

August 1, 2018

U.S. Supreme Court Update



Overview

**Overview of
OT17**

**How Conservative
is the Supreme
Court?**

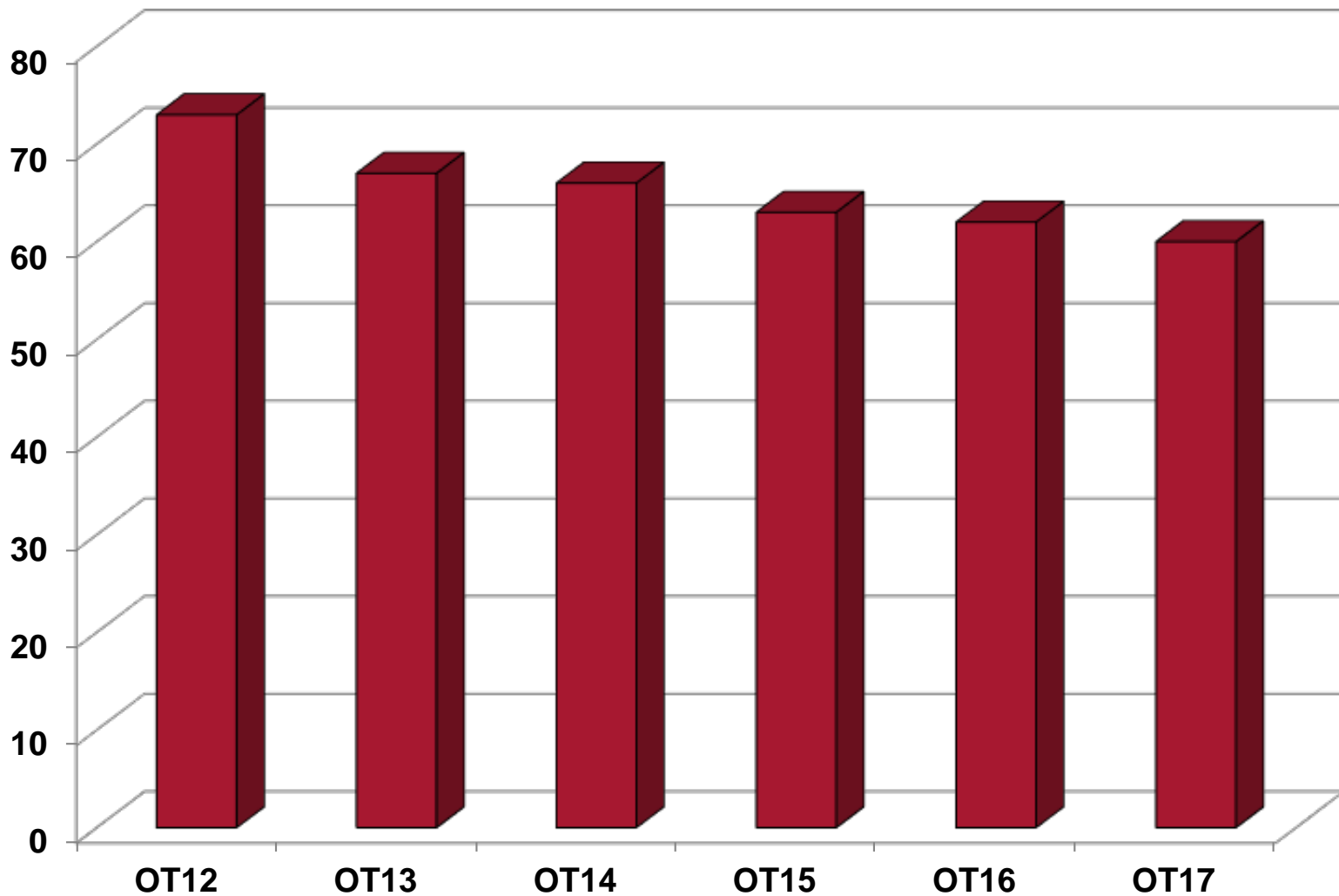
