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## Closing the Courthouse Doors

# CLOSING THE COURTHOUSE DOORS

ERWIN CHEMERINSKY<sup>†</sup>

## ABSTRACT

One crucial aspect of the Roberts Court's decision making has been its systematically closing the courthouse doors to those suing corporations, to those suing the government, to criminal defendants, and to plaintiffs in general. Taken together, these separate decisions have had a great cumulative impact in denying access to the courts to those who claim that their rights have been violated. The Roberts Court often has been able to achieve substantive results favored by conservatives through these procedural devices.

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## INTRODUCTION

Last year, the Supreme Court decided a case about the ability of a state to give tax credits to support private parochial schools. The case, *Arizona Christian School Tuition Organization v. Winn*,<sup>1</sup> attracted almost no media attention. The Arizona law allowed individuals to get a \$500 tax credit if they gave money to a school tuition organization. The evidence and the record of the case showed that virtually all of the funds through these tax credits went to support Evangelical Christian and Catholic schools. The United States Court of Appeals for the Ninth Circuit found that the Arizona program violated the Establishment Clause of the First Amendment. The federal court of appeals said that this was a program that had the purpose and the effect of advancing religion. The Supreme Court, in a 5–4 decision, divided along ideological grounds, reversed. Justice Kennedy wrote the opinion for the Court. He was joined

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1. 131 S. Ct. 1436 (2011).

by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. Justice Kennedy said the taxpayers lacked standing to bring a challenge to the Arizona law.

The Supreme Court had previously ruled that taxpayers had standing to challenge government expenditures violating the Establishment Clause. But the Supreme Court said this is not a government expenditure—this is a tax credit—so no one has standing to sue. In other words, even if the program violates the Establishment Clause—even blatantly violates the Establishment Clause—literally no one could come to court to object. Justice Elena Kagan wrote a powerful dissent. She said the distinction drawn by the majority makes no sense. Why, if we are going to allow taxpayers to challenge government expenditures, not allow them to challenge tax credits? She said \$350 million that would otherwise have been in the coffers of the Arizona State Treasury now has gone to religious institutions. She said there is no stopping point. If a \$500 tax credit were permissible, then a \$1,000 or \$25,000 tax credit would be permissible. In fact, the government now can support any kind of religion just by saying a person gets a tax credit. So if the government wants to encourage people to buy religious icons, the government will simply say it will give a tax credit just for that. As I said, the case did not make headlines because no one paid much attention to it, except for maybe federal court scholars and those who practice in this narrow field of law.

But imagine if the Supreme Court had held on that day that the government could give unlimited amounts of money to religious schools; that would have made headlines. The difference is, so long as the Supreme Court ruling is in procedural terms about standing, no one pays attention. I picked this case because it is recent and because it is powerful, but most of all, I selected it because it is typical. I believe that the most important theme about the Roberts Court, which is now seven years in existence, is how it is consistently closing the courthouse doors. And I think this is pernicious because rights can be taken away directly, or they can be removed by making sure that nobody can go to court to vindicate them. And that is what I think the Roberts Court has been doing in area after area. I want to focus on four areas, and for each I want to choose cases almost exclusively from the last year. Now, I picked these cases because they are recent and illustrative, but I could choose a number of other cases during the Roberts era and cases from the Rehnquist Court, too. Over and over, what is occurring is the courthouse doors are being slammed on those who have viable claims and now have no way to vindicate them.

#### I. CLOSING THE COURTHOUSE DOORS TO THOSE SUING CORPORATIONS

So the first of the four areas that I want to talk about is that the Supreme Court is closing the courthouse doors to those who want to sue corporations. I believe that another of the key themes about the Roberts

Court is how much it is a pro-business court. Without a doubt, the most famous decision of the Roberts Court in its relatively young history is *Citizens United v. Federal Election Commission*,<sup>2</sup> which holds that corporations can spend unlimited amounts of money in independent expenditures to get the candidates that they want elected, or those they oppose defeated.<sup>3</sup> This pro-business orientation is also very evident in the jurisdictional decisions of the court.

