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50th Annual William H. Leary Lecture - Fifty Years of Constitutional Law: What's Changed?

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50TH ANNUAL WILLIAM H. LEARY LECTURE
FIFTY YEARS OF CONSTITUTIONAL LAW: WHAT'S CHANGED?

Erwin Chemerinsky*

INTRODUCTION

It is a tremendous honor to have been asked to deliver the 50th annual William H. Leary Lecture. In honor of this wonderful occasion, I want to identify what I think are five of the most important changes in constitutional law over the last five decades and then conclude by suggesting for you what I think are the five most underappreciated Supreme Court cases for the last fifty years. To put this in some context, over the last fifty years, fifteen justices have been appointed and confirmed for the Supreme Court.[1] Ten have been appointed by republican presidents; five were appointed by democratic presidents.[2] The earliest during this time confirmed for the Supreme Court was Justice Thurgood Marshall.[3] The most recent, of course, is Justice Elena Kagan in the year 2010.[4] All three of the Chief Justices, who have assumed that role on the Supreme Court in the last fifty years, were appointed by republican presidents: Warren Burger, William Rehnquist, and now John Roberts.[5] And the fact that ten of fifteen vacancies were filled by republican presidents, only five by democrats, certainly shapes everything that's occurred over the last five decades.

I. THE FIVE MOST IMPORTANT DEVELOPMENTS

A. The Emergence of Unenumerated Rights

The first important development has been the debate over unenumerated rights in the Constitution. I did some quick Westlaw research—I'm admittedly not very good on Westlaw—but I tried to see if the words originalism and non-originalism ever appeared earlier than 1966. I could find no law review article, no Supreme Court case that ever used those words. Now, over the last several decades, certainly constitutional scholars, yet also Supreme Court justices have been in a debate over constitutional interpretation. The debate has been especially with regard to the

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[1] *See Members of the Supreme Court of the United States*, SUP. CT. OF THE U.S. (last visited July 27, 2016) http://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/5WTB-H82T] [hereinafter: *Members of the Supreme Court*].

[2] *See id.*

[3] *See Supreme Court Nominations, Present–1789*, U.S. SENATE (last visited July 27, 2016) http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm [https://perma.cc/FP4B-FDFH] [hereinafter: *Supreme Court Nominations*].

[4] *See id.*

[5] *See Members of the Supreme Court*, *supra* note 1.

appropriateness of the Supreme Court protecting rights that aren't expressly mentioned in the Constitution.

Originalism is the view that the meaning of a constitutional provision is fixed when it is adopted and that it can be changed only through the amendment process. Non-originalism, obviously by contrast, says the meaning of constitutional provision can change by interpretation, as well as by amendment.

Griswold v. Connecticut,[6] in 1965—fifty-one years ago now—was such an important case in the Supreme Court, saying it could find rights that were not enumerated in the Constitution.[7] There, for better or worse, privacy was found by Justice William Douglas to be safeguarded in the penumbra of the Bill of Rights.[8] Justice Douglas said that there are privacy aspects of the First Amendment, the Third Amendment, the Fourth Amendment, and the Fifth Amendment.[9] It led one commentator to say that Justice Douglas was like a cheerleader, skipping through the Bill of Rights, saying, "Give me a P . . . give me an R . . . an I" and finding privacy in the penumbra of the Bill of Rights.[10] I checked this too, and in the last fifty years there is no Supreme Court justice that has ever again found rights in penumbras or emanations.

The debate over unenumerated rights has continued. On the current Court, justices such as Antonin Scalia and Clarence Thomas declare themselves to be originalists.[11] Many justices of course embrace non-originalism.[12] In confirmation hearings of Supreme Court justices, there have been battles over non-originalism and originalism. The most obvious of these was in 1987, when Robert Bork was nominated for the Supreme Court and rejected, in large part, because of his views about constitutional interpretation.[13] In fact, there was an article by Robert Bork in 1971 titled "Toward Neutral Principles of the First Amendment" that began the idea of the meaning of a constitution's provisions should change only by amendment.[14] He didn't use the word originalism—that came later—but it was one of the most

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[6] 381 U.S. 479 (1965).

[7] *Id.* at 482–83.

[8] *Id.* at 483.

[9] *Id.* at 483–85.

[10] Robert G. Dixon, Jr., *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 B.Y.U. L. REV. 43, 84 (1976).

[11] Bradley P. Jacob, *Will the Real Constitutional Originalist Please Stand Up?*, 40 CREIGHTON L. REV. 595, 595–96 (2007).

[12] *See, e.g.*, *id.* at 618 (noting that Justice Stevens is a non-originalist).

[13] *See* Michael J. Gerhardt, *Interpreting Bork*, 75 CORNELL L. REV. 1358, 1388–89 (1990) (book review).

[14] *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 INDIANA L.J. 1, 1 (1971) (promoting the idea of "neutral principles" in the Supreme Court's interpretation of the Constitution).

important initial defenses of it. Raoul Berger and his book, *Government by Judiciary*,[15] advanced this view.[16]

But, of course, it was *Roe v. Wade*,[17] in 1973, that really raised consciousness of academics, judges, the public, with regard to this debate over constitutional interpretation.[18] I think it's fair to say that no Supreme Court decision in the last fifty years has been more important with regard to the debate on unenumerated rights than *Roe v. Wade*.

As I was thinking about this and preparing this lecture, I realized that though there has been a heated debate over originalism versus non-originalism—whether it's appropriate for the Court to protect rights that are not enumerated to the Constitution—the intellectual disagreement over interpretation hasn't mattered all that much with regard to Supreme Court decisions. The Supreme Court repeatedly over the course of these fifty years has found unenumerated rights to be protected by the Constitution.

