No. 00-8545

In the Supreme Court of the United States

CAROLINE KITCHENER,

Petitioner,

v.

BRANDON HOLT,

Respondent

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PRINCETON UNIVERSITY MOOT COURT TOURNAMENT
SPRING 2018
Oral Argument Scheduled for April 27-28, 2018

Important Note:
Oral argument will be held as though the date is December 3, 2020.

Last Revised February 1, 2018

FACT PATTERN:

Ohio uses both Direct Recording Electronic (DRE) voting machines and paper ballots during elections. On a DRE voting machine, voters cast their ballot on a touchscreen. The machine stores the vote using electronic memory and, as a backup, prints each vote on a paper receipt. In May 2019, revisions to Ohio elections law were enacted in the Adler Act (named for its sponsor). Section 3 of the Act stated, "Before each election, each county Board of Elections shall file an Emergency Preparedness Plan (EPP) with the Ohio Secretary of State. Such a plan shall include appropriate procedures for identifying and responding to any emergency during an election. At the request of the chair of a county's Board of Elections, a county shall implement its EPP."

In the summer of 2020, the Republican Party nominated petitioner Caroline Kitchener as its candidate for U.S. President. Shortly thereafter, the Democratic Party nominated respondent Brandon Holt as its presidential candidate.

On the morning of Election Day, November 3, 2020, elections officials in five Ohio counties saw an "Error: Memory Disk" message on their DRE voting machines for a few seconds before the machines began to display normal prompts. In each county, officials notified the county Board of Elections chair of the message, and he or she acted in accordance with the county's unique EPP.

In Hamilton and Montgomery Counties, the EPP identified any technical failure of voting machines as an emergency. In these counties, the chair of the Board of Elections barred elections officials from using voting machines in accordance with the EPP. The EPP required elections officials to keep backup paper ballots, and elections officials used these ballots to record votes.

In Warren and Claremont Counties, the chair of the Board of Elections also declared a "technical failure" emergency in accordance with the county's EPP. In these counties, however, the EPP did not require elections officials to keep backup paper ballots. Polling places in these two counties opened over two hours late so that officials could get paper ballots from neighboring counties.

In Butler County, the EPP only identified "malfunctions of DRE voting machines in which the ballot does not display properly" as "technical failure" emergencies. On Election Day, the Board of Elections chair correctly decided that the error message did not meet this criterion. Officials therefore continued to use the machines until about 4:00 pm, when they all abruptly shut off. The chair then declared an emergency, and paper ballots were used for the rest of Election Day.

No other elections irregularities occurred in Ohio. On Election Night, Ohio was deemed "too close to call." For the other 49 states (and Washington, D.C.), news networks projected 262 electoral votes for Kitchener and 258 votes for Holt. (These were later verified and were not contested.) Ohio's 18 electoral votes go to the statewide winner; 270 votes are needed to win the presidency.

On November 11, the Butler County Board of Elections stated, "We are working with the FBI to recover the votes stored on the DRE voting machines' memory. Therefore, our election results will only include votes from paper ballots." On November 17, Ohio Secretary of State Peter Angelica announced the results of the Ohio elections as 2,745,029 votes for Kitchener and 2,773,908 votes for Holt. The Ohio Secretary of State has final authority to certify the winners of Ohio elections.

In previous presidential elections, Republicans won about 70 percent of the vote in Warren, Claremont, and Butler Counties, earning about 45,000 more votes than Democrats in each county. According to the official results, Kitchener won a similar percentage of the vote in each county, but the total number of recorded votes had sharply decreased. In each of Warren and Claremont Counties, Kitchener earned about 35,000 more votes than Holt. In the Butler County results, which only counted paper ballots, Kitchener earned about 20,000 more votes.

On November 18, Kitchener requested a recount in Butler County, which was to involve counting the DRE voting machine receipts. However, when the roll of receipts was opened, officials found that the ink was so faded that the receipts were unreadable. On November 23, even though these DRE voting machine results had not been recovered, Secretary of State Angelica, who was elected as a Democrat, announced his intention to certify Holt as the Ohio presidential winner.

On the same day, Kitchener officially contested the election, submitting affidavits from 251 voters who used DRE voting machines in Butler County. An additional 35 voters testified that they were turned away by Warren and Claremont County officials early on Election Day and could not return to the polls due to other commitments. Per Ohio law, the election contest was tried by Ohio Supreme Court Chief Justice Paul Riley. On November 26, Riley enjoined Secretary of State Angelica from certifying the election for either candidate. In his opinion, he wrote, "The Adler Act created an elections procedure—the creation of EPPs—with 'minimal procedural safeguards' to satisfy 'the rudimentary requirements of equal treatment.' In *Bush v. Gore*, the Supreme Court decided that this violated equal protection. However, ordering a 'revote' is unconstitutional judicial overreach. There is now no way to treat voters equally, so the results cannot be certified."

In a November 27 press release, Ohio Speaker of the House Pauline Yeung controversially stated, "I applaud Justice Riley's decision. Since the election has yielded no result, federal law gives the Ohio General Assembly the right to select presidential electors, and we will proudly select electors to vote for Caroline Kitchener." Republicans control both houses of the Ohio General Assembly.

Holt appealed the decision to the Ohio Supreme Court; Chief Justice Riley recused himself. In a November 30 decision, the court reversed Riley's decision. Writing for the 4-2 majority, Justice Mary Marshall claimed that "Chief Justice Riley's reliance on *Bush v. Gore* as precedent is misplaced. Given the effort to recover the Butler County votes, he has failed to identify any definitively disenfranchised voters. There is no equal protection issue here. Indeed, certifying elections presents a political question that should not be settled by the judiciary." In a dissent, Justice Cal Peyser argued that "disenfranchising *all* Ohio voters is the exact opposite of the remedy that this flagrant equal protection violation requires." He argued that the Butler County votes should be discarded and a new special presidential election be held for Butler County only.

On the same day, FBI Director Nancy Xiao stated, "Malware of Russian origin has erased the electronic recording of the votes on Butler County voting machines. We do not know whether malicious action led to the faded ink on the receipts, which have been sent to FBI headquarters for testing. It is possible, but unlikely, that we will be able to read the receipts and recover the votes."

Kitchener appealed to the Supreme Court. Considering the importance of the equal protection questions and the need for a prompt decision, the Supreme Court granted cert on December 1.

It is therefore ordered that counsel present oral argument on the following questions:

1. Does the present case present a nonjusticiable political question?
2. Does the implementation of Section 3 of the Adler Act violate the Equal Protection Clause of the Fourteenth Amendment?
3. What is the appropriate judicial remedy in the present case?

Important Note:
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Author's Note:
The 2017 Virginia House of Delegates election, in which a tied election led to a random draw that ultimately determined which party controlled the chamber, exemplifies the cliché that "every vote counts." Of course, these close elections can also lead to legal challenges. In this case, you will have the opportunity to examine some of these challenges, while revisiting what is arguably one of the most consequential Supreme Court decisions of the past few decades (*Bush v. Gore*).

As you read the case packet, you might find the following suggestions helpful:

-Read the fact pattern carefully, making note of key details that will be useful to each side.

-Develop a succinct explanation of both the fact pattern and your argument. While judges do receive basic information about the case packet, they might not be as familiar with the material as you.

-Prepare enough material to fill most of the 20-minute oral argument, but make sure to allow enough time to answer judges' questions fully.

-Pay attention to each of the theories presented in the case law, even ones you do not plan to present. Judges might bring up such theories in their questions.

-Pay special attention to tensions, inconsistencies, or problems in the case law, and consider how the decision in the present case might resolve them. Try to see if you can draw distinctions that make seemingly contradictory decisions appear consistent.

-Consider the precedent that you're asking the judges to set. Does your argument rely on reaffirming established legal principles or setting a new precedent? If your argument is adopted, how will it affect the legal arguments in future cases?

Acknowledgements:
Once again, I have had the privilege of building off the work of legal scholars, including Edward B. Foley, Richard L. Hasen, Michael McConnell, Daniel L. Lowenstein, Erwin Chemerinsky, Nathan L. Colvin, Chad Flanders, Nelson Lund, Robert C. O'Brien, Amy Borlund, John Kay, Steven F. Huefner, Steven J. Mulroy, Peter M. Shane, Tracy A. Thomas, and Laurence H. Tribe. The organizers of this year's moot court tournament—Leo Li, Bobo Stankovikj, Jason Tan, Mahishan Gnanaseharan, and Marcus Grey—have once again devoted their time to helping the tournament run smoothly. Their hard work is what makes Princeton Moot Court possible.

RELEVANT CONSTITUTIONAL PROVISIONS:

You may discuss any section of the Constitution, including its amendments, during oral argument—even sections that are not included here.

Excerpt from Article II, Section I

The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

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…

The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

Excerpt from Amendment XII

The electors shall meet in their respective states and vote by ballot for President… which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; —the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice…

Excerpt from Amendment XX, Section 3

If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Excerpt from Amendment XIV, Section 1

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RELEVANT LEGISLATION:

Excerpts from 3 U.S. Code, Chapter 1

§1. The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.[1]

§2. Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.

§5. 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,[2] 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.

§7. The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December[3] next following their appointment at such place in each State as the legislature of such State shall direct.

RELEVANT CASE LAW:

Several cases appear in excerpted form. Only the excerpted parts of these cases may be referenced during oral argument.

[1] In 2020, this date (Election Day) is Tuesday, November 3.
[2] In 2020, this date (the "safe-harbor deadline") is Tuesday, December 8.
[3] In 2020, this date (the date set for the meeting of the Electoral College) is Monday, December 14.

Baker v. Carr, 369 U.S. 186 (1962)

Syllabus

Appellants are persons allegedly qualified to vote for members of the General Assembly of Tennessee representing the counties in which they reside. They brought suit in a Federal District Court in Tennessee under 42 U.S.C. §§ 1983 and 1988, on behalf of themselves and others similarly situated, to redress the alleged deprivation of their federal constitutional rights by legislation classifying voters with respect to representation in the General Assembly. They alleged that, by means of a 1901 statute of Tennessee arbitrarily and capriciously apportioning the seats in the General Assembly among the State's 95 counties, and a failure to reapportion them subsequently notwithstanding substantial growth and redistribution of the State's population, they suffer a "debasement of their votes," and were thereby denied the equal protection of the laws guaranteed them by the Fourteenth Amendment. They sought, *inter alia,* a declaratory judgment that the 1901 statute is unconstitutional and an injunction restraining certain state officers from conducting any further elections under it. The District Court dismissed the complaint on the grounds that it lacked jurisdiction of the subject matter and that no claim was stated upon which relief could be granted.

