SUPREME COURT REPORT*

*General William K. Suter***

I. INTRODUCTION

Thank you all very much for giving me this opportunity. I was last here in 2002 with my wife, Jeanie, when I gave the graduation address at this school. I pulled up my notes, and I want to quote something, just one paragraph, of what I said back in 2002. I said:

> I served with several Texas Tech Law School graduates in the Army and they were excellent representatives of your school. One of them, Major General Walter Huffman, a former Judge Advocate General of the Army, was one of the most outstanding lawyers I have ever known. He is also a gifted leader and a man of great character and integrity.

Well, my observations were pretty accurate. Not long thereafter, not because of me but because of him and his accomplishments and his potential, he became your remarkable and successful dean. Walt and Anne are the greatest. But you all knew that; I didn't have to tell you. It's a great honor, Walt, to come down and stand here after all the years we've know each other and give a lecture that's in your honor. Thank you very much for allowing me to do this.

While I'm saying that, two quick things: I know your new dean quite well, Darby Dickerson. I've known her for a number of years. She's going to be a

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** Clerk of the United States Supreme Court.

great dean out here, and I'm sure she's going to carry on the same traditions and serve as your dean with great distinction.

Now, I call Walt a great American. Whenever I say that term, "great American," I really mean it. But it reminds me of something that happened a number of years ago. I was a staff judge advocate, a lieutenant colonel, of the 101st Airborne Division down in Fort Campbell, Kentucky. That's pretty much a rock-and-roll outfit. One of my neighbors and fellow officers was then-Colonel Colin Powell, a very fine leader. And so one evening—it's a very rural area—in one of the local towns, a little suburb out there of nonsuburbs, a little town of about 1,000 people, the Rotary Club invited me out to speak.

So Jeanie and I drive out to this little town. I think the speech was probably held at Homer's Cafe. And the Rotary Club president got up and waxed on eloquently about the many accomplishments of Lieutenant Colonel Bill Suter, and finally he ended up by saying, "And now I present to you a truly great American, Lieutenant Colonel Bill Suter." And I got up in my paratrooper outfit and gave an unforgettable, or forgettable, speech.

We're driving home that night on a country road, on the way to Fort Campbell, and the windows were down, letting some fresh air in. You don't do that much anymore, but it was driving slowly through the countryside, and I looked toward my wife and I said, "Honey, that was quite an introduction. How many great Americans do you think there really are?" She quickly responded, "One less than you think, Big Boy." It takes a great wife to put you in your place.

One spring day a number of years ago, I was in Chief Justice Rehnquist's chambers, talking with him. And he didn't make small talk. There it was pretty much state your business, get an answer, and leave. But I liked that. He didn't dicker around much with a lot of loose conversation. But he did ask me that one day, he said, "Bill, are you giving a graduation speech this year?" And I said, "Yes, Chief, I am," and I told him where. And he said, "Well, how long do you speak?" I said, "Chief, at graduation, twelve minutes." He looked up, and he said, "Why, that's how long I speak." He looked down. He looked back up again and said, "No one's listening anyway."

As Jonathan pointed out, only two of the Justices on the Court when I got there twenty years ago are still there—Justices Scalia and Kennedy. So that means I've worked for sixteen Justices. That's 14% of the 112 who have worked there in a little over 200 years.

The Justices have a real sense of humor. One day one of my deputy clerks was outside with the late Justice White—what a guy he was: professional football player, All-American football player—and they're watching this demonstration going on, standing there with their arms crossed. And a kid kind of broke away from the demonstration and ran up to them. This guy had purple hair and earrings in his nose and so forth—typical Washington kid. And he ran up to Justice White and my deputy and said, "Hey, do you guys work here?" And within a nanosecond, Justice White said, "He does."

Oral arguments are great fun. I have sat with the Court and listened to over 1,500 oral arguments in that hallowed courtroom. What's amazing is that almost every counsel does a superb job. You can be proud of the profession you're in, and you students, the profession that you're entering. They obey the three rules of appellate advocacy—and don't forget them: preparation, preparation, and, yep, preparation.

One time Justice Stevens asked a question, and you could tell the counsel who gave the answer, he stumbled a little, he wasn't doing very well; I could tell Justice Stevens was enjoying every minute of this because that's the answer he wanted, a nonanswer. When the poor fellow finished, Justice Scalia said, "Let's go back to that question Justice Stevens asked. Could you have answered it this way?" He gives a drop-dead beautiful, constitutional, eloquent answer. And the poor guy looks up and says, "That's exactly what I meant to say." So here are these two great minds, these two Justices, talking to each other through this hapless bowl of Jell-O that's out in front of us trying to give his answer.

The attorneys that are up there are very, very professional. And I know at a fine school like this they stress professionalism. You are professionals. You might be a hired gun, but professionalism is the word. And you're not just the member of the bar of a court, you're an officer of the court. A couple of years ago, a counsel was up, and she was arguing her case, and her opponent seated beside her was former Solicitor General Seth Waxman, under Bill Clinton, a very fine lawyer and a fine gentleman. A Justice asked a question, and the woman answering it, she, they said, "What page is that on in this brief?" Well, she started looking, and she couldn't find it. Have you ever done that? The harder you look, you're just getting frustrated. Seth, seated beside her, had the document open to the correct page, and just reached up and put it in front of her.

Now some lawyers would say, "She's your enemy, you shouldn't do that, you helped her." No, no, no. She's your friend. And you're going to be much happier in the profession of law if you consider your opponent your friend and not your enemy. I've seen it many, many times. Not too long after that, I was speaking to a group, and Justice O'Connor was in the group. And I told that story and I said, "Now, you couldn't have seen that because you're sitting on the bench." And she said, "Oh, I saw it." And she said, "That Seth Waxman is the greatest." Isn't that nice to be thought of as a professional, a Supreme Court Justice and the lowly Clerk both thinking of you in that regard?