The most recent example of this is the right to marry for gay and lesbian couples. In *Obergefell v. Hodges*,[19] on June 26, 2015, the Supreme Court focused on the right to marry as a fundamental right and found that state laws that prohibit same-sex marriage are unconstitutional.[20] This isn't the first case to protect the right to marry, even though that right isn't mentioned in the Constitution. *Loving v. Virginia*,[21] in 1967, declared unconstitutional a Virginia law preventing interracial marriage.[22] The Court focused on equal protection, but the Court also explicitly said that the right to marry is a fundamental right protected under the Constitution.[23] To pick other examples, the Supreme Court has said that parents have a fundamental right to custody of their children: *Stanley v. Illinois*,[24] in 1973.[25] Again, that right is not mentioned in the Constitution. The Court has said that there is a constitutional right to keep the family together, including the extended family. This was the holding in *Moore v. City of East Cleveland*,[26] in 1976.[27] Other enumerated rights protected in the last half century include the right to engage in private, consensual, same-sex sexual activity (*Lawrence v. Texas*,[28] in 2003) and the right of competent

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[15] RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 363 (1977).

[16] *Id.* at 373–73.

[17] 410 U.S. 113 (1973).

[18] *Id.* at 152 (1973) (holding that there exists a right of privacy in the penumbras of the Bill of Rights).

[19] 135 S. Ct. 2584 (2015).

[20] *Id.* at 2599, 2608–09.

[21] 388 U.S. 1 (1967).

[22] *Id.* at 11–12.

[23] *Id.* at 12.

[24] 405 U.S. 645 (1972).

[25] *Id.* at 651.

[26] 431 U.S. 494 (1977).

[27] *Id.* at 506–07.

[28] 539 U.S. 558, 578 (2003).

adults to refuse medical care, even lifesaving medical care (*Cruzan v. Director of Health Services*).[29]

These are all basic rights. They are all deemed by the Supreme Court to be crucial aspects of our autonomy. Notice all of these are cases in the last fifty years and all are unenumerated rights. So, I do think as we look back on the last fifty years, especially those of us who write about constitutional law, we have to start by talking about this debate over constitutional interpretation over the last half century. But, it's interesting, it hasn't been one that has kept the Court from protecting unenumerated rights.

B. Shifts in Structure of Federalism and Separation of Powers

The second change that I would identify over the last fifty years has been the shift of having the Supreme Court protect the structure of government: federalism and separation of powers. From 1937 until 1995, not one federal law was declared unconstitutional as exceeding the scope of Congress's Commerce Clause power. From 1937 until 1992, only one federal law was found to violate the Tenth Amendment and infringe the state's rights and that case was overruled nine years later.[30] One of the things that I've been doing for a long time now is lecturing to students getting ready for the bar exam. I remember when I started doing this, telling them if there is an answer to a bar question that says that a federal law exceeds the scope of Congress's commerce power, it's always a wrong answer. Or, if there is an answer that says that a federal law violates the Tenth Amendment, that's always a wrong answer.

But of course, that's changed. In *United States v. Lopez*,[31] in 1995, the Supreme Court—for the first time since 1937—struck down a federal law as exceeding the scope of the commerce power.[32] *Lopez* as you might remember declared unconstitutional the Federal Gun-Free School Zone Act (federal law that made it a federal crime to have guns within 1000 feet of a school).[33] This case led the way to other important decisions limiting the scope of the commerce power. In *United States v. Morrison*,[34] in 2000, the Supreme Court declared unconstitutional the civil damages provision of the Violence Against Women Act,[35] a provision of a federal law that allows victims of gender-motivated violence—rape, sexual assault, domestic violence—to sue their assailants in federal court.[36]

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[29] Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261, 279 (1990).

[30] Nat'l League of Cities v. Usery, 426 U.S. 833, 849, 852 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985).

[31] 514 U.S. 549 (1995).

[32] *Id.* at 551.

[33] *See id.*

[34] 529 U.S. 598 (2000).

[35] *Id.* at 627.

[36] *See id.* at 605–06.

Most recently, in *National Federation Business v. Sebelius*,[37] five justices would have said that the individual mandate exceeds the scope of Congress's commerce power—that it was Congress regulating inactivity; people not buying insurance—that Congress only can regulate "activity."[38] And, as I mentioned with regard to the Tenth Amendment, for so many years the Court left the protection of the states to the political process. But in *New York v. United States*,[39] in 1992, and in *Printz v. United States*,[40] in 1997, the Court said it violates the Tenth Amendment for Congress to commandeer the states, for Congress to force the state to pass laws, and enact regulations.[41] This enforcement of the structural guarantee of federalism was unheard of when this lecture began fifty years ago, but now it is such an important part of constitutional law.

Judicial protection of states has manifested itself in many ways. Just a few years ago, in June 2013, in *Shelby County v. Holder*,[42] the Supreme Court for the first time since the nineteenth century declared unconstitutional a federal civil rights law dealing with race.[43] There, the Court declared unconstitutional, a key provision of the Voting Rights Act,[44] which required that states with a history of race discrimination in voting get preapproval before changing their election systems.

The Supreme Court has tremendously expanded the sovereign immunity of state governance over the last fifty years. During the 1960s, the Court was making it easier to sue states.[45] But, if you look at the cases since then, the Supreme Court has limited the ability of Congress to authorize suits against states.[46] The Supreme Court has said that states not only can't be sued in federal court, but can't be sued in state court either—even to enforce federal laws.[47]

Just as the Court has protected federalism more in the last fifty years than in the prior decades, so is that true with regard to separation of powers. From 1950 to 1975, I can't identify a single instance in which a presidential action was declared unconstitutional as violating separation of powers. From 1950 until the 1980s, I can't identify a single instance where a federal law was struck down as infringing

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[37] 132 S. Ct. 2566 (2012).

[38] *Id.* at 2587.

[39] 505 U.S. 144 (1992).

[40] 521 U.S. 898 (1997).

[41] *See New York*, 505 U.S. at 188; *Printz*, 521 U.S. at 935.

[42] 133 S. Ct. 2612 (2013).

[43] *Id.* at 2618–19.

[44] *See id.*

[45] *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 347 (holding that a state's sovereign immunity "is not carried over when state power is used as an instrument for circumventing a federally protected right").

[46] *See, e.g.*, Seminole Tribe of Florida v. Florida, 517 U.S. 44, 72–73 (1996) ("Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.").