Held:

1. The District Court had jurisdiction of the subject matter of the federal constitutional claim asserted in the complaint.

2. Appellants had standing to maintain this suit.

3. The complaint's allegations of a denial of equal protection presented a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision.

179 F.Supp. 824, reversed and cause remanded.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This civil action was brought under 42 U.S.C. §§ 1983 and 1988 to redress the alleged deprivation of federal constitutional rights. The complaint, alleging that, by means of a 1901 statute of Tennessee apportioning the members of the General Assembly among the State's 95 counties, "these plaintiffs and others similarly situated, are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes," was dismissed by a three-judge court convened under 28 U.S.C. § 2281 in the Middle District of Tennessee. The court held that it lacked jurisdiction of the subject matter and also that no claim was stated upon which relief could be granted. 179 F.Supp. 824. We noted probable jurisdiction of the appeal. 364 U.S. 898. We hold that the dismissal was error, and remand the cause to the District Court for trial and further proceedings consistent with this opinion.

The General Assembly of Tennessee consists of the Senate, with 33 members, and the House of Representatives, with 99 members. The Tennessee Constitution provides in Art. II as follows:

"Sec. 3. Legislative authority—Term of office.—The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people; who shall hold their offices for two years from the day of the general election."

"Sec. 4. Census.—An enumeration of the qualified voters, and an apportionment of the Representatives in the General Assembly, shall be made in the year one thousand eight hundred and seventy-one and within every subsequent term of ten years."

"Sec. 5. Apportionment of representatives.—The number of Representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each, and shall not exceed seventy-five; until the population of the State shall be one million and a half, and shall never exceed ninety-nine; *Provided,* that any county having two-thirds of the ratio shall be entitled to one member."

"Sec. 6. Apportionment of senators.—The number of Senators shall, at the several periods of making the enumeration, be apportioned among the several counties or districts according to the number of qualified electors in each, and shall not exceed one-third the number of representatives. In apportioning the Senators among the different counties, the fraction that may be lost by any county or counties in the apportionment of members to the House of Representatives shall be made up to such county or counties in the Senate, as near as may be practicable. When a district is composed of two or more counties, they shall be adjoining, and no county shall be divided in forming a district."

Thus, Tennessee's standard for allocating legislative representation among her counties is the total number of qualified voters resident in the respective counties, subject only to minor qualifications. Decennial reapportionment in compliance with the constitutional scheme was effected by the General Assembly each decade from 1871 to 1901. The 1871 apportionment was preceded by an 1870 statute requiring an enumeration. The 1881 apportionment involved three statutes, the first authorizing an enumeration, the second enlarging the Senate from 25 to 33 members and the House from 75 to 99 members, and the third apportioning the membership of both Houses. In 1891, there were both an enumeration and an apportionment. In 1901, the General Assembly abandoned separate enumeration in favor of reliance upon the Federal Census, and passed the Apportionment Act here in controversy. In the more than 60 years since that action, all proposals in both Houses of the General Assembly for reapportionment have failed to pass.

Between 1901 and 1961, Tennessee has experienced substantial growth and redistribution of her population. In 1901, the population was 2,020,616, of whom 487,380 were eligible to vote. The 1960 Federal Census reports the State's population at 3,567,089, of whom 2,092,891 are eligible to vote. The relative standings of the counties in terms of qualified voters have changed significantly. It is primarily the continued application of the 1901 Apportionment Act to this shifted and enlarged voting population which gives rise to the present controversy.

Indeed, the complaint alleges that the 1901 statute, even as of the time of its passage, "made no apportionment of Representatives and Senators in accordance with the constitutional formula…,

but instead arbitrarily and capriciously apportioned representatives in the Senate and House without reference…to any logical or reasonable formula whatever."

It is further alleged that, "because of the population changes since 1900, and the failure of the Legislature to reapportion itself since 1901," the 1901 statute became "unconstitutional and obsolete." Appellants also argue that, because of the composition of the legislature effected by the 1901 Apportionment Act, redress in the form of a state constitutional amendment to change the entire mechanism for reapportioning, or any other change short of that, is difficult or impossible. The complaint concludes that "these plaintiffs and others similarly situated, are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes."

They seek a declaration that the 1901 statute is unconstitutional and an injunction restraining the appellees from acting to conduct any further elections under it. They also pray that, unless and until the General Assembly enacts a valid reapportionment, the District Court should either decree a reapportionment by mathematical application of the Tennessee constitutional formulae to the most recent Federal Census figures, or direct the appellees to conduct legislative elections, primary and general, at large. They also pray for such other and further relief as may be appropriate.

I

THE DISTRICT COURT'S OPINION AND ORDER OF DISMISSAL

Because we deal with this case on appeal from an order of dismissal granted on appellees' motions, precise identification of the issues presently confronting us demands clear exposition of the grounds upon which the District Court rested in dismissing the case. The dismissal order recited that the court sustained the appellees' grounds "(1) that the Court lacks jurisdiction of the subject matter, and (2) that the complaint fails to state a claim upon which relief can be granted. . . ."

In the setting of a case such as this, the recited grounds embrace two possible reasons for dismissal:

First: That the facts and injury alleged, the legal bases invoked as creating the rights and duties relied upon, and the relief sought, fail to come within that language of Article III of the Constitution and of the jurisdictional statutes which define those matters concerning which United States District Courts are empowered to act;

Second: That, although the matter is cognizable and facts are alleged which establish infringement of appellants' rights as a result of state legislative action departing from a federal constitutional standard, the court will not proceed because the matter is considered unsuited to judicial inquiry or adjustment.

We treat the first ground of dismissal as "lack of jurisdiction of the subject matter." The second we consider to result in a failure to state a justiciable cause of action.

The District Court's dismissal order recited that it was issued in conformity with the court's per curiam opinion. The opinion reveals that the court rested its dismissal upon lack of subject matter

jurisdiction and lack of a justiciable cause of action without attempting to distinguish between these grounds. After noting that the plaintiffs challenged the existing legislative apportionment in Tennessee under the Due Process and Equal Protection Clauses, and summarizing the supporting allegations and the relief requested, the court stated that
"The action is presently before the Court upon the defendants' motion to dismiss predicated upon three grounds: first, that the Court lacks jurisdiction of the subject matter; second, that the complaints fail to state a claim upon which relief can be granted, and third, that indispensable party defendants are not before the Court."

The court proceeded to explain its action as turning on the case's presenting a "question of the distribution of political strength for legislative purposes." For,
"From a review of [numerous Supreme Court] . . . decisions, there can be no doubt that the federal rule, as enunciated and applied by the Supreme Court, is that the federal courts, whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration, will not intervene in cases of this type to compel legislative reapportionment."179 F.Supp. at 826.

The court went on to express doubts as to the feasibility of the various possible remedies sought by the plaintiffs. 179 F.Supp. at 827-828. Then it made clear that its dismissal reflected a view not of doubt that violation of constitutional rights was alleged, but of a court's impotence to correct that violation:
"With the plaintiffs' argument that the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs the Court entirely agrees. It also agrees that the evil is a serious one which should be corrected without further delay. But even so, the remedy in this situation clearly does not lie with the courts. It has long been recognized and is accepted doctrine that there are indeed some rights guaranteed by the Constitution for the violation of which the courts cannot give redress." 179 F.Supp. at 828.

In light of the District Court's treatment of the case, we hold today only (a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief, and (c) because appellees raise the issue before this Court, that the appellants have standing to challenge the Tennessee apportionment statutes. Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial.

II

JURISDICTION OF THE SUBJECT MATTER

The District Court was uncertain whether our cases withholding federal judicial relief rested upon a lack of federal jurisdiction or upon the inappropriateness of the subject matter for judicial consideration—what we have designated "nonjusticiability." The distinction between the two grounds is significant. In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. In the instance of lack of

jurisdiction, the cause either does not "arise under" the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, § 2); or is not a "case or controversy" within the meaning of that section; or the cause is not one described by any jurisdictional statute. Our conclusion, *see* pp. 369 U.S. 208-237 *infra,* that this cause presents no nonjusticiable "political question" settles the only possible doubt that it is a case or controversy. Under the present heading of "Jurisdiction of the Subject Matter," we hold only that the matter set forth in the complaint does arise under the Constitution, and is within 28 U.S.C. § 1343.

Article III, 2, of the Federal Constitution provides that
"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ." It is clear that the cause of action is one which "arises under" the Federal Constitution. The complaint alleges that the 1901 statute effects an apportionment that deprives the appellants of the equal protection of the laws in violation of the Fourteenth Amendment. Dismissal of the complaint upon the ground of lack of jurisdiction of the subject matter would, therefore, be justified only if that claim were "so attenuated and unsubstantial as to be absolutely devoid of merit," *Newburyport Water Co. v. Newburyport,* 193 U.S. 561, 193 U.S. 579, or "frivolous," *Bell v. Hood,* 327 U.S. 678, 327 U.S. 683. That the claim is unsubstantial must be "very plain." *Hart v. Keith Vaudeville Exchange,* 262 U.S. 271, 262 U.S. 274. Since the District Court obviously and correctly did not deem the asserted federal constitutional claim unsubstantial and frivolous, it should not have dismissed the complaint for want of jurisdiction of the subject matter. And, of course, no further consideration of the merits of the claim is relevant to a determination of the court's jurisdiction of the subject matter. We said in an earlier voting case from Tennessee: "It is obvious . . . that the court, in dismissing for want of jurisdiction, was controlled by what it deemed to be the want of merit in the averments which were made in the complaint as to the violation of the Federal right. But as the very nature of the controversy was Federal, and, therefore, jurisdiction existed, whilst the opinion of the court as to the want of merit in the cause of action might have furnished ground for dismissing for that reason, it afforded no sufficient ground for deciding that the action was not one arising under the Constitution and laws of the United States." *Swafford v. Templeton,* 185 U.S. 487, 185 U.S. 493. "For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits, and not for a dismissal for want of jurisdiction." *Bell v. Hood,* 327 U.S. 678, 327 U.S. 682. *See also Binderup v. Pathe Exchange,* 263 U.S. 291, 263 U.S. 305-308.

Since the complaint plainly sets forth a case arising under the Constitution, the subject matter is within the federal judicial power defined in Art. III, § 2, and so within the power of Congress to assign to the jurisdiction of the District Courts. Congress has exercised that power in 28 U.S.C. § 1343(3):
"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . [t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States. . . ."

