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Chief Justice Rehnquist's Preemptive Apologia in *Bush v. Gore*

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This article argues that the Supreme Court setting constrains preemptive apologias in unique ways. To make this point, the article provides a new interpretation of Chief Justice Rehnquist's concurring opinion in Bush v. Gore by reading it as a preemptive apologia. This interpretation helps explain why the dissenters in this ruling focused their attacks on Rehnquist's concurrence instead of the majority's per curiam ruling and why legal scholars believed it to be on sounder constitutional footing than the majority's rationale. In its context, Rehnquist's opinion functions to preempt criticism from media critics and legal scholars by answering the attacks (kategorias) from colleagues on the bench.

Late on election night 2000, the major television and cable networks put Florida's electors in Vice President Al Gore's column and declared him the president-elect.[1] A few hours later, the networks backtracked, and the next day the Florida race was hanging by a chad. Eventually, on the night of December 12, 2000, the Supreme Court issued a ruling that prohibited counties in Florida from continuing their recounts of votes cast and upheld the formal count as it stood, which favored George W. Bush by 537 votes and gave him a bare majority in the Electoral College. Only five Republican appointed justices, William Rehnquist, Anthony Kennedy, Antonin Scalia, Clarence Thomas, and Sandra Day O'Connor held that Florida needed to adopt new standards in order to protect the rights of its citizens under the equal protection clause of the Fourteenth Amendment.[2] Furthermore, the majority pointed out that there was no longer time to implement such standards due to deadlines set by U.S. Code Title 3, Chapter 1, Section 5 for the reporting of electoral votes in the safe harbor period protected from challenge by the U.S. House of Representatives.

The controversy that followed highlights the importance of the *per curiam* decision written by Kennedy.[3] Some scholars defended the decision.[4] However, the bulk of legal scholars were highly critical.[5] Martin Garbus claimed it was "wretched."[6] Samuel Issacharoff of Columbia University's law school reported, "When the *Bush v. Gore* case came down, there was a wide-spread view it was judicial imperialism."[7] Cass Sunstein predicted, "In the fullness of time, the decision is likely to rank among the most controversial decisions in the entire history of the Supreme Court."[8] Other scholars demonstrated that the ruling undercut the Court's credibility.[9] Overton argued that the majority advanced a merit-based agenda that was exclusionary and

overturned the more inclusionary agenda of the Florida Supreme Court.[10] In two law review articles, Backer argued that *Bush v. Gore* opened the door to the further devolution of federal authority back to state legislatures, which had racial implications.[11] While the progeny and impact of the ruling are beyond the scope of this analysis, I show that they are relevant to the ideological assessment of Rehnquist's agenda in his 2000 concurrence. However, the *per curiam* ruling was not the last word in the controversy.[12] There were dissenting opinions and the concurring opinion of the Chief Justice joined by Justices Thomas and Scalia. Sifting through the scholars' and news media's commentary, one finds that Rehnquist's concurrence drew more attention from his colleagues, the news media, and legal community than did the *per curiam* ruling or any of the dissents.[13]

To explain this phenomenon, I read Chief Justice Rehnquist's concurrence through the lens of preemptive apologia as constrained by the Supreme Court context. I selected Rehnquist's concurrence for several reasons. First, it is a significant and singular rationale for the ruling in a vitally important case; *Bush v. Gore* decided who would become the next president of the United States and all that came with the ascendency of George W. Bush. Second, Rehnquist's concurrence demonstrates that the longer one sits on the bench, the more confined a justice becomes by his or her prior rulings. Negotiating one's way out of that box requires rhetorical talent. Rehnquist's "additional grounds" for reversing the Florida court provided a space for him to advance his case for stopping the vote count while dodging what appeared to be a hypocritical stance on the part of the Court's conservatives.[14] Third, Rehnquist's concurrence shifted the rationale for the decision from the Fourteenth Amendment's equal protection clause and time constraint (safe harbor) grounds of the Constitution's Article II used in the *per curiam* ruling to the contention that the state courts had infringed on the power vested in the state legislature, and that the situation warranted intervention because it threatened the stability of the Republic. His opinion gave him the opportunity to point out that the liberals on the Court were reversing their previous positions and thereby shift the burden of proof to the dissenters. As Toobin has made clear, Rehnquist was "very mindful of protecting the Court's reputation as well as his own."[15] Fourth, many legal scholars argued that Rehnquist's rationale was stronger than Kennedy's *per curiam*.[16] Finally, Rehnquist's concurrence is generated in part by the *stasis* system that helps define the realm of linguistic possibilities for Supreme Court rulings. In this forensic context, the concurrence

attempted to fend off the attacks by Justices John Paul Stevens, David Souter, Stephen Breyer, and Ruth Bader Ginsburg, which were exercises in classical *kategoria,* a speech of accusation.[17]

This analysis proceeds in five stages. First, it explains the evolution of the preemptive apologia and how its judicial use relies on the *stasis* system. Second, it establishes Rehnquist's realm of linguistic possibilities by examining his record to determine the ways in which the forensic context constrained his rationalization of the ruling in *Bush v. Gore*. Third, it reviews the Supreme Court's decision in *Bush v. Gore* to further refine the context for the Chief Justice's concurrence. Fourth, it examines that concurring opinion as a preemptive apologia. Finally, the analysis summarizes its findings and examines implications for the sub-genre.

The Preemptive Apologias

The vocabulary and methodology for a close reading of a preemptive apologia begins with the first theories that dealt with the genre as reactive; that is, an accusation or event called the apologia into being after the fact. These reactive speeches of explanation or defense might be forensic or epideictic depending on whether speakers sought to defend actions taken or restore their honor.[18] For example, Ware and Linkugel are concerned with the postures and stances of apologists, whom they claim often combine strategies of defense to achieve success.[19] Benoit and Brinson flesh out the standard approach to apologias by providing five nuanced strategies that expand the tactics of denial and add evasion of responsibility, reduction of offensiveness, attack, mortification, and correction.[20] Relying on case studies, Benoit demonstrates how the use of an apologia can be a strategy of image management and/or restoration.[21] Gold examines the role of reactive apologia in political rhetoric.[22]

However, Harter, Stephens and Japp find these contemporary typologies too limiting, especially when it comes to apologias that are part of a public ritual or that apologize on behalf of others.[23] These latter apologias, as Villadsen also makes clear, often become epideictic, that is, more concerned with praise or blame than with justice being done.[24] Speeches of self-defense can also become epideictic when they are constructed as implicit apologias after the fact as Smith demonstrates in his analysis of Rehnquist's speech to the John Carroll Society weeks after *Bush v. Gore.*[25] In that apologia, Rehnquist analyzed the electoral crisis of 1876 to vindicate his handling of the crisis of 2000. Thus, the reactive apologia usually fuses rhetorical forms for its substance (accusation and defense, praise and blame) with forensic and/or epideictic elements for its function

