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Carnival of Mirrors: Laurence Tribe's "Unbearable Wrongness"

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Professor Tribe has now done to me just what I claim he did to the Supreme Court in *eroG v. hsuB*.[1] By repeatedly distorting what I actually said, *Unbearable Wrongness*[2] creates illusory targets that Professor Tribe then holds up to ridicule.[3] In the very limited space that the editors have allotted, I could not possibly offer point-by-point responses to his many mischaracterizations of what I said in the two articles that he attacks.[4] Nor will I try to catalog the arguments that he left unanswered in his lengthy rebuttal.[5]

Instead, I will focus on our most significant points of disagreement: whether the Court's rationale for the decision in *Bush v. Gore* suffers from an "almost embarrassing bank-

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1. Laurence H. Tribe, eroG v. hsuB *and its Disguises: Freeing* Bush v. Gore *from its Hall of Mirrors*, 115 Harv. L. Rev. 170 (2001) ("Tribe, *eroG v. hsuB*").

2. Laurence H. Tribe, *The Unbearable Wrongness of* Bush v. Gore, 19 Const. Comm. 571 (2002) ("Tribe, *Unbearable Wrongness*").

3. Perhaps the most ridiculous thing I'm accused of saying is that Professor Tribe's *eroG v. hsuB* is "unexceptional." Id. at 572 & n.3. Fortunately for me, however, what Professor Tribe calls a "direct quotation" is an outright misquotation. In fact, I said almost the opposite, *viz.* that much of his essay is "quite unexceptionable." Nelson Lund, *"EQUAL PROTECTION, MY ASS!"?* Bush v. Gore *and Laurence Tribe's Hall of Mirrors*, 19 Const. Comm. 543, 544 (2002) ("Lund, *"EQUAL PROTECTION . . ."?*").

4. For just one illustrative example, consider the following passage: "Professor Lund attempts to dismiss the importance of *Davis* on the ground that it was merely a plurality opinion. Apparently, the reader is supposed to believe that, because *Davis* commanded no clear majority, the case is not good law. I trust Professor Lund is kidding." Tribe, *Unbearable Wrongness* at 580 n.42 (cited in note 2). I invite the reader to compare this passage, and the rest of footnote 42, with what I actually said in Lund, *"EQUAL PROTECTION . . ."?* at 553 n.35, 559-60 (cited in note 3). Nowhere did I say or imply that the absence of a majority opinion in *Davis* means that the case or decision is not "good law." Cf. Tribe, *Unbearable Wrongness* at 576 & n.18 (cited in note 2) (attributing a statement in the plurality opinion in the *Casey* abortion case to "the Court itself").

5. For one example, see Lund, *"EQUAL PROTECTION . . ."?* at 554-55 (cited in note 3) (criticizing Professor Tribe's defense of the Florida court's treatment of the partial recount in Miami-Dade).

ruptcy,"[6] and whether the Court was legally prohibited from deciding the case at all. These are the important issues, and it is important to keep in mind that Professor Tribe's attacks on me are significant only because he desperately needs to show that *any* legal defense of the Court is silly. That is the only way to sustain his own claim that the Court was playing a shell game in *Bush v. Gore*,[7] or as he now says, that the Court's decision deserves to be greeted with "head-scratching incredulity."[8] Professor Tribe's claim is not just that *Bush v. Gore* was wrongly decided, but rather that no reasonable person could defend the decision. That is an extraordinarily serious accusation against the Court, and I say that the accusation is itself outrageous.

I. EQUAL PROTECTION

First, Professor Tribe ignores the distinction that I and all the Justices have drawn between what we may think is the "original meaning" of various constitutional provisions and what the Court's cases say they mean.[9] Most importantly, neither I nor the *Bush v. Gore* majority argued that *Reynolds v. Sims* was rightly decided.[10] Notwithstanding Professor Tribe's repeated efforts to saddle me with the deep perplexities that are attributable to the *Reynolds* line of cases, I have neither the power to change the opinion that Chief Justice Warren wrote, nor the power to overrule any decision. Unlike me, the *Bush v. Gore* Court did have the power to overrule the well-settled *Reynolds* line of cases. But neither Professor Tribe nor anyone else that I'm aware of has criticized *Bush v. Gore* for accepting this line of precedent.

The real issue is whether the Court applied those precedents correctly. I have argued that the decision in *Bush v. Gore*

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6. Tribe, *Unbearable Wrongness* at 573 (cited in note 2).

