

# AN OPEN LETTER FROM HEAVEN TO JUSTICE SAMUEL ALITO

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*Michael Higginbotham\**

October 2, 2006

Dear Justice Alito:

The President has signed your commission and you have now become the 110th Justice of the United States Supreme Court. I congratulate you on this high honor!

Your job will be of vital importance not only because the Supreme Court is the final arbiter of constitutional interpretation but also because you have replaced a Justice who often represented the fifth and deciding vote in many of the most controversial issues of equal protection—Justice Sandra Day O'Connor.<sup>1</sup> It is now your vote that will determine the direction of the Court on equal protection issues for many years to come. I believe that Justice O'Connor can serve as your model for utilizing a conservative judicial philosophy to reach fair compromises that expand the scope of individual rights consistent with equality notions contained in the Constitution.

It has been seven years since that December day when I passed away. Since that time I have closely watched the critical cases that have come before the Supreme Court: in particular, the opinions of Justice O'Connor. I remember fondly the last time I chatted with Justice O'Connor—it was 1994 and she was receiving the prestigious Thurgood Marshall Award from Georgetown University Law Center. That evening I praised Justice O'Connor for the careful balance she struck over the years when constitutional rights were in conflict. Her commitment to upholding individual rights and preserving the integrity of the Constitution of the United States of America<sup>2</sup> was remarkable. Justice O'Connor knew that reconciling the rights of the individual with the needs of society poses one of the most

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1. See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (writing for the majority, increasing the level of scrutiny from rational basis to strict scrutiny); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (writing for the majority, holding that the University of Michigan Law School's affirmative action program satisfied the strict scrutiny standard).
2. See, e.g., *Adarand*, 515 U.S. 200; *Grutter*, 539 U.S. 306.

difficult challenges for members of the Court. Whether the issue was abortion rights, affirmative action, or the death penalty, she always endeavored (in my view successfully) to strike a well-crafted balance between individual rights and societal concerns that bridged the conservative/liberal divide on the Court.<sup>3</sup>

I also have pleasant memories of the occasions in which you appeared before me as a lawyer. I often remarked to colleagues that you were one of the best appellate advocates that have ever come before me on the bench. Your oral arguments were clear, well reasoned, and conveyed in a forthright manner. Your briefs were thoroughly annotated, carefully structured, and intricately detailed. Your work ethic was equally apparent in the few years that you and I sat together as colleagues on the Third Circuit Court of Appeals. The confirmation hearing on your Supreme Court nomination served to remind me of those times. You were a valued colleague whom I respected for your intellect, integrity, and dedication, and I know first hand that you possess the ability to be a superb justice. While your ability is beyond question, your approach to adjudicating individual rights—insofar as I can discern it from your record as a lawyer and a judge—gives me some cause for concern. It is particularly important to me that my thoughts are known since, prior to and during your confirmation hearing, a senator and a witness invoked my name to suggest that I might not have opposed your nomination.<sup>4</sup> Although I continue to regard you with great respect, I must admit that such a suggestion could not be further from the truth. Regardless of how I would have viewed your nomination, the question is whether you will now serve as a justice who earns my respect and admiration. Your past gives me reason for great concern, but I am not without hope.

#### I. YOUR POSITIONS ON RACE ISSUES AND MINE

You and I differed on issues of race over the years. These differences were apparent both when you served as a government lawyer early in your professional career and after you were appointed to the federal bench. Indeed, in your fifteen years on the bench, you ruled only twice for African Americans on the merits in their employment discrimination cases.<sup>5</sup>

3. See, e.g., *Rush Prudential HMO v. Moran*, 536 U.S. 355 (2002). Justice O'Connor was the swing vote which upheld state laws giving people the right to a second doctor's opinion if their HMOs tried to deny them treatment. Conservatives on the court include Chief Justice Roberts, who recently replaced Justice Rehnquist, and Justices Kennedy, Thomas, and Scalia. Liberals or moderates on the court include Justices Stevens, Ginsburg, Souter, and Breyer. Justice O'Connor often cast the deciding vote when these two groups disagreed.

4. See *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the Judiciary*, 109th Cong. 443 (2006) (remarks by Senator John Cornyn); *NPR News Special Coverage* (National Public Radio broadcast Oct. 31, 2005) (remarks by Judge Timothy Lewis).