(justice and injustice, honor and dishonor). It is open to a wide range of styles from simple narratives to eloquent perorations. Its situation is reactive to a crisis, an accusation or some other event.[26]

In contrast, scholars have examined the preemptive apologia used in anticipation of an attack (*kategoria*).[27] Downey suggests that because media allow the "threat" of accusation to be "ever present," public speakers have started accounting for their actions in a preemptive manner. She maintains that this preemption is "the genre's most remarkable change."[28] Muller extends this theory by arguing that preemptive apologias are offensive rather than defensive because they are pro-active.[29] Smith examines this phenomenon in Senator Daniel Webster's opposition to the war with Mexico and demonstrates that preemptive apologias use the major rhetorical genre of Aristotle for their substance.[30] For example, Webster warned that the war would have bad consequences (deliberative), was an illegal act (forensic), and was dishonorable to the country (epideictic). Years later, Webster recalled his preemptive rhetoric to bolster his image as he successfully fought for the 1850 compromise. Bass argues that the journals of General Charles Gordon from 1884, attempt to vindicate his war strategy prior to the surrender of Khartoum.[31] Those opposed to Gladstone's policies in the Sudan recalled Gordon's rhetoric to overturn them.

Thus, while apologias are generally responses to accusations, preemptive apologias anticipate an accusation and attempt to defuse it before the damage can be done. They do not wait to be called into being, instead they are self-justifying, arise from many different anticipated situations, and serve to inoculate speakers from further attack. They function to prevent a crisis, answer potential charges, and/or establish a rhetorical record that leads to vindication in the future. Like the reactive apologia, their style can range from simple narrative to ornate peroration depending on form, substance, and audience.

While using the preemptive apologia as frame for a close reading of Rehnquist's concurring opinion, this analysis also reveals that the Supreme Court context restricts the preemptive apologia's form and substance. Prior articulations of such guiding theories of original intent, a "living Constitution," judicial activism, judicial restraint, or strict reading of the Constitution, narrows over time a justice's realm of linguistic possibilities. This realm is further constrained by the fact that forensic speeches rely heavily on the *stasis* system to generate arguments that will provide a stopping point or resolution to the conflict. The preemptive apologia in the forensic setting is no different.

The *stasis* system of issue analysis was first developed in the lost writing of Hermagoras. It has been reconstructed by relying on references to his system in later works.[32] In *De Inventione*, for example, Cicero outlined the system's use in controversies: "Every subject that contains in itself a controversy to be resolved by speech and debate involves a question about a fact, or about a definition, or about the nature of an act, or about the legal processes . . . There will always be one of these issues applicable to every kind of case; for where none applies, there can be no controversy."[33] The *stasis* system is useful in inventing lines of argument for a preemptive apologia.[34] Thus, this reading of Rehnquist's concurrence is guided by the fact that preemptive apologias in the judicial context with their use of the *stasis* system exhibit a focused genre often used by justices of the Supreme Court.

Rehnquist's Realm of Linguistic Possibilities

Judicial speakers are confined by their past statements due to their precedential nature. In the case of the Supreme Court, the restrictions are intensified due to the high profile of the Court and its reliance on the doctrine of *stare decisis.* Rehnquist's rhetoric was not only constrained by his immediate circumstances, it was constrained by his past, which confined the means of persuasion available to his concurrence. Thus, it is important to review Rehnquist's record to understand the constraints he faced in *Bush v. Gore.*

After the Senate failed to confirm Supreme Court nominees Clement Haynsworth and G. Harold Carswell in the summer of 1971, President Nixon asked his aides "about that clown Renchburg down in the Justice Department?"[35] After reviewing Rehnquist's record, Nixon decided that Rehnquist would be an excellent justice.[36] Eventually, the Senate approved Rehnquist's nomination 68 to 22. Once on the Court, Rehnquist became known as the "lone ranger" because he filed so many single dissents, 54 in all, a Supreme Court record. Rehnquist's dissents were aimed at alleged "judicial activism"; he claimed to embrace "judicial restraint," which often led to a presumption for states' rights over federal rule, and a strict reading of the Constitution.[37]

During the Reagan administration, Rehnquist's approach further narrowed his available means of persuasion. Starting in 1981, Attorney General Edwin Meese and his deputy William Bradford Reynolds worked closely with then Solicitor General Robert Bork to roll back affirmative action programs and strengthen "federalism," that is, states' rights. Reagan had signaled his intentions in a campaign speech on August 3, 1980 at the Neshoba County Fair in Mississippi

where he embraced "states' rights."[38] Rehnquist supported the Reagan administration from the bench. For example, on May 24, 1983, every justice except Rehnquist ruled against Bob Jones University in its attempt to retain tax-exempt status.[39] Rehnquist defended the university's prejudicial admissions procedures.

Despite Rehnquist's isolation on the Supreme Court, President Reagan promoted Rehnquist to Chief Justice in 1986 with the advice and consent of the Senate. Soon Rehnquist was able to escape his isolation and form a new majority because Reagan had appointed more conservatives to the bench.[40] Justice John Paul Stevens became so concerned about Rehnquist's emerging influence over the Court that Stevens claimed in a public *kategoria* that Attorney General Meese was conspiring with Rehnquist to advance a conservative agenda.[41] As we shall see, the enmity between Stevens and Rehnquist re-surfaced in *Bush v. Gore.*

Rehnquist's majority held up into the 1990s and many of its rulings would seem contradictory to the *per curiam* in *Bush v. Gore*. For example, the Republican appointed majority of Rehnquist, Scalia, Thomas, O'Connor, and Kennedy strengthened the sovereign immunity of states, which had been eroded by the Warren Court. In *Printz v. U.S.* the five-to-four majority struck down portions of the Brady gun control act because it forced state law enforcement officers to conduct background checks; the practice, according to the majority, was an invasion of states' rights.[42] Earlier in the same year as *Bush v. Gore,* the same five justices in *U.S. v. Morrison* denied an equal protection claim against a state's treatment of gender-related violence.[43] According to the ruling, Congress had no authority under either the Commerce Clause or the *Fourteenth Amendment* to enact the Violence Against Women Act, which provided a federal civil remedy for victims of gender-motivated violence.[44] Again in the same year as *Bush v. Gore,* in *Kimel v. Florida Board of Regents,* a case concerning use of the age discrimination clause in Employment Act, Rehnquist joined Scalia, O'Connor, Thomas, and Kennedy, to defend the sovereign immunity of states, arguing that an *imperfection in law is insufficient to justify the application of the Fourteenth Amendment.*[45] *Kimel* and *Morrison* are important because the justices on the majority side reversed themselves on this issue of states' rights and reliance on the equal protection and due process clauses of the Fourteenth Amendment in *Bush v. Gore.* Perhaps because of this contradiction, Rehnquist shifted the ground for the decision to premises acceptable to and consistent with the conservatives' past rulings. In this way, he negotiated his way out of his precedential box, which his conservative colleagues failed to do in their *per curiam* ruling.

