

OPEN LETTER CONCERNING THE INVITATION
TO JUSTICE CLARENCE THOMAS TO SPEAK AT THE UGA
SCHOOL OF LAW GRADUATION CEREMONY

Published in *Flagpole Magazine*, p. 7 (April 30, 2003).

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On Monday, November 25, 2002, the law faculty of the University of Georgia School of Law received a memorandum from Dean David Shipley which begins as follows: "I am pleased to announce that Justice Clarence Thomas has accepted the invitation extended by me, Class of 2003 President [name redacted], Class of 2003 Vice President [name redacted], and Class of 2004 Vice President [name redacted] to be our graduation speaker on May 17, 2003."

The decision to invite Justice Thomas is appalling, unwise, and perverse—the embodiment of bad judgment. Anyone who has carefully examined his opinions in the fields of criminal procedure, civil rights, civil liberties, the rights of prisoners, and the writ of habeas corpus knows that Justice Thomas has one of the most anti-human rights voting records in modern Supreme Court history. This man does not deserve the honor of being invited to speak at the law school graduation ceremony. He is inimicus libertatis, the enemy of liberty. A worse choice of a judge as graduation speaker could hardly have made. Inviting a judge with his lamentable record on individual rights issues is a terrible mistake and sets a bad precedent. He is not the type of judge who should be held up as an example for students on the verge of entering the legal profession. He is unworthy of the high honor being bestowed on him by this law school. His appearance here will, in the eyes of future generations, be a blot on the reputation of and an embarrassment to this law school.

The poor judgment reflected in the disastrous decision to invite Justice Thomas unfairly places graduating law students on the horns of a dilemma. They must choose between, on the one hand, being forced to attend a ceremony where Justice Thomas will be feted and to listen politely to and applaud Justice Thomas's speech, or, on the other hand, foregoing attendance at their own graduation ceremony. Similarly, law faculty members must either attend Justice Thomas's speech or miss the ceremony.

And who is this man the students and faculty will be forced to listen to if they attend the ceremony? Justice Thomas is a reactionary judicial activist—a right-wing extremist pretending to be a neutral and impartial judge. His judicial philosophy amounts to "a new, aggressive, and repressive judicial activism." Niles, *Clarence Thomas: The First Ten Years Looking For Consistency*, 10 Am. U. J. Gender Soc. Pol'y & L.

327, 332 (2002). This man's judicial philosophy embodies the right-wing extremist agenda. He has a narrow view of the basic rights of Americans and usually votes to denigrate and attenuate those rights. In cases involving criminal procedure, civil rights, civil liberties, the rights of prisoners, and the writ of habeas corpus he almost always sides with the government and rejects the claims of individuals that their rights were violated. "Thomas has . . . been a consistent member of the Court's most conservative wing since his first term. . . . If judicial liberalism is defined in the traditional fashion as support for individuals' rights in disputes with the government, Thomas stands out as a strong conservative in any analysis. . . . Justice Thomas has established a consistent and predictable voting record as a dependable member of the Court's most conservative wing. . . . [H]e articulates . . . a vision of constitutional interpretation that . . . advances his preferences for . . . diminution of constitutional protections for individuals." Smith, *Clarence Thomas: A Distinctive Justice*, 28 Seton Hall L. Rev. 1, 2, 28 (1997). He believes that the role of the courts in protecting individual rights is very limited. He not infrequently expresses an inclination to overrule landmark pro-human rights Supreme Court precedents. He doesn't think much of the writ of habeas corpus. Indeed, in *O'Neal v. McAninch*, 513 U. S. 432, 447 (1995), in a dissenting opinion, he went so far as to assert: "We have ample cause to be wary of the writ [of habeas corpus!]." I can recall only one case where Justice Thomas has ever voted in favor of granting relief to a habeas corpus petitioner, and in that case Justice Thomas, along with Justice Scalia, took a narrower view than the Court of the petitioner's rights and only concurred in part and in the judgment. *Lynce v. Mathis*, 519 U. S. 433 (1997). He is shrilly pro-death penalty. He "expresses little sympathy for the plight of the incarcerated." Note, *Lasting Stigma: Affirmative Action and Clarence Thomas's Prisoners' Rights Jurisprudence*, 112 Harv. L. Rev. 1331, 1341 (1999). He is "the first justice to criticize, even indirectly, the ruling in *Brown [v. Board of Education]* . . ." Id. at 1348 n. 50. Furthermore, some of Justice Thomas's opinions rejecting claims of violations of rights are written a mocking, scornful tone inappropriate in a judge but typical of a right-wing extremist.

In deciding individual rights cases Justice Thomas almost always votes the same as the two other right-wing extremists serving on the Court, Chief Justice Rehnquist and Justice Scalia. See, e.g., Wilkins, Worthington, Chow, Chow & Becker, *Supreme Court Voting Behavior: 2000 Term*, 29 Hastings Const. L. Q. 247 (2002) (tables of voting patterns of Supreme Court justices since 1991 term). Justice Thomas is therefore one of the principal reasons why tragically in recent years the Supreme Court has been implementing a counterrevolution in criminal procedure and individual rights—a counterrevolution which has narrowed the legal rights and remedies of Americans against

government, enlarged the power of the state over the individual, and transformed the role of the Court from that of the keeper of the nation's conscience to that of a cost-benefit analysis calculating machine.

Impius et crudelis judicandus est qui libertati non favet, the old legal maxim says. He is to be judged impious and cruel who does not favor liberty. This maxim fits Justice Thomas to a T.

Moreover, Justice Thomas is one of the five right-wing Republican justices who handed the presidency to Republican candidate George W. Bush in *Bush v. Gore*, 531 U. S. 98 (2000), the most outrageously partisan decision of the Supreme Court in history, a decision in which, as Vincent Bugliosi has written, "the Court committed the unpardonable sin of being a knowing surrogate for the Republican party instead of being an impartial arbiter of the law." Bugliosi, "None Dare Call It Treason," *The Nation*, at 11 (Feb. 5, 2001).

