

8-1-2012

2012 Honorable James R. Browning Distinguished Lecture in Law: Today's Supreme Court

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Recommended Citation

General William K. Suter, *2012 Honorable James R. Browning Distinguished Lecture in Law: Today's Supreme Court*, 73 Mont. L. Rev. (2013).

Available at: <https://scholarship.law.umt.edu/mlr/vol73/iss2/1>

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THE 2012 HONORABLE JAMES R. BROWNING DISTINGUISHED LECTURE IN LAW

TODAY'S SUPREME COURT

General William K. Suter*

Editors' Note: The Montana Law Review was honored to have General William K. Suter deliver the 2012 Honorable James R. Browning Distinguished Lecture in Law on April 12, 2012. Each year since 2002, the Browning Lecture has brought distinguished lawyers, scholars, and judges from across the country to the University of Montana School of Law. As Clerk of the Supreme Court of the United States, General Suter's lecture furthered that tradition. As its namesake indicates, the Browning Lecture honors the Honorable James R. Browning, formerly of the United States Court of Appeals for the Ninth Circuit. Judge Browning, who passed away in May, 2012, was a member of the first editorial board of the Montana Law Review and ultimately served as Editor-in-Chief. He served with distinction for over 50 years on the Ninth Circuit, many of which he spent as its Chief Judge.

Montana is no stranger to the Supreme Court. You might recall that last term the Court decided a case—I think you've heard of it—I think it

* General William Suter has been the Clerk of the Supreme Court of the United States since 1991. He is the nineteenth person to hold that position. Previously he was a career Army Judge Advocate and retired as a Major General. He served in numerous positions of responsibility around the world, including Appellate Judge, Deputy Staff Judge Advocate of the U.S. Army Vietnam, Staff Judge Advocate of the 101st Airborne Division, Commandant of the JAG School, and the Assistant Judge Advocate General of the Army. His military awards include the Distinguished Service Medal, the Bronze Star Medal, and the Parachutist Badge. The opinions represented here do not necessarily represent those of the Supreme Court or individual Justices.

applies to that river we crossed a little while ago—*PPL Montana, LLC v. Montana*.¹ It dealt with something I have never heard of, but you have: navigability for title under the equal-footing doctrine. Not something I would get up and say every morning before breakfast. A most interesting case. I am sad to report that my Court reversed your Court, but it has been remanded and the case is still alive. I am not going to say anymore about what we did on that case. I have to get out of town alive.

Twenty-one years at the Supreme Court. I have watched over 1,500 oral arguments. The arguments are really great lawyering and also great theater. I will say this: The lawyers, your colleagues that argue up there, including the Montana lawyers that have been there—in fact, your attorney general has been up there—are very well argued. I have discovered that it is very simple. Successful appellate advocacy depends on three things: preparation, preparation, and preparation. You can write that down. I mean it. They get up there and they can answer any question. I have a view from the side where I can watch the court and I can watch—I sit next to Justice Sotomayor to the side a little bit and I can watch the attorney. When attorneys get asked difficult questions that he or she cannot answer, they lean back. When they know the answer, they lean forward. They cannot wait for that question to end because they have prepared for it and they have the answer. Some are so good—your colleagues up there are so good, they argue cases with no notes—not even one 3x5 card, nothing. Third years, I don't recommend doing that. Take a few notes with you. One of those advocates, former Solicitor General Paul Clement, he is now just 45 years old. He was only 39 when he was the Solicitor General, a former law clerk at the Court to Justice Scalia in, I believe, 1995 or 1996. He has argued 60 cases at the Court, and he is arguing seven cases this term. He argued three of the Affordable Care Act cases,² and he stands up there with not one note and can answer any question, from anybody, anytime, including what page something is on in one of the many briefs. He is a very fine lawyer and he is one to emulate if you are a young lawyer.

Sometimes some very humorous things happen. One time there was counsel arguing a case and Justice Stevens asked him a very difficult question. You could see that this poor fellow was struggling with the answer. Justice Stevens wasn't smiling or anything, but I could tell that he was not displeased with the poor answer being given by the counsel. When the poor fellow ended, within nanoseconds, Justice Scalia said, "Let's go back to that question Justice Stevens asked. Could you have answered it this way?" Justice Scalia gave a drop-dead eloquent answer. The poor fellow looked

1. *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215 (2012).

