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BUSH V. GORE AT THE DAWNING OF THE AGE OF OBAMA

*Nelson Lund**

INTRODUCTION

As Akhil Amar reminds us, hundreds of law professors denounced the *Bush v. Gore* majority as propagandists who suppressed the facts and used their power “to act as political partisans, not judges of a court of law”; as he also notes, a few other law professors leveled similar judgments against the Florida judges whose decision triggered the U.S. Supreme Court’s review.¹ Professor Amar does not openly endorse the most venomous accusations leveled against the *Bush v. Gore* majority, but he does attempt to show that the actions of the Florida judges “in general were legally defensible, and often quite admirable.”² He also maintains that “the U.S. Supremes,” as he repeatedly calls them, had no legal basis for their decision and that three of them strategically joined an opinion that even they probably regarded as “implausible.”³

If one knew only what Professor Amar tells us, it would be hard to resist the conclusions reached by two vitriolic professors whom he quotes at length: “[F]ive Republican members of the Court decided the case in a way that is recognizably nothing more than a naked expression of these justices’ preference for the Republican Party . . . [T]he court gave *no* legally valid reason for [its] act of usurpation.”⁴

Fortunately, the legal professoriate is not an Athenian jury, with the power to ostracize disfavored officials. These pundits are but self-appointed prosecutors in the court of public opinion. In that court, as Professor Amar says, “Facts matter.”⁵ Or at least they should. And when one looks at the facts, Professor Amar’s legal case collapses.

In the space allotted for my response, I will discuss a few of the most significant omissions, errors, and rhetorical misdirections in Professor Amar’s passionate assault on the Supreme Court.⁶ Nothing I say in this

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1. Akhil Reed Amar, *Bush, Gore, Florida, and the Constitution*, 61 FLA. L. REV. 945, 947–50 (2009).

2. *Id.* at 955.

3. *Id.* at 966.

4. *Id.* at 947–48 (quoting Margaret Jane Radin and Bruce Ackerman, respectively).

5. *Id.* at 963.

6. More extensive treatments of the issues discussed in this response are available in Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 1219 (2002) [hereinafter *Unbearable Rightness*]; Nelson Lund, “*Equal Protection, My Ass!?*” *Bush v. Gore and Laurence Tribe’s Hall of Mirrors*, 19 CONST. COMMENT. 543 (2002) [hereinafter *Hall of Mirrors*]; Nelson

response is novel—it has all been on the public record for many years.

SOME OMITTED FACTS ABOUT THE CASE

Before considering Professor Amar's argument, the reader needs an accurate summary of the Court's decision. Based on two separate machine counts of the Florida ballots, George Bush narrowly won that state's electoral votes.⁷ Al Gore demanded hand recounts in a few heavily Democratic counties, where he could expect to pick up votes as the result of the random errors that inevitably occur whenever large numbers of ballots are counted.⁸ State statutes created obstacles to this strategy, but the Florida Supreme Court swept those obstacles aside, apparently relying on Florida constitutional law.⁹ In *Bush v. Palm Beach County Canvassing Board*,¹⁰ the U.S. Supreme Court *unanimously* vacated that decision, and warned the Florida judges that their decision seemed to conflict with *McPherson v. Blacker*,¹¹ which had interpreted Article II of the U.S. Constitution to preclude state constitutions from abridging the discretion of state legislatures to specify the manner of choosing presidential electors.¹²

The Florida Supreme Court ignored this warning. By a vote of four to three, these judges ratified Gore's cherry-picking strategy, created more time for recounts to be conducted, and *definitively* awarded Gore a number of additional votes from the counties he had selected.¹³ This included additional votes based on a *partial* recount in Miami-Dade County that had begun with heavily Democratic precincts and stopped before it reached the more Republican precincts.¹⁴ The Florida Supreme Court also ordered a recount of some additional ballots in Miami-Dade County, but *only* the so-called undervote ballots that Gore wanted to have recounted.¹⁵ The Florida Supreme Court also ordered a state-wide hand recount (which Gore had not requested), but *not* a recount of all the ballots, or even a recount of all the ballots that had been rejected as invalid in the initial machine counts;

Lund, *Carnival of Mirrors: Laurence Tribe's "Unbearable Wrongness,"* 19 CONST. COMMENT. 609 (2002) [hereinafter *Carnival of Mirrors*].

