The Supreme Court’s Hidden Hostility to the Constitutional Rights of American Citizens

Review of Closing the Courthouse Door: How Your Constitutional Rights Became Unenforceable. By Erwin Chemerinsky. Yale University Press. 262 pp. $32.50

On October 6, 1976, Los Angeles police officers stopped Adolfo Lyons, a twenty-four-year-old African American, for driving with a defective taillight. With guns drawn, four cops ordered Lyons to get out of his car, spread his legs, and put his hands on top of his head. After he was patted down, Lyons dropped his hands; an officer slammed them back, applying his forearm to the throat in a chokehold. Lyons fainted. When he recovered, he was spitting blood and had urinated and defecated. The police issued a citation for the broken taillight and released him.

Lyons filed a complaint, alleging police misconduct and denial of his Fourth, Eighth and Fourteenth Amendment constitutional rights. In a 5-4 decision, the United States Supreme Court declared that Lyons did not have “standing” to seek an injunction to stop the LAPD from employing the “carotid hold” in nonthreatening situations. Writing for the majority, Justice Byron White explained that absent a likelihood that he would be choked again, Lyons was no more entitled to seek this remedy than any other citizen of Los Angeles. In his dissent, Justice Thurgood Marshall pointed out that the decision meant that no one could sue the LAPD and the City of Los Angeles; it immunized
chokeholds - or "any policy that authorizes persistent deprivations of constitutional rights."

In Closing the Courthouse Door, Erwin Chemerinsky, a professor at the University of California, Irvine, School of Law, documents the hostility of the Rehnquist and Roberts courts to the enforcement of citizens’ constitutional rights. That hostility comes in a multitude of forms: restrictions on who has standing to sue, an expansion of immunity for the federal government, state governments, and government officials; a narrowing of the right of habeas corpus; changes in pleading rules; abstention doctrines; and limitations on class action suits.

Clear, cogent, passionate and persuasive, Closing the Courthouse Door demonstrates that the recent record of the federal judiciary cannot be reconciled with John Marshall’s claim in Marbury v. Madison: “The very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”

Closing the Courthouse Door is awash in examples of disturbing decisions of the Supreme Court. In The United States v. Stanley, the Court held that the federal government was immune for damages for severe injuries resulting from the administration of LSD (without the serviceman’s knowledge) in an army experiment. As he shrugged off Justice O’Connor’s claim that the treatment of Stanley was “so far beyond the bounds of human decency that as a matter of law it simply cannot be considered part of the military mission,” Justice Scalia also decreed that in suits against military officers no remedy was available “for injuries that arise out of or are in the course of activity incident to service.”

In a series of decisions, Chemerinsky reveals, the Court has decided that prosecutors, police, and prosecutors’ investigators cannot be sued for money damages, even if they knowingly and intentionally lie under oath. Taxpayers have been denied standing to challenge alleged violations of the Establishment Clause of the First Amendment. The Court has declined to hear cases alleging partisan gerrymandering because they are “political questions.” And habeas corpus, a basic right designed to provide relief to individuals convicted or sentenced in violation of the Constitution or laws of the United States, is now granted by federal district courts in only 12.4% of capital cases and a miniscule three tenths of one percent of non-capital cases.

In Wal-Mart Stores, Inc. v. Dukes, Chemerinsky adds, five Supreme Court justices concluded that a class action suit initiated by 1.5 million female workers alleging sex discrimination in pay and promotions could not go forward because the company had an official non-discrimination policy; the actions were due to decisions made by supervisors across the country; and therefore the plaintiffs could not show sufficient “commonality” to their claims. The remedy for employment discrimination, the majority implied, was for each individual to pursue a separate claim. These conclusions came despite 120 affidavits (about personnel policies and corporate culture) and statistical evidence indicating that female employees at Wal-Mart fill 70% of hourly jobs, get less pay than males doing comparable work, and occupy only 33% of
management positions. Subsequent decisions, according to Chemerinsky, have compelled litigants to use arbitration rather than court adjudication, a remedy strongly favored by businesses.

Although at times, Chemerinsky approaches an absolutist position in favor of standing (to enforce limits on government power found in the Constitution), he acknowledges that there are some instances in which partial grants of immunity are justified. He also confesses that he is plagued by doubts about whether the reforms he supports are likely to be implemented, doubts that surely have intensified with the election of Donald Trump.

That said, Chemerinsky is certainly right that change “will not happen unless people advocate for it.” With its revelations about the denial of legal recourse by federal courts to individuals whose rights have been infringed, Closing the Courthouse Door makes it possible for Americans to be better informed, and perhaps, aroused.