US Supreme Court Opinions Update

Thursday, May 5, 2011
8:30 a.m. – 12:00 p.m.
Edgewater Room
Fairbanks, AK
Alaska Bar Convention

CLE #2011-704 3.0 General CLE Credits

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FACULTY

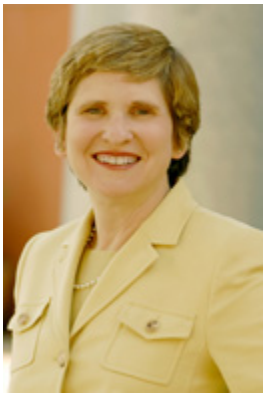
Erwin Chemerinsky, Dean and Distinguished Professor of Law, University of California, Irvine, School of Law. Prior to assuming this position in July 2008, was the Alston & Bird Professor of Law and Political Science, Duke University. Joined the Duke faculty in July 2004 after 21 years at the University of Southern California Law School, where he was the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science. Before that he was a professor at DePaul College of Law from 1980-83. Practiced law as a trial attorney, United States Department of Justice, and at Dobrovir, Oakes & Gebhardt in Washington, D.C. Received a B.S. from Northwestern University and a J.D. from Harvard Law School.

Author of six books and over 100 law review articles that have appeared in journals such as the Harvard Law Review, Michigan Law Review, University of Pennsylvania Law Review, Stanford Law Review and Yale Law Journal. Writes a regular column on the Supreme Court for California Lawyer, Los Angeles Daily Journal, and Trial Magazine, and is a frequent contributor to newspapers and other magazines. Regularly serves as a commentator on legal issues for national and local media.

In April 2005, was named by Legal Affairs as one of "the top 20 legal thinkers in America." Named by the Daily Journal in 2008 and 2009 (and many prior years) as one of the 100 most influential lawyers in California. In 2006, received the Duke University Scholar-Teacher of the Year Award. Has received many awards from educational, public interest, and civic organizations.

Frequently argues appellate cases, including in the United States Supreme Court and the United States Courts of Appeals. Testified many times before congressional and state legislative committees.

Elected by the voters in April 1997 to serve a two year term as a member of the Elected Los Angeles Charter Reform Commission. Served as Chair of the Commission which proposed a new Charter for the City which was adopted by the voters in June 1999. Also served as a member of the Governor's Task Force on Diversity in 1999-2000. In September 2000, released a report on the Los Angeles Police Department and the Rampart Scandal, which was prepared at the request of the Los Angeles Police Protective League. Served as Chair of the Mayor's Blue Ribbon Commission on City Contracting, which issued its report in February 2005.



Laurie L. Levenson is Professor of Law and the David W. Burcham Chair in Ethical Advocacy at Loyola Law School where she teaches criminal law, criminal procedure, ethics, anti-terrorism, and evidence. She served as Loyola's Associate Dean for Academic Affairs from 1996-1999. In addition to her teaching responsibilities, Professor Levenson is also the Director of the Loyola Center for Ethical Advocacy. Professor Levenson was the 2003 recipient of Professor of the Year from both Loyola Law School and the Federal Judicial Center.

Prior to joining the Loyola Law School faculty in 1989, Professor Levenson served for eight years as an Assistant United States Attorney in Los Angeles. While a

federal prosecutor, Professor Levenson tried a wide variety of federal criminal cases, including violent crimes, narcotics offenses, white collar crimes, immigration and public corruption cases. She served as Chief of the Training Section and Chief of the Criminal Appellate Section of the U.S. Attorney's Office. In 1988, she received the Attorney General's Director's Award for Superior Performance. Additionally, she received commendations from the FBI, IRS, U.S. Postal Service, and DEA.

Professor Levenson attended law school at UCLA School of Law and received her undergraduate degree from Stanford University. In law school, she was the Chief Article Editor of the Law Review. After graduation, she clerked for the Honorable Judge James Hunter, III, of the U.S. Court of Appeals for the Third Circuit.

