# Case Note

## The Kabuki Mask of *Bush v. Gore*

*Bush v. Gore*, 531 U.S. 98 (2000).

Is law merely Kabuki politics?[1] Many critics consider the Supreme Court's recent foray into electoral matters, *Bush v. Gore*,[2] as resounding evidence that it is, with concerns for equality and electoral deadlines constituting the "conservative" Justices' masks. These critics point to flaws in the equal protection argument,[3] the "conservative" Justices' decision not to remand the case to determine appropriate vote-counting standards,[4] and the irony of the pro-federalism Rehnquist Court's intervention in a state supreme court's interpretation of state law.[5] They conclude that political animus must explain the result.

In this Case Note, I assume arguendo that the equal protection critiques are valid (even though some disagree[6]). I nevertheless seek to justify the Court's equal protection holding, not as correct on its own terms, but as a vehicle through which the Court addressed a likely First Amendment freedom of association violation. The real problem was not that the

1. For another use of the Kabuki metaphor, see E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992) ("Notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.").

2. 531 U.S. 98 (2000).

3. The predominant criticism is that "[t]he claimed wrong in Florida, the disparity in the standards for counting contested ballots, pales before other disparities in access to a meaningful vote, most notably the well-documented failure of voting machines used in one part, but not in another, of many states, Florida included." Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 650 (2001).

4. Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1427-28 (2001).

5. *Id.* at 1408.

6. *E.g.*, Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v. Gore, 68 U. CHI. L. REV. 657, 674 (2001) (arguing that this equal protection critique is not legitimate, as "the Equal Protection Clause requires equality of treatment within a jurisdiction, but not between jurisdictions" and that an equal protection violation arose because of the different standards used by different counting teams in the same county).

difference between standards was inherently too large but rather that political partisanship (i.e., viewpoint discrimination) may have caused it.[7]

In particular, I focus on how the absence of specific standards guiding permissible legal votes—when the instrumental effect of a county's choice of recount standard was immediately apparent—provided counties with an opportunity to try to manipulate the election results.[8] The risk of viewpoint discrimination arose because the county canvassing boards in predominantly Democratic counties, such as Broward (on which I focus in this Case Note), knew that Gore would lose if the pre-recount vote held. There was a substantial possibility that Broward's Democratic agenda may have caused it to choose a more lenient vote-counting standard in order "to maximize the number of recovered votes."[9] Even if the resulting standard were applied equally to Bush and Gore votes (which I presume to be true), this partisan choice of standards would—for reasons that I explain—unconstitutionally restrict Bush voters' freedom of association by intentionally providing Gore with a relative gain.

Part I explains the bare-bones facts pertinent to this Case Note and briefly restates the Court's equal protection holding.[10] Part II discusses the doctrinal underpinnings of freedom of association analysis. Part III describes how *Bush v. Gore* would have presented a unique but cognizable—and potentially meritorious—relative restriction of association.

## I

On November 8, 2000, Republican Governor George W. Bush narrowly led Democratic Vice President Al Gore in Florida's presidential vote. As part of protest and contest proceedings, various county canvassing boards decided to conduct manual recounts. The touchstone for determining

7. This First Amendment issue was not properly before the Court because it was not one of the questions presented for Supreme Court review. Other lower court decisions, *e.g.*, Siegel v. LePore, 234 F.3d 1163 (11th Cir. 2000), did have First Amendment components.

8. Even if counties could properly have discretion to adopt different standards, and could adopt virtually any standard at all in advance, there are additional issues posed by elected boards adopting standards in the middle of a contest when the instrumental effect is immediately apparent. *See* Richard H. Pildes, *Disputing Elections*, *in* THE LONGEST NIGHT (Arthur Jacobson & Michele Rosenfeld eds., forthcoming 2001) (on file with author). This Case Note focuses on the narrower issue of the standard's arbitrariness when the instrumental effect of a choice is immediately apparent. *Cf. infra* note 49 (discussing a First Amendment standardless discretion argument and explaining why I do not raise it in this Case Note).

9. Richard A. Posner, Bush v. Gore*: Prolegomenon to an Assessment*, 68 U. CHI. L. REV. 719, 721 (2001); Steve Harrison, *Tougher Standard for Counting Ballot Dimples Angers Democrats*, MIAMI HERALD, Nov. 26, 2000, 2000 WL 31357064.