Let me give you two examples from last term. Both, I think, are quite important in terms of the practical effects. The first is *AT&T Mobility v. Concepcion*.<sup>4</sup> AT&T was advertising that it was giving away free cell phones. The Concepcions went and each got a free phone. They were then surprised on their first monthly bill to see that they were charged \$30.22 in sales tax. They heard that there was a class action in federal court, arguing that AT&T had committed fraud. The claim was that AT&T had promised free cell phones, so it should have to absorb the sales tax, not pass it on to the consumers. Well, the Concepcions, like all of us, had to sign an agreement when getting their cell phones. The Concepcions, probably like all of us, did not read the agreement they were signing. Had they read that agreement they would have seen a clause that said, in any dispute with AT&T, they agreed to go to arbitration; they could not go to court. AT&T invoked a 1925 federal statute, the Federal Arbitration Act, to say that the Concepcions could not sue; the claim would have to go to arbitration. The Federal Arbitration Act says that contracts in interstate commerce with arbitration clauses shall be enforced unless they are revocable under state law.

The Supreme Court of California, in *Discover Bank v. Superior Court*,<sup>5</sup> had ruled that arbitration clauses in routine consumer contracts are not enforceable under California law.<sup>6</sup> The Supreme Court of California said that they were contracts of adhesion and not enforceable. The Ninth Circuit, based on the *Discover Bank* case, said that the arbitration clause in the Concepcions' contract with AT&T was revocable under state law. Thus, the Concepcions did not have to go to arbitration; they could go to court. The Supreme Court, again in a 5–4 decision, reversed, with the same split among the Justices. Here, Justice Scalia wrote for the Court, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. Justice Scalia began by extolling the virtues of arbitration over court adjudication in terms of efficiency. Justice Scalia then talked about the ill effects of class actions on businesses. He spoke of, and I quote, the “in terrorem” effect of class actions on corporations, forcing them to

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2. 130 S. Ct. 876 (2010).

3. See *id.* at 899–900.

4. 131 S. Ct. 1740 (2011).

5. 113 P.3d 1100 (Cal. 2005).

6. *Id.* at 1110.

settle even non-meritorious claims.<sup>7</sup> The Supreme Court said that, therefore, California law was preempted. The Concepcions had to go to arbitration.

Justice Breyer wrote for the dissenting Justices. Here, he said, the alternative is not hundreds of thousands or millions of separate arbitrations against AT&T. He said the reality is few or no claims against AT&T. He said the reality is that people are not going to sue, or even go to arbitration, for \$30.22. He said we really need class actions for situations like this, where a large number of people each lose a small amount of money. The case is important because arbitration clauses are increasingly ubiquitous in consumer contracts, like in this litigation, in employment contracts, and even in medical contracts.

Not long ago, I went to see a new eye doctor for the first time, and the receptionist gave me a whole stack of papers to fill out. In the middle was a form where I had to agree that, in any claims against the eye doctor, I would have to go to arbitration; I could not sue in court. I asked the receptionist if the doctor would still see me if I did not fill out the form, and she said she did not know. No one ever asked her that question before. The doctor did see me, but I have now heard of many physicians who will not treat patients unless they sign arbitration agreements.

Around the same time, I bought a new Dell computer. As you know, in order to use a computer for the first time, you have to click that you have read the terms and agreed to them. I usually just click “agree” without looking. However, in this instance, I decided to read—to see if there was an arbitration clause. Sure enough, there was a paragraph that said, if I had any dispute with Dell arising out of the computer, I would have to go to arbitration; I could not go to court. Well, I wrote Dell a letter back saying that I did not agree to that paragraph and by opening the envelope of my letter, Dell agreed I could sue if I had any dispute. Dell did not write back, but the computer still works.

This is actually one of several Supreme Court cases in the last few years, all 5–4, all ideologically divided, all strictly enforcing arbitration agreements to keep injured people out of court. Another example with regard to closing the courthouse doors to suits against corporations, also from last spring, is *Wal-Mart Stores, Inc. v. Dukes*.<sup>8</sup> This was a class action of as many as 1.5 million women employees of Wal-Mart, claiming sex discrimination in pay and promotion. The federal district court found that there was sufficient evidence to certify the class. The Supreme Court, in the most important part of the ruling, held 5–4 that the class could not go forward, with the same split among the Justices. Once more, Justice Scalia wrote the majority opinion, joined by Chief Justice Roberts

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7. *AT&T Mobility*, 131 S. Ct. at 1752.