Professor Levenson is the author of numerous books and articles, including: *California Criminal Procedure* (2010); California Criminal Law (2010), *Handbook on the Federal Rules of Criminal Procedure* (2010; *Roadmap of Criminal Law* (2008); *Police Corruption and New Models for Reform,* 35 Suffolk L. Rev. 1 (2001); *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors (*1999); *Ethics of Being a Legal Commentator,* 69 So. Cal. L. Rev. 1303 (1996); *The Future of Civil Rights Prosecutions: The Lessons of the Rodney King Trial,* 41 U.C.L.A. L. Rev. 509 (1994); and *Media Madness or Civics 101: The Lessons of "The Trial of the Century,"* 26 U.W.L.A. 57 (1995).

Professor Levenson has served as a volunteer counsel for the "Webster Commission" and as a Special Master for the Los Angeles Superior Court and United States District Court. She has served as a member of the Los Angeles County Bar Association Judicial Appointments Committee and Judiciary Committee. She was a member of two Rampart Investigation Commissions.

Professor Levenson has provided legal commentary on several high profile cases while working as a columnist for the Los Angeles Times and an expert legal consultant for CBS, NBC, ABC, CNN and NPR. She also regularly lectures on legal ethics issues. Professor Levenson currently serves on a working group studying the ABA Standards Relating to the Administration of Criminal Justice, Prosecution and Defense Standards.

She is an active member of the Los Angeles community. Professor Levenson has served on the Board of Directors for Bet Tzedek Legal Services, Levitt & Quinn Family Services, and the UCLA Hillel Advisory Committee. Professor Levenson lectures regularly throughout the country and internationally for the Federal Judicial Center, National Judicial College, international bar associations, bar review courses, community groups and legal societies.

Supreme Court Review: Civil

Alaska Conference
May 5, 2011

Erwin Chemerinsky
Dean and Distinguished Professor of Law,
University of California, Irvine, School of Law

I. Civil procedure

Krupski v. Costa Crociere SPA, 130 S.Ct. 2485 (2010). Relation back of amendment changing party or naming of party against whom claim is asserted depended on what party to be added knew or should have known, not on amending party's knowledge or timeliness in seeking to amend pleading.

AT & T Mobility v. Concepcion, 131 S.Ct. ___ (April 27, 2011). The Federal Arbitration Act preempts a California court decision that held that a class ban embedded in an arbitration clause is unenforceable.

Wal-Mart Stores, Inc. v. Dukes, 603 F.3d 571 (9th Cir. 2010), *cert. granted*, 131 S.Ct. 795 (2010). Did the certification of an employment discrimination class action involving millions of female Wal-Mart employees throughout the United States violate the Rule 23(a) threshold class certification requirements for commonality, typicality, and adequacy? May the Wal-Mart class claimants recover monetary damages in a Rule 23(b)(2) injunctive class action?

II. Due process

McDonald v. City of Chicago, 130 S.Ct. 3020 (2010). The Second Amendment is incorporated into the Fourteenth Amendment and applies to state and local governments.

III. First Amendment

A. Speech

United States v. Stevens, 130 S.Ct. 1577 (2010). A federal statute that prohibits "knowingly creat[ing], sell[ing], or possess[ing] a depiction of animal cruelty violates the free speech clause of the First Amendment.

Humanitarian Law Project v. Holder, 130 S.Ct. 2705 (2010). The federal law which makes it a crime to "knowingly provide support or resources to a foreign terrorist organization" – including "training," "expert advice or assistance", "service", and "personnel" – is not unconstitutionally vague. Independent advocacy for a group violates the statute only when done at the direction of with the coordination of a foreign group that the speaker knows to be a terrorist organization.

Christian Legal Society Chapter v. Martinez, 130 S.Ct. 2971 (2010). A law school does not violate the First Amendment if it has an "all-comers" policy that requires that officially recognized student groups be open to all students within the school.

Snyder v. Phelps, 131 S.Ct. 1207 (2011). Liability for intentional infliction of emotional distress and intrusion on to seclusion violates the First Amendment for those who held anti-gay and anti-lesbian demonstrations at funerals of those who died in the military.