In this letter I limit my critique of Justice Thomas to his voting record while on the Supreme Court. I put to one side the serious questions that have been raised about whether Justice Thomas lied or was deceptive or evasive when he testified at his U. S. Senate confirmation hearing in 1991. See, e.g., D. Brock, *Blinded by the Right: The Conscience of an Ex-Conservative* (2002); C. Smith & J. Baugh, *The Real Clarence Thomas: Confirmation Veracity Meets Performance Reality* (2000); J. Mayer & J. Abramson, *Strange Justice* (1994); Baugh & Smith, *Doubting Thomas: Confirmation Veracity Meets Performance Reality*, 19 Seattle U. L. Rev. 455 (1996); Bell, *Clarence Thomas: Evasive or Deceptive*, 21 N. C. Cent. L. J. 194 (1995); Tushnet, *Book Review*, 63 Geo. Wash. L. Rev. 466 (1995). *Contra*: D. Brock, *The Real Anita Hill* (1993); O'Daniel, *Book Review*, 5 Tex. Rev. L. & Pol. 495 (2001).

When Justice Thomas appeared at the University of North Carolina School of Law in 2002, the Black Law Students Association there staged a teach-in protest, and the five African-American law faculty members boycotted his appearances and issued a joint letter which stated in part: "We will not participate in any institutional gesture that honors and endorses what Justice Thomas does." See Calmore, *Airing Dirty Laundry: Disputes Among Privileged Blacks—From Clarence Thomas to the "Law School Five"*, 40 How. L. Rev. 175 (2003). To all of which I say, Amen.

In protest of Justice Thomas's appearance here I shall not attend the law school graduation ceremony. Instead, at the time Justice Thomas speaks, I will deliver my own speech at the Arch, the Tate Center, or some other appropriate site on campus a good distance away from the

law school graduation ceremony. The speech will focus on Justice Thomas's deplorable record as a Supreme Court justice and the blows that record has inflicted on liberty, freedom, rights, and justice. My speech will be part of a lawful, respectful, peaceable, classic exercise of First Amendment rights, and I hope there will be many others there to hear me and to express their concern about Justice Thomas's anti-individual rights decisions and right-wing extremist ideology.

Here is a summary of a few of the numerous Supreme Court decisions in the fields of criminal procedure, civil rights, civil liberties, the rights of prisoners, and the writ of habeas corpus where Justice Thomas has voted against an individual's claim that his or her rights were violated:

■ In *Hudson v. McMillian*, 503 U. S. 1 (1992), the Court held that the eighth amendment cruel and unusual punishments clause is violated when prison officials maliciously and sadistically use force to cause harm to an inmate, whether or not significant injury is evident. The plaintiff inmate had proved in federal district court that while he was in handcuffs and shackles two prison guards had, when there was no need to do so, punched him in the mouth, eyes, chest, and stomach, as well as kicked and punched him from behind. As result of this episode the inmate suffered minor bruises, swelling of his face, mouth, and lip, loosened teeth, and the cracking of his partial dental plate. The inmate had been awarded \$800.00 in damages against the two guards and a prison supervisor who watched the beating but did nothing except tell the two guards "not to have too much fun." Justice Thomas filed a dissenting opinion in which Justice Scalia joined. In his dissenting opinion Justice Thomas argued that (1) a use of force that causes only insignificant harm is not cruel and unusual punishment, and (2) the cruel and unusual punishments clause regulates sentences, but not the treatment of prisoners. Justice Thomas's dissent is notable for its "combative, faintly mocking tone." Note, *Lasting Stigma: Affirmative Action and Clarence Thomas's Prisoners' Rights Jurisprudence*, 112 Harv. L. Rev. 1331, 1345 (1999). In that dissent, Justice Thomas claimed that "[t]oday's expansion of the Cruel and Unusual Punishments Clause [is] beyond all bounds of history and precedent . . . and another manifestation of the pervasive view that the Federal Constitution must address all ills in our society." He added: "The Eighth Amendment is not, and should not be turned into, a National Code of Prison Regulation." 503 U. S. at 28. Justice O'Connor, speaking for the majority, reproved Justice Thomas in these words: "To deny, as the dissent does, the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the 'concepts of dignity, civilized standards, humanity, and decency' that animate the Eighth Amendment." 503 U. S. at 11. Justice Thomas's dissent in this case prompted an editorial in *The New York Times* labeling him "The

Youngest, Cruellest Justice.” “The Youngest, Cruellest Justice,” *N. Y. Times*, at A24 (Feb. 27, 1992).

■ In *Morgan v. Illinois*, 504 U. S. 719 (1992), the Court held that (1) in a capital punishment trial a juror who will always impose the death penalty for capital murder is not “impartial” in the sense required by the sixth amendment, (2) the Constitution requires that voir dire directed to this specific “bias” be provided upon the defendant's request, and (3) that the more general questions about “fairness” and ability to “follow the law” that were asked during voir dire in this case were inadequate. Justice Scalia filed a dissenting opinion in which Chief Justice Rehnquist and Justice Thomas joined.

■ In *Herrera v. Collins*, 506 U. S. 390 (1993), Justice Thomas, along with Justices O'Connor, Scalia, and Kennedy, joined in Chief Justice Rehnquist's opinion for the Court, which held that (1) even in a death sentence case it was not a violation of due process for Texas to require that motions for a new trial based on newly discovered evidence be filed within 30 days of sentencing, and (2) a claim of actual innocence based on newly discovered evidence is not grounds for federal habeas corpus relief, even where the habeas petitioner has been sentenced to death.

■ In *Graham v. Collins*, 506 U. S. 461 (1993), Justice Thomas, along with Chief Justice Rehnquist and Justices Scalia and Kennedy, joined in Justice White's opinion for the Court, which denied federal habeas corpus relief to a Texas death row inmate based on one of the numerous obstacles to habeas relief invented by the Supreme Court in recent years to curtail the scope of the writ of habeas corpus. Justice Thomas also filed a concurring opinion which he hostilely described the NAACP Legal Defense and Educational Fund's concerted national litigative campaign against the constitutionality of the death penalty in the 1960's and early 1970's as a campaign “waged by a small number of ambitious lawyers and academics on the Fund's behalf.” 506 U. S. at 480. These callous, insensitive comments were issued the day after the death of Justice Thurgood Marshall.

■ In *Brecht v. Abrahamson*, 507 U. S. 619 (1993), Justice Thomas, along with Justices Stevens, Scalia, and Kennedy, joined in Chief Justice Rehnquist's opinion for the Court, which changed the standard of harmless error in federal habeas corpus proceedings to a less onerous one, i.e., one which makes it more likely that a violation of a habeas petitioner's constitutional rights will be deemed harmless error and that therefore habeas relief will be denied. The new standard adopted by the Court previously had been limited to claims of nonconstitutional error in federal criminal cases.

