



Roberts at 10:

Roberts's Consistent Votes to Close the Courthouse Doors

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I. Overview

Most of the “snapshots” that are part of CAC’s [yearlong](#) “Roberts at 10” project have focused on, or will focus on, substantive areas of the law. Our most recent “[snapshot](#),” for example, focused on women’s rights, specifically reproductive rights and statutory protections against employment discrimination. But these and all other substantive rights and protections are undermined to the extent people cannot access the courts to vindicate them. This “snapshot” focuses on that issue: access to the courts.

The topic of access to the courts is a very broad one, encompassing many distinct areas of the law that can affect whether or how readily injured parties can bring claims in court. In this snapshot, we will look at four distinct areas of the law relevant to access to the courts and discuss the most significant cases in each area: (1) the doctrine of standing (that is, who may constitutionally bring a claim in court), (2) arbitration (whether individuals may bring their claims in court or must instead use private arbitration procedures), (3) pleading standards (what a plaintiff must allege at the outset of litigation to avoid having his or her case dismissed), and (4) lawsuits against the states (that is, when individuals can use the federal courts to challenge unconstitutional state action). Cases in all of these areas regularly come before the Supreme Court. Indeed, the Court is scheduled to decide a potentially significant case in the final category this Term. In that case (*Armstrong v. Exceptional Child Center, Inc.*), the Court has been asked to decide whether plaintiffs who assert that they have been harmed by a state law—specifically, health care providers who allege that they are not receiving adequate payments from Medicaid because of a state law—can ask a federal court to stop state officials from enforcing that state law because it conflicts with federal law. The ramifications of the Court’s decision in *Armstrong* could be significant not only for individuals seeking their day in court to redress all manner of unlawful state action, but also for the effective operation of the nation’s health care system.

Access to the courts is one area in which the story of the Roberts Court is largely, but not entirely, negative. Although most of the decisions of the Roberts Court in this area have limited access to the courts, there have been a few that have not, including most significantly the Court’s 2007 decision, *Massachusetts v. EPA*, holding that Massachusetts could sue the Environmental Protection Agency to challenge its failure to regulate greenhouse gas emissions under the Clean Air Act.¹ But even though the record of the Roberts Court may be mixed on

¹ 549 U.S. 497 (2007).

access to the courts, the record of John Roberts is not. He dissented in that 2007 case and in every other significant case during his tenure as Chief Justice in which the Court has refused to limit access to the courts, and he has always been in the majority when it has decided to limit such access. In casting these votes to limit access to the courts, Roberts has repeatedly disregarded not only the Framers' vision of a robust judiciary that would serve to protect people from unlawful action by the other branches of government, but also Supreme Court precedent repeatedly affirming that access to the courts is, as Chief Justice Marshall put it, critical to the "very essence of civil liberty."²

As disturbing as Chief Justice Roberts's decisions in these cases are, they are not terribly surprising. Unlike [some areas](#) of the law in which Roberts's pre-confirmation statements seem to conflict with his post-confirmation votes and opinions, there's little inconsistency between his pre-confirmation statements and his post-confirmation votes in this area. Indeed, prior to his confirmation, Roberts wrote an article defending a divided Supreme Court decision that denied standing to environmental organizations, and he said nothing at his confirmation hearing to assuage concerns that he would vote to limit access to the courts. Rather, at his hearing, he repeatedly emphasized that the role of the courts should be limited, and that the doctrine of standing is critical to enforcing that limited role.³ During Roberts's first decade on the Court, it has become very clear just how strongly he feels about access to the court issues. Interestingly, although Roberts has rarely written majority opinions in these areas, he has repeatedly written passionate dissents in cases in which he was in the minority, going so far as to describe the majority's opinion in one case as "achingly wrong."⁴

In short, although the category of access to the courts is a broad one, encompassing many distinct areas of law, Chief Justice Roberts's votes and opinions across all of them reflect the strong view that the courts are often the wrong place to seek relief for a broad array of injuries.

II. Confirmation Hearing

Long before John Roberts was Judge Roberts, not to mention Chief Justice Roberts, he wrote an article defending a then-recent Supreme Court decision that limited the ability to sue to prevent injury to the environment.⁵ In doing so, he set forth his views on the doctrine of standing and, in particular, emphasized the important role that he believed it played in defining

² *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

³ While Roberts has consistently voted to limit litigants' access to the courts, not all of his actions on the High Court seem as consistent with his asserted belief in a limited role for the courts themselves. For example, as we discussed in our "[snapshot](#)" on campaign finance, Roberts joined the Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), which produced major changes in campaign finance law by deciding an issue that the parties before the Court had not even raised.

⁴ *Sprint Commc'n Co. v. APCC Servs., Inc.*, 554 U.S. 269, 315 (2008) (Roberts, C.J., dissenting).

