The Supreme Court and corporate America

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Over the past several decades, the US Supreme Court has been steadily cutting back on the fundamental democratic rights of the population while discovering more and more protections in the law for corporations and the rich.

Multinational corporations like Wal-Mart, investment banks like Janus Capital Management, energy giants like American Electric Power, and convicted corporate criminals like Jeffrey Skilling enjoy ready access to the Supreme Court. The nine justices carefully and exhaustively consider the grievances of the wealthy elite who usually receive favorable rulings. Meanwhile, cases affecting the core democratic rights and interests of the working population are heard only rarely, and when they are, the result is usually the further erosion of those rights.

A review of recent Supreme Court decisions reveals that this process has accelerated in recent months.

The Supreme Court decision last week in *Wal-Mart v. Dukes* provides the clearest expression of this trend (see "US Supreme Court undermines class action lawsuits in Wal-Mart ruling"). In a brazenly pro-corporate ruling, the Supreme Court unanimously overturned the decision of the Ninth Circuit Court of Appeals certifying a group of 1.5 million female employees as a class for the purposes of a class action lawsuit against Wal-Mart for sex discrimination.

The extreme right-wing majority on the court went on to hold, this time by a vote of 5-4, that the women could not be certified as a class under any legal theory. In other words, the women were stopped "at the starting gate," as Justice Ginsburg wrote in her dissent, preventing them from even bringing the case and having a day in court. The court also held, 9-0, that the women could not recover back pay.

The decision was a tremendous boon for Wal-Mart and its well-heeled team of lawyers, which have been throwing up legal obstacles to the women's case for more than 11 years. However, the decision has implications extending far more broadly than this particular case.

The court's perverse rationale for rejecting the certification of the class in the Wal-Mart case—supported unanimously by the nine justices—was that because Wal-Mart was so large, the claims by the individual employees did not have enough in common to warrant a class action. In other words, the larger the corporation, the less susceptible it will be to class actions.

This rationale is a devastating blow to class actions and a spectacular boost to the largest corporations. It essentially creates a special category of corporations that are "too big" to be held accountable for their misconduct by means of a class action lawsuit. This unanimous holding in the Wal-Mart case signals that a certain limited permissiveness that once prevailed in the US legal system with regard to class actions is coming to a close.

In addition to cutting back on class actions, the court in the Wal-Mart case simultaneously dealt a major blow to employment discrimination cases. In making their case that Wal-Mart discriminated against women, the women bringing the lawsuit cited one study that female employees made up 70 percent of Wal-Mart's hourly paid workforce, but only 33 percent of its management. Justice Antonin Scalia wrote for the majority that this evidence was "worlds away from 'significant proof' that Wal-Mart operated under a general policy of discrimination."

In other words, according to Scalia and a majority on the Supreme Court, in order to prove that a corporation discriminates unlawfully among its employees, an internal corporate document more or less must be uncovered titled "official discrimination policy." Since such documents obviously do not exist in nearly every case, a wide range of discrimination cases will simply fail at the inception as a result of last week's decision.

Finally, the court's unanimous determination that the women could not recover back pay eliminates the economic basis for the class action. This, perhaps more than any of the other findings in the case, will discourage class actions against corporations, since a financial recovery constituted the main incentive to bring such cases in the first place.

For decades, class actions have served as one of the primary legal mechanisms through which the worst corporate excesses were held in check. These legal mechanisms are now giving way one by one under enormous corporate pressure. The nine-to-zero support on the Supreme Court in the Wal-Mart case for the removal of the option to recover back pay—including by Obama appointees Elena Kagan and Sonia Sotomayor—exposes the subservience of the entire political establishment to corporate interests.

The Wal-Mart decision is only the latest in a string of recent Supreme Court decisions favoring corporate interests and

severely narrowing access to any legal redress by ordinary citizens.

The Wal-Mart decision on class actions comes on the heels of the Supreme Court's April decision in *AT&T Mobility v. Concepcion*, which permits corporations to put fine-print clauses in their contracts through which individuals may waive their rights to bring class actions and agree to individual "arbitration" outside of court for their claims.

