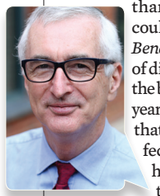
SIZING UP *the* SUPREME COURT TERM

FACULTY DISCUSS TOP CASES FROM 2018 TERM

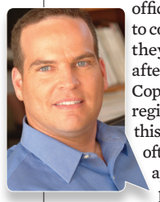
FORT BEND COUNTY, TEXAS v. DAVIS
TITLE VII AND JURISDICTION



"THE SUPREME COURT held that the need to file a charge with the Equal Employment Opportunity Commission before suing in court was a 'mandatory claim-processing rule subject to forfeiture' rather than a 'jurisdictional prescription' that could not be waived. The plaintiff in *Fort Bend* had attempted to amend her charge of discrimination to add discrimination on the basis of religious discrimination. Several years into the litigation, the defendant argued that her attempted amendment was ineffective. The court held that the defendant had forfeited this objection by waiting too long to raise it. The court followed a line of recent decisions generally reserving the term 'jurisdictional,' absent long-time practice or statutory language to the contrary, 'to describe the classes of cases a court may entertain (subject-matter jurisdiction) or the persons over whom a court may exercise adjudicatory authority (personal jurisdiction).'"

—GEORGE RUTHERGLEN

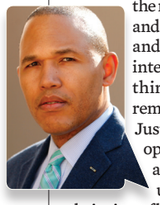
FOURTH ESTATE PUBLIC BENEFIT CORP. v. WALL-STREET.COM
WHEN DOES COPYRIGHT REGISTRATION HAPPEN?



"THE SUPREME COURT clarified that copyright registration happens when the Copyright Office processes an application to register a work (whether favorably or not for the applicant), rather than at the earlier moment in which the application is merely submitted to the office. What satisfies registration matters to copyright owners of U.S. works because they can file infringement actions only after they register their works. It takes the Copyright Office several months to process registration applications, and one effect of this decision is that copyright owners would often be unable to sue infringers while their application is pending. As registration is permissible, this decision should make copyright owners more inclined to register their works and do so early in order to be able to effectively file infringement actions, when needed."

—DOTAN OLIAR

HOME DEPOT v. JACKSON
CLASS-ACTION CLAIMS



"THE SUPREME COURT held that only original defendants may remove actions (including Class Action Fairness Act class actions) to federal court. This decision is correct and unsurprising, given the language of the relevant statutes. Although Justice Alito and his fellow dissenters (Roberts, Gorsuch and Kavanaugh) argued that the text and intent of Congress supported permitting third-party counterclaim defendants to remove CAFA claims lodged against them, Justice Thomas—who penned the majority opinion—rightly rebuked the dissenters as attempting to legislate from the bench by using their policy preferences to shape their view of how the removal statutes should be read."

—A. BENJAMIN SPENCER

IANCU v. BRUNETTI
FIRST AMENDMENT AND TRADEMARKS

"IN *IANCU V. BRUNETTI*, the Supreme Court invalidated on First Amendment grounds a portion of the Lanham Act, which regulates the registration of federal trademarks. In its 6-3 opinion, the court elaborated on both vagueness and content discrimination, two important aspects of First Amendment doctrine. The court also signaled that it is serious about bringing those First Amendment concepts to bear on trademark, an area of law that until recently had lived in peaceful coexistence with the First Amendment for a long time."

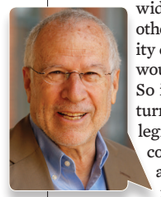
—LESLIE KENDRICK '06

MITCHELL v. WISCONSIN
SEARCHES AND SEIZURES

"*MITCHELL V. WISCONSIN* is the court's most recent effort to apply the Fourth Amendment to sobriety tests of drunk-driving suspects. Both breath tests and blood tests are 'searches' that must be constitutionally 'reasonable.' Since breath tests are less invasive than blood tests, police may administer the former, but not the latter, under the search-incident-to-arrest exception. By contrast, to do a blood test, police have been required to obtain a warrant or identify some exception to the warrant requirement other than search incident to arrest. In *Mitchell*, police could not breath-test the suspect because he was unconscious. Acting without a warrant, police took him to a hospital and asked hospital staff to draw a blood sample. The Wisconsin courts found that the blood test was reasonable under the state's 'implied-consent' statute, and the Supreme Court took the case to consider the constitutionality of such statutes. However, a divided court did not pass on the implied-consent theory, but, instead, relied on the exigent-circumstances exception. Justice Alito announced the judgment in an opinion joined by three other justices, with Justice Thomas concurring in the judgment only. The case appears to create a general rule under which police do not need to get a warrant to blood-test an unconscious driver, but the plurality opinion explicitly refused to 'rule out the possibility' that there may be 'unusual case[s]' where a suspect may be able to show that the general rule does not apply. The court remanded the case to give Mitchell the opportunity to make that showing."

