The Princeton historian outdoes himself.

In the fall of 1998, testifying before the Judiciary Committee of the U.S. House of Representatives, Princeton historian Sean Wilentz prophesied that history would regard as "zealots" and "fanatics" members who sincerely believed they had good reason to vote to impeach President Clinton. In November 2000, days after the presidential election ended in stalemate, Wilentz assembled a bizarre group that included some of our nation's top professors of constitutional law (including Bruce Ackerman, Ronald Dworkin, and Cass Sunstein) mixed together with actors and other celebrities (including Robert De Niro, Rosie O'Donnell, and Bianca Jagger) and persuaded them to sign their names to a full-page ad in the *New York Times* that spoke of Al Gore's having won a "clear constitutional majority of the popular vote," even though the Constitution says nothing about the popular vote in presidential elections and is perfectly clear that victory goes to the candidate who receives the most electoral votes. However, on Monday, in his scurrilous attack on Justice Scalia, " From Justice Scalia, a Chilling Vision of Religion's Authority in America," featured on the *New York Times* op-ed page, Wilentz outdid himself. [Posted on FR here.]

Wilentz, who directs Princeton's American Studies Program, centered his attack around remarks that Justice Scalia delivered in February at a conference on the death penalty at the University of Chicago, subsequently published under the title "God's Justice and Ours" in the May 2002 issue of *First Things*. According to Wilentz, "Justice Scalia's remarks show bitterness against democracy, strong dislike for the Constitution's approach to religion and eager advocacy for the submission of the individual to the state." Yet while he insists that Justice Scalia's "writings deserve careful attention," almost everything Wilentz writes about Justice Scalia's published remarks is wrong. In fact, Justice Scalia shows respect for democracy by identifying some of its self-destructive tendencies and suggesting remedies; embraces the Constitution's approach to religion, as opposed to the condescending and uncomprehending approach to religion that he finds rampant among contemporary intellectuals; and, far from advocating submissiveness, insists that citizens engage in politics to change laws they think immoral, and if ultimately necessary, revolt.

Wilentz's brief against Scalia is littered with perverse misinterpretations and sly errors. Begin with Wilentz's accusation that Justice Scalia views submission as the essence of faith: "Mr. Scalia seems to believe strongly that a person's religious faith is something that he or she (as a Roman Catholic like Mr. Scalia) must take whole from church doctrine and obey." If, however, those writings of Justice Scalia that Wilentz had assured us "deserve careful attention" are any guide, then Justice Scalia actually believes strongly that Catholic faith involves a complicated mixture of obedience and independent judgment. Indeed, Justice Scalia took issue in his published remarks in *First Things* with the teaching on the death penalty in the encyclical *Evangelium Vitae* and with Avery Cardinal Dulles's reading of it. By

virtue of his analysis of, and dissent from recent Church statements on the death penalty, Scalia actually demonstrates that obedience to Church doctrine can and should be based upon an informed and reasoned encounter with it.

Nevertheless, Wilentz frets that "Mr. Scalia apparently believes that Catholics, at least, would be unable to uphold, as citizens, views that contradict church doctrine." In a country governed by the First Amendment, it is unclear under what circumstances the failure to uphold "views" — as opposed say to laws — would present an insuperable problem for Catholics or for anybody else. More importantly, contrary to the impression created by Wilentz, Scalia's discussion did not focus on the case of ordinary citizens who live in a society where not everything that their church doctrine teaches them is immoral is made unlawful. Rather, Scalia examined the much more limited question of whether a Supreme Court justice who "reviews and affirms capital convictions" and therefore (unlike the ordinary citizen) is "part of the criminal-law machinery that imposes death," could properly perform his job if he were convinced that his church taught that the death penalty were morally impermissible.

Wilentz professes to be worried that the opinion he (inaccurately) attributes to Scalia "is exactly the stereotype of Catholicism as Papist mind control that Catholics have struggled against throughout the modern era and that John F. Kennedy did so much to overcome." Yet in the process of unfairly blaming Justice Scalia for resuscitating an old stereotype used to stigmatize Catholics and banish them from public life, Wilentz resuscitates the old stereotype and stigmatizes Scalia as an unthinking servant of Rome whose beliefs ought to be banished from public life.

Next, Wilentz expresses fear about Justice Scalia's attitude toward democracy. "[A]larmingly, Mr. Scalia wishes to rally the devout against democracy's errors." The errors of democracy to which Wilentz refers revolve around Justice Scalia's suggestion that democracy in America has shown a tendency "to obscure the divine authority behind government." And the task to which Justice Scalia wishes to rally men and women of faith and of which Wilentz stands in such fear is a restoration of an understanding of that divine authority.