7. Lund, *Unbearable Rightness*, *supra* note 6, at 1228.

8. *Id.* at 1228–29.

9. *Id.* at 1229–33; *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000).

10. 531 U.S. 70 (2000).

11. 146 U.S. 1 (1892).

12. *Id.* at 25; *Bush v. Palm Beach Canvassing Bd.*, 531 U.S. at 76–77.

13. *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000); Lund, *Unbearable Rightness*, *supra* note 6, at 1235–37.

14. Lund, *Hall of Mirrors*, *supra* note 6, at 554 & n.40; Lund, *Unbearable Rightness*, *supra* note 6, at 1239–40 & n. 68.

15. "Undervotes" are ballots on which the machine detects no vote for a particular office; "overvotes" are ballots on which the machine detects a vote for more than one candidate, and therefore does not register any vote for that office. Lund, *Unbearable Rightness*, *supra* note 6, at 1241; Lund, *Hall of Mirrors*, *supra* note 6, at 546 n.10.

the *only* ballots that would be reviewed were those resembling the ballots Gore asked to have recounted in Miami-Dade County.¹⁶ The Florida court, moreover, provided no standards to be used by the officials charged with reexamining these selected ballots, and no uniform standard was in fact adopted.¹⁷

In *Bush v. Gore*, the Supreme Court held that this partial recount of the ballots violated the Equal Protection Clause¹⁸ as interpreted in a line of vote-dilution cases beginning with *Reynolds v. Sims*,¹⁹ and remanded the case to the Florida Supreme Court “for further proceedings not inconsistent with this opinion.”²⁰

THE FIRST EQUAL PROTECTION CANARD

Professor Amar maintains that the initial machine counts, which the Florida Supreme Court invalidated, were infected with much more serious “inequalities and inaccuracies and disenfranchisements” than the partial and selective hand recount at issue in *Bush v. Gore*.²¹ Professor Amar falsely claims, based on an incomplete and misleading quotation from the *Bush v. Gore* opinion, that the only problem with the Florida recount was that “some dimpled chads were being treated as valid votes, others not.”²²

Professor Amar may think that the Supreme Court majority was just “fixating on the small glitches of the recount”²³ when it rejected the biased and partial recount described above. But three out of seven Florida Supreme Court Justices (*all Democrats*) thought otherwise.²⁴ You didn’t need to be a Republican or a Bush supporter to recognize that this kind of recount had “no foundation in the law of Florida,”²⁵ or to conclude that the partial recount ordered by the Florida majority “would violate other voters’ [federal] rights to due process and equal protection of the law.”²⁶

Professor Amar claims that these “small glitches” or “picayune discrepancies” paled in comparison with the unfairness of the initial machine counts of the ballots.²⁷ And why were these counts unfair? The

16. Lund, *Unbearable Rightness*, *supra* note 6, at 1237; *Bush v. Gore*, 531 U.S. 98, 101 (2000).

17. For more details about the facts and rulings summarized in this paragraph and the preceding paragraph, see Lund, *Unbearable Rightness*, *supra* note 6, at 1235–43; Lund, *Hall of Mirrors*, *supra* note 6, at 548–56; Lund, *Carnival of Mirrors*, *supra* note 6, at 612–13.

18. *Bush v. Gore*, 531 U.S. at 103.

19. 377 U.S. 533 (1964).

20. *Bush v. Gore*, 531 U.S. at 111.

21. Amar, *supra* note 1, at 961–63.

22. Amar, *supra* note 1, at 961.

23. Amar, *supra* note 1, at 964.

24. *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000).