**Important OT17
Cases**

**Preview of OT18
Cases**

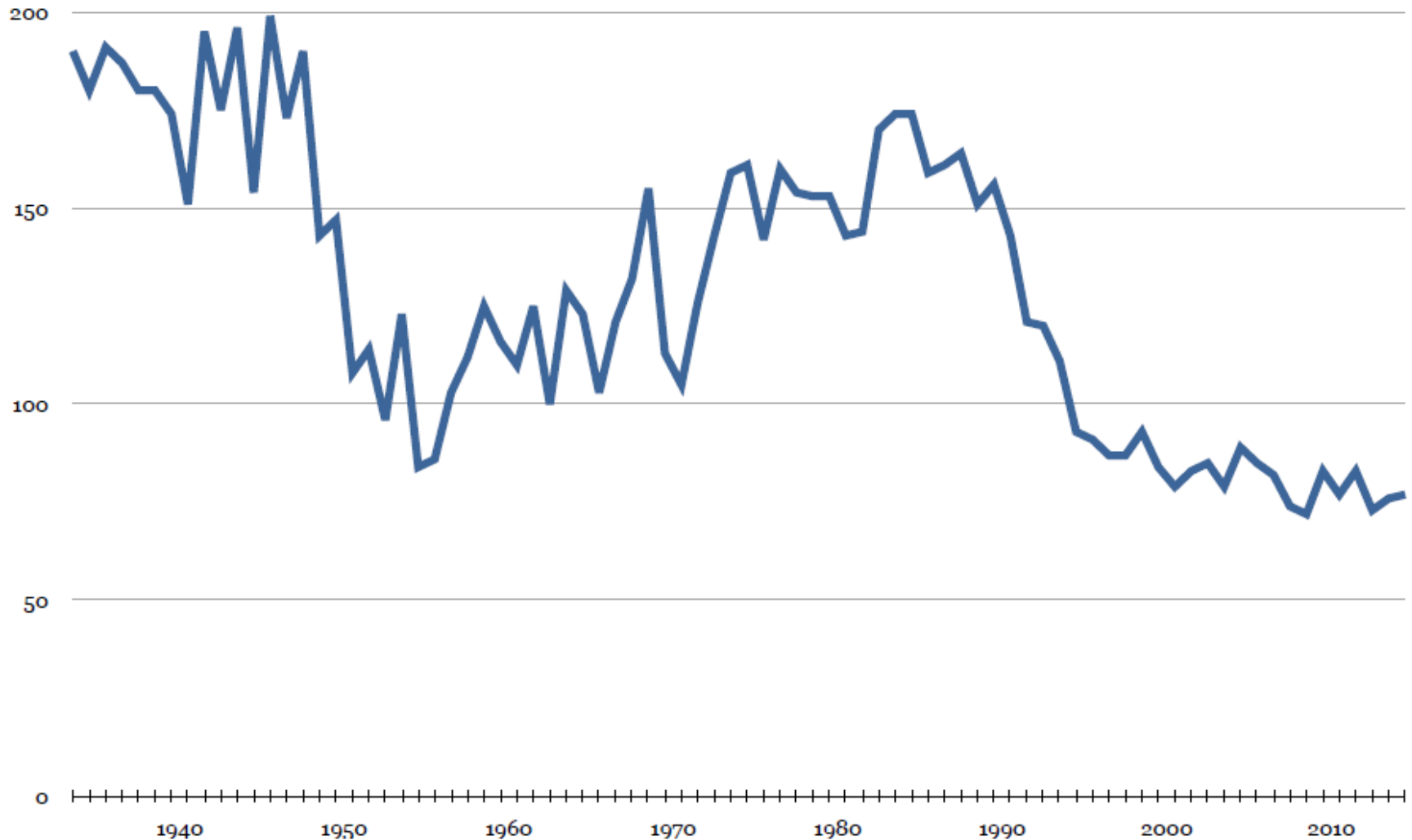


Overview of OT17

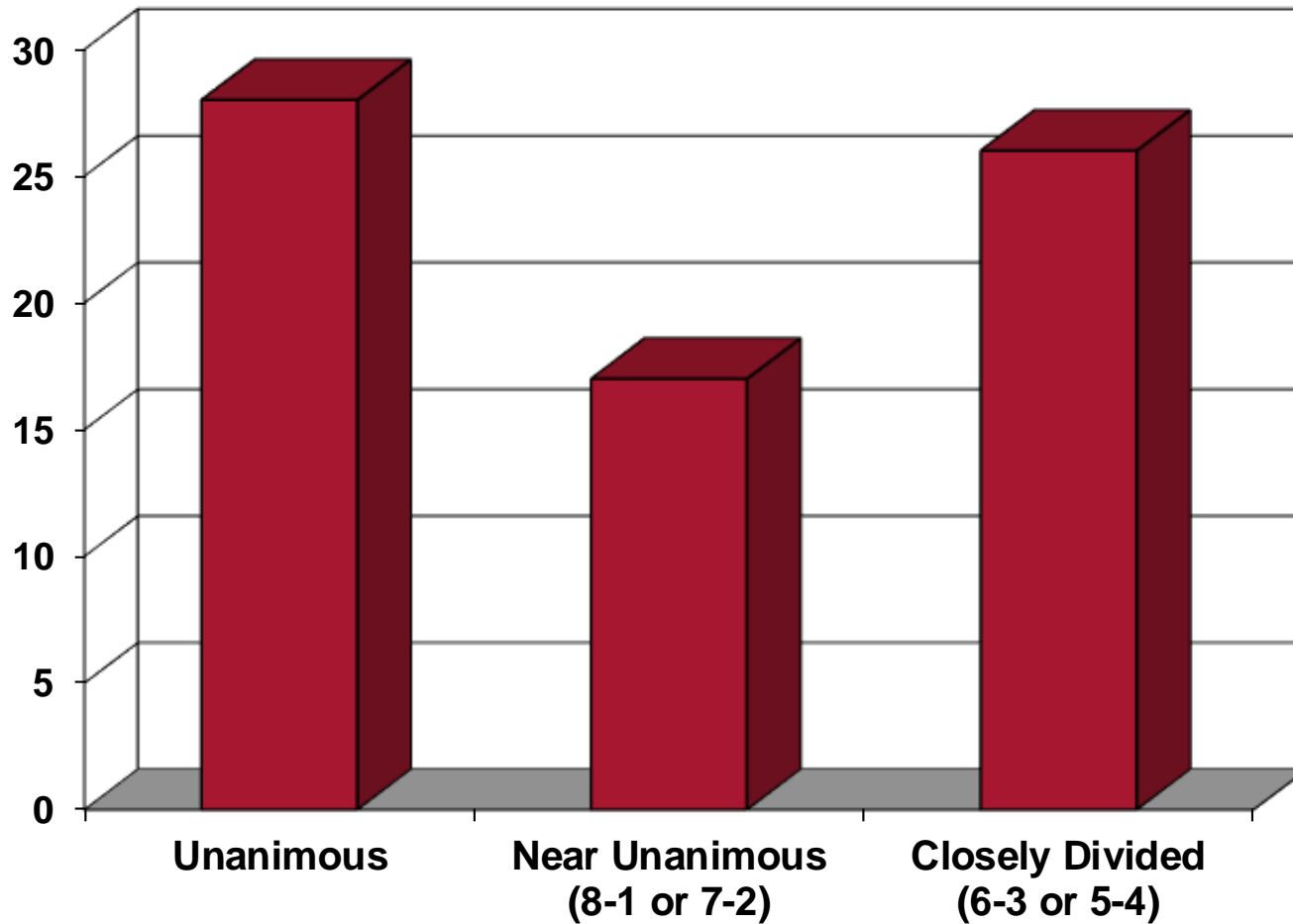