[47] *See* Alden v. Maine, 527 U.S. 706, 711–12 (1999) (holding that Congress could not subject nonconsenting states to private suits in state courts for violation of federal law).

separation of powers—where Congress was interfering with the powers of another branch of government. But, of course, in 1974, in *United States v. Nixon*,[48] the Supreme Court held that President Nixon would violate separation of powers by keeping the Watergate tapes secret. The Court said that under separation of powers, executive privilege must yield and cannot interfere with the ability of courts to perform their essential functions.[49]

In the 1980s, in *Chadha v. INS*,[50] the Supreme Court struck down a federal law that included legislative veto provisions, which gave Congress the ability by resolution to overturn executive actions. This invalidated provisions in 300 federal statutes.[51] Most recently—just in May of this year—in *Zivotofsky v. Kerry*,[52] the Supreme Court struck down a federal law on separation of powers grounds.[53] This was a law that was adopted in 2002 that said that if an American citizen had a child born in Jerusalem, the American citizen could have the child's passport indicate the birthplace as Jerusalem, Israel.[54] The Supreme Court, 5–4, said that this infringed the president's sole power to decide whether to recognize foreign governments.[55] The Supreme Court over the last half century then has revived judicial protection of the structural guarantees of the Constitution in a way that didn't exist or rarely existed in the prior decades. The Supreme Court would say that it's gone back to the vision of the framers; that the structure of government is the primary protector of individual liberties under the Constitution.

C. Restriction to Court Access

The third change that I would identify in constitutional law over the last half century has been the restriction in access to the courts. Now I often remark that if the Supreme Court were to hold that the government can give unlimited amounts of money to parochial schools, that would make headlines of every newspaper. But if the Supreme Court says no one has standing to challenge the government giving unlimited amounts of money to parochial schools, no newspapers would pay attention at all. Restrictions of access to the courts are largely invisible to the general public—maybe to even most attorneys. But a right is meaningless if it can't be enforced. And, I would suggest to you that there have been more restrictions on access to the courts imposed in the last half century than in the prior half century and by a large multiplier effect.

In fact, in the 1960s it seemed that the Supreme Court was greatly liberalizing access to the courts. It was relaxing barriers like standing. In *Flast v. Cohen*,[56] in

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[48] 418 U.S. 683 (1974).
[49] *Id.* at 703–05.
[50] 462 U.S. 919 (1983).
[51] *Id.* at 958.
[52] 135 S. Ct. 2076 (2015).
[53] *Id.* at 2096.
[54] *Id.* at 2082.
[55] *Id.* at 2096.
[56] 392 U.S. 83 (1968).

1969, at the end of the Warren Court, the Supreme Court said taxpayers have standing to challenge government expenditures that violate the Establishment Clause.[57] This involved a law where the federal government was giving financial aid directly to parochial schools, and the Court said that the taxpayer, with no other injury than that, had standing to bring the suit.[58] Since *Flast v. Cohen*, in every case without exception, the Supreme Court has rejected the ability of taxpayers to have standing to sue in federal court.[59] Initially, the Court rejected taxpayer standing outside of the Establishment Clause context, and then the Supreme Court has progressively restricted that exception and denied taxpayer standing even to enforce the Establishment Clause.[60]

In fact, just focusing on standing, there are so many ways in the last half century that the Supreme Court has limited who has standing to sue. I'll just mention a few examples. Take *City of Los Angeles v. Lyons*,[61] in 1982. Adolf Lyons was a twenty-four-year-old African American man.[62] He was stopped by a police officer in Los Angeles for having a burnt out tail light.[63] The officer slammed Lyons' hands above his head; Lyons complained that the keys were cutting into his palm.[64] The officer then administered a choke hold on Lyons and rendered him unconscious.[65] Lyons awoke spitting blood and dirt; he had urinated and defecated.[66] The officer gave him a traffic citation for having a burnt out tail light and let him go.[67] Lyons did some research and discovered to that point, sixteen people in Los Angeles—almost all like him, African American men—had died from the police use of the choke hold.[68] He sued the city of Los Angeles for an injunction to stop officers from using the choke hold except where necessary to protect the officer's life and safety.[69] But the Supreme Court ruled that Lyons lacked standing.[70] The Supreme Court said a plaintiff like Lyons seeking an injunction must show a likelihood that he or she personally will suffer the injury again.[71] There are hundreds of lower court cases that

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[57] *Id.* at 105–06.

[58] *See id.* at 85–86, 105–06.

[59] *See* United States v. Richardson, 418 U.S. 166, 174 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 209 (1974); DaimlerChrsyler Corp. v. Cuno, 547 U.S. 332, 345–46 (2006).

[60] *See, e.g.*, Arizona Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 168 (2011) (Scalia, J., dissenting) ("Today's decision devastates taxpayer standing in Establishment Clause cases.").

[61] 461 U.S. 95 (1983).

[62] *Id.* at 114 (Marshall, J., dissenting).

[63] *Id.*

[64] *Id.* at 114–15.

[65] *Id.* at 115.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 115–16.

[69] *Id.* at 98 (majority opinion).

[70] *Id.* at 105–06.

[71] *Id.* at 111–12.

have been dismissed based on *City of Los Angeles v. Lyons* for standing.[72] There is ongoing practice—it is apparent that someone will be hurt by it—but there is no standing because it cannot be shown that the particular person is likely to be injured again.

Or take a more recent case on standing: *Clapper v. Amnesty International*.[73] In 2008, Congress amended the Foreign Intelligence Surveillance Act to allow the National Security Agency ("NSA") to gather information by intercepting communications from those in the United States and those in foreign countries.[74] Under the law, the NSA can listen to conversations and read email exchanges.[75] Lawyers brought a challenge to this.[76] They said they represented clients in foreign countries, in places where the communications were being intercepted. They said that they had a duty to protect the attorney-client privilege.[77] They said they couldn't communicate by email or phone any longer—that that interfered with their ability to protect their clients' interests.[78] The only way to talk to their clients would be travel.[79] Plaintiffs also included journalists who said they talked to sources in foreign countries and their communication was inhibited.[80] Business people also were plaintiffs and made the same claim.

But the Supreme Court ruled 5–4 that the suit had to be dismissed for lack of standing.[81] The Supreme Court said none of the plaintiffs could show that their communications were intercepted or likely to be intercepted.[82] The NSA doesn't tell people when it's intercepting their communications, and so, therefore, there was no standing.

