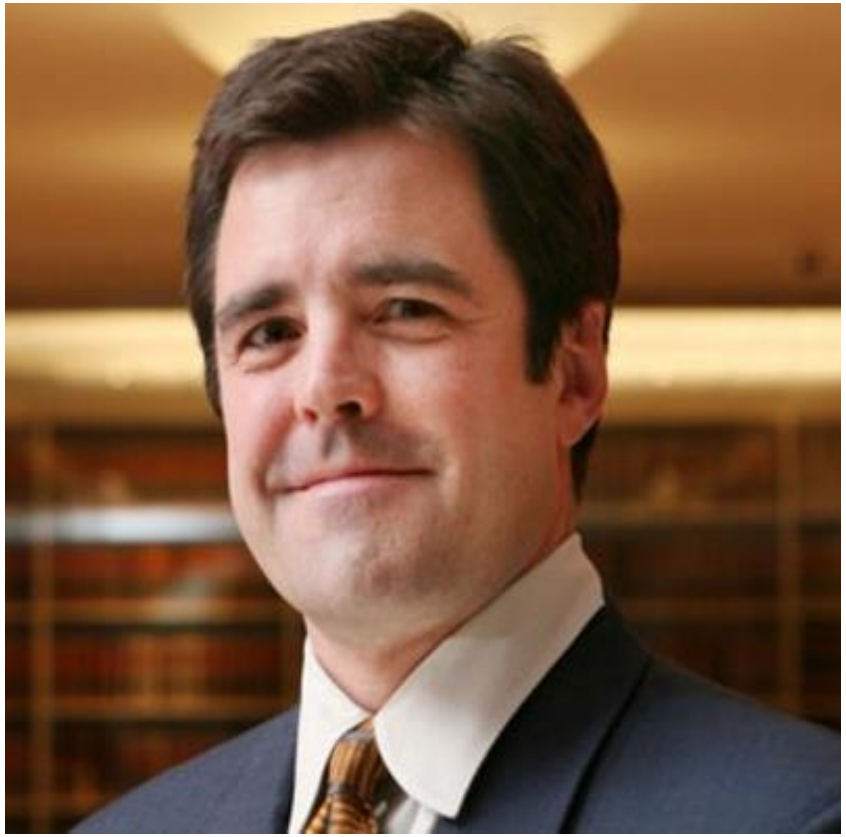
5th Circuit Bar Association Appellate Advocacy Seminar—Supreme Court Panel

TIMOTHY CROOKS

JEFFREY GREEN

Introduction



The Northwestern Law School Supreme Court Clinic

http://www.law.northwestern.edu/legalclinic/appellate/

October Term 2017: Salient Decisions

Murphy v. Nat'l Collegiate Athletic Ass'n

QP: Does a federal statute that prohibits adjustment or repeal of state-law prohibitions on private conduct – namely, the Professional and Amateur Sports Protection Act ("PASPA"), which forbids states from "authoriz[ing]" sports wagering "by law" – impermissibly commandeer the regulatory power of states in contravention of *New York v. United States*, 505 U. S. 144 (1992), and *Printz v. United States*, 521 U. S. 898 (1997)?

Murphy v. Nat'l Collegiate Athletic Ass'n

Held: To the extent PASPA purports to prohibit New Jersey from repealing its previous bans on sports gambling, it violates the anticommandeering principle implicit in the federalist structure of the Constitution and hence is unconstitutional.

-- Furthermore, the unconstitutional portions of PASPA are not severable from the rest of PASPA.

Judgment: Reversed, 6-3, in an opinion by Justice Alito on May 14, 2018. Justice Alito delivered the opinion of the court, in which Chief Justice Roberts and Justices Kennedy, Thomas, Kagan, and Gorsuch joined, and in which Justice Breyer joined as to all but Part VI–B. Justice Thomas filed a concurring opinion. Justice Breyer filed an opinion concurring in part and dissenting in part. Justice Ginsburg filed a dissenting opinion, in which Justice Sotomayor joined, and in which Justice Breyer joined in part.

South Dakota v. Wayfair

QP: Should this Court abrogate *Quill's* sales-tax-only, physical-presence requirement?