25. *Id.* at 1263 (Wells, C.J., dissenting).

26. *Id.* at 1272 (Harding, J., dissenting).

27. Amar, *supra* note 1, at 964.

only specific problem he identifies is that “black precincts in 2000 typically had much glitchier voting machines, which generated undercounts *many times* the rate of wealthier (white) precincts with sleek voting technology.”²⁸ His only evidence is a citation to an essay written by one of Gore’s lawyers after he lost his case, which offers a mere assertion that was never tested through the adversarial process.²⁹ Even assuming that Professor Amar’s vague and unproven allegation is true, is he right to say that the Supreme Court “piously attribut[ed] the problems to ‘voter error’ (as opposed to outdated and seriously flawed machines)”?³⁰ Why couldn’t one just as easily maintain that Professor Amar piously blames the machines for (certain) voters’ failure to follow the instructions? Justice O’Connor made such a suggestion at oral argument: “Well, why isn’t the [appropriate] standard the one that voters are instructed to follow, for goodness sakes? I mean, it couldn’t be clearer”³¹

Let us leave aside the obvious differences between discrepancies that inevitably arise in a decentralized election system like Florida’s and those resulting from a recount system devised after the winner of the initial machine counts has been determined.³² Even on the far-fetched assumption that there was *more* “unfairness” or “inequality” in the initial machine counts than in the challenged recount, *how could the Supreme Court have known about it?* Vice President Gore made no such allegation in his lawsuit.³³ No evidence of such inequality was presented to the trial court, or to any of the appellate courts that reviewed the case. None of the dissenting Justices on the U.S. Supreme Court made any such claim.³⁴ Was

28. *Id.* at 964. Such a racially disparate impact, assuming that it actually existed, has no apparent legal significance. *See, e.g.,* Washington v. Davis, 426 U.S. 229, 248 (1976) (rejecting disparate impact analysis under the Equal Protection Clause). *Cf.* Amar, *supra* note 1, at 969 (expressing concern about the disenfranchisement of felons, “who are disproportionately persons of color”); Michael D. Goldhaber, *The Felon Vote: Millions of Prisoners and Ex-Cons Have Lost the Ballot, but Suits Could Change That*, 23 NAT’L L.J., Oct. 30, 2000, at A1 (discussing study estimating that 70% to 90% of enfranchised felons would vote Democratic).

29. Amar, *supra* note 1, at 964 n.61. For an illuminating example of the importance of testing factual allegations through the adversarial process, taken from the *Bush v. Gore* litigation itself, see the devastating cross-examination of a Yale professor, Nicholas Hengartner, who served as one of Gore’s expert witnesses. Contest Trial Transcript, Vol. II, at 192–230, 233–74, *Gore v. Harris*, 772 So. 2d 1243 (Fla. Leon County Ct. 2000) (No. 00-2808), *available at* <http://election2000.stanford.edu/CV-00-2808-33.pdf>.

30. Amar, *supra* note 1, at 964.

31. Transcript of Oral Argument at 58, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949), *available at* 2000 WL 1804429.

32. For further discussion, see Lund, *Hall of Mirrors*, *supra* note 6, at 552–62; Lund, *Unbearable Rightness*, *supra* note 6, at 1235–36, 1268. Professor Amar also suggests that *Bush v. Gore* made the preposterous assumption that “the Constitution requires absolute perfection and uniformity of standards in counting and/or recounting.” Amar, *supra* note 1, at 962. The Court did no such thing. *See* Lund, *Carnival of Mirrors*, *supra* note 6, at 611–12.

33. Lund, *Carnival of Mirrors*, *supra* note 6, at 613 & n.23.

34. For further detail, see *id.*; Lund, *Hall of Mirrors*, *supra* note 6, at 559.

the Supreme Court really expected (or even permitted) to take judicial notice of facts that were not argued or proved, and that Professor Amar himself has not tried to prove nine years later? On this critical point, Professor Amar's case against *Bush v. Gore* does not simply dissolve, it boomerangs.