Now, one of the significant features of the Court is consistency. We had the same Justices on board from 1994 to 2005—that's eleven years with the same crowd on the bench. That was the longest we've had the same group in 180 years. So we had consistency. In the last five years, we've had four additions—Chief Justice Roberts, Justice Alito, Justice Sotomayor, and Justice Kagan. A lot of people said to me, "Boy, I bet things are in a turmoil up there, all those new appointees." Not at all. Nothing changed. They jump on to a

moving train, they learn the rules, the procedures—they get their vote and so forth, but they've got to adapt to the way we do things. So, nothing changes as far as procedures up at the Court. We thrive on two things up there: tradition and discipline. So I guess as a former Army officer, that's one of the reasons I like it. Things start on time, and they end on time, and nobody's playing games, and nobody's playing politics. We're up there to do a job, and we get it done.

Now, during this transition of the Justices retiring and one dying and others coming on board, Justice O'Connor really showed her real strength as a jurist and also as a great American. In June of 2005, she announced her retirement. Her husband was very, very ill, she thought it was time to quit, so she announced her retirement, sold her home in Maryland, and moved back to Arizona. Okay, it's over, right?

Well, Chief Justice Rehnquist died. Judge Roberts became Chief Justice Roberts—he was going to be the junior Justice and replace Justice O'Connor. As the junior Justice, he'd have been chair of the Cafeteria Committee. Think of that. And he'd take notes at conference. Oh boy. But timing is everything, my friends. He wound up sitting in the center chair as the youngest Justice, but as the Chief Justice.

Well, as we neared the first Monday in October 2005, it was clear we weren't going to have a full court. We'd only have eight. And there was no chance Justice Alito would be confirmed in time to start the Term in October. So what did Justice O'Connor do? Unlike historically, when Justices would leave us short-handed with only eight, she came back to Washington. She had to find a place to live, get a car. She had to read 2,000 petitions in a very short time that came in over the summer and get ready for all the arguments that took place between October 2005 and January 2006, when Justice Alito was confirmed.

She got nothing extra for doing this. Actually, she got no praise except from people up there who worked for her. I just thought it was one of the most selfless things I've ever seen in my life. She came back to ensure we had nine. Now, why did she do it? I ask young people, and I get stares back. "Gee, I don't know, why'd she do it?" It was a very stressful time in her life, right? She put her nation first. We don't see much of that anymore. But you see it with her.

I wish young people would do more of studying people like Justice Sandra Day O'Connor, her life and her history and her contributions, and spend less time listening to unintelligible rap music and worshiping Hollywood airheads. Now I say that knowing that people might quote me. In fact, you will. But I don't care. I really feel that way. Study some things that really count in life.

Now, all the Justices sitting today were appellate judges before they got there, except Justice Kagan. They all came from circuit courts. Prior to the 1950s, only about a third of the Supreme Court Justices had prior judicial experience. Since that time, about two thirds have had judicial experience.

Well, the question comes up: Do Supreme Court Justices need prior judicial experience? The answer that I'll give you is one that Justice Frankfurter gave many years ago. He said, "[T]he correlation between prior judicial experience and fitness for the functions of the Supreme Court is zero."[1] So, if you're bright (which they all are) and hard-working (which they all are), you don't have to be a judge with judicial experience to sit on the Supreme Court.

The tenure before 1970 was about fifteen years. Since that time, the tenure has extended to twenty-five years. We're living longer. Justice Stevens, when he retired, he was just shy of ninety years old. If he'd stayed just one more Term, he could have exceeded the time there by Justice Holmes and the age of Justice Holmes. But Justice Stevens is sharp as a tack, alive and writing and doing many things today even though he's been retired for a couple of years.

Now, life tenure is something that people like to debate and talk about. It's always been a great factor in our American politics. Thomas Jefferson, like a lot of presidents, got mad at the Supreme Court many years ago, and he said, "That blankety-blank Supreme Court," he said, "they never retire, and they rarely die." So, he wanted to make some changes.

Now, the media, which I respect greatly, likes to classify justices using what I call the political terms of liberal and conservative.

The so-called liberals, of course, are Justices Ginsburg, Breyer, Sotomayor, and Kagan. Last Term, Justice Sotomayor and Justice Kagan voted together in about 95% of the cases.

The so-called conservatives are the Chief Justice and Justices Scalia, Thomas, and Alito. Chief Justice and Justice Alito voted together about 95% of the time.

Of course, who did I leave out? Justice Kennedy. He's sort of in the middle. He's kind of here and kind of there. I don't mean wishy-washy at all, I have great respect for him, but sometimes he's on one side and sometimes the other. It's amazing though how much consistency we have in voting.

Last Term, more than 60% of decisions were unanimous or had only one dissenting vote. There were exactly sixteen cases that were 5–4. But those are the ones that make the newspaper, of course, and you read about. In those cases, Justice Kennedy was in the majority in all but two. Term before last, I believe, there were twenty-two 5–4 decisions, and he was in the majority in every one of them. But I caution counsel, "Don't get up there and just argue to Justice Kennedy alone. You'd better argue to all nine of them while you're up there." But using labels to call a Justice conservative or liberal is pretty tricky, and I recommend that you don't do it. Again, I think that those are political terms and are not very well used in the judiciary, but sometimes we use them.

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1. William T. Coleman, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 42, 44 n.7 (1991).

