



THE COUNTER-CLERKS OF JUSTICE SCALIA

Ian Samuel*

“So, what are you going to do when you’re done here?”

That’s what he asked me first. I had just sat down in his chambers, on a big, overstuffed leather couch. It was a day in early April, and I’d spent my last few minutes sitting across the street in a park, shuffling through the index cards I’d been using for weeks to prepare. The cards were organized by topic, each with a few bullet points to remind me of what the man across from me thought about every subject on which he’d had an opinion over the last quarter-century. From A (the Administrative Procedure Act) to Z (*Zerbst*, a doctrine about the voluntary waiver of constitutional rights), it was all there.

But this? He wants to know what I want to be when I grow up?

“Well,” I said to Justice Scalia. “I’m thinking about becoming a lawyer.”

* The author is an attorney at Jones Day (although the views in this essay are his own) and a former law clerk to Justice Scalia, and will join Harvard Law School as a Climenko Fellow this summer. For their thoughtful comments and critiques on this essay while I was writing it, I extend my thanks to Shannon McHugh, Jana Loeb, Matt Owen, Dan Epps, Dennis Rimkunas, Adam Klein, and Rebecca Buckwalter-Poza.

IN OCTOBER TERM 2012, I was a law clerk for Justice Scalia. When that fact comes up in conversation (say, at a social gathering), the reaction is almost always the same: “Cool!” people say, which is about my view on it, too. And then (I know it’s coming, and nowadays I just wait a beat for it): “Wait . . . You’re not, um . . . Are you a Republican?” To get a sense of the tone—relative certainty touched with a hint of concern—imagine asking a person seated next to you at dinner, “You don’t have pink eye . . . Do you?”

“No,” I say, trying not to sound as defensive as I feel. “I’m not.” And it’s true. I am no kind of Republican. In college, I made my first political donation to Howard Dean (ten bucks), and I’ve never looked back. So no—I’m not a Republican. (The experience of being interrogated about this fact so many times, however, has given me a genuine sympathy for the so-called “shy Tory” problem, whereby conservatives are nervous to admit what they think in social settings lest they face the opprobrium of their peers.)

What, then, was I doing there? Most lawyers know that Justice Scalia would sometimes hire a politically liberal law clerk to be one of the four who worked for him each year. But I’ve found that most people who aren’t lawyers don’t know that. “Oh,” they’ll say. “So you were like, the token liberal?” That’s essentially right (though typically people don’t like being described to their faces as “tokens”). In the parlance, the term was *counter-clerk*. The autumn after I worked for him, the Justice explained his rationale for this practice in an interview with *New York* magazine.² “Other things being equal,” he said—“which they are usually not”—“I like to have one of the four clerks whose predispositions are quite the opposite of mine—who are social liberals rather than social conservatives.” Such a person was useful, in his view, “to make sure I don’t make mistakes.”

² Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAGAZINE (Oct. 6, 2013), available at <http://nymag.com/news/features/antonin-scalia-2013-10/>.

In other words, as the Justice frequently remarked in other contexts, a good textualist judge should sometimes, perhaps even often, find himself coming to results that he finds politically bitter. As he put it in the *New York* interview, that is the consequence of “paying attention to [the] text” of the laws a judge is asked to apply, rather than simply “playing in a policy sandbox.” The Justice prided himself on having come to many such decisions over the years. He would often point to the Court’s decision in *Texas v. Johnson*,³ which held that flag burning is protected speech under the First Amendment. He joined that opinion, which was written by one of the Court’s greatest liberals, William Brennan, and his vote was necessary for the result — it was 5 to 4. And he joined the majority despite the fact that flag-burning personally offended him tremendously. “If it were up to me, I would put in jail every sandal-wearing, scruffy-bearded weirdo who burns the American flag,” he would often cheerfully remark.⁴ But, he invariably added, “I am not King.” He was a judge, and the First Amendment said what it said.

Therefore it was useful, in his view, to have someone around whose political instincts would cause them to *want* flag burning to be protected, or who would *want* the EPA to set clean-air standards without regard to cost.⁵ A fainthearted textualist with conservative political leanings might feel tempted to look the other way in those cases. But that is the job of the counter-clerk, as he saw it: to stop your boss from doing something that would be a mistake by *his own* lights. You are required to speak up; your duty is to disagree, and to state that disagreement using the Justice’s methodology.