Electoral Intervention

To understand the context of these opinions, it is important to examine the iterations *Bush v. Gore* went through before it came to the Supreme Court. The day after the election, Bush had a lead of 1,784 votes, which was not enough to avoid an automatic recount under Florida law. When the ballots were run through the machines a second time, Bush's lead shrank to 327 votes and the Gore campaign requested that four counties conduct manual recounts; their framing argument was "every vote should count."[46] Bush's lawyer, Theodore Olsen, filed suit on November 11 to stop these recounts and a stay was granted. His framing argument was "You can't change the rules in the middle of the game."[47] On November 17, the Florida Supreme Court ignored his plea, removed the stay, and ordered the recounts to continue. In the meantime, Bush's margin had grown to 930 votes, as absentee and provisional ballots were also counted. On November 21, the Florida Supreme Court forbade Secretary of State Harris from certifying the election until November 26, giving the four heavily Democratic counties more time to complete their recounts. Bush appealed to the Supreme Court and Rehnquist, O'Connor, Scalia, Kennedy, and Thomas voted to grant *certiorari.*[48]

On November 26, Harris certified the election declaring that Bush won by 537 votes. Gore filed a "contest" under Florida law, the next step after the "protest," which had been exhausted. The case was argued for the first time before the Supreme Court on December 1, 2000, which on December 4, requested that the Florida Supreme Court provide a clearer explanation of its intervention. On the same day, a local judge denied Gore's "contest" and his legal team appealed that ruling to the Florida Supreme Court. On December 8, the Florida Supreme Court vindicated Gore by a vote of four to three and the recount was allowed to continue. Bush's team appealed that decision back to the U.S. Supreme Court, where oral arguments were heard on December 11 and broadcast via radio to the nation.

The next day the Court issued a *per curiam* ruling which claimed that "our consideration" of election law "is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[49] The *per curiam* ruling asserted that the Court valued judicial restraint and had been reluctant to take up the case:

> None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political

> sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.[50]

In other words, this crisis has been forced upon the Supreme Court and it has no choice but to intervene.

One way to calm discontent was for the Supreme Court to speak with one voice, as it had in other controversial cases such as *Brown v. Board of Education*[51] in 1954 or *United States v. Nixon*[52] twenty years later. In *Bush v. Gore*, although the *per curiam* decision was favored by seven justices for different reasons at different points, only five voted to intervene *and* halt the Florida re-count immediately. Four liberal or moderate justices opposed intervention in that form and suggested ways by which the various county re-counts could continue without violating the Fourteenth Amendment. Because the former position favored the Republican Bush and the latter position favored the Democrat Gore, both sides seemed animated by partisan motives. Even such conservative jurists as Kenneth Starr wrote, "It would be silly to deny that partisan considerations influenced the . . . justices' rulings."[53] Worse, as Smith and Prosise demonstrate, the conservatives' decision could be seen to have overruled states' prerogatives and the liberals' decision could be seen to have upheld states' prerogatives.[54] The positions of the justices damaged the Supreme Court's credibility because of charges of craven hypocrisy sparked by the fact that each side seemed to violate precedents they supported in their past opinions to back their favored candidate for president.[55] According to the *Los Angeles Times,* 42 percent of those polled believed the decision "was motivated by political favoritism" and perhaps more importantly "by 53% to 45%, a majority of Americans disagreed with the ruling and said that vote counting should have been allowed to continue."[56] Later polls indicated that many Americans considered the decision unjust and politically motivated. According to the findings, "A majority of Democrats and half of all independents said they do not consider that George Bush had legitimately won the White House."[57]

The decision was also compromised by the fact that the justices ignored their earlier remand, which instructed the Florida court not to exceed its mandate. The Supreme Court's *per curiam* decision condemned the Florida court for not going far enough: "[W]e are presented with a situation where a state court with the power to assure uniformity has ordered a statewide re-count with minimal procedural safeguards."[58] In pursuing the equal protection question, the plurality took

advantage of the dilemma that they had created for the Florida Supreme Court. If that court imposed uniform standards, it could be legislating, that is engaging in judicial activism, since it would be re-writing the Florida election laws. If the Florida court avoided placing consistent standards for re-counts in place, it opened itself to charges of leaving an arbitrary system in place, thus violating the equal protection and due process clauses of the Fourteenth Amendment. That is why Raskin makes the case that *Bush v. Gore* was the least defensible Supreme Court decision in history.[59] When the Florida court tried to remedy the situation by allowing re-counts based on differing county standards, the plurality of the Supreme Court condemned the inclusion of partial totals, ad hoc evaluation panels, and uneven re-counting and objection procedures. In short, the conservatives who supported the *per curiam* had consistently opposed judicial activism. Now they argued that the Florida court had not been judicially active enough: "The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary."[60]

In an attempt to save the majority from itself, Rehnquist tried to get his colleagues to join him on different grounds. Only Scalia and Thomas accepted his invitation. Rehnquist shifted the basis for the decision to a condemnation of the Florida Supreme Court infringing on the state legislature's power and de-stabilizing the electoral process by ignoring parts of Article II of the U.S. Constitution.[61] Rehnquist needed to avoid invoking the Fourteenth Amendment because he had restricted its use, as we have seen, in his earlier rulings.[62] Furthermore, Rehnquist's opinion anticipates that attack on the *per curiam* by shifting the grounds for the ruling, by refuting the *kategorias* of the dissenters and thereby attempting to preempt attacks by the news media and legal analysts.[63] That may be why legal scholars argued that Rehnquist's rationale was more persuasive than Kennedy's *per curiam*.[64] In the analysis that follows, I show why that is the case by examining how Rehnquist deploys a preemptive apologia in this judicial context.

Rehnquist's Judicial Preemptive Apologia

This examination of the Chief Justice's concurring opinion focuses on his rationale for his vote in *Bush v. Gore:* to preempt a national electoral crisis, to prevent the Florida Supreme Court from infringing on legislative powers, and to refute the dissenters thereby inoculating himself from criticism from legal scholars and media critics. Rehnquist deftly negotiates his way out of his

precedential box by relying on a judicial preemptive apologia. It is generated in an environment that requires justification of one's own position while attacking the opinion of others. Furthermore, the limitations created by the *decorum* of the Supreme Court induced Rehnquist to construct a concurring opinion based on arguments generated by the questions found in the *stasis* system.