Consider this case. It came down last Term. *Michigan v. Bryant*.[2] Police were dispatched to a gas station parking lot and they found a mortally wounded man laying there.[3] He said, "I was shot by Bryant at Bryant's house, and I drove myself here."[4] He then died.[5] His statement led the police to Bryant's home where they found incriminating evidence.[6] At the trial, the police testified about what the victim had told them—that Bryant had shot him.[7] Bryant was convicted.[8] The Michigan Supreme Court upheld it based on the old case of *Ohio v. Roberts*.[9] That said that if a witness is unavailable, the testimony is admissible if it's reliable.[10] Well, good. Case is over.

Well, not quite, because after that, the Supreme Court in 2004 decided a case called *Crawford v. Washington*.[11] You've studied that in criminal law. Here, a woman made statements to the police that her husband committed a crime.[12] At his trial, wonder of all wonders, this happens a lot you'll find out, she refused to make a statement.[13] Is she allowed to do that? Of course: the spousal privilege. So they had no trial; they couldn't try him. So, the police came in and testified about what she told them.[14]

The Supreme Court held that those were testimonial statements that violated the Confrontation Clause of the Sixth Amendment, and nine-to-nothing said they were not admissible statements.[15] But the Court did not define what testimonial statements really are. Okay, so we thought that the state of the law is pretty clear. If you're going to use a statement by somebody, they'd better be there to be able to be cross-examined.

Well, back to *Michigan v. Bryant*, the gas station parking lot case.[16] And that case, I thought, gosh, *Crawford v. Washington* would mean that you can't use that testimony. The man is dead; he's not available to testify.[17] The Court held 6–2, just last year, that the statements made to the police were not testimony.[18] They were to enable the police in an ongoing emergency investigation, and they weren't testimony at all.[19] So, therefore, they could be

2. Michigan v. Bryant, 131 S. Ct. 1143 (2011).
3. *Id.* at 1150.
4. *See id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *See id.* at 1152.
10. *See* Ohio v. Roberts, 448 U.S. 56, 65-66 (1980).
11. Crawford v. Washington, 541 U.S. 36 (2004).
12. *See id.* at 38-40.
13. *Id.* at 40.
14. *Id.* at 40-41.
15. *Id.* at 68-69.
16. Michigan v. Bryant, 131 S. Ct. 1143, 1150 (2011).
17. *Id.*
18. *Id.* at 1166-77.
19. *Id.* at 1166.

admitted, and they reinstated the conviction of Mr. Bryant.[20] So, his right to confrontation was not violated because these weren't testimonial statements.[21]

Now, you might say, "Why didn't they use dying declarations or something like that?" Because they didn't need to; they were relying on *Ohio v. Roberts*.[22] I see you're shaking your head—you wonder, why not? Because they didn't need to; they wish they could. Protect your record at trial. Right, Walt? Put in everything you might want to raise on appeal. They should have said, "Also, this is a dying declaration." It might have saved the case, but it lost the case—we thought. But the opinion came down in this gas station parking lot case, and they said no, that was not testimony.[23] Six-to-two, the Court said those were just statements to the police.[24] Well, who wrote that opinion? It's very pro-prosecution. Everybody agree with that? That's a pro-prosecution type of case and kind of flies in the face of *Crawford v. Washington*. It was written by Justice Sotomayor.[25] Now, she's supposed to be a liberal. So who dissented in the case on behalf of the defendant and said, "Boy, he was denied his right to confrontation"? You guessed it: Justice Scalia.[26] What this really means is, you can have these labels, and you can apply them to a Justice, but they don't stick. They're just not there. Sometimes they're different places, and you might say, "Gee, that's not the way she's supposed to vote." But they vote each case according to their own conscience and the law.

II. JURISPRUDENTIAL PHILOSOPHY OF THE COURT

Now what about the jurisprudential philosophy of the Court? Let's go back to the Rehnquist and the Roberts Courts. I'll just mention a few bottom-line results of some cases that came out of these two Courts. And the media likes to label both Courts, the Rehnquist Court and Roberts, as very, very conservative. Now here are just some bottom-line results. I won't say which Court, but of the two Courts, they've had these results:

- Upheld racial preferences in college admissions;[27]
- Struck down a Texas law making homosexual conduct between consenting adults a crime;[28]
- Upheld abortion rights that were first announced in *Roe v. Wade*;[29]

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20. *Id.* at 1167.
21. *Id.*
22. Ohio v. Roberts, 448 U.S. 56 (1980).
23. *Bryant*, 131 S. Ct. at 1167.
24. *See id.* at 1167-77.
25. *Id.* at 1150.
26. *See id.* at 1168-76 (Scalia, J., dissenting).
27. *See* Grutter v. Bollinger, 539 U.S. 306 (2003).
28. *See* Lawrence v. Texas, 539 U.S. 558 (2003).
29. Roe v. Wade, 410 U.S. 113 (1973); *see, e.g.*, Stenberg v. Carhart, 530 U.S. 914 (2000); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Hodgson v. Minnesota, 497 U.S. 417 (1990); City of

- Invalidated the all-male admissions policy at Virginia Military Institute;[30]
- Prohibited voluntary student prayer at public high school football games (another Texas case—thank you for sending us all these cases; we really enjoy them);[31]
- Prohibited imposing the death penalty for mentally retarded people[32] and for those who commit crimes while under age eighteen;[33]
- Prohibited life without parole for juveniles except in homicide cases.[34]

Now, there's no way you can say that those are conservative results. I don't call them conservative results; I just say they aren't liberal.

Let me just go over the trends of the Court in a couple of the recent years in several areas—free speech, criminal law, federalism, and a couple of business cases.

III. FREEDOM OF SPEECH

The Rehnquist and Roberts Courts, according to the commentators, and I agree with them for what it's worth, have been very active in protecting free speech. Here are two recent examples.

