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Civil Justice Playbook

IDEAS, INITIATIVES, INFLUENCE

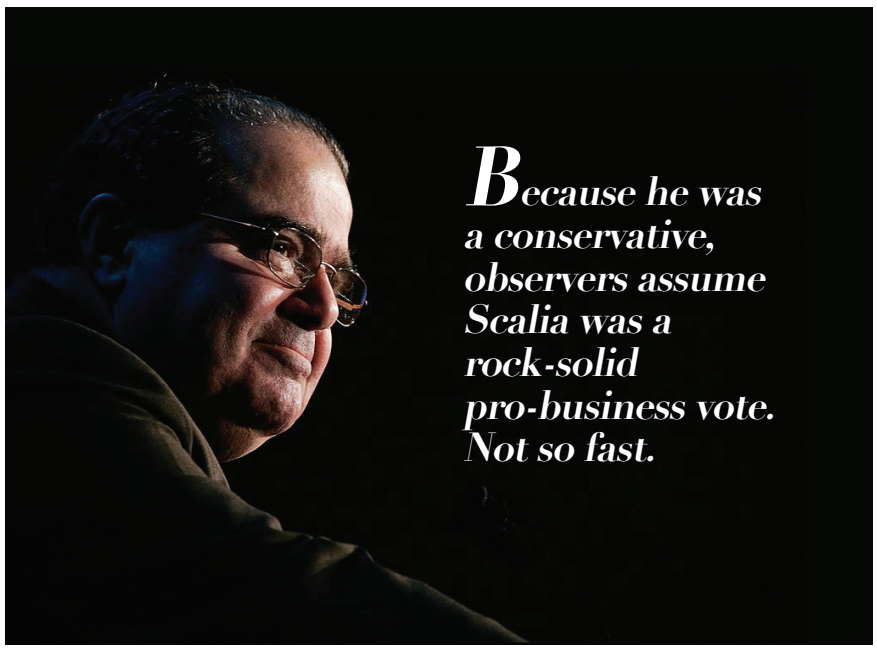
Corporate America Loses a (Sometimes) Champion in Scalia

When we heard of the death of Justice Antonin Scalia, our first instinct was to reach out to the Washington Legal Foundation, a public-interest law firm and policy outfit that focuses on "free enterprise" issues on the radar of our in-house readers. The WLF is engaged in many of these cases, particularly those concerning property rights, judicial deference to federal agencies, preemption, class actions, and the like.

We called Mark Chenoweth, the foundation's General Counsel, for his take – not on the hyper-politicized process of picking a replacement, but on the commercial cases and issues where the absence of Scalia's voice and vote will be felt today, tomorrow and beyond.

To the casual observer, which means most of us, it all seems clear enough. Scalia was a conservative, if flamboyant, jurist. Nominated by Ronald Reagan, he was confirmed by a 98–0 vote on September 17, 1986, as the first Italian-American justice. (Earlier the same day, William Rehnquist was confirmed as chief justice by a vote of 65–33.) Think about it: 98-0! Let's predict right here that the unbeatable 57-game hitting streak of another Italian-American legend, Joe DiMaggio, will fall before we see another unanimous confirmation of a Supreme Court nominee.

Because he is labeled a conservative, most observers assume Scalia was a rock-solid pro-business vote. That's not irrational. In the parlor game arraying Supreme Court justices along a linear political spectrum, Scalia ranked number 1 on a recent list of the 15 most conservative jurists of the modern era (FDR to Obama). Joining him on that list were five fellow (male) members of the current Court: Samuel Alito (#3), John Roberts (#6), Clarence Thomas (#7), Anthony Kennedy (#13) and Stephen Breyer (#15). In comparison, only three (female) members of the Roberts Court made the list of the most liberal modern-era justices: Sonia Sotomayer (#8), Elena Kagan (#13) and Ruth Bader Ginsburg (#17). (Talk about a gender gap.)