2. *See Natl. Fedn. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

up and said: "That's what I meant to say." By then, he was nothing more than a poor bowl of Jello just being whipped around from one side to the other.

In another case one time, the Justices made a big issue of a video that was included in the record of a case. A fellow down in Georgia was speeding in his car at high rates of speed—90 and 100 miles per hour or something—at night, on a two-lane road, going through stop signs and stop lights, hitting other cars, spinning around. It was a real chase. Justice Scalia commented, he said: "That's the biggest car chase I've seen since *The French Connection*." The driver was injured when the police finally tipped his car over to stop him to prevent him from taking any lives or anything else. Well the police saw it as a safety matter, but the injured driver brought up a suit in court against the police. He was trying to make something out of his case—his attorney was—and he said: "Let me say this about the chase. My client always used his turn signal." Justice Kennedy leaned over and said: "That's like saying the strangler obeyed the no-smoking sign." Tip to 3Ls—don't try to make an axe murderer sound like Mother Theresa. It just won't work.

After all those years I spent in the Army, I really did not know what to expect at the Supreme Court. I retired one night at midnight and went to the Court the next day dressed in the new clothes that Jeanie made me buy at Nordstrom's. I had no idea what I supposed to do but I was pleased to find out that the work place there was just about as the Army was. It is a very structured environment. It has really been an honor and a pleasure to serve there for over 21 years. I have enjoyed getting to know the Justices. They are exceptionally bright and hard working. They are also very down to Earth and have a good sense of humor; easy to work for. Only two that are there now were there when I arrived: Justice Scalia and Justice Kennedy. So, I have worked for 16 justices on that Supreme Court.

One of the significant features about the Court is consistency. Everything we do is consistent. We had the same Justices from 1994 to 2005; that was 11 years with the same Justices. Poor Justice Breyer was the junior Justice for all of that time. That was the longest time that the same Court had been together in 180 years. In the last six years, we have had four appointments; Chief Justice Roberts, Justice Alito, Justice Sotomayor and Justice Kagan. You might say, boy, I bet a lot of changes took place up there. But nothing really changed at all. Maybe some things changed internally such as when they vote, but on the outside, and for the staff, it has been the same Court, using the same rules, and same procedures; nothing really changes. A person like me having come from the military, I like that. I don't like sudden swift changes. I like changes to be planned far in advance.

Each year we receive about 8,000 petitions for certiorari. We have a process where every case is carefully examined, no matter if it is a two-page, hand-written prisoner pro se case. The petition is looked at carefully and reviewed. When the Justices meet and vote, four votes means that the Court will grant the petition. Next we set the case down for briefing and argument. With 8,000 petitions, we only grant about 75. Unless your petition has a split in the circuits—same law but different result—or between the state and a circuit, or unless it’s some new federal question that’s never been answered, the Court, isn’t going to grant your case. The Court is not there to decide guilt and innocence, and do right in every case. We just cannot do it. The grant rate is less than 1 percent. About 70 percent of our petitions that come in are criminal and habeas corpus. Only 30 percent are civil cases. Of those granted, the numbers are reversed. About 70 percent of the cases argued at the Court are civil cases, and the other 30 percent are criminal cases and/or habeas corpus petitions. Habeas corpus meaning: collateral attack after a conviction in almost all cases. All of the Justices sitting today were judges before they got there, except for Justice Kagan. She was the former Solicitor General of the United States and the Dean of Harvard Law School. She had never argued cases in court until she became the Solicitor General. Her first year as Solicitor General, she argued six cases and she did so very ably before she was nominated by President Obama, confirmed, and came to the bench. That is different from most Justices. As I said, all the others came from the federal circuits. That is a change. Back in the period of the 1950s, only about a third of the Supreme Court Justices had prior judicial experience. Since that time, it has changed, and about two-thirds of them have since that time [been judges before joining the Court]. That is a matter of the President’s wishes on who he wants to be on that Court. The political process of going through the confirmations of the nominee, I don’t think there’s any game plan, but a lot of literature is written on it and it is all very interesting. But I think each President has to make up his or her mind and nominate whoever they want. Prior judicial experience is not a requirement but most of them have had it. So, by saying that, they know the business of judging. I know some [Montana] Supreme Court Justices are here—it is a business—it is a legal business and you got to know how to do it. You just cannot reach out and take a case because it is interesting. They are all interesting—well, [maybe not] some bankruptcy cases

But the President who appoints a Justice [and his political party] really does not determine how that Justice is going to vote or anything else. Each Justice can have an ideology; we all have ideology, but it has nothing to do with politics. Unfortunately, we use political terms “conservative” and “liberal” in politics, and then it slides over into the legal profession and we

use it there. I say it is unfortunate, but maybe they are the right terms to use. Some Justices are called conservatives and some are called liberal. You have to be careful how the media labels a Justice in trying to determine how they are going to vote.

