

THE GOOD, THE BAD, AND THE UGLY: REFLECTIONS OF A COUNTERCLERK

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Everyone has strong feelings about Justice Scalia. Lionized by the political right and demonized by the left, he has been among the most polarizing figures in American public life over the course of the last half-century.¹ It is hardly surprising, then, that in the weeks since Justice Scalia's death, the public discourse surrounding his legacy has exhibited something of a split personality. There have, of course, been plenty of appropriately respectful—even admiring—tributes from some of the Justice's ideological adversaries;² and here and there one of the Justice's champions has acknowledged, with a hint of lament, the acerbic quality of some of his opinions and public comments.³ For the most part, however, the Justice has been depicted as a flat character—or, more accurately, one of two flat characters: He is, on the one hand, the stalwart champion of law and judicial restraint—a paragon of integrity interested only in the dictates of legal texts and willing to cast aside his personal preferences to make way for outcomes commanded by sources he is bound to obey and powerless to change.⁴ And

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1. Among Supreme Court Justices, I'd say only Earl Warren and Clarence Thomas could give him a run for his money along this dimension.

2. See, e.g., Cass R. Sunstein, *The Scalia I Knew Will Be Greatly Missed*, BLOOMBERG VIEW (Feb. 13, 2016), <http://www.bloombergview.com/articles/2016-02-14/the-scalia-i-knew-will-be-greatly-missed> [<https://perma.cc/H3L4-MVGM>]; Laurence H. Tribe, *The Legacy of Antonin Scalia – the unrelenting provoker*, BOS. GLOBE (Feb. 17, 2016), <https://www.bostonglobe.com/opinion/2016/02/17/the-legacy-antonin-scalia-unrelenting-provoker/mH40dhHDvEPXCzyXCLfxqI/story.html> [<https://perma.cc/WG5R-D3H4>].

3. See, e.g., George Will, *A Jurist of Colossal Consequence*, NAT'L REV. (Feb. 15, 2016), <http://www.nationalreview.com/article/431318/antonin-scalia-his-lasting-influence?target=author&tid=903126> [<https://perma.cc/5CKZ-DSDE>] (“The serrated edges of his most passionate dissents sometimes strained the court's comity and occasionally limited his ability to proclaim what the late Justice William Brennan called the most important word in the Court's lexicon: ‘Five.’”).

4. See, e.g., Tara Kole, *I'm a Liberal Lawyer: Clerking for Scalia Taught Me How to Think About the Law*, WASH. POST (Feb. 17, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/02/17/im-a-liberal-lawyer-clerking-for-scalia-taught-me-how-to-think-about-the-law/> [<https://perma.cc/3BCX-P9E5>] (“What he cared about was the law, and where the words on the page took him. More than any one opinion, this will be his lasting

he is, on the other hand, obnoxious and pompous, a phony and a hack—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 (with bonus points awarded if a socially marginalized group could be made to suffer in the process).⁵

In my experience, Justice Scalia was neither of these people. He was, rather, a complex man doing a complex job under a particularly luminous spotlight (which, it must be conceded, he made no effort to dim). I got to know the Justice when I clerked for him during the Supreme Court's 2002 Term. We worked together on opinions and spent many hours discussing cases. And we also talked, from time to time (sometimes one-on-one, sometimes with my co-clerks present), about the law generally or about the media, about religion or about our families. (For both of us, discussion of those last two topics often ran together.) My goal in this essay is to report on some of those experiences in the hope that I might give readers a better, fuller picture of the man they have been reading and hearing so much about over the course of these past few weeks.

For me, at least, it's a difficult needle to thread. In part this is because of the deeply entrenched norm that directs law clerks to treat what is said in and around chambers as strictly confidential. This norm seems to me to have obvious and significant virtues, even if it does impede public understanding of some of the most important figures in American government. I will do my best here to follow the lead of other former clerks who have, in recent weeks, gingerly relied upon their experiences with the Justice to help educate a

contribution to legal thought.”); Joan L. Larsen, *What I Learned from Justice Scalia*, N.Y. TIMES (Feb. 16, 2016), http://www.nytimes.com/2016/02/16/opinion/what-i-learned-from-justice-scalia.html?_r=0 [https://perma.cc/N9MA-C5PM] (“Justice Scalia believed in one simple principle: That law came to the court as an *is* not an *ought*. Statutes, cases and the Constitution were to be read for what they said, not for what the judges wished they would say.”); Sunstein, *supra* note 2 (“[H]is greatness . . . lies in his abiding commitment to one ideal above any other: the rule of law.”).

