

Supreme Court: October Term 2018
Fifth Circuit Judicial Conference
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Erwin Chemerinsky
Dean and Jesse H. Choper Distinguished Professor of Law
University of California, Berkeley School of Law

I. Criminal cases

A. Fourth Amendment

Mitchell v. Wisconsin, 914 N.W.2d 151 (Wis. 2018), *cert. granted*, 139 S.Ct. 915 (2019). Whether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement.

B. Double jeopardy

Gamble v. United States, 694 F. App'x. 750 (11th Cir. 2017), *cert. granted*, 138 S.Ct. 2707 (2018). Whether the Supreme Court should overrule the “separate sovereigns” exception to the double jeopardy clause.

C. Eighth Amendment

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, 240 So.3d 1082 (Miss. 2018), *cert. granted*, 139 S.Ct. 451 (2018). Whether the Mississippi Supreme Court erred in how it applied *Batson v. Kentucky* in this case.

II. First Amendment

A. Speech

Iancu v. Brunetti, 877 F.3d 1330 (Fed. Cir. 2018), *cert. granted*, 139 S.Ct. 782 (2019). Whether 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, 712 Fed. App’x 613 (9th Cir. 2017), *cert. granted*, 138 S.Ct. 2709 (2018). Whether probable cause defeats a First Amendment retaliatory-arrest claim under 42 U.S.C. § 1983.

B. Religion

American Legion v. American Humanist Association; Maryland-National Capital Park and Planning Commission v. American Humanist Association, 874 F.3d 195 (4th Cir. 2018), *cert. granted*, 139 S.Ct. 451 (2018). Whether the establishment clause requires 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. Common Cause, 318 F. Supp. 3d 777 (M.D.N.C. 2018), *probable jurisd. noted*, 139 S.Ct. 782 (2019). (1) Whether plaintiffs have standing to press their partisan gerrymandering claims; (2) whether plaintiffs’ partisan gerrymandering claims are justiciable; and (3) whether North Carolina’s 2016 congressional map is, in fact, an unconstitutional partisan gerrymander.

Lamone v. Benisek, 2018 WL 5816831 (D.Md. 2018), *probable jurisd. noted*, 139 S.Ct. 782 (2019). In case in which the plaintiffs allege that a Maryland congressional district was gerrymandered to retaliate against them for their political views: (1) whether the various legal claims articulated by the three-judge district court are unmanageable; (2) whether the three-judge district court erred when, in granting plaintiffs’ motion for summary judgment, it resolved disputes of material fact as to multiple elements of plaintiffs’ claims, failed to view the evidence in the light most favorable to the non-moving party, and treated as “undisputed” evidence that is the subject of still-unresolved hearsay and other evidentiary objections; and (3) whether the three-judge district court abused its discretion in entering an injunction despite the plaintiffs’ years-long delay in seeking injunctive relief, rendering the remedy applicable to at most one election before the next decennial census necessitates another redistricting.

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, 883 F.3d 608 (6th Cir. 2018), *cert. granted*, 139 S.Ct. 53 (2018). Whether the 21st Amendment empowers states, consistent with the

dormant commerce clause, to regulate liquor sales by granting retail or wholesale licenses only to individuals or entities that have resided in-state for a specified time.

Franchise Tax Board of California v. Hyatt, 407 P.3d 717 (Nev. 2017), *cert. granted*, 138 S.Ct. 2710 (2018). Whether *Nevada v. Hall*, which permits a sovereign state to be haled into another state's courts without its consent, should be overruled.

Knick v. Township of Scott, Pennsylvania, 862 F.3d 310 (3d Cir. 2017), *cert. granted*, 138 S. Ct. 1262 (2018). (1) Whether the Supreme Court should reconsider the portion of *Williamson County Regional Planning Commission v. Hamilton Bank* that requires property owners to exhaust state court remedies to ripen federal takings claims; and (2) whether *Williamson County's* ripeness doctrine bars review of takings claims that assert that a law causes an unconstitutional taking on its face, as the U.S. Courts of Appeals for the 3rd, 6th, 9th and 10th Circuits hold, or whether facial claims are exempt from *Williamson County*, as the U.S. Courts of Appeals for the 1st, 4th and 7th Circuits hold.

V. Administrative law

Gundy v. United States, 695 F. App'x. 639 (2d Cir. 2017), *cert. granted*, 138 S. Ct. 1260 (2018). Whether 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 violates the nondelegation doctrine.

Kisor v. Wilkie, 869 F.3d 1360 (Fed. Cir. 2018), *cert. granted*, 139 S.Ct. 657 (2018). Whether the Supreme Court should 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, 2019 WL 190285, *cert. granted*, 139 S.Ct. 953 (2019). (1) Whether the district court erred in enjoining the secretary of the Department of Commerce from reinstating a question about citizenship to the 2020 decennial census on the ground that the secretary's decision violated the Administrative Procedure Act, 5 U.S.C. 701 et seq; and (2) whether, in an action seeking to set aside agency action under the APA, a district court may order discovery outside the administrative record to probe the mental processes of the agency decisionmaker -- including by compelling the testimony of high-ranking executive branch officials -- without a strong showing that the decisionmaker disbelieved the objective reasons in the administrative record, irreversibly prejudged the issue, or acted on a legally forbidden basis.

VII. Civil rights

Fort Bend County, Texas v. Davis, 893 F.3d 300 (5th Cir. 2018), *cert. granted*, 139 S.Ct. 915 (2019). Whether Title VII's administrative-exhaustion requirement is a jurisdictional prerequisite to suit, as three circuits have held, or a waivable claim-processing rule, as eight circuits have held.

McDonough v. Smith, 898 F.3d 259 (2d Cir. 2018), *cert. granted*, 139 S.Ct. 915 (2019).

Whether the statute of limitations for a Section 1983 claim based on fabrication of evidence in criminal proceedings begins to run when those proceedings terminate in the defendant's favor, as the majority of circuits have held, or whether it begins to run when the defendant becomes aware of the tainted evidence and its improper use, as the U.S. Court of Appeals for the 2nd Circuit held below.