

7-2010

Closing the Courthouse Doors: Transcript of the 2010 Honorable James R. Browning Distinguished Lecture in Law

Erwin Chemerinsky
UC Irvine School of Law, echemerinsky@law.uci.edu

Follow this and additional works at: <https://scholarship.law.umt.edu/mlr>

 Part of the [Constitutional Law Commons](#)

Recommended Citation

Erwin Chemerinsky, *Closing the Courthouse Doors: Transcript of the 2010 Honorable James R. Browning Distinguished Lecture in Law*, 71 *Mont. L. Rev.* 285 (2010).

Available at: <https://scholarship.law.umt.edu/mlr/vol71/iss2/2>

This Transcript is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.

LECTURE

CLOSING THE COURTHOUSE DOORS: TRANSCRIPT OF THE 2010 HONORABLE JAMES R. BROWNING DISTINGUISHED LECTURE IN LAW

Erwin Chemerinsky*

Editors' Note: The Montana Law Review was honored to have Dean Erwin Chemerinsky deliver the 2010 Honorable James R. Browning Distinguished Lecture in Law on March 8, 2010. Each year since 2002, the Browning Lecture has brought distinguished scholars and judges from across the country to The University of Montana School of Law. Dean Chemerinsky's Lecture and visit to the School of Law certainly furthered that tradition. As its namesake indicates, the Browning Lecture honors the Honorable James R. Browning of the United States Court of Appeals for the Ninth Circuit. Judge Browning was a member of the first editorial board of the Montana Law Review and ultimately served as Editor-in-Chief. He served with distinction for many years as Chief Judge for the Ninth Circuit and continues to serve on that court today.

I. LAWSUITS AGAINST FEDERAL OFFICIALS

The names Valerie Plame and Joe Wilson, I am sure, are familiar to all of you. But I want to tell you a part of the story that is less familiar. I want to talk about what happened to them when they filed a civil lawsuit in federal court, because I think the outcome of their lawsuit is very typical of what is going on in the federal courts in the last several decades.

* Erwin Chemerinsky is the Founding Dean of the School of Law, University of California-Irvine.

Just to refresh your recollection, Valerie Plame, for many years, was a secret agent in the CIA. I learned that there are different degrees of secrecy among operatives. She was the most secret of secret operatives. Her husband, Joe Wilson, was in the Diplomatic Corps from 1976 to 1998. He served as the deputy ambassador to Iraq. He also served as the ambassador to some African nations.

In the early part of the last decade, there were rumors that Iraq was seeking to buy uranium in countries of Africa. The government asked Joe Wilson to go in and investigate. He came to the conclusion that there was no basis to the rumors. Iraq was not, in fact, seeking to buy uranium to build nuclear weapons. However, in the State of the Union Address, on January 28, 2003, President George W. Bush said that Iraq was seeking to buy uranium from nations in Africa. Soon after, some reporters investigated and discovered that this was not true. In fact, they found out that a former deputy ambassador had gone to Africa to investigate and found no basis for this. The spotlight then turned to the ambassador who wrote an op-ed in the *New York Times* in June of 2003 revealing that, indeed, he had gone to Africa, and there was no basis for President Bush's statement that Iraq was seeking to buy uranium.

At this time, those at the highest levels of American government—Vice President Dick Cheney; his top aide Lewis Libby; aide to the President, Karl Rove; and Deputy Secretary of State Rick Armitage—set out in a concerted effort to punish Joe Wilson for what he had done to embarrass the Bush Administration. They learned that Wilson's wife, Valerie Plame, was a secret agent, and they systematically set out to leak this information to reporters, such as Judith Miller of the *New York Times*, a reporter at *Time* magazine, and others. Karl Rove told Chris Matthews from *Hardball* that Valerie Plame was now "fair game." That is what she decided to title her autobiography.

The problem with being a secret agent is that once it is revealed that you are doing that, you can no longer be one. Her career as an operative was effectively destroyed. Also, she and Joe Wilson felt that their family's lives were in danger. She worked on so many missions for the government that she feared retaliation once people learned that, in fact, she had been a secret agent. When I first met Valerie Plame, I was very impressed by her. My first thought was that I could not imagine that she was a secret agent. But, of course, I realized that is probably exactly why she was so effective.