Opinions After Oral Argument by Term



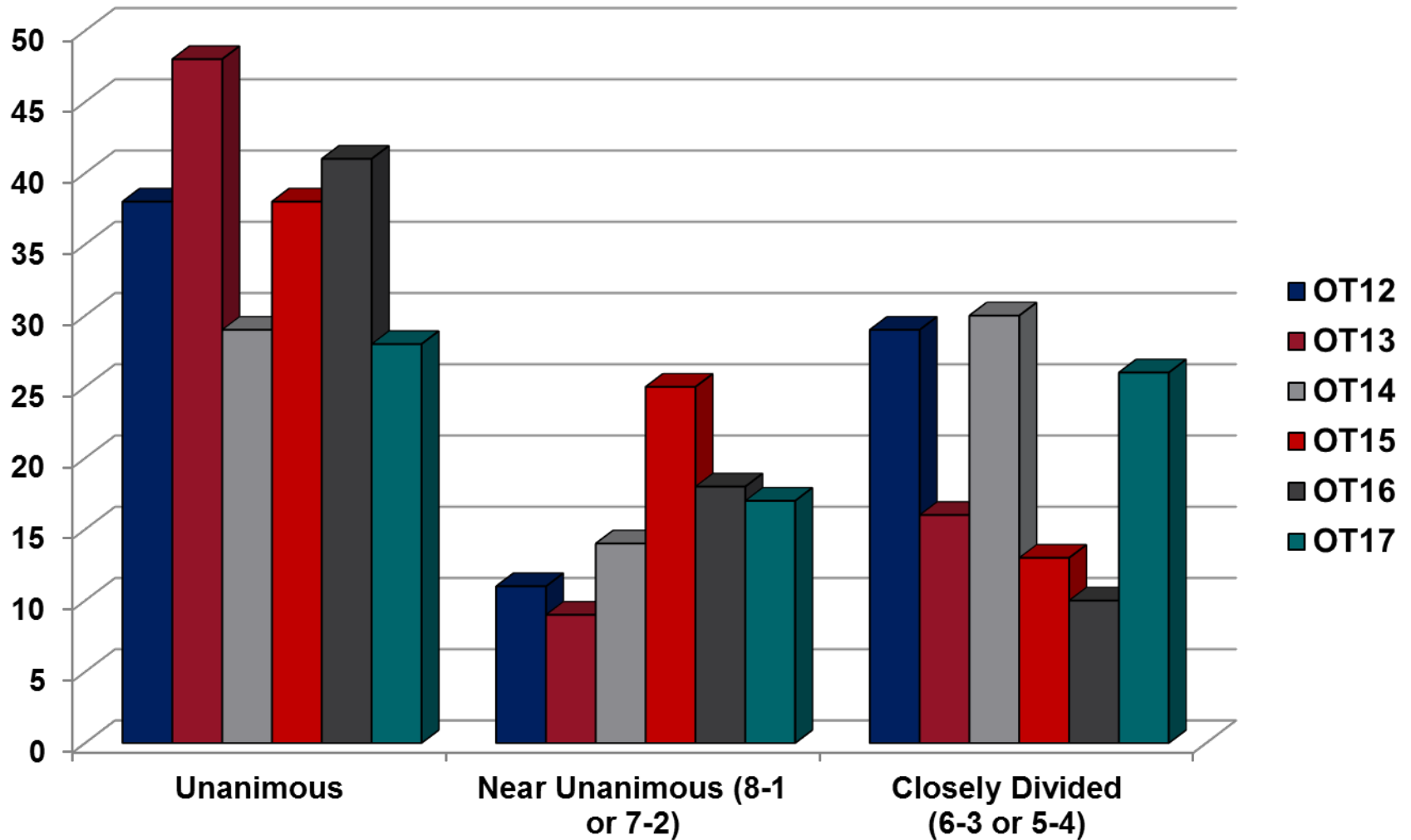
Workload in Historical Context



A Divided Court?



A Divided Court?



