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April 7, 2021

Senator Richard J. Durbin
United States Senate
Washington, DC 20510-6275

Dear Senator Durbin:

Attached to this letter are my responses to the written questions submitted by Senators Whitehouse, Kennedy, and Sasse. I look forward to seeing these materials included in the formal Committee record for the hearing on "What's Wrong with the Supreme Court: The Big-Money Assault on Our Judiciary."

As I previously noted, my testimony and these responses to questions represent my personal views, and not the institutional views of Case Western Reserve University, its law school, or the Coleman P. Burke Center for Environmental Law.

Sincerely,

Jonathan H. Adler

cc: Sen. John Kennedy

Senate Committee on the Judiciary
Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights
"What's Wrong with the Supreme Court: The Big-Money Assault on Our Judiciary"

Senator Whitehouse's Questions for Jonathan Adler

1. **Please provide the Committee with a list of all *amicus curiae* briefs you have filed in federal court, either yourself as *amicus* or as a lawyer representing *amici*.**

Based upon a review of my records, what follows is a listing of all *amicus curiae* briefs I have filed in federal court, either as an *amicus* or as a lawyer representing *amici*.

- Brief for Jonathan H. Adler, Nicholas Bagley, Abbe R. Gluck, and Ilya Somin as Amici Curiae Supporting Petitioners, *California v. Texas*, Supreme Court of the United States. May 13, 2020.
- Brief of Amici Curiae Public Law Scholars and Concerned Landowners in Support of Petition for a Writ of Certiorari, *Givens v. Mountain Valley Pipeline, LLC*, Supreme Court of the United States. August 08, 2019.
- Brief of Amici Curiae Jonathan H. Adler, Nicholas Bagley, Abbe R. Gluck, and Ilya Somin in Support of Intervenors-Defendants-Appellants, *Texas v. United States*, U.S. Court of Appeals for the Fifth Circuit, April 1, 2019.
- Brief for the Cato Institute, Professors Jonathan H. Adler, Richard A. Epstein, and Michael W. McConnell, and Cause of Action Institute as Amici Curiae Supporting Petitioner, *Kisor v. Wilkie*, Supreme Court of the United States. January 31, 2019.
- Brief of Amici Curiae Jonathan H. Adler, Nicholas Bagley, Abbe R. Gluck, Ilya Somin, and Kevin C. Walsh in support of Intervenor-Defendants' Opposition to Plaintiffs' Application for Preliminary Injunction, *Texas v. United States*, U.S. District Court for the Northern District of Texas, June 14, 2018.
- Brief for The Cato Institute, Professors Jonathan H. Adler, James F. Blumstein, Richard A. Epstein, and Michael W. McConnell, and Cause of Action Institute as Amici Curiae in Support of Petitioners, *Gloucester County School Board v. G.G.*, Supreme Court of the United States. January 10, 2017.
- Brief of Constitutional Law, Political Science, and Economics Professors as Amici Curiae in Support of Noting Probable Jurisdiction, *Independence Institute v. Federal Election Commission*, Supreme Court of the United States. January 09, 2017.
- Brief of Amici Curiae Administrative Law Professors, *FERC v. Barclays Bank PLC*, U.S. District Court for Eastern District of California, November 7, 2016.
- Brief of Amici Curiae Administrative Law Professors, *FERC v. Powhatan Energy Fund, LLC*, U.S. District Court for the Eastern District of Virginia, December 7, 2016
- Brief of Amici Curiae First Amendment Scholars & First Amendment Lawyers Association in Support of Petitioners, *Expressions Hair Design v. Schneiderman*, Supreme Court of the United States, November 21, 2016.
- Brief for the Cato Institute and Professors Jonathan H. Adler, Richard A. Epstein, and Michael W. McConnell as Amici Curiae in Support of Petitioner, *Gloucester County School Bd. v. G.G.*, Supreme Court of the United States. September 27, 2016.
- Brief of Amici Curiae First Amendment Scholars in Support of Petitioners. *Expressions Hair Design v. Schneiderman*, Supreme Court of the United States, June 15, 2016.