In the spring of 2006, I received a phone call from a lawyer in Washington saying that Valerie and Joe wanted to file a civil lawsuit against Vice President Cheney, Libby, Rove, and Armitage for the harms that were done to them. They asked if I would be willing to represent Plame and Wilson on a pro bono basis. I eagerly agreed. We filed our lawsuit in July of 2006,

calculating a three-year statute of limitations running from the time their identity was revealed to reporters. As you may know, there is no federal statute that authorizes civil lawsuits against federal officials who violate the Constitution. If local officials violate the Constitution, they can be sued under 42 U.S.C. § 1983. But § 1983 does not apply to federal officials.

Instead, if someone wants to sue a federal official for a constitutional violation, it has to be done through what is called a “*Bivens* suit.” This takes its name from a 1971 United States Supreme Court decision, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,¹ where the Supreme Court said that it is possible to sue a federal official for violating the Constitution. That is exactly what the lawsuit for Valerie Plame Wilson and Joe Wilson was founded on. I thought we had strong constitutional claims. For Joe Wilson, it was a First Amendment claim. He was punished by those in the highest levels of government for his speech. For both Valerie and Joe, there were privacy claims. For Valerie there was a claim that she had been deprived of her property, her job, her liberty, and her safety without due process.

Predictably, all of the defendants moved to dismiss. Not so predictably, I lost in a 2–1 decision from the United States Court of Appeals for the District of Columbia Circuit. The opinion was written by Judge David Sentelle. He gave two reasons why their lawsuit—their *Bivens* claims—could not go forward. One was that there is a statute that provides relief. He said that the Supreme Court had indicated that if there is a statute that provides relief, that is “a special factor counseling hesitation” that precludes a *Bivens* suit. But what was the statute that Judge Sentelle pointed to? The Privacy Act. However, the Privacy Act here did not apply. It did not apply at all to Joe Wilson’s claim. The United States Court of Appeals for the District of Columbia Circuit previously ruled that there is only a claim under the Privacy Act if it is information about you that is being revealed. There was nothing about Joe Wilson disclosed. He had no cause of action under the Privacy Act.

Moreover, the United States Supreme Court has held that the Privacy Act does not apply to the Office of the President and Vice President. So neither Valerie nor Joe had claims against Vice President Cheney, Libby, or Rove at all. The D.C. Circuit was saying that a statute that does not apply can preclude constitutional claims. I am skeptical that a statute can ever preclude constitutional claims. But how can a statute that does not apply preclude the ability to sue under the United States Constitution?

The second ground that was given by Judge Sentelle was even more questionable. He said that this civil suit might risk the disclosure of confi-

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

dential information. Of course, it was the defendants that chose to reveal that Valerie Plame was a secret operative. In my brief I said that this argument is like a child who kills his parents and pleads for mercy for being an orphan. Additionally, it is completely speculative whether this case would reveal confidential information. There had already been the criminal prosecution and conviction of Lewis Libby. All the facts that were needed for the lawsuit came out publicly during that trial. Besides, there are many ways in which courts can protect confidential information. Perhaps, it would turn out, as the suit progressed, that one of the claims might need to be dismissed if there was no other way to protect the confidential information. But to grant a motion to dismiss on that basis had no grounds whatsoever. I sought review from the United States Supreme Court. On June 22, 2009, the Supreme Court denied certiorari.

The reason I start with this story is because although Valerie and Joe are certainly more high profile than most plaintiffs, their story is not unique. It is very difficult to win a *Bivens* action in the federal courts. No *Bivens* action has been successful in the United States Supreme Court in decades.