8. 131 S. Ct. 2541 (2011).

and Justices Kennedy, Thomas, and Alito. Rule 23 of the Federal Rules of Civil Procedure (FRCP) provides that one of the requirements for a class action is that there be commonality. Justice Scalia, writing for the five-person majority, said that there was not sufficient commonality because hiring, pay, and promotion decisions were made by separate store managers and assistant managers all over the country. Justice Scalia said that Wal-Mart has an official policy that prohibits gender discrimination. He said the anecdotal evidence is not sufficient to be able to show commonality for a class. Thus, the court held this could not be a class action. Now, in all likelihood, few of these women will bring individual claims, even if they suffered gender discrimination in hiring, pay, and promotion.

It is difficult for an employee to sue a current employer without risking his or her job. Also, the amount of money that is involved often does not justify bringing the lawsuit. What the Court has done is simply protect one of the largest corporations in the country at the expense of the employees. If you think about it, this case is going to make it very difficult for employment discrimination class actions to go forward in the future. Those who represent plaintiffs who want to bring an employment discrimination class action are going to have to look for the “Goldilocks” of classes because if it is a small workplace where one or two people are making hiring, pay, and promotion decisions, there is not going to be numerosity, another requirement for class actions. And then there is the large workplace. Even, say, this university or my university, where hiring, pay, and promotion decisions are made by departments and schools across campus, there will not be the commonality for class actions. How often will it be that you will have just the right class—not too small and not too large—that there can be an employment discrimination class action?

But the case, in its significance, goes beyond just employment discrimination. Justice Scalia, for the first time in American history, said that the standard for certifying a class is a rigorous one. Never before had the Court said that the Rules of Evidence were to be applied at the class certification stage. In these two cases, think of the defendants, AT&T and Wal-Mart. We are dealing with two of the largest corporations in the United States today and in all of American history, and yet the Court seems unconcerned about providing a remedy to those injured by them.

I could talk about other examples, even from the last year. For example, the Supreme Court said that makers of generic drugs cannot be sued for failure to warn consumers. These cases are all about closing the courthouse doors to those who want to sue corporations.

## II. CLOSING THE COURTHOUSE DOORS TO THOSE SUING THE GOVERNMENT

The second theme that I identify is closing the courthouse doors to those who want to sue government and government officials. I think the preeminent purpose of the United States Constitution is to protect people from the government. So it follows that the preeminent purpose of the federal court is to protect people from their government and government officials. And yet, in area after area and in case after case, what the Supreme Court has done is slam the courthouse doors shut to those who have suffered serious injuries at the hands of the government.

I am going to mention just a few examples of this. One place where this occurred is making it much more difficult for people to sue government entities. The Rehnquist Court, for example, greatly expanded sovereign immunity, which made it much harder to sue state governments. The Rehnquist Court said, for example, that states cannot be sued in state court, just as they cannot be sued in federal court, even to enforce federal statutes. The Rehnquist Court said that a whole host of federal civil rights statutes, like the Age Discrimination in Employment Act and the employment discrimination part of the Americans with Disabilities Act, cannot be used to sue state governments, period.

Let me give you an example of this from last year, in terms of expanding the immunity of local governments from suit. It is a case called *Connick v. Thompson*.<sup>9</sup> Thompson spent eighteen and a half years in prison, almost all of them on death row, for a murder that he did not commit. At the time of Thompson's trial, one of the assistant district attorneys was given blood evidence that linked Thompson to an armed robbery. It is clear, under the law—and none of the litigants in this case disputed it—that the assistant district attorney was constitutionally required to give that blood evidence to the defense lawyer. *Brady v. Maryland*<sup>10</sup> in 1963 requires it.<sup>11</sup> The law of professional responsibility, under the ethics rules in every state, requires it.<sup>12</sup> The assistant district attorney did not turn over the blood evidence; he hid it instead. Only many years later, when the assistant district attorney was literally on his deathbed dying of cancer, did he tell other assistant district attorneys what he had done. But they did not tell anyone. Literally, just weeks before Thompson's scheduled execution, through a series of coincidences, Thompson's defense lawyers learned of this blood evidence. They had it tested. Not only did it not match Thompson's DNA, it did not even match his blood

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9. 131 S. Ct. 1350 (2011).

