

Tribe v. Truth

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ONE OF the reasons Bush v. Gore won't go away is that its scholarly critics--who are numerous, influential, and vehement--won't let it. Many of the biggest guns in the business--Yale's Bruce Ackerman, Harvard's Alan Dershowitz, New York University's Ronald Dworkin--weighed in early and denounced the decision unequivocally. Along with a substantial portion of their colleagues from law schools around the country, they have not been content to argue that the case was wrongly decided. Rather, in a continuing flow of newspaper op-eds, opinion magazine essays, law journal articles, academic conferences, and university press books, they have insisted that the December 12, 2000, per curiam opinion joined by the five more conservative justices on the U.S. Supreme Court was lawless and undemocratic. Now Laurence Tribe, the Tyler Professor of Constitutional Law at Harvard Law School, an eminent appellate advocate and among the nation's foremost scholars of constitutional law, has stepped forward in the pages of the November 2001 Harvard Law Review to correct and refine and lend scholarly gravitas to the academic critique of Bush v. Gore. In the preciously entitled "Erog .v Hsub and its Disguises: Freeing Bush v. Gore from its Hall of Mirrors," Tribe provides one of the densest and most legally sophisticated attempts to date to demonstrate that the majority's legal arguments were "completely without merit," and that the Court's intervention betrayed an "utter disdain for democracy and its pluralistic institutions." The result of his labors, however, is a monument to the lengths its critics will go to make a scandal out of the case. The academic critics have claimed that the U.S. Supreme Court was wrong in holding that

the statewide hand recount of undervotes (ordered by the Florida Supreme Court on December 8, 2000) violated the Equal Protection Clause of the Fourteenth Amendment. It erred as well in concluding that under Florida law time had run out as of December 12 (the federal safe-harbor deadline) to conduct a constitutionally proper recount. In so ruling, the critics have charged, the conservatives committed an inexcusable violation of their judicial duty to decide cases in an impartial and principled manner. The conservatives' disgraceful decision was intelligible only as a reckless partisan act perpetrated to hand the presidency to their candidate. This grave accusation, which quickly congealed into the academy's conventional wisdom, has far-reaching consequences. It inflames partisan anger and provides Democrats with a seemingly respectable motivation for obstructing President Bush's nominations to the federal bench. It warps the important public debate about the relation in our constitutional system between the courts and the democratic process. And--most damaging of all, perhaps--over the long haul, as the legal academy disseminates its disgust and disdain in the classrooms, it threatens to corrode the next generation of lawyers' confidence in the judiciary and their respect for the rule of law. WHAT MAKES these consequences particularly unfortunate is that the conventional wisdom that gives them life and legs is deeply flawed. To begin with, the academic critics misstate the holding of the case. It was not only that the Supreme Court held that the Florida recount unconstitutionally diluted the weight of citizens' votes by treating similarly marked ballots differently, applying different standards from county to county and sometimes within the same county and in the same counting room. What the critics overlook is that votes were also subjected to arbitrary and disparate treatment, the Court held, because the Florida court's recount excluded overvotes, the much larger class of spoiled ballots on which machines detected more than one choice for president; because it included the results of a partial and unfinished recount in Miami-Dade County; and because it allowed untrained and unsupervised personnel to count votes. In addition, the academic critics

misrepresent the Court's reasoning about the remedy. The critics say that the Court imposed its independently arrived at interpretation of Florida law on the Florida Supreme Court. That's incorrect. The Court relied upon the Florida Court's construction of Florida law to conclude that December 12 was the outside deadline for determining the winner of Florida's 25 electoral votes. And the academic critics misunderstand the conservatives' judicial philosophy. They imply that conservatives doubt that the Supreme Court has an obligation to review state action to ensure that it conforms to federal law and the Constitution. This too is incorrect. What the conservatives believe is that invalidation of state action by the Court must be grounded in settled precedent and explicit textual statements rather than moral values and substantive goods thought to be implicit in the Constitution. Recognizing these flaws in the conventional wisdom, Harvard's Tribe entered the fray in order to set the record straight and show that despite misstatements, misrepresentations, and misunderstandings, the conventional wisdom--that the majority opinion in *Bush v. Gore* was lawless and undemocratic--is basically correct. IF ANYBODY could demonstrate, once and for all, the indefensibility of *Bush v. Gore*, it is reasonable to suppose that it would be Tribe. Though an interested party--he notes that during the election 2000 controversy he was Vice President Gore's "counsel of record in all of the U.S. Supreme Court proceedings"--Tribe is the author of a massive two-volume treatise, "American Constitutional Law, 3rd Edition," that is widely considered authoritative, and few surpass his mastery of the subject. Of course expert knowledge is a double-edged sword. The master doctor, as Socrates points out in the "Republic," also makes the most effective poisoner. Indeed, far from laying bare the illogic of *Bush v. Gore*, Tribe's 135 pages and 533 footnotes in the Harvard Law Review weave a bigger and better disguise for the case and contribute mightily to locking the doors and bolting the gates of the house of mirrors in which legal scholars have sought to imprison it. To be sure, Tribe makes a variety of telling points, including some that tell powerfully against the conventional wisdom and unwittingly, it appears, against his