5. See, e.g., Paul Campos, *Scalia Was an Intellectual Phony: Can We Please Stop Calling Him a Brilliant Jurist?*, SALON (Feb. 18, 2016), http://www.salon.com/2016/02/18/scalia_was_an_intellectual_phony_can_we_please_stop_calling_him_a_brilliant_jurist/ [https://perma.cc/6M2M-ZULR] (“[H]is badness consisted precisely in his contempt for the rule of law, if by ‘the rule of law’ one means the consistent application of legal principles, without regard to the political consequences of applying those principles in a consistent way.”); Bruce Hay, *I Thought I Could Reason With Antonin Scalia: A More Naive Young Fool Never Drew Breath*, SALON (Feb. 27, 2016, 8:00 AM), http://www.salon.com/2016/02/27/i_thought_i_could_reason_with_antonin_scalia_a_more_naive_young_fool_never_drew_breath/ [https://perma.cc/9PW7-WCBB] (“[For Justice Scalia], the enemy was to be found in judges who believe decency and compassion are central to their jobs, not weaknesses to be extinguished. Who refuse to dehumanize people and treat them as pawns in some Manichean struggle of good versus evil, us versus them.”).

public thirsty for knowledge about this transformative, larger-than-life figure.

In truth, however, among the things that make this exercise challenging, the norms surrounding public discussion of the clerkship rank a distant second. For in my case, the Justice's complexity has a personal dimension. I was a so-called "counterclerk," meaning I was hired not in spite of but (in part) *because of* the fact that my instincts about the law are profoundly different from the Justice's. We disagreed in a big way about small things and in a bigger way about big things. And if I disagreed with the *content* of many of Justice Scalia's views, I positively recoiled, from time to time, at the *manner* in which he chose to express those views in public. This was especially true when the subject under discussion was the law's treatment of historically oppressed groups, most notably blacks, gays, and women.

Yet as I discovered in the days following the Justice's death—during which I was peppered on all sides with inquiries about the man and my experiences as his clerk—I cannot straightforwardly answer what seems like a very simple question: Did I like him? Yes, I did. But then again, I didn't. Kind of? I'm just not sure. It's a pretty neat trick, when you think about it: to be so profoundly likable in person, so decent and respectful and convivial and just plain fun that someone inclined to find your views not just wrongheaded, but downright pernicious (and consequentially so) has to think twice and three times about this particular question. In my case, at least, Justice Scalia pulled it off, and I believe he did it effortlessly. Which is to say, the warm and winning parts of the Justice's personality never struck me as calculated or contrived. They just *were*. The good was as much a part of the essence of the man as were the (by my lights, anyway) bad and ugly. I hope this brief essay can shed some light on all three.

THE GOOD

Justice Scalia once stuck his tongue out at me. I don't remember what I said to provoke him, but the response was unforgettable. There he was: a sitting Supreme Court Justice, sixty-six years old, with his tongue out, head dancing a bit from side to side, eyes wide with playful mockery. He broke the pose after a couple of seconds, cracked a wide smile, and chuckled at me (and, I think, himself).

He also called me "Mikey" from time to time (as in: "Is that ok with you, Mikey?")—likening my objections to the wording of draft opinions to the behavior of the picky eater from those cereal commercials that aired in the 1970s.⁶ The Justice also called me an ass a few times, once told me to go to

6. Apparently, I was not the only counterclerk to receive the "Mikey" treatment. See Kole, *supra* note 4.

hell, and responded to a particularly cogent point I made about the Court's Eleventh Amendment jurisprudence with the words: "Screw you, Seinfeld." (I took that as conclusive evidence that I had won the argument.)

The point of all this is not to demonstrate that the Justice was profane or juvenile. It is, rather, to show that he was delightful (and I can assure you, he was overflowing with delight on each of these occasions) and an exceedingly good boss. If being pelted with curses every so often is not your idea of a happy work environment, I invite you to consider the following question: If you were the sort of person who might talk that way from time to time, who might you talk that way *to*? For most of us, I think the answer is "only people we know well, feel comfortable with, and are confident will take it the right way." Say that sort of thing to a stranger or too casual an acquaintance and you're liable to get punched in the eye. The fact is, most of us save this sort of thing for our friends. So when the Justice found me most exasperating—when I was a little too "counter" and not enough "clerk"—he responded by telling me that he liked me. Enough to look me in the eye and call me an ass.