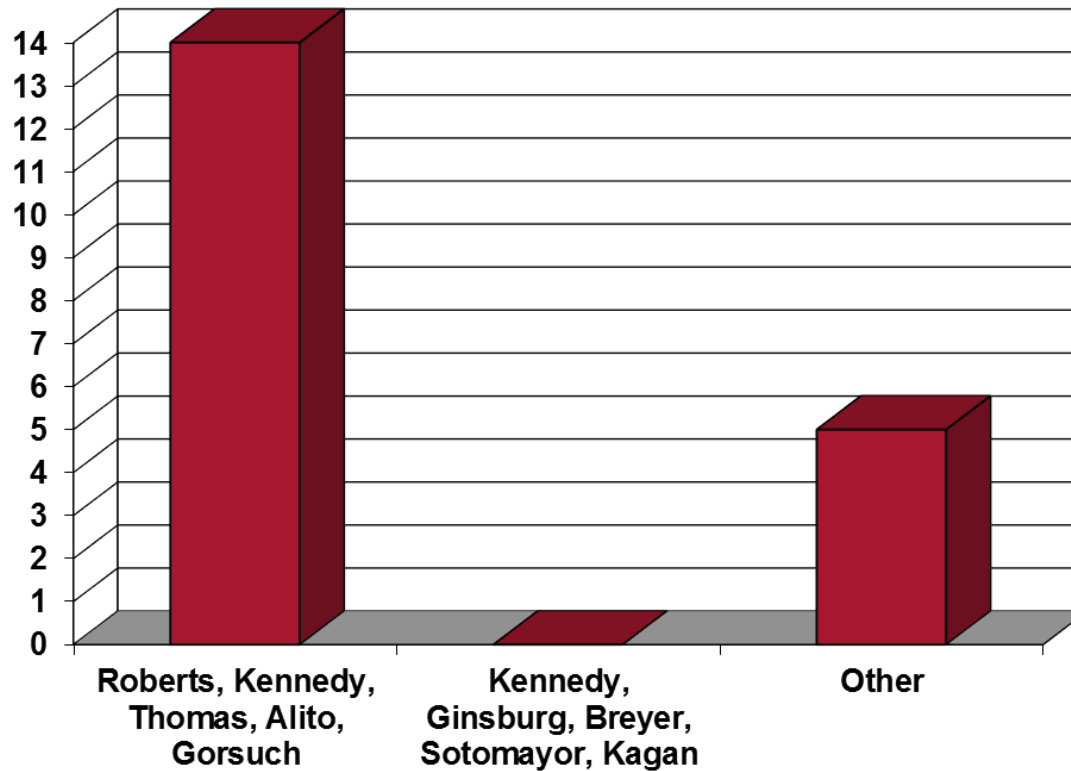
Reversal Rate

- Overall reversal rate: 74 percent
- Outliers:
 - Ninth Circuit: Reversed in 12 out of 14 cases (86 percent)
 - D.C. Circuit: Reversed in 4 out of 5 cases (80 percent)
 - Sixth Circuit: Reversed in 4 out of 4 cases (100 percent)



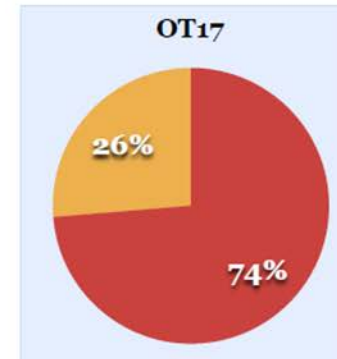
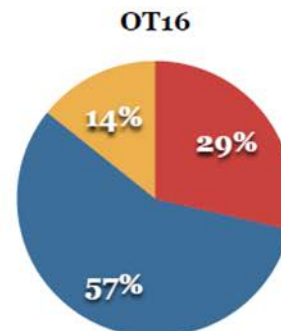
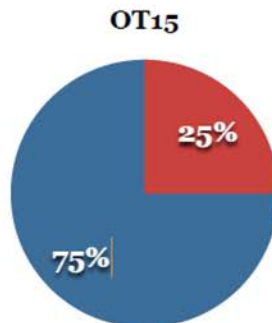
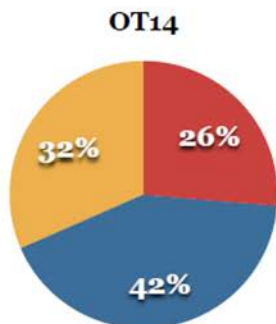
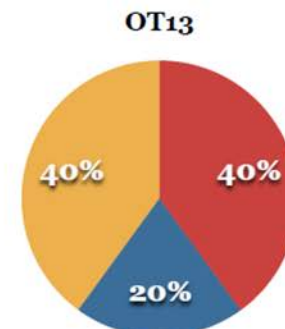
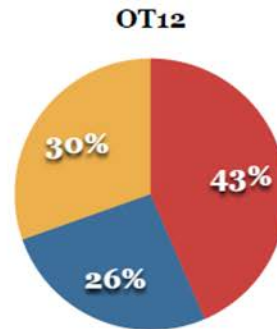
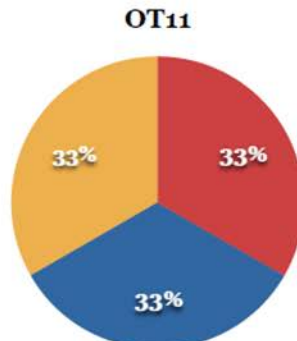
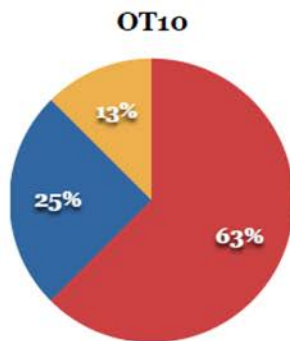
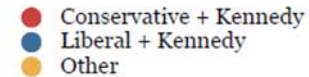
How Conservative is the Supreme Court?

