

# SIZING UP THE SUPREME COURT TERM

## FACULTY DISCUSS TOP CASES FROM 2016 TERM HOBBLED BY THE LACK OF A NINTH JUSTICE

**A**LTHOUGH NO SINGLE moment captured the public's attention like the court's dramatic halting of the Florida recount 16 years earlier—and despite many of the justices' best efforts—the Supreme Court's 2016 term was inextricably caught up in presidential politics. The seat formerly held by Justice Antonin Scalia went unfilled until April, meaning that the vast majority of the year's cases were decided by an eight-member court. During that time, the justices seemed to be struggling to avoid controversy, with the number of cases continuing to fall and the number of unanimous decisions continuing to rise.

Justice Neil Gorsuch's nomination led to the demise of the filibuster as a means of opposing Supreme Court nominations, and his first months on the court emphasized the stakes for all involved. In his first 17 cases, Justice Gorsuch had a 100 percent agreement rate with the court's most conservative member, Justice Clarence Thomas. He also



established himself as an aggressive questioner at oral argument and a sharp and clever writer who, even as the junior justice, seems more than willing to tussle with colleagues and question precedent. So far, he has done nothing to make those who supported him second-guess their choice and

much to make his opponents worry. "The 2016 term had no real blockbusters. Free speech claimants continued to win, usually by lopsided margins. In two important cases involving jury privacy and the death penalty, respectively, the court continued to show some concern about racism in the criminal justice system. There were cases under the Voting Rights Act and the Fair Housing Act and about the ability to sue government officials for constitutional violations. Even so, the 2016 term largely had the feeling of a calm between storms."

—TOBY HEYTENS '00

### EXPRESSIONS HAIR DESIGN V. SCHNEIDERMAN THE LIMITS OF FREE SPEECH

"EXPRESSIONS HAIR IS A CASE that asks what the scope of the First Amendment is. It involves a New York law that says businesses cannot charge extra for paying with a credit card. They can offer a cash discount, but not a credit card surcharge. Expressions Hair argued that this is a



First Amendment violation, because it affects how they can describe their prices. The interesting thing is that both the solicitor general and the Supreme Court agreed—because the law might affect speech, it implicated 'the freedom of speech' under the First Amendment.

"But plenty of other business and contract regulations also implicate speech. Imposing liability for express warranties of fitness for a particular purpose also affects what businesses can say about their products. Does that mean that the warranty implicates the First Amendment? The law has traditionally said no. This case destabilizes the line between what is covered by the First Amendment and what is not."

—LESLIE KENDRICK '06

### KOKESH V. SECURITIES AND EXCHANGE COMMISSION APPLICATION OF STATUTE OF LIMITATIONS

"THE SUPREME COURT'S unanimous *Kokesh* decision said the SEC may not obtain disgorgement, the surrendering of profits from illegal acts, from a defendant for conduct



older than five years before the date of filing an enforcement case. ...

"The decision will have some but not dramatic effects on the SEC's enforcement program. It will put extra pressure on the enforcement staff to devote attention to relatively more recent suspected violations.

It will also provide a further incentive to move investigations along to a prompt conclusion or to develop a record sufficient to persuade defendants to extend the limitations period with a tolling agreement. Speedier investigations would be a welcome development because a common complaint about SEC enforcement inquiries is that they take far too long."

—ANDREW VOLLMER '78

### MURR V. WISCONSIN REGULATORY TAKING

"THE SUPREME COURT'S 5-3 decision in *Murr v. Wisconsin* provides courts with a new legal test to use in



determining what 'property' is for the purposes of assessing whether property has been taken by the government without just compensation, in violation of the Fifth Amendment.

"If past takings decisions are any guide, one thing is sure: This new multi-factor test will lead to lots more litigation, and this is probably not the last time the court will have to weigh in. The multi-factor balancing test that courts use to assess whether property has been 'taken' has already led to—in the court's own words—"vexing" subsidiary questions about the proper meaning, scope and application of each factor."

—MAUREEN BRADY

"THE COURT HEWED to its longstanding 'ad hoc' approach to questions of when government regulation goes so far as to amount to a taking of property for which compensation is owed. While the court broke some



new doctrinal ground by articulating a nonexclusive multi-part test for determining the 'proper unit of property against which to assess the effect of the challenged government action,' Justice Kennedy's majority opinion for five of the eight participating justices stressed that

neither the ultimate question of whether property has been taken nor the narrower one of the proper 'denominator' presented in *Murr* is reducible to straightforward analysis. Justice Gorsuch, who joined the court after the *Murr* oral argument, did not participate. In dissent, Justice Thomas suggested that the court revisit its regulatory takings precedents, raising the interesting possibility that we may see significant doctrinal change in this area in the not-too-distant future."

—JULIA MAHONEY

### SESSIONS V. MORALES-SANTANA CITIZENSHIP

"IN *MORALES-SANTANA*, the Supreme Court struck down a citizenship statute that treated children differently than children of unmarried U.S. citizen mothers. The court has considered similar challenges on numerous occasions over the last 40 years but has never before found a constitutional violation—despite the gender-discriminatory nature of the statutes in question.



This case reflects a significant departure from past precedent. What is really striking about the opinion is that the court did not give the extraordinary deference to Congress that it has usually applied to immigration and citizenship statutes. Instead, the opinion reads like the court's other equal protection cases, applying intermediate scrutiny to strike down a gender-discriminatory statute."

—KERRY ABRAMS

### TC HEARTLAND V. KRAFT FOOD BRANDS PATENT LITIGATION FORUM-SHOPPING

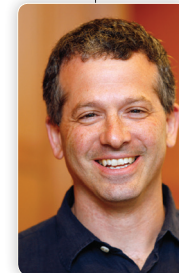
"THE DECISION 'vindicates prior Supreme Court precedent and reinstates the traditional approach to patent venue, which had worked well for nearly a century before the Federal Circuit departed from that approach. The case also shows the continuing trend of the Supreme Court reasserting its authority over patent cases—a trend I identified 15 years ago in my article on 'The Festo Decision and the Return of the Supreme Court to the Bar of Patents.'"



—JOHN DUFFY, who was on the legal team for TC Heartland

### TRINITY LUTHERAN CHURCH OF COLUMBIA V. COMER FIRST AMENDMENT, 14TH AMENDMENT

"THE IMPACT of Trinity Lutheran is somewhat ambiguous. For some, the court's striking down of a provision of the Missouri constitution that



prevented churches from receiving state grants for playground resurfacing is not a great departure from existing precedent. The decision simply requires the state to treat religious applicants the same as non-religious ones.

For others, however, this decision is more momentous, as it seems to open the door to significant state funding of churches and church-related operations. The decision understates some core anti-Establishment concerns. Those concerns include the opposition to using taxpayer money to fund religious organizations, the worry that religious organizations will become dependent on the government or complicit with the government for funding, and the fear that competition for government funds will generate religious strife."

—RICHARD SCHRAGGER

### WEAVER V. MASSACHUSETTS PREJUDICE, EFFECTIVE COUNSEL

"THIS RULING emphasizes how willing the justices have become to find serious and even structural constitutional errors at criminal trials not reversible because they are deemed 'harmless.' The justices were unwilling to recognize that serious structural errors, like the lack of a public trial, that harm interests beyond just the correctness of the outcome, require meaningful relief. The court's reasoning highlights just how complex and difficult it has become for any convict to prevail on constitutional claims, even ones that go to the very structure of a fair criminal trial."



—BRANDON GARRETT