

In the Supreme Court of the United States

McCain v. Obama

Scheduled for oral argument
Monday, October 20, 2008, 10:00 a.m.
[as if it were Monday, December 1]

Neutral Memorandum of Law from Acting Clerk of Court, Edward B. Foley

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APPENDIX: Notice of Supplemental Authority (October 2, 2008)

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Monday, October 20, 2008, 10:00 a.m.
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Introduction

This memorandum is prepared for the benefit of the Court and arguing Counsel, to help them prepare for the oral argument in this case. It assumes familiarity with the stipulated Statement of the Case. Its analysis of the issues before this Court strives for balance and impartiality.

The petitions for certiorari, which have been granted, present two questions for this Court's consideration, one concerning the Equal Protection Clause of the Fourteenth Amendment and the other concerning Article II of the U.S. Constitution. The Equal Protection question conceivably could be divided into two components: (1) whether, as the Colorado Supreme Court majority believed, Equal Protection *requires* counting the contested provisional ballots; and (2) whether, as the petitioners assert, Equal Protection *prohibits* counting these ballots. But the first of these two subcomponents is arguably not properly before this Court given the "independent and adequate state ground" doctrine: the Colorado Supreme Court alternatively relied on both state constitutional law and state

statutory interpretation as independent reasons for requiring the counting of the contested ballots, and thus review and reversal of its holding that federal Equal Protection *requires* their counting would be inconsequential and merely advisory (and thus beyond the Court's jurisdiction). Instead, this Court should consider the contention that federal Equal Protection goes so far as to *require* the counting of these ballots as relevant to its consideration, on the merits, of petitioners' claim that their counting would *violate* federal Equal Protection, a claim which is properly before this Court jurisdictionally. (Relevant because it is worth asking whether Equal Protection law, properly interpreted, should give Colorado enough leeway to avoid the Scylla of "must" and the Charybdis of "can't".) Moreover, although the Colorado Supreme Court's reliance on state statutory and constitutional law serve as "independent and adequate state grounds" with respect to this sub-component of the Equal Protection question, these state law grounds are not "independent and adequate" with respect to the separate Article II issue (as discussed below); instead, these state law rulings of the state supreme court are necessarily part of the Article II analysis, at least on the view of Article II espoused in the *Bush v. Gore* concurrence.

Thus, this memorandum will analyze separately the two distinct (jurisdictionally proper) bases that petitioners assert for reversing the Colorado Supreme Court's decision: (1) their claim that it would violate Equal Protection to count these ballots; and (2) their claim that the Colorado Supreme Court's decision violated Article II. It should be noted, however, that the scope of reversal might be considered somewhat different with respect to these two federal constitutional claims. If the petitioners are correct with respect to the first, reversal would seem necessarily to entail an order to prohibit the counting of these

ballots. But if this Court affirms with respect to petitioners' Equal Protection claim, while reversing with respect to their Article II claim, arguably there might be room for the Colorado Supreme Court on remand to write an opinion that still requires counting of the provisional ballots in a way would not violate Article II. (For example, the state supreme court might be able to point to additional statutory sources, beyond the "liberal construction" provision of the election code that it cites, as authority for counting ballots cast by voters who arrive at polling places after 7 p.m. as a result of emergency circumstances.) This point has additional practical significance insofar as it appears possible that Colorado will enact new legislation in an effort to confirm the legitimacy of the state supreme court's decision (as indicated in the press conference of Nov. 26, discussed in the Statement of the Case). While such new legislation might raise additional federal constitutional questions under Due Process, those issues would be premature to consider here, in the current posture of this case. Rather, they signify only that an Article II reversal at this juncture would not have the definitiveness of an Equal Protection ruling with respect to the counting of the contested ballots.

Finally, it is open to this Court to reject both of petitioners' federal constitutional claims on the alternative ground that the political question doctrine precludes the Court's consideration of them. This alternative ground would require the Court to overrule *Bush v. Gore*—or at least hold *Bush v. Gore* inapposite on the ground that it did not address the political question doctrine there, as it might have—but this Court has the authority to overrule *Bush v. Gore*, if doing so is consistent with a proper application of *stare decisis*, since (although a 3-Justice panel), this court is acting with the full authority of the U.S. Supreme Court in this case. Consequently, after analyzing the merits of the Equal

Protection and Article II issues, this memorandum explores the arguments concerning whether or not this Court should invoke the political question doctrine to negate *Bush v. Gore* as an operative precedent.

This memorandum does not consider the separate, narrower question of whether the Equal Protection holding of *Bush v. Gore* should be overruled as a mistaken application of the Equal Protection Clause. The reason for not addressing this separate question is that, as explained below, the Equal Protection issue here is sufficiently distinguishable from the Equal Protection question in *Bush v. Gore* that this Court could reject petitioners' Equal Protection claim without having to confront whether to overrule *Bush v. Gore* as an Equal Protection precedent. Presumably, disposing of the Equal Protection claim on that narrower ground would be judicially preferably. But for more analysis on whether or not the Equal Protection precedent of *Bush v. Gore* should be overruled in a case that required the Court to confront that issue, see Edward B. Foley, *The Future of Bush v. Gore?*, 68 Ohio St. L.J. 925, 952-54 (2007) (suggesting that Dworkin's ideal "Justice Hercules" would not overrule the Equal Protection precedent of *Bush v. Gore*, but instead would attempt to apply it faithfully within the overall fabric of the law).

I. Would it violate federal Equal Protection to count the contested provisional ballots?

The U.S. Supreme Court precedents relevant to the Equal Protection issue in this case are few, not directly on point, and not clearly determinative in their reasoning. In addition to *Bush v. Gore*, 531 U.S. 98 (2000), there is most prominently *Crawford v. Marion County Board of Election*, 128 S.Ct. 1610 (2008), the recent Indiana voter ID

case—although it may be difficult to call it a “precedent” when the Court was divided four ways, with no opinion garnering more than one-third of the Court (3 of 9 Justices), and with intense disputes among the Justices about basic questions of Equal Protection methodology and how to apply that methodology to the record there. Older but still relevant is *Reynolds v. Sims*, 377 U.S. 533 (1964), as well as related Warren Court cases on voter equality, and specifically two cases concerning the availability of absentee ballots: *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 808 (1969), and *O’Brien v. Skinner*, 414 U.S. 524, 529 (1974).

This memorandum will also discuss a few lower court opinions with facts and reasoning that might be helpful to the Court’s consideration of this case. After discussing these various precedents, the memorandum will focus on the facts here that affect the Equal Protection analysis.

A. *Bush v. Gore*

This memorandum will assume a basic familiarity with the facts and majority opinion in *Bush v. Gore*. It also draws upon the analysis of the Equal Protection holding contained in Foley, *The Future of Bush v. Gore?*, supra, although it endeavors to be a stand-alone document, discernible to the Court and Counsel here without need to read that law journal article. It should suffice for purposes of this memorandum to remember simply that the Equal Protection violation identified in *Bush v. Gore* concerned the different standards employed by different local election officials for reviewing dimpled, punctured, and hanging chads. These locally different standards occurred because state law contained only a general “discern the intent of the voter” directive, which left excessive discretion to local officials in its implementation. The Court thought it possible

for state law to be more specific in its instructions to local election officials on how to evaluate these chads—and because it was possible, the Court concluded that it was “necessary.” 531 U.S. at 106.

1. The Uncertain Scope of *Bush v. Gore*

The Equal Protection holding of *Bush v. Gore* is notoriously unclear about its own scope. Everyone recalls its famous self-limitation: “Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.” *Id.* at 109. Even assuming that this sentence is nothing more than conventional judicial caution against reading too much into an opinion—compare *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) (“[n]o bright line separates permissible election-related regulation from unconstitutional infringements”)—one still struggles to know how broad or narrow the *Bush v. Gore* holding is. Scholars have proposed “First Amendment,” “Due Process” and “Equal Protection” readings of *Bush v. Gore* as an Equal Protection precedent. See Foley, *The Future of Bush v. Gore?*, *supra*, at 960-61 (citing to scholarly works that propose these alternatives). The first two alternative readings narrow the case’s precedential scope by arguing that an election-related inequality must offend a separate federal constitutional value, either free expression or due process (in addition to offending the value of equal electoral treatment), in order to violate the Fourteenth Amendment. The “Equal Protection” reading, by contrast, contends that any election-related inequality—if severe enough and insufficiently justified—may violate the Fourteenth Amendment even if it does not implicate a separate constitutional value.

This debate about *Bush v. Gore* may be significant only insofar as there is a sub-category of election-related claims governed by the added (or specific) force of *Bush v. Gore* itself, as distinguished from the general category of Equal Protection claims concerning the administration of state election laws. The general (or residual) category is governed by the balancing test that has evolved in a series of Supreme Court precedents, culminating in the fractious decision in *Crawford*, the Indiana voter ID case. Whatever the different possible understandings of that generic balancing test (a point to be discussed subsequently), it would apply here even if *Bush v. Gore* had nothing distinctive to add in this context. In other words, if *McCain v. Obama* falls outside the distinctive sub-category of election cases governed specifically by the Equal Protection precedent and principle of *Bush v. Gore*, it still must answer to the generic Equal Protection analysis of *Crawford* and earlier precedents.

2. Comparing the Facts of *Bush v. Gore* and *McCain v. Obama*

To determine whether or not this case does lie within the *Bush v. Gore* sub-category, it is useful to compare the factual similarities and differences of the two cases. As for similarities (beyond the obvious one that they both involve presidential elections), first, the inequality alleged to be unconstitutional is geographic in nature. In *Bush v. Gore*, the complaint was that different Florida counties used different specific standards to assess whether each disputed chad should be counted as a valid vote. (There was also the complaint that even within a single county some recount teams were applying different standards.) Here, the alleged unconstitutionality is that Denver voters received an extra two hours to vote that was not available to voters elsewhere.

The second similarity between this case and *Bush v. Gore* is that the inequality was caused by the state's judiciary. In *Bush v. Gore* the inequality resulted (at least according to the majority opinion) from the Florida judiciary's failure to provide more specific instructions as part of the recount it ordered. In this case, the inequality results from the Colorado judiciary's approval of the two-hour extension in Denver, without requiring a similar extension elsewhere.

But there also are factual differences between this case and *Bush v. Gore*. There, the problem was the insufficiently specific "intent of the voter" standard, which in its application caused the location variation in the treatment of identical chads. Here, there is nothing vague about the two hours of extra voting in Denver: it is precisely two hours, and applies exactly to Denver and only to Denver.

Also, *Bush v. Gore* involved an adjudicatory chad-by-chad judgment about whether to count each ballot as a valid vote. This case, by contrast involves an across-the-board order that is more regulatory (or "rule-making") in character: every registered voter in Denver who had not previously cast a ballot was entitled to take advantage of the two-hour extensions. There was no individualized assessment of whether a particular Denver voter would be entitled to vote between 7 and 9 p.m.

3. The Analytical Classification of Potential *Bush v. Gore* Claims

How significant are these factual distinctions between *Bush v. Gore* and this case? As part of a symposium discussion of *Bush v. Gore* as precedent, Professors Foley and Lowenstein offered two somewhat different classificatory schemes for comparing new cases with *Bush v. Gore*.¹ Despite the differences in these two taxonomies, both would

¹ See Edward B. Foley, *Refining the Bush v. Gore Taxonomy*, 68 Ohio St. L.J. 1035, 1044 (2007); Daniel H. Lowenstein, *The Meaning of Bush v. Gore*, 68 Ohio St. L.J. 1007, 1029-32 (2007).

treat this case of *McCain v. Obama* as analytically distinct from *Bush v. Gore* along two important dimensions. Both Foley and Lowenstein treat the distinction between adjudicatory and regulatory decisions as particularly significant for considering the precedential force of *Bush v. Gore*. Thus, the fact that *McCain v. Obama* involves a regulatory-type order putting all Denver voters in a separate category from non-Denver voters, rather than the kind of ballot-specific adjudicatory determinations at issue in 2000, would be the most important factor in setting this case apart from *Bush v. Gore*. (The fact that this regulatory order comes in the context of a judicial proceeding does not change its regulatory, or rulemaking, character. It is the nature of the order that matters analytically. The regulatory rule is what the voting hours will be. By contrast, an individualized evaluation of each ballot to determine its eligibility—for example, verifying the signature and other information on each absentee ballot’s envelope—is adjudicatory in nature even when conducted by an administrative agency rather than a court.)