An unbroken line of our precedents sustains the federal courts' jurisdiction of the subject matter of federal constitutional claims of this nature. The first cases involved the redistricting of States for the purpose of electing Representatives to the Federal Congress. When the Ohio Supreme Court sustained Ohio legislation against an attack for repugnancy to Art. I, § 4, of the Federal

Constitution, we affirmed on the merits and expressly refused to dismiss for want of jurisdiction "In view . . . of the subject matter of the controversy and the Federal characteristics which inhere in it. . . ." *Ohio ex rel. Davis v. Hildebrant,* 241 U.S. 565, 241 U.S. 570. When the Minnesota Supreme Court affirmed the dismissal of a suit to enjoin the Secretary of State of Minnesota from acting under Minnesota redistricting legislation, we reviewed the constitutional merits of the legislation and reversed the State Supreme Court. *Smiley v. Holm,* 285 U.S. 355. *And see* companion cases from the New York Court of Appeals and the Missouri Supreme Court, *Koenig v. Flynn,* 285 U.S. 375; *Carroll v. Becker,* 285 U.S. 380. When a three-judge District Court, exercising jurisdiction under the predecessor of 28 U.S.C. § 1343(3), permanently enjoined officers of the State of Mississippi from conducting an election of Representatives under a Mississippi redistricting act, we reviewed the federal questions on the merits and reversed the District Court. *Wood v. Broom,* 287 U.S. 1, *reversing* 1 F.Supp. 134. A similar decree of a District Court, exercising jurisdiction under the same statute concerning a Kentucky redistricting act was reviewed and the decree reversed. *Mahan v. Hume,* 287 U.S. 575, *reversing* 1 F.Supp. 142.

The appellees refer to *Colegrove v. Green,* 328 U.S. 549, as authority that the District Court lacked jurisdiction of the subject matter. Appellees misconceive the holding of that case. The holding was precisely contrary to their reading of it. Seven members of the Court participated in the decision. Unlike many other cases in this field which have assumed without discussion that there was jurisdiction, all three opinions filed in *Colegrove* discussed the question. Two of the opinions expressing the views of four of the Justices, a majority, flatly held that there was jurisdiction of the subject matter. MR. JUSTICE BLACK, joined by MR. JUSTICE DOUGLAS and Mr. Justice Murphy, stated: "It is my judgment that the District Court had jurisdiction . . . ," citing the predecessor of 28 U.S.C. § 1343(3), and *Bell v. Hood, supra.* 328 U.S. at 328 U.S. 568. Mr. Justice Rutledge, writing separately, expressed agreement with this conclusion. 328 U.S. at 328 U.S. 564-565, n. 2. Indeed, it is even questionable that the opinion of MR. JUSTICE FRANKFURTER, joined by Justices Reed and Burton, doubted jurisdiction of the subject matter. Such doubt would have been inconsistent with the professed willingness to turn the decision on either the majority or concurring views in *Wood v. Broom, supra.* 328 U.S. at 328 U.S. 551.

Several subsequent cases similar to *Colegrove* have been decided by the Court in summary per curiam statements. None was dismissed for want of jurisdiction of the subject matter. *Cook v. Fortson,* 329 U.S. 675; *Turman v. Duckworth, ibid.; Colegrove v. Barrett,* 330 U.S. 804; *Tedesco v. Board of Supervisors,* 339 U.S. 940; *Remmey v. Smith,* 342 U.S. 916; *Cox v. Peters,* 342 U.S. 936; *Anderson v. Jordan,* 343 U.S. 912; *Kidd v. McCanless,* 352 U.S. 920; *Radford v. Gary,* 352 U.S. 991; *Hartsfield v. Sloan,* 357 U.S. 916; *Matthews v. Handley,* 361 U.S. 127.

Two cases decided with opinions after *Colegrove* likewise plainly imply that the subject matter of this suit is within District Court jurisdiction. In *MacDougall v. Green,* 335 U.S. 281, the District Court dismissed for want of jurisdiction, which had been invoked under 28 U.S.C. § 1343(3), a suit to enjoin enforcement of the requirement that nominees for statewide elections be supported by a petition signed by a minimum number of persons from at least 50 of the State's 102 counties. This Court's disagreement with that action is clear, since the Court affirmed the judgment after a review of the merits and concluded that the particular claim there was without merit. In *South v. Peters,* 339 U.S. 276, we affirmed the dismissal of an attack on the Georgia "county unit" system but founded our action on a ground that plainly would not have been reached if the lower court

lacked jurisdiction of the subject matter, which allegedly existed under 28 U.S.C. § 1343(3). The express words of our holding were that "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions."

We hold that the District Court has jurisdiction of the subject matter of the federal constitutional claim asserted in the complaint.

III

STANDING.

A federal court cannot "pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." *Liverpool Steamship Co. v. Commissioners of Emigration,* 113 U.S. 33, 113 U.S. 39. Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing. It is, of course, a question of federal law.

The complaint was filed by residents of Davidson, Hamilton, Knox, Montgomery, and Shelby Counties. Each is a person allegedly qualified to vote for members of the General Assembly representing his county. These appellants sued "on their own behalf and on behalf of all qualified voters of their respective counties, and further, on behalf of all voters of the State of Tennessee who are similarly situated. . . ." The appellees are the Tennessee Secretary of State, Attorney General, Coordinator of Elections, and members of the State Board of Elections; the members of the State Board are sued in their own right and also as representatives of the County Election Commissioners whom they appoint.

We hold that the appellants do have standing to maintain this suit. Our decisions plainly support this conclusion. Many of the cases have assumed, rather than articulated, the premise in deciding the merits of similar claims. And *Colegrove v. Green, supra,* squarely held that voters who allege facts showing disadvantage to themselves as individuals have standing to sue. A number of cases decided after *Colegrove* recognized the standing of the voters there involved to bring those actions.

These appellants seek relief in order to protect or vindicate an interest of their own, and of those similarly situated. Their constitutional claim is, in substance, that the 1901 statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to voting population. The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-a-vis* voters in irrationally favored counties. A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution when such impairment resulted from dilution by a false tally, *cf. United States v. Classic,* 313 U.S. 299; or by a refusal to count votes

from arbitrarily selected precincts, *cf. United States v. Mosley,* 238 U.S. 383, or by a stuffing of the ballot box, *cf. Ex parte Siebold,* 100 U.S. 371; *United States v. Saylor,* 322 U.S. 385.

It would not be necessary to decide whether appellants' allegations of impairment of their votes by the 1901 apportionment will ultimately entitle them to any relief in order to hold that they have standing to seek it. If such impairment does produce a legally cognizable injury, they are among those who have sustained it. They are asserting "a plain, direct and adequate interest in maintaining the effectiveness of their votes," *Coleman v. Miller,* 307 U.S. at 307 U.S. 438, not merely a claim of "the right, possessed by every citizen, to require that the Government be administered according to law. . . ." *Fairchild v. Hughes,* 258 U.S. 126, 258 U.S. 129; compare *Leser v. Garnett,* 258 U.S. 130. They are entitled to a hearing and to the District Court's decision on their claims. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison,* 1 Cranch 137, 5 U.S. 163.

IV

JUSTICIABILITY

In holding that the subject matter of this suit was not justiciable, the District Court relied on *Colegrove v. Green, supra,* and subsequent per curiam cases. The court stated: "From a review of these decisions, there can be no doubt that the federal rule . . . is that the federal courts . . . will not intervene in cases of this type to compel legislative reapportionment." 179 F.Supp. at 826. We understand the District Court to have read the cited cases as compelling the conclusion that, since the appellants sought to have a legislative apportionment held unconstitutional, their suit presented a "political question," and was therefore nonjusticiable. We hold that this challenge to an apportionment presents no nonjusticiable "political question." The cited cases do not hold the contrary.

Of course, the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection "is little more than a play upon words." *Nixon v. Herndon,* 273 U.S. 536, 273 U.S. 540. Rather, it is argued that apportionment cases, whatever the actual wording of the complaint, can involve no federal constitutional right except one resting on the guaranty of a republican form of government, and that complaints based on that clause have been held to present political questions which are nonjusticiable.

We hold that the claim pleaded here neither rests upon nor implicates the Guaranty Clause, and that its justiciability is therefore not foreclosed by our decisions of cases involving that clause. The District Court misinterpreted *Colegrove v. Green* and other decisions of this Court on which it relied. Appellants' claim that they are being denied equal protection is justiciable, and if "discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." *Snowdell v. Hughes,* 321 U.S. 1, 321 U.S. 11. To show why we reject the argument based on the Guaranty Clause, we must examine the authorities under it. But because there appears to be some uncertainty as to why those cases did present political questions, and specifically as to whether this apportionment case is like those cases, we deem it necessary first to consider the contours of the "political question" doctrine.

Our discussion, even at the price of extending this opinion, requires review of a number of political question cases, in order to expose the attributes of the doctrine—attributes which, in various settings, diverge, combine, appear, and disappear in seeming disorderliness. Since that review is undertaken solely to demonstrate that neither singly nor collectively do these cases support a conclusion that this apportionment case is nonjusticiable, we, of course, do not explore their implications in other contexts. That review reveals that, in the Guaranty Clause cases and in the other "political question" cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the "political question."

We have said that, "In determining whether a question falls within [the political question] category, 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 are dominant considerations." *Coleman v. Miller,* 307 U.S. 433, 307 U.S. 454-455. The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. To demonstrate this requires no less than to analyze representative cases and to infer from them the analytical threads that make up the political question doctrine. We shall then show that none of those threads catches this case.

Foreign relations: there are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature, but many such questions uniquely demand single-voiced statement of the Government's views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action. For example, though a court will not ordinarily inquire whether a treaty has been terminated, since on that question, "governmental action . . . must be regarded as of controlling importance," if there has been no conclusive "governmental action," then a court can construe a treaty, and may find it provides the answer. Compare *Terlinden v. Ames,* 184 U.S. 270, 184 U.S. 285, with *21 U.S. New Haven,* 8 Wheat. 464, 21 U.S. 492-495. Though a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute, no similar hesitancy obtains if the asserted clash is with state law. Compare *Whitney v. Robertson,* 124 U.S. 190, with *Kolovrat v. Oregon,* 366 U.S. 187.

While recognition of foreign governments so strongly defies judicial treatment that, without executive recognition, a foreign state has been called "a republic of whose existence we know nothing," and the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory, once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area.