The informal banter was a two-way street (though I had the good sense to stop short of swearing at the Justice). I could tell the Justice that an argument "didn't pass the straight face test" or "was not close to being a good idea" without the slightest worry that adverse consequences would follow. And when he asked for my impression of a draft opinion that had been circulated by one of his colleagues (and that I knew he planned to join), I did not hesitate to answer honestly: "I don't know Justice, you guys are totally out to lunch on this one. I can't make heads or tails of it." It was at that point in our relationship that "go to hell" made its appearance. Good times.

Of course, the Justice could be affable without name-calling. I remember with particular fondness an occasion on which he appeared in the office shortly after a hunting trip (this was before his hunting trips had become famous⁷) with a pheasant that he had shot and smoked. The Justice parked at the desk of one of his secretaries (I believe this must have happened on a weekend—I very much doubt if he would have sat at Maryellen's desk if there was any risk she might catch him), unwrapped the pheasant from its tin foil sheath, and proceeded to carve off pieces and hand them—no plates, no napkins, no utensils—to amused clerks from other chambers who happened to pass the open door. The image of a Supreme Court Justice tearing flesh off of a smoked pheasant and distributing pieces to more or less random passersby is something to behold.⁸

7. See *Cheney v. U.S. Dist. Court for D.C.*, 541 U.S. 913 (2004) (Scalia, J., mem.).

8. When the Justice offered me a taste, I politely turned him down, explaining that I did not believe pheasant to be kosher and that, in any event, his shotgun blast almost certainly

It would be a mistake to conclude from all of this that “the Good,” when it comes to Justice Scalia, is limited to the fact that he was essentially a good guy—fun and funny and entertaining to be around. He had other virtues as well, and these are more consequential from the perspective of his legacy as a jurist. For example, he was, at least in some circumstances, open-minded—willing to confess error and to change his mind. I saw this firsthand in ways big and small. First the small: When my mother’s middle school class visited the Supreme Court while on a trip to Washington D.C., the Justice graciously took time out to meet with her students and answer their questions. When a student inquired whether there was a case the Justice had decided that he now believed he had gotten wrong, the Justice did not hesitate to answer. (He described a somewhat esoteric case involving the propriety of federal courts crafting a common law immunity to shield defense contractors from tort liability.⁹) I have seen other judges field this question and show obvious reluctance to admit error or reflect on missteps. Justice Scalia could not possibly have been more forthcoming. And in so doing, he taught the students the valuable lesson that everyone (including Supreme Court Justices) makes mistakes, and there is no shame in saying so.

And now for the big: One of my disagreements with the Justice that year related to a case of little interest to the general public. The norms I mentioned earlier prevent me from specifying the name of the case or describing the issues at stake even in a very general way. But I can tell you that the Justice and I disagreed not about the holding, but about the reasoning the Court ought to deploy in the course of explaining that holding. We argued back and forth for hours spread out across a few days. We argued after the Justice read my bench memo, we argued in the course of preparing for oral argument, and we argued in advance of the conference at which the Justices were to cast their votes. I got nowhere.

As was typically the case, opinion assignments were to be handed out on a Monday, and I decided to spend the weekend prior crafting one final pitch for the Justice. The product was a two-page memo explaining as best I could why I felt the approach the Justice favored “wouldn’t write”—why the law couldn’t be made to do what the Justice thought it could (and should). I left the office Sunday evening having placed the memo in the Justice’s box, and I

did not qualify as proper *shechita*. When he asked: “What’s wrong with pheasant?! Why can’t it be kosher?” I responded with an argument I was sure would appeal to his juridical sensibilities: I explained that Leviticus contains an “actual enumeration” of fowl that are permissible for consumption. Cf. *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346–47 (1999) (Scalia, J., concurring in part). He shot back: “Oh, come on. They didn’t know about pheasant back then!” I smiled at him impishly and asked: “Are you trying to tell me that *God* didn’t know about pheasant?” He shrugged and smiled back.