The second dimension important to both Foley and Lowenstein is whether the alleged geographical inequality is caused by a single central decisionmaker or instead a series of separate local decisions.² Although Lowenstein classifies *Bush v. Gore* as involving a central decisionmaker, because the recounts there were conducted pursuant to the Florida Supreme Court’s order, whereas Foley would treat *Bush v. Gore* as involving one sub-type of local decisionmaking (involving an imprecise statewide directive), both

² This distinction is potentially significant because an inequality arising from a policy-based decision of a central statewide authority often has a better chance of being justified under Equal Protection scrutiny than an inequality resulting from a myriad of separate local decisions, especially when the existence of these separate local decisions was not itself the result of a statewide policy choice, but instead a haphazard development of a poorly worded state law (as in *Bush v. Gore*). For further explanation of this point, see Foley, *supra* n. 1, at 1040-43.

would see this case as factually different from *Bush v. Gore* along this second dimension. Even though *Bush v. Gore* involved the supervisory authority of the Florida Supreme Court, it also involved separate local-level decisions in a way that this case does not. There, the different local election boards were devising and implementing their own separate standards for evaluating chads: some counting them if (but only if) light appeared through them, others counting them if they have a discernible dimple, and some requiring them to be detached from the ballot by at least two corners. See 531 U.S. at 107. Here, by contrast, there are no equivalent series of separate local decisions. Instead, the single operative decision is the one by the Colorado Supreme Court to permit voting to be extended by two hours in Denver, but only in Denver. To be sure, one might say that this decision was triggered initially by the decision of the local election officials in Denver. But that single local administrative decision (no other local board acted) would not have become operative unless and until the Colorado Supreme Court countermanded the Secretary of State's determination to void that local order. Yet by countermanding the Secretary of State *without extending polling hours outside Denver*, the Colorado Supreme Court is the single central authority responsible for the alleged inequality here: the extra two hours in Denver but not elsewhere.³ Thus, analytically, because (1) this case involves a single central regulatory order to have different voting rules in separate localities within the state, and (2) local officials did not choose these different voting

³ In this particular respect (even if not in others), this case would be analytically equivalent if the Secretary of State had been the single central authority to approve different voting hours for Denver than elsewhere, or if the state legislature had explicitly specified that polls always close in Denver at 9 p.m., although they always close elsewhere at 7 p.m. By contrast, a case in which inequality in polling hours were caused by a series of separate local decision would be one where local officials had the authority to choose their own voting hours and some chose longer hours than others. This point will bear on the Equal Protection analysis in additional ways, as later discussed in this memorandum.

rules in a series of separate local decisions, this case is two steps (or at least a step-and-a-half, as Lowenstein might put it) removed from the core sub-category of cases controlled by the *Bush v. Gore* precedent.

Putting *McCain v. Obama* in a separate conceptual sub-category from *Bush v. Gore*, however, does not end the inquiry. This categorization may reduce the precedential force of *Bush v. Gore* to *McCain v. Obama*, but does it eliminate the case's precedential power completely. That judgment, again, depends on what Equal Protection principle one believes underlies *Bush v. Gore*. If one adopts the "Due Process" reading of *Bush v. Gore*, thinking that its holding enforces a kind of hybrid "Due Process-Equal Protection" claim applicable only to adjudicatory contexts, then putting *McCain v. Obama* in a separate analytic sub-category would be decisive (although the generic balancing test of *Crawford* would still apply). But if instead *Bush v. Gore* indicates a skepticism of any geographical distinction among the voters of a state in a statewide election—demanding a sound justification for treating the voters of one political subdivision differently from the voters in the political subdivision when they are all casting ballots for the same statewide office (here presidential electors)—then *Bush v. Gore* would have some precedential force in *McCain v. Obama* above and beyond the baseline generic balancing test. Still, this precedential force would not dictate an outcome: it would only put the state to the task of justifying its geographic discrimination. In this sense, one could consider *Bush v. Gore* as demanding some extra form of heightened scrutiny, which would be required by the generic balancing test, wherever there exist geographic distinctions among voters casting ballots in the same statewide race.

Since the two different readings of *Bush v. Gore* would view it as having different precedential applicability to *McCain v. Obama*—on one reading none, on the other reading some—which is the better reading of *Bush v. Gore*? That question is intensely difficult. See Foley, *The Future of Bush v. Gore?*, *supra*, at 962-64. Strong arguments can be made for the narrower “Due Process” reading. Serious counterarguments can be made for the “purely” Equal Protection reading. One doubts whether Ronald Dworkin’s famous “Justice Hercules” would be able to determine—much less demonstrate—which reading is conclusively the “correct” one give all available legal materials.

4. A Different “Due Process” Understanding of *Bush v. Gore*

There is perhaps, however, a version of the “Due Process” reading not considered by Professors Foley and Lowenstein in their symposium debate, one which finds another important factual similarity between this case and *Bush v. Gore*. The relevant fact would be that both cases involve disputes over which candidate won an election after the ballots have been cast. Post-voting disputes are particularly treacherous, as many election law scholars have noted, since both candidates know the initial count of the ballots and thus the “margin of victory” that must be overturned in order for the dispute to yield a different winner. In this context, the unequal treatment of voters—particularly inequalities imposed by new rules that emerge in the context of the dispute itself—would warrant heightened judicial review. The fear would be that the inequality is part of an effort to skew the electoral system towards a victory for one candidate in the dispute, and thus the heightened judiciary scrutiny would exist to assess whether this suspicion were correct or, instead, the inequality was justified by a sufficient strong state interest.⁴

⁴ I recall Professor Samuel Issacharoff of NYU making this particular point, and I could endeavor to locate a particular source if that would be useful.

There are passages in *Bush v. Gore* that would support this alternative “Due Process” interpretation, especially those that focus on the fact that the Equal Protection issue there occurred in a “recount” context. 531 U.S. at 109. *McCain v. Obama* does not involve a “recount” of ballots in technical sense, but it is a similar dispute over whether some ballots, after they have been cast, should count. In both cases, moreover, the inequalities occurred because of rulings made in the context of the fight over the result of the election: the inequality would not have been apparent from an examination of applicable state statutes and regulations prior to the emergence of the dispute itself. (One might argue that here the inequality was caused on Election Day in the decision to permit the casting of ballots by voters in Denver arriving after 7 p.m., but the *dispute* did not occur until the initial count of the ballots showed that these post-7pm ballots were worth fighting over. Still, because these ballots were provisional, the official determination that made them eligible to be counted was one that occurred after the dispute arose.) This reading of *Bush v. Gore* would make facts relevant to the Article II issue concerning arguable changes in the state’s election law since the casting of ballots relevant to the Equal Protection issue as well. The post-voting change would be part of the reason for heightened judicial scrutiny under the Fourteenth Amendment.

A prominent pre-2000 Eleventh Circuit decision (prominent at least in the election law world), *Roe v. Alabama*, 43 F.3d 574, 581 (11th Cir. 1995), would support this suspicious-of-changing-the-rules-after-ballots-are-cast reading of *Bush v. Gore*. The Eleventh Circuit case involved an Alabama Supreme Court decision that, in the context of an intense dispute over the outcome of an election for Chief Justice of the Alabama Supreme Court itself (yes, there were collateral recusal issues), changed state law

concerning the signature and notarization requirements for absentee ballots to be counted. The Eleventh Circuit held that for the state supreme court to judicially change the state rules for when absentee ballots are disqualified for counting, after the ballots have been cast, would undermine the integrity of the election. Accord *Griffin v. Burns*, 570 F.2d 1065 (1st. Cir. 1978). On this view, the relationship of the Colorado Supreme Court decision to the existing Colorado election code would be relevant to validity of that decision under the Fourteenth Amendment.

Even if this alternative reading of *Bush v. Gore* is the best one, it still does not definitively answer whether there is an Equal Protection violation on the facts here. Rather, it would elevate the level of scrutiny because of the post-voting context of the dispute over which ballots to count, and an arguable appearance that the Colorado Supreme Court deviated from the state's election code in counting the ballots. This Court would still need to probe the strength of the Colorado Supreme Court's justification for its decision. In this respect, this Court's analysis would be similar to, although less deferential than, the generic balancing test debated in *Crawford*.

B. *Crawford*

There were four opinions in *Crawford*. Justice Stevens wrote the "lead" opinion, with Chief Justice Roberts and Justice Kennedy joining it. Justice Scalia wrote an opinion concurring in the judgment only, explicitly rejecting the reasoning of Justice's Stevens opinion, and Justices Thomas and Alito joined that one. Justice Souter wrote a dissenting opinion for himself and Justice Ginsburg, and Justice Breyer wrote a separate dissent for himself alone.

Crawford is relevant to *McCain v. Obama* because, although all four opinions disagree about how the generic Equal Protection balancing test should apply to Indiana’s voter ID rule, they all agree that it should apply. This is significant because the generic Equal Protection balancing test was developed in a different category of election cases: those involving “ballot access,” where either a candidate complains about being denied placement on the ballot or a political party complains about how a candidate’s name appears on the ballot. *Crawford*, by contrast, concerned a rule affecting the voter’s ability to cast a ballot. In that respect, *Crawford* is similar to *McCain v. Obama*: the geographically limited extension of polling hours affects a non-Denver voter’s ability to cast a ballot (in comparison to a Denver voter).

1. Justice Stevens (with Chief Justice Roberts and Justice Kennedy)

Justice Stevens looked to *Anderson v. Celebrezze*, 460 U.S. 780 (1983), for the canonical formulation of the generic balancing test. *Anderson* involved John Anderson, the independent candidate for President in 1980, and Justice Stevens also wrote that precedent for the Court. In *Crawford*, Justice Stevens quoted from *Anderson* to describe its “balancing approach” this way: “‘evenhanded restrictions that protect the integrity and reliability of the electoral process’ are not invidious” and thus do not violate the earlier Poll Tax Case, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). The word “evenhanded” may be important: if extra polling hours for Denver than elsewhere is not “evenhanded . . . to protect the integrity and reliability of the electoral process itself,” then the stricter scrutiny of *Harper* may apply to *McCain v. Obama*.

Justice Stevens also asserted that under *Anderson* any burden on casting a ballot, however minimal, must be justified by a sufficiently strong interest offered by the state.

According to Justice Stevens, neither *Anderson* nor its progeny established “any litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters.” 128 S.Ct. at 1616. On this view, being deprived an extra two hours available to other voters—unless not being considered a “burden” at all—would require adequate justification from the state; it could not be dismissed as failing to meet a threshold level of severity. Later in his *Crawford* opinion, however, Justice Stevens wrote:

A photo identification requirement imposes some burdens on voters that other methods of identification do not share. For example, a voter may lose his photo identification, may have his wallet stolen on the way to the polls, or may not resemble the photo in the identification because he recently grew a beard. *Burdens of that sort arising from life’s vagaries, however, are neither so serious nor so frequent as to raise any question about the constitutionality* of [Indiana’s law]; the availability of the right to cast a provisional ballot provides an adequate remedy for problems of that character.

Id. at 1620 (emphasis added). It is not clear how this passage relates to Justice Stevens’ earlier description of *Anderson* balancing. It may relate to the fact that *Crawford* involved a pre-enforcement facial challenge to Indiana’s voter ID law, and the plaintiffs there sought an injunction to block any enforcement of the law whatsoever, even to voters for whom the ID rule would concededly impose no burden. Much of Justice Stevens’ opinion is devoted to rejecting that sweeping facial challenge, while leaving open the possibility of a more focused as-applied challenge. *McCain v. Obama*, for what it is worth, is not a facial challenge to a statute, but an as-applied challenge to the Colorado Supreme Court’s ruling.

