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# RESPONSE

## **BUSH V. GORE—A RESPONSE TO DEAN BELSKY**

Steven K. Balman\*

“Let me tell you about Florida politicians. I make them out of whole cloth, just like a tailor makes a suit. I get their name in the newspaper. I get them some publicity and get them on the ballot. Then after the election, we count the votes. And if they don’t turn out right, we recount them. And recount them again. Until they do.”

—Edward G. Robinson to Humphrey Bogart in *Key Largo*<sup>1</sup>

### I. INTRODUCTION

Dean Martin H. Belsky wrote “*Bush v. Gore—A Critique of Critiques*”<sup>2</sup> before the terrorist attacks on September 11, 2001. When Belsky wrote his article on the United States Supreme Court’s decision in *Bush v. Gore*,<sup>3</sup> the twin towers of the World Trade Center were still standing, and the press still called George W. Bush “Dubya.” Since September 11, George W. Bush has gained a reputation as a competent and effective wartime President.<sup>4</sup> His approval ratings have soared to 90 percent.<sup>5</sup> Even the *New York Times* has acknowledged that President Bush had a “new gravitas.”<sup>6</sup> Some commentators have even compared President Bush to Winston Churchill.<sup>7</sup>

Before Belsky wrote his article, several supporters of Al Gore, the man defeated in the 2000 Presidential election, wrote angry denunciations of *Bush v. Gore*. The critics blamed the Supreme Court

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1. *Overtime! The Election 2000 Thriller* 14 (Larry J. Sabato ed., Longman 2001).

2. Martin H. Belsky, *Bush v. Gore—A Critique of Critiques*, 37 *Tulsa L. Rev.* 45 (2001).

3. 531 U.S. 98 (2000).

4. *Leaders: The Difference a Year Makes*, *The Economist* 11 (Jan. 12, 2002).

5. *Bush’s Job Approval Rating Soars in Poll*, *Reuters* 1 (Jan. 28, 2002).

6. *Mr. Bush’s New Gravitas*, *N.Y. Times* A24 (Oct. 12, 2001).

7. Dana Milbank, *In This Crisis, the Choices in Words Are Churchill’s*, *Wash. Post* A15 (Oct. 30, 2001).

for Gore's loss of the election. In particular, the critics blamed the Court for Gore's loss of the "post-election campaign"—Gore's extraordinary and unprecedented effort to win the Presidency by litigating in the state courts of Florida.<sup>8</sup>

The editors' comments in *The New Republic* were typical. They accused the Court of staging a "judicial putsch"—a coup d'état:

George W. Bush's presidency will forever be haunted by James Madison's ghost. Constitutionally speaking, this presidency is ill gotten. It is the prize of a judicial putsch. . . . George W. Bush won the election but Al Gore won the vote. And the Supreme Court of the United States has made itself a party to this dread of democratic truth. We disrespectfully dissent.<sup>9</sup>

Professor Alan M. Dershowitz of the Harvard Law School<sup>10</sup> also considered the *Bush v. Gore* decision "lawless." He stated in his book:

The five Justices who ended election 2000 . . . have damaged the credibility of the U.S. Supreme Court and their lawless decision . . . promises to have a more enduring impact on Americans than the outcome of the election itself.<sup>11</sup>

In so voting, they [the five-vote majority] shamed themselves and the Court on which they serve, and they defiled their places in history.<sup>12</sup>

*Bush v. Gore* was a 5-4 decision. The five Justices who, according to Dershowitz, "defiled their places in history" were Chief Justice William Rehnquist, Justice Antonin Scalia, Justice Clarence Thomas, Justice Anthony Kennedy, and Justice Sandra Day O'Connor. They found the recount was conducted in a manner that was so arbitrary and so standardless that it violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.<sup>13</sup> The five Justices also found that there was no way for the Supreme Court of Florida—the court that had ordered the standardless recount—to correct the problem. A federal statute made December 12, 2000 the deadline for completing the election and there was no time for Florida to adopt appropriate standards and conduct a proper recount.<sup>14</sup>

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8. See e.g. Jeffrey Rosen, *The Supreme Court Commits Suicide*, in *Bush v. Gore: The Court Cases and the Commentary* 311 (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001).

9. E.J. Dionne, Jr. & William Kristol, *Unsafe Harbor*, in *Bush v. Gore: The Court Cases and the Commentary* 317-18 (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001).

10. Professor Alan M. Dershowitz is perhaps best known as one of the defense lawyers for O.J. Simpson and Claus Von Bulow. Professor Dershowitz also makes frequent appearances on television news programs.

11. Alan M. Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* 3 (Oxford U. Press 2001).

12. *Id.* at 4.

13. *Bush v. Gore*, 531 U.S. at 109.

14. *Id.* at 110.

According to Dershowitz, the actions of the five Justices were “unprincipled” and “partisan:”

[T]here is . . . widespread popular outrage at what the high court did . . . [and when the Court members] act in an unprincipled and partisan manner—as they did in *Bush v. Gore*—they risk losing respect and frittering away the moral capital accumulated by their predecessors over generations.<sup>15</sup>

Dershowitz was not the only law professor to express such views. Over 600 law professors signed an electronic petition and took out an advertisement in *The New York Times*. The law professors accused the Court of acting in a non-judicial fashion when it enjoyed the recount of votes in the Florida Presidential election.<sup>16</sup>

Other critics were even more shrill. They compared *Bush v. Gore* to *Dred Scott v. Sandford*,<sup>17</sup> the infamous decision that denied the humanity of African Americans and recognized the rights of slaveholders. The decision was debated by Abraham Lincoln and Stephen Douglas in the Lincoln-Douglas debates, and did much to precipitate the Civil War.<sup>18</sup>

Belsky, in contrast, is not shrill. If Belsky is angry about the result of *Bush v. Gore*, he keeps his emotions to himself. He disagrees with the ultimate result in the case, but only reveals his position and his reasoning in the last two pages of his article.<sup>19</sup> Throughout, Belsky takes the approach of *Dragnet's* Sergeant Joe Friday: “Just the facts, ma'am.” Unlike Sergeant Friday—and unlike most critics of *Bush v. Gore*—Belsky uses humor. He quotes Yogi Berra. If, as Horace Walpole observed, “[t]he world is a tragedy to those who feel, but a comedy to those who think,” Belsky is clearly a thinker.

According to the critics, the most fundamental question about *Bush*

15. Dershowitz, *supra* n. 11, at 5-6.

16. 673 *Law Professors Say* <<http://www.the-rule-of-law.com/statement.html>> (accessed Feb. 5, 2002). The law professors' use of the name “the-rule-of-law.com” is curious. It may be intended to indicate approval of Justice Steven's assertion that “[a]lthough we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian to the rule of law.” *Bush v. Gore*, 531 U.S. at 128-29.

At least some of the 600 law professors are “Pomos”—postmodernists—and “Crits”—participants in the Critical Legal Studies movement. Pomos and Crits normally have as much enthusiasm for the “rule of law” as members of the Harvard Divinity School have for tent revivals. For example, one of the 600 professors is Pierre Schlag, who compares law to phrenology, in *Law and Phrenology*, 110 *Harv. L. Rev.* 877 (1997). Schlag's article rejects the viability of the rule of law, and is otherwise opaque.

17. 60 U.S. 393 (1856).