Snyder v. Phelps.[35] Here's one where the facts might make you mad, and I understand why. The Westboro church members protested at the funeral of a marine who was killed in Iraq.[36] They were going all over the country protesting at the funerals of our soldiers and marines who were killed in combat.[37] This one took place in Maryland.[38] The protesters were 1,000 feet from the church.[39] The signs said things like, "Thank God for Dead Soldiers."[40]

And by the way, in the media, those signs looked like they were right up against the church, right? That's what they looked like. They were 1,000 feet away.[41] That's what the record in the trial shows.[42]

Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416 (1983); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

30. *See* United States v. Virginia, 518 U.S. 515 (1996).
31. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).
32. *See* Atkins v. Virginia, 536 U.S. 304 (2002).
33. *See* Roper v. Simmons, 543 U.S. 551 (2005).
34. *See* Graham v. Florida, 130 S. Ct. 2011 (2010).
35. Snyder v. Phelps, 131 S. Ct. 1207 (2011).
36. *Id.* at 1213.
37. *See id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *See id.*

But the protesters were on public land.[43] They obeyed police instructions.[44] They made no noise.[45] They did not get near the church.[46] The signs did not refer to *this* dead marine at all.[47] And there was no violence.[48] The father of the marine never even saw these signs at the funeral until the next day he saw them on television.[49] He brought a suit for emotional distress and invasion of privacy.[50] He won a large judgment in the district court, and the Fourth Circuit reversed it on the grounds of free speech.[51]

The Supreme Court affirmed that 8–1.[52] Justice Alito dissented, but it was almost a unanimous decision.[53] Let me just read what the Chief Justice said, just one paragraph, and it sums up everything, I believe, of what the Court says about free speech. He said this:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and . . . inflict great pain. . . . [W]e cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield [the church] from tort liability for its picketing . . . .[54]

Again, you might not be too happy with it. Incidentally, the case was argued on behalf of the church by the minister's daughter,[55] who argued her first case at the Supreme Court, and she won the case so I guess she did a good job.

Now here is what I find kind of interesting: A lot of free speech interest groups applauded wildly about this free speech decision of this Court. But I find it curious that many of those groups support the prosecution of so-called "hate speech" crimes. Now, I'm a lawyer, and I try to figure out—what's the difference between hate speech and non-hate speech? If you're just saying something to somebody like, "You look like a martian," or, "I think you act like a yak driver from Eastern Mongolia"—I just picked those out of thin air—you might be offending the person, but offending somebody is not a crime as far as I know. Some speech can be a crime; you've all studied this. Communicating a threat to injure somebody, that's a crime, right?[56] But otherwise, calling

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43. *Id.*
44. *Id.*
45. *Id.*
46. *See id.*
47. *See id.* at 1216-17.
48. *Id.* at 1213.
49. *Id.* at 1213-14.
50. *Id.* at 1214.
51. *Id.*
52. *Id.* at 1212.
53. *Id.*
54. *Id.* at 1220.
55. *See id.* at 1212.
56. *See, e.g.*, Watts v. United States, 394 U.S. 705, 707-08 (1969) (per curiam).

somebody a name, it's offensive, but where's the criminality? I don't know. So far, the college speech codes haven't fared very well in the federal courts.[57] So I point that out—those groups that really like free speech, they only like some free speech and not other free speech. I think free speech is pretty wide-sweeping and covers everything except those that have been carved out by the Court: fighting words, and, again, communicating a threat, yelling "fire" in a crowded theater,[58] that sort of thing, but they're pretty easy to distinguish.

The second case I'll mention from last Term is *Brown v. Entertainment Merchants*.[59] The question presented was out of California: Does the First Amendment bar California from restricting the sale of violent video games to minors?[60] I think we'd all agree on a hand vote, at least a majority, we shouldn't be selling violent video games to minors. But then there's that pesky Free Speech Clause that comes up.

The Court held 7–2 that California cannot do that.[61] The First Amendment trumps the desire to protect children.[62] These movies, these videos, they communicate ideas and social messages.[63] Now, depictions of violence have never been subject to control.[64] Think of some depictions of violence from your childhood days: Hansel and Gretel or Snow White. You think, yeah, that's different. It's not different. There's violence all over the place. I went back and read them. At least, I Googled them. I guess I've read them to our grandchildren, maybe not, Honey, I don't know. But I looked back and said, "Ooh, boiling people in oil, that's pretty bad." But we thrive on reading that to our children at bedtime. So the violent video games fall into the same category.[65] And they're not the same thing as criminalizing obscenity.[66] Okay, enough on free speech.

IV. CRIMINAL LAW

The trend of the Court has been, I believe with a few exceptions, we have come to the end of the criminal law revolution, really started during the Warren Court, when more rights were sort of judicially created, and so on, and so

57. *See, e.g.*, Roberts v. Haragan, 346 F. Supp. 2d 853, 872-73 (N.D. Tex. 2004); UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys., 774 F. Supp. 1163, 1181 (E.D. Wis. 1991).

58. *See, e.g.*, *Watts*, 394 U.S. at 707-08; Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942); Schenck v. United States, 249 U.S. 47, 52 (1919).

59. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011).

60. *Id.* at 2732.

61. *Id.*

62. *See id.* at 2742.

63. *Id.* at 2733.

64. *See id.* at 2736.

65. *See id.* at 2738.

66. *See id.* at 2735.

forth.[67] I'm not saying what's bad or good here, right or wrong; I'm just saying they're not creating more rights for defendants in cases.

The Rehnquist Court drew a lot of bright-line rules, especially in Fourth Amendment search-and-seizure and Fifth Amendment confession cases.[68] By bright-line rules I mean easier to understand by the police and easier to understand by the lower courts when you're ruling on admissibility of evidence and confessions. So the Rehnquist Court and the Roberts Court really dwelt on the word in the Fourth Amendment that we're free from *unreasonable* searches and seizures. So they're really looking—was this search reasonable or not? So, let's look at the Court two years ago in the exclusionary rule.

