ISSA Proceedings 2002 – Felicity Conditions For The Circumstantial Ad Hominem: The Case Of Bush v. Gore

In popular usage and many textbooks on reasoning, the argument *ad hominem* is defined as a personal attack on one's opponent, which is a distraction from the real issues at hand. Because it is a diversion, substituting personal for substantive argument, it is defined as a fallacy *per se*. As is often the case in informal reasoning, however, it is not as simple as that. Not all *ad hominem* arguments are fallacies, and in not all situations is the *ad hominem* inappropriate.

1. The Circumstantial Ad Hominem

In his recent book, Douglas Walton distinguishes among five varieties of the ad hominem argument, any of which may be strong, valid but weak, or fallacious depending on circumstances (Walton, 1998). Walton's key distinction is between abusive and circumstantial forms of the argument. The abusive form – misleadingly named – suggests that a person's claims should not be accepted because he or she has bad character. "Of course we shouldn't accept Smith's argument against European integration; after all he is a homosexual," is an example of this type. The notion that sexual orientation has anything to do with one's views on European unity is so farfetched that we can dismiss the argument as fallacious. Not all cases of abusive ad hominem are fallacious, however.

In contrast, the circumstantial ad hominem is not really an attack against a person's character but the identification of a breach between one's argumentative position and one's own circumstances. It suggests that one's actions deny one's principles. The classic case is the chain-smoking parent who admonishes his or her child not to smoke, only to be met with the reply, "You can't really mean that, since you smoke three packs a day yourself." Although *some* person could make a case against smoking, this person cannot, because his or her own behavior undermines the force of the claim.

Walton suggests (Walton, 2001) that the circumstantial ad hominem was quite

common in the ancient world, with philosophers often attacked for the discrepancy between their claims about what constituted the good life and their own behavior. The implicit assumption was that one's inability to live out his own precepts is evidence of the weakness of those precepts.

As Walton implies, however, the discrepancy between statements and actions may not be the strongest case of the circumstantial ad hominem. Since humans are imperfect, one's inability always to live out one's values is not necessarily proof of insincerity. The chain-smoking parent may recognize that smoking is harmful, acknowledge that nicotine is addictive, and admit his or her inability to conquer the addiction, and therefore urge the child not to smoke. The target of a circumstantial ad hominem may be able to repair the argument simply by acknowledging his or her own imperfection and then urging the other person, in the familiar maxim, "Do as I say, not as I do."

A stronger characterization of the circumstantial ad hominem is to see it, in Walton's phrase, as argument from commitment. The essence of the argument is that a person cannot commit himself or herself to a claim and advance that claim for the adherence of others, because the claim is inconsistent with other commitments the same person has made. Over forty years ago, Henry Johnstone maintained that all valid philosophical arguments are of precisely this type (Johnstone, 1959). Because differing philosophical positions typically reflected incommensurable world-views, a philosophical position could not be dislodged merely by reference to external evidence. That evidence would be understood within incommensurable frameworks so that it might be deemed dispositive by one arguer and irrelevant by another. Accordingly, Johnstone suggested, the only way to dislodge a philosophical argument is to establish that it is inconsistent with its adherents' own commitments. And doing so does not dislodge the argument universally. But for the person caught in the inconsistency, it cannot be a reasonable position.

If one is on the receiving end of a circumstantial ad hominem, three possible replies suggest themselves. The nature and persuasiveness of the reply will determine whether discussion will shift to another level. First, one could maintain either that he or she did not make the initial commitment or that the other party has misunderstood the commitment. For example, the allegation that one cannot really oppose secessionist movements since one believes in self-determination might be countered by saying that one was not really committed to self-determination or that it applied only to culturally homogeneous nation-states.