- Brief of Amici Curiae Federal Courts Scholars and Southeastern Legal Foundation in Support of Respondents, *United States of America v. States of Texas*, Supreme Court of the United States, April 04, 2016.
- Brief for Amici Cato Institute and Professors of Constitutional Law in Support of Plaintiff-Appellee, *People for the Ethical Treatment of Property Owners v. United States Fish & Wildlife Service*, United States Court of Appeals, Tenth Circuit, May 26, 2015.
- Brief of Jonathan H. Adler and Michael F. Cannon as Amici Curiae in Support of Petitioners, *King v. Burwell*, Supreme Court of the United States. December 29, 2014.
- Brief of Jonathan H. Adler and Michael F. Cannon as Amici Curiae in Support of Appellants, *Halbig v. Burwell*, United States Court of Appeals, District of Columbia Circuit, October 03, 2014.
- Brief of Jonathan H. Adler and Michael F. Cannon as Amici Curiae in Support of the Appellants, *King v. Sebelius*, United States Court of Appeals, Fourth Circuit, March 10, 2014.
- Brief of Jonathan H. Adler and Michael F. Cannon as Amici Curiae in Support of the Appellants, *Halbig v. Sebelius*, United States Court of Appeals, District of Columbia Circuit. February 06, 2014.
- Brief of Administrative Law Professors and the Judicial Education Project as Amici Curiae in Support of Petitioners, *Chamber of Commerce v. Environmental Protection Agency*, Supreme Court of the United States, Dec. 16, 2013.
- Brief of Jonathan H. Adler and Michael F. Cannon as Amici Curiae in Support of the Plaintiffs, *King v. Sebelius*, U.S. District Court for the Eastern District of Virginia, November 27, 2013.
- Brief of Jonathan H. Adler and Michael F. Cannon as Amici Curiae in Support of the Plaintiffs, *Halbig v. Sebelius*, U.S. District Court for the District of Columbia, November 18, 2013.
- Brief of Administrative Law Professors and the Judicial Education Project as Amici Curiae in Support of Petitioners, *Chamber of Commerce v. Environmental Protection Agency*, Supreme Court of the United States, May 24, 2013.
- Brief of Federalism Scholars as Amici Curiae in Support of Respondent Windsor, *United States of America v. Windsor*, Supreme Court of the United States, March 01, 2013.
- Brief of Amici Curiae Cato Institute, Professors Jonathan H. Adler, Roderick M. Hills, Jr., James Huffman, Daniel A. Lyons, Andrew P. Morriss, Nathan A. Sales, and David Schoenbrod in Support of Petitioners, *City of Arlington, Texas v. Federal Communications Commission*, Supreme Court of the United States, November 26, 2012.
- Brief of the Washington Legal Foundation and Constitutional Law Scholars as Amici Curiae in Support of Respondents (Individual Mandate Issue), *U.S. Department of Health & Human Services v. State of Florida*, Supreme Court of the United States. February 13, 2012.
- Brief of the Washington Legal Foundation and Constitutional Law Scholars As Amici Curiae in Support of Appellees, Urging Affirmance, *State of Florida v. U.S Department of Health & Human Services*, United States Court of Appeals, Eleventh Circuit. May 11, 2011.
- Brief of the Washington Legal Foundation And Constitutional Law Scholars As Amici Curiae in Support of Appellee, Urging Affirmance, *Commonwealth of Virginia ex rel. Cuccinelli v. Sebelius*, United States Court of Appeals, Fourth Circuit. April 04, 2011.
- Brief for Administrative Law Professors as Amici Curiae in Support of Petitioner, *Ochoa v. Holder*, Supreme Court of the United States. February 18, 2011.
- Brief of the Cato Institute and Law Professors Jonathan H. Adler, James L. Huffman, and Andrew P. Morriss as Amici Curiae in Support of Respondents, *Massachusetts v. Environmental Protection Agency*, Supreme Court of the United States, October 24, 2006.

- Brief Amici Curiae of Law Professors in Support of Respondent Duke Energy Corporation, *Environmental Defense v. Duke Energy Corporation*, Supreme Court of the United States, September 15, 2006.
- Brief of Amici Curiae Law Professors Supporting Defendants-Appellants and Reversal of The District Court's Ruling, *United States v. Cinergy Corp.*, United States Court of Appeals, Seventh Circuit. April 06, 2006.
- Brief of Amici Curiae Supporting Defendant-Appellee Duke Energy Corporation and Affirmance of the District Court's Ruling, *United States v. Duke Energy Corp*., United States Court of Appeals, Fourth Circuit, October 19, 2004.