³ 491 U.S. 397 (1989).

⁴ For just one example, see Scott Bomboy, *Justice Antonin Scalia Rails Again About Flag-Burning “Weirdoes,”* CONSTITUTION DAILY (Nov. 12, 2015), <http://goo.gl/XyzlzS>. For some reason, that he chose an image of someone wearing sandals — “sandals!” — has always been a source of great amusement to me.

⁵ See *Whitman v. American Trucking Ass’ns, Inc.*, 531 U.S. 457 (2001).

BUT BACK TO THE INTERVIEW. He laughed. He liked my smart-alecky answer. He liked, too, that I wanted to move back to New York, where he'd grown up and where I'd gone to law school. (Washington, he said, wasn't "a real city.") And then he gave me some advice. When you finish here, he said, go to a law firm. "You've gotta soak 'em," he joked, referring to the signing bonuses for Supreme Court clerks, which have grown to astonishing heights. "But," he said, you've also got to find a place that gives you time for your "other responsibilities." I asked what he meant. "You have responsibilities to your *family*," he said. "You have responsibilities to your *church*. These aren't leisure activities. These are important obligations, and so many of these firms now work their young lawyers so hard that they can't fulfill them." It was an arresting bit of wisdom: How often does someone at the peak of your profession tell you not to let your work consume your life?

But before I could really digest it, he asked me a more substantive question: "Okay," he said, "why don't you tell me an opinion I've written in the last couple of years that you disagree with, so we can argue about it?" He said this with a rather mischievous smile, one I would come to know very well. I'll spare you the back-and-forth about the case we discussed. But at the end, he waved me off with a laugh: "All right, all right. You picked a good one." He'd had fun, and I had (I hoped) survived.

Shortly thereafter, he sent me up for the second part of the interview, conducted by the four current clerks, though not before warning me that the tradition was for them to deliver quite a grilling, and that—not to worry—"I don't always listen to what they say." We had been together perhaps twenty or thirty minutes. I shook his hand and walked out of his chambers, genuinely wondering whether I'd ever see him again.

THE LIST OF POLITICAL LIBERALS who worked for Justice Scalia is quite an august one. It's worth dwelling on that fact for a moment. A Supreme Court clerkship can have a huge effect on a young lawyer's

career. Justice Scalia (by supplying that credential to a number of young liberals) directly abetted the prominence of many people who went on to use their prominence to advance goals, political and legal, with which he didn't agree.

Yet he was proud of them, even when he didn't share their professional objectives. I once came into chambers to inform him that one of his former clerks, Rachel Barkow, had been named to serve on the United States Sentencing Commission, which develops sentencing guidelines for federal judges in criminal cases. The Justice had once derided the Commission (in dissent) as a "junior-varsity Congress" that offended the Constitution's separation of powers.⁶ "That unconstitutional commission?!" he said, mock-aghast. But then: "Ah, good for her." I imagine that the Justice, who sometimes referred to his law clerks as his "nieces and nephews" (a touching descriptor from an only child), felt about his liberal clerks the way my Republican grandfather thinks of me: Politically hopeless, and family all the same.

Most of the time, that affection was mutual, and in the wake of his death, the remembrances of his counter-clerks have mostly been warm ones. For example, Tara Kole, who worked for the Justice several years before I did, wrote that he treated her with "enormous respect," that he "always seemed to value [her] opinion," that his trust of her "felt implicit," and that she "never felt as though he looked at [her] differently than [her] conservative counterparts."⁷ Professor Barkow wrote, on the 20th anniversary of his appointment to the bench, that the Justice was "a valued mentor," and that "serving as his law clerk was an honor I will always treasure."⁸ And Lawrence

⁶ *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

⁷ Tara Kole, *I'm a Liberal Lawyer. Clerking for Scalia Taught Me How to Think About the Law*, WASHINGTON POST (Feb. 17, 2016), <https://goo.gl/TWFJTr>.

⁸ Rachel Barkow, *A Scalia Clerk Remembers Her Former Boss*, OBSERVER (Feb. 13, 2016), <http://goo.gl/GSB7fs>.