⁵ John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 *DUKE L.J.* 1219 (1993) (defending the Court's decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

the proper role of the courts. As he explained it, “[t]he legitimacy of an unelected, life-tenured judiciary in our democratic republic is bolstered by the constitutional limitation of that judiciary’s power in Article III to actual ‘cases’ and ‘controversies.’ The need to resolve such an actual case or controversy provides the justification . . . for the exercise of judicial power itself, ‘which can so profoundly affect the lives, liberty, and property of those to whom it extends.’”⁶ In other words, “[s]tanding is . . . properly regarded as a doctrine of judicial self-restraint,”⁷ and “standing—like other doctrines of judicial self-restraint—compels the other branches of government to do a better job in carrying out their responsibilities under the Constitution.”⁸

Many years later, at his confirmation hearing to become Chief Justice, Roberts made essentially the same points. He explained that the “institution of judicial review” is “grounded on the obligation to decide cases and controversies,”⁹ and “judges should be very careful to make sure they’ve got a real case or controversy before them, because that is the sole basis for the legitimacy of them acting in the manner they do in a democratic republic.”¹⁰ He later explicitly connected the case or controversy requirement to ensuring the proper separation of powers among the branches, noting that the decision in 1793 by Chief Justice John Jay—the nation’s first Chief Justice—not to render an opinion in a case where there was no constitutional case or controversy was “one of the leading historical episodes that contributed to implementing the separation of powers.”¹¹

At one point in the hearing, Roberts elaborated on what the standing doctrine requires as a practical matter: “[s]o first make sure you’ve got a real case, and a real case is not simply, you know, I’m interested in this area, I don’t like what the Government’s doing or I don’t like this law, and so I’m going to go to court. What the standing doctrine requires is that you actually be injured by what the Government is doing, injured by Congress’s action.”¹² Roberts did clarify, however, that the “injury doesn’t have to be economic. The Supreme Court has explained . . . it can be aesthetic, it can be environmental, it can cover a wide range of injuries, but you do have to show some injury that separates you from the general public, so you’re just not voicing a gripe, you’re trying to get a case decided. That’s the importance of the standing doctrine.”¹³

On the distinct, but related topic, of when federal law provides a cause of action that allows individuals with constitutional standing to sue to enforce that law, Roberts repeatedly

⁶ *Id.* at 1220 (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982)).

⁷ *Id.* at 1221.

⁸ *Id.* at 1229.

⁹ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 342 (2005), available at <http://www.gpo.gov/fdsys/pkg/GPO-CHRG-ROBERTS/content-detail.html> [hereinafter *Confirmation Hearing*].

¹⁰ *Id.*

¹¹ *Id.* at 381.

¹² *Id.* at 342-43.

¹³ *Id.* at 343; *id.* at 155-56.

emphasized that he would follow Court precedents,¹⁴ but that the question judges must ask is what Congress intended. For example, at one point, Senator Feingold expressed “concern[] that [Roberts] seem[ed] to have consistently argued for making it harder to bring Section 1983 lawsuits,”¹⁵ including co-authoring an *amicus curiae* brief while in the Solicitor General’s office that “said that individual Medicaid providers should not be able to sue under Section 1983 to enforce a provision of the Medicaid statute which requires States to reimburse them for services at reasonable rates.”¹⁶ Roberts explained that “[a]ll of these issues go to the question of what Congress intended to do. If Congress had spelled out whether or not a right should be enforceable in Court, that is what the determination would be in Court. These issues arise only because of confusion over whether or not Congress has spelled out that a right should be enforceable in Federal court for damages or not.”¹⁷ As he put it later, “if Congress wants them to sue, all Congress has to do is write one sentence saying, ‘Individuals harmed by a violation of this statute may bring a right of action in Federal court.’ There are laws where Congress says that, and that question never comes up.”¹⁸

Thus, although Roberts professed his willingness to follow Court precedent, he made no secret at his confirmation hearing or in his pre-judicial writings that he believed in the importance of using a stringent standing doctrine to maintain the “legitimacy” of the courts, and he said nothing to allay concerns that he would try to close the courthouse doors. To Roberts, much of the responsibility for protecting individuals and society from unlawful action should properly be left to the political branches instead.

III. Access to the Courts During John Roberts’s First Decade on the Court

A. Standing

At the core of questions of access to the courts is the doctrine of standing, which defines when, as a constitutional matter, parties have the right to bring claims in federal court. Reflecting the Founding generation’s recognition that an independent, co-equal judicial branch that could provide redress to Americans who have suffered legal wrongs was critical to the success of the Constitution and the rule of law,¹⁹ the Constitution broadly provides that “[t]he judicial Power shall extend” to “all Cases . . . [and] Controversies.”²⁰ Consistent with that promise of broad access to the courts, throughout much of the twentieth century, the Supreme Court affirmed access to the courts as a basic fundamental constitutional principle, repeatedly expanding the power of the federal courts to remedy violations of federal law.

¹⁴ *Id.* at 249; *id.* at 414.

¹⁵ Section 1983 is a federal law that makes relief available to those whose constitutional rights have been violated by an actor acting under State authority. 42 U.S.C. § 1983.

¹⁶ *Id.* at 248.

¹⁷ *Id.*; *id.* at 415.

¹⁸ *Id.* at 416

¹⁹ See generally THE FEDERALIST NO. 78 (Alexander Hamilton).

²⁰ U.S. Const. art. III, § 2, cl. 1.