Similarly, recognition of belligerency abroad is an executive responsibility, but if the executive proclamations fall short of an explicit answer, a court may construe them seeking, for example, to determine whether the situation is such that statutes designed to assure American neutrality have become operative. *The Three Friends,* 166 U.S. 1, 166 U.S. 63, 166 U.S. 66. Still again, though it is the executive that determines a person's status as representative of a foreign government, *Ex parte Hitz,* 111 U.S. 766, the executive's statements will be construed where necessary to determine the court's jurisdiction, *In re Baiz,* 135 U.S. 403. Similar judicial action in the absence of a recognizedly authoritative executive declaration occurs in cases involving the immunity from seizure of vessels owned by friendly foreign governments. Compare *Ex parte Peru,* 318 U.S. 578, with *Mexico v. Hoffman,* 324 U.S. 30, 324 U.S. 34-35.

Dates of duration of hostilities: though it has been stated broadly that "the power which declared the necessity is the power to declare its cessation, and what the cessation requires," *Commercial Trust Co. v. Miller,* 262 U.S. 51, 262 U.S. 57, here too analysis reveals isolable reasons for the presence of political questions, underlying this Court's refusal to review the political departments' determination of when or whether a war has ended. Dominant is the need for finality in the political determination, for emergency's nature demands "[a] prompt and unhesitating obedience," *Martin v. Mott,* 12 Wheat. 19, 25 U.S. 30 (calling up of militia). Moreover, "the cessation of hostilities does not necessarily end the war power. It was stated in *Hamilton v. Kentucky Distilleries & W. Co.,* 251 U.S. 146, 251 U.S. 161, that the war power includes the power 'to remedy the evils which have arisen from its rise and progress,' and continues during that emergency. *Stewart v. Kahn,* 11 Wall. 493, 78 U.S. 507." *Fleming v. Mohawk Wrecking Co.,* 331 U.S. 111, 331 U.S. 116. But deference rests on reason, not habit. The question in a particular case may not seriously implicate considerations of finality—*e.g.,* a public program of importance (rent control), yet not central to the emergency effort. Further, clearly definable criteria for decision may be available. In such case, the political question barrier falls away: "[A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . [It can] inquire whether the exigency still existed upon which the continued operation of the law depended." *Chastleton Corp. v. Sinclair,* 264 U.S. 543, 264 U.S. 547-548. Compare *Woods v. Miller Co.,* 333 U.S. 138. On the other hand, even in private litigation which directly implicates no feature of separation of powers, lack of judicially discoverable standards and the drive for evenhanded application may impel reference to the political departments' determination of dates of hostilities' beginning and ending. *The Protector,* 12 Wall. 700.

Validity of enactments: in *Coleman v. Miller, supra,* this Court held that the questions of how long a proposed amendment to the Federal Constitution remained open to ratification, and what effect a prior rejection had on a subsequent ratification, were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp. Similar considerations apply to the enacting process: "[t]he respect due to coequal and independent departments," and the need for finality and certainty about the status of a statute contribute to judicial reluctance to inquire whether, as passed, it complied with all requisite formalities. *Field v. Clark,* 143 U.S. 649, 143 U.S. 672, 143 U.S. 676-677; *see Leser v. Garnett,* 258 U.S. 130, 258 U.S. 137. But it is not true that courts will never delve into a legislature's records upon such a quest: if the enrolled statute lacks an effective date, a court will not hesitate to seek it in the legislative journals in order to preserve the enactment. *Gardner v. The Collector,* 6 Wall. 499. The political question doctrine, a tool for maintenance of governmental order, will not be so applied as to promote only disorder.

The status of Indian tribes: this Court's deference to the political departments in determining whether Indians are recognized as a tribe, while it reflects familiar attributes of political questions, *United States v. Holliday,* 3 Wall. 407, 70 U.S. 419, also has a unique element in that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else. . . . [The Indians are] domestic dependent nations . . . in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." *The Cherokee Nation v. Georgia,* 5 Pet. 1, 30 U.S. 16, 30 U.S. 17. Yet here, too, there is no blanket rule. While "'It is for [Congress] . . and not for the courts, to determine when the true interests of the Indian require his release from [the] condition of tutelage,' . . . it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe. . . ." *United States v. Sandoval,* 231 U.S. 28, 231 U.S. 46. Able to discern what is "distinctly Indian," *ibid.*, the courts will strike down any heedless extension of that label. They will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power.

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional 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.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a *bona fide* controversy as to whether some action denominated "political" exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.

But it is argued that this case shares the characteristics of decisions that constitute a category not yet considered, cases concerning the Constitution's guaranty, in Art. IV, § 4, of a republican form of government. A conclusion as to whether the case at bar does present a political question cannot be confidently reached until we have considered those cases with special care. We shall discover that Guaranty Clause claims involve those elements which define a "political question," and, for that reason and no other, they are nonjusticiable. In particular, we shall discover that the nonjusticiability of such claims has nothing to do with their touching upon matters of state governmental organization.

Republican form of government: Luther v. Borden, 7 How. 1, though in form simply an action for damages for trespass was, as Daniel Webster said in opening the argument for the defense, "an unusual case." The defendants, admitting an otherwise tortious breaking and entering, sought to

justify their action on the ground that they were agents of the established lawful government of Rhode Island, which State was then under martial law to defend itself from active insurrection; that the plaintiff was engaged in that insurrection, and that they entered under orders to arrest the plaintiff. The case arose "out of the unfortunate political differences which agitated the people of Rhode Island in 1841 and 1842," 7 How. at 48 U.S. 34, and which had resulted in a situation wherein two groups laid competing claims to recognition as the lawful government. The plaintiff's right to recover depended upon which of the two groups was entitled to such recognition; but the lower court's refusal to receive evidence or hear argument on that issue, its charge to the jury that the earlier established or "charter" government was lawful, and the verdict for the defendants were affirmed upon appeal to this Court.

Chief Justice Taney's opinion for the Court reasoned as follows: (1) If a court were to hold the defendants' acts unjustified because the charter government had no legal existence during the period in question, it would follow that all of that government's actions—laws enacted, taxes collected, salaries paid, accounts settled, sentences passed—were of no effect, and that "the officers who carried their decisions into operation [were] answerable as trespassers, if not in some cases as criminals." There was, of course, no room for application of any doctrine of *de facto* status to uphold prior acts of an officer not authorized *de jure*, for such would have defeated the plaintiff's very action. A decision for the plaintiff would inevitably have produced some significant measure of chaos, a consequence to be avoided if it could be done without abnegation of the judicial duty to uphold the Constitution.

(2) No state court had recognized as a judicial responsibility settlement of the issue of the locus of state governmental authority. Indeed, the courts of Rhode Island had in several cases held that "it rested with the political power to decide whether the charter government had been displaced or not," and that that department had acknowledged no change.

(3) Since "[t]he question relates, altogether, to the constitution and laws of [the] . . . State," the courts of the United States had to follow the state courts' decisions unless there was a federal constitutional ground for overturning them.

(4) No provision of the Constitution could be or had been invoked for this purpose except Art. IV, § 4, the Guaranty Clause. Having already noted the absence of standards whereby the choice between governments could be made by a court acting independently, Chief Justice Taney now found further textual and practical reasons for concluding that, if any department of the United States was empowered by the Guaranty Clause to resolve the issue, it was not the judiciary:
"Under this article of the Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue, and . . . Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts. "

"So, too, as relates to the clause in the above-mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. . . . [B]y the act of February 28, 1795, [Congress] provided, that," "in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection."

"By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere is given to the President. . . ."

"After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? . . . If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order."

"It is true that, in this case, the militia were not called out by the President. But, upon the application of the governor under the charter government, the President recognized him as the executive power of the State and took measures to call out the militia to support his authority if it should be found necessary for the general government to interfere. . . . [C]ertainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government. . . . In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice. . . ." 7 How. at 48 U.S. 42-44.

Clearly, several factors were thought by the Court in *Luther* to make the question there "political": the commitment to the other branches of the decision as to which is the lawful state government; the unambiguous action by the President in recognizing the charter government as the lawful authority; the need for finality in the executive's decision, and the lack of criteria by which a court could determine which form of government was republican.

But the only significance that *Luther* could have for our immediate purposes is in its holding that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government. The Court has since refused to resort to the Guaranty Clause—which alone had been invoked for the purpose as the source of a constitutional standard for invalidating state action. *See Taylor & Marshall v. Beckham (No. 1),* 178 U.S. 548 (claim that Kentucky's resolution of contested gubernatorial election deprived voters of republican government held nonjusticiable); *Pacific States Tel. Co. v. Oregon,* 223 U.S. 118 (claim that initiative and referendum negated republican government held nonjusticiable); *Kiernan v. Portland,* 223 U.S. 151 (claim that municipal charter amendment per municipal initiative and referendum negated republican government held nonjusticiable); *Marshall v. Dye,* 231 U.S. 250 (claim that Indiana's constitutional amendment procedure negated republican government held nonjusticiable); *O'Neill v. Leamer,* 239 U.S. 244 (claim that delegation to court of power to form drainage districts negated republican government held "futile"); *Ohio ex rel. Davis v. Hildebrant,* 241 U.S. 565 (claim that invalidation of state reapportionment statute per referendum negates republican government held nonjusticiable); *Mountain Timber Co. v. Washington,* 243 U.S. 219

(claim that workmen's compensation violates republican government held nonjusticiable); *Ohio ex rel. Bryant v. Akron Metropolitan Park District,* 281 U.S. 74 (claim that rule requiring invalidation of statute by all but one justice of state court negated republican government held nonjusticiable); *Highland Farms Dairy v. Agnew,* 300 U.S. 608 (claim that delegation to agency of power to control milk prices violated republican government rejected).

Just as the Court has consistently held that a challenge to state action based on the Guaranty Clause presents no justiciable question, so has it held, and for the same reasons, that challenges to congressional action on the ground of inconsistency with that clause present no justiciable question. In *Georgia v. Stanton,* 6 Wall. 50, the State sought by an original bill to enjoin execution of the Reconstruction Acts, claiming that it already possessed "A republican State, in every political, legal, constitutional, and juridical sense," and that enforcement of the new Acts, "[i]nstead of keeping the guaranty against a forcible overthrow of its government by foreign invaders or domestic insurgents, . . . is destroying that very government by force." Congress had clearly refused to recognize the republican character of the government of the suing State. It seemed to the Court that the only constitutional claim that could be presented was under the Guaranty Clause, and Congress having determined that the effects of the recent hostilities required extraordinary measures to restore governments of a republican form, this Court refused to interfere with Congress' action at the behest of a claimant relying on that very guaranty.

