Supreme Court: Taking Care of Business

How the high court caters to corporations and ignores commoners.

Stephanie Mencimer
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The line forms early on Friday mornings at Foundry United Methodist Church, a nearly 200-year-old institution located a few blocks from the White House. Famous in some circles as Bill Clinton's church, among the city's down and out, Foundry is better known as one of the few places around that offers help securing a government-issued photo identification.

Two weeks ago, Deborah Killebrew, 58, was one of those queued up outside the church to pick up a copy of her birth certificate, which Foundry volunteers had helped her obtain. Six years ago, Killebrew was hit by a drunk driver. Her fiance was killed in the crash and she was left with cervical spine injuries that eventually put her in a wheelchair. After a string of bad luck, she wound up living in a D.C. homeless shelter. Somewhere along the way, she lost her expired Virginia driver's license. Killebrew was unable to get a new one because she didn't have an official copy of her birth certificate from the state of Indiana, where she was born. But to get her birth certificate, Killebrew had to send the state a copy of her driver's license or a stack of other documents—like a car registration or mortgage document—she also didn't have. Eventually, she just gave up, until recently when she was referred to Foundry.

Without a photo ID, Killebrew may not be able to drive or apply for food stamps, but here in D.C., one thing she can do is vote, which she does regularly. If she still lived in Indiana, though, she'd be out of luck. Two days before she arrived at Foundry to claim her birth certificate, the U.S. Supreme Court heard oral arguments in a lawsuit over a strict new Indiana law requiring all voters to show a government-issued photo ID before casting a ballot. The plaintiffs argued that the law was an unconstitutional burden on voters, particularly minority, poor, and elderly voters, who are the least likely to have the requisite ID. The law does allow people without an ID to cast a provisional ballot, but it won't get counted until the voter turns up at a county clerks' office to present identification.

If the justices rule against the plaintiffs, they will clear the way for other states to implement similar laws restricting voting rights for the less fortunate. Judging from the oral arguments in *Crawford v. Marion County Elections Board*, that's just what the justices are poised to do. While John Roberts worked at a steel mill during college, and Clarence Thomas came up dirt-poor in Pin Point, Georgia, the Supreme Court of late hasn't shown much interest in people like Killebrew who reside at the bottom of the economic food chain. The court's docket is increasingly dominated by business litigation—patent challenges, anti-trust suits, and attempts by big businesses to insulate themselves from all sorts of legal liability and litigation brought by their employees, investors, or aggrieved customers. The U.S. Chamber of Commerce recently bragged that it had its best year yet before the high court in 2007, racking up a string of impressive victories for big business that even surpassed the chamber's record-breaking year in 2006.

Topped off by last week's decision in *Stoneridge Investment Partners v. Scientific Atlanta*, which sharply restricted the ability of shareholders to sue entities that abet corporate fraud, recent winners before the Supreme Court have included Enron and the banks that facilitated its scam; payday lenders; investment banks that engage in price fixing; and tobacco companies, among others. Losers have been small investors, poor, black school children, working-class women paid less than men—and one kid who was paralyzed after a police officer rammed his car because he was speeding.

Not only are "the people" losing at a rapid clip when they come before the court, but it has gotten much, much harder for the average person to even get into court in the first place. Over the past two decades, Supreme Court decisions have quietly prevented a wide swath of the American population from even reaching the courthouse, much less prevailing there when they've challenged better-funded and more powerful interests. Lee Epstein, a professor at Northwestern law school, says that the court is "shutting down access to plaintiffs in all sorts of ways. The court seems to be saying 'stay out.'"

In the last term, the court ruled, for instance, that taxpayers had no right to challenge the federal government's use of tax dollars to pay for religious-based social services. The case overturned years of precedent giving people a say in how their money is spent if it seems to mix too much church with state business. In a complicated anti-trust case, the court basically rewrote the rules for filing a civil lawsuit, making it harder for plaintiffs to even get into a courtroom under the guise of protecting business from allegedly frivolous lawsuits.

Many civil rights lawsuits are brought by private individuals rather than the government through agencies like the Equal Employment Opportunity Commission, making them the primary mode of enforcing anti-discrimination laws passed by

Congress. Yet the Supreme Court has moved to sharply limit such lawsuits through decisions that, for instance, restrict the awarding of attorneys fees to plaintiffs so that lawyers can no longer afford to bring such cases.

Epstein says that while it's true many of these decisions break down along ideological lines, some of rulings also may stem from the justices' personal backgrounds. Never has the Supreme Court been more homogenous, she says, noting that race and gender aside, the range of professional experience of the current court is extremely limited. All of the current justices came straight from the federal appeals courts, she points out, and most spent the bulk of their careers in government service or academia. Today's sitting justices are even geographically homogenous, having lived most of their adult lives in Washington or other nearby East Coast metro centers. Before they were appointed, Epstein says, "Most of these people could have taken the Metro or Amtrak to get to work."

At least with Sandra Day O'Connor on the court, Epstein says, there was not just a female voice, but someone from the West who had a different background from the other justices. O'Connor had been an Arizona state legislator and served as an elected trial court judge in Maricopa County. Epstein suggests that some of the court's rulings in recent years may have as much to do with the justices' service on appellate courts as ideology. None of them has much experience as private-practice litigators or trial judges, where they would be forced to look the plaintiffs in the eye and hear their stories. Epstein believes that the current crop of justices is inclined to think that "the judges below them get it right."

