CLOSING THE COURTHOUSE DOORS

OCTOBER TERM 2010

Erwin Chemerinsky

RARELY HAS A SINGLE THEME explained so many cases in a Supreme Court term as the October 2010 term can be understood as being about closing the courthouse doors. In case after case, in both the civil and the criminal context, the Court has limited the ability of litigants – especially consumers, employees, and criminal defendants – to have their day in court.

Overall, the Supreme Court decided 75 cases after briefing and oral argument.[1] This is identical to the number of cases from the term before and virtually identical to the year before that, but still much less than the average of over 150 cases a term from the 1980s. The two justices most often in agreement were Chief Justice John Roberts and Justice Samuel Alito, who agreed 96.4% of the time. Next most often in agreement were the two justices nominated by President Obama, Justices Sonia Sotomayor and Elena Kagan, who voted together 94% of the time.

Once more, it was the Anthony Kennedy Court. Justice Kennedy voted in the majority 94% of the time, the most of any justice.

---

† *Erwin Chemerinsky is Dean and Distinguished Professor of Law at the University of California, Irvine School of Law.*

[1] All of the statistics in this paragraph are from the "Statpack" prepared by and available on Scotusblog.com.

But the real evidence of Kennedy's influence comes in the 5-4 decisions. There were 16 5-4 or 5-3 decisions during October Term 2010 and Kennedy was in the majority in 14 of them, the most of any justice.[2] In fact, for each of the six years in which John Roberts has been Chief Justice, Kennedy has been in the majority in more 5-4 decisions than any other justice.

It is easiest to get a clear sense of the overall ideology of the Roberts Court by focusing on the 5-4 (or 5-3) decisions where the Court is split along ideological lines. There were 14 such cases in which Roberts, Alito, Scalia, and Thomas were on one side and the liberal justices were on the other. Kennedy sided with the conservatives in 10 and with the liberals in four. Over the six years of the Roberts Court, Kennedy has voted with the conservatives over 70 percent of the time in ideologically divided 5-4 cases.

This essay primarily focuses on the many cases in which the Supreme Court restricted access to the courts. Of course, not all cases can be understood through this lens. For example, there were important cases upholding free speech claims, such as in *Snyder v. Phelps*,[3] which held that the First Amendment is violated by allowing civil liability for offensive demonstrations at military funerals, and *Brown v. Entertainment Merchants*,[4] which declared unconstitutional a California law which made it a crime to sell or rent violent videogames to minors under 18. There were significant criminal procedure rulings, particularly with regard to the Confrontation Clause of the Sixth Amendment. In *Michigan v. Bryant*,[5] the Court ruled that statements are not testimonial, and can be used against a criminal defendant, if the primary purpose of the police in their questioning was obtaining information in dealing with an emergency. In *Bullcoming v. New Mexico*,[6] the Court reaffirmed that laboratory reports are

[2] This Term there were 13 5-4 decisions and 3 5-3 decisions, in all of which Justice Kagan had recused herself because the matter was handled in the Solicitor General's office while she was the Solicitor General.

[3] 131 S.Ct. 1207 (2011)

[4] 131 S.Ct. 2729 (2011).

[5] 131 S.Ct. 1143 (2011).

[6] 131 S.Ct. 2705 (2011).

testimonial and that an analyst who did not participate in doing the analysis cannot testify as to their content.

In a remarkable number of cases, though, the Court ruled against access to the courts. Part I of this essay summarizes many of these cases and their impact. Part II analyzes why this has occurred and what might be done about it.

I. THE MANY RULINGS DENYING ACCESS TO THE COURTS

A. Limiting Class Action Suits

In two important cases, the Court limited class action suits. In *AT&T Mobility LLC v. Concepcion*,[7] the Court concluded that a standard arbitration clause in a consumer contract precludes individuals from participating in a class action suit.

Vincent and Liza Concepcion purchased cellular telephones from AT&T Mobility LCC and the form contract they signed provided for arbitration of all disputes between the parties. AT&T had advertised that the phones were free, but charged the Concepcions $30.22 in taxes. The Concepcions' suit was consolidated with other similar claims in a class action suit in federal court alleging that AT&T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free.

AT&T moved to compel arbitration under the terms of its contract with the Concepcions. The federal district court and the Ninth Circuit, however, rejected this because California law was clear that such a contractual provision is not enforceable because there was no meaningful waiver and because arbitration of a dispute between two parties is no substitute for a class action remedy. The Federal Arbitration Act requires enforcement of arbitration clauses in contracts, but specifically provides that such clauses are not enforceable where state law provides for the revocation of the contractual provision.