18. Rosen, *supra* n. 8, at 312. See *The Oxford Companion to the Supreme Court of the United States* 759-61 (Kermit L. Hall ed., Oxford U. Press 1992) (“American legal and constitutional scholars consider the *Dred Scott* decision to be the worst ever rendered by the Supreme Court. Historians have abundantly documented its role in crystallizing attitudes that led to war.”); Walter Ehrlich, *They Have No Rights: Dred Scott's Struggle for Freedom* (Greenwood Press 1979).

19. Belsky, *supra* n. 2, at 78-79.

*v. Gore* was whether the decision was political?<sup>20</sup> Were the Justices in *Bush v. Gore* acting as judges or politicians? Belsky discusses this very serious question in the central part of his article:

On a philosophic level, the decision in *Bush v. Gore* will be seen as just another example of the real world. Are the Justices of the Supreme Court political? Are the Justices ideological? Are the Justices biased toward certain people, ideas, and perspectives? Surprise, surprise!

Traditional scholars, legal realists, critical legal scholars, and post-modernists can all agree that decisions, even or especially those of the United States Supreme Court, are not based on fixed precedents and doctrines but include the judge's history and personality. My now deceased colleague, Chapman Professor Bernard Schwartz, documented this in his books reviewing drafts of Supreme Court opinions.

Here, supposed "states rights" Justices overruled a state's highest court. Justices who had not been proponents of voters' rights urged a new application of equal protection to safeguard such rights. Supposed activist judges urged restraint and even avoidance whereas individual and federal rights proponents argued for acceptance of a state decision rejecting claims of equal protection. If there was bias, argued others, it was the partisanship of the Florida courts. To quote my favorite legal scholar, Yogi Berra, in this and in most situations: "Where you stand, depends on where you sit."

That said, we should expect, and did in fact receive, partisanship. Now, let's move on to the bases of the Court's actions and their legitimacy.<sup>21</sup>

Significantly, Belsky does not limit his allegation of partisanship to the five majority Justices. He suggests that all parties, including the Florida Supreme Court, were motivated at least in part by politics.<sup>22</sup>

Belsky directly attacks Dershowitz' conclusion that the Court sacrificed its institutional legitimacy and frittered away moral capital accumulated "over generations." According to Belsky,

It is naive to believe that there will be any lasting impact on public confidence in the Judiciary because of its decision in *Bush v. Gore*. Even outrageous decisions, such as those on slavery, segregation and Japanese-American internment, which have been universally condemned, did not lead to permanent disrespect to the Court. Other decisions which caused deep splits in the public response, such as those on abortion,

20. Rosen, *supra* n. 8, at 311-16.

21. Belsky, *supra* n. 2, at 71-72.

22. *Id.* Belsky's observation that judicial decisions are motivated at least in part by politics is not novel. See Hall, *supra* n. 18, at 373-404 ("History of the Court"). Erwin Chemerinsky has written, "[t]he emperor has no clothes. Justices inescapably must—and should—make value choices interpreting the Constitution. . . . This, of course, is what constitutional law has always been about." Erwin Chemerinsky, *Getting Beyond Federalism in Constitutional Law: Constitutional Theory Matters*, 54 Okla. L. Rev. 1, 13 (2001) (written prior to the *Bush v. Gore* decision).

school prayer, and suspect rights, may have led to anger, attempts to “reign in the Court,” and debates on the selection of future Justices. They did not, however, lead to a wholesale rejection of legitimacy of the Court.<sup>23</sup>

Of course, Belsky is right. Opinion polls confirm that the public has *not* lost confidence in the Court. The public has gained confidence in Bush.<sup>24</sup>

Belsky also confronts Dershowitz in a more indirect and subtle way. Dershowitz believes that *Bush v. Gore* is “unprincipled” and “lawless.” It is possible, however, to read Belsky’s article as a refutation of Dershowitz. Refuting Dershowitz may not be an intended purpose, or even a conscious effect of Belsky’s article, but sometimes effects overtake intentions.

## II. THE DERSHOWITZ CHALLENGE

In *Supreme Injustice: How The High Court Hijacked Election 2000*, Dershowitz throws down the gauntlet: “I challenge any law professor or Supreme Court litigator to defend the majority’s equal protection conclusion and remedy in a public debate.”<sup>25</sup> Belsky quotes this challenge, “The Dershowitz Challenge,” in a footnote.<sup>26</sup>

The “majority’s equal protection conclusion” is not the same as the majority’s equal protection “remedy.” Seven Justices reached the conclusion that the statewide recount ordered by the Florida Supreme Court was arbitrary, and accordingly violated the requirements of equal protection (and, incidentally, due process).<sup>27</sup>

The recount ordered by the Supreme Court was arbitrary in at least three different ways. *First*, the Florida Supreme Court ordered partial recount totals from three counties to be included in the total. The three counties were Miami-Dade, Palm Beach, and Broward. Each of the counties “used varying standards to determine what was a legal vote.”<sup>28</sup>

*Second*, the Florida Supreme Court treated undervotes differently

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23. Belsky, *supra* n. 2, at 70.

24. Byron York, *The Reassuring President*, Natl. Rev. Online (Jan. 28, 2002) <<http://www.nationalreview.com/york/york012502.shtml>> (accessed Feb. 21, 2002).

25. Dershowitz, *supra* n. 11, at 84.

26. Belsky, *supra* n. 2, at 74 n. 256.

27. *Bush v. Gore*, 531 U.S. at 109-10 (“The record provides some examples. A monitor in Miami Dade testified at trial that he observed that three members of the county canvassing board applied different standards in defining a legal vote. And testimony at trial also revealed that a least one county changed its evaluative standards during the counting process. Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretence of a *per se* rule, only to have a court order that the county consider dimpled chads legal. This is not a process with sufficient guarantees of equal treatment.” (citation omitted)).

28. *Id.* at 106-07.

than overvotes.<sup>29</sup> An overvote is a ballot that contains more than one vote for the same office. An undervote is a ballot that contains no vote for one or more offices. The Florida Supreme Court ordered a recount of undervotes. The partial recount total from the three counties included overvotes.<sup>30</sup>

*Third*, the Florida Supreme Court did not “specify who would recount the ballots.”<sup>31</sup> Joseph Stalin once observed that “Those who cast the votes decide nothing; those who count the votes decide everything.”<sup>32</sup> In the statewide recount ordered by the Florida Supreme Court, different county election boards, called canvassing boards, scrambled to assemble teams of judges to do the recount. Some of the judges had “no previous training in handling and interpreting . . . ballots.”<sup>33</sup>

Justice Stephen Breyer and Justice David Souter also found that the statewide recount violated equal protection.<sup>34</sup> However, the two Justices did not agree with the majority’s remedy, which ended the recounting of Presidential ballots.<sup>35</sup>

Justices Souter and Breyer believed the proper remedy for the equal protection violation would have been to remand the case to the Florida Supreme Court with instructions to establish uniform standards for the recount.<sup>36</sup> Belsky sympathizes with the Souter-Breyer position. He believes that the Supreme Court should have remanded the case to the Florida Supreme Court.<sup>37</sup> Notwithstanding his ultimate conclusion, Belsky *appears* to take on the task of debating Dershowitz as an intellectual exercise.