10. For a more thorough description of the facts, see Note, *Non Sub Homine?: A Survey and Analysis of the Legal Resolution of Election 2000*, 114 HARV. L. REV. 2170, 2174-81 (2001).

a legal vote was "the intent of the voter,"[11] but each county interpreted the "intent of the voter" differently. Both Palm Beach County and Broward County, for instance, counted dimpled chads[12] as demonstrating "the intent of the voter," but Palm Beach County would only do so when all of the chads on that ballot were dimpled,[13] while "Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties."[14] This led to a net gain of 567 Gore votes in Broward County and 215 Gore votes in Palm Beach County—also a result markedly disproportionate to the difference in population between the counties.

The Court's per curiam decision explained that "[t]he problem inheres in the absence of specific standards to ensure . . . equal application [of 'the intent of the voter' standard],"[15] as "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another."[16] The Court deemed this recount process "inconsistent with the minimum procedures necessary to protect the fundamental right of each voter" under the Equal Protection Clause.[17]

## II

The right to vote has traditionally implicated both freedom of association and equal protection:

> [S]tate laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. . . . We have repeatedly held that freedom of association is protected by the First Amendment.[18]

11. Gore v. Harris, 772 So. 2d 1243, 1256 (Fla. 2000) ("No vote shall be declared invalid . . . if there is a clear indication of the intent of the voter . . . ." (quoting FLA. STAT. ch. 101.5614(5) (2000))).

12. A "dimpled" chad is indented, but all four of its corners are still attached to the ballot.

13. Amy Driscoll, *Review of Undervotes Includes Dimples, Chads, Clean Punches*, MIAMI HERALD, Feb. 26, 2001, 2001 WL 1644977.

14. *Bush*, 531 U.S. at 107.

15. *Id.* at 106.

16. *Id.*

17. *Id.* at 109. In this Case Note, I do not address whether the Court's remedy of stopping the recount was legitimate.

18. Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).

This right to associate freely is primarily a group right,[19] derived from the "nexus between the freedoms of speech and assembly,"[20] for group members to express their shared beliefs collectively.[21]

The Court's scrutiny of regulations that burden a group's "collective effort on behalf of [its] shared goals"[22] varies according to the extent of the burden on association.[23] States are permitted a fair degree of leniency in enacting electoral restrictions,[24] and, in most cases, the states' "important regulatory interests" in conducting free, fair, and efficient elections are "generally sufficient to justify reasonable, nondiscriminatory restrictions."[25] Discriminatory restrictions are suspect even when the burden is minimal, as they compromise the "integrity and reliability of the electoral process itself";[26] and the level of corresponding scrutiny would be much higher[27]—almost certainly strict scrutiny.[28]

## III

*Bush v. Gore* presents a different sort of restriction of association than the Court's previous election cases recognize: a relative restriction of association. Unlike the previous election cases, in which a governmental

19. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (describing how "group association" enhances the advocacy of the group members' shared beliefs). The "primarily" qualifier is necessary because a few cases, *e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 (1977); Elrod v. Burns, 427 U.S. 347, 357-60 (1976), focus on how an individual cannot be compelled to join a political party as a condition of public employment.

20. *Patterson*, 357 U.S. at 460.

21. *See, e.g.*, Cousins v. Wigoda, 419 U.S. 477, 487 (1975) (describing a political party's collective right to associate); *see also* Julia E. Guttman, Note, *Primary Elections and the Collective Right of Freedom of Association*, 94 YALE L.J. 117, 121 (1984) (describing the "collective right of freedom of association possessed only by political party associates and not by independent voters").

22. Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984).

23. Burdick v. Takushi, 504 U.S. 428, 434 (1992).

24. *Id.* at 433 ("[T]o subject every voting regulation to strict scrutiny and to require the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.").

25. Anderson v. Celebrezze, 460 U.S. 780, 788 (1983).

26. *Cf. id.* at 788 n.9 (describing how "evenhanded restrictions . . . protect the integrity and reliability of the electoral process").

27. *Id.* at 793 ("[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint [or] associational preference . . . .").

