THE MEANING OF *BUSH V. GORE*: THOUGHTS ON PROFESSOR AMAR'S ANALYSIS

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It is tempting to blame the United States Supreme Court's decision in *Bush v. Gore* for the evils the Bush Administration inflicted on the nation. If only Al Gore had become president, there would not have been the disastrous war in Iraq or the enormous deficit-spending to fund it, which has contributed to the worst economic problems since the Great Depression. If only Al Gore had become president, the responses in the War on Terror would have been more measured and would not have included torture and indefinite detentions without due process. If only Al Gore had become president, then Justices William Rehnquist and Sandra Day O'Connor would have been replaced by individuals far more moderate than Justices John Roberts and Samuel Alito.

From the lens of 2009, after eight years of the Bush presidency, the consequences of *Bush v. Gore* are worse than it could have seemed on December 12, 2000, when the decision came down.[1] Of course, the problem with this way of looking at *Bush v. Gore* is that George W. Bush might well have become president even if the U.S. Supreme Court never had become involved or had affirmed the Florida Supreme Court's ruling. Counting all of the uncounted votes (what Gore urged) might have led to a Bush victory anyway. Also, if the Court stayed out of it, the political process ultimately may well have resolved the matter in Bush's favor.

Professor Akhil Amar's focus is not on these practical consequences of *Bush v. Gore*, but instead on the judicial opinions. He persuasively explains why the Florida Supreme Court's decision was at least reasonable, if not correct, and why the majority of the U.S. Supreme Court got it wrong. I agree with him. However, I want to focus on the larger question: What does *Bush v. Gore* tell us about judicial review and the judicial power?

For decades, conservatives have attacked what they perceive as illegitimate judicial activism. The 2008 Republican platform declares: "Judicial activism is a grave threat to the rule of law because unaccountable federal judges are usurping democracy, ignoring the Constitution and its separation of powers, and imposing their personal opinions upon the public. This must stop."[2] And conservatives, such as Justice Antonin Scalia, purport to pursue a method of analysis having no relationship to the views or ideology.

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1. Bush v. Gore, 531 U.S. 98, 98 (2000).

2. 2008 Republican Party Platform, http://www.gop.com/2008 Platform/GovernmentReform.htm (last visited Oct. 11, 2009).

This picture of judging has great rhetorical force. At his confirmation hearings for Chief Justice, John Roberts proclaimed that: "Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see an umpire."[3] The power of this conservative rhetoric also was seen in Justice Sonia Sotomayor's recent confirmation hearings where she repeatedly told the members of the Senate Judiciary Committee that judges must "apply not make the law."[4]

Conservatives thus claim that they have a method of judicial decision-making which is neutral and even formalistic, and that liberals make it up. This would be a laughable claim, except for its tremendous rhetorical power. I have participated in countless debates over originalism over the years and inevitably its proponents argue that originalists have a theory, while opponents of originalism have none. At the very least, conservatives do have slogans—"judges are umpires," "judges should apply not make the law," "judges should follow the law not their personal views"—that have so much rhetorical force that even Democratic nominees for the U.S. Supreme Court repeat them.

It is here that *Bush v. Gore* and Professor Amar's critique of it is so important: *Bush v. Gore* is a powerful example of how decision-making occurs in constitutional cases. Although unusual in its national significance, *Bush v. Gore* is typical in terms of two crucial points: first, Justices have tremendous discretion in deciding constitutional cases; and second, how that discretion is exercised is frequently, if not inevitably, a product of the Justices' life experiences and ideology. Neither of these propositions should be the least bit controversial, except that they are vehemently denied by conservatives, such as the Republican Senators who opposed and voted against Justice Sonia Sotomayor. Therefore, because it shows that all Justices, liberal or conservative, come to results based on their views and ideology, *Bush v. Gore* should be used to forever bury silly adages like "judges are umpires who don't make the rules, but apply them" and "judges should apply the law, not make it."

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3. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.).

4. Peter Baker and Neil A. Lewis, *Sotomayor Vows 'Fidelity to the Law' as Hearings Start*, N.Y. TIMES, July 14, 2009, at A1.