THE SECOND EQUAL PROTECTION CANARD

Professor Amar also maintains that the Supreme Court “failed to cite a single case that, on its facts, came close to supporting the majority’s analysis and result.”³⁵ It is true that there were no previous cases with similar facts. How could there have been? No legislature or court had ever devised a way of counting votes that remotely resembled the arbitrary and biased procedures adopted by the Florida Supreme Court.

Bush v. Gore's equal protection holding was in fact supported by a large body of well-established precedent, beginning with *Reynolds v. Sims*,³⁶ where the Court clearly stated: “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.’”³⁷ The Florida Supreme Court devised an extremely complex system of weighting, in which certain kinds of ballots were more likely to be counted as legal votes in some places than in others, thus discriminating for and against different groups of voters based on where they happened to reside.³⁸

Most obviously, voters who cast “overvote” ballots in the heavily Democratic counties Gore selected for recounts were treated more favorably than those who cast similar ballots elsewhere.³⁹ Similarly, voters living in the un-recounted (and more Republican) precincts of Miami-Dade were disadvantaged in comparison with those living in the recounted (and more Democratic) precincts.⁴⁰ The complexity of the vote dilution involved did not convert it into something other than vote dilution.

Not a single one of the dissenters in *Bush v. Gore* argued that the Florida recount comported with the Court's equal protection precedents,⁴¹ and Professor Amar understandably does not try to do so either. Better just to hope the reader will accept on faith the accuracy of epithets like “new-

35. Amar, *supra* note 1, at 963.

36. 377 U.S. 533 (1964).

37. *Id.* at 563 (emphasis added). For discussions of the case law, see Lund, *Hall of Mirrors*, *supra* note 6, at 548–56; Lund, *Unbearable Rightness*, *supra* note 6, at 1244–51.

38. For a detailed discussion, see Lund, *Unbearable Rightness*, *supra*, note 6, at 1237–52.

39. *See id.* at 1241–42.

40. *See id.* at 1239–40.

41. *Bush v. Gore*, 531 U.S. 98, 123–58 (2000) (separate dissenting opinions of Stevens, Souter, Ginsburg, Breyer, JJ.).

minted” and “absurdly ad hoc” to describe the Court’s holding.⁴²

THE NARROW HOLDING CANARD

Professor Amar writes: “The Rehnquist Court claimed that its new-minted equality principles applied only to judicially supervised state recounts, and not necessarily to other aspects of the electoral system. But the Court gave no principled reason for this absurdly ad hoc limitation.”⁴³ This is false. The Court rested its decision on well-established principles from previous decisions,⁴⁴ and never said these principles would not apply in future cases. The Court did say, quite prudently and responsibly, that “our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”⁴⁵ This was no more “absurdly ad hoc” than the Court’s equally prudent decision to limit its consideration in *Brown v. Board of Education*⁴⁶ to the issue of segregation in public education. The *Brown* Court did not say that its principles were inapplicable elsewhere, and neither did *Bush v. Gore*.⁴⁷

THE ‘STOP COUNTING’ CANARD

Professor Amar insinuates that “the U.S. Supremes felt they had to stop the recount altogether, rather than remand once again to judges whom they had come to view as judicial cheats.”⁴⁸ Leaving aside the unsubstantiated charge that some members of the Court viewed the Florida judges as dishonest, this is a fictionalized report of the Court’s remedial order.

The Supreme Court *did* remand the case to the Florida judges, and the Court *did* leave these judges legally free to conduct a recount conforming to the principles of *Reynolds v. Sims*⁴⁹ and its progeny.⁵⁰ The only legal bar to such a recount was the Florida Supreme Court’s own prior determination that *state* law required a recount to be concluded by December 12 (the same day that *Bush v. Gore* was decided).⁵¹ The Florida Supreme Court would have been free to overturn that determination on remand.⁵²

42. Amar, *supra* note 1, at 962.

43. Amar, *supra* note 1, at 962.

44. *Bush v. Gore*, 531 U.S. at 104–10 (majority opinion).