7. Tribe, *eroG v. hsuB* at 221-22 (cited in note 1) (quoted in part in Lund, "*EQUAL PROTECTION*..."? at 543-44 n.2 (cited in note 3)).

8. Tribe, *Unbearable Wrongness*. at 571(cited in note 2). See also id. at 575 (charging that "the [equal protection] holding was "not just *incorrect* but utterly *bizarre*") (emphasis in original); id. at 601 n.118 (apparently claiming that the case contained no "colorable claims for federal relief").

9. If this has contributed to my being labeled "deeply, deeply, shallow," so be it. See id. at 572.

10. I specifically called Justice Harlan's dissent in that case "devastating and unanswered," and I explained at some length why I agreed with a good part of Professor Tribe's analytical critique of the vote dilution theory that I say arose in and from *Reynolds*. Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 23 Cardozo L. Rev. 1219, 1262 (2002) ("Lund, *Unbearable Rightness*"); Lund, "*EQUAL PROTECTION*..."? at 556-61 (cited in note 3).

flows easily from the *Reynolds* line, and I believe I'm right about that. But I do not claim that anyone who advances a different interpretation of the Court's equal protection precedents must be greeted with the kind of mockery that Professor Tribe directs at the Supreme Court and me.[11] At least since the day the Court concluded that "the equal protection of the laws" means "the protection of equal laws,"[12] the jurisprudence of this constitutional provision has been a never-ending exercise in drawing judicially-created lines between permissible and impermissible forms of inequality. All, or almost all, of the Court's equal protection decisions can therefore be defended with some sort of reasoned argument, as well as criticized with some sort of reasoned argument. In this respect, *Bush v. Gore* is just like the others.

But Professor Tribe has not contented himself with making a reasoned argument against the Court's application of its equal protection precedents. Instead, he has taken upon himself the far more difficult burden of demonstrating that *Bush v. Gore* was "not just *incorrect* but utterly *bizarre*."[13] Unless he can meet that burden, his indictment of the Court is highly irresponsible. And he does not meet the burden. Professor Tribe's first major criticism of my defense of *Bush v. Gore* essentially boils down to this: the broad principle of equal protection that I quoted from *Reynolds v. Sims*[14] cannot imply that *Bush v. Gore* was right to "mandate[ ] *precisely drawn* and *completely* uniform standards for recounting electoral ballots"[15] because such a constitutional requirement would lead to a host of inconsistencies and even ab-

11. See Lund, "*EQUAL PROTECTION*..."? at 553 (cited in note 3) ("The nature of the Supreme Court's equal protection jurisprudence has produced a huge range of cases in which a decision either way would be neither indisputably correct nor impossible to defend. *Bush v. Gore* falls within that range, though the Court's holding is extremely easy to defend.").

12. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

13. Tribe, *Unbearable Wrongness* at 575 (cited in note 2) (emphasis in original).

14. "Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids 'sophisticated as well as simpleminded modes of discrimination.'" 377 U.S. at 563 (citations omitted). As I have already explained at length, the *Reynolds* opinion as a whole confirms that the Court was relying on a principle that went well beyond the malapportioned legislative districts that were directly at issue. See Lund, *Unbearable Rightness* at 1244-51 (cited in note 10); Lund, "*EQUAL PROTECTION*..."? at 551-53 (cited in note 3).

15. Tribe, *Unbearable Wrongness* at 572 (cited in note 2) (emphasis added). See also id. at 586 (apparently implying that the Court and I maintain that "the Constitution requires that all ballots be treated *identically*" (emphasis in original)); id. at 587-88 (claiming that the Court demanded that any right to vote for President must be "perfectly uniform").

surdities.[16] It is true that the Court and I both interpret *Reynolds* to stand for a principle broader than the requirement of equipopulous legislative districts. So does Professor Tribe, at least some of the time.[17] But neither the Court nor I interpreted *Reynolds* to entail the many absurdities that would no doubt follow if it required *perfect* equality or *complete* uniformity.

Professor Tribe's argument would have considerable merit if he had correctly described the holding in *Bush v. Gore*. But he has not. *Bush v. Gore* pointed to several different instances of serious, unjustified, and avoidable nonuniformity in the recount ordered by the Florida court, and concluded that the recount order did not satisfy "the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right."[18] The Court certainly did say that the formulation of uniform rules was practicable and necessary,[19] but it never said that these rules must be "precisely drawn" or "completely" uniform. Whether one agrees with the Court's equal protection analysis or not, nobody should put these words into the Court's mouth, as Professor Tribe does, and then mock the Court for having said something utterly bizarre and foolish.