■ In *Withrow v. Williams*, 507 U. S. 680 (1993), the Court held that a claim that a confession obtained in violation of *Miranda v. United States*, 384 U. S. 436 (1966), was admitted at the petitioner's state criminal trial may be raised in a federal habeas corpus proceeding. Justice O'Connor filed opinion concurring in part and dissenting in part in which Chief Justice Rehnquist joined. Justice Scalia filed a dissenting opinion in which Justice Thomas joined, arguing that Miranda claims should be cognizable in federal habeas proceedings brought by state prisoners only in the event the state courts had denied the petitioner an opportunity for full and fair litigation of the Miranda claim (which would make it nearly impossible to ever obtain federal habeas relief based on a Miranda claim).

■ In *J. E. B. v. Alabama ex rel. T. B.*, 511 U. S. 127 (1994), the Court held that the equal protection clause of the fourteenth amendment forbids intentional discrimination on the basis of gender in the trial jury selection process, just as it prohibits discrimination on the basis of race. Chief Justice Rehnquist filed a dissenting opinion. Justice Scalia filed a dissenting opinion in which Chief Justice Rehnquist and Justice Thomas joined.

■ In *Simmons v. South Carolina*, 512 U. S. 154 (1994), the Court held that (1) the state, which had raised the specter of the defendant's future dangerousness, violated the defendant's due process rights by refusing to instruct the jury that, as alternative to a death sentence, a sentence of life imprisonment carried with it no possibility of parole, and (2) the trial court's jury instruction that life imprisonment was to be given its ordinary meaning and that the jury was not to consider parole did not satisfy in substance defendant's request for a jury charge on parole ineligibility. Justice Scalia filed a dissenting opinion in which Justice Thomas joined.

■ In *McFarland v. Scott*, 512 U. S. 849 (1994), the Court held that (1) the 1988 Act of Congress creating a statutory right to qualified legal representation in federal habeas corpus proceedings for state death row inmates includes a right to legal assistance in the preparation of a habeas corpus petition, and that therefore the right to appointed counsel created by the statute adheres prior to filing of a formal, legally sufficient habeas petition, and (2) the federal district court has jurisdiction to enter a stay of execution where necessary to give effect to the state death row inmate's statutory right to appointment of habeas corpus counsel. Justice Thomas filed a dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined. In his dissenting opinion, Justice Thomas argued that (1) a district court lacks jurisdiction to grant a stay until an application for a stay has been filed, and (2) a district court cannot appoint counsel under the statute until the death row inmate has

actually filed a federal habeas corpus petition.

■ In *Holder v. Hall*, 512 U. S. 874 (1994), the Court held that the plaintiff black voters could not maintain a vote dilution challenge to a government body, such as county commission, under § 2 of Voting Rights Act of 1965. Justice Thomas filed an opinion, joined in by Justice Scalia, concurring in the judgment. In his opinion Justice Thomas asserted that “a systematic reassessment of our interpretation of § 2 is required in this case,” complained that “the broad reach” which prior Supreme Court decisions had given to the Act “has produced such a disastrous misadventure in judicial policymaking,” and urged the overruling of *Thornburg v. Gingles*, 478 U. S. 30 (1986), which had held that proof of vote dilution could establish a violation of § 2. 512 U. S. at 892, 893, 943. In criticizing numerous previous Supreme Court interpretations of the Act, Justice Thomas waxed hyperbolic: “We would be mighty Platonic guardians indeed if Congress had granted us the authority to determine the best form of local government for every county, city, village, and town in America. But under our constitutional system, this Court is not a centralized politburo appointed for life to dictate to the provinces the ‘correct’ theories of democratic representation, the ‘best’ electoral systems for securing truly ‘representative’ government, the ‘fairest’ proportions of minority political influence, or, as respondents would have us hold today, the ‘proper’ sizes for local governing bodies.” 512 U. S. at 912.

■ In *Schlup v. Delo*, 513 U. S. 298 (1995), involving a state death row inmate seeking to proceed on a second federal habeas corpus petition raising claims either raised in or omitted from his initial federal habeas petition, the Court held that the standard of *Murray v. Carrier*, 477 U. S. 478 (1986), which requires a procedurally defaulted habeas petitioner to show that a constitutional violation has probably resulted in the conviction of one who is actually innocent, rather than the more stringent standard of *Sawyer v. Whitley*, 505 U. S. 333 (1992), under which a petitioner must demonstrate by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him guilty, governs the miscarriage of justice inquiry when a petitioner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to consideration of merits of constitutional claims in a second or subsequent federal habeas petition. Chief Justice Rehnquist filed a dissenting opinion in which Justices Kennedy and Thomas joined. Justice Scalia filed a dissenting opinion in which Justice Thomas joined.

■ In *O’Neal v. McAninch*, 513 U. S. 432 (1995), in which the federal habeas corpus petitioner was a state prisoner convicted of murder, the Court held that where in a federal habeas corpus proceeding

the federal district judge determines that there has been a violation of the petitioner's federal constitutional rights in the state court criminal proceedings but the federal district judge is in grave doubt about whether or not that error is harmless, the judge should treat the error, not as if it were harmless, but as if it affected the verdict (i.e., as if it had a "substantial and injurious effect or influence in determining the jury's verdict"). Justice Thomas filed a dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined.

■ In *Kyles v. Whitney*, 514 U. S. 419 (1995), the Court granted federal habeas corpus relief to a state death row inmate on grounds the prosecution had, in violation of due process, suppressed exculpatory evidence. Justice Scalia filed a dissenting opinion in which Chief Justice Rehnquist and Justices Kennedy and Thomas joined.

■ In *M. L. B. v. S. L. J.*, 519 U. S. 102 (1996), the Court held, based in part on the landmark decision in *Griffin v. Illinois*, 351 U. S. 12 (1956) (fourteenth amendment due process and equal protection clauses require that indigents be provided a free transcript when they appeal), and other precedents building on *Griffin*, that the due process and equal protection clauses were violated when the state denied an indigent mother the right to appeal the termination of her parental rights unless she prepaid record preparation fees of over \$2,300. Justice Thomas filed a dissenting opinion in which Justice Scalia joined, and in which Chief Justice Rehnquist joined in part. In Part II of his dissenting opinion Justice Thomas wrote that "if this case squarely presented the question, I would be inclined to vote to overrule *Griffin* and its progeny." 519 U. S. at 139. Chief Justice Rehnquist declined to join in Part II of Justice Thomas's dissent.

