



Chief Justice Rehnquist's Rationale for *Bush v. Gore*

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ABSTRACT

In an address to the John Carol Society three weeks after the *Bush v. Gore* (2000) decision, Chief Justice William Rehnquist attempted to rationalize his concurrence by comparing himself to Justice Joseph Bradley, who was the decisive vote on the commission that recommended a resolution of the controversial presidential election of 1876. In the process, Rehnquist deploys an implicit apologia which is supported by sub-analogies and enthymemes.

KEYWORDS

Apologia, Rehnquist, epideictic, *Bush v. Gore*, enthymeme, analogy.

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I. Introduction

On December 12th, 2000, the majority of the Supreme Court prohibited certain counties in Florida from continuing their recounts of votes cast in the presidential election 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. Justice Anthony Kennedy's majority opinion (Savage & Weinstein, 2003) held that because of arbitrary vote counting, Florida was violating the Fourteenth Amendment rights of its citizens. Thus, Florida needed to adopt new standards; however, 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 scrutiny by the U.S. House of Representatives. However, Chief Justice Rehnquist wrote a separate concurrence in which he provided a different rationale for the decision. He argued that the crisis necessitated intervention. It was after all a presidential election, and the Supreme Court of Florida had overstepped its bounds by taking on legislative responsibilities (Rountree, 2007). This article focuses on Rehnquist's defense of his concurrence in his address to the John Carroll Society a few weeks later.

The ruling was one of the most controversial in the history of the Supreme Court (Rountree, 2007). Polls taken shortly after *Bush v. Gore* revealed a split in the electorate regarding the legitimacy of the decision. 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" ("Poll . . .", 2000, p. A1; see also, Kritzer, 2001; Nagourney & Elder, 2003, p. A1).

In examining Rehnquist's address to the John Carroll Society, this article reveals that he relied on an implicit apologia, one based on analogy by which the speaker induces the audience to make a favorable comparison between a discursive depiction of a hero and the speaker. This article is divided into four parts. First, it briefly reviews relevant literature on apologies. Second, it reviews the ruling in *Bush v. Gore*. Third, it thematically examines Rehnquist's address to the John Carroll Society. Finally, it concludes by summarizing its findings and examining their implications for Rehnquist's defense of states' right and for the construction of implicit apologies.

II. Apologias

Several scholars have demonstrated that the ancient *stasis* system of Cicero and the *Rhetorica ad Herennium* provide a way to invent lines of argument for the apologia (Kramer and Olson, 2003; Ryan, 1982). For example, *stasis* questions of fact can be correlated to apologetic strategies of denial. While in classical literature, apologies are usually seen as a sub-form of the forensic genre, they can also be a sub-form of the epideictic genre in cases where speakers are seeking to restore or defend their honor (Smith, 2005, pp. 85-86; Murphy, 2003; Ochs, 1993, Chapter 3).

Contemporary scholars have also refined the classical notion of apologia, which can be traced all the way back to Gorgias, by showing that apologies can engage in denial, bolstering, differentiation, and/or transcendence (Ware & Linkugel, 1973), and/or can house evasion of responsibility, reduction of offensiveness, attack, mortification, and correction (Benoit and

Brinson, 1994). Benoit (1995; 1997; 2000) demonstrates how apologies contribute to image repair, management and/or restoration. Downey (1993) adds self-exoneration, self-absolution, self-sacrifice, self-service, and self-deception. Other show that apologies can be part public ritual or an apology on behalf of others (Harter, Stephens & Japp, 2000), which often take on an epideictic cast (Villadsen, 2008).

By examining Rehnquist's address as an apology, this study not only relies on the strategies mentioned above but responds to Koesten and Rowland's call for "a broader theory" of apologies (2004, p. 84). This study presents a unique sub-genre to our field, one based on an extended analogy, which can be seen as an *implicit* apology. Using the *stasis* system, enthymematic analysis, and apology theory as tools, this study attempts to open Rehnquist's address to the John Carroll Society to a closer, more nuanced reading.