- In 1967, this Court held that the dormant commerce clause prohibits a State from requiring catalog retailers to collect sales taxes on sales into the State unless the retailer is "physically present" there. Nat'l Bellas Hess v. Dep't of Rev. of Ill., 386 U.S. 753 (1967).
- That rule, questionable even then, became an isolated outlier when Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977), held that only a "substantial nexus" was needed for other state taxes affecting interstate commerce. In Quill Corp. v. North Dakota, 504 U.S. 298 (1992), this Court was asked to correct that aberration. But despite a vigorous dissent-and the lack of a similar, "physical presence" rule for any other type of tax, id. at 317-this Court tentatively retained the requirement on stare decisis grounds.
- The legal and practical developments of the past 25 years strongly recommend revisiting that judgment. Quill has grown only more doctrinally aberrant, and has been roundly criticized by members of this Court, including Justices Kennedy, Thomas, and Gorsuch. But while its legal rationales have imploded with experience, its practical impacts have exploded with the rapid growth of online commerce. Today, States' inability to effectively collect sales tax from internet sellers imposes crushing harm on state treasuries and brick-and-mortar retailers alike. "Given these changes ... , it is unwise to delay any longer a reconsideration of the Court's holding in Quill." Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1135 (2015) (Kennedy J., concurring).

South Dakota v. Wayfair

Held: Because the physical presence rule of *Quill* is unsound and incorrect, *Quill Corp. v. North Dakota*, 504 U. S. 298, and *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U. S. 753, are overruled.

Judgment: Vacated and remanded, 5-4, in an opinion by Justice Kennedy on June 21, 2018. Justice Thomas and Justice Gorsuch filed concurring opinions. Chief Justice Roberts filed a dissenting opinion, in which Justices Breyer, Sotomayor, and Kagan joined.

Lucia v. SEC

QP: Are administrative law judges of the Securities and Exchange Commission are "Officers of the United States" within the meaning of the Appointments Clause of the United States Constitution, U.S. Const. art. II, § 2, cl. 2?

Lucia v. SEC

Held: The SEC's ALJs are "Officers of the United States" subject to the Appointments Clause.

-- They hold a "continuing" position established by law; and

-- They "exercis[e] significant authority pursuant to the laws of the United States";

-- Therefore, they must be appointed by one of the entities listed in the Appointments Clause.

Judgment: Reversed and remanded, 7-2, in an opinion by Justice Kagan on June 21, 2018. Justice Thomas filed a concurring opinion, in which Justice Gorsuch joined. Justice Breyer filed an opinion concurring in the judgment in part and dissenting in part, in which Justices Ginsburg and and Sotomayor joined as to Part III. Justice Sotomayor filed a dissenting opinion, in which Justice Ginsburg joined.

Voting Rights Cases
Husted v. A. Philip Randolph Inst.

QP: Does 52 U.S.C. § 20507 permit Ohio's list-maintenance process, which uses a registered voter's voter inactivity as a reason to send a confirmation notice to that voter under the NVRA and HAVA?

Held: The process that Ohio uses to remove voters on change-of-residence grounds does not violate the National Voter Registration Act.

Judgment: Reversed, 5-4, in an opinion by Justice Alito on June 11, 2018. Justice Thomas filed a concurring opinion. Justice Breyer filed a dissenting opinion, in which Justices Ginsburg, Sotomayor, and Kagan joined. Justice Sotomayor filed a dissenting opinion.

Voting Rights Cases
Gill v. Whitford

QP: 1. Did the district court lack jurisdiction over this case because Plaintiffs have no standing to bring their statewide partisan-gerrymandering claims?

2. Did the district court lack jurisdiction over this case because statewide partisan-gerrymandering claims are nonjusticiable?

3. Did Plaintiffs fail to state a claim on which relief can be granted because they failed to articulate a "limited and precise" standard, Vieth v. Jubelirer, 541 U.S. 267, 306, 311 (2004) (Kennedy, J., concurring in the judgment)?

4. Are Defendants entitled to judgment because Act 43 complies with traditional redistricting principles and is otherwise unobjectionable?

5. Are Defendants entitled, at the very minimum, to a remand so that they can present evidence under a fairly noticed legal standard?

Held: Plaintiffs -- Wisconsin Democratic voters who rested their claim of unconstitutional partisan gerrymandering on statewide injury -- have failed to demonstrate Article III standing.

Judgment: Vacated and remanded, 9-0, in an opinion by Chief Justice Roberts on June 18, 2018. Thomas and Gorsuch joined the opinion except as to Part III. Justice Kagan filed a concurring opinion, in which Justices Ginsburg, Breyer, and Sotomayor joined. Justice Thomas filed an opinion concurring in part and concurring in the judgment, in which Justice Gorsuch joined.

Janus v. American Fed. of State, County, and Municipal Employees, Council 31

QP: Do "free rider" fees – namely, fees that public-sector employees are compelled to pay to a union for the union's collective bargaining and other activities on behalf of those employees, even when those employees do not choose to join the union or agree with the union's positions – violate the First Amendment?

(Should *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) – which upheld in part such "free rider" fees against a First Amendment challenge – be overruled?)