2. Justice Scalia (with Justices Thomas and Alito)

Justice Scalia protested Justice Stevens’ characterization of *Anderson* balancing. Justice Scalia saw post-*Anderson* precedents—especially *Burdick v. Takuski*, 504 U.S.

428 (1992) (upholding Hawaii’s denial of “write in” candidates)—as establishing a threshold level of burden on a voter’s ability to cast a ballot before the state is put to a serious challenge of having to justify its election rule. If a plaintiff falls short of this threshold level, according to Justice Scalia, judicial review should be very deferential. Moreover, to meet the threshold level, Justice Scalia would demand that the burden be “severe . . . beyond the merely inconvenient.” 128 S.Ct. at 1625. But, like Justice Stevens, Justice Scalia indicates that a non-severe burden on voting must be “generally applicable” and “nondiscriminatory” in order to get the benefit of the deferential standard of review. *Id.*

Justice Scalia is clearly concerned about increased election-related litigation based on imprecise, fact-intensive constitutional standards:

. . . This is an area where the dos and don’ts need to be known in advance of the election, and voter-by-voter examination of the burdens of voting regulations would prove especially disruptive. A case-by-case approach naturally encourages constant litigation. Very few election regulations improve everyone’s lot, so the potential allegations of severe burdens are endless. *A State reducing the number of polling places would be open to the complaint that it has violated the rights of disabled voters who live near the closed stations[,] . . . and one can predict lawsuits demanding that a State adopt voting over the Internet or expand absentee balloting.*

That sort of detailed judicial supervision of the election process would flout the Constitution’s express commitment of the task to the States. See Art. I, § 4. It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified burden on the right to vote, *or is intended to disadvantage a particular class.*

Id. at 1626 (emphasis added). But Justice Scalia’s presumption against judicial scrutiny might not apply when Denver voters are treated differently than non-Denver voters—and especially when that differential treatment results from a state court order rather than the text of state legislation. In this sense, Justice Scalia may merge Equal Protection and

Article II concerns; after all, he joined both the majority and concurrence in *Bush v. Gore*. His *Crawford* concurrence does not cite *Bush v. Gore* and thus does not consider the relationship, on his view, of *Anderson-Burdick* balancing to *Bush v. Gore*. Thus, it remains uncertain how Justice Scalia’s mode of reasoning would apply to *McCain v. Obama*.

3. Justice Souter (with Justice Ginsburg)

Justice Souter explicitly embraced the same view of *Anderson* balancing as Justice Stevens, but reached the opposite result on the record in *Crawford*. Because government needs to regulate elections so that they are fair, Justice Souter observed that the Court has “avoided pre-set levels of scrutiny in favor of a sliding-scale balancing analysis: the scrutiny varies with the effect of the regulation at issue.” 128 S.Ct. at 1628. It is understandable that such a flexible standard would yield different answers in the hands of different jurists. Applying Justice Souter’s approach to *McCain v. Obama* would entail making “a careful, ground-level appraisal both of the practical burdens on the right to vote and of the State’s reasons for imposing those precise burdens.” *Id.*

4. Justice Breyer

Justice Breyer also adopts a flexible balancing test, but he phrases it a bit differently: “I would balance the voting-related interests that the statute affects, asking ‘whether the statute burdens any one such interest in a manner out of proportion to the statute’s salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative).’” *Id.* at 1643 (quoting one of his own concurrences in a campaign finance case). Applied here, this approach presumably would look closely at the effect on non-Denver voters of not having the two

extra hours, in comparison to the effect on Denver voters if the extra two hours had not been given, as well as the degree of flexibility that federal constitutional law should grant state government in not having the two extra hours be uniform statewide.

C. *Reynolds v. Sims*, 377 U.S. 533 (1964), and related one-person-one-vote cases

The Equal Protection Clause obviously bans some geographic-based disparities with respect to voting. Colorado could not count ballots cast in Denver twice as much as those cast elsewhere in the state, or vice versa. *Bush v. Gore* relied on *Reynolds*, related cases, and their underlying principle. Citing *Gray v. Sanders*, 372 U.S. 368 (1963) (votes in some counties weighted more than votes in others), and *Moore v. Ogilvie*, 394 U.S. 814 (1969) (nominating process easier for voters in some counties than in others), the Court in *Bush v. Gore* observed that it had invalidated state practices that “accorded arbitrary and disparate treatment to voters in its different counties.” 531 U.S. at 107. Thus, even without *Bush v. Gore*, these earlier precedents and their underlying principle would still apply. But does that principle apply to voters in some counties having longer hours at their polling places than voters in other counties—and, if so, how? (Fewer hours to cast a ballot is not the same as the vote dilution of *Reynolds*, where the weight of votes count differently). Is there a *per se* rule against any such differential treatment, or can it be justified by the state? And if it can be justified, upon what type of showing?

D. This Court’s Absentee Ballot Cases

Two precedents, now 35-40 years old, concern the availability of absentee ballots to some, but not all, of the state’s registered and eligible voters.

In *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 808 (1969) (per Warren, C.J.), the Court unanimously rejected an Equal Protection challenge

to an Illinois law that limited absentee voting to certain specified categories, none of which covered individuals held in jail awaiting trial without bail. The Court refused to apply the strict scrutiny called for by *Reynolds*, *Harper*, and related voting rights precedents because “we cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting.” The Court added that “the record is barren of any indication that the State might not, for instance, possibly furnish the jails with special polling booths or facilities on Election Day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own.” *Id.* n. 6.

In *O’Brien v. Skinner*, 414 U.S. 524, 529 (1974) (7-2) (per Burger, C.J.), the Court made clear that the result in *McDonald* turned on the lack of evidence in that earlier case: “Essentially the Court’s disposition of the claims in *McDonald* rested on a failure of proof.” *O’Brien* involved plaintiffs in the same situation of pre-trial detention as those in *McDonald*, but now the plaintiffs showed that they had requested the means to cast a ballot but had been denied. Furthermore, the absentee voting law at issue in *O’Brien* (New York’s) permitted anyone “unavoidably absent from the county of his residence” to cast an absentee ballot. State officials interpreted this statute to mean that if a pre-trial detainee were held in a jail located in a different county from the one in which he resided, then the detainee would be entitled to vote by absentee ballot. Thus, only pre-trial detainees held in the same county in which they resided were denied an opportunity to cast a ballot (even though, since they had not been convicted, they were not

disqualified from voting under state law). The Supreme Court found this distinction “wholly arbitrary” and thus a denial of Equal Protection. *Id.* at 530.

As the Court put it, “two citizens awaiting trial . . . sitting side by side in the same cell, may receive different treatment as to voting rights [because] if [one] is confined in the county of his legal residence he cannot vote by absentee ballot as can his cellmate whose residence is in the adjoining county.” *Id.* at 529. The Court did not suggest that the state had any justification for this differential treatment. Its opinion does not say whether the state attempted to offer any.

Justice Blackmun, with Justice Rehnquist joining, dissented. He found the state law “irritating and less-than-thoughtful” but “was not convinced that [the Court] should be so ready to interfere.” 414 U.S. at 536. “Line-drawing is necessary,” he added, “and by the very process of line-drawing, someone will be left out or treated differently.” *Id.* at 536-37. He saw the absentee voting law as the extension of a benefit that, while perhaps not extending as far as it might, was permitted to proceed “one step at a time.” The inequality in the case, he observed, “is wholly a function of the State’s failure to extend its remedial provisions a little further.” He noted that the plaintiffs were not the only ones denied an absentee ballot: so, too, someone “who on election day is away attending the funeral of a loved one in a distant State” (because the decision to attend the funeral was not “unavoidable” within the meaning of the statute). *Id.* at 537. “These are inequalities, but they are the incidental inequalities of life, and I do not regard them as unconstitutional.” Thus, Justice Blackmun concluded, sounding very much like Justice Scalia in *Crawford*:

I would refrain from continued tampering and interference with the details of state election laws. If details are deserving of cure, the State's legislature, and not this Court, ought to be the curative agent.

Id. (But what if the Colorado Supreme Court has already “tampered” with the state’s election code? As a matter of federal Equal Protection, leave it still to state law, to be worked out between the state’s legislature and judiciary?)

E. Relevant Lower Court Cases

Although not authoritative precedents of this Court, several lower court opinions are worth considering for their analysis, treatment of particular fact patterns, or both.

1. *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004)

Griffin v. Roupas is an opinion written by Judge Posner and joined by Judges Ripple and Wood. Like *McDonald*, above, it concerns an Equal Protection challenge to Illinois’s absentee ballot law, this time by working mothers who claim that they are unable to get to the polls on Election Day because of their combination of work and family obligations. The relief plaintiffs requested was broad: either an unlimited right of all registered and eligible voters to vote by mail, at least if they could show some kind of hardship from voting in person on Election Day, or a right to vote in person on a weekend. Illinois, however, had not adopted either “no excuse” absentee voting or in-person early voting, as many states recently have. On the contrary, at the time of this case, Illinois limited absentee voting to a narrow category of circumstances that cause an inability to vote in person: absence from the county, physical incapacity, religious observance, residential attendance at a college or university outside one’s precinct, or performance of certain official duties (like being a sequestered juror.)

Crucial to its rejection of plaintiffs' claim, the Seventh Circuit observed: "Many people besides working mothers might find themselves in the same fix, such as emergency-room and other medical personnel, persons who work at the other end of a large county from their precinct, persons who work two jobs, and those who are caring for a sick or disabled family member." *Id.* at 1130. Thus, the discrimination against working mothers did not seem so invidious. While they might be denied a right that some received, they were lumped among many equally deserving who also were denied this right.

The Seventh Circuit did not see a way to create a "hardship only" category of absentee voting. "It is hardly to be supposed that election officials would require proof of hardship or question claims of hardship; the necessary inquiry would be unmanageable." *Id.* The upshot, then, would be absentee voting available for all, if plaintiffs were to prevail. This result the Seventh Circuit refused to decree, viewing it as judicial legislation.

Like Justice Blackmun's dissent in *O'Brien v. Skinner*, Judge Posner's opinion in this case saw "unavoidable inequalities" in a state's administration of its election law:

[W]hile the specific inequality of which plaintiffs complain could be eliminated if instead of drawing the line at the county boundary the law said that anyone who lives more than, say, 30 miles from his polling place can get an absentee ballot, this would be as coarse a rule as the county-line rule. The length of time it takes to cover 30 miles depends on road and traffic conditions that vary dramatically across the state.

Id. at 1132. This observation about driving conditions might be relevant to *McCain v. Obama*, and later this memorandum will consider what implication (if any) Colorado's absentee and early voting laws have to the Equal Protection issue here. Still, *O'Brien v. Skinner* demonstrates that some distinctions concerning the availability of absentee

ballots are unconstitutional. While *O'Brien v. Skinner* is distinguishable from this Seventh Circuit case—two pre-trial detainees treated differently depending on county of residence; working mothers treated the same as others working two shifts—it would have been helpful if Judge Posner’s opinion had cited and distinguished it. But Judge Posner never mentioned *O'Brien v. Skinner*, and one is left wondering just what sorts of distinctions concerning the availability of absentee ballots are unconstitutional. Invoking the reasoning of the majority in *O'Brien v. Skinner*, for example, what if two working mothers have cubicles side-by-side at their place of employment, but one resides in the next county, while the other resides in the same county? Can the out-of-county working mother vote by absentee because her work takes her out-of-county on Election Day, and she is unable to vote in person? If so, then would the Illinois law be as arbitrary as the New York law invalidated in *O'Brien v. Skinner*? Presumably, one need not answer that question definitely to rule on *McCain v. Obama*, but its uncertainty bears on the difficulty of the Equal Protection issue here.

2. ***Corning v. Board of Elections of Albany County*, 57 N.Y.2d 746, 440 N.E.2d 1326 (1982).**

Corning is a New York Court of Appeals decision involving two consolidated cases presenting the same constitutional challenge to a New York statute that specified longer polling hours in some counties than others for primary elections. The statute provided that the polls would be open from noon to 9 p.m. in most counties, but from 6 a.m. to 9 p.m. in New York City, Long Island, Westchester (just north of New York City), and two others (Rockland and Erie). Both trial judges invalidated this difference on Equal Protection grounds. The intermediate appellate court reversed, however, and

the Court of Appeals adopted the intermediate appellate opinion as its own, with one high-court judge (Fuchsberg) dissenting.