Let me give you an example. *Michigan vs. Bryant*³ was decided just last year. Police were dispatched to a gas station where they found a mortally wounded man. He says, "I was shot by Bryant at Bryant's home and I drove myself here." Then he died. The police went to Bryant's home, and they found incriminating evidence. In a trial, the police testified as to what Bryant told them before he died. Forget the exception to the hearsay rule that you think of right there, "Dying Declaration." The prosecution just did not use it. Instead, they relied on the old Supreme Court case, *Ohio vs. Roberts*,⁴ which said that a statement [from an unavailable witness] is admissible if it is reliable. In other words, there is no cross examination, right? The witness is dead so you cannot cross-examine. But the court let the statement in, and the Michigan Supreme Court affirmed the conviction.

In the meantime, the Supreme Court of the United States decided a famous case called *Crawford vs. Washington*,⁵ the unanimous case, where the wife told the police that her husband committed a certain crime. When it came time for the trial, she refused to testify, asserting the spousal immunity privilege. But the prosecution went ahead and convicted the husband by using her prior statement, and the defendant Crawford said: "Look, I was denied my Sixth Amendment right to cross examination." Supreme Court said: "That's right. [The prosecution] is precluded [from using the prior statement]." The Sixth Amendment violation in *Crawford* left things unclear because the courts applied it only to testimonial statements. So was the man who died at the gas station, was it a testimonial statement or not? In the *Crawford* case the Court said [the wife's statement] was testimonial.

So back to the *Bryant* case, what happened? We now have *Crawford*; most people thought that the *Crawford* decision was going to mean that Bryant had a right to cross examination, but the man is dead, so that's not allowable. The Court held 6–2 that the statement is admissible because the primary purpose was to enable police to conduct an ongoing investigation. They said, therefore, it was not a testimonial statement and, therefore, *Crawford* does not apply. Again, the dying declaration exception was not available because it was not raised at trial (note to potential prosecutors—raise everything you can; get it in the record because once you get up on the appellate level, if it's not in the record you are not going to talk about it).

3. *Mich. v. Bryant*, 131 S. Ct. 1143 (2011).

4. *Ohio v. Roberts*, 448 U.S. 56 (1980).

5. *Crawford v. Wash.*, 541 U.S. 36 (2004).

You might say—as the press said: “That’s a pro-prosecution, very conservative result.” The conviction was affirmed even though *Crawford* is the law of the land. Who wrote the opinion? Justice Sotomayor. The media was saying: “Oh, no, she’s liberal. She wouldn’t do something like that.” Who dissented in favor of the defendant in the case? Justice Scalia. Of course, he wrote *Crawford*. He is supposed to be a conservative. Why would he [write a] liberal [opinion]—it is because those labels are easy to apply but they do not stick. After all, of the opinions we have every year, the decisions—between 65 and 75 these days—40 percent are unanimous. All nine agree. I could not get the *Law Review* to agree to what we are going to have for lunch. Last term, I think we had 60 percent where the cases were decided either 9–0 or 8–1. It is rather remarkable. Usually they agree to agree or agree to disagree and then the opinion comes down.

The media has sort of labeled the Rehnquist Court and the Roberts Court—if you can call them that—as conservative. Let me just tick off a list of results and, again, I am result oriented here like the media is sometimes. Not the reason why the Court ruled that way, but these are some results from the last 25 years or so that came out of the Supreme Court. The Court upheld racial preferences in college admissions,⁶ struck down of Texas law making homosexual conduct between consenting adults a crime,⁷ invalidated the all-male admission policy at the Virginia Military Institute,⁸ prohibited voluntary student prayer at public high school football games down in Texas,⁹ prohibited imposing the death penalty for the mentally retarded¹⁰ and for those who commit crimes under 18,¹¹ and prohibited life without parole for juveniles except in homicide cases.¹² If you are using the terms conservative and liberal, those don’t sound very conservative do they? I guess you would say, well, they sound more liberal. How can the Court be a conservative court if those kinds of rulings come down? The answer is—this is just Bill Suter speaking, by the way—I am not speaking for the Court here, Dean, we all know that. I don’t think the Court is conservative or it is really liberal.