When you think of cases like *Lyons* or *Clapper*, there's no analog prior to fifty years ago. These are new. The Supreme Court has imposed other standing requirements requiring that the plaintiff prove causation.[83] The plaintiff must prove that a favorable court decision will remedy the injury in order for the plaintiff to

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[72] *See, e.g.*, Shain v. Ellison, 356 F.3d 211, 215 (2d Cir. 2004) (holding that a detainee in a county correctional facility lacked standing to challenge county policy of requiring strip searches of all detainees); Am. Civil Liberties Union v. Nat'l Sec. Agency, 493 F.3d 644, 686–89 (6th Cir. 2007) (holding that plaintiffs lacked standing to challenge NSA's Terrorist Surveillance Program because they could not prove imminent harm); Schirmer v. Nagode, 621 F.3d 581, 585–86 (7th Cir. 2010) (holding protesters that were arrested did not have standing to challenge the constitutionality of city's disorderly conduct ordinance).

[73] 133 S. Ct. 1138 (2013).

[74] *Id.* at 1144.

[75] *Id.* at 1143–44.

[76] *Id.* at 1145.

[77] *Id.*

[78] *Id.*

[79] *Id.* at 1145–46.

[80] *Id.* at 1148.

[81] *Id.* at 1155.

[82] *Id.* at 1147–48.

[83] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (holding that "a causal connection between the injury and the conduct complained of" is one element of standing).

have standing.[84] These are very much restrictions on access to the court and typical of so many areas where the Supreme Court has done this in the last half century.

I'll take another area here to illustrate how over the last half century the Supreme Court has so often closed access to the courts. Here, let me talk about what's going on with regard to habeas corpus in the last fifty years. The Warren Court very much liberalized habeas corpus. For example, in *Fay v. Noia*,[85] in 1963, the Supreme Court said let individuals come to federal court with a writ of habeas corpus, unless it can be proven that they deliberately bypassed state proceedings.[86] The attitude in the Warren Court was that if something wasn't raised in state court, it was probably an attorney error. In any event, it's not fair to bind the criminal defendant by that mistake.

But beginning with the Burger Court and continuing with the Rehnquist and the Roberts Courts, the Supreme Court has imposed many new restrictions on habeas corpus. The Court, for example, has said that Fourth Amendment claims can't be raised on habeas corpus at all. A criminal defendant cannot argue that the police engaged in an illegal search and that the evidence should have been suppressed. This was the holding in *Stone v. Powell*,[87] in 1976. The Supreme Court has said if something wasn't raised below, there is a strong presumption that it cannot be raised on habeas corpus.[88] *Wainwright v. Sykes*[89] said that it could only be raised on habeas if the petitioner could show good cause for not being raised and prejudice. This is based on the assumption that defendants should be bound by their attorney's choices.[90] And then in 1996, Congress adopted the Antiterrorism and Effective Death Penalty Act that imposes so many additional restrictions on habeas corpus.[91] It says generally one and only one habeas petition.[92] It says there is a one-year statute of limitations usually from the end of the state court proceedings.[93] It says that a federal court can grant habeas corpus only if the state court decision was contrary to or an unreasonable application of a clearly established law as articulated by the Supreme Court.[94] Estimates are now, as a result of all of these restrictions, well under 5% (and some estimates go as low as 2%) of all habeas petitions are granted. It means that individuals who are unconstitutionally convicted—even innocent individuals—often cannot get their day in court.

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[84] *See id.* at 561 (holding that it "must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision'") (citations omitted).

[85] 372 U.S. 391 (1963).

[86] *Id.* at 438–39.

[87] 428 U.S. 465 (1976).

[88] *Id.* at 494–95.

[89] 433 U.S. 72 (1977).

[90] *Id.* at 87.

[91] Antiterrorism and Effective Death Penalty Act of 1996, § 101 18 U.S.C. § 440(a) (2012).

[92] *Id.* at § 104 (amending 18 U.S.C. § 2254 to prevent successive habeas corpus applications with few exceptions).

[93] *Id.* at § 101.

[94] *Id.* at § 103.

Standing and habeas corpus are examples of restrictions of access to the courts. I could mention so many others that have gone on over the last half century that have limited the ability of people whose rights have been violated to have access to the courts.

D. An Expansion of Freedom of Speech

The fourth change that I would identify over the last half century is the much greater commitment to freedom of speech, except when the institutional interests of the Government are at stake. If you look at the course of American history with regard to freedom of speech, robust protection of expression is something relatively new. I think that the modern era starts just a little bit earlier than a half century ago. *New York Times v. Sullivan*,[95] in 1964, is a key case that shifts the Supreme Court's protection of freedom of speech and increases the protection of expression.[96] *New York Times v. Sullivan* said that the First Amendment limits the ability of a person, who is a public official or running for public office, to win a defamation suit.[97] *New York Times v. Sullivan* said that if a plaintiff is a public official or running for public office, the plaintiff can win a defamation suit only by proving with clear and convincing evidence falsity of the statement and actual malice.[98] The Supreme Court said that it is essential that there be robust open debate about those holding and running for public office.[99] The Court said that the freedom of speech needs breathing space, so that even false speech is protected by the First Amendment.[100] Harry Kalven, then a professor at the University of Chicago Law School, said that *New York Times v. Sullivan* was an occasion for dancing in the streets, speaking of its importance with regard to expression.[101]

And I think that the Supreme Court largely over the last half century has been very protective of speech. Think of the types of speech that had been restricted in the prior fifty years. So many of the most important free speech cases in the prior half century dealt with incitement of illegal activity. The Supreme Court was very deferential during that prior half century when the government wanted to punish people who advocated illegal activity—were advocating to overthrow the United States government. But that changed in *Brandenburg v. Ohio*,[102] in 1969, where the Supreme Court says a person can be punished for inciting illegal activity only if there is a substantial likelihood of imminent illegality and only if the speech is

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[95] 376 U.S. 254 (1964).
[96] *Id.* at 292.
[97] *See id.* at 271.
[98] *Id.* at 279–80.
[99] *Id.* at 270–71.
[100] *Id.* at 271–72.
[101] Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 n.125 (quoting philosopher Alexander Meiklejohn).
[102] 395 U.S. 444 (1969) (per curiam).

directed at causing it.[103] Since then, the Supreme Court has hardly dealt with the issue of incitement and lower courts have been much more protective of speech.

