

Virgin Islands Conference

January 20, 2015

Erwin Chemerinsky
Dean and Distinguished Professor of Law
Raymond Pryke Professor of First Amendment Law
University of California, Irvine School of Law

I. Criminal Procedure

A. Fourth Amendment

Fernandez v. California, 134 S.Ct. 1126 (2014). Under Georgia v. Randolph, a defendant must be personally present and objecting when police officers ask a co-tenant for consent to conduct a warrantless search.

Navarette v. California, 134 S.Ct. 1683 (2014). The Fourth Amendment does not require an officer who receives an anonymous tip regarding a drunken or reckless driver to corroborate dangerous driving before stopping the vehicle.

Riley v. California, 134 S.Ct. 2473 (2014). The contents of a cell phone cannot be searched as part of a search incident to arrest without a warrant unless there are exigent circumstances.

Heien v. North Carolina, 135 S.Ct. ____ (2014). The Fourth Amendment is not violated when a police officer makes a mistake of law to justify a traffic stop.

Rodriguez v. United States, 741 F.3d 905 (8th Cir. 2013), *cert. granted*, 135 S.Ct. 43 (2014). Whether an officer may extend an already completed traffic stop for a canine sniff without reasonable suspicion or other lawful justification.

City of Los Angeles v. Patel, *cert. granted*, 738 F.3d 1058 (9th Cir. 2013), *cert. granted*, 135 S.Ct. ____ (October 20, 2014). (1) Whether facial challenges to ordinances and statutes are permitted under the Fourth Amendment; and (2) whether a hotel has an expectation of privacy under the Fourth Amendment in a hotel guest registry where the guest-supplied information is mandated by law and an ordinance authorizes the police to inspect the registry, and if so, whether the ordinance is facially unconstitutional under the Fourth Amendment unless it expressly provides for pre-compliance judicial review before the police can inspect the registry.

B. Confrontation clause

Ohio v. Clark, 137 Ohio St.3d 346, 2013 Ohio 4731 (2013), *cert. granted* 135 S.Ct. ____ (2014). (1) Whether an individual's obligation to report suspected child abuse makes that individual an agent of law enforcement for purposes of the Confrontation Clause; and (2) whether a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause.

II. First Amendment

A. Freedom of Speech

McCutcheon v. Federal Election Commission, 134 S.Ct. 1434 (2014). The aggregate contribution limits of the Bipartisan Campaign Finance Reform Act -- an individual contributor cannot give more than \$46,200 to candidates or their authorized agents or more than \$70,800 to anyone else per two year election cycle (and within the \$70,800 limit a person cannot contribute more than \$30,800 per calendar year to a national party committee) -- violate the First Amendment.

McCullen v. Coakley, 134 S.Ct. 2518 (2014). The First Amendment is violated by a Massachusetts law which makes it a crime for speakers other than clinic "employees or agents . . . acting within the scope of their employment" to "enter or remain on a public way or sidewalk" within 35 feet of an entrance, exit, or driveway of a "reproductive health care facility."

Elonis v. United States, 730 F.3d 321 (3d Cir. 2013), *cert. granted*, 134 S.Ct. 2819 (2014). (1) Whether, consistent with the First Amendment and *Virginia v. Black*, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten, as required by the Ninth Circuit and the supreme courts of Massachusetts, Rhode Island, and Vermont; or whether it is enough to show that a "reasonable person" would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort; and (2) whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten.

Reed v. Town of Gilbert, Arizona, 707 F.3d 1057 (9th Cir. 2013), *cert. granted*, 134 S.Ct. 2900 (2013). Whether the Town of Gilbert's mere assertion that its sign code lacks a discriminatory motive renders its facially content-based sign code content-neutral and justifies the code's differential treatment of petitioners' religious signs.

Williams-Yulee v. Florida State Bar, 138 So.3d 379 (Fla. 2013), *cert. granted*, 135 S.Ct. 44 (2014). Whether a rule of judicial conduct that prohibits candidates for judicial office from personally soliciting campaign funds violates the First Amendment.

B. Religion

Town of Greece v. Galloway, 134 S.Ct. 1811 (2014). A Town Board does not violate the Establishment Clause if over a long period virtually every meeting is begun with an explicitly Christian prayer.

