

THE *MCCAIN V. OBAMA* SIMULATION: A FAIR TRIBUNAL FOR DISPUTED PRESIDENTIAL ELECTIONS

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INTRODUCTION

On Monday October 20, 2008, barely two weeks before Election Day, three distinguished retired judges entered the auditorium at Georgetown University's law school. They were there to act as if they were the United States Supreme Court, to hear oral argument in a case that would decide the race between candidates Barack Obama and John McCain. Like the two veteran attorneys standing before them that morning, they were pretending that the date was December 1, 2008, and that 60,000 disputed ballots from Colorado would determine which candidate won that state's Electoral College votes and, with them, the presidency. The hypothetical facts concerning these Colorado ballots raised constitutional questions comparable to those in the very real case of eight years earlier, *Bush v. Gore*.¹ The exercise would show that, despite superficial changes to the voting process in the United States, nothing fundamental had been fixed since the dispute over ballots from Florida in 2000. In a close election, legal challenges to ballots in a pivotal state could be teed up to give the United States Supreme Court the opportunity to rule on whether or not to count the outcome-determinative ballots.

Eight days after the oral argument in this hypothetical case, the three jurists acting as the United States Supreme Court issued an opinion regarding the constitutional questions presented by the hypothetical facts.² According to the real-world calendar, they released their opinion on Tuesday, October 28, still a week before the voters would actually elect then-Senator Barack Obama as their next president. It was important to the exercise for the judges to announce their decision while the real-world outcome of the 2008 election was still unsettled.³

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

2. The appendix to this essay contains the full text of this opinion, so readers may judge it for themselves.

3. If the real-world result was already known, the judges' opinion might be viewed as influenced by the outcome. Conversely, as long as the winner of the election re-

This real-world date of October 28 corresponded to Tuesday, December 9, in terms of the “make-believe” calendar within the hypothetical scenario itself; in other words, the judicial decision in the *McCain v. Obama* simulation was announced eight days after the “make-believe” date of December 1 for the oral argument, actually held on October 20.

December 9 was a date with very real significance in the 2008 presidential election. This date was the so-called “safe harbor” deadline set by Congress. If a state resolves a dispute over its presidential ballots by this deadline according to rules and procedures that the state establishes in advance of the election, then Congress, by statute, promises to honor the state’s resolution of the dispute when it comes time to count Electoral College votes in Congress.⁴ This “safe-harbor” deadline was crucial for the real Supreme Court in *Bush v. Gore*. It was the reason that the Court had ordered a stop to the recounting of Florida’s ballots. Thus, by meeting the “safe harbor” deadline on December 9, according to the hypothetical scenario’s internal calendar, the three jurists acting as the Supreme Court in *McCain v. Obama* were being realistic concerning the time available for their deliberations and the preparation of their opinion.

Although the constitutional questions in the hypothetical *McCain v. Obama* are comparable to those in *Bush v. Gore*, there are significant differences between the opinions in the two cases. *McCain v. Obama* was unanimous, whereas *Bush v. Gore* infamously was not. The judges in *McCain v. Obama* rejected all the constitutional arguments analogous to those that the majority and concurring opinions in

mained in doubt, the judges were behind a “veil of ignorance.” This enabled their decision to remain motivated by their conception of the law rather than a particular result to which they felt pressured to conform. On the idea of a “veil of ignorance” as protecting the purity of decision-making, see JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

4. See 3 U.S.C. § 5 (2006). The text of this congressional provision is rather convoluted, but it essentially creates a deadline six days before the meeting of the Electoral College for resolving any litigation under state law over ballots cast for Electoral College members:

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

Bush v. Gore accepted. What explains these differences? Was it the selection of the three particular retired judges to act as the Court for *McCain v. Obama*?⁵

A large amount of thought and effort went into the selection of these three judges, both in terms of the particular methodology and criteria used to select them and the specific individuals who were eventually chosen using this approach. The overarching objective was to find one retired judge of outstanding reputation with a Democratic background and an equally outstanding retired judge with a Republican background—and then let the two of them mutually select the third member of their three-judge Court. Did this selection procedure account for the unanimity that resulted or the particular answers to the legal questions that they reached? Is it a selection procedure worth replicating for a real case involving disputed presidential ballots that might arise in the future?

This article explores these questions. It explains the genesis of the project to conduct the *McCain v. Obama* simulation; describes the hypothetical facts and legal issues involved; and discusses what lessons we can learn from the first exercise of this type and how we might build upon the experience.

I.

THE IMPETUS FOR THE EXERCISE

The *McCain v. Obama* exercise resulted from a convergence of two lines of scholarship.

A. *Bush v. Gore as a Precedent*

The first line of scholarship was academic inquiry regarding the implications of *Bush v. Gore* for the resolution of future election disputes. After the first wave of academic fury over *Bush v. Gore* died down, there emerged a second generation of scholarship devoted to whether *Bush v. Gore* had a role to play as precedent in new disputes and, if so, the meaning, scope, and force of that precedent. In litigation regarding counting votes in non-presidential elections, as well as in pre-voting lawsuits in 2004 designed to shape the terrain upon which that year's presidential election would be battled, observers began to see *Bush v. Gore* cited by campaign attorneys.⁶

5. See *infra* Part III.A–B.

6. See Edward B. Foley, *The Future of Bush v. Gore?*, 68 OHIO ST. L. J. 925, 933 (2007) [hereinafter *The Future of Bush v. Gore?*] (highlighting the various ways in which *Bush v. Gore* has been, or may be, used as precedent). As a result of seeing *Bush v. Gore* invoked as precedent in new election-related lawsuits, scholars began to

One of the two main issues in *Bush v. Gore* was not relevant to non-presidential elections. That issue concerned whether Article II of the U.S. Constitution placed any constraints on a state's judiciary in its interpretation of the state's legislative rules concerning the casting and counting of presidential ballots. Article II says that a state's legislature shall "direct" the "Manner" in which the state's presidential electors are chosen.⁷ In *Bush v. Gore*, three of the Supreme Court justices in the majority—but not all five—wrote that they would employ this constitutional provision to nullify a state supreme court's ruling that strays too far from the text of state statutes applicable to the counting of ballots for presidential electors.⁸

Equal Protection was the other main issue in *Bush v. Gore* and, by contrast, it remains very relevant to any election regardless of the particular office at stake. The Equal Protection problem in *Bush v. Gore*, according to all five Justices in the majority (as well as two of the Justices dissenting from the order to stop the recounting of ballots in Florida), concerned the so-called "hanging" or "punctured" or "dimpled" chads, familiar from ubiquitous news coverage.⁹ Some local recount teams in Florida would require a chad to be hanging and, therefore, would reject a ballot with only a dimpled or punctured chad. Other local recount teams would count a punctured or hanging chad,

debate the judicially authoritative scope of *Bush v. Gore*. See *id.*; see also Edward B. Foley, *Refining the Bush v. Gore Taxonomy*, 68 OHIO ST. L. J. 1035, 1035–36 (2007); Daniel Lowenstein, *The Meaning of Bush v. Gore*, 68 OHIO ST. L. J. 1007, 1016–27 (2007); cf. Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 3–4 (2007) (expressing pessimism that *Bush v. Gore* would have significant future utility as generative of an Equal Protection principle). As practitioners increasingly seek to find ways to use *Bush v. Gore*, scholarly reassessment of the case has continued beyond the 2008 election. See generally Akhil Reed Amar, *Bush, Gore, Florida, and the Constitution*, 61 FLA. L. REV. 945 (2009) (discussing the decisions of both the Florida Supreme Court and the United States Supreme Court); Richard L. Hasen, *Bush v. Gore and the Lawlessness Principle: A Comment on Professor Amar*, 61 FLA. L. REV. 979, 988–89 (2009) (offering an interpretation of *Bush v. Gore* rooted in Due Process values); Erwin Chemerinsky, *The Meaning of Bush v. Gore: Thoughts on Professor Amar's Analysis*, 61 FLA. L. REV. 969, 978 (2009) (arguing that judges have enormous discretion in cases involving constitutional issues, and will be influenced by personal views and experiences).

7. U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.").

8. 531 U.S. at 115 (Rehnquist, C.J., concurring). Justices Scalia and Thomas were the others who joined this concurrence.

9. Justices Souter and Breyer were the two that voiced concern over the Equal Protection problem presented by the facts of *Bush v. Gore*. See 531 U.S. at 133–34 (Souter, J., dissenting); *id.* at 145–46 (Breyer, J., dissenting).

but not a dimpled one, while still other recount teams would also count the dimpled chad. Moreover, sometimes the standard changed over time even in the same place. “This,” the Court declared, was “not a process with sufficient guarantees of equal treatment.”¹⁰

By 2004, increasingly frequent claims arose that localized differences in the casting or counting of ballots violated whatever Equal Protection principle the ruling in *Bush v. Gore* was based on. Sometimes these claims were fairly far afield, as when claimants attacked the use of different types of voting machines in different counties within a state.¹¹ The Court in *Bush v. Gore* itself had hinted strongly that differences in local procurement policies of this type would raise no constitutional problem.¹² But other cases fell fairly close to *Bush v. Gore* factually, as in the case of arguments over allegedly different local standards used to evaluate stray marks on optical scan ballots (rather than the chads of punch card ballots).¹³

The scholarly question now became whether there was a discernible principle by which one could distinguish a properly winning *Bush v. Gore* claim from an objectively unmeritorious one. In a piece entitled *The Future of Bush v. Gore?*, I contributed to this scholarly inquiry and offered a taxonomy by which to classify and evaluate the potential strength of various possible *Bush v. Gore* claims based on various attributes in their fact patterns.¹⁴ But other scholars saw the potential landscape of *Bush v. Gore* claims differently,¹⁵ and it is fair to say that there was more than a considerable degree of murkiness in the effort to discern the operative principle at work in *Bush v. Gore* in order to predict how it would apply in future cases. The fact that the majority in *Bush v. Gore* itself said that it was going no further than necessary to decide the case before it,¹⁶ a pronouncement that has been much derided and likely misunderstood, did not help in this regard. Although some scholars suggest that the Court was purposefully

10. *Id.* at 107 (per curiam).

11. See *Stewart v. Blackwell*, 444 F.3d 843, 846 (6th Cir. 2006), *vacated*, 473 F.3d 692 (6th Cir. 2007) (en banc).

12. 531 U.S. at 109 (“The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.”).

13. See *Big Spring v. Jore*, 109 P.3d 219, 222 (Mont. 2005).

14. *The Future of Bush v. Gore?*, *supra* note 6, at 932–945.

15. See, e.g., Lowenstein, *supra* note 6, at 1027–32 (offering a revised taxonomy of possible applications of *Bush v. Gore*).

16. 531 U.S. at 109 (“Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”).

unprincipled and willing to say so explicitly,¹⁷ it seems much more likely that the Court was only signaling ordinary caution about courts deciding cases one at a time, and thus lawyers should be wary about reading too much into any one opinion. In any event, although it seemed possible to identify future factual circumstances in which the claim of a *Bush v. Gore* violation would be strong (an ambiguous statute on how to decide whether disputed ballots were eligible for counting being the ingredient most likely to lead to a successful claim), there were plenty of other imaginable fact patterns about which one could only remain deeply uncertain.

B. *How to Have an Impartial Tribunal for Disputed Elections?*

The second strand of scholarship leading to the *McCain v. Obama* simulation involved research into how courts handle disputes over the counting of ballots, especially in statewide or other high-stakes elections (such as those for governor, big-city mayor, or congressional representative). That research disturbingly indicated that judges faced with these disputes tended to decide them based on partisan leanings.¹⁸ Multi-member courts would split in their rulings on these cases, with the split following partisan lines. The divide did not exist only in the Florida Supreme Court (or the U.S. Supreme Court) in *Bush v. Gore*, and it did not just exist when the legal issue concerned a vague constitutional principle like Equal Protection. Instead, the conventional rules that most states used for adjudicating disputes over the counting of ballots were sufficiently malleable that judges prone to partisanship could easily manipulate those rules to support a decision for their favored candidate.¹⁹

A noteworthy exception to this dispiriting trend was the three-judge court used to supervise the recounting of ballots in Minnesota's 1962 gubernatorial election. That three-judge panel was handpicked by the two candidates to be evenly balanced towards both sides. One judge was a Democrat (or DFL, as they say in Minnesota²⁰), another

17. Amar offers an amusing recapitulation of the scholarship that accused the Court of willful dishonesty. See Amar, *supra* note 6, at 946–49.

18. See, e.g., Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POL'Y REV. 350, 377–78 (2007).

19. See, e.g., *Roe v. Mobile County Appointment Bd.*, 676 So. 2d 1206, 1221–25 (Ala. 1995) (per curiam), *nullified by Roe v. Alabama*, 68 F.3d 404 (11th Cir. 1995); *In re Contest of Election for Governor*, 444 N.E.2d 170, 178–79 (Ill. 1983); *In re Application of Anderson*, 119 N.W.2d 1, 5–7 (Minn. 1962). Knowledge of the identity of the judges in these cases and their party backgrounds reveals that the split votes in these cases tracked partisan differences.