III. Electoral Intervention

In *Bush v. Gore*, the majority opinion condemned the Florida Supreme Court for allowing arbitrary vote counting system to continue, thereby violating the Fourteenth Amendment rights of its citizens. Seven justices agreed with the Fourteenth Amendment argument, but two of these would have allowed Florida to proceed as long as the state found a way to clean up its act.

Chief Justice Rehnquist, joined by Justices Scalia and Thomas, wrote a concurring opinion that shifted the basis for the decision to argue that the nation faced a unique crisis that could result in chaos and then condemned the Florida Supreme Court's interference in a legislative matter. Because the Florida court had "infringed" on legislative prerogative, the 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" (531 U.S. 98, 115). Rehnquist's rationale rendered the whole issue of re-counts moot by re-establishing the power of the Florida legislature to settle the matter. Florida's conflicting laws and rulings, and the impending end to the safe harbor period on December 12th gave the U.S. Supreme Court the rationale for intervention, as did the fact that a national election outcome was at stake. Rehnquist claimed that he was saving Florida law from the ravages of the Florida Supreme Court, which "empties certification of virtually all legal consequence" (531 U.S. 98, 118).

The Supreme Court's *decorum* and the rush to settle the presidential election constrained Rehnquist's concurring opinion by restricting his rhetorical options. When the hue and cry continued, Rehnquist accepted an invitation to appear before the John Carroll Society to continue his defense of the ruling.

IV. Remarks at John Carroll Society

On January 7th, 2001, Rehnquist spoke before a society named for one of the Catholic founders. Like Rehnquist, the Society was dedicated to a strict reading of the Constitution. The *decorum* of this venue allowed Rehnquist to move beyond the standard *stasis* system of the forensic rhetoric of the Supreme Court and to defend his ruling using a wider array of arguments and forms, including such epideictic elements as national lore, praise for a hero of 1876, and by implication restoration of his own honor. Rehnquist creates an analogy between the presidential elections of 1876 and 2000, and inside that analogy creates another between himself and Justice

Joseph Bradley. The praise Rehnquist accords Bradley thereby provides implicit praise for himself. This analogy is regularly undergirded with sub-analogies and enthymemes that allow the audience to draw their own conclusions.

Rehnquist chose for his grounds the contested election of 1876 probably because Supreme Court justices were involved and because press reports after that election had alleged that the method of resolution was questionable, just as the contemporary media was doing in the case of Bush's ascendancy. The argument from analogy required the audience to fill in the application of the 1876 case to the ruling of 2000. This step was not difficult because the address relied on a narrative that was highly accessible to the audience. Except for some digressions, the 1876 narrative took up the entire address, which is approximately 30 minutes. Though the audience obviously knew the outcome of the narrative, Rehnquist chose to tell the story from beginning to end, opening with, "I thought I would talk to you this morning about the disputed Presidential election – not of 2000, but of 1876" (JCT, 2001, p. 1). The laughter from the audience indicates that the opening reference to 2000 alerted the audience to their enthymematic responsibilities.

Rehnquist re-created the context of the 1876 election by pointing out that "The panic of 1873 . . . had brought hard times, and the Democrats had gained control of the House of Representatives in the election of 1874" (JCT, 2001, p. 1). He once again reinforced the analogy at hand: "As we all know from the recently disputed election of 2000, the magic number of electoral votes is now 270. But then it was 185" (JCT, 2001, p. 3). His opening concluded with another wry comment that further tipped his hand with regard to his ultimate purpose: "New York had by far the greatest number of electoral votes – 35 – while California had only 5, and Florida had only 3" (JCT, 2001, p. 3). If the audience was unsure about what his underlying purpose was, the reference to Florida made it clear.