A second type of response is to distinguish the case at hand from the category that the commitment covers. Yes, one is committed to self-determination, but this is not a case of it: it is a terrorist act that targets innocent civilians and actually denies them the opportunity for self-determination.
Third, one could respond by suggesting that extenuating circumstances outweigh or transcend the original commitment. One still maintains the original view but sees it in a different light. Committed civil libertarians who have acquiesced in the grant of additional investigative powers to national governments fighting terrorism reason that civil liberties depend upon the existence of a society that embraces them, and some sacrifice may be justified in order to defend such a society against attack.

2. The Case of Bush v. Gore

The workings of this form of argument are illustrated in the United States Supreme Court decision in the case of *Bush v. Gore*, the case that effectively ended the dispute over the 2000 Presidential election by halting the manual recount of ballots in Florida. Those unfamiliar with the mechanics of U.S. elections were reminded in 2000 that the contest for the Presidency is not truly a national election. Instead, each state is responsible for determining how its Presidential electors will be chosen, and a majority of the electoral vote, not the popular vote, determines the winner. This arrangement is set out in the United States Constitution, adopted in 1788 as the result of numerous political compromises but in a culture generally suspicious of ordinary citizens' abilities to make wise choices. Over the past 200 years, each state has determined that a popular election will be the means of making its choice, but the laws regulating these elections vary from state to state.

In 2000, the results in several states were quite close, especially in Florida. It soon became clear that whoever won Florida's 25 electoral votes would win the election. On Election Night, George W. Bush led in Florida by only 1784 votes out of six million that had been cast. Since the winning margin was less than half of one percent, state law provided for an automatic machine recount, which reduced Bush's lead to 300 votes. There were also procedures for protesting the vote count before it was certified, and contesting it afterwards, if there was reason to believe that a recount might alter the election results.
Vice President Al Gore sought manual recounts in four counties where he won by large margins but where there were significant numbers of "undervotes" (ballots

on which no vote for President was registered). So that these recounts might be completed, he sought a court order delaying the certification of the results. After lower-court skirmishes, the Florida Supreme Court ordered the certification deadline pushed back to November 26. The Bush campaign appealed this decision to the U.S. Supreme Court, holding that the Florida court was violating Federal law by changing the rules that were in place before the election and that it was violating the U.S. Constitution by usurping a role assigned to the Florida legislature. Defenders of the Florida court held that it had done no such thing but merely had engaged in the normal process of statutory interpretation when there were conflicting provisions in state law. The U.S. Supreme Court did not decide the case, *Bush v. Palm Beach County Canvassing Board*, but remanded it to Florida, seeking clarification as to whether the state court had based its decision on state law or whether it had invoked the U.S. or Florida constitution. If the latter, the Florida court would have run afoul of the Constitutional stipulation that the legislature, not the court, determine the means of choosing Presidential electors. On December 11, the Florida court replied that it had based its decision on state law alone.

Meanwhile, the certification deadline had arrived and the recounts requested by Vice President Gore had not all been completed. The addition of military absentee ballots, some of them of dubious legality, had raised Bush's margin to 930 but the completed recounts lowered it to 537. By that margin Governor Bush was certified as winning Florida and thus the election.

Still unconvinced, Vice President Gore contested these results, asking that partial recounts be included, that the incomplete recounts be finished, and that a lenient standard be used to discern "the intent of the voter" so that a candidate might be assigned ballots on which a machine registered no vote if the voter's intent could be determined. A circuit court ruled against the Gore campaign but its decision was overturned by the Florida Supreme Court, which ordered a statewide recount of all "undervotes." No sooner had these recounts begun than the Bush campaign obtained an order from the U.S. Supreme Court stopping them. The Florida decision was then reversed in the case of *Bush v. Gore*, rendered on December 12.

Bush v. Gore is a complex case with six separate opinions. The majority, in an unsigned opinion, held that the recount procedures denied Floridians the equal protection of the laws guaranteed by the 14th Amendment to the U.S. Constitution, because there was no consistent standard for what counted as "the

intent of the voter." Moreover, there was no time for Florida to correct this deficiency because December 12 was the deadline for states to choose electors who would enjoy a "safe harbor" from challenge by the U.S. Congress. Justices Kennedy, O'Connor, Scalia, Thomas, and Chief Justice Rehnquist supported this opinion.