More recently, however, the Court has used the somewhat oblique phrase “Cases . . . [and] Controversies” to impose stringent limits on who can bring claims in Court. As the Court’s 1992 opinion in one of the seminal cases in this area, *Lujan v. Defenders of Wildlife*, puts it, “[o]ver the years, our cases have established that the irreducible constitutional minimum of standing contains three elements”: (1) “the plaintiff must have suffered an ‘injury in fact’”; (2) “there must be a causal connection between the injury and the conduct complained of”; and (3) “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’”²¹ As Justice Kennedy explained in his concurrence in *Lujan*, these requirements are supposed to “preserve[] the vitality of the adversarial process.”²²

During Roberts’s first decade as Chief Justice, the Court has decided a number of cases further defining the scope of these limitations, the vast majority of which have been 5-4 decisions with Justice Kennedy playing the familiar role of “swing justice.”

In *Massachusetts v. EPA*, the Court held, in a 5-4 decision, that Massachusetts had standing to petition for review of an EPA order denying a petition for rulemaking to regulate greenhouse gas emissions under the Clean Air Act.²³ As the Court explained in an opinion written by Justice Stevens, the three requirements set out in *Lujan* were easily satisfied: “it is clear that petitioners’ submissions as they pertain to Massachusetts have satisfied the most demanding standards of the adversarial process. EPA’s steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both ‘actual’ and ‘imminent.’ There is, moreover, a ‘substantial likelihood that the judicial relief requested’ will prompt EPA to take steps to reduce that risk.”²⁴

Chief Justice Roberts disagreed. In a dissent joined by Justices Scalia, Thomas, and Alito, Roberts emphasized the importance of “‘particularized injury’” as the requisite that shows there is “‘a real need to exercise the power of judicial review.’”²⁵ According to Roberts, “[t]he very concept of global warming seems inconsistent with this particularization requirement.”²⁶ As he explained it, “Global warming is a phenomenon ‘harmful to humanity at large,’ and the redress petitioners seek is focused no more on them than on the public generally—it is literally to change the atmosphere around the world.”²⁷ He also took the position that the harm was not sufficiently imminent because it would require “accepting a century-long time horizon . . . [that would] render[] requirements of imminence and immediacy utterly toothless,”²⁸ and that

²¹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

²² *Id.* at 581 (Kennedy, J., concurring in part and in the judgment).

²³ 549 U.S. 497 (2007).

²⁴ *Id.* at 521 (internal citation and quotation marks omitted) (quoting *Duke Power Co. v. Carolina Evtl. Study Grp., Inc.*, 438 U.S. 59, 79 (1978)).

²⁵ *Id.* at 541 (Roberts, C.J., dissenting) (*Warth v. Seldin*, 422 U.S. 490, 508 (1975)).

²⁶ *Id.* (Roberts, C.J., dissenting).

²⁷ *Id.* (Roberts, C.J., dissenting) (internal citation omitted) (quoting *Massachusetts v. EPA*, 415 F.3d 50, 60 (D.C. Cir. 2005) (Sentelle, J., dissenting in part and concurring in judgment)).

²⁸ *Id.* at 542 (Roberts, C.J., dissenting).

petitioners could not “trace their alleged injuries back . . . to the fractional amount of global emissions that might have been limited with EPA standards” or establish that the relief they seek could redress the alleged harm.²⁹

To Roberts, the fundamental flaw with the Court’s analysis was that “[t]he constitutional role of the courts . . . is to decide concrete cases—not to serve as a convenient forum for policy debates,”³⁰ and “the Court’s self-professed relaxation of those Article III requirements has caused us to transgress ‘the proper—and properly limited—role of the courts in a democratic society.’”³¹ To Justice Stevens, the response to these criticisms was simple: “The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek.”³²

Justice Kennedy also sided with the Court’s more liberal Justices in another standing case the next Term. In *Sprint Communications Co. v. APCC Services, Inc.*, the Court held, again in a 5-4 decision this time written by Justice Breyer, that payphone operators could assign their claim against long-distance carriers who owed them money to someone else who could sue on their behalf even if they were going to remit the proceeds of the litigation back to the payphone operators.³³ The legal issue might seem arcane, but the practical consequences for the ability of individuals to sue is significant. As the Court explained, “[b]ecause litigation is expensive, because the evidentiary demands of a single suit are often great, and because the resulting monetary recovery is often small, [the plaintiffs in the case] assign their . . . claims to billing and collection firms called ‘aggregators’ so that, in effect, these aggregators can bring suit on their behalf.”³⁴ The Court based its conclusion that the assignees could sue on both precedent and history.

Roberts again disagreed, and on behalf of the same group of Justices who dissented in *Massachusetts v. EPA*, Roberts wrote another dissent deploring the Court for opening the courthouse doors too wide. According to Roberts, the plaintiffs “have nothing to gain from their lawsuit,” and “until today, it has always been clear that a party lacking a direct, personal stake in the litigation could not invoke the power of the federal courts.”³⁵ He faulted the Court for “replac[ing] the personal stake requirement with a completely impersonal one. The right to sue is now the exact opposite of a personal claim—it is a marketable commodity.”³⁶

In a number of other standing cases decided during Roberts’s tenure, the Court also split 5-4, but with Justice Kennedy joining the Chief Justice and the Court’s other conservatives to

²⁹ *Id.* at 544-45 (Roberts, C.J., dissenting).

³⁰ *Id.* at 547 (Roberts, C.J., dissenting).

³¹ *Id.* at 548-49 (Roberts, C.J., dissenting) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984) (internal quotation marks omitted)).

³² *Id.* at 526.

³³ 554 U.S. at 271.

