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THE JURISPRUDENCE OF JUSTICE ANTONIN SCALIA: A RESPONSE TO PROFESSOR BRUCE ALLEN MURPHY AND PROFESSOR JUSTIN DRIVER

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ABSTRACT

This is a book review of Professor Bruce Allen Murphy's recent biography of Justice Antonin Scalia entitled: **Scalia: A Court of One**. We show that Professor Murphy's account of events to which Professor Calabresi was, in part, a witness is wrong and, at times, almost appears to be tainted by anti-Catholicism. In addition, we are baffled by Professor Murphy's utter disregard for Justice Scalia's contributions to the field of legal interpretation and his misunderstanding of Supreme Court history. All in all, we believe Justice Scalia should be praised for his many accomplishments, contributions to the law, and impact on theories of textual interpretation.

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Justice Antonin Scalia was nominated by President Ronald Reagan to serve on the United States Supreme Court in 1986 following Chief Justice Warren Burger's decision to step down from the Court and the appointment of William Rehnquist to succeed Burger as Chief Justice. While Rehnquist was confirmed by a vote of 65 to 33, which featured the most votes against a nominee for Chief Justice in American history, Justice Scalia was confirmed by an astounding 98-0 majority of the United States Senate and has since served as an Associate Justice on the High Court for twenty eight years. Justice Scalia's textual originalism has had a profound impact on legal interpretation, as even his opponents would have to concede.

Professor Calabresi had the distinct honor and privilege of clerking for Justice Scalia during the 1987 term of the Supreme Court and thus had a chance to closely observe for one year Justice Scalia's decision-making process. In addition, Justice Scalia was a major source of assistance in the establishment of The Federalist Society, which Professor Calabresi co-founded in 1982. Professor Calabresi has known Justice Scalia well for more than thirty years, and the man described as being Justice Scalia in Bruce Allen Murphy's book bears no relationship to reality. Justice Scalia is a great man and is one of the finest jurists ever to sit on the Supreme Court. The Murphy book is an unfair depiction of a very great man.

Professor Bruce Allen Murphy's Scalia: A Court of One criticizes Justice Scalia's originalism, his religious beliefs, his ethical values, and his treatment of his colleagues on the Supreme Court. Professor Murphy seems to be unaware of the deep contribution that Justice Scalia has made to American constitutional law, statutory interpretation, and to legal theory. He seems to be driven by a partisan dislike for the outcomes that Justice Scalia's originalism produces, but rather than just expressing disagreement with Justice Scalia, Murphy engages in ad hominem attacks. These attacks quite wrongly call into question Justice Scalia's character, his judicial independence, and the role that Catholicism plays in his originalist interpretive methodology.

Professor Murphy accuses Justice Scalia of single-handedly politicizing the Supreme Court, citing several of Justice Scalia's dissenting opinions as the impetus for the Court's politicization. Professor Murphy blames Justice Scalia for "alienating" centrist justices like Sandra Day O'Connor, Anthony Kennedy, and David Souter, and he suggests that Justice Scalia drove those justices to the left. Throughout the book, Professor Murphy is highly critical of Justice Scalia's textualism, which he ties to the Justice's pre-Vatican II religious leanings, and this leads Murphy to completely disregard the profound impact that Scalia has had on the interpretation of legal texts in this country.

Professor Justin Driver has already written a powerful critique in The New Republic of Professor Murphy's book, almost all of which we agree with.[1] We applaud Professor Driver for acknowledging the contribution that Justice Scalia has made to American law, arguing that his theory of originalism in constitutional interpretation "transform[ed] what had been a fringe phenomenon into a central part of the nation's mainstream constitutional conversation."[2] Professor Driver cites Justice Elena Kagan, who disagrees with Justice Scalia on important constitutional issues, while nonetheless acknowledging his monumental contributions to legal interpretation.[3] Professor Driver concludes by condemning Professor Murphy's "objectionable," and to us offensive, claim that Justice Scalia's Catholicism is inseparable from the decisions that he makes as a Supreme Court Justice.[4] Murphy's argument[5] to this effect seeks to condemn Scalia's

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[1] Justin Driver, *How Scalia's Beliefs Completely Changed the Supreme Court: And therefore, the Country*, NEW REPUBLIC (Sept. 9, 2014), http://www.newrepublic.com/article/119360/scalia-court-one-reviewed-justin-driver.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

originalism by calling into question whether, as a member of the Supreme Court, Justice Scalia follows the U.S. Constitution or the doctrine of the Roman Catholic Church.

In this essay, we assess Professor Murphy's book. In Part I, we consider Professor Murphy's failure to recognize Justice Scalia's many impressive public accomplishments and his absurd attack on Scalia for allegedly being a partisan who is unethical. In Part II, we address Murphy's false charge that Justice Scalia has alienated all of his colleagues and has driven them to the left leaving only himself as a "Court of One." In Part III, we take issue with Professor Murphy's extraordinary claim that it is Justice Scalia who has politicized the U.S. Supreme Court. In Part IV, we rebut the absurd charge that Justice Scalia is improperly influenced by his Catholicism.

I. JUSTICE SCALIA'S INFLUENCE ON AMERICAN LAW

A central thesis of the Murphy book is the accusation that Justice Scalia is an isolated crank who fights with all his colleagues, is a rabid partisan, is an ethicist's nightmare, and has had little influence on American law. Every part of this indictment is untrue. Justice Scalia is, to the contrary, the most visible and influential teacher of American law to sit on the U.S. Supreme Court since Justice Joseph Story. He is the only Justice since Story to write a book about the techniques of legal interpretation, and he has travelled the United States and the Globe to spread his ideas. Scalia and Justice Clarence Thomas have made originalism in constitutional interpretation central to the work of the Supreme Court. For example, there is far more citation of legal history, dictionaries, the *Federalist Papers*, and other similar texts today than before Justice Scalia took office in 1986.

We will consider in order here Professor Murphy's interrelated claims that: 1) Scalia is an isolated crank, an only child who was spoiled and never learned to play with others, and we conclude that contrary to Murphy's claims, Scalia has had a huge and salutary influence on the Supreme Court, on his colleagues, and on American

legal culture generally; 2) that Justice Scalia is a rabid partisan; and 3) that Justice Scalia is an ethicist's nightmare.

1. JUSTICE SCALIA IS NOT AN ISOLATED CRANK: "A COURT OF ONE"

We will save for Part II the question of Justice Scalia's relationship with his colleagues on the Supreme Court since that is such a central claim in the Murphy book. We wish to focus here on the enormous influence Justice Scalia has had on American law outside the realm of the Supreme Court building in Washington, D.C. One might begin by noting Scalia's huge role in changing techniques of statutory interpretation. When Justice Scalia joined the Supreme Court, the Justices rarely looked at the text of the statutes the Court was called upon to interpret, preferring instead to focus on the legislative history.

Professor William Eskridge, the nation's leading authority on statutory interpretation, views Scalia's impact on this field as having been enormous. Professor Eskridge has told us that during the Warren Court era the Justices rarely looked at the statutory text and focused almost entirely on legislative history. Those days at the Supreme Court are now long gone as the direct result of Justice Scalia's twenty-eight-year crusade against the use of legislative history. All nine Justices on the current Supreme Court are textualists and formalists to some degree, although a few still occasionally consult legislative history. There has been a sea change in practice on this idea, Justice Scalia has single-handidly caused that sea change, and Professor Murphy never acknowledges it.

Moreover, it must be noted that Justice Scalia's highly successful campaign against the use of legislative history, with which we thoroughly agree, was entirely of his own making. Justice Scalia's originalism owes something to the writings and speeches of Judge Robert H. Bork and Attorney General Edwin Meese III, but the campaign against legislative history wholly originated with Scalia and had little purchase in the thought of either Judge Bork or of Attorney

General Edwin Meese III. To the contrary, both Judge Bork and General Meese themselves promoted original "intent" over the original "meaning of legal texts." Justice Scalia's originalism is much more formalistic and juridical than the idea of original "intent."

Today, especially after the publication of his book with Bryan A. Garner, *Reading Law: the Interpretation of Legal Texts*, Justice Scalia has become the leading academic in the country in the burgeoning field of statutory interpretation. This status is bolstered by the fact that Yale Professor Bill Eskridge is currently hard at work writing a counter-thesis on the benefits of examining legislative history when text is unclear. A leading scholar at Yale at the pinnacle of his career would not rush out to write a counter-thesis to a Justice's new book unless he felt it was urgent for him to do so. Professor Eskridge knows the power of Scalia's book, and he feels that it is important to respond to it, which suggests the impact Justice Scalia's ideas are actually having.

Justice Scalia has also revolutionized the field of Administrative law. His championship of the theory of the unitary executive, of the judicial unenforceability of the non-delegation doctrine, and of *Chevron* deference has led to a major shift in policy-making power away from unelected judges and towards politically-accountable regulatory agencies. Again, the change here from 1986 to 2014 is nothing less than astonishing and reflects Justice Scalia's pioneering role as the leading scholarly and judicial figure in Administrative Law today.

In *City of Arlington v. FCC*,[6] which concerns the important question of whether agencies are entitled to deference when interpreting their own jurisdiction or whether this impermissibly makes them a judge in their own case, Justice Scalia makes the case for deference.

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[6] City of Arlington v. FCC, 133 S.Ct. 1863 (2013).

Chief Justice John Roberts heatedly dissented, but Justice Scalia won the case, which ended up as the most important Administrative Law case since *Chevron.* Once again, it is Justice Scalia who has set the path of the law.

Justice Scalia has also played a huge role in the law of freedom of speech and of the press. Early in his tenure on the Supreme Court, Justice Scalia joined with Justices Brennan, Marshall, Blackmun, and Kennedy to produce blockbuster free speech rulings in the two Flag Burning Cases, which became cornerstones of the Supreme Court's jurisprudence in this area.[7] Strikingly, Scalia broke from his usual conservative allies—Rehnquist, White, Stevens, and O'Connor—on the First Amendment and flag-burning question to produce a free speech landmark.

Later Scalia decisions, such as the summary affirmance of Judge Frank Easterbrook's holding that an Indiana pornography law was unconstitutional in *American Booksellers v. Hudnut,*[8] were equally important and path-breaking. Finally, in *R.A.V. v. City of St. Paul*,[9] Justice Scalia led the Supreme Court in striking down a hate-speech ordinance on the ground that criminalizing hate speech alone, without imminent incitement to violence, was an unconstitutional violation of the First Amendment. In sum, Justice Scalia has led the Supreme Court in an important series of landmark cases greatly liberalizing the law of freedom of speech and of the press.

Justice Scalia has also played an outsized role in the law of Constitutional Criminal Procedure. As even Murphy acknowledges, Justice Scalia revolutionized our understanding of the Confrontation Clause as requiring a face-to-face encounter between the defendant and the accused, and he won enough votes to write most of what he

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[7] Texas v. Johnson, 491 U.S. 397 (1989); United States *v. Echman*, 496 U.S. 310 (1990).
[8] 771 F.2d 323 (7th Cir. 1985).
[9] 505 U.S. 377 (1992).

wanted in this area of Supreme Court case law. More recently, Justice Scalia allied with Justices Thomas, Ginsberg, Kagan, and Sotomayor to produce two pro-defendant rulings in Fourth Amendment cases, one involving the attaching of a GPS device to a defendant's car to track its movement and another involving the use of drug sniffing dogs in a warrantless search.