Since all corporations will no doubt include such clauses in their contracts from now on, the AT&T decision effectively put an end to most varieties of class actions. For example, class action lawsuits against cell-phone companies, cable companies, utility companies, and the like for bogus surcharges in bills will be foreclosed, since these companies will include class action waivers and arbitration clauses in their contracts. After the AT&T case, the Wal-Mart case was simply another nail in the coffin of class actions.

The stream of reactionary decisions seems endless. In a decision released the same day as the Wal-Mart case, the Supreme Court worried lawsuits by government employees alleging retaliation under the First Amendment could disrupt "official activity." In the case of *Borough of Duryea v. Guarnieri*, the Supreme Court held that government employees could "petition the government for redress" under the First Amendment only if the employee's complaint involves a "matter of public concern." This decision thus shuts down the vast majority of such retaliation cases, which mostly involve claims of individual retaliation.

In a decision earlier this month *in Janus Capital Group, Inc. v. First Derivative Traders*, the Supreme Court intervened to protect a mutual fund investment adviser who lied about the mortgage-backed securities of its clients in the run-up to the economic collapse of 2008.

Justice Clarence Thomas, writing for the Supreme Court and relying on nothing less than dictionary sophistry, held that the mutual fund investment adviser did not "make" the false statements, even though it had produced them in writing, thus shielding the mutual fund investment adviser from liability under securities regulation laws. According to Thomas, the false statements were "made" only by the corporate client, which was also part of the Janus group.

In *American Electric Power v. Connecticut*, also decided the same day as the Wal-Mart case, the Supreme Court unanimously went out of its way to protect energy giant American Electric Power, holding that it was primarily for the Environmental Protection Agency and not the courts to regulate pollution. The state of Connecticut had sued the energy corporation on the grounds that the corporation's carbon emissions were contributing to climate change and thus constituted a "public nuisance."

"The Court," Justice Ruth Bader Ginsburg wrote for the unanimous court, "endorses no particular view of the complicated issues related to carbon-dioxide emissions and climate change." This amounts to shameful prostration before the lavishly funded energy lobby, which is endlessly attempting to refute the well-established scientific evidence of climate change.

Last month, in *Turner v. Rogers*, the Supreme Court held that an indigent parent was not entitled to have a lawyer appointed for him even though he faced jail time for contempt of court in family law proceeding. This case constitutes a substantial further erosion of the Fourteenth Amendment Due Process Clause, which has traditionally required the state to appoint a lawyer for someone who faces jail time.

The Supreme Court, in theory, operates as a check on legislative and executive power, defending and upholding individual constitutional and democratic rights. In reality, in the present period of explosive social inequality and faced with a rising tide of criminality and lawlessness in the political establishment and big business, the Supreme Court functions to shield corporate criminals and to shut down legal avenues through which the worst excesses might be challenged.

Over the past two years alone, the Supreme Court has weakened the right to face one's accuser, upheld warrant-less searches of homes, upheld the sweeping use of anti-terrorism laws against free speech and dissent, heard appeals by convicted corporate criminal Jeffrey Skilling, upheld the abuse of "material witness" warrants to jail terrorism suspects without a trial, upheld government credits to religious schools, suppressed torture photographs, upheld state executions, blocked appeals by Guantánamo Bay detainees, and abolished restrictions on big business political spending. Meanwhile, reactionary lower court rulings blocking challenges to torture and assassination on the grounds of the authoritarian "state secrets" doctrine have gone undisturbed.

It is clear that the appointments over the recent period by President Barack Obama of Elena Kagan and Sonia Sotomayor to replace John Paul Stevens and David Souter have done nothing to reverse the court's steady march to the right. In the final analysis, the spate of recent anti-democratic and pro-corporate opinions demonstrates that the Supreme Court is no less an instrument of the most powerful corporate and financial interests than every other branch of the US government.