To give you another example of an unsuccessful *Bivens* action, consider *United States v. Stanley*.² Stanley served in the United States Army in the 1950s. Unknown to him, he was subjected to human experimentation. The Army told Stanley and other soldiers that they were testing some new gear and they gave them injections. He was given, without his consent or knowledge, LSD. He said that as a result throughout his life he suffered flashbacks that interfered with his functioning. The United States, in the most eloquent language, condemned human experimentation during the Nuremberg Trials. Stanley sued the military officials who were responsible for this. He lost in the United States Supreme Court in a 5–4 decision. The Supreme Court said that those in the military cannot sue superior officers even, when here, it was outside of combat. And, even when here, the government's actions violated every protocol of human rights, the refusal to allow lawsuits for constitutional violations by federal officials is one example of how the courthouse doors have been closed.

What I would like to do this afternoon is pick three other examples where the Supreme Court closed the door even to those who had meritorious claims. All were 5–4 decisions with the five most conservative justices in the majority. Based on these examples, I will draw some overall conclusions of what has happened in the American justice system.

2. *U.S. v. Stanley*, 483 U.S. 669 (1987).

II. HEIGHTENED PLEADING REQUIREMENTS

The first example is the heightened pleading requirements now being imposed in federal court. From the time the Federal Rules of Civil Procedure were adopted in the 1930s, it was always said that they ushered in a system known as “notice pleading.” I have always taught my students that notice pleading was best embodied by a Supreme Court case in 1957, *Conley v. Gibson*.³ There, the Supreme Court said that a complaint should be dismissed only if there is no set of facts upon which relief can be granted. The Supreme Court, as well as many others, said on countless occasions, that the philosophy of the federal rules was to make it easy for a plaintiff to get into federal court and easy to withstand a motion to dismiss—that screening was to be done at the summary judgment stage, not at the motion to dismiss stage.

That definitely meant there would be some instances where the defendants were subjected to needless litigation. But it was thought unfair to require that the plaintiffs prove their case in order to get into court. Often, crucial evidence is possessed only by the defendants. Often, it would be available to plaintiffs only through discovery. To require that plaintiffs plead it in the complaint would keep them out of court.

All of this began to change in 2007 when the Supreme Court decided *Bell Atlantic v. Twombly*.⁴ *Bell Atlantic* was about how much needed to be pled in a complaint under § 1 of the Sherman Act,⁵ for conspiracy in restraint of trade. Over the course of the majority opinion, approving the dismissal of the complaint, the Court said that *Conley v. Gibson* was “abrogated.” The dissenting opinion by Justices Stevens and Ginsburg said that *Conley v. Gibson* was “interred.” I assume that “abrogated” and “interred” are synonyms for “overruled,” but the Supreme Court did not say that. In fact, in November of 2008, there was a national conference of federal courts of appeals judges in Washington D.C. For each topic, they paired a Supreme Court justice with two law professors. For the panel on civil litigation they had Justice Breyer. I was surprised over the course of the question and answer period to hear the federal court of appeals judges’ sense of frustration. With even an anger in their voice, many said, “What is the standard of pleading after *Bell Atlantic v. Twombly*?” Finally Justice Breyer responded, with frustration and perhaps anger in his voice, saying that *Bell Atlantic v. Twombly* is just an antitrust case. It turns out that Jus-

3. *Conley v. Gibson*, 355 U.S. 41 (1957).

4. *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007).

5. 15 U.S.C. §§ 1–7.

tice Breyer was wrong, and that is why a decision from last spring, *Ashcroft v. Iqbal*,⁶ is so important.

For any of you who litigate civil cases in federal court or any of you who are students who will do civil litigation in federal court, this is the most important Supreme Court decision in years. When I checked last month, there were already 6,000 federal court cases citing to *Ashcroft v. Iqbal*. It will soon be the most frequently cited Supreme Court case by the lower federal courts in all of American history, and it was decided just last spring.

Iqbal was a man of Pakistani descent. He was held in New York after September 11th. Upon his release, he sued 53 defendants including the then-Attorney-General, John Ashcroft, and the director of the FBI. *Iqbal* maintained that his detention and treatment violated the Constitution. The Supreme Court in a 5–4 decision held that *Iqbal*'s complaint should be dismissed. Justice Kennedy wrote the opinion for the Court, joined by Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito. Justice Kennedy said that the new standard for pleading in federal courts is one of "plausibility." A plaintiff must allege enough facts so that a court can conclude it is plausible the plaintiff might recover.

