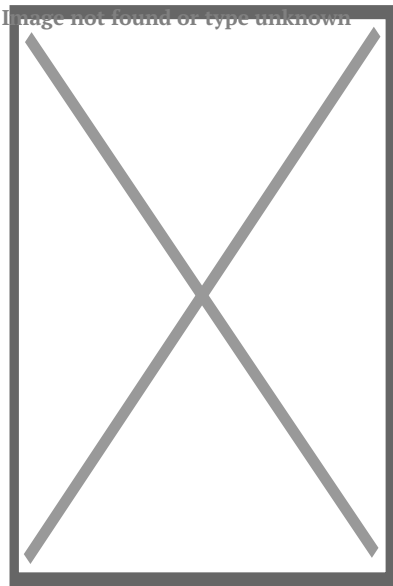


Justice Scalia Leaves Pro-Business Legacy



By Lucas D. Bradley, Bouhan Falligant

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Justice Antonin Scalia died early Saturday, leaving behind nine children and a legal landscape that he profoundly altered. Scalia catalyzed a conservative revolution in the federal courts — he normalized the idea that judges should hew to the written word of the Constitution and of laws, rather than interpreting the broader meaning or policy purposes behind those provisions. And Scalia was known — to both his fans and his critics — as a social conservative who opposed racial affirmative action and opposed constitutional rights to same sex marriage and abortion.

But this socially-conservative legacy belies the influence that Justice Scalia's opinions had on business and markets. Scalia, even before he ascended to the Supreme Court, recognized the importance of economic freedom and its impact on enterprise and personal destiny. Writing in *Regulation Magazine*, he recalled “Dwight Eisenhower's demonstrably successful slogan that he was ‘a conservative in economic affairs, but a liberal in human affairs,’” noting Eisenhower's

formulation “seemed to me a peculiar way to put it — contrasting economic affairs with human affairs, as though economics is a science developed for the benefit of dogs or trees; something that has nothing to do with human beings, with their welfare, aspirations, or freedoms.”

Justice Scalia's jurisprudence had concrete effects on business. Perhaps his greatest contribution to business defendants was his full-throated defense of the standing doctrine. Standing, in essence, says that only a party who is personally interested in the outcome of litigation — a party who has tangible skin in the game — may bring a lawsuit. Though the doctrine predates Justice Scalia's tenure, he wrote the case on standing that is now the paragon: *Lujan v. Defenders of Wildlife*, in which the Court held that a pair of professors who wanted to travel to the Aswan Dam and observe crocodiles did not have standing to sue the Department of the Interior over its interpretation of the Endangered Species Act. These professors, the Court noted, had not shown evidence they would imminently travel to the Aswan Dam, nor could they show the changes they requested in the rules would save the crocodiles they wanted to observe. *Lujan* and other standing cases have enormous practical effects, especially for industrial defendants — mills and factories sued by activist groups or environmentalists can often dispose of these cases because the plaintiffs lack standing.

Along with the conservative bloc of the Court (including Chief Justices Rehnquist and Roberts and Justices O'Connor, Kennedy, Thomas, and Alito), Scalia also dramatically limited the procedural mechanisms that consumers and workers could use in challenging business policies. These justices, for example, routinely approved arbitration clauses in contracts between businesses and consumers, and sometimes even invalidated state laws that protected consumers from mandatory arbitration. Scalia authored *AT&T Mobility LLC v. Concepcion*, which abolished a California rule designed to prevent large companies from forcing individual consumers into arbitration. These arbitration decisions are enormously beneficial for businesses — for instance, a company like Verizon or American Express can require a consumer to sign a standard contract that commits them to arbitration in the event of a dispute. That consumer is then bound to the arbitration forum and cannot take the company to court — and arbitrators are often paid for by the company itself. The benefits to the corporation, both financially and in avoiding negative publicity, are significant.

Scalia protected companies not just from lawsuits from consumers, but also from suits from their own employees. In *Wal-Mart Stores, Inc. v. Dukes*, his opinion for the Court prevented female Wal-Mart employees from joining together and filing a class action against their employer. Wal-Mart, Scalia reasoned for the Court, had a policy that expressly forbid discrimination, and the female employees could not prove that they had all been discriminated against in a similar fashion — a requirement for bringing a class action. This strict interpretation of class certification rules ensures that businesses will face a single employee in court, and it protects them from routinely defending suits brought by 100, 1,000, or 10,000 employees. In all of these facets, Justice Scalia's jurisprudence made it easier for business to operate and to avoid litigation.

Justice Scalia will likely be remembered for his interpretive philosophy and his ardent defense of socially conservative principles. But he, along with fellow conservative justices, helped to insulate businesses from some of the suits that damage those businesses the most. Though liberals and conservatives will argue whether such insulation is proper, it undeniably helps business, and Justice Scalia's economic legacy will affect the marketplace for years to come.

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