In only a few other cases has the Court considered Art. IV, § 4, in relation to congressional action. It has refused to pass on a claim relying on the Guaranty Clause to establish that Congress lacked power to allow the States to employ the referendum in passing on legislation redistricting for congressional seats. *Ohio ex rel. Davis v. Hildebrant, supra.* And it has pointed out that Congress is not required to establish republican government in the territories before they become States, and before they have attained a sufficient population to warrant a popularly elected legislature. *Downes v. Bidwell,* 182 U.S. 244, 182 U.S. 278-279 (dictum).

We come, finally, to the ultimate inquiry whether our precedents as to what constitutes a nonjusticiable "political question" bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none: the question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if, on the particular facts, they must, that a discrimination reflects no policy, but simply arbitrary and capricious action.

This case does, in one sense, involve the allocation of political power within a State, and the appellants might conceivably have added a claim under the Guaranty Clause. Of course, as we have seen, any reliance on that clause would be futile. But because any reliance on the Guaranty Clause could not have succeeded, it does not follow that appellants may not be heard on the equal

protection claim which, in fact, they tender. True, it must be clear that the Fourteenth Amendment claim is not so enmeshed with those political question elements which render Guaranty Clause claims nonjusticiable as actually to present a political question itself. But we have found that not to be the case here.

In this connection, special attention is due *Pacific States Tel. Co. v. Oregon,* 223 U.S. 118. In that case, a corporation tax statute enacted by the initiative was attacked ostensibly on three grounds: (1) due process; (2) equal protection, and (3) the Guaranty Clause. But it was clear that the first two grounds were invoked solely in aid of the contention that the tax was invalid by reason of its passage:
"The defendant company does not contend here that it could not have been required to pay a license tax. It does not assert that it was denied an opportunity to be heard as to the amount for which it was taxed, or that there was anything inhering in the tax or involved intrinsically in the law which violated any of its constitutional rights. If such questions had been raised, they would have been justiciable, and therefore would have required the calling into operation of judicial power. Instead, however, of doing any of these things, the attack on the statute here made is of a wholly different character. Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes it [*sic*] not on the tax as a tax, but on the State as a State. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court not for the purpose of testing judicially some exercise of power assailed, on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the State that it establish its right to exist as a State, republican in form." 223 U.S. at 223 U.S. 150-151.

The due process and equal protection claims were held nonjusticiable in *Pacific States* not because they happened to be joined with a Guaranty Clause claim, or because they sought to place before the Court a subject matter which might conceivably have been dealt with through the Guaranty Clause, but because the Court believed that they were invoked merely in verbal aid of the resolution of issues which, in its view, entailed political questions. *Pacific States* may be compared with cases such as *Mountain Timber Co. v. Washington,* 243 U.S. 219, wherein the Court refused to consider whether a workmen's compensation act violated the Guaranty Clause but considered at length, and rejected, due process and equal protection arguments advanced against it, and *O'Neill v. Leamer,* 239 U.S. 244, wherein the Court refused to consider whether Nebraska's delegation of power to form drainage districts violated the Guaranty Clause, but went on to consider and reject the contention that the action against which an injunction was sought was not a taking for a public purpose.

We conclude, then, that the nonjusticiability of claims resting on the Guaranty Clause, which arises from their embodiment of questions that were thought "political," can have no bearing upon the justiciability of the equal protection claim presented in this case. Finally, we emphasize that it is the involvement in Guaranty Clause claims of the elements thought to define "political questions," and no other feature, which could render them nonjusticiable. Specifically, we have said that such claims are not held nonjusticiable because they touch matters of state governmental organization. Brief examination of a few cases demonstrates this.

When challenges to state action respecting matters of "the administration of the affairs of the State and the officers through whom they are conducted" have rested on claims of constitutional deprivation which are amenable to judicial correction, this Court has acted upon its view of the merits of the claim. For example, in *Boyd v. Nebraska ex rel. Thayer,* 143 U.S. 135, we reversed the Nebraska Supreme Court's decision that Nebraska's Governor was not a citizen of the United States or of the State, and therefore could not continue in office. In *Kennard v. Louisiana ex rel. Morgan,* 92 U.S. 480, and *Foster v. Kansas ex rel. Johnston,* 112 U.S. 201, we considered whether persons had been removed from public office by procedures consistent with the Fourteenth Amendment's due process guaranty, and held on the merits that they had. And only last Term, in *Gomillion v. Lightfoot,* 364 U.S. 339, we applied the Fifteenth Amendment to strike down a redrafting of municipal boundaries which effected a discriminatory impairment of voting rights, in the face of what a majority of the Court of Appeals thought to be a sweeping commitment to state legislatures of the power to draw and redraw such boundaries.

Gomillion was brought by a Negro who had been a resident of the City of Tuskegee, Alabama, until the municipal boundaries were so recast by the State Legislature as to exclude practically all Negroes. The plaintiff claimed deprivation of the right to vote in municipal elections. The District Court's dismissal for want of jurisdiction and failure to state a claim upon which relief could be granted was affirmed by the Court of Appeals. This Court unanimously reversed. This Court's answer to the argument that States enjoyed unrestricted control over municipal boundaries was:
"Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution. . . . The opposite conclusion, urged upon us by respondents, would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions. 'It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.'" 364 U.S. at 364 U.S. 344-345.

To a second argument, that *Colegrove v. Green, supra,* was a barrier to hearing the merits of the case, the Court responded that *Gomillion* was lifted "out of the so-called political' arena and into the conventional sphere of constitutional litigation" because here was discriminatory treatment of a racial minority violating the Fifteenth Amendment.
"A statute which is alleged to have worked unconstitutional deprivations of petitioners' rights is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries. . . . While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights. That was not *Colegrove v. Green.*"

"When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." 364 U.S. at 364 U.S. 347.

We have not overlooked such cases as *In re Sawyer,* 124 U.S. 200, and *Walton v. House of Representatives,* 265 U.S. 487, which held that federal equity power could not be exercised to enjoin a state proceeding to remove a public officer. But these decisions explicitly reflect only a traditional limit upon equity jurisdiction, and not upon federal courts' power to inquire into matters

of state governmental organization. This is clear not only from the opinions in those cases, but also from *White v. Berry,* 171 U.S. 366, which, relying on *Sawyer,* withheld federal equity from staying removal of a *federal* officer. *Wilson v. North Carolina,* 169 U.S. 586, simply dismissed an appeal from an unsuccessful suit to upset a State's removal procedure, on the ground that the constitutional claim presented—that a jury trial was necessary if the removal procedure was to comport with due process requirements—was frivolous. Finally, in *Taylor and Marshall v. Beckham (No. 1),* 178 U.S. 548, where losing candidates attacked the constitutionality of Kentucky's resolution of a contested gubernatorial election, the Court refused to consider the merits of a claim posited upon the Guaranty Clause, holding it presented a political question, but also held on the merits that the ousted candidates had suffered no deprivation of property without due process of law.

Since, as has been established, the equal protection claim tendered in this case does not require decision of any political question, and since the presence of a matter affecting state government does not render the case nonjusticiable, it seems appropriate to examine again the reasoning by which the District Court reached its conclusion that the case was nonjusticiable.

We have already noted that the District Court's holding that the subject matter of this complaint was nonjusticiable relied upon *Colegrove v. Green, supra,* and later cases. Some of those concerned the choice of members of a state legislature, as in this case; others, like *Colegrove* itself and earlier precedents, *Smiley v. Holm,* 285 U.S. 355, *Koenig v. Flynn,* 285 U.S. 375, and *Carroll v. Becker,* 285 U.S. 380, concerned the choice of Representatives in the Federal Congress. *Smiley, Koenig* and *Carroll* settled the issue in favor of justiciability of questions of congressional redistricting. The Court followed these precedents in *Colegrove,* although over the dissent of three of the seven Justices who participated in that decision. On the issue of justiciability, all four Justices comprising a majority relied upon *Smiley v. Holm,* but, in two opinions, one for three Justices, 328 U.S. at 328 U.S. 566, 328 U.S. 568, and a separate one by Mr. Justice Rutledge, 328 U.S. at 328 U.S. 564. The argument that congressional redistricting problems presented a "political question" the resolution of which was confided to Congress might have been rested upon Art. I, § 4, Art. I, § 5, Art. I, § 2, and Amendment XIV, § 2. Mr. Justice Rutledge said: "But for the ruling in *Smiley v. Holm,* 285 U.S. 355, I should have supposed that the provisions of the Constitution, Art. I,§ 4, that 'The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . .'; Art. I, § 2 [but see Amendment XIV, § 2], vesting in Congress the duty of apportionment of representatives among the several states 'according to their respective Numbers,' and Art. I, § 5, making each House the sole judge of the qualifications of its own members, would remove the issues in this case from justiciable cognizance. But, in my judgment, the *Smiley* case rules squarely to the contrary, save only in the matter of degree. . . . Assuming that that decision is to stand, I think . . . that its effect is to rule that this Court has power to afford relief in a case of this type as against the objection that the issues are not justiciable." 328 U.S. at 328 U.S. 564-565. Accordingly, Mr. Justice Rutledge joined in the conclusion that the case as justiciable, although he held that the dismissal of the complaint should be affirmed. His view was that "The shortness of the time remaining [before forthcoming elections] makes it doubtful whether action could, or would, be taken in time to secure for petitioners the effective relief they seek. . . . I think, therefore, the case is one in which the Court may properly, and should, decline to exercise

its jurisdiction. Accordingly, the judgment should be affirmed, and I join in that disposition of the cause." 328 U.S. at 328 U.S. 565-566.