Belsky’s defense of the Court’s equal protection conclusion consists of seven steps:

1. Federal constitutional doctrines apply to election challenges.<sup>38</sup>
2. Election challenges are a proper subject for judicial review.<sup>39</sup>
3. Strict scrutiny of deviations from the one-person-one-vote

29. *Id.* at 107-08.

30. *Id.* at 108.

31. *Id.* at 109.

32. Einer Elhauge, *The Lessons of Florida 2000*, Policy Rev. 15, 19 (Dec. 2001 & Jan. 2002); Sabato, *supra* n. 1, at v.

33. *Bush v. Gore*, 531 U.S. at 109.

34. *See id.* at 145-46 (Breyer, J., concurring in part); *id.* at 134 (Souter, J., concurring in part).

35. *Id.* at 110-11.

36. *Id.* at 129-35.

37. Belsky, *supra* n. 2, at 76-78.

38. *Id.* at 74-75. *See Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964); Hall, *supra* n. 18, at 899-902.

39. Belsky, *supra* n. 2, at 75. Dershowitz appears to argue that *Reynolds v. Sims* and other reapportionment cases were about discrimination against blacks and urban dwellers. *See Dershowitz, supra* n. 11, at 71-78. Belsky’s treatment of the right to vote as a fundamental constitutional right—a right that can be vindicated in federal court—is more conventional. *See e.g.* William H. Rehnquist, *The Supreme Court 277* (rev. ed., Vintage 2001).

standard is not required.

Some flexibility would be allowed to preserve the normal functioning of state governments and for minor population differences. Politics is an acceptable component of an election process, but cannot be allowed to go so far as to intentionally frustrate the will of the majority or to intentionally discriminate against an identified minority of the votes.<sup>40</sup>

4. The state standard— “the intent of the voter”—is acceptable. When that standard is “so loosely applied as to allow arbitrary and disparate treatment” to dilute the “weight of a citizen’s vote,” then it is appropriate for the Court to act.<sup>41</sup>

The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.<sup>42</sup>

5. There must be some standards for counting votes. Votes cannot be counted without a standard for determining whether a vote is legal.<sup>43</sup>
6. It is possible to frame a uniform standard for determining the “intent of the voter.” An “arbitrary and capricious” test could be used.<sup>44</sup>
7. The statewide recount ordered by the Florida Supreme Court was so arbitrary and so resulted in disparate treatment as to be standardless. The statewide recount was not requested by the parties. Procedural safeguards that could have been utilized were not adopted.<sup>45</sup>

Belsky’s defense of the equal protection *conclusion*—the argument endorsed by seven Justices—is overt and express. His defense of the equal protection *remedy* is a matter of inference and interpretation. Belsky says: “[i]f the equal protection basis for the decision had merely led to a remand to the Florida Supreme Court, *and the court had had the time to develop standards for a recount*, there would have been little

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40. Belsky, *supra* n. 2, at 75.

41. *Id.*

42. *Id.*

43. *Id.* at 75.

44. *Id.*

45. *Id.* at 61.



criticism of the Supreme Court."<sup>46</sup>

The essential part of Belsky's statement is the qualifying language: "and the court had had the time to develop standards for a recount." Significantly, the Florida Supreme Court did not have time to develop standards for a recount. The recount would necessarily have to be completed by December 12, 2000.<sup>47</sup> A federal statute, 3 U.S.C. § 5, governs the selection of Presidential electors. The statute provides:

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.<sup>48</sup>

December 18, 2000, was the day fixed for the meeting of the Electoral College. December 12, 2000, was six days before December 18. Belsky describes 3 U.S.C. § 5 as a "Safe Harbor" provision that establishes "a mechanism for the presumptive validity of state election returns. If a state has a procedure for the final selection of electors, including resolution of all controversies, at least six days before the date set for the meeting of electors, the selection is "conclusive."<sup>49</sup>

By December 12, 2000, the Florida Supreme Court had twice indicated that the Florida legislature wanted to take advantage of the presumption.<sup>50</sup> Belsky carefully pointed out those acknowledgements of the December 12 deadline.<sup>51</sup>

Even if the December 12 Safe Harbor deadline had not applied, it would have been impossible to devise new standards and conduct a recount during the six days between December 12 and the December 18 meeting of the Electoral College. Remand would have been futile. The law does not require futile acts.<sup>52</sup>

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46. Belsky, *supra* n. 2, at 74 (emphasis added) (citing Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. Chi. L. Rev. 657, 673 (2001)).

47. *Gore v. Harris*, 772 So.2d 1243, 1261-62 & nn. 21-22 (Fla. 2000); *See Palm Beach County Canvassing Bd. v. Harris*, 772 So.2d 1273, 1281-82, 1289-91 (Fla. 2000) (*per curiam*).

48. 3 U.S.C.A. § 5 (West 2001).

49. Belsky, *supra* n. 2, at 52.

50. *Gore v. Harris*, 772 So.2d at 1261-62; *Palm Beach County Canvassing Bd.*, 772 So.2d at 1281-82, 1289-91.

51. Belsky, *supra* n. 2, at 55-56.

52. *Id.* at 37; *Gore v. Harris*, 772 So.2d at 1272 (Harding, J., dissenting); Elhauge, *supra* n. 32, at 24-26; Richard A. Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* 132-46 (Princeton U. Press 2001).

I am not sure that Belsky intentionally decided to take the Dershowitz Challenge. I do not know whether he thinks he has refuted Dershowitz. I had to read Dershowitz's book once and Belsky's article three times before I saw how completely Belsky had responded to the Dershowitz challenge.

### III. OTHER CHALLENGES, OTHER QUESTIONS

"Their viewpoint is, of course, valid to them."

—Nero Wolfe<sup>53</sup>

Belsky's greatest contribution to the debate on *Bush v. Gore* is his objectivity. I wish that he would have been able to bring his reason and wit more fully to bear on five other questions raised by the commentary in *Bush v. Gore*:

- A. Did the *Bush v. Gore* majority act in bad faith?
- B. Is the argument based on Article II, Section 1 of the Constitution valid?
- C. Did the *Bush v. Gore* majority betray the principles of the "New Federalism?"
- D. Can *Bush v. Gore* be reconciled with *Planned Parenthood of Southeastern Pennsylvania v. Casey*?
- E. Is *Bush v. Gore* just another battle in the Culture Wars?

#### A. *Did the Bush v. Gore majority act in bad faith?*

As previously explained, some supporters have charged that the *Bush v. Gore* majority acted in a manner that was political and partisan. Belsky states at one point that "I will not focus directly on allegations and counter-allegations 'politics' and on the 'partisan nature' of these decisions."<sup>54</sup> Belsky nevertheless concludes that politics does play a part in judicial decisions.

The critics assume that a decision that is political cannot be a decision that follows the rule of law. Why? It is conceivable that a Justice could act in a manner that is simultaneously political and principled. Belsky does not make clear whether he thinks that the Court acted or showed fidelity to the rule of law in *Bush v. Gore*. Although Belsky does not expressly state his views, it is possible to infer them. As a preliminary matter, Belsky definitely seems to believe that it was

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53. Rex Stout, *Some Buried Caesar* 34 (Viking 1958). Nero Wolfe is reputed to be the illegitimate son of Sherlock Holmes and Irene Adler. In manner and physical appearance, Wolfe bears a closer resemblance to Mycroft Holmes, Sherlock's older, smarter, and more massive brother. Jacques Barzun described Nero Wolfe as "a portrait of an Educated Man." Jacques Barzun, *A Jacques Barzun Reader: Selections from his Works* 565 (HarperCollins 2002).