45. *Id.* at 109.

46. 347 U.S. 483 (1954).

47. See Lund, *Unbearable Rightness*, *supra* note 6, at 1267–69.

48. Amar, *supra* note 1, at 950.

49. 377 U.S. 533 (1964).

50. *Bush v. Gore*, 531 U.S. at 111.

51. *Id.* at 110; Lund, *Unbearable Rightness*, *supra* note 6, at 1274–78.

52. See Lund, *Carnival of Mirrors*, *supra* note 6, at 614–16; Lund, *Unbearable Rightness*, *supra* note 6, at 1270–78.

Professor Amar may not recognize this, but Al Gore did. Two of Gore's lawyers have publicly acknowledged that *Bush v. Gore* permitted them to seek a new recount, and they even stayed up all night on December 12 writing a brief that invited the Florida Supreme Court to conduct one.⁵³ Gore decided to concede the election instead, perhaps because he recognized what the dissenting judges on the Florida Supreme Court found obvious: it would have been logistically impossible to conduct such a recount and provide for meaningful judicial review in the six days remaining before the federal deadline.⁵⁴ Whatever Gore's reason for conceding, it was not because the Supreme Court had "stopped" the Florida Supreme Court from conducting a new recount.

THE FIRST ARTICLE II RED HERRING

A substantial part of Professor Amar's lecture is devoted to attacking the argument that the Florida Supreme Court violated Article II of the Constitution, which commands that presidential electors be chosen as state legislatures (not state courts or state constitutions) may direct.⁵⁵ The majority opinion in *Bush v. Gore* made no reference to this argument, so its validity *vel non* has no bearing on the merits of the Court's decision. However, it is relevant to Professor Amar's argument for two reasons. First, he suggests that three concurring Justices (Republicans all), who endorsed both this argument and the Court's equal protection argument, were engaged in disingenuous strategic voting.⁵⁶ Second, he argues that the Florida judges clearly did not violate Article II, and should not even be suspected of any improper behavior.⁵⁷

The strategic voting charge against Justices Rehnquist, Scalia, and Thomas rests on two claims: (1) that these three Justices had previously adopted an equal protection approach that "ran counter" to the approach in the *Bush v. Gore* majority opinion, and (2) that principled originalists must have had "special problems" with the majority opinion.⁵⁸ Accordingly, the Republican trio probably saw the majority opinion they joined as "highly problematic and implausible."⁵⁹

Professor Amar does not provide a single example of an opinion by Justices Rehnquist, Scalia, or Thomas that "ran counter" to the *Bush v. Gore* majority opinion, and I know of none.⁶⁰ Regarding the second claim,

53. See Lund, *Carnival of Mirrors*, *supra* note 6, at 615 & n.32.

54. The Electoral College was required to meet on December 18. 3 U.S.C. § 7 (2006). A somewhat similar recount case—the 2008 Coleman-Franken senatorial contest—took eight months to resolve.

55. Amar, *supra* note 1, at 957–60.

56. Amar, *supra* note 1, at 965–66.

57. Amar, *supra* note 1, at 953–56.

58. Amar, *supra* note 1, at 965.

59. Amar, *supra* note 1, at 966.

60. A related version of Professor Amar's unsupported accusation is debunked in Lund, *Hall*

it is true that there are serious originalist objections to the Court's Fourteenth Amendment voting rights jurisprudence, which Justice Harlan powerfully articulated at the outset.⁶¹ But no Supreme Court Justice in our history has ever advocated the overruling of all cases that rest on objectionable precedential foundations, especially when none of the litigants has asked for a precedent to be reconsidered. Not Chief Justice Rehnquist, not Justice Scalia, not Justice Thomas, not anybody. In order to find an inconsistency in what these three Justices did in *Bush v. Gore*, you have to caricature them.