5-4 Case Alignments

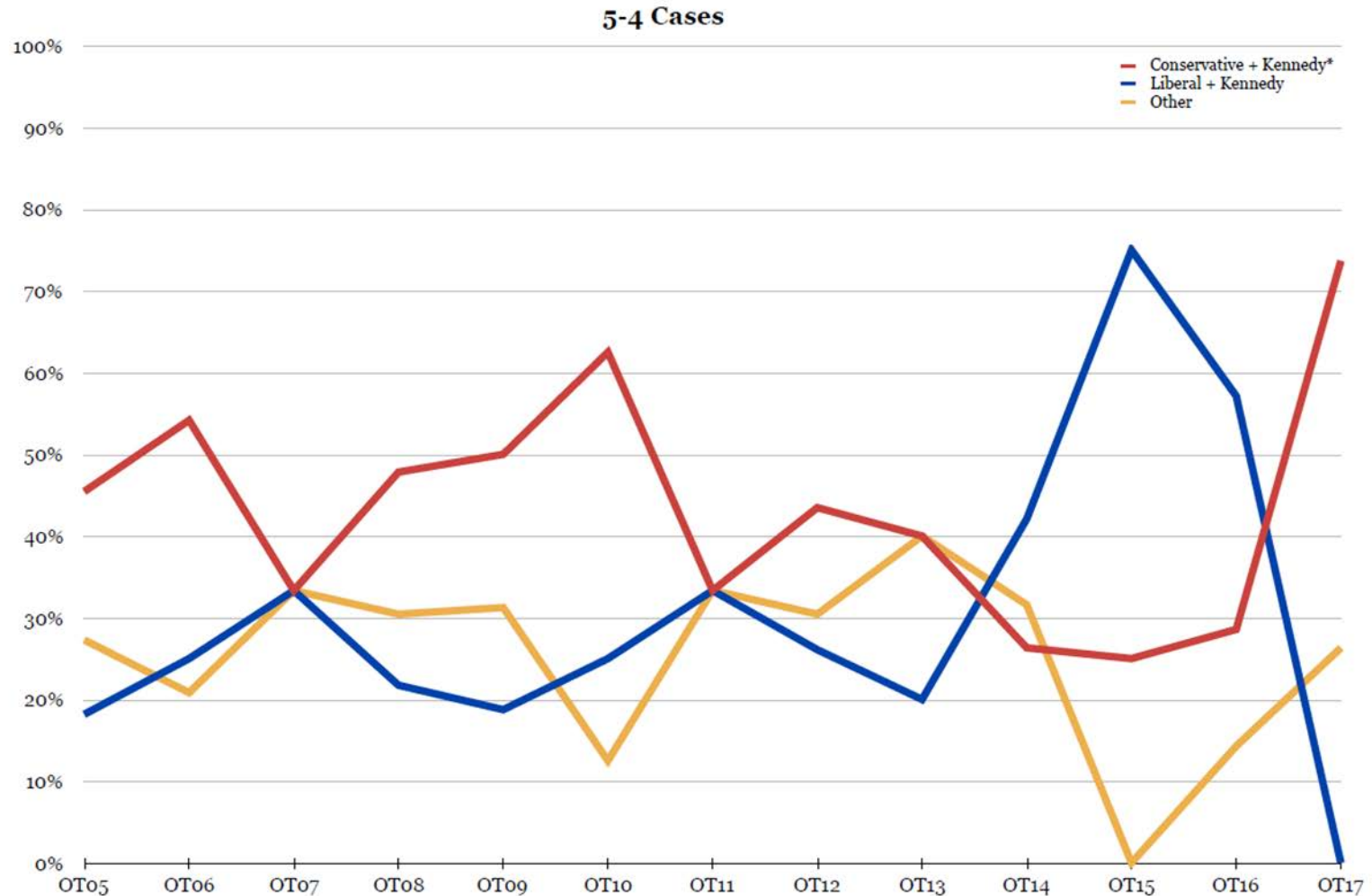


5-4 Cases: Historical Context

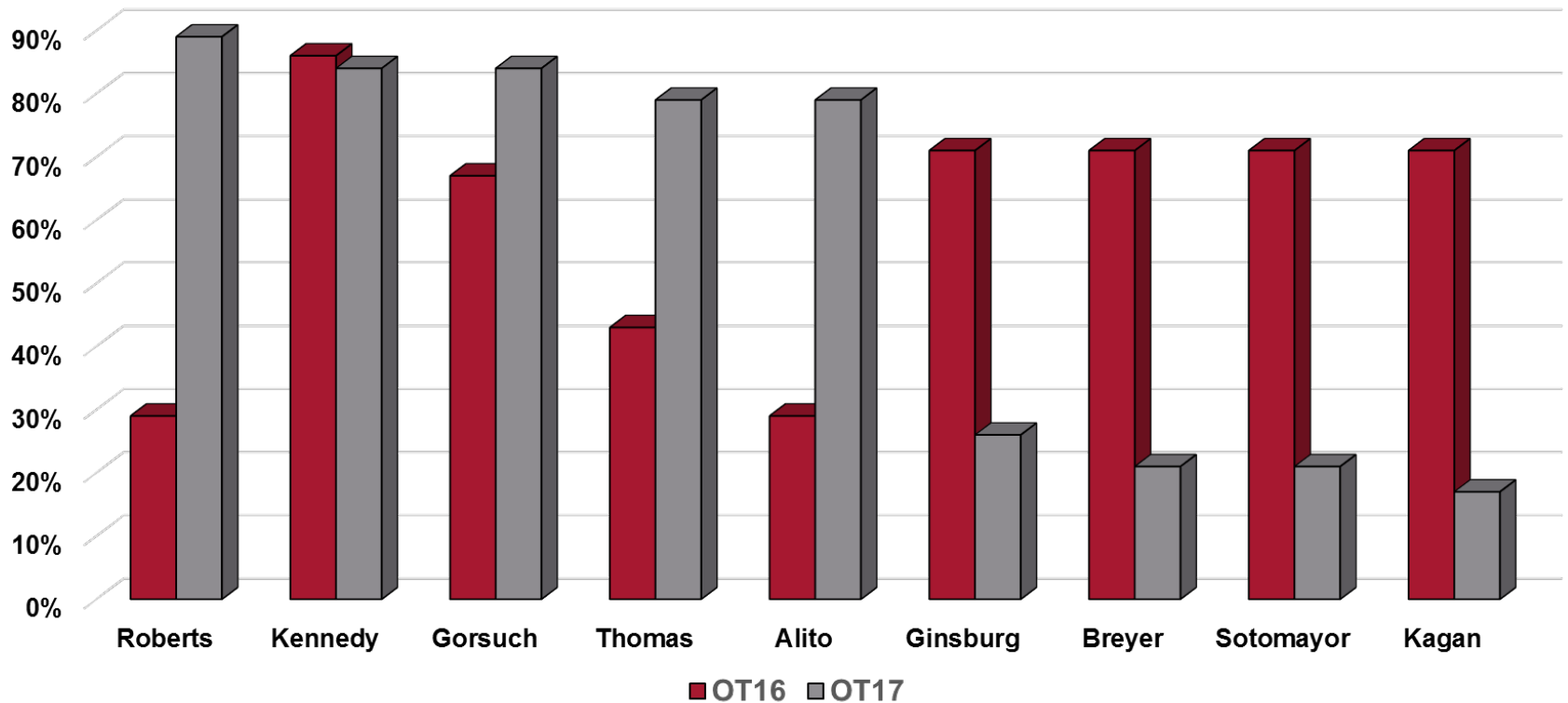
5-4 Cases