Lessig wrote that in his time as “the only liberal clerk in the chamber,” he watched the Justice “struggle with [the] conflict” that came when his originalist methodology required a more liberal result.⁹ The resulting “acts of integrity,” wrote Lessig, were “incredibly important to me in my becoming a lawyer,” even if there were instances in which he believed the Justice had misstepped.¹⁰

There are a handful of others, however, with a somewhat less glowing assessment. Some of them exhibit such a boundless contempt for Justice Scalia that I wonder how (and more importantly, why) they made it through the year without resigning. Most visibly, Bruce Hay, a law professor at Harvard, has recently written that although he once believed the Justice “prized reason,” “a more naïve young fool never drew breath.”¹¹ Hay charges that Justice Scalia “detested science” (because it “threatened everything he believed in”), that he used his “intelligence and verbal gifts” as “instruments of cruelty and persecution and infinite scorn,” and goes on to accuse the Justice of having been an enemy of women’s rights, racial justice, economic equality, environmental protection, intellectuals, universities, anyone who questions authority, “foreignness,” social change, and – in sum – the “modern world.”¹²

Hay provides almost no evidence to justify these accusations – strange, given that it is easy enough to list decisions by the Justice

⁹ Lawrence Lessig, *Scalia Set a Principled Example*, USA TODAY (Feb. 18, 2016), <http://goo.gl/ZgBPFL>.

¹⁰ *Id.* (“I’m not convinced he always chose originalism over conservatism. . . . But whether perfectly or not, what was most striking to me was to watch someone of great power constrain his power, not for favors or public approval, but because he thought it right.”).

¹¹ Bruce Hay, *I Thought I Could Reason With Antonin Scalia*, SALON (Feb. 27, 2016), <http://goo.gl/eg3rhj>.

¹² *Id.*

that (for example) favored environmental protection.¹³ It would also be odd for a man who hated universities to teach at them nearly every summer. Moreover, if Justice Scalia really did regard “foreignness” as the enemy, his shelf-full of books on foreign constitutions was a very effective disguise for that contempt. And for a foe of the modern world, he had an awfully broad view of speech protections for video games.¹⁴ Then again, when a man who spoke Latin and loved opera is charged with *anti-intellectualism*, then perhaps we are no longer within the realm of what you might call reasoned disagreement.

No: Hay’s project is not a close-read critique, but pure *argumentum ad clerkeratum*. Hay claims that he knows from experience that the *aim* was always to win “the culture war,” and the Justice’s professed judicial philosophy was nothing other than a means to that end. “What I took for the pursuit of reason in those chambers was in fact the manufacture of verbal munitions,” Hay fumes, and from “the comfort of our leather chairs, we never saw the victims.” That is a charge about the Justice’s character. And to sell it, Hay engages in a pure ethical appeal: *I should know*, he seems to say. *After all, I worked for him.*¹⁵

¹³ See Whitman, *supra* note 4; see also Decker v. Northwest Environmental Defense Center, 133 S. Ct. 1326, 1339 (2013) (Scalia, J., dissenting).

¹⁴ See Brown v. Entertainment Merchants Ass’n, 131 S. Ct. 2729 (2011).

¹⁵ Of course, if the Justice’s legacy is to be settled by a swearing contest among the liberals who knew him, was it not Justice Ginsburg who said of him that he was her “best budd[y],” and that they were “one in our reverence for the Constitution and the institution we serve?” *Statements From the Supreme Court Regarding the Death of Antonin Scalia*, SUPREME COURT OF THE UNITED STATES (Feb. 15, 2016), available at <http://goo.gl/8fFTYI>. Describing the time she first heard him speak, Justice Ginsburg remarked that she “disagreed with most of what he said, but I loved the way he said it.” David Savage, *BFFs Ruth Bader Ginsburg and Antonin Scalia Agree to Disagree*, L.A. TIMES (June 22, 2015), <http://goo.gl/S8Q0W5>. In his essay, Hay writes that Justice Brennan was his “hero.” Most young liberals that I know—including me—would name Justice Ginsburg as a hero, too. Which leaves us with a version of C.S. Lewis’ famous trilemma: Our hero is either lying (maybe she hated the Justice, but lacks Hay’s

Hay chose an interesting moment to unburden himself. He clerked for Justice Scalia in October Term 1989—almost twenty-seven years ago. Since then, Hay has mostly been a professor at Harvard Law School, where he was hired just four years after graduating (undoubtedly in no small part on the strength of his clerkship). And yet, as far as I can tell, Hay has never before commented¹⁶ on the works of a man who he now accuses of “dehuman[izing] people and treat[ing] them as pawns in some Manichean struggle of good versus evil.” Yet, suddenly, in the wake of the Justice’s death, Hay has something to say. How curious.