The opinion adopted by the Court of Appeals reasoned that strict scrutiny was inapplicable because voters in the noon-9pm counties were not denied the right to vote; nor was the weight of the vote diluted. Employing a threshold requirement similar to Justice Scalia's in *Crawford*, the opinion said that the burden on voting from fewer hours was not "substantial." Moreover, despite the fact that the plaintiff in one of the two cases testified that, as a doctor, he was able to vote only between 6-8am, the appellate opinion asserted: "There is no evidentiary showing that the shorter voting hours available in some counties impede or otherwise disadvantage voters in these counties." 88 A.D.2d at 414.

Finding no significant burden, the opinion applied the rational basis test. The court said it was rational for the legislature to believe that commuters in heavily populated metropolitan areas needed extra voting hours. Overcrowding at the polls in the evening might be more problematic there, and giving those localities extra hours in the morning facilitates the right to vote.

Judge Fuchsberg's dissent echoed the two trial court opinions, arguing that the geographic discrimination with respect to voting necessitated strict scrutiny. He observed that the Legislature's only reason for not adopting the longer polling hours in all counties was to save money—an inadequate reason under strict scrutiny.

3. *League of Women Voters/Ohio v. Blackwell*, 432 F. Supp.2d 723 (N.D. Oh. 2005); *Ury v. Santee*, 303 F. Supp. 119 (N.D. Ill. 1969)

In *LWVO v. Blackwell*, , 432 F. Supp.2d 723 (N.D. Ohio 2005), appeal pending (scheduled for argument on October 21, 2008), the district court rejected the Ohio Secretary of State's motion to dismiss an Equal Protection claim based on allegations that

voting conditions in some counties were substantially superior than in other counties.

Here is how the district court described the allegations:

Some citizens get short lines, properly functioning voting machines, well trained and informed poll workers, accurate registration information, and the opportunity to cast unencumbered absentee or proper provisional ballots. Other citizens, due to the vagaries of residence and registration, encounter long lines, defective voting machines, ill-trained and uninformed poll workers, inaccurate registration information, and absentee or provisional ballots that are ultimately deemed invalid.

Id. at 727. These allegations, if true, were enough to state a claim under the Equal Protection Clause, according to the district court. In addition to citing *Reynolds* and *Bush v. Gore*, the court relied on a much earlier district court decision to the same effect. In *Ury v. Santee*, 303 F. Supp. 119 (N.D. 1969), officials had consolidated precincts in a way that caused severe overcrowding and long lines in certain polling locations but not others. “Substantial traffic jams” caused the police “to divert traffic away from [one] polling place.” *Id.* at 124. Consequently, “hundreds of voters were effectively deprived of their right to vote,” *id.*, with 397 individuals submitting affidavits that they “attempted to vote” but “were unable to do so.” *Id.* at 125. These facts constituted a violation of Equal Protection, according to the court.

These two district court decisions are germane to *McCain v. Obama* because they concern the “Scylla and Charybdis” point and the concern that state election administration not be “straitjacketed” by federal constitutional law—a concern expressed by Justices Scalia, Blackmun, Breyer, and others, as well as Judge Posner, in various opinions discussed above. At some point, if the voting conditions in Denver got so bad, then according to *LWVO* and *Ury* it would violate Equal Protection *not* to grant Denver voters some relief (the same argument made by the Colorado Supreme Court here).

Moreover, in unpublished opinions, other federal district courts have extended polling hours in previous elections based on similar sorts of allegations as those in *Ury*. Indeed, in both the November 2006 general election and the March 2008 primary, the U.S. District Court for the Northern District of Ohio extended polling hours in specified Cleveland precincts because of allegedly unconstitutional impediments to voting at those precincts.⁵ This Court here need not agree with the Colorado Supreme Court that the line of unconstitutionality had been crossed in terms of a *deprivation* of voting rights in Denver, in order for the principle underlying *LWVO* and *Ury* to weigh as a factor in evaluating whether the line of unconstitutionality had been crossed by *extending* voting opportunities in Denver.

F. Relevant Facts of *McCain v. Obama*

If the foregoing review of the relevant case law reveals anything, it demonstrates how indeterminate the law of Equal Protection is in this context and how intensely fact-dependent any judicial analysis is likely to be. Even if judicial scrutiny here should be heightened—because this case, like *Bush v. Gore*, involves an unequal treatment of voters, based on geography, arising in a dispute over which candidate won the election—it is still necessary to examine the particular nature of the geographical inequality and the reasons given to defend it.

1. A Preliminary Procedural Point: Fact-finding & the Electoral College deadlines

There has been no evidentiary proceeding for factual findings in this case. Instead, the state trial judge immediately certified the legal questions to the state supreme

⁵ Documents, including the court order, in the 2006 case are available at the *Election Law @ Moritz* website: <http://moritzlaw.osu.edu/electionlaw/litigation/cuyahogaboe.php>. The same is true for the March 2008 order: <http://moritzlaw.osu.edu/electionlaw/litigation/ObamaforAmericavCuyahoga.php>

court. In that sense, the case arguably takes on a posture comparable to an appeal after a motion to dismiss for failure to state a claim. But if there are legally relevant disputed facts, it would seem difficult to remand for fact-finding proceedings. There are only eight days between the date of oral argument in this Court and the so-called Safe Harbor Deadline under 3 U.S.C. § 5.⁶ That's different from *Bush v. Gore*, which was issued on the same day as the Safe Harbor Deadline. Still, it does not leave a lot of time for the presentation and cross-examination of witnesses, and any appeal from a decision based on an evidentiary hearing.

The Electoral College meets 14 days after the date of the oral argument in this case, essentially doubling the time available for further adjudicatory proceedings—if this Court were willing to go beyond the Safe-Harbor Deadline, something that the Court was unwilling to do in *Bush v. Gore*. But the Court's unwillingness to do that in *Bush v. Gore* was based in large part on an assertion from the Florida Supreme Court that Florida's legislature wished to obtain the full benefit of the Safe Harbor Deadline. (531 U.S. at 110.) But there is no comparable statement from the Colorado Supreme Court here. Instead, there is a press release from Colorado's Governor and legislative leadership (from both houses) saying that it may wish to enact new state legislation to exercise its authority over the appointment of presidential electors under Article II of the U.S. Constitution. If the legislature were to do that, even if the Governor signed the new law in the next eight days, before the Safe-Harbor Deadline, there is the possibility of further

⁶ As all of the opinions in *Bush v. Gore* observed, 3 U.S.C. § 5 provides that when it comes time for Congress to count the Electoral College votes submitted from the States, Congress must accord a “conclusive” presumption of validity to the resolution of a dispute concerning a state's appointment of presidential electors, if that resolution occurs six days before the meeting of the Electoral College and was made pursuant to a law that existed prior to the date on which voters cast their ballots for presidential electors.

post-enactment litigation, if that legislation were challenged as impermissibly retroactive (for example, as violating the Due Process Clause of the Fourteenth Amendment).

Moreover, were this Court to release its decision on the same date as the Safe-Harbor Deadline, as in *Bush v. Gore*, the press release from the Governor and legislative leadership suggests that the legislature might still attempt to enact new legislation before the date that the Electoral College meets. Thus, available signs suggest that the Colorado legislature here does not have the same strong desire to take full advantage of the Safe-Harbor Deadline that Florida's apparently did.

Perhaps, however, this Court will reach the judgment that there is no need for any further fact-finding relevant to the Equal Protection question, even assuming that time is available.

2. The Facts on this Record

The most obvious fact, of course, is that Denver voters had two extra hours to go the polls on Election Day than non-Denver voters. But this fact alone is not necessarily enough to establish an Equal Protection violation, at least not if the New York Court of Appeals majority is correct in *Corning v. Board of Elections of Albany County*, discussed above. Even without the winter storm, if the Colorado legislature had regularly established that polls in Denver are open for two more hours than the polls elsewhere in the state, the *Corning* court would permit the legislature to justify that differential treatment based on the extra difficulties that urban voters have in getting to their polls. On the other hand, the *Corning* court might be mistaken in the laxity with which it views such geographic differentials in polling hours, as the dissent and the trial courts there argued. Moreover, the extra two hours here are obviously distinguishable from *Corning*

insofar as they were granted, not by an explicit enactment of the state legislature, but instead by the state supreme court's approval of the Denver election director's decision.

a. Extra hours at the end of the day

Other facts stand out to distinguish this case further from *Corning*, even assuming *Corning* was correctly decided. Here, the two extra hours come at the end of Election Day, not the beginning. (In *Corning* the extra hours limited to a few counties were from 6am to noon; all polls statewide closed at 9pm.) This is potentially significant because “last minute” voting, in an effort to tip a close election, might be perceived as particularly unfair if it is seen to give an extra advantage to one side because it is limited to only part of the entire territory voting in the election. Sophisticated campaigns conduct their own exit polling and track turnout rates in battleground locations throughout Election Day. Thus, they have some sense of how well they are doing as the end of Election Day approaches. If certain localities favorable to one side are given extra hours after the time the polls were scheduled to close everywhere, that side can redouble its Get-Out-the-Vote efforts in those areas. It has an opportunity to “change the score” in “overtime” that is not available to the other side. To use a baseball metaphor, it is arguably like giving only one team an extra “tenth inning” opportunity to bat again.

There is some indication in the record (p.11) that the Obama campaign was trying to take advantage of the extra voting opportunity in Denver, although the Obama campaign vigorously disputes any impropriety in doing so. And no impropriety need be suggested to raise a concern: it is natural for a candidate's campaign to try to turn out more of its potential voters when the opportunity arises, but it still may be unfair (does that mean it is unconstitutional?) if the other side is not given an equivalent opportunity.

On this record, moreover, there is every indication that the two extra hours of voting in Denver made a difference—indeed, *the* difference—in the race. 62,729 ballots were cast by Denver voters during the post-7pm extended period. We don't know how many non-Denver ballots would have been cast if the same two-hour extension had been granted throughout the rest of the state. Or even just in neighboring Jefferson County, which was the location besides Denver most affected by the storm. (See Statement of the Case, p.9 n.8.)

We also don't know, however, how many of the 62,729 post-7pm Denver ballots were cast by voters who were unable to arrive at the polls before 7pm. The significantly lower turnout rate in Denver, in comparison both to elsewhere in the state and to the previous presidential election in Denver—unless these post-7pm ballots are counted—suggests that many of them were cast by individuals unable to cast them earlier. But these turnout figures, which have not been subjected to any kind of cross-examination or contrary “expert testimony,” are not conclusive proof of this, and some unknown percentage of these post-7pm ballots were cast by individuals who had not attempted to go to the polls prior to 7pm.

This missing fact complicates the matter. If there is good reason to believe that the extra two hours in Denver essentially compensates for time that the polls were “constructively closed” for Denver voters earlier in the day, then perhaps the Equal Protection analysis changes. Regardless of *Corning* being right or wrong, if the Colorado legislature had set 9am-9pm as the time for voting in Denver, but 7am-7pm elsewhere, there seems little likelihood of a successful Equal Protection challenge: everywhere gets 12 hours of voting, just Denver a different 12 hours. To invoke another baseball analogy,

it would be like one team getting its first 2 or 3 innings at bat (6-9 outs) before the other team gets its turn at the plate, but then it evens out at the end, because the other team's "last licks" becomes as long as the first team's initial at bat. Unorthodox, but not inherently unequal.

Similarly, if the polls never opened in Denver between 7am and 9am—although they had been scheduled to do so—then arguably giving Denver an extra two hours at the end of the day would be just the same as if Denver had been scheduled to vote from 9am to 9pm. Something like this actually happened in Denver in 2006,⁷ when its new and inadequately tested "electronic poll book" technology crashed as soon as it was booted up at 7am, and it took a couple of hours to fix. Likewise, suppose polls in Denver open smoothly at 7am, but suddenly at 3pm the "electronic poll book" technology crashes, making it impossible for any Denver resident to vote from 3pm to 5pm, when technicians finally get the system running again. Suppose Denver is given an extra two hours to vote from 7pm to 9pm, to compensate for the two missing hours of voting between 3pm and 5pm. In that situation, the extra two hours would not look so much like an advantage given exclusively to Denver voters, of which the rest of the state was deprived: the polls everywhere were open 12 hours; Denver just had a different 12 hours because of its 3-5pm breakdown.