10. 373 U.S. 83 (1963).

11. *See id.* at 87.

12. *See, e.g.*, COLO. RULES OF PROF'L CONDUCT R. 3.8 (2007); ILL. RULES OF PROF'L CONDUCT R. 3.8 (2009); VA. RULES OF PROF'L CONDUCT R. 3.8 (2009); *see also* Lesley E. Williams, *The Civil Regulations of Prosecutors*, 67 *FORDHAM L. REV.* 3441, 3469 (1999) (discussing the *Brady* doctrine in light of Rule 3.8 of the Model Rules of Professional Conduct).



type. A new trial was held and Thompson was acquitted. A great deal of evidence came out that showed that Thompson was innocent of that for which he had been convicted.

Thompson then sued the district attorney and the City of New Orleans, claiming that they had a system and a policy of violating the constitution's requirements, as articulated in *Brady*. The jury issued a large judgment in favor of Thompson. The United States Court of Appeals for the Fifth Circuit affirmed. The Supreme Court, in a 5–4 decision reversed. Here, Justice Thomas wrote the majority opinion, but the split amongst the Justices was the same. He was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito. Justice Thomas said that in order to hold a local government liable, there has to be proof of a municipal policy. Justice Thomas said there is only one incident here. A municipal policy cannot be proven based on one incident. Justice Ginsburg wrote a scathing dissent. She said, how can it be said here that there is just one incident. She said five different assistant district attorneys over an eighteen-year period knew of this blood evidence, and not one of them spoke up. She said, moreover, in this case, this is not the only *Brady* violation. It turns out that at the time of the trial, the police had an eyewitness who described the assailant as having short hair. At the time the murder occurred, Thompson had a large afro. The police and prosecutors never disclosed that to the defense. It too, of course, was a *Brady* violation. Justice Ginsburg pointed out that there is a good deal of evidence of systematic violations of *Brady* in New Orleans. It was not one incident, but the Supreme Court protected the government and denied the coverage of somebody who suffered an injury that no amount of money can ever remedy.

Another way in which the court protects government and government officers is by expanding immunity from suit. Any government official who is sued for money damages can claim either absolute immunity from suit, or at least what is called qualified immunity. Qualified immunity means that the person can be sued for money damages only when it is shown that he or she violates clearly established law that the reasonable officer should know. In a series of decisions, the Roberts Court has expanded both absolute and qualified immunity. This means that individuals who are injured—even if they are seriously injured—can gain no recovery.

I again want to pick an example to make this concrete. I choose my illustration from last term, and it is a case called *Ashcroft v. al-Kidd*.<sup>13</sup> Abdullah al-Kidd was apprehended in Chicago O'Hare Airport on a material witness warrant. He was then taken and held in a federal maximum-security prison. He was moved to two other federal maximum-

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13. 131 S. Ct. 2074 (2011).

security prisons. When he was transported, it was always in chains and handcuffs. When he was released, he was placed under house arrest. His wife left him. He lost his job. Well, it turns out that the U.S. government never had the desire to use him as a material witness. The government used the material witness warrant as a pretext because it wanted to question him about somebody else they suspected of involvement with terrorist activity. Mr. al-Kidd was never suspected of any crime and was never charged with any offense. As I said, there was never a desire to use him as a material witness.