THE COURT'S DISCRETION IN *BUSH V. GORE*

Bush v. Gore is a perfect illustration of the enormous discretion that Justices have in constitutional cases. This would seem so obvious as to not require elaboration except that it is the crucial flaw in the conservative rhetoric about constitutional decision-making: ignorance of the inevitably large discretion that exists in constitutional decision-making.

Using *Bush v. Gore* as an example, discretion existed at countless levels. Initially, the Court had total discretion as to whether to hear the case at all. This came to the U.S. Supreme Court on certiorari and that, of course, is entirely in the discretion of the Justices; if four Justices vote to grant certiorari, the Court hears the case, otherwise it does not. The Justices could have simply decided to stay out of the matter entirely and let the matter work its way through the Florida courts and the political process.

Once the Court decided to grant certiorari, it then had to decide whether to stay the counting of the uncounted ballots. Interestingly, Professor Amar does not mention this in his Dunwody Lecture. But I believe that this was a crucial moment in the *Bush v. Gore* litigation. If the Court had not granted a stay, all of the uncounted ballots were to have been counted by 2:00 p.m. on Sunday, December 10, the day before the oral arguments in *Bush v. Gore*. Had the counting shown Bush ahead, the Gore challenge would have been moot. But had the counting shown Gore ahead in Florida, it would have been far more difficult for the U.S. Supreme Court to find the recounting impermissible.

As Professor Amar rightly points out, the U.S. Supreme Court in *Bush v. Gore* premised its decision on Florida's desire to determine its electors by the safe harbor of December 12, 2000.[5] But if the counting had been completed on December 10, this concern would have been nonexistent. In other words, it often has been overlooked that the Court's central reason for stopping the recount, the need to be done by December 12, was entirely of its own making when it granted the stay of the counting on December 9.[6]

The Court had complete discretion whether to stay the counting. Under traditional principles of equity, a stay requires a finding of

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5. Akhil Reed Amar, *Bush, Gore, Florida, and the Constitution*, 61 FLA. L. REV. 945, 947–48 (2009); *Bush*, 531 U.S. at 111 ("Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, Justice Breyer's proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18-contemplates action in violation of the Florida Election Code, and hence could not be part of an 'appropriate' order authorized by [Florida Statute § 102.168(8)].").

6. 531 U.S. 98 (2000).

irreparable injury and a substantial likelihood of prevailing on the merits.[7] What was the irreparable injury to allowing the counting to continue? The U.S. Supreme Court issued no opinion justifying the stay. But Justice Antonin Scalia, writing only for himself, issued an opinion on December 9 explaining the stay.[8] He said that Bush met the requirements for a stay: showing a substantial likelihood of prevailing on the merits and irreparable injury.[9] Justice Scalia identified two injuries.[10] First, Justice Scalia said that counting the uncounted votes risked placing a cloud over the legitimacy of a Bush presidency.[11] In other words, if the counting put Gore ahead, but the U.S. Supreme Court disallowed it, there would be doubts about the legitimacy of Bush's presidency. However, such speculation as to political fallout hardly seems to meet the legal requirement for "irreparable injury." Maybe the counting would have put a cloud over the Bush presidency, or maybe people would have just accepted Bush as President anyway. The reality is by halting the counting, the U.S. Supreme Court still put a cloud over the Bush presidency. For those who voted for Gore on November 7, there always will be a cloud over the Bush presidency; for those who voted for Bush, they always will be thrilled that their candidate won. It is hard to turn this into irreparable injury.

Second, Justice Scalia said that counting the ballots would cause them to degrade, and thus prevent a more accurate count at a later date.[12] The problem with this argument is that there was nothing in the record to support Justice Scalia's assertion about degradation of ballots. He just made it up. Moreover, it was a disingenuous concern—the Court stayed the counting so as to protect a more accurate later counting that it prevented from occurring.