As to the behavior of the Florida majority, Professor Amar admits it was "a momentous mistake"⁶² to ignore the constitutional issue raised by the Supreme Court in *Bush I*, but he excuses the mistake on the ground that time was short and the Florida majority nevertheless "did the right legal things and for the right legal reasons."⁶³ How so? According to Professor Amar, they "intuitively" saw the case in light of a "larger spirit."⁶⁴

Let us leave aside the fact that the U.S. Supreme Court declared such "larger spirits" inapplicable over a century ago, in a case that the Court unanimously told the Florida judges to consider.⁶⁵ And let us accept, *arguendo*, the radical assumption that appellate judges may properly "intuit" (or guess at, or stumble on) correct legal conclusions. Even on these generous assumptions, is Professor Amar right to be so sure that the Florida majority's "intuitions" were correct?

In support of these intuitions, he offers his own extended legal analysis, which he describes as "crisp and cogent."⁶⁶ This argument—essentially replicating a reasonably crisp portion of Justice Ginsburg's *Bush v. Gore* dissent—is that state election statutes are generally taken to mean whatever state courts interpret them to mean, and that Florida's legislature has never said a different presumption should operate when the statutes are applied in presidential elections.⁶⁷ The argument is certainly colorable,⁶⁸ but how "cogent" is it? Florida's own Chief Justice (a Democrat) unequivocally concluded, on the basis of longstanding precedent, that his court's majority had violated Article II.⁶⁹ Furthermore, Chief Justice Rehnquist's

of Mirrors, *supra* note 6, at 548–50.

61. See Lund, *Carnival of Mirrors*, *supra* note 6, at 610; Lund, *Hall of Mirrors*, *supra* note 6, at 556–61; Lund, *Unbearable Rightness*, *supra* note 6, at 1262 & n.142.

62. Amar, *supra* note 1, at 953.

63. Amar, *supra* note 1, at 956.

64. Amar, *supra* note 1, at 956.

65. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76–77 (2000) (discussing *McPherson v. Blacker*, 146 U.S. 1, 25 (1892)).

66. Amar, *supra* note 1, at 953–55.

67. See *Bush v. Gore*, 531 U.S. 98, 135–43 (2000) (Ginsburg, J., dissenting).

68. See Lund, *Unbearable Rightness*, *supra* note 6, at 1233.

69. *Gore v. Harris*, 772 So. 2d 1243, 1268 (Fla. 2000) (Wells, C.J., dissenting). Professor Amar misleadingly reports that Chief Justice Wells "worried aloud about the Article II issue." Amar, *supra* note 1, at 952. He did a lot more than worry aloud.

concurrence in *Bush v. Gore* offered detailed arguments in support of that conclusion.⁷⁰ Apparently, we are just expected to “intuit” that these arguments are so obviously wrong that they need not even be addressed.

In a small red herring within the larger red herring of his arguments about Article II, Professor Amar encourages such intuitions by attacking Katherine Harris, an elected officeholder whose job required her to interpret Florida’s election laws.⁷¹ Professor Amar claims that she “showed dubious legal judgment” by participating in Bush’s 2000 election campaign (though he does not say what law she may have violated), and claims that her official interpretations of the Florida election statutes “raised a vivid specter of severe partisanship.”⁷² They were based, he implies, on “bureaucratic mumbo jumbo or statutory legalese”⁷³ rather than a “deep constitutional principle” that Professor Amar has himself intuited.⁷⁴ In support, he notes that the supposedly more expert Florida Attorney General’s office had resolved at least one statutory issue differently than Harris did.⁷⁵

Before swallowing this story, one should consider a couple of facts that Professor Amar omits. Alas, the Florida Attorney General used the same “dubious legal judgment,” if that is what it was, by serving as co-chairman of Al Gore’s 2000 Florida election campaign.⁷⁶ What’s more, even this active Gore supporter gave an early warning that a recount like the one eventually struck down in *Bush v. Gore* “will incur a legal jeopardy, under both the U.S. and State constitutions.”⁷⁷ So maybe the specter of Harris’ “severe partisanship” wasn’t so vivid after all.⁷⁸ Or perhaps it just seemed vivid to those who can perceive specters of partisanship only in Republicans.