2. The co-author of your *amicus* brief in *King v. Burwell,* Michael Cannon, wrote in *Forbes* that "[a]long with Jonathan H. Adler," he "helped lay the foundation for" that case, and "even helped recruit plaintiffs for *King*."[1] Did you play any role in recruiting plaintiffs for *King* or any other federal case? If so, please describe it.

I do not recall recruiting any plaintiffs for *King* or any other federal case. Beginning in 2011, I wrote and lectured extensively on the issues in *King v. Burwell* and had literally hundreds of conversations with people interested in various aspects of the cases, including some who wished to be involved. I routinely field inquiries about how my writing or research may be relevant to actual or potential litigation and, where appropriate, I refer inquiries to attorneys or non-profit groups that may have an interest in the litigation. I would have done so here as well, though I do not recall specific instances of doing so with regard to this litigation.

[1] Michael Cannon, *Something you probably won't expect me to say about* King v. Burwell, Forbes (June 26, 2015), *available at* https://www.forbes.com/sites/michaelcannon/2015/06/26/something-you-probably-wont-expect-me-to-say-about-king-v-burwell/.

3. **The Competitive Enterprise Institute (CEI), which employed you from 1991 to 2000, declared that it was "coordinating and funding . . . the *King v. Burwell* case."[2] Recent reports indicate that CEI took in undisclosed funding from the Bradley Foundation, which also routed funds to several *amici* in the case at Leonard Leo's suggestion.[3] Were you aware of CEI's involvement in the litigation at the time you filed your *amicus* brief?**

Yes. CEI's role was no secret. As the press release cited in the question indicates, CEI sought to take public credit for its work on the case.

4. **Did you receive any payment or reimbursement of any kind for your *amicus* brief in *King v. Burwell*? If so, did you have an obligation to disclose this to the Court pursuant to Supreme Court Rule 37.6? Did you make such a disclosure?**

No. I received no payment or reimbursement of any kind for any of the amici we filed in *King v. Burwell*, nor did I receive any payment or reimbursement for any of the amici we filed in any of the other cases raising the same issues as *King*. I made no disclosure as there was nothing to disclose.

5. **Did you at any point during the *King* litigation speak to Leonard Leo, Neil Corkery, Carrie Severino, or anyone associated with Judicial Education Project about the case or your plans to file an *amicus* brief?**

I do not recall any conversations with Leonard Leo, Neil Corkery, Carrie Severino, or anyone associated with Judicial Education Project about whether we would file amicus briefs or, for that matter, about any other aspect of the litigation. Michael Cannon and I submitted amicus briefs representing our own views throughout this litigation, based upon the research and other work we had done on the questions at issue in these cases—research that began well before any related lawsuits were filed.

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[2] Competitive Enterprise Institute, "SCOTUS Announces Review of CEI's Healthcare Case: *King v. Burwell*" (press release, Nov. 7, 2014), *available at* https://cei.org/news_releases/scotus-announces-review-of-ceis-healthcare-case-king-v-burwell/.

[3] Lisa Graves, *Dark money for Supreme Court briefs tied to former Federalist Society Leader*, TruthOut (Oct. 13, 2020), *available at* https://truthout.org/articles/dark-money-for-supreme-court-briefs-former-federalist-soceity/.

6. **Your testimony encourages the justices to "increase their voluntary disclosures and divest themselves of conflict-producing investments, as well as to issue explanations for all recusal decisions." In principle, would you support legislation making those disclosures, divestments, and explanations mandatory? Why or why not.**

I support the justices increasing their voluntary disclosures, divesting themselves of conflict-producing investments (such as individual stocks), and explaining all recusal decisions. This is certainly something worthy of Congressional attention and were I convinced that Congress could impose such requirements on the justices of the Supreme Court, I would support reasonable measures along those lines.

7. **Do you agree that Congress has the authority to legislate standards for judicial financial disclosures and ethics?**

I believe that Congress has such authority with regard to the lower courts. I am not sure whether Congress can impose such binding obligations on the justices of the Supreme Court beyond its power to impeach and remove any justices who failed to uphold the standard of "good behavior" established by the Constitution. Congress could, however, pass a resolution endorsing such measures, and such a resolution might influence the behavior of the justices.

8. **Your CV notes you have given presentations to George Mason Law and Economics Center programs to educate judges and state Attorneys General, and that you make a full list of those presentations available upon request. Please provide that list to the Subcommittee.**

My records indicate that I have given lectures or presentations on the following subjects at the following Law and Economics Center programs for judges and state attorneys general.