5. See *Goosby v. Johnson and Johnson Medical Inc.*, 228 F.3d 313 (3d Cir. 2000); *Smith v. Davis*, 248 F.3d 249 (3d Cir. 2001). In contrast, Judge Alito authored several opinions ruling against African American plaintiffs in employment discrimination cases. See, e.g., *Tomlinson v. Continental Express*, 225 F.3d 650 (3d Cir. 2000) (affirming summary judgment against the plaintiff on the ground that she failed to provide sufficient evidence to establish pretext regarding her assignment claim); *Williams v. Dalton*,

As I am sure you recall, in *Grant v. Shalala*, the claimants accused an administrative law judge of adopting a biased policy and stating that “claimants living in Hispanic, black or poor white communities are only ‘attempting to milk the system,’ that they are ‘perfectly capable of going out and earning a living,’ [and] that they ‘preferred [sic] living on public monies.’”<sup>6</sup> The district court below certified the class and set the case for trial. The government appealed, and you wrote for the majority. In that opinion you held that the district court could not make its own findings on the bias claims, but had to defer to the agency finding of no bias.<sup>7</sup> You wrote that “we are convinced that the plaintiffs’ right to an impartial administrative determination can be fully protected through the process of judicial review of the Secretary’s determination” instead of allowing the district court the power to conduct its own full trial of bias claims rejected by the agency.<sup>8</sup> I believe that your refusal to allow a full trial on the bias claims by initiating a judicial procedural sidestep erroneously and unnecessarily permitted racially discriminatory treatment to go unchecked.

Conversely, I strongly believed when I first joined the federal judiciary that the federal courts had a duty to give full effect to the civil rights laws that were being passed. To me, civil rights laws had little meaning unless federal courts were willing to enforce them. If you recall my dissent in *Grant*, I warned that “[t]he determination of whether or not plaintiffs’ constitutional right has been violated is the province of the courts and not that of an agency.”<sup>9</sup> I added, “What the majority proposes to do in its holding is effectively to have courts take a back seat to bureaucratic agencies in protecting constitutional liberties. This . . . is a radical and unwise redefinition of the relationship between federal courts and federal agencies . . . .”<sup>10</sup>

Another example of your deftness in procedural two-stepping arose in a case dealing with race discrimination in jury selection, an issue about which I feel passionate. In *Riley v. Taylor*, a black defendant who had been convicted of murder by an all-white jury claimed the prosecutor had unconstitutionally dismissed all black prospective jurors.<sup>11</sup> In dissent, you explained that statistics could be misleading.<sup>12</sup> As proof, you compared the evidence of race discrimination to the disproportionate number of U.S. presidents who have been left-handed.<sup>13</sup> Judge Sloviter, who often

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173 F.3d 422 (3d Cir. 1998) (affirming summary judgment against the plaintiff on the ground that he failed to provide sufficient evidence to establish pretext regarding his promotion claim); *Hobbs v. Rubin*, 156 F.3d 1224 (3d Cir. 1998) (affirming a jury trial verdict against the plaintiff on a termination claim on evidentiary grounds).

6. *Grant v. Shalala*, 989 F.2d 1332, 1348 (3d Cir. 1993) (Higginbotham, J., dissenting).

7. *Id.* at 1333.

8. *Id.* at 1346.

9. *Id.* at 1357.

10. *Id.* at 1359.

11. *Riley v. Taylor*, 277 F.3d 261 (3d Cir. 2001).

12. *Id.* at 326-27.

13. *Id.* at 327. (“Although only about 10% of the population is left-handed, left-handers have won five of the last six presidential elections. Our ‘amateur with a calculator’ would conclude that ‘there is little chance of randomly selecting’ left-handers in five out of six presidential elections. But does it follow that the voters cast their ballots based on whether a candidate was right-or left-handed?”).

sided with me on issues involving individual rights,<sup>14</sup> responded in the majority opinion:

[Judge Alito] has overlooked the obvious fact that there is no provision in the Constitution that protects persons from discrimination based on whether they are right-handed or left-handed. To suggest any comparability to the striking of jurors based on their race is to minimize the history of discrimination against prospective black jurors and black defendants . . . .<sup>15</sup>

Your laissez-faire attitude toward police practices involving broader search and seizure authority under the Fourth Amendment presents further insight into your values. Given the history of police brutality against minorities, your views on lethal police force are alarming. In 1984, you wrote that you saw no constitutional problem with an officer fatally shooting an unarmed teenager fleeing after a burglary.<sup>16</sup> You suggested the shooting was “reasonable” and recommended that since an officer could not be certain why any suspect was fleeing, the courts should not set a blanket rule forbidding the use of deadly force in such situations.<sup>17</sup> I, however, supported such a rule and was pleased when the Supreme Court, in *Tennessee v. Garner*, concluded that killing a felony suspect is “constitutionally unreasonable” in cases where the police do not have “probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.”<sup>18</sup>