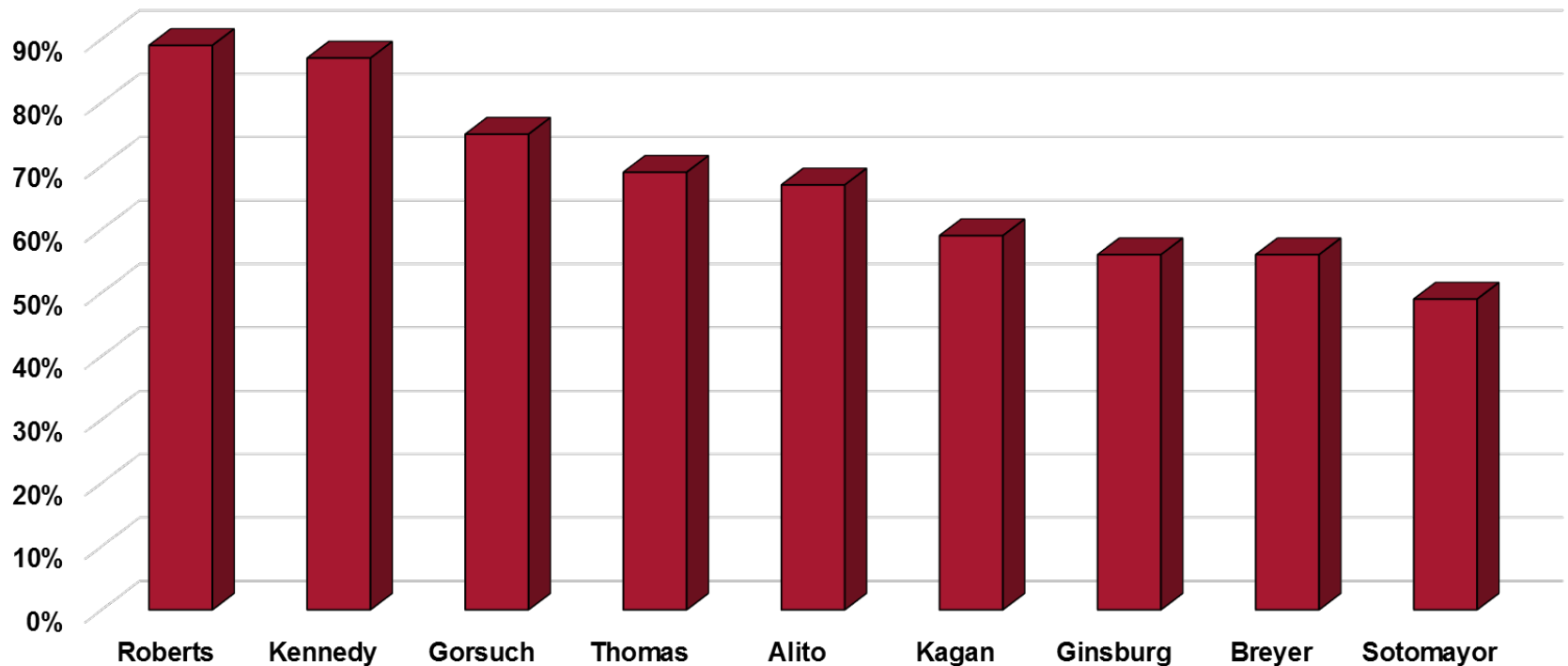
5-4 Cases: Historical Context



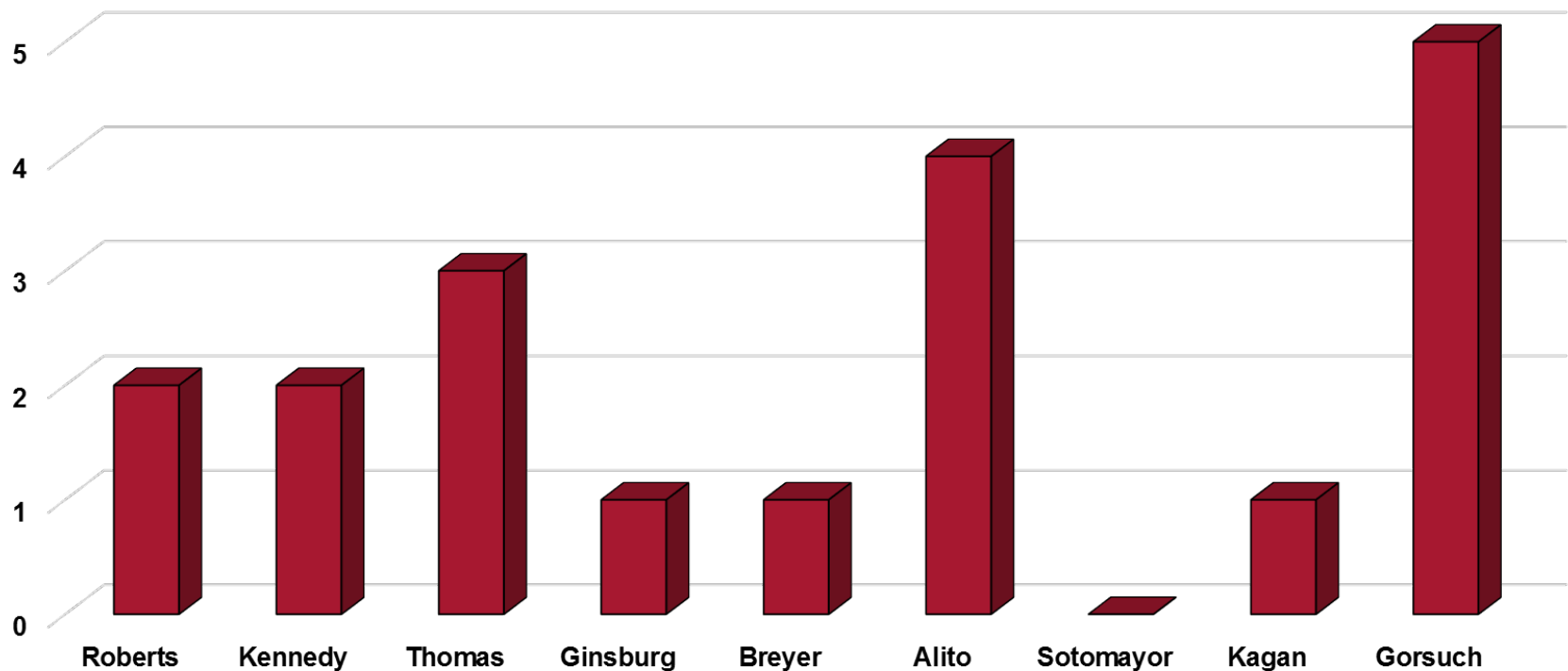
Membership in the Majority, 5-4 Cases: A Tale of Two Terms