Weighing in on a matter that falls within the purview of his scholarly expertise, Wilentz declares that Scalia's view that legitimate government power is rooted in divine authority has been at best "a minority view, even an eccentric one, among Americans." Indeed, stresses Wilentz, Scalia's view, "has had no appreciable place in our constitutional history because the framers rejected it." All the respectable people throughout our history, according to Wilentz, followed the Framers who "rejected the idea that political authority lay with anyone or anything other than the sovereign people."

Contrary to Wilentz, however, the view that he asserts that all respectable people in America have always held does not conflict, but coheres both in theory and practice, with what he regards as Justice Scalia's sinister and disreputable view. This is because what Tocqueville

called the principle or the dogma of the sovereignty of the people has commonly been thought to have its roots in our natural rights, which in turn have commonly been thought to be both self-evident and a gift of God.

In fact, the view that Wilentz suggests is a great menace to America and which he claims "has had no appreciable place in our constitutional history because the framers rejected it" — that political authority lies with the sovereign people *because* each was created free and equal by nature's God — certainly seems to be plainly inscribed by Thomas Jefferson in the Declaration of Independence.

It certainly seems to be the view of James Madison, who in 1785, arguing on behalf of religious liberty in his *Memorial and Remonstrance*, declared at the outset:

> It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This Duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority: much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.

It certainly seems to be the view of George Washington, who in 1796 in his Farewell Address, maintained:

> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. . . . And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

It certainly seems to be the view of John Adams, who declared in a 1798 letter to Massachusetts military officers:

> We have no government armed with power of contending with human passions unbridled by morality and religion. Avarice, ambition, revenge, or gallantry, would break the strongest cords of our Constitution as a whale goes through a net. *Our Constitution is made only for a moral and religious people. It is wholly inadequate to the government of any other.*

It certainly seems to be the view of Abraham Lincoln, who in 1865, as the Union's victory in the Civil War drew near, proclaimed in Biblical cadences in his Second Inaugural Address:

> Both [sides] read the same Bible, and pray to the same God; and each invokes His aid against the other. It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces; but let us judge not that we be not judged. . . .
>
> With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive on to the finish the work we are in; to bind up the nation's wounds; to care for him who shall have borne the battle, and for his widow, and his orphan — to do all which may achieve and cherish a just, and a lasting peace, among ourselves, and with all nations.

And it certainly seems to be the view of Martin Luther King Jr., who in 1963, from the confines of the Birmingham City Jail, explained the ground of civil disobedience in a free society:

> A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of Saint Thomas Aquinas, an unjust law is a human law that is not rooted in eternal and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality.

If Wilentz were correct about the connection between religious belief and politics in American constitutional history, then not only Justice Scalia but also Thomas Jefferson, James Madison, George Washington, John Adams, Abraham Lincoln, and Martin Luther King Jr. — to say nothing of numerous other famous figures and countless ordinary Americans — would represent the apex of un-Americanism.

The final absurdity in Wilentz's unscrupulous attack concerns his mockery of Justice Scalia's contention that under our constitutional system a judge who opposes the death penalty on moral grounds ought to resign, and if he feels strongly enough he should participate in a political campaign to abolish it and, if all else fails, he should lead a revolution. To which Wilentz — apparently having forgotten that he began his diatribe by contradictorily accusing Scalia of "eager advocacy for the submission of the individual to the state" — sarcastically replies: "But leading a revolution would inevitably bring some interference with the application of laws, not to mention all the other atrocities that typically attend revolutions. Only a judge could think it better to play Robespierre than to issue too ambitious an opinion." To which one appropriate response is: Only a professor could find a judge's succinct expression of the principle of judicial restraint absurd. And perhaps only a professor of American history who has long ago put aside the scholar's vocation for pursuing the truth in favor of the partisan's quest for victory could write as if all revolutions follow the French model, and insinuate that revolution — or as the Declaration of Independence frames it, "the Right of the people to alter or to abolish" government that fails to secure "certain unalienable Rights" — is foreign to American constitutional history.

With the aid of the grand platform provided him by the *New York Times* op-ed page, Sean Wilentz has rendered another disservice to the public, a disservice that goes well beyond the misrepresentations of Justice Scalia's thought and the distortions of critical features of American constitutional history. Despite our need in these dangerous and demanding times for accurate knowledge of the past and for precise exposition of complex ideas about religion and politics, Wilentz has once again given us reason to scorn pronouncements by our professors on matters of urgent public interest.