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Bush v. Gore and the Uses of 'Limiting'

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COMMENT

Bush v. Gore and the Uses of "Limiting"

Following the Supreme Court's decision in *Bush v. Gore*,[1] the controversial case that decided the 2000 election, many scholars debated the meaning of the Court's explicit admonition that its "consideration was limited to the present circumstances."[2] The academic discussion of *Bush v. Gore*'s precedential value has since receded into the background. As the recent Sixth Circuit voting rights case of *Stewart v. Blackwell*[3] makes clear, however, the practical issue of whether lower courts must follow *Bush v. Gore*—or whether the decision was only good for the particular facts of that case—seems unlikely to disappear any time soon.[4]

In *Stewart*, the majority and the dissent disagreed not only about how the Court's jurisprudence should be interpreted, but also about whether *Bush v. Gore* should be treated as precedent at all. *Stewart* concerned disparities in Ohio's voting technology—for example, voters who lived in counties with the latest optical scan technology were notified if they had made any errors in their ballots, while those who used punch-card ballots or older scanners were not.[5]

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1. 531 U.S. 98 (2000).

2. *Id.* at 109 (per curiam); *see, e.g.*, Guido Calabresi, *In Partial (but Not Partisan) Praise of Principle*, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY 67, 80 (Bruce Ackerman ed., 2002) ("Will history hail the courage—the willingness to risk obloquy of Justices O'Connor and Kennedy in writing an opinion that was designed to self-destruct?"); Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 650 (2001) (describing *Bush v. Gore* as "the classic 'good for this train, and this train only' offer"). For contrasting views of *Bush v. Gore*'s precedential value, see *infra* note 14.

3. 444 F.3d 843 (6th Cir. 2006), *superseded by* 473 F.3d 692 (6th Cir. 2007) (en banc), *vacating as moot* 356 F. Supp. 2d 791 (N.D. Ohio 2004).

4. *Cf.* Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914 (9th Cir. 2003) (en banc) (overturning a panel decision that voting machines in California violated the equal protection principle articulated in *Bush v. Gore*).

5. *See* 444 F.3d at 870-71.

The court held that Ohio had violated the Equal Protection Clause by failing to utilize uniform voting technologies across the state.[6] The case has now been declared moot at the plaintiffs' request,[7] but the theoretical debate at the heart of *Stewart* remains fundamentally unsettled.

In support of its holding, the *Stewart* majority relied on *Bush v. Gore* extensively—quoting, citing, or mentioning the case more than twenty times.[8] Judge Gilman, dissenting, sharply criticized this reliance. *Bush v. Gore*, Gilman wrote, had provided clear instructions on its own use as precedent that required "limit[ing] the reach of *Bush v. Gore* to the peculiar and extraordinary facts of the case."[9] The Supreme Court had given an "explicit admonition"[10] to this effect. The *Stewart* majority's reply was straightforward: "Respectfully, the Supreme Court does not issue non-precedential opinions."[11] Noting its status as an inferior court, one that did not have "the luxury or the power to decide which Supreme Court decisions . . . to follow,"[12] the majority stated that it could not ignore "the Supreme Court's murky decision in *Bush v. Gore*."[13]

This Comment does not take a position on the merits of *Bush v. Gore* but merely asks what the Court was doing when it limited its consideration "to the present circumstances." Scholars have debated whether the language was innocuous, indicating that the principle deciding *Bush v. Gore* was to be narrowly applied (as the *Stewart* majority assumed), or whether the Court was intentionally limiting the application of the equal protection rationale to only one case (as the *Stewart* dissent urged).[14] This Comment looks to the Court's past use of limiting language to try to resolve this debate.

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6. *See id.* at 880.

7. *Stewart*, 473 F.3d 692; *see* Howard Bashman, *Sixth Circuit Deals Knock-Out Blow to Ohio Punch-Card Voting Lawsuit*, How Appealing, Jan. 13, 2007, http://howappealing.law.com/011307.html#021213.

8. *See* 444 F.3d at 859 & nn.8-9, 860, 861 & nn.11-13, 862, 865-66, 869 n.16, 870 & n.17, 873 & n.22, 874 & n.23, 875 & nn.24-25, 876-77.

9. *Id.* at 886 (Gilman, J., dissenting).

10. *Id.* at 889.

11. *Id.* at 873 n.22 (majority opinion).

12. *Id.* at 875-76.

13. *Id.* at 859 n.8 (quoting *id.* at 880 (Gilman, J., dissenting)).