Nonetheless, Justice Scalia, writing for the Supreme Court in a 5-4 decision, ruled that the California law allowing consumer class

[7] 131 S.Ct. 1740 (2011).

actions in such circumstances was preempted. The Court stressed the efficiency benefits of arbitration and said that it was important to protect defendants, such as corporations, from the "in terrorem" effects of class actions which pressure them into settlements.

The Court said that the Federal Arbitration Act requires that claims be arbitrated on an individual basis and that class arbitration is not allowed. Nowhere does the Federal Arbitration Act say or imply this. Justice Breyer described the practical reality: "What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim? The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."[8]

Class actions exist precisely for this situation, where a large number of people lose a small amount of money and no one is likely to bring an individual claim. The effect of the Supreme Court's decision is to make it far less likely that corporations engaged in even massive fraud will be held accountable in situations where many people lose a little.

This is the third decision in the last three years in which the Court has found that arbitration agreements should be broadly read to prevent injured individuals from going to court. Two years ago, the Court ruled that an arbitration clause in an employment agreement precluded a plaintiff from bringing an age discrimination case to federal court.[9] Last year, the Court ruled that it is for the arbitrator, and not a judge, to decide whether an arbitration clause is valid.[10] All of these decisions have been 5-4, with the majority composed of the five most conservative justices: Roberts, Scalia, Kennedy, Thomas, and Alito.

In *Wal-Mart Stores, Inc. v. Dukes*,[11] the Court ruled that a class action of 1.5 million women who alleged sex discrimination by Wal-

---

[8] 131 S.Ct. at 1761 (Breyer, J., dissenting) (citations omitted).

[9] 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009).

[10] Rent-a-Center, West, Inc. v. Jackson, 130 S.Ct. 2722 (2010).

[11] 131 S.Ct. 2541 (2011).

Mart in pay and promotions could not go forward because they could not show sufficient commonality to their claims. Justice Scalia, again writing for the majority in a 5-4 decision, explained that Wal-Mart had an official non-discrimination policy and that therefore the employment decisions were made by many different individuals in stores across the country. The Court's majority held that a class action alleging intentional employment discrimination cannot be brought when the allegedly discriminatory decisions were made by individual supervisors at different Wal-Mart stores.

The Court also ruled, 9-0, that there could not be a damages claim in a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure. But since damages could be sought under other parts of Rule 23, by far the most important aspect of the decision was in precluding class actions in the employment discrimination context.

The Supreme Court rejected the evidence on which the lower courts relied to find that there were sufficient allegations to allow a class action suit to go forward against Wal-Mart. First, the Court found the plaintiffs' statistical evidence of nationwide gender disparities was "insufficient."[12] It speculated that the pay disparities between men and women "may be attributable to only a small set of Wal-Mart stores." Second, the majority found the plaintiffs' expert witness not worthy of belief and thus "disregard[ed]" his testimony about the ways in which Wal-Mart's personnel policies and corporate culture allowed gender bias to infect thousands of pay and promotion decisions; the majority rejected his entire testimony simply because he could not determine how often Wal-Mart's individual employment decisions were "determined by stereotyped thinking." Third, the majority dismissed the 120 affidavits recounting evidence of discriminatory statements and decisions as insufficient given Wal-Mart's size and the size of the plaintiff class. Having thus brushed aside the evidence of bias, and twice pointed out that Wal-Mart has a written policy prohibiting sex discrimination, the Court found that the gender disparities were the result of individual supervisors' deci-

[12] 131 S.Ct. at 2555.

sions and must be litigated individually.

The result is that it will be very difficult for employment discrimination claims to be litigated as a class action. If it is a small workplace, with a single decision-maker, then there are unlikely to be a sufficient number of plaintiffs to warrant a class action suit. But if it is a larger workplace, where multiple people are making pay and promotion decisions, the Court refuses to allow a finding of sufficient commonality for it to be litigated in a class action.

B. Preemption

Two year ago, in *Wyeth v. Levine*, the Supreme Court held that drug companies could be sued for failure to adequately warn patients and doctors of the harmful effects of prescription drugs.[13] Justice Stevens, writing for the Court in a 6-3 ruling, explained that the approval of drug labels by the Food and Drug Administration (FDA) does not preempt such state tort suits because drug companies are allowed to provide more information.[14] The Court emphasized that allowing such liability serves the underlying statutory goal of informing doctors and patients of side effects and protecting patients from harms.