If the winter storm in this case can be considered essentially equivalent to a poll-closing technological breakdown from 3-5pm, then the Equal Protection challenge here becomes weaker—although not eliminated entirely, for reasons to be discussed soon. To be sure, there is a difference between a winter storm (however difficult it makes getting to the polls) and a citywide technological breakdown. If the city's computer system for

⁷ [City officials broadsided by "tsunami"](#), Denver Post, November 9, 2006.

voting crashes, affecting the ability to cast a ballot in every Denver precinct, then the polls literally are closed for business during the period the system is down. But unless the power goes out at polling places during the winter storm—and the record does not speak of any citywide power outage, or even local outages within the city—then the polls remained open for business to anyone who could get there during the storm. There is no claim in this record that voting completely stopped in Denver during the time the intense storm passed through or in its immediate aftermath. Still, the storm made it exceedingly difficulty—even impossible—for many Denver voters to get to the polls late afternoon on Election Day, as the turnout figures indicate. Therefore, perhaps, conditions should be considered fairly equivalent to a technological failure that prevents voting for a couple of hours.

b. Suburban voters who suffered from the storm

There is more, however, to consider. Not just Denver voters were affected by the storm. Although Denver suffered disproportionately, the storm did hit Jefferson County immediately to the west. Also, commuters who work in Denver but who live in suburban counties would be adversely affected by the bad conditions on Denver roads as they traveled home. Turnout figures suggest that some Jefferson County residents, in particular, were unable to make it to the polls. Although we cannot be sure of exact numbers of affected suburban voters, we do know that there is at least one suburban (non-Denver) plaintiff who personally claims to have attempted to get the polls before 7pm, could not do so, and who would have been able to cast a ballot if polling hours had been extended to other counties, at least those counties adjacent to Denver. (See Statement of the Case, at 10 n.9.)

This plaintiff probably poses the Equal Protection issue most strongly (that is not to say it is definitively a winning claim). There is also the suburban voter who never attempted to go to the polls before 7pm, to match against the unknown number of Denver voters who took advantage of the extra two hours despite having never tried to vote earlier. Or even the Boulder or Pueblo or Colorado Springs voter who also might have taken advantage of that extra opportunity. But insofar as the extra two hours is justified as necessary to make up for lost voting hours caused by the storm, that justification is “under-inclusive” (to use technical Equal Protection terminology) because suburban voters also prevented from voting by the storm were not similarly given an extra two hours.

But numbers may matter on this point. If most of the voters needing an extension were Denver residents, then the degree of under-inclusivity is small relative to the ambit of the extension as a whole. Depending on the level of scrutiny that should apply in this case—an obviously debatable proposition given *Bush v. Gore*, *Crawford*, *Corning*, and all available precedents—the amount of under-inclusivity of the 2-hour extension might not be enough to render it a violation of the Fourteenth Amendment.

c. The identify of the state actor whose action is under challenge

Does it make a difference that the extension in this case was initially ordered by Denver officials, opposed by the Secretary of State, and ultimately approved by the Colorado Supreme Court? Ordinarily, one thinks that the Equal Protection Clause—indeed the Fourteenth Amendment generally—does not differentiate among various “state actors” that have the authority to act on behalf of the state. In the famous Flag Salute case, *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), Justice

Frankfurter said that the Court had to treat the actions of the local school board as if it were equivalent to an enactment of the state legislature, and the majority opinion there agreed: “village tyrants” are just as bound by the Fourteenth Amendment as the state’s Governor.

On this view, if the decision to extend voting by 2 hours only in Denver had been made by the Colorado Secretary of State pursuant to an explicit grant of authority from the legislature to issue such an order when the Secretary of State believes circumstances warrant it, the federal Equal Protection issue in this case *would be exactly the same*. The particular institutional arrangement responsible for the state action that causes the alleged inequality makes no difference. All that matters is the “facts on the ground” concerning the alleged inequality: the number of Denver and non-Denver voters affected, etc.

But there are reasons to think that this *Barnette* view (if we may call it that) is not the last word on this point. For one thing, as discussed above, *Bush v. Gore* indicates that the institutional context in which state action allegedly discriminates among voters geographically may make a difference. *Bush v. Gore* emphasized the special context of a judicial recount, suggesting that the judiciary would be especially expected to adopt uniform standards. In retrospect, however, it may have been more important in *Bush v. Gore* that the inequality there occurred in the context of a post-voting dispute about which ballots to count than that the state *judiciary* supervised the 2000 recount in Florida. Would it have (should it have?) made a difference in *Bush v. Gore* if, counter-factually, the recount there had been pursuant to an order from the Secretary of State and everything else had been the same concerning the vague “intent of the voter” statewide standard and differential implementation of that general standard at the local level?

Similarly, would it (should it?) make a difference in *McCain v. Obama* if, hypothetically, the decision to extend voting hours only in Denver had been made by the Secretary of State, with all other facts being the same?

These questions raise, again, the analytical distinction between adjudicatory and regulatory state action, which is a separate consideration from the institutional identity of the state actor. It may matter more to the holding of *Bush v. Gore* that the different treatment of individualized ballots there was unnecessarily arbitrary, because of the variable way that separate recount teams attempted to implement the vague general “intent of the voter” standard. By contrast, the decision to extend polling hours in Denver because of the storm’s effect on traffic is a single considered policy judgment: right or wrong, it meets a standard of administrative rationality that is markedly different from the arbitrariness of the unequal treatment of ballots in *Bush v. Gore*. In other words, on this view, consistent with *Barnette*, it matters not the identity of the state actor responsible for the unequal treatment, but instead the *nature* of the unequal treatment itself (and the arbitrary ballot-by-ballot differences in treatment because of the variability in implementing the general “intent of the voter” standard was the key aspect of that nature in *Bush v. Gore*).

Nonetheless, insofar as this case turns on an assessment of the state’s *interest* in extending voting hours in Denver, as well as the *weight* of that interest under the appropriate level of scrutiny, that assessment might be affected by the identity of the state institution that order the extension. Perhaps the state’s chief elections officer (the Secretary of State) is owed greater deference from the federal judiciary on election-specific judgments about whether or not, in particular factual circumstances, an extension

is warranted. Here, of course, the Secretary of State opposed an extension. But perhaps any special deference that the federal judiciary should ordinarily give to a Secretary of State is undercut by the fact that the Secretary of State was himself running for Congress in the same election (see Statement of the Case, p.3, n.2) and thus was arguably even more of a partisan than most elected Secretaries of State are.

In hindsight, the Colorado Supreme Court might be faulted for not expanding the 2-hour extension so that it covered not only Denver, but either the entire state or at least the suburban counties surrounding Denver. But given how the case came to the Colorado Supreme Court on Election Day, it might be forgivable that the court did not act with 20-20 hindsight. The Denver officials themselves could not have extended the hours outside Denver, and once the Secretary of State refused any extension, there was no other state official available to assure uniformity. When the expedited case arrived at the Colorado Supreme Court at 7:15pm on Election Day, its only issue was preservation of the status quo under the “balancing of the equities” standard for issuing an injunction. (Maybe the trial-level state judge sitting in Denver should have realized that it could have expanded the Denver officials’ order beyond the city limits, but it did not.) Given the provisional status of provisional ballots, the state supreme court thought best not to disturb what the Denver officials had ordered and what the state trial judge had permitted. Now, however, with the need to decide whether to count the provisional ballots, it becomes necessary to consider whether the failure to permit extra voting outside Denver is fatal under the federal Equal Protection Clause.

In reviewing the decision of the Colorado Supreme Court to require the counting of these provisional ballots, should this Court be suspicious of the fact that the four

justices in the majority there were appointed by Democratic Governors and their decision favors the Democratic candidate for President? In both *Bush v. Gore* and *Crawford*, Justice Stevens addressed this concern, and in both cases his position was that this Court should presume a good-faith impartiality on the part of state actors whose decisions are under Equal Protection attack. Their decisions, he opined, should be judged by reference to the impartial justifications offered for them, not by reference to allegedly partisan motives (unless that were the only defense of them). In *Crawford*, Justice Stevens wrote: “if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators.” 128 S.Ct. at 1624. And in *Bush v. Gore*, Justice Stevens said he “assume[d] . . . that the members of [the Florida Supreme Court and the judges who would have carried out its mandate [were] impartial.” 531 U.S. at 128. If this Court should take the same approach here, then the Colorado Supreme Court’s decision to require the counting of provisional ballots should be evaluated on its “merits,” based on the strength of the neutrally stated reason for giving Denver voters extra time, without impugning the motives of the state-court justices who reached that decision.

d. The relevance of absentee and early voting

In assessing how much inequality non-Denver voters suffered as a result of the Denver-only extra 2 hours of voting, it would seem useful to consider Election Day in the context of overall voting options available to Coloradans. A key point of consideration in *McDonald* and *O’Brien v. Skinner*, the Court’s two early absentee-ballot cases, was whether voters were altogether denied an opportunity to vote as a result of the

unavailability of absentee ballots. Likewise, in the Seventh Circuit absentee ballot case, *Griffin v. Roupas*, Judge Posner observed for his unanimous panel opinion that some voters will always have greater traffic-related difficulties in getting to the polls than others, but these differences in personal circumstances might be considered in the context of the overall opportunity for voting provided by the state.

This Court can take judicial notice of the fact that Colorado provides a very wide range of voting opportunities other than by casting a ballot at a regular polling place on Election Day. Pursuant to Colorado Revised Statute § 1-8-102, any registered voter eligible to vote in an election is entitled to cast a “mail-in” ballot rather than an in-person ballot at the polls. Colorado, in other words, is one of the states that have adopted “no excuse” absentee voting, in sharp contrast to the state laws in *McDonald, O’Brien v. Skinner*, and *Griffin v. Roupas*, where the absentee voting was limited to specific categories. Thus, any Colorado voter fearful of an inability to get to the polls on Election Day because of adverse driving conditions can submit a mail-in ballot instead.

Interestingly, Colorado law requires all absentee ballots—including those submitted by military personnel overseas, as well as emergency absentee ballots requested on Election Day itself—to arrive at the local board of elections by 7pm on Election Day. See Colorado Rev. St. §§ 1-8-103.5, 1-8-115. This uniformity of 7pm as the last time for voting under Colorado’s statutes might be more germane, however, to the Article II issue in this case, although perhaps it also “ups the ante” on the Colorado Supreme Court’s justification for deviating from that uniformity under Equal Protection analysis.

Colorado has also adopted in-person “early voting” which begins 15 days before Election Day (October 20, this year) and ends the Friday before Election Day (Oct. 31, this year). Like mail-in voting, in-person early voting is available to all registered voters eligible to participate in the election, without any need for an “excuse” or reason. *Id.* 1-8-202. Thus, to avoid the possibility of bad weather on Election Day itself—or any other unexpected development that might prevent a person from getting to the polls on Election Day—any Colorado voter can take advantage of the many extra hours of in-person voting available under this “early voting” program.

Moreover, Colorado law does not require the number of early voting hours to be the same throughout the state. On the contrary, § 1-8-202 requires each local jurisdiction to make early voting available “during regular business hours” but permits them “by resolution” to “increase the hours that the early voters’ polling place may be open.” Thus, in Denver this year, early voting was scheduled to be available between 11am and 7pm at thirteen locations, and between 8am and 7pm at the Denver Elections Division’s office: <http://www.denvergov.org/ForVoters/VoteEarly/tabid/430456/Default.aspx>. By contrast, early voting in neighboring Jefferson County was scheduled this year for between 7:30am and 5:30pm at five locations, and between 10am and 5pm at three other places: http://www.co.jefferson.co.us/elections/elections_T101_R31.htm.⁸ If this geographic difference in the number of voting hours would not violate Equal Protection, and it presumably would not under *Corning*, then it becomes harder (although not impossible) to see how a 2-hour difference in voting on Election Day is unconstitutional.