- On October 12, 2020, I spoke about my book, *Marijuana Federalism: Uncle Sam and Mary Jane* on the panel, "The Economic Effects of State Competition: Toward the Creation of Smart Regulation of Emerging Cannabis Industries in the Absence of a Federal Marketplace," at the Judicial Education Program Symposium on the Economics and Law of Cannabis Markets. [This was a web-based program.]
- On October 8, 2019, I spoke on the economics of federalism my book, *Marijuana Federalism: Uncle Sam and Mary Jane*, at the Law & Economics Center Judicial Education Program Symposium on the Law & Economics of Marijuana Legalization, in Denver, CO.
- On June 27-30, 2019, I lectured at the Judicial Education Program Workshop on the Economics of Environmental Law & Policy, sponsored by the Law & Economics Center, in Beaver Creek, Colorado. My lectures covered "The Common Law and the Environment," "Environmental Federalism," and "Climate Change."
- On May 21, 2018, I moderated a debate between Professors Patrick Parenteau and Thomas Merrill on whether climate change constitutes a public nuisance at the Civil

Justice Institute for Judges, sponsored by the Law & Economics Center at the Antonin Scalia Law School, George Mason University, in Arlington, VA.

- On March 23, 2018, I lectured on Environmental Federalism at the George Mason University Law & Economics Center's Attorneys General Education Program's Workshop on Federalism and the Economics of Regulation in Nashville, TN.
- On October 7, 2017, I participated in a panel on "The Regulation of Emerging Risks: Precautionary Principle or Risk v. Risk," at the Judicial Deference and Regulatory Science Symposium for Judges, sponsored by the Law & Economics Center at the George Mason University Antonin Scalia Law School in Arlington, VA, October 7.
- December 8-13, 2013, I lectured on environmental law and economics at conferences for judges sponsored by the George Mason University Law and Economics Center Judicial Education Program, in Duck Key, Florida. My lectures covered "The Common Law and the Environment," "Environmental Federalism," and "Climate Change."
- On January 17, 2013, I served as the facilitator for the "Summit on Federalism and the Future of Fossil Fuels," convened by Oklahoma Attorney General Scott Pruitt and sponsored by the Attorneys General Education Program of the George Mason University Law and Economics Center, in Oklahoma City, OK.

Senator Ben Sasse
Questions for the Record
Senate Judiciary Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts Hearing: "What's Wrong with the Supreme Court: The Big-Money Assault on Our Judiciary"

For Prof. Adler:

1. **Concerns about a "flotilla of amici" imply that these briefs are frequently decisive in the outcome of judicial decisions. In your view, how often are amicus briefs decisive in the outcome of judicial decisions?**

It is hard to say how often amicus briefs are decisive in the outcome of judicial decisions. As a frequent author and contributor to amicus briefs, I would like to believe these briefs have assisted federal courts in analyzing and assessing the relevant claims and issues before them. Some of these briefs have been cited or quoted by the relevant courts, which suggests they were helpful or influential, but it is hard to know. Empirical research on this question has shown that the Court often cites amicus briefs, and suggests that amicus briefs from some parties (most notably the Solicitor General and state Attorneys General) may have an influence in some cases, but this is still a matter of academic inquiry and debate. Further, it is important to remember that some amicus briefs are submitted less for the Court than for the public, as some organizations use the opportunity to submit amicus briefs as an opportunity to raise money or attract public attention to their efforts, even if their briefs are unlikely to have any influence at all.

2. **If one finds the content of a political opponent's amicus brief to be upsetting, isn't the appropriate response to file an amicus brief of one's own critiquing those arguments, rather than preventing or intimidating one's political opponents from making their arguments?**

Yes. Those concerned that a court's judgment may be unduly influenced by persuasive briefs submitted on the "wrong" side of a case should organize to ensure the submission of briefs on the "right" side of the case. As things stand, however, it is the truly rare, high-profile case that does not attract amicus briefs on both sides of the question, at least in the Supreme Court. Accordingly, it is rare that relevant positions are left unrepresented before the Court.

3. **Are efforts to silence or discount arguments based on the identity or funding source of the speaker healthy for our courts?**

No. Courts should base their decisions on the relevant law, not based on whether a given plaintiff or defendant is more sympathetic or politically popular. A party's argument should be evaluated based upon the quality of the arguments, not who is making them or even who may have supported them. We do not discount a criminal defendant's claims because he or she may have committed a grievous wrong. Nor should we discount any other litigants claims because we do

not like who they are, who they consort with, or the cause we think they may represent. Legal arguments should be evaluated on their legal merits.