A. Exclusionary Rule

In a case called *Herring v. United States*, Herring was arrested based on a warrant issued by a neighboring county.[69] He was stopped for a traffic stop.[70] Why do these guys always have a taillight out or are speeding? Every time, they do it. So he gets stopped; it's a lawful stop.[71] They did a check on him.[72] In the neighboring county, there was a warrant out for his arrest.[73] So they arrested him.[74]

In a search incident to that arrest, guess what they found in his car—they weren't holiday greeting cards—it was drugs and a gun.[75] Really, a short time later, minutes later, they got a call that said that warrant had been withdrawn; it was a mistake.[76] The withdrawal had never got in the database in the neighboring county.[77]

So it was admitted at trial.[78] The trial judge said in this case, in a federal district court, that there was a violation of the Fourth Amendment, but the exclusionary rule did not apply.[79]

The purpose of the exclusionary rule is to deter police misconduct, right? You've all studied this. Where's the police misconduct? None! There was

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67. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 498-99 (1996) (requiring police to clearly explain certain rights to a person interrogated in police custody); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (establishing the right of all indigent criminal defendants to appointed counsel).

68. *See, e.g.*, Illinois v. Perkins, 496 U.S. 292, 300 (1990) (holding that undercover law enforcement agents are not required to give *Miranda* warnings to incarcerated suspects); Florida v. Riley, 488 U.S. 445, 451-52 (1983) (holding that police officials did not need a warrant to observe an individual's property from a helicopter in public airspace).

69. *See* Herring v. United States, 555 U.S. 135, 137 (2009).

70. *See id.*

71. *See id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 138.

77. *Id.*

78. *Id.*

79. *Id.*

negligence on the part of somebody who entered data in a computer in a neighboring county.[80] This came up to the Supreme Court, and I wasn't surprised at all.

It was a 5–4 decision saying it was an unreasonable search, but the exclusionary rule did not apply.[81] The police did nothing wrong.[82] The exclusionary rule is not a right.[83] Where'd the exclusionary rule come from? It arose almost, believe it or not, a hundred years ago.[84] Who remembers what case? The Court created it out of whole cloth—*Weeks v. United States*.[85] The criminal law professor, where are you? You know it. In *Weeks v. United States*, 1914, the Supreme Court said, we're tired of these searches, of breaking down the doors and searching without any due process or any reason to do it, so the exclusionary rule was put in as a Court-made rule.[86] So if the Court can make it, I guess they can take it away. And little by little by little, it's being eroded because there's been no police misconduct in these cases.

Now, let me take it further. England and a few other civilized countries don't have the exclusionary rule,[87] and they seem fairly civilized to me over there—except for the food. Don't put that down. Maybe it's time to do away with the exclusionary rule. If it was created in 1914, maybe in 2014 the Court will boldly announce it's not there anymore, and if there's a violation of the Fourth Amendment, the only time we'll have the exclusionary rule is when the search is unreasonable. So you can write that down in your notes, 1Ls, maybe by that time—I hope I'm still the Clerk—the Court might do something like that. Or, they might not do it. But, in criminal law, a lot of changes are coming about.

B. Confessions

Let's look at confessions. A year ago, in *Maryland v. Shatzer*, Mr. Shatzer was in prison for certain convictions.[88] They had nothing to do with what we're going to talk about. The police came and interrogated him about an allegation of child molestation and sexual abuse of his son.[89] He invoked his *Miranda* right to counsel.[90] Now you all know when you say: "I'm not going to speak," the questioning has to stop right there. And *Edwards v. Arizona* says

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80. *See id.* at 138-39.
81. *Id.* at 136.
82. *See id.* at 147-48.
83. *Id.* at 141.
84. *See* Weeks v. United States, 232 U.S. 383, 398 (1914).
85. *Id.*
86. *See id.*
87. *See, e.g.*, Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 669 (1970).
88. Maryland v. Shatzer, 130 S. Ct. 1213, 1217 (2010).
89. *Id.*
90. *See id.*

it's a bright-line rule, you can't question them any more; you've got to leave them alone, get them an attorney, whatever it is.[91] Well, they did that.[92]

Three years later, a different investigator, following up on a cold case, got him—he's still back in the general prison population—got Mr. Shatzer and gave him a *Miranda* warning.[93] He waived it and made inculpatory statements.[94] Okay, what happened? In the lower courts, they said, look, the *Miranda* warning in *Edwards v. Arizona* has to end sometime, and three years is long enough.[95] The Supreme Court said nine-to-nothing that two weeks is a reasonable amount of time.[96]

It was another bright-line rule, telling the police that two weeks after you interrogate somebody, *Miranda* protections terminate—now I think if you went back every two weeks, they might find some violation, but you don't get immunity from being questioned by just saying "*Miranda*" once in your life and that's it forever.[97] I was not surprised at all by a unanimous decision by the Court. In other words, there were no conservative and liberal wings fighting each other on something that seemed really to most people to be a very common-sense approach.