Schwarzenegger v. Entertainment Merchants Ass'n, 556 F.3d 950 (9th Cir. 2009), *cert. granted*, 130 S.Ct. 2398 (2010). Whether a law prohibiting the sale or rental of violent videogames to those under 18 without parental approval violates the First Amendment.

Burough of Duryea v. Guarnieri , 364 Fed.App. 649 (3rd Cir. 2010), *cert. granted*, 131 S.Ct. 456 (2010). May a government employee bring a claim for violation of the First Amendment right to petition for speech on the job in the scope of his or her duties?

B. Religion

Salazar v. Buono, 130 S.Ct. 1803 (2010). An injunction against a cross on federal land in the Mojave Desert should be reconsidered in light of a federal statute giving the land it was located on to a private group.

Arizona Christian School Tuition Organization v. Winn, 562 F.3d 1002 (9th Cir. 2009), *cert. granted*, 130 S.Ct. 3350 (2010). Who, if anyone, has standing to challenge a state law program providing tax credits for tuition for parochial schools and does such a program violate the Establishment Clause of the First Amendment?

IV. Employment discrimination and civil rights

Lewis v. City of Chicago, 130 S.Ct. 2191 (2010). A plaintiff who does not file a timely charge challenging the adoption of an employment practice may assert a claim of disparate impact even if the lawsuit is aimed at an application of the practice. When an employer has an examination that violates Title VII's disparate impact provision, plaintiffs may wait and file charges within 300 days after the employer uses the examination results to fill specific job provisions.

Thompson v. North American Stainless, 131 S.Ct. 863 (2011). The federal law's prohibition against retaliation against those filing a complaint of employment discrimination also forbids an employer from inflicting reprisals on a third party, such as a spouse, family member, or fiancé.

Los Angeles County v. Humphries, 131 S.Ct. 447 (2011). Suing a local government for declaratory or injunctive relief requires proof of a municipal policy or custom.

Connick v. Thompson, 131 S.Ct. ___ (20110. Does failure to train subordinate attorneys impose liability under 42 U.S.C. §1983 upon a district attorney's office fir a prosecutor's deliberate violation of *Brady v. Maryland*, even with no history of similar violations in the office?

Sossamon v. Texas, 131 S.Ct. ___ (2011). A state government or state official cannot be sued for money damages for violating the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc.

Schwarzenegger v. Plata, 2010 WL 9900 (9th Cir. 2010), *probable jurisdiction noted*, 130 S.Ct. 3413 (2010). Does a three judge federal court have the authority to order the release of inmates as a remedy for deliberate indifference as a result of substantial prison overcrowding?

*Ashcroft v. Al-Kidd***,** 580 F.3d 349 (9th Cir. 2010), *cert. granted*, 131 S.Ct. 415 (2010). Is the Attorney General protected by immunity when sued for money damages for improperly detaining an individual under the material witness statute?

V. Federalism

United States v. Comstock, 130 S.Ct. 1949 (2010). Congress has the authority under the commerce clause and the necessary and proper clause to commit "sexually dangerous" persons after they have completed their sentences.

Bond v. United States, 581 F.3d 128 (3rd Cir. 2010), *cert. granted*, 131 S.Ct. 455 (2010). Does a criminal defendant have standing to raise a Tenth Amendment challenge to a federal criminal statute?

Alaska Bar Convention
May 5, 2011
Supreme Court Review

Professor Laurie L. Levenson
David W. Burcham Chair in Ethical Advocacy
Loyola Law School, Los Angeles

I. Criminal Procedure

A. Fourth Amendment

City of Ontario v. Quon, 130 S.Ct. 2619 (2010). A police officer's privacy rights were not violated when his text messages were read by superiors because the search was conducted in a reasonable manner.