Equally illustrative of your values is *Bray v. Marriott Hotels*, which involves a black employee denied a promotion by the Marriott Corporation.<sup>19</sup> Without permitting a trial, a federal judge ruled in Marriott’s favor.<sup>20</sup> On appeal, the court ruled that the employee had presented enough evidence for a trial.<sup>21</sup> You disagreed, characterizing the employee’s evidence as merely showing “minor inconsistencies.”<sup>22</sup> You chose to focus on a Marriott executive’s statements that he sought the best candidate.<sup>23</sup> In the majority opinion, Judge Theodore McKee, who replaced me on the court and who remains its only black member, responded that judges could not ignore the possibility that some executives never view minority applicants as the best candidates and suggested that your position nullified current antidiscrimination law.<sup>24</sup>

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14. See, e.g., *U.S. v. Bierley*, 922 F.2d 1061 (3d Cir. 1990) (Alito, J., dissenting).

15. *Riley*, 277 F.3d at 290.

16. Memorandum, From Samuel Alito as Assistant Attorney General to Janet Reno, National Archives and Records Administration Record Group 60, Department of Justice Files of the Deputy Assistant Attorney General, Charles Cooper, 1981–1985 Accession #060-89-216, Box 19; Folder: Memphis Police Dept. v. Garner, 1984.

17. *Id.* at 12.

18. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

19. *Bray v. Marriott Hotels*, 110 F.3d 986 (3d Cir. 1997).

20. *Id.* at 989.

21. *Id.* at 998.

22. *Id.* at 1003.

23. *Id.* at 1001.

24. *Id.* at 993 (Chief Judge McKee stating “[i]ndeed, Title VII would be eviscerated if our analysis were to halt where the dissent suggests.”).

## II. MY RACE VALUES

Thurgood Marshall and I spent our entire lives fighting against racial discrimination and for the creation of racial equality. He and I had a laugh, albeit a nervous one, when we heard Judge Timothy Lewis and Senator John Cornyn mention our names in connection with your confirmation hearing.<sup>25</sup> Judge Lewis quoted Thurgood saying nice things about Justice Rehnquist<sup>26</sup> and Senator Cornyn quoted me saying nice things about you.<sup>27</sup> We found that somewhat humorous because while both of us often said nice things about our conservative colleagues in speeches and at conferences, we never imagined those words being used to draw an inference that is completely contradictory to our lives and work. That contrary inference, of course, was that either Thurgood or I would have supported your nomination as an associate justice. Quite simply, your values on race would have prevented our support.

One issue indicative of the ideological divide between us is affirmative action in higher education. I believed that the reduction in affirmative action was causing an increase in racial inequity, concomitantly limiting the racial diversity achieved in higher education since Thurgood's masterful argument resulted in the 1954 *Brown* decision, holding that state-required segregation in public schools was unconstitutional.<sup>28</sup> In a piece entitled "No More Time for Foolishness,"<sup>29</sup> I criticized the *Hopwood v. University of Texas* decision invalidating an affirmative action program at the University of Texas Law School.<sup>30</sup> I believed that this decision was based more on politically conservative ideology than on any constitutional or jurisprudential basis. I explained:

The story of how today, in 1997, there is just one African-American student out of a total of 268 in the first year class of the University of California at Berkeley, School of Law, and four out of a total of 468 at the University of Texas Law School, is not just one story, but several. First and foremost, it is the story of two specific cases: *Sweatt v. Painter*, which desegregated the University of Texas Law School, and *Hopwood v. University of Texas*, which is about to "re-segregate" it. But, more importantly, it is also the story of how former Presidents Ronald Reagan and George Bush sowed the federal courts of this nation with their seeds of very conservative

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25. See *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 443, 667–68* (2006); see also *NPR News Special Coverage* (National Public Radio broadcast Oct. 31, 2005) (remarks by Judge Timothy Lewis).

26. *Confirmation Hearing*, *supra* note 25, at 667–68.

27. *Id.* at 443.

28. *Brown v. Board of Education*, 347 U.S. 483 (1954). The NAACP's chief counsel, Thurgood Marshall—who was later appointed to the U.S. Supreme Court in 1967—argued the case before the Supreme Court for the plaintiffs.