Janus v. American Fed. of State, County, and Municipal Employees, Council 31

Held: *Abood* is overruled.

-- Forcing free and independent individuals to endorse speech they find objectionable (including by compelling them to subsidize the speech of other private speakers) raises serious First Amendment concerns.

-- Neither of *Abood*'s two justifications for requiring payment of union fees meets the "exacting" scrutiny standard applicable to this challenge.

-- *Stare decisis* does not require adherence to *Abood*.

Judgment: Reversed and remanded, 5-4, in an opinion by Justice Alito on June 27, 2018. Justice Sotomayor filed a dissenting opinion. Justice Kagan filed a dissenting opinion, in which Justices Ginsburg, Breyer, and Sotomayor joined.

Janus v. American Fed. of State, County, and Municipal Employees, Council 31

"This procedure violates the First Amendment and cannot continue. Neither an agency fee nor any other payments to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay."

(Slip op. at 48)

Masterpiece Cakeshop v. Colorado Civil Rights Comm'n

No. 16-111

IN THE

Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.; AND JACK C. PHILLIPS,
Petitioners,
v.
COLORADO CIVIL RIGHTS COMMISSION;
CHARLIE CRAIG; AND DAVID MULLINS,
Respondents.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF FOR CAKE ARTISTS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

AARON M. STREETT
BENJAMIN A. GESLISON
J. MARK LITTLE
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, Texas 77002
(713) 229-1234

EVAN A. YOUNG
Counsel of Record
SAMANTHA KUHN
BAKER BOTTS L.L.P.
98 San Jacinto Boulevard
Suite 1500
Austin, Texas 78701-4078
(512) 322-2500
evan.young@bakerbotts.com

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

Masterpiece Cakeshop v. Colorado Civil Rights Comm'n

QP: Whether applying Colorado's public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

Masterpiece Cakeshop v. Colorado Civil Rights Comm'n

Held: The Colorado Civil Rights Commission's actions in assessing a cakeshop owner's reasons for declining to make a cake for a same-sex couple's wedding celebration violated the free exercise clause.

Judgment: Reversed, 7-2, in an opinion by Justice Kennedy on June 4, 2018. Justice Kagan filed a concurring opinion, in which Justice Breyer joined. Justice Gorsuch filed a concurring opinion, in which Justice Alito joined. Justice Thomas filed an opinion concurring in part and concurring in the judgment, in which Justice Gorsuch joined. Justice Ginsburg filed a dissenting opinion, in which Justice Sotomayor joined.

Sessions v. Dimaya

18 U.S.C. § 16:

The term "crime of violence" means —

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Johnson v. United States (2015)

Held that the very similar residual clause of the Armed Career Criminal Act was unconstitutionally vague

The ACCA defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that:

(i) has as an element the use, attempted use, or threatened use of physical force against the person or another; or

(ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 USC §924(c)(2)(B)

Sessions v. Dimaya

QP: Whether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague.

Held: 18 U.S.C. § 16(b) is unconstitutionally vague.

Judgment: Affirmed, 5-4, in an opinion by Justice Kagan on April 17, 2018. Justice Kagan delivered the opinion of the court with respect to Parts I, III, IV-B, and V, in which Justices Ginsburg, Breyer, Sotomayor, and Gorsuch joined, and an opinion with respects to Parts II and IV-A, in which Justices Ginsburg, Breyer, and Sotomayor joined. Justice Gorsuch filed an opinion concurring in part and concurring in the judgment. Chief Justice Roberts filed a dissenting opinion, in which Justices Kennedy, Thomas, and Alito joined. Justice Thomas filed a dissenting opinion, in which Justices Kennedy and Alito joined as to Parts I-C-2, II-A-1, and II-B.

Carpenter v. United States

QP: Whether the warrantless seizure and search of historical cell phone records revealing the location and movements of a cell phone user over the course of 127 days is permitted by the Fourth Amendment.

Carpenter v. United States

Held: The government's acquisition of Timothy Carpenter's cell-site records from his wireless carriers was a Fourth Amendment search; the government did not obtain a warrant supported by probable cause before acquiring those records.

Judgment: Reversed and remanded, 5-4, in an opinion by Chief Justice Roberts on June 22, 2018. Justice Kennedy filed a dissenting opinion, in which Justices Thomas and Alito joined. Justice Thomas filed a dissenting opinion. Justice Alito filed a dissenting opinion, in which Justice Thomas joined. Justice Gorsuch filed a dissenting opinion.

McCoy v. Louisiana

QP: Is it unconstitutional for defense counsel to concede an accused's guilt over the accused's express objection?