Recognizing that "the problem of equal protection in election processes generally presents many complexities,"[20] *Bush v. Gore* refrained from trying to elaborate a comprehensive set of rules for determining exactly how much and what kinds of nonuniformity are constitutionally proscribed in each of the various factual contexts that can arise in counting ballots. I think the Court's decision to rule narrowly made good sense, for reasons that I have already explained in detail.[21] Someone else might ar-

16. See, e.g., id. at 587 ("... *Bush v. Gore* appears to put states in a Catch-22: the *failure* to specify a uniform statewide substandard for recounting may risk invalidation under the 'arbitrariness' principle, while the decision to *specify* such a substandard may inadvertently treat ballots unequally.") (emphasis in original).

17. See, e.g., Tribe, *eroG v. hsuB* at 224 (cited in note 1) ("No one doubts that the *Reynolds* line would prevent a state from adopting a system in which those who tally machine-rejected ballots manually are instructed to toss out ballots with ambiguous marks indicating an intent to vote for Bush but to count all the votes for Gore."). See also Lund, *"EQUAL PROTECTION..."?* at 550-53 (cited in note 3) (discussing Professor Tribe's inconsistent statements about the breadth of *Reynolds*' reach).

18. *Bush v. Gore*, 531 U.S. 98, 105 (2000).

19. Id. at 106.

20. Id. at 109.

21. Lund, *Unbearable Rightness* at 1267-69 (cited in note 10). It could hardly be maintained that the Court had some kind of obligation to answer the myriad questions that undoubtedly do remain open after *Bush v. Gore*. It is typical, rather than unusual, for equal protection rulings to generate many more questions than they answer. Familiar examples include *Reynolds v. Sims* and *Brown v. Board of Education*.

gue, without embarrassing himself, that the Court should have provided more detailed guidance for future cases. But that is not the argument that Professor Tribe advances.

Instead, he insists that the Court was obliged to consider, *sua sponte*, hypothetical equal protection objections to the underlying count in Florida, and then rule on the basis of "facts" that had never even been argued to the Court, let alone tested in a trial. His principal argument, as I understand it, is that the underlying count was infected with uniformity problems at least as serious as those that the Supreme Court identified in the recount ordered by the Florida court.[22] It may or may not be true that a properly litigated challenge to the underlying count should have resulted in its being invalidated under the equal protection standards relied on in *Bush v. Gore*. But we will never know, because Gore's legal team never even argued (let alone proved) that the underlying count suffered from uniformity problems comparable to those in the court-ordered recount.[23]

One must ask why the brief that Professor Tribe filed in the Supreme Court *didn't* articulate such an objection—one which Professor Tribe now finds so compelling—in response to the Bush team's equal protection arguments. Perhaps it had something to do with the fact that Professor Tribe's brief *did* object to allowing his *opponents* to challenge the underlying count.[24] But let us assume that Gore's legal team could not have been expected to realize the importance of comparing the nonuniformity in the court-ordered recount with that in the underlying count until after the Court's decision in *Bush v. Gore*. Even on that generous assumption, Gore *got that chance* after the U.S. Supreme Court remanded the case to the Florida Supreme Court: he could have argued to the Florida court that equal protection problems in the underlying count required a new recount consis-

22. See Tribe, *eroG v. hsuB* at 254-63 (cited in note 1).

23. In support of his suggestion that this issue was somehow before the Supreme Court, Professor Tribe cites only an amicus curiae brief. Tribe, *Unbearable Wrongness* at 589 n.79 (cited in note 2). I'll spare the reader a disquisition on the differences between parties and *amici*. Quite apart from that issue, the amicus brief cited by Professor Tribe made no effort to compare the inequalities in the underlying count with those in the court-ordered recount. Indeed, and notwithstanding Professor Tribe's description, the brief did not discuss the Florida election dispute at all.

24. Brief of Respondents at 35, *Bush v. Gore*, 531 U.S. 98 (2000), ("Petitioners' Fourteenth Amendment arguments rest principally on the assertion that, if the manual count proceeds, similar ballots will be treated dissimilarly in different parts of the State. We note that, insofar as this argument is directed at pre-contest tabulations, it is out of place here; petitioners should have raised such claims in an election contest of their own.").

tent with the equal protection standards recognized in *Bush v. Gore*.