29. A Leon Higginbotham, Jr., *No More Time For Foolishness: A Personal Perspective on Race and the American Legal Process* (Nov. 15, 1997). Memorandum on file with the author.

30. *Hopwood v. University of Texas*, 861 F.Supp. 551(5th Cir. 1994).

judges, and how African-Americans are now reaping the bitter harvest of their policies.<sup>31</sup>

Another issue is racism in the criminal justice system. I spoke out against racial bias in prosecution, jury selection, judicial decision-making, and media reporting. In an article entitled "The O. J. Simpson Trial: Who Was Improperly 'Playing the Race Card'?" I discussed the implications of Officer Mark Fuhrman's false denial of previous racist statements.<sup>32</sup> I explained:

The case of *The People v. Orenthal James Simpson* has come to be seen by many as a metaphor for the seemingly intractable problems of race in America. Yet, for all of the incalculable hours of media attention and endless public comment by both observers and trial participants, many of the "lessons" drawn from the trial by commentators and a large segment of the public were deceptive. The most blatantly deceptive of these lessons is what now has become the conventional wisdom that in using detective Mark Fuhrman's racism as a test of his credibility, the Simpson defense team had *improperly and unjustifiably* "played the race card." That conclusion is false. Rather than establishing that the defense strategy was improper or unethical, when carefully analyzed, many of the critiques of the defense team's strategies reveal far more the latent and explicit biases of the commentators and the duality of standards the public still uses to judge African-American criminal defendants and African-American lawyers.<sup>33</sup>

I further explained that:

[p]erhaps the most deceptive statement of all was uttered with a purported neutrality when Andy Rooney, the famed *60 Minutes* correspondent, declared that "[t]he [Simpson] acquittal was the worst thing that's happened to race relations in 40 years." Worse than what? one wanted to ask Mr. Rooney: Worse than the bombing of the 16th Street Baptist Church in Birmingham, and the killing of four schoolchildren in 1963? Worse than the slaying of Medgar Evers in 1963, of James Chaney, Andrew Goodman, and Michael Schwerner in 1964, of Jimmie Lee Jackson, Reverend James Reeb, and Viola Gregg Liuzzo in 1965, or of dozens of other civil rights martyrs in the 1960s? Worse even than the assassination of Martin Luther King?<sup>34</sup>

In my 1996 book, *Shades of Freedom*, I provided a more in-depth analysis of racism in the criminal justice system.<sup>35</sup> The book began by listing several notorious examples of recent situations in which African Ameri-

31. Higginbotham, *supra* note 29, at 2.

32. A. LEON HIGGINBOTHAM, JR., ADERSON BELLGARDE FRANCOIS, & LINDA Y. YUEH, *The O. J. Simpson Trial: Who Was Improperly "Playing The Race Card"?*, in *BIRTH OF A NATION'HOOD*, 31 (Toni Morrison ed., 1997).

33. *Id.* at 31-32.

34. *Id.* at 35 (citation omitted).

35. A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* (Oxford University Press 1996).

cans were wrongly accused of perpetrating heinous crimes.<sup>36</sup> The six examples were characterized by two interesting features: first, the truth about the cases was brought to the attention of most Americans through the mass media;<sup>37</sup> secondly, each case involved a white person accusing an anonymous and non-existent black person of committing the crime.<sup>38</sup>

Particularly noteworthy was the 1994 accusation by Susan Smith, who “claimed that an armed black man perpetrated a car jacking, kidnapped her children who were in the vehicle, and left her on the side of the road.”<sup>39</sup> It was later discovered, after weeks of network news coverage on the abduction and the search for the alleged black perpetrator, that the story was a complete fabrication. Smith was later arrested, tried, and convicted of the murder of her own children.<sup>40</sup>

Another shocking example I offered was the case of Charles Stuart, who claimed that his pregnant wife had been assaulted in their vehicle and killed by a black man attempting to steal her cash and jewelry.<sup>41</sup> Mrs. Stuart, who died from a gunshot wound to the abdomen, was in fact killed in an elaborate scheme devised by Mr. Stewart and his brother to collect life insurance benefits.<sup>42</sup> I reasoned that these examples of false accusation were highly indicative of widespread racial discrimination in the judicial system.<sup>43</sup>

### III. YOUR RACE VALUES

Values, of course, are what have always been of paramount concern to me when it comes to judicial nominations. Speaking candidly, I am troubled by some of your answers in the confirmation hearing concerning matters of racial equality.