C. Second Amendment

Let's look at the Second Amendment. Now, this is really not criminal law, but it's closely related—*McDonald v. Chicago*.[98] The Second Amendment, let me remind you what it says: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."[99] Not your model of clarity in writing. The comma is confusing, and that must have been about a third draft. And the history of it, in the Federalist Papers and otherwise, isn't really clear what it meant. But in a case that came out in 2008, *District of Columbia v. Heller*, the Supreme Court said, dealing with the District of Columbia's gun control laws, they said the right to bear arms in the Second Amendment is an individual right.[100] It's not connected to membership in the militia.[101] So that set the foundation. After 2008, you have a right to bear arms.[102] Now Justice Scalia's opinion went on to very clearly say that right, like other rights, has

91. *See* Edwards v. Arizona, 451 U.S. 477, 486-87 (1981).
92. *See Shatzer*, 130 S. Ct. at 1217.
93. *Id.* at 1218.
94. *Id.*
95. *See id.*
96. *See id.* at 1227.
97. *See id.*
98. McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).
99. U.S. CONST. amend. II.
100. *See* Dist. of Columbia v. Heller, 554 U.S. 570, 595 (2008).
101. *See id.* at 595-97.
102. *See id.* at 595.

limitations.[103] The governing authorities can say you can't bear arms in a school, in a church, perhaps in a bar, by a felon, by someone who's insane, by a convicted felon, I mean all these other restrictions, like restrictions on speech, can be put in, not to criminalize it, but you can have restrictions.[104] But that was D.C., which is a federal enclave. So *McDonald*, the case I mentioned to begin with, happened in Chicago.[105]

McDonald wanted to have a weapon in his home because he was afraid of the drug gangs that were breaking in and shooting people.[106] So he wanted a gun.[107] But Chicago had some of the most stringent laws in the United States saying no firearms.[108] You could possess them, but it was practically impossible—you couldn't pass all the regulations and do all the things you had to do to have a firearm.[109]

Well, when the case was argued, Mr. McDonald, who wanted to bear arms, lost in the Seventh Circuit.[110] He had two theories. First, he said that the Second Amendment we know is a right.[111] *District of Columbia v. Heller* said that.[112] Now we think it's incorporated to the states—now remember, the Bill of Rights only applies to the federal government.[113] Everybody with me here? To apply to the states, they have to be incorporated by the Supreme Court.[114] And they have been in many cases: the First Amendment, the Fourth, Fifth, Sixth, they've been incorporated to say they apply to the states.[115] But we'd never tested the Second Amendment.

So one theory was they were incorporated under the Privileges or Immunities Clause, and the second theory was they were incorporated under the Due Process Clause.[116] Well, the Court held it is a constitutional right that applies to the states.[117] It was a 5–4 decision.[118] Four justices said it is done by the Due Process Clause.[119] Justice Thomas concurred and said it is the Privileges or Immunities Clause, which gives new life to a clause that was

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103. *See id.*
104. *See id.* at 626-27.
105. McDonald v. City of Chicago, 130 S. Ct. 3020, 3025 (2010).
106. *See id.* at 3026-27.
107. *See id.*
108. *See id.*
109. *See id.*
110. NRA, Inc. v. City of Chicago, 567 F.3d 856, 860 (7th Cir. 2009), *rev'd sub nom.* McDonald v. City of Chicago, 130 S. Ct. 3020.
111. *See McDonald*, 130 S. Ct. at 3028.
112. *See* Dist. of Columbia v. Heller, 554 U.S. 570, 595 (2008).
113. *See* Barron v. City of Baltimore, 32 U.S. 243, 247, 249 (1833).
114. *See, e.g.*, *NRA*, 567 F.3d at 858.
115. Malloy v. Hogan, 378 U.S. 1, 10 (1964).
116. *McDonald*, 130 S. Ct. at 3028.
117. *Id.* at 3050.
118. *See id.* at 3025.
119. *Id.* at 3025, 3050.

struck down, I believe in 1872, in the case you studied—the *Slaughter-House Cases*.[120] Remember that?

By the way, these arcane cases and things, their names are argued all the time in the Supreme Court. You've really got to know the history of everything because if you're up there arguing, they might say, "What about *The Prize Cases*?[121] How about *The Charming Betsy*?"[122] We're going back to 1814, stuff like that, but you've got to know all that when you're arguing up in front of them. So the Court held again, yeah, it's a constitutional right.[123] Now, the reaction of many states has been to impose more stringent gun control laws. I'm just amazed. Instead of maybe saying, yeah, we recognize it's a constitutional right to bear arms and here are our regulations—can't be a felon, so on and so forth—they've imposed even tougher restrictions.

Now, I draw a parallel that's a bit delicate, and it might even be provocative—I hope not. I think those jurisdictions that are trying to prohibit people from exercising their right to bear arms, which is a Second Amendment constitutional right, are somewhat like those who stood in schoolhouse doors in the 1950s and tried to prevent children from exercising their rights guaranteed to them under *Brown v. Board of Education*.[124] A constitutional right, I think, is a constitutional right. Now, maybe I'm wrong here and maybe that parallel is not right, but I think it's there. I haven't seen anybody write about it. Maybe everybody's too timid. But they shouldn't be, I mean, a constitutional right is a constitutional right.

Incidentally, during the argument of that case, the Justices asked 102 questions. Now, figure each side gets thirty minutes. You're up there for sixty minutes. One hundred and two questions—do the math. You don't have much time to argue. You spend a lot of your time answering questions from the Justices.

V. FEDERALISM AND THE SEPARATION OF POWERS

Now let's look at federalism. The trend of the Court in recent years has been to impose some constraints on Congress, especially on its use of the Commerce Clause to legislate for us. You remember what the Commerce Clause says: Congress has the power to regulate commerce among the states.[125] You've studied that case from 1942 called *Wickard v. Filburn*.[126] That was a high-water mark of the Supreme Court approving using the Commerce Clause

120. *See id.* at 3059 (Thomas, J., concurring); Slaughter-House Cases, 83 U.S. 36 (1872).
121. The Prize Cases, 67 U.S. (2 Black) 635 (1862).
122. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).
123. *McDonald*, 130 S. Ct. at 3050.
124. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
125. *See* U.S. CONST. art. I, § 8, cl. 3.
126. Wickard v. Filburn, 317 U.S. 111 (1942).

to pass a law.[127] In that case, a poor old guy out in Kansas wanted to grow wheat in his backyard for personal consumption.[128] Have you studied that case? Give me some yeses. Okay, good, you've got a good Con Law professor. And the Supreme Court said, no, that could be controlled by the federal government even though it didn't cross state lines or anything else, because it has an effect on interstate commerce.[129] That was the trend of the Congress for many, many years. Pass any law you want on just about anything you want using, what? The Commerce Clause.