14. *See* Charles Fried, *An Unreasonable Reaction to a Reasonable Decision*, *in* BUSH V. GORE, *supra* note 2, at 3, 15 ("[E]very student of the Supreme Court knows that it is canonical for the Court, when it decides for the first time an issue on an unusual set of facts, to issue such a caveat. It is almost boilerplate."); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1153 n.49 (2002) (stating that the majority in *Bush v. Gore* acted in a "classic minimalist fashion"); *see also* Owen Fiss, *The Fallibility of Reason*, *in* BUSH V. GORE, *supra* note 2, at 84, 88 (asserting that disclaimers such as the one in *Bush v. Gore* are

There are, in fact, several varieties of limiting language. The Court has used such language to *narrow* the scope of a principle that has been used to decide a case, to *nullify* a principle that has decided a previous case, or to *persuade* a future Court not to extend a ruling past the facts of the case being decided. But *Bush v. Gore*'s uniqueness is that it limited the case being decided "to the present circumstances," apparently using a principle to decide a case and then nullifying that principle *in the very same case*. When limiting is used to nullify (rather than to narrow) the principle in a case, it traditionally has been used to nullify the principle of a case that has already been decided. *Bush v. Gore*, I demonstrate, is the sole exception to this rule.

I. LIMITING AS NARROWING

I begin by noting two kinds of limiting language that the Court has used to announce that the principle behind a case is merely narrow, rather than applicable only to the facts of a single case. When the Court decides a case and offers reasons for its decisions, the very act of giving reasons will suggest that the same reasons could be applied to similar circumstances. As Frederick Schauer has put the point, "[O]rdinarily, to provide a reason for a decision is to include that decision within a principle of greater generality than the decision itself."[15]

On some occasions the Court explicitly limits the scope of the principle behind a case, without denying that the principle remains applicable to other circumstances. The Court can do this through one of two devices: it can state that a previous case is "limited *by* its facts," or it can describe a previous case as having a "limited holding." With these types of language, the Court draws attention to the specific facts of the case and warns that the principle applied should not be interpreted to extend very broadly. Both uses of limiting language are, in the classic sense, minimalist.[16]

"commonplace in common-law decisions"). *But see* Cass R. Sunstein, *Order Without Law*, *in* THE VOTE: BUSH, GORE, AND THE SUPREME COURT 205, 215 (Cass R. Sunstein & Richard A. Epstein eds., 2001) ("In fact this was a subminimalist opinion, giving the appearance of having been built for the specific occasion.").

15. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 640 (1995) (emphasis omitted); *see also* Fiss, *supra* note 14, at 88-89.

16. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3-4 (1999).

First, the Court may write that the "general language" of a previous opinion "must be construed and limited by the facts of the case"[17] or that "[t]he implications of this case are limited by the facts."[18] The point here is to caution against an overbroad reading of the opinion rather than to deny that the opinion has an application outside that particular case. The use of "limited by" serves as a caveat and not as an absolute bar to future application of the case.[19] That a case is "limited by its facts" does not mean that its application is limited *only* to those facts, as the Court's language in *Hudson v. Palmer* suggests: "While *Parratt* [*v. Taylor*] is necessarily limited by its facts to negligent deprivations of property, it is evident . . . that its reasoning applies as well to intentional deprivations of property."[20]

Second, a later Court may say that an earlier Court has "limited its holding" to a certain set of circumstances. This use of limiting language again narrows, rather than nullifies, the decision. The Court's goal is to limit the applicability of the principle of a prior case to similar circumstances. Thus, when the Court notes a prior case in which it "expressly limited [its] holding to 'the narrow circumstances'"[21] of that case, the term "narrow circumstances" simply designates a limited class of circumstances, but it does not restrict the members of that class to only the case mentioned.

17. MacKay v. Easton, 86 U.S. 619, 632 (1873); *see also* Virginia v. Rives, 100 U.S. 313, 328 (1879) ("The language must, therefore, be limited by the facts of the case.").

18. McElroy v. United States, 455 U.S. 642, 655 n.19 (1982).

19. *Cf.* Fried, *supra* note 14, at 15; *see also* Fiss, *supra* note 14, at 88 ("Such disclaimers . . . . do not disavow principle, but rather warn against overreading the principle articulated.").

20. 468 U.S. 517, 533 (1984) (discussing *Parratt v. Taylor*, 451 U.S. 527 (1981)).