20. DFL stands for Democratic-Farmer-Labor, which is Minnesota's version of the Democratic Party, based on a merger between the state's Democratic party and a

was a Republican, and the third was one whom both sides perceived as genuinely independent and neutral. The panel performed its role with proverbial flying colors. Its unanimous decision was deemed fair and legitimate by the losing candidate, who declined to pursue an appeal.²¹

Uncovering this Minnesota example in 2007 while conducting research led to two ideas even before Minnesota itself turned to this piece of its history for guidance on how to handle the dispute over its 2008 U.S. Senate election. First, would it be wise for states to adopt legislative or, if necessary, constitutional reforms that would employ this kind of specially selected and balanced court to resolve any high-stakes disputed election that might arise in the future? Second, even if states did not adopt this kind of court as the official tribunal for disputed elections, would it be possible for the private sector to create this kind of tribunal as an advisory institution? This advisory tribunal's purpose would be to attempt to influence the official court with jurisdiction over the dispute. Hopefully, by demonstrating how to resolve the dispute free of partisan bias, the advisory tribunal would cause the official court to conform its own decision to the same unbiased outcome. Perhaps the existence of the advisory tribunal would be influential even if the official court were tilted to one side or the other in its membership; if it is too embarrassed to follow its own partisan leanings, the official court might feel compelled to embrace the outcome reached by the unbiased advisory tribunal. In other words, if a state suddenly faced a major disputed election but its existing institution for handling this dispute was perceived to be imbalanced in its partisan composition, would the creation of a parallel panel that was evenly balanced—like Minnesota's—and which would "decide" the case in advance of the official institution's deliberations, cause the official institution to keep its own partisan predilections in check? And if not, would the transparent discrepancy between the decision of the impartial parallel panel and contrary result reached by partisan official body serve as a catalyst for legislative—or, if necessary, constitutional—reform to replace the existing official body with an evenhanded system modeled after this parallel panel?

previously separate Farmer-Labor party. *See* JOHN EARL HAYNES, *DUBIOUS ALLIANCE: THE MAKING OF MINNESOTA'S DFL PARTY* 116 (1984).

21. *See* STEVEN F. HUEFNER, DANIEL P. TOKAJI, & EDWARD B. FOLEY WITH NATHAN A. CEMENSKA, *FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES* 140 (2007) [hereinafter *FROM REGISTRATION TO RECOUNTS*]; *see also* RONALD F. STINNETT & CHARLES BACKSTROM, *RECOUNT* 192–93 (1964).

C. *Developing a Simulation to Explore These Issues*

The *McCain v. Obama* simulation was developed as an experiment to begin testing these ideas. The concept of an evenly balanced parallel panel, based on the Minnesota model, was originally presented at a meeting of the Tobin Project's Institutions of Democracy working group in June 2007.²² First called a "shadow court," and later "an amicus court"²³ (a friendlier label reflecting the possibility that it might submit an amicus brief containing its unofficial decision to the official tribunal responsible for resolving the disputed election), this non-partisan private-sector tribunal was conceptually refined through a series of academic workshops in early 2008.²⁴

The refinement of the "amicus court" idea culminated at a colloquium in May 2008 sponsored by the AEI-Brookings Election Reform Project.²⁵ This joint endeavor of the two think tanks was motivated by the bipartisan belief that improvements to the electoral process need acceptance from both major political parties. The "amicus court" idea fit within AEI-Brookings's core commitment to bipartisan electoral reform. Given the positive reception to this idea at the May 2008 colloquium, the question arose whether AEI-Brookings could implement the idea in advance of the November 2008 election. In other words, could AEI-Brookings lay the groundwork for the creation of an amicus court in the event that a dispute actually arose in the 2008 presidential election? Could three distinguished retired judges be found who would be willing to sign up in advance to serve on this kind of parallel panel? What sort of judges would one wish to select, so that the two presidential candidates and the actual U.S. Supreme Court would perceive that the panel's composition was genuinely balanced and impartial *and* that the panel's judgment concerning any legal issues should command the respect of the candidates and the Court?

As discussions continued regarding the selection of judges, an additional idea emerged. Why not have the three-judge panel adjudicate a hypothetical case in advance of Election Day, rather than just holding the panel in reserve in the event of a real dispute after Election

22. Edward B. Foley, *A Model Court for Contested Elections (or the "Field of Dreams" Approach to Election Law Reform)*, TOBIN PROJECT DISCUSSION PAPER 4 (2007), <http://www.tobinproject.org/downloads/Foley-AModelCourtforContestedElections.pdf>.

23. See Edward B. Foley, *Let's Not Repeat 2000: A Special Political Tribunal Could Help Resolve Election Conflicts Without Mistrust*, 31 LEGAL TIMES 62 (2008).

24. These workshops were held throughout the spring of 2008 at the University of Virginia (February 23), William & Mary University (March 14), the University of Minnesota (April 14), and the Ohio State University (April 22).

25. Information about the Project is available at <http://electionreformproject.org/>.

Day? It is, of course, extremely rare (and mercifully so) that a dispute actually occurs over the counting of presidential ballots. Thus, one may go to all the effort to select an impartial panel of distinguished retired judges, and they would simply sit on the shelf (so to speak). By contrast, even if an actual dispute did not materialize, a mock trial of a hypothetical dispute might tell us something about how such a three-judge panel would operate in a contemporary high-stakes election. The Minnesota model was almost fifty years old and occurred in a much less politically polarized environment than a twenty-first century presidential election. Would a balanced three-judge panel work as well in the current context? Testing the suggested system even in a hypothetical exercise would be useful for considering both whether states should officially adopt this kind of institutional reform *and* whether it would be worthwhile to set up a balanced amicus court as a contingency.

Moreover, if we conducted the hypothetical exercise before Election Day and a dispute arose over the 2008 presidential election, then we would be better prepared to handle it. Maybe the same three-judge panel would be willing to serve again as an amicus court to issue an opinion concerning the actual dispute. Or maybe the issues in the hypothetical would be close enough to the issues in the real dispute that the panel's opinion in the hypothetical could serve as a kind of informal precedent in the real case. In any event, as development of the simulation progressed under the auspices of the AEI-Brookings project, the idea of convening an "amicus court" as a parallel institution for an actual dispute became a secondary consideration, whereas the more basic idea of simply illustrating the operation of an impartial tribunal became a primary objective.

II.

THE FACTS OF THE SIMULATION

A. *How the Facts Were Developed*

The hypothetical facts of the *McCain v. Obama* simulation came from a final exam I gave the students in my Election Law class in the Spring of 2008. I developed the fact pattern to see how well the students could argue both sides of issues left unsettled by *Bush v. Gore*. I tried to tailor the particular details of the hypothetical scenario so that neither side had an inherent advantage. While it is probably impossible to design a hypothetical case that teeters perfectly on the edge of a blade, that equipoise was the objective.

The detailed specificity of the hypothetical scenario made it a suitably realistic vehicle for illustrating the potential virtues of an impartial tribunal at the AEI-Brookings forum. Would an impartial tribunal's treatment of this case differ from what would be expected from a partisan tribunal that tilted to one side or the other? Would the public perceive this evenly balanced tribunal and its decision to be fair, whereas at least half the public would view a conventional court and its decision as biased towards one side? Because the facts of the hypothetical were structured to be as up-for-grabs as possible, it would be difficult to perceive an objectively correct outcome to the case. Therefore, if a court with a partisan tilt among its membership came down for the candidate of that party, then there would be an inevitable suspicion that the court's ruling was based on partisanship rather than the law. Would a tribunal specially structured to be evenly balanced be able to inoculate itself from this kind of suspicion regardless of which side its legal ruling ultimately favored?

When AEI-Brookings became interested in pursuing the idea of an evenly balanced panel of retired judges as an impartial tribunal to deliberate about disputed elections, it quickly made sense to use the existing hypothetical scenario to test the idea. "Let's see how a panel of this type would handle this particular fact pattern before attempting to develop the idea any further"—that was the essence of the thinking. The hypothetical facts were inherently interesting, involving a dispute over ballots that would decide whether Barack Obama or John McCain won the presidency. It would be an intellectually enjoyable as well as potentially instructive way to test the concept of a structurally impartial, special-purpose court for disputed elections.

Moreover, it was an added bonus that the hypothetical involved inherently uncertain legal issues arising from the indeterminacy of *Bush v. Gore* as precedent. Having an impartial panel of distinguished retired judges address these issues would give us greater insight into the process of judicial reasoning in this still largely uncharted area of election law. Would the panel read *Bush v. Gore* generously or stringently as it confronted the new case? As the hypothetical scenario presented both Equal Protection and Article II issues, like *Bush v. Gore* itself, would the panel show any kind of preference for one issue over the other? While the panel could not divine the "true meaning" of *Bush v. Gore* as precedent, its reasoning might reveal what judges would actually do with the precedent as a practical matter.

B. *The Content of the Facts*

The hypothetical facts of *McCain v. Obama* involved a winter storm in Colorado on Election Day. I chose Colorado to show that a state other than Florida or Ohio could end up as pivotal in a dispute over the counting of presidential ballots. As late as mid-September 2008, prominent pollsters such as Stuart Rothenberg were predicting that Colorado, indeed, could be the decisive state in terms of attaining an Electoral College majority.²⁶

I chose bad weather as the basis for a potential dispute because that complication had already occurred during the primaries. In Ohio's primary, a storm hit Cleveland late in the afternoon. The Obama campaign, in its battle against the Clinton campaign, had gone to federal court and obtained an emergency order to keep the polls open in certain precincts that arguably had been disproportionately affected by the storm.²⁷ Likewise, during the so-called "Potomac primaries," an afternoon storm hit Maryland and Virginia, causing major traffic delays on highways during the afternoon rush hour. Maryland decided to keep its polls open an extra ninety minutes, whereas Virginia stuck with its regularly scheduled closing time.²⁸ During Tennessee's primary, a major windstorm hit parts of the state, closing some polling places early.²⁹ Given all this, the idea that a severe winter storm might hit Colorado on November 4, the date of the general election, was hardly far-fetched. Colorado, to be sure, is used to heavy winter weather, but still could get hit with a storm that would be difficult for parts of the state to handle.

I knew from previous research that when polls are ordered to stay open after regularly scheduled closing times, there often may be a dispute regarding the validity of ballots cast as a result of that extension. In the 2000 presidential election, for example, a Missouri court had extended polling hours, but the Bush campaign successfully nullified

26. Stuart Rothenberg, *What's the Top Electoral College State This Year?*, REAL CLEAR POLITICS (Sept. 19, 2008), http://www.realclearpolitics.com/articles/2008/09/whats_the_top_electoral_colleg.html. Rothenberg answered his own question: "I've become convinced that my initial list of [five] swing states probably can be boiled down to just one—one state that is most likely to determine who will be the next occupant of the White House. And that state is Colorado." *Id.*

27. Joe Guillen, *Obama Campaign Outcry Extends Precinct Hours*, PLAIN DEALER (Cleveland), Mar. 5, 2008, at A1.

28. Miranda S. Spivack, *Voters Persevere Despite Ballot Shortages, Lines*, WASH. POST, Feb. 13, 2008, at A21.

29. Mark Preston, *Severe Weather in Tenn., Ark. Forces Early Poll Closure*, POLITICAL TICKER (Feb. 5, 2008, 9:01PM), <http://politicalticker.blogs.cnn.com/2008/02/05/tornados-force-some-tennessee-polling-places-to-close/>.

the order on appeal.³⁰ Moreover, the new Help America Vote Act of 2002, which Congress adopted in the aftermath of all the problems that occurred in 2000, explicitly specified that any ballots cast as a result of an extension of regularly scheduled polling hours must be *provisional*, so that they can be set aside and remain uncounted in the event the extension is subsequently ruled invalid.³¹

Upon examination, I discovered that a Colorado state statute appeared to prohibit extending the time by which a voter might arrive at the polls to cast a ballot:

All polls shall be opened continuously from 7 A.M. until 7 P.M. of each election day The polls shall remain open after 7 P.M. until every eligible elector who was at the polling place at or before 7 P.M. has been allowed to vote. *Any person arriving after 7 P.M. shall not be entitled to vote.*³²

The provision that someone standing in line at closing time does not get turned away without an opportunity to cast a ballot is commonplace. Moreover, it is well-understood that this provision is different from letting someone cast a ballot who arrives after the regularly scheduled closing time, even if there are still individuals standing in line who got there beforehand. A late voter cannot join the queue at 7:10 P.M. just because there are still individuals in the queue who have been standing there at least ten minutes. Colorado's statutory language seemed to categorically prohibit any circumstance in which someone arriving after 7 P.M. would be permitted to join the line.

The apparent absoluteness of the statutory language worked to the advantage of setting up the hypothetical scenario. If the state supreme court created an exception to this statutory language, it would create the basis for an argument based on the *Bush v. Gore* concurrence that the state's highest court violated the state legislature's prerogative under Article II of the U.S. Constitution to determine the

30. See *State ex rel. Bush-Cheney 2000, Inc. v. Baker*, 34 S.W.3d 410 (Mo. Ct. App. 2000).

31. The law states:

Any individual who votes in an election for Federal office as a result of a Federal or State court order or any other order extending the time established for closing the polls by a State law in effect 10 days before the date of that election may only vote in that election by casting a provisional ballot under subsection (a) of this section. Any such ballot cast under the preceding sentence shall be separated and held apart from other provisional ballots cast by those not affected by the order.

42 U.S.C. § 15482(c) (2006).

32. Colo. Rev. Stat. § 1-7-101(1) (2009) (emphasis added).

“Manner” of selecting the state’s presidential electors.³³ To be sure, it would be possible to make a counterargument to this Article II claim. Colorado’s election code provides that it “shall be liberally construed so that all eligible electors may be permitted to vote.”³⁴ Colorado’s constitution also robustly protects the right to vote,³⁵ making it easy to imagine circumstances in which an exception might be made to the seemingly rigid 7 P.M. deadline for arriving at the polls. For example, what if a water main break blocked access to the one road necessary for reaching a particular polling place and it took until 8 P.M. to repair the problem? From this perspective, a Colorado Supreme Court decision finding an exception to the apparently unalterable deadline would not be an Article II violation, but rather a permissible construction of state law taken as a whole. Plausible arguments on either side of an Article II issue are exactly what one would want to show that the same kind of issue that arose in *Bush v. Gore* could arise again in a context not involving dimpled, punctured, or hanging chads.

It was also easy to create a plausible Equal Protection issue arising from an extension of polling hours: if polling hours were extended for some voters within the state, but not others, might that discrepancy violate the Equal Protection principle underlying *Bush v. Gore*? Suppose Denver and its suburbs were hit with the same storm, and polling hours were extended in Denver but not in the suburbs—would that difference amount to an Equal Protection violation? One could never be certain given the indeterminacy of *Bush v. Gore* itself, but it would seem that the strength of an Equal Protection claim would depend on particular facts. If the storm hit Denver and its suburbs equally hard, and yet only Denver voters got the benefit of an extension of polling hours, that hypothetical fact would weigh in favor of the Equal Protection claim. If the storm affected only Denver, and the suburbs were entirely unaffected, that would weigh against the claim: extending the hours just in Denver, in this situation, could be seen as putting the city back on the same footing as the suburbs. Calibrating the hypothetical facts of *McCain v. Obama* just right, so that the arguments on both sides of the Equal Protection issue would be equally strong was

33. See *Bush v. Gore*, 531 U.S. at 115 (Rehnquist, C.J., concurring) (“[W]e would . . . hold that the Florida Supreme Court’s interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II.”).