■ In *Lindh v. Murphy*, 521 U. S. 320 (1997), the Court held that the provisions of Title I of the Antiterrorism and Effective Death Penalty Act of 1996, which greatly curtailed the availability of federal postconviction habeas corpus relief, did not apply in noncapital cases to habeas petitioners whose habeas petitions had been filed before enactment of Title I. Chief Justice Rehnquist filed dissenting opinion in which Justices Scalia, Kennedy, and Thomas joined.

■ In *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U. S. 357 (1998), Justice Thomas wrote the opinion of the Court, in which Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy joined, holding that evidence obtained in violation of the fourth amendment is admissible in a parole revocation proceeding, even if the officer conducting the illegal search or seizure is aware or has reason to be aware of the suspect's parole status.

■ In *Mitchell v. United States*, 526 U. S. 314 (1999), the Court held that (1) neither the defendant's guilty plea nor her statements at the plea colloquy functioned as a waiver of her right to remain silent at sentencing, and (2) the sentencing court could not draw adverse inferences from the defendant's silence in determining facts relating to circumstances and details of the crime. Justice Scalia filed a dissenting opinion in which Chief Justice Rehnquist and Justices O'Connor and Thomas joined. Justice Thomas also filed his own dissenting opinion in which he attacked two landmark fifth amendment self-incrimination privilege decisions, *Griffin v. California*, 380 U. S. 609 (1965) (jury charge authorizing jury to infer guilt from a defendant's failure to testify violates self-incrimination privilege), and *Carter v. Kentucky*, 450 U. S. 288 (1981) (self-incrimination privilege secures a defendant right to have jury instructed that his failure to testify must be disregarded), argued that these two decisions "should be reexamined," and added: "Given their indefensible foundations, I would be willing to reconsider *Griffin* and *Carter* in the appropriate case." 526 U. S. at 342, 343.

■ In *City of Chicago v. Morales*, 527 U. S. 41 (1999), the Court held unconstitutionally vague a 1992 municipal ordinance which required a police officer, on observing a person whom he reasonably believed to be a criminal street gang member loitering in any public place with one or more other persons, to order all such persons to disperse, and made failure to obey such an order a crime. Under this ordinance 42,000 persons had been arrested during the three years it was enforced. Justice Thomas filed a dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined.

■ In *Dickerson v. United States*, 530 U. S. 428 (2000), the Court held that the landmark decision in *Miranda v. Arizona*, 384 U. S. 436 (1966), was a constitutional decision that could not be overturned by an Act of Congress and that therefore 18 U. S. C. § 3501, which was enacted in 1968 and purported to make admissible in federal court confessions obtained in violation of *Miranda*, was unconstitutional. Justice Scalia filed a dissenting opinion in which Justice Thomas joined. At the end of that dissenting opinion Justice Scalia announced that "until § 3501 is repealed, [I] will continue to apply it in all cases where there has been a sustainable finding that the defendant's confession was voluntary [even it was obtained in violation of *Miranda*]." 530 U. S. at 465.

■ In *City of Indianapolis v. Edmond*, 531 U. S. 32 (2000), the Court held that a highway motor vehicle checkpoint (i.e., roadblock) program which was unaccompanied by individualized suspicion of the vehicles stopped, and whose primary purpose was to detect evidence of ordinary criminal wrongdoing (i.e., drug offenses), violated the fourth

amendment. Chief Justice Rehnquist filed dissenting opinion in which Justice Thomas joined and in which Justice Scalia joined in part. Justice Thomas also filed his own dissenting opinion.

■ In *Shafer v. South Carolina*, 532 U. S. 36 (2001), a follow-up to *Simmons v. South Carolina*, 512 U. S. 154 (1994), the Court held that (1) whenever future dangerousness is at issue in a capital sentencing proceeding under South Carolina's amended sentencing scheme, due process requires that the jury must be informed that a life sentence carries no possibility of parole, and (2) neither the trial court's instruction nor defense counsel's closing argument was sufficient to inform the jurors of the defendant's parole ineligibility. Justices Scalia and Thomas each filed a dissenting opinion.

■ In *Ferguson v. City of Charleston*, 532 U. S. 67 (2001), which involved the drug testing by a public hospital of unsuspecting pregnant women suspected of cocaine use and the forwarding of positive test results to the police so the women could be arrested on criminal charges, the Court held that (1) a state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure, and (2) the interest in using the threat of criminal sanctions to deter pregnant women from drug abuse does not justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid search warrant. Justice Scalia filed a dissenting opinion in which Chief Justice Rehnquist and Justice Thomas joined.

■ In *Atwater v. City of Lago Vista*, 532 U. S. 318 (2001), the “soccer mom” case, Justice Thomas, along with Chief Justice Rehnquist and Justices Scalia and Kennedy, joined in Justice Souter’s opinion for the Court, which held that police do not violate the Fourth Amendment when they make a warrantless arrest for a minor criminal offense not involving a breach of the peace, such as a misdemeanor seatbelt violation punishable only by a fine.

■ In *INS v. St. Cyr*, 533 U. S. 289 (2001), the Court held that: (1) the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) did not deprive the federal courts of jurisdiction to review a permanent resident alien's habeas corpus petition, and (2) the provisions of AEDPA and IIRIRA repealing discretionary relief from deportation did not apply retroactively to the alien, who had pleaded guilty to a sale of controlled substances prior to statutes' enactment. Justice Scalia filed a dissenting opinion in which Chief Justice Rehnquist and Justice Thomas joined. In that dissenting opinion Justice

Scalia “made the unprecedented argument that the [Habeas Corpus] Suspension Clause [of the U. S. Constitution] places no restriction whatsoever on the permanent abrogation or redefinition of the writ of habeas corpus, but rather prohibits only temporary suspensions,” and also “maintained that the inquiry into the discretionary powers of the executive to release a prisoner lay outside the scope of the writ as it existed in 1789, and therefore, outside the reach of the Suspension Clause.” Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 Colum. Hum. Rts. Rev. 555, 559-60 (2002).

■ In *Lee v. Kemna*, 534 U. S. 362 (2002), the Court held that the federal courts were not procedurally barred from considering the federal habeas corpus petitioner’s due process claim that he should have been granted an overnight continuance at his state murder trial so that he could locate subpoenaed, previously present, but suddenly missing alibi witnesses key to his defense, where the petitioner had substantially, if imperfectly, made to the trial court the basic showing required under state law to obtain a continuance. Justice Kennedy filed a dissenting opinion in which Justices Scalia and Thomas joined.

■ In *Alabama v. Shelton*, 535 U. S. 654 (2002), the Court held that the sixth amendment right to counsel extends to a criminal defendant sentenced to a suspended or probated term of imprisonment. Justice Scalia filed a dissenting opinion in which Chief Justice Rehnquist and Justices Kennedy and Thomas joined.