I have taught civil procedure many times. I always instructed my students that when a court assesses a motion to dismiss it is supposed to accept that the allegations of the complaints are true. No longer is that the case after *Ashcroft v. Iqbal*. The Supreme Court said that a court is not to accept a conclusory allegation of fact as true. The Supreme Court said that a district court should go through the complaint, exclude all of the conclusory allegations of fact, exclude all the statements of law, and then decide, based on what remains, if it is plausible that the plaintiff might recover. To see how radical this is in changing the law, pick up any copy of the Federal Rules of Civil Procedure and look at the model complaints that were placed there by the Federal Rules Advisory Committee. Each and every one of them would have to be dismissed after *Ashcroft v. Iqbal* because they contain nothing but conclusory allegations of fact.

It has long been established that credibility of a witness is not to be determined on a motion to dismiss. In fact, it has been established that the credibility of a witness is not to be decided on a motion for summary judgment. Credibility should be an issue for a jury. Yet, if you read Justice Kennedy's majority opinion, the Court ordered that the claims against Ashcroft and the director of the FBI be dismissed because the Justice found the allegations not to be credible.

What does plausibility mean as a standard of pleading? The only guidance the Supreme Court gave was to say that a district court should decide

6. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

based on context and common sense. What that means is that it all depends on the luck of the draw and who your district judge is. What is plausible and credible to one district judge is not going to be plausible and credible to another.

How is there to be appellate review under this standard? It has long been established that a court of appeal is to review a dismissal for failure to state a claim *de novo*. Does that then mean that the federal court of appeals is to substitute for the district court its own judgment of what is plausible? To me, what is striking about this decision is how it will close the courthouse door to many people with meritorious claims. There are going to be countless individuals who suffered injuries, even egregious constitutional violations, who will not have the evidence at the time of writing the complaint to be able to go forward. They need to be able to get to discovery, which will not be available to them.

In 1993, in a case called *Leatherman v. Tarrant County Texas*,⁷ and in 2002, in a case called *Swierkiewicz v. Sorema N.A.*,⁸ the Supreme Court in unanimous decisions upheld that notice pleading is the standard of federal courts. Yet, here in two cases, in 2007 and 2009, the Supreme Court has dramatically changed the standard of pleading in virtually every civil case in federal court. There has been no change in Rule 8, no change in Rule 12(b)(6). Congress did not exercise its authority under the Federal Rules Enabling Act to revise the Rules of Civil Procedure. This was nothing except the five conservative justices on the Court making it harder for those with claims to get access to the federal judiciary.

III. SOVEREIGN IMMUNITY

The second example that I want to talk about is the great expansion of the scope of sovereign immunity. I have often felt that the concept of sovereign immunity was inconsistent with the rule of law. It did not surprise me that with the fall of the Soviet Union, one of the first things that the Russian Government did was eliminate sovereign immunity. Sovereign immunity in the United States is derived from English law. It is based on the principle that “the king can do no wrong.” It is inconsistent in a nation that rejects royal prerogatives, and, going all the way back to *Marbury v. Madison*,⁹ it has been said that no person, not even the President, is above the law. There is only one provision in the Constitution that pertains to sovereign immunity. It is the Eleventh Amendment, and it provides sovereign immunity only in a very limited context. It says that the judicial power

7. *Leatherman v. Tarrant Co. Tex.*, 507 U.S. 163 (1993).

8. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002)

9. *Marbury v. Madison*, 5 U.S. 137 (1803).

in the United States shall not extend to a suit against the state by citizens of other states or citizens of foreign countries. As demonstrated in historical research by two federal courts of appeals judges in separate articles, John Gibbons and William Fletcher, the purpose of this Amendment was simply to stop states from being sued when the only ground for jurisdiction was diversity of citizenship. It was not meant to stop a suit against the state for constitutional violations or other federal violations.