Justice Scalia has also revived the regulatory takings doctrine, single-handedly, in a 5–4 ruling in *Nollan v. California Coastal Commission*, in which he wrote the opinion of the Court.[10] Justice Scalia also wrote a lone dissent in, *Morrison v. Olsen,*[11] the key presidential-power case of the last twenty-five years—a dissent that played an important role in getting Congress to repeal the law, which had provided for independent special prosecutors to investigate high-level wrongdoing. [12] It is hard to get much more successful than that! Scalia's masterful and scholarly opinion in *District of Columbia v. Heller*[13] for the first time in American history, held that the Second Amendment right of the people to keep and bear arms was an individual right, and not a collective right of the state militias, thus allowing individuals to defend themselves by owning guns to protect against violent crime. This was yet another landmark opinion that fundamentally expanded liberty and constitutional rights.

It should also be noted here that Justice Scalia played, as Murphy sarcastically says, a key role in *Bush v. Gore*,[14] the seminal case which decided the 2000 presidential election. We have come to think that Justice Scalia's opinion in that case was a masterpiece produced in a very short period of time. It is important to note just some of the

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[10] 483 U.S. 825 (1987).
[11] 487 U.S. 654 (1988).
[12] *Cf. id*.
[13] 554 U.S. 570 (2008).
[14] 531 U.S. 98 (2000).

highly divisive, but perfectly constitutional outcomes that might have occurred had the Court not decided to step in to decide *Bush v. Gore:* 1) The Florida Legislature, which was controlled by the GOP could have voted in December 2000 to elect the Bush electors from Florida. A federal law does not allow for this, but that law is probably unconstitutional on enumerated powers grounds; 2) The issue could have led to a congressional deadlock in which the Democratic Senate might have claimed Gore had won the election while the Republican House might have said that Bush had won instead; or 3) The issue might not have been resolved at all by noon on January 20, 2001, at which point President Clinton's and Vice President Gore's terms would have ended. If so, the Republican Speaker of the House of Representatives, Dennis Hastert, would have become Acting President

On this third point, it bears noting that the presidential succession statute, which puts legislative officers in the line of succession to the presidency, is in our opinion unconstitutional[15] and it has never been tested in practice. The presidential succession clause allows Congress, by legislation, to specify which "officer" shall act as President in the event of a vacancy in both the Presidency and the Vice Presidency. Congress has by law specified that the Speaker of the House of Representatives and the President Pro Tempore of the Senate are second and third-in-line to the presidency after the Vice President.

The trick is that the Incompatibility Clause of Article I, Section 6 explicitly says that no member of Congress shall hold any "office" under the United States during his time as a member of Congress. As a result, Hastert would have had to resign his membership in the

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[15] Steven G. Calabresi, *The Political Question of Presidential Succession,* 48 STAN. L. REV. 155 (1995).

House of Representatives and as Speaker of the House of Representatives in order to become president, but then he would no longer have been an "officer" who was entitled to act as president in the event of a double vacancy. It is for this reason that James Madison argued in the 1790's, to no avail, that it was blat antly unconstitutional to put legislative officers in the line-of -succession to the presidency. The same problem would have prevented the President Pro Tempore of the Senate from succeeding to the presidency.

If the service of legislative officers as Acting Presidents was struck down, the presidency would have devolved on Treasury Secretary Larry Summers, since Secretary of State Madeline Albright was not born in the United States. To make matters worse, any Acting President like Larry Summers would be obligated under the Twenty-Fifth Amendment to nominate a Vice President to fill the vacancy in that office. That person, if confirmed by the Senate and the House, would then bounce the Acting President out of office and become President himself. Any of these developments would have been far more polarizing and constitutionally damaging than what the U.S. Supreme Court accomplished in *Bush v. Gore.* Justice Scalia's role in *Bush v. Gore* is not the role that Murphy tries to cast, i.e., that Scalia is a crazy old uncle locked up in the attic because he cannot get along with anyone. To the contrary, he played the role of a very responsible senior Justice responding to a grave national emergency.

Justice Scalia's masterful joint dissent in *Nat'l Fed'n Indep. Bus. v. Sebelius*[16] revolutionized the law of the Commerce and Necessary and Proper Clauses by confining them so they cannot be used to force people to engage in interstate commerce. This is an important holding in its own right, even though Chief Justice Roberts defected from

[16] 132 S.Ct. 2566 (2012).

the judicially restrained justices to uphold the mandate that individuals buy health insurance as being within the Taxing Power of Congress.

Justice Scalia's theory of originalism in constitutional interpretation thus has had a huge nationwide impact. Professor Driver is completely correct in acknowledging that Justice Scalia's originalist contributions to the Court have "transform[ed] what had been a fringe phenomenon into a central part of the nation's mainstream constitutional conversation."[17] Law Schools are now full of originalist scholars who teach and use Justice Scalia's methodology. One need only think of Professors Akhil Amar, Jack Balkin, and Bill Eskridge at Yale; Professors John Manning and Jack Goldsmith at Harvard; Professors Philip Hamburger and Tom Merrill at Columbia; Professor Michael McConnell at Stanford; Professor Will Baude at the University of Chicago; Professor Ernie Young at Duke; and Professor Steven Calabresi at Northwestern University School of Law, Brown University, and Yale Law School. Justice Scalia has more acolytes, by far, than any other Justice currently on the Supreme Court. His impact on the nation's law schools has been nothing short of immense!

This can be seen in the rapid growth of citations to original history and meaning, to dictionaries, and to the Federalist Papers in the briefs that are filed with the Supreme Court. Everyone is getting into the originalism game—including liberal jurists like former Justices David Souter and John Paul Stevens. Justice Scalia has single-handedly transformed American legal culture. Far from being a lone odd ball, he is, along with Justice Clarence Thomas, an intellectual leader of the Supreme Court.

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[17] Driver, *supra* note 1.

2. JUSTICE SCALIA IS NOT A RABID PARTISAN

After knowing Justice Scalia quite well for almost thirty-five years and having clerked for him during the 1997–1988 term of the Supreme Court, Professor Calabresi feels that he knows for a fact that Justice Scalia **NEVER** lets his political views affect the outcome of the cases he decides. When Justice Scalia was construing a bad statute that produced bad policy outcomes, he was fond of saying "garbage in, garbage out!" Justice Scalia simply did not then, and does not today, view it as being within his job description to rewrite statutes or constitutional language to produce good public policy outcomes. Justice Scalia interprets the law; he does not make it. He is even-handed and impartial and will vote for seedy defendants who are probably guilty in constitutional criminal rights cases if he think those defendants have a valid legal claim.

Professor Calabresi is quite certain, for example, that Justice Scalia had no sympathy at all for Gregory Lee Johnson, the individual who was prosecuted for burning an American flag in *Texas v. Johnson*.[18] Consider below the facts that gave rise to *Texas v. Johnson*:

> While the Republican National Convention was taking place in Dallas in 1984, respondent Johnson participated in a political demonstration dubbed the "Republican War Chest Tour." As explained in literature distributed by the demonstrators and in speeches made by them, the purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations. The demonstrators marched through the Dallas streets, chanting political slogans and stopping at several corporate locations to stage "die-ins" intended to dramatize the consequences of

[18] 491 U.S. 397 (1989).

> nuclear war. On several occasions they spray-painted the walls of buildings and overturned potted plants, but Johnson himself took no part in such activities. He did, however, accept an American flag handed to him by a fellow protestor who had taken it from a flagpole outside one of the targeted buildings.
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> The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted, "America, the red, white, and blue, we spit on you." After the demonstrators dispersed, a witness to the flag burning collected the flag's remains and buried them in his backyard. No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning . . . .
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> Of the approximately 100 demonstrators, Johnson alone was charged with a crime. The only criminal offense with which he was charged was the desecration of a venerated object in violation of Tex. Penal Code Ann. § 42.09(a)(3) (1989).[19]

Justice Scalia has no sympathy for people who go around saying "America the red, white, and blue, we spit on you" while burning American flags. Yet Justice Scalia decided this case exactly the way a judge ought to do by applying the First Amendment to the ordinance and facts at hand. When the law compelled him to rule for an unsavory hippy saying inflammatory things, he followed the law and not his policy preferences. This is exactly what a judge is supposed to do.

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[19] *Id.* at 399–400.

Justice Scalia has also followed the law to unpleasant conclusions when doing so benefitted the Democratic Party. He voted in dissent to uphold the delegation of sweeping impoundment powers to Democratic President Bill Clinton even though doing so went against the interests of a Republican Congress and a majority of six of his colleagues in *Clinton v. City of New York*.[20] In *City of Arlington v. FCC*,[21] Justice Scalia accorded broad *Chevron* deference to President Obama's executive branch agencies over the dissent of John Roberts, even though in doing this Scalia was greatly empowering Obama. And, in many free speech and criminal cases Scalia has sided with the ACLU rather than with Attorney General Ed Meese who helped appoint him. There is frankly nothing in the record that supports the claim that Scalia is a partisan justice.

Murphy points to Scalia's role in *Bush v. Gore*, the case that settled the 2000 presidential election as evidence of Scalia's partisanship. Nothing could be further from the truth. The events which led to *Bush v. Gore* make it plain as day that Al Gore's lawyers were trying to use the Florida State courts to steal an election they had narrowly lost.

Shortly after Election Day, Republican Secretary of State Katherine Harris certified George W. Bush as the winner of Florida's electoral votes. The Gore legal team then ultimately sued in the Florida Supreme Court to overturn the election result as certified by Katherine Harris. In a fit of judicial activism the left-dominated Florida Supreme Court ordered the recounting of paper ballots with loosened procedures as to what constituted a vote. In doing this, the Florida Supreme Court unconstitutionally changed State law after the presidential election had been held. It was only at that point, when Gore

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[20] 524 U.S. 417 (1998).
[21] 133 S.Ct. 1863 (2013).

had sued to get the state courts to invalidate the declaration of Florida's secretary of state that the Bush legal team felt it needed to challenge the Florida Supreme Court's ruling for Gore, which it did successfully in the federal courts. The Florida Supreme Court then entered an additional order directing three counties to count undervote paper ballots while allowing the use of radically inconsistent standards for counting the vote in each county with respect to dimpled chads, hanging chads, etc. At this point the U.S. Supreme Court quite properly stopped the vote counting and declared Bush the winner of Florida's electoral votes. This was an entirely reasonable construction of U.S. constitutional constraints of "one person, one vote" on Florida election law. It bears noting again that it was Al Gore and not George W. Bush who brought this final case to court in the first place.