Article I, § § 2, 4, and 5, and Amendment XIV, § 2, relate only to congressional elections, and obviously do not govern apportionment of state legislatures. However, our decisions in favor of justiciability even in light of those provisions plainly afford no support for the District Court's conclusion that the subject matter of this controversy presents a political question. Indeed, the refusal to award relief in *Colegrove* resulted only from the controlling view of a want of equity. Nor is anything contrary to be found in those per curiams that came after *Colegrove.* This Court dismissed the appeals in *Cook v. Fortson* and *Turman v. Duckworth,* 329 U.S. 675, as moot. *MacDougall v. Green,* 335 U.S. 281, held only that, in that case, equity would not act to void the State's requirement that there be at least a minimum of support for nominees for statewide office, over at least a minimal area of the State. Problems of timing were critical in *Remmey v. Smith,* 342 U.S. 916, dismissing for want of a substantial federal question a three-judge court's dismissal of the suit as prematurely brought, 102 F.Supp. 708, and in *Hartsfield v. Sloan,* 357 U.S. 916, denying mandamus sought to compel the convening of a three-judge court—movants urged the Court to advance consideration of their case, "[i]nasmuch as the mere lapse of time before this case can be reached in the normal course of . . . business may defeat the cause, and inasmuch as the time problem is due to the inherent nature of the case. . . ." *South v. Peters,* 339 U.S. 276, like *Colegrove,* appears to be a refusal to exercise equity's powers; see the statement of the holding quoted, *supra,* p. 369 U.S. 203. And *Cox v. Peters,* 342 U.S. 936, dismissed for want of a substantial federal question the appeal from the state court's holding that their primary elections implicated no "state action." See 208 Ga. 498, 67 S.E.2d 579. But compare *Terry v. Adams,* 345 U.S. 461.

Tedesco v. Board of Supervisors, 339 U.S. 940, indicates solely that no substantial federal question was raised by a state court's refusal to upset the districting of city council seats, especially as it was urged that there was a rational justification for the challenged districting. *See* 43 So.2d 514. Similarly, in *Anderson v. Jordan,* 343 U.S. 912, it was certain only that the state court had refused to issue a discretionary writ, original mandamus in the Supreme Court. That had been denied without opinion, and, of course, it was urged here that an adequate state ground barred this Court's review. And in *Kidd v. McCanless,* 200 Tenn. 273, 292 S.W.2d 40, the Supreme Court of Tennessee held that it could not invalidate the very statute at issue in the case at bar, but its holding rested on its state law of remedies, *i.e.,* the state view of *de facto* officers, and not on any view that the norm for legislative apportionment in Tennessee is not numbers of qualified voters resident in the several counties. Of course, this Court was there precluded by the adequate state ground, and, in dismissing the appeal, 352 U.S. 920, we cited *Anderson, supra,* as well as *Colegrove.* Nor does the Tennessee court's decision in that case bear upon this, for, just as in *Smith v. Holm,* 220 Minn. 486, 19 N.W.2d 914, and *Magraw v. Donovan,* 163 F.Supp. 184, 177 F.Supp. 803, a state court's inability to grant relief does not bar a federal court's assuming jurisdiction to inquire into alleged deprivation of federal constitutional rights. Problems of relief also controlled in *Radford v. Gary,* 352 U.S. 991, affirming the District Court's refusal to mandamus the Governor to call a session of the legislature, to mandamus the legislature then to apportion, and if they did not comply, to mandamus the State Supreme Court to do so. And *Matthews v. Handley,* 361 U.S. 127, affirmed a refusal to strike down the State's gross income tax statute—urged on the ground that the legislature was malapportioned—that had rested on the adequacy of available state legal remedies for suits involving that tax, including challenges to its constitutionality. Lastly, *Colegrove v. Barrett,* 330

U.S. 804, in which Mr. Justice Rutledge concurred in this Court's refusal to note the appeal from a dismissal for want of equity, is sufficiently explained by his statement in *Cook v. Fortson, supra:* "The discretionary exercise or nonexercise of equitable or declaratory judgment jurisdiction . . . in one case is not precedent in another case where the facts differ." 329 U.S. at 329 U.S. 678, n. 8. (Citations omitted.)

We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment.

The judgment of the District Court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

O'Brien v. Brown, 409 U.S. 1 (1972)

Syllabus

On July 3, 1972, delegates from California and Illinois brought suits in District Court contesting their unseating, recommended by the Democratic Party's Credentials Committee, in the 1972 Democratic National Convention, scheduled to convene July 10. The District Court dismissed both actions. On July 5, the Court of Appeals reversed both decisions, granting relief to the California delegates, and denying relief to the Illinois delegates.

Held: In view of the probability that the Court of Appeals erred in deciding the cases on the merits, and in view of the traditional right of a political convention to review and act upon the recommendations of a Credentials Committee, the judgments of the Court of Appeals must be stayed. The important constitutional issues cannot be resolved within the limited time available, and no action is now taken on the petitions for certiorari.

PER CURIAM.

Yesterday, July 6, 1972, the petitioners filed petitions for writs of certiorari to review judgments of the United States Court of Appeals for the District of Columbia Circuit in actions challenging the recommendations of the Credentials Committee of the 1972 Democratic National Convention regarding the seating of certain delegates to the convention that will meet three days hence.

In No. 72-35, the Credentials Committee recommended unseating 59 uncommitted delegates from Illinois on the ground, among others, that they had been elected in violation of the "slate-making" guideline adopted by the Democratic Party in 1971. A complaint challenging the Credentials Committee action was dismissed by the District Court. The Court of Appeals, on review, rejected the contentions of the unseated delegates that the action of the Committee violated their rights under the Constitution of the United States.

In No. 72-34, the Credentials Committee recommended unseating 151 of 271 delegates from California committed by California law to Senator George McGovern under that State's "winner-take-all" primary system. The Committee concluded that the winner-take-all system violated the mandate of the 1968 Democratic National Convention calling for reform in the party delegate selection process, even though such primaries had not been explicitly prohibited by the rules adopted by the party in 1971 to implement that mandate. A complaint challenging the Credentials Committee action was dismissed by the District Court. On review, the Court of Appeals concluded that the action of the Credentials Committee in this case violated the Constitution of the United States.

Accompanying the petitions for certiorari were applications to stay the judgments of the Court of Appeals pending disposition of the petitions.

The petitions for certiorari present novel questions of importance to the litigants and to the political system under which national political parties nominate candidates for office and vote on their policies and programs. The particular actions of the Credentials Committee on which the Court of

Appeals ruled are recommendations that have yet to be submitted to the National Convention of the Democratic Party. Absent judicial intervention, the Convention could decide to accept or reject, or accept with modification, the proposals of its Credentials Committee.

This Court is now asked to review these novel and important questions and to resolve them within the remaining days prior to the opening sessions of the convention now scheduled to be convened Monday, July 10, 1972.

The Court concludes it cannot in this limited time give to these issues the consideration warranted for final decision on the merits; we therefore take no action on the petitions for certiorari at this time.

The applications to stay the judgments of the Court of Appeals call for a weighing of three basic factors: (a) whether irreparable injury may occur absent a stay; (b) the probability that the Court of Appeals was in error in holding that the merits of these controversies were appropriate for decision by federal courts; and (c) the public interests that may be affected by the operation of the judgments of the Court of Appeals.

Absent a stay, the mandate of the Court of Appeals denies to the Democratic National Convention its traditional power to pass on the credentials of the California delegates in question. The grant of a stay, on the other hand, will not foreclose the Convention's giving the respective litigants in both cases the relief they sought in federal courts.

We must also consider the absence of authority supporting the action of the Court of Appeals in intervening in the internal determinations of a national political party, on the eve of its convention, regarding the seating of delegates. No case is cited to us in which any federal court has undertaken to interject itself into the deliberative processes of a national political convention; no holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do relationships of great delicacy that are essentially political in nature. *Cf. Luther v. Borden,* 7 How. 1 (1849). Judicial intervention in this area traditionally has been approached with great caution and restraint. *See Irish v. Democratic Farmer-Labor Party of Minnesota,* 399 F.2d 119 (CA8 1968), affirming 287 F.Supp. 794 (Minn. 1968), and cases cited; *Lynch v. Torquato,* 343 F.2d 370 (CA3 1965); *Smith v. State Exec. Comm. of Dem. Party of Ga.,* 288 F.Supp. 371 (ND Ga. 1968). *Cf. Ray v. Blair,* 343 U.S. 214 (1952). It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated. Thus, these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties. Highly important questions are presented concerning justiciability, whether the action of the Credentials Committee is state action and, if so, the reach of the Due Process Clause in this unique context. Vital rights of association guaranteed by the Constitution are also involved. While the Court is unwilling to undertake final resolution of the important constitutional questions presented without full briefing and argument and adequate opportunity for deliberation, we entertain grave doubts as to the action taken by the Court of Appeals.

In light of the availability of the convention as a forum to review the recommendations of the Credentials Committee, in which process the complaining parties might obtain the relief they have sought from the federal courts, the lack of precedent to support the extraordinary relief granted by the Court of Appeals, and the large public interest in allowing the political processes to function free from judicial supervision, we conclude the judgments of the Court of Appeals must be stayed. We recognize that a stay of the Court of Appeals' judgments may well preclude any judicial review of the final action of the Democratic National Convention on the recommendation of its Credentials Committee. But, for nearly a century and a half, the national political parties themselves have determined controversies regarding the seating of delegates to their conventions. If this system is to be altered by federal courts in the exercise of their extraordinary equity powers, it should not be done under the circumstances and time pressures surrounding the actions brought in the District Court, and the expedited review in the Court of Appeals and in this Court.

The applications for stays of the judgments of the Court of Appeals are granted.

MR. JUSTICE BRENNAN is of the view that in the limited time available the Court cannot give these difficult and important questions consideration adequate for their proper resolution. He therefore concurs in the grant of the stays pending action by the Court on the petitions for certiorari.

MR. JUSTICE WHITE would deny the applications for stays.

MR. JUSTICE DOUGLAS, dissenting.

I would deny the stays and deny the petitions for certiorari. The grant of the stays is, with all respect, an abuse of the power to grant one. The petitions for certiorari will not be voted on until October, at which time everyone knows the cases will be moot. So the action granting the stays is an oblique and covert way of deciding the merits. If the merits are to be decided, the cases should be put down for argument. As MR. JUSTICE MARSHALL has shown, the questions are by no means frivolous. The lateness of the hour before the Convention and the apparently appropriate action by the Court of Appeals on the issues combine to make a denial of the stays and a denial of the petitions the only responsible action we should take without oral argument.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS joins, dissenting.

These two separate actions challenge the exclusion from the Democratic National Convention by the party's Credentials Committee of 151 delegates from the State of California and 59 delegates from the State of Illinois, all of whom were selected as delegates as a result of primary elections in their respective States. The excluded delegates allege, in essence, that the refusal of the party to accept them as delegates denies them due process, and denies the voters who elected them their right to full participation in the electoral process as guaranteed by the United States Constitution.