⁸ This kind of variation in early voting hours exists among other suburban Denver counties, as well as elsewhere in the state. Boulder, for example, has 10 hours of early voting on weekdays, whereas Pueblo has only 8 (although Pueblo also offers 8 hours on Saturday, whereas Boulder offers only 5 on Saturday).

Given Colorado's early voting as well as mail-in voting options, Election Day is merely one of many days to cast an in-person ballot, which itself is only one of two alternative voting options available to each voter. The differential arguably seems small in relationship to the overall voting opportunities.

3. Summary of Strongest Arguments Based on Available Facts

a. McCain argument

Were I counsel for McCain, I would come back to the fact that the 2 extra hours were at the very end of Colorado's voting process, where they evidently made a critical difference, as many (although not all) voters in this intensely competitive election evidently chose not to cast a ballot early but instead waited until the very last day to make their choice for President. The extra 2 hours should have been made available for Jefferson County, and other non-Denver, voters equally affected by the storm. The discriminatory decision was not made by the state's chief elections officer, based on special administrative expertise concerning the needs of voters in exigent circumstances. On the contrary, that official's decision to maintain the state's uniform time for closing polls was overridden by the state's judiciary, which lacks elections-specific expertise.

To paraphrase Chief Justice Burger's majority opinion in *O'Brien v. Skinner*, two downtown office workers who share a cubicle in their Denver office could have left work at the same time on Election Day, each heading off to vote. Both could have been equally stuck in traffic and unable to reach their polling place by 7pm. But one gets to cast a ballot before 9pm because she lives as well as works in Denver, whereas her office-mate does not, because he lives in Jefferson County. That inequality in the right to vote, based on a last-minute decision in contravention of the judgment of the state's chief

elections officer—which allowed any Denver voter, but no non-Denver voter, to cast an “overtime” ballot—is arguably not a situation “with sufficient guarantees of equal treatment,” in the words of *Bush v. Gore*.

Moreover, the Colorado Supreme Court made its critical decision to count the contested provisional ballots after the voting occurred, when everyone knows how those ballots will affect the outcome. Its decision is contrary to the apparent legislative judgment that no ballots, regular or absentee, should be cast after 7pm on Election Day (except by voters already standing in line at that time). That judicial deviation from legislative intent is relevant to Equal Protection because, contrary to Justice Stevens, it undermines the neutral justification for counting these ballots. The proper lesson of *Bush v. Gore*, according to this argument, is to distrust state supreme court decisions that have this character of post-voting deviation from legislative intent, and “the facts on the ground” concerning the particular storm-related difficulties faced by Denver voters are not sufficient to overcome this special level of Equal Protection scrutiny in this context.

b. Obama argument

Were I counsel for Obama, however, I would emphasize the need for flexibility in federal Equal Protection law as it applies to the details of operating elections. This need has been recognized in many of the Court’s opinions applying the *Anderson-Burdick* balancing test, not just in Justice Scalia’s opinion in *Crawford*. Judge Posner relied on the same need in his opinion for the unanimous panel in *Griffin v. Roupas*, as did the New York Court of Appeals (but for one dissenter) in *Corning*.

In light of this need for flexibility, Colorado must be credited with all the extended voting opportunities that it provides through early and mail-in voting. Unlike

the cellmates in *O'Brien v. Skinner*, no non-Denver voter was deprived of an opportunity to vote by failing to receive the extra 2 hours on Election Day; they all had ample opportunities to cast a ballot in this presidential election. That they waited to the last day was their own decision; not the government's fault. It wouldn't violate Equal Protection for the government on April 15 to keep post offices open late in those locations most affected by bad weather, even if some other places were also affected by bad weather. To be sure, it is habitual that taxpayers wait to the last minute before filing their returns. But they cannot complain of an unconstitutional inequality if they did not file in any of the previous days they could have, and then on the last day a location hit harder than theirs gets a filing extension unavailable to them.

The decision to extend polling hours in Denver, while imperfect, was—if I were Obama's attorney arguing—an effort to take account of “on the ground” exigencies as they were fast occurring. While it might not have been an Equal Protection violation to *refuse* to extend polling hours, some case law suggests that had conditions become bad enough in Denver relative to the rest of the state, it would be unconstitutional *not* to offer some relief. (*League of Women Voters* and *Ury*, described above, so suggest.) In light of the need to balance the interest of Denver voters with the interests of voters elsewhere, state authorities are entitled to “some play in the joints.” The judgment here that Denver uniquely needed relief was, arguably, not an unreasonable one. The fact that this judgment was made by Colorado's judiciary, rather than its Secretary of State, does not deprive it of legitimacy under federal Equal Protection, especially not when the Secretary of State's contrary position is tainted by a particularly sharp appearance of a partisan conflict-of-interest.

* * *

Thus, it should be evident that the Equal Protection issue in this case can be argued cogently on both sides, and it is up to this Court to decide which should prevail.

II. Does the Colorado Supreme Court decision violate Article II?

In *Bush v. Gore*, three Justices (Rehnquist, CJ; Scalia & Thomas) would have ruled, as an additional basis for reversal, that the Florida Supreme Court's decision violated Article II. The four dissenters all rejected the concurrence's reasoning. Justices O'Connor and Kennedy did not address the Article II issue, as they relied solely on the Equal Protection reasoning of the majority opinion.

Thus, *Bush v. Gore* does not provide binding precedent on the Article II issue in this case. Instead, if this Court finds no Equal Protection violation, then it must go on to consider an Article II issue comparable (but not identical) to the one partially addressed and unresolved in *Bush v. Gore*. Alternatively, this Court could avoid the Equal Protection issue here if it were to rest a reversal of the Colorado Supreme Court decision on Article II grounds. Of course, were the Court here to determine that the political question doctrine precludes reviewing the merits of the federal constitutional challenge to the Colorado Supreme Court's decision, thereby overruling *Bush v. Gore* (a point to be analyzed subsequently in this memorandum), then the Court would not reach the merits of the Article II issue for that reason.

A. Article II according to the *Bush v. Gore* Concurrence

A state supreme court may violate Article II in either of two ways, according to the theory articulated in Chief Justice Rehnquist's concurrence. First, the court may so distort the interpretation of a state's statutory law relating to the appointment of

presidential electors that the misinterpretation must be considered a repudiation of the state legislature's authority under Article II. Second, if the state supreme court relies on the state's constitution to invalidate a state statutory provision relating to the appointment of presidential electors, then the federal court must ask whether the state constitution's curtailment of state legislative authority over the appointment of presidential electors is a violation the state legislature's independent source of authority in Article II of the U.S. Constitution.

The concurrence thought that the Florida Supreme Court had violated Article II in the first of these ways. It saw Florida's election code as giving the Secretary of State the authority to interpret the code to preclude manual recounts to review chads that had not been fully dislodged by the voter. 531 U.S. at 119. It also saw the Florida Supreme Court's alteration of the statutory deadlines for certification and, especially for completion of all recounts and related litigation by the Safe Harbor Deadline, as setting aside the legislature's will. In sum, the concurrence explained: "we would . . . hold that the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading would require, in violation of Article II." *Id.* at 115.

The second way of violating Article II is suggested, but not conclusively determined, in the Court's unanimous remand of the Florida Supreme Court's earlier decision to extend the certification deadline. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 77 (2000) (*per curiam*). There, the Court observed that the state supreme court apparently had relied on Florida's constitution as a reason for construing the statutory provisions to permit manual recounts that would cause counties to miss their

certification deadlines. *Id.* at 75. But in doing so, the Florida Supreme Court may have invoked the state’s constitution in a way that would go too far in intruding on the legislature’s Article II power over presidential electors. “There are expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl.2, ‘circumscribe the legislative power.’” *Id.*, at 77 (quoting *McPherson v. Blacker*, 146 U.S. 1, 25 (1892)).⁹ But the Court ultimately found the Florida Supreme Court’s opinion unclear and remanded for clarification, without definitively ruling on whether the state supreme court had violated Article II by relying on the state constitution to undermine the legislative scheme.

B. The *Bush v. Gore* dissenters on the Article II issue there

Several of the dissenting opinions indicate that they reject the concurrence’s Article II theory entirely, meaning that in no set of facts would they think it appropriate for the federal judiciary to reverse a state supreme court’s ruling on state law grounds with regard to the appointment of presidential electors. But none of the dissenting opinions needed to press this point, since all four dissenters believed that—even accepting the premise that a state supreme court might stretch statutory interpretation beyond the breaking point, in a way that would violate Article II—the Florida Supreme Court had not done so in that case.

⁹ In *McPherson v. Blacker*, the Michigan legislature had switched from an “at-large” to a “proportional” system of choosing presidential electors, and the Court upheld the state legislature’s plenary power to do that under Article II. In the course of so holding, the Court’s opinion suggested that it might violate Article II if a state constitution curtailed the state legislature’s plenary power to determine the “Manner” of appointing presidential electors (as, for example, if the state constitution had insisted on at-large, rather than proportional, selection). But that suggestion was dicta as there was no state constitutional provision before the Court in that case.

Justice Stevens said he believed that state constitutional law could constrain state legislative power concerning the appointment of presidential electors without violating Article II because “nothing in Article II of the Federal Constitution frees the state legislature from the constraints in the State Constitution that created it.” 531 U.S. at 124. Justice Ginsburg did not believe that Article II permitted the second-guessing of the state supreme court on issues of state constitutional and statutory law: “Article II does not call for the scrutiny undertaken by this Court [in the concurrence’s view].” *Id.* at 142. Principles of “republican government,” she asserted, called for state legislatures to exist along side state judiciaries, with both under the state constitution. “Article II can hardly be read to invite this Court to disrupt a State’s republican regime.” *Id.* at 141. Yet she saw the concurrence as doing just that. Likewise, Justice Breyer did not believe that the concurrence’s “unusual review of state law” was “proper” to undertake at all. *Id.* at 147-48.

Although Justice Souter joined the portions of the other dissents containing these categorical renunciations of the concurrence’s approach, he did not himself include such a statement in his own dissent. Rather, he confined himself to the concurrence’s position that the Florida Supreme Court was unreasonable in its interpretation of the relevant state statutes. On this latter point, all four dissenters were in complete agreement:

Justice Stevens: “[T]he Florida Supreme Court . . . did what courts do”; “[i]ts decisions were rooted in long-established precedent and were consistent with the relevant statutory scheme taken as a whole.” *Id.* at 128.

Justice Ginsburg: “I might [agree with the state supreme court dissent] were it my commission to interpret Florida law. But disagreement with the Florida court’s interpretation of its own State’s law does not warrant the conclusion that the justices of that court have legislated. There is . . . no cause to upset their reasoned interpretation of Florida law.” *Id.* at 136.

Justice Breyer: “I do not see how one could call [the Florida Supreme Court’s] interpretation of a 1999 statutory change so misguided as no longer to qualify as judicial interpretation or as a usurpation of the authority of the state legislature.” *Id.* at 152.

Justice Souter: “None of the state court’s interpretations is unreasonable to the point of displacing the legislative enactment quoted. . . . [T]he law as declared is consistent with Article II.” *Id.* at 131.

C. Application of Concurrence’s Article II Theory to *McCain v. Obama*

If the *Bush v. Gore* dissenters are correct insofar as they reject any Article II scrutiny of a state supreme court’s interpretation of state law, then there is no further inquiry that the Court here needs to do on this question. If, however, the concurrence is correct in undertaking this Article II inquiry, then this Court must make that inquiry with respect to the Colorado Supreme Court’s decision.