Mr. al-Kidd sued the Attorney General of the United States, John Ashcroft, who had authorized this detention. Ashcroft raised absolute and qualified immunity as a defense. The U.S. Court of Appeals for the Ninth Circuit ruled in favor of al-Kidd and against John Ashcroft. Judge Milan Smith wrote the opinion for the Ninth Circuit. I mention him by name because he is not a liberal judge. He was appointed by President George W. Bush. Judge Smith said that any government officer, let alone the Attorney General of the United States, should know that it violates the Fourth Amendment to hold a person unless there is probable cause. There is a federal statute that allows a material witness to be obtained if his or her testimony is essential and there is a risk of flight. Justice Smith, writing for the Ninth Circuit, said, in this instance, there was no desire to use him as a material witness. Besides, the requirements of the material witness statute were not met. The United States Supreme Court reversed the Ninth Circuit. Justice Scalia wrote the opinion for the Court. Justice Scalia said that the underlying motive of government officials does not matter under the Fourth Amendment. Justice Scalia said that, here, there was a valid warrant issued by a federal magistrate judge. Justice Scalia said that the Attorney General should be protected by qualified immunity because there is no case on point that says that the Attorney General cannot use the material witness statute in this way.

The Supreme Court has said in many cases that there does not have to be a case on point in order for there to be clearly established law that the reasonable officer should know. But as Justice Ginsburg pointed out in her concurring opinion, how can it be said in this case that there was really a valid warrant? She pointed out that the government, in getting the warrant, never disclosed to the magistrate judge that it did not really want to use al-Kidd as a material witness. Flight is also a prerequisite for a material witness warrant, and the government never told the magistrate judge that al-Kidd was married to an American citizen and has children who are American citizens. As Justice Ginsburg pointed out, the government, in getting the material witness warrant, never pointed out that al-Kidd was fully cooperating with the federal authorities and answering all of their questions, so there was no need to detain him. Mr. al-Kidd suffered an enormous injury, a clear violation of his Fourth Amendment

rights. He lost his job and his marriage, and yet the Supreme Court said that he could get absolutely no recovery.

The Supreme Court also has made it almost impossible now to sue federal government officials who violate constitutional rights. As you may know, there is not a federal statute that authorizes suits against federal officers for money damages when they violate constitutional rights.

In 1971, in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,<sup>14</sup> the Supreme Court said that federal officers who violate rights can be sued under a cause of action directly inferred from the Constitution.<sup>15</sup> That case involved officers of the Federal Bureau of Narcotics who violated the Fourth Amendment, and the Supreme Court said that a damage remedy was possible. But Justice Harlan famously remarked that for someone in *Bivens*' shoes, "it is damages or nothing."<sup>16</sup> Justice Brennan, writing for the Court, said that it is essential that there be a remedy for constitutional violations. After all, isn't that what *Marbury v. Madison*<sup>17</sup> said?<sup>18</sup> Where there is a right, there has to be a remedy. But in case after case, the Supreme Court has denied a remedy even when there is a violation of a right, holding that no *Bivens* suit is available.

One of the most important is a case from this term. It is a case called *Minneci v. Pollard*.<sup>19</sup> The case involves a prisoner at a private prison that operated under a contract with the federal government. The question is, Can the prisoner sue the prison guards at this private prison in a so-called *Bivens* cause of action? Surprisingly to me, the Supreme Court ruled in an 8–1 decision that the prisoner could not sue the prison guards. The Supreme Court said that the prisoner had a tort remedy available under state law. If there is a tort remedy available, then you cannot have a *Bivens* suit. There was a tort remedy available to *Bivens* in that case—but the Supreme Court was clear—that vindication of a federal right should not depend on the existence of state tort remedies. But now it seems the Supreme Court is saying you cannot sue a federal officer for violating a federal constitutional right so long as there is a tort remedy available.

I had the opportunity to represent Joe Wilson and Valerie Plame Wilson in their lawsuit against Dick Cheney, Karl Rove, Lewis Libby, and Richard Armitage. If you remember, President Bush, in a State of the Union address, said that Iraq was trying to purchase nuclear material. Joe Wilson, a former Deputy Ambassador to Iraq, investigated and found out

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14. 403 U.S. 388 (1971).

15. *Id.* at 397.

16. *Id.* at 410 (Harlan, J., concurring).

17. 5 U.S. (1 Cranch) 137 (1803).

18. *See id.* at 147.