You admitted being a member of Concerned Alumni of Princeton (CAP), though you could not recall exactly why you joined the organization.<sup>44</sup> You did, however, list it on your resume when you applied for a job with the Reagan Administration in 1985. There seemed to be some concern expressed at your confirmation hearing as to whether you were a high rank-

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36. *Id.*

37. African Americans have long complained that media coverage of events where they are involved is biased against them. Journalist Carl Rowan has written that during the period immediately after World War II, “[t]he white daily newspapers carried almost nothing about blacks except for an item about someone stealing a chicken or being accused of rape or robbery.” CARL T. ROWAN, *BREAKING BARRIERS, A MEMOIR*, 65 (Little, Brown, and Co. 1991).

38. Higginbotham, *supra* note 35. The perception that there is a lack of fairness for blacks in the criminal justice system has also been a pervasive problem. Even the Supreme Court has acknowledged that “racial and other forms of discrimination still remain a fact of life, in the administration of justice . . . .” *Rose v. Mitchell*, 443 U.S. 545, 558–59 (1979).

39. Higginbotham, *supra* note 35 at xxvi.

40. Tom Morganthau, *Condemned*, *NEWSWEEK*, Aug. 7, 1995, at 19.

41. Higginbotham, *supra* note 35 at xxvii.

42. *Id.*

43. *Id.*

44. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the Judiciary*, 109th Cong. 456 (2006).

ing member of CAP and to what extent you participated in CAP activities.<sup>45</sup>

My concern, however, is not whether you were an active or inactive member, high ranking or low-level, officer or ranking member, but why you have not repudiated your membership. You indicated that you probably joined CAP in the 1970s because of its vigorous defense of Reserve Officer Training Corps (R.O.T.C.) programs at Princeton. Such programs were terminated in the late 1960s and you wanted to see them reinstated. I have no problem with your support of R.O.T.C. programs, but CAP stood for much more than simply bringing R.O.T.C. back to campus. CAP desired a return to the Princeton of the 1950s, which meant not only the return of R.O.T.C. programs but a drastic reduction of minority enrollment through the manipulation of affirmative action programs and the exclusion of women from admission altogether.<sup>46</sup> CAP's literature at the time was very clear on this exclusionary point. Such a reduction and elimination of women and minorities would be inconsistent with the values of access, fairness, and diversity to which I am deeply committed.

Politicians from both sides of the ideological divide recognized how CAP's position on gender and racial equality was extreme. Princeton graduates such as Bill Bradley, a liberal Democratic senator from New Jersey, and Bill Frist, a conservative Republican senator from Tennessee, both denounced the organization and withdrew their membership and support.<sup>47</sup> This was widely reported in the media at that time.<sup>48</sup> While you indicated that you do not oppose women and minorities having access to higher education, your failure to repudiate CAP, as Senators Bradley and Frist did, suggests a lack of a similar commitment to the notion of equal access to higher education for women and minorities.

As a high-ranking government official, what you say and do has a tremendous impact on how Americans think, particularly about notions of equality. Based upon this perception, I made a concerted effort neither to belong to nor accept any award, no matter how prestigious, from any organizations that did not reflect racial, religious, ethnic, and gender pluralism. In the 1980s I rejected the University of Chicago Law School's invitation to judge its moot court competition final round because they had no black faculty at the law school and had not for many years.<sup>49</sup> Similarly,

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45. Chanakya Sethi, *Alito '72 joined conservative alumni group*, DAILY PRINCETONIAN, Nov. 18, 2005, at 1, available at <http://www.dailyprincetonian.com/archives/2005/11/18/news/13876.shtml>.

46. See Dujack, Stephen, *Alito Needs to Shed his CAP*, dailyprincetonian.com (Nov. 22, 2005).

47. Former Senator Bill Bradley, a Democrat, resigned in 1973 because of the unbalanced viewpoints expressed in the organization's magazine, *Prospect*. Republican Senator Bill Frist co-authored a report that condemned CAP as extremist and destructive. See People for the American Way Press Release, *Alito: CAP and Credibility*, (Jan. 10, 2006), available at <http://www.pfaw.org/pfaw/general/default.aspx?oid=20293>.

48. See, e.g., David D. Kirkpatrick, *From Alito's Past, a Window on Conservatives at Princeton*, N.Y. TIMES, Nov. 27, 2005, at 1.

49. See F. Michael Higginbotham, *Speaking Truth to Power: A Tribute to A. Leon Higginbotham, Jr.*, 20 YALE L. & POL'Y REV. 341, 350 (2002) (internal citations omitted).