The Colorado Supreme Court relied on three grounds to reject the argument that section 1-7-101 precludes any ballots cast by individuals arriving at polling places after 7 pm, even in the most extenuating of circumstances. The first ground was federal Equal Protection. Insofar as the court relied on this ground, it creates no Article II problem: if it would indeed violate federal Equal Protection to appoint presidential electors in a particular way, then that separate federal constitutional requirement constrains the state legislature’s authority under Article II. To take an obvious example, the state legislature could not adopt a method of appointing presidential electors that permitted men, but not women, the right to vote for these electors. This Court has recognized this point many times, including in *Anderson*, 460 U.S. at 795 n.18 (the ballot access case for independent candidate John Anderson, discussed above in the context of the Equal Protection question). But, returning to the application of this point here, if the Equal Protection Clause does *not* require counting the post-7pm provisional ballots from Denver, then the

Colorado Supreme Court's contrary view is of no avail with respect to the Article II issue.

The second ground relied on by the Colorado Supreme Court was state constitutional law. This ground implicates the second version of the concurrence's Article II theory: would a state constitution violate Article II if it unduly constrains the state legislature's authority to appoint presidential electors? This question takes the Court into uncharted waters because the *Bush v. Gore* concurrence did not pursue this second version. Analytically, however, the following points would seem fairly uncontroversial:

First, while the Colorado Supreme Court might not have construed the Colorado Constitution correctly (and indeed might have violated federal Equal Protection in doing so), its construction was not bizarre. It's a plausible conception of electoral equality that would say that under the circumstances of the storm, Denver voters were entitled to extra time in order to receive equal treatment.

Second, even if *some* state constitutional constraints would violate the state legislature's prerogatives under federal Article II, it would seem that a state constitutional commitment to equal voting rights—even if erroneously interpreted by the state supreme court—would not be an “undue” or “inappropriate” constraint on the state legislature's power. This situation is not like one in which it appears that the state supreme court is distorting the “plain meaning” of a state statute. Instead, the state supreme court is interpreting a general constitutional commitment to invalidate a state statute. Suppose, for example, that the state's election code denies ex-felons the right to vote for presidential electors (as the code also does for all statewide elections, including gubernatorial and U.S. Senate elections). But suppose the state supreme court construed the state constitution's general commitment to equal voting rights to preclude felon disenfranchisement in the state. Again, it may be an erroneous construction of the state constitution, but it does not seem one that excessively or inappropriately undermines the state legislature's Article II authority over the appointment of presidential electors. The legislature did not need to permit the state's citizens to vote for the presidential electors, but once it did, it would not seem unreasonable to say that this vote must comply with the state constitution's requirements concerning equal voting rights (just as the vote must comply with *federal* Equal Protection and First Amendment requirements concerning the voting process).

Thus, if the Colorado Supreme Court’s decision is to violate Article II in this case, it would seem to come down to the question, analogous to the one considered by the *Bush v. Gore* concurrence, whether its interpretation of the statutory § 1-7-101 was too much of a stretch. In defense of its exercise of statutory construction, the court relied on the separate statutory provision that the state’s election code is to be construed liberally to promote voting by eligible citizens. The dissent, however, responded by saying:

first, the majority misunderstood the balance called for by the “liberal construction” provision (the election code is also to be construed liberally to prevent the counting of unlawful ballots);

second, the “liberal construction” principle does not apply when the post-7pm ballots are clearly “ineligible”; and

third, the Secretary of State’s interpretation controls under the Code.

The dissent may be correct on all these points—as arguably was the Florida Supreme Court dissent in *Bush v. Gore*—but the question remains whether the Colorado Supreme Court majority was *so wrong* as to have crossed the Article II line. Compared to the Florida Supreme Court, the Colorado Supreme Court’s interpretation of the relevant state statutes is arguably less egregious given the existence of the “liberal construction” provision (even if misapplied): that provision could be said to automatically insert some latitude in the interpretation of the election code, thereby loosening the apparent “plain meaning” of § 1-7-101. The strongest argument on the other side is that § 1-1-107 does say unequivocally: “Any person arriving after 7 p.m. shall not be entitled to vote.” When combined with the other statutes that also require all overseas and emergency absentee ballots to be in the hands of local election officials by 7 p.m., the statutory deadline reflects a clear legislative policy—one that the Secretary of State wished to enforce, as he is authorized to do under the code. These factors make it possible for a Justice who

shares the view of the *Bush v. Gore* concurrence to believe that the Colorado Supreme Court's undoing of the legislative scheme was at least as severe as the Florida Supreme Court's in *Bush v. Gore*.

D. The relevance to Article II of the November 26 press conference?

There is, however, another factor to consider—one not present in *Bush v. Gore*. As the Statement of the Case explains, the Governor and legislative leaders announced on November 26 that they approved of the Colorado Supreme Court's interpretation of the state's election code. While that announcement is not a formal exercise of the state legislature's Article II authority, it perhaps has bearing on the reasonableness of the state supreme court's interpretation of legislative will. If it were absolutely clear that this type of announcement was “180 degrees” opposite of what the existing statutes say, then it might not be able to negate the unreasonableness of a state supreme court's interpretation of *prior* (and as-yet-unamended) legislative will. But if there is any ambiguity in what the existing statutory scheme provides—and specifically if the “liberal construction” provision injects that kind of ambiguity—then arguably it might bear on the whether or not the state supreme court “stretched too far” in interpreting the existing statutory language that the current legislature (with the Governor's support) wanted that existing statutory law construed in the way that the state supreme court did.

Whether one thinks it is permissible to consider this kind of extrinsic evidence in statutory interpretation depends most likely on one's general jurisprudential views regarding statutory interpretation and the relationship of courts and legislatures. That difference in judicial philosophy relates back to the different theories of Article II: the concurrence's and the dissenters'. For what counts as “too much of a stretch” under one

view of statutory interpretation is a permissible (even if not inevitable) mode of statutory “construction,” according to the other judicial philosophy.

* * *

Thus, here, as in *Bush v. Gore*, it seems open to a Justice to conclude either that the state supreme court went too far in “distorting” the existing statutory scheme or that it did not.

III. Should this Court rule the Equal Protection and Article II questions in this case to be “nonjusticiable” under the Political Question Doctrine, thereby necessarily overruling *Bush v. Gore*?

Some commentators have argued that the Court should have relied on the political question doctrine to avoid deciding either the Equal Protection or Article II claim there on the merits.¹⁰ That argument is a bolder one than the position, voiced by several of the *Bush v. Gore* dissenters, that the Court should not have granted certiorari in the case. Among the dissenters, only Justice Breyer, in a portion of his opinion speaking only for

¹⁰ Interestingly, however, the most prominent proponent of that view, Laurence Tribe, has backtracked considerably on that position, as he himself acknowledges:

“I confess . . . the error of my overly mechanical formulation of the ‘political question’ question in my first scholarly analysis of the dispute . . . and [now] offer a considerably more nuanced formulation that rejects . . . my own *Harvard Law Review* position that the question was categorically nonjusticiable, advancing instead a ‘political process’ doctrine according to which political nonjusticiability, in an important class of instances, is akin to nonjusticiability for want of ripeness.”

Laurence H. Tribe, *The Unbearable Wrongness of Bush v. Gore*, 19 CONSTITUTIONAL COMMENTARY 571, 573-74 (2002) (emphasis in original). For a critique of Tribe’s revised view, see Nelson Lund, *Carnival of Mirrors: Laurence Tribe’s “Unbearable Wrongness,”* 19 CONSTITUTIONAL COMMENTARY 609, 616-18 (2002).

For different voices expressing Tribe’s earlier (but since recanted) categorical view that the entire *Bush v. Gore* case was non-justiciable, see Steven G. Calabresi, *A Political Question*, in Bruce Ackerman (ed.), *BUSH V. GORE: THE QUESTION OF LEGITIMACY* 129 (2002); Erwin Chemerinsky, *How Should We Think About Bush v. Gore?*, 24 LOYOLA U. (CHI.) L. J. 1, 16 (2002) (suggesting, rather than definitively making, this argument; an earlier piece by Chemerinsky was more definitive on the issue, so arguably he did some back-tracking comparable to Tribe’s).

himself, suggested that the case might have been dismissed on political question grounds. But even he did not go so far as to press the point, rather than simply alluding to it in passing. See 531 U.S. at 157. (It is worth noting, moreover, that a dismissal of the entire case as nonjusticiable would have been logically incompatible with Justice Breyer's decision to join Part III of Justice Souter's dissent, which found an Equal Protection violation on the facts there, but disagreed with the majority's remedy for that violation.)

In a footnote, see *id.* at 142 n.2, Justice Ginsburg did have a "cf." citation to two precedents that relied on political question doctrine grounds; these were cases that concerned analogous "structural" issues that the Court had determined to be committed to other branches of government:

cf. *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916) (treating as a nonjusticiable political question whether use of a referendum to override a congressional districting plan enacted by the state legislature violates Art. I, § 4); *Luther v. Borden*, 7 How. 1, 42 [Republican Form of Government clause] (1849).

But Justice Ginsburg used these citations as a reason for rejecting the concurrence's reliance on Article II. She did not suggest that the entire case was nonjusticiable, including specifically the Equal Protection claim.

If this Court were to rely on the political question doctrine here, dismissing the petitions for certiorari for want of Article III jurisdiction, it would pose tricky jurisprudential questions quite apart from the basic issue of *stare decisis*: what would justify overruling *Bush v. Gore* on this ground? The reason is that the posture of the case here differs from the posture of *Bush v. Gore* in a significant respect: this case involves a legal dispute over whether a certain category of ballots are entitled to be counted, *prior to the final Secretary of State's official determination—certification—of which slate of*

presidential electors received the most votes. By contrast, *Bush v. Gore* involved a post-certification challenge to the procedures for conducting a recount.

In his revised argument of how the political question doctrine should have applied to *Bush v. Gore*, Laurence Tribe asserts that the precise timing and context in which Equal Protection and Article II issues are presented to this Court concerning a presidential election are critical.¹¹ He articulates a “political *process*” instead of “political question” doctrine to make this point, and says that this reformulated justiciability doctrine would have been particularly concerned with the *remedy* that the *Bush v. Gore* majority ordered and, specifically, that remedy’s relationship (by stopping the manual recounts in Florida altogether) to the rest of the presidential election process called for in the Constitution (including submission of Electoral College votes to Congress for its review). Tribe’s “political *process*” doctrine presumably would treat the present context of *McCain v. Obama* quite differently: whether this Court affirms the Colorado Supreme Court’s order to count the contested provisional ballots, or reverses on the ground that Equal Protection (or Article II) requires that those ballots not be counted, or remands for reconsideration by the Colorado Supreme Court in a way that might not violate Article II—any of those potential remedies from this Court would not put a stop to anything in the way that the remedy in *Bush v. Gore* arguably did. It would permit the Secretary of State’s certification to occur, in a way consistent with both state and federal law that is applicable, and then the state legislature, Congress, and other relevant institutional actors would be able to proceed as they wish in accordance with whatever additional authority they may have in the presidential election process.

¹¹ Tribe, *supra* n. 10, at 596, 602-03.

Furthermore, Tribe’s revised time-and-context-sensitive “political process” doctrine, rather than his earlier “overly mechanical” (his own words) reliance on the political question doctrine, is necessary to save *McPherson v. Blacker*, 146 U.S. 1, 23 (1892), from overruling. That precedent squarely rejected the contention that adjudicating a claim about the extent of a state legislature’s power under Article II was beyond the Court’s authority because of the political question doctrine. Only by distinguishing *McPherson v. Blacker* as presenting the Article II issue at a different (and much earlier) temporal point in the presidential election process can Tribe argue, as he does, that *McPherson* was correct to reject the invocation of the political question doctrine there, but that the Court should have invoked it in *Bush v. Gore* because of the particular remedial context in which the latter case arose. (If one were to put this *McCain v. Obama* case on a timeline of the presidential election process, it would fall between *McPherson v. Blacker* and *Bush v. Gore*. But Tribe’s reformulated theory is not solely about timing; it is about the consequences of the *nature* of this Court’s potential intervention, based on the particular *remedy* that the Court might impose at the particular time the case arises.¹²)

Here’s another reason for adopting what Tribe calls a “more nuanced” approach to the political question doctrine (assuming, consistent with *stare decisis*, it should play a role at all in this case): if adjudicating the Equal Protection issue in this case were beyond the scope of this Court’s jurisdiction under Article III, it would leave state courts with the authority to adjudicate this kind of federal constitutional question without this Court’s

¹² Jeffrey Rosen has also argued for re-focusing the political question doctrine to look at the potential remedy that the Court may impose, rather than the potential right the Court may declare. See Jeffrey Rosen, *Political Questions and the Hazards of Pragmatism*, in Ackerman, *supra* n. 10, at 146.

supervisory review, as state constitutions may not be so stingy with respect to their own courts' jurisdiction. This circumstance could lead to an odd judicial dissonance over a major federal constitutional question of utmost national significance, one in which uniformity of interpretation might be thought especially important. Again, this concern has more force in the pre-certification context, before an official election winner has been declared. Just as the political question doctrine has no applicability to Equal Protection or Article II challenges to the voting rules applicable to presidential elections *before* any ballots are *cast*—*McPherson v. Blacker* is squarely on point for that proposition, and much litigation has already occurred during this 2008 presidential election predicated on that premise—the authority under Article III of this Court to answer federal constitutional questions concerning the rules for *counting* presidential ballots, during the time between when they are cast and when they are officially counted, need not be denied—even though there might be reason to question this Court's authority to intervene *after* the ballots have been *counted*.