That came to a screeching halt in 1995, in a case that's not well known, called *United States v. Lopez*.[130] It came out of Texas.[131] There was a law that Congress passed, the Gun-Free School Zones Act of 1990, I believe it was.[132] It was this thick [gestures]. It had a lot of provisions. But one provision says that anyone who possesses a gun within 1,000 feet of a school, that's a federal crime.[133] Based on what? Where's the Commerce Clause? Where's the federal interest? The Constitution doesn't say anything about that, so where'd Congress get that authority? And the Court struck it down in 1995 and said Congress has no authority to do this.[134] Now, by the way, that didn't overrule any case or anything else. What could they have done with Lopez? Tried him in a state court. There would have been no *United States v. Lopez*. But they wanted to go into federal court, test the new law, and probably, I'm assuming, get a longer sentence. That trend has continued since 1995. The Court has continued to strike down—not whole acts of Congress, but provisions. Brady Handgun Control Bill,[135] Violence Against Women Act,[136] just one provision at a time, saying to Congress, you don't have the authority to pass this law on the Commerce Clause.

So it's a conflict, there's a lot written about it, but the next thing we're going to see about the Commerce Clause, I think, will be on the docket early next year. And it deals with the Patient Protection and Affordable Care Act, otherwise known as "Obamacare." You're all on that one. One circuit, the Sixth Circuit, upheld the Act,[137] the Eleventh Circuit struck it down,[138] and the

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127. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 560 (1995) (calling *Wickard* "perhaps the most far reaching example of Commerce Clause authority over intrastate activity").

128. *See Wickard*, 317 U.S. at 119-24.

129. *Id.* at 128-29.

130. *Lopez*, 514 U.S. 549.

131. *Id.* at 552.

132. *See id.* at 551

133. *Id.* at 551 n.1.

134. *See id.*

135. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993), *invalidated in part by* Printz v. United States, 521 U.S. 898 (1997).

136. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified at 42 U.S.C. § 13981 (2006)), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).

137. *See* Thomas More Law Ctr. v. Obama, 651 F.3d 529, 549 (6th Cir. 2011).

138. *See* Florida v. U.S. Dep't of Health and Human Servs., 648 F.3d 1235, 1328 (11th Cir. 2011).

Fourth Circuit punted.[139] It said Virginia had no standing.[140] Don't you love that? No standing, we're out of here. But that's good, so we've got a circuit split.

And I don't know what the Court's going to do, but I wouldn't be surprised if they grant the circuit split. And if my timing is right, and it should be, it's done through my office, I think this case will probably be argued in February. It'll be a full house, believe me. Everybody in town, all over the country, will want to come and see that landmark decision.

Incidentally, when you come up to the Court—a number of your professors have been here, your graduates have been here, Dean Huffman brought groups up twice to Washington to be introduced to the Court and sworn in in front of the Supreme Court—those are grand occasions. When you get older and that all happens, join the Dean, whoever it is at that time, and come to Washington and do it. When you walk in that courtroom, you think, every major legal decision since 1935 has been decided in that room, not out in the streets with weapons and so forth. But I just throw that in right there, come up and see me some time.

That case, I wouldn't bet a nickel either way how it's going to come down. Does Congress have the authority under the Commerce Clause to make you buy health care insurance? I don't know the answer, do you? Good. Join the multitude. Now, you've got to remember, the Obamacare issue—somebody told me the other day, "You shouldn't call it 'Obamacare.'" President Obama calls it "Obamacare," so why can't I say that? There are political issues, there are medical issues, there are fiscal issues. But the legal issue is quite different from all those. It has nothing to do with them. So as lawyers, isolate yourself and don't get all political about this thing. You've got to look at just this one thing and say, "What are the legal issues involved?"

VI. BUSINESS CASES

A couple of words about business cases to end. And I'll just mention one, because it's just too good to be true. *NASA v. Nelson*.[141] These people at NASA are contract employees, alright, they're not government employees.[142] Government employees for fifty years—federal government employees—have been required to answer questions about their background to get security clearance—have you used drugs, and so on, and so forth.[143] So after 9/11, they

139. *See* Virginia v. Sebelius, 656 F.3d 253, 266 (4th Cir. 2011); Liberty Univ., Inc. v. Geithner, 2011 WL 3962915, at *1 (4th Cir. 2011).

140. *Sebelius*, 656 F.3d at 266.

141. NASA v. Nelson, 131 S. Ct. 746, 751 (2011).

142. *See id.* at 752.

143. *See id.* at 753.

started making contract employees do the same thing, those that wanted to work at NASA.[144]

Well a group of them said no, we won't answer a question concerning our drug use or counseling concerning drug use, even though the answers would be protected by the Privacy Act.[145] Their thought was this: it violates our "constitutional right to informational privacy."[146] Remember that term, "constitutional right to informational privacy." The Ninth Circuit said it violates that right.[147] Of course, that's the Ninth Circuit. Which I admire. They keep us in business, for heaven's sakes.