Justice Scalia did nothing improper in this context at all. He simply applied *Baker v. Carr*,[22] a widely-celebrated Warren Court landmark that had paved the way for the rule of "one person, one vote" and the requirements of Article II of the Constitution to the Florida vote for presidential Electors. Since the election was for the highest office in our federal government it was appropriate, even essential, that it be decided by the U.S. Supreme Court and not the Florida Supreme Court. The U.S. Supreme Court simply reinstated Florida Secretary of State Katherine Harris's initial declaration that Bush had won Florida's electoral votes—a ruling that the Florida Supreme Court had quite implausibly cast to one side. As we mentioned above, the U.S. Supreme Court's intervention in *Bush v. Gore* saved the nation from three resolutions to the 2000 election fight, which would have been constitutional but very damaging to U.S. constitutional culture. It is far better that the U.S. Supreme Court heard *Bush v. Gore* and decided it on the merits the way the Court did.

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[22] 369 U.S. 186 (1962).

Justice Scalia's handling of *Bush v. Gore* was not partisan at all nor was it motivated, as Murphy says, by a desire to get George W. Bush into office so that Scalia could be appointed Chief Justice. Justice Scalia's decision to resolve judicially *Bush v. Gore* was not an effort at career advancement but rather reflected a cold-headed assessment of the terrible pickle the U.S. was in in November and December of the year 2000. Justice Scalia has never exhibited an interest in being Chief Justice, and he would hate the huge administrative, clerical burdens of that job. Such tasks are best reserved for clerical minds rather than for intellectual leaders like Justice Scalia.

There was no good way to settle the winner of a Florida election that was so close that the voting technology used simply was too primitive to determine the result. The election had to be decided by officials in tie-breakers roles like the Republican Secretary of State Katherine Harris, the Republican Florida State Legislature, the Democratic Senate of the United States, the Republican House of Representatives of the United States or the State or federal Supreme Courts. Given the importance of the issue to the rest of the country, the U.S. Supreme Court acted professionally and in a non-partisan way in stopping the recounts of votes in Florida counties using different standards for dimpled and hanging chads. Justice Scalia is not a partisan Republican, and he did not behave as one in *Bush v. Gore*.

It might be noted in this context that the tied presidential election of 1876 was resolved by the vote of a Supreme Court Justice on an otherwise evenly balanced commission that reviewed the evidence and declared Rutherford B. Hayes the winner. There is a long history of judges umpiring electoral disputes and the leading constitutional theorist of the modern era has called on judges to do exactly that.[23]

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[23] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

All that the Justices in the majority did in *Bush v. Gore* was follow John Hart Ely's theory of judicial review, which had been widely acclaimed by law professors in the two decades prior to *Bush v. Gore.*

3. JUSTICE SCALIA AND THE ETHICS LAWS AND RULES

Murphy complains bitterly and repeatedly that Justice Scalia's many public speeches, trips, and occasional appearances in public, for which he was being modestly compensated, if at all, compromise the integrity of the Supreme Court and were unethical. He seems to believe that Supreme Court Justices should live cloistered lives talking to no one other than their law clerks and spouses. It has never been the practice of U.S. Supreme Court Justices to behave this way, and it would be a very bad thing if they did so.

For the first one hundred years of American constitutional history, Supreme Court Justices were forced to ride circuit for many months, initially on horse-back, to get them outside the beltway (which had not yet been built) and so as to keep them in touch with the views of common people all over the United States. Justice Scalia's travels and speeches are not only unproblematic; they are in keeping with the best aspects of the circuit riding tradition that was for one hundred years required of all Supreme Court justices.[24] Murphy's complaint about Scalia's travel and speeches reveals his profound ignorance of Supreme Court history. Supreme Court Justices are not supposed to go off and spend the summer hiking in the White Mountains of New Hampshire amusing themselves. They ought to mix and mingle with a lot of other people so they can be sure they are not living in a bubble.

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[24] Steven G. Calabresi & David C. Presser *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386 (2006) (symposium issue).

Many Supreme Court Justices other than Justice Scalia have played a role as public intellectuals. Chief Justice John Marshall wrote a glowing biography of George Washington during his time on the bench that was designed to be and was helpful to the Federalist Party. Marshall's well known use of extensive anti-presidential-power dicta in *Marbury v. Madison*,[25] a case he concluded he lacked jurisdiction to hear and which he should have summarily dismissed, reveals Marshall as having been an openly partisan Justice—far more so than Justice Scalia. Justice Samuel Chase gave such ideologically charged jury instructions while riding circuit that he was impeached and acquitted of the charge of being a partisan Justice. Chief Justice Roger Taney and his fellow Justices in 1856 and 1857 engaged in correspondence with President-elect Buchanan, who urged them to write the *Dred Scott v. Sandford*[26] opinion as broadly as possible so as to resolve the slavery power issue once and for all time. They did so as good partisans and helped to trigger the Civil War. Felix Frankfurter engaged in *ex parte* conversations with U.S. Justice Department officials about *Brown v. Board of Education*[27]—a highly improper and partisan abuse of power. And, finally, Abe Fortas was forced to resign from the Supreme Court after it was revealed that he had committed financial improprieties.

It should be noted as well, here, that John Jay served simultaneously as Chief Justice of the United States and as an ambassador to King George III of Great Britain with whom he negotiated a very controversial treaty that many Americans hated. Oliver Ellsworth served simultaneously as Chief Justice and as an ambassador to France, a country whose Revolution many Americans were by then terrified

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[25] 369 U.S. 186 (1803).
[26] 60 U.S. (19 How.) 393 (1857).
[27] 347 U.S. 483 (1954).

of. John Marshall served simultaneously during the last month of John Adams's Administration as Chief Justice of the United States and as Secretary of State to the outgoing President John Adams. Chief Justice John Marshall presided over the very events involving the signing of judicial commissions by Secretary of State John Marshall that he was later to render a judicial opinion on in *Marbury v. Madison*. Robert Jackson served simultaneously as the lead prosecutor at the Nazi Nuremberg Trials and as an Associate Justice on the Supreme Court. And, most recently, Chief Justice Earl Warren served simultaneously as Chief Justice and as the head of a law enforcement commission—the Warren Commission—that investigated the assassination of President John F. Kennedy even though cases on that crime could easily have been appealed to the Supreme Court. Former Chief Justice William Rehnquist became a prolific author in his old age and wrote a book on the impeachment process. No one objected when Rehnquist was called to the Senate to Chair President Bill Clinton's impeachment trial, even though Rehnquist had foreshadowed in his book what he might do in presiding over the Senate.

We mention all of these examples of judicial extra-curricular activities not because we approve of them but to show how utterly absurd Murphy's insinuations of ethical impropriety on the part of Scalia really are. Unlike John Jay, Oliver Ellsworth, John Marshall, Robert Jackson, and Earl Warren, Justice Scalia has <u>never</u> sought or received an executive office to hold concurrent with his Supreme Court judgeship. Unlike Roger B. Taney or Felix Frankfurter, Justice Scalia has never conspired with a President-elect or the Solicitor General's office on how to decide the most important legal question of the day. Unlike Robert Jackson, Scalia has never tried to serve as a prosecutor and a judge at the same time. And, unlike Earl Warren, Justice Scalia has never run an executive branch law enforcement commission whose work could easily have come before the Supreme Court for its review. Justice Scalia's behavior is modest and constrained compared with that of his predecessors who Murphy for the most part never mentions.

Murphy points out that Justice Scalia earned some income as a result of his publishing and his visits to law schools, but this is hardly a scandal. Many, many Supreme Court justices have done exactly the same thing and have never been questioned for it. John Marshall hoped his five volume biography of George Washington would earn him some extra money, and it accomplished that goal while furthering the interests of the Federalist Party. Joseph Story undoubtedly hoped to earn money from publishing his greatly admired books, but no one has ever suggested that this is improper. Indeed, Justice Story has been admired for his book-writing and teaching of classes at Harvard Law School. Justices Ginsburg, Breyer, and Kennedy are frequently paid to speak at summer events in Europe and no one raises a question about this nor should they. All nine of the Justices periodically speak at American law schools and the popular response is to yawn, even though American law schools are all rabidly left wing and partisan. One Justice, Abe Fortas, did commit ethical improprieties for which he was forced to resign, but no other Justice, including Justice Scalia, has ever been in this situation. Murphy's book is full of insinuations and hot air about ethical improprieties, but there is no real meat to chew on. Two examples suffice to prove the point.

Murphy complains hypocritically about Justice Scalia's participation in some Federalist Society events including a separation-of-powers course he taught in Colorado. Professor Calabresi was present for Justice Scalia's entire talk at that separation-of-powers conference, and he performed brilliantly and amusingly, making the conference one of the best and most intellectually stimulating academic conferences he had ever been to. The conference was indistinguishable in subject matter from similar conferences he has attended at many of the nation's major law schools, but it was more intellectually rigorous because Justice Scalia has a much sharper mind and a better sense of humor than most law professors.

Murphy implies it was unethical for Scalia to speak to the Federalist Society, presumably because it is an audience of conservative and libertarian lawyers. Murphy would have no problem with Scalia

giving exactly the same talk at Harvard Law School where he would face an audience of progressive and socialist lawyers hostile to his ideas and uninterested in learning from him. In a recent survey, of campaign contributions of law professors at the top twenty law schools, Professor John McGinnis found that at almost all law schools over 90% of the contributions reported to the Federal Election Commission by law professors went to Democratic candidates and not to Republicans.[28] Murphy judges Scalia and other conservatives by an outrageous double standard. Speaking in Austria in the summer or at Harvard is OK, but speaking to the Federalist Society or organizations that are openly faith-based is not OK. This is a two-faced Orwellian ethics standard that cannot stand when it is exposed in the light of day.

Justice Scalia's books and speeches and law school courses have earned him at most a very small amount of money—certainly much less than he could earn if he retired from the Supreme Court and worked at a law firm. No one who knows Justice Scalia thinks that he is avaricious or is out looking to make a buck. To the contrary, Scalia is at home in the worlds of ideas, of debate, and of constitutional law. If Justice Scalia is not honest, then no one is.

Murphy also excoriates Justice Scalia for making off-the-bench remarks that suggest he pre-judges cases that may come before him and from which he ought to recuse himself. This, too, is a deeply problematic claim that misstates the traditional rules on recusal. Sir Edward Coke in *Dr. Bonham's Case* laid down a general rule that under the common law no man should be a judge in his own cause.[29] This was widely understood to mean at the Founding that judges had

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[28] John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L. J. 1167 (2005).

[29] (1610) 77 Eng. Rep. 638 (C.P.).

a legal obligation to recuse themselves when they had a financial interest in a case, but not otherwise. Following this rule, Chief Justice John Marshall did not recuse himself in *Marbury v. Madison* even though he as Secretary of State had signed William Marbury's commission to be a Justice of the Peace, and even though it was through the error of his brother, James, that Marbury's commission was lost and not delivered to him after John Marshall signed it. Marshall did, however, recuse himself in *Martin v. Hunter's Lessee*[30] because he had a direct financial interest in the property that was the subject of the dispute. Marshall's behavior makes it clear that recusal is typically most necessary when a judge has a financial interest in a case. Beyond that, there is also a duty to be impartial and judicious in the way one comports oneself—a duty that ought to have led Marshall to recuse himself in *Marbury v. Madison*. One must give equal justice unto the poor and the rich and to all parties. There is no reason at all to think that Justice Scalia has not done that.