But this term, in *PLIVA, Inc. v. Mensing*, the Supreme Court dramatically limited the effect of *Wyeth v. Levine* by holding that manufacturers of generic drugs cannot be sued on a failure to warn theory because such claims are preempted by federal law.[15]

The case involved patients who took metoclopramide, a drug designed to speed the movement of food through the digestive system. The FDA first approved metoclopramide tablets, under the brand name Reglan, in 1980. Five years later, generic manufacturers also began producing metoclopramide. Studies have shown that long-term metoclopramide use can cause tardive dyskinesia, a severe and

---

[13] 129 S.Ct. 1187 (2009).

[14] Justice Stevens's opinion was joined by Justices Kennedy, Souter, Ginsburg, and Breyer. Justice Thomas concurred in the judgment.

[15] 131 S.Ct. 2567 (2011).

often irreversible neurological disorder. These studies have demonstrated that up to 29% of patients who take metoclopramide for several years develop this condition.

The case involved two women who used the drug for a long period of time and developed tardive dyskinesia. Both women took the generic version of metoclopramide. They sued the drug manufacturer for failing to provide adequate warnings.

Justice Thomas, writing for the Court in a 5-4 decision, held that such suits against the manufacturers of generic drugs are preempted by federal law. The Court focused on the Hatch-Waxman Amendments,[16] which provide that generic drugs can gain FDA approval by showing equivalence to a drug that has already been approved by the FDA. Under the Hatch-Waxman Amendments, warning labels for generic drugs are to be the same as those for the non-generic drug approved by the FDA. The Court quoted the federal regulation which states: "[T]he [generic drug's] labeling must be the same as the listed drug product's labeling because the listed drug product is the basis for [generic drug] approval."[17]

The Court said that the makers of generic drugs could not unilaterally change these warnings because the content of the warnings for generic drugs must be the same as has been approved for non-generic drugs. Nor could manufacturers send "Dear Doctor" letters to inform physicians of the harms. The Court thus concluded that failure to warn claims against manufacturers of generic drugs are preempted by federal law.

Therefore, whether a suit can be brought against a drug company now depends entirely on whether the drug is a generic or a non-generic version.

But nothing in federal law or the law of preemption requires this distinction. Under federal law, makers of generic drugs could ask the Food and Drug Administration to change the warning labels to provide the needed information to patients and doctors. The Court,

---

[16] The Drug Price Competition and Patent Term Restoration Act, 98 Stat. 1585, commonly called the Hatch-Waxman Amendments. 21 U.S.C. § 355(j)(2)(A).

[17] 57 Fed. Reg. 17961 (1992).

however, says that suits for failure to warn are preempted because the drug companies could not unilaterally change the warning labels. However, nothing in the law of preemption has ever defined impossibility in this way. As Justice Sotomayor lamented in her dissent: "[The Court] invents new principles of pre-emption law out of thin air to justify its dilution of the impossibility standard."[18]

The premise of the Court's decision is that the Hatch-Waxman Amendments require that warning labels on generic drugs be the same as the warning labels the FDA has approved for non-generic drugs. If so, then it would make sense that generic drug companies would face the same liability for failure to warn and be required to have the same content on their warning labels as is required for non-generic drug companies. The point of the Hatch-Waxman Amendments was to help consumers by facilitating the marketing of generic drugs by allowing them to copy the warning labels approved by the FDA. A statute that was meant to protect patients and to treat generic drugs the same as non-generic drugs is interpreted to prevent suits by patients and to have generic drugs treated dramatically differently from their non-generic equivalents.

Seventy-five percent of all prescriptions in the United States are filled with generic drugs. After *PLIVA, Inc. v. Mensing*, those hurt by prescription drugs have far less legal protection. This can and must be remedied by Congress.

C. Habeas Corpus

In *Cullen v. Pinholster*,[19] the Court significantly lessened the ability of federal courts to prevent injustices through the use of the writ of habeas corpus. Scott Lynn Pinholster was convicted of murder. His defense lawyers had not been notified that the prosecutor planned to present aggravating circumstances in a penalty phase and therefore did not prepare to present mitigating evidence. Nonetheless, the judge allowed the penalty phase to go forward and the defense lawyers presented only one witness, Pinholster's mother.

---

[18] 131 S.Ct. at 2582 (Sotomayor, J., dissenting).

[19] 131 S.Ct. 1388 (2011).