My point is simply that the Court had complete discretion whether to grant the stay. Even after it took the case and even after it granted the stay, the Court had discretion as to whether to decide the merits or dismiss the case as non-justiciable. As I have argued elsewhere, I believe also that the Court erred by not dismissing on ripeness and perhaps on political question doctrine grounds.[13]

At the very least, the Court had discretion as to whether the issues before the U.S. Supreme Court in *Bush v. Gore* were ripe for review. The central issue was whether the counting of votes would deny equal

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7. Bush v. Gore, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring).
8. *Id.* at at 1046–47.
9. *Id*.
10. *Id.*
11. *Id*. at 1047.
12. *Id*.
13. Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1102–09 (2001).

protection.[14] There would be a constitutional violation only if similar ballots were treated differently in the counting process. But it could not be known if this would occur until the counting occurred and the trial judge in Florida, Judge Terry Lewis, ruled on all of the challenges. Until then, it was purely speculative as to whether there would be a problem with similar ballots being treated differently.

The U.S. Supreme Court, in its per curiam opinion, focused on inequalities that already had occurred. The per curiam opinion points to differences in the Miami-Dade County and the Palm Beach County counting.[15] But the counting that already had been done was not the issue before the U.S. Supreme Court. The only issue was whether the counting should continue. Prior experience was not predictive of what was to occur because of a key change: a single judge was overseeing the counting under the Florida Supreme Court's decision. This judge was to hear all of the disputes and potentially could eliminate any inequalities by applying a uniform standard.

Justice Stevens emphasized exactly this point in his dissent.[16] He wrote: "Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns. Those concerns are alleviated—if not eliminated—by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process."[17] Justice Stevens, however, did not draw a key conclusion from his observation—the challenge to the counting was not ripe for review. Only after the counting was completed could the parties claim that there was inequality and thus a constitutional violation.

Phrased another way, the U.S. Supreme Court improperly treated an "as applied" equal protection challenge as if it were a facial challenge.[18] Bush was not arguing that the Florida election law was unconstitutional on its face. Neither in the briefs nor in the oral argument did Bush's lawyers suggest such a facial attack. Rather, Bush argued that counting without uniform standards denied equal protection. This would be an equal protection violation only if, after the counting and the resolution of disputes by the judge, similar ballots were treated differently. But that could not possibly be known until all the ballots were counted. Until then, it would be purely speculative as to whether there would be a denial of equal protection.

Bush v. Gore was not ripe for an even more basic reason: George W. Bush might well have ended up ahead after the counting. In that event,

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14. Bush v. Gore, 531 U.S. 98, 109–10 (2000).
15. *Id.* at 106–07; Amar, *supra* note 5, at 961–62.
16. 531 U.S. at 126 (Stevens, J., dissenting).
17. *Id.*
18. *See* Chemerinsky, *supra* note 13, at 1103.

there obviously would have been no need for the U.S. Supreme Court to decide this appeal. The Supreme Court repeatedly has held that a case is not ripe when it is unknown whether the injury will be suffered.

Bush v. Gore was not ripe for review on December 9, when the stay was issued,[19] or December 11, when the case was heard,[20] or December 12, when the case was decided.[21] The case would have been ripe only after all the counting was done if: a) Gore came out ahead in Florida, and b) Bush could present evidence of inequalities in how the ballots were actually counted. Unless and until these eventualities occurred, the case was not ripe and should have been dismissed.

Again, my point here is just that the Court had discretion as to whether to dismiss the case on ripeness grounds. It also might have found the matter to be a political question—it after all was quintessentially and profoundly political—and dismissed the case on that basis.

Even after taking the case, halting the counting, and finding the case justiciable, the Court still had great discretion. Does the risk of counting similar ballots with different standards violate equal protection? Professor Amar describes this as "exuberant and unprecedented equal protection analysis."[22] Professor Amar forcefully explains the problems in the majority's equal protection approach.[23] At the very least, Professor Amar clearly demonstrates that reasonable Justices could have gone either way on the issue of whether there was an equal protection violation.

Even after the Court took the case, halted the recount, found the matter justiciable, and determined that equal protection was violated, it still had discretion as to the remedy. The case could have been remanded to the Florida courts to decide whether, under Florida law, to halt the recount to meet the safe harbor of December 12 or whether to continue the recount with uniform standards for counting the uncounted ballots. The Supreme Court acknowledged that the choice to end the recount was entirely based on its interpretation of Florida law and its desire to have the electors decided by December 12. But it is well established that state courts are to get the last word as to the meaning of state law. This obviously was a situation that had never arisen in Florida and so the Florida courts had never ruled as to how this tension—meeting the safe harbor as opposed to making sure that all of the votes were counted—was to be resolved.