Of course, there are many ways to look at the Court. In a 2014 article in *The New York Times*, Hannah Fairfield and Adam Liptak took what they called a "more nuanced" view of the ideological spectrum. They reached a different conclusion. "There is no dispute that the court has a four-member liberal wing and a four-member conservative wing, with Justice Anthony Kennedy somewhere in the middle," they wrote.

Beyond that, however, nuance kicks in. They found the three liberal justices clustered tightly on the left, Breyer, substantially more conservative, edging over toward Kennedy, who sits dead center, and the conservative cluster on the right split into two blocs, with Roberts and Scalia shading more centrist than Thomas and Alito.

The WLF's Chenoweth is anything but a casual observer. He shot over a list of 41 cases in which Scalia's interest and influence on issues related, directly and indirectly, to the foundation's mission has been evident over the last 10 years. Most are 5-4 and 6-3 decisions, with Scalia in the majority 26 times and dissenting 15 times. These are not, by and large, the sexy cases that catch the public's attention. They are the meat-and-potato matters of keen interest to corporate America.

In our conversation, Chenoweth starts with the big picture: judicial philosophy. He points to Scalia's restoration of textualism in statutory interpretation as one of his "signature legacies."

"That can constrain agencies from overreaching," he says, "but it can be a good thing or a bad thing for free enterprise."

He points to last year's decision in *Yates v. United States* as an example of textualism run a bit amok. The case, which saw the Court splintered 4-1-4 in an odd scrum of justices, became something of a touchstone for how judges interpret federal laws. It also grabbed attention because the divided Court managed to rein in a post-Enron criminal law against shredding corporate documents in a case about a commercial fisherman arrested for tossing undersized grouper back into the drink. (It also spawned the high court's first citation – long overdue – to Dr. Seuss, a reference in Kagan's dissent to "One Fish Two Fish Red Fish Blue Fish.")

Scalia joined that dissent from Ginsburg's majority opinion, which interpreted the crime of destroying "any record, document, or tangible object" in an attempt to thwart a federal investigation as not extending to fish. Arch-liberal Kagan, supported by arch-conservative Scalia, would have none of it. "A tangible object," she wrote, "is an object that's tangible." Nuff said.

According to Chenoweth, had the dissenters' super-strict reading of "tangible object" carried the day, it would have substantially extended the reach of the Sarbanes-Oxley Act – a "bad thing" byproduct of a textualist approach that often delivers "good thing" results for free enterprise.

On the other hand, Chenoweth points to another example of textualism in action, one with an outcome more to the liking of the WLF crowd. That's the 2015 Obamacare case *King v. Burwell*, in which a 6-3 majority interpreted the Affordable Care Act as extending tax credits to individuals who purchase healthcare on both state and federal exchanges. Scalia, joined by Alito and Thomas, read his fiery dissent from the bench – suggesting along the way that the law's nickname should now be SCOTUScare. "The Court holds that when the Patient Protection and Affordable Care Act says 'Exchange established by the State' it means 'Exchange established by the State or the Federal Government.' That is of course quite absurd, and the Court's 21 pages of explanation make it no less so," he said. Unlike *Yates*, the outcome of Scalia's textualism in *Burwell* would have led to a result conservatives could cheer.

From judicial philosophy Chenoweth turned to these specific areas that the WLF is focused on:

Class Actions

"This is a big one because there's a lot going on right now," he says. He points to Scalia's majority opinions in 2011's *Dukes v. Wal-Mart* and 2013's *Comcast Corp. v. Behrend*, a pair of 5-4 class action opinions. Chenoweth speculates that Scalia may have been the key vote in taking up the cases in an area he clearly cared about and where his absence will be felt. "When courts of appeals uphold outrageous class action opinions, we can no longer look to Scalia as being in favor of a second look," he says. "He'll be missed in that regard." A number of important class action