Rehnquist's substitute opinion avoided the equal protection and due process standards of the plurality, which he consistently abjured in the past. Instead he argued that it was imperative that a constitutional crisis be averted and that the prerogative of the Florida legislature be protected from the judicial activism of the Florida Supreme Court: "This inquiry does not imply a disrespect for state courts but rather a respect for the constitutionally prescribed role of state legislatures. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II."[65] Since there were few decisions concerning Article II of the U.S. Constitution, Rehnquist sailed into uncharted waters by setting out his own interpretation of the article,[66] which was that the U.S. Constitution bowed to legislatures to determine the rules for conducting presidential elections in their states. Thus, Rehnquist defended the U.S. Constitution from disruption and state legislatures against infringements by state courts. To achieve his goal, his rhetoric pro-actively attacked the arguments of the dissenters, thereby in effect preempting arguments of media and legal critics.

Forensic Elements

Forensic elements guide the substance, situation, function and style of the preemptive apologia. This forensic setting poses two important questions: Who was the audience? Did they act as an advocate, a judge or a jury? The discourse of the justices is unique regarding this element of the forensic genre since they are at various times advocate, judge, or jury. They attempt to persuade one another while at the same time keeping an eye on the public, the press, and the legal community. Thus, the judicial preemptive apologia is uniquely suited to this environment because it allows the speaker to address multiple audiences while performing multiple roles. However, this particular forensic situation was highly constrained by the decorum of the Supreme Court and the past records of its members. The forensic elements of their rhetoric needed to be tailored to these constraints or their opinions risked appearing hypocritical or confused. Rehnquist seemed more cognizant of the fact than his colleagues that he could not contradict his own past rulings without

severely damaging his credibility. He overcame this difficulty by shifting the grounds for the decision. No other justice was as effective at avoiding the charge of contradicting his or her past rulings in this case. Other elements of the forensic genre are easier to deal with.

We can begin with the past event that composed the crime. According to Rehnquist, the Florida Supreme Court interfered in a legislative matter thereby overstepping its charge. Because the Florida court had "infringed" on legislative prerogative and created a national crisis, Rehnquist argued that the U.S. Supreme Court had the duty to intervene: "[T]he Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II."[67] He enhanced his indictment by arguing that the Florida court had departed from the legislative scheme of the state by failing to certify Bush's victory in the contest period. Rehnquist's rationale rendered the whole issue of re-counts moot by affirming the power of the Florida legislature to settle the matter by authorizing Florida's Secretary of State to certify the election. If the U.S. Supreme Court allowed the Florida county recounts to continue, the results would be tainted because of the violation of separation powers in Florida. Rehnquist's rhetorical move was to claim that the Florida court had created a new exigence within the crisis. Rehnquist reinforced the forensic nature of the situation by recounting the sins of the Florida court. It had assumed powers given to the county boards to define a "legal vote." It failed to defer to the Secretary of State, and "rejected her reasonable interpretation and embraced the peculiar one."[68] Thus, in forensic fashion, Rehnquist accused the Florida Supreme Court of a miscarriage of justice. He acknowledged the compound nature of the situation by reiterating the importance of settling the presidential contest in an orderly matter. That shift in the grounds for the ruling allowed Rehnquist to slide into his legitimate realm of argumentative premises: Because he had long been opposed to judicial activism, he could credibly condemn the Florida courts on that ground.

In the pursuit of justice, a forensic function, Rehnquist's concurrence attempted to refute the arguments of the dissenters and preempt legal scholars and media critics by relying on cases they admired.[69] For example, he cited *NAACP v. Alabama*[70] and *Bouie v. City of Columbia*[71] to buttress his claim that lower courts should not be allowed to interfere in legislative matters. Here Rehnquist deployed cases from the activist Warren era using the dissenters' tradition against them.[72] This argument might also appeal to liberal critics because it conflated the plight of African Americans in the 1950s and 1960s with the plight of voters in Florida in 2000. However,

Rehnquist's past record on civil rights mitigated his sincere use of these cases which led to one of Ginsburg's attacks (see below) of his opinion. This is one instance of where Rehnquist may have been too clever by half.

Accusation and Defense: Arguments from the *Stasis* System

Rehnquist defended his opinion by generating arguments that preempt the thesis that the usual course for conservative justices was not to interfere in state matters. Allow me to lay out his general case and then to show how it is supported by arguments generated from the questions in the *stasis* system.

He argued that there were "a few exceptional" cases, where intervention was required, and he claimed that this was one of them.[73] He used Article II, Section 1, clause 2 to provide this opening; state legislatures were to make rules for conducting federal elections, including the selection of electors for president. Florida's conflict between its courts and legislature provided one rationale for intervention. For a second rationale, Rehnquist used the impending end to the safe harbor period on December 12, which would have allowed the U.S. House of Representatives to challenge Florida's slate of electors. His third rationale was the fact that a presidential election outcome was at stake and the longer the outcome was up in the air, the more the national crisis deepened.

The heart of Rehnquist's concurrence illustrates how reliance on the *stasis* system can buttress a preemptive effort. First, Rehnquist built a narrative generated by *questions of fact*: The Florida legislature had delegated its power to the Secretary of State of Florida and agreed to end the vote count by December 12 to prevent the electors of Florida being subject to challenge by the U.S. House of Representatives. The Florida courts had intervened to overturn that legislative mandate. Rehnquist claimed that he was saving Florida law from the ravages of the Florida Supreme Court, which "empties certification of virtually all legal consequence."[74]

He used *questions of definition* to generate strategies of redefinition, which Rehnquist employed when he argued that the Court's decision should not be based on Fourteenth Amendment concerns but on separation of powers inside the state of Florida. Another use of questions of definition helped him lay out his version of Florida law including when mandatory recounts are triggered. He dryly defined the protest and contest periods as described in Florida law. This detailed review concluded that the Florida Supreme Court had overstepped its bounds

by "lengthening the protest period," thereby arbitrarily shortening the contest period.[75]

Questions of quality helped Rehnquist deal with arguments from circumstance. For example, he adopted the frame used by the Bush legal team: you cannot change the rules in the middle of the game.[76] For Rehnquist, this forensic aim was a matter of fundamental fairness.

Questions of jurisdiction provided Rehnquist with more arguments regarding the powers of the Florida state legislature versus its courts. He claimed that Article II of the U.S. Constitution compelled him to intervene to protect the prerogatives of the Florida legislature against the attacks by the Florida judiciary.

Another way that Rehnquist attempted to preempt legal and media critics was by attacking the dissenters directly. Justices Breyer, Stevens, and Ginsburg, each wrote dissents sometimes concurring in one another's reasoning and being joined by Justice Souter along the way. It is important to note that the dissenters spent more time attacking Rehnquist's concurrence than they did attacking Kennedy's *per curiam* ruling. Like the legal scholars cited previously in this analysis, they may have seen Rehnquist's position as the more logically consistent opinion.