54. Belsky, *supra* n. 2, at 68.

appropriate for the Court to grant certiorari and to reverse the decision of the Florida Supreme Court. Belsky is persuaded by the equal protection conclusion reached by seven of the nine Justices.<sup>55</sup> Belsky is also persuaded that it was appropriate for the Court to stay the statewide recount ordered by the Florida Supreme Court.<sup>56</sup> Significantly, Belsky is critical of the remedy ordered by the Court in connection with equal protection: he says the Court should have remanded the case to the Supreme Court of Florida so that it could develop the standards for a recount and allow the completion of the statewide recount.<sup>57</sup>

Belsky almost certainly thinks that the Court was acting politically when it devised the equal protection remedy of remand without restarting the recount. He stopped short, however, of directly stating that the Court was acting in bad faith. Belsky's criticism of the remedy ordered by the Court has three parts:

1. It was and is the State of Florida's choice to apply the federal statutory "Safe Harbor" provision of 3 U.S.C. § 5. A state could decide if it wanted to proceed beyond the Safe Harbor date.<sup>58</sup>
2. "If the Constitution requires application of equal protection standards to a voting recount, those standards should be applied and a statute providing a choice for the decision-maker as to the time of the decision should not be seen as a limitation, let alone a bar."<sup>59</sup>
3. Congress has the ultimate right to make any final decision about selecting the President under Article II and the Twelfth Amendment of the Constitution.<sup>60</sup> "Our nation can cope with assassinations and attempted assassinations of the President in capacity of the President, and clouds impeachment over a President. Surely it could cope with a few weeks' delay in deciding who is to be the President."<sup>61</sup>

Belsky's argument is not, however, completely persuasive. *First*, as Belsky himself points out, the Supreme Court of Florida had already stated that the legislature intended for the December 12, Safe Harbor date, to be a deadline for completing recounts. Remand would have served no purpose.<sup>62</sup>

*Second*, Belsky's argument that 3 U.S.C. § 5 is subordinate to the Constitution is convincing. Section five implements Article II, Section 1 of the Constitution. The power of the state legislature over the manner

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55. *Id.* at 77.

56. *Id.*

57. *Id.*

58. *Id.* at 78.

59. *Id.* at 79.

60. See U.S. Const. art. II, § 1; U.S. Const. amend. XII.

61. Belsky, *supra* n. 2, at 78. See Posner, *supra* n. 52, at 132-33 & nn. 72-73.

62. Belsky, *supra* n. 2, at 78.

of the selection of the presidential electors is plenary. This principle was established in *McPherson v. Blacker*.<sup>63</sup>

*Third*, Belsky's observation about the power of Congress under Article II of the Twelfth Amendment is irrelevant. Article II of the Twelfth Amendment grants Congress the power to select the President in the event of a tie in the Electoral College. The Electoral College had not voted on December 12, 2000.<sup>64</sup> As a consequence, the predicate condition—a tie in electoral votes—did not exist. Seven Justices of the United States Supreme Court had, however, determined that the recount ordered by the Florida Supreme Court violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The power of Congress to resolve a deadlock in the Electoral College does not help determine the appropriate remedy for such an equal protection violation.<sup>65</sup>

*Fourth*, if the Court had remanded the case to the Florida Supreme Court and the recount had continued, the result might have been a "constitutional train wreck." It is frightening to play "What if?" Congress might have been forced to choose between a group of Florida electors chosen by the Florida legislature and a separate group of Florida electors chosen by the Florida Supreme Court. That choice might in turn have led to more litigation—perhaps even a third United States Supreme Court case. It might have taken months to choose between Bush and Gore. It might have been necessary to choose an interim President.<sup>66</sup>

Belsky treats the question of the propriety of the remedy as a legal

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63. 146 U.S. 1 (1892).

64. Belsky, *supra* n. 2, at 59; Elhauge, *supra* n. 32, at 29; Posner, *supra* n. 52, at 133-37.

65. Belsky, *supra* n. 2, at 60-61; Elhauge, *supra* n. 32, at 24-33; Posner, *supra* n. 52, at 132-46, 168-69.

66. Professor Einer Elhauge served as counsel for the Florida House of Representatives during the 2000 election dispute. Professor Elhauge wrote:

The Gore forces were preparing lawsuits seeking a court order blocking any appointment of electors by the Florida legislature. There was talk of a court order prohibiting the Florida legislators from meeting to make the appointments, or barring any legislatively appointed electors from voting in the Electoral College. Given that the Electoral College had to meet on December 18, this would have left but a few short days to litigate and resolve all appeals concerning the complex and never-before-adjudicated issue of whether state legislative appointment was appropriate when election contests failed to follow state legislative directions or make a timely choice conclusive on Congress.

Elhauge, *supra* n. 32, at 29-30. Professor Cass R. Sunstein of the University of Chicago Law School suggests that the Court's decision in *Bush v. Gore* "might well have averted chaos." Cass R. Sunstein, *Order Without Law*, in *The Vote: Bush, Gore & The Supreme Court* 205-22 (Cass R. Sunstein & Richard A. Epstein eds., U. Chi. Press 2001). "[A] genuine constitutional crisis might have arisen. It is not clear how it would have been settled. No doubt the nation would have survived, but things would have gotten very messy." *Id.* The term "constitutional train wreck" is used by Richard H. Pildies in *Democracy and Disorder*, in *The Vote: Bush, Gore & The Supreme Court* 145 (Cass R. Sunstein & Richard A. Epstein eds., U. Chi. Press 2001). See Posner, *supra* n. 52, at 137-39.

question, not a political question. He advances a legal argument that the Court ordered the wrong remedy. Because he takes the trouble to advance arguments, he appears to take the Court's position seriously: he seems to assume the Court was acting in good faith. To be sure, Belsky may think the Court was wrong. But courts, like lawyers, make good faith mistakes all the time. Conclusion: the *Bush v. Gore* majority acted in good faith.

*B. Is the argument based on Article II, Section 1 of the Constitution valid?*

Three Justices—Rehnquist, Scalia, and Thomas—joined in a separate opinion and argued that the Supreme Court of Florida had violated Article II, § 1, clause 2 of the United States Constitution. Article II, § 1, clause 2 provides that:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Belsky gives the Rehnquist-Scalia-Thomas position short shrift. He calls their Article II, § 1 concern a “non-issue.” According to Belsky,

It is not necessary to spend much time on the criticisms and supporters of the concurring opinions as to the application of Article II. The political/legal reality is that [the] concurring Justices [Rehnquist, Scalia and Thomas] did not get the two swing Justices [Kennedy and O'Connor] on the issue.<sup>67</sup>

The argument that the Supreme Court of Florida violated Article II, § 1 deserves more attention and consideration. The argument consists of six parts.

1. State imposed restrictions on Presidential elections implicate a “uniquely important” national interest.<sup>68</sup>
2. In most cases, the decisions of state courts are “definitive pronouncements of the will of the States as sovereigns.” In most cases, principles of comity and federalism would compel the Court to defer to the decisions of state courts on issues of state law.<sup>69</sup>
3. In exceptional cases, the other branches of a State's government speak for the State.<sup>70</sup>
4. In the matter of selecting Presidential electors, the State

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67. Belsky, *supra* n. 2, at 65.