cases are now on the docket: *Spokeo v. Robins*, which turns on whether a plaintiff who suffered no concrete harm (so would not have standing) can still sue based solely on violation of a federal statute; *Microsoft Corp. v. Baker*, raising the issue of a federal appeals court's jurisdiction to deny a class cert order after the named plaintiff has dismissed their claims with prejudice; and *Tyson Foods v. Bouaphakeo*, turning on whether a certified class under the Fair Labor Standards Act may include people who suffered no injuries. "My hope is that *Spokeo* is enough of a clear-cut case that Scalia's vote would not matter," Chenoweth said. "But there's also little doubt he was a thought leader and a voice in favor of narrowing class actions." At least one company agrees and already has taken action in anticipation of a possible post-Scalia tilt in class action jurisprudence. Less than two weeks after Scalia's death, Dow Chemical Co agreed to pay $835 million to settle a decade-long $1.06 billion price-fixing suit rather than roll the dice at the Supreme Court. The company had petitioned the Court, arguing that the verdict ran afoul of Scalia's *Wal-Mart* and *Comcast* opinions. Is there any doubt what Dow meant when it cited "growing political uncertainties due to recent events within the Supreme Court" as the basis for its action?

Property Rights

In *Horne v. Department of Agriculture* (2015), Scalia joined the 5-4 majority in holding that the government can't use a Depression-era program designed to drive up the price of raisins to take a raisin farmer's crop in exchange for the right to continue in the farming business. "Shockingly," Chenoweth said, "at least three justices seemed prepared to believe that driving up the price for the raisins not taken provided just compensation enough for taking away a farmer's crop."

Federal Preemption

In 2013's *Mutual Pharmaceutical v. Bartlett*, a 5-4 decision with Scalia joining the majority, the Court held that federal law preempts state-law design-defect claims against generic manufacturers that turn on a drug's warnings. A number of commentators noted that the case, along with related decisions, might well sound the death knell for the longstanding presumption against preemption, a result the WLF favors.

Standing

Scalia joined the 5-4 majority in an area dear to his heart in *Clapper v. Amnesty Int'l*, which narrowed standing to sue in a matter arising from challenges to a federal eavesdropping program. Chenoweth believes the decision could be important going forward because Scalia's vote was needed to narrow the opening to the federal courthouse door in class actions and other cases brought under federal statutes where the plaintiffs' lack of an injury-in-fact should preclude standing. The *Clapper* majority had to reach back to 1923 for a decision in a natural gas storage case for a rule restricting federal suits from proceeding – sparking a chorus of boos from the dissenters. The WLF took issue with the boobirds and, in an amicus brief filed on behalf of six former attorneys general, cited several more recent decisions.

Labor Relations

In 2012's *Christopher v. SmithKline-Beecham Corp*, a 5-4 decision, Scalia joined the majority in preserving the longstanding view that pharma sales reps – so-called "detailers" – are outside salespeople under an exemption in the Fair Labor Standards Act and not entitled to overtime pay. That's a case, Chenoweth says, that would end up 4-4 without Scalia, so it's worth keeping an eye on with a number of important labor issues percolating in the courts.

Commercial Free Speech

Chenoweth does not see this as an area likely to shift without Scalia as most recent cases have been 6-3 decisions, but he notes that Scalia was viewed as a staunch defender of commercial free speech rights.

Punitive Damages

This is an area in which Chenoweth believes the business community could stand to gain from the loss of Scalia – and an example of how his originalism in constitutional interpretation can cut both ways. In the last major punitives case, *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003), Scalia was a dissenter from a majority holding that the Due Process Clause limits punitive awards to 10 times compensatory damages. Scalia stuck to his view that the Constitution is not a shield against runaway punitive damages. It's an interesting issue as some conservatives are eager to pull back on punitive damages while others find no federal authority to yank the reins. Chenoweth says the issue hasn't seen much action because the business community hasn't been sure where the votes are. Perhaps that will change.