21. Brown v. Legal Found. of Wash., 538 U.S. 216, 238 n.10 (2003) (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980)); *see also, e.g.*, Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 125 (1994) (O'Connor, J., dissenting) (describing a holding in an earlier case as "expressly 'limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments'" (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 n.3 (1985))); Evans v. United States, 504 U.S. 255, 287 (1992) (Thomas, J., dissenting) ("We expressly limited our holding to campaign contributions."); Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 510 n.13 (1988) ("Our holding is expressly limited to cases where an 'economically interested party exercises *decisionmaking* authority in formulating a product standard for a private association that comprises market participants.'"); Welsh v. Wisconsin, 466 U.S. 740, 749 n.11 (1984) ("Our decision in *Payton*, allowing warrantless home arrests upon a showing of probable cause and exigent circumstances, was also expressly limited to felony arrests.").

II. LIMITING AS NULLIFICATION

When the Court limits a case *to* its facts, it is not trying to narrow a principle; it is trying to void the principle of the case by restricting its application not merely to a narrower set of circumstances but to only a single set of facts. This makes nullification the most extreme version of narrowing, for when the Court uses the language of "limited by" or "limited holding," it is still announcing that a principle exists (however narrow) that can be applied beyond a single set of circumstances.

I refer to the act of limiting a decision to its facts as nullifying the principle behind the decision. By "nullifying" I mean that the principle should be taken as not applying to any other cases, so that the only aspect of the case that retains any binding force is its particular result—a decision for or against the plaintiff. Thus, a case that has been limited to its facts has no precedential value, and it cannot be cited as governing subsequent cases: the scope of a limited principle is only one case (at which point we may wonder whether it is a principle at all).[22] Although limiting as nullification is not necessarily the most common usage of limiting language,[23] it is the central or core meaning of the phrase "limiting a case to its own facts."

The best introduction to limiting as nullification comes not from the rare cases in which limiting language is employed (i.e., when a case is in fact limited), but from cases in which it is recommended or anticipated. It becomes clear from these uses of limiting language that limiting a case is a (small) step short of overruling the case. Thus, in one such use, Justice Kennedy warned that a case's analysis "must be respected with reference to dwellings unless that precedent is to be overruled or so limited to its facts that its underlying principle is, in the end, repudiated."[24] Justice Thomas wrote of *Mayer v. Chicago*[25] that even if a previous line of cases "were sound, *Mayer* was an unjustified extension that should be limited to its facts, if not overruled."[26] Similarly, Justice Harlan corrected what he believed was the majority's error in interpreting *Stanley v. Georgia*,[27] which, "far from overruling *Roth* [*v. United*

22. Justice Rehnquist seemingly blurred this distinction in *Moore v. Illinois*, when he wrote that a case had been "largely limited to its facts." 434 U.S. 220, 233 (1977). By including the word "largely," Rehnquist implied that the case still had some precedential value.

23. *See supra* Part I.

24. Minnesota v. Carter, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring).

25. 404 U.S. 189 (1971).

26. M.L.B. v. S.L.J., 519 U.S. 102, 141 (1996) (Thomas, J., dissenting).

27. 394 U.S. 557 (1969).

States], did not even purport to limit that case to its facts."[28] The unmistakable impression from these passages is that, for the Court, limiting to the facts is nearly the same as overruling a case, with the exception that in limiting a case the particular result of the decision still stands. Otherwise, when a case is thus limited, it no longer remains good law: its value as precedent is, to use Justice Kennedy's words, "repudiated."[29]

A. Actual Nullification

There are two primary ways in which the Court uses limiting language to nullify. First, an opinion may actually limit an earlier case to its facts, simply by declaring that the case has been limited to its facts or that it should be thus read. We might call this the "performative" use of limiting to the facts[30]: when a Court *says* it is limiting an earlier case to its facts, it *is* actually limiting it. This use of limiting is arguably most akin to that of *Bush v. Gore*, which limited its consideration "to the present circumstances."[31] In *Williams v. Union Central Life Insurance Co.*, for instance, the Court distinguished the case from a lower court decision in which "there were provisions in the [insurance] policy, quite different from those before us, which were of doubtful meaning."[32] But to remove any doubt that the superficially similar decision might conflict with the outcome of *Williams*, the Court wrote that "[t]he views expressed by the court may be taken as *limited to the facts* of the particular case."[33]

A more straightforward example is found in *Rutkin v. United States*,[34] in which the Court, distinguishing the case at bar from *Commissioner v. Wilcox*,[35] took no chances that *Wilcox* could still be taken to be good law and accordingly

28. United States v. Reidel, 402 U.S. 351, 358 (1971) (Harlan, J., concurring) (discussing *Roth v. United States*, 354 U.S. 476 (1957)).