68. *Bush v. Gore*, 531 U.S. at 112.

69. *Id.*

70. *Id.*

legislature speaks for the State. The legislature's authority is "plenary" according to *McPherson v. Blacker*, an 1892 decision in which the Court interpreted Article II, § 1 of the Constitution.<sup>71</sup>

5. The legislature of Florida enacted statutes that govern the selection of Presidential electors.<sup>72</sup>
6. The Supreme Court of Florida interpreted the Florida election laws in a manner that "impermissibly distorted them beyond what a fair reading required, in violation of Article II."<sup>73</sup>

Belsky's discussion of the Article II, § 1 argument is incomplete. In particular, Belsky ignores the discussion of *McPherson v. Blacker* in the Rehnquist-Scalia-Thomas concurrence. In addition, he ignores the reference to *McPherson* in the *per curiam* opinion.<sup>74</sup> A majority of five Justices believed that the power to choose electors is specifically entrusted to State legislatures.<sup>75</sup>

The four dissenters—Breyer, Souter, Stevens, and Ginsburg—also ignore *McPherson*. Belsky does not comment upon their failure to deal with a case the majority believes to be controlling on an important point. Belsky quotes passages from the dissents of Justices Stevens and Ginsburg. Those passages contain *ipse dixit* assertions that the Florida legislature intended the Florida Supreme Court to be involved in the selection of electors, and that the Florida Supreme Court acted in a traditional manner.

Belsky also fails to discuss another aspect of the Article II, § 1 argument: that the Supreme Court of Florida distorted the Florida Election Code. The Florida legislature enacted statutes providing that:

1. The Secretary of State was the Chief Election Officer of Florida. As Chief Election Officer, the Secretary of State was responsible for "obtain[ing] and maintain[ing] uniformity in the application, operation and interpretation of the election laws."<sup>76</sup>
2. County election boards—called canvassing boards—were responsible for protest of election returns.<sup>77</sup>
3. Candidates were authorized to initiate protest proceedings. A protest is a challenge to the propriety of challenge the returns of an election. The procedure is only available if there is a "error in the vote tabulation which could affect the outcome of the

71. *Id.* at 113.

72. *Id.* at 113-14.

73. *Id.* at 115 & n. 1.

74. *Bush v. Gore*, 531 U.S. at 104. It is not clear how much support *McPherson v. Blackes* provides for the Article II, § 1 argument. On one hand, the relevant parts of *McPherson* appears to be dicta. See Posner, *supra* n. 52, at 113-114 n. 41. On the other hand, *McPherson* is cited by the Court in *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 77 (2000) (*per curiam*).

75. *Id.*

76. Fla. Stat. § 97.012(1) (2001).

77. Fla. Stat. § 102.166 (2001).

election."<sup>78</sup>

4. The deadline for completing protest proceedings and certifying election results is 5:00 p.m. on the seventh day following an election. Canvassing boards "shall" meet that deadline. The Secretary of State "may" extend the deadline.<sup>79</sup>
5. After the votes are certified, a candidate may initiate a contest proceeding. The contest phase follows the protest phase.<sup>80</sup>
6. A presumption operates in favor of the actions of the Secretary of State and the canvassing boards. Such actions are reviewed for abuse of discretion.<sup>81</sup>

After the November 7, 2000 election, the Florida Supreme Court changed all six elements of the Florida Election Code set forth above. *First*, the Florida Supreme Court failed to acknowledge that the Secretary of State was Chief Election Officer. The Florida Supreme Court failed to acknowledge that the Secretary of State was responsible for obtaining and maintaining uniformity in the application, operation and interpretation of the election laws.<sup>82</sup>

*Second*, the Florida Supreme Court failed to acknowledge the authority and statutory role of the county canvassing boards.<sup>83</sup>

*Third*, the Florida Supreme Court expanded the grounds for initiating a protest. The Florida Supreme Court held that the failure to consider fully the intent of the voter was an error in the tabulation of votes.<sup>84</sup>

*Fourth*, the Florida Supreme Court extended the statutory deadline for certifying election results. The Florida Supreme Court ignored the role of the Secretary of State in determining that deadline. According to Professor McConnell, one statute said that the Secretary of State "shall" ignore late-filed returns, and another statute said to "may" ignore late-filed returns. But that provides no support for interpreting the law to say that she "shall not" ignore them, or to authorize the Court to create

78. Fla. Stat. § 102.166(1)-(5) (2001).

79. Fla. Stat. § 102.111(1) (2001).

80. Fla. Stat. § 102.168 (2001). See Richard A. Epstein, *In Such Manner as the Legislature Thereof May Direct: The Outcome in Bush v. Gore*, in *The Vote: Bush, Gore & The Supreme Court* 13, 31 (Cass R. Sunstein & Richard A. Epstein eds., U. Chi. Press 2001) ("[O]ne has contests about protests, so that the issues raised at the second [contest] phase are efforts to overturn incorrect decisions at the protest phase.").

81. See *Gore v. Harris*, 772 So.2d at 1262-73 (dissenting opinions); *Krivanek v. Take Back Tampa Political Committee*, 625 So.2d 840, 844-845 (Fla. 1993); *Boardman v. Esteve*, 323 So.2d 259, 268 n. 5 (Fla. 1975).

82. See *Gore v. Harris*, 772 So.2d at 1262-73 (dissenting opinions); Posner, *supra* n. 52, at 102-07, 118; Epstein, *supra* n. 80, at 13.

83. See *Gore v. Harris*, 772 So.2d at 1262-73 (dissenting opinions); Posner, *supra* n. 52, at 102-07, 118; Epstein, *supra* n. 80, at 13. The Florida Supreme Court effectively eliminated the role of the county canvassing boards, by refusing to defer to them and reviewing their decisions *de novo*.

84. See *Gore v. Harris*, 772 So.2d at 1262-73 (dissenting opinions); Posner, *supra* n. 52, at 102-07, 118; Epstein, *supra* n. 80, at 13.

its own deadline.<sup>85</sup>

*Fifth*, the Florida Supreme Court ordered a statewide recount. That recount included counties that had not previously held, or been the subject of, protest proceedings. In effect, the Florida Supreme Court abolished the distinction between protests and contests.<sup>86</sup>

*Sixth*, the Florida Supreme Court ignored the presumption in favor of the actions of the Secretary of State and the canvassing boards. The Florida Supreme Court used the non-deferential *de novo* standard of review.<sup>87</sup>

For the foregoing reasons, it is clear that the Florida Supreme Court changed the law intended to govern Presidential elections by the Florida legislature. The Florida Supreme Court “changed the rules in the middle of the game.”<sup>88</sup> Changing the rules in the middle of the game is normally *not* consistent with “fairness” and “justice.” A rule is fair if it is formulated under a “veil of ignorance”—at a time when decision-makers do not know whether they will be helped or hurt by a specific formulation.<sup>89</sup> The Florida Supreme Court changed the rules to benefit Gore.<sup>90</sup> In doing so, the Florida Supreme Court acted in a manner that was not permitted by federal law.<sup>91</sup>

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85. Michael W. McConnell, *Two and a Half Cheers for Bush v. Gore*, in *The Vote: Bush, Gore & The Supreme Court* 109 (Cass R. Sunstein & Richard A. Epstein eds., U. Chi. Press 2001).