9. *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988). This would not have been my first choice.

planned to discuss it with him the following morning. When Monday rolled around, I came across the opinion assignments from the Chief Justice's chambers before I came across Justice Scalia, and I was mildly panicked to learn that Justice Scalia had been assigned the opinion in the case over which he and I had been jousting. My mind quickly filled with images of the weeks ahead—my time devoted to a task I believed impossible and the Justice increasingly frustrated by my incapacity. When I saw the Justice later that day, I asked whether he had had a chance to read the memo I prepared over the weekend. "I did," he replied, "and I was appropriately persuaded. Do it your way, Seinfeld."¹⁰

In any context, it is hard to move off of a position once you've clearly staked out your ground. And it is harder, still, to do so when you've staunchly defended that ground over many hours of vigorous disagreement. But to do so in this particular context—in light of the hierarchical character of the Justice-clerk relationship and the vast gap in our knowledge of the law and our experience exercising this kind of judgment—is extraordinary. It requires a truly open mind and respect for the opinions and capacities of others.

I think it is along this last dimension—respect for the opinions and capacities of others—that Justice Scalia most impressed me over the course of my clerkship.¹¹ There is no escaping the fact that my views about a host of important legal and political questions were anathema to the Justice, and yet never—not *once*—did he make me feel as if *I* were anathema to him—as if he experienced me as blockheaded or ill-motivated or perhaps evil (which, it cannot be denied, is an adjective some of the Justice's detractors have used to describe him). To the contrary, 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, and that he was generally happy to have me around. 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. Or whether you could work closely and collaboratively with that person for a prolonged period of time and make him or her feel genuinely valued and respected. It's no easy task, and I doubt if anyone could pull it off any better than Scalia did with me.

The good was really quite good.

10. This is probably second to "screw you" on my list of proudest moments from that year.

11. *But see infra* pp. 120–22.

THE BAD

I take no pleasure, especially under these circumstances, in reflecting on the lamentable aspects of the Justice's legacy. But my goal is to provide readers with as fair and balanced an account of the Justice as I can, and to avoid the kind of hagiography that cheapens those aspects of the Justice's character and legacy that are truly worth celebrating. A single example should do.

Over the course of his career, Justice Scalia worked vigorously to paint a picture of himself as an especially principled jurist—one willing to do what the law demands whether he approved of the outcome or no. I don't think this was just a PR move. That is, I believe it mattered a great deal to the Justice not only to *seem* like an especially principled jurist, but also to *be* an especially principled jurist. (I imagine most of the Justice's colleagues felt and feel the same way.)

The practice of hiring counterclerks was a reflection of the Justice's commitment to maintaining high standards of intellectual integrity. To some extent, I suppose, he kept people like me around because he found the sparring fun; but the practice of hiring left-leaning clerks was ultimately rooted in loftier considerations. The role of the counterclerk was, as the Justice used to say, to "keep him honest"; and the motivating intuition was that a liberal clerk was more likely than a conservative one to cry foul in the event that, in a moment of weakness, the Justice showed signs of playing fast and loose with (or even abandoning) the interpretive principles he had repeatedly insisted are the lifeblood of properly restrained judging. To put the point more concretely, the role of the counterclerk was not to try to persuade the Justice that, say, originalism is an error or that his mode of textualist statutory interpretation was too wooden. It was, rather, to help assure that he was the best, truest, most straight-shooting originalist and textualist he could be.

It didn't always work. Through his writing—both on the Court and off—Justice Scalia emerged during the latter decades of the twentieth century as the leading intellectual figure of the originalist school of constitutional interpretation. Originalism (at least the version propounded by Justice Scalia) directs judges to interpret constitutional texts in accordance with their public meaning at the time of enactment.¹² As the Justice acknowledged, this is difficult work. It calls upon judges to consider "an enormous mass of material,"¹³ including the records of ratification debates and the writings of intelligent and informed people at the time of

12. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 38 (1997).

13. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 856 (1989).

ratification¹⁴ in an effort to “immers[e] oneself in the political and intellectual atmosphere of the time.”¹⁵ Difficult though it may be, the Justice insisted that originalism is the interpretive method most compatible “with the nature and purpose of a Constitution in a democratic system,”¹⁶ and best suited to avoiding “the main danger in judicial interpretation of the Constitution,” namely “that judges will mistake their own predilections for the law.”¹⁷

Justice Scalia once conceded that he was probably best described as a “faint-hearted originalist,”¹⁸ by which he meant that originalism might, in his view, appropriately give way to the principle of *stare decisis*, and that he might refuse to decide a case in accordance with original meaning if doing so would yield a result that was just too morally troubling to endorse.¹⁹ To many observers on the political left, however, the Justice’s failure to live up to his originalist ideals extended far beyond the circumstances suggested by his confession of faint-heartedness. Exhibit A in this critique is the Justice’s position on affirmative action. Seizing on the Justice’s opinions and votes in *City of Richmond v. J.A. Croson Co.*²⁰ and *Adarand Constructors, Inc. v. Peña*²¹—two cases involving the permissibility of race-based affirmative action in connection with the awarding of government contracts—many commentators writing in the 1990s and beyond took Justice Scalia to task for being an opportunistic adherent of originalist methodology.²² Those commentators pointed to a robust body of evidence indicating that, in the years following the Civil War and the ratification of the Reconstruction Amendments, Congress routinely enacted measures conferring benefits on

14. See SCALIA, *supra* note 12, at 38.

15. Scalia, *supra* note 13, at 856.

16. *Id.* at 862.

17. *Id.* at 863.

18. *Id.* at 864.

19. *Id.* at 861–62, 864. The example he used to illustrate the latter scenario was a statute imposing public flogging or branding as punishment for a crime. *Id.* at 861, 864. Decades later, the Justice repudiated this view and insisted that, even in the flogging case, he would vote in accordance with the Constitution’s original meaning. See Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013) <http://nymag.com/news/features/antonin-scalia-2013-10/> [<https://perma.cc/KB7R-9MSM>].

20. 488 U.S. 469 (1989).

21. 515 U.S. 200 (1995).

22. See, e.g., Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 391–92 (2000); Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 11 n.33 (1998); Jed Rubenfeld, *Affirmative Action*, 107 YALE L. J. 427, 429–31 (1997).

blacks as a group.²³ And they noted that none of the opinions authored or joined by Justice Scalia in *Croson* or *Adarand* makes a remotely serious effort to engage with the relevant historical record.

It was with particular interest, then, that I considered my role as a counterclerk in connection with two of the blockbuster cases on the docket during October Term 2002: *Grutter v. Bollinger*²⁴ and *Gratz v. Bollinger*.²⁵ Those cases involved equal protection challenges to the affirmative action policies employed by the University of Michigan in connection with law school (*Grutter*) and undergraduate (*Gratz*) admissions. I tended to agree with the views of the Justice's critics with respect to the invisibility of originalist analysis in *Croson* and *Adarand*. And it seemed to me that, if ever there was a time for a Scalia counterclerk to perform his unique duty, this was it.

If the Justice could show why the measures enacted by Reconstruction era Congresses were inapposite to the question of whether modern affirmative action policies are permissible under the Fourteenth Amendment, so be it. If there was evidence that courts were skeptical of Reconstruction era legislation that conferred benefits exclusively on blacks, fine. Or, if the Justice felt that his commitment to originalist constitutional interpretation ought to give way to other considerations, he could identify those considerations and explain his position. But if he could not do any of these things, it seemed to me, the Justice needed to be on the other side of these cases. And I told him so.

If my intervention was of any consequence, it is not reflected in the opinions in *Grutter* or *Gratz*. In the former case, Justice Scalia penned a brief dissenting opinion and joined the dissenting opinions authored by the Chief Justice and Justice Thomas; in the latter, he joined the Chief Justice's opinion for the Court. Not one of these opinions contains even a syllable of originalist argument.

Perhaps the Justice believed that the Court abandoned originalism in connection with race and equal protection in *Brown v. Board of Education*,

23. See, e.g., Rubinfeld, *supra* note 22, at 430–31; see also Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754–83 (1985) (providing a detailed account of Reconstruction era measures establishing programs “limited to blacks”); Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Law: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 547–65, 590 (examining state and federal laws enacted during the Reconstruction era and concluding that “there is no plausible originalist argument that the Constitution proscribes the federal government's power to enact benign color-conscious laws, such as affirmative action”) (1998).

24. 539 U.S. 306 (2003).