In the prior half century, so many of the Supreme Court cases and lower court cases involved sexual speech, specifically obscenity prosecutions. The last major Supreme Court case about obscenity was in 1973, in *Miller v. California*,[104] where the Court reformulated the definition of obscenity.[105] In large part, I think the absence of Supreme Court cases about obscenity is the results of changes in social attitudes. Our society has become much more tolerant and permissive with regard to sexual speech and so it is not surprising there are fewer prosecutions. But I also think it reflects a judiciary that is much more protective of speech than it had been in the prior half century.

Over the last fifty years, the Supreme Court has expanded the types of speech that are protected. Earlier in the 1940s, the Court said that commercial advertising wasn't speech protected by the First Amendment at all.[106] In the 1970s, the Court changed that and said commercial speech is protected, and increasingly there has been a robust protection of commercial speech.[107]

I think the cases that most reflect the change in attitude by the Supreme Court over speech in the last half century are those in where the Court has made clear that offensive speech, even very deeply offensive speech, is protected by the First Amendment. *Snyder v. Phelps*[108] is illustrative. It involves a small church out of Topeka, Kansas—the Westboro Baptist Church—that goes to military funerals and uses this as an occasion for expressing a very vile antigay/antilesbian message.[109] Matthew Snyder was a marine who died in military service in Iraq.[110] The members of the Westboro Baptist Church went to his funeral in Maryland.[111] They asked a police officer where they could stand; the officer pointed to a spot about one thousand feet away from the funeral.[112] Before the funeral, they chanted and sang; during the funeral they were silent, but they held up signs with offensive slogans.[113] That night, Matthew's father, Albert, saw on the news footage, where he could read the signs; he was deeply offended.[114] He sued for intentional infliction of emotional distress and invasion of privacy.[115] The federal court jury awarded him ten million dollars in damages, including both compensatory and punitive damages. But the United States Supreme Court, in an 8–1 decision, held that the damage award

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[103] *Id.* at 447.
[104] 413 U.S. 15 (1973).
[105] *Id.* at 16.
[106] Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).
[107] *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 829 (1975).
[108] 562 U.S. 443 (2011).
[109] *Id.* at 448.
[110] *Id.*
[111] *Id.*
[112] *Id.* at 448–49.
[113] *Id.* at 449.
[114] Snyder v. Phelps, 562 U.S. 443, 449 (2011).
[115] *Id.* at 450.

violated the First Amendment.[116] Here too, the importance of *New York Times v. Sullivan* is apparent, because it was there that the Court held that tort liability is limited by the First Amendment, just like criminal liability is limited by the First Amendment.[117] But most of all, what *Snyder v. Phelps* stands for is the proposition that speech cannot be the basis of liability or punishment, even though it's offensive, even very deeply offensive.[118]

But, there was a "but" in my statement. And that is *but* the Supreme Court has not been protective of speech when the institutional interests of government are at stake. So for instance, if it is student speech being regulated by a school, the Supreme Court has not been protective of student expression much at all. Early in these fifty years in *Tinker v. Des Moines Board of Education*,[119] the Court eloquently declared that students don't leave their free speech rights at the schoolhouse gate. But in every speech case involving students since then, the Supreme Court has ruled for the Government against the students.[120] The most recent case, *Morse v. Frederick*,[121] in 2007, is illustrative. The Olympic torch was coming through Juneau, Alaska.[122] A school released its students to stand on the sidewalk and watch.[123] A student got together with his friends and held up a banner that said quote, "BONG HiTS 4 JESUS."[124] At the oral argument, Justice Souter said he had no idea what that meant.[125] But the principal thought it was a message to encourage illegal drug use.[126] She confiscated the banner and suspended the students from school.[127] The case went to the Supreme Court. 5–4 the Supreme Court ruled in favor of the principal of the school.[128]As Justice Stevens said, it's hard to believe that any student—the smartest or the slowest—are more likely to use marijuana because of this banner.[129] The Court didn't require any showing of that. The Court just deferred to the school.

Another example where the institutional interests of government are at stake is the speech of government employees. In *Garcetti v. Ceballos*,[130] in 2006, the Supreme Court said there is no free speech protection for the speech of government employees on the job in the scope of their duties.[131] Speech on military bases is

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[116] *Id.*
[117] New York Times v. Sullivan, 376 U.S. 254, 291–92 (1964).
[118] *Snyder*, 562 U.S. at 460–61.
[119] 393 U.S. 503 (1969).
[120] *Id.* at 506.
[121] 551 U.S. 393 (2007).
[122] *Id.* at 397.
[123] *Id.*
[124] *Id.*
[125] *See* Transcript of Oral Argument at 25, Morse v. Frederick, 551 U.S. 393 (2007) (No. 06-278).
[126] Morse v. Frederick, 551 U.S. 393, 398 (2007).
[127] *Id.*
[128] *Id.* at 395.
[129] *Id.* at 444.
[130] 547 U.S. 410 (2006).
[131] *Id.* at 425–26.

another example. I argued a case in the Supreme Court two years ago, *United States v. Apel*,[132] about the right of a person to demonstrate on a public area of a military base—actually the side of a major public road, the Pacific Coast Highway.[133] I lost by the close margin of nine to nothing.[134] So yes, there is a far greater commitment now by the Supreme Court, lower courts, and our society to freedom of speech. But this is a commitment that ends when there's an institutional interest of the government at stake.

E. An Increased Emphasis on Equality

The fifth and final change that I would identify is a much greater commitment to equality on the part of the Supreme Court, though it's often least manifest with regard to racial equality and especially with regard to racial equality in schools. It might surprise you, if you haven't studied constitutional law recently, to know that it wasn't until 1971, in *Reed v. Reed*,[135] that the Supreme Court for the first time in American history found sex discrimination unconstitutional.[136] It wasn't until a few years after that that the Supreme Court for the first time indicated that some form of heightened scrutiny would be used for sex discrimination.[137] It wasn't until 1976 that the Supreme Court in *Craig v. Boren*[138] formulated the test we know as intermediate scrutiny and said that is to be used for sex discrimination; sex discrimination will be allowed only if it is substantially related to an important government interest.[139] It is only in the last fifty years that the Supreme Court has protected noncitizens from discrimination and that the Court has protected children or nonmarital children from discrimination.[140] And obviously it's only in the last fifty years and really only in the last twenty years that the Supreme Court has protected gays and lesbians from discrimination. The first Supreme Court case ever to protect gays and lesbians from discrimination wasn't until 1996, in *Romer v. Evans*,[141] and the most recent, of course, is *Obergefell v. Hodges*,[142] on June 26th of last year.

