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## JUSTICE SCALIA: CLASS WARRIOR

Seymour Moskowitz\*

Justice Antonin Scalia had one of the longest tenures on the Supreme Court in American history. Over almost thirty years he helped decide thousands of cases, writing hundreds of opinions, for the majority and in dissent. As a consequence, his influence on a wide-range of federal constitutional, statutory, and procedural issues was enormous.

This brief Essay describes Justice Scalia's judicial positions on the distribution of wealth and economic power in the United States. The current gulf between the affluent and the vast majority of Americans is enormous and has dramatically widened over the past generation. Justice Scalia served during a period when Chief Justice Rehnquist, and later Chief Justice Roberts, presided over a conservative majority of the Court. Without the power to assign opinion writing, Justice Scalia's views were not articulated in every case impacting these economic matters. Within the conservative bloc, however, Justice Scalia's jurisprudence was consistent over time and extremely influential in judicially perpetuating disparities of wealth and power. This will be his most lasting legacy.

The closest analogy in American history to our contemporary economic situation is the "Gilded Age," 1890-mid-1930s. This era was characterized by consolidation of major industries into small numbers of corporate entities and extraordinary disparities in wealth.<sup>1</sup> Another pronounced feature was the political and economic subjugation of racial minorities, workers, and other disfavored groups.

From a judicial perspective, the "Lochner Era" mirrored and ratified these developments. The Lochner Court had a number of distinguishing characteristics. First, to protect large corporate and financial interests, the Court aggressively restricted legislative powers of both federal and state governments, creating constitutional protections for big business. Attempts to level the economic playing field were repeatedly blocked.<sup>2</sup> Second, procedural issues were manipulated by courts to support the substantive ideological agenda.<sup>3</sup> Finally, the Lochner Court gutted

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<sup>1</sup> The 1890 Census revealed nine percent of families controlled eighty-one percent of the wealth in the United States. The 1900 Report of the U.S. Industrial Commission concluded that between sixty percent and eighty-eight percent of the American people could be classified as poor or very poor.

<sup>2</sup> See, e.g., *Adkins v. Children's Hosp. of the Dist. of Columbia*, 261 U.S. 525 (1923); *Coppage v. State of Kansas*, 236 U.S. 1 (1915).

<sup>3</sup> See, e.g., *Ex Parte Young*, 209 U.S. 123 (1908); *Giles v. Harris*, 189 U.S. 475 (1903).

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constitutional and statutory protections created for African Americans, workers, the disabled, and other politically powerless groups.<sup>4</sup>

Contemporary America, a second “Gilded Era,” mirrors the monetary and social patterns of a century ago. The richest one percent of our country now holds the same share of national wealth as the bottom ninety percent.<sup>5</sup> Inequality is both produced and reflected judicially. Between 1986–2016—Justice Scalia’s tenure on the Court—the Supreme Court has reprised Lochnerian themes. A reliable majority, typically at least 5-4, favors powerful economic interests, and consistently creates procedural rules to promote these conservative substantive results. The Court has also led a counter-revolution against the improvements for minorities and other powerless groups created by the modern Civil Rights Movement. Justice Scalia was a leader in all this; his judicial DNA is “old Lochner wine in new bottles.”

With due deference to thousands of pages in U.S. Reports devoted to analyzing precedents and elaborating jurisprudential theories, it is important to see the actual target in litigation— who wins and who loses. Arranged below are litigants in a representative group of Supreme Court cases in which Justice Scalia participated. Review the lists and guess how Justice Scalia voted.

Injured consumers	AT&T
Workers alleging discrimination (sex, race, disability, etc.)	Wal-Mart
Workers alleging wage discrimination	Goodyear Tire & Rubber
Injured medical consumers	Wyeth Pharmaceuticals Pliva Pharmaceuticals
Credit Union depositors	First National Bank
Environmental Claimants	American Electric Power
Et al.	Et al.

<sup>4</sup> See, e.g., *Gong Lum v. Rice*, 275 U.S. 78 (1927); *Berea College v. Commonwealth of Kentucky*, 211 U.S. 45 (1908); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>5</sup> Emmanuel Saez & Gabriel Zucman, *Wealth Inequalities in the United States Since 1913: Evidence from Capitalized Income Tax Data*, Nat’l Bureau of Economic Research Working Paper No. 20625 (2014), <http://gabriel-zucman.eu/files/SaezZucman2014.pdf> [<https://perma.cc/8ME6-5Z2H>]. Disparities in wealth correlate directly to health and educational outcomes as well. Today more than sixty million people in our country have incomes below twice the poverty line. Deep “poverty”—income below half the poverty line—has doubled over the past forty years.

If you are uncertain about these votes, check the results in the actual cases.<sup>6</sup> Indeed, the most reliable predictor of how Justice Scalia would come out in a case involving corporate/big business interests is to look at the litigation position of the United States Chamber of Commerce, the American Bankers Association, Big Pharma, et al.

Similar to the *Lochner* era, Justice Scalia and the Rehnquist-Roberts Court produced a series of procedural rulings empowering powerful commercial and political interests. Ironically, the Court blocks access to courts, effectively tipping the scales against claimants seeking financial redress and transferring huge wealth from ordinary Americans to corporate balance sheets. Consider that the 1937 FRCP's "notice pleading" has been emasculated, overturning decades of Supreme Court precedent.<sup>7</sup> The resulting burden on plaintiffs alleging causes of action based on intent or motive has created huge changes in the results of constitutional and statutory litigation, despite the unfairness of decision making before discovery. The Federal Arbitration Act has been made into a jurisdiction-stripping device, blocking consumers from entering courts. Concomitantly, collective actions in arbitration are blocked even when this completely precludes meaningful individual redress.<sup>8</sup> As a result, forced arbitration clauses are now a basic feature of adhesion form contracts drafted by Amazon, Comcast, Wells Fargo, Goldman Sachs, and the rest of corporate America.<sup>9</sup> The same instinct to reserve the federal courts for the wealthy and powerful is evidenced in rulings about class actions.<sup>10</sup> Plaintiffs claims under Section 1983 and other federal statutes are narrowed and eviscerated.<sup>11</sup> Again, we should focus on who are winners and losers in these high-stakes cases.