Percentage in the Majority (non-unanimous cases)



5-4 Case Majority Opinion Assignments



Justices Who Agree the Most Often (non-unanimous cases)

1. Ginsburg-Sotomayor:	93 percent
2. Breyer-Kagan:	88 percent
3. Thomas-Alito:	88 percent
4. Sotomayor-Kagan:	86 percent
5. Breyer-Sotomayor	84 percent
Roberts-Kennedy	84 percent

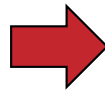
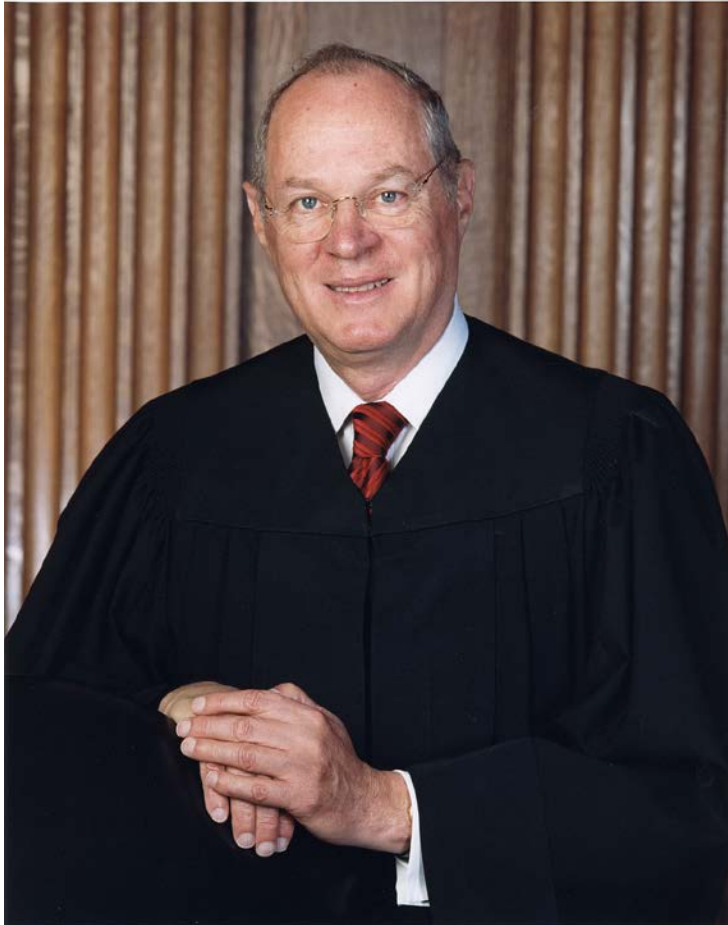
Justices Who Agree the Least Often (non-unanimous cases)

1. Alito-Sotomayor:	16 percent
2. Thomas-Sotomayor	19 percent
3. Ginsburg-Alito	23 percent
Breyer-Alito	23 percent
5. Sotomayor-Gorsuch	26 percent