The insular experience of the Supreme Court justices seems to be spilling over into their decision making in a way that goes beyond partisan politics. Indeed, some of the more arcane business cases, which will nonetheless have a profound impact on such things as consumer protection, were decided by majorities that included Clinton appointees. All of the justices seem reluctant to do anything that might mess with business too much, even when those businesses could use some messing with.

In *Watters v. Wachovia* last year, for instance, Ruth Bader Ginsburg, a former ACLU lawyer, wrote the opinion for a majority that also included liberal Steven Breyer in a case that declared that states have no right to regulate the operating subsidiaries of national banks. On its face, this might sound like no big deal, until you recognize that some of those operating subsidiaries were engaged in subprime and other shady mortgage lending that's now wreaking havoc on the economy. The states had attempted to step in to combat some of the fraud at work long before the feds even noticed there was a problem.

But the court's liberals deferred to the federal banking regulators in the Office of the Comptroller of the Currency. The decision was a huge victory for the banks, leaving their subsidiaries largely immune to regulation or lawsuits based on state consumer protection laws.

Ginsburg and Breyer also came down with the majority in a decision that upheld the use of mandatory-arbitration clauses in contracts for services that are themselves against the law. In *Buckeye Check Cashing v. Cardegna*, the court said a consumer could be forced to arbitrate a dispute with a payday lender rather than go to court even though payday lending is illegal in Florida, where the case originated.

During the oral arguments, Breyer expressed concern that if the court ruled for the consumer, businesses might suffer because so many of them now use mandatory arbitration to keep people out of court. He seemed to believe that letting people go to court would somehow lead to economic ruin, even when they were suing companies that had defrauded them. "I wouldn't want to reach a decision...that would make a significant negative difference in the gross national product of the United States," Breyer said. The case greatly expanded the number of people who can no longer bring their consumer disputes before a judge or jury.

Despite a few of these sorts of decisions, it is still the conservatives on the court who seem to be most out of touch with the people who will be affected by their rulings. The oral arguments during the Indiana voter ID case serve as a case in point. There was Chief Justice John Roberts Jr., with his movie-star good looks, and a smile and smoothness that seemed so reasonable and reassuring during his confirmation hearings. And yet, during the oral arguments, Roberts couldn't have been more dismissive of the plight of poor and minority voters at the heart of the case. Like the other conservatives, Roberts, who earned $1 million a year in private practice, couldn't seem to fathom that there are people in this country who don't have a photo ID. When informed that a voter who didn't have ID would have to travel to a county clerk's office to provide addition documentation for her vote to be counted, Roberts quipped that in his home state of Indiana, county clerk's offices weren't too far apart.

The plaintiffs' lawyer, Paul Smith, countered that for a poor person living in Gary, Indiana, the county clerk's office was quite a schlep, 17 miles. ("Seventeen miles is 17 miles for the rich and the poor," Antonin Scalia chimed in.) Smith gently reminded the justices that the people he was talking about didn't have driver's licenses. That's why they couldn't vote at their local polling places. For them, getting to the clerk's office would require using public transportation, which, anyone who's ever spent much time on public transit would surely know, gets less and less frequent and reliable the farther you have to travel.

What was striking about the exchange between Smith and Roberts, though, wasn't just Roberts' unfamiliarity with riding the bus, but his lack of any apparent understanding of the lives of people on the lower end of the economic spectrum. In this regard, Roberts is not alone on the court. It's clear that many of the justices would rather not see these sorts of folks appearing on their docket at all. Simon Lazarus, public policy counsel at the National Senior Citizens Law Center, calls it the "arrogant abstractness" that predominates the court today.

The court's overt hostility to average- or low-income people is in itself keeping people out of court. One possible reason the Supreme Court docket is so crowded with business cases is that liberal public interest lawyers are avoiding it, says John Bouman, the president of the Sargent Shriver National Center on Poverty Law. "There's very little empathy on the court," he says, and as a result "people are showing restraint as to whether to take things up at all."

The change in the docket may only reinforce the court's ivory-tower qualities. The fewer everyday people who make their cases in court, the fewer opportunities the justices will have to let their perceptions evolve. One of the selling points of lifetime tenure for Supreme Court justices is that it can free them from politics and allow them to focus on the law and the facts of the cases before them. It is supposed to allow for evolution, which has been known to happen. Justice John Paul Stevens, now the last remaining reliable liberal on the court, is himself a Republican appointee, nominated by Gerald Ford. His views on such hot-button issues as affirmative action and obscenity have changed during his many years on the court. Even former Chief Justice Rehnquist, who as a law clerk once wrote that he thought *Plessy v. Ferguson*, the case upholding racial segregation, ought to be reaffirmed, eventually came to champion *Brown v. Board of Education*.

But you do have to wonder about the current crop of young conservatives like Roberts. Insulated from the real world through an adult life of privilege, insulated from actual people by years of conservative legal rulings, it's hard to see where the opportunities for growth will come from. As Arthur Bryant, the executive director of Public Justice, a public-interest law firm, says, "Our system of justice cannot do justice if people cannot get into court."

Stephanie Mencimer is a reporter in *Mother Jones*' Washington, D.C., bureau and the author of *Blocking the Courthouse Door: How the Republican Party and Its Corporate Allies Are Taking Away Your Right to Sue* (Free Press, 2006).

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