³⁴ *Id.* at 271-72.

³⁵ *Id.* at 298-99 (Roberts, C.J., dissenting).

³⁶ *Id.* at 301-02 (Roberts, C.J., dissenting).

limit standing and constrict access to the courts. In *Hein v. Freedom from Religion Foundation*, the Court, in a 5-4 decision written by Justice Alito (and joined by the Chief Justice), held that an organization opposed to government endorsement of religion could not bring an Establishment Clause challenge to a federal agency's use of federal money to fund conferences to promote the President's "faith-based initiatives."³⁷ As the dissent recognized, this decision seemed out of step with Court precedent recognizing that "plaintiffs with an Establishment Clause claim could 'demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements'" because "when the Government spends money for religious purposes a taxpayer's injury is serious and concrete enough to be 'judicially cognizable.'"³⁸

In another case several years later, the Court again limited the ability of taxpayers to bring claims for Establishment Clause violations. In *Arizona Christian School Tuition Organization v. Winn*, the Court held, again 5-4 in an opinion this time written by Justice Kennedy (and joined by the Chief Justice), that taxpayers lacked standing to challenge Arizona's tuition tax credit for contributions to school tuition organizations that used the contributions to provide scholarships to students attending private, including religious, schools.³⁹ In dissent, Justice Kagan noted that "[f]or almost half a century, litigants like the Plaintiffs have obtained judicial review of claims that the government has used its taxing and spending power in violation of the Establishment Clause,"⁴⁰ and the Court's "novel" basis for distinguishing its prior case law had "as little basis in principle as it has [in the Court's] precedent."⁴¹ As Justice Kagan explained, the Court's opinion "enables the government to end-run *Flast's* guarantee of access to the Judiciary. . . . And that result—the effective demise of taxpayer standing—will diminish the Establishment Clause's force and meaning."⁴²

Two other significant standing decisions handed down since Roberts joined the Court also merit brief mention. In *Summers v. Earth Island Institute*, the Court, in a 5-4 opinion written by Justice Scalia (joined by the Chief Justice), limited the ability of environmental organizations to challenge the U.S. Forest Service's enforcement of regulations that exempted certain small projects from the notice, comment, and appeal process applicable to larger land management decisions.⁴³ Among other things, the Court rejected plaintiffs' claim that the "deni[al of] the ability to file comments on some Forest Service actions" constituted sufficient "procedural injury" to sue, concluding that "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is

³⁷ 551 U.S. 587 (2007). The Court relied on its decision the previous year in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006), in which the Court held, in a 9-0 decision written by the Chief Justice, that there should be no exception to the general prohibition on taxpayer standing for Commerce Clause challenges to state tax decisions.

³⁸ *Id.* at 637 (Souter, J., dissenting) (quoting *Flast v. Cohen*, 392 U.S. 83, 102 (1968)); *id.* at 643 (Souter, J., dissenting) (quoting *Allen*, 468 U.S. at 752).

³⁹ 131 S. Ct. 1436 (2011).

⁴⁰ *Id.* at 1450 (Kagan, J., dissenting).

⁴¹ *Id.* (Kagan, J., dissenting).

⁴² *Id.* at 1450-51 (Kagan, J., dissenting).

⁴³ 555 U.S. 488 (2009).

insufficient to create Article III standing.”⁴⁴ As Justice Breyer wrote in dissent, “Nothing in the record or the law justifies [the] counterintuitive conclusion” that the plaintiff environmental organizations and their members “do not suffer any “concrete injury” when the Forest Service sells timber for logging on ‘many thousands’ of small (250-acre or less) woodland parcels without following legally required procedures.”⁴⁵

And in *Clapper v. Amnesty International USA*, the Court considered a challenge to the Foreign Intelligence Surveillance Act, which “allows the Attorney General and the Director of National Intelligence to acquire foreign intelligence information by jointly authorizing the surveillance of individuals who are not ‘United States persons’ and are reasonably believed to be located outside the United States.”⁴⁶ The Court held, in a 5-4 decision written by Justice Alito (and joined by the Chief Justice), that “attorneys and human rights, labor, legal, and media organizations whose work allegedly requires them to engage in sensitive and sometimes privileged telephone and e-mail communications with colleagues, clients, sources, and other individuals located abroad” could not challenge the surveillance program.⁴⁷ The Court held that such persons and entities did not have standing because their fears of injury were too “speculative” because, among other things, they could not *know* that the government would target people with whom they communicate.

Justice Breyer disagreed, pointing out in his dissent that the alleged harm is “as likely to take place as are most future events that commonsense inference and ordinary knowledge of human nature tell us will happen.”⁴⁸ And in a series of hypotheticals, Justice Breyer illustrated the oddity of the Court’s conclusion: “Suppose that a federal court faced a claim by homeowners that (allegedly) unlawful dam-building practices created a high risk that their homes would be flooded. Would the court deny them standing on the ground that the risk of flood was only 60, rather than 90, percent?”⁴⁹ To Justice Breyer and the other dissenters, the answer was obvious: no.

Although the Chief Justice did not write an opinion in the cases denying standing in which he was in the majority, his strong dissents in *Massachusetts v. EPA* and *Sprint* speak to how powerfully he feels about decisions that, in his view, improperly expand access to the courts. At the end of his dissent in *Sprint*, Roberts wrote that “perhaps we should heed the counsels of hope rather than despair,” acknowledging that the majority “purports to comply with our Article III precedents, so those precedents at least live to give meaning to ‘the

⁴⁴ *Id.* at 496.