Justice Scalia has never to our knowledge participated in ANY case or controversy as to which he has had a financial interest, and he is not, as we said above, an avaricious person. The Justice does have very strong views on the issues of the day, as do we, and he sometimes expresses himself expansively in colorful language, as do we. The American people benefit from Justice Scalia's candid discussions of the work of the Supreme Court, and there would be a severe problem if Scalia and other Justices could only speak at hard leftist law schools like Stanford and not at Federalist Society gatherings where a great diversity of viewpoints can be found.

Murphy's book is a vain and poorly written effort to prevent Justice Scalia from getting his views before the American people by forbidding him from speaking anywhere other than at a left-wing law

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[30] 14 U.S. 304 (1816).

school where he can be publically scolded for the alleged error of his ways. It is true that sometimes Justice Scalia's speeches lead him to express an opinion on an issue that might come before the Court, but that is perfectly fine. Justice Scalia is always willing to change his views in particular cases if the facts and the law warrant it, and, quite frankly, the American people already knew what Justice Scalia thought about the constitutionality of the use of the phrase "under God" in the Pledge of Allegiance, anyway, even before he said it. The man has twenty-eight years of published Supreme Court opinions under his belt and his views on the issues are very well known. Unless he pledges to decide a particular named case a certain way, Justice Scalia and his brethren ought to be largely free to speak their minds. If anything, the Justices live too cloistered a life and they do not get out and mix it up enough with ordinary people. Justice Scalia's colleagues ought in this respect to follow his example.

The complaints in the Murphy book about Justice Scalia's speeches are unwarranted, and they overlook one huge benefit of Justice Scalia's speeches and travel. Justice Scalia is not a monk confined to a marble monastery on Capitol Hill, but is instead a very friendly and extroverted person who loves to meet people all over the United States and the world. Through his speeches, Justice Scalia reaches out to millions of people and he humanizes the Supreme Court. Scalia's outreach is a good thing for the Court, just as Justice Joseph Story's outreach was a good thing for the Supreme Court in the early Nineteenth Century. Far from condemning Scalia for his speeches, Murphy ought to be praising him for them.

This leaves us to resolve only Murphy's angst over Justice Scalia's duck hunting trip with former Vice President Dick Cheney and several other individuals which happened to fall during a period of time when the Supreme Court was hearing a case concerning Cheney's office. The record indicates that Justice Scalia and Vice President Cheney were not together alone at any time on the trip and that they in fact had little contact with one another. They were also good friends of thirty years, having worked together in the Ford Administration, and knew each other quite well. The legal issue in the

case was for Justice Scalia an incredibly easy one since he had long taken a pro-executive branch view of similar matters. Justice Scalia had no financial interest in Cheney's case at all. Murphy's arguments for recusal here are trumped up and partisan and are totally lacking in merit. Judges and lawyers appear in social settings all the time with people with whom they cannot share information or talk about cases. It literally happens all the time. There was nothing amiss in Justice Scalia going hunting with the Vice President while not discussing a pending case. Lawyers and judges are completely used to being in such situations.

Finally, Murphy repeatedly insinuates that Justice Scalia tried as an Associate Justice to curry favor with George W. Bush to get himself appointed Chief Justice. Murphy even argues that this explains the way Scalia approached *Bush v. Gore*. With all due respect to Murphy, this is just not true. Justice Scalia loves his job and enjoys travelling, public speaking, and saying things that are controversial so as to make people think. As we said above, if he became Chief Justice, Scalia would have had to give all of that up, and he would have had to take on huge administrative chores which he would have hated doing. Scalia may or may not have mused about moving to the center chair, but Professor Calabresi knows him quite well enough to know that he did not campaign for it by coming out as he did in *Bush v. Gore* or by going on the hunting trip with Vice President Cheney.

In all his years of knowing Justice Scalia and talking with him, Professor Calabresi never once heard him express a desire to be Chief Justice. Professor Murphy does not know Justice Scalia at all nor does he know what makes him tick. Professor Calabresi, however, has known the Justice quite well since April 1982 and clerked for him for a year and frequently sees him at law clerk reunions and banquets. The fuss over the duck hunting trip is politically motivated and meritless because Scalia had little interest in becoming Chief Justice. Justice Scalia is an exceptionably honest and able public servant, and he has never engaged in the social-ladder-climbing that Murphy indicts him for.

II. JUSTICE SCALIA DID NOT ALIENATE THE OTHER JUSTICES ON THE SUPREME COURT

Another flagrant falsehood in the book, which must be mentioned up front, is its absurd claim that Justice Scalia "alienated" Justices Sandra Day, O'Connor, Anthony Kennedy, and David Souter, and that he "drove them to the left" with his strongly worded dissents and other judicial opinions. This claim is premised on the idea that Justices O'Connor, Kennedy, and Souter had no judicial philosophy or minds of their own and that they were simply pawns who were only reactive to Justice Scalia's philosophy and his ways of expressing himself. This is a slur on the centrist Justices, which has no foundation in fact. Those Justices did not move to the left on the High Court but were centrists and non-originalists when they were appointed to the Supreme Court long before they ever met Justice Scalia and heard his supposedly pre-Vatican II ideas.

Justice O'Connor was appointed to the Supreme Court because President Reagan had promised during his 1980 presidential campaign to appoint the first woman to the Court. We are not aware of *any* women jurists or lawyers who were in their early fifties in 1981 who were more conservative than Justice O'Connor and who President Reagan could have appointed instead of her. Given the tiny number of women who attended law school in the 1950's, it is very unlikely that any such conservative woman existed who had attended the nearly all male law schools of the 1950's. Justice O'Connor was hand-picked for her job by former Judge Ken Starr who served as Attorney General William French Smith's Councilor and Chief of Staff in the early 1980's.

Justice Scalia did not drive Justice O'Connor to the left. She was already there when President Reagan appointed her. The person to blame for the fiasco of the O'Connor appointment is not Justice Scalia but the people who appointed her.

A similar tale applies to the appointment of Justice Anthony Kennedy. Justice Kennedy, who is a libertarian, is a moderate liberal on the social issues and is a conservative on economic issues. He is also

a living-constitutionalist and not an originalist, although he cares about the constitutional text. Justice Kennedy was chosen after two prior Reagan nominees for his seat had been turned down by the Senate. Judge Robert H. Bork was denied confirmation after a nasty and bitter fight over what liberals in the Senate mistakenly thought was the swing seat on the Supreme Court. (They were wrong in this assumption because they were counting Justice O'Connor as a vote to overrule *Roe v. Wade* [31]—an assumption that turned out to be completely in error.) After Judge Bork's defeat, the Justice Department, led by conservative Attorney General Edwin Meese III, offered up a rule-of-law libertarian, former Harvard law professor Douglas Ginsburg as the second nominee. Ginsburg's nomination went down in flames after it was discovered that he had attended a party at Harvard Law School in which students and faculty were openly smoking marijuana to which he did not object. Education Secretary Bill Bennett and his key aide William Kristol led a crusade to get Ginsburg to withdraw his nomination because he was soft on marijuana. That campaign succeeded, paving the way for Justice Anthony Kennedy's appointment. Ironically, Bennett and Kristol would have more likely agreed with Ginsburg than they have with Kennedy. The Doug Ginsburg nomination failed because of Bill Bennett and Bill Kristol and not because of opposition from Senate Democrats.

We will never know how conservative or libertarian Doug Ginsburg would have been had he been confirmed to the Supreme Court, but it seems highly unlikely that he would have been totally a Scalia-style originalist, social conservative. Judge Ginsburg was a law-and-economics scholar with no training in legal formalism or textualism and his policy views were libertarian, which is to say he was a conservative on economic issues and a liberal on social issues. It is hard

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[31] 410 U.S. 113 (1973).

to imagine that Ginsburg and Justice Scalia would have seen eye-to-eye on everything, although Professor Calabresi's belief is that Ginsburg and Scalia would have agreed a lot more often than have Justice Kennedy and Justice Scalia.

The nomination of Justice Anthony Kennedy after the Bork and Ginsburg fiascos fell to liberal Republican Howard Baker—who was the White House Chief of Staff trying to stave off Ronald Reagan's threatened impeachment over Iran-Contra—and to his squishy White House Council, A. B. Culvahouse, because conservative Attorney General Edwin Meese had lost his control over the Supreme Court nomination process after the Bork and Ginsburg fiascos. Justice Kennedy's libertarianism on the Supreme Court was not a surprise. It was a key reason why Professor Tribe and the Democratic Senate at that time were willing to confirm him after denying confirmation to Judge Bork. They knew him fairly well, and they knew he would not be a reliable Scalia/Rehnquist ally. These 1987 predictions have been born out by Justice Kennedy's votes on the Supreme Court. Reagan went with Kennedy as his third nominee, and he got what Howard Baker wanted. Justice Kennedy was who he was long before he served on the Supreme Court with Justice Scalia. Justice Scalia did not drive Justice Kennedy away. Justice Kennedy was who he was long before he ever met Justice Scalia.

The next Supreme Court vacancy after the one filled by Justice Kennedy occurred during the administration of President George H.W. Bush. Bush's White House Chief of Staff, John Sununu; White Council, Boyden Gray; Bush's Attorney General, Dick Thornburg; Bush's Solicitor General, Ken Starr; and Bush's future Attorney General William Barr all came together to get Bush to make the fateful mistake of nominating David Souter to the Supreme Court.

Attorney General Thornburgh apparently never conducted an exhaustive review of the fifteen candidates as the Meese Justice Department had done. The Bush Administration had to come up with a nominee very quickly, and Bush's very powerful White House Chief of Staff John Sununu and liberal Republican Senator Warren Rudman (R-NH) pushed hard for the appointment of Judge David Souter

who was by then on the First Circuit. Liberals on Capitol Hill were at first wary of the Souter nomination, but Souter's college room-mate assured them, correctly, that Souter was another John Paul Stevens, as did liberal Republican Senator Warren Rudman who had repeatedly been a thorn in Ed Meese's side and from whom no-one in the Republican Party should have been taking any advice. It then emerged that Souter had served on the board of a hospital that performed abortions without voicing any objections to that practice. Souter gave very liberal answers to the questions asked of him by the Senate Judiciary Committee, and Senate Democrats joyfully voted to confirm him.

The point of all of this is that David Souter, like Sandra Day O'Connor and Anthony M. Kennedy, was not "driven to the left" by Justice Scalia's dissents and his ebullient, joyful personality. Souter, O'Connor, and Kennedy were ALWAYS well to the left of Justice Scalia, and this fact was widely known to many people at the time they were appointed. Blaming Justice Scalia for Justice O'Connor's, Kennedy's, and Souter's voting behavior is both unfair and contrary to the facts. It also suggest a profound lack of respect for the three centrist Justices by claiming that they would decide cases not according to the Constitution as they understood it but out of spite for a colleague. Murphy's claim here is as wrong as it is mean-spirited.