The latter three justices, in a concurring opinion, also found the recount invalid because the Florida court had taken over a function assigned by the U.S. Constitution to the state legislature and because it had changed the rules after the election had been completed. Each of the four dissenting Justices – Stevens, Souter, Ginsburg, and Breyer – also wrote an opinion. None of the four believed that the Supreme Court should have taken the case. Two believed that there was a potential equal-protection problem but that it could be solved by remanding the case to the state level with instructions to apply a consistent standard for determining the voter's intent. The other two dissenters did not believe there was any equal-protection issue at stake.

The decision and the reasons for it were controversial. In my judgment, a principal reason for controversy was that the majority and concurring opinions so readily lent themselves to the circumstantial ad hominem. Inconsistency between the Court's reading of this case and the prior commitments of this particular Supreme Court invited the accusation that not jurisprudence but ideology or partisanship was responsible for the outcome. Please consider with me four respects in which this accusation was made.

3. Equal Protection

First, the majority opinion justified federal intervention in order to preserve equal protection of the laws. As the opinion put it, "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each vote"(103)**(i)**. But the Florida recount procedures, it held, do not achieve equal protection because of "the absence of specific standards" (104) to assure that the means of determining intent of the voter would be the same in each case.

No precedents were cited for this ruling. Indeed, there had been no previous case in which the equal protection principle had been applied to electoral tabulations. Diversity in election procedures had existed for many years and it was widely understood that the federal role in this matter was quite limited (Gillman, 2001, 31). The Rehnquist court, which had eschewed judicial activism, was not likely to

mark out new applications of Constitutional rights. The Rehnquist court had been particularly unwilling to invoke the equal-protection clause as a justification for federal intervention, except in cases of overt racial discrimination (Toobin, 2001, 259). The equal-protection cases cited in the majority opinion – none of them related to voting – were ones with which the majority Justices, given their judicial ideology, probably would have disagreed. Moreover, in the earlier case of *Bush v. Palm Beach County Canvassing Board*, the Court had declined even to hear arguments alleging violations of equal protection. So the invocation by the Court in this case was suspect, given its own prior commitments.

Furthermore, invoking equal protection guarantees in this case was suspect since there were even greater disparities in other aspects of vote tabulation. For example, in Florida different counties used different voting instruments. Some used punch cards, some used marksense technology (optical scanning of spaces filled in with a pencil), and a few used paper ballots or computer screens. The percentage of uncounted ballots varied among these instruments. Although he gave it little emphasis, Gore attorney David Boies developed an *a fortiori* argument. The variation in error votes among counties using different technologies was greater than that resulting from differences in manual recount standards (Gillman, 2001, 135). If the greater variation did not violate equal protection, then certainly the lesser variation could not do so. Indeed, by this reasoning one could understand the hand recounts as a means of correcting for the equal-protection problem of varying voting technologies. But the majority held that this is not the question before the Court, thereby narrowing the context of the Florida recount procedures and permitting a ruling that is at odds with the Court's more general commitment against invoking equal protection.

Additionally, if equal protection were applicable to vote counts, its application would be far broader than just to this case. It would invalidate most disparities among states and would seem to mandate uniform national election procedures (Gillman, 2001, 104; Dershowitz, 2001, 82). The facts that no court had so ruled, and that any such ruling would fly in the face of Article II, Section 1 of the U.S. Constitution which gives each state the power to determine the means of selecting electors, seem to suggest that the equal-protection standard is out of place. The majority opinion tries to prevent this circumstantial ad hominem by circumscribing the Court's decision: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities" (107). That is not only an understatement but also

an attempt at blocking an ad hominem showing the larger implications of this decision to be at odds with the Court's own commitments.

