SIZING UP the SUPREME COURT TERM

FACULTY DISCUSS KEY CASES FROM 2021 TERM

THE U.S. SUPREME COURT

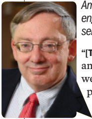
reshaped constitutional law regarding abortion, firearms and religious liberty during its most recent term, which ended June 30.

THE JUSTICES CITED UVA LAW PROFESSORS 12 TIMES:

Saikrishna Prakash had four citations; Caleb Nelson had three; and John Harrison, Douglas Laycock, Frederick Schauer, Bobbie Spellman and Ann Woolhandler each had one citation.

KENNEDY v. BREMERTON SCHOOL DISTRICT

HOLDING: A high school football coach who led prayers with students during and after school games was fired; he argued his prayers were protected speech. The court ruled the First Amendment protects individuals engaging in a personal religious observance from government reprisal.



"[THE PRAYERS] WEREN'T QUIET and they weren't isolated. They were leading the students in prayer, and to say that's okay undermines all the school prayer cases."

—DOUGLAS LAYCOCK (NPR)

MORGAN v. SUNDANCE INC.

HOLDING: An employee suing Sundance argued that the company's delay in a complaint regarding overtime pay constituted a waiver of its right to enforce an arbitration agreement under the Federal Arbitration Act. The justices ruled that federal courts may not adopt an arbitration-specific rule conditioning a waiver of the right to arbitrate on a showing of prejudice.

"THE SUPREME COURT has signaled so strongly that it wants to remove obstacles to arbitration and make sure that arbitration agreements get enforced, and they've spoken very broadly about this 'strong federal policy favoring arbitration.' I think they can all be forgiven for thinking that the court really meant that."

—RIP VERKERKE (LAW360)

BECERRA v. EMPIRE HEALTH FOUNDATION

HOLDING: The court upheld a U.S. Department of Health and Human Services regulation that limits the additional compensation hospitals receive when they treat low-income patients.

"WHILE BILLIONS OF DOLLARS WERE AT STAKE, the case is more important for what it did not do. Court watchers were worried that the conservative majority would use this case to overturn the longstanding *Chevron* doctrine established by *Chevron U.S.A. v. Natural Resources Defense Council Inc.*, the most-cited administrative law decision of all time. *Chevron* held that courts should defer to agencies when a statute is ambiguous. Conservative judges have long argued against deferring to agency experts. However, in this case, the majority and the dissent do not cite *Chevron*. They simply hold that the statute is not ambiguous—even though they come to opposite conclusions. I suspect the liberal judges in the majority would have preferred to rely on *Chevron* but did not do so in order to attract Justices [Clarence] Thomas and [Amy Coney] Barrett [to the majority], both of whom have criticized *Chevron*."

—CRAIG KONNOTH

CUMMINGS v. PREMIER REHAB KELLER

HOLDING: A legally blind and deaf woman was denied an American Sign Language interpreter by a physical therapist she was working with. The court held that Cummings could not recover emotional-distress damages for the violation of certain federal antidiscrimination laws.

"THERE IS SOME AMBIGUITY about whether *Cummings* indeed relied on wholly 'implied' causes of action, as distinct from causes of action that Congress later 'ratified.' Nonetheless, Congress' silence about the precise remedies available under the Rehabilitation Act and the ACA figured into the majority's reasoning in addition to featuring in [Brett] Kavanaugh's concurrence. [John] Roberts, writing for the majority, expressed the concern that Cummings' position about the scope of remedies 'risks arrogating legislative power.'"

—RACHEL BAYEFSKY (SCOTUSBLOG)

DOBBS v. JACKSON WOMEN'S HEALTH ORGANIZATION

HOLDING: Following a challenge to Mississippi's ban on abortions after 15 weeks, the court held the Constitution does not confer a right to abortion, overruling Roe v. Wade *and* Planned Parenthood of Southeastern Pennsylvania v. Casey.

"IT CREATES CONFUSION for anyone seeking an abortion, friends and family members of those seeking an abortion, and health care professionals seeking guidance on what kind of treatment they can provide—not just for abortion care—but for reproductive health care more generally."

—NAOMI CAHN (THE HILL)

NEW YORK STATE RIFLE & PISTOL ASSOCIATION INC. v. BRUEN

HOLDING: New York's requirement that applicants show proper cause for unrestricted concealed-carry gun licenses violates the 14th Amendment "by preventing law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms in public for self-defense."

"THE OUTCOME OF BRUEN IS UNSURPRISING: 'May issue' permitting regimes can be problematic, and by contrast, the court made clear in its opinion that the more common 'shall issue' regimes are generally permissible. The real impact of this decision is the solely history-focused methodology it prescribes. This will make the job of advocates and lower courts even more difficult as they try to make sense of an inconsistent and unclear historical record [on gun laws and rulings]. It also likely means that innovative new ways of addressing gun violence will be more difficult to support in the face of challenges."

—SARAH SHALF '01

FEDERAL ELECTION COMMISSION v. TED CRUZ FOR SENATE

HOLDING: Section 304 of the Bipartisan Campaign Reform Act of 2002, which limits the amount of post-election contributions that may be used to repay a candidate who lends money to his own campaign, violates the First Amendment rights of candidates and campaigns.

"THESE CONTRIBUTIONS are especially likely to lead to corruption for two reasons. First, the contribution is used to repay the campaign's debt to the candidate and thus the money ultimately goes into the candidate's own pocket, unlike other campaign contributions. Second, because these contributions are made after the election, the donor knows, rather than merely hopes, that the candidate is in a position to confer benefits. The opinion was also noteworthy for its blurring of the line between a contribution and an expenditure, emphasizing that the limit on repayment via contribution after the election will deter candidates from spending their own money on their campaigns."

—DEBORAH HELLMAN

WEST VIRGINIA v. ENVIRONMENTAL PROTECTION AGENCY

HOLDING: In the Clean Air Act, Congress did not grant the Environmental Protection Agency the authority to devise emissions caps based on the generation-shifting approach the agency took in the Clean Power Plan.

"IN *WEST VIRGINIA V. EPA*, the court explained that it is generally the job of Congress, not administrative agencies, to make major decisions about pressing economic and social questions. In the absence of clear congressional delegation of power, the court declined to find that Congress had authorized the EPA to adopt a sweeping regulatory scheme under the Clean Air Act. Today's holding will be understood by many as a victory for the principles of separation of powers and the bounded authority of the administrative state."

—JULIA MAHONEY

FBI v. FAZAGA

HOLDING: Attendees at an Islamic Center sued for discrimination, alleging that a surveillance program targeted them because of their Muslim religious identity. The federal government sought to dismiss the case under the state secrets privilege. The question that rose to the Supreme Court was whether Section 1806(f) of the Foreign Intelligence Surveillance Act of 1978—which provides a procedure for lower courts to consider the legality of electronic surveillance conducted under FISA and order forms of relief—displaces the state secrets privilege. The court said no, siding with the FBI.

"A UNANIMOUS SUPREME COURT ruled that the special procedure under the 1978 Foreign Intelligence Surveillance Act for determining the legality of electronic surveillance had no bearing on the state-secrets privilege, which entitles the government to withhold state and military secrets from judicial proceedings. The privilege rests on threats to national security, not the legality of the collection. It reversed the Ninth Circuit, which had held that the government could not invoke the privilege with respect to electronic surveillance covered by the 1978 Act."

—PAUL B. STEPHAN '77

—Compiled by Mike Fox