Expert Evidence

Scalia was not a vote against applying the rules in a way that forces plaintiffs to make their cases, but he was vocal outside the Court about his lack of interest in the issue. And when the Court granted cert in *Comcast*, which appeared to be an expert evidence case, Scalia's majority opinion bypassed that issue. "The Court hasn't taken on one of these cases recently, and there now could be a justice who is more willing," says Chenoweth. "It's an area where folks who care about free enterprise want to see more reliable expert testimony and less junk science. It didn't move Scalia."

Administrative Law

Justice Scalia was widely thought of as an expert on administrative law. In a recent case, *City of Arlington v. FCC* (2013), many were disappointed, Chenoweth says, that he was as deferential to agencies as he was – taking the view that it's better to defer to their judgment than to that of judges with lifetime tenure, who are tougher to rein in. "It's fair to say that lots of times less deference to federal agencies is in the interest of free markets," Chenoweth says, "but I can imagine a Republican-appointed justice who is less deferential to federal agencies. Roberts and Alito are in that camp." Chenoweth says Scalia's passing may have been particularly untimely for this area of law, as he had recently signaled his interest in revisiting the question of agency deference. "*United Student Aid Funds v. Bible* is a case seeking cert before the Court now on the question of whether to reverse *Auer v. Robbins*, a nearly 20-year-old decision authored by Scalia holding that federal judges must give an agency's interpretation of its own rules controlling weight. That case, which tees up the *Auer* question starkly, stood a better chance of getting cert when Scalia was still on the bench."

Criminal Law

Scalia has been a big supporter of forcing government to have specificity in its criminal statutes before the courts will interpret them in a way that deprives someone of their liberty. "His voice will be missed here," says Chenoweth, pointing to *Johnson v. U.S.*, in which Scalia wrote for the majority striking down an enhanced sentence under the Armed Career Criminal Act. "He was a particularly fervid exponent of the 'void for vagueness' idea," says Chenoweth, noting that *Johnson* was a 6-2-1 decision in which Kennedy and Thomas filed opinions concurring in the judgment and Alito was the sole dissenter. He says Thomas took issue in particular with Scalia's void for vagueness rationale, which is one reason he will be missed in this area.

Trial by Jury

The Sixth Amendment is another area where Chenoweth sees Scalia as a clear thought leader. He points to a 2000 landmark, *Apprendi v. New Jersey*, in which Scalia joined a 5-4 majority holding that the Sixth Amendment right to a jury trial prohibits judges from enhancing criminal sentences beyond the statutory ceiling based on facts other than those decided by a jury beyond a reasonable doubt. In his concurrence, Scalia wrote that the right to trial by jury "has never been efficient; but it has always been free." Chenoweth sees this as an example of an area where Scalia's originalist strain upholds the Constitution but doesn't necessarily lead to conservative (pro law and order) outcomes.

Arbitration

Scalia had been a strong advocate of arbitration in general and deferral to decisions under the Federal Arbitration Act in particular. It's not as flashy as his more scathing opinions, but he was cheered on by the business community. One example is *AT&T Mobility LLC v. Concepcion* (2011), in which Scalia wrote for a 5-4 majority that said states must enforce arbitration agreements even if those agreements compel complaints to be arbitrated individually, and not on a class basis. As one commentator said, "To suggest *AT&T* was anti-consumer is an understatement."

Chenoweth concludes with a bit of speculation on how things might play out in the increasingly likely event of an extended opening on the Court. He focuses on what that will mean for the cases the Court decides to take – or not. "On the one hand," he says, "there may be reluctance to grant certiorari in certain cases that likely will end up in a 4-4 split. That's not a good use of resources. On the other hand, that might mean there's more room for lower-profile cases than usual. So a case that matters to business and otherwise would not make it out of conference could get a shot. But the Court has already pushed at least one case, *Microsoft v. Baker*, from being heard this term to the 2016 October term. So we'll have to see how it shakes out."