86. As Chief Justice Rehnquist observed:

[U]nderlying the extension of the certification deadline and the short changing of the contest period was, presumably, the clear implication that certification was a matter of significance: The certified winner would enjoy presumptive validity, making the contest proceeding by the loosing candidate an uphill battle. In its latest opinion, however, the [Florida Supreme] Court emptied certification of virtually all legal consequence during the contest, and in doing so, departs from the provisions enacted by the Florida Legislature.

*Bush v. Gore*, 531 U.S. at 118.

87. *Gore v. Harris*, 772 So.2d at 1252.

88. Ronald A. Klain & Jeremy B. Bash, *The Labor of Sisyphus: The Gore Recount Perspective*, in *Overtime! The Election 2000 Thriller* 166 (Larry J. Sabato ed., Longman 2001).

89. Adrien Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 Yale L.J. 399, 399-403 (2001).

90. See Samuel Issacharoff, *Political Judgments*, in *The Vote: Bush, Gore & The Supreme Court* 65 (Cass R. Sunstein & Richard A. Epstein eds., U. Chi. Press 2001); Elhange, *supra* n. 32, at 26 (“Choosing the standard was tantamount to choosing the president.”).

91. According to Issacharoff:

It is entirely fair to read 3 U.S.C. § 5 as codifying an important principle of electoral democracy requiring the rules of engagement to be explicated *ex ante* and to be fairly immutable under the strain of electoral conflict. The basic premise is that election officials, who are mostly partisan figures, cannot be trusted to improve electoral remedies once the impact of their decisions is known and the temptation toward self-serving behavior becomes irresistible.

Samuel Issacharoff, *Political Judgments*, in *The Vote: Bush, Gore & The Supreme Court* 65 (Cass R. Sunstein & Richard A. Epstein eds., U. Chi. Press 2001). Issacharoff refers the *ex ante* formulation of rules as “precommitment.” *Id.* at 65-66.



C. *Did the Bush v. Gore majority betray the principles of the “New Federalism?”*

Belsky notes that *Bush v. Gore* has been criticized because “supposed ‘states rights’ Justices overruled a state’s highest court.”<sup>92</sup> He describes Justice O’Connor as “a defender of deference to the state courts, especially when state law is involved.”<sup>93</sup> He calls Justice Kennedy “a strong and articulate proponent of states as ‘sovereign powers’ independent of action by the federal judiciary and of letting state courts resolve conflicts between federal law and state powers.”<sup>94</sup>

Justices Kennedy and O’Connor have joined Chief Justice Rehnquist and Justices Scalia and Thomas to form the majority in a line of cases that is sometimes described as the “New Federalism.” These cases hold that various statutes enacted by Congress are, in effect, *ultra vires*—that they exceed the scope of the limited, enumerated powers of the federal government and invade the sovereignty of the states.<sup>95</sup>

*Bush v. Gore* does not involve any issue of the validity of a federal statute. *Bush v. Gore* involves the constitutionality of recounts of votes ordered by a state supreme court. As a result, there is no inconsistency between the Court’s “New Federalism” jurisprudence and *Bush v. Gore*. The suggestion that the “states rights” Justices are acting in an inconsistent (or even a hypocritical) manner are not well founded. “Federalism does not create a free-fire zone where states may do anything they please.”<sup>96</sup>

One other point regarding federalism should be mentioned. It is possible to read *Bush v. Gore* as a reaffirmation of federal *judicial* supremacy. The United States Supreme Court had previously vacated a decision of the Florida Supreme Court that favored Gore.<sup>97</sup> The Florida Supreme Court ignored that decision, and continued to treat its prior opinion as good law. Such conduct by a state court is not merely presumptuous and arrogant; it is inconsistent with the Supremacy

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92. Belsky, *supra* n. 2, at 72.

93. *Id.* at 73.

94. *Id.*

95. See e.g. *U.S. v. Morrison*, 529 U.S. 598 (2000) (striking down the Violence Against Women Act as beyond the power of Congress under the Commerce Clause); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that the Religious Freedom Restoration Act exceeded the remedial powers of Congress under the Fourteenth Amendment); *U.S. v. Lopez*, 515 U.S. 549 (1995) (holding that the prohibition of firearms possession in areas adjacent and proximate to schools was beyond the power of Congress). See Michael S. Greve, *Real Federalism: Why it Matters, How it Could Happen* (AEI Press 1999); Ronald D. Rotunda, *The New States’ Rights, the New Federalism, the New Commerce Clause, and the Proposed New Avocation*, 25 Okla. C. L. Rev. 869 (2000).

96. Michael S. Greve, *The Real Division in the Court: Neither the Conservative Nor the Liberal Justices Were Hypocritical. They Just Have Fundamentally Different Views of Federalism*, in *Bush v. Gore: The Court Cases and the Commentary* 323-30 (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001).

97. *Bush v. Palm Beach Canvassing Bd.*, 531 U.S. 70 (2000).

Clause of the Constitution.<sup>98</sup>

D. *Can Bush v. Gore be reconciled with Planned Parenthood of Southeastern Pennsylvania v. Casey?*

Critics of *Bush v. Gore* denounce the decision for nationalizing issues that should be left to state law, and for inventing new constitutional rights. These, of course, are the criticisms that conservatives have traditionally leveled at the Court's abortion decisions—the decisions finding a federal right to an abortion in the penumbras of the Ninth Amendment of the Constitution.

The first abortion decision, *Roe v. Wade*,<sup>99</sup> was reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>100</sup> Justices O'Connor and Kennedy cast the decisive swing votes. They voted with Justices Souter, Ginsburg, Stevens, and Breyer.

As a general matter, liberal critics of *Bush v. Gore* favor a federal right to abortion; they favor *Roe v. Wade* and *Casey*. They fear Bush because he might appoint a new Rehnquist, Scalia, or Thomas and pave the way for the reversal of *Roe v. Wade*.<sup>101</sup> Interestingly, Dershowitz is so anxious to condemn *Bush v. Gore* that he criticizes *Roe v. Wade* as a political decision:

The lessons of *Roe v. Wade* and *Bush v. Gore* are not easy to distill, but at bottom they represent opposite sides of the same currency of judicial activism in areas more appropriately left to the political processes. Courts ought not to jump into controversies that are political in nature and are capable of being resolved—even if not smoothly or expeditiously—by the popular branches of government. Judges have no special competence, qualifications, or mandate to decide between equally compelling moral claims (as in the abortion controversy) or equally compelling political claims (counting ballots by hand or stopping the recount because the standard is ambiguous). Absent clear governing constitutional principles (which are not present in either case), these are precisely the sorts of issues that should be left to the rough-and-tumble of politics rather than the *ipse dixit* of five justices.<sup>102</sup>

There is only one problem: in *Casey*, O'Connor and Kennedy were liberals.

More conservative commentators see *Casey* in a different light: *Casey* involves a major, high profile issue—abortion. *Bush v. Gore* involves a major, high profile issue—selection of the President of the United States. In both cases, Justices O'Connor and Kennedy voted in

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98. U.S. Const. art. VI. See John E. Nowak & Ronald D. Rotunda, *Constitutional Law* §§ 1.5 to 1.6 (6th ed., West 2000) (discussing *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816)).