On the other hand, limiting the decision to the present case – offering a ticket good for "this day and train only" – is at odds with the standards of jurisprudence employed by several of the majority Justices. Scalia, in particular, believed that the function of the Supreme Court in deciding a specific case was to formulate generally applicable precedents that could guide the behavior of political actors in similar circumstances (Dershowitz, 2001, 82). On several counts, then, the invocation of equal protection is vulnerable to the circumstantial ad hominem.

4. The "Safe Harbor" Deadline

Supposing, however, that the equal-protection standard were justified, the question of remedy invites a second ad hominem challenge. If Florida has ordered a recount without satisfactory standards, an obvious remedy would be to remand the case to the state with instructions to establish uniform standards and then to proceed with the recount. Justices Souter and Breyer recommend just this solution in their dissenting opinions. But the majority opinion rejects that approach because of the lack of time. The U.S. Supreme Court decision was issued on December 12, the very date by which a state must choose its electors if it wishes to enjoy the "safe harbor" that will shield them from later challenge. Accordingly, the Court held, "That date [December 12] is upon us… Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed [namely, the lack of equal protection guarantees], we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed" (108).

As Justice Ginsburg's dissent indicated, the December 12 date is not sacrosanct. The key date was January 6, when Congress was to open and determine the validity of electoral votes (132). There were historical examples of valid electoral votes cast by electors chosen after December 12. In fact, in the 2000 election several states failed to meet the date and still had their votes counted. The significance of December12 comes from the Electoral Count Act of 1887, passed in the wake of the disputed election of 1876, which held that electors chosen by that date enjoyed a "safe harbor" against Congressional challenge that their votes had not been "regularly given."

The Supreme Court majority assumed both that Florida wished to enjoy the "safe harbor" protection and that this desire trumped the desire for an accurate count.

The evidence for the first assumption was that the Florida Supreme Court "has said that the legislature intended the State's electors to 'participate fully in the federal electoral process,' as provided in 3 U.S.C. §5," which includes the safe-harbor provision (108). But there is no legislative history to establish that such is the case (Toobin, 2001, 266); the U.S. Supreme Court relies on the Florida court's claim that it is interpreting the wish of the legislature. The Florida court, however, also claimed to be interpreting the wish of the legislature on other points: employing the general "intent of the voter" standard and reconciling seemingly inconsistent provisions in state law. The U.S. Supreme Court hardly deferred to Florida's interpretive authority on these matters! Only when it was convenient, because it stopped the recounts, would the U.S. Supreme Court show such deference.

As for the second assumption, that the December 12 date trumps other considerations, no authority is offered; the concurring Justices simply assert that it is so. Attempting to reconcile the Florida legislature's desire to use the "safe harbor" clause with its grant to the state courts of the ability to provide appropriate relief, the concurring Justices state that the legislature "must have meant relief that would have become final by the [December 12] cut-off date" (116). There is no evidence from the legislative record to suggest that this is so.

5. Article II and Federalism

The third respect in which the Court invites a circumstantial ad hominem relates especially to the concurring opinion, which held that the Florida Supreme Court lacked the power to order recounts. On the face of it, this finding is at odds with the philosophical orientation of the Rehnquist court with regard to federalism. Time after time, both before and after *Bush v. Gore*, the U.S. Supreme Court has protected state sovereignty from federal incursion. In particular, it had denied that it had the power to alter a state court's opinion of state law (Gillman, 2001, 68; Kaplan, 2001, 87). In her dissenting opinion, Justice Ginsburg alludes to this anomalous situation, writing, "Were the other members of this Court as mindful as they generally are of our system of dual sovereignty, they would affirm the judgment of the Florida Supreme Court" (131).