Rehnquist took up the role of the press to provide another sub-analogy to support the meta-analogy between 1876 and 2000. He revealed that the press reported that the presidential election of 1876 see-sawed somewhat like the one in 2000. The early results pointed to a victory for Governor Samuel Tilden of New York, but later, "it appeared that if [Rutherford B.] Hayes carried the Pacific Slope states . . . Tilden was assured of only 184" of the needed 185 electoral votes. Republicans sent messages to South Carolina, Florida and Louisiana "where federal troops were still stationed to guard the polls. . . . The dispute had begun" (JCT, 2001, p. 7). Returns were soon called for. Rehnquist recalled that the election of 1876 involved a thin margin of electoral votes, disputed votes, and a "result . . . was proclaimed by the press to be in doubt" (JCT, 2001, p. 9). Rehnquist again reinforced the link between 1876 and 2000: "Both the Democrats and the Republicans quickly sent teams of party statesmen to Louisiana and Florida to witness the proceedings There were no early flights out of Reagan National Airport to Miami in those days" (JCT, 2001, p. 9). He then reported, "On December 6th, the Hayes electors were declared winners by over 900 votes" (JCT, 2001, p. 9). Both sides then turned in alternate slates of electors in the disputed states.

The examination of the role of Justice Joseph Bradley provides a sub-analogy based on an enthymeme: if Bradley was a hero in 1876, then Rehnquist was a hero in 2000. In an attempt to resolve the crisis of 1876, the Congress established an election commission comprised of ten members of Congress (five Democrats and five Republicans) and five members of the Supreme Court.

The Supreme Court's representatives were to include two members appointed by Democratic presidents, two appointed by Republican presidents, and a fifth, David Davis, who had been appointed by Lincoln but who was considered a legitimate independent. When Davis declined, he was replaced by Justice Bradley. Rehnquist revealed that Bradley was an appointee of Republican President Grant, a move that increases the similarity between Rehnquist and Bradley since Rehnquist had been appointed by a Republican President, Richard Nixon. Rehnquist then pointed out that "[Bradley's] vote would be decisive" (JCT, 2001, p. 12). Rehnquist claimed that Bradley recognized the overlap in politics and judicial action, and the "high level political drama" that was "being played out" (JCT, 2001, p. 13).

Having vetted his hero, Rehnquist placed him in the midst of the crisis of 1876 facing the same dilemma Rehnquist faced in 2000: "If [Bradley] voted with the Republicans, he would be condemned as a party hack, rather than an honest jurist. If he voted with the Democrats, he would doubtless be praised as an independent arbiter, but denounced by all the elements of his own party which had placed him where he was" (JCT, 2001, pp. 14-15). Bradley voted "with the Republican majority," and Hayes was elected by one electoral vote, (JCT, 2001, p. 15), even though Tilden had won the popular vote.

Two enthymemes operate here: First, like Tilden, Vice President Gore won the popular vote but did not become president. Second, like Bradley, Rehnquist was a Republican-appointed justice who would decide the outcome and thus faced a tough decision. He took the "courageous" course, knowing his own motives would be widely and unfairly criticized. The apologetic theme of self-sacrifice was reinforced when Rehnquist noted the challenge that Supreme Court justices face when participating in such matters:

It is one thing for members of Congress to serve in an obviously partisan political capacity – they *are* political partisans. However, members of the Supreme Court are appointed by the President, confirmed by the Senate, but do not get involved in political decisions. Bradley in particular was criticized for his service, and there are obviously very good reasons for members of the Court to say 'no' when asked The argument on the other side is that when there is a national crisis, and only you can avert it, it may be very hard to say 'no' (JCT, 2001, pp. 15-16).

This paragraph, which comes with only two pages remaining in the address, implied that Rehnquist made the courageous choice despite media claims to the contrary. He contended that the 1876 Court's involvement was necessary in order to avert "a national crisis" (JCT, 2001, p. 16). He went on to argue that just like the Roberts Commission and the Warren Commission, which were condemned as a "whitewash" and as a "superficial, preordained result" (JCT, 2001, p. 16) respectively, the Compromise of 1877, and that of December, 2000 by analogy, were a nation-saving moments. He even defended Hayes agreement to withdraw federal troops from the military districts into which the South was divided by developing more epideictic analogies. He claimed that the election "Compromise of 1877" was of equal merit to those of 1820 and 1850, and so by implication was his Supreme Court's ruling of 2000.