Justice Scalia's relationship with all his colleagues on the Supreme Court other than Justices O'Connor, Kennedy, and Souter go unmentioned in Murphy's book, but this topic is important in weighing the claim that Scalia is a one man wrecking-machine when it comes to interpersonal relations on the Supreme Court. To begin with, Justice Scalia and Justice O'Connor were good friends who often socialized together. Justice Scalia once described her to Professor Calabresi as the social glue that held the Supreme Court together. He has also said often that he misses her. The disagreements Scalia and O'Connor had on the Supreme Court never spilled over into their interpersonal relations.

When Professor Calabresi clerked for Justice Scalia in 1987–1988, Justice William J. Brennan was still on the Supreme Court where he was the Senior Associate Justice and the leader of the four more liberal Justices. Professor Calabresi was struck as a young law clerk by the very warm and friendly relationship between Justice Scalia and Justice Brennan. They clearly both admired and respected one another, and Justice Scalia thought that Justice Brennan was a pillar of the Court who helped, critically, in making it run and hold together. Justices Scalia and Brennan agreed on some criminal procedure and free speech issues, like the unconstitutionality of laws banning the burning of the American flag, and their relationship was unusually cordial at a time when Justice Brennan was arguably the most liberal Justice on the Court and Justice Scalia the most conservative. Murphy appears to be unaware of this friendship.

Justice Scalia also took huge pleasure in the appointment in 1990 of Justice Clarence Thomas to the Supreme Court. This appointment added a second originalist justice to the Court and a very congenial colleague for Justice Scalia. Justice Scalia told his former law clerks repeatedly how pleased he was about Justice Thomas joining the Court as a close methodological ally and friend. Murphy totally ignores the Scalia-Thomas friendship because it does not fit into his thesis that Scalia has created "a court of one." This is just plain wrong. Justice Scalia has often told Professor Calabresi how the presence of two originalists on a court of nine justices has led to the inclusion of a lot more evidence of original meaning and intent in briefs and oral arguments to the Court. While Justices Scalia and Thomas overwhelmingly agree, there have been some notable cases where they have diverged, which shows the integrity of the two justices and some slight differences in their methodological approach. Murphy's silence about the public alliance between these two friends is a startling omission in a book that claims Scalia's Supreme Court is "a court of one."

Another Justice with whom Justice Scalia has an extremely warm friendship is Justice Ruth Bader Ginsburg, the leading liberal on the current Supreme Court who was appointed by President Bill Clinton.

Scalia and Ginsburg became very good friends when they served together in the 1980's on the U.S. Court of Appeals for the D.C. Circuit. Scalia was thrilled when Ginsburg replaced Justice Byron White who sarcastically and nastily referred to Scalia as "the Professor" the year Professor Calabresi clerked, and he told all his former law clerks how much more fun his job became once she joined the Court. Scalia and Ginsburg and their spouses regularly celebrated New Year's Eve together as well as many trips to the opera. When Justice Ginsburg's husband was dying Scalia cut short a trip to Europe to return early to console his friend over the loss. Murphy's utter silence about the Scalia-Ginsburg friendship shows his total ignorance of the social dynamics on the Rehnquist and Roberts' Supreme Courts. The reader is left to wonder how much of Murphy's book is due to ignorance and how much of it is a just a deliberate hatchet job.

Another close Scalia friendship exists between Justice Scalia and Justice Elena Kagan, the Supreme Court's newest Justice and a close friend with whom he has gone duck hunting. Justice Scalia was euphoric when Justice Kagan, who is a good friend, replaced former Justice John Paul Stevens who had made it his mission in life to write opinions attacking Scalia. Justices Scalia and Kagan do differ on the big cases, but they are good friends and have occasionally allied with Justices Thomas, Ginsburg, and Sonia Sotomayor in important criminal procedure cases. Scalia also has an excellent relationship with Justice Sotomayor, who came to his daughter's wedding, which is more than her predecessor David Souter would ever have done.

Justice Scalia had a very close relationship with former Chief Justice William Rehnquist and was visibly distraught when the former Chief was dying. He also has an excellent relationship with Chief Justice John Roberts, notwithstanding Murphy's hyperbolic claims about how badly Scalia supposedly wanted to be appointed Chief Justice. As we said above, Justice Scalia would have hated the administrative work a Chief Justice has to do, and he has a very high regard for the new Chief. Justice Scalia has told his former law clerks that he almost always agrees with John Roberts and that, as a result, he is

very rarely able to assign opinions even though he is now the Supreme Court's Senior Associate Justice.

In summary, almost everything Murphy says about Justice Scalia's relationships with his colleagues reflects either ignorance or error of some form or another. Justice Scalia is an intensely social man, and he has many good friendships with his colleagues on the bench notwithstanding the strongly worded opinions that sometimes get produced. The idea that it is Justice Scalia who drove Justices O'Connor, Kennedy, and Souter to the left shows not only a lack of respect for Scalia but also a lack of respect for O'Connor, Kennedy, and Souter. Those Justices voted as they did, and as one of them continues to do, based on their own personal judicial philosophies, which were formed long before they met Justice Scalia. To claim that O'Connor, Kennedy, and Souter vote or voted to express spite for Justice Scalia is disrespectful to them as well as to Justice Scalia and is patently untrue.

III. THE HISTORY OF A POLITICIZED U.S. SUPREME COURT AND THE ORIGINALIST RESPONSE

Professor Justin Driver notes in his book review that Professor Murphy's book blames Justice Scalia's hotly-worded dissents and public speeches for "beg[inning] the process of politicizing the Court and for launching partisan warfare among the justices."[32] We applaud Professor Driver for pointing out the farcicality of Professor Murphy's claim, at least as it pertains to Supreme Court Justices giving public addresses. As Professor Driver points out, "in a well-known speech delivered one year before Scalia's confirmation, Justice Brennan made the case for living constitutionalism in a major public speech, and in the process he dismissed originalism as 'little

[32] *Cf.* Driver, *supra* note 1.

more than arrogance cloaked as humility.'"[33] Justice Thurgood Marshal also gave a major public speech at about this time justifiably criticizing, in blistering terms, the country's history of race discrimination, while Justice John Paul Stevens gave a public speech like Justice Brennan's criticizing originalism as propounded by Attorney General Edwin Meese. Thus, it is both silly and not true for Murphy to claim that Justice Scalia "single-handedly . . . changed the code of conduct for extrajudicial behavior by justices on the Supreme Court," and that his speeches "changed the conventional perception of the justices from lofty judicial figures to partisan political actors."[34]

Professor Murphy also blames several of Justice Scalia's passionate dissenting opinions for politicizing the Supreme Court. Contrary to Professor Murphy's belief, the Supreme Court has historically had many Justices who hold diametrically opposed views and who spar heatedly on very important issues before the Court. One need only read the dissenting opinions in *Dred Scott v. Sandford* to appreciate that this is the case. In fact, Justice Curtis was so angry at the majority after writing his dissent in *Dred Scott* that he resigned from his seat on the Supreme Court in protest! So much for the idea that Justice Scalia was the first Justice to write heated dissents on the High Court.

One of the Supreme Court's most famous Justices, Oliver Wendell Holmes, was frequently known as the Great Dissenter because of his many heated dissents, some of which eventually became the law as has, in effect, happened with Justice Scalia's *Morrison v. Olson* dissent. This led Justice Oliver Wendell Homes to claim that the nine Justices on the Supreme Court were the equivalent to "nine scorpions in a bottle." One need only remember Justice Holmes's dissents in

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[33] *Id.*
[34] *Cf. id.*

Lochner v. New York;[35] *Hammer v. Dagenhart;*[36] and *Abrams v. United States*[37] to appreciate the force of this point.

Ever since the days of the Early Republic, U.S. Supreme Court Justices have sparred heatedly on issues that they have disagreed on. Consider here Justice Joseph Story's strong dissents in *New York v. Miln*[38] or in the *Charles River Bridge*[39] case or John Marshall's partisan behavior in *Marbury v. Madison*.[40] For Professor Murphy to insinuate that for two hundred years prior to Justice Scalia's arrival that the Justices of the Supreme Court held hands and sang kumbaya is absolutely absurd! Perhaps Murphy has not read the heated dissents in such Warren and Burger Court classics as *Griswold v. Connecticut*[41] or *Roe v. Wade.*

The late Judge Robert H. Bork provides a masterful history of the Supreme Court's politicization in his best-selling book *The Tempting of America,* a book which everyone should read.[42] Judge Bork's book shows that politics and impassioned opinions began to play a role on the Court shortly after the Constitution's ratification.[43] In a separate opinion in the 1798 case of *Calder v. Bull*,[44] Justice Samuel Chase, who was influenced by his Federalist Party politics, declared it to be "political heresy" for the Court not to restrain state legislatures, unless

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[35] 198 U.S. 45 (1905).
[36] 247 U.S. 251 (1918).
[37] 250 U.S. 616 (1919).
[38] 36 U.S. 102 (1837).
[39] Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. 420 (1837).
[40] 369 U.S. 186 (1803).
[41] 381 U.S. 479 (1965).
[42] ROBERT H. BORK, THE TEMPTING OF AMERICA (1990).
[43] *Id*.
[44] 3 U.S. 386 (1798).

the Constitution explicitly placed limits on their power.[45] Justice James Iredell heatedly and pointedly disagreed, declaring that "[t]he ideas of natural justice are regulated by no fixed standard: the ablest and purest of men have differed on the subject."[46]

However, Justice Iredell's warning fell on deaf ears when the Marshall Court came to power in 1801. As important as Chief Justice John Marshall was in establishing the foundations of judicial review, federalism, and for interpreting the Commerce and Necessary and Proper Clauses, he too succumbed to politics and rank partisanship in reaching some of his decisions. The opinion in *Marbury v. Madison*[47] is full of highly partisan dicta, which was aimed squarely at the Jeffersonian Republicans in a case that Marshall lacked jurisdiction to hear![48] It could be argued Marshall's partisan performance in *Marbury* is itself an affront to the rule of law.

Perhaps no case during the 19th century was more politicized and carried greater political consequence than *Dred Scott*.[49] The Majority Opinion, which was written by Chief Justice Roger B. Taney, was highly politicized and blatantly racist. On the question of slavery, President James Buchannan had quite improperly asked Taney to issue an opinion that was so sweeping that it would resolve the question of slavery for good. Contrary to Buchannan's wishes, the *Dred Scott* opinion's political nature became instead a catalyst for the starting of the Civil War! In his opinion, Taney held that Congress could not regulate slavery in the territories as it had done in the Missouri

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[45] BORK, *supra* note 42, at 19-20.
[46] *Id*. at 20.
[47] 5 U.S. 137, 178 (1803).
[48] BORK, *supra* note 42, at 22-25.
[49] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

Compromise of 1820 and under the Northwest Ordinance of 1787. Taney's view completely disregarded the text of Article IV, §3, cl. 2 which explicitly says that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[50] In doing so, Taney held the core plank of the Republican Party's platform to be unconstitutional.