25. 539 U.S. 244 (2003).

and that there could be no turning back.²⁶ Perhaps the Justice thought that the race-conscious measures enacted by the Reconstruction Congress were distinguishable from the sorts of affirmative action policies that came before the Court during his tenure, and that the historical record therefore did not speak clearly to the questions at hand. We do not know. His opinions shed no light on the matter. To me, at least, this is gravely disappointing, and it gives the lie to those who regard the Justice as an unfailing champion of adjudicative rectitude.

I don't mean to intimate by any of this that the Justice was not a man of principle. I think he was. Nor do I mean to suggest that he was meaningfully worse along this dimension than many of his colleagues. I don't think that's true. What I think is that, as is true of many men and women of principle and of many other able and respectable jurists, Justice Scalia's instincts about what was right and what was wrong sometimes overwhelmed him and caused him to discard the principles that he applied honorably in many other contexts (including cases in which those principles commanded results he disfavored²⁷). And this happened, sometimes, when the stakes were very high.

The affirmative action cases presented a real opportunity for legal principle to strut its stuff. Imagine how strong a statement Justice Scalia would have made about the importance of the rule of law, and about the need to adhere to one's theory of constitutional interpretation even when one doesn't like the result, if he had published opinions saying that he thought affirmative action terribly misguided, yet still permissible in light of the original understanding of the Fourteenth Amendment. He chose not to make that statement, and our constitutional discourse is weaker for it.

THE UGLY

I noted earlier that one of the defining features of my experience as Justice Scalia's clerk was the warm, respectful manner in which he engaged me when we disagreed. All too often, however, when the Justice aired disagreements with his colleagues in print, that manner disappeared. The Justice's writing could be caustic and dismissive, and sometimes it was just plain nasty. The manner in which Justice Scalia chose to express himself

26. See, e.g., Jeremy Rabkin, *Grand Delusion?: Divining Constitutional Legitimacy from Legal Theory*, 1995 PUB. INT. L. REV. 157, 157-58 (reviewing EARL M. MALTZ, *RETHINKING CONSTITUTIONAL LAW: ORIGINALISM, INTERVENTIONISM, AND THE POLITICS OF JUDICIAL REVIEW* (1994)).

27. Everyone's favorite example (including the Justice's) is *Texas v. Johnson*, 491 U.S. 397 (1989) (overturning, on First Amendment grounds, a criminal conviction for burning the American flag).

publicly under conditions of sharp disagreement is dismaying, and it is a blot upon his legacy.

Through his opinions and other writings, Justice Scalia devoted a great deal of energy to lecturing his colleagues (and his many different audiences) on the proper role of judges in American society. The essence of these lectures is that the Constitution leaves much to the democratic process and that judges have no business stifling that process by reading their personal preferences into ambiguous or inapposite constitutional texts.²⁸ I am certain that all of Justice Scalia's colleagues agreed with this sentiment, and surely Justice Scalia knew it too.

Thus the point of these lectures was to insist that the competing views presented in these cases did not reflect legitimate disagreement among well-intentioned jurists over how to apply frustratingly delphic constitutional provisions to our most challenging socio-legal problems. It was to insist that Justice Scalia was committed to constitutional principle, while his adversaries indulged in lawless ideological hackery. These characterizations were often unfair, they were more than a little ironic (given examples like the affirmative action cases), and the entire posture and tone was uncivil. And while Justice Scalia is not the only Justice ever to rake his colleagues over the coals for this sort of thing, it cannot be denied that he was in a class of his own along this dimension.

And for what? Would I better understand the Rehnquist Court's sovereign immunity decisions if the dissenters had channeled Justice Scalia and criticized the majority for turning its back on constitutional text in the interest of preserving "freedoms and entitlements that this Court *really* likes"?²⁹ Would I feel better about *Bush v. Gore*³⁰ if the dissenting Justices had taken a page from the Scalia playbook and characterized the majority opinion as "the result-oriented expedient that it is,"³¹ or noted that it was an

28. Good examples can be found in *Lawrence v. Texas*, 539 U.S. 558, 602–04 (2003) (Scalia, J., dissenting), *United States v. Virginia*, 518 U.S. 515, 566–70 (1996) (Scalia, J., dissenting), *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting), and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1000–01 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

29. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2630 (Scalia, J., dissenting). Recall that in *Seminole Tribe of Florida v. Florida*, Justice Scalia signed onto an opinion that, in the course of holding that Congress may not abrogate state sovereign immunity when legislating pursuant to its powers under Article I of the Constitution, characterized the text of the United States Constitution as "a straw man." 517 U.S. 44, 69 (1996). This is the same man who once lamented that "[i]f you go into a constitutional law class, or study a constitutional law casebook, or read a brief filed in a constitutional law case, you will rarely find the discussion addressed to the text of the constitutional provision that is at issue." SCALIA, *supra* note 12, at 39.