Let’s look at a couple of areas of the law in recent years and let me tell you what I think the trends are. First, freedom of speech. The Rehnquist Court and the Roberts Court have been very active in protecting free speech. You might disagree on what free speech really is and I will not

6. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

7. *Lawrence v. Tex.*, 539 U.S. 538 (2003).

8. *U.S. v. Va.*, 518 U.S. 515 (1996).

9. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

10. *Atkins v. Va.*, 536 U.S. 304 (2002).

11. *Roper v. Simmons*, 543 U.S. 551 (2005).

12. *Graham v. Fla.*, 130 S. Ct. 2011 (2010).

even talk about *Citizens United*—it is just too much to talk about, and one of your professors is writing a very fine article on it.¹³

Free speech cases like *Snyder vs. Phelps*.¹⁴ This is the case where the Westboro Baptist Church members protested at the funeral of a Marine who had been killed in Iraq. If you read all the media, you would think that the protestors are right up in the face of the family. They were not. They were 1,000 feet away, and they were not making any noise. The police approved where they stood and what they did. When the funeral cars came up to the church, they stopped doing everything and they were making no noise. They did not refer to this Marine, just to other soldiers who were killed. The signs were very offensive. They said things like: “The only good soldier is a dead soldier.” I find that particularly offensive, and I think you do too. The father of the Marine who was killed and buried never saw the signs, but he saw them the next day on television. He brought a lawsuit for emotional distress and invasion of privacy. He won a large judgment in the district court, the Fourth Circuit Court of Appeals down in Virginia reversed it. It came to the Supreme Court, and it was very well argued. An emotional case, I might say. You really can take sides pretty easily on this, but you can’t let your heart overrule your mind when you are thinking about it. The court ruled 8–1 that the Fourth Circuit was affirmed. I will quote to you what the Chief Justice said in his majority opinion. He said:

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—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 in this case.”¹⁵

The reaction to all of this was very emotional. There were many special interest groups on both sides said that said it was good, [others] said it is bad, but whatever it is, that is the law. Special interest groups that favor free speech were particularly getting loud applause. What is curious to me is that some of those groups want to prohibit hate-crime speech. Now the difficulty there is what standard do you use when you say hate speech is a crime. What is your standard? It might be offensive, it might be repugnant, it might be very, very rude, but just saying something to another person you might not want to associate with them but can you prohibit it? I don’t know. A lot of colleges have tried with their speech codes. My review of it is most of them fail when they face a court.

13. See Larry Howell, *Once Upon a Time in the West: Citizens United, Caperton, and the War of the Copper Kings*, 72 Mont. L. Rev. 25 (2012).

14. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

15. *Id.* at 1220.

Here is another free speech case that was argued recently, a very interesting one, but much more difficult. It involves the Stolen Valor Act of 2005.¹⁶ It has been a crime for many years to wear a military award or take any benefit if you are not entitled to it. It was never an offense to say: “I have the Silver Star or the Bronze Star.” Just to say it were words of free speech. I think you have a constitutional right to lie. Right? Under certain circumstances there are limitations. But Congress was tired and fed up with all these people going around, especially those running for office, saying I won this medal and I won that medal. So they made it a crime to even say it. There was a crime, so what happened. The crime for saying that you have a Silver Star is a misdemeanor for six months. If you say you have the Medal of Honor, it enhances it to a year of confinement. In Title 18, when they passed the Stolen Valor Act, the writers of the legislation said that they enhanced the punishment for anybody saying that they were awarded the Congressional Medal of Honor. Mr. Alvarez, our featured speaker here, was running for office for the California Water District Board of Directors. He falsely told the public that he was a retired Marine, that he had been wounded in combat, and that he earned the Medal of Honor. He actually said the Congressional Medal of Honor. He never served in the military one day in his life. By the way, he also said he played hockey for the Detroit Red Wings. That is not a crime. He was convicted. This came up to the Supreme Court and has been argued. The Ninth Circuit said that this was an unconstitutional constraint on free speech. That was pretty easy to see and fairly predictable. It has been argued and when it was argued at the Supreme Court, the Solicitor General Donald Verrilli made a very strong argument in favor of the statute and also argued for showing deference to Congress. We don’t know how it is going to come out.¹⁷ One footnote here is if we put all liars in prison there would be no bed space in prison. We would have to build more prisons. I just don’t know how it’s going to come out. Stay tuned and we’ll find out.