In a particularly shrill critique, Dershowitz mentioned that the Rehnquist court would not even intervene to stop the execution of state prisoners whose conviction was based on a mistaken reading of constitutional law (Dershowitz, 2001, 8). The "intent of the voter" standard, as Dershowitz claimed, precisely fit Justice Scalia's "criteria for a law or practice that should not be struck down: It is

not expressly prohibited by the text of the Constitution, it bears the endorsement of many states over a long period of time, and it has never previously been challenged (Dershowitz, 2001, 128). Perhaps for this reason, some of Governor Bush's advisers believed that they had no chance to prevail in a jurisdictional challenge (Toobin, 2001, 49).

The concurring Justices defended their intervention by observing that this was no ordinary election but a contest for the Presidency of the United States. It was therefore governed by Article II, Section 1 of the U.S. Constitution, which gave the Florida *legislature* the power to determine the means of choosing electors, and the Florida Supreme Court had usurped that power. Moreover, it had changed the counting rules after the election was over, thereby jeopardizing the legislature's desire to take advantage of the "safe harbor" provision. In other words, a separation-of-powers error at the state level had led to a Federal Constitutional violation, creating the need for a ruling by the U.S. Supreme Court.

In their opinion, Chief Justice Rehnquist and Justices Scalia and Thomas cite several instances of alleged judicial usurpation in addition to overriding the legislature's desire to observe the "safe harbor" timetable. The court has failed to show deference to the Secretary of State and to state circuit courts, the bodies designated by the legislature to exercise discretion to conduct elections and to resolve disputes. The court has undermined the legislature's determination that certified election results have a strong presumption of legitimacy. And most fundamentally, the court has ordered a statewide manual recount of "undervote" ballots even though the statutes enacted by the legislature "cannot reasonably be thought to require the counting of improperly marked ballots" (110-14; quotation on 114).

The proper exercise of judgment by the Florida court, these Justices maintain, would involve deference to the legislature, the administrative agencies to which it delegated the conduct of elections, and the circuit courts. "In any election but a Presidential election," they note, "the Florida Supreme Court can give as little or as much deference to Florida's executives as it chooses, so far as Article II is concerned, and this Court would have no cause to question the court's actions" (110). But a Presidential election is different; there "the clearly expressed intent of the legislature must prevail" (115). Finally, the concurring opinion cites precedents in civil rights cases for overturning state court opinions that impermissibly broaden the meaning of state statutes in ways that violate guarantees in the U.S. Constitution (111). In other words, the concurring Justices

tried to avert the circumstantial ad hominem by distinguishing between the general principle of deference to states and the specific case of a U.S. Presidential election. Dissenters simply denied that the Florida Supreme Court had changed state law or usurped any legislative power.
Curiously, some of the concurring Justices' complaints concern the protest phase of the Florida election, before official results were certified. But that was not the case at hand. With respect to the contest phase, as Gillman points out, "the state legislature explicitly gave the Florida Supreme Court the authority to rule on these sorts of cases" (Gillman, 201, 83). Hence a court order, such as that for statewide recounts of undervotes, was one of the solutions to election disputes authorized by the state legislature. Moreover, had the Florida legislature disagreed with the court's power to interpret election laws or with the substance of the court's interpretation, it could have modified the election laws to limit the court's power in this respect. It had not done so, even though it had changed the voting laws in other respects (Dershowitz, 2001, 34). The Justices' professed sympathy for state sovereignty is undermined, a circumstantial ad hominem would suggest, by their actions implying that federalism is not the reigning principle for them if it leads to actions they do not like.