After Pinholster was sentenced to death and exhausted his appeals in California state court, his new lawyers filed a writ of habeas corpus in federal court. The lawyers provided declarations showing substantial new evidence that supported the claim of ineffective assistance of counsel. The federal court granted a hearing and the new evidence documented that the defense counsel at trial had undertaken no investigation of mitigating circumstances and had they done so they would have learned that Pinholster suffered from a brain injury, a seizure disorder, and personality disorders. The evidence also included testimony from family members and school officials about Pinholster's abuse as a child. All of this is powerful mitigating evidence that might have caused the jury to have refrained from imposing the death penalty.

The federal district court granted the writ of habeas corpus and ultimately the Ninth Circuit affirmed in an en banc decision. The Supreme Court, though, in an opinion by Justice Thomas, reversed. The Court held that the federal district court should not have held the hearing on ineffective assistance of counsel. The Court ruled that the federal court on habeas corpus is limited to considering the evidence that was before the state court and cannot hold an evidentiary hearing. The Court stated: "We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."[20]

The crucial flaw in this conclusion is that the habeas corpus statute expressly allows federal courts to hold an evidentiary hearing. Section 2254(e)(2) specifies situations in which federal courts can hold an evidentiary hearing on habeas corpus, including if "the factual predicate . . . could not have been previously discovered through the exercise of due diligence." The Supreme Court essentially read this provision out of the statute in holding that federal courts may not hold evidentiary hearings and must decide petitions entirely based on the record that was before the state courts.

The result is that individuals who have substantial evidence of ineffective assistance of counsel, or of a prosecutor's failure to dis-

[20] Id. at 1398.

close exculpatory evidence, or even of actual innocence, will be unable to present this material on habeas corpus. In theory, the criminal defendants can go to state court, but often state courts are unwilling to hear the evidence or simply deny claims without a hearing and with no more than a postcard.

D. Standing

In *Arizona Christian School Tuition Organization v. Winn,* the Supreme Court further narrowed the ability of taxpayers to sue to challenge violations of the Establishment Clause of the First Amendment.[21] Arizona law provides for a tax credit of up to $500 for those contributing money to a school tuition organization. The vast majority of these funds have gone to support Catholic and Evangelical Christian schools. The Ninth Circuit declared the Arizona tax credit system unconstitutional as an impermissible establishment of religion.

The Supreme Court, in a 5-4 decision, reversed with Justice Kennedy writing for the Court. Over 40 years ago, in *Flast v. Cohen*,[22] the Supreme Court held that taxpayers have standing to challenge government expenditures as violating the Establishment Clause of the First Amendment. Although generally taxpayers do not have standing to argue that government expenditures violate the Constitution, the Court said that the Establishment Clause of the First Amendment was meant to be a limit on Congress's taxing and spending power. But in *Arizona Christian School Tuition Organization*, the Court distinguished *Flast* and said that taxpayers have standing to challenge government expenditures, but not government tax credits, as violating the Establishment Clause.

As Justice Kagan pointed out in a powerful dissent, this is a distinction without a difference. She pointed out that the Arizona tax credit law has shifted $350 million from the state treasury to the coffers of religious institutions and declared: "Cash grants and targeted tax breaks are means of accomplishing the same govern-

[21] 131 S.Ct. 1436 (2011).

[22] 392 U.S. 83 (1968).

ment objective – to provide financial support to select individuals or organizations. Taxpayers who oppose state aid of religion have equal reason to protest whether that aid flows from the one form of subsidy or the other. Either way, the government has financed the religious activity. And so either way, taxpayers should be able to challenge the subsidy."[23]

This is not the Court's first erosion of taxpayer standing under *Flast v. Cohen*. In *Valley Forge Christian College v. Americans United for Separation of Church and State,* the Court denied taxpayer standing to challenge a federal government grant of surplus property as violating the Establishment Clause.[24] More recently, the Court further restricted taxpayer standing in the Establishment Clause context in *Freedom from Religion Foundation v. Hein*, which held that taxpayers lack standing to challenge expenditures from general executive revenue.[25]

None of these distinctions makes sense other than as a desire to limit taxpayer standing to enforce the Establishment Clause. Little seems to remain of *Flast v. Cohen* and the result is that often no one will have standing to challenge unconstitutional government conduct.[26]

E. Suing Local Governments

In *Monell v. Department of Social Services*,[27] the Court held that local governments may be sued for their own policies or customs that violate the Constitution and federal laws; they cannot be sued on a

[23] 131 S.Ct. at 1450 (Kagan, J., dissenting).

[24] 454 U.S. 464 (1982).