Breyer argued that the Supreme Court should never have taken up this case in the first place because it was a political matter that the state of Florida should work out. The U.S. Supreme Court had a long history of deferring to states and Congress on political matters. He pointed out, for example, that the Supreme Court did not intervene in the disputed election of 1876 but instead deferred to a political commission to resolve the election.[77] Furthermore, he argued, "The Florida Supreme Court concluded that the term 'legal vote' means a vote recorded on a ballot that clearly reflects what the voter intended. That conclusion differs from the conclusion of the Secretary. But nothing in Florida law requires the Florida Supreme Court to accept as determinative the Secretary's view on this matter."[78] Breyer bought the argumentative frame of Gore's legal team: every vote should count.[79] So he opposed intervention and wanted to send the case back to the Florida Supreme Court with instructions on how to set uniform standards for the recount.[80]

Relying on Sections 97.012 and 106.23 of the law, Rehnquist's refutation of Breyer was generated by questions of fact and legal definitions:

> Florida statutory law cannot reasonably be thought to require the counting of improperly marked ballots . . . No reasonable person would call it "an error in the vote tabulation" or a "rejection of legal votes," when electronic or electro-mechanical equipment performs precisely in the manner designed, and fails to count those ballots that are not marked in the manner that these voting instructions explicitly and prominently specify.[81]

Rehnquist supported his claim with the dissent of Florida Chief Justice Wells and comments from the state's Attorney General, *who had supported Gore's claim*. Rehnquist used the words of his opponents against them. He also pointed out that Breyer had cited no law in support of his interpretation. These refutations caught the attention of media critics and legal scholars, and thereby preempted some of their attacks.[82]

Rehnquist also refuted the position of Breyer and Souter on the safe harbor question. They would have allowed the vote count to continue past the date when such a count would be open to challenge by the U.S. House of Representatives. Relying on questions of fact, Rehnquist claimed that the Florida court had authorized recounts that could not be completed by the December 12 deadline. In launching this argument, however, Rehnquist put words into the mouths of the legislature, which they did not utter. He revealed this tactic in the words I italicize in the following sentence: "*Surely* when the Florida legislature empowered the courts of the State to grant 'appropriate' relief, *it must have meant* relief that would have become final by the cutoff date of [December 12]."[83] The fact is that Florida was free to file its electors later, even though they would be subject to challenge in the U.S. House. Rehnquist acknowledged that Florida courts had taken time to resolve local elections in the past, but doing so in a presidential election would have led to "chaos."[84] Thus, those who later considered criticizing the majority's decision would need to overcome the preemptive attack that opening the electoral slate to challenge by the U.S. House of Representatives would cause a national crisis. The suppressed premise in this context was that the Republicans held a majority in the House and would accept only the electoral slate pledged to Bush.[85] In this way, Rehnquist narrowed a multidimensional argument about the effects of the recount into a single result, political chaos.

Ginsburg's dissent was joined by Stevens entirely and by Souter and Breyer in part. Being much more direct than her colleagues, she argued that the Florida Supreme Court had the right to interpret the Florida law. Courts determine the law of the land and Rehnquist in the past had shown deference to state courts that functioned in that manner. She then cited cases where the U.S. Supreme Court deferred to state courts even on interpretations of federal laws. She also rejected the Fourteenth Amendment arguments of the majority.

Rehnquist's opinion attempted to overcome Ginsburg's charges by arguing that this case was unique, and thus, his and other justices' past decisions did not apply. He then cited three precedents where he and others had not deferred to state courts. He also cited, as I have shown,

Warren court rulings. Appalled, Ginsburg characterized these as "casual citations." In other words, Ginsburg claimed that Rehnquist cherry picked cases to support his opinion rather than citing all of the cases that were relevant to the ruling at hand or consistent with his own precedents. For these reasons, Ginsburg's dissent was the most effective.

Rehnquist also went after the dissenting opinion penned by Justice Stevens, who was joined by Ginsburg and Breyer. Perhaps hoping to bring Rehnquist's civil rights record to the fore, Stevens argued that the majority had disenfranchised many voters: "In the interest of finality . . . the majority effectively orders the disenfranchisement of an unknown number of voters whose ballots reveal their intent—and are therefore legal votes under state law—but were for some reason rejected by ballot-counting machines."[86] Like Breyer, Stevens accepted the argumentative frame of the Gore team.

In response, Rehnquist claimed that it was the majority who was preventing the electors of Florida from being challenged in the U.S. House, thereby protecting the decision of the legitimate voters of Florida as opposed to disenfranchising a minority who filled out their ballots incorrectly. He again turned to Florida Supreme Court Chief Justice Wells to support the "fact" that passing the December 12 deadline would disenfranchise the six million voters of Florida, and again used a word from the dissenters' opinions against them while finally answering the charge that the majority's ruling had disenfranchised many voters.

Rehnquist also interpreted *McPherson v. Blacker* differently than did Stevens, who had used the decision to justify limiting the powers of the Florida legislature.[87] Rehnquist claimed that the ruling strengthens the Florida legislature's role in deciding the outcome of presidential elections in Florida. This moment of direct clash caught the attention of various legal authorities, which again brought Rehnquist concurrence to the fore.[88]

However, it did not conclude the battle between Rehnquist and Stevens. Stevens' conclusion was stinging: "Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although 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 of the rule of law."[89] Thus, Stevens launched a *kategoria* against the ruling, setting up a classic opposition that is fundamental to forensic endeavors.[90]

Rehnquist responded by focusing on the chaos that would have resulted if the re-count had

been allowed to continue. While he claimed that he normally abjured such intervention, the unique circumstances in this case demanded that the Supreme Court step in. Rehnquist's opinion attempted to strengthen his case by narrowing its application. It claimed that the circumstances forced a reluctant Court to intervene to save the nation from "chaos," and that the ruling was unique, applying only in this one instance, thereby reducing his burden of proof, narrowing the application of the ruling, and again avoiding the appearance of hypocrisy.

Rehnquist's refutation of Breyer, Ginsburg, and Stevens served as a preemptive apologia for media critics and legal scholars. If they agreed with the dissenters and sought to advance the case against the majority, to be credible, media critics and legal scholars would need to take Rehnquist's refutations and claims into account. Rountree demonstrates that Rehnquist was successful in distracting some legal scholars and media critics into debating whether Kennedy or Rehnquist wrote the most compelling opinion, and whether Rehnquist's replies to his colleagues were persuasive.[91] Rehnquist's opinion thereby dissipated some of the criticism of the ruling.

A few weeks after the historic decision, Rehnquist reinforced the argument that the Supreme Court had preempted a national crisis. He appeared before the Senate Committee on the Judiciary to make his annual report: "We are once again witnessing an orderly transition of power from one Presidential administration to another. This Presidential election, however, tested our Constitutional system in ways it has never been tested before. The Florida State courts, the lower federal courts and the Supreme Court of the United States became involved in a way that one hopes will seldom, if ever, be necessary in the future."[92] By acknowledging that there had been a crisis, Rehnquist reinforced his main argument in the debate over how the Florida vote should have been handled. For the members of the Court, he had the last word.