—ANNE COUGHLIN

NIEVES v. BARTLETT
FIRST AMENDMENT AND RETALIATORY-ARREST CLAIMS



"IT IS WIDELY ACCEPTED that people are arrested solely because of their otherwise-protected speech activity. And it is equally widely accepted that engaging in otherwise-protected speech activity cannot be used to avoid what would otherwise be a valid arrest. So it turns out that everything turns on the burden of proof when legitimate grounds for arrest are conjoined with protected speech activity. And because the issue is thus procedural and in some sense technical, it is not surprising that the justices did not divide along predicted ideological lines."

—FREDERICK SCHAUER

RUCHO v. COMMON CAUSE
PARTISAN GERRYMANDERING AND JURISDICTION

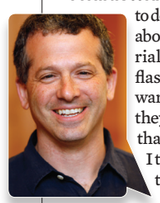
"IN *RUCHO V. COMMON CAUSE*, the Supreme Court for the first time held conclusively that partisan gerrymandering is nonjusticiable. As a result, the extreme gerrymanders favoring Democrats in Maryland and Republicans in North Carolina will stand. At the same time, the court emphasized that its conclusion 'does not condone excessive partisan gerrymandering' and underscored that both Congress and state legislatures have the power to limit it. Of course there are practical difficulties in doing so, as Justice Kagan emphasized, given that current representatives have incentives to draw maps that favor themselves. At the federal level, where power is more evenly split, such a remedy may be attainable. In my view, we all benefit from a system that allows people to choose their representative rather than the other way around."

—DEBORAH HELLMAN

THE AMERICAN LEGION v. AMERICAN HUMANIST ASSOCIATION
SEPARATION OF CHURCH AND STATE

"FROM A CHURCH-STATE separation perspective, this could have been much worse. The government said the cross is a universal symbol of sacrifice, which is just nonsense. And the court didn't go there. So there's some good news here."

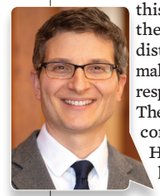
—DOUGLAS LAYCOCK co-authored an amicus brief on behalf of religious groups arguing that a government-sponsored cross is unconstitutional



"I THINK WHAT THE COURT is trying to do is put an end to disputes about long-standing memorials, which have become flash points in the culture wars in some ways. Whether they're successful in doing that I think is questionable. I think there will continue to be debates."

—RICHARD SCHRAGGER, quoted in Route Fifty

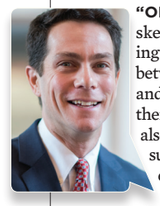
VIRGINIA HOUSE OF DELEGATES v. BETHUNE-HILL
GERRYMANDERING



"THE RULING MEANS that the court-ordered House districting plan will apply in the 2019 election. The plan 'unpacks' some minority voters, spreading them across districts. Since minority voters tend to support Democrats, this should favor Democrats in the 2019 election. As for 2020 districting, the decision doesn't make any new substantive law with respect to racial gerrymandering. The legislature will face the same constraints in 2020 as before. However, the decision makes it harder for either chamber of the legislature to contest adverse court decisions about racial gerrymandering. If someone challenges the 2020 district plan as a racial gerrymander, the attorney general can defend the plan, or maybe the two chambers of the legislature together can defend the plan, but neither chamber can defend the plan itself."

—MICHAEL GILBERT

VIRGINIA URANIUM v. WARREN
FEDERAL PREEMPTION AND STATE ENERGY POLICY



"ON ONE LEVEL, the justices sketched out the court's evolving views on the proper balance between federal regulatory power and the rights of states in setting their own policies. Their opinions also challenged some common assumptions about how grassroots environmental advocates can pull together winning political coalitions."

—CALE JAFFE '01 co-authored an amicus brief on behalf of regional stakeholders arguing in favor of Virginia's ban on uranium mining