The Senate Committee on the Judiciary, Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights - Questions for the Record from Senator John Kennedy
March 10, 2021

Hearing entitled: "What's Wrong with the Supreme Court: The Big-Money Assault on Our Judiciary."

Questions for Professor Adler

1. **Senator Whitehouse has pointed to a string of 5-4 decisions in which the five conservative justices voted for a conservative outcome over the dissent of four liberal justices. Why do you reject Senator Whitehouse's conclusion that this show the conservative justices are behaving in a partisan fashion?**

On a Court on which there are five conservative justices appointed by Republican presidents, and four liberal justices appointed by Democratic Presidents, every time the Court splits 5-4 along ideological lines it will necessarily split 5-4 in favor of the conservative justices. No other 5-4, ideological split is possible. Further, for the Court to split in this way, two conditions must hold. The conservative justices must vote together *and* the liberal justices must vote together. Given this fact, there is no *a priori* reason to conclude that it is the conservative justices, as opposed to the liberal justices, who are behaving in a partisan or political matter.

Further as I noted in my written statement, such 5-4 splits represent a small portion of the Court's decisions, and even a small portion of the Court's decisions decided by a 5-4 vote. In his 2019 report, Senator Whitehouse noted that there were 78 5-4 decision on which the Court divided along these ideological lines. Yet over that same period there were over 200 decisions that were decided 5-4. In other words, most of the time when the Court split 5-4 it did *not* split along the lines Senator Whitehouse highlighted. In each of these cases, at least one of the five conservative justices had to split with his conservative colleagues. So, if one looks at the entire data, it would appear that the liberal justices who were more likely to vote as a block in 5-4 cases. Therefore, if one believes that such voting patterns are evidence of partisan or political decision-making, one would be forced to conclude that it was the liberal justices who were behaving in a more partisan fashion, yet that is not the conclusion that Senator Whitehouse has chosen to draw.

As noted in my written testimony, I believe it is both more fair and more accurate to attribute the justices' individual votes to their distinct judicial philosophies, and not to any political or partisan motive. However, if one thinks the vote patterns are suggestive, I do not believe they suggest what Senator Whitehouse claims.

2. **In Professor Klarman's testimony, he claimed that "today's [Supreme] Court is the most conservative the last hundred years." In what ways is the Court more "conservative" than it was in 1920?**

On most questions of law, the Supreme Court's decisions are significantly more "liberal" (by conventional standards) than were the Supreme Court's decisions in 1920, particularly when it comes to constitutional law. That is to say, on most major questions, current doctrine is more "liberal" than it was in 1920. For instance, the Supreme Court today is more willing to uphold broad assertions of federal power, more likely to scrutinize governmental actions taken in the name of national security, more likely to protect individual rights and equal protection, and more willing to allow litigants to seek redress for claims in federal court. There are perhaps a few exceptions to this. Such exceptions would include the Supreme Court's jurisprudence on commercial speech, the Second Amendment, the Fifth Amendment's Takings Clause, religious liberty, and antitrust.

There are two ways in which one might characterize the Roberts Court as more "conservative" than prior courts. First, as I noted in my testimony to the Subcommittee, the Roberts Court overturns prior Supreme Court precedents and holds federal statutes to be unconstitutional less often than did the Warren, Burger, or Rehnquist Courts. This might make the Court more "conservative," in that it is more oriented toward the status quo, though I did not understand Professor Klarman to be making that point.

A second way the current Court may be considered more "conservative" than its predecessors, and perhaps even more conservative than any Court in 100 years, would be in its trajectory. One could argue that from 1920 through the early 21st Century, the Court generally trended in a "liberal" or progressive direction in that its decisions move the law toward more "liberal" or progressive outcomes and doctrines. Under Chief Justice Roberts, however, the Court has been very status-quo oriented, and has moved the law in a more "conservative" direction in an handful of areas (such as those noted above). For this reason, one could argue that the Court has a more conservative trajectory than prior courts, because it is the first Court in a very long time not to be trending in a "liberal" or progressive direction.

3. **Is the scope of federal power to regulate commerce under the Supreme Court's jurisprudence broader or narrower than it was in 1920?**

The scope of federal power to regulate commerce under the Supreme Court's jurisprudence is far broader than it was in 1920. In 1920, *Hammer v. Dagenhart* (1918) and *United States v. E.C. Knight* (1895) were still good law, and the Court had yet to approve the federal government's authority to regulate intrastate activities that may have a "substantial effect" on interstate commerce.