⁴⁵ *Id.* at 501 (Breyer, J., dissenting).

⁴⁶ 133 S. Ct. 1138, 1142 (2013) (internal footnote omitted).

⁴⁷ *Id.* at 1145.

⁴⁸ *Id.* at 1155 (Breyer, J., dissenting); *id.* at 1159 (Breyer, J., dissenting) (“The upshot is that (1) similarity of content, (2) strong motives, (3) prior behavior, and (4) capacity all point to a very strong likelihood that the Government will intercept at least some of the plaintiffs’ communications.”).

⁴⁹ *Id.* at 1162-63 (Breyer, J., dissenting).

judiciary's proper role in our system of government' another day."⁵⁰ He described the majority's conclusion as "achingly wrong," but took solace in the fact that "at least the articulated test is clear and daunting."⁵¹

B. Arbitration

When it comes to arbitration, the governing law is the Federal Arbitration Act ("FAA"), which was enacted in 1925 in response to "a period of 'hostility' by the Supreme Court toward private arbitration agreements"⁵² and provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."⁵³ Starting in the 1980s, the Supreme Court began using the FAA to expand arbitration and concomitantly limit access to the courts.⁵⁴ The Roberts Court has continued this trend, deciding a number of cases that channel more claims into arbitration and make it more difficult for injured individuals to use the class action device in the arbitral forum.⁵⁵ Chief Justice Roberts has been in the majority in all of these decisions.

Two of these significant arbitration cases were decided in 2010. In *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*, the Court made it more difficult for individuals to bring a class action in an arbitral forum. Relying on what the Court described as the FAA's "'primary'

⁵⁰ 554 U.S. at 314 (Roberts, C.J., dissenting) (internal citation omitted) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (internal quotation marks omitted)).

⁵¹ *Id.* at 315 (Roberts, C.J., dissenting).

⁵² J. Maria Glover, *Disappearing Claims and the Erosion of Public Law*, 124 YALE L.J. __, at 5 (forthcoming 2015) (internal footnote omitted), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2534481.

⁵³ 9 U.S.C. § 2.

⁵⁴ As numerous commentators have noted, the shift from the courts to arbitral forums has had numerous deleterious consequences for injured parties and the legal system. See, e.g., Glover, *supra* note 52, at 1-2 ("Normatively, scholars have argued that the large-scale shift from trials to settlement has resulted in significant losses to the values of democratic participation, legitimacy, deterrence, accuracy, judicial independence, egalitarianism, access to information, and peacekeeping." (internal footnotes omitted)); David S. Schwartz, *Enforcing Small Print To Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 37 (arguing that "displacing adjudication through pre-dispute arbitration clauses systematically reduces the legal liability of corporate defendants").

⁵⁵ The Roberts Court's decisions on class action in the arbitration context reflect a more general antipathy to the class action device, one that Chief Justice Roberts seems to share. As discussed in our "[snapshot](#)" on women's issues, the Court decided a significant class action case in 2011, holding that female employees seeking to sue their employer for sex discrimination could not bring their suit as a class action because they failed to satisfy the "commonality" requirement of the Federal Rules of Civil Procedure, that is, that there be "questions of law or fact common to the class." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Justice Ginsburg, writing for the Court's more liberal members, wrote a strong dissent that faulted the Court for "giv[ing] no credence to the key dispute common to the class: whether Wal-Mart's discretionary pay and promotion policies are discriminatory." *Id.* at 2565 (Ginsburg, J., dissenting). Two years later, the Court issued another class action decision that was also divided along the typical 5-4 axis. In an opinion written by Justice Scalia, the Court held that current and former Comcast subscribers could not seek damages from Comcast for alleged violations of the federal antitrust laws because they had failed to prove that damages would be capable of measurement on a classwide basis. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). In a dissent by Justices Ginsburg and Breyer (and joined by Justices Sotomayor and Kagan), the minority explained why the Court was not only wrong on the merits, but also wrong to decide the case at all.

purpose . . . to ensure that ‘private agreements to arbitrate are enforced according to their terms,’” the Court held, in a 5-3 decision written by Justice Alito (and joined by the Chief Justice), that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.”⁵⁶

In dissent, Justice Ginsburg pointed out that the “parties jointly asked the arbitrators to decide . . . whether the arbitration clause in their . . . contracts permitted class proceedings,” and the Court “allow[ed] [the defendant] essentially to repudiate its submission of the contract-construction issue to the arbitration panel, and to gain, in place of the arbitrators’ judgment, [the Supreme Court’s] *de novo* determination.”⁵⁷ Justice Ginsburg also noted the real-world consequences of the Court’s decision: “When adjudication is costly and individual claims are no more than modest in size, class proceedings may be ‘the thing,’ *i.e.*, without them, potential claimants will have little, if any, incentive to seek vindication of their rights.”⁵⁸ As she put it, “disallowance of class proceedings severely shrinks the dimensions of the case or controversy a claimant can mount.”⁵⁹