Camreta v. Greene, 588 F.3d 1031 (9th Cir. 2010), *cert. granted,* 131 S.Ct. 456 (2010). Does the Fourth Amendment require a warrant, a court order, parental consent or exigent circumstances before law enforcement and child welfare officials may conduct a temporary seizure and interview at a public school of a child they reasonably suspect was being sexually abused by her father?

Kentucky v. King, 302 S.W.3d 649 (Ky. 2010), *cert. granted*, 131 S.Ct. 61 (2010). When may police actions themselves be the basis for creating exigent circumstances?

Davis v. United States, 598 F.3d 1259 (11th Cir. 2010), *cert. granted*, 131 S.Ct. 502 (2010). Is evidence admissible under the good-faith exception to the exclusionary rule when it is discovered during a search that was conducted in objectively reasonable reliance on existing Fourth Amendment precedent, but subsequent to the search, that precedent is overturned by the Court?

B. Fifth Amendment privilege against self-incrimination

Berghuis v. Thompkins, 130 S.Ct. 2250 (2010). Silence by a suspect is not sufficient to invoke the right to silence. The right must be invoked unambiguously. A single word is sufficient for a waiver.

J.D.B. v. North Carolina, *cert. granted*, 131 S.Ct. 502 (2010). In determining whether a statement complied with the *Miranda* requirements governing custodial interrogation, may the age of a suspect be taken into consideration in determining whether a reasonable person in the juvenile's position would have felt he was free to terminate the police questioning?

C. Sixth Amendment: Confrontation Clause

Michigan v. Bryant, 131 S.Ct. 1143 (2011). Statement to police by gravely wounded person identifying and describing of the shooter and the location of the shooting were not testimonial statements because they had a "primary purpose ... to enable police assistance to meet an ongoing emergency." Therefore, their admission at trial did not violate the Confrontation Clause.

Bullcoming v. New Mexico, 147 N.M. 487, 226 P.3d 1 (2010), *cert. granted*, 131 S.Ct. 62 (2010). Does the Confrontation Clause permit the prosecution to introduce a forensic laboratory report through the in-court testimony of a supervisor or other person who did not perform or observe the report?

D. Venue and Pretrial Publicity

Skilling v. United States , 130 S.Ct. 2896 (2010). Pretrial publicity does not deny a defendant the right to a fair trial unless there is a showing of actual prejudice.

E. Discovery and Brady Violations

Connick v. Thompson, __ S.Ct. ___, 2011 WL 1119022 (2011). Except in extraordinary circumstances, prosecutors cannot be sued under 42 U.S.C. § 1983 for single Brady violations.

F. Sentencing

Pepper v. United States**,** 131 S.Ct. 1229 (2010). In resentencing a defendant after appeal, a district court may consider evidence of the defendant's rehabilitation after the initial sentence.

Tapia v. United States, 376 Fed. Appx. 707, 2010 U.S. App. LEXIS 8269 (9th Cir. 2010), *cert. granted,* 2011 U.S. LEXIS 428 (Jan. 10, 2011). May a district court give a defendant a longer prison sentence in order to promote defendant's rehabilitation?

G. Cruel and unusual punishment

Graham v. Florida, 130 S.Ct. 2011(2010). Sentencing a juvenile to life imprisonment without parole for nonhomicide offense constitutes cruel and unusual punishment.

H. Habeas Corpus

Holland v. Florida, 130 S.Ct. 2549 (2010). Equitable tolling is permitted of the one year statute of limitations for filing habeas corpus petitions as required by the Antiterrorism and Effective Death Penalty Act.

Magwood v. Patterson, 130 S.Ct. 2788 (2010) If a federal court grants a habeas corpus petition and remands the case to state court, a subsequent habeas petition challenging the state court decision on remand is not a "second or successive petition" under the Antiterrorism and Effective Death Penalty Act. The new petition may raise any grounds, including those that could have been raised in the initial petition.

Cullen v. Pinholster, __ S.Ct. __, 2011 U.S. LEXIS 2616 (Apr. 4, 2011). Federal habeas review is limited to the record that was before the state court at the time it ruled on the merits of the claim.