



25TH ANNIVERSARY
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Friday, November 22, 2019



The Contra Costa County Bar Association
proudly presents...

Luncheon Keynote Speaker

Erwin Chemerinsky,
Dean, UC Berkeley School of Law

***AN AMAZING TIME IN THE
U.S. SUPREME COURT***

Erwin Chemerinsky



Erwin Chemerinsky became the 13th Dean of Berkeley Law on July 1, 2017, when he joined the faculty as the Jesse H. Choper Distinguished Professor of Law.

Prior to assuming this position, from 2008-2017, he was the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at University of California, Irvine School of Law, with a joint appointment in Political Science. Before that he was the Alston and Bird Professor of Law and Political Science at Duke University from 2004-2008, and from 1983-2004 was a professor at the University of Southern California Law School, including as the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science. He also has taught at DePaul College of Law and UCLA Law School.

He is the author of eleven books, including leading casebooks and treatises about constitutional law, criminal procedure, and federal jurisdiction. His most recent books are, *We the People: A Progressive Reading of the Constitution for the Twenty-First Century* (Picador Macmillan) published in November 2018, and two books published by Yale University Press in 2017, *Closing the Courthouse Doors: How Your Constitutional Rights Became Unenforceable* and *Free Speech on Campus* (with Howard Gillman).

He also is the author of more than 200 law review articles. He writes a regular column for the Sacramento Bee, monthly columns for the ABA Journal and the Daily Journal, and frequent op-eds in newspapers across the country. He frequently argues appellate cases, including in the United States Supreme Court.

In 2016, he was named a fellow of the American Academy of Arts and Sciences. In 2017, National Jurist magazine again named Dean Chemerinsky as the most influential person in legal education in the United States.

EDUCATION

B.S., Northwestern University (1975)

J.D., Harvard Law School (1978)

**An Amazing Time in the Supreme Court
Contra Costa County Bar Association
November 22, 2019**

Erwin Chemerinsky
Dean and Jesse H. Choper Distinguished Professor of Law
University of California, Berkeley School of Law

October Term 2018

I. Criminal cases

A. Fourth Amendment

Mitchell v. Wisconsin, 139 S.Ct. 2525 (2019). There are almost always exigent circumstances that justify the police taking blood from an unconscious motorist without a warrant.

B. Double jeopardy

Gamble v. United States, 139 S.Ct. 1960 (2019). The “separate sovereigns” exception to the double jeopardy clause is reaffirmed.

C. Eighth Amendment

Dunn v. Ray, 139 S.Ct. 661 (2019) (mem.) Overturning stay of execution issued by the Eleventh Circuit because of denial of clergy to a Muslim inmate at his execution.

Murphy v. Collier, 139 S.Ct. 1475 (2019) (mem.) Staying execution of Buddhist inmate who was not allowed clergy at the time of his execution.

Madison v. Alabama, 139 S.Ct. 718 (2019). The Eighth Amendment may permit executing a prisoner even if he cannot remember committing his crime, but it may prohibit executing a prisoner who suffers from dementia or another disorder rather than psychotic delusions.

Bucklew v. Precythe, 139 S.Ct. 1112 (2019). *Baze v. Rees* and *Glossip v. Gross* govern all Eighth Amendment challenges alleging that a method of execution inflicts unconstitutionally cruel pain; Russell Bucklew’s as-applied challenge to Missouri’s single-drug execution protocol -- that it would cause him severe pain because of his particular medical condition -- fails to satisfy the *Baze-Glossip* test.

D. Due process

Flowers v. Mississippi, 139 S.Ct. 2228 (2019). *Batson v. Kentucky* was violated when the same prosecutor struck 41 of 42 African-American jurors over six trials involving the same defendant.

United States v. Davis, 139 S.Ct. 2319 (2019). Title 18 U. S. C. §924(c)(3)(B), which provides enhanced penalties for using a firearm during a “crime of violence,” is unconstitutionally vague.