99. 410 U.S. 113 (1973).

100. 505 U.S. 833 (1992).

101. There are, of course, liberal critics of *Bush v. Gore*. See Rosen, *supra* n. 8, at 312.

102. Dershowitz, *supra* n. 11, at 194.

favor of an active role for the Court. From that perspective, O'Connor and Kennedy voted consistently in both *Casey* and *Bush v. Gore*.

Belsky does not discuss *Casey*. It would be interesting to know what he thinks about the relationship between *Casey* and *Bush v. Gore*.

*E. Is Bush v. Gore just another battle in the Culture Wars?*

Belsky does not discuss the Culture Wars—the never-ending battle between the forces Dean William Powers of the University of Texas calls the “nudes” and the “prudes.” Nudes include Hugh Hefner, Bill Clinton, Jane Fonda, J. M. Keynes, and Alan Dershowitz. Prudes include William F. Buckley, Jr., George Washington, John Wayne, Winston Churchill, and Antonin Scalia.

Professor Harvey Mansfield of Harvard University has described *Bush v. Gore* as a “contest of principle between two parties”—the Republicans and the Democrats. According to Mansfield,

The Republicans stand for the rule of law, and the Democrats for the rule of the people. And the Democrats, because they stand for the rule of the people, believe that rule should be paramount, and that technicalities are subordinate to that will. Whereas the Republicans believe in doing things properly or legally.<sup>103</sup>

Is this description fair? Gore and his supporters gathered under the slogan “Count every vote.” They emphasized that Gore was the people’s choice. Bush emphasized compliance with rules, and protested against “changing the rules in the middle of the game.”<sup>104</sup>

Mansfield’s description of the competing principles seems fair. It also seems familiar. These principles always clash. Over twenty-five years ago, Alexander Bickel wrote:

Two diverging traditions in the mainstream of Western political thought—one “liberal,” the other “conservative”—have competed, and still compete, for control of the democratic process and of the American constitutional system; both have controlled the direction of our judicial policy at one time or another.

One of these, the contractarian tradition, began with the moderate common sense of John Locke. It was pursued by Rousseau, and it long ago captured, and substantially retains possession of, the label liberal, although I would contest its title to it. The other tradition can, for lack of a better term, be called Whig in the English eighteenth-century sense. It is usually called conservative, and I would associate it chiefly with Edmund

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103. Harvey C. Mansfield, *What We'll Remember In 2050, The Chronicle of Higher Education*, in *Bush v. Gore, The Court Cases and the Commentary* 341 (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001). See Leo Strauss, *Natural Right and History* 141 (U. Chi. Press 1953) (“The political problem consists in reconciling the requirement for wisdom with the requirement for consent . . . the rule of law is to take the place of the rule of men, however wise.”).

104. Klain & Bash, *supra* n. 91, at 166.

Burke. This is my own model.<sup>105</sup>

The model of Burke and Bickel is also my model.<sup>106</sup> I believe that it may be the model of the *Bush v. Gore* majority.

In contrast, the model of Gore, Dershowitz, and of the *Bush v. Gore* defenders—particularly Justice Stevens and Justice Ginsberg—seems to be what Bickel describes as the “Liberal Contractarian Model.” “The Liberal Contractarian Model rests on a vision of individual rights that have a clearly defined, independent existence predating society and are derived from nature and from a natural, if imagined, contract.”<sup>107</sup> The Liberal Contractarian Model embraces majoritarianism. “In the political process, majoritarianism is everything for the liberal contractarian. The vote is all important, the franchise must be universally available, absolute equality of the vote and equality of the size of constituencies are essential.”<sup>108</sup> In other words, every vote must count.

The liberal contractarian view justifies strong beliefs and strong emotions. “Nothing is easier for strong-minded, compassionate men, the true believers, who are given, in the phrase of Richard Hofstadter, to ‘self-assertive subjectivism’—nothing is easier for such a man to attribute their passionate beliefs to a monolithic abstraction called the people or the Constitution.”<sup>109</sup>

The Whig model, in contrast, “begins not with theoretical rights but with a real society, whose origins in the historical mists it acknowledges to be mysterious.”<sup>110</sup> According to Bickel, the Whig model “rests on mature skepticism.”<sup>111</sup> Significantly, exponents of the Whig model define “the people” in a way that is different from the liberal contractarian

105. Alexander M. Bickel, *The Morality of Consent* 3 (Yale U. Press 1975). Alexander Bickel (1924-1974) was born in Romania and graduated *summa cum laude* from Harvard Law School. Bickel clerked for Justice Felix Frankfurter during the 1952 Supreme Court term. He assisted Justice Frankfurter in preparing a memorandum urging that *Brown v. Board of Education* be reargued. Bickel taught Constitutional Law at Yale Law School, represented the New York Times in the *Pentagon Papers Case* (1971), and defended President Richard M. Nixon's order firing Archibald Cox as the Watergate special prosecutor. See Alan M. Dershowitz, *N.Y. Times Book Rev.* (Sept. 21, 1975) (reviewing *The Morality of Consent*) (reprinted in Alan M. Dershowitz, *Shouting Fire: Civil Liberties in a Turbulent Age* 383-87 (Little, Brown & Co. 2002)).

*The Morality of Consent* was Bickel's last book. It represents his mature views in a way that his prior works do not. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 71-72 (Harv. U. Press 1980) (“The Odyssey of Alexander Bickel”); Thomas Sowell, *A Conflict of Visions* 59 & nn. 89-91 (Basic 2002). Justice Breyer quoted an earlier book by Bickel, *The Least Dangerous Branch*, in his dissent in *Bush v. Gore*, 531 U.S. at 156.

106. See Steven K. Balman, *Book Review*, 17 *Tulsa L.J.* 811, 821-22 (1982) (reviewing *The Brandeis/Frankfurter Connection: The Secret Political Activity of Two Supreme Court Justices*, by Bruce Allen Murphy).

107. Bickel, *supra* n. 105, at 4.

108. *Id.* at 6.

109. *Id.* at 9.

110. *Id.* at 4.

111. *Id.*

model. To the Whigs, “[t]he people are something else than a majority registered on election day, although we elect various majorities, including electoral ones, settle various things and various contexts on various occasions.”<sup>112</sup> The people means more than a momentary numerical majority.<sup>113</sup>

The people, then, are parties to a contract that includes the dead, the living, and those yet unborn.<sup>114</sup> Burke suggested that the two views, to some extent, “rival follies.”<sup>115</sup> Bickel suggested that the rival follies were engaged in an unrelenting war.<sup>116</sup> That war influences politics and institutions.<sup>117</sup>

In *Bush v. Gore*, the Whigs declared and pursued agnostic objectives. They asked all parties—the candidates, the state officials, the Florida Supreme Court—to play by rules adopted before the election. Gore, in contrast, acted as a “true believer.” He was willing to change the rules in the middle of the game in order to “achieve the true ends of government”—that is, the ends as he understood them.<sup>118</sup>

112. *Id.* at 17.

113. See Bickel, *supra* n. 105, at 17.

114. See Edmund Burke, *Reflections on the Revolution in France* (originally published 1790), in Russell Kirk, *The Portable Conservative Reader* (Viking 1982).