In 1989, in a case called *Pennsylvania v. Union Gas Co.*,¹⁰ the United States Supreme Court said that sovereign immunity does not bar a suit against a state, pursuant to a federal statute. Congress, if it does so expressly, can authorize suits against state governments. But the Court quickly has overruled this, and one of the important legal developments over the last decade has been the tremendous expansion of the scope of sovereign immunity. The bottom line, and the reason I am talking about it this afternoon, is the way it closes the courthouse doors to those with injuries and prevents them from gaining recovery.

The Rehnquist Court successfully expanded sovereign immunity in a couple ways. First it said that Congress, by statute, generally cannot authorize suits against state governments. In 1996, in the *Seminole Tribe of Florida v. Florida*,¹¹ the Supreme Court expressly overruled *Pennsylvania v. Union Gas Co.* What changed between 1989 and 1996? Why did the Court overrule a decision that was just seven years old? Had the Court found some musty history of the Eleventh Amendment that led them to believe they had made a mistake? Had *Pennsylvania v. Union Gas* proven impossible to administer in practice? The only difference was that Justice Thurgood Marshall had been replaced by Justice Clarence Thomas, and Justice Thomas cast the deciding fifth vote to shift the balance in the other direction, joining the justice who had written the dissent in *Pennsylvania v. Union Gas Co.*

The Supreme Court quickly followed this decision by holding that, under many different federal laws, injured individuals cannot sue state governments. For example, in 1999, in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,¹² the Supreme Court held that state governments could not be sued for patent infringement.

Not long ago, I was doing a talk in another state to the judges there, and since I was using some copyright material prepared by somebody else, I said to the coordinator of judicial education that I would get a copyright release. She said, "Oh, we do not worry about that anymore. Ever since the Supreme Court decided *Florida Prepaid* we cannot be sued for copyright

10. *Pa. v. Union Gas Co.*, 491 U.S. 1 (1989).

11. *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44 (1996).

12. *Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999).

infringement, so we do not worry about it.” What if some enterprising state university would decide to download my casebook and my treatises and make them available for free to the students? Make it a hypothetical professor who has case books and treatises and who is saving the royalties, such that they are, for his hypothetical four children’s college education. He is out of luck. Maybe he can sue the individual professors for money damages. In all likelihood those professors are judgment proof or close to it. But there is no ability to sue the state university. Now, contrary to what you law students think, law professors who write textbooks and treatises do not get all that much in royalties. But there are instances of patent infringements by state governments that are worth millions or billions of dollars. And there is no ability to sue the state.

In subsequent cases the Supreme Court said that the plaintiffs could not sue states for civil rights violations. In *Kimel v. Florida Board of Regents*,¹³ the Supreme Court said that states cannot be sued for violating the Age Discrimination in Employment Act.¹⁴ In *Board of Trustees of University of Alabama v. Garrett*,¹⁵ the Supreme Court said that those with disabilities cannot sue under Title 1 of the American Disabilities Act if it is employment discrimination on the base of disabilities. Again, there might be the ability to sue the individual state officers. But the Supreme Court has made those suits more difficult, as well. The tremendous expansion of sovereign immunity means that the courthouse door is often closed to those with serious injuries, including civil rights violations.

The other way in which the Supreme Court expanded sovereign immunity was by increasing the fora where states could assert it. The key case here was *Alden v. Maine*¹⁶ in 1999. My guess is that, unless you have taken federal courts or maybe a constitutional law class that covered it, you would have never heard of *Alden v. Maine*. Yet I think it is one of the most important decisions of the Rehnquist Court. One of the most revealing things about it is its attitude towards constitutional and statutory claims and the importance of access to the federal courts. The case involved probation officers in the State of Maine who alleged that they were owed overtime pay under the federal Fair Labor Standards Act.¹⁷ The Supreme Court had ruled that the federal Fair Labor Standards Act does apply to the states. The probation officers sued in federal court, but after *Seminole Tribe* the case was thrown out. Congress by statute cannot authorize suits against state governments. So the probations officers sued in Maine State Court.

13. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

14. 29 U.S.C. §§ 621–634.

15. *Bd. of Trustees of U. of Ala. v. Garrett*, 531 U.S. 356 (2001).

16. *Alden v. Maine*, 527 U.S. 706 (1999).

17. 29 U.S.C. §§ 201–219.

There is no constitutional provision about sovereign immunity of states in state courts. The Eleventh Amendment is the only provision, and it refers to just suits against states in federal courts. But the Supreme Court in a 5–4 decision ruled that state governments have sovereign immunity and cannot be sued in state court even on federal claims. The split was the same as in *Seminole Tribe* with Justice Kennedy writing for the court, joined by Chief Justice Rehnquist, Justice O’Connor, Justice Scalia, and Justice Thomas. Justice Kennedy said the silence of the Framers here indicates that they assumed that states could not be sued in federal court. Silence is inherently ambiguous. Maybe the Framers were silent because they assumed that states could not be sued. Maybe they were silent because they assumed that states could be sued. Or likely they were silent because they did not think about the issue at all. Most of the states that existed then did not have sovereign immunity protecting themselves from being sued in state court.

The Solicitor General of the United States at the time, Seth Waxman, argued to the justices that it is impossible to ensure the supremacy of federal law if states cannot be sued and held accountable. In his oral argument, he quoted to the justices from Article VI in the Constitution, which says that the Constitution, the statutes, and the treaties made pursuant to it, are the supreme law of the land.

Under roman numeral III of his opinion, Justice Kennedy addresses this, and he said, the trust in the “good faith of the states . . . provides an adequate assurance” of the supremacy of federal law.¹⁸ What is the remedy for state violations of the constitution of federal laws? Trust in the good faith of state governments. Can you imagine in the late 1950s and the 1960s at the height of the civil rights movement, the Supreme Court saying, “no need for federal court oversight compliance with desegregation, we will trust the good faith of state governments”? James Madison said that if people were angels there would be no need for a constitution. But there would be no need for a government either. The reality is there are times when state governments intentionally and inadvertently will violate people’s rights. And *Alden v. Maine* means they cannot be sued in federal court or state court or any forum. The courthouse door has simply been slammed shut.

IV. ARBITRATION

As for the fourth and final example, I again will start with a personal story. Not long ago I went to a doctor for the first time for a routine checkup. As I got to the desk the receptionist gave me a stack of papers to fill out. I noticed that one of them included a form that I would waive any

18. *Alden*, 527 U.S. at 755.

ability to sue the doctor for malpractice or other claims and that instead I would agree to go to binding arbitration. I went back to the receptionist and I said, "Will the doctor see me if I do not sign this form?" She said, "I do not know. Nobody's ever asked that question." I assume that it was not a new form. It was stunning to me that nobody had ever asked; everybody routinely signed it. Thankfully, the doctor was willing to see me without signing the form. As far as I know, thankfully, no malpractice was committed.

Not long before that, I was teaching Civil Procedure, and I was coming to the part of the course where we talk about alternative dispute resolution and arbitration. I had just bought a new computer from Dell, and I confess that I am one of those lawyers who often does not read what I sign. But in this instance I decided to look, and sure enough paragraph seven was an arbitration clause. It agreed that if I had any dispute with Dell about my computer, it would go to binding arbitration, and it even designated where the matter would be arbitrated. I wrote Dell back a letter saying that I did not accept paragraph seven, binding arbitration, and that by opening my letter they consented that I could take them to court to sue. They did not respond.

To me, one of the disturbing trends in the Supreme Court in the last decade or so has been a great emphasis in shifting cases away from juries and courts towards arbitration. Let me be clear, I am not against arbitration. I think it serves a very important function in many kinds of disputes. But I also tremendously value the ability of people to go to a court to be before a jury, and that is what is lost with regard to arbitration.