Professor Tribe does have a response of sorts, which is a corollary to his second major objection to the Court's decision. He claims that there was no remand, and the Court decided "to halt the entire political and legal process set in motion and declare by fiat an end to the presidential election."[25] Or, in an alternative formulation, that the Court deserves strong criticism for its "particularly inexplicable failure to grasp the inconsistency between its own equal protection holding and the remedy on which it settled."[26]

I agree that it would have been inappropriate for the Supreme Court to forbid the Florida court to attempt a new recount comporting with equal protection standards. The principal legal obstacle to such an attempt was the Florida court's own conclusion that state law set a deadline of December 12 (the very date of the Supreme Court's decision). That deadline was based on a questionable interpretation of the state statutes, and the Florida court should have been permitted to reconsider its interpretation of state law on remand.

Once again, however, Professor Tribe's facially plausible objection to what the Court did is based entirely on attributing to the Court something it never said or implied. Contrary to Professor Tribe's repeated misstatements, *there was indeed a remand.*[27] And contrary to Professor Tribe's undefended assumption, the Supreme Court nowhere forbade the Florida court from ordering a new recount. I have already explained and defended this aspect of the Court's decision at great length, as Professor Tribe is well aware.[28] His response is a footnote in which he says

25. Tribe, *Unbearable Wrongness* at 588 (cited in note 2) (footnotes omitted).

26. Id. at 573.

27. *Bush v. Gore*, 531 U.S. at 111 ("The judgment of the Supreme Court of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion."). See Tribe, *Unbearable Wrongness* at 589 (cited in note 2) (alluding to the "woeful inadequacy of the Court's explanation for shutting down the recount rather than remanding the case to the Florida Supreme Court"); id. at 589 ("Under Lund's one-person, one-vote theory, the only constitutionally permissible remedy was a remand.").

28. Professor Tribe says that my "most recent work studiously avoids any mention of the [remedy] issue." Tribe, *Unbearable Wrongness* at 589 (cited in note 2). This is untrue, as anyone can see by turning back to page 545 of this issue of *Constitutional Commentary*. Not only did I mention the issue, I pointed out that I disagreed with Professor Tribe's claim that the Supreme Court forbade the Florida court from ordering a new recount on remand. And I gave the reader a citation to a lengthy discussion of my reasons for disagreeing with him. Lund, *"EQUAL PROTECTION..."?* at 545 n.7 (cited in note 3) (discussing and citing Lund, *Unbearable Rightness* at 1270-78 (cited in note 10)). It is true that I did not ask the editors of *Constitutional Commentary* to reprint that lengthy

"Au contraire," followed by a selective quotation from the Court's opinion.[29]

"Au contraire" is not an argument. Nor does it, or the quotation on which Professor Tribe relies, in any way refute my contrary arguments. In language omitted by Professor Tribe, the Court said that it could not remand for a new recount "*[b]ecause the Florida Supreme Court has said* that the Florida Legislature intended" to set a deadline of December 12.[30] The Supreme Court was perfectly correct to defer to the state court's interpretation of state law.[31] More important, however, the Court simply did not forbid the state court to change its interpretation of state law on remand, nor did the Court forbid a new recount based on such a reinterpretation. Professor Tribe's claim that the Supreme Court forbade the Florida court from ordering a new recount is a canard, plain and simple.

Professor Tribe's co-counsel in *Bush v. Gore*, David Boies and Ronald Klain, have both acknowledged that the Supreme Court's opinion did not foreclose the Florida court from ordering a new recount.[32] Professor Tribe should join them in doing

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discussion in this issue of the journal. Nor will I ask them to do so now. But Professor Tribe knows about this discussion. See Tribe, *Unbearable Wrongness* at 589 n.78 (cited in note 2).

29. Tribe, *Unbearable Wrongness* at 589 n.78 (cited in note 2).

30. Bush v. Gore, 531 U.S. at 111:

> Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safeharbor 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).

Professor Tribe should have been well aware of the importance of the language that he omitted when quoting part of this passage, for I had already objected to its being ignored by another commentator. See Lund, *Unbearable Rightness* at 1277 n.182 (cited in note 10).