Moreover, if the principle of legislative supremacy were asserted strictly, it would discredit more than the Florida Supreme Court. The law passed by the state legislature requires that all absentee ballots arrive by 7:00 p.m. on Election Day; it contains no exception for military absentee ballots from overseas. But Florida officials in the executive branch entered into a consent decree with the U.S. Justice Department to provide for a ten-day extension for receipt of overseas ballots postmarked by Election Day. Acceptance of these late ballots was challenged in the case of *Harris v. Florida Election Canvassing Commission*, on the basis that "if it was unconstitutional for the Florida judiciary to extend a legislative deadline for when counties had to report their vote, it should also be unconstitutional for Florida's executive branch (working with the federal government) to extend a legislative deadline for the receipt of absentee ballots (Gillman, 2001, 138). This case was thrown out by the federal district and appellate courts, but had the Supreme Court's concurring opinion been the majority opinion, it is easy to imagine that the challenge to late absentee ballots would have been revived. The concurring Justices' seeming failure to consider fully the ramifications of overturning state sovereignty strengthens the suspicion that their commitment to federalism was trumped by their political preferences,

suspicion which is the basis of a circumstantial ad hominem.

6. Intervention and Judicial Activism

There is a final respect in which the *Bush v. Gore* decision invites a circumstantial ad hominem, and that relates to its decision to intervene before a political process had run its course. Normally, a case would not be "ripe" for judicial review until the alleged wrong had occurred and other methods of resolution had been found lacking. It would have been more in keeping with normal procedure for the recount to be conducted, and *then* for any challenge to be brought forward that it violated Constitutional guarantees. But in this case judgments were made in advance about a recount that had not yet occurred. Moreover, the U.S. Constitution and federal statutes assign roles for resolving electoral conflicts to the state legislatures and the U.S. Congress, but not to the Supreme Court. The legitimacy of the Court's acting in *Bush v. Gore* was called into question against the backdrop of its non-intervention norm.

The majority Justices explained their action by implying that they had no choice. In the conclusion of their opinion, they write, "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." They portrayed their involvement as reluctant, observing, "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" (108). This position is in keeping with the rhetorical conventions of court decisions, particularly the norm that they are characterized as inevitable and compelled by the law, even if there actually were alternatives (Ferguson, 1990). But the Court's contention is almost fatuous on its face. The Court was not forced to do anything; it could have chosen not to take the case or at least not to take it yet.

In academic and popular discussions of the case, two reasons were frequently offered for the U.S. Supreme Court's hasty involvement. One was that its action was necessary to correct the unwarranted judicial activism of the Florida Supreme Court. This line of argument was anticipated by remarks of Bush campaign officials that the Florida court had "overreached" and was trying to rewrite election laws to assure the election of Vice President Gore by any means necessary (Berke, 2000, 269). Of course, this allegation begs the question. It

assumes that the Florida Supreme Court was doing something other than exercising the power to resolve disputes that had been granted to it by the Florida legislature.

The more substantial justification for the Court's seemingly hasty intervention was that there was a transcendent interest in bringing certainty and finality to the election, and that this was something only the Supreme Court could do. On this reasoning, even if the Court's action was not strictly justified on the legal arguments, it served the greater good of finally bringing the 2000 election to a close. This argument has been made forcefully by Justice Richard Posner. Acknowledging that the Court's reasoning, especially concerning equal protection, was vulnerable, he nevertheless praises the Court for breaking the deadlock (Posner, 2001, 151, 144). The need for finality was often stipulated by political or media leaders rather than resulting from public demand (Shogan, 2001, 267-68; Toobin, 2001, 275). Although there was a sense of relief when the election finally was settled, polls consistently had shown that the public was patient and willing to wait, and that people preferred an accurate to a swift conclusion (Of course, this view presumed that it was somehow possible to obtain a definitive, accurate answer in an election that was decided within the margin of error).

Perhaps because the case for judicial intervention was weak in light of the Court's traditional reluctance to duck questions not yet "ripe," some speculated that intervening would hurt the Court's legitimacy, dignity, or prestige. In his dissenting opinion, Justice Stevens predicted that the credibility of judges would suffer because of the Supreme Court's unnecessary intervention (121). Some commentators predicted that the Supreme Court's own cherished reputation would be tarnished (Greenhouse, 2000, 296). So far, neither calamity has ensued, although the real test is likely to come is there is a vacancy on the Supreme Court while President Bush is in office.