So in all of these ways, there's a much greater commitment to equality. And yet, I have to pause when we talk about racial equality. Here, the Supreme Court's record is much more mixed, if not even dismal. The Supreme Court over these last fifty years has held that disparate impact isn't enough to prove race discrimination under equal protection.[143] Or to put it in more formal language of constitutional law,

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[132] 134 S. Ct. 1144 (2014).
[133] *Id.* at 1148–49.
[134] *Id.* at 1146.
[135] 404 U.S. 71 (1971).
[136] *Id.* at 76–77.
[137] *See* Frontiero v. Richardson, 411 U.S. 677, 682–83 (1973).
[138] 429 U.S. 190 (1976).
[139] *Id.* at 197–98.
[140] *See* Levy v. Louisiana, 391 U.S. 68, 71–72 (1968).
[141] 517 U.S. 620, 635–36 (1996).
[142] 135 S. Ct. 2584, 2607–08 (2015).
[143] Washington v. Davis, 426 U.S. 229, 244–46 (1976).

just showing a discriminatory effect isn't enough to get more than rational basis.[144] *Washington v. Davis*,[145] in 1976, involved a Washington D.C. ordinance that said in order to be a police officer, a person had to pass a test.[146] Statistics showed that African Americans failed that test much more often than whites.[147] But the Supreme Court said that's not race discrimination, that's just a discriminatory effect, discriminatory purpose must be proven to establish the existence of a racial classification.[148] Another example is *McCleskey v. Kemp*,[149] in 1987. It involved a man, Warren McCleskey, who had been sentenced to death by a jury in Georgia.[150] A law professor, the late David Baldus from the University of Iowa, did studies to prove that the death penalty administered in Georgia was racially discriminatory.[151] The statistics were compelling. But the Supreme Court, 5–4, said that the statistics only show a disparate impact and that isn't enough to establish a racial classification.[152] The Supreme Court said that the criminal defendant had to prove either that the legislature in Georgia adopted the death penalty because of a discriminatory purpose or that this jury acted out of discriminatory purpose.[153] It's so difficult to prove discriminatory purpose. Rarely anymore, thankfully, will decision-makers express racist motivations. And yet, without being able to use disparate impact, it is so difficult to deal with the problem of race discrimination in society. So much of racism is the result of unconscious, implicit bias. Therefore, generally, there's not going to be the evidence to prove discriminatory intent to accompany the disparate impact.

But where I think the Supreme Court has failed the most with regard to race is with regard to school desegregation. *Brown v. Board of Education*,[154] of course, came down on May 17, 1954. A decade after *Brown*, in 1964, virtually nothing had been done to achieve desegregation in the South.[155] In Alabama, Mississippi and South Carolina in 1964, not one African American child was attending school with a white child.[156] In North Carolina, which has always prided itself on being a more progressive southern state, only one-tenth of African Americans were attending

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[144] *Id.*
[145] *Id.*
[146] *Id.* at 232–34.
[147] *Id.*
[148] *Id.* at 238–39.
[149] 481 U.S. 279 (1987).
[150] *Id.* at 284.
[151] *Id.* at 286.
[152] *Id.* at 282, 298–99.
[153] *Id.*
[154] 347 U.S. 483 (1954).
[155] *See* Kimberly Jenkins Robinson, *Resurrecting the Promise of* Brown*: Understanding and Remedying How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C.L. REV. 787, 804 (2010).
[156] *See Brown v. Board: Timeline of School Integration in the U.S.*, TEACHING TOLERANCE: A PROJECT OF THE SOUTHERN POVERTY LAW CENTER (Spring 2004), http://www.tolerance.org/magazine/number-25-spring-2004/feature/brown-v-board-timeline-school-integration-us [https://perma.cc/H83Z-YXM5].

school with whites in 1964.[157] But then things began to change. In 1964, the Supreme Court declared that there has been all too much deliberation and not enough speed.[158] That same year, Congress passed the 1964 Civil Rights Act.[159] Title VI says that recipients of federal funds can't discriminate based on race.[160] The then Department of Health, Education, and Welfare said any school system segregated by race would be deemed to discriminate and could not get federal funds.[161] Every school system depends on federal funds.

From 1964 to 1988, by every measure, American public schools were less racially segregated. Since 1988, every year American public schools have become more racially segregated.[162] And according to UCLA professor Gary Orfield, they're becoming more racially segregated at an accelerating rate.[163] And I think Supreme Court decisions are largely responsible for this. I point to *Milliken v. Bradley*,[164] in 1977 that said that there cannot be interdistrict remedies for school segregation.[165] Students generally cannot be taken from suburbs and moved to city schools, or from cities and moved to suburban schools. The result is, very little in the way of meaningful school desegregation can be achieved. In most major cities, the school systems are 80% or 90% more minority students.[166] Unless students can be brought across district lines, desegregation cannot be achieved. In *Oklahoma City v. Dowell*,[167] in 1991, the Supreme Court said once a school system has achieved so-called unitary status, federal court desegregation orders must end even when it's going to mean the resegregation of the schools.[168] And most recently in 2007, in *Parents Involved in Community Schools v. Seattle School District No. 1,*[169] the Supreme Court said that school systems cannot on their own use race as a factor of assigning students into their schools to achieve diversity and desegregation.[170] These cases—*Milliken*, *Oklahoma City v. Dowell*, *Parents Involved*—all are responsible

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[157] *See* Ian Millhiser*, American Schools Are More Segregated Now Than They Were in 1968, and the Supreme Court Doesn't Care*, THINK Progress (Aug. 13, 2015), http://think progress.org/justice/2015/08/13/3690012/american-schools-are-more-segregated-now-then -they-were-in-1968-and-the-supreme-court-doesnt-care/ [https://perma.cc/47AU-NPDR].