19. 132 S. Ct. 617 (2012).

that this was untrue. He wrote an article in the *New York Times* saying that he did not find in Iraq any indication its government was trying to purchase nuclear material.<sup>20</sup> He also went on the Sunday-morning talk shows and said this.<sup>21</sup> At this point, Vice President Dick Cheney, his top deputy Lewis Libby, Karl Rove, and Richard Armitage engaged in a concerted effort to punish Joe Wilson. They did this by revealing that Mr. Wilson's wife, Valerie Plame, was a CIA operative. Somebody cannot successfully be a CIA operative if his or her identity is publicly revealed. And you might have seen this in the movie *Fair Game*,<sup>22</sup> in which Sean Penn plays Joe Wilson and Naomi Watts plays Valerie Plame. So I filed a lawsuit in federal district court on behalf of Joe Wilson and Valerie Plame, claiming a violation of their constitutional rights and seeking money damages. The district court dismissed, and the D.C. Circuit affirmed in a 2–1 decision. They said there is a federal statute, the Privacy Act, and because the Privacy Act exists, you cannot have a *Bivens* remedy. However, the Privacy Act does not apply to the Office of the President or Vice President. It cannot be used against Cheney, Libby, and Rove. The Privacy Act provides no protection to Joe Wilson because nothing about him was revealed. So what the D.C. Circuit held was that a statute that does not apply is enough to preclude a constitutional remedy.

The D.C. Circuit went on and said that allowing this suit to go forward might reveal national security information. Now, I likened it to the child who kills his parents and begs for mercy for being an orphan because, after all, it was the defendants who revealed the national security information. I said, moreover, in light of the Libby trial, anything sensitive has probably already become public, and this is the motion to dismiss stage. Why not allow it to go forward, and if there is some national security information, deal with it then? But the D.C. Circuit said, no *Bivens* cause of action, and the Supreme Court denied certiorari. I use this as an example—and there are so many—of how difficult it is now to ever sue a federal official for a constitutional violation. It illustrates how the courthouse doors have been shut on those who want to sue the government or government officials.

### III. CLOSING THE COURTHOUSE DOORS TO CRIMINAL DEFENDANTS

The third theme that I want to identify is closing the courthouse door to criminal defendants. I think the most important way that this has happened in federal court is the restrictions on those who want to bring a writ of habeas corpus. The writ of habeas corpus, which comes to us from the English law, is referred to as the Great Writ. Article 1, Section 9 of the Constitution says that Congress cannot suspend habeas corpus,

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20. Joseph C. Wilson IV, *What I Didn't Find in Africa*, N.Y. TIMES (July 6, 2003), at WK9.

21. See, e.g., *This Week with George Stephanopoulos*, (ABC television broadcast Apr. 9, 2006).

22. FAIR GAME (Summit Entertainment 2010).

except in instances of rebellion or invasion. In a series of decisions that began with the Burger Court and intensified with the Rehnquist Court, the Supreme Court made it much more difficult for state prisoners and, for that matter, federal prisoners, to be able to come to federal court with a writ of habeas corpus.

But these decisions pale in comparison to what happened in a 1996 federal statute, the Antiterrorism and Effective Death Penalty Act, which imposed so many additional restrictions on those who want to bring habeas corpus petitions. It imposed a statute of limitations, it imposed a prohibition on success of the petitions, it strengthened the exhaustion requirement, and so much else. So the reality is that people who have been wrongly convicted, even innocent people, are much less likely to have any recourse or access to federal courts.

Again, I am going to give you an example from just this last term, of how the courthouse doors have been closed to criminal defendants. *Cullen v. Pinholster*<sup>23</sup> exemplifies my theme of the court closing the courthouse door, but it received no media attention. And yet a former student of mine who has been doing death penalty work for the last twenty-five years says that this is the most important Supreme Court case to come down in her career for her work.