30. 531 U.S. 98 (2000).

31. *Lawrence*, 539 U.S. at 592 (Scalia, J., dissenting).

act “not of judicial judgment, but of political will”?³² Would it improve the public discourse relating to *Roe v. Wade* if, say, Justice Ginsburg suggested—as Justice Scalia so often did about *Bush v. Gore*—that people ought to just “get over it”?³³

The fact is that the strident contemptuousness of so many of Justice Scalia’s dissenting opinions and public comments served no worthy purpose. It was just an angry man railing against a world that was changing around him in ways he found profoundly unsettling. Most disappointing, the Justice’s rhetoric taught a generation of law students precisely the opposite of what he taught me (through his words and his actions) during our year’s work together: that deep ideological disagreement can play out with civility—that you can think a person profoundly misguided and still treat him not just with respect, but with genuine warmth. It is a shame.

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Sometimes people ask me whether I felt bad about helping Justice Scalia advance his jurisprudential agenda. I usually explain that it was pretty easy for me to avoid deep immersion in the more ideologically charged cases on the Court’s docket. We (the clerks, that is) were free, so far as I can recall, to divide up the cases as we saw fit; and I routinely selected cases of relatively low political salience, happy to leave the juicy stuff to my co-clerks. This strategy had at least one important defect, from my perspective, and it manifested itself in cases in which the Justice was writing an opinion. In those cases, the Justice expected all four clerks—not just the one assigned to the case—to review his draft opinion and to offer comments and suggestions before the opinion was circulated to other members of the Court.³⁴ In those cases, I could not hide.

The Court decided *Lawrence v. Texas* that year, which raised the question of whether a Texas law criminalizing homosexual sodomy was

32. *Romer*, 517 U.S. at 653 (Scalia, J., dissenting). The closest one gets to this sort of thing in *Bush v. Gore* is Justice Stevens’s suggestion that the decision will shake “the Nation’s confidence in the judge as an impartial guardian of the rule of law.” 531 U.S. at 129. The passage is surely intended as a shot at the Justices in the majority, but read in context, it is equally clear that, on the surface, Justice Stevens is speculating that the public will follow the lead of the Supreme Court majority, which exhibited no confidence in the impartiality of the judges on the Florida Supreme Court.

33. See, e.g., CBS NEWS, *Justice Scalia on the Record*, <http://www.cbsnews.com/news/justice-scalia-on-the-record/> [<https://perma.cc/V4QG-QFXS>].

34. The lead clerk would work together with the Justice on generating that draft.

constitutional.³⁵ The majority said no and, predictably, in an opinion seething with bitterness and hostility, Justice Scalia dissented.

Even before I read the Justice's opinion, I knew I'd want no part of it. I didn't want to help hone the Justice's arguments or improve his prose. I didn't even want to point out a typo or a citation error. I remember wavering between two possible courses of action. One option was to fake it. I could read the draft (or not), claim to have found no warts and to have no suggestions, and just pass it along to the next guy. The other was to ask the Justice for permission to sit this one out. I chose the latter.

I do not remember exactly what the Justice said to me when I came to him with this request, but I remember that it went well. I remember that he communicated that he understood why I wanted to opt out and that he had no problem with it. And I remember that I made it through the rest of the clerkship without a shred of concern that the Justice bore ill feelings about the whole thing.

I think this is remarkable. After all, I knew what I was getting into when I signed on to clerk for the man.³⁶ And before taking the job, I didn't ask whether conscientious objection might be permitted every now and again. So it would've been entirely fair, I think, for the Justice to have responded to my request by demanding that I do the job he hired me to do. More pointedly, he might've taken offense at the fact that I had essentially told him that his position so disturbed me that I wished not to dirty my hands with it at all. He did neither of these things, and I think it speaks well of him.

The opinion still bothers me.

35. 539 U.S. at 564.

36. Indeed, when the Justice called to offer me the job, his exact words were: "So? You think you can clerk for me?" The implication was clear.