own critique. For instance, Tribe rejects the commonplace accusation that the conservative justices acted out of "partisan zeal and crude self-interest." He does so in light of a simple consideration: "Two moderate Justices [Breyer and Souter], whom no one could plausibly suspect of being foolish enough to contribute unwittingly to a partisan conspiracy nor corrupt enough to go along knowingly, accepted the equal protection theory adopted by the majority." Although he doesn't notice it, this same simple consideration--that two non-conservative justices on the Supreme Court "essentially endorsed" the equal protection theory, bringing the total to seven out of nine Supreme Court justices--weakens substantially Tribe's own contention that the majority's equal protection holding is "completely without merit." Indeed, Tribe's wholesale dismissal of the Court's per curiam opinion as a symptom of diseased conservative thinking--"what the Court did is perfectly understandable in terms of several unfortunate pathologies generally manifested in its jurisprudence"--becomes even more implausible when one also considers that three of the seven Florida Supreme Court justices who heard the case that on appeal became *Bush v. Gore* (all of them Democrats serving on a liberal and activist court) found merit enough in the theory to conclude in their dissenting opinions that the Florida Court's selective recount was unconstitutional and must be terminated. It is, however, the "political question doctrine" that furnishes Tribe with the principal materials out of which he weaves the newest disguise for use in the vilification of *Bush v. Gore*. Even supposing there were merit in the equal protection theory, Tribe insists that the Court would have been plainly wrong to intervene in the dispute. For Bush's challenge to the recount, Tribe argues (developing a theory sketched in Justice Breyer's dissent and alluded to in Justice Souter's), presented a political question for resolution by Congress, which the Court had no authority under the Constitution to hear, indeed which the Constitution "commanded the Court" not to hear. The political question doctrine declares that the Court must avoid exercising powers or resolving controversies for which the

Constitution assigns responsibility to Congress or the executive or the states. Or, more technically, according to "American Constitutional Law, 3rd Edition," a controversy raises a "political question" in its primary sense when it prominently presents (in the landmark language of *Baker v. Carr*, the 1962 voting rights case holding that questions about legislative apportionment could be legal and not political) "a textually demonstrable constitutional commitment of the issue to a coordinate political department." In the case of *Bush v. Gore*, according to Tribe, "the requisite textual commitment to a political branch could hardly be clearer." The text, history, and structure of the Twelfth Amendment, which provides in relevant part that "The President of the Senate shall, in presence of the Senate and the House of Representatives, open all the certificates and the votes shall then be counted" is, in Tribe's view, "entirely decisive in establishing that power to resolve electoral disputes" is entrusted to Congress. And if there were any remaining doubt that the law required Congress and not the Court to resolve the issues raised in *Bush v. Gore*, it should have been disposed of by reference to the Electoral Count Act of 1877 (otherwise known as Title 3 of the U.S. Code, the source of the famous safe-harbor provision, which establishes the conditions under which Congress must treat a state's choice of presidential electors as conclusive), crafted and ratified in response to the Hayes-Tilden affair of 1876 and setting forth procedures for Congress to follow to resolve disputes over electors or electoral slates. Tribe further maintains, quoting the dissenting opinion of his former Harvard colleague Justice Breyer, that beyond the strictly legal question, prudence too should have compelled the justices to stay their hand: "However awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people's will far more accurately than does an unelected Court. And the people's will is what elections are about." In the end, it was the antidemocratic alliance of "hubris" and "disdain" in the conservative justices' jurisprudence, their overweening confidence in their own competence to define and