Hay’s timing has certain advantages. For one, it spares him any possibility of a response—real or imagined. We are all familiar with the uncomfortable sensation of knowing that the object of our verbal scourging might read what we write of them, and the accompanying sense of shame. Hay’s timing eliminates *that* bothersome twinge, leaving him free to bask in the warm *alleluias* of ideological fellow travelers. Also, because the media appetite for commentary on the Justice was enormous following his death, Hay’s timing ensured that even a lightly organized confessional-cum-*ad hominem* could be published relatively prominently. Of course, Hay’s timing has *some* drawbacks: for example, publishing a personal attack on someone’s character immediately after his death might cause further grief to that person’s family or his close friends. But insofar as Hay boasts of being trained to deploy “verbal munitions . . . against civilian populations” without “thinking about what [he is] doing,” I am sure that

rhetorical courage?), mistaken (maybe she did not know him as well as Hay did? Maybe she is not as committed as Hay is to the leftist cause?), or she is right.

¹⁶ The only reference to the Justice I could find in Hay’s academic writing came in 1992, when he describes one of his opinions as “hint[ing] darkly that specific adjudicative jurisdiction may be required in all cases where the defendant is neither a resident of the forum state nor served with process while physically present within its borders.” Bruce Hay, *Conflicts of Law and State Competition in the Product Liability System*, 80 GEO. L. J. 617, 645 n.78 (1992). Damning stuff.

he is not too bothered by that; after all, from the “comfort of [his] leather chair[],” he will “never [see] the victims.” So, in the end, perhaps Hay chose a savvy moment to accuse Justice Scalia of “[dying] as he lived,” “killing helpless prey from a position of safety and comfort” – of lacking, in other words, the moral bravery of a tenured law professor who would wait to publicly criticize a man *whom he knew personally* until after his death.¹⁷

MORE NUANCED is the account of Gil Seinfeld, who was the Justice’s counter-clerk during the Court’s 2002 term.¹⁸ Seinfeld aims to create separation both from those (like Kole) who depict the Justice as “a paragon of integrity interested only in the dictates of legal texts” and those (like Hay) who see him as “ready and willing to cast aside legal texts he is bound to obey, and interpretive principles he purports to believe in, in order to make way for outcomes that are congenial to him personally.”¹⁹ Justice Scalia, Seinfeld says, was neither; rather, he was “a complex man doing a complex job under a particularly luminous spotlight (which, it must be conceded, he made no effort to dim).”²⁰ Seinfeld praises the Justice’s personal warmth and willingness to admit mistakes; criticizes as unprincipled his view of affirmative action; and finds downright “ugly” the Justice’s “caustic and dismissive” dissents, which Seinfeld argues would have been

¹⁷ By contrast, Professor Lessig tells us that he expressed his disagreement (stated in rather vivid terms) *face to face*: “Indeed, the last time I saw him over lunch, I complained to him that he had ruined me as a constitutional lawyer, because I was constantly predicting he’d choose originalism over conservatism. Yet too often, I said, when the decision came down, I felt like Linus waiting for the Great Pumpkin. Scalia laughed his extraordinary life-loving laugh, and told me I obviously hadn’t read the cases carefully enough.” Lessig, *supra* note 9. Certainly a different approach.

¹⁸ Gil Seinfeld, *The Good, The Bad, and The Ugly: Reflections of a Counter-Clerk*, 114 MICH. L. REV. FIRST IMPRESSIONS 111 (2016).

¹⁹ *Id.* at 112.