Conclusion

Many legal scholars believe Rehnquist's rationale for intervening in the Florida presidential vote count was stronger than Kennedy's.[93] I believe that is so because Rehnquist's concurrence is an effective judicial preemptive apologia. It refutes the attacks of colleagues, and thereby, preempts attacks from legal experts and media critics. It is tightly argued using a forensic frame, the *stasis* system, and the dichotomies of legal argumentation.[94] It illustrates many of the characteristics of a preemptive apologia, particularly its pro-active stance[95] and its sensitivity to the news media's potential assessment.[96] Its structure is created from forensic elements and the *stasis* system. Its

situation is created by the impending electoral crisis and its style is constrained by the decorum of the Supreme Court and Rehnquist's past opinions. The discourse functions, by Rehnquist's own admission, to prevent a crisis ("chaos") from occurring. Thus, it is preemptive in at least two senses: it seeks to preempt a national electoral crisis and it seeks to preempt criticism of the means used to prevent that crisis.

Rehnquist based his concurrence on a crisis that was caused by a very close vote, by confusion of federal and state powers, and by competition between state legislature and state court prerogatives. Responding to the arguments of his colleagues on the Supreme Court, his opinion also addressed media and legal critics.

I note that in this judicial context the Chief Justice was placed in an argumentative straight jacket. For example, many commentators argued that Rehnquist in particular and the conservatives in general were in favor of Bush because his appointments to the Court would extend the conservative dominance.[97] Rehnquist could not properly preempt this charge due to the decorum of the Court. However, the clash in which Rehnquist engaged might have taken the focus off that question and shifted the blame to the dissenters.[98] Toobin writes, "The justices did almost everything wrong. They embarrassed themselves and the Supreme Court."[99] In short, while Rehnquist may have preferred a vindication for the majority ruling in *Bush v. Gore,* he may have achieved a-plague-on-both-your-houses curse by media and legal critics, which is preferable from Rehnquist's stand point to a condemnation of the conservatives alone.

With regard to implications for the use of preemptive apologias, the *stasis* system might be integrated into the forensic apologic form to make analysis of it more meaningful. For example, while Macagno and Walton apply their theory of dichotomy to cases that arise before a trier of fact, the theory along with the *stasis* system is useful in the analysis of Supreme Court opinions.[100] Furthermore, in the process of answering direct attacks, the *preemptive* apologia anticipates other attacks, and thus may be used for image maintenance and inoculation. In fact, the Supreme Court may provide a unique home for the preemptive apologia because of the likelihood of an attack on one's opinion, and hence one's reputation, by colleagues on the bench, and after by media critics and legal scholars. This phenomenon is particularly true of the current Court, which often divides five to four between conservatives and liberals. Furthermore, this preemptive discourse provides arguments to which justices can return in the future to justify new opinions that alter the law of the land when minorities on the court become majorities. Hence, they provide a rich field of analysis

for scholars of judicial rhetoric.

Notes

1. Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (New York. Anchor Books, 2008), 168.
2. Citing *Gray v. Sanders,* 372 U.S. 368 (1963). The case at bar concerned the claim that Georgia's presidential primaries of favored rural voters over urban voters. The Supreme Court ruled against Georgia, thereby intervening in a state matter.
3. David Savage and H. Weinstein, "Supreme Court May Pass on This One," *Los Angeles Times*, (September 17, 2003): A22.
4. Richard A. Posner, "*Bush v. Gore* as Pragmatic Adjudication," in Ronald Dworkin, ed., *A Badly Flawed Election (Debating) Bush v. Gore, the Supreme Court, and American Democracy* (New York: New Press, 2002): 187-213. Posner endorses the Article II and crisis avoidance approach of Rehnquist. See also, McConnell, "Two-and-a-Half Cheers for *Bush v. Gore*," 657-674; Richard H. Pildes, "Democracy and Disorder," *U. Chicago Law Review* 68(2001): 695ff. Perhaps the best summary of arguments for and against the decision can be found in the critiques of Laurence Tribe and Nelson Lund. In "The Unbearable Wrongness of *Bush v. Gore*," Tribe mainly attacks the equal protection rational of the Court's majority and argues that since this was a state political matter, the Supreme Court should not have intervened given Court precedent. (In *Law and Economics Working Papers* (Fairfax, VA: George Mason U. School of Law, 2002): 571-607.) Tribe claims that this paper is an important revision of and more nuanced than his critique of 2001 playfully entitled "*eroG .V hsuB* and its Disguises: Freeing *Bush v. Gore* from its Hall of Mirrors," *Harvard Law Review* 115 (2001): 170ff. Lund primarily defends the majority on the grounds that they extended the precedential cases on "one-man, one-vote," in Nelson Lund, "The Unbearable Rightness of *Bush v. Gore*," *Cardoza Law Review* 23 (2002): 1219-79.
5. *Bush v. Gore,* 531 U.S. 98 (2000).
6. Martin Garbus, *Courting Disaster: The Supreme Court and the Unmaking of American Law*. New York: Henry Holt and Co., 2002), 2.
7. Savage and Weinstein, "Supreme Court May Pass," A22.
8. Cass R. Sunstein and R. Epstein, *The Vote: Bush, Gore, and the Supreme Court*, (Chicago: U. of Chicago Press, 2001): 1.
9. Sunstein and Epstein, *The Vote;* Ward Farnsworth, "To Do a Great Right, Do a Little Wrong," *Minnesota Law Review* 86 (2001): 227-34; Richard L. Hasen, "A Critical Guide to *Bush v. Gore* Scholarship," *Annual Review of Political Science* 7 (2004): 297-313; Michael W. McConnell, "Two-and-a-half Cheers for *Bush v. Gore," U. of Chicago Law Review* 68 (2001): 657-674; Clark Rountree, *Judging the Supreme Court.* (East Lansing: Michigan State U. Press. 2007); Craig R. Smith and Ted Prosise, "The Supreme Court's Ruling in *Bush v. Gore*: A Rhetoric of Inconsistency," *Rhetoric and Public Affairs* 4 (2001): 605-632; David Zarefsky, "Felicity Conditions for the Circumstantial *ad hominem*: The Case of *Bush v. Gore*," *Proceedings of the Fifth Conference of the International Society for the Study of Argumentation*. ed. Franz H. Van Eemeren. (Amsterdam: SicSat, 2003): 1109-1117.
10. Spencer Overton, "A Place at the Table: *Bush v. Gore* through the Lens of Race," *Florida State University Law Review,* 29 (2001): 469-492. While it is beyond the scope of this analysis to examine the implications of Rehnquist's opinions in terms of Critical Race Theory, such a study might prove productive starting with Rehnquist's defense of *Plessy v. Ferguson* when he was a clerk at the Supreme Court. See Marouf Hasan, Jr., Celeste M. Condit, and John Lucaites, "The Rhetorical Boundaries of 'The Law': A Consideration of Legal Practice and the Case of the 'Separate but Equal' Doctrine," *Quarterly Journal of Speech,* 82 (1996): 323-42; Lani Guinier, "Voting Rights and Voting Wrongs: An Interview with Lani Guinier," *Massachusetts Foundation for the Humanities* (Spring, 2006). www.law.harvard.edu/faculty/guinier/publications/mass_humanities.pdf (accessed September 18, 2014).
11. Larry C. Backer, "Race, the Race," and the Republic: Reconceiving Judicial Authority after *Bush v. Gore*," *Catholic University Law Review* 51 (2002): 1057-1113; "Using the Law against Itself: *Bush v. Gore* Applied in Courts," *Rutgers Law Review* 55 (2003): 1109-1174.
12. Smith, "Chief Justice Rehnquist's Rationale for *Bush v. Gore,"* 24; Aaron D. Gresson, *The Recovery of Race in America* (Minneapolis: U. of Minnesota Press, 1995); (2004). *America's Atonement: Racial Pain, Recovery Rhetoric and the Pedagogy of Healing.* (New York: Peter Lang Press, 2004).
13. Rountree, *Judging the Supreme Court.*
14. Kenneth W. Starr, *Bush v. Gore: The Court Cases and the Commentary*, (Washington, D.C.: Brookings