[158] Griffin v. Cty. Sch. Bd. of Prince Edward Cty., 377 U.S. 218, 229 (1964).

[159] 42 U.S.C. § 2000d (2006).

[160] Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 241, 252 (1964).

[161] Ruby G. Martin, *Title VI of the Civil Rights Act of 1964 and Education*, EDUCATIONAL HORIZONS, Fall 1968, at 34, 34.

[162] *See* GARY ORFIELD & JOHN T. YUN, RESEGREGATION IN AMERICAN SCHOOLS 19, 29 (The Civil Rights Project, Harvard University) (1999).

[163] *See id.* at 3.

[164] 433 U.S. 267 (1977).

[165] *Id.* at 286–88.

[166] *See* ORFIELD, *supra* note 162, at 9 (demonstrating by the numbers that major U.S. cities have large numbers of minority students).

[167] 498 U.S. 237 (1991).

[168] *See id.* at 244–46.

[169] 551 U.S. 701 (2007).

[170] *Id.* at 710–11.

for what has increasingly become separate and unequal schools.[171] So that's why I say that generally, there has been a greater commitment to equality by the Supreme Court, but it's been much less evident with regard to race.

II. THE MOST IMPORTANT DECISIONS

I want to conclude by giving you my opinion of the five most important Supreme Court cases over the last half century. And I'll do that, but I realize it would be more useful to conclude by talking about what I regard as the five most underappreciated Supreme Court cases.

As for the most important cases, I will list them alphabetically and begin with *Baker v. Carr*[172] and *Reynolds v. Sims*.[173] I'm grouping them together as one. Those are the Supreme Court cases that said that challenges to malapportionment of state legislatures could be heard by the federal courts and that for any elected body, there must be one person, one vote; all districts must be about the same in population. When Earl Warren stepped down as Chief Justice, he was asked what were the most important rulings during his tenure.[174] He pointed to those cases, *Baker v. Carr* and *Reynolds v. Sims*, since state legislatures never were going to reapportion themselves and these rulings were crucial for protecting the democratic process.[175]

I would put *Bush v. Gore*[176] on my list of the most important five cases in the last fifty years. It is the first time that the Supreme Court played a role in deciding a presidential election. Maybe it did decide that presidential election—we'll never know. And certainly I think it's a case that changed the way many people perceive the United States Supreme Court, for better or for worse.

I would put *Obergefell v. Hodges*[177] on my list of the five most important Supreme Court cases in the last fifty years. *Obergefell v. Hodges*, of course, is the case where the Supreme Court said that state laws that prohibit same-sex marriage are unconstitutional.[178] It's obviously enormously important for the ability of gays and lesbians to marry, but it's also important in terms of the Supreme Court so

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[171] *See id.*; *Dowell*, 498 U.S. at 244–46; Milliken v. Bradley, 433 U.S. 267, 286–88 (1977).

[172] 369 U.S. 186 (1962).

[173] 377 U.S. 533 (1964).

[174] Carlo A. Pedrioli, *Instrumentalist and Holmesian Voices in the Rhetoric of Reapportionment: The Opinions of Justices Brennan and Frankfurter in Baker v. Carr*, 4 ALA. C.R. & C.L.L. REV. 1, 2 (2013) ("In his autobiography, Chief Justice Earl Warren described Baker v. Carr as 'the most important case of [his] tenure on the Court.'") (citations omitted); Erin Daly, *Idealists, Pragmatists, and Textualists: Judging Electoral Districts in America, Canada, and Australia*, 21 B.C. INT'L & COMP. L. REV. 261, 384 (1998) ("Chief Justice Warren wrote that the most important case of his tenure on the Court was not *Brown* as some might have guessed, but the voting rights cases.").

[175] 369 U.S. at 186; 377 U.S. at 533; *see supra* text accompanying note 174.

[176] 531 U.S. 98 (2000).

[177] 135 S. Ct. 2584 (2016).

[178] *Id.* at 2607–08.

emphatically rejecting originalism, so clearly embracing a non-originalist approach to interpreting the Constitution.

I would think that anyone's list of the five most important cases in the last fifty years would also include *Roe v. Wade*.[179] Obviously it's important for the millions of women who have had the chance to decide for themselves whether to continue or terminate a pregnancy. But no case has more shaped the public and scholarly debate about constitutional interpretation and the role of the courts than *Roe v. Wade*.

And fifth on my list of the most important would be *United States v. Nixon.*[180] *Nixon* stands for the proposition that no one—not even the president of the United States—is above the law.[181]

But those are cases that are all familiar. I want to conclude by identifying what I regard as the five most underappreciated cases from the Supreme Court from the last half century. So again, I'm doing these alphabetically. I would start my list with *Buckley v. Valeo*,[182] in 1976. Everyone is familiar with *Citizens United v. Federal Elections Commission*.[183] That's where the Supreme Court held that corporations can spend unlimited amounts of money to get candidates elected or defeated.[184] But *Citizens United* was very much built on the earlier case in *Buckley v. Valeo*.[185] *Buckley v. Valeo* is the case where the Supreme Court said spending money in election campaigns is a form of speech.[186] *Buckley v. Valeo* is the case that said that the government cannot regulate independent expenditures; that the wealthy have the right to spend as much as they want to get candidates elected or defeated.[187] The Court ruled that expenditure limits are always unconstitutional.[188] And *Buckley v. Valeo*, more than any other Supreme Court decision in history, has shaped the very nature of our political landscape.

Second on my list of the most underappreciated cases is *Circuit City v. Adams*,[189] in 2001. Of all the cases that I'm talking about tonight, it's the case that affects nearly all of us in this room. It's *Circuit City v. Adams* that says that arbitration clauses, even in employments contracts, are enforceable and can preclude civil rights suits in federal court.[190] *Circuit City v. Adams* involved a man who applied for a job at Circuit City.[191] He filled out his job application and on the back of the application there was a lot of fine print; a lone clause on the back of the job application that said that if he ever had any grievances or lawsuits against Circuit

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[179] 410 U.S. 113 (1973).
[180] 418 U.S. 683 (1974).
[181] *Id.* at 715–16.
[182] 424 U.S. 1 (1976).
[183] 558 U.S. 310 (2010).
[184] *Id.* at 311–15.
[185] *Buckley*, 424 U.S. at 1.
[186] *Id.* at 44–45.
[187] *Id.* at 45.
[188] *Id.*
[189] 532 U.S. 105 (2001).
[190] *Id.* at 113.
[191] *Id.* at 109.