²⁰ *Id.*

better had they been modeled on the “warm, respectful manner in which he engaged me when we disagreed.”²¹

But Seinfeld’s account is particularly interesting because of the role he describes in one of the Justice’s most famous dissents, in *Lawrence v. Texas*.²² The question presented in *Lawrence* was whether Texas could criminally prohibit sexual intimacy by same-sex couples. The Court said no; Justice Scalia dissented. Seinfeld writes that he begged off of working on the dissent at all: “I knew I’d want no part of it. I didn’t want to help hone the Justice’s arguments or improve his prose.”²³ Instead, he forthrightly went to the Justice and asked “for permission to sit this one out,” which was granted, and he “made it through the rest of the clerkship without a shred of concern that the Justice bore ill feelings about the whole thing.”²⁴ But the “opinion,” Seinfeld writes, “still bothers me.”²⁵

The *Lawrence* dissent bothers a lot of people. It is this dissent to which Hay is almost certainly referring when he speaks of a transgender friend who has left academic physics because of what he calls the “[b]igotry and ignorance inflamed by demagogues like Antonin Scalia.”²⁶ The *Lawrence* dissent is likely to be Exhibit A in any argument by a detractor of the Justice’s.²⁷ In particular, its closing

²¹ *Id.* at 120.

²² 539 U.S. 558 (2003); see also *id.* at 586 (Scalia, J., dissenting).

²³ *Id.* at 123.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Hay, *supra* note 11. I do not mean to confuse the conceptually distinct issues of sexual orientation and gender identity. But the only Supreme Court case even touching upon the latter of which I am aware is *Farmer v. Brennan*, 511 U.S. 825 (1994), in which the plaintiff was a transgender woman who was incarcerated with the male population at a prison. Justice Scalia did not write an opinion. So Hay’s remark can only be read as a reference to *Lawrence* and other cases concerning sexual orientation.

²⁷ Exhibit B? Well: “some readers may wish to pause here to gesticulate angrily while shouting ‘*Bush v. Gore!* What about *Bush v. Gore!*’ Take a moment and get it out before we move on.” Adam Klein, *Justice Scalia’s Legacy*, LAWFARE (Feb. 16, 2016), <https://goo.gl/VuOive>.

section, which begins this way: “Today’s decision is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.”²⁸ The fat, juicy target in that sentence is obvious: the use of the phrase “homosexual agenda,” which was (even in 2003) so politically loaded that the rest of the sentence might as well not be there, for most readers will not get to it. Similarly, the dissent observes that “I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means.”²⁹ But, of course, the quotation is easy (too easy) to shorten to the groan-worthy “I have nothing against homosexuals.” And the dissent observes that “many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home,” because they view that “lifestyle” as “immoral.”³⁰ Maybe, but . . . yikes.

These passages are painful to read – not in spite of my affection for Justice Scalia, but because of it. To readers who are gay or lesbian, these passages were hurtful – and I am sure that the Justice (whatever his views on same-sex relationships) would not have inflicted that wound except through inadvertence. In a nearly thirty-year career on the bench, every judge is bound to commit some serious errors – just ask Oliver Wendell Holmes, who remarked of forced sterilization (in a *majority opinion*) that “three generations of imbeciles are enough.”³¹ When that judge is a great one, a mistake like that is

²⁸ 539 U.S. at 602 (Scalia, J., dissenting).

²⁹ *Id.* at 603.

³⁰ *Id.* at 602.

³¹ *Buck v. Bell*, 247 U.S. 200, 207 (1927).

(rightly) magnified in our minds, because we expect more from our legends.

As it happens, we know for sure that Justice Scalia's views on the Constitution's protections (or not) for same-sex relationships were capable of being expressed in a much different way. During my Term, the Court decided *United States v. Windsor*, which invalidated the so-called Defense of Marriage Act.³² To no one's surprise, Justice Scalia dissented. His substantive principle was the same as in *Lawrence*: that the issue of gay rights was one of those issues left to democratic resolution. But the tone was very different. The question of same-sex marriage, he noted, had inspired "passion by good people on all sides," and that passion had prompted "plebiscites, legislation, persuasion, and loud voices – in other words, democracy."³³ He disagreed with the idea that "this story is black-and-white: Hate your neighbor or come along with us."³⁴ He spoke of "our fellow human beings, our fellow citizens, who are homosexual," and how terrible it was that the majority had accused the authors of the law of acting with "the purpose" to "degrade" or "humiliate" gay people.³⁵ In a lament I think Seinfeld might cheer, he observed how "hard" it is "to admit that one's political opponents are not monsters."³⁶ His stated regret was not that the proponents of same-sex marriage had won, but that the Court had not "let the People decide."³⁷

³² 133 S. Ct. 2675 (2013).