[25] 551 U.S. 587 (2007).

[26] The other standing case of the term, *United States v. Bond*, 131 S.Ct. 2355 (2011), found that taxpayers have standing to challenge federal government actions as violating the Tenth Amendment. Justice Kennedy, writing for the Court, emphasized the importance of federalism (and thus of the Tenth Amendment) in protecting individual liberties. The implicit message is that the majority of the Court sees the Tenth Amendment, but not the Establishment Clause of the First Amendment, as protecting individual liberty.

[27] 436 U.S. 658 (1978).

respondeat superior basis. In two cases this term the Court further limited suits against cities and counties. In *County of Los Angeles v. Humphries*,[28] the Court ruled that local governments may be sued for injunctive or declaratory relief only if there is proof of an unconstitutional municipal policy or custom.

In *Connick v. Thompson*,[29] the Court ruled against a man who was convicted and spent 18 years in prison, and 14 years on death row, because of prosecutorial misconduct. One month before he was to be executed, John Thompson's defense lawyers found blood evidence that prosecutors possessed, but did not disclose, that exonerated him for an armed robbery for which he had been convicted and that greatly affected his murder trial.

Two days before Thompson's murder trial, the assistant district attorney received the crime lab's report, which stated that the perpetrator had blood type B. The defense was not told of this, not at the trial and not until the report was discovered shortly before Thompson's scheduled execution. Thompson has type O blood.

The district attorney conceded that it had violated its obligations under *Brady v. Maryland*[30] by not turning over the blood evidence. Thompson sued for prosecutorial misconduct and a jury awarded him $14 million. But the Supreme Court reversed, in a 5-4 decision, and held that the city could not be held liable for the prosecutorial misconduct. Justice Thomas, writing for the Court, said that a single instance of prosecutorial misconduct was not sufficient to show sufficient deliberate indifference to allow the city to be sued.

But as Justice Ginsburg pointed out in her dissenting opinion, this was not a single instance of misconduct. She wrote:

> Throughout the pretrial and trial proceedings against Thompson, the team of four engaged in prosecuting him for armed robbery and murder hid from the defense and the court exculpatory information Thompson requested and had a constitutional right to receive. The prosecutors did so despite multiple

[28] 131 S.Ct. 447 (2011).

[29] 131 S.Ct. 1350 (2011).

[30] 373 U.S. 83 (1963).

> opportunities, spanning nearly two decades, to set the record straight. . . . What happened here, the Court's opinion obscures, was no momentary oversight, no single incident of a lone officer's misconduct. Instead, the evidence demonstrated that misperception and disregard of *Brady*'s disclosure requirements were pervasive in Orleans Parish.[31]

F. Denying Relief to Victims of Abuses of Power

In *Ashcroft v. al-Kidd*,[32] the Supreme Court held that there was no constitutional violation and no basis for recovery of damages when the government used the material witness statute as a pretext for detaining a person that it never sought to use as a material witness.

It is revealing and disturbing that none of the justices state the facts of this case. Abdullah al-Kidd, a United States citizen and a married man with two children, was arrested at a Dulles International Airport ticket counter. Over the next 16 days, he was confined in high security cells lit 24 hours a day in Virginia, Oklahoma, and then Idaho, during which he was strip searched on multiple occasions. Each time he was transferred to a different facility, al-Kidd was handcuffed and shackled about his wrists, legs, and waist. He was released on "house arrest" and subjected to numerous restrictions on his freedom. By the time al-Kidd's confinement and supervision ended, 15 months after his arrest, al-Kidd had been fired from his job as an employee of a government contractor and had separated from his wife.

al-Kidd was not arrested and detained because he had committed a crime or was suspected of committing a crime. Rather, he was held under the federal material witness statute. But the government was not holding him because they wanted to secure his testimony, as that statute requires. His detention had absolutely nothing to do with obtaining testimony from him. Rather, al-Kidd was detained to investigate him and the material witness statute was used because

---

[31] 131 S.Ct. 1370 (Ginsburg, J., dissenting)

[32] 131 S.Ct. 2074 (2011).

the government did not have enough evidence to arrest him on suspicion of any crime.

Nonetheless, the Supreme Court held that al-Kidd had no claim upon which he could recover. Justice Scalia wrote for the Court. First, he said that al-Kidd's Fourth Amendment rights were not violated because a valid warrant had been issued by a magistrate judge and that it is inappropriate for courts to consider the subjective reasons why the Attorney General chose to detain al-Kidd.