34. Colo. Rev. Stat. § 1-1-103(1) (2009).

35. The Colorado Supreme Court has repeatedly recognized the importance of this constitutional right. See, e.g., *Meyer v. Lamm*, 846 P.2d 862, 874 (Colo. 1993) (“The right to vote is a fundamental right of the first order.” (quoting *Erickson v. Blair*, 670 P.2d 749, 754 (Colo. 1983))).

tricky—and probably impossible, given the inevitable subjectivity of any person’s judgment concerning the exact strength of an Equal Protection claim based on *Bush v. Gore*. But in creating the hypothetical scenario, it seemed best to make Denver disproportionately affected by the storm and yet simultaneously have at least some suburban voters unable to get to their polling places by 7 P.M., as they intended, because of storm-related traffic jams.

An adjustment was made to the facts that the students received as their final exam before these facts were ready to become the basis for the case argued before our three-judge panel. In their exam answers, the students overwhelmingly concluded that, on the facts presented to them, the better argument was in favor of finding an Equal Protection violation, rather than rejecting the Equal Protection claim. If the storm affected both the city and the suburbs significantly, with the consequence that substantial numbers of voters in both locations were unable to get to their polling places by 7 P.M., then the fact that the number of affected voters in both places was not exactly proportional did not affect the validity of the Equal Protection claim. Thus, to bring the hypothetical scenario back to equipoise between the Equal Protection arguments on both sides of the case, it seemed necessary to make driving conditions in Denver considerably more severe than in the suburbs; otherwise, there did not seem enough of a chance of justifying that Denver voters received a reprieve that suburban voters did not.

It was not difficult to imagine that Denver officials might choose to extend polling hours for their residents, whereas suburban officials would not. In 2008, the Denver officials in charge of administering elections were Democrats who might be tempted to extend polling hours in an effort to aid Obama’s candidacy.³⁶ Conversely, Republicans controlled at least some of the suburbs and presumably would be backed by the incumbent Republican Secretary of State in deciding not to extend polling hours.³⁷ Thus, a hypothetical lawsuit over the

36. Under Colorado law, responsibility for administering Denver elections belongs to the Clerk and Recorder, an elected official. This office gained this responsibility after Denver suffered severe problems in administering the voting process in the November 2006 elections. In 2008, that official was Stephanie O’Malley, a protégé of Denver mayor John Hickenlooper. See George Merritt, *Hickenlooper Makes it Look Easy in Winning 2nd Term*, DENVER POST, May 2, 2007, at A1. Although Denver’s elected officials technically run on a non-partisan ballot, which does not list a candidate’s partisan affiliations, Democrats have long dominated Denver politics. Mayor Hickenlooper is now the Colorado Democratic Party’s candidate for governor in 2010.

37. In 2008, Colorado’s Secretary of State was Mike Coffman, a Republican who at the time was running as his party’s candidate for Congress in the state’s 6th congressional district.

extension of polling hours between Denver and Obama on one side and the Secretary of State and McCain on the other quickly fell into place.

Moreover, an easy Internet search revealed that the composition of the seven-member Colorado Supreme Court included five Democrats and two Republicans, and that they often divided along party lines in politically charged cases.³⁸ The table was thus perfectly set for a scenario that would resemble Florida Supreme Court's 4-3 ruling in favor of Gore, which was the predicate for the U.S. Supreme Court's intervention and reversal in *Bush v. Gore*. A hypothetical majority opinion of the Colorado Supreme Court would uphold the Denver-exclusive extension of polling hours, whereas the dissent would see it as a violation of the apparently explicit state statute forbidding any such extension. Both an Equal Protection and an Article II issue would then be teed up for the U.S. Supreme Court, in a petition filed by the Republican presidential candidate, just as in *Bush v. Gore* itself.

All that was necessary to complete the hypothetical scenario were the numbers in terms of the ballots affected by the extension of polling hours and how they related to the overall vote count. Looking at past returns and projected turnout,³⁹ we settled on roughly 60,000 ballots cast in Denver as a result of the extension and stipulated that, apart from these ballots, McCain would win the state by some 13,000 votes. But these numbers could be easily altered without changing the legal issues raised by the scenario. It could have been 12,000 legally disputed ballots in a race where the candidates were separated by only 300 votes (and, then, the hypothetical numbers would have eerily pre-

38. See *Colorado Supreme Court Justice Ideology*, WASH PARK PROPHET BLOG (June 27, 2006, 5:47 PM), <http://washparkprophet.blogspot.com/2006/06/colorado-supreme-court-justice.html>; see also Richard B. Collins, *The Colorado Constitution in the New Century*, 78 U. COLO. L. REV. 1265, 1296-97 (2007) (describing how a 5-2 split on the Colorado Supreme Court in a recent legislative reapportionment case mirrored the positions of the political parties with which the justices were affiliated). One local newspaper columnist in the summer of 2008 lamented about "what is wrong with" the Colorado Supreme Court: "Put simply, the four-member liberal court majority is all too eager to bend the law and prior court precedent if it can reach what may seem like a desired result." Al Knight, *Why Courts Matter*, DENVER POST, July 23, 2008, at B13. Later that year, the leader of the Republicans in the State Senate decried: "This Supreme Court is the most partisan branch of government in Colorado." Tim Hoover, *Mill-Levy Freeze Allowed*, DENVER POST, Dec. 7, 2008, at B1.

39. Turnout figures for Denver and surrounding counties in 2004 and 2006 were available in reports published on the Secretary of State's website. In the summer of 2008, officials were anticipating a potentially record turnout in Colorado, like elsewhere in the nation, given the huge push to mobilize voters by both campaigns in the race between presidential candidates Obama and McCain. See Tim Hoover, *Voter Turnout May Top Record*, DENVER POST, Oct. 19, 2008, at B7.

saged the numbers in Minnesota's disputed U.S. Senate election, a real case to emerge from the 2008 election). The key point was that one could devise a realistic situation in which the presidency would hinge on a legal dispute over ballots from Denver, with the Democratic-dominated Colorado Supreme Court siding with the Obama campaign's argument for counting those ballots over the objections of the Republican Secretary of State—echoing the situation in Florida eight years earlier.

Indeed, the realism of the hypothetical scenario scared attorneys and public officials in Colorado familiar with elections there. As the hypothetical scenario was being developed during the summer of 2008, its details were shared with a few individuals in the state who were in a position to comment on its verisimilitude. "I broke into a cold sweat reading the case" was how one Colorado election lawyer put it, "because something like that actually could happen."⁴⁰

Moreover, there was the underlying sense that if the facts were actually real—and thus if these facts actually reached the real U.S. Supreme Court—there was the chance that the Court would intervene again and invalidate a Democratic-dominated state supreme court's decision that favored a Democratic presidential candidate. To be sure, there would always be the chance that the Court might consider itself having been burned by the reaction to its intervention in *Bush v. Gore* and thus either shy away from this kind of case or else rule this time in favor of the Democratic candidate in an effort to show its evenhandedness.⁴¹ Of course, one would never know as long as the case remained hypothetical. Still, having a distinguished panel of retired judges adjudicate this hypothetical as if they were the U.S. Supreme Court might give us a sense of how the real Court would handle these facts. Better yet, if retired judges were selected so that their panel was structurally balanced and impartial, then their adjudication of these facts might give us a sense of the difference in this kind of a case between a

40. This telephone conversation was confidential because of the attorney's involvement with actual election-related litigation in Colorado. Similar comments, however, were made by others from Colorado who attended the *McCain v. Obama* oral argument at Georgetown.

41. See generally, e.g., JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* (2007) (quoting Justice O'Connor saying that *Bush v. Gore* was not the Court's best work). See generally *The Future of Bush v. Gore?*, *supra* note 6 (discussing the potential uses of *Bush v. Gore* as precedent in future cases); David Cole, *The Liberal Legacy of Bush v. Gore*, 94 *GEO. L. REV.* 1427 (2006) (identifying distinctively "liberal" decisions in the aftermath of *Bush v. Gore*, which the Court might have been unwilling to embrace except as a kind of penitence for that ruling).

genuinely neutral U.S. Supreme Court and one that is lopsided in its ratio of Republican and Democratic appointees.

III.

THE JUDGES, THEIR PROCEEDINGS, AND THEIR RULING

A. *The Criteria of Judicial Selection*

In thinking about the characteristics of the ideal judges to serve on a panel to adjudicate an election dispute of this kind, three qualities came to mind. First was their reputation. We wanted judges perceived to be of the highest caliber in terms of their judicial abilities. “The bluest of blue-ribbon panels” is how we thought of it.⁴² The need for this utmost level of reputation seemed especially pressing if the dispute concerned a presidential election, but it would also apply for other high-stakes electoral disputes like those involving a gubernatorial or senatorial race.

The second quality was the trickiest. We wanted one judge who was identifiable as solidly Democratic in background, and another who had an equally solid Republican background. The reason is that we wanted partisans on both sides to be able to perceive that each of their sides was, in some sense, securely—and equally—represented in the composition of the panel. If, for example, the nominally Republican judge was really a liberal but the Democratic judge was solidly left-of-center, then Republicans easily could perceive that the overall structure of the panel was tilted leftward. The same would, of course, be true if the nominally Democratic judge was conservative while the Republican was solidly right-wing.

Concern for this kind of balance will exist regardless of the mechanism for selecting the Democratic and Republican members of the three-judge panel. But the concern was especially prevalent in the particular context of this simulation, where these judges would be selected by the simulation’s sponsors and not by the candidates or the parties themselves. While the AEI-Brookings Election Reform Project is an inherently bipartisan enterprise, it is still a self-appointed body within the nonprofit private sector. It is not as if the DNC and RNC

42. In this regard, “bluest” is most emphatically *not* meant to signify most Democrat or most liberal, according to the familiar “red state, blue state” categorization. Instead, it is simply meant to indicate highest quality, as the term “blue-ribbon panel” commonly connotes. See *Blue-ribbon panel*, WIKIPEDIA, http://en.wikipedia.org/wiki/Blue-ribbon_panel (last visited Oct. 2, 2010) (“The ‘blue-ribbon’ aspect comes from the presentation of the panel as the ‘best and brightest’ for the task.”) Indeed, the term “blue-ribbon panel” also usually implies non-partisanship or at least “a degree of independence from political influence or other authority.” *Id.*

were each selecting one of the judges for our panel,⁴³ or the Obama and McCain campaigns were doing so. We thought about attempting to seek approval of our panel from the chief attorneys for the two campaigns, but we did not wish to risk a veto that would derail the experiment altogether. Therefore, we attempted to do our best in identifying judges who ought to be acceptable to both sides.

We knew, too, that there was some tension between this desire for judges with identifiably solid political backgrounds and the third quality we wanted in our judges. We wanted judges to consider the case judicially, not politically. We did not want them to decide the case based on partisan inclinations, even if they were identifiable as having a partisan background. We were looking for judges who would act in accordance with a judicial temperament, a factor that no doubt contributed to their high reputation. But getting judges who would act judicially—and yet be identifiable as having solid political background—was no easy combination.

B. *The Selection of Our Judges*

Finding judges who fit this combination turned out to be easier in practice than seemed theoretically feasible in advance. We started with the Democratic judge. At the beginning of my career, I had been fortunate to serve as a law clerk to Patricia Wald, who at the time was the Chief Judge of the United States Court of Appeals for the D.C. Circuit. She had been appointed by President Carter, was President Clinton's initial choice for Attorney General (which would have made her the first woman to hold that position, an honor which Clinton eventually bestowed on Janet Reno),⁴⁴ and was often mentioned as a potential Supreme Court nominee of a Democratic president.⁴⁵ She had a reputation as a first-rate judge whose opinions were analytically precise and well-reasoned.⁴⁶ Yet, she was known as a judge who tended to be liberal in her judicial perspective. Hers was a court with distinctly recognizable liberal and conservative wings, and she was clearly in the liberal camp. No one had reason to doubt her judicial

43. "DNC" and "RNC" are used in common parlance to refer to the Democratic National Committee and Republican National Committee, respectively.

44. Dan Balz, *Judge Wald Tops List for Justice Post*, WASH. POST, Dec. 10, 1992, at A1; see also Bill McAllister, *Why Wald Rejected a Cabinet Job*, WASH. POST, Dec. 17, 1992, at A21.

45. See, e.g., Fred Barbash, *Election Also Could Determine Future Course of Supreme Court*, WASH. POST, July 15, 1984, at A3; see also Tony Mauro, *Court "Name Game" Enters a New Inning*, LEGAL TIMES, Nov. 9, 1992, at 1.

46. See Nancy Lewis, *U.S. Appeals Court Here Gets Its First Woman Chief*, WASH. POST, July 26, 1986, at C1.

integrity; she decided cases as she perceived the law required her to do. Thus, she was just what we were looking for: a judge of the highest reputation, with the right judicial attitude, and yet perceived to have a solidly Democratic background.⁴⁷

In seeking a Republican counterpart to Judge Wald, one additional attribute that would be advantageous would be experience on a state rather than federal court. Disputes over the counting of ballots are litigated primarily in state court, and a judge with first-hand knowledge of how a state court would view this kind of case would bring a valuable perspective to the panel's deliberations. I had been to a few conferences where Thomas Phillips, the former Chief Justice of the Texas Supreme Court, spoke. From these events, I knew the high caliber of his intellect and his dedication to judicial integrity.⁴⁸ Further research showed me that he was a partner and protégé of James Baker, the lawyer who led then-candidate George W. Bush's successful legal strategy during the dispute over ballots in the 2000 presidential election. Even more fortuitous, Phillips had served with Baker on the Carter-Baker Commission, which was designed to examine problems in the operation of the electoral process during the 2004 election. Thus, Phillips was perfect for this role: he had knowledge of and interest in election issues, as well as a high reputation in leading legal circles.⁴⁹ He, too, would approach the case with judicial integrity, and yet, as a counterpart to Wald, he had solidly Republican credentials.⁵⁰

Once we had these two judges on our panel, the next task was for them to pick a third judge to join them. The key to the whole exercise was that this third judge was to be entirely *their* mutual choice, not someone even suggested to them by the project. If the Democratic and Republican judges—and only them—participated equally in the selec-

47. Earlier in 2008, the leading law-related news periodical covering Washington, D.C. named Judge Wald as one of the jurisdiction's "greatest lawyers" of the previous thirty years. See Pedro Ruz Gutierrez, *Patricia Wald*, LEGAL TIMES, May 19, 2008, at 32.