E. Sixth Amendment

United States v. Haymond, 139 S.Ct. 2369 (2019). The U.S. Court of Appeals for the 10th Circuit was correct in holding “unconstitutional and unenforceable” the portions of 18 U.S.C. § 3583(k) that required the district court to revoke the respondent’s 10-year term of supervised release, and to impose five years of reimprisonment, following its finding by a preponderance of the evidence that the respondent violated the conditions of his release by knowingly possessing child pornography.

Garza v. Idaho, 139 S.Ct. 738 (2019). The presumption of prejudice for Sixth Amendment purposes recognized in *Roe v. Flores-Ortega* applies regardless of whether a defendant has signed an appeal waiver.

F. Statutory issues

Rehaif v. United States, 139 S.Ct. 2191 (2019). In a prosecution under 18 U. S. C. §922(g) and §924(a)(2), the government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.

II. First Amendment

A. Speech

Iancu v. Brunetti, 139 S.Ct. 2294 (2019). Section 2(a) of the Lanham Act’s prohibition on the federal registration of “immoral” or “scandalous” marks is facially invalid under the free speech clause of the First Amendment.

Nieves v. Bartlett, 139 S.Ct. 1715 (2019). Probable cause generally defeats a First Amendment retaliatory-arrest claim under 42 U.S.C. § 1983.

Manhattan Community Access Corp. v. Halleck, 139 S.Ct. 1921 (2019). Manhattan Community Access Corp., a private nonprofit corporation designated by New York City to operate the public access channels on the Manhattan cable system owned by Time Warner (now Charter), is not a state actor subject to the First Amendment.

B. Religion

American Legion v. American Humanist Association; Maryland-National Capital Park and Planning Commission v. American Humanist Association, 139 S.Ct 2067 (2019). The establishment clause does not require the removal or destruction of a 93-year-old memorial to American servicemen who died in World War I solely because the memorial bears the shape of a cross.

III. Voting rights

Rucho v. League of Women Voters, 139 S.Ct. 2484 (2019). Challenges to partisan gerrymandering are non-justiciable political questions.

IV. Federalism

Timbs v. Indiana, 139 S.Ct. 682 (2019). The Eighth Amendment's excessive fines clause is incorporated against the states under the Fourteenth Amendment.

Tennessee Wine & Spirits Retailers Association v. Blair, 139 S.Ct. 2449 (2019). A state law that regulates liquor sales by granting retail or wholesale licenses only to individuals or entities that have resided in-state for a specified time violates the dormant commerce clause.

Franchise Tax Board of California v. Hyatt, 139 S.Ct. 1485 (2019). *Nevada v. Hall*, which permitted a sovereign state to be haled into another state's courts without its consent, is overruled.

Knick v. Township of Scott, Pennsylvania, 139 S.Ct. 2162 (2019). *Williamson County Regional Planning Commission v. Hamilton Bank*, which required property owners to exhaust state court remedies to ripen federal takings claims, is overruled.

V. Administrative law

Gundy v. United States, 139 S.Ct. 2116 (2019). The federal Sex Offender Registration and Notification Act's delegation of authority to the attorney general to issue regulations under 42 U.S.C. § 16913 does not violate the nondelegation doctrine.

Kisor v. Wilkie, 139 S.Ct. 2400 (2019) The Supreme Court does not overrule *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.*, which direct courts to defer to an agency's reasonable interpretation of its own ambiguous regulation.

Department of Commerce v. New York, 139 S.Ct. 2551 (2019). The secretary of the Department of Commerce did not violate the enumeration clause or the Census Act in deciding to reinstate a citizenship question on the 2020 census questionnaire, but the district court was warranted in remanding the case back to the agency where the evidence tells a story that does not match the secretary's explanation for his decision.

VI. Civil rights

Fort Bend County, Texas v. Davis, 139 S.Ct. 1843 (2019). Title VII's administrative-exhaustion requirement is not a jurisdictional prerequisite to suit; it is a waivable claim-processing rule.

McDonough v. Smith, 139 S.Ct. 2149 (2019). The statute of limitations for Edward McDonough's 42 U. S. C. §1983 fabricated-evidence claim against his prosecutor began to run

when the criminal proceedings against him terminated in his favor – that is, when he was acquitted at the end of his second trial.