29. Again, the point of these examples is not that the Court is *actually* limiting a case to its facts, but that the Court understands what actually limiting a case to its facts entails, even when it refers to "limiting" in an offhanded way.

30. *See* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 1-11 (J.O. Urmson & Marina Sbisà eds., 2d ed. 1975).

31. It might be argued that the difference in language is significant, in that "facts" can be limited, but the word "circumstances" inherently suggests application to other, similar situations. But if anything, *Bush v. Gore*'s limiting its consideration "to the *present* circumstances" severely constrains any implied broadening.

32. 291 U.S. 170, 183 (1934).

33. *Id.* (emphasis added).

34. 343 U.S. 130 (1952).

35. 327 U.S. 404 (1946).

"limit[ed] that case to its facts."[36] A later Court observed that although *Rutkin* did not explicitly overrule *Wilcox*, it had nonetheless "thoroughly devitalized" and "effectively vitiated" *Wilcox*.[37]

A second way in which the Court may "limit a case to its facts" is not by stating that the case has been limited to its facts, but by noting how a previous case or series of cases has led to the actual nullification of its principle. Justices may use the language of "limited to its facts" to emphasize that a prior Court has already nullified the principle of a previous case without having expressly said so. For example, the Court in *United States v. Villamonte-Marquez* noted that *Ex parte Bain*[38] (on which the dissent relied) "was long ago limited to its facts"[39] by *Salinger v. United States*.[40] In a more recent opinion, Justice Brennan dismissed the majority's use of the *Insular Cases*[41] by noting that "these cases were limited to their facts long ago."[42] And one year after *Bush v. Gore*, Justice Kennedy provided a good example of how a case slowly dies by first being limited to its facts. In *Lee v. Kemna*, Kennedy noted that *Fay v. Noia*[43] had been "limited to its facts"[44] in *Wainwright v. Skyes*[45] before finally being "put to rest"[46] by *Coleman v. Thompson*.[47]

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36. *Rutkin*, 343 U.S. at 138.

37. James v. United States, 366 U.S. 213, 216-17 (1961).

38. 121 U.S. 1 (1887).

39. 462 U.S. 579, 582 n.2 (1983).

40. 272 U.S. 542 (1926). *Salinger*'s language provides an example of limiting without using limiting language: "The principle on which the decision proceeded," the Court wrote with reference to *Ex parte Bain*, "is not broader than the situation to which it was applied." *Id.* at 549.

41. *E.g.*, Balzac v. Porto Rico, 258 U.S. 298 (1922); Ocampo v. United States, 234 U.S. 91 (1914); Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903).

42. United States v. Verdugo-Urquidez, 494 U.S. 259, 291 (1990) (Brennan, J., dissenting); *see* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 397 n.18 (1968) ("The *Jewell-LaSalle* decision must be understood as limited to its own facts."); *see also* Lodge 76 Int'l Ass'n of Machinists v. Wis. Employment Relations Comm'n, 427 U.S. 132, 159 n.5 (1976) (Stevens, J., dissenting). That some uses of limiting language were made by Justices not in the majority does not prevent them from being accurate descriptions of *past* majority decisions. Sometimes claims that a case has been limited will be inaccurate; when this happens, the limiting no longer is *descriptive* of the past case or cases but is instead an example of *persuasive* limiting language. *See infra* Section II.B.

43. 372 U.S. 391 (1963).

44. 534 U.S. 362, 394 (2002).

45. 433 U.S. 72 (1977).

46. 534 U.S. at 394.

47. 501 U.S. 722 (1991).