Rehnquist was not only attempting to restore his own image, but that of President George W. Bush, while tarnishing the reputation of those across the partisan divide. Hayes, a hero and general in the Civil War, who became Ohio's governor and then was nominated for president, is the intended parallel to Bush. Rehnquist noted that Hayes' ascendancy was a product of a

commission that contained, among others, Supreme Court members who decided the outcome. The enthymeme is simple: if Hayes was a bad choice, then this type of selection process could be condemned. If Hayes was a good president, then the process would be vindicated. However, Rehnquist began his rehabilitation of Hayes by making a joke that did not help his argument. Quoting Henry Adams, Rehnquist concluded that Hayes' virtue was that he was "obnoxious to no one" (JCT, 2001, p. 4).

When Rehnquist turned his attention to Hayes' opponent, he moved from virtue to vice, typical of epideictic-apologetic form. He dubbed Tilden a "hypochondriac, and a rather cold and unlovable individual," who never married; "there does not appear to have been any intimacy in his life" (JCT, 2001, p. 5). Rehnquist also linked Tilden with Boss Tweed, when in fact Tilden was a reformer who had defeated Tweed's machine and the Canal Ring in upstate New York. While Rehnquist's immediate audience believed this description was humorous, the flavor of his remarks reinforced the perception that Rehnquist was involved in a political fray rather than a transcendent constitutional argument. The traits attributed to Tilden seemed irrelevant to the analogy until Rehnquist concluded, "Hayes was very likely less intelligent than Tilden but considerably more likeable" (JCT, 2001, p. 6). It would be difficult for the audience to miss the implication: Hayes equates with Bush and Tilden with Gore, thus completing the sub-analogy of candidates. Rehnquist pointed out that despite the fact that many shunned Hayes, just as some would shun Bush, "Hayes was a better President than some of his detractors predicted, and the nation as a whole settled down to a more normal existence. The political processes of the country had worked, admittedly in a rather unusual way, to avoid a serious crisis" (JCT, 2001, p. 18).

Since Rehnquist was attempting to restore his reputation and since partisanship on his part had been charged in the *Bush v. Gore* ruling, one would have thought that the Chief Justice would avoid partisanship at all costs. Instead, partisan ripples in the speech hurt that its effectiveness: "The Democrats were building what would become the 'solid south' . . . obtained in part by intimidation of black voters" (JCT, 2001, p. 4). A few pages later, he claimed that "In Florida, Democrats relied upon economic intimidation to force black and white Republicans to vote Democratic" (JCT, 2001, p. 8). Whether or not this claim is true, it deepens the partisan shadows cast across Rehnquist's speech and raises the issue of race.

Furthermore, since the Jim Crow laws were passed by southern states after Hayes' withdrawal of federal troops, it is odd for Rehnquist to raise the issue in the context of a story limited to the election of that year and one in which he claimed the results were fortuitous. Since the vast majority of black voters in Florida supported the Democratic Party in 2000 and some of their votes were not counted because of the decision in *Bush v. Gore*, one could argue that the decision reflected the outcome of the 1876 election with regard to racial issues. Because of this problem, it is important to explore an unstated relationship between Rehnquist and Bradley.