Still, Taney was not done torturing the text of the Constitution. He came to an even more disturbing conclusion that free African Americans could never be citizens of the United States because the Framers would have never "intended" that. Taney's denunciation of African American citizenship exhibited not what the Framers had intended, but rather a classic case of one psychologically projecting their own deep-seated beliefs onto someone else.! As Justice Benjamin Curtis wrote in dissent, even the Articles of Confederation conferred citizenship rights upon free African Americans under its Privileges and Immunities Clause and at the time of the Framing, five out of thirteen states allowed for African Americans to obtain citizenship and participate in the state ratification conventions which approved the U.S. Constitution.![51] The Privileges and Immunities Clause of the Articles of Confederation explicitly said that "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States;".[52] Free African Americans were citizens of the United States even before the U.S. Constitution was adopted, and the U.S. Constitution says in Article IV, Section 2 that all citizens

[50] U.S. CONST. art IV, § 3, cl. 2.
[51] *Dred Scott*, 60 U.S. at 564 (Curtis, J., dissenting).
[52] ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1.

of the United States were and are entitled to all the privileges and immunities of citizens in the several states. *Dred Scott* was quite simply wrong on the law, in every respect, as well as being a moral atrocity.

Following the ratification of the Fourteenth Amendment, the political bug once again bit the Supreme Court in the case of *Lochner v. New York*.[53] The case involved the constitutionality of a New York statute that placed maximum-hour laws for bakers. A baker sued claiming that his "liberty to contract" his labor had been violated by the state. He opined that the state law in question violated the clause of the Fourteenth Amendment which states that "[no] state [shall] deprive any person of life, liberty, or property, without due process of law."[54] The Majority of the Court, embracing politically conservative economic policies, struck down the law by employing substantive due process. In justifying the "liberty of contract" theory from what he saw as "a mere meddlesome interference," Justice Peckham rhetorically questioned: "[A]re we all . . . at the mercy of legislative majorities?"[55] "Yes," answers Judge Bork, "in cases where the Constitution is silent" the prerogative of state legislatures to act is the utilization of "representative democracy."[56] Professor Calabresi has argued elsewhere that a case can be made for the correctness of *Lochner* under the Privileges or Immunities Clause, but the Court did not make that argument in its opinion, and the opinion itself was openly political.

The New Deal era marked yet another moment in time at which the Supreme Court was highly politicized. It also featured four Justices who emphatically sparred with each other over their differing

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[53] 198 U.S. 45 (1905).
[54] U.S. CONST. amend. XIV, § 2.
[55] BORK, *supra* note 42, at 49.
[56] *Id.*

doctrines of constitutional interpretation.[57] In an era marked by a presidential court-packing scheme and substantial political pressure on the Supreme Court to expand the original understanding of the Commerce Clause,[58] the Supreme Court was the site of many internal battles among its members. In describing the interactions between Justices Felix Frankfurter, Hugo Black, Robert Jackson, and William O. Douglas, Noah Feldman writes the following:

> They began as close allies and friends of Franklin Delano Roosevelt, who appointed them to the Supreme Court in order to shape a new, liberal view of the Constitution that could live up to the challenges of economic depression and war. Within months, their alliance had fragmented. Friends became enemies. In competition and sometimes outright warfare, the men struggled with one another to define the Constitution and, through it, the idea of America.[59]

The four Justices constantly exchanged barbs over their differing judicial philosophies.

Justice Douglas exhibited his openly political style of judging in his opinion in the case of *Griswold v. Connecticut*.[60] In a forthcoming law review article, we criticize Justice Douglas's "connect-the-dots holism" of the First, Third, Fourth and Fifth Amendments to strike down a Connecticut statute that forbade the sale of contraceptives to

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[57] NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT, at xi-xii (2010).

[58] *Cf.* the Court's swift change in jurisprudence regarding the Commerce Clause from *United States v. Butler*, 297 U.S. 1 (1936) to *United States v. Darby*, 312 U.S. 100 (1941) and *Wickard v. Filburn*, 317 U.S. 111 (1942).

[59] FELDMAN, *supra* note 57, at xi.

[60] 381 U.S. 479 (1965).

married couples. [61] With the exception of his argument involving the Fourth Amendment, Justice Douglas's claims are "plainly motivated by values other than privacy" in his *Griswold* opinion.[62] While we believe laws that ban the sale of contraceptives to be "stupid and highly offensive," [63] Justice Douglas's arguments just do not hold water. Rather as Professor Calabresi writes in a forthcoming article, the purchase of contraceptives may be protected as a matter of Lockean natural rights, which create a presumption of liberty.[64]

The Warren Court's judicial activism generated such tirades of public hostility that bumper stickers saying "Impeach Earl Warren" began cropping up all over the country. Some of this partisan hatred of Warren was morally wrong because it reflected disagreement with Warren's entirely correct decision in *Brown v. Board of Education* and in the "one person, one vote" cases, but a lot of the anger at Warren was the result of his criminal procedure rulings, which always seemed to help criminals and hurt the police. It is more than a little misleading for Murphy to charge Scalia with politicizing the Supreme Court for the first time in its history after the escapades into judicial activism performed by the Warren Court!

The cases presented here show that the Supreme Court has had a long history of partisan and sometimes heated judicial opinion

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[61] Steven G. Calabresi & Justin Braga, *Judge Robert H. Bork and Professor Bruce Ackerman: An Essay on The Tempting of America*, 13 Ave Maria L. Rev. 45 (2015).

[62] *Id.*

[63] *Id.*

[64] Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Clauses,* 93 Tex. L. Rev. 1299. (2015).

writing. The Supreme Court "remains a fundamentally political institution" of "justices compet[ing] for influence."[65] Professor Murphy's charge that Justice Scalia uniquely "changed the conventional perception of the justices from lofty judicial figures to partisan political actors"[66] is simply preposterous, especially in the wake of the 1960's campaign to impeach Earl Warren.

IV. ROMAN CATHOLICISM AND THE U.S. SUPREME COURT

A major claim made by Professor Murphy is that Justice Scalia's decision-making as a Supreme Court Justice has been heavily and improperly influenced by his Roman Catholicism. However, Murphy distinguishes Justice Scalia's Catholicism from the doctrine of the Second Vatican Council, claiming that Justice Scalia embraces and applies in his judicial decisions the more conservative and traditionalist approach of the First Vatican Council.[67] This makes Murphy hostile to Justice Scalia for two reasons: first, because he is a Catholic; and second, because he is a pre-Vatican II Catholic.

Murphy discusses at length Justice Scalia's childhood in order to show that Justice Scalia's Italian immigrant parents raised him to be a Catholic who embraced a strict adherence to the text of the Scripture, along with several other Church traditions that were rejected by the Second Vatican Council.[68] Murphy goes on to trace pre-Vatican II influences on Justice Scalia during his youth prior to college and at Georgetown University where Scalia was an undergraduate. In light of Justice Scalia's jurisprudence, especially in cases involving the

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[65] DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS, at xiii (10th ed. 2014).

[66] Driver, *supra* note 1.

[67] BRUCE ALLEN MURPHY, SCALIA: A COURT OF ONE 366 (2014).

[68] *Id.* at 14.

death penalty, the use of which the Pope and the Vatican has condemned, Murphy goes out on a limb to assert that Justice Scalia is incapable of separating his devout Catholicism from his jurisprudence. For Murphy, Justice Scalia's originalism is a disguise for his apparent evangelization of Roman Catholicism from the bench:

> Indeed for Scalia, there were strong similarities between the literal reading of biblical text and the use of historical sources to interpret Scripture in the pre-Vatican II Catholic faith, and the historically based dictionary technique for interpreting the Constitution in his originalist/textualist legal philosophy. Both religious leaders and originalist judges reveal the meaning of these sources while adopting a similar authoritarian relationship to the parishioners and lawyers before them, wrapped in their own sense of certainty.[69]

Because of his disagreement with some of the judicial outcomes Justice Scalia reaches, Murphy calls into question Justice Scalia's independence as an impartial interpreter of laws, claiming that he "will continue to use his originalism and textualism decision-making theories, his traditionalism *as dictated by his religious beliefs*, and his partisan conservatism."[70]

Murphy's condemnation of Justice Scalia's "conservatism" and his stunning and religiously biased conclusion that Justice Scalia's judicial philosophy is improperly influenced by the Justice's religious beliefs leads Murphy to denounce Justice Scalia for being both "conservative" *and* a Roman Catholic—a biased snipe similar to that which was used to scare American voters in 1960 into believing that if John F. Kennedy, as a Roman Catholic, was elected President that

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[69] *Id*. at 366.
[70] *Id*. at 493.

he might place his loyalty to the Vatican ahead of his constitutional obligations in serving as President of the United States.

Article VI, Clause 3 of the U.S. Constitution anticipates the attacks of people like Professor Murphy. It says in its entirety:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Murphy would unconstitutionally impose a "religious Test" as a Qualification for serving as a Justice on the U.S. Supreme Court. He would exclude pre-Vatican II Catholics from ever serving as Article III federal judges. Murphy's religious qualification for holding office is not only immoral, but it is also unconstitutional.

Unfortunately, the attack that Professor Murphy uses against Scalia's Catholicism is not an anomaly in contemporary critiques of conservatism on the High Court. In fact, Professor Murphy is only one of several left-wing writers who have criticized the jurisprudence of the so-called conservative Justices on the U.S. Supreme Court because of their Catholicism.[71] Recent decisions involving contraception and abortion, such as *Burwell v. Hobby Lobby Stores, Inc.*[72] and

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[71] For multiple examples of this, *see* David Marcus, *It's Open Season on Catholics*, THE FEDERALIST (July 3, 2014), http://thefederalist.com/2014/07/03/its-open-season-on-catholics/.

[72] 134 S. Ct. 2751 (2014).

McCullen v. Coakley,[73] have led some on the left to be especially hostile towards the Catholics on the Supreme Court whose jurisprudence doesn't align with their political views.

In a recent Huffington Post article titled *The Uncomfortable Question: Should We Have Six Catholic Justices on the Supreme Court?*, Ronald A. Lindsay drums up the same sort of bias against the Catholic Justices currently serving on the Supreme Court as that which was once used against American Catholics to question in general their ability to separate church and state.[74] Lindsay's piece is nothing more than vehement disagreement with the five Justices who voted in the majority in the *Burwell* case, which struck down the mandate that required privately held corporations to provide health insurance that covered certain types of contraception. As if the title of the article is not disturbing enough, Lindsay goes on to assert that:

> *Unfortunately, a majority of the Supreme Court may now be resurrecting concerns about the compatibility between being a Catholic and being a good citizen, or at least between being a good Catholic and an impartial judge.* In accepting the Catholic Church's extremely expansive understanding of what constitutes a burden on someone's religious beliefs, while simultaneously being dismissive of concerns that would be raised by minority religions, the Court majority is effectively undermining confidence in Catholic judges and forcing us to ask the uncomfortable question: Is it appropriate to have six Catholic justices on the Supreme Court?[75]

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[73] 134 S. Ct. 2518 (2014).