I refused invitations to join several organizations that refused membership to women.<sup>50</sup>

#### IV. YOUR SUPREME COURT JURISPRUDENCE ON RACE

While you have been on the Supreme Court only for a short period of time, your initial decisions reinforce my concerns but also provide a glimpse of hope. For example, in *League of United Latin American Citizens v. Perry*, the Court examined a challenge to a 2003 redistricting scheme enacted by the Texas state legislature.<sup>51</sup> Plaintiffs-Appellants argued that the redistricting represented unconstitutional partisan gerrymandering and violated both § 2 of the Voting Rights Act of 1965 and the Equal Protection Clause of the Fourteenth Amendment, resulting in the dilution of both Latino and African American voting power.<sup>52</sup>

With respect to the part of the redistricting plan that broke apart a staunchly Democratic district in which African Americans were the second-largest racial group, you concurred with the Court and voted to reject Appellants' § 2 claim.<sup>53</sup> Although assuming "for purposes of this litigation that it is possible to state a § 2 claim for a racial group that makes up less than fifty percent of the population," the Court invoked the rule established in a previous case which requires § 2 plaintiffs to show that the racial group constitutes "a sufficiently large minority to elect their candidate of choice with the assistance of cross-over votes."<sup>54</sup> The District Court found that it was impossible to determine whether African Americans could elect their candidate of choice because the Democratic primaries in that district had been uncontested for twenty years; it was plausible that Anglos would have voted in greater numbers had an African American candidate of choice run against the incumbent, and thus evidenced their control over the district.<sup>55</sup> The Court upheld the District Court's findings, under the clearly erroneous standard:

The opportunity [for racial groups] to elect representatives of their choice . . . requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice. There is no doubt that African-Americans preferred Martin Frost to the Republicans who opposed him. The fact that African-Americans preferred Frost to some others does not, however, make him their candidate of choice.<sup>56</sup>

You agreed with the majority requiring a racial group to make a fairly extensive showing that a candidate is their "candidate of choice"<sup>57</sup> in order to obtain relief under § 2. The majority's references to Frost being Anglo and having the support of Anglo and Latino voters<sup>58</sup> seem to suggest that,

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50. *See id.*

51. 126 S. Ct. 2594 (2006).

52. *Id.*

53. *Id.* at 2624-2626.

54. *Id.* at 2624 (citing *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993)).

55. *Id.* at 2624.

56. *Id.* at 2625 (internal citations omitted).

57. *League of United Latin American Citizens*, 126 S. Ct. at 2625.

58. *Id.* at 2624.

if Frost were an African American enjoying less support from other racial groups, there would have been a stronger presumption that he was the African American “candidate of choice.”<sup>59</sup> Thus, the majority seems to punish racial groups for supporting a candidate that has broad cross-racial support.

In *League of United Latin Am. Citizens*, you joined in part of Justice Scalia’s concurrence in the judgment in part and dissent in part, which addressed appellants’ equal protection claims.<sup>60</sup> Appellants argued that the state removed 100,000 mostly Latino residents from one district to purposefully dilute Latino voting power.<sup>61</sup> Although the District Court found that the district was redrawn to protect the Republican incumbent against a growing bloc of opposition Latino voters, it concluded that the redistricting plan as a whole was not racially motivated.<sup>62</sup> Moreover, it concluded that the residents were removed from the district because they voted for Democrats, not because they were Latino.<sup>63</sup> Justice Scalia found no clear error in the District Court’s findings about the legislature’s motivations.<sup>64</sup>

Justice Scalia then went on to examine the redrawing of another district at issue, one in which a Latino “opportunity district” was actually created by the redistricting plan.<sup>65</sup> The state, in its brief, conceded that it classified individuals on the basis of their race when it redrew this district: “To avoid retrogression and achieve compliance with § 5 of the Voting Rights Act . . . , the Legislature chose to create a new Hispanic-opportunity district . . . which would allow Hispanics to actually elect its [sic] candidate of choice.”<sup>66</sup> In other words, the legislature tried to compensate for the diminished voting power of Latinos in one district by creating another district in which Latinos would have increased voting power.