City, they would have to go to arbitration.[192] He couldn't go to court. His lawyer brought a race discrimination claim on his behalf under California state law in California court.[193] The lawyer didn't want it to be removed to federal court.[194] But Circuit City filed a lawsuit in federal court under a 1925 statute, the Federal Arbitration Act, to compel arbitration.[195] The Supreme Court, in a 5–4 decision, interpreted the Federal Arbitration Act to say that arbitration should be compelled.[196] Of course, it was this case that then paved the way to decisions like *AT&T Mobility v. Concepcion*[197] and *American Express v. Italian Colors*,[198] where the Court has held that arbitration clauses in employment contracts, consumer contracts, medical contracts, are all enforceable.[199]

Not long ago I went to see a new eye doctor for the first time and I was given a big stack of papers to fill out. In the middle was a form I was asked to sign, that if I had any claims against the doctor I could not sue the doctor in court—I'd have to go to arbitration. I asked the receptionist if the doctor would still see me if I didn't sign the form. She said she didn't know. Nobody had ever asked her that question before.

Around the same time, I bought a new Dell computer, and as you know in order to use a computer or an iPad for the first time, you have to click that you've read the terms, and agree to them. For the iPad, they are forty-six pages long. Well I never read—I just click and use the machine. But in this instance, I read the terms. And sure enough there was a clause that said that in any claims against Dell with regard to the computer, I had to go to arbitration. I couldn't go to court. I wrote Dell a letter saying I did not agree to that clause and by opening the envelope of my letter they were agreeing I could sue them in court if there was a dispute. Dell didn't write back but the computer sort of still works.

Circuit City v. Adams affects all of us because our consumer contracts—maybe our employment contracts, maybe our medical contracts—now have arbitration clauses and they are enforceable.

The third case that I would put on my list of the underappreciated is *New York v. United States*,[200] in 1992. I briefly mentioned it earlier. The case involved a federal law, the Low-Level Radioactive Waste Policy Act, that required that every state clean up its nuclear waste by 1996.[201] The Supreme Court declared this unconstitutional as violating the Tenth Amendment.[202] The Supreme Court said that Congress violates the Tenth Amendment if it commandeers the states, forcing them to enact laws and adopt regulations. Why does this case matter so much? Prior to

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[192] *Id.* 109–10.
[193] *Id.* at 110.
[194] *Id.*
[195] *Id.*
[196] *Id.* at 123.
[197] 563 U.S. 333 (2011).
[198] 133 S. Ct. 2304 (2013).
[199] *AT&T Mobility*, 563 U.S. at 333; *American Express*, 133 S. Ct. at 2304.
[200] 505 U.S. 144 (1992).
[201] *Id.* at 153–54.
[202] *Id.* at 175–76.

1992, the Supreme Court, since 1937, had said that the protection of states as states is left to the political process. In fact, in a 1985 case, *Garcia v. San Antonio Metropolitan Transportation District*,[203] the Supreme Court explicitly said the protection of states is left to the political process.[204] It's *New York v. United States* that changes that. It's *New York v. United States* that paves the way for all of the Supreme Court's decisions about federalism that I was referring to earlier.

Fourth on my list of the most underappreciated cases is *San Antonio Board of Education v. Rodriguez*,[205] in 1973. The case involved a challenge to the Texas system of funding public schools largely through local property taxes.[206] The result was that poor areas had to tax at a very high rate and had relatively little to spend on education.[207] Wealthy areas could tax at a low rate and had a great deal to spend on education.[208] But the Supreme Court, 5–4, upheld the Texas system.[209] Justice Lewis Powell wrote for the Court. He was joined by the other three Nixon appointees: Burger, Blackmun, and Rehnquist, and an Eisenhower appointee Potter Stewart.[210] In *Rodriguez*, the Supreme Court said that poverty is not a suspect classification, discrimination against the poor doesn't get more than rational basis review, and education is not a fundamental right.[211] *Rodriguez*, together with cases like *Milliken v. Bradley*, that I mentioned earlier, have led to separate and unequal schools in the United States, something that plagues and affects all of us.[212]

Fifth and finally on my list of underappreciated cases is *Terry v. Ohio*,[213] in 1968. *Terry v. Ohio* is the case that says that police can stop and frisk only on the basis of reasonable suspicion; they don't need to have probable cause in order to be able to stop and frisk.[214] What's interesting is there's now been a release of some of the justices' papers from that time. We know that especially Justice Thurgood Marshall was very concerned about how the police would use this greater authority to stop and to frisk, especially against people of color.[215] The experience of the last several years confirms that the discretion of the police to stop and to frisk often is used in a racially discriminatory way.

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[203] 469 U.S. 528 (1985).
[204] *Id.* at 555 (1985).
[205] 411 U.S. 1 (1973).
[206] *Id.* at 7.
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.* at 37.
[212] *See supra* note 171 and accompanying text.
[213] 392 U.S. 1 (1968).
[214] *Id.* at 24.
[215] *See* Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1511–15 (2007).

CONCLUSION

I was thinking of trying to conclude by projecting ahead fifty years and imagine what the professor is going to be talking about when he or she gives the 100th anniversary of the Leary Lecture. And then I realized that's impossible. No one fifty years ago could have imagined things like the rise of fundamentalism across the globe and the terrors that resulted from it. Technological changes, like the internet, that so alter the way in which we communicate and express ourselves, could not have been imagined. The moral changes, such as the recognition of rights for gays and lesbians, including the right to marriage equality—would have been unthinkable a half century ago.

So I conclude with the one prediction I'm sure about. I truly believe that over the next fifty years there will be, as there was in the prior fifty years, an expansion of freedom; an increase in equality. Because here I believe, and I'll conclude with this, that the late Dr. Martin Luther King got it right when he said, "The arc of the moral universe is long, but it bends towards justice."[216]

[216] Dr. Martin Luther King, Jr., *Where Do We Go from Here?, in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 252 (James M. Washington ed.,1986).