Freedom of Religion. The Court has interpreted the Establishment Clause pretty strictly. I think that the Court has loosened up a little bit in other areas such as support of church schools and so forth. They did that a few years ago when they upheld the school voucher case coming out of Cleveland, Ohio.¹⁸ Just because some of the students might go to a parochial school, the Court said, that that does not violate the Establishment Clause.

16. *U.S. v. Alvarez*, 132 S. Ct. 2537 (2012).

17. The Court vacated Alvarez’s conviction and struck down the Stolen Valor Act by a vote of 6–3. *See id.* at 2551.

18. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

This term we had sort of a blockbuster, which surprised a lot of people: *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*¹⁹—I will just call it *Hosanna*. This was a woman who was teaching at this church school and she was a “called” teacher as to opposed to just a “lay” teacher. She had been trained in religious studies and she conducted some religious exercises. She became ill and could not teach, so they hired somebody else to start the school year. In February, she came back and said that she was ready to teach. The superintendent of the school said, “No you are not, you still have physical difficulties and you cannot teach.” She apparently made a disturbance and threatened to sue. That violated Lutheran policy and the church decided to terminate her employment. She went to the EEOC, and the EEOC agreed and filed suit. The suit wound up at the Supreme Court of the United States. The thing here is, is there a ministerial exception to the Americans with Disability Act? That is a common law restriction. The circuit court said: “Yeah, there is a ministerial exception, but she was not a minister.” The Supreme Court, in a unanimous decision, last January, said she is a minister and these laws do not apply to church-related activities. Again, not a lot of reporting on that case, which I was kind of surprised at, but it was a unanimous decision. Again, labels; they don’t work.

Criminal Law. I think you have seen the end of the criminal law revolution. I’m not sure when it started but probably in the 1950s and 1960s. Good or bad is not what I am here to say. I think it is ending new procedural criminal rights for defendants in cases. The Rehnquist Court and the Roberts Court have drawn more bright line rules to make criminal law easier to understand by police and lower courts and to apply it efficiently.

One case: *Herring vs. United States*.²⁰ Herring was arrested because there was an outstanding warrant listed for him. He was stopped at a traffic stop and the police checked out an outstanding warrant in a neighboring county. They arrest him. So far, so good; all quite lawful. They search, and they found a gun and drugs. Typical case? Shortly thereafter that, what did they find out? Oops, the neighboring county called and said, “We didn’t clean our database out. That was taken care of a long time ago.” There was no outstanding warrant. So there was an illegal arrest and illegal search. It violated the Fourth Amendment. The lower court said so. But they also said that the Exclusionary Rule does not apply because there was no wrongdoing. The Exclusionary Rule was created by the Supreme Court. They felt like they had to do something about it. The Fourth Amendment

19. *Hosanna-Tabor Evangelical Church & Sch. v. Equal Empl. Opportunity Commn.*, 132 S. Ct. 694 (2011).

20. *Herring v. U.S.*, 555 U.S. 135 (2009).

says searches must be reasonable. But there is no remedy. Almost a hundred years ago, the Court said we need a remedy. We just cannot have police going and breaking down doors and going in, which was the *Weeks* case,²¹ so we got the Exclusionary Rule. Here, the courts said and it is an exception to the Exclusionary Rule, if there was no wrongdoing by the police, you are not punishing the police and teaching them a lesson. Somebody did not make a data entry in a database and that is why he was arrested. There are some commentators that think that maybe it's time to say, "We don't need the exclusionary rule anymore." I know that is shocking. Some criminal law professors faint when I say something like that. Police are better trained; they have more sanctions for police. You have *Bivens*²² suits that can go on if you do something that is truly illegal and unconstitutional, but here it was a mistake. What they did was, they found a criminal and the Court said that the Exclusionary Rule does not apply in this case. It was 5–4 decision. Not overwhelming. Think about this: England and some other civilized nations do not have the Exclusionary Rule. They just don't have it. They weigh the evidence in each case. I am not here predicting that we're going to do away with Exclusionary Rule, but some people are saying that, little by little, maybe we don't need it anymore.