Justice Scalia argued that “when a legislature intentionally creates a majority-minority district, race is necessarily its predominant motivation and strict scrutiny is therefore triggered.”<sup>67</sup> When Justice Scalia subjected this portion of the scheme to strict scrutiny, he found that, because the state’s purpose in creating the Latino “opportunity district” was to comply with the antidiscrimination provisions of § 5 of the Voting Rights Act, there was a compelling state interest justifying the use of race.<sup>68</sup> Thus, Justice Scalia chose to apply strict scrutiny to the one part of the plan that ostensibly benefited Latino voters, yet applied the clear error standard to the lower court’s findings with regard to the redrawing of another district in which Latino voting power was diminished. In the former case, Justice Scalia found a predominance of racial motivation in the Texas legislature, while in the latter he concluded that the state was merely “aware of racial

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59. *See id.* at 2625 (citing the testimony of a state representative that the “African-Americans [in this district] did not have the ability to elect . . . an African-American candidate”).

60. *Id.* at 2664–2669.

61. *Id.* at 2664.

62. *Id.* at 2664–65.

63. *League of United Latin American Citizens*, 126 S. Ct. 2594 at 2665 (2006).

64. *Id.*

65. *Id.* at 2666–69.

66. *Id.* at 2667.

67. *Id.*

68. *Id.* at 2664–68.

demographics” and was motivated more by political, race-neutral concerns.<sup>69</sup>

Justice Scalia’s concurrence, in which you partly joined, is troubling for a number of reasons. First, Justice Scalia’s logic appears flawed on its face: he acknowledges that the state was trying to compensate for its own purposeful (or at least knowledgeable) dilution of the voting power of a racial group, and yet finds discriminatory intent only in the district in which the state attempted to rectify the disparity that it acknowledged causing. Moreover, this concurrence seems to denigrate the strict scrutiny standard by applying it in an inconsistent and arbitrary manner: the distinction drawn between a redistricting which receives great deference and a redistricting which receives strict scrutiny is not entirely clear or convincing. A legislature apparently need only offer pretextual “political” reasons (i.e., that Latinos vote Democrat) to avoid strict scrutiny even when it is clearly singling out a racial group.

*League* demonstrates your willingness to vote with the conservative bloc of the Court. Moreover, the absence of your own concurring opinion indicates either that your views on these issues do not diverge significantly from those of Justices Roberts, Scalia, and Thomas, the most conservative justices, or that you are taking a cautious approach to airing your views on race and individual rights as a member of the Court. In either case, I must confess my disappointment. I hoped you would have been much more like Justice O’Connor in speaking out more decisively in favor of minority rights in a fundamental area (political rights), instead of simply voting with your ideological colleagues or remaining silent when such important equality issues were presented.

Alternatively, the majority opinion you authored in *Holmes v. South Carolina*, vacating a murder conviction that had been affirmed by the state Supreme Court,<sup>70</sup> gives me hope. Your opinion rejected as “arbitrary” the state court’s interpretation of federal evidence rules that permitted disallowance of defense evidence of third party guilt, “even if that evidence, [when] viewed independently, would have great probative value and . . . would not pose an undue risk of . . . prejudice, or confusion of the issues.”<sup>71</sup> In this case, the prosecution had introduced forensic evidence that, if believed, strongly supported a guilty verdict. However, you wrote that “[j]ust because the prosecution’s evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case.”<sup>72</sup> You noted that, “by evaluating the strength of only one party’s evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt.”<sup>73</sup> The state’s interpretation of the evidence rule, you concluded, “violates a criminal defendant’s right to have ‘a meaningful opportunity to present a complete defense.’”<sup>74</sup>

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69. *League of United Latin American Citizens*, 126 S. Ct. at 2664–65.

70. 126 S. Ct. 1727 (2006).

71. *Id.* at 1734.

72. *Id.*

73. *Id.* at 1735.

74. *Id.* at 1735 (internal citations omitted).

This case is an encouraging sign of your willingness to clarify an ambiguous area of criminal law in a way that increases the rights of criminal defendants. However, the facts of this case were overwhelming: the defendant produced witnesses who placed another specific person near the scene of the crime and who refuted that person's alibi.<sup>75</sup> Nonetheless, I commend you for taking a step to combat the judicial curbing of defendants' rights witnessed during the last thirty years.

#### CONCLUSION

Based upon the Justice you replaced and the present ideological divide on the Court, you stand to be the critical vote on many equal protection issues involving race. While your conservative judicial philosophy will, no doubt, guide much of your deliberation on the most difficult cases that come before you, you will also be moved by your own personal values, both moral and spiritual, and your sense of right and wrong.