Burwell v. Hobby Lobby, 134 S.Ct. 2751 (2014). The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb et seq., which provides that the government “shall not substantially burden a person’s exercise of religion” unless that burden is the least restrictive means to further a compelling governmental interest, is violated by a requirement that closely held for-profit corporations that provide insurance to employees must include contraceptive coverage for women.

III. Civil rights litigation

A. Qualified immunity

Plumhoff v. Rickard, 134 S.Ct. 2012 (2014). Police did not violate the Fourth Amendment through the use of deadly force to stop a high speed chase and may continue to shoot until the car they are chasing has been stopped. Also, officers were protected by qualified immunity.

Wood v. Moss, 134 S.Ct. 2056 (2014). Secret service agents were protected by qualified immunity when they moved anti-Bush demonstrators further and allowed pro-Bush demonstrators to be closer to the President.

Lane v. Franks, 134 S.Ct. 2369 (2014). A government employee’s First Amendment rights are violated when he is fired for truthful testimony given pursuant to a subpoena, but the defendant is protected by qualified immunity.

B. Pregnancy Discrimination Act

Young v. United Parcel Service, 707 F.3d 437 (4th Cir. 2013), *cert. granted*, 134 S.Ct. 2898 (2014). Whether, and in what circumstances, the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), requires an employer that provides work accommodations to non-pregnant employees with work limitations to provide work accommodations to pregnant employees who are “similar in their ability or inability to work.”

C. Housing discrimination

Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc., 747 F.3d 275 (5th Cir. 2013), *cert. granted*, 134 S.Ct. 44 (2014). Whether disparate-impact claims are cognizable under the Fair Housing Act.

IV. Procedure

A. Personal jurisdiction

Daimler AG v. Bauman, 134 S. Ct. 746 (2014). Daimler cannot be sued in California for injuries allegedly caused by conduct of its Argentinian subsidiary when that conduct took place entirely outside of the United States.

Walden v. Fiore, 134 S. Ct. 1115 (2014). When the conduct of the defendant, a Georgia police officer, occurred entirely in Georgia, the mere fact that his conduct affected plaintiffs with connections to Nevada does not authorize jurisdiction over him in Nevada.

B. Authority of bankruptcy courts

Executive Benefits Insurance Agency v. Arkison, 134 S.Ct. 2165 (2014). De novo review by an Article III court is sufficient to permit a decision by a bankruptcy court on a state law claim.

Wellness Int'l Network, Limited v. Sharif, 727 F.3d 751 (7th Cir. 2013), *cert. granted*, 134 S.Ct. 2901 (2014). (1) Whether the presence of a subsidiary state property law issue in a 11 U.S.C. § 541 action brought against a debtor to determine whether property in the debtor's possession is property of the bankruptcy estate means that such action does not "stem[] from the bankruptcy itself" and therefore, that a bankruptcy court does not have the constitutional authority to enter a final order deciding that action; and (2) whether Article III permits the exercise of the judicial power of the United States by the bankruptcy courts on the basis of litigant consent, and if so, whether implied consent based on a litigant's conduct is sufficient to satisfy Article III.

V. Intellectual property

American Broadcasting v. Aereo, 134 S.Ct. 2498 (2014). A company "publicly performs" a copyrighted television program when it retransmits a broadcast of that program to thousands of paid subscribers over the Internet.

Petrella v. Metro-Goldwyn-Mayer, 134 S.Ct. 1962 (2014). The nonstatutory defense of laches is not available to bar remedies for civil copyright claims filed within the three-year statute of limitations prescribed by Congress, 17 U.S.C. § 507(b).

VI. The high profile cases of October Term 2014

King v. Burwell, cert. granted, 759 F.3d 358 (4th Cir. 2014), 135 S.Ct. ____ (November 7, 2014). Whether the Internal Revenue Service may permissibly promulgate regulations to extend tax-credit subsidies to coverage purchased through exchanges established by the federal government under Section 1321 of the Patient Protection and Affordable Care Act.

DeBoer v. Snyder, ____ F.3d ____ (6th Cir. 2014), to be considered at Conference of January 9, 2015. Whether a state violates the Fourteenth Amendment to the U.S. Constitution by denying same-sex couples the right to marry.