■ In *Atkins v. Virginia*, 536 U. S. 304 (2002), the Court held that the execution of mentally retarded criminal offenders violates the cruel and unusual punishments clause of the eighth amendment. Chief Justice Rehnquist filed a dissenting opinion in which Justices Scalia and Thomas joined. Justice Scalia filed a dissenting opinion in which Chief Justice Rehnquist and Justice Thomas joined.

■ In *Hope v. Pelzer*, 536 U. S. 730 (2002), the Court held that (1) under the circumstances, the alleged handcuffing of the plaintiff prison inmates to a hitching post was a gratuitous infliction of wanton and unnecessary pain which violated the eighth amendment cruel and unusual punishments clause, and (2) the defense of qualified immunity was precluded at the summary judgment stage of this civil rights action. Justice Thomas filed a dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined, claiming that the majority opinion was “based . . . on [the majority’s] own subjective views on appropriate methods of prison discipline.” 536 U. S. at 748. He also maintained that the device to which the inmates had allegedly been affixed was a “restraining bar,” not a “hitching post.” 536 U. S. at 749 n. 1.

■ In *Board of Education v. Earls*, 536 U. S. 822 (2002), Justice Thomas wrote the opinion for the Court, in which Chief Justice Rehnquist and Justices Scalia, Kennedy, and Breyer joined, upholding the constitutionality of mandatory suspicionless drug testing of all students in a public school district participating in competitive extracurricular activities.

There are, of course, in comparison with his numerous pro-government votes, a relatively small number of cases where Justice Thomas's vote in a case in the fields of criminal procedure, civil rights, civil liberties, the rights of prisoners, and the writ of habeas corpus has been in favor of an individual rights claim. See, e.g., *Ring v. Arizona*, 536 U. S. 584 (2002); *Kyllo v. United States*, 533 U. S. 27 (2001); *Apprendi v. New Jersey*, 530 U. S. 466 (2000); *United States v. Hubbell*, 530 U. S. 27 (2000); *Carmell v. Texas*, 529 U.S. 513 (2000); *Bond v. United States*, 529 U. S. 334 (2000); *Florida v. J. L.*, 529 U. S. 266 (2000); *Knowles v. Iowa*, 525 U. S. 113 (1998); *United States v. Bajakajian*, 524 U. S. 321 (1998) (opinion for the Court by Thomas, J.); *Chandler v. Miller*, 520 U. S. 305 (1997); *Lynce v. Mathis*, 519 U. S. 433 (1997); *Wilson v. Arkansas*, 514 U. S. 927 (1995) (opinion for the Court by Thomas, J.); *United States v. Williams*, 504 U. S. 36 (1992); *Jacobson v. United States*, 503 U. S. 540 (1992). These surprising cases are, however, merely the exceptions which prove the rule.

Furthermore, to crown all, in *Bush v. Gore*, 531 U. S. 98 (2000), Justice Thomas, along with Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy, all of whom are Republicans appointed by Republican presidents, joined in the *per curiam* opinion for the Court which delivered the presidency to Republican candidate George W. Bush. Justice Thomas was one of the five justices who voted to hear the case in the first place, then to grant the infamous stay of the Florida presidential vote recounting, and finally to forbid any further recounting. *Bush v. Gore*, as I have noted elsewhere, "is the most egregiously partisan ruling in the Supreme Court's history," in which "the court's majority let its desire for a particular partisan outcome have priority over legal principles." Wilkes, "A President by Judicial Fiat," *Flagpole Magazine*, at 8 (Dec. 11, 2002). In *Bush v. Gore*, as I have noted in my *Flagpole* article, "the majority justices, in order to rule in Bush's favor, endorsed legal arguments or embraced legal principles which contradicted views they have long espoused and which they would have scorned if proffered by Gore's lawyers." As University of Virginia law professor Michael J. Klarman has written: "Had all the other facts in the Florida election imbroglio remained the same, but the situation of the two presidential candidates been reversed, does anyone seriously believe that the conservative Justices would have reached the same result? Thus, the result in *Bush v. Gore* depended on the order in

which the parties' names appeared on the case caption. . . . I cannot think of another Supreme Court decision about which one can say with equal confidence that reversing the parties, and nothing else, would have changed the result.” As I also observed in my article: “For several decades the Supreme Court has been notably unreceptive to claims that a person's rights secured by the equal protection clause of the Fourteenth Amendment were violated, and the Court currently almost always rejects such claims. The Court has insisted that unequal treatment cannot constitute a violation of the equal protection clause unless it is done purposefully, and the five justices who joined in *Bush v. Gore* regularly vote to deny equal protection claims. Yet in *Bush v. Gore* these same five justices based their decision in favor of Bush on a novel, expansive interpretation of the equal protection clause, and did so despite the absence of any allegation or proof that the unequal treatment complained of was purposeful.” In my article I also stated: “Why, according to *Bush v. Gore*, was the Florida Supreme Court’s decision to recount the presidential votes, based on the state’s traditional standard that the clear intent of the voter governs, violative of the equal protection clause? Because, the five-justice majority strangely held, the general standard of voter intent was subject to different interpretations by different vote counters! But why would this be more harmful to Bush than to Gore? And don’t the same or similar disparities in vote counting equally exist when the votes are counted the first time? And why this sudden concern with uniformity at the state level by justices who, in the name of federalism, ordinarily insist that state governments be given room for ‘play in the joints’?” In *Bush v. Gore*, Justice Thomas and the other four right-wing justices “acted suspiciously out-of-character,” Niles, *Clarence Thomas: The First Ten Years Looking For Consistency*, 10 Am. U. J. Gender Soc. Pol’y & L. 327, 341 n. 14 (2002). Thus, Justice Thomas’s vote was not only politically partisan, but also hypocritical. Curiously missing in *Bush v. Gore* are sarcastic comments by Justice Thomas to the effect that the decision to deliver the presidency to Bush amounted to a “National Code of Vote Recounting,” or that the decision was “another manifestation of the pervasive view that the Federal Constitution must address all ills in our society.” Also notably absent are ironical statements by Justice Thomas about judges acting as “mighty Platonic guardians” of Florida election recount practices, or about how the Supreme “Court is not a centralized politburo appointed for life to dictate to the provinces the ‘correct’ theories of democratic representation, the ‘best’ electoral systems for securing truly ‘representative’ government, [and] the ‘fairest’ proportions of minority political influence.”