28. Harwin v. Goleta Water Dist., 953 F.2d 488, 491 n.6 (9th Cir. 1991) ("[D]iscriminatory burdens on First Amendment rights have typically been subjected to strict scrutiny."). My assumption linking *Harwin* and the *Burdick* focus on severity of restriction is that a burden on association would qualify as "most severe" either when the burden is so large that it effectively precludes association, or when the restriction on one group's ability to associate (no matter how small) is deliberately inflicted. *Cf.* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 596 (1997) (Scalia, J., dissenting) (explaining how in dormant Commerce Clause analysis the Court analyzes facially discriminatory statutes under a virtual per se rule of invalidity even though it normally analyzes facially neutral statutes under a balancing test).

restriction made it harder to associate with a candidate,[29] Broward's use of a lenient recount standard made it easier for people to associate with a candidate—possibly too easy, converting potential nonvotes into votes.[30] The problem ensues because Gore gained disproportionately more votes. To show that this relative gain poses a freedom of association problem (if one concedes vote-machine failure and equal application of the standard[31]), I must establish that (1) this relative gain qualifies as a restriction of association even if the use of a lenient standard made it equally easier for individuals to associate with each candidate; (2) the choice of this lenient standard, when this relative gain could be foreseen, could qualify as discriminatory and therefore trigger strict scrutiny; and (3) this lenient standard would likely fail the narrow tailoring prong of strict scrutiny.

Freedom of association analysis is group-oriented, focusing on group members' ability to express shared beliefs collectively.[32] One can restrict association either by limiting group members' participation or by diluting its expressive value.[33] In elections, this right of association involves voters rallying around candidates,[34] and thus a restriction on association results when either a group does not have the ability to rally around a candidate or the value of that rallying is diminished.[35] From the perspective of rallying strength in a winner-take-all contest, an opponent's relative gains are functionally equivalent to one's own direct losses.[36] Gore's relative gain of

29. *Anderson* involved a deadline for statements of candidacy that made it more difficult for those supporting alternative candidates to associate. 460 U.S. at 793. *Burdick* involved a voter's inability to write in a vote for Donald Duck because of a statute prohibiting all write-in votes. 504 U.S. at 437-38.

30. Individuals have the right to abstain from voting for an office. *See Burdick*, 504 U.S. at 438 ("Reasonable regulation of elections *does not* require voters to espouse positions that they do not support."). Counting dimples may convert some purposeful nonvotes into votes.

31. If counting teams applied the standard more leniently to Gore dimples than Bush dimples, it would almost certainly constitute impermissible viewpoint discrimination. *Cf.* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("Once [a state] has opened a limited forum . . . [it may not] discriminate against speech on the basis of its viewpoint.").

32. *See supra* notes 19-21 and accompanying text.

33. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000) (inquiring whether the inclusion of openly homosexual scout leaders would impair the group's desire to depict homosexual conduct as illegitimate); *cf.* Ward v. Rock Against Racism, 491 U.S. 781, 790-91 (1989) (describing how a municipal regulation limiting the volume of sound amplifiers restricts the expressive value of speech (albeit permissibly)).

34. *Anderson*, 460 U.S. at 788.

35. Williams v. Rhodes, 393 U.S. 23, 31 (1968) ("The right to form a party for the advancement of political goals means little if a party can be . . . denied an equal opportunity to win votes."); *cf.* Guttman, *supra* note 21, at 123-24 ("A state infringes freedom of political association if it . . . interferes with a political party in such a way as to deny party members the advantages conferred by association . . . .").

36. For instance, giving two votes to one candidate and one vote to everyone else is the same as taking one vote away from everyone else. The Court has recognized this "correlative disadvantage" in other election contexts. *Anderson*, 460 U.S. at 791 (discussing how with an early filing deadline "[c]andidates . . . within the major parties . . . have the political advantage of continued flexibility; for independents, the inflexibility imposed by the March filing deadline is a correlative disadvantage because of the competitive nature of the electoral process.").

567 votes restricts Bush association to the same extent as if 567 Bush voters were precluded from voting.[37]

Recognition of a cognizable injury, however, is only the first step, as these relative gains are common and almost always permissible. For instance, a relative gain would likely arise from any decision to conduct a manual recount to remedy a possible undervote—and an unknowable net gain would arguably be just, given that there probably were more Gore undervotes in Broward County—and these relative gains would be allowed under the lower level of scrutiny applied to nondiscriminatory election restrictions. It is only when the relative gain is accompanied by (and its size probably enhanced by[38]) an intent to discriminate that this relative gain would be subject to strict scrutiny and perhaps violate the Constitution.[39]

The crux of the analysis centers around this proof of discriminatory intent. Considering that the right to vote dually implicates freedom of association and equal protection, the standard to ascertain invidious intent would presumably be the same as the standard used to prove a discriminatory purpose in antidiscrimination law.[40] In the recount context, this discriminatory purpose would be something more than merely remedying an undervote; it would involve using means at the county's disposal to help one candidate win.