The case involved a man in southern California who was tried for three murders, and he was convicted. As soon as the jury came back with its verdict, the assistant district attorneys said to the judge that they wanted to schedule the penalty phase where the jury would be able to decide whether to impose a death sentence. The defense lawyers objected. Under California law, the prosecutors not only have to announce that they might seek the death penalty, but they have to make certain disclosures along the way. The assistant district attorneys had not complied with California law. The defense lawyer said, we have not had any opportunity to prepare for a penalty phase. The judge overruled the objections of the defense counsel. The judge said, though, I understand you have not had a chance to prepare for the penalty phase, so I will give you whatever continuance you need in order to do so. The defense lawyer said, never mind, we are ready to go forward with the penalty phase now. And the judge scheduled the penalty phase for six days later. The defense lawyers presented only one witness in terms of mitigating circumstances, the defendant's mother. By all accounts, she was not an effective witness. The defendant was sentenced to death. The Supreme Court of California upheld the convictions and the sentence.

The defendant then went to federal court with a writ of habeas corpus, and he alleged ineffective assistance of counsel. A number of declarations were presented in support of the writ of habeas corpus. For ex-

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23. 131 S. Ct. 1388 (2011).

ample, there were declarations from the defense lawyers saying that they had done no investigation whatsoever for the penalty phase. Affidavits were presented from doctors, indicating that the defendant suffered from serious mental illness. He was bipolar and had a seizure disorder. Affidavits were presented from the defendant's family members and from an elementary school teacher, indicating that the defendant was seriously abused as a child. The Supreme Court has said that those are mitigating circumstances. The federal district court held an evidentiary hearing, all of this testimony was heard, and the district court found ineffectiveness of counsel. The Ninth Circuit ultimately affirmed in an 8–3 en banc ruling. The Supreme Court reversed. Justice Thomas wrote the opinion for the Court. Justice Thomas said that a federal court, in considering a habeas corpus petition, is limited to the evidentiary record that was before the state court and that it was inappropriate for the federal court to hear any of this additional evidence. As Justice Sotomayor pointed out in her dissent, What about the person who has been convicted in state court, who finds evidence that shows that he or she is actually innocent? How can that be heard? Or what if the defendant who asserts a *Brady* violation in state court—and only after conviction and appeal to a public records request—can prove that there was a *Brady* violation? Does this mean that that evidence can never be heard?

Moreover, there is a statutory provision, part of the Antiterrorism and Effective Death Penalty Act, that specifically authorizes evidentiary hearings. It is 28 U.S.C. § 2254(e)(2). The Supreme Court read this provision out of the statute, and then the Supreme Court went on and held that this was not ineffective assistance of counsel. And, of course, if this is not ineffectiveness of counsel, what would be? The effect is very much to make it difficult, if not impossible, for individuals who have habeas petitions heard to prevail if they have new evidence. Now, I imagine the majority's answer to this is, well, let the defendant go back to state court and present the evidence there first. But what if it is a state, like some, that does not have any post-conviction proceedings available? Or what if it is a state like California, where the state's supreme court, even in death penalty cases, does not hold a hearing but issues postcard denials? How then is that new evidence to be heard? Think of just the innocent people who have evidence of actual exoneration of innocence. How can they be heard if the courthouse doors have been closed on them?

#### IV. CLOSING THE COURTHOUSE DOORS TO PLAINTIFFS IN GENERAL

The fourth and final theme that I want to point to is how the Supreme Court has more generally closed the courthouse doors to plaintiffs. I think the single most important case—in the now almost seven years of the Roberts Court—is *Ashcroft v. Iqbal*.<sup>24</sup> Because I would expect that

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24. 556 U.S. 662 (2009).

most in this room have taken a civil procedure course, it is a case that I assume you have studied. From the 1930s, when the Federal Rules of Civil Procedure were adopted, it was always said that they ushered in a system known as notice pleading.<sup>25</sup> Notice pleading said that a plaintiff can go forward as long as he or she presents a short plain statement of facts.

In fact, when I taught civil procedure, I used to say that *Conley v. Gibson*,<sup>26</sup> a 1956 Supreme Court case, embodied it. It said the complaint should be dismissed only if there is no set of facts upon which relief can be had. The philosophy of the FRCP is to make it relatively easy for plaintiffs to get into federal court, to then have the chance to do discovery to prove their case, and then use summary judgment as the screening device.