Having made it more difficult for individuals to bring class claims in an arbitral forum, the Court later that year also made it more likely that individuals would be forced out of the courts and into arbitration. In *Rent-A-Center, West, Inc. v. Jackson*, the Court held, in a 5-4 decision written by Justice Scalia (and joined by the Chief Justice), that a litigant who challenges the validity of an agreement to arbitrate must submit that challenge *to the arbitrator*, unless he has lodged an objection to the specific line in the agreement that purports to assign such challenges to the arbitrator.⁶⁰ The consequence of the Court’s decision was to limit individuals’ ability to access the courts to bring claims of all kinds where they have signed arbitration agreements, even if the agreement is void under state law. In dissent, Justice Stevens not only explained why the Court’s decision was wrong, but also noted that “[n]either petitioner nor respondent has urged us to adopt the rule the Court does today.”⁶¹

The next year, the Court compounded the significance of its two decisions the prior year, holding in *AT&T Mobility LLC v. Concepcion* that states cannot “condition[] the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.”⁶² This was, again, a 5-4 decision written by Justice Scalia (and joined by the Chief Justice). Noting, among other things, that “our cases place it beyond dispute that the FAA was designed to promote arbitration,”⁶³ and that “class arbitration greatly increases risks to

⁵⁶ 559 U.S. 662, 682 (2010) (quoting *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)); *id.* at 684.

⁵⁷ *Id.* at 693 (Ginsburg, J., dissenting). Justice Ginsburg also took the position that the defendant’s claim was not ripe for review by the Court. *Id.* at 688 (Ginsburg, J., dissenting).

⁵⁸ *Id.* at 699 (Ginsburg, J., dissenting).

⁵⁹ *Id.* (Ginsburg, J., dissenting).

⁶⁰ 561 U.S. 63 (2010).

⁶¹ *Id.* at 76 (Stevens, J., dissenting).

⁶² 131 S. Ct. 1740, 1744 (2011).

⁶³ *Id.* at 1749.

defendants,”⁶⁴ the Court concluded that the state rule requiring that classwide arbitration procedures be available was preempted by the FAA. In dissent, Justice Breyer took the position that the state rule was inconsistent with neither the text nor the purpose of the FAA. He explained that “class arbitration is consistent with the use of arbitration” and was, in fact, a “form of arbitration that is well known in California and followed elsewhere.”⁶⁵ He also noted the “countervailing advantages” of class proceedings, most notably that “agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate.”⁶⁶

Finally, in 2013, the Court again made it still more difficult to pursue class actions in arbitration. In *American Express Co. v. Italian Colors Restaurant*, the Court held, in a 5-3 decision again written by Justice Scalia (and joined by the Chief Justice), that a contractual waiver of class arbitration is enforceable even when the plaintiff’s cost of individually arbitrating a federal statutory claim exceeds the potential recovery.⁶⁷ The Court dismissed the plaintiffs’ assertion that the waiver would preclude their ability to vindicate their federal rights under the antitrust laws, explaining that “the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”⁶⁸

In dissent, Justice Kagan boiled the case down to a “nutshell”: “The owner of a small restaurant (Italian Colors) thinks that American Express (Amex) has used its monopoly power to force merchants to accept a form contract violating the antitrust laws. . . . [I]f the [contract’s] arbitration clause is enforceable, Amex has insulated itself from antitrust liability—even if it has in fact violated the law.”⁶⁹ She went on: “[H]ere is the nutshell version of today’s opinion, admirably flaunted rather than camouflaged: Too darn bad.”⁷⁰ Justice Kagan then explained how the Court’s decision “betray[ed]” both the Court’s precedents and federal statutes, and that the agreement could have prohibited class actions if it provided some other means (such as cost-shifting) to make such actions tenable.⁷¹ But as she explained: “To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.”⁷²

In short, during Roberts’s first decade as Chief Justice, Roberts and the other conservatives on the Court have consistently voted to channel more disputes into arbitration and to limit the ability of plaintiffs to vindicate their rights in arbitral forums. No less than the Court’s decisions on standing, its decisions in this area have significantly limited the ability of

⁶⁴ *Id.* at 1752.

⁶⁵ *Id.* at 1758 (Breyer, J., dissenting).

⁶⁶ *Id.* at 1760 (Breyer, J., dissenting).

⁶⁷ 133 S. Ct. 2304 (2013).

⁶⁸ *Id.* at 2311.

⁶⁹ *Id.* at 2313 (Kagan, J., dissenting).

⁷⁰ *Id.* (Kagan, J., dissenting).

⁷¹ *Id.* at 2313, 2318 (Kagan, J., dissenting).

⁷² *Id.* at 2320 (Kagan, J., dissenting).

individuals to use the courts and the judicial system to vindicate their rights and redress their injuries.