October Term 2019

I. Abortion rights

June Medical Services LLC v. Gee, 905 F.3d 787 (5th Cir. 2018). Whether the U.S. Court of Appeals for the 5th Circuit’s decision upholding Louisiana’s law requiring physicians who perform abortions to have admitting privileges at a local hospital conflicts with the Supreme Court’s binding precedent in *Whole Woman’s Health v. Hellerstedt*.

Gee v. June Medical Services LLC, 905 F.3d 787 (5th Cir. 2018). (1) Whether abortion providers can be presumed to have third-party standing to challenge health and safety regulations on behalf of their patients absent a “close” relationship with their patients and a “hindrance” to their patients’ ability to sue on their own behalf; and (2) whether objections to prudential standing are waivable – per the U.S. Courts of Appeals for the 4th, 5th, 7th, 9th, 10th and Federal Circuits – or non-waivable per the U.S. Courts of Appeals for the D.C., 2nd, and 6th Circuits.

II. Civil Rights Litigation

A. Employment discrimination

Zarda v. Altitude Express, Inc., 883 F.3d 100 (2nd Cir. 2018) (en banc). Consolidated with *Bostock v. Clayton County, Georgia*, 723 Fed.Appx. 964 (11th Cir. 2018).

Whether the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), against employment discrimination “because of . . . sex” encompasses discrimination based on an individual’s sexual orientation.

R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission, 884 F.3d 560 (6th Cir. 2018).

Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*.

B. Section 1981

Comcast Corp. v. National Association of African American-Owned Media
National Association of African American-Owned Media v. Comcast Corp., 743 F. Appx. 106 (9th Cir. 2019).

Whether a claim of race discrimination under 42 U.S.C. § 1981 fails in the absence of but-for causation.

C. *Bivens* claims

Hernandez v. Mesa, 885 F.3d 811 (5th Cir. 2018).

Whether, when the plaintiffs plausibly allege that a rogue federal law-enforcement officer violated clearly established Fourth and Fifth amendment rights for which there is no alternative

legal remedy, the federal courts can and should recognize a damages claim under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.

III. Criminal cases

Kahler v. Kansas, 410 P.3d 105 (Kansas 2018).

Whether the Eighth and 14th Amendments permit a state to abolish the insanity defense.

Ramos v. Louisiana, 31 So.3d 44 (La. Ct. App. 2018).

Whether the 14th Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict.

Kansas v. Glover, 422 P.3d 64 (Kansas 2018).

Whether, for purposes of an investigative stop under the Fourth Amendment, it is reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle absent any information to the contrary.

IV. Deferred Action for Childhood Arrivals

Department of Homeland Security v. Regents of the University of California, 908 F.3d 476 (9th Cir. 2018); *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 279–81 (E.D.N.Y. 2018); *Trump v. NAACP*, 298 F.Supp.3d 209 (D.D.C. 2018).

(1) Whether the Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals policy is judicially reviewable; and (2) whether DHS's decision to wind down the DACA policy is lawful.

V. Free exercise of religion

Espinoza v. Mont. Dep't of Rev., 393 Mont. 446 (2018)

Whether it violates the religion clauses or the equal protection clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools.

VI. Second Amendment

New York State Rifle and Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242 (2d Cir. 2015).

Whether New York City's ban on transporting a licensed, locked and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the commerce clause and the constitutional right to travel.

VII. Separation of powers

Sheila Law LLC v. Consumer Financial Protection Board, 923 F.3d 680 (9th Cir. 2019).

(1) Whether the vesting of substantial executive authority in the Consumer Financial Protection Bureau, an independent agency led by a single director, violates the separation of powers; and

(2) whether, if the Consumer Financial Protection Bureau is found unconstitutional on the basis of the separation of powers, 12 U.S.C. §5491(c)(3) can be severed from the Dodd-Frank Act.

VIII. Sovereign immunity.

Allen v. Cooper, 895 F.3d 337 (4th Cir. 2018). Whether Congress validly abrogated state sovereign immunity via the Copyright Remedy Clarification Act in providing remedies for authors of original expression whose federal copyrights are infringed by states.