31. Professor Tribe is mistaken to say that my defense of *Bush v. Gore* somehow compels me to conclude that "deferring to the Florida Supreme Court's December 12 deadline would plainly violate the Fourteenth Amendment." Tribe, *Unbearable Wrongness* at 589 (cited in note 2). The Court was not obliged to somehow anticipate and accept Professor Tribe's unlitigated, *post hoc* claims, which were never presented to the Court, about a "dizzying array of arbitrary inequalities," id., in the underlying count.

32. See Lund, *Unbearable Rightness* at 1277 n.185 (cited in note 10) (cited in Lund, "*EQUAL PROTECTION*..."? at 545 n.7 (cited in note 3)). See also 3 Engage: The Journal of the Federalist Society's Practice Groups 80-81 (Aug. 2002) (transcript of Lund/Klain colloquy), where Mr. Klain agreed "as a legal matter" that the Florida court could have ordered a new recount on remand, while suggesting (quite reasonably in my view) that "as a practical matter" the Florida court was not likely to have accepted an invitation from the Gore team to do so:

> Nelson, I agree that the opinion did not preclude the possibility that the Florida Supreme Court could have had a remand proceeding and could have determined that the Supreme Court's conclusion in its opinion that the Decem-

so. That will probably not happen, however, because Professor Tribe's whole complex edifice of argumentation collapses once one recognizes that he has again attributed to the Court a decision which does sound outrageous but which the Court *never made*. This point is sufficiently important that a special word of caution is required.[33] By agreement, Professor Tribe will get the last word in this exchange of views in *Constitutional Commentary*. If he uses that opportunity to challenge the detailed arguments that I presented on this issue in *Unbearable Rightness*, I hope that interested readers will carefully compare whatever he says about my arguments with what I actually said.[34]

II. JUSTICIABILITY

On justiciability, Professor Tribe has now abandoned the position that I called "spectacularly indefensible." Which is good. It would have been even better had he returned to the position that he took during the *Bush v. Gore* litigation. Unfortunately, he has now invented yet a third theory, which is entirely new and which the Supreme Court could certainly not have been expected to anticipate.

Space constraints preclude a critique of Professor Tribe's latest position, which essentially seeks to conflate the "passive virtues" theory of judicial restraint to which Justice Breyer ap-

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ber 12th deadline was wrong. I absolutely agree with you that that possibility was open, and, in fact, on the night of December 12th, a number of us on the Gore team stayed up all night and wrote just such a brief inviting the Florida Supreme Court to do just that.

I think as a practical matter, though, in this context, our view was that the Florida Supreme Court had gotten, you know, two increasingly intense candygrams from the U.S. Supreme Court and the second one seemed to have the word "stop" written on it in really big letters. It was our view that the Florida Supreme Court, which had divided four-three the past time around, was really not that interested in seeing us there one more time.

So I take your point that as a legal matter, it was open to the Florida Supreme Court to write an opinion that said, "we know the Supreme Court said December 12th was the deadline, we know everyone in America thinks this is over now, but in fact, December 16th is the deadline and we're going to start the counting again." You know, it just seemed like the Supreme Court was sending a very strong signal not to do that.

33. Indeed, this issue reappears in an important way even in the context of the political question doctrine, discussed below. Under Professor Tribe's new theory of the political question doctrine, it seems that if the Court had "rule[d] out remedies that prematurely short-circuited the political process, and had remanded the case to the Florida Supreme Court to conduct a manual recount with uniform standards, it would at least have remained somewhat faithful to our constitutional tradition." Tribe, *Unbearable Wrongness* at 602 (cited in note 2).

34. See Lund, *Unbearable Rightness* at 1270-78 (cited in note 10).

pealed[35] with the legal doctrine of nonjusticiable political questions.[36] It is worth stressing, however, the extent of Professor Tribe's concession. Not only does he admit that he cannot defend the theory I attacked, he also seems to concede that his new theory has never previously been articulated by anyone. Most important, he now says that "it seems implausible that any resolution of the ultimate legal battle over the propriety of the Court's intervention in the face of the political question doctrine could be described as plainly right or as plainly wrong."[37] In light of this statement, I would like to think that Professor Tribe will withdraw his sarcastic remarks about the Court's failure to address a justiciability issue never raised by the parties,[38] and perhaps also his claim that the five "Justices in the *Bush v. Gore* majority have little but disdain for Congress as a serious partner in the constitutional enterprise, and not much patience with 'We the People' as the ultimate source of sovereignty in this republic."[39]

One other point deserves to be emphasized. Contrary to what Professor Tribe would have us believe,[40] Justices Souter and Breyer absolutely did not say, imply, or even suggest that *Bush v. Gore* was nonjusticiable. Neither of them ever used the word "justiciable" or any of its cognates. Neither of them ever referred to the "political question doctrine." And neither of them cited any of the innumerable cases from this line of prece-

35. See, e.g., *Bush v. Gore*, 531 U.S. at 57-58 (Breyer, J., dissenting) (citing a Harlan Stone dissent and an extrajudicial remark by Louis Brandeis that was quoted in Alexander Bickel's *The Least Dangerous Branch*).