As part of these personal values, you stressed at your confirmation hearing the struggles of your parents in the early twentieth century as members of poor immigrant families from Italy.<sup>76</sup> You talked about the value of hard work, educational opportunity, and military and public service.<sup>77</sup> You discussed the pain of ethnic discrimination against your parents and the isolation working-class Americans could experience at prestigious universities such as Princeton.<sup>78</sup>

What you and I will discuss in the future when you join me in Heaven is how generations to come evaluate your attempts to reconcile these liberal and moderate personal views with your conservative judicial philosophy. Will you apply the same concern you had for struggling Italian immigrants of the early twentieth century who fought against ethnic prejudice to the struggles of Haitian immigrants today who fight against racial prejudice? Will you apply the same concern you had for R.O.T.C. candidates seeking access to attend Princeton in the 1970s to the struggles of minorities and women today seeking to continue access to higher education and to avoid the glass ceiling regarding job promotion?

This struggle is evident in Justice O'Connor's jurisprudence on equal protection race issues. For example, Justice O'Connor wrote a 5-4 majority opinion in *Adarand Constructors, Inc. v. Peña*, remanding to the lower federal court a decision by the Court of Appeals upholding a federal government affirmative action plan in highway construction contracts.<sup>79</sup> Justice O'Connor's ruling mandated a more rigorous scrutiny under equal protection analysis than had been applied by the lower court, thus making it much more difficult for the government to implement affirmative action programs and to satisfy the constitutional standard against discrimination.<sup>80</sup>

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75. *Id.* at 1730-31.

76. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 54-55 (2006).

77. *Id.* (extolling the presence of these values in his parents' lives).

78. *See id.*

79. 515 U.S. 200 (1995).

80. *Id.*

Due to this decision, many were surprised when Justice O'Connor wrote a 5-4 majority opinion in *Grutter v. Bollinger*, upholding a similar affirmative action program in higher education, reasoning that creating a diverse classroom is a compelling government interest that satisfies the stringent standard required by her decision in *Adarand*.<sup>81</sup> What many fail to understand, however, is that Justice O'Connor's conservative judicial philosophy was always balanced by her liberal personal values of pluralism, anti-discrimination, and equal opportunity. Thus, even while questioning the validity of an affirmative action plan in *Adarand*, Justice O'Connor explained: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality."<sup>82</sup>

Justice O'Connor struggled with these dual concerns throughout her time on the Supreme Court. She is both revered and despised by liberals and conservatives, depending upon which equal protection race discrimination case is the focus of the debate. Some say that this "divide" more than any other factor demonstrates that Justice O'Connor struck the right balance. For many here in Heaven, like Thurgood and myself, we can't help but wonder: when you retire from the bench, what will be said about the balance struck by Justice Alito?

Sincerely,

A. Leon Higginbotham, Jr.<sup>83</sup>

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81. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

82. *Adarand*, 515 U.S. at 237.

83. The sentiments expressed in this letter reflect the author's best judgment as to what Judge Higginbotham might have said and felt had he been living today.

Aloysius Leon Higginbotham, Jr., was born the child of Aloysius Leon Higginbotham, Sr., and Emma Douglas Higginbotham in Trenton, New Jersey. He graduated from Ewing Park High School in Trenton at the age of sixteen and went on to Purdue University, but transferred to Antioch College in Ohio, from which he graduated in 1949. He graduated at the top of his class from Yale Law School in 1952 and was admitted to the Pennsylvania Bar in 1953. In the years following, Judge Higginbotham served as president of the Philadelphia branch of the NAACP, a commissioner of the Pennsylvania Human Relations Commission, and a special deputy attorney general.

In 1962, after a successful private practice, Judge Higginbotham was appointed by President John F. Kennedy to the Federal Trade Commission. In 1964, President Lyndon B. Johnson appointed him a federal district court judge, and in 1977, President Jimmy Carter appointed him to the United States Court of Appeals for the Third Circuit. Judge Higginbotham served as chief judge of that court from 1989 to 1991, and as a senior judge from 1991 until his retirement in 1993.

During his judicial service, Chief Justices Warren, Burger, and Rehnquist appointed Judge Higginbotham to a variety of judicial conference committees and other related responsibilities. Judge Higginbotham also found time to teach at the law schools of Harvard University, University of Michigan, New York University, University of Pennsylvania, Stanford University, and Yale University.

By appointment of President Johnson, Judge Higginbotham served as vice chairman of the National Commission on the Causes and Prevention of Violence. In November 1995, he was appointed by President William Jefferson Clinton to the United States Commission on Civil Rights. Also in 1995, he received the Presidential Medal of Freedom, the nation's highest civilian award.