Second Amendment, Right to Bear Arms. We have had two cases in the last couple of years dealing with that. The first one came out of the District of Columbia. The Court held that the Second Amendment does guarantee the individual the right to bear arms not connected to the militia cause.²³ Case over. That applied to only the District of Columbia. A couple years later we had another case, the *McDonald* case that came out of Chicago.²⁴ The question was, does that right apply to the states via the Fourteenth Amendment, through the Incorporation Clause? The Court said: "Yes, it does." Another close case, but now we have the rule that you do have the right to bear arms. That opinion clearly said that there are certain restrictions that you could put on this. The state can restrict your right to bear arms if you are a felon, if you are a juvenile, if you are mentally unstable. They have all these restrictions on bearing arms. After all, are there restrictions on free speech? Sure: perjury, impersonating an officer, lying on food products, etcetera. There are a lot of restrictions on free speech. You can put restrictions on the right to bear arms. What has happened is that a lot of jurisdictions are fighting this by imposing ordinances—usually cities—making it more difficult for a person to bear a firearm. Again, not good or bad, but they are doing this. That litigation on the

21. *Weeks v. U.S.*, 232 U.S. 383 (1913) overruled, *Mapp v. Ohio*, 367 U.S. 643 (1961).

22. *Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

23. *D.C. v. Heller*, 554 U.S. 570 (2008).

24. *McDonald v. City of Chi., Ill.*, 130 S. Ct. 3020 (2010).

McDonald case in Chicago is still going on and on, trying to refine what the Court meant by that case. I saw one parallel to this that I thought was quite interesting. If the Supreme Court has said that you have the right to bear arms under the Second Amendment, but somebody is trying to keep you from exercising that right, are they similar to those back in the 1950s who stood in the school-house door and wouldn't let little children come in who had their right to an education in school—an integrated school guaranteed by *Brown vs. Board of Education*.²⁵ I say that and you might be shocked, but is there a difference? If you had a constitutional right, are there different elevations of rights under the Constitution? I don't know. That is why you are all lawyers and you are going to figure this out.

Right to Privacy. Nope, the Court is not fooling around with the right to privacy much anymore. We had a case last year *NASA vs. Nelson*.²⁶ The federal government has always required, for 50 years, that employees fill out forms about security and so forth; have you ever been arrested, have you been convicted, etcetera. After 9/11, they extended this to government contract workers. You work for somebody else, but the government has a contract. Some of these workers that were working for NASA objected to this and said: "No, no, no, we have a constitutional right to informational privacy." They kind of made that one up. They said that we have this right and we do not have to answer these questions. Of course, they won their case in the lower courts—the Ninth Circuit I might add—which said that there is such a constitutional right of information privacy. When it got to the Supreme Court last year, the Court assumed that there is such a right. Whenever a Court does that, look out because something else is going to happen. We will assume that there is such a right but it does not apply in this case because these questions are entirely reasonable to ask if you have been counseled for drug use and this and that. We have to know who is working for us in the jet propulsion lab for heaven's sake. That is where these people worked. Now, it was an 8–0 decision. It was a unanimous decision. Justice Scalia was interesting, he concurred in the judgment. He said: "These background checks do not violate the Constitution. There is no such thing as a constitutional right of informational privacy, and we should not assume such a thing." He was amazed that in the brief of these NASA contract employees they talked about this right, but there was no footnote citing any particular part of the Constitution where this came from. He said, "I find this refreshingly honest. If you are just going to make it up, then don't say it is in the Constitution, just call it a constitutional right." Of course, the poor counsel that represented these people was asked that question during oral argument, and he had to come up with an answer. So what

25. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

26. *NASA v. Nelson*, 131 S. Ct. 746 (2011).

did he do? When everything else fails, pull out the old due process clause. He pulled out the Fifth Amendment Due Process Clause and said: “That’s it. That’s where I find it.” You know what he could have said: “This right is found in a penumbra emanating from a specific guarantee in the Bill of Rights.” Who said that? *Griswold vs. Connecticut*.²⁷ It is there, and *Griswold* is still good law.