C. Pleading Standards

The Federal Rules of Civil Procedure, which are the starting point for understanding pleading standards, provide that a plaintiff's complaint must set out "a short and plain statement of the claim showing that the pleader is entitled to relief."⁷³ Historically, the Supreme Court had interpreted this standard liberally, stating in 1957, in the seminal case on the issue, that "the accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."⁷⁴

In 2007, in *Bell Atlantic Corporation v. Twombly*, the Roberts Court raised that standard. In a 7-2 decision written by Justice Souter (and joined by the Chief Justice), the Court held that consumers bringing a putative class action against regional telephone service providers for antitrust violations had failed to state a claim on which relief could be granted.⁷⁵ While acknowledging that a complaint need not contain "detailed factual allegations," the Court held that "[f]actual allegations must be enough to raise a right to relief above the speculative level."⁷⁶ The Court addressed the *Conley* standard head-on, stating that "after puzzling the profession for 50 years, this famous observation has earned its retirement."⁷⁷ According to the Court, "[t]he phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard."⁷⁸ The Court ultimately held that the plaintiffs could not meet that standard because they had failed to "nudge[] their claims across the line from conceivable to plausible."⁷⁹

In dissent, Justice Stevens (joined by Justice Ginsburg) faulted the majority for holding that the plaintiffs' complaint should be dismissed based on the Court's "appraisal of the plausibility of the ultimate factual allegation rather than its legal sufficiency,"⁸⁰ and for "scrap[ping]" *Conley's* formulation of the proper standard, which Stevens noted "has been cited as authority in a dozen opinions of this Court and four separate writings."⁸¹ But in addition to explaining why the Court's result was inconsistent with its precedent, Justice Stevens also made clear that the heightened pleading standard was inconsistent with Rule 8 of the Federal Rules of Civil Procedure because it would improperly limit access to the courts. As he explained, "Under

⁷³ Fed. R. Civ. P. 8(a)(2).

⁷⁴ *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *abrogated by* *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

⁷⁵ 550 U.S. 544 (2007).

⁷⁶ *Id.* at 555.

⁷⁷ *Id.* at 563.

⁷⁸ *Id.*

⁷⁹ *Id.* at 570.

⁸⁰ *Id.* at 573 (Stevens, J., dissenting).

⁸¹ *Id.* at 577 (Stevens, J., dissenting).

the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in.”⁸²

In 2009, in *Ashcroft v. Iqbal*, the Court built on its decision in *Twombly*, but this time to hold, in a 5-4 decision, that the plaintiff, a Muslim Pakistani who was detained in the United States after 9/11, had failed to plead sufficient facts to state a claim for unlawful discrimination in connection with the conditions of his detention.⁸³ In an opinion authored by Justice Kennedy (and joined by the Chief Justice), the Court noted that Rule 8 “does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions,”⁸⁴ and it concluded that the doors of discovery should not be opened for this plaintiff because he had not stated claims that were plausible. Justice Souter, the author of *Twombly*, dissented in an opinion joined by the Court’s other more liberal members. Justice Souter faulted the Court for “looking at the relevant assertions [in the complaint] in isolation,”⁸⁵ and he explained how the complaint, “[t]ak[en] . . . as a whole” gave the defendants “‘fair notice’” of plaintiffs’ claims.⁸⁶

In short, although it is still too early to state just how significant the Roberts Court’s decisions on the sufficiency of pleadings will be, it seems fair to say that they could be very significant indeed. And the impact on access to the courts could be no less significant. As one federal judge has noted, “Few issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to courts.”⁸⁷ While John Roberts did not author either *Twombly* or *Iqbal*, he signed on to both, reflecting his willingness to make it more difficult for litigants to use the court system to vindicate their rights.

D. Suits Against the States

At the nation’s inception, an important purpose of the federal courts was to protect citizens against unlawful actions by state governments. In 1890, with its decision in *Hans v. Louisiana*, the Supreme Court made it more difficult for the federal courts to serve this purpose, holding that states generally enjoy immunity from suit (what is commonly called “sovereign immunity”).⁸⁸ The Court has, however, recognized that “certain suits for declaratory or injunctive relief against state officers must . . . be permitted if the Constitution is to remain the supreme law of the land.”⁸⁹ The Roberts Court has already considered two cases that test the limits of that principle—and it will consider another this Term.

In *Virginia Office for Protection and Advocacy v. Stewart*, an independent state agency charged with running a system to “protect and advocate the rights of individuals with

⁸² *Id.* at 575 (Stevens, J., dissenting).

⁸³ 556 U.S. 662 (2009).

⁸⁴ *Id.* at 678-79.

⁸⁵ *Id.* at 698 (Souter, J., dissenting).

⁸⁶ *Id.* (Souter, J., dissenting) (quoting *Twombly*, 550 U.S. at 555).

⁸⁷ *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008).

⁸⁸ 134 U.S. 1 (1890).

⁸⁹ *Alden v. Maine*, 527 U.S. 706, 747 (1999); see *Pennoyer v. McConaughy*, 140 U.S. 1, 12 (1891); *Ex Parte Young*, 209 U.S. 123 (1908).

developmental disabilities” sued the state to secure certain documents it needed to investigate the deaths of two patients and injuries to a third at state-run mental hospitals.⁹⁰ Relying on the Court’s seminal decision in *Ex parte Young*, the Court concluded, in a 6-2 decision written by Justice Scalia, “that entertaining [the suit] is consistent with our precedents and does not offend the distinctive interests protected by sovereign immunity.”⁹¹ As the Court explained, the defendants “concede that were [the state entity] a private organization rather than a state agency, the doctrine would permit this action to proceed,” and there was “no reason for a different result” in that case.⁹² Justice Kennedy, one of the greatest champions of state interests on the current Court, agreed that the agency could sue under *Young*, though he wrote separately to note that there might be other constitutional problems with the federal scheme that led to the creation of the state agency.⁹³