36. Here again, and contrary to the insinuation in Tribe, *Unbearable Wrongness* at 592 n.88, I have respected the distinction between my interpretation of the Constitution and the Supreme Court's case law. I believe that the Constitution can plausibly be interpreted to render cases like *Bush v. Gore* nonjusticiable. Whether it should be so interpreted seems to me a difficult question, and I have not been able to arrive at a settled opinion about that issue. The case law, however, is clear enough: *McPherson v. Blacker* answered the question, and that decision has not been overruled. The skimpy reasoning in the *McPherson* opinion is quite inadequate, and I have never said that the case was correctly decided. On the contrary, I have repeatedly cautioned against inferring that I think it was rightly decided. See Lund, *Unbearable Rightness* at 1234 n.53, 1254 n.113 (cited in note 10). As with the equal protection issue, my claim has been that the Court correctly applied its own precedents, and Professor Tribe does not contend that the Court was obliged to overrule *McPherson*.

37. Tribe, *Unbearable Wrongness* at 593 (cited in note 2).

38. Tribe, *eroG v. hsuB* at 279 (cited in note 1) (quoted in Lund, *"EQUAL PROTECTION..."?* at 562-63 (cited in note 3)).

39. Tribe, *eroG v. hsuB* at 290 (cited in note 1) (quoted in Lund, *"EQUAL PROTECTION..."?* at 569 (cited in note 3)).

40. See Tribe, *Unbearable Wrongness* at 603 (cited in note 2) ("Contrary to Lund's utterly bizarre assertion, Justices Breyer and Souter plainly invoked the political question doctrine.").

dents. Whatever kinship their position may have with Professor Tribe's newly minted "political process variant" of the political question doctrine, it is simply untrue that Souter or Breyer relied on what Professor Tribe calls "the traditional doctrine."[41]

Both Justices plainly did believe that the Court should not have exercised its discretion to grant certiorari in this case, and I have no doubt that they would have been pleased to see the writ dismissed as improvidently granted. But they never said that the Court had violated the Constitution or any other *legal* rule by the very act of deciding the case.[42] Professor Tribe's effort to suggest otherwise requires him to conflate the doctrine of nonjusticiable political questions (which Souter and Breyer did *not* invoke) with arguments (which Souter and Breyer clearly did make) about the proper exercise of judicial discretion.

CONCLUSION

As in most important constitutional cases, there was room in *Bush v. Gore* for reasonable disagreement about the best interpretation of the applicable precedents. I think it was a very easy case, but my strong objections to Professor Tribe's position are not based on that conclusion. Rather, I object to the extravagant terms in which he has denounced the Court, and to his claim that no reasonable defense of the Court's decision is possible. He is able to make that extremely serious charge sound plausible only by attributing to the Court absurd and irresponsible positions that it never took, and thereby creating an illusion of judicial outlandishness. Professor Tribe continues to paint the decision in this case as an outrage, and that is simply insupportable.

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41. See id. at 604 ("... Justice Souter's argument invokes both the traditional doctrine and what I have called its political process variant"). Justice Ginsburg did allude to the "traditional doctrine," but only in criticizing Chief Justice Rehnquist's Article II analysis in his separate concurrence. 531 U.S. at 141-42 & n.2.

42. Once again, Professor Tribe gets an assist from a misleading use of ellipses. See Tribe, *Unbearable Wrongness* at 605 (cited in note 2), where a careful review of the quotation shows that Justice Breyer did *not* say that it was "legally wrong" for the Court to resolve the equal protection issue. Although Professor Tribe italicizes the term "legally wrong" in the quotation, Justice Breyer was not speaking there about the Court's decision to resolve the equal protection issue, but rather about what he believed was the remedy the Court ordered. Whether or not one agrees with Breyer's characterization of the remedy in the case, and whether or not one agrees with Breyer's prudential arguments against deciding the case at all, the fact remains that neither he nor Justice Souter said or implied that the case was nonjusticiable.