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19. Bush v. Gore, 531 U.S. at 98.
20. *Id.*
21. *Id.*
22. Amar, *supra* note 5, at 965.
23. *See* Amar, *supra* note 5, at 960–64.

The U.S. Supreme Court's per curiam opinion made two arguments. First, counting the uncounted votes without standards violates equal protection. Second, Florida law prevented the counting from continuing past December 12. This second point is indispensable to the Court's decision to end the counting. Assuming that there were inequalities in the counting that violated the Constitution, there were two ways to remedy this situation: count none of the uncounted ballots or count all of the ballots with uniform standards. The latter would involve remanding the case to the Florida Supreme Court for development of standards and for such relief as that court deemed appropriate.

It must be emphasized that the U.S. Supreme Court did not hold that federal law prevented the counting from continuing. The only reason for not remanding the case was the Court's judgment that Florida law prevented this.[24] In two paragraphs near the end of the per curiam opinion, the Court explained why it was stopping the counting:

> The Supreme Court of Florida has said that the legislature intended the State's electors to "participat[e] fully in the federal electoral process," as provided in 3 U.S.C. § 5. . . . That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.
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> Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. . . . The only disagreement is as to the remedy. Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, Justice Breyer's proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18—contemplates action in violation of the Florida Election Code, and hence could not be part of an "appropriate" order authorized by Fla. Stat. Ann. § 102.168(8) (Supp. 2001).[25]

This reasoning is recited at length to show that the sole reason the Court gave for ending the counting was based on its interpretation of

24. Bush v. Gore, 531 U.S. 98, 98 (2000).
25. *Id.* at 110–11.

Florida law. However, no Florida statute stated or implied that the counting had to be done by December 12. The sole authority for the Supreme Court's conclusion was one statement by the Florida Supreme Court.

However, that statement was made in a very different context and at a time when the Florida Supreme Court was not faced with the issue posed by the U.S. Supreme Court's ruling. After the U.S. Supreme Court decided on December 12 that the counting without standards violated equal protection, the issue was what remedy was appropriate under Florida law: continue the counting past December 12 or end the counting to meet the December 12 deadline. The Supreme Court could not possibly know how the Florida Supreme Court would resolve this issue because it had never occurred before. However, prior Florida decisions emphasized the importance of making sure that every vote is accurately counted.[26] The Florida Supreme Court might have relied on this precedent to continue the counting past December 12. Alternatively, the Florida Supreme Court might have ended the counting, treating December 12 as a firm deadline in Florida.

Indeed, after *Bush v. Gore* was decided, the Florida Supreme Court issued a decision dismissing the case.[27] Justice Shaw, in a concurring opinion, declared:

> [I]n my opinion, December 12 was not a "drop-dead" date under Florida law. In fact, I question whether any date prior to January 6 is a drop-dead date under the Florida election scheme. December 12 was simply a *permissive* "safe-harbor" date to which the states could aspire. It certainly was not a *mandatory* contest deadline under the plain language of the Florida Election Code . . . .[28]

Perhaps a majority of the Florida Supreme Court would have followed this view, perhaps not. The point is that this was a question of Florida law to be decided by the Florida Supreme Court. Of course, it is clearly established that state supreme courts get the final word as to the interpretation of state law. From a federalism perspective, it is inexplicable why the five Justices in the majority—usually the advocates of states' rights on the Court—did not remand the case to the Florida Supreme Court to decide under Florida law whether the counting should continue.

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26. *See, e.g.*, State *ex rel.* Millinor v. Smith, 144 So. 333, 335 (Fla. 1932) ("The right to a correct count of the ballots in an election is a substantial right which it is the privilege of every candidate for office to insist on, in every case where there has been a failure to make a proper count. . . .").

27. Gore v. Harris, 773 So. 2d 524 (Fla. 2000) (per curiam), *rev'd per curiam sub nom. Bush II*, 531 U.S. 98 (2000).

28. *Id.* at 128–29 (Shaw, J., concurring).

Again, at the very least, *Bush v. Gore* demonstrates that the Court had discretion, choices that could have gone either way, on whether to take the case, whether to halt the recount, whether to find the matter justiciable, whether to conclude that equal protection was violated, and whether to end the counting or send the matter back to the Florida courts. Although I believe that the Court was wrong at each step, here I only seek to show that there was discretion; mechanical judging was impossible.