rank constitutional values combined with a contempt for Congress and the people, that compelled them to halt abruptly the "constitutional dialogue" in full swing on the counting room floors in Florida. "Intervening to short-circuit the political process," Tribe scathingly concludes, "the Court stands revealed wielding naked power clothed in the trappings of judicial authority." This is the core of Tribe's case, grounded in the political question doctrine, against *Bush v. Gore*. The combination of confidence and contempt with which he makes it is breathtaking. Particularly given how unconvincing is his case. FOR STARTERS, contrary to Tribe, neither the Twelfth Amendment nor the Electoral Count Act "commanded" the Supreme Court "not to inject itself into the dispute." To reach the conclusion that they did, Tribe, like many previous critics, must tendentiously couch the controversy as one about presidential electors or electoral slates. It may have been on the way to becoming that, but the controversy the Court resolved centered on the right to vote. And longstanding Fourteenth Amendment jurisprudence assigns the Court a critical role in upholding that right. Nor is Tribe correct to contend that the leading recent case concerning the political question doctrine, *Nixon v. United States* (1993), supports his view that as a matter of law the Supreme Court was barred from reviewing the issues at stake in *Bush v. Gore*. In *Nixon*, a former federal judge asked the Court to overturn his impeachment conviction on the grounds that the Senate tried him in an unconstitutional manner. The Court concluded that the issue was a nonjusticiable political question. While Art. I, SS 3, cl. 6 of the Constitution provides that the "Senate shall have the sole Power to try all Impeachments," the Court found that it had no basis for intervening because "the word 'try' in the Impeachment Trial Clause does not provide an identifiable textual limit on the authority which is committed to the Senate." *Bush v. Gore* represents a situation quite different from that which the Court faced in *Nixon*. If the election 2000 controversy had developed differently, if under the Twelfth Amendment and the Electoral Count Act of 1877 Congress had been compelled to resolve a dispute

concerning rival electoral slates sent to it by Florida, and if the defeated presidential candidate had brought a lawsuit arguing that Congress had counted electoral votes in a constitutionally improper manner, then Nixon would have offered guidance to the Supreme Court. For Nixon says that the Court must have solid textual grounds in the Constitution for overturning a particular exercise of power conferred by the Constitution on Congress. But Nixon had no bearing on *Bush v. Gore*, because as of December 12, 2000, Congress had not yet begun to exercise the vote-counting power assigned to it by the Twelfth Amendment. Besides, in *Bush v. Gore* the Court was not engaged in counting electoral votes but in ensuring that Florida did not violate the Fourteenth Amendment's promise of equal protection by subjecting its citizens' votes to arbitrary and disparate treatment. Furthermore, Tribe's invocation of the Hayes-Tilden affair cuts against his criticism of the Court, both because of the inappositeness of the political circumstances in 1876 and because of crucial changes in constitutional law in the last 40 years. In the aftermath of the 1876 election, Florida sent to Congress competing slates of electors. To deal with the problem, Congress created an electoral commission composed of five senators, five representatives, and five sitting Supreme Court justices. The nonjudicial panel split along party lines, with Justice Joseph Bradley casting the deciding vote in favor of the Hayes slate, thereby tainting members of the Court with the appearance of involvement in partisan politics. The lesson from Hayes-Tilden was that justices of the Supreme Court should not be asked to step out of their judicial role and participate in the resolution of politically charged controversies, and if the controversies do contain a question of federal or constitutional law, justices should participate in their resolution only if they reach the members of the Court as a lawsuit. It is not surprising that no lawsuits on behalf of Hayes or Tilden reached the Supreme Court in 1876. The federal government was still relatively small and slight. The Fourteenth Amendment was only eight years old. Equal protection doctrine had not yet come into existence. The country would have to wait almost 90 years for the Court to

hold under the Fourteenth Amendment that the vote, once granted, is fundamental, and that the Equal Protection Clause guarantees that states may not weigh one person's vote differently from another person's. These seminal developments in the 1960s created an independent constitutional obligation on the part of the Court to protect the right to vote, an obligation that is not lessened in elections for president. OBVIOUSLY, the Court had the discretion to choose not to hear *Bush v. Gore*; and there were respectable reasons--notably the interest all nine justices had in who would become the next president, with the power to appoint justices to the Supreme Court--for the Court to give Florida and Congress the chance to resolve the dispute. And just as obviously, judicial protection of the fundamental right to vote can affect a state's choice of presidential electors. Still, critics like Tribe who accuse the Court of having selected Florida's electors blur a crucial distinction. Enforcing a rule differs from selecting a winner. In insisting that state election procedures comply with the Fourteenth Amendment, the Supreme Court is no more selecting presidential electors than the umpire who ends the World Series by calling the tying run out at the plate is selecting the best team in Major League Baseball. Moreover, on his own expansive understanding of Congress's vote-counting power under the Twelfth Amendment, Tribe is mistaken to accuse the Court of "seizing the last word on a matter that involved the identity of the next President." If the Constitution endows Congress with the sweeping adjudicative powers that Tribe finds latent in its Twelfth Amendment counting power, then there was no legal barrier to Congress's raising and considering a challenge to the electoral slate that resulted from the Supreme Court's decision in *Bush v. Gore*. Indeed, if Tribe is right about Congress's expansive constitutionally mandated role in presidential elections, then he is wrong to condemn the Court "for first interrupting, then bringing to a close the national conversation that was *Bush vs. Gore*, for making it into *Bush v. Gore*, and then calling the game before the matter could reach Congress." Instead, he should have reprimanded members of the House and Senate, and citizens and officials in