[74] Ronald A. Lindsey, *The Uncomfortable Question: Should We Have Six Catholic Justices on the Supreme Court*, THE HUFFINGTON POST (June 30, 2014), http://www.huffingtonpost.com/ronald-a-lindsay/supreme-court-catholic-justices_b_5545055.html.

[75] *Id.* (emphasis added).

We find this sort of religious bias to be very objectionable and unconstitutional on equal protection as well as religious freedom grounds.[76] It is especially puzzling given the fact that Justice Sonia Sotomayor, who is also a Catholic, dissented in *Burwell*. The differences in jurisprudence between Justice Sotomayor and Justice Scalia alone show that Catholic justices are not hamstrung to one ideology, and to insinuate the contrary is to drag us back to a time when American Catholics were discriminated against because of their religious beliefs.[77] The Catholic Justices on the Supreme Court have diverged from the Vatican on gay marriage (Anthony Kennedy and Sonia Sotomayor) and on capital punishment (Antonin Scalia and Clarence Thomas). The notion that the six Catholic Justices on the current U.S. Supreme Court vote in lockstep with the Pope is as absurd as it is a violation of the equal protection and religious liberty clauses.

One principle assault on Justice Scalia's Catholicism illustrates Murphy's profound ignorance and his penchant for what almost seem to be *ad hominem* attacks. Murphy repeatedly asserts that Justice Scalia's textualism, formalism, and use of dictionaries in constitutional interpretation reflects his pre-Vatican II Catholic leanings. This claim is patently false and reveals Murphy's shocking ignorance when it comes to understanding the difference between Catholics and Protestants. A core belief of Catholics is an acceptance of hierarchy in the Church in which the Pope, as the successor of St. Peter as Bishop of Rome, is supreme over the cardinals, bishops, priests, and

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[76] Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 1087 (2013).

[77] To some on the left, Catholic justices who are liberal are more tolerable than those who are conservative, despite the fact that the liberal opposition to the death penalty coincides with Roman Catholic teaching just as conservative opposition to abortion does. For an example of this double standard, *see* Frances Kissling, *Are six Catholics too many for the Supreme Court?*, SALON (May 31, 2009), http://www.salon.com/2009/05/31/supreme_court_9/.

laity of the Catholic Church. Pre-Vatican II Catholics were not textualists, they were followers of the Pope and the long and elaborate traditions built up by past Popes and by the Vatican over the last 2,000 years. For this reason, early American Protestant bigots called Catholic's "Papists" and claimed the Roman Catholic Church wanted to establish "Popery" and idolatry around the world.

A belief in the primacy of the Biblical text was, however, associated with American Protestants, including the Congregationalists who founded the Massachusetts Bay and New Haven, Connecticut colonies. Protestants in the Seventeenth Century disagreed with Catholics in that they thought that the Bible should be translated into English, that it should be read by all believers, and that as Rhode Island Protestants came to believe there should be a priesthood of all believers such that any one person's reading of the Bible was just as good as any others. The Protestant belief in Biblical textualism over Catholic Church traditionalism was captured in the phrase *Sola Scriptura* – only scripture – by which was meant the supremacy of each believer's personal reading of the Bible over the traditions of the church.

Anyone who reflects on the matter for even ten seconds will immediately recognize that Justice Scalia's *sola scriptura* approach to constitutional law reflects a Protestant rather than a Catholic approach to the law. In claiming otherwise, Murphy reveals his own ignorance about the topic he is writing on as well as his anti-Catholic bias.

The assault on the faith of the six Catholic Justices on the current Supreme Court requires that we briefly discuss the long history of discrimination against Roman Catholics in the United States, a country which was largely founded by Protestants. There are very disturbing parallels between the anti-Catholicism of those who questioned John F. Kennedy's ability to serve as President and the anti-Catholicism accusation, which is made by the Catholic Justices on the U.S. Supreme Court in recent years. The recent attacks on the Supreme Court's Catholics have caused some to question whether this

sort of bias is the "last acceptable prejudice."[78] Murphy's anti-Catholicism almost has a kind of paranoid quality to it since it is so unfounded in the facts. His paranoia about the Catholic justices calls to mind the paranoia of Senator Joe McCarthy about the alleged presence of communists in the State Department in the 1950's.

Roman Catholics are just one of many groups which have experienced discrimination over the course of American history. Discrimination against and public suspicion of Catholic politicians ebbed after the election of John F. Kennedy in 1960, but the accusations made by Professor Murphy about Justice Scalia show that there is still a living suspicion of Catholic jurists. John Tracy Ellis published a famous book entitled *American Catholicism* that delineates the history of Roman Catholics living in the United States.[79] Ellis traces bigotry towards Roman Catholics all the way back to the founding of the colony at Jamestown in 1607.[80] Throughout much of English colonial history in North America, colonial governments were openly hostile towards Roman Catholics, who they denounced for being "Papists" and who they feared would promote "Popery."

Despite the theological differences between the Anglican Episcopalians, who controlled the Virginia colony, and the Puritans who controlled the Massachusetts Bay colony, there was a shared suspicion of the Vatican's influence in English Colonial America.[81] In March 1642, Virginia passed an anti-Catholic statute, and Massachusetts Bay followed suit five years later.[82] Ironically, the very Puritans in Massachusetts Bay who had fled England to escape persecution by

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[78] James Martin, S.J., *The Last Acceptable Prejudice?*, AM. (Mar. 25, 2000), http://americamagazine.org/issue/281/article/last-acceptable-prejudice.

[79] JOHN TRACY ELLIS, AMERICAN CATHOLICISM (2d. ed. 1969).

[80] *Id.* at 19.

[81] *Id.*

[82] *Id.* at 19-20.

the Church of England, found themselves passing laws that persecuted those who belonged to the Church of Rome.[83] Much of this anti-Catholic bias in colonial law derived from the English penal laws against the Catholics of Ireland, a system so vile that Edmund Burke claimed to have "abhorred it."[84] However, American anti-Catholic sentiment was not exclusive to Virginia and Massachusetts. As Catholics began to settle along the Atlantic seaboard, anti-Catholic sentiment became prevalent in all of the thirteen colonies, despite the very small numbers of Catholics who lived in the colonies at that time.[85]

By the time of the Framing of the U.S. Constitution, Catholics had made some gains in terms of their treatment and standing in the United States. During the American Revolution, some Catholics joined the Continental Army and participated in the struggle for independence from Great Britain.[86] The efforts of Catholics during the war, in conjunction with the U.S. alliance with Catholic France and the complexity of America's religious composition led to a relaxation of discriminatory laws against Catholics.[87] Much of this stemmed from the Enlightenment ideal of religious toleration in law and was embraced by the Framers of the Constitution.

After the Revolutionary War several states passed laws supporting religious freedom.[88] For Catholics, the apex of religious freedom in the 18th century United States came with the ratification of the First

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[83] *Id.* at 21-22.

[84] *Id.* at 20-21; *see generally* 4 EDMUND BURKE, *Letter to Sir Hercules*, *in* THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 305 (7th ed. 1881) (Per footnote 257 of AMERICAN CATHOLICISM, the origin of Burke's commentary is traced back to the Letter to Sir Hercules).

[85] ELLIS, *supra* note 79, at 19, 21.

[86] *Id.* at 37.

[87] *Id.* at 37-38.

[88] *Id.* at 38.

Amendment, which guaranteed religious freedom.[89] Despite these gains in legal treatment, Catholics were represented only in a small way at the Philadelphia Convention. Of the fifty-five delegates who gathered in Philadelphia in 1787, only two were Catholics.[90] Although Catholics had made gains under the law with guarantees of religious freedom, they would still have to combat prejudice throughout the 19th and 20th centuries that would always cast suspicion over their allegiance to the Church of Rome.

One of the many religiously biased arguments that were made in support of the disenfranchisement of American Catholics was the claim that their adherence to the Church hierarchy was incompatible with the American system of republicanism and of representative democracy. Alexis de Tocqueville said that when he came to the United States in 1831, he encountered an environment in which it was "erroneously [assumed that] regarded [Catholicism was] the natural enemy of democracy."[91]

By 1850, Catholics had become the single largest religious denomination in the United States.[92] Despite this, Catholics still endured years of religious persecution during the antebellum period. The pairing of nativism and opposition to Catholicism helped to give rise to the so-called Know-Nothing Party in 1854.[93] The crux of the Know-Nothing Party platform was suspicion of any person who immigrated to the United States, especially those whose beliefs were contrary to the American Protestant tradition.[94] After the Civil War, Catholics found themselves wrestling with bigoted groups such as

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[89] *Id.*

[90] *Id.*

[91] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 281 (Henry Reeve trans., Law Book Exchange Ltd. 2003) (1835).

[92] Martin, *supra* note 78.

[93] *Id.*

[94] *Id.*

the Ku Klux Klan and the American Protective Association, who sought to make life difficult for Catholics living in the United States and who circulated sentiment that was staunchly anti-Catholic.[95] The Democratic Party at this time was called the party of "Rum, Romaism, and Rebellion" because the Democrats opposition to Prohibition, the party's Catholic voting base, and the Party's support for the South during the Civil War.

Such sentiment eventually drove Congress to pass multiple immigration laws in the early twentieth century that were very restrictive of immigration. The most restrictive of these laws was the Johnson-Reed Act of 1924,[96] which imposed immigration quotas targeted at stemming the tide of Eastern and Southern European immigrants, many of whom were Catholic or Jewish.[97]

The Presidential Election of 1928 marked a milestone for American Catholics. New York Governor Al Smith became the first Roman Catholic to be nominated by a major political party for President of the United States. While Smith's nomination was a milestone for American Catholics, it led to the expression of vehement anti-Catholic sentiment.[98] While Smith was soundly defeated by Herbert Hoover, there was a stark electoral divide between nativists who were more likely to ally themselves with Hoover and the new wave of immigrants living in urban areas who were more likely to vote for Smith.[99]

John F. Kennedy was presented with an opportunity to overcome anti-Catholic suspicion when he was nominated for President

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[95] *Id*.

[96] Immigration Act of 1924, Pub. L. No. 68-139 (1924), *repealed by* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

[97] *Id*.

[98] Martin, *supra* note 78.