In 2007, in *Bell Atlantic v. Twombly*,<sup>27</sup> the Supreme Court said that *Conley*'s "no set of facts" standard has "earned its retirement" and "is best forgotten."<sup>28</sup> The dissent referred to *Conley* as being "interred."<sup>29</sup> The Court did not use the word "overrule," but based on the metaphors it chose, it might as well have. *Twombly* was a lawsuit under Section 1 of the Sherman Antitrust Act for conspiracy and restraint of trade. And I think it is quite reasonable to have read *Twombly* as just being about pleading in antitrust cases, but two years later in *Iqbal*, the Supreme Court made it clear that *Twombly* changes the pleading standards in all federal cases.

*Iqbal* was of Muslim Pakistani descent and detained in New York after September 11, 2001. Upon his release, he brought a lawsuit against a large number of defendants, including the Attorney General and the director of the FBI. Among other things, they moved to dismiss for failure to state a claim upon which relief can be granted. The Supreme Court, in a 5-4 decision, said that the complaint should have been dismissed. Justice Kennedy wrote the majority opinion, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. Justice Kennedy said that the standard of pleading now in federal courts is plausibility. The plaintiff must plead sufficient facts that the district court can conclude that it is plausible that the plaintiff can recover.

Now, the law I have always taught my students is that, in assessing a motion to dismiss, the federal district court has to accept the allegations of the complaint as true. Justice Kennedy said that is no longer so. Justice Kennedy said that the district court should not accept conclusory factual allegations. To see how radical this changes the law, pick up any

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25. A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 2 (2009).

26. 355 U.S. 41 (1957).

27. 550 U.S. 544 (2007).

28. *Id.* at 562-63.

29. *Id.* at 577 (Stevens, J., dissenting).

copy of the FRCP and look at the model complaints placed there by the Federal Rules Advisory Committee. Every one of them would have to be dismissed after *Iqbal* because they have nothing but conclusory allegations of fact.

No one seems to know what plausibility means as a legal standard, but it is clear it all depends on the judges. What is plausible to one judge will not be to another. And many district judges are taking this invitation to dismiss cases on the Rule 12(b)(6) standard, at the motion to dismiss stage. Legal scholars have now done studies documenting a significant increase in dismissals at the Rule 12(b)(6) stage—in just the few years since *Iqbal*—and especially a significant increase in dismissals in civil rights cases since *Iqbal*.<sup>30</sup> And, of course, it makes sense that this would happen because if plaintiffs cannot have access to discovery, they often will not be able to gain the information to prove their case at the motion to dismiss stage. This is an enormous victory for defendants and makes it much harder for plaintiffs to recover.

#### CONCLUSION

Now, I have gone through examples, but this is a place where the whole is much greater than the sum of the parts. If you look at all of these cases—and all of the ones like them—you see why I say that what the Supreme Court has been doing is closing the courthouse doors. We take for granted in this country that an injured person will have the opportunity for his or her day in court. What I want to suggest to you this afternoon is that increasingly that is just a myth.

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30. “Especially after *Iqbal*, they appear to be granting 12(b)(6) motions at a significantly higher rate than they did under *Conley*—which was already a sizeable 49% in the Database in the two-year period before *Twombly*. In addition, *Twombly* and *Iqbal* are poised to have their greatest impact on civil rights cases, simply because those cases are by far the most likely type of case to be attacked by a 12(b)(6) motion.” Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 624 (2010). Ms. Hatamyar warns that her results should be taken with caution because her statistical sample was small. *Id.* at 556 (“[T]he short time span and smaller number of *Iqbal* cases counsel caution in interpreting the data.”). However, Ms. Hatamyar Moore (the same author) conducted a second later study with a much larger sample, in which she found that motions to dismiss were 1.75 times more likely to be granted without leave to amend under *Iqbal* than under *Conley* and that “constitutional civil rights cases in particular were dismissed at a higher rate post-*Iqbal* than pre-*Twombly*.” Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal’s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 605 (2012); see also Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 118 (2010) (finding increase in dismissal rate of disability cases after *Twombly*).