7. Conclusions

Elsewhere I have argued that the *Bush v. Gore* decision was flawed because it depends on self-sealing arguments (Zarefsky, 2002). Here my claim has been that it is flawed because it invites four circumstantial ad hominem attacks (ii). The Rehnquist court's general unwillingness to invoke equal protection called into question the legitimacy of its doing so in this case. Its general unwillingness to defer to the Florida Supreme Court's judgment calls into question its convenient choice to do so on the matter of the "safe harbor" deadline. Its known defense of

federalism and state sovereignty renders suspect the willingness of the concurring Justices to find a violation of Article II in the recounts ordered by the Florida court. And the Court's traditional disposition not to intervene until it has to calls into question the decision to stop the manual recount before it could be completed or before Congress had a chance to evaluate the result.

In assessing this decision, I do not mean to suggest that the outcome of the election would have been different had the recount been allowed to run its course. Using statistical models, Posner has argued convincingly that the odds against definitively changing the result were great (Posner, 2001, 48-91). We now know that a statewide recount of undervotes most likely would not have changed the result. Ironically, a recount of both overvotes and undervotes – which neither side had proposed but which had been suggested by Bush to be necessary if *any* recounting were to be done – would have produced a Gore victory. While the recount was underway, the Florida legislature probably would have intervened to name a slate of Bush electors, as *Bush v. Gore* reaffirmed that they had a right to do (103). It is difficult to imagine Florida Governor Jeb Bush certifying the election of a Democratic slate as a result of a disputed recount. Nor, if the dispute had been thrown to the U.S. House of Representatives, in which the Republicans controlled a majority of state delegations, is it likely that the House would have elected Al Gore. I cannot imagine a different outcome to the election even though I believe that a slight majority of Florida voters and would-be voters intended to cast their ballots for Gore. My concern here is not with the election outcome but with the Court's public justification for it.

How, finally, does this case deepen our understanding of the ad hominem argument? First, it underscores that personal character is intrinsic to argument. One cannot simplistically dismiss it as a fallacy because it is a personal attack. Second, it underscores the importance of evaluating arguments relative to their context rather than fashioning content-invariant rules in the manner of the formal logician. Third, it bears out the utility of Walton's distinction among types of ad hominem arguments, particularly the difference between the abusive and circumstantial forms. Fourth, however, it suggests that there is an interaction effect between these two forms of the argument. Asserting merely that the *Bush v. Gore* decision should be distrusted because the majority Justices were partisan Republicans might be seen as a fallacious use of the abusive form. But that same conclusion might be reached as a result of the circumstantial ad hominem. If the Court reached a result so much at odds with its own prior commitments, one

legitimately might wonder why. Gillman concludes, after examining the record of all the courts involved in the 2000 election controversy, that the Justices in the Supreme Court majority "are thus the only judges involved in this election dispute who fall uniquely within the category that is most indicative of partisan politics: they made a decision that was consistent with their political preferences but inconsistent with precedent and inconsistent with what would have been predicted given their votes in other cases (Gillman, 2001, 189). What these writers are suggesting is that the circumstantial ad hominem provides the grounds for the abusive ad hominem, redeeming it as a reasonable argument rather than a fallacy.

Perhaps in an attempt to avoid this imputation of partisanship, the majority opinion claims that seven, not five, Justices agree that there are equal-protection violations that demand a remedy and that they disagree only as to the remedy (108). Similarly, James A. Baker III, who headed the Bush legal team, objected to the characterization of the decision by the *New York Times* as a 5-4 vote. He wrote, "The court's holding that the lack of uniform standards for the recount violated the 14th Amendment guarantee of equal protection was decided on a 7-to-2 vote, with one of two Democrats joining six of seven Republicans" (Baker, 2001, A24). But this is a misreading of the opinions of Justices Souter and Breyer. Neither believed that the U.S. Supreme Court should have taken the case or stopped the recount. Although they are concerned about equal protection, they do not acknowledge that Florida violated the 14th Amendment. Justice Souter wrote that "if this Court had allowed the State to follow the course indicated by the opinion of its own Supreme Court, it is entirely possible that there would ultimately have been no issue requiring our review" (121), because the equal protection concern might have been resolved. And Justice Breyer began his dissenting opinion, "The Court was wrong to take this issue. It was wrong to grant a stay. It should now vacate that stay and permit the Florida Supreme Court to decide whether the recount should resume" (132). Their unsuccessful effort to form a majority in favor of a remand to the Florida court should not obscure the fact that Justices Souter and Breyer viewed the case in a very different light from that of the majority Justices.