[99] SAMUEL LUBELL, THE FUTURE OF AMERICAN POLITICS 28-57 (1952).

of the United States by the Democratic Party in 1960. Kennedy faced the same paranoid fears of "Popery" as had Al Smith, but he was much more aggressive in swatting those claims down than Al Smith had been. Kennedy ambitiously engaged with many of his skeptics in the Protestant ministerial community, and he strongly reaffirmed the importance of the separation of church and state.[100] When Kennedy spoke to the Houston Ministerial Association in 1960, he was greeted with the same anti-Popery rhetoric that other Catholic candidates had faced.[101] Unlike prior Catholics who ran for office, however, Kennedy was quite obviously a secular candidate, who had been educated at Choate and Harvard and who had been assimilated into American culture.[102] Thus, Kennedy was able to overcome the anti-Catholic prejudice that helped sink Al Smith in 1928.[103] Kennedy's narrow victory over Republican Richard Nixon in the 1960 Presidential Election effectively squashed public hysteria over papal infiltration in American public affairs as a result of there being a Catholic in the White House.[104] As Charles R. Morris claims, "the question of whether Catholics could be full participants in American society was forever laid to rest."[105]

Morris's contention that "the question of whether Catholics could be full participants in American society was forever laid to rest"[106] after Kennedy's election is true in that anti-Popery hysteria disappeared as political rhetoric after the 1960 presidential election. But, while we agree with Morris that Kennedy's election resulted in

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[100] CHARLES R. MORRIS, AMERICAN CATHOLIC: THE SAINTS AND SINNERS WHO BUILT AMERICA'S MOST POWERFUL CHURCH 281 (1997).

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* at 280.

[105] *Id.* at 280.

[106] *Id.* at 280.

remarkable strides for Catholics in American politics, Professor Murphy's book suggests that anti-Catholic bias in the United States is still alive and well even though discrimination on the basis of religion is a violation of the Equal Protection Clause.[107] Murphy never acknowledges in *Scalia: A Court of One* the long history of discrimination that Catholics have faced in the United States. Professor Murphy's anti-Catholic rhetoric about Justice Scalia's jurisprudence puts him in the same company as those who used Catholicism as a political sword against Al Smith and John F. Kennedy.

While Professor Murphy limits his witch-hunt to Catholic judicial candidates who also happen to be conservatives, he fails to acknowledge that his grand inquisition of Catholics has been used against liberal judges as well. As biographer Hunter R. Clark writes, Justice William Brennan faced a Murphy-style inquisition over his Catholicism during the era of McCarthyism.[108] In 1957, Justice Brennan was called before the Senate Judiciary Committee to "explain and defend his Catholicism" even though "[t]here was no reason to suspect that Brennan's religious conviction would unduly influence his decision making on the Court."[109] The questioning of Justice Brennan by Senator Joseph O' Mahoney (D-Wyoming), a Catholic himself, contained statements made to Brennan similar to those employed by Professor Murphy against Justice Scalia:

> You are bound by your religion to follow the pronouncements of the Pope on all matters of faith and morals. There may be some controversies which involve matters of faith and morals and also matters of law and justice . . . . If you should be faced with such a mixed issue, would you be able

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[107] *See* Locke v. Davey, 540 U.S. 712, 726 (2004) (Scalia J., dissenting).
[108] HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 109-112 (1995).
[109] *Id.* at 109.

> to follow the requirements of your oath or would you be bound by your religious obligations?[110]

Senator O' Mahoney's questioning calls to mind Professor Murphy's assertion that Justice Scalia's Catholicism improperly influences his decision making in cases involving "faith and morals."

While Professor Justin Driver is quite correct in his book review to criticize Professor Murphy for using Justice Scalia's Catholicism against him, he is silent on the merits of Murphy's argument that there are similarities between "the use of historical sources to interpret Scripture in the pre-Vatican II Catholic faith, and the historically based dictionary technique for interpreting the Constitution in [Scalia's]originalist/textualist legal philosophy."[111] Professor Murphy's statement is merely conjecture and contradicts the historical record. In fact, there are stark differences between the ideals embraced by the Framers in 1787 and the "pre-Vatican II" doctrine of Roman Catholic Church, particularly concerning issues of sovereignty, religious liberty, and interpretation. Professor Murphy can't have it both ways. He can't criticize Justice Scalia for chaining himself to the original public meaning of constitutional provisions that contradict "pre Vatican II" Church teachings and then turn around and claim that Scalia's jurisprudence runs wild and employs those same "pre Vatican II" Church teachings!

As Professor Calabresi and Sofia Vickery have shown in a forthcoming law review article, the Enlightenment had an enormous impact on the Founding Era and on the Framers of the U.S. Constitution.[112] While the Catholic Church went through its own Enlightenment during the 18th century, it had difficulty severing its ties with

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[110] *Id.* at 110.
[111] MURPHY, *supra* note 67, at 366.
[112] Calabresi, *supra* note 64.

the strict religious orthodoxy that had been established by the Council of Trent in 1563.[113] Thus, the Enlightenment was a movement led by Protestants and Deists. Enlightenment philosophers even sought to alter Reformation Protestantism, thereby further individualizing one's relationship with God and making theology compatible with man's ability to reason.[114] By the end of the 17th century, many in Europe had grown war-weary from conflicts such as the English Civil War, the Thirty Years War in Germany, and the expulsion of the Huguenots from France.[115] All of these religious wars caused great harm to many Europeans.[116] As a result, Europeans began to embrace religious toleration in the 17th and 18th centuries.[117]

After William & Mary came to the throne in England, the Toleration Act was passed in 1689, granting religious liberty to "all the Protestant confessions."[118] By the end of the century, John Locke was well on his way to declaring that "Christianity conformed to the requirements of man's reason."[119] In the minds of Enlightenment thinkers, the Protestantism that spawned from the Reformation of the 16th century had inadequately rid itself of all "remnants of the Papacy."[120] By the end of the 18th century, the idea of religious liberty had greatly expanded, as is shown by Virginia's 1786 Statute on Religious Freedom written by Thomas Jefferson and the First

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[113] ULRICH IM HOF, THE ENLIGHTENMENT 174-175 (William E. Yuill trans., Oxford: Basil Blackwell 1994).

[114] *Id.* at 169.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*; *cf.* JOHN LOCKE, *REASONABLENESS OF CHRISTIANITY, AS DELIVERED IN THE SCRIPTURES* (John Higgins-Biddle ed., Oxford: Clarendon 1999) (1695).

[120] HOF, *supra* note 113, at 169.

Amendment to the Constitution written by James Madison. The Enlightenment thinkers did not perceive the Catholic Church to be a supporter of these new radical notions of religious toleration. Philosophers like Voltaire heavily criticized the Church, as a hierarchical organization that opposed religious toleration and the Lockean idea that "Christianity conformed to the requirements of man's reason."[121]

The bedrock Enlightenment principles of toleration, liberty, natural equality, and individual reasoning were embedded in the perceptions regarding sovereignty and natural rights at the time of the Framing. This was evident in the Declaration of Independence, which stated that:

> We hold these truths to be self-evident, that *all men are created equal*, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, *Governments are instituted among Men*, deriving their just powers from the consent of the governed.[122]

The Declaration emphatically rejected a hierarchical society by affirming that "all men are created equal," and it placed sovereignty in the American people by declaring that "[g]overnments are instituted among Men."[123] It also conferred natural rights upon the people and such rights could not be intruded upon at the pleasure of the government because the government "derive[es] [its] just powers from the consent of the governed."[124]

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[121] VOLTAIRE, DICTIONNAIRE PHILOSOPHIQUE (H. I. Woolf trans., Dover Publ'n 2010) (1764).

[122] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[123] *Id.*

[124] *Id*.

It has been stated that, "[t]he Declaration of Independence was the promise; the Constitution was the fulfillment."[125] There are evident parallels between the Declaration's discussion about "[g]overnments [being] instituted among Men"[126] and the Preamble to the Constitution:

> *We the people of the United States*, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.[127]

Emphasis is placed on the opening clause of the Preamble, for it declares that in the United States "we the people" are sovereign. Given the influence that the Enlightenment had on the Framers, the Constitution and Bill of Rights can be seen as a putting into practice of the fundamental rights that Locke had already espoused. Locke asserted that "[m]en . . . had absolute rights in a state of nature"[128] but that "absolute rights were substantively worthless, however, [if] there was . . . no real law to secure them."[129] Thus, "[i]t is the creation of real law—government—that converts the worthless rights of asocial men into the actual rights of men in a civil society."[130]

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[125]Charles Alan Wright, *In Memoriam: Warren Burger: A Younger Friend Remembers*, 74 TEX. L. REV. 213, 219 (1995).

[126] Martin, *supra* note 78.

[127] U.S. CONST. pmbl. (emphasis added).

[128] Judith A. Best, *Fundamental Rights and the Structure of the Government*, *in* THE FRAMERS AND FUNDAMENTAL RIGHTS 42 (Robert A. Licht ed., The AEI Press 1992).

[129] *Id*.

[130] *Id*. at 42-43.

The Framers further solidified the rights of the people by establishing a republican federal government and by guaranteeing to each state a republican form of government under Article IV.[131] In a Lockean society "[l]iberty requires that minority rights be protected" but this does not mean that the minority governs.[132] While the majority has the ability to "fire a government and hire a new one" it cannot take legal action when in power by rule of force; they must do it through rule of law and thus may not employ force without right.[133] This system of minority rights in a republic governed by a majority quelled fears that minorities may have their basic liberties obstructed by a despotic majority, as was the case in France when King Louis XIV, acting in the interest of the Catholic majority, issued the Edict, which forcibly expelled the Huguenots from France.

The Framers also demonstrated a respect for the *vox populi* by giving the people the ability to amend the supreme law of the land. Article V of the Constitution states that:

> The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress.[134]

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[131] U.S. CONST. art. IV, §4, cl. 1.
[132] Best, *supra* note 128, at 42-43.
[133] *Id.*
[134] U.S. CONST. amend. V.

Through elected representatives, the people can change the Constitution under which they are governed. Professor Murphy seems to expect his readers to perform mental gymnastics in order to accommodate his claim that Justice Scalia's originalism, which gives primacy to an Enlightenment Constitution, somehow derives from his "pre-Vatican II Catholic faith."[135] This is simply a false and absurd claim.

CONCLUSION

Professor Murphy's book *Scalia: A Court of One* collects a huge amount of information about the Justice, but it is riddled with errors. Murphy provides a useful account of Justice Scalia's life, from his childhood, to his days in law school, his work in the Nixon administration, and his tenure as an Associate Justice of the United States Supreme Court. His compilation of Justice Scalia's speeches and correspondences demonstrates a worthwhile attempt to develop a better understanding of Justice Antonin Scalia's jurisprudence.

We agree with Professor Driver that by no means is a biographer obliged to "portray their protagonists in relentlessly favorable terms,"[136] but we think Murphy's account is so unfair to Justice Scalia and so inaccurate in much of what is said that the book is rendered to be of no value at all. While Professor Murphy may not agree with Justice Scalia's originalism, the public record makes it crystal clear that Justice Scalia has transformed legal dialogue since he was appointed to the High Court in 1986. Justice Scalia's contributions to the legal community *have* shaped a new generation of legal minds, whether it be through his work as a Justice, a legal theorist, or as an unwavering supporter of The Federalist Society. For his impressive

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[135] MURPHY, *supra* note 67, at 366.
[136] *Id.*

accolades and contributions to the law, he should be highly respected and commended.