³³ *Id.* at 2710 (Scalia, J., dissenting).

³⁴ *Id.* at 2711.

³⁵ *Id.* at 2708–09 (internal quotations omitted).

³⁶ *Id.* at 2711. Compare Seinfeld, *supra* note 18, at 116 ("Think about how hard it is to do that. For my politically active and engaged readers, especially, think about the person you disagree with most intensely in connection with the issues that matter to you most. And ask yourself whether you could treat that person with the sort of warmth and affection I have described here. . . . It's no easy task, and I doubt if anyone could pull it off any better than Scalia did with me.")

³⁷ *Id.*

The *Windsor* dissent took some left-leaning proponents of marriage equality by surprise. Emily Bazelon, a prominent commentator on the Court's work, wrote that the Justice was "surprisingly OK with ballot initiatives and laws that have approved gay marriage," and that while he "doesn't share the morals of gay marriage supporters," he was "willing to live and let live."³⁸ (She even described one passage as "lovely."³⁹) But why was Bazelon surprised that the Justice did not object to the legalization of same-sex marriage via the democratic process? After all, he had written in *Lawrence* that "social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best," and insisted that he "would no more *require* a State to criminalize homosexual acts—or, for that matter, display *any* moral disapprobation of them—than I would *forbid* it to do so."⁴⁰ I suspect that she was surprised because what she remembered from *Lawrence* were its more eye-popping statements. That is what almost everyone remembers. And they created for some a misimpression: a man who did not believe that the rights of gay people were to be settled via the political process, but who had *personal* animus toward gay people *qua* people.

That is why I found Seinfeld's story about the *Lawrence* dissent interesting. He admits, as he admitted at the time, that he did not want to help the Justice "improve his prose."⁴¹ I can't say that he erred—I wouldn't presume. But I do wonder: What if he *had* wanted to? Improve the prose, I mean? Of course, in the end, the Justice wrote what he wanted to write—no one on the Court had a more distinctive voice. But as Seinfeld notes, he was also willing to listen

³⁸ Emily Bazelon, *What Scalia's Vivid DOMA Dissent Gets Wrong (And What It Gets Right)*, Slate (June 26, 2013), <http://goo.gl/pdifHS>.

³⁹ *Id.*

⁴⁰ 539 U.S. at 603 (Scalia, J., dissenting).

⁴¹ Seinfeld, *supra* note 18, at 123.

when his clerks thought that he was making a mistake. Seinfeld praises as “extraordinary” his capacity “to confess error and to change his mind” (“at least in some circumstances”), and attests that “the Justice made me feel that he respected and valued my opinion, that the things I had to say were worth listening to and thinking about.”⁴² I genuinely wonder what would have happened if someone had said: “Justice, not for nothing, but if you say ‘homosexual agenda,’ that’s where half of people will stop reading.” Would a *Lawrence* dissent with a counter-clerk’s touch have been any different?

We’ll never know. To be sure, the idea of helping a person improve an opinion with which you profoundly disagree might not sound so desirable. Some imagine the counter-clerk as being like the protagonist in John Strand’s *The Originalist*, which portrays a (fictional) one who is meant to have worked for the Justice during my Term. She is a ceaseless sparring partner, waging a root-and-branch campaign from the inside, yielding nothing, a sort of mini-Brennan crusading for the use of “living Constitutionalism” and unwritten rights. I was not that. For one thing, as Justice Thomas once remarked,⁴³ having a law clerk of that sort is “like trying to train a pig”: “It wastes your time, and it aggravates the pig.” But Seinfeld says he was not, either: The “role of the counterclerk was not to try to persuade the Justice that, say, originalism is an error,” but to “help assure that he was the best, truest, most straight-shooting originalist and textualist he could be.”⁴⁴

Everyone, of course, has limits. If one views the *Lawrence* dissent as the moral equivalent of a *Dred Scott*, then maybe at some point the duty to disagree runs out. (“You know, Chief Justice Taney, do you

⁴² *Id.* at 115–16.