In a dissenting opinion in 1873, Bradley used the precept of original intent to interpret the Fourteenth Amendment to incorporate the Bill of Rights into those rights that apply to the states. Bradley interpreted the "privileges or immunities" clause in the Fourteenth Amendment to mean that the Bill of Rights applied to the states. Three-quarters of a century later, this decision inspired liberal Justice Hugo Black to issue a full scale defense of original intent and incorporation of the Bill of Rights against the states in his famous decision in *Adamson v. People of the State of California* (332 U.S. 46, 1947; see particularly, 71-72). Black attached a 30 page

appendix to his decision laying out the history of the Fourteenth Amendment approved in 1868, the intent of its author, Congressman John Bingham, and the ruling of Bradley in 1873. The incorporation doctrine as derived from original intent eventually prevailed and became the *path by which the Warren Court applied the Bill of Rights to the states* to end segregation (*Brown v. Board of Education*), insure in person cross examination of witnesses (*Pointer v. Texas*), provide attorneys to the indigent (*Gideon v. Wainwright*), prevent unreasonable search and seizure (*Mapp v. Ohio*), and for police to read rights to those they arrest among other rights (*Miranda v. Arizona*). Under Rehnquist's guidance, however, the originalist interpretation was appropriated by the conservatives, who then used it to roll back some of the Warren Court's rulings. Because of this tactic and his record, Rehnquist opened himself to charges of racial insensitivity. For example, during his nomination hearings, it was revealed that Rehnquist had defended *Plessy v. Ferguson's* (1896) separate but equal ruling in a memo to Justice Jackson for whom Rehnquist clerked in 1952.

What is more, while in the Justice Department, Rehnquist coordinated the Supreme Court nomination processes for Clement Haynsworth and G. Harold Carswell, the former a states rights' advocate from South Carolina eliminated due to a financial conflict of interest, the latter eliminated from contention for racial remarks during the 1948 presidential campaign. The defeat of these two nominations opened the way for the nomination of Rehnquist himself, who became the most prominent lone dissenter in Supreme Court history until President Reagan nominated other conservative justices to the Court (Jenkins, 2012).

Reagan's 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 re-establish "federalism," that is, states' rights. Reagan had signaled his intentions in a campaign speech on August 3rd, 1980 at the Neshoba County Fair in Mississippi where he embraced "states' rights" (Reagan, 1980). Rehnquist supported the Reagan administration from the bench. For example, on May 24, 1983, every justice except Rehnquist voted against Bob Jones University's attempt to retain tax exempt status (*Bob Jones University v. U.S.*, 461 U.S. 574, 612-23). Rehnquist defended the University's admissions procedures, which revived questions about his ideology with regard to race. Reagan then moved Rehnquist up to Chief Justice in 1986. When thus contextualized, Rehnquist's address to the John Carroll Society raises questions about the impact of Rehnquist's commitment to states' rights on voting rights. For example, Overton (2001) argues that *Bush v. Gore* advanced a racist merit-based agenda that was exclusionary and overturned the more inclusionary agenda of the Florida Supreme Court. In two law review articles, Backer (2002, 2003) claims that *Bush v. Gore* opened the door to the further devolution of federal authority back to the states. While the progeny and impact of *Bush v. Gore* are beyond the scope of this study, they are relevant to the ideological assessment of the agenda of Rehnquist that he once again revealed in his remarks at the John Carroll Society.

V. Conclusions and Implications

Rehnquist deployed self-sacrifice on the road to image restoration. By implication, Rehnquist argued that he sacrificed his popularity to serve his nation, just as the protagonists of his story did in settling the election of 1876. The speech was necessitated by the controversy surrounding the *Bush v. Gore* ruling. Many scholars demonstrated that the ruling damaged the credibility of the Court (Rountree, 2007; Hasen, 2004; Zarefsky, 2003; Farnsworth, 2001; McConnell, 2001; Smith and Prosser, 2001; Sunstein, 2001). As a result at the John Carroll

Society, Rehnquist sought to rationalize his role in *Bush v. Gore* to a broader, friendlier, and less legally trained audience than he faced on the bench. Freed of the *decorum* the Supreme Court, Rehnquist's apologia has much broader implications than his concurrence in *Bush v. Gore*. Rehnquist's implicit defense is a major analogy resting on sub-analogies grounded in enthymemes generated by the *stasis* system. He dealt with questions of fact when he detailed his narrative. He dealt with questions of jurisdiction when talked about the relationship among the states and the courts. He dealt with questions of quality when he assessed the courage of those who resolved the dispute of 1876. However, his partisan assessment undercut some of the virtue that Rehnquist might have achieved for himself by working against a unifying message. The facts of 1876 not only weaken Rehnquist's case, they provide an opportunity to examine one of the weaknesses of implicit apologies: their analogies may unravel.