115. Bickel, *supra* n. 105, at 11. According to Bickel,

The people, as Burke used the term, was a body in place, gathered, lead, manifesting its temper in many ways and over a span of time as a whole, or as one another sizable community within the whole body, not speaking merely on occasion in momentary numerical majorities. The influence of the people so conceived must be in common because their consent is essential. That consent may be withdrawn regardless of elections: it must be preponderant, not merely majority consent, and is yielded not only and even chiefly to the electoral verdict, but to institutions validated by time and familiarity and composed from time to time with men who are trusted because they are seen to have ‘a connection with the interest—the sentiments and opinion of the people.

*Id.*

116. *Id.*

117. *Id.* at 18 (“Safeguards against arbitrary power, resistance to total power, assurance of stable government, which is responsive and capable of generating long-term consent—these are agnostic objectives. Any true believer will want total power to achieve the true ends of government, and will be a democrat of an authoritarian depending, as Burke said, on which scheme or system he thinks will bring him nearer to total power.”).

118. On November 27, 2000, Gore stated:

Every four years there's one day when the people have their say. In many ways the act of voting and having that vote counted is more important than who wins the majority of the votes that are cast, because whoever wins, the victor will know that the American people have spoken with a voice made mighty by the whole of its integrity.

On that one day every four years the poor, as well as the rich, the weak as well as the strong, women and men alike, citizens of every race, creed and color, of whatever infirmity or political temper, are all equal. They're equal, that is, so long as all of their votes are counted. . . . Ignoring votes means ignoring democracy itself. And if we ignore the votes of thousands in Florida and this election, how can you or any American have confidence that your vote will not be ignored in a future election? . . . This is America. When votes are cast, we count them. We don't arbitrarily set them aside because it's too difficult to count them.

Gore and his supporters seemed animated by an attitude of moral certitude. Bickel counseled skepticism:

If we allow ourselves to become engulfed in moral certitudes, we will march to self-destruction from one Vietnam and one domestic revolution—sometimes Marcusean and often not—to another. And yet we do need, individually and as a society, some values, some belief in the foundations of our conduct, in order to make life bearable. If these two are lies, they are, as Holmes's great contemporary, Joseph Conrad, thought them, true lies: If illusions, then indispensable ones. To abandon them is to commit moral suicide.<sup>119</sup>

It is not necessary to commit moral suicide. As Justice Jackson famously observed, "the Constitution is not a suicide pact."<sup>120</sup> The procedures and the technicalities, so disparaged by Gore and his supporters, are necessary to our survival. The decision in *Bush v. Gore* constitutes recognition by an institution imbued with the will of the people, of the need for rules. As a consequence, *Bush v. Gore* represents a triumph of the rule of law, at least under the Whig view.<sup>121</sup>

The Whig view, of course, is not the only view. Gore and his supporters, on and off the Court, have a different view. If I am correct, their view is what Bickel called the liberal contractarian view. To quote my favorite legal scholar, Nero Wolfe, "[t]heir viewpoint, of course, is valid to them."<sup>122</sup> Gore's moral certainties compelled him to become the first person in 113 years to contest a Presidential election.<sup>123</sup> A Whig would not be able to reconcile personal ambition with national interest in the way chosen by Gore. In 1960, Richard Nixon found himself in a position similar to Gore's. Nixon chose not to contest the election of John F. Kennedy. Significantly, Nixon discouraged others from raising questions about Kennedy's 1960 campaign victory: Nixon talked a reporter for the *New York Herald Tribune* out of writing a series of articles on election fraud, arguing that "Our country can't afford the agony of a constitutional crisis—and I damn well will not be a party to creating one, just to become president or anything else."<sup>124</sup>

In summary, *Bush v. Gore* can be seen as a battle in the Cultural Wars. Although the case helped make George W. Bush President of the United States, it is not necessary to see the result as narrowly partisan.

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See *Bush v. Gore—Election 2000* 41 (Lexis-Nexis eds., LEXIS L. Publg. 2001). On the same day, Gore's running mate, Senator Joe Lieberman, stated: "How can we teach our children that every vote counts if we are not willing to make a good-faith effort to count every vote?" *Id.* at 43.

119. Bickel, *supra* n. 105, at 77.

120. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

121. See Mansfield, *supra* n. 103.

122. Stout, *supra* n. 53, at 34.

123. Elhauge, *supra* n. 32, at 31.

124. *36 Days: The Complete Chronology of the 2000 Presidential Election* xviii (John Wright et al. eds., Times Books 2001).

Broad philosophies clash in *Bush v. Gore*: the rule of law triumphs over anarchic, freewheeling “equity.” Bush’s appeals to due process and fairness prevail over Gore’s passionate solipsistic improvisation.

#### IV. CONCLUSION

Much of the criticism of *Bush v. Gore* was shrill, passionate, and angry. That criticism was largely unfounded as a matter of constitutional law. A cooler, more detached approach to criticism—the Belsky approach—is possible. That approach balances the persuasive aspects of the opinions against their faults and shortcomings, and will better stand the test of time. Judge Posner has suggested that much of the criticism of *Bush v. Gore*—including criticism by law professors—was “ill-informed, premature, and inaccurate.”<sup>125</sup>

Belsky could have made the same criticism as Judge Posner. Instead, Belsky chose to emphasize the positive and substantive contributions of the various commentators on *Bush v. Gore*, including the shrill commentators. By accentuating the positive, Belsky makes it possible to move past the emotional displays of the shrill commentators and to evaluate the merits of their arguments. Something, however, is lost in the translation. Walter Kaufmann’s interpretation of Nietzsche turned a nihilist into a liberal;<sup>126</sup> Belsky’s mediation of the shrill commentators turned partisans into moderates. Belsky filters the commentator’s resentment of the Court’s action, and mutes their anguish over Bush’s victory.

My main criticism of Belsky’s article is that it was too short: he did not have the chance to fully explore several important issues raised by *Bush v. Gore*. It would have been interesting to read a balanced, reasoned discussion of the Article II, § 1 argument and of the federalism issues. It would have been very interesting to know Belsky’s answers to

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125. Richard A. Posner, *The Professor’s Profess*, A. Mthly 28 (Feb. 2002). Judge Posner wrote:

Concerning the election deadlock, professors en masse, long before they could have mastered the intricacies of election law and the election statistics, said that Bush had stolen the election; that the U.S. Supreme Court Justices were corrupt; that the decision in *Bush v. Gore* was the worst decision in the history of the Court (worse than, for example, the decision in the *Dred Scott* case, which is sometimes blamed for the Civil War). Several of our most distinguished constitutional theorists argued in the *New York Times* that ‘there is a good reason to believe that Vice President Gore has been elected President by a clear constitutional majority of the popular vote and the electoral college,’ even though it is elementary that a popular vote majority has absolutely no constitutional significance for the election of the president. . . .

It was regrettable—and, indeed an embarrassment to academia—that so much of their talk was ill informed, premature, and inaccurate.

*Id.* See Richard A. Posner, *Public Intellectuals: A Study of Decline* 39 (Harv. U. Press 2001) (to the same effect).

126. See Walter Kaufman, *Nietzsche: Philosopher, Psychologist, Antichrist* (4th ed., Princeton U. Press 1974).

the questions that flow from his conclusion that the *Bush v. Gore* decision was political—Was *Bush v. Gore* decided in good faith? Was *Bush v. Gore* a battle in the Culture Wars?