⁴³ David Savage, *Clarence Thomas Is His Own Man*, L.A. TIMES (July 3, 2011), <http://goo.gl/3T4hcC>.

⁴⁴ Seinfeld, *supra* note 18, at 117.

think we should tone down the part about black people being ‘so far inferior that they had no rights which the white man was bound to respect?’ I feel like we might lose some folks there.”⁴⁵) My point is not to criticize Seinfeld’s choice, even though I think I might have made a different one. Rather, it is that *Lawrence* demonstrates the Justice’s wisdom in having counter-clerks in the first place. He knew, in advance, that there would be times when he might need them for his own good – and we can see, for ourselves, what it looked like (at least in this instance) when he operated without one.

IT WOULD BE FAIR to ask, at this point: “So, did *you* ever have a ‘homosexual agenda’ moment—a time when you had to stand athwart an opinion shouting ‘stop?’ Did you speak up?” Unfortunately, the ethical obligations of clerkships forbid discussing one’s work in any detail. I will say only that there were times when we disagreed, times when I persuaded him, and times when he persuaded *me*. (Most interesting were those instances in which his textualist and originalist instincts produced a liberal result in the first place, and my happy task was to simply nurture those instincts.) And, of course, there were times when he would hear me out, give the matter thoughtful consideration, and then respond: “Write it up my way.” That’s how it should be.

It is also fair to ask (given that I have critiqued everyone else’s view) what my opinion of the Justice is. As a *jurist*, that’s an easy one: I stand with Justice Kagan, who recently observed that Justice Scalia will “go down as one of the most important, most historic figures in the Court.”⁴⁶ I think the implications of that are also underappreciated. Legendary jurists eventually come to transcend the particular

⁴⁵ See *Dred Scott v. Sandford*, 60 U.S. 393, 404–05 (1857).

⁴⁶ Elena Kagan & John Manning, *The Scalia Lecture: A Dialogue With Justice Elena Kagan on the Reading of Statutes*, HARVARD LAW SCHOOL (Nov. 18, 2015), available at <https://youtu.be/dpEtszFT0Tg>. (The quotation occurs at 7:59.)

controversies in which they were involved. We do not really hold forced sterilization against Justice Holmes—not because it was not error, but because we are far enough past the danger to forgive it. Similarly, I think, what will *endure* about Justice Scalia are the thousand ways, small and large, that he forever changed the way that American judges do their work. (For instance, as Justice Kagan observed, “we are all textualists now.”⁴⁷) My prediction is that Justice Scalia will eventually become one of the rare figures, like Holmes, who can transcend the debate over whether he was right or wrong in this or that case. As for the errors, even the serious errors? All judges—all people—have them. The only question is whether they will be forgiven (as they are for the greats) or forgotten (as they will be for the rest of us).

On a more personal level, what will endure for me—the image I will keep in my mind of the man, rather than the jurist—is a photograph taken by the Court’s official photographer at President Obama’s second inauguration. The Justice was wearing an eight-sided hat that had been given to him as a gift; it was a replica of the one worn by St. Thomas More, in Hans Holbein’s famous portrait. He was seated up near the podium where the President spoke, with the other members of the Court and various *éminences grises*.

⁴⁷ *Id.* (at 8:25).



His expression is familiar and unmistakable: he is squinting and smiling exactly the way he did on that spring day during my interview. In that photograph, attending the inauguration of a Democratic president, he is positively *enjoying* himself. In that portrait is the man who wanted a political liberal around (“other things being equal, which they are usually not”); in that portrait, too, is the conservative hero (a Thomas More hat!). My co-clerks and I loved the photo so much that we had prints made, which he generously inscribed to all of us as gifts.

There will be no more counter-clerks now. But neither will there be any young liberal who is free, whether she likes it or not, of the Justice’s influence. And as those young liberals read through their case books, they will hear the Justice’s voice on the page—inviting them to pick an opinion they disagree with, and argue about it.