Institution Press, 2001); Rountree, *Judging the Supreme Court,* 49.
15. Toobin, *The Nine*, 50.
16. Rountree, *Judging the Supreme Court,* 330-32.
17. Halford R. Ryan, "Kategoria and Apologia: On their Rhetorical Criticism as a Speech Set," *Quarterly Journal of Speech* 68 (1982): 254-61.
18. Cicero, *De Inventione*, trans. H. M. Hubbel (Cambridge: Harvard University Press, 1959), I.viii.34; James Murphy, "'Our Mission and Our Moment': George W. Bush and September 11th," *Rhetoric and Public Affairs* 6 (2003): 607-632; Donovan J. Ochs, *Consolatory Rhetoric: Grief, Symbol, and Ritual in the Greco-Roman Era*, (Columbia, S.C.: U. of South Carolina Press, 1993); Craig R. Smith, *Daniel Webster and the Oratory of Civil Religion* (Columbia: U. of Missouri Press, 2005, 85-86; Craig R. Smith, "Chief Justice Rehnquist's Rationale for *Bush v. Gore," American Communication Journal* 15 (2013): 18, 17-28.
19. B. L. Ware and Will A. Linkugel, "They Spoke in Defense of Themselves: On the General Criticism of Apologia," *Quarterly Journal of Speech* 59 (1973): 273-83.
20. William L. Benoit and Susan L. Brinson, "AT&T: 'Apologies Are Not Enough,'" *Communication Quarterly* 22 (1994):75-88.
21. William L. Benoit, *Accounts, Excuses, and Apologies: A Theory of Restoration Strategies.* Albany: State University of New York Press, 1995); "Hugh Grant's Image Restoration Discourse: An Actor Apologizes," *Communication Quarterly* 45 (1997): 251-267; "Another Visit to the Theory of Image Restoration Strategies," *Communication Quarterly* 48 (2000): 40-43.
22. Ellen Reed Gold, "Political Apologia: The Ritual of Self-defense," *Communication Monographs* 45 (1978): 306-316.
23. Lynn Marie Harter, Ronald J. Stephens, and Phyllis M. Japp, "President Clinton's Apologia for the Tuskegee Syphilis Experiment: A Narrative of Remembrance, Redefinition, and Reconciliation," *The Howard Journal of Communication* 11 (2000): 19-34.
24. Lisa Villadsen, "Speaking on Behalf of Others: Rhetorical Agency and Epideictic Functions in Official Apologies," *Rhetoric Society Quarterly* 38 (2008): 25-45.
25. Smith, "Chief Justice Rehnquist's Rationale for *Bush v. Gore,"* 17-28.
26. Sharon Downey, "The Evolution of the Rhetorical Genre of Apologia," *Western Journal of Communication* 57 (1993): 42-64.
27. Downey, "The Evolution of the Rhetorical Genre of Apologia," 48.
28. Downey, "The Evolution of the Rhetorical Genre of Apologia," 56.
29. A. G. Muller, "Affirming denial through preemptive apologia: the case of the Armenian Genocide Resolution," *Western Journal of Communication* 68 (2004): 30, 24-44.
30. Smith, *Daniel Webster and the Oratory of Civil Religion*, Chapters 9, 10, 11.
31. J.D. Bass, "Of Madness and Empire: The Rhetor as 'Fool' in the Khartoum Siege Journals of Charles Gordon, 1884," *Quarterly Journal of Speech* 93 (2007), 449-469.
32. Hermagoras' theory is fleshed out in the *Rhetorica ad Herennium* and Cicero's and Quintilian's writings. Michael J. Hoppmann, "A Modern Theory of Stasis," *Philosophy and Rhetoric* 47 (2014): 273-296.
33. Cicero, *De Inventione*, I.viii.10.
34. M. R. Kramer and Katherine M. Olson, "The Strategic Potential of Sequencing Apologia Stases: President Clinton's Self-defense in the Monica Lewinski Scandal," *Western Journal of Communication* 66 (2003): 347-368; Ryan, "Kategoria and Apologia: On their Rhetorical Criticism as a Speech Set," 254-61.
35. Garrett Epps, *To an Unknown God: Religious Freedom on Trial* (New York: St. Martin Press, 2001), 159.
36. Craig R. Smith, *A First Amendment Profile of the Supreme Court* (Rome: John Cabot University Press, 2011), 17-21.
37. Garbus, *Courting Disaster,* 203; John A. Jenkins, *The Partisan: The Life of William Rehnquist,* (New York: Public Affairs, 2012). "Judicial activism" refers to judges or justices who use their decision to reform, change, or extend current laws and precedents beyond the scope of the case at bar. For example, when the Warren Court unanimously extended the equal protection clause to pupils in schools, it struck down the separate but equal precedent established in 1896 in *Plessy v. Ferguson.* States' rights advocates accused the Warren Court of overreaching. However, "Judicial activism" is a contested term because one could argue that the Warren Court's decision in *Brown v. Board of Education* was a correct interpretation of the Fourteenth Amendment that needed to put in place, a deficiency that needed a remedy. The opposing pole in case law is "judicial restraint," wherein judges

and justices either refuse to hear cases that do not rise to constitutional scrutiny, overturn legislation that upsets the balance between state and federal jurisdiction, or private and federal jurisdictions, or issue very narrow rulings that apply only to the case at bar.