Two assertions are central to the challenge made by the delegates from California. First, they contend that, under California's "winner take all" primary election law, which the Democratic Party explicitly approved prior to the 1972 primary election, and which the California voters relied on in casting their ballots, they are validly elected delegates committed to the presidential candidacy of Senator George McGovern. Second, they claim that after all of the presidential candidates who were on the ballot in California had planned and carried out their campaigns relying on the validity of the State's election laws, and after all votes had been cast in the expectation that the winner of the primary would command the entire California delegation, the Credentials Committee changed the party's rules and reneged on the party's earlier approval of the California electoral system. The delegates contend that, in so doing, the committee and the party impaired the rights of both voters and duly elected delegates in violation of the Fourteenth Amendment.

The Illinois delegates contend that they were excluded on the ground that they were "selected outside the arena of public participation by, and given the massive support and endorsement of, the Democratic organization in Chicago and specifically and clearly identifiable as the party apparatus in [certain districts], to the exclusion of other candidates not favored by the organization, and this without written and publicized rules and with no notice to the public such as would permit interested Democratic electors to participate."

They argue that the restrictions placed by the rules on party officials violate their rights under the First and Fourteenth Amendments. It is also suggested that another reason why the delegates were excluded was that their delegation had an insufficient number of Negroes, women, and representatives of certain other identifiable classes of persons. This is alleged to be establishment of a "quota" system in violation of the Fourteenth Amendment.

The United States District Court for the District of Columbia denied both sets of plaintiffs relief on the ground that there was no justiciable question before it. The United States Court of Appeals reversed the District Court, and held that the questions presented in both suits were justiciable. It unanimously rejected the challenge made by the Illinois delegates, and, by a 2-1 vote, upheld the claim of the delegates from California that the belated change in the rules constituted a denial of due process of law.

The losing parties in the Court of Appeals seek review, and today this Court grants partial relief in the form of a stay of the judgments of the Court of Appeals. The Court holds, in effect, that even if the District Court was incorrect in ruling that the issues before it were "political questions" not properly justiciable in a court of law, the posture and timing of these cases require that federal courts defer to the Democratic National Convention for resolution of the underlying disputes. I cannot agree.

In each of these cases, the claim is made that the Credentials Committee has impaired the right of Democratic voters to have their votes counted in a presidential primary election. The related claim is also made that the committee has deprived the delegates themselves of their right to participate in the convention, by methods that deny them due process of law. Both these claims are entitled to judicial resolution, and now is the most appropriate time for them to be heard.

If these cases present justiciable controversies, then we are faced with a decision as to the most appropriate time to resolve them. There would appear to be three available choices: now; after the Credentials Committee's report is either accepted or rejected by the national convention; or after the convention is over.

There can be no doubt, in my view, that there is, at the present time, a live controversy between the excluded delegates and the Democratic National Committee. Nevertheless, because this controversy may vanish at the national convention, it is suggested that judicial intervention is premature at this point. This may be correct with respect to a decision on whether to grant injunctive relief, but not with respect to the appropriateness of a declaratory judgment.

Should this Court, or a lower federal court, be compelled to wait until the national convention makes a final decision on whether it will seat the delegates excluded by the Credentials Committee, it may never again be practicable to consider the important constitutional issues presented. Once the convention rules, we will be faced with the Hobson's choice between refusing to hear the federal questions at all or hearing them and possibly stopping the Democratic convention in midstream. This would be a far more serious intrusion into the democratic process than any we are asked to make at this time.

If we wait even longer—until the national convention is over—and ultimately sustain the delegates' claims on the merits, we would have no choice but to declare the convention null and void and to require that it be repeated. The dispute in these cases concerns the right to participate in the machinery to elect the President of the United States. If participation is denied, there is no possible way for the underlying disputes to become moot. The drastic remedy that delay might require should be avoided at all costs.

It is, therefore, obvious to me that now is the time for us to act. It is significant in this regard that the delegates request declaratory, as well as injunctive, relief. A declaratory judgment is a milder remedy than an injunction, *cf. Perez v. Ledesma*, 401 U.S. 82, 401 U.S. 111 (1971) (BRENNAN, J., concurring in part and dissenting in part). It is a particularly appropriate remedy under these circumstances, because it can protect any constitutional rights that may be threatened at the same time that the premature issuance of an injunction is avoided. Hence, I believe that we should consider the prayer for declaratory relief, and that we should do so now.

In granting the stays, then, the Court seems to rely at least in part on the view that the claims are not yet ripe for decision, a view which I cannot accept for the reasons stated above. In addition, the Court suggests that judicial relief will be inappropriate even after the full convention has ruled on these claims. The point appears to be that, quite apart from the mere matter of timing, the cases present a "political question," or are otherwise nonjusticiable, because they concern the internal decisionmaking of a political party. That argument misconceives the nature and the purpose of the doctrine. Half a century ago, Mr. Justice Holmes, writing for a unanimous Court, made it clear that a question is not "political," in the jurisdictional sense, merely because it involves the operations of a political party:

"The objection that the subject matter of the suit is political is little more than a play upon words. Of course the petition concerns political action, but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in

a suit at law hardly has been doubted for over two hundred years, since *Ashby v. White,* 2 Ld.Raym. 938, 3 *id.* 320, and has been recognized by this Court. *Wiley v. Sinkler,* 179 U.S. 58, 179 U.S. 64, 179 U.S. 65. *Giles v. Harris,* 189 U.S. 475, 189 U.S. 485. *See also* Judicial Code, § 24 (11), (12), (14). Act of March 3, 1911, c. 231; 36 Stat. 1087, 1092. If the defendants' conduct was a wrong to the plaintiff, the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result." *Nixon v. Herndon,* 273 U.S. 536, 273 U.S. 540 (1927).

The doctrine of "political questions" was fashioned to deal with a very different problem, which has nothing to do with this case. As the Court said in *Baker v. Carr,* 369 U.S. 186 (1962), the basic characteristic of a political question is that its resolution would lead a court into conflict with one or more of the coordinate branches of government; courts decline to decide political questions out of deference to the separation of powers. 369 U.S. at 369 U.S. 217; *see Powell v. McCormack,* 395 U.S. 486, 395 U.S. 518-549 (1969). Neither the Executive nor the Legislative Branch of Government purports to have jurisdiction over the claims asserted in these cases. Apart from the judicial forum, only one other forum has been suggested—the full convention of the National Democratic Party—and that is most assuredly not a coordinate branch of government to which the federal courts owe deference within the meaning of the separation of powers or the political question doctrine.

Moreover, it cannot be said that "judicially manageable standards" are lacking for the determinations required by these cases, 369 U.S. at 369 U.S. 217. The Illinois challenge requires the Court to determine whether certain rules adopted by the National Party for the selection of delegates violate the First and Fourteenth Amendment rights of Illinois voters, and, if the rules are valid, whether they were correctly applied to the facts of the case. The California challenge requires the Court to determine whether the votes of party members were counted in accordance with the rules announced prior to the election and, if not, whether a change in the rules after the election violates the constitutional rights of the voters or the candidates. Both these determinations are well within the range of questions regularly presented to courts for decision, and capable of judicial resolution.

A second threshold objection, however, has been raised as an obstacle to judicial determination of these claims. Even if the actions of a political party are not inherently nonjusticiable, it is suggested that the Constitution places few, if any, restrictions on the actions of a political party, and none of those restrictions is even arguably implicated by any of the allegations here. On this view, then, the plaintiffs below failed to state a claim on which relief can be granted. I disagree.

l. First, I agree with the Court of Appeals that the action of the Party in these cases was governmental action, and therefore subject to the requirements of due process. The primary election was, by state law, the first step in a process designed to select a Democratic candidate for President; the State will include electors pledged to that candidate on the ballot in the general election. The State is intertwined in the process at every step, not only authorizing the primary, but conducting it and adopting its result for use in the general election. In these circumstances, the primary must be regarded as an integral part of the general election, *see United States v. Classic,* 313 U.S. 299 (1941), quoted *infra* at 409 U.S. 15-16, and the rules that regulate the primary must be held to the standards of elementary due process.

It is suggested that California, at least, cannot be charged with responsibility for the rules that are challenged here, because California by law sought (albeit unsuccessfully) to prohibit the Party from adopting those rules. That argument is somewhat disingenuous, however, unless it can seriously be contended that California will decline to recognize on its ballot in the general election the nominee of the Democratic convention. For so long as the State recognizes and adopts the fruits of the primary as it was actually conducted, then the State has made that primary an integral part of the election process, and infused the primary with state action, no matter how vociferously it may protest. A State cannot render the action of officials "private" and strip it of its character as state action, merely by disapproving that action. *Monroe v. Pape,* 365 U.S. 167, 365 U.S. 172-187 (1961).

Thus, when the Party deprived the candidates of their status as delegates, it was obliged to do so in a manner consistent with the demands of due process. Because the Court does not reach the question, I likewise refrain from expressing my views on the merits of the due process challenge in either case. It is sufficient to say that, beyond all doubt, these claimants are entitled to a judicial resolution of their claim.

2. Even if the action of the Credentials Committee did not deny the delegates due process, petitioners in these cases claim that it impaired the federally protected right of voters to vote, and to have their votes counted, in the presidential primary election.

It is, of course, well established that the Constitution protects the right to vote in federal or state elections without impairment on the basis of race or color, Const. Amdt. XV, or on the basis of any other invidious classification, *e.g., Baker v. Carr,* 369 U.S. 186 (1962); *Dunn v. Blumstein,* 405 U.S. 330 (1972). With respect to federal elections, however, the right to vote enjoys a broader constitutional protection. In *Oregon v. Mitchell,* 400 U.S. 112 (1970), Mr. Justice Black cited a long line of precedents for the proposition that Congress has ultimate supervisory power over all congressional elections, based on Art. I, § 4, of the Constitution. *E.g., Ex parte Siebold,* 100 U.S. 371 (1880); *Ex parte Yarbrough,* 110 U.S. 651 (1884); *United States v. Mosley,* 238 U.S. 383 (1915); *United States v. Classic, supra.* On the basis of these precedents, it is beyond dispute that the right to vote in congressional elections is a federally secured right.

Mr. Justice Black went on to argue that presidential elections have the same constitutional status: "It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections." 400 U.S. at 400 U.S. 124. To support this conclusion, he relied on Art. II, §1, and its judicial interpretation in *Burroughs v. United States,* 290 U.S. 534 (1934), and also on "the very concept of a supreme national government with national officers." 400 U.S. at 400 U.S. 124 n. 7. On the basis of *Oregon v. Mitchell,* then, in which Mr. Justice Black's analysis was decisive, the right to vote in national elections, both congressional and presidential, is secured by the Federal Constitution.