THE SECOND ARTICLE II RED HERRING

Professor Amar devotes another lengthy section of his lecture to arguing that the Florida Legislature had no authority under Article II to appoint a slate of electors in response to the uncertainty and delay created by the ongoing recount litigation.⁷⁹ No such appointment occurred, and the

70. *Bush v. Gore*, 531 U.S. at 112–15 (Rehnquist, C.J., concurring).

71. Amar, *supra* note 1, at 957.

72. Amar, *supra* note 1, at 957.

73. Amar, *supra* note 1, at 957.

74. Amar, *supra* note 1, at 957.

75. Amar, *supra* note 1, at 957.

76. Don Van Natta Jr., *Palm Beach Panel Votes to Proceed on Count*, N.Y. TIMES, Nov. 15, 2000, at A1.

77. Lund, *Unbearable Rightness*, *supra* note 6, at 1245–46 n.91 (quoting Letter from Robert A. Butterworth, Attorney Gen., to Honorable Charles E. Burton, Chair, Palm Beach Canvassing Board (Nov. 14, 2000)).

78. Amar, *supra* note 1, at 957.

79. Amar, *supra* note 1, at 957–60.

issue has absolutely nothing to do with the Court's decision in *Bush v. Gore*.

Besides being a distraction, Professor Amar's analysis is one-sided and simplistic. There are obvious arguments to be made on both sides of the question,⁸⁰ and additional arguments might have been developed had the question ever been litigated. Professor Amar also fails to acknowledge that the Florida Legislature had good practical reasons for contemplating direct appointment of an electoral slate. Federal law required the Electoral College to meet on December 18,⁸¹ and the State of Florida could have lost its right to participate in electing the President if electors had not been appointed by then. The Florida Supreme Court, moreover, had found an even earlier deadline (December 12) in Florida law,⁸² and that deadline was rapidly approaching when some Florida legislators began to consider direct appointment of electors.⁸³ The pressure of time—invoked to excuse what Professor Amar concedes was “a momentous mistake” by the Florida Supreme Court⁸⁴—somehow is forgotten when evaluating what legislators merely considered doing if time actually ran out.

CONCLUSION

Professor Amar is a highly skilled rhetorician. In this very short response, I have only touched on some of the more beguiling misstatements, omissions, and distractors in his lecture. I do not expect to persuade those who are consumed with disdain for Republicans, or Bush, or “conservative” judges. But perhaps there is another audience, more thoughtful and disciplined than the hippies called to mind by Professor Amar's apparent allusion to the 1960s musical *Hair*, with its celebration of the Age of Aquarius.⁸⁵ As we stand here at what Professor Amar calls “the dawning of the Age of Obama,”⁸⁶ there are many students and lawyers who have encountered snippets of *Bush v. Gore* in a case book, along with editorial comments from professors who have publicly excoriated the Court and its decision. Perhaps some of these readers can be moved to take a closer, and unprejudiced, look at the facts. They will find a story that bears almost no resemblance to the one told by Professor Amar.

80. For a brief summary of arguments on both sides, see Lund, *Unbearable Rightness*, *supra* note 6, at 1272–73 & n.167.

81. 3 U.S.C. § 7 (2006).

82. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1286 n.17, 1290 n.22 (Fla. 2000); *Gore v. Harris*, 772 So. 2d 1243, 1268 & n.30 (Fla. 2000) (Wells, C.J., dissenting); *id.* at 1272 (Harding, J., dissenting).

83. For further detail, see Lund, *Unbearable Rightness*, *supra* note 6, at 1274–75.

84. Amar, *supra* note 1, at 953.

85. The most famous song in this play, which became a hit for the Fifth Dimension, features a ringing prophecy: “This is the dawning of the Age of Aquarius”

86. Amar, *supra* note 1, at 968.