37. My baseline of zero dilution is the pre-recount totals. I use this baseline neither because I believe that the pre-recount level is more accurate nor because the "true" vote count is theoretically unknowable, but rather because Broward did not know the "true" count or the right standard to use at the time of its decision. This Case Note questions whether *given the information that Broward had before it*, Broward was justified in making the choice that it did for the reasons it may have made it. It is a question of the constitutionality of means, not of the legitimacy of the ends. In that sense, Broward could have uncovered exactly the "right" number of votes, and the recount still could have been unconstitutional if the means were flawed. That being said, evidence of increased accuracy would raise a presumption of noninvidious intent, and evidence that Broward had legitimate reasons for being so lenient would increase the probability that its choice of standards was a narrowly tailored way of remedying machine-induced undervotes. *See infra* notes 40-48 and accompanying text.

38. The size of the restriction is independent of the actual violation. I suspect, however, that most discriminators will know what they are doing, and there will be larger relative gains.

39. Allegations of invidious intent would arise against many actors in the Florida election controversy, *see, e.g.*, Pildes, *supra* note 8 (manuscript at 2) ("Rather than acting behind a veil of ignorance, the relevant actors are irretrievably corrupted with knowledge of who will be advantaged, [and] who will lose, as a result of their rulings. As a result, half of public opinion, at least, will likely view any action as partisan in motivation."), and several of these allegations may be right. For instance, I would suggest that Katherine Harris's actions might qualify for a higher level of scrutiny, as her Republican affiliation might have motivated the rigidity of her interpretations of various Florida statutes.

40. Title VII disparate treatment suits involve proof of a discriminatory purpose by a private employer, *see* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977), and Fourteenth Amendment Equal Protection Clause cases involve intentional discrimination by a state actor, *see* Washington v. Davis, 426 U.S. 229, 239 (1976). In most cases, proof of a statistical disparity will not suffice to create an inference of discriminatory motive, *see id.* at 247-48, but if the disparity is large enough, it may suffice to prove a prima facie violation, Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08 (1977).

Although the discrimination would be more overt if the leniency were selectively applied, the choice to use a more lenient standard could support a finding of intentional discrimination if the standard was chosen with the expectation that its added leniency would have a disparate effect.[41] This would be true—even if the vote count was actually made more accurate ex post[42]—if the reason for the added leniency was not a good-faith belief that these dimples were actually votes but rather a partisan desire to benefit Gore.[43] Admittedly, the evidence on this point is inconclusive, as no objective evidence exists as to whether more dimples were machine-induced or purposeful nonvotes. But circumstantial evidence of invidious intent exists in that: (1) Broward counted dimples in more circumstances than other counties using the same type of voting machine;[44] (2) Broward never presented any evidence specific to its machines as to why they might have produced more dimples than other counties' machines;[45] and (3) Broward recovered a disproportionately high number of Gore votes relative to these other counties.[46] At the very least, these aspects make one seriously consider the possibility that Broward was not just legitimately remedying the undervote but had in fact crossed the line into viewpoint discrimination.

It is for the same comparative reasons that Broward's standard would likely fail strict scrutiny. Strict scrutiny requires that the governmental regulation serve a compelling state interest and be narrowly tailored.[47] Although remedying machine failure would certainly have qualified as a compelling state interest, it is unlikely that Broward's standard would be considered narrowly tailored. Like the rest of the counties conducting a

41. In *Green v. USX Corp*., 896 F.2d 801 (3d Cir. 1990), the Third Circuit explained that, in the antidiscrimination context, when a facially neutral test is employed precisely because of its known discriminatory effects, that is intentional discrimination (and disparate treatment) under Title VII. *See id.* at 804; *see also* Bullock v. Carter, 405 U.S. 134, 144 (1972) (striking down a law that imposed substantial assessments as a way of limiting the number of primary candidates, and noting "the obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community"); *cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (striking down a superficially neutral statute that appeared to target religious animal sacrifice). *But see* United States v. O'Brien, 391 U.S. 367, 383-84 (1968) (expressing skepticism about invalidating legislation based on invidious intent).