4. **Is the permissible scope of governmental power to regulate labor conditions under the Supreme Court's jurisprudence broader or narrower than it was in 1920?**

The permissible scope of governmental power to regulate labor conditions under the Supreme Court's jurisprudence, including the power to protect and safeguard unions and labor organizing, is far broader than it was in 1920. In 1920, *Lochner v. New York* (1905) and *Hammer v. Dagenhart* (1918) were still good law.

5. **Is the Supreme Court's Equal Protection jurisprudence more or less protective of racial and ethnic minorities than it was in 1920?**

The Supreme Court's Equal Protection jurisprudence is far more protective of racial and ethnic minorities than it was in 1920. In 1920, the Court was willing to uphold state-mandated segregation and discriminatory measures did not receive the sort of heightened scrutiny they receive today.

6. **Is the Supreme Court's Equal Protection jurisprudence more or less protective of the rights of women than it was in 1920?**

The Supreme Court's Equal Protection jurisprudence is far more protective of the rights of women than it was in 1920. In 1920, the Supreme Court would uphold laws that discriminate on the basis of sex, including when laws were based upon crude stereotypes about sexual differences. In 1920, state coverture laws were still considered to be constitutional as well.

7. **Is the Supreme Court's jurisprudence more or less protective of freedom of speech and expression than it was in 1920?**

The Supreme Court's First Amendment jurisprudence is far more protective of the freedom of speech than it was in 1920. Indeed, the Roberts Court likely provides greater protection, to a wider variety of speech, than any Court in the nation's history.

8. **Is the Supreme Court's jurisprudence on reproductive rights more or less protective of abortion than it was in 1920?**

The Supreme Court's jurisprudence on reproductive rights is vastly more protective of abortion than it was in 1920. One hundred years ago, the Supreme Court did not recognize a right to abortion or reproductive choice, and in *Buck v. Bell* (1927) the Court would uphold a law mandating sterilization for those deemed mentally unfit.

9. **Is the Supreme Court's jurisprudence more or less protective of homosexuals than it was in 1920?**

The Supreme Court's jurisprudence is far more protective of homosexuality than it was in 1920, when laws throughout the United States (and even in the U.S. military) criminalized homosexual conduct. At that time a constitutional right to same-sex marriage could not even have been imagined.

10. **Does the Supreme Court's jurisprudence impose greater or fewer limitations on capital punishment than it did in 1920?**

The Supreme Court's current jurisprudence imposes far more constitutional constraints on the imposition and execution of capital punishment than it did in 1920.

11. **Under the Supreme Court's jurisprudence, it is easier or more difficult for governments to adopt discriminatory policies and impose racial segregation than it was in 1920?**

Under the Supreme Court's current jurisprudence, it is vastly more difficult for government entities to adopt racially discriminatory policies than it was in 1920, when state sponsored segregation was still permitted under Supreme Court doctrine.

12. **Under the Supreme Court's jurisprudence, is there greater or lesser protection of the rights of criminal defendants than there was in 1920?**

Under the Supreme Court's current jurisprudence, there is far greater protection of the rights of criminal defendants in both state and federal courts than there was in 1920.

13. **Under the Supreme Court's jurisprudence, is it easier or more difficult to sue manufacturers for defective products than it was in 1920?**

It is much easier to sue manufacturers for defective products than it was in 1920.

14. **Under the Supreme Court's jurisprudence, is it easier or more difficult to file a class action than it was in 1920?**

It is much easier to file a class action lawsuit than it was in 1920. The modern class action did not really exist prior to the 1966 revisions to the Federal Rules of Civil Procedure, and the FRCP are promulgated by the Supreme Court.

15. **How does the Supreme Court's enforcement of the exclusionary rule compare with that of 1920?**

The Supreme Court's enforcement of the exclusionary rule is much broader than it was in 1920, as the exclusionary rule was only applied in federal courts prior to *Mapp v. Ohio* (1961).

16. **Is the right of a criminal defendant to have legal representation subject to more or less protection than it was in 1920?**

The right of a criminal defendant to have legal representation has greater protection under current Supreme Court doctrine than it did in 1920. The Supreme Court did not conclude that indigent criminal defendants were entitled to legal representation until *Gideon v. Wainright* (1963).