points.

"What more obviously narrows the decision is that the Supreme Court based it on the state's hostility to the baker's religious faith. As evidence, the court pointed both to hostile comments from members of the Colorado Civil Rights Commission and to the commission's inconsistent treatment of religious discrimination and sexual-orientation discrimination."

—DOUGLAS LAYCOCK and Thomas Berg, co-authors of an influential amicus brief that suggested the court should focus on the free exercise clause, writing in SCOTUSBlog

ORTIZ v. U.S.

SEPARATION OF POWERS

"THE FRAMERS of the Constitution limited the Supreme Court's original and appellate jurisdiction primarily because of the burdens that travel to a centralized court placed on U.S. citizens in the 18th century. Rather than require litigants to journey long distances to a central court in the first instance, the Constitution contemplates some local adjudication, followed by an appeal to the 'one Supreme Court.' In our modern era, the constitutional text has remained the same while advances in transportation capabilities have happily reduced, though by no means eliminated, this concern. Those advances do not diminish *Ortiz*'s jurisprudential importance, but they limit, in some ways, the consequences of *Ortiz*'s precise holding about the Supreme Court's appellate jurisdiction."

—ADITYA BAMZAI, who argued the case as an independent amicus, writing in Lawfare

RUBIN v. ISLAMIC REPUBLIC OF IRAN

SEIZING PROPERTY FROM NATIONS SPONSORING TERROR

"IN INTERPRETING the Foreign Sovereign Immunities Act, the court took a cautious approach to the scope of a court's authority to seize property belonging to a foreign state to enforce a judgment based on support for terrorism. The court read the statute as keeping in place the limitations on seizure power generally applicable with respect to other kinds of judgments permitted by the act. The effect was to make it harder for successful plaintiffs (here the beneficiaries of default judgments) to collect against these sovereigns."

—PAUL STEPHAN '77

SOUTH DAKOTA v. WAYFAIR

TAXATION OF E-COMMERCE

"THE DECISION'S implications for e-commerce are not totally clear yet. *Wayfair* struck down the anachronistic and judicially created physical-presence test, which said that an out-of-state seller was not obliged to collect sales tax if it lacked physical presence in the state. ... [States may try to join the Streamlined Sales and Use Tax Agreement] and duplicate South Dakota's thresholds [for tax collection—at least 200 sales or $200,000 in sales in a year]. Or Congress may intervene to impose uniform sales tax standards. Some states may try to impose sales tax collection obligations retroactively, which would generate more litigation. What is clear, however, is that online sellers can no longer make billions of sales in a state while avoiding obligations to collect sales taxes."

—RUTH MASON co-authored amicus briefs urging the court to grant cert and overturn the physical-presence test

TRUMP v. HAWAII

PRESIDENT'S POWER ON IMMIGRATION

"IN THE TRAVEL BAN cases, the Supreme Court abdicated its responsibility to uphold religious neutrality under the First Amendment. It ignored President Donald Trump's unprecedented and pervasive religious hostility toward Muslims. As a result, the court has made a mockery of its decision in *Masterpiece Cakeshop*, where it demanded 'neutral and respectful' consideration of religious minorities. In *Masterpiece*, the court cited as evidence of religious hostility the state's disparate treatment of a Christian baker, who lost his appeal, and secular bakers, who were not required to bake cakes that they opposed in conscience. But in siding with the religious freedom of Christians but not Muslims, the court has raised the same concerns about religious hostility that it so recently condemned under the First Amendment."

—MICAH SCHWARTZMAN '05 helped lead amicus briefs on the travel ban arguing that the president's executive orders violated the First Amendment