Because *Bush v. Gore* prohibited any further vote recounts, thousands of Florida voters who had cast legal ballots for President were deprived of the right to have their votes counted. *Bush v. Gore* is therefore a case

where in reality basic rights were denied, not upheld, even though the decision purports to vindicate equal protection rights. As I wrote in my Flagpole article: “The Court’s remedy for the equal protection violation it had strained to concoct was bizarre. It barred any more recounting, even though this meant that perhaps thousands of voters whose clear intention would have been evident to anyone doing the recount would be denied their legal right to have their votes counted. The Court evidently thought it was better that a significant number of legal votes be ignored than that some questionable votes should be counted. ‘The end result,’ [law professor Alan] Dershowitz tells us, ‘was that a large number of voters who cast proper votes under Florida law but whose votes were not counted were denied their . . . right to vote for president in order to ensure that the votes of others would not be diluted by the improper inclusion of ballots that might be invalid This is the most perverse misuse of the equal protection clause I have seen in my forty years as a lawyer.’”

Justice Thomas’s participation in the scandalous *Bush v. Gore* decision is, without more, sufficient to render him unworthy of being invited to give the graduation speech.

I urge readers of this letter to personally check out the votes Justice Thomas has cast on individual rights issues while he has been a member of the Supreme Court.

There are two Annexures to this letter. Annexure A is a bibliography of suggested helpful writings on Justice Thomas’s voting record in individual rights cases. Annexure B is my Flagpole article on the *Bush v. Gore* decision.

ANNEXURE A

Bibliography of Books and Articles on Justice Thomas’s Supreme Court Voting Record on Human Rights Issues

Books

1. C. Smith & J. Baugh, *The Real Clarence Thomas: Confirmation Veracity Meets Performance Reality* (2000)
2. S. Gerber, *First Principles: The Jurisprudence of Clarence Thomas* (1999)

Articles

1. Gerber, *Justice Clarence Thomas: First Term, First Impressions*,

35 How. L. J. 115 (1992)

2. Smith & Johnson, *The First-Term Performance of Justice Clarence Thomas*, 76 *Judicature* 172 (1993)

3. Cook, *Thurgood Marshall and Clarence Thomas: A Glance at Their Philosophies*, 73 *Mich. B. J.* 298 (1994)

4. Bell, *Clarence Thomas: Evasive or Deceptive*, 21 *N. C. Cent. L. J.* 194 (1995)

5. Smith, *The Constitution and Criminal Punishment: The Emerging Visions of Justices Scalia and Thomas*, 43 *Drake L. Rev.* 593 (1995)

6. Baugh & Smith, *Doubting Thomas: Confirmation Veracity Meets Performance Reality*, 19 *Seattle U. L. Rev.* 455 (1996)

7. Smith, *Clarence Thomas: A Distinctive Justice*, 28 *Seton Hall L. Rev.* 1 (1997)

8. Muller, *Where, But For the Grace of God, Goes He? The Search for Empathy in the Criminal Jurisprudence of Clarence Thomas*, 15 *Const. Commentary* 225 (1998)

9. Note, *Lasting Stigma: Affirmative Action and Clarence Thomas's Prisoners' Rights Jurisprudence*, 112 *Harv. L. Rev.* 1331 (1999)

10. Niles, *Clarence Thomas: The First Ten Years Looking For Consistency*, 10 *Am. U. J. Gender Soc. Pol'y & L.* 327 (2002)

11. Gerber, "My Rookie Years are Over": *Clarence Thomas After Ten Years*, 10 *Am. U. J. Gender Soc. Pol'y & L.* 3 (2002)

See also M. Garbus, *Courting Disaster: The Supreme Court and the Unmaking of American Law* (2002); *The Rehnquist Court: A Retrospective* (M. Belsky ed. 2002); J. Dean, *The Rehnquist Choice: The Untold Story of the Nixon Appointment That Redefined the Supreme Court* (2001); S. Gottlieb, *Morality Imposed: The Rehnquist Court and Liberty in America* (2000); T. Yarbrough, *The Rehnquist Court and the Constitution* (2000); C. Smith, *The Rehnquist Court and Criminal Punishment* (1997); R. Brisbin, *Justice Antonin Scalia and the Conservative Revival* (1997); D. Tucker, *The Rehnquist Court and Civil Rights* (1995); S. Friedelbaum, *The Rehnquist Court: In Pursuit of Judicial Conservatism* (1994); P. Irons, *Brennan vs. Rehnquist:*

The Battle for the Constitution (1994); J. Decker, *Revolution to the Right: Criminal Procedure Jurisprudence During the Burger-Rehnquist Years* (1992); D. Savage, *Turning Right: The Making of the Rehnquist Supreme Court* (1992); Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. Colo. L. Rev. 1337 (2002); Wilkins, Worthington, Chow, Chow & Becker, *Supreme Court Voting Behavior: 2000 Term*, 29 Hastings Const. L. Q. 247 (2002); Smith, *Criminal Justice and the 1999-2000 U. S. Supreme Court Term*, 77 N. D. L. Rev. 1 (2001); Smith, *Criminal Justice and the 1998-99 U. S. Supreme Court Term*, 9 Widener J. Pub. L. 23 (2001); Smith, *Criminal Justice and the 1997-98 U. S. Supreme Court Term*, 23 S. Ill. U. L. J. 443 (1998); Gerber, *Justice Clarence Thomas and the Jurisprudence of Race*, 25 So. U. L. Rev. 43 (1997); Smith, *Criminal Justice and the 1996-97 U. S. Supreme Court Term*, 23 Dayton L. Rev. 29 (1997); Slobogin, *Having It Both Ways: Proof That the U. S. Supreme Court is "Unfairly" Prosecution-Oriented*, 48 Fla. L. Rev. 743 (1996); Smith, *Criminal Justice and the 1995-96 U. S. Supreme Court Term*, 74 U. Det. Mercy L. Rev. 1 (1996); Smith, *The Impact of New Justices: The U. S. Supreme Court and Criminal Justice Policy*, 30 Akron L. Rev. 1 (1996); Wallace, *The Eighth Amendment and Prison Deprivations: Historical Revisions*, 30 Crim. L. Bull. 5 (1994); Smith and Jones, *The Rehnquist Court's Activism and the Risk of Injustice*, 26 Conn. L. Rev. 53 (1993); Note, *Blinking at Reality: The Implications of Justice Clarence Thomas's Influential Approach to Race and Education*, 78 B. U. L. Rev. 575 (1998).