McCoy v. Louisiana

Held: The Sixth Amendment guarantees a defendant the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt, even when counsel's experience-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.

- Furthermore, "counsel's admission of a client's guilt over the client's express objection is error structural in kind"; therefore defendant was entitled to a new trial "without any need first to show prejudice."

Judgment: Reversed and remanded, 6-3, in an opinion by Justice Ginsburg on May 14, 2018. Justice Alito filed a dissenting opinion, in which Justices Thomas and Gorsuch joined.

October Term 2018: Coming Attractions

Lamps Plus, Inc. v. Varela

QP: Whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements.

Henry Schein, Inc. v. Archer and White Sales, Inc.

QP: Whether the Federal Arbitration Act permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless."

Knick v. Township of Scott, Pennsylvania

QP: Whether the Court should reconsider the portion of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-96 (1985), requiring property owners to exhaust state court remedies to ripen federal takings claims, as suggested by Justices of this Court? See *Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of certiorari); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 348 (2005) (Rehnquist, C.J., joined by O'Connor, Kennedy, and Thomas, JJ., concurring in judgment).

Franchise Tax Board of California v. Hyatt

QP: Should *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into another State's courts without its consent, be overruled?

Jam v. International Finance Corp.

QP: Whether the International Organizations Immunities Act—which affords international organizations the "same immunity" from suit that foreign governments have, 22 U.S.C. § 288a(b)— confers the same immunity on such organizations as foreign governments have under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-11.

Weyerhaeuser Co. v. U.S. Fish and Wildlife Service

QP: Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation. Whether an agency decision not to exclude an area from critical habitat designation because of the economic impact of designation is subject to judicial review.

Culbertson v. Berryhill

In Social Security litigation, 42 U.S.C. § 406(a) governs fees for representation in administrative proceedings, and 42 U.S.C. § 406(b) controls fees for representation in court." Section 406(b) specifies in particular that

[w]henever a court renders a judgment favorable to a claimant * * * who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee *for such representation*, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.

42 U.S.C. § 406(b)(1)(A) (emphasis added).

QP: Whether fees subject to § 406(b)'s 25-percent cap include, as the Sixth, Ninth, and Tenth Circuits hold, only fees for representation in court or, as the Fourth, Fifth, and Eleventh Circuits hold, also fees for representation before the agency.

Gamble v. United States

QP: Whether the Court should overrule the "separate sovereigns" exception to the Double Jeopardy Clause.

Gundy v. United States

QP: Does 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 violate the nondelegation doctrine?

Frank v. Gaos

QP: Whether, or in what circumstances, a *cy pres* award of class action proceeds that provides no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be "fair, reasonable, and adequate."

Grants from Long Conference

Thacker v. Tennessee Valley Authority, No. 17-1201

QP (Limited to Question 1): This Court tests the immunity of governmental "sue and be sued" entities (like the Tennessee Valley Authority) under Fed. Housing Amin. v. Burr, 309 U.S. 242 (1940). The Court has declined to borrow rules from the Federal Tort Claims Act (FTCA) to narrow that immunity. FDIC v. Meyer, 510 U.S. 471 (1994). Did the Eleventh Circuit err by using an FTCA-derived "discretionary-function exception," rather than Burr, to immunize the TVA from the plaintiffs' claims?

Home Depot U.S.A. Inc. v. Jackson, No. 17-1471

QP: Whether an original defendant to a class-action claim can remove the class action if it otherwise satisfies the jurisdictional requirements of the Class Action Fairness Act when the class action was originally asserted as a counterclaim against a co-defendant.

In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: Should this Court's holding in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U. S. 100 (1941)—that an original plaintiff may not remove a counterclaim against it—extend to third-party counterclaim defendants?

Grants from Long Conference

Azar v. Allina Health Services, No. 17-1484

QP (limited to the following question): Whether 42 U.S.C. §1395hh(a)(2) or §1395hh(a)(4) required the Department of Health and Human Services to conduct notice-and-comment rulemaking before providing the challenged instructions to a Medicare Administrator Contractor making initial determinations of payments due under Medicare.

Rimini Street Inc. v. Oracle USA Inc., No. 17-1625

QP: Whether the Copyright Act's allowance of "full costs," 17 U.S.C. § 505, to a prevailing party is limited to taxable costs under 28 U.S.C. §§ 1920 and 1821, as the U.S. Courts of Appeals for the 8th and 11th Circuits have held, or or also authorizes non-taxable costs, as the Ninth Circuit holds.

Tennessee Wine & Spirits Retailers Association v. Byrd, No. 18-96

QP: 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 entitles that have resided in-state for a specified time.

Questions and Answers