The key case, I think, was one decided in 2001, *Circuit City Stores, Inc. v. Adams*.¹⁹ Adams worked for Circuit City. When he applied for a job there, there was a part of the application form that said that any dispute with Circuit City arising out of his employment would go to binding arbitration. He worked there for two years, and he later believed he had suffered discrimination on the basis of his race and his gender. He went to a lawyer, and the lawyer decided that he wanted to keep the case out of federal court. He believed that it was much more likely to succeed in California state court. So Adams sued in state court only under California antidiscrimination claims. He did not bring any federal claims.

You know from your first year civil procedure class that if you sue in state court on state law claims and if there is no diversity of citizenship, the case cannot be removed to federal court. Circuit City filed a lawsuit in federal court under the Federal Arbitration Act to compel arbitration. The Federal Arbitration Act is a statute, adopted in 1925, that provides for the

19. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

enforcement of arbitration agreements, but it has an exception. The exception includes employees engaged in interstate commerce. This would seem to be a good defense for Adams. Circuit City, at least at the time, they no longer exist, was a business engaged in interstate commerce. Given how the Supreme Court has defined interstate commerce since 1937, it would certainly fit. But the Supreme Court in a 5–4 decision ruled against Adams. Once more, the court was split on ideological lines. Once more, the majority was Justices Rehnquist, O’Conner, Scalia, Kennedy, and Thomas. And the Supreme Court said that the arbitration would be compelled. The Supreme Court construed “employees” in interstate commerce to only be those in the transportation industry. If you look at the statute, it certainly refers to transportation workers, but then there is an “and.” It says, “employees engaged in interstate commerce.” It seems broad and inclusive, but the Supreme Court decided it had to go to arbitration.

I will give you one more example of a case of this sort: *Buckeye Check Cashing, Inc. v. Cardegna*.²⁰ Buckeye is a small business in Florida that cashes checks primarily for day laborers. It charges a large fee when you cash a check. A person who goes to cash a check with them has to sign an agreement that any dispute can go to arbitration. I will confess to you, I have not studied contract law since I was a first year law student in 1975. The little bit I remember is that if anything is an unconscionable contract, this is it. If anything is the antithesis of a bargained for exchange, this is it. Day laborers going in to cash their check and in exchange having to sign an agreement that the matter goes to arbitration is not a bargained for exchange. The question was whether a court could declare this to be unconscionable? Or did the issue of unconscionability have to go to arbitration? The Florida Supreme Court said whether the contract is valid is the threshold question, and it would be for the court to decide whether it was unconscionable. And the Florida courts found that, not surprisingly, it is an unconscionable contract. The United States Supreme Court reversed. The Supreme Court said the question of whether it is an unconscionable contract has to go to arbitration. In other words, it was the arbiter who was going to decide whether the arbiter would get to decide the case. Again, think of the individuals with no access to the courts. Once more, the courthouse doors are getting slammed shut.

I have talked about four examples this afternoon. I have talked about how much harder it is for injured individuals to sue federal officials—like in the Valerie Plame and Joe Wilson case. I talked about the heightened pleading requirements. I talked about the expansion of sovereign immunity. I talked about the shift in cases from litigation to arbitration. If there

20. *Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

were more time I could pick so many other examples where procedural devices have been used to close the courthouse door. I could talk about how standing has been limited to not allow injured individuals their day in federal court. There has been a tremendous expansion to the scope of immunity, including absolute immunity when government officials are sued, making it much harder for lawsuits to go forward. I could tell you how much harder it is for injured plaintiffs to recover attorney's fees under the federal civil rights statutes.

What all of these examples share in common is that they never make headlines in the New York Times or any other newspaper. When the Supreme Court makes it harder to bring a *Bivens* suit, tightens pleading requirements, expands sovereign immunity, or shifts cases to arbitration, no one pays attention. It is technical. It is too legalistic. To me, what makes this so insidious is that rights are being taken away by denying a forum without people even being aware of it. To be sure, rights are meaningless if there is not remedy. That was the point that *Marbury v. Madison* made all those years ago: If there is a right, there should be a remedy. If there is no court available, is there realistically any remedy?

We all learn from junior high school civics on that the great thing about our country is if there is an injured person, that individual has his right to his or her day in court. All too often that is becoming a myth.