Florida, and for that matter members of the Gore team, for failing to seize the moment and keep the national conversation going by challenging the Court's ruling and taking the case to Congress. That having been said, Tribe is also mistaken to endorse Justice Breyer's confused argument that Congress was the proper place for the resolution of the election 2000 controversy because members of Congress are closer to the people "and the people's will is what elections are about." Elections are not only about the people's will. In elections, the people express their will through formal procedures. Whether those formal procedures have been complied with is not itself a question of popular will but of reason and law. Finally, Tribe's charge that the Court's intervention betrays contempt for the democratic political process is based on a bizarre understanding of the relation between democracy and the rule of law, as if upholding the law were somehow inimical to the public good in a democracy. In truth, Tribe presses this charge half-heartedly. For some reason, when the Florida Supreme Court, in Gore-initiated lawsuits, intervened on Gore's behalf to overturn decisions by lower state courts and elected and local officials, Tribe saw a vindication of democracy. But when the U.S. Supreme Court intervened in those Gore-initiated lawsuits, overturning decisions by the Florida Supreme Court and effectively upholding the decisions by Florida's lower state courts and elected and local officials, Tribe saw a subversion of democratic process. Like it or not, the 2000 election controversy was taken over by lawyers and judges within days of the election. The decisive battles took place in courts of law and turned on the interpretation of obscure and ambiguous statutes, little-known as well as landmark cases, and broad principles of federalism and constitutional law. In concluding that Bush's challenge to the Florida recount presented only a political question, Tribe downplays the extent to which the dispute, from the beginning, revolved around legal questions. According to "American Constitutional Law, 3rd Edition," however, such a consideration is highly relevant: "ultimately, the political question inquiry turns as much on the Court's conception of judicial competence as on the constitutional text." If

Tribe's authoritative treatise is to be relied upon, then once again it seems that the climactic claim in his Harvard Law Review article that Bush v. Gore involved a plainly nonjusticiable political question must be rejected. This is because there can be little doubt that the justices on the Court are more competent than the politicians in Congress to determine whether, by debasing or diluting the weight of citizens' votes, a court-ordered statewide recount violates the Equal Protection Clause of the Fourteenth Amendment. A FINAL REASON to doubt Tribe's case against Bush v. Gore stems from the fascinating discrepancy between the arguments put forward by Tribe the scholar and those put forward by Tribe the lawyer. "How remarkable was it," Tribe mockingly observes in the Harvard Law Review, "that neither the Court's per curiam opinion nor the Chief Justice's concurrence so much as mentioned the political question issue, much less attempted to justify its assertion of authority in the face of the seemingly applicable political question doctrine? It's hardly the sort of thing a Supreme Court Justice simply forgets about." Or, one might add, hardly the sort of thing a lawyer arguing a case in the Supreme Court simply forgets about. Indeed, if the Constitution's command to the Court to keep out of the Florida controversy really had been applicable and conclusive (or even a command), it is remarkable that Gore's brief to the Court--which Tribe wrote and signed as counsel of record--fails to so much as mention the political question doctrine or assert that Bush's challenge to the recount was nonjusticiable or invoke the Twelfth Amendment. It would seem that by failing to mention a legal argument that Tribe the scholar regards as clear cut and decisive, Tribe the lawyer, before the highest court in the land and in one of the biggest cases of his career, committed a substantial blunder. Or by characterizing in the Harvard Law Review as clear and decisive a legal theory that Tribe the lawyer, along with some of the brightest legal minds in the land, regarded as not worth mentioning in their brief on behalf of the vice president, Tribe the scholar committed a substantial mischaracterization of the law. In passing off weak arguments as if they were

devastating and unanswerable, and in refusing to acknowledge any merit whatsoever in respectable arguments on the other side of the issue, Tribe the scholar displays the vices that have contributed so much to the academic denunciation of Bush v. Gore. Indeed, after a year of intemperate and deeply flawed criticism and with no end in sight, the collective effort by academic critics to expose the alleged failure of the conservative justices in Bush v. Gore to fulfill their obligations as judges has done nothing so much as expose the failure of academic critics to fulfill their obligations as scholars. Peter Berkowitz teaches at George Mason University School of Law and is a contributing editor to the New Republic. He is the author of "Virtue and the Making of Modern Liberalism."

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