A related point: some judicial ruling must be made on whether or not to count these disputed provisional ballots. The decision whether to count these ballots is necessary in order to certify the results of *other* races in the general election. Whether or not these other races were close enough to be disputed, or exactly how the provisional ballots might factor in the determination of which candidates won those other races, the election of these other offices is not complete without a final disposition on whether or not to count the contested provisional ballots. The state judiciary here could not avoid a ruling on this legal matter, given its general authority to entertain claims that administrative proceedings concerning the casting and counting of ballots are being

conducted in violation of state or federal law. Thus, insofar as the Colorado courts must address issues of federal law in resolving this dispute, the correctness of their determination of these federal issues is appropriate for this Court's review. Indeed, that conclusion is precisely the one this Court reached in *McPherson v. Blacker*: "As we concur with the state court [on the issue of federal law under review], its judgment has been affirmed; if we had not, its judgment would have been reversed." 146 U.S. at 24. The Court added: "The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the highest tribunal of the state, as revised by our own." *Id.*

Thus, it might be argued, the time for invoking the political question doctrine in the particular context of the 2008 election would seem to come, if at all, later in the process than in the posture presented here, which (as said above) involves a dispute over whether a specific category of ballots are eligible for counting even before there has been an official certification of the election's outcome. The judiciary, including this Court insofar as it reviews the judgments of the state supreme court on questions of federal law, can appropriately resolve this pre-certification legal dispute, and then let the federal constitutional process for electing a President unfold. If (for example), after certification of which slate of presidential electors received the most votes, according to a legally proper determination of which ballots count as valid votes, the state legislature enacts a new law purporting to reassert its authority to appoint presidential electors directly, this Court could then reassess whether the political question doctrine would block any litigation over the validity of that new state legislation. Or, even further on down the

road (so to speak), were Congress to reject the Electoral College votes from the slate of Colorado electors that had been certified as properly appointed in the aftermath of this Court’s judgment here, then this Court might declare that the political question doctrine precluded its consideration of the validity of that congressional action—on the ground that the matter had been “textually committed” to Congress, under the analysis in *Baker v. Carr*. But those future possibilities would not necessarily be reasons for concluding here, that in the current posture of this case, the political question doctrine barred this Court’s adjudication of the Equal Protection and Article II questions presented by the Colorado Supreme Court’s decision to require the counting of these provisional ballots.

Still, it would be within the power of this Court, after hearing the oral argument in this case, to conclude that its writ of certiorari had been improvidently granted—and thus to decline to exercise its discretionary jurisdiction to review the Equal Protection and Article II questions that are properly presented by the petitions for certiorari.¹³ Were this Court to reach *that* conclusion, after having already granted the petitions for certiorari in this momentous case concerning a presidential election, and after similarly granting certiorari to address similar Equal Protection and Article II issues in *Bush v. Gore*, one would hope that the Court would write an opinion explaining the basis for its conclusion. The reasons that the Court would give for concluding that, upon further consideration, it would be more beneficial to the Nation for the Court to decline to exercise the power that

¹³ In some of the academic commentary on *Bush v. Gore*, there is a “commingling” of the Article III political question doctrine, which goes to the Court’s *power* to adjudicate the Equal Protection and Article II questions presented, and the decision to grant certiorari, which goes to the Court’s *discretion* to adjudicate those questions. Certainly, factors that might be relevant to a political question doctrine analysis under *Baker v. Carr* and related precedents might also be relevant to a discretionary decision whether to grant certiorari or (having done so) whether to dismiss as improvidently granted. Nonetheless, it seems analytically useful, if not important, to keep these two matters separate: the decision not to exercise discretion to adjudicate is not precedent for the proposition that the Court lacks power to adjudicate.

it has, thereby letting the Colorado Supreme Court decision stand unreviewed on the federal constitutional questions, would be important for the Nation to know.

Furthermore, it would help shape public expectations on when to look to the U.S. Supreme Court to exercise its certiorari jurisdiction in cases involving disputes over major elections, including presidential ones.

One reason that the author Jeffery Rosen has given as to why the Court should not have granted certiorari in *Bush v. Gore* is not applicable here. He argued that the Justices in *Bush v. Gore* should have “had enough humility not to trust” themselves.¹⁴ But for this case, a special procedure has been used to empanel this Court so that it is structurally trustworthy. Therefore, if this dispute over the counting of contested ballots is to be decided according to law, this panel is entitled to consider itself as capable of doing so—as capable as any court of law that could be created to do so.

[Submitted to the Court and arguing Counsel on September 26, 2008; typographical, grammatical, and other formal corrections made October 2, 2008.]

¹⁴ Rosen, *supra* n. 10, at 146.

In the Supreme Court of the United States

McCain v. Obama

Scheduled for oral argument
Monday, October 20, 2008, 10:00 a.m.
[as if it were Monday, December 1]

Notice of Supplemental Authority **Edward B. Foley**

(October 2, 2008)

Research conducted by *Election Law @ Moritz* has uncovered this additional case that may be of interest to the Court and Counsel: *Lake v. State Board of Elections of North Carolina*, 798 F.Supp. 1199 (M.D. N.C. 1992).

This case primarily involved a federal Voting Rights Act challenge to an extension of polling hours and other alleged misconduct by state election officials, but it also raised Equal Protection and Due Process challenges under the Fourteenth Amendment to the same state action. Although a pre-2000 decision whose reasoning may in part have been superseded by *Bush v. Gore*, this unanimous three-judge district court decision (Phillips, Bullock, Tilley) is nonetheless interesting for its discussion of the relationship of state and federal law concerning the extension of polling hours and, in particular, the effect that an allegedly improper extension may have on federal-court intervention in a dispute over the outcome of a close election.

The election in *Lake* was a statewide race for a seat on the North Carolina Supreme Court. Voting machines broke down at precincts in two counties, Durham and Guilford. Long lines at the polls resulted, including some two-hour delays. In Durham

County, the local election board (at about 1pm) extended voting from 7:30 to 8:30pm, as permitted by North Carolina law. A state court, however, subsequently extended voting until 10pm, which apparently was not permitted (8:30pm being the outer limit for an extension under the statute). “As many as 1,998 persons allegedly entered the line to vote after 8:30 p.m. and were allowed to vote.” 798 F.Supp. at 1202. In Guilford County, the local election board declined to extend polling hours, but at 7:20pm—10 minutes before the scheduled closing—a state court ordered an extension until 8:30pm. Some precincts, however, did not get the message, while others did; in the chaotic conditions, it was unclear how many voters took advantage of this last-minute extension in precincts where it was possible to do so.

One of the two candidates, together with some voters, sued in federal court, seeking a decree that would void the election and order a new one, on the ground that the facts described above established a violation of the Fourteenth Amendment (as well as the Voting Rights Act). Rejecting this constitutional claim, the court described it this way: “Seemingly, [plaintiffs] identify as unconstitutional action both the original malfunctionings [sic] of the voting machines and then the state court orders which in both counties extended the voting periods in efforts to rectify the malfunctioning.” 798 F. Supp. at 1206. The court reasoned that the plaintiffs’ reliance on *Reynolds v. Sims* was inappropriate because the constitutionally protected “federal right” to vote “is not an absolute one.” *Id.* at 1207. The court continued: “The same [federal] constitution which creates it as an ultimate safeguard against state action imposes structural limitations upon it by delegating to the states the primary power and responsibility to police their own elections.” In what is perhaps the court’s most telling sentence, it states: “Responding to

this structural limitation—whose exact dimensions are not spelled out in the Constitution—the courts uniformly have recognized that whether particular state action impinges upon the ultimate federal right of suffrage is *in all cases a matter of degree.*” *Id.* (emphasis added).

The court went on to say that “in extreme cases of intentional state action literally corrupting the process” federal judicial intervention under the Fourteenth Amendment would be appropriate even to void the results of “completed elections,” but ordinarily federal courts may impose only “prospective decrees that do not intrude on the state’s conduct and corrective supervision of completed elections.” *Id.* at 1208. Applying that principle to the facts before it, the court stated that the “irregularities” alleged did not amount to a constitutional violation because “none is claimed or could be claimed to have resulted from intentional, systematic conduct aimed at corrupting the state’s electoral process.” *Id.* The malfunctioning machines were “purely fortuitous.” More importantly, for purposes of *McCain v. Obama*, “[t]he efforts by the two [state] judges to rectify the situation were . . . not intended to pervert the process, but to salvage it.” *Id.* Thus, in dismissing the claim, the court left the matter to the state’s legal system to resolve: “Federal intervention to attempt to rectify any injury done here would require the undoing of a completed election, a remedy properly reserved to the State of North Carolina and available under its election laws.” *Id.*

In light of *Bush v. Gore*, one wonders how authoritative this reasoning can still be. There are ways to reconcile the two decisions. One possibility is to observe that this case was filed in federal district court, seeking a remedy for the alleged constitutional violation under section 1983, whereas *Bush v. Gore* came to the Supreme Court from the

state's highest court. The *Lake* opinion contains much language on the need to limit the scope of federal-court intervention *under section 1983 specifically* in order to protect the structural value of state authority to remediate its own electoral flaws. Understood that way, *Lake* is not so much a holding about the Fourteenth Amendment as it is about section 1983 employed to enforce the Fourteenth Amendment through claims filed in federal district court. If this is the right basis for distinction, then *Lake* has little applicability to *McCain v Obama*, which like *Bush v. Gore* comes to this Court from a state supreme court. (This analysis converts *Lake*, in light of *Bush v. Gore*, into a quasi-abstention holding.)

The other possibility is to pick up on the “matter of degree” language, and say simply that the facts of *Bush v. Gore* fell on one side of the Fourteenth Amendment—the wrong side—while the facts of *Lake* did not. This approach would then call for determining which side of the line *McCain v. Obama* falls on (assuming, again, that *Lake* should be considered as correct with respect to its own facts after *Bush v. Gore*). This approach could be seen as lending support to Obama's position in this case. On this view, like *Lake* the facts here involve a geographically limited polling extension in an effort to remediate a localized problem causing the inability to cast ballots at particular polling places. Thus, maybe the facts here are closer to *Lake* than to *Bush v. Gore*. But this factual analysis is not necessarily dispositive: winter storms may be constitutionally different from malfunctioning voting machines (less worthy of an extension, because not remediating the government's own failure to begin with?), and limiting the extended hours here only to Denver arguably is more demonstrably underinclusive than the state-court orders in *Lake*.

A third possibility would be to say that *McCain v. Obama*, unlike both *Lake* and *Bush v. Gore*, does not involve a “completed election” because there has been no official certification of the count of all ballots yet, and thus whatever the tension between *Lake* and *Bush v. Gore*, that tension need not be resolved for the purpose of deciding *McCain v. Obama*. This third approach presumably would put *McCain v. Obama* back under the rubric of the general balancing test that divided the Court in *Crawford*.

Thus, *Lake* provides an illuminating, but not decisive, additional precedent to consider relevant to *McCain v. Obama*.