There are many flaws in Justice Scalia's reasoning. As Justice Ginsburg observed, there was no valid warrant for al-Kidd's arrest. She explained:

> Is a warrant "validly obtained" when the affidavit on which it is based fails to inform the issuing Magistrate Judge that "the Government has no intention of using [al-Kidd as a witness] at [another's] trial," and does not disclose that al-Kidd had cooperated with FBI agents each of the several times they had asked to interview him. Casting further doubt on the assumption that the warrant was validly obtained, the Magistrate Judge was not told that al-Kidd's parents, wife, and children were all citizens and residents of the United States?[33]

al-Kidd was arrested as a material witness, not for committing any crime, and there was no probable cause or other reason to believe that he would be a material witness. There thus was no probable cause for the arrest and the seizure violated the Fourth Amendment.

Second, Justice Scalia said that former Attorney General John Ashcroft was protected by qualified immunity because there were no cases on point indicating that his conduct was unconstitutional. But the Supreme Court has expressly held that there need not be a case on point to overcome qualified immunity.[34] Surely, it does not take a case on point for the Attorney General of the United States to know that it is unconstitutional to detain a person as a material witness if there is no desire to use the person as a material witness. It is

---

[33] 131 S.Ct. at 2087 (Ginsburg, J., concurring in the judgment).

[34] Hope v. Pelzer, 536 U.S. 730 (2002).

clearly established law that it violates the Fourth Amendment to detain a person without probable cause and this is exactly what was done to al-Kidd.

al-Kidd should have been a simple case for the Supreme Court. A man was arrested to be a material witness and there was no basis whatsoever, and the government knew this, for believing that he would ever be a material witness. The government used the material witness statute as a pretext for preventative detention to investigate a person who committed no crime. This so clearly violates the Fourth Amendment that any government official, especially the Attorney General, would know this.

II. WHY AND WHAT CAN BE DONE?

One way of interpreting these decisions, and others like them,[35] is that the conservative justices are simply pro-business and pro-prosecutor and are denying access to the courts to consumers, employees, and criminal defendants. This certainly explains the rulings. But something else that is even more disturbing seems to underlie these rulings: a repeated distrust of the courts.

In limiting class action suits, Justice Scalia expressed the concern that such litigation terrorizes businesses and forces them to settle even non-meritorious claims. In precluding suits for money damages by those injured by prescription drugs or those wrongly incarcerated, the Court gives little weight to the need for such damages to deter wrong-doing in the future. In denying prisoners the chance to prove the unconstitutionality of their convictions, the Supreme Court seems worried about federal courts unjustifiably releasing dangerous individuals.

The distrust of the judiciary is not limited to this term and not limited to the Supreme Court's justices. In prior years, for example, the Supreme Court has dramatically limited the availability of punitive damages based on distrust of juries and of the ability of trial

[35] For example, in Janus Capital Group, Inc. v. First Derivative Traders, 131 S.Ct. 2296 (2011), the Court, 5-4, denied a private right of action for false statements made by an investment fund.

judges to control their awards.[36] In a very different area, the desire to use military tribunals, rather than federal courts, to try those accused of terrorist acts is based on a lack of faith in federal judges to handle such matters and come to the desired results.

This trend, and the decisions of the 2010 Term, are disturbing on so many levels. The conservatives on the Court have uncritically accepted attacks on the courts that have little evidentiary support or foundation. At the same time, they have failed to recognize that civil suits for money damages, including class actions, are essential to ensure that injured individuals gain recovery and that future misconduct is deterred. People are wrongly convicted, including innocent individuals, and they should have access to federal courts to gain redress. Constitutional rights are meaningless if there are no courts to enforce them.

What can be done about this? A first step is to see the troubling pattern and realize that these decisions in so many disparate areas share a common theme: the Supreme Court is closing the courthouse doors to those who have claims that should be heard.

Next, Congress can and must act to remedy many of these injustices. Many of the rulings from this term involved the Supreme Court restrictively interpreting federal statutes and rules. These decisions, since they are not interpreting the Constitution, can be fixed by new federal laws. For example, Congress can restore access to class actions, allow suits by those injured by generic drugs, and provide hearings in federal court for those who claim to have been unconstitutionally convicted.

No principle is more basic to our constitutional system than that a person who has been hurt deserves his or her day in court. It is time for the Supreme Court to believe this again and to act that way.

[36] *See, e.g.,* Philip Morris USA v. Williams, 549 U.S. 346 (2007); State Farm Mut. Auto Ins. v. Campbell, 538 U.S. 408 (2003).