Chief Justice Roberts, writing in dissent only for himself and Justice Alito, could not have disagreed more strongly, deriding the Court for engaging in a “substantial and novel expansion of what we have . . . called ‘a narrow exception’ to a State’s sovereign immunity.”⁹⁴ He faulted the Court for seeing no difference between a “suit against the State brought by a private party and one brought by a state agency.”⁹⁵ According to the Chief, “[i]t is the difference between eating and cannibalism; between murder and patricide. While the ultimate results may be the same—a full stomach and a dead body—it is the means of getting there that attracts notice.”⁹⁶ And he concluded by criticizing the Court for “undermin[ing] state sovereignty in an unprecedented and direct way.”⁹⁷

Two years later, the Court considered another important case about the ability of individuals to use the federal courts to prevent unconstitutional state action. In *Douglas v. Independent Living Center of Southern California, Inc.*, the Court considered whether Medicaid providers and recipients may maintain a cause of action under the Supremacy Clause to enforce a federal Medicaid law that, in their view, conflicts with state Medicaid statutes.⁹⁸ Because the relevant federal agency, in a change of position, concluded a month after oral argument that the state law satisfied federal requirements, the Court decided, 5-4, not to answer the question. Justice Breyer wrote an opinion (joined by Justice Kennedy and the Court’s more liberal members) that vacated the lower court’s decision and sent the case back to the lower court to be reconsidered in light of those intervening developments.⁹⁹

⁹⁰ 131 S. Ct. 1632, 1636 (2011) (quoting 42 U.S.C. § 15043(a)(1)).

⁹¹ *Id.* at 1638.

⁹² *Id.* at 1639.

⁹³ The agency was created as part of a condition to receive federal funds to improve the community services available to individuals with developmental disabilities.

⁹⁴ *Id.* at 1645 (Roberts, C.J., dissenting).

⁹⁵ *Id.* at 1649 (Roberts, C.J., dissenting).

⁹⁶ *Id.* (Roberts, C.J., dissenting).

⁹⁷ *Id.* at 1651 (Roberts, C.J., dissenting).

⁹⁸ 132 S. Ct. 1204 (2012).

⁹⁹ *Id.* at 1211.

In dissent, Chief Justice Roberts (joined by Justices Scalia, Thomas, and Alito) said the Court should have decided the underlying question and held that “the Supremacy Clause does not provide a cause of action to enforce the requirements” of federal law because “Congress, in establishing those requirements, elected not to provide such a cause of action in the statute itself.”¹⁰⁰ Roberts wrote that the Supremacy Clause is “not a source of any federal rights,”¹⁰¹ and that the federal courts enjoy no general equitable power to prevent unconstitutional state action; reaching such a conclusion, he wrote, would “raise the most serious concerns regarding both the separation of powers . . . and federalism.”¹⁰² He diminished the significance of *Ex parte Young*, suggesting that it is applicable only when the plaintiff is “subject to or threatened with [an] enforcement proceeding” by the state.¹⁰³

In short, Chief Justice Roberts has made clear that he thinks the exception to state sovereign immunity should be an exceedingly narrow one, even if that means individuals are unable to access the federal courts to prevent unconstitutional state action. Roberts could not find five votes for that view in *Douglas*. We will see whether that continues to be the case later this year when the Court hears *Armstrong v. Exceptional Child Center*, which is scheduled for oral argument on January 20. That case raises the question the Court left undecided in *Douglas*, and although there seems little doubt about what the Chief Justice will say, it remains unclear what his Court will say. Although Justice Kennedy joined the majority in both *VOPA* and *Douglas*, his separate concurrence in *VOPA* suggested that he takes a narrow view of the scope of *Ex parte Young*. If Chief Justice Roberts convinces him to join the other conservatives this time around, *Armstrong* could end up being one of the most important access-to-court cases of Roberts’s tenure so far. It could also have significant consequences for the American health care system, potentially making it much more difficult for individuals enrolled in Medicaid—a population that has grown significantly in recent years—to access care.¹⁰⁴

IV. Conclusion

John Roberts has long said that he thinks the role of the courts should be a limited one, and that restricting access to the courts is an important way to preserve that limited role. In his first decade as Chief Justice, he has made clear that his views on this score have not changed, consistently voting to limit access to the courts in a number of different ways. And although Roberts has often chosen not to write in these areas, when he has, he has made clear just how strongly he feels about these long-held views. Thus, while the record of the Roberts Court on access-to-court issues is at least somewhat mixed, the record of John Roberts is decidedly not. Unless there is a marked change in the years to come, Chief Justice Roberts’s legacy when it

¹⁰⁰ *Id.* at 1212 (Roberts, C.J., dissenting).

¹⁰¹ *Id.* (Roberts, C.J., dissenting) (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)).

¹⁰² *Id.* at 1213 (Roberts, C.J., dissenting).

¹⁰³ *Id.* (Roberts, C.J., dissenting).

¹⁰⁴ Robert Pear, *As Medicaid Rolls Swell, Cuts in Payments to Doctors Threaten Access to Care*, N.Y. TIMES, Dec. 27, 2014, <http://www.nytimes.com/2014/12/28/us/obamacare-medicaid-fee-increases-expiring.html>.

comes to access-to-courts issues will be one of closing the courthouse doors as much as possible.