Justice Bradley was not quite the hero Rehnquist claimed. Bradley was simply part of the deal to end reconstruction, a deal engineered by Representative James Garfield (R-OH); his deal is what carried the day for the Republicans, not Bradley's vote on the commission since the Congress had the right to reject the Commission's report. As part of the bargain, reconstruction federal troops would be pulled out of the South in 1877 and Hayes agreed to serve only one term. Nonetheless, Rehnquist compared that brokered deal to the great compromises of 1820 and 1850 "arising out of the Slavery Question," thereby endorsing congressional deals that kept slavery in place. Furthermore, Rehnquist claimed that, in terms of the presidency, Hayes was better than expected and that the country returned to a "more normal existence" (JCT, 2001, p.18). That "more normal existence" included an end to reconstruction, the passage of Jim Crow laws, and eventually the Supreme Court's ruling in *Plessy v. Ferguson* (1896), allowing for separate but equal facilities for 60 years in a segregated South, a decision Rehnquist had defended when he was a law clerk. Thus, Rehnquist not only failed to rehabilitate Hayes, he opened the door to criticism of his own record and ideological orientation favoring states' rights. Rehnquist's discourse is open to the charge that he embraced rhetorical strategies often found in the rhetoric of racism: he abjured judicial activism while engaging in it; he attempted to bolster his own image to distance himself from the racial implications of his decision; he engaged in what Gresson (2004, 1995) calls "racial recovery." Scholars of critical legal theory may wish to pursue this theme in more depth in Rehnquist's rhetoric to add to the scholarship on *Bush v. Gore* initiated by Overton and Backer.

Rehnquist built parallels between 2000 and 1876 arguing that Hayes was a better president than many believed he would be; thus, by implication President-elect Bush might be a better president than many believed he would be. However, one could just as easily invert the equation. Because Hayes' presidency led to bad consequences, so would Bush's. Beyond this enthymematic equation, Rehnquist attempted to argue that the settlement procedure in 1876 saved the country from a crisis and by implication so did the Supreme Court in 2000. However, these procedures are not analogous. The Congress created the 15 person commission to help resolve the dispute of 1876; it included ten congressmen and five justices. Representative Garfield then used the report as a basis for a compromise. In 2000, a majority of the Supreme Court resolved the crisis before it could reach the House. The settlement of 1876 took four months; in the name of expediency, the 2000 decision came a month and a week after the election. Following Rehnquist's logic, if a national crisis was averted in 1876, and it took months to resolve, the decision of 2000 was too hasty. He could have answered this objection at least in part by pointing out that the Inaugural of 1877 was in March, while the Inaugural of 2001

was in January, requiring quicker action. His failure to explain that situational difference weakened his argument. Where Rehnquist's analogy holds, it grounds both 1876 and 2000 in partisanship reinforcing Gabler's earlier claim that the decision of 2000 was "ensnared in tawdry politics" (2000, p. M2). Where Rehnquist's analogy does not hold, it undercuts his implicit apologia.

We have seen that by combining the *stasis* system with the apologetic form, one can generate claims to bolster one's reputation. Because it is implicit, this form of apologia is well served by enthymematic reasoning, particularly when generated by the *stasis* system and narratives. However, when deploying such analogies, speakers need to take care that there is congruence between the cases involved. Since the *implicit* apologia argues by analogy, it opens itself to counter-arguments showing that the intended analogy does not hold.

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