38. Ronald Reagan, "Address at the Neshoba County Fair," *Neshoba Democrat* (August 4, 1980): A1 (accessed 9/14/2014 at http://neshobademocrat.com/main.asp?SectionID=2&SubSectionID=297&ArticleID=15599&TM=60417.67
39. *Bob Jones University v. U.S.,* 461 U.S. 574 (1983).
40. Mark Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (New York: W.W. Norton, 2005).
41. John Paul Stevens, "Remarks before the Federal Bar Association on October 23, 1985," *The Great Debate: Interpreting our Written Constitution* (Washington, D.C. The Federalist Society, 1986), 27.
42. *Printz v. United States,* 521 U.S. 898 (1997).
43. *United States v. Morrison,* 529 U.S. 598 (2000).
44. *Violence Against Women Act,* 42 USCS 13881.
45. *Kimel v. Florida Board of Regents,* 528 U.S. 62 (2000).
46. Toobin, *The Nine*, 188.
47. Toobin, *The Nine*, 188.
48. Toobin, *The Nine*, 177.
49. 531 U.S. 98, 109.
50. 531 U.S. 98, 111.
51. *Brown v. Board of Education of Topeka Kansas,* 347 U.S. 483 (1954).
52. *United States v. Nixon,* 418 U.S. 683 (1974).
53. Starr, *Bush v. Gore*, 324.
54. Smith and Prosise, "The Supreme Court's Ruling in *Bush v. Gore*."
55. Garbus, *Courting Disaster*; Jamin B. Raskin, *Overruling Democracy: The Supreme Court v. the American People* (New York: Routledge, 2003).
56. "Poll: Election Fight Leaves Country More Split than Before, Survey Finds," *Los Angeles Times* (December 17, 2000): A1; Herbert M. Kritzer, "The Impact of *Bush v. Gore* on Public Perceptions and Knowledge of the Supreme Court," *Judicature* 85(2001): 79
57. Adam Nagourney and Janet Elder, "Bush's Support Strong Despite Tax Cut Doubts," *New York Times* (May 14, 2003): A1.
58. 531 U.S. 98, 109.
59. Raskin, *Overruling Democracy*.
60. 531 U.S. 98, 106.
61. Toobin, *The Nine*, 200.
62. Howard Gilman, *The Votes That Counted: How the Court Decided the 2000 Presidential Election* (Chicago: University of Chicago Press, 2001); Richard A. Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* (Princeton, NJ: Princeton U. Press, 2001); Toobin, *The Nine*, 200.
63. Rountree, *Judging the Supreme Court,* 394.
64. Rountree, *Judging the Supreme Court,* 330-32. See also, Posner, "*Bush v. Gore* as Pragmatic Adjudication," 187-213; McConnell, "Two-and-a-Half Cheers for *Bush v. Gore*," 657-674; Pildes, "Democracy and Disorder," 695.
65. 531 U.S. 98, 115.
66. Rountree, *Judging the Supreme Court,* 56.
67. 531 U.S. 98, 115.
68. 531 U.S. 98, 120.
69. This strategy was also used in the *per curiam* (Rountree, *Judging the Supreme Court,* 39).
70. 357 U.S. 449 (1958).
71. 378 U.S. 347 (1964).
72. This is a modified enthymeme based on the sixth *topoi* in Aristotle's *Rhetoric,* W. Rhys Roberts, trans. (New York: Random House, 1954): Book II, Chapter 23.
73. 531 U.S. 98, 112.
74. 531 U.S. 98, 118. Rehnquist treats "certification" as an action with legal consequences rather than a disputed characterization of the State's action. Gore's team claimed the certification was a political action, not a legal one.

75. 531 U.S. 98, 118.
76. Toobin, *The Nine*, 188.
77. He does not point out that the Commission's report was only advisory and that Representative James Garfield cut a deal to get the Republican Rutherford B. Hayes elected by the House of Representatives. Rehnquist later writes about these events in his *Centennial Crisis: The Disputed Election of 1876.* (New York: Knopf, 2004).
78. 531 U.S. 98, 151.
79. Toobin, *The Nine,* 188.
80. Souter agreed with him on this point.
81. 531 U.S. 98, 119.
82. This theme is fully developed in Rountree's *Judging the Supreme Court.*
83. 531 U.S. 98, 12.
84. 531 U.S. 98, 122.
85. When the House votes to decide a presidential election, it votes on a state by state basis. Thus, Wyoming's single Representative's vote has the same weight as the majority cast by California's large delegation. This formula would have further strengthened the Republican's grip on the outcome had it gone to the House.
86. 531 U.S. 98, 127.
87. *McPherson v. Blacker*, 146 U.S.1 (1892). The case at bar concerned the Michigan legislature's method of selecting electors for presidential elections. Challengers to the scheme argued that it violated the equal protection clause of the Fourteenth Amendment. The Supreme Court rejected the challenge and affirmed the Michigan winner take all method of selection. In the ruling, the Court argued that this was a political issue best left to the state.
88. Rountree, *Judging the Supreme Court*, 60-61; Posner, "*Bush v. Gore* as Pragmatic Adjudication," 187-213; McConnell, "Two-and-a-Half Cheers for *Bush v. Gore*," 657-674; Pildes, "Democracy and Disorder," 695ff; Sunstein and Epstein, *The Vote;* Farnsworth, "To Do a Great Right, Do a Little Wrong," 227-34; Richard L. Hasen, "A Critical Guide to *Bush v. Gore* Scholarship," 297-313; Smith and Prosise, "The Supreme Court's Ruling in *Bush v. Gore*: A Rhetoric of Inconsistency," 605-632.
89. 531 U.S. 98, 128-29.
90. Fabrizio Macagno and Douglas Walton, "Dichotomies and Oppositions in Legal Argumentation," *Ratio Juris*, 23 (2010): 229-57.
91. Rountree, *Judging the Supreme Court.*
92. William Rehnquist, "2000 Year-end Report on the Federal Judiciary," *The Third Branch: Newsletter of the Federal Courts,* 33 (2001): 1-10.
93. Rountree, *Judging the Supreme Court,* 331.
94. Macagno and Walton, "Dichotomies and Oppositions in Legal Argumentation."
95. Muller, "Affirming denial through preemptive apologia: the case of the Armenian Genocide Resolution."
96. Downey, "The Evolution of the Rhetorical Genre of Apologia."
97. Garbus, *Courting Disaster*; Kritzer, "The Impact of *Bush v. Gore"*; Smith and Prosise, "The Supreme Court's Ruling in *Bush v. Gore*"; and Sunstein and Epstein, *The Vote*; Tushnet, *A Court Divided.*
98. Neal Gabler, "The Unhappy Triumph of Partisanship." *Los Angeles Times*, (December 17, 2000): M2.
99, Toobin, *The Nine,* 165.
100. Macagno and Walton, "Dichotomies and Oppositions in Legal Argumentation."