Finally, this case helps us to identify the felicity conditions for the circumstantial ad hominem. It should allege an inconsistency between prior and current commitments, not an easily resolvable disparity between belief and action. It should pre-empt the response strategies discussed in this paper: denial, distinction, and transcendence. And it should function as the premise or grounds

for an ad hominem of the abusive type.

It seems eerily anachronistic to examine this case in such detail in the aftermath of September 11, 2001. The terrorist attacks, if not the election, gave President George W. Bush all the legitimacy and approval he would need. Yet the case of *Bush v. Gore* remains important, not only because of its long-term legal implications but also because it reveals the interplay of judicial and political argument and deepens our understanding of the circumstantial ad hominem as a tool for argument analysis and criticism.

NOTES

i. I am using the text of the decision reproduced in Dionne and Kristol (2001). All internal page references are to this source.

ii. Prosise and Smith (2001) also emphasize inconsistencies in the Court's decision, but they do not follow closely the structure of argument in the individual opinions and they do not analyze the case with reference to the circumstantial ad hominem.

REFERENCES

Baker, J. A., III. (2001). Bush v. Gore: The fateful rulings. *New York Times*, July 7 (p. A24).

Berke, R. L. (2000). Angry Republicans vow bitter fight. In: *Correspondents of the New York Times*, 36 Days: The complete chronicle of the 2000 Presidential election crisis (pp. 268-69). New York: Times Books.

Dershowitz, A. M. (2001). *Supreme injustice: How the high court hijacked election 2000*. New York: Oxford Univ. Press.

Dionne, E. J., Jr., and Kristol, W., ed. (2001). *Bush v. Gore: The court cases and the commentary.* Washington: Brookings Institution Press.

Ferguson, R. A. (1990). The judicial opinion as literary genre. *Yale journal of law and the humanities*, 2, 201-19.

Gillman, H. (2001). *The votes that counted: How the Court decided the 2000 Presidential election.* Chicago: Univ. of Chicago Press.

Greenhouse, L. (2000). Another kind of bitter split. In: *Dionne and Kristol* (pp. 296-99).

Johnstone, H. W., Jr. (1959). *Philosophy and argument*. University Park: Pennsylvania State Univ. Press.

Kaplan, D. A. (2001). *The accidental President*. New York: William Morrow.

Posner, R. A. (2001). *Breaking the deadlock: The 2000 election, the Constitution,*

and the courts. Princeton: Princeton Univ. Press.
Prosise, T. O., and Smith, C. A. (2001). The Supreme Court's ruling in Bush v. Gore: A rhetoric of inconsistency. *Rhetoric & Public Affairs*, 4, 605-32.
Shogan, R. (2001). *Bad news: Where the press goes wrong in the making of the President*. Chicago: Ivan R. Dee.
Toobin, J. (2001). *Too close to call.* New York: Random House.
Walton, D. (1998). *Ad hominem arguments*. Tuscaloosa: Univ. of Alabama Press.
Walton, D. (2001). Searching for the roots of the circumstantial ad hominem. *Argumentation*, 15, 207-21.
Zarefsky, D. (2002). The structure of argument in Bush v. Gore. In: G. T. Goodnight, ed., *Arguing communication & culture* (pp. 537-45). Washington: National Communication Association.