The Court is now considering another affirmative action. The most significant affirmative action cases you thought were decided in 2003, the Michigan University and Michigan Law School affirmative action cases,²⁸ the question is using race as a factor and not the factor in school admissions. We have another case where the Court granted certiorari. Watch out for it on the docket, *Fisher vs. Texas*.²⁹ It will be argued next term. Down in Texas, the law is, if you are in the top 10 percent of your high school class, you are guaranteed a seat in a state college. This woman, who happened to be white, missed the cut and she then said: “Look, I was not selected at another school that I wanted to go to.” What Texas has is a race-neutral way of selecting students for the top 10 percent, but then they use race as a factor for picking others. She said that the state cannot have it both ways. It is going to be a very interesting case. I expect it to come up and be argued in October or November.

Of course, you are all waiting for me to say something about separation of powers. Yep, March 26–28, we argued the Affordable Care Act cases. It has lots of other names on it but ACA are those cases dealing with the National Health Care/Obamacare/PPACA testing the separation of powers. It was really four separate arguments in three days. They dealt with the Anti-Injunction Act, the Mandate, the old Commerce Clause. Remember *Wickard v. Filburn*³⁰ dealt with what? Wheat, growing wheat and eating it yourself. The Commerce Clause covers that because it affects commerce. The next big case in 1995, *Lopez*,³¹ the Gun Free Schools Zone Act says that if you possess a gun within a 1,000 feet of a school, it is a federal crime. The Supreme Court struck down, not the whole act—they never strike down a whole act, usually it is just one portion—and said: “What is federal about that? Where is the commerce?” The gun did not cross state lines. That was a real sleeper. Most people did not see that one coming. The cases in the last few years it seems to be the Court is examining the Commerce Clause more closely or we’re just getting more cases concerning

27. *Griswold v. Conn.*, 381 U.S. 479 (1965).

28. *Grutter*, 539 U.S. 306; *Gratz v. Bollinger*, 539 U.S. 244 (2003).

29. *Fisher v. Tex.*, 631 F.3d 213 (5th Cir. 2011) cert. granted, 132 S. Ct. 1536 (2012).

30. *Wickard v. Filburn*, 317 U.S. 111 (1942).

31. *U.S. v. Lopez*, 514 U.S. 549 (1995).

the Commerce Clause—we've had a few others. But that's the biggest issue in the Affordable Care Act cases.

Two others issues including severability and Medicaid. One of the interesting things here is that in all of these cases—in two of these cases, both parties agreed that the lower court was wrong. So what does the Supreme Court do in that instance? The Court appoints an Amicus attorney to argue the case in support of the lower court judgment to show a respect for that court's judgment, which I think is a really good idea. The two counsel who did that were handpicked by the Court. They are not paid anything. They do it, write the briefs, do the whole thing, and argue the case for nothing because they are professionals. They were asked to do a job, they did it, and they did a very fine job of doing it. That means when you are a member of the bar of a court, you are not just a member, you are also an officer of the court. If you can do it and the court asked you to do something, I think, as a professional and officer, you should do it. I expect a decision in the Affordable Care Act cases by the end of June.

Where does that put us? A few trends, a little bit about the Court on where we have been and where we are going. The Court is not an institution that has an agenda where it says: "This term, here is what we are going to do. We are going to win the division and go to the finals and be the NCAA champions." It just does not work that way. We take whatever flies in from the lower courts and that is what we have to work with. I think it is going to be more of the same. You see Affirmative Action, I thought it was over with but it is back up again. The Affordable Care Act cases might spawn even more litigation. We have no idea what is going on. A lot of the media predicted by listening to the arguments—we had pretty big crowds those days, I might add—they predicted who is going to win. That is a pretty dangerous game. In fact, your batting average is usually about 50 percent, you win some, and you lose some. I have tried to predict every case I have watched in 21 years. When the arguments over, I circle on my sheet who I think is going to win. I am about 65 percent one year and 72 percent the next year. I just cannot get any lower and cannot get any higher. Some are pretty obvious, but on others you just have no idea what is really going to happen. Hard to predict by oral argument, but oral arguments are great fun and great education, and I recommend you come up and watch one some time.

Thank you for your hospitality.