42. Like other First Amendment doctrines, restrictions on viewpoint discrimination aim at ex ante deterrence of official misconduct, not just correction of harms ex post. *Cf.* Massachusetts v. Oakes, 491 U.S. 576, 586 (1989) (Scalia, J., concurring in part) ("The overbreadth doctrine serves to protect constitutionally legitimate speech not merely *ex post* . . . but also *ex ante*, that is, when the legislature is contemplating what sort of statute to enact.").

43. This determination is complicated by the Gadamerian phenomenon that one's identity influences how one views the world. *See generally* William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990) (describing Gadamerian hermeneutics). It might be because of Broward's Democratic leanings that it viewed dimples as votes rather than nonvotes.

44. *See* Posner, *supra* note 9, at 722; Harrison, *supra* note 9.

45. Perhaps Broward could have produced this evidence if given more time.

46. The more disproportionate a gain for Gore, the more suspicious the intent in adopting the corresponding standard. Proof of a disparate impact, however, does not usually suffice to prove a discriminatory purpose. *See supra* note 40.

47. Shaw v. Hunt, 517 U.S. 899, 902 (1996).

manual recount, Broward had to choose among several standards without having any objective evidence indicating which standard was most accurate. The comparison with other counties who faced the same undervote dilemma and chose to count dimples in a more narrow way reveals a substantial probability that Broward's lenient standard was not narrowly tailored to the task at hand.[48]

## IV

Unfortunately, no one will ever know whether the lenient standard used by Broward County during the manual recount (or even the more restrictive standards being applied in other counties) actually made the vote count more or less accurate. For that reason, the Court's equal protection rationale will always remain suspicious on its own terms. Regardless, there was a substantial possibility that Broward's choice to use a lenient standard represented a conscious attempt to manipulate the manual recount process in order to help the trailing candidate overtake the presumed winner—causing substantial First Amendment concerns.[49] Perhaps, then, the Justices' concern for equal protection really was a mask, but it was not just politics hiding underneath.[50]

*—Nick Levin*

48. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986) (Powell, J., plurality opinion) ("[T]he means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose.").

49. Geoffrey Stone broaches a different sort of First Amendment argument based on a line of freedom of speech cases, *e.g.*, Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988), involving facial challenges to regulations with "arbitrary" standards that delegate "standardless discretion" to decisionmakers. Geoffrey Stone, *Equal Protection? The Supreme Court's Decision in* Bush v. Gore, *at* http://www.fathom.com/story/story.jhtml?story_id=122240 (last visited July 30, 2001) (applying the standardless discretion line of cases to *Bush v. Gore*). The Republican lawyers attempted such an argument (unsuccessfully) in *Siegel v. LePore*, 234 F.3d 1163 (11th Cir. 2000), claiming that Florida law did not provide any standards for the county's decision whether to conduct a recount.

I do not make the standardless discretion argument in this Case Note for three reasons. First, I focus on the actual application of the intent of the voter standard by Broward. "An as-applied challenge, not a facial challenge, is the proper vehicle to address any unconstitutional implementation." Tennison v. Paulus, 144 F.3d 1285, 1287 (9th Cir. 1988). Second, there were important timing aspects to the counties' adoption of lenient standards that a facial challenge does not address—i.e., the instrumental effect of the county's choice was immediately apparent, *see supra* note 8. Third, in the specific context of *Bush v. Gore*, the purpose underlying facial challenges—to prevent censorship and chilled speech, *see Forsyth County*, 505 U.S. at 131—was not implicated. No matter how many corners needed to be detached to count as a legal vote, no one was going to speak *less* than they had before the recount began. *Cf. Siegel*, 234 F.3d at 1189 n.14 (Anderson, C.J., concurring specially) (describing how no chilled speech resulted from the counties' decisions whether to conduct a manual recount).

50. *See generally* Richard A. Pildes, *Two Conceptions of Rights in Cases Involving Political "Rights,"* 34 HOUS. L. REV. 323 (1997) (suggesting that courts often use "rights" in cases involving democracy not to protect individualized interests, but to protect the structural integrity of democratic processes).