THE EXERCISE OF DISCRETION REFLECTS THE JUSTICES' VALUES AND IDEOLOGY

I am continually stunned to hear conservatives defend a view of judging that purports to exclude any importance of a Justice's background, values, and ideology. How can any person decide what is "reasonable" in the context of the Fourth Amendment or what is "compelling" in applying strict scrutiny except by making a value choice? This does not mean that the choices are based on whim or caprice. They are influenced by what has been deemed reasonable or compelling in other cases and by the arguments presented by counsel. But ultimately, it is still inescapably a value choice to be made.

Bush v. Gore is irrefutable evidence of this point. Republicans, including the five in the majority on the U.S. Supreme Court, took Bush's side in the litigation; Democrats, including the two on the U.S. Supreme Court, took Gore's. Professor Amar briefly reviews the partisan breakdown among the scholarly literature, mentioning critics of the decision as including liberal law professors like Margaret Jane Radin, Mark Kelman, Robert Gordon, Derrick Bell, Jeb Rubenfeld, and Jack Balkin.[29] Professor Amar also quotes defenders of the decision as including Richard Epstein, Michael McConnell, and Charles Fried.[30] Surely, this political division is not coincidence. I have often speculated that if the results had come out differently in Florida (if it was Gore who was ahead by a slim margin and it was Bush who wanted a recount), the sides would have simply flipped.

Some have suggested that *Bush v. Gore* was a baldly partisan choice by Republican Justices to make the Republican candidate the next President. Vincent Bugliosi advanced this view and even argued for impeachment of the Justices in the *Bush v. Gore* majority.[31]

I believe, however, that the role of politics was more subtle and more profound. On Friday, December 8, after the Florida Supreme Court ordered the counting of uncounted votes, everyone I knew who voted

29. Amar, *supra* note 5, at 947–49.

30. Amar, *supra* note 5, at 949–51.

31. VINCENT BUGLIOSI, THE BETRAYAL OF AMERICA: HOW THE SUPREME COURT UNDERMINED THE CONSTITUTION AND CHOSE OUR PRESIDENT 1 (2001).

for Gore praised the decision, and everyone I knew who voted for Bush decried the ruling. I immediately said that there was no reason to think that the Justices on the U.S. Supreme Court would be any different.

In fact, it would have been much easier for the dissenting Justices on the Court and the liberal law professors to embrace the equal protection argument. Part of the irony of *Bush v. Gore* is that it was virtually the only case in which Justice Scalia or Justice Thomas found an equal protection violation, except in striking down affirmative action programs.

In other words, it was not that the five Justices in the majority set out to make sure that Bush became President, and the four dissenters acted to make sure that Gore was President. I truly believe that each of the nine Justices deeply believed that he or she was making a ruling on the law, not on partisan grounds. But how each saw the case was entirely a product of the Justices' biases and views.

This decision has profound implications for how we think about the law. We are all result-oriented, consciously or unconsciously, much of the time. We come to conclusions and then look for arguments to support them. We constantly hear criticisms of judges or academics for being result-oriented. Yet there is no way to avoid this. The premises we begin with influence, if not determine, the conclusions we come to. *Bush v. Gore* unquestionably seemed a result-oriented decision in the sense that the nine Justices each came to a result that was consistent with their political views, so far as we know them. That does not mean that it was corrupt or even unique among judicial decisions. In the vast majority of important cases, the Justices' conclusions are a reflection of the views with which they started.

CONCLUSION

Bush v. Gore was a unique moment in American history: the only time in which the U.S. Supreme Court has played a direct role in deciding a presidential election. It is therefore a decision and a series of events that warrant reexamination, especially with the benefit of time and hindsight. Professor Amar's excellent analysis of what happened does exactly this.

My point, however, has been that the case also stands for something more basic in the never ending debate over judicial review: Justices have great discretion and how they exercise that discretion is a product of their life experiences, values, and ideology. It is long past time to get past disingenuous slogans like "judges are umpires" and "judges should apply not make the law." Keeping *Bush v. Gore* in mind is a large step in this direction.