Current Ages

- Justice Ginsburg: 85 years old
- Justice Breyer: 80 years old

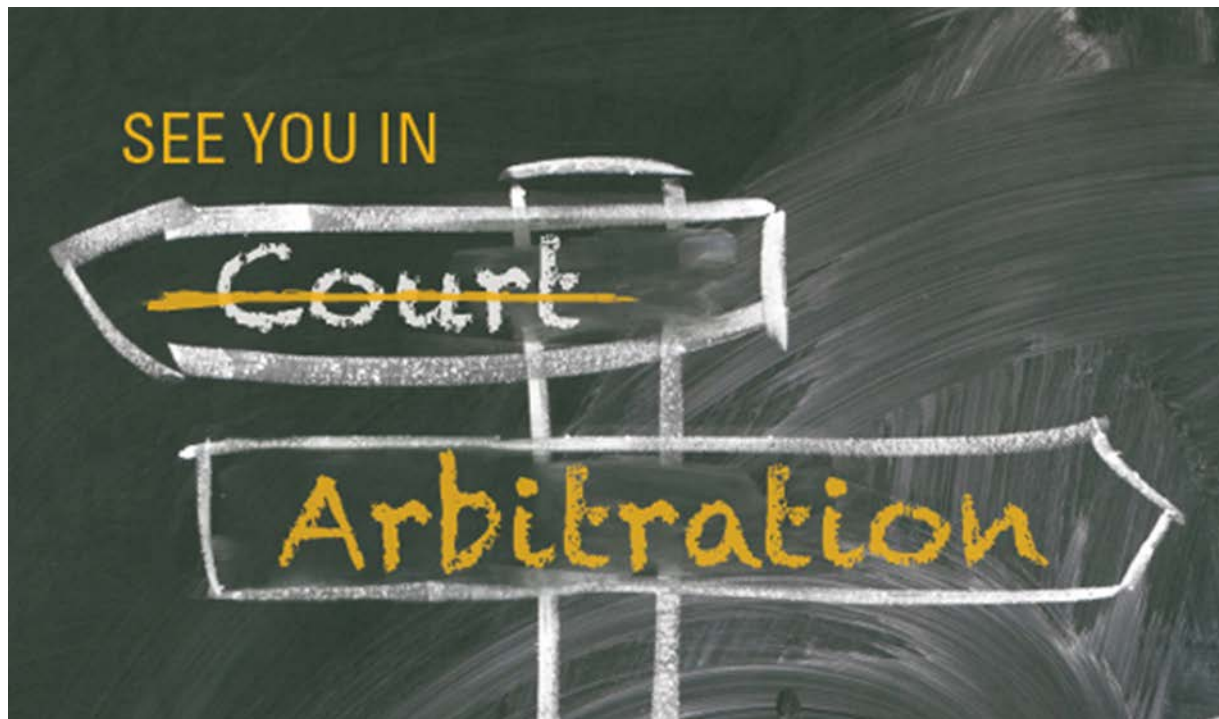
Justice Kennedy Retires





Notable Cases of the 2017 Term

Epic Systems Corp. v. Lewis



Epic Systems Corp. v. Lewis

- Employers and employees executed employment contracts that required *individualized* arbitration of labor disputes. Each employee nonetheless filed FLSA and state-law claims in class or collective actions in court.
- The Court held 5-4, per Justice Gorsuch, that the NLRA did not nullify the Federal Arbitration Act.
- The employees' claims did not fall within the FAA's savings clause, and Congress did not intend class/concerted actions to be protected by the NLRA and trump the FAA.

Carpenter v. United States



Carpenter v. United States

- Prosecutors obtained court orders—not warrants—to obtain cell-site location information related to Carpenter’s cell phone—detailing 101 data points per day for 127 days. Carpenter argued that a warrant was required.
- The Court agreed 5-4, per the Chief Justice (joined by Ginsburg, Breyer, Sotomayor and Kagan).
- The Court declined to “extend” the “third-party doctrine” to these records, finding a reasonable expectation of privacy in one’s physical movements.

Murphy v. National Collegiate Athletic Association



Murphy v. National Collegiate Athletic Association

- A federal law (PASPA) makes it unlawful for a state to “license” or “authorize by law” sports gambling, with limited exceptions. PASPA barred New Jersey from allowing sports betting at casinos and racetracks. But no federal law directly outlaws sports gambling.
- The Court invalidated PASPA 6-3, per Alito. PASPA violated the “anti-commandeering” rule of the 10th Amendment by dictating what the New Jersey legislature may and may not do.
- The dissent did not disagree with the commandeering holding, but believed that the prohibition on private operation of sports gambling authorized by state law was severable.

South Dakota v. Wayfair



South Dakota v. Wayfair

- In 1967 and 1992, the Court held that a state could not require an out-of-state retailer without a physical location in a state to collect sales taxes for sales in that state.
- The Court overruled those decisions 5-4—in an unusual lineup: Kennedy joined by Thomas, Ginsburg, Alito and Gorsuch vs. Roberts joined by Breyer, Sotomayor and Kagan. The Court explained that the physical presence rule was inconsistent with current commerce clause principles.
- The dissent agreed that the older cases were wrong but would have adhered to them under stare decisis principles.

Janus v. AFSCME Council 31



Janus v. AFSCME Council 31

- Illinois law required employees who are not members of the union to pay an “agency fee”—a portion of union dues attributable to the cost of collective bargaining activities, but not political activities. The Court upheld the constitutionality of such a law in *Abood* in 1977.
- The Court overruled *Abood* 5-4, per Alito. The state’s extraction of agency fees from non-consenting public-sector workers violates the 1st Amendment. That does not permit a state to force people to endorse ideas they find objectionable.

Masterpiece Cakeshop v. Colorado Civil Rights Commission



Masterpiece Cakeshop v. Colorado Civil Rights Commission

- Jack Phillips told a same-sex couple that he would not create a cake for their wedding because of his religious beliefs. The Colorado Civil Rights Commission and the state court rejected his First Amendment defenses.
- The Court held 7-2, per Kennedy, that the Commission's actions violated the Free Exercise Clause. The Commission showed a clear and impermissible hostility to Phillips' religious beliefs, primarily by comments at the hearing.
- Ginsburg, joined by Sotomayor, dissented. They found no hostility to religion at the Commission.

Oil States Energy Services, LLC v. Greene's Energy Group, LLC



Oil States Energy Services, LLC v. Greene's Energy Group, LLC

- The American Invents Act established a new way to challenge patents—“inter partes review.” In an IPR, an agency—the Patent Trial and Appeal Board—determines the validity of a previously issued patent.
- Oil States argued that the validity of a patent must be tried before a jury in an Article III court.
- The Court upheld the statute 7-2, per Thomas. Congress may assign adjudication of public rights to an entity other than an Article III Court.
- Gorsuch (joined by Roberts) dissented, complaining that AIA allows property rights to be stripped by political appointees.

Trump v. Hawaii



Trump v. Hawaii

- The President's third "travel ban" order restricted entry from eight nations, six of them majority Muslim, after a "worldwide review." The order also included provisions for exceptions.
- The Court upheld the order 5-4, per Roberts. The Court held that the INA gave the President broad discretion to restrict the entry of aliens. The order did not violate the Establishment Clause because it was neutral on its face and was "plausibly related" to protecting the country instead of religious animus.
- Breyer (joined by Kagan) dissented narrowly, questioning whether the exceptions were illusory. Sotomayor (joined by Ginsburg) dissented broadly.



Preview of the 2018 Term

Fourth Estate Public Benefit Corp. v. Wall-street.com

- Whether copyright registration is made when the copyright holder delivers the application to the Copyright Office or only once the Copyright Office acts on the application.

Franchise Tax Board of Calif. v. Hyatt

- Whether *Nevada v. Hall*, which permits a sovereign state to be haled into another state's courts without its consent, should be overruled.

Frank v. Gaos

- Whether, or in what circumstances, a cy pres award of class action proceeds that provides no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be “fair, reasonable, and adequate.”

Helsinn Healthcare v. Teva

- Whether, under the America Invents Act, an inventor's sale of an invention to a third party that is obligated to keep the invention confidential qualifies as prior art for purposes of determining the patentability of the invention.



Adam H. Charnes
Partner
t 214.922.7106
acharnes@kilpatricktownsend.com



Christin J. Jones
Senior Associate
t 214.922.7148
cjones@kilpatricktownsend.com