The Court said this: We'll assume there is a constitutional right to informational privacy—that's a giant leap—and here, it's not violated, if there was such a thing, by these questions.[148]

Justice Scalia would have none of it. He concurred in the judgment.[149] He said yeah, you employees, you lose, but here's why: There's no such thing as a constitutional right to informational privacy.[150] And he pointed out that in the briefs of these employees, not once did they have a footnote—pay attention, Law Review people—they had no footnote citing the Constitution.[151] I guess this was just a right that was emanating from some penumbra, right? *Griswold*?[152] Remember *Griswold*? But they didn't cite that, even.[153] They just left it. And the Ninth Circuit bought it—hook, line, and sinker.[154]

But they lost at the Supreme Court, as I said, big time—eight-to-nothing—there was not a ninth Justice on the Court, or Justice Kagan was recused I believe.[155] They lost the case, but Justice Scalia wouldn't let go.

At argument, the poor person arguing for the employees—I could see it coming. Justice Scalia was sort of circling in his chair. And I thought, here it comes. He reaches up and takes his mic—he lets it go for a long time—and he says: "Uh, counsel, I was reading through your brief. What constitutional provision gives you this right?" And the guy tried to avoid the question.

Never do that. He's got his teeth into your neck about like this [gestures]. You cannot avoid it, you've just got to go ahead, just take it on the chin, say "I don't have a clue," or something like that, or "I don't know."

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144. *See id.* at 752.

145. *See id.* at 754; Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified at 5 U.S.C. § 552a (2009)).

146. *See NASA*, 131 S. Ct. at 754.

147. *See id.*

148. *See id.* at 754-57.

149. *Id.* at 764 (Scalia, J., concurring in judgment).

150. *See id.* at 765.

151. *Id.* at 764.

152. *See* Griswold v. Connecticut, 381 U.S. 479, 483-84, 487, 499 (1965).

153. *See NASA*, 131 S. Ct. at 764 (Scalia, J., concurring in judgment).

154. *See* Nelson v. NASA, 530 F.3d 865, 883 (9th Cir. 2008), *rev'd and remanded*, 131 S. Ct. 746 (2011).

155. *NASA*, 131 S. Ct. at 748.

But he did what all lawyers do. When everything else fails, pull out the old Due Process Clause. And that's what he did. And Justice Scalia leaned back, confident that he had his case, and it was eight-to-nothing.[156] So cite something in your brief saying where these rights come from.

Probably the biggest case we had last Term was *Wal-Mart v. Dukes*.[157] It was the biggest class-action case I think anybody had ever seen. Three women who worked at Wal-Mart said they were discriminated against in pay and promotions because of their sex.[158] If they were, it violates federal law, and they should be compensated.[159] Okay, let's all get over that. That's it. But they wanted to be certified as a class.[160]

The law firms signed up 1.5 million current and former employees of Wal-Mart.[161] Wal-Mart is the largest employer in the United States; everybody knows that.[162] Three thousand four hundred stores and at any one time they employ more than a million people.[163] But they signed up every woman who'd ever worked for them since 1998—even those who got promotions and everything else, but you're in the class—and said, now we've got a class action.[164]

Of course, sometimes this is done—I'm not saying in this case—it's done to drive the defendant company to do what? Settle. Settle and avoid all the litigation. That usually is a very wise decision to do.

Wal-Mart drew a line in the sand and said no.[165] It came to the Supreme Court, and the Supreme Court said—there are actually two parts to the decision—but the part that said whether you are a class or not (now this is not on the merits of the case, no merits here, just the issue *are you a class or not*), the Court said no.[166] There was nothing that held together the law and facts of all these 1.5 million employees.[167] The only thing they had in common was they were all women.[168] But it was millions of decisions made by thousands of managers at 3,400 stores in fifty states.[169]

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156. *See id.* at 751.
157. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).
158. *See id.* at 2547-48.
159. *See id.*
160. *See id.*
161. *See id.* at 2547.
162. *Id.*
163. *Id.*
164. *Id.* at 2549.
165. *See id.*
166. *Id.* at 2561.
167. *See id.*
168. *See id.* at 2548.
169. *See id.* at 2546.

The Ninth Circuit relied on the testimony of a psychologist who said that bias was *likely* to be there.[170] And the Court said that's not enough.[171] So this struck a blow at some of the giant class action-suits in this country.

I asked a learned attorney, who's a practitioner: How much do you think the law firm spent on bringing on this lawsuit? They had to do depositions, discovery, right? It costs a lot of money to do it. And the estimate was that it cost at least five million dollars. So they spent a lot of money and got no result out of it.

Now, of course, the business community says this is a very fine decision. On the other side, they said this is a terrible decision. It's a decision. But I think that class actions are going to be much harder to bring unless you have a commonality of the facts and the law for all the people who are in the class.

VII. CONCLUSIONS

Now conclusions, and we'll still have some time. I think the Roberts Court is considered really slightly more conservative than the Rehnquist Court, the reason being Justice Alito replaced Justice O'Connor. She was sometimes left of center; he's usually more right of center.

I think the Court is an activist court, but it's always trying to impose judicial restraint. It's trying to maintain the balance of power between the three sections of our government and restore federalism to restore rights to the states that they should have.

It's been a privilege being with you here today. And as I mentioned, when you come to Washington, I want you to come and see me. A number of your professors have been up there to hear cases and so forth. One professor already moved for the admission of his wife. There they are right there. His motion was successful, and he fainted right there in the . . . no, I kidded her this morning; I said the vote was 6–3 on your case. No.

The Dean brought graduates up twice. That's a great occasion. Students come up sometimes, and I want to point out two students here today. Zach Noblitt from Trinity University was one of my summer interns, a very fine intern. And Sierra Redding, who came to Washington and just started walking around looking for a job and wound up in my office, and one thing led to another, and she got a great job up there, and now she's here, and she is also a Trinity graduate. So I think that's the finest college in the United States.

But I've come to the end of my time of talking to you, so we've still got some time here, how about some questions?

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170. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 601 (9th Cir. 2010) (en banc), *rev'd*, 131 S. Ct. 2541 (2011).

171. *Wal-Mart*, 131 S. Ct. at 2561.