The third major *Lochner* theme, interpreting the Constitution and statutes to gut protection for African Americans and other powerless

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<sup>6</sup> See *Pliva, Inc. v. Mensing*, 131 S. Ct. 2567 (2011); *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410 (2011); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011); *Bruesewitz v. Wyeth, LLC*, 562 U.S. 223 (2011); *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007); *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479 (1998).

<sup>7</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

<sup>8</sup> See, e.g., *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010); *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477 (1989).

<sup>9</sup> A Consumer Financial Protection Bureau study found eighty-eight percent of mobile wireless contracts and ninety-nine percent of storefront payday loans are now subject to forced arbitration. See *Arbitration Study, Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, Consumer Financial Protection Bureau (Mar. 2015), [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf) [<https://perma.cc/5H5K-ZWHV>].

<sup>10</sup> See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

<sup>11</sup> See, e.g., *Blessing v. Freestone*, 520 U.S. 329 (1997).

groups is likewise dramatically reprised by numerous Scalia opinions and the contemporary Court. Our judicial era will be remembered for its counter-revolution in racial equality. The past thirty years has seen the creation and application of the almost-always fatal “strict scrutiny standard” to Affirmative Action programs. While the official unemployment rate of Black America is double that of society as a whole and the median income of Black households hovers at sixty percent of White America, Justice Scalia and the conservative majority have consistently struck down legislative or administrative measures attempting to address these chronic structural problems.<sup>12</sup> In education, federal school desegregation remedies have been ended.<sup>13</sup> Justice Scalia and the Court have gone even further, limiting the ability of local school boards to voluntarily remedy racial segregation.<sup>14</sup> The same judicial intent and impact is revealed in voting cases<sup>15</sup> and interpretations of civil rights statutes.<sup>16</sup> Congress’ legislative power is typically restricted.<sup>17</sup>

In perhaps the most powerful structural development, the conservative bloc has created First Amendment and other constitutional defenses against attempts to limit the political power of the wealthy and corporate business interests. *Citizens United*<sup>18</sup> thwarted attempts to limit the unrestricted flow of money into election campaigns. State efforts to restrict this tsunami of cash meet the same fate.<sup>19</sup> Public financing is similarly crippled.<sup>20</sup> In a parallel development, Scalia and the conservative majority have exponentially expanded constitutional protections for corporate speech, repeatedly striking down consumer protection legislation.<sup>21</sup>

Lastly, how can we reflect on Justice Scalia’s career without noting his role in *Bush v. Gore*,<sup>22</sup> which created a presidential election decided by nine votes—five of them Republican. Surely this decision was the

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<sup>12</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>13</sup> See, e.g., *Freeman v. Pitts*, 503 U.S. 467 (1992); *Bd. of Educ. of Oklahoma City Pub. Schs., Indep. Sch. Dist. No. 89, Oklahoma Cty., Okla. v. Dowell*, 498 U.S.237 (1991); *Missouri v. Jenkins*, 495 U.S. 33 (1990).

<sup>14</sup> *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2010).

<sup>15</sup> See, e.g., *Shelby Cty., Ala. v. Holder*, 132 S. Ct. 2612 (2013); *Crawford v. Marion Cty. Election Bd.*, 353 U.S. 181 (2008).

<sup>16</sup> See, e.g., *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

<sup>17</sup> See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>18</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

<sup>19</sup> See *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012).

<sup>20</sup> *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

<sup>21</sup> See, e.g., *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011).

<sup>22</sup> 531 U.S. 98 (2000).

quintessential “restricted railway ticket, good for this day and train only.”<sup>23</sup>

Justice Scalia was renowned for his acerbic and devastating quotes. In September of 2008, he gave a talk in Chicago in which he advised law students to take “bread and butter classes, not ‘Law and Poverty’ or other made-up stuff. . . . Take serious classes . . . don’t waste your time.”<sup>24</sup> Raised in a working class family and spending long years representing non-affluent clients, I can assure the reader that Law for the Poor is at least as real to them as the Law for the Rich. In a long career, Justice Scalia always knew which side of America’s bread the butter was spread. Perhaps if he had left his chambers on Washington’s 1st Street and viewed life in Flint, Michigan, Appalachia, or a thousand other places, he might have found a different America. The frieze adorning the Supreme Court building promises “Equal Justice Under the Law.” For Scalia that equality found its expression in Anatole France’s aphorism, “in its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread.”<sup>25</sup>

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<sup>23</sup> Smith v. Allwright, 321 U.S. 649, 669 (1944).

<sup>24</sup> Dan Slater, *Scalia: U. of Chicago Law Lost Its Conservative Cred*, WALL ST. J. L. BLOG (Sept. 17, 2008, 1:29 PM), <http://blogs.wsj.com/law/2008/09/17/scalia-u-of-chicago-law-lost-its-conservative-cred/> [<https://perma.cc/M79F-B7V2>].

<sup>25</sup> ANATOLE FRANCE, *THE RED LILY* (1984).