B. Persuasive Nullification

"Limiting to the facts" need not always be used to signify that the principle of a case has actually been nullified. A concurring or dissenting opinion may say that the principle announced in a case is "limited to its facts" as a way of trying to *persuade* us that the case has been so limited, rather than actually limiting the case. That is, a dissenting or concurring Justice may describe the holding articulated by the majority as "limited to its facts"—even though the majority itself has not stated as much—as a way of suggesting that the principle should apply only to the instant case. The purpose of using language in this way is to persuade a future Court to disregard the principle of the case or to predict that a future Court will in fact disregard it. In other words, when a Justice limits a case to its facts persuasively he or she does not *actually* limit the case, but only *purports* to do so.[48]

Justice Thurgood Marshall, who frequently used persuasive limiting language in his dissents,[49] once concluded a dissent by stating that "[b]ecause today's decision, though limited to its facts, disobeys this important constitutional command, I dissent."[50] There is no indication, however, that the majority accepted this characterization of its ruling. Commentators have described Marshall's "predictive" limiting language as "probably wishful thinking."[51] Justice Brennan, dissenting in *FCC v. Pacifica Foundation*, similarly characterized the majority's opinion as "limited to its facts."[52] While the

48. For a particularly good example of "purporting" that the majority has limited the case to its facts, see *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (Breyer, J., concurring). Ernest Young has read Justice Breyer's opinion in this case as an example of limiting as narrowing. *See* Young, *supra* note 14, at 1153 n.49. However, I believe it is better characterized as using limiting language as a means of trying to persuade us that the majority has limited the case to its facts.

49. *See* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 870 (1990) (Marshall, J., dissenting) ("The Court's holding is necessarily limited to the facts of this case."); Dothard v. Rawlinson, 433 U.S. 321, 346-47 (1977) (Marshall, J., dissenting) ("Although I do not countenance the sex discrimination condoned by the majority, it is fortunate that the Court's decision is carefully limited to the facts before it."). Notably, the majority opinions in these cases do not give any impression that the holdings were limited to the facts before the Court.

50. United States v. Sokolow, 490 U.S. 1, 18 (1989) (Marshall, J., dissenting) (citation omitted).

51. Aviam Soifer & Miriam Wugmeister, *Mapping and Matching DNA: Several Legal Complications of "Accurate" Classifications*, 22 HASTINGS CONST. L.Q. 1, 18 n.57 (1994).

52. 438 U.S. 726, 772 (1978) (Brennan, J., dissenting).

majority did "emphasize the narrowness" of its holding, it did not appear to believe that it was limiting the holding to the facts of the case.[53]

The distinction between actual and persuasive use of limiting language shows the importance of its presence in the majority opinion rather than in a concurrence or dissent. This is why it is particularly noteworthy that the *majority* in *Bush v. Gore* limited its decision to the facts. Only the Justices in the majority can actually limit a case to its facts; the other Justices must simply wait and hope.

CONCLUSION

In this Comment, I have offered a taxonomy of the Supreme Court's use of various types of limiting language. I have tried to demonstrate that the use of limiting language by the *Bush* Court is historically unique. No other majority in the history of the Court has applied limiting language to the very case being decided; all past uses of "limiting the case to its facts" by the majority in a decision have applied to *earlier* cases and not to the case being decided. If we take this past history as governing the meaning of "limiting to its facts," then the meaning of *Bush v. Gore*'s limiting language (namely, that its "consideration is limited to the present circumstances"[54]) is indeed to nullify the principle of that case. And this reading inevitably raises the deeper theoretical question of whether the Court has the power to limit the principle of a decision to a single case *in the very case being decided* and not in a later case. If the Court must give reasons for its decisions, it is unclear whether it should have the power to make those reasons non-general, i.e., to limit their application beyond one set of facts.[55] But this is precisely what the Court in *Bush v. Gore* purported to do.[56]

The *Stewart* decision, recently declared moot, will not force the Court to confront its ambiguous command. Thus it still remains for lower courts to

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53. *Id.* at 750 (majority opinion).

54. 531 U.S. 98, 109 (2000) (per curiam).

55. *See* Ronald Dworkin, *Introduction* to A BADLY FLAWED ELECTION 1, 10 (Ronald Dworkin ed., 2002) ("No court can decide how far its own rulings will serve as precedents for or influence later decisions.").

56. Perhaps the Court did not use such limiting language self-consciously and instead (and possibly for the first time) used a variation of "limited to the facts" simply to emphasize the narrow principle at play. The opinion, notoriously, was written under great time pressure. *See* JAN CRAWFORD GREENBURG, SUPREME CONFLICT 174 (2007) ("The liberal and conservative justices agree today on one thing: If only they had had more time, they would have produced a better decision."). I am grateful to Orin Kerr for pressing me on this point.

decide how to interpret *Bush v. Gore*'s limiting language. The Supreme Court in *Bush v. Gore* used a common technique (limiting a case to its facts) in a wholly uncommon way (limiting the case *being decided* to its facts), and the result has predictably been confusion. Only a further clarification by the Court can definitively settle what, exactly, it meant by its words.

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