Moreover, federal protection of the right to vote in federal elections extends not only to the general election, but to the primary election as well. In *United States v. Classic, supra,* this Court sustained an indictment charging a conspiracy "to injure and oppress citizens in the free exercise and enjoyment of rights and privileges secured to them by the Constitution and Laws of the United States, namely, (1) the right of qualified voters who cast their ballots in the primary election to

have their ballots counted as cast for the candidate of their choice, and (2) the right of the candidates to run for the office of Congressman and to have the votes in favor of their nomination counted as cast." *Id.* at 313 U.S. 308. It was critical to the decision to hold, first, that the Constitution protects the right to vote in federal congressional elections, and, second, that the right to vote in the general election includes the right to vote in the primary.

"Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, § 2. And this right of participation is protected, just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative." *Id.* at 313 U.S. 318.

That reasoning has equal force in the case of a presidential election. Where the primary is, by law, made an integral part of the election machinery, then the right to vote at that primary is protected, just as is the right to vote at the election. In the cases before this Court, it is claimed that the presidential primary is an integral part of the election machinery, and that the right to vote in the presidential primary has been impaired. That claim should be heard and decided on its merits, certainly not by the use of the stay mechanism in lieu of granting certiorari and plenary consideration.

It is unfortunate that cases like these must be decided quickly or not at all, but sometimes that cannot be avoided. Where there are no substantial facts in dispute and where the allegation is made that a right as fundamental as the right to participate in the process leading to the election of the President of the United States is threatened, I believe that our duty lies in making decisions, not avoiding them.

I would therefore deny the applications for stays.

McDonald v. Board of Elections Commissioners of Chicago, 394 U.S. 802 (1969)

Syllabus

Appellants are qualified Cook County electors who are unsentenced inmates of the Cook County jail awaiting trial. They allege that Illinois' failure to include them among the classes of persons entitled to absentee ballots violates the Equal Protection Clause of the Fourteenth Amendment. The District Court granted summary judgment for appellees holding that extending absentee ballots to those physically incapacitated for medical reasons constituted a proper and reasonable classification not violative of equal protection.

Held: Illinois' failure to provide absentee ballots for appellants does not violate the Equal Protection Clause.

(a) While classifications "which might invade or restrain [voting rights] must be closely scrutinized and carefully confined," a more exacting judicial scrutiny is not necessary here, since the distinctions made by Illinois' absentee voting provisions are not drawn on the basis of wealth or race, *Harper v. Virginia Board of Elections,* 383 U.S. 663, and there is nothing in the record to show that Illinois has precluded appellants from voting.

(b) A state legislature traditionally has been allowed to take reform "one step at a time," and need not run the risk of losing its entire remedial scheme (here absentee voting) because it failed to cover every group that might have been included.

(c) Since there is nothing to show that the judicially incapacitated appellants are absolutely prohibited from voting, it is reasonable for Illinois to treat differently the physically handicapped.

(d) Constitutional safeguards are not offended by the different treatment accorded unsentenced inmates incarcerated within and those incarcerated without their counties of residence.

277 F.Supp. 14, affirmed.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

Appellants and the class they represent are unsentenced inmates awaiting trial in the Cook County jail who, though they are qualified Cook County electors, cannot readily appear at the polls either because they are charged with nonbailable offenses or because they have been unable to post the bail imposed by the courts of Illinois. They cannot obtain absentee ballots, for they constitute one of a number of classes for whom no provision for absentee voting has yet been made by the Illinois Legislature. The constitutionality of Illinois' failure to include them with those who are entitled to vote absentee is the primary issue in this direct appeal from a three-judge court.

The specific provisions attacked here, Ill.Rev.Stat., c. 46, § § 19-1 to 19-3, have made absentee balloting available to four classes of persons: (1) those who are absent from the county of their residence for any reason whatever; (2) those who are "physically incapacitated," so long as they present an affidavit to that effect from a licensed physician; (3) those whose observance of a

religious holiday precludes attendance at the polls, and (4) those who are serving as poll watchers in precincts other than their own on election day. The availability of the absentee ballot in Illinois has been extended to its present coverage by various amendments over the last 50 years. Prior to 1917, Illinois had no provision for absentee voting, requiring personal attendance at the polls, and in that year the legislature made absentee voting available to those who would be absent from the county on business or other duties. In 1944, absentee voting was made available to all those absent from the county for any reason. The provisions for those remaining in the county but unable to appear at the polls because of physical incapacity, religious holidays, or election duties were added in 1955, 1961, and 1967, respectively.

On March 29, 1967, appellants made timely application for absentee ballots for the April 4 primary because of their physical inability to appear at the polls on that election day. The applications were accompanied by an affidavit from the warden of the Cook County jail attesting to that inability. These applications were refused by the appellee Board of Election Commissioners on the ground that appellants were not "physically incapacitated" within the meaning of §§ 19-1 and 19-2 of the Illinois Election Code. On the same day, appellants filed a complaint, alleging that they were unconstitutionally excluded from the coverage of the absentee provisions. They requested that a three-judge court be convened to rule the provisions violative of equal protection insofar as the provisions required denial of an absentee ballot to one judicially incapacitated while making it available at the same time to one medically incapacitated, and they sought an injunction to restrain appellee Board "from refusing to grant [appellants'] timely applications for absentee ballots." The District Court granted appellants' request for temporary relief on March 30, before the three-judge court was convened, and ordered the Board to issue ballots to qualified Illinois electors awaiting trial in the Cook County jail. Both parties then filed motions for summary judgment, the Board asserting that to honor the applications would subject its members to criminal liability under Illinois law.

On December 11, the District Court granted summary judgment for the Board, holding that the Illinois provisions extending absentee voting privileges to those physically incapacitated because of medical reasons from appearing at the polls constituted a proper and reasonable legislative classification not violative of equal protection. The case was brought here by appellants on direct appeal, 390 U.S. 1038 (1968), and we affirm.

Appellants argue that Illinois' absentee ballot provisions violate the Equal Protection Clause of the Fourteenth Amendment for two reasons. First, they contend that, since the distinction between those medically incapacitated and those "judicially" incapacitated bears no reasonable relationship to any legitimate state objective, the classifications are arbitrary and therefore in violation of equal protection. Secondly, they argue that, since pretrial detainees imprisoned in other States or in counties within the State other than those of their own residence can vote absentee as Illinois citizens absent from the county for any reason, it is clearly arbitrary to deny the absentee ballot to other unsentenced inmates simply because they happen to be incarcerated within their own resident counties. Underlying appellants' contentions is the assertion that, since voting rights are involved, there is a narrower scope for the operation of the presumption of constitutionality than would ordinarily be the case with state legislation challenged in this Court. *See Yick Wo v. Hopkins,* 118 U.S. 356, 118 U.S. 370 (1886).

Before confronting appellants' challenge to Illinois' absentee provisions, we must determine initially how stringent a standard to use in evaluating the classifications made thereunder and whether the distinctions must be justified by a compelling state interest; for appellants assert that we are dealing generally with an alleged infringement of a basic, fundamental right. *See, e.g., Reynolds v. Sims,* 377 U.S. 533 (1964); *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966). Thus, while the "States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised," *Lassiter v. Northampton County Board of Elections,* 360 U.S. 45, 360 U.S. 50 (1959), we have held that, once the States grant the franchise, they must not do so in a discriminatory manner. *See Carrington v. Rash,* 380 U.S. 89 (1965). More importantly, however, we have held that, because of the overriding importance of voting rights, classifications "which might invade or restrain them must be closely scrutinized and carefully confined" where those rights are asserted under the Equal Protection Clause; *Harper v. Virginia Board of Elections, supra,* at 383 U.S. 670. And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, *Harper v. Virginia Board of Elections, supra,* two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny. *Douglas v. California,* 372 U.S. 353 (1963); *McLaughlin v. Florida,* 379 U.S. 184, 379 U.S. 192 (1964).

Such an exacting approach is not necessary here, however, for two readily apparent reasons. First, the distinctions made by Illinois' absentee provisions are not drawn on the basis of wealth or race. Secondly, there is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote. It is thus not the right to vote that is at stake here, but a claimed right to receive absentee ballots. Despite appellants' claim to the contrary, the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise; nor, indeed, does Illinois' Election Code so operate as a whole, for the State's statutes specifically disenfranchise only those who have been convicted and sentenced, and not those similarly situated to appellants. Ill.Rev.Stat., c. 46, § 3-5 (1967). Faced as we are with a constitutional question, we cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has, in fact, precluded appellants from voting. We are then left with the more traditional standards for evaluating appellants' equal protection claims. Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently, and the presumption of statutory validity that adheres thereto, admit of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. *See McGowan v. Maryland,* 366 U.S. 420 (1961); *Kotch v. Board of River Port Pilot Commissioners,* 330 U.S. 552 (1947); *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61 (1911). With this much discretion, a legislature traditionally has been allowed to take reform "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 348 U.S. 489 (1955), and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through

inadvertence or otherwise, to cover every evil that might conceivably have been attacked. *See Ozan Lumber Co. v. Union County National Bank*, 207 U.S. 251 (1907).

Since there is nothing to show that a judicially incapacitated, pretrial detainee is absolutely prohibited from exercising the franchise, it seems quite reasonable for Illinois' Legislature to treat differently the physically handicapped, who must, after all, present affidavits from their physicians attesting to an absolute inability to appear personally at the polls in order to qualify for an absentee ballot. Illinois could, of course, make voting easier for all concerned by extending absentee voting privileges to those in appellants' class. Its failure to do so, however, hardly seems arbitrary, particularly in view of the many other classes of Illinois citizens not covered by the absentee provisions, for whom voting may be extremely difficult, if not practically impossible.

Similarly, the different treatment accorded unsentenced inmates incarcerated within and those incarcerated without their resident counties may reflect a legislative determination that, without the protection of the voting booth, local officials might be too tempted to try to influence the local vote of in-county inmates. Such a temptation, with its attendant risks to prison discipline would, of course, be much less urgent with prisoners incarcerated out of state or outside their resident counties. Constitutional safeguards are not thereby offended simply because some prisoners, as a result, find voting more convenient than appellants.

We are satisfied then that appellants' challenge to the allegedly unconstitutional incompleteness of Illinois' absentee voting provisions cannot be sustained. Ironically, it is