48. "Chief Justice Phillips will also be remembered as a pioneer of judicial campaign reform." Kent Rutter, *Texas Supreme Court Changes*, 68 TEX. B. J. 66, 66 (2005).

49. For example, Phillips wrote an amicus brief for the Conference of Chief Justices—the body that represents the chief justices of all fifty states—in *Caperton v. Massey Coal Co.*, 129 S. Ct. 2252 (2009), which dealt with the need for elected judges to recuse themselves from cases in which campaign contributions present an egregious conflict of interest. See Tony Mauro, *Sweep of Recusal Ruling Unclear*, 41 NAT. L. J., June 15, 2009, at 21 (interviewing Phillips as a leading authority on judicial ethics).

50. Because I did not know Phillips personally, I approached him through an intermediary. Our project was extremely fortunate that he, like Wald, quickly agreed to participate.

tion of the third judge, then this third judge necessarily was neutral and balanced between the two. There could be no other procedure that could better obtain a genuinely neutral and balanced third member of the panel than this method of mutual selection by the first two panelists.

As sponsors of the project, we had ideas about whom we hoped Wald and Phillips would select. We were careful not to share our ideas with them, however, because we did not wish to taint the process. Consequently, we were tremendously pleased when they told us that the person they picked was the individual who was at the top of our list for this neutral slot. Their choice, David Levi, had been a U.S. District Court judge appointed by the first President Bush and enjoyed a reputation for moderation and non-partisan fairness.⁵¹ He happened to be the son of Edward Levi, who had been president of the University of Chicago and Attorney General under President Ford, and is currently serving as Dean of Duke University's law school.

We could not have had a better three-judge tribunal for our exercise. It certainly fit our goal of being exceptional in its caliber of excellence.⁵² It was visibly balanced in precisely the way that we wanted it to be, and all three judges were known for their judicial integrity. They might disagree on how to decide the case, but if they did so it would be because of their honest differences of opinion regarding what the law required with respect to the facts. That difference of opinion, if it surfaced, might correlate with partisan background, with Levi being forced to break a tie between Wald and Phillips. But if that 2-1 split occurred, it would be an interesting outcome—in a close case involving the outcome of a presidential election, one could not expect even the most conscientious of judges of opposite political backgrounds to agree—and it would test the notion that a tie-breaking vote cast by the neutral judge, chosen by the other two, was a fair—or at least the fairest possible—way to resolve the dispute.

C. *The Attorneys for the Two Sides*

Once we had our three-judge panel in place, we proceeded to recruit experienced Supreme Court advocates to represent the two sides in the case. Again, we were most fortunate in the willingness of individuals with first-rate reputations to participate. Walter Dellinger

51. Orin Kerr, *More on 100-0 Nominees*, THE VOLOKH CONSPIRACY (May 24, 2005, 8:09 PM), http://volokh.com/posts/chain_1121816986.shtml (“Levi is a moderate Republican Bush I appointee who is brilliant and universally admired.”).

52. These three could be fairly characterized as the “bluest” of “blue-ribbon” panels in the specific sense describe above. See *Blue-ribbon panel*, *supra* note 42.

agreed to represent the Democratic position, and Glen Nager was his Republican counterpart. Dellinger headed the Solicitor General's office during the Clinton administration, while Nager had been an attorney in that office during the Reagan administration. Currently, Dellinger chairs the Appellate Practice of the law firm O'Melveny & Myers,⁵³ and Nager chairs the Issues & Appeals Practice of the firm Jones Day.⁵⁴ Each numbers his appearances before the U.S. Supreme Court in the double digits. Both teach constitutional law in addition to their active practice, Dellinger at Duke University School of Law and Nager at Georgetown University Law Center. Both, in other words, are accomplished practitioners with a sophisticated understanding of the Supreme Court and its role in high-profile constitutional cases. We knew they would represent their respective sides of the case vigorously and expertly. Their adversarial advocacy would put the case before our three-judge panel in just the same posture as if it were real, with the issues sharply delineated and each side presented as effectively as feasible.

That is precisely what happened. With the help of other lawyers in their firms, both Dellinger and Nager wrote briefs with the kind of arguments they would present to the real U.S. Supreme Court.⁵⁵ We told all the participants in our exercise to assume that our three-judge panel had the full power of the U.S. Supreme Court for this single case, and the three judges were to decide the case in accordance with what *they* thought the outcome *should be* under the law—not what they would predict the nine current members of the actual Supreme Court would do with the same facts. Interestingly, each side's brief emphasized arguments that I had not anticipated. Dellinger pressed the point that, notwithstanding *Bush v. Gore* and its consideration of the Equal Protection and Article II issues in that case, *McCain v. Obama* involved "political questions" for Congress to decide and thus the three-judge panel should decline to address them.⁵⁶ Nager, for his part, wove a Due Process component into both his Equal Protection and Article II arguments: the hypothetical Colorado Supreme Court deci-

53. Biography of Walter Dellinger, <http://www.omm.com/walterdellinger/> (last visited Oct. 2, 2010).

54. Biography of Glen D. Nager, <http://www.jonesday.com/gdnager/> (last visited Oct. 2, 2010).

55. These briefs are available on the webpage for the *McCain v. Obama* simulation. See *Election Court: McCain v. Obama*, ELECTION LAW @ MORITZ, <http://moritzlaw.osu.edu/electionlaw/projects/mccainvobama/index.php> (follow "Petitioner's Brief" and "Respondent's Brief" hyperlinks, respectively).

56. *Id.* (follow "Respondent's Brief" hyperlink).

sion represented an unfair, and suspiciously motivated, change in the relevant state law concerning the rules for counting ballots.⁵⁷

D. *The Oral Argument in the Case*

When the morning came for the oral argument, we all assembled at Georgetown's law school, which graciously co-sponsored the event and offered the use of its facilities. The director of Georgetown's Supreme Court Institute also helped in identifying potential judges for our panel. The event was well attended by inside-the-Beltway election law experts as well as Georgetown students and members of the media. NPR ran a segment on the event the next day on its "Morning Edition" program. Echoing comments from attendees in the audience, NPR's reporter Pam Fessler said that the realism of the oral argument "was enough to send chills down the spine."⁵⁸

The three judges hearing the case certainly treated the oral argument as if it was real. They fired tough, probing questions at both attorneys, focusing intensely on the particular facts in the record, just as they would if these same facts were not hypothetical. Watching the high-quality performance of the judges, as well as the attorneys in responding to their questioning, I thought that the exercise would be a good teaching tool for preparing lawyers for appellate litigation generally, not just in the specific field of election law.⁵⁹

The judicial questions focused on the magnitude of the snowstorm and the effect it had on voters in both Denver and the surrounding suburbs. As judges often do at oral argument, they were exploring variations on the facts presented in order to figure out how to handle the line-drawing problem: if some set of similar facts would amount to an Equal Protection violation, but others would not, where exactly does the law draw that line, and how much does the court need to say in this case about where the line is?

For example, Wald asked Nager whether his position would be the same if a tornado or power outage had hit and closed a polling place down for a period of time.⁶⁰ Nager said no, because the polls in

57. *Id.* (follow "Petitioner's Brief" hyperlink).

58. Pam Fessler, *Election Day Scenario Plays Out in Mock Court*, NPR MORNING EDITION (Oct. 21, 2008), <http://www.npr.org/templates/story/story.php?storyId=95924817>.

59. Both a video and a transcript of the oral argument are available at <http://moritzlaw.osu.edu/electionlaw/projects/mccainvobama/index.php> (for the video, follow "Archived Webcast" hyperlink; for the transcript, follow "Court Transcript" hyperlink).

60. Transcript of Oral Argument at 7, *McCain v. Obama*, Mock Case No. 1 (2008), http://moritzlaw.osu.edu/electionlaw/projects/mccainvobama/docs/081020_transcript.

the snowstorm did remain open despite the difficulty voters had in getting to them.⁶¹ Wald pressed by asking whether it mattered if the government was partly responsible for this difficulty by failing to devote sufficient resources in Denver for snow removal.⁶² Nager answered by saying that as long as the government does not prevent voters from voting, it is not in a position to remediate its own problem by extending polling hours for only a subset of its citizens.⁶³

Phillips expressed his concern to Nager that the 60,000 provisional voters in Denver had relied on the announcement of the two-hour extension, and to disqualify their ballots now would be to disenfranchise them unfairly.⁶⁴ Nager replied that they should not have

pdf [hereinafter Transcript] (“My question to you—partly hypothetical but it will help me understand your argument—is that if something, if an emergency happens, if a tornado hits, if the electrical power goes out for a couple of hours during the Election Day between 7:00 A.M. and 7:00 P.M. so that the polls cannot be continuously operated, you would still say that there’s no authority for the electoral district to lengthen the hours of voting beyond 7:00—beyond anybody that arrives by 7:00 P.M. . . . Is that right?”). Judge Wald’s use of the word “hypothetical” in this question is particularly fascinating and illuminating. It reveals that while on the bench, psychologically she was indeed treating *McCain v. Obama* as the real case before her, while the tornado variation was a “hypothetical” designed to question the limits of McCain’s argument in the case.

61. *Id.* at 8 (“[W]e do believe that the Equal Protection Clause would require that jurisdiction to have its polls open for the same period of time that other jurisdictions around the State were required to have theirs open.”).

62. *Id.* at 9 (“[W]hat about the fact that—and I think it’s referred to in the record at one point—the fact that the traffic congestion was so great that it provoked the electoral district people into extending the hours? Isn’t that a responsibility of the State? In other words, States—the State didn’t keep the roads clear enough so that people could get to the polls.”). Judge Wald’s mention of the “record” refers to the Stipulated Statement of the Case, which was prepared for the simulation’s participants and is available at http://moritzlaw.osu.edu/electionlaw/projects/mccainvobama/docs/080912_statement_of_case.pdf. Judge Wald, in pressing Nager even further, ended up quoting the Statement of the Case directly: “Well, I’m reading from the record [concerning] ‘what drivers were experiencing on Denver roads’” in comparison to their suburban counterparts—thereby indicating the level of preparation she gave to the case before the oral argument. Transcript, *supra* note 60, at 9–10.

63. “And my answer to that is, is that government has to create the obstacle to timely voting.” Transcript, *supra* note 60, at 10. Otherwise, according to Nager, Denver cannot unilaterally extend polling hours on its own:

The important point for the Equal Protection Clause here, Justice Wald, is that, in this particular instance, [Denver Elections] Director Scarpello did not do what he needed to do in order to get a proper extension. He didn’t listen to the State official who he is directed by statute to take orders from, the Secretary of State.

Id. at 10–11.

64. *Id.* at 12–13:

So why would the remedy be then not to count those votes? I mean, you’re going to tell 62,000 people or so, who understood from a duly appointed election official that they had an extra two hours—maybe they

been permitted to cast ballots at all, and thus to discard their ballots would not be unfair.⁶⁵ Levi explored how much discretion Colorado law could give local election officials under Equal Protection.⁶⁶ Nager responded by saying that the problem would be if the discretion were implemented in a way that caused some, but not all, similarly situated voters to receive an extra period of voting at the end of the day.⁶⁷

When it was Dellinger's turn at the podium, he faced considerable resistance from all three judges for his reliance on the "political question" doctrine. Levi, for example, pointed out that the provisional ballots at issue would affect the counting of votes, and thus potentially the determination of winners and losers in elections for offices other

could have gotten there on time, but they thought they had more time and that it would be more convenient, perhaps safer, to show up later. They acted in reliance upon that. Why—why would that be a just order on equal protection grounds?

Phillips's question shows that, at its heart, the Equal Protection inquiry concerns the basic justice or fairness of the situation. Hence, the basic jurisprudential conundrum: in a case like this one, with its especially acute partisan divisiveness, is what justice or fairness requires something that judges can objectively discern directly from the facts?

65. "[T]he Secretary of State of Colorado believes, pursuant to his authority to interpret the Colorado Election Code and to count the votes and to certify the votes, that voting after 7:00 P.M. is not permitted in the State of Colorado." *Id.* at 15–16. Nager then elaborated how this point made a difference to his Equal Protection claim:

Here, we have two statewide actors. We have the Secretary of State, who has been trying to ensure equal treatment of voters across the State and in compliance with his understanding of the Election Code, and we have the Colorado Supreme Court, who has ordered differential treatment of similarly situated voters across that State. And that, of course, is what we contend violates the Equal Protection Clause.

Id. at 16–17.

66. Levi inquired of Nager:

[Suppose the Colorado statute] expressly gave to the county Election Director the authority to extend the polling time by two hours, but no more than two hours, in the event of inclement weather in that county. And people thought this was a very good idea because the weather in Colorado is not statewide, it varies from place to place, and that these judgments should be made—the local Election Director is in a position to know whether it's practicable on short notice to extend the polling hours in particular counties, and that may depend on resources, the distance to the polls, and how many polls there are, and that sort of thing. That, in your view, would be unconstitutional?

Id. at 19. This question targeted the most vulnerable element of Nager's Equal Protection claim and shows Levi's judicial skill; I would not want to have been the advocate who faced it.

67. Nager struggled to answer but gave the best response that he could: "I don't think the mere conferral of that authority on the local Election Director would be unconstitutional," but "there has to be consistent application of that rule across the State so that, if a plaintiff came in and showed that that discretion was being exercised differently by different local officials, that would be constitutionally problematic." *Id.* at 19–20.

than president.⁶⁸ He also observed that the Colorado Supreme Court, pursuant to a grant of jurisdiction from the state's legislature, had passed judgment on the Equal Protection issue now on review.⁶⁹ If it would not invade Congress's authority for the state supreme court to decide the case as it did, why would it invade Congress's authority for the U.S. Supreme Court to review, and potentially correct, the state court's decision regarding matters of federal law?

Despite his best efforts, Dellinger did not have a strong response to this line of questioning. It did not matter, however, since Dellinger could win the case even if he lost his "political question" argument. As long as he prevailed in defeating Nager's Equal Protection and Article II claims, Dellinger would obtain an order affirming the counting of the disputed provisional ballots. The three judges did not press Dellinger as hard on these issues as they pressed Nager. Phillips did explore with Dellinger his position on the Article II issue, suggesting that there must be some enforceable limit on what a state court might do in relationship to the relevant state statute.⁷⁰ But it was unclear from his questioning whether Phillips thought there was an actual Article II violation on the facts of this case and, more importantly, whether he could convince either of his two colleagues of this proposition even assuming he believed it himself.

Thus, while it is always dangerous to predict the outcome of a case based on questioning at the oral argument, it seemed as if the Democratic position for counting the provisional ballots held the upper hand.

68. "[Our decision] wouldn't be advisory on the question of what certification the State of Colorado should make, and that's a decision of some significance . . ." *Id.* at 32. This point was also emphasized in the Court's ultimate decision: "It bears repeating that we are rendering our opinion without knowledge of whom the provisional ballots ultimately will favor in the presidential election *as well as the many other election contests included on the Denver November ballot.*" *McCain v. Obama*, Mock Case No. 514, 4 n.3 (2008) (per curiam), http://moritzlaw.osu.edu/electionlaw/projects/mccainvobama/docs/081028_McCainvObamaFinal.pdf (emphasis added).

69. "If the Colorado Supreme Court, relying in part on its understanding of Federal constitutional law, makes certain rulings as to State law, then . . . those rulings will be presumptively valid under the safe harbor provision." *See* Transcript, *supra* note 60, at 29. Thus, why can the U.S. Supreme Court not exercise its certiorari jurisdiction to review that state court determination of federal law? *Id.*

70. "[Under] Chief Justice Rehnquist's concurrence in *Bush versus Gore*, we have to give [the Colorado Supreme Court's] interpretation some deference, but not the deference that we would ordinarily give to a State high court's interpretation of its own law. Is that correct?" *Id.* at 42.

E. *The Unanimous Opinion in McCain v. Obama*

When the opinion arrived eight days later, it was in favor of Obama and the Democrats, and—perhaps the only point of some surprise—it was unanimous.⁷¹ Reaching ten pages single-spaced, it was carefully written and lucidly reasoned, as one would expect from the high caliber of these three judges. They took the task of writing the opinion as seriously as they had prepared for the oral argument.⁷²

In its analysis of the issues, the opinion began by rejecting Delinger's reliance on the "political question" doctrine. The panel observed that its ruling "d[id] not decide today how to award Colorado's electoral votes" but only determined the legal status of provisional ballots that might, in turn, affect the awarding of those electoral votes.⁷³ The panel saw no particular obstacle to its adjudication of the Equal Protection and Article II issues. The issues were "judicially manageable," meaning they were susceptible to the sort of judicial reasoning that courts routinely apply in constitutional cases, and their judicial resolution would not invade Congress's turf since Congress retained the ultimate authority to count a state's electoral votes.⁷⁴ Indeed, the panel said that "it would be astonishing" if the U.S. Supreme Court lacked jurisdiction to adjudicate the Equal Protection claim presented by the facts concerning these provisional ballots, since the Court has adjudicated many comparable Equal Protection claims, including the one in *Bush v. Gore*.⁷⁵

Turning to the merits of the Equal Protection argument, however, the panel summarily distinguished *Bush v. Gore*, consigning it to a footnote.⁷⁶ "*Bush v. Gore* governs a distinct sub-category of election cases," the footnote stated, "and this case does not fall into that group."⁷⁷ The sub-category governed by *Bush v. Gore*, according to

71. In addition to being contained in an appendix to this essay, the opinion is available at http://moritzlaw.osu.edu/electionlaw/projects/mccainvobama/docs/081028_McCainvObamaFinal.pdf.

72. Like the majority opinion in *Bush v. Gore*, the unanimous opinion in *McCain v. Obama* was issued *per curiam*, meaning that no member of the Court was identified as its author. After *Bush v. Gore*, it was reported that Justice Kennedy was the primary author of the majority opinion. See *The Future of Bush v. Gore?*, *supra* note 6, at 972 & n.113. With respect to *McCain v. Obama*, it is possible to discern from the relationship of the oral argument to the *per curiam* opinion that the three-judge panel split up its work: Levi took the "political question" portion of the opinion, Judge Wald wrote the Equal Protection section, and Phillips authored the part on Article II.

73. *McCain*, Mock Case No. 1 at 513.

74. *Id.*

75. See *id.* at 514–515.

76. See *id.* at 518 n.4.

77. *Id.* at 518.

this distinction, involves “large numbers of local officials [who] applied an indeterminate standard throughout the state over a period of time,” whereas in *McCain v. Obama* “one unambiguous rule was issued for one district and no further discretion was permitted.”⁷⁸

With *Bush v. Gore* set aside, the panel focused on its rationale for rejecting McCain’s Equal Protection claim. The essence of its reasoning was that, because the storm hit Denver harder than the suburbs, it was permissible for the state to allow Denver officials to make a different judgment on extending polling hours than suburban officials. According to the panel:

[T]he realities of holding elections in [many disperse localities throughout the state] will occasionally mean that unexpected events like severe weather, power outages, and voting machine breakdowns may require immediate adjustments to general rules of time and place to serve the overarching goals of equal access to the ballot box and facilitation of maximum voter participation.⁷⁹

The opinion, noting Nager’s concession at oral argument, stated that “if government-controlled conditions produced temporary inaccessibility to the polls, extension of voting hours would be permissible to make up for the time lapses,”⁸⁰ but simultaneously rejected Nager’s argument that this concession did not affect the circumstances in which “natural causes” blocked access to polling places.⁸¹

The panel did acknowledge that there might be circumstances where localized extension of polling hours in statewide election would violate Equal Protection.⁸² Yet, that situation was not present on this record, where “the extension succeeded merely in bringing to par the participation of Denver voters with their neighboring county residents, not in conferring a preferential impact or disadvantage on either.”⁸³ The opinion also reiterated the concern expressed at argument by Phillips that rejecting the provisional ballots now would be unfair to the voters who cast them: “[t]he cure, it seems to us, would be worse than the malady.”⁸⁴

78. *Id.*

79. *Id.* at 516.

80. *Id.*

81. *Id.* (“This distinction makes little sense to us.”).

82. *Id.* at 517 (“We might be faced with a different question eliciting a different response if districts equally affected by the storm responded differently. . . .”). This qualification contains a faint echo of the assertion in *Bush v. Gore* that Equal Protection in the context of elections is extremely fact-dependent, with each case ultimately resting on its own particular facts. See *Bush v. Gore*, 531 U.S. at 109 (2000).

83. *McCain*, Mock Case No. 1 at 517.

84. *Id.* at 7.

After dispensing with McCain's Equal Protection claim, the opinion made quick work of his Article II argument. "Even if we accept Chief Justice Rehnquist's view of Article II [as expressed in his *Bush v. Gore* concurrence] and give only limited deference to the state court's interpretation of state law, we cannot conclude that the Colorado Supreme Court's construction of the relevant provisions amounts to an 'impermissible distortion' of the Colorado Election Code."⁸⁵ Invoking the Code's mandate that its provisions "be liberally construed"⁸⁶ to further the exercise of the franchise, the panel observed that "[t]he specified 7:00 P.M. closing time was merely 'a general rule,' not a blanket prohibition against local initiative to protect voter access in exigent circumstances."⁸⁷ Even if these three judges would not have reached the same result as the Colorado Supreme Court, it did not matter: "We cannot say that this interpretation was so novel or so strained as to fall short of constituting a 'fair reading' of the state law."⁸⁸ Thus, the U.S. Constitution did not block counting the provisional ballots.

IV.

THE IMPLICATIONS OF THIS SIMULATION

What can we learn from having conducted this judicial experiment? In answering this question, we are aided by a very similar dispute that actually emerged in the context of the U.S. Senate election in Minnesota about a week after the release of the *McCain v. Obama* opinion. I will not describe here the details of the Minnesota dispute, in which challenger Al Franken eventually prevailed over incumbent Norm Coleman. Instead, I describe and analyze that dispute at length elsewhere.⁸⁹ It is enough to make two key points. First, the Minnesota dispute also involved an Equal Protection issue concerning the application of *Bush v. Gore* to a vote-counting situation different from the one involving chads in 2000. In Minnesota, the Equal Protection dispute concerned the rejection of absentee ballots on the ground that the statutory rules for their submission had not been satisfied. Different counties applied those statutory rules differently, with the consequence that similar absentee ballots would be either accepted or rejected depending on the particular county in which they had been cast.

85. *Id.* at 520.

86. Colo. Rev. Stat. § 1-1-103(1) (2009).

87. *McCain*, Mock Case No. 1 at 9.

88. *Id.* at 520.

89. See Edward B. Foley, *How Fair Can Be Faster—and Other Lessons of Coleman v. Franken* (Jan. 10, 2009) (unpublished manuscript) (on file with author).

Second, the Minnesota dispute also benefited from a three-judge panel that was selected to be evenly balanced and ended up unanimous in its decision. Thus, with the actual Minnesota experience in mind, along with the *McCain v. Obama* simulation, it is possible to make the following observations.

A. *A Better Understanding of Bush v. Gore and Its Limited Scope*

First, both the Minnesota case and *McCain v. Obama* indicate that impartial courts are very unlikely to view the Equal Protection precedent of *Bush v. Gore* expansively. Minnesota's judiciary, just like the *McCain v. Obama* panel, confined the precedent of *Bush v. Gore* narrowly to its particular circumstances of a law that ambiguously permitted local officials to engage in a wide variety of practices concerning whether or not to count equivalent ballots.⁹⁰ The Minnesota case involved absentee rather than provisional ballots, but that difference is irrelevant to the legal principle at stake. Rather, in endeavoring to explain the scope (and limits) of the Equal Protection principle underlying *Bush v. Gore*, both courts reasoned that not all localized variations in the casting and counting of ballots violate Equal Protection—only those that involve the kind of unnecessary statutory ambiguity that caused the problem in *Bush v. Gore*.⁹¹

Thus, if nothing else, the *McCain v. Obama* decision is helpful in demonstrating that the result in Minnesota is hardly idiosyncratic. On the contrary, what the Minnesota judges did in adjudicating the Equal Protection claim in *Coleman v. Franken* conforms to how an impartial

90. The three-judge court in Minnesota stated that “[u]nlike the factual situation presented in Florida, the Minnesota legislature enacted a standard clearly and unambiguously enumerating the specific grounds upon which an election judge may accept or reject an absentee ballot.” *Coleman v. Franken*, No. 62-CV-09-56, at 46 (Minn. Dist. Apr. 13, 2009), <http://moritzlaw.osu.edu/electionlaw/litigation/documents/MNfinalorder.pdf>. One may debate whether the relevant Minnesota statute was actually as “clear and unambiguous” as the court thought it was, but the court indisputably was confining *Bush v. Gore* to the situation of statutory ambiguity. As the Minnesota Supreme Court explicitly embraced the trial court’s reasoning regarding *Bush v. Gore*, the same point applies to the high court’s opinion. See *Coleman v. Franken*, 767 N.W.2d 453, 465–66 (Minn. 2009).

91. Compare the Minnesota Supreme Court’s account of *Bush v. Gore*—“the essence of the Equal Protection problem addressed in *Bush* was that there were no established standards under Florida statutes or provided by the state supreme court for determining voter intent,” *Coleman*, 767 N.W.2d at 466.—with the *McCain v. Obama* decision: “*Bush v. Gore* governs . . . [where] large numbers of local officials appl[y] an indeterminate standard throughout the state over a period of time.” *McCain*, Mock Case No. 1 at 518 n.4. Although they use somewhat different language, both opinions confine the reach of *Bush v. Gore* solely to the circumstances of indeterminacy in the relevant state law standard.

panel of judges with the highest possible national reputations would handle a similar claim. That fact ought to assuage any doubts that the Minnesota judiciary was fair in its treatment of the Equal Protection claim that was at the heart of the fight over that state's U.S. Senate seat. To be sure, there should be no need for such reassurance regarding the resolution of the Minnesota dispute, since the three-judge panel there, like the one for the *McCain v. Obama* simulation, had one Democrat, one Republican, and one neutral. Nevertheless, reassurances are welcome even when unnecessary, and the national prestige of the three *McCain v. Obama* judges ought to dispel any notion that the Minnesota three-judge panel was merely exhibiting some kind of favoritism for its own state's electoral infrastructure.

None of the *McCain v. Obama* judges had Colorado connections. After the Minnesota dispute was over, some involved on the Republican side expressed the view that the three-judge panel there was biased, not in any partisan way, but in favor of upholding the decision of the state's election administrators.⁹² The suggestion was that the state judges did not want to make Minnesota administrators look like the ones in Florida during the 2000 dispute. In rejecting the Equal Protection claim offered by Republicans in the Minnesota dispute, however, the three-judge panel there adopted an understanding of Equal Protection and *Bush v. Gore* that was essentially the same as the one adopted in *McCain v. Obama*. Yet, quite obviously, the *McCain v. Obama* panel harbored no local favoritism for casting Denver's election officials in a positive light. Thus, the equivalence of the two decisions is reason to reject the charge of local favoritism leveled at the Minnesota judiciary.

To be sure, even as both the Minnesota ruling and the *McCain v. Obama* opinion sharply curtail the scope of *Bush v. Gore*, both decisions also signal that there remains some ambit in which the Equal Protection principle of that precedent operates. The ambit, again, involves statutory ambiguity that invites local officials to treat equivalent ballots differently. The exact contours of the ambit remain unclear, even with the benefit of reading both the hypothetical ruling and actual Minnesota ruling together.⁹³ This residual uncertainty in

92. These views were expressed in interviews I conducted with attorneys for the Coleman campaign.

93. For example, the opinions neither separately nor jointly shed much light on an example of statutory ambiguity that I considered in the aftermath of the 2004 and 2006 elections. See *The Future of Bush v. Gore?*, *supra* note 6, at 934. There, I posited a statute that instructed local officials to check their "records" to determine the eligibility of provisional ballots cast in their localities. But, I did not specify whether this obligation required officials only to review their computerized voter registration

Equal Protection law applicable to vote-counting disputes underscores the desirability of having a panel that is evenly balanced in partisan composition and thus impartial towards both sides.

B. The Benefit of an Impartial Tribunal

More research needs to be conducted on the effect that the structural impartiality of a tribunal's membership has on public perception of the fairness or legitimacy of the tribunal's decision. It is possible that sometimes a losing candidate's supporters will not accept a tribunal's decision as fair or legitimate even if the tribunal is structured to be evenly balanced between both candidates. And it is at least conceivable that sometimes a losing candidate's supporters will accept as fair and legitimate a decision rendered by a tribunal that has more members from the same party as the winning candidate.

Still, it stands to reason that having an evenly balanced tribunal increases the chances that supporters of the losing candidate will accept the result as fair and legitimate. The composition of the three-judge panel in Minnesota—again, one Democrat, one Republican, and one Independent (the Independent judge having been appointed by Governor Jesse Ventura)—certainly factored in the decision of editorial pages, including those that had endorsed the Republican candidate, to write that the panel's decision was unbiased and worthy of respect.⁹⁴ There is no similar way to gauge the significance of political balance on the *McCain v. Obama* panel, since the case was hypothetical. But imagine if the same opinion had been written, not by the evenly balanced panel in the exercise, but instead by a panel of three former judges who were all strongly Democrats. In other words, instead of Wald being joined by Phillips and Levi, suppose Wald had been joined by Abner Mikva, a Democrat who served in Congress and as White House counsel in addition to his service as a federal appellate judge, and George Mitchell, who was a federal district judge before becoming a Democratic Senator and Majority Leader. An identical ruling in favor of Obama by a panel of Wald, Mikva, and Mitch-

database or, instead, take the additional step of reviewing the original paper record of a voter's registration form. If some localities did only the minimal review, while others undertook the more extensive review, would that variation violate Equal Protection? Perhaps not, if local officials could justify the difference in their practices based on economics or other valid considerations. The answer remains murky, and I would not hazard a confident prediction.

94. See Editorial, *A Gracious Finish to an Epic Drama*, MINNEAPOLIS STAR TRIB., July 1, 2009, at A14; see also Editorial, *A Senator—At Long Last*, ST. PAUL PIONEER PRESS, June 30, 2009, at B8.

ell would be inherently suspect in a way that the opinion of Wald, Phillips, and Levi most certainly is not.

The combined positive experiences of the balanced three-judge panels in both the real Minnesota case and the *McCain v. Obama* hypothetical suggest that a much greater effort should be made to assure that future disputes of this kind are adjudicated by similarly balanced panels. This point is reinforced when one compares these two positive experiences with the fallout from *Bush v. Gore* and other cases where the tribunals were not balanced. *Bush v. Gore* will never be free of the perception that it was a biased decision, the product of a Court that happened to have a disproportionately high percentage of Republican appointees.⁹⁵ Whether this perception is accurate or not, it would not exist in the same way if the Court that issued the *Bush v. Gore* opinion had been as evenly balanced as the *McCain v. Obama* panel. Imagine a three-judge panel of one Democrat, one Republican, and one neutral chosen by the first two, being the tribunal in *Bush v. Gore*. Indeed, imagine Wald, Phillips, and Levi being that panel. Even if that panel had ruled for Bush on Equal Protection grounds, just as the actual *Bush v. Gore* opinion did, one might be critical of that opinion's reasoning, but one could not say that the opinion was the product of a court that structurally had a pro-Republican bias.

C. *The Potential Relationship of Selection Method and Unanimity*

One intriguing similarity between the three-judge panels in both the Minnesota case and the *McCain v. Obama* simulation is that both were unanimous in their decisions.⁹⁶ This unanimity was also true of the much earlier three-judge panel in Minnesota that adjudicated the dispute over the state's 1962 gubernatorial ruling.⁹⁷ Perhaps this unanimity was purely coincidental, but it at least raises the question whether an evenly balanced tribunal is more likely to be unanimous than a panel that happens to have two judges from the same party and one from the opposite party.

The judges for both of the Minnesota panels, like the ones for the *McCain v. Obama* simulation, were selected so that the resulting three-member body was overtly balanced and neutral towards both

95. See Amar, *supra* note 6, at 947 (reviewing some of the more pointed accusations of the Supreme Court's partisanship in *Bush v. Gore*).

96. The three-judge trial court in the Minnesota case was unanimous in all of its published rulings, which are collected in the archived pages of the *Election Law @ Moritz* website at <http://moritzlaw.osu.edu/electionlaw/litigation/ColemanvFrankenContest.php>.

97. See STINNETT & BACKSTROM, *supra* note 21 at 203.

sides.⁹⁸ Moreover, in connection with this overt balance, the judges were expected to strive to decide the case objectively according to law, rather than based on political inclinations. Consequently, the judges' efforts to be true to the task may have caused them to converge on their shared view of what the law required in the case. To be sure, even with each striving to be objective, one of them could have seen the law differently than the other two, thereby provoking a dissent. Yet the process of picking the three members of the panel, part of an effort to avoid an outcome tainted by partisan bias, might have caused the judges to try extra hard to put aside their divergent political backgrounds and ideological perspectives.

By contrast, a panel of three judges assigned to an election case in the same manner as any case, without regard to their partisan backgrounds, might feel less constrained.⁹⁹ If the three judges happen to be two Democrats and one Republican, they may act as many assume they always do and perhaps produce a 2-1 partisan split. The same would be true if it were two Republicans and one Democrat. Either way, judges are generally predisposed to disagree on partisan, or at least ideological, lines in high-profile cases involving politically

98. Stinnett & Backstrom recite the circumstances leading to the appointment of the three-judge panel to resolve the 1962 election; essentially, attorneys for both candidates mutually agreed upon the three judges, picking one judge identified with each party and the third whom both sides perceived as genuinely neutral. *Id.* at 95. For the 2008 U.S. Senate election in Minnesota between Coleman and Franken, the process of selecting the three-judge panel was different. There was no agreement between the two candidates on who should serve, and Justice Alan Page exercised the statutory authority to select the three judges. He picked one judge appointed by a Democratic (DFL) governor, the second appointed by a Republican governor, and the third judge had been appointed by Jesse Ventura, Minnesota's well-known Independent governor. Although Justice Page did not articulate the reasons for his selection, it was widely regarded by newspapers and bloggers in the state that he made his selections with the aim of achieving "tripartisan" balance—especially because the Senate race had included an Independent candidate who had received 15% of the vote. *See, e.g., Rachel Stassen-Berger, Tripartisan Trio to Rule on Franken/Coleman Election Contest*, ST. PAUL PIONEER-PRESS, Jan. 12, 2009, at A1.

99. In this regard, it is worth noting that in both Minnesota elections—the 1962 gubernatorial election and the 2008 U.S. Senate election—the State's supreme court split 3-2 on preliminary rulings before the selection of the three-judge panel to conduct the determinative recount. For the earlier split, see *Andersen v. Donovan*, 119 N.W.2d 1 (Minn. 1962). *See also* FROM REGISTRATION TO RECOUNTS, *supra* note 21, at 140; STINNETT & BACKSTROM, *supra* note 21, at 82. For the more recent split, see *Coleman v. Ritchie*, 758 N.W.2d 306 (Minn. 2008). In both of these disputed elections, the split decision by the Minnesota supreme court was seen by many local observers as the low point in each episode. Indeed, in each instance, the unanimity of the balanced three-judge panel may have been achievable in part as a reaction against the unfortunate nature of the apparently partisan split within the state's highest court in handling the disputed election.

charged issues.¹⁰⁰ They are used to disagreeing about abortion, criminal procedure, and a whole range of topics, including redistricting, campaign finance, and other election-related issues.¹⁰¹ If faced with a dispute over which candidate won a major statewide race, these routinely polarized judges may simply fall into the pattern of disagreeing again in a way that tracks their partisan backgrounds. If so, then it is essential whether the panel is two Democrats and one Republican or vice versa.

Breaking up this routine by deliberately bringing one Democrat and one Republican judge together, and letting them pick a third neutral, with the goal that the resolution of the disputed election be impartial and unbiased, may motivate the judges to show that they can rise above party background and produce a unanimous decision rooted in law.

There may also be another element at work that is conducive to unanimity. In both the Minnesota case and the *McCain v. Obama* simulation, the three judges on the panel were sitting together for the first time. They were not used to adjudicating cases together. The three Minnesota judges came from different parts of the state. The three *McCain v. Obama* judges came from different states and different judicial systems. This lack of previous judicial service together might have put them all on their best behavior, judicially speaking. Whether as a result of human nature generally, or a specific feature of judicial etiquette, perhaps each of them wished to make a good first impression on their colleagues—wished to show that they could find common ground based on the rule of law. It is only conjecture, but one that is perhaps worth exploring further.

100. Two examples from 2008 come quickly to mind. One is the 2-1 decision in *Florida State Conference of NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008), where an Eleventh Circuit panel split sharply on the validity of Florida's rules regarding voter registration databases—the split correlating with the differing partisan backgrounds of the panel members. Even more egregious was the 10-6 split within the en banc Sixth Circuit regarding Ohio's voter registration database in *Ohio Republican Party v. Brunner*, 544 F.3d 711 (6th Cir. 2008), *vacated*, 129 S. Ct. 5 (2008). See David G. Savage, *Justices Toss Lawsuit Over New Voters*, L.A. TIMES, Oct. 18, 2008, at 8 (noting that all the circuit judges in the *Brunner* majority except one were Republican nominees while every dissenting justice was nominated by a Democrat).

101. See, e.g., Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 836–40 (2008) (reviewing the literature that attempts to explain the apparent partisan, or ideological, divergence among judges). The 5-4 decision in *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010), which controversially overruled a 5-4 decision from less than a decade earlier, has prompted a particularly large outpouring of commentary. Such a case highlights how a change in membership of the tribunal authorized to decide the case may well be the decisive factor in determining the case's outcome.

In any event, unanimity prevailed in *McCain v. Obama*, as in Minnesota, and this unanimity undoubtedly enhances the perception that the ruling is unbiased, impartial, fair, and legitimate.

D. *The Value of More Simulations*

One lesson that emerges from the *McCain v. Obama* simulation is that there ought to be more simulations along the same lines. Some might concern gubernatorial elections rather than a presidential race, or might simulate a variation of Minnesota's disputed U.S. Senate election set in the context of another state's Senate race. Different simulations could concern different kinds of issues that might emerge in a dispute over the counting of ballots. Rather than testing the rules for extending polling hours in the event of a snowstorm, the simulations might concern the implementation of voter identification rules or protocols for matching voter registration information with motor vehicle information. There are a myriad of particular issues that could be tested in each state, and the accumulation of information from these simulations could give us a better sense of how impartial panels handle disputed elections. For one thing, a series of simulations could show whether unanimity was coincidental or a predictable phenomenon resulting from an evenly balanced tribunal.

Conducting these simulations could teach us not only about the performance of impartial tribunals but also about other aspects of the electoral system. These simulations expose weaknesses in a state's electoral infrastructure and thus can be used to troubleshoot a state's infrastructure in advance of an upcoming election. After watching the *McCain v. Obama* simulation, some election specialists wanted to re-run the same scenario to focus not on the Supreme Court after the polling hours had been extended, but instead on what decision the Denver officials would make in the midst of the snowstorm. The realization that simulations of this sort would help election officials prepare for problems that might arise in the voting process has led me to recommend, in a separate essay, that election officials conduct "war gaming" exercises as part of their preparations for each election.¹⁰²

With respect to presidential elections, one question that arises in the aftermath of the *McCain v. Obama* exercise is whether a simulation should be constructed to focus on the potential role of Congress, rather than the Supreme Court, in a future dispute. It is possible that a

102. Edward B. Foley, *Democracy in the United States, 2020 and Beyond*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS (manuscript at 11–13) (Heather Gerken, Guy Charles & Michael Kang, eds., forthcoming 2010).

future dispute over presidential ballots might not end at the Supreme Court, but instead may proceed all the way to Congress.¹⁰³ If one party controls the Senate while the other controls the House of Representatives, it is possible that Congress might deadlock in a way that results in chaos. One or both branches of Congress might ignore the rules that supposedly govern in this situation,¹⁰⁴ or either branch might claim the rules are inapplicable to the particular circumstances that arise. A “war gaming” exercise could simulate how Congress might handle the situation, or perhaps preferably a variation on the *McCain v. Obama* exercise might construct a three-member impartial tribunal to adjudicate the dispute as it comes before Congress.

This kind of simulation would test whether a three-member impartial panel is a better mechanism for resolving a disputed presidential election that reaches Congress than the fifteen-member commission created for the dispute over the Hayes-Tilden election of 1876.¹⁰⁵ One problem with that commission was that its seven Democrats and seven Republicans overwhelmed the lone member who was to serve as the neutral. An even bigger problem was that the individual initially picked to be the neutral refused to serve, and the rules for creating the commission did not permit the selection of a new genuinely neutral member, but instead required adding an eighth Republican.¹⁰⁶ Running a simulation with only one Democrat and one Republican on a comparable commission, with the two of them empowered to select any third member that they considered to be genuinely neutral, would permit a testing of the commission idea without the particular flaws that undermined the Hayes-Tilden Commission.

103. Under the Twelfth Amendment, the ultimate stage for identifying the winner of a presidential election is a proceeding attended by both the Senate and House of Representatives, over which the Vice-President of the United States (as president of the Senate) presides. U.S. CONST. amend. XII. There, “the [Electoral College] votes shall be counted.” *Id.* The ambiguity created by the passive voice in this constitutional passage, failing to specify precisely exactly *who* shall count the votes, yields the potential for a constitutional crisis of monumental proportions. See Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475, 479 (2010).

104. In the Electoral Count Act of 1887, which includes the Safe Harbor Provision, Congress attempted to lay down rules that would govern in the event that a dispute over the outcome of a presidential election reached the final vote-counting proceeding called for by the Twelfth Amendment. However, there is no guarantee that either house of Congress would obey those rules, especially if there were a credible assertion that these rules conflict with the Twelfth Amendment—as has been argued periodically ever since the Electoral Count Act was adopted. See Colvin & Foley, *supra* note 103, at 477 & 478 n.7.

105. For more details about the Hayes-Tilden dispute, see *id.* at 502–16.

106. See *id.* at 505–06 n.172.

Even though it was structured to focus on the role of the Supreme Court rather than a congressional commission, the *McCain v. Obama* simulation suggests that a properly structured three-member commission would work to achieve an impartial resolution of a dispute over presidential ballots that reached all the way to the congressional stage of the process. There is no reason why the trio of Wald, Phillips, and Levi could not have been equally fair if they were adjudicating a dispute at the congressional stage. The issues might be different, and their jurisdiction might not be confined in the same way as the Supreme Court's. But the Hayes-Tilden commission considered the issues before it to be legal rather than political, and the judges on that commission were supposed to act according to law rather than politics. Thus, the hypothesis is that a congressionally created commission of Wald and Phillips, who chose Levi as their third, could better handle any legal issue coming before Congress concerning a dispute over presidential ballots than could Congress itself or a commission structured in any other way. This is a hypothesis worth testing in a new simulation.

CONCLUSION: TOWARDS AN OFFICIAL IMPARTIAL TRIBUNAL FOR
DISPUTED PRESIDENTIAL ELECTIONS

In the absence of new simulations of the sort just described, any conclusions arising from the *McCain v. Obama* exercise must be tentative. Even so, the success of this experiment is enough to say that the idea of an evenly balanced tribunal for disputed elections—or at least for disputed presidential elections—is a worthwhile one. If this kind of dispute should occur, the private sector should be quick to put this kind of impartial tribunal in place, even as an unofficial body that can guide the existing official institutions—the Supreme Court and Congress—to a fair resolution that might otherwise be more difficult for them to reach.

Even better than an impartial tribunal set up by the private sector, with no real power to resolve the dispute, would be a new law by Congress creating an evenly balanced tribunal to have official—and final—jurisdiction over any dispute regarding presidential ballots. There are different ways to select the first two members of this tribunal who would then mutually choose the third, as did the first two members of the *McCain v. Obama* panel. One method would be to have the four party leaders of Congress, the Majority and Minority Leaders in the Senate and the Speaker and Minority Leader in the House, each choose one member of an appointing authority and then require the four-member appointing authority to choose, either unani-

mously or by majority vote, one Democrat and one Republican for the adjudicatory tribunal.

A variation that might be preferable would be to require each party leader to pick a member of the appointing authority from a list of names prepared by that leader's counterpart. Thus, for example, the Senate Majority Leader would choose one name from a list of ten names prepared by the Senate Minority Leader, and vice versa. Likewise, the Speaker of the House would choose one name from a list of ten prepared by the House Minority Leader, and vice versa. Picked this way, these four members of the appointing authority would tend to be more moderate, and less partisan, than if each party leader simply selected one member. The process could also require the party leaders to confine their list of ten names to federal judges, rather than elected politicians, to increase the likelihood that the four-member appointing authority would place a premium on the attribute of judicial virtue when undertaking the task of appointing the three individuals to serve on the impartial tribunal.

There is no guarantee that a three-judge panel selected in this way to handle a future disputed presidential election would render a decision perceived by the losing side to be fair and legitimate. Nevertheless, the evidence of the *McCain v. Obama* simulation, together with Minnesota's subsequent experience involving its disputed U.S. Senate seat, suggests that this kind of impartial tribunal has a better chance of success in this regard than the institutions that currently exist: the Supreme Court and the Congress. It would be something of an experiment to change the rules for disputed presidential elections along the lines I have just outlined. But then it was just as much an experiment for the Supreme Court to intervene as it did in *Bush v. Gore*—and for Congress to create the flawed fifteen-member commission that it used to diffuse the crisis over the Hayes-Tilden dispute.

The handling of each new disputed presidential election, rare as they thankfully are, is inevitably something of an experiment. Better that the experiment be designed with the benefit of all available information to maximize the likelihood of success—with success measured by the extent to which the losing side perceives the resolution to be fair. Given this goal, the future handling of a disputed presidential election should take account of the result of the *McCain v. Obama* simulation. This result indicates that an evenly balanced three-judge panel, in which one Democratic and one Republican judge mutually agree upon a third neutral member, is the means most likely to achieve this success.

APPENDIX

Cite as: 555 U. S. ____ (2008)

Per Curiam

SUPREME COURT OF THE UNITED STATES

Mock Case No. 1

JOHN MCCAIN, ET AL.
v. BARACK OBAMA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI

[December 9, 2008]

PER CURIAM

I.

The events leading up to the present controversy began on Election Day, November 4, 2008, when an especially severe and unusual winter storm hit the city of Denver in the mid-afternoon. The storm greatly affected driving conditions, making road travel treacherous even for drivers accustomed to winter weather. Although the storm caused minor delays in the outlying Denver suburbs, it disproportionately affected rush hour traffic in Denver, causing extensive problems for voters trying to reach their polling places. In response, Denver Elections Director Michael Scarpello, with the approval of Denver's elected official responsible for administering elections, issued an email directive at 4:53 P.M. requiring that all polling places in Denver stay open an extra two hours, closing at 9:00 P.M. instead of the statutorily-prescribed time of 7:00 P.M. The direction provided that all ballots cast during the extended hours would be treated as provisional ballots.

At about 5:30 P.M., upon learning of the poll hour extension, Colorado's Secretary of State, Mike Coffman, filed suit in state district court seeking to enjoin the extension of polling hours beyond 7:00 P.M. The request for emergency relief was denied on the basis that the provisional ballots could be disqualified in later proceedings if the extension proved unlawful following more considered briefing and deliberation.

Secretary Coffman filed an immediate appeal to the Colorado Supreme Court. The Colorado Supreme Court issued a 5-2 ruling upholding the decision of the state district court. Secretary Coffman then sought an emergency injunction from this Court at 8:12 P.M. Our rul-

ing, issued at 8:46 P.M. on election night, denied Coffman's application for an emergency injunction on the basis that "any such relief at this point would be moot." *Statement of the Case (Statement)* at 6.

During the hours of the extension, 62,729 provisional ballots were cast in Denver County. There is no dispute that 92% of registered voters cast ballots in non-Denver counties. If the provisional ballots are counted, 87% of registered voters in Denver County will have voted. If the provisional ballots are not counted, only 67% of registered voters in Denver will have voted.

With a 265-264 Electoral College vote divide, the determination of the Presidency in this election rests on Colorado's nine electoral votes. Without the provisional ballots cast in Denver pursuant to Director Scarpello's order extending polling hours, the electors for John McCain and Sarah Palin have a small but significant 13,363 vote lead over the electors for Barack Obama and Joe Biden. The provisional ballots have not been opened or counted; no one knows, therefore, whether these ballots would alter the outcome of the election in Colorado, but it is possible that they could.

On November 6, 2008, Secretary Coffman issued an administrative order that the certified results from Denver, which must be delivered to the Secretary of State by November 21, 2008, should not include any of the provisional ballots cast by persons arriving at the polls after 7:00 P.M. The following day, Director Scarpello sought a decree from the state district judge that would void Secretary Coffman's order and permit Denver election officials to process the provisional ballots and include all eligible votes in the official results submitted to the Secretary. The district judge referred the dispute to the Colorado Supreme Court for its instruction on the following question: "Under the laws of this state, and of the United States, in determining the state's presidential electors, should the certified vote totals for each presidential candidate include provisional ballots cast by individuals arriving at the polls after 7 P.M. pursuant to the directive of the Denver Elections Director, if there is no other basis for disqualifying those provisional ballots?" *Id.* at 9–10. The district court also ordered that while the matter was pending review, Denver officials were permitted to review the provisional ballots solely to determine whether each would be eligible apart from the issue in dispute, but the eligible ballots were not to be counted.¹ The order further prohibited the Sec-

1. The record does not reveal the precise number of eligible, provisional ballots. However, there is no dispute that most of the 62,729 ballots have been found eligible and that the precise figure is well in excess of the 13,363 difference in votes between Senators McCain and Obama without the provisional ballots.

retary from issuing a final certification without first receiving a final order from the Colorado Supreme Court.

The Colorado Supreme Court scheduled oral argument on the question certified by the state district court. At this stage of the litigation, both the McCain and Obama campaigns intervened to protect their interests. After oral argument, the Colorado Supreme Court issued a 4–3 decision holding that “[i]t would deny Denver voters Equal Protection not to count these provisional ballots.” *Id.* at 11. The Court further held that the Colorado Constitution requires this same conclusion because a citizen’s equal right to vote is a “fundamental right of the first order” under the State’s Constitution. *Id.* Finally, the Court concluded that there is some flexibility in the statutorily-dictated 7:00 P.M. poll-closing time for “true emergencies” because the Colorado Legislature instructed its courts to construe Colorado’s Election Code “liberally . . . so that eligible electors may be permitted to vote.” *Id.* at 11-12 (citing Colorado Revised Statute, section 1-1-103(1)). The dissent focused exclusively on the language in section 1-7-101, which the dissent contended could not be interpreted to permit an extension of the polls beyond 7:00 P.M. under any circumstance. The Colorado Supreme Court then remanded the case to the district court with instructions that it enter an order requiring the Secretary to accept vote totals from Denver including the provisional ballots and to include these totals in the final certification. The Court stayed the effect of its mandate to permit our review.

The petitions for certiorari filed by the campaigns and consolidated by this Court present the following questions: whether the counting of contested provisional ballots cast in Denver pursuant to extended polling hours limited to Denver voters violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and whether the Colorado Supreme Court’s decision violates Article II’s specific grant of authority to the Colorado Legislature to “direct” the “Manner” of appointing the state’s presidential electors. Because we find no constitutional violation under the Equal Protection Clause and no Article II concern with the Colorado Supreme Court’s interpretation of state law, we affirm.

II.

A.

We first address jurisdiction. Respondents contend that the issue in this case presents a nonjusticiable political question entrusted to the United States Congress for resolution—specifically, the determination

of the award of Colorado's nine electoral votes. Respondents misperceive the question before us. Although our decision ultimately may affect how those votes are awarded, we do not decide today how to award Colorado's electoral votes. That decision must await action by the Colorado Secretary of State and the United States Congress. All we decide here is whether the order of the Colorado Supreme Court requiring counting of the provisional ballots is consistent with the Equal Protection Clause of the Fourteenth Amendment and Article II of the United States Constitution. Because both the Equal Protection and Article II issues presented here involve the application of judicially-manageable standards to the narrow question of whether to count the contested provisional ballots, and because no serious separation of powers concern is presented by our resolution of this question, we hold that the political question doctrine does not bar our review in these circumstances.

The political question doctrine provides that even when all other jurisdictional and justiciability requirements are met, a certain class of cases should not be adjudicated by the federal courts because these controversies have been entrusted for decision to the politically accountable branches—Congress and the President. The political question doctrine is a prudential one, concerned primarily with the separation of powers. *Baker v. Carr*, 369 U.S. 186, 211 (1962). As a means of determining whether a particular question is a “political question,” we have looked to “the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination [as the] dominant considerations.”² *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939) (plurality opinion). The doctrine has been employed sparingly. The Court previously has found a political question to exist in cases involving foreign policy and affairs, *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); the Guaranty

2. In *Baker*, we further explained the circumstances in which the political question doctrine requires the Court to defer judgment to a coordinate branch:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

Clause and the electoral process, *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); self-regulation of Congress's internal processes, *Field v. Clark*, 143 U.S. 649 (1892); ratification of constitutional amendments, *Coleman*, 307 U.S. at 450; instances where the federal courts are incapable of shaping effective equitable relief, *Gilligan v. Morgan*, 413 U.S. 1 (1973); and challenges to the impeachment process, *Nixon v. United States*, 506 U.S. 224 (1993).

Determining the precise questions posed and the posture of the particular case are important preliminary components of any justiciability analysis. See generally *Baker*, 369 U.S. at 211-12, 217 (“[T]he cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case.”). The issue before us does not involve the question of who should win the presidential election or who should be on Colorado’s slate of presidential electors,³ but rather whether certain votes cast in Denver pursuant to a localized poll-hour extension can be counted in the Secretary of State’s certification of results under federal law, specifically the Equal Protection Clause and Article II. Cf. *Roudebush v. Hartke*, 405 U.S. 15, 19 (1972) (noting that while the state was permitted to order a recount for a senatorial election even though Article I makes the Senate the “judge of the elections [for the Senate],” it cannot determine which candidate is entitled to a seat in the Senate because this presents a nonjusticiable political question).

Furthermore, the particular constitutional issues raised are similar to those that courts routinely address and for which there are judicially-manageable standards and doctrines. We have consistently found jurisdiction over Equal Protection claims raised in the election and voting contexts and have rejected application of the political question doctrine to these disputes. See *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); *Williams v. Rhodes*, 393 U.S. 23, 29 (1968); *Baker v. Carr*, 369 U.S. 186, 209-10 (1962) (“[j]udicial standards under the Equal Protection Clause are well-developed and familiar”); and *Bush v. Gore*, 531 U.S. 98, 106 (2000) (*Bush II*). In *Williams*, we held that the political question doctrine did not apply to prevent judicial review of possible equal protection violations in the presidential election process. 393 U.S. at 28. These decisions alone should foreclose any further discussion of nonjusticiability. Indeed, it would be astonishing to divest this Court of jurisdiction to determine whether the counting of the ballots was permissible under the Equal Protection Clause—coun-

3. It bears repeating that we are rendering our opinion without knowledge of whom the provisional ballots ultimately will favor in the presidential election as well as the many other election contests included on the Denver November ballot.

sel for Respondents conceded as much at argument. Oral Argument Tr. at 27. With respect to the Equal Protection claim, we unquestionably have jurisdiction.

Our ability to review the Article II issue presented in these circumstances is similarly well established. See *McPherson v. Blacker*, 146 U.S. 1, 23–24 (1892) (political question doctrine did not bar resolution of a claim about the extent of the legislature’s power under Article II), *Bush II*, 531 U.S. at 113 (Rehnquist, C.J., concurring). The inapplicability of the political question doctrine is particularly clear when the question is the narrow one of whether Article II is compromised by the Colorado Supreme Court’s decision to require the counting of the provisional ballots. As is evident from our analysis of the issue below, judicially-manageable standards are available—a deferential review to assess whether the state court’s interpretation of Colorado’s election law substantially complied with the Legislature’s will. Such a deferential standard ensures that this Court will rarely be placed in a position where its interpretation of state law differs from state decision-makers, with the potential of drawing the Court into conflict with political departments of the state and federal governments.

In short, in view of the precise questions presented under the Equal Protection Clause and Article II, we hold that the political question doctrine has no application. The Court has jurisdiction and, therefore, a duty to resolve the constitutional claims presented.

B.

The central claim in Petitioners’ case is that the Colorado Supreme Court’s order requiring that the Secretary of State count the provisional ballots of voters who arrived at the Denver polls after 7:00 P.M. violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Their equal protection claim rests solely on the premise that the extension of the voting time for Denver residents resulted in unequal treatment and a deprivation of an important right for all eligible Colorado voters who live outside of Denver and did not vote but might have voted had they too been provided the extra time. The record contains affidavits from individual residents in neighboring suburbs who make such a claim. In no other electoral district did the local authority declare such an emergency extension of poll hours or ask the Secretary of State to do so.

We do not find Petitioners’ equal justice claim to be a substantial one. In general, the residents of other electoral districts in Colorado were not “similarly situated” to those in Denver. The record states

with respect to Denver that “after-work rush hour traffic [was] exceptionally gridlocked, [while] Denver’s suburbs, as well as the rest of the state, largely escaped the full brunt of the freakish storm.” *Statement* at 2. Although “some suburban roads suffered storm-related delays, they were not significantly worse than often occurs during heavy traffic and minor in comparison to what drivers were experiencing on Denver’s roads. . . .” *Id.* In these circumstances we cannot conclude that the Colorado Supreme Court’s sanctioning of the Denver Election Director’s decision to extend poll hours for Denver residents alone constituted an “arbitrary and unjustified disparate treatment of qualified voters” in other districts not similarly affected by the storm. It was rather a reasonable response to an unanticipated and location specific natural phenomenon. While it is certainly true, as Petitioners argue, that uniform voting rules within a state are highly desirable, and purposeful deviations without cause may in some circumstances rise to the level of a constitutional violation, the realities of holding elections in 64 districts will occasionally mean that unexpected events like severe weather, power outages, and voting machine breakdowns may require immediate adjustments to general rules of time and place to serve the overarching goals of equal access to the ballot box and facilitation of maximum voter participation. Indeed, Petitioners’ counsel conceded at argument that if government-controlled conditions produced temporary inaccessibility to the polls, extension of voting hours would be permissible to make up for the time lapses, but he insisted that if similar periods of inaccessibility were caused by natural causes, the same extensions would amount to a violation of the Equal Protection Clause. Oral Argument Tr. at 8–9. This distinction makes little sense to us.

Local election officials have authority to act only for their districts. The Colorado Legislature has provided for such districts and for the election of local officials to run elections within them. These officials are required to draw up local emergency plans for dealing with unexpected events that may disrupt normal voting practices. *See* Colo. Election R. 43.10, *available at* http://www.elections.colorado.gov/WWW/default/Rule%20Making/2008/8_ccr_1505_1_sos_election_rules_as_amended_07_11_08.pdf. If citizens feel they need extra time to vote due to such conditions, it is to those officials they must look initially, and if relief is not forthcoming, to the Secretary of State who has power to prescribe statewide rules. If an emergency strikes, those local officials can deal only in general responses that affect the majority of voters in their districts; they are in no position to single out those voters who, due to special individual circumstances such as lo-

cation or work hours, will be especially injured by the storm. We might be faced with a different question eliciting a different response if districts equally affected by the storm responded differently in terms of granting or denying extensions, but no such differential occurred here. Like the Colorado Supreme Court, we do not view the limited response of a two-hour extension for Denver voters hit disproportionately by serious traffic congestion from a “freakish” storm as anything approaching a constitutional violation. We note that the number of provisional ballots cast after 7:00 P.M. in Denver brought its total vote count to 87% of “active” voters (as defined by the Colorado Secretary of State), in line with but below the 92% count in “non-Denver counties.” *Statement* at 9. Had the Denver polls closed at 7:00 P.M., some 60,000 fewer votes would have been recorded, yielding a far lower percentage (67%) of “active” voters participating in this election. *Id.* These figures suggest to us that the extension succeeded merely in bringing to par the participation of Denver voters with their neighboring county residents, not in conferring a preferential impact or disadvantage on either.

Petitioners are concerned with the alleged deprivation of extra voting time to some unknown number of voters in neighboring counties. Yet, the remedy Petitioners request, were their equal protection claim recognized, is most troublesome. Petitioners ask this Court to reject over 60,000 votes cast in good faith by Denver voters after they had been told by their local official that poll hours had been extended. Would not these 60,000 plus voters then have plausible claims that they had been deprived of their right to vote by this misinformation? And the same ballots that would be rejected in the contest for Presidential electors could prove determinative in their absence from the contests for local and statewide officials which were on the same ballot. *See infra* note 7. The cure, it seems to us, would be worse than the malady.

In so concluding we follow the contours of our past cases in which we have expressed reluctance to intervene in state electoral processes unless there has been a demonstrated burden placed on an identifiable group of voters, as well as reticence to supervise minutiae of elections unless there has been a significant impact on voters’ accessibility to the polls. *See Crawford v. Marion County Bd. of Election*, 128 S. Ct. 1610, 1626 (2008) (Scalia, J., concurring) (rejecting “detailed judicial supervision of the election process, [which] would flout the Constitution’s express commitment of the task to the States,” stating that the Court must defer to state legislatures unless a statute “imposes a severe and unjustified burden on the right to vote, or is

intended to disadvantage a particular class,” and noting that “weighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence”); *see generally* *Clingman v. Beaver*, 544 U.S. 581, 592 (2005) (“not every electoral law that burdens associational rights is subject to strict scrutiny . . . strict scrutiny is appropriate only if the burden is severe”); *Bain Peanut Co. of Tex. v. Pinson*, 282 U.S. 499, 501 (1931) (as a general matter “[w]e must remember that the machinery of government would not work if it were not allowed a little play in its joints”). Here we find no undue burden or disparate impact such as to require our intervention.⁴

In sum, we decline to impose our views as to how elections should be run, district by district, on the State of Colorado under these circumstances.

C.

Petitioners’ last point claims that the Colorado Supreme Court’s judgment unconstitutionally usurps the Legislature’s exclusive authority under Article II to set the time at which the state’s polling places are to close. We also reject this argument.

The United States Constitution provides in relevant part: “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors” U.S. CONST. art. II, § I, cl. 2. Petitioners assert that the Colorado Legislature has, as to the time during which the polls shall be open, “directed” the “Manner” of “appointing Electors” through this provision:

All polls shall be opened continuously from 7 A.M. until 7 P.M. of each election day. . . . The polls shall remain open after 7 P.M. until every eligible voter who was at the polling place at or before 7 P.M.

4. Our decision in *Bush v. Gore*, 531 U.S. 98 (2000), does not require a contrary result. *Bush v. Gore* governs a distinctive sub-category of election cases, and this case does not fall into that group. In that case, large numbers of local officials applied an indeterminate standard throughout the state over a period of time. Here, by contrast, one unambiguous rule was issued for one district and no further discretion was permitted. The Court in *Bush v. Gore* concluded that the recount could have been “conducted in compliance with the requirements of equal protection and due process,” if the state had adopted “adequate statewide standards for determining what is a legal vote, and practical procedures to implement them,” and had provided for an “orderly judicial review of any disputed matters that might arise.” *Id.* at 110. Because these types of deficiencies are simply not implicated here, *Bush v. Gore* would have little precedential force in this case, even if that opinion had not explicitly been limited to its particular facts. *Id.* at 109.

has been allowed to vote. Any person arriving after 7 P.M. shall not be entitled to vote.

COLO. REV. STAT. § 1-7-101 (1). Petitioners argue that because Article II “leaves it to the legislature exclusively to define the method of effecting the object” of selecting a state’s presidential electors, *McPherson*, 146 U.S. at 27, and the Colorado Legislature has done so with respect to the hours when the polls shall be open, neither a local election judge nor any trial or appellate court member of the state judiciary may constitutionally direct a contrary closing time. Moreover, while the Colorado Secretary of State has, pursuant to authority granted by the Legislature, both promulgated rules requiring local contingency plans for certain disasters⁵ and issued a guide discussing how to deal with emergencies and disasters that may affect voting,⁶ neither mentions altering polling place hours. Thus, Petitioners say, regardless of whether extended hours were a practical, or appropriate, response to the winter storm, and regardless of whether any voter’s equal protection rights were affected by the extension of voting hours in one county but not another, such an order would be unconstitutional unless the Legislature provided for it by statute. As to the Presidential election, therefore, no provisional ballot from Denver may be counted.⁷

We assume, without deciding, that the “Manner” of choosing electors sweeps broadly enough to vest a state legislature with the right to exclusive constitutional authority over all details of electoral administration, including specifically the hour at which the polls must close. We further recognize that Article II “operat[es] as a limitation upon the State in any attempt to circumscribe the legislative power.” *McPherson*, 146 U.S. at 25. In modern times, the Supreme Court has unanimously recognized that Article II limits, at least to some extent,

5. Election Rule 43.10 requires each local election authority to develop and file with the Secretary of State a “contingency plan” that addresses “emergency situations including fire, severe weather, bomb threat, civil unrest, electrical blackout, equipment failure, and any other emergency situations identified by the designated election official.” Colo. Election R. 43.10, *available at* http://www.elections.colorado.gov/WWW/default/Rule%20Making/2008/8_ccr_1505_1_sos_election_rules_as_amended_07_11_08.pdf.

6. COLO. SECT’Y OF STATE, *Emergency and Disaster Planning: Best Practices Guide*, *available at* <http://www.elections.colorado.gov/DDefault.aspx?tid=1029>.

7. Petitioners make no claim regarding the disposition of the provisional ballots insofar as they contain votes for candidates for other offices, including the United States Senate and United States House of Representatives. Whether or not such votes should count merely because they were cast by voters not in line by 7:00 P.M. is entirely a question of state law upon which the judgment of the Supreme Court of Colorado would be final, regardless of our disposition of Petitioners’ Article II claim.

the authority of a State Constitution to “circumscribe the legislative power” over presidential elector selection. *Bush v. Gore*, 531 U.S. 70, 77 (2000) (*Bush I*). But even so broad a mandate does not divest the coordinate branches of the State’s government of all authority, especially when the legislature expressly delegates authority to administer elections to these other branches. Here, the Colorado Legislature has conferred upon the Colorado Supreme Court “original jurisdiction for the adjudication of contests concerning presidential electors,” COLO. REV. STAT. § 1-11-204, and has delegated the responsibility of supervising the election itself to the executive branch, COLO. REV. STAT. § 1-1-107. Similarly, in *Bush v. Gore*, the Florida Legislature had “delegated the authority to run the elections and to oversee election disputes to the Secretary of State and to state circuit courts.” *Bush II*, 531 U.S. at 113–14 (citations omitted). Chief Justice Rehnquist, concurring for three justices in that case, opined that Article II still left some interpretative role for the state judiciary in such circumstances: “Though we generally defer to state courts on the interpretation of state law[,] there are of course areas in which the Constitution requires this Court to take an independent, if still deferential, analysis of state law. . . . [W]e would . . . in the present case . . . hold that the Florida Supreme Court’s interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II.” *Id.* at 114, 115 (citation omitted).

Even if we accept Chief Justice Rehnquist’s view of Article II and give only limited deference to the state court’s interpretation of state law, we cannot conclude that the Colorado Supreme Court’s construction of the relevant provisions amounts to an “impermissibl[e] distort[ion]” of the Colorado Election Code. Relying on § 1-1-103(1) of the Colorado Revised Statutes, which mandates in part that the Election Code “shall be liberally construed so that all eligible voters may be permitted to vote . . . ,” as well as its view that the literal interpretation adopted by Petitioners would bring the statute into conflict with the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the Colorado Constitution’s protection of a citizen’s equal right to vote, the Colorado Supreme Court concluded that the provision in question “should not be construed to prohibit the extension of polling hours when emergencies require it.” *Statement* at 12. The specified 7:00 P.M. closing time was merely “a general rule,” not a blanket prohibition against local initiative to protect voter access in exigent circumstances. *Id.*

Whether we would interpret the Colorado Election Code in the same manner were this question left initially to us, or whether we

agree with the rationale articulated by the state court to support its interpretation, are both beside the point. Under our federal system, at least some deference is due to the state judicial interpretation of state law. We cannot say that this interpretation was so novel or so strained as to fall short of constituting a “fair reading” of the state law.

For these reasons, we hold that Article II of the United States Constitution does not compel the rejection of the provisional ballots in this case.

III.

The judgment of the Colorado Supreme Court is affirmed.