ANNEXURE B

A PRESIDENT BY JUDICIAL FIAT

Published in slightly abridged form under the title "We Will Not 'Move On,'" in *Flagpole Magazine*, p. 8 (December 11, 2002).

The Betrayal of America: How the Supreme Court Undermined the Constitution and Chose Our President

Vincent Bugliosi

Thunder's Mouth Press/Nation Books, 2001

166 pp., \$9.95, paper

Supreme Injustice: How the High Court Hijacked Election 2000

Alan Dershowitz

Oxford University Press, 2001
298 pp., \$25.00, clothbound

"It is a sad day for America and the Constitution when a court decides the outcome of an election."

"The ... court's radicalism went far beyond routine judicial activism... The ... court did exceed its lawful powers, with astonishing inventiveness, in a case where the political stakes could hardly be higher... Yes, the decision is a scandal."

"The action of the ... court is not constitutionally defensible."

"Let no one pretend [the court] acted as judges."

"[J]udges acting beyond their authority will have effectively picked the next president."

"Judges now select the next president of the United States."

"[An] illegitimately gained presidency."

"A presidency achieved by litigation and judicial fiat."

"A President by judicial fiat."

"[A] blatant and extraordinary abuse of judicial power."

"An act of judicial usurpation."

"A power grab, pure and simple."

Harsh words by overwrought, sour grapes Democrats enraged by the U. S. Supreme Court's 5-4 *Bush v. Gore* decision, which exactly two years ago bestowed the presidency on George W. Bush? Overexcited rhetoric by embittered, malcontent liberals and left-wingers critical of the death-blow that decision inflicted on Al Gore's candidacy? Not quite. They are instead the fulminations of Republican and right-wing zealots blasting the Dec. 8, 2000 Florida Supreme Court decision which ordered a presidential vote recount but was stayed on Dec. 9, and then reversed on Dec. 12, by the U. S. Supreme Court in *Bush v. Gore*.

There are scores of books and hundreds of scholarly articles on *Bush v. Gore*. Among the best of these publications are the two books reviewed here, Vincent Bugliosi's *The Betrayal of America: How the Supreme Court Undermined the Constitution and Chose Our President*, and Alan Dershowitz's *Supreme Injustice: How the High Court Hijacked Election 2000*. The centerpiece of Bugliosi's little book is his famous scathing critique of *Bush v. Gore*, "None Dare Call It Treason," originally published in the Feb. 5, 2001 issue of *The Nation* magazine. The Dershowitz book is calmer in tone and richer in scholarship. But both authors fundamentally agree that, as stated on the dust cover of the Dershowitz book, *Bush v. Gore* "is the most egregiously partisan ruling in the Supreme Court's history," and that "the court's majority let its desire for a particular partisan outcome have priority over legal principles."

A Dishonest Decision

As Yale law professor Akhil Reed Amar notes, *Bush v. Gore* “failed to cite a single case that, on its facts, comes close to supporting its analysis and result.” Despite this, despite what Dershowitz calls its “selective use of inapt cases [as precedents],” *Bush v. Gore* is not wholly outside the bounds of legal reasoning. But this does not mean it is an honest decision. It merely proves that, as Dershowitz points out, “clever judges can always justify their decisions by grounding them in acceptable interpretations of existing law.” Thus, in analyzing *Bush v. Gore*, the issue is not simply whether the interpretation of the law by the five right-wing justices who formed the majority (Rehnquist, O’Connor, Kennedy, Scalia, and Thomas) can be reasonably defended; rather, the issue is whether the majority’s legal interpretation would have been the same if Bush had been seeking the recount. “I believe it is morally wrong,” Dershowitz writes, “for scholars to defend the majority justices, even if they think their arguments are theoretically defensible, unless they honestly believe that the justices themselves would have offered these arguments in behalf of Gore if the shoe had been on the other foot.”

And the dispiriting truth is, as both Bugliosi and Dershowitz convincingly demonstrate, that the majority justices, in Dershowitz’s words, “tried to hide their bias [in favor of Bush] behind plausible legal arguments that they would never have put forward had the shoe been on the other foot.”

In assessing *Bush v. Gore*, Bugliosi and Dershowitz both make use of what Dershowitz labels the “shoe-on-the-other-foot test” by pointing out the instances in which the majority justices, in order to rule in Bush’s favor, endorsed legal arguments or embraced legal principles which contradicted views they have long espoused and which they would have scorned if proffered by Gore’s lawyers. Thus, Bugliosi begins his famous essay with this famous paragraph:

“[In *Bush v. Gore*] the Court committed the unpardonable sin of being a knowing surrogate for the Republican party instead of being an impartial arbiter of the law. If you doubt this, try to imagine Al Gore’s and George Bush’s roles being reversed and ask yourself if you can conceive of Justice Antonin Scalia and his four conservative brethren issuing an emergency order on December 9 stopping the counting of the ballots (at a time when Gore’s lead had shrunk to 154 votes) on the grounds that if it continued, Gore could suffer ‘irreparable harm,’ and then subsequently, on December 12, bequeathing the election to Gore on equal protection grounds. If you can, then I suppose you can also imagine a man jumping away from his own shadow, Frenchmen no

longer drinking wine.”

Bugliosi and Dershowitz are not alone in noting that the shoe-on-the-other-foot test exposes the partisan shabbiness of *Bush v. Gore*. For example, University of Virginia law professor Michael J. Klarman has written: “Had all the other facts in the Florida election imbroglio remained the same, but the situation of the two presidential candidates been reversed, does anyone seriously believe that the conservative Justices would have reached the same result? Thus, the result in *Bush v. Gore* depended on the order in which the parties’ names appeared on the case caption... I cannot think of another Supreme Court decision about which one can say with equal confidence that reversing the parties, and nothing else, would have changed the result.”

Unequal Protection

For several decades the Supreme Court has been notably unreceptive to claims that a person’s rights secured by the equal protection clause of the Fourteenth Amendment were violated, and the Court currently almost always rejects such claims. The Court has insisted that unequal treatment cannot constitute a violation of the equal protection clause unless it is done purposefully, and the five justices who joined in *Bush v. Gore* regularly vote to deny equal protection claims. Yet in *Bush v. Gore* these same five justices based their decision in favor of Bush on a novel, expansive interpretation of the equal protection clause, and did so despite the absence of any allegation or proof that the unequal treatment complained of was purposeful.

In our legal system there is no such thing as a one-case rule, and the right-wing justices who constituted the majority in *Bush v. Gore* have on prior occasions denounced the notion that a judicial decision can ever be a “unique disposition.” Nevertheless, after unexpectedly and atypically enlarging equal protection rights, the *Bush v. Gore* majority endeavored to ensure that its expansion of rights would never benefit anyone other than Bush, asserting (with “effrontery and shamelessness,” Bugliosi notes) that its ruling was “limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.” As Dershowitz comments waggishly: “Like a great spot-relief pitcher in baseball, this equal-protection argument was trotted out to do its singular job of striking out Vice President Gore and was immediately sent to the showers, never to reappear in the game.”

Under Florida statutes and court decisions, a voter casts a legal vote that must be counted if, despite any error by the voter or by the voting machine, the intent of the voter clearly appears from the face of the

ballot. Why, then, according to *Bush v. Gore*, was the Florida Supreme Court's decision to recount the presidential votes, based on the state's traditional standard that the clear intent of the voter governs, violative of the equal protection clause? Because, the five-justice majority strangely held, the general standard of voter intent was subject to different interpretations by different vote counters! But why would this be more harmful to Bush than to Gore? And don't the same or similar disparities in vote counting equally exist when the votes are counted the first time? And why this sudden concern with uniformity at the state level by justices who, in the name of federalism, ordinarily insist that state governments be given room for "play in the joints"? To quote Bugliosi: "Varying methods to cast and count votes have been going on in every state of the union for the past two centuries, and the Supreme Court [prior to *Bush v. Gore*] has been as silent as a church mouse on the matter, never even hinting that there might be a right under the equal protection clause that was being violated."

The Court's remedy for the equal protection violation it had strained to concoct was bizarre. It barred any more recounting, even though this meant that perhaps thousands of voters whose clear intention would have been evident to anyone doing the recount would be denied their legal right to have their votes counted. The Court evidently thought it was better that a significant number of legal votes be ignored than that some questionable votes should be counted. "The end result," Dershowitz tells us, "was that a large number of voters who cast proper votes under Florida law but whose votes were not counted were denied their ... right to vote for president in order to ensure that the votes of others would not be diluted by the improper inclusion of ballots that might be invalid... This is the most perverse misuse of the equal protection clause I have seen in my forty years as a lawyer."

Irreparable Harm

The most palpably dishonest aspect (Bugliosi calls it a "maddening sophistry") of *Bush v. Gore* was the majority's claim that it could not permit any further recounting because under Florida law any presidential vote recount had to be completed by Dec. 12. (*Bush v. Gore* was decided at 10 p.m. on Dec. 12.) Actually, there was no Florida legal requirement that presidential vote recounts be completed by a specified date. (The original recount underway when the Supreme Court stopped it probably would have been completed by Dec. 12 if the Supreme Court had not entered its stay order on Dec. 9.)

The stay itself is incomprehensible unless it is acknowledged that the majority justices who granted it were acting in a partisan fashion. The rule is that the Supreme Court is supposed to grant a stay of the

judgment of a lower court only if the party seeking it makes a substantial showing that in the absence of the stay he will suffer irreparable harm. Yet in *Bush v. Gore*, Dershowitz shows, “the balance of harms ... unmistakably were on the side of Gore... If the counting was stopped, Bush would win... What possible harm [to Bush] could result from merely counting ballots by hand? If the Supreme Court ultimately ruled that these ballots should not have been counted, they could have been eliminated from the tally.” The only conclusion to be drawn from the granting of the stay is that, as The New York Times said at the time, it was “highly political” and that it gave the appearance of “racing to beat the clock before an unwelcome truth would come out.”

Making Presidents

Because of the strong evidence that *Bush v. Gore* was, in the words of Prof. Klarman, an example of “partisan preferences trumping law,” supporters of the decision have few lines of defense. One involves raising the flag of pragmatism by taking a result-oriented approach. The decision, they say, saved the nation from a constitutional and political crisis in which the issue of who won the presidency would have had to be decided (as the Constitution provides) by Congress. There are three problems here. First, the recount, if it had been permitted to go forward, might have resolved the election dispute; and even if the election had ended up in Congress that body might well have resolved the controversy before the scheduled inauguration. Second, the pragmatic argument presupposes that courts are (to borrow words used by Justice Thomas in another context) “mighty Platonic guardians” better able to resolve political disputes than elected politicians. Third, as Bugliosi rightly says, the pragmatic argument boils down to this absurd assertion: “If an election is close, it’s better for the Supreme Court to pick the President, whether or not he won the election, than to have the dispute resolved in the manner prescribed by law.”

Another possibility for *Bush v. Gore* defenders is for them to accuse their opponents of irresponsible criticism of a court decision. But in light of the frenzied attacks launched against the Florida Supreme Court, taking this course of action is untenable, for to do so would expose *Bush v. Gore* defenders as hypocrites who maintain that, in Dershowitz’s words, “judicial fiat is to be condemned when it produces a Gore victory and praised when it produces a Bush victory.”

Another option for *Bush v. Gore* defenders is to call their opponents sore losers—to admonish the decision’s critics to cease complaining about the plain fact that five right-wing Republican justices, appointed by right-wing Republican presidents, installed a right-wing Republican as president. But it is absolutely certain that right-wingers would still be

raging deliriously if the Florida Supreme Court decision had prevailed and Gore had become president by virtue of the recount. Bill Kristol, the doyen of right-wing and Republican militants, announced, after the Florida court's decision (but prior to its reversal in *Bush v. Gore*): “[S]ome of us will not believe that Al Gore has acceded to the presidency legitimately... We will therefore continue to insist that he gained office through an act of judicial usurpation. We will not ‘move on.’” Is it only right-wingers who are permitted to “not ‘move on’”?

For decades right-wing Republicans have excoriated “liberal judicial activists” on the federal bench and labored (with great success) to replace them with “strict constructionist” federal judges who “will interpret the law, not make it.” Although five of their justices, in a stunning display of partisan politics cloaked in the forms of law, have elected a president, the right-wing Republicans solemnly deny that the five justices are activists. And perhaps they are literally correct. After all, they said their judges would not make law; they never said their judges would not make presidents.

Note: The Dec. 9, 2000 decision of the U. S. Supreme Court staying the Florida Supreme Court decision ordering a recount is reported at *Bush v. Gore*, 531 U. S. 1046, 121 S. Ct. 512, 148 L. Ed. 2d 553 (2000). The Dec. 12, 2000 decision of the U. S. Supreme Court reversing the Florida Supreme Court decision and prohibiting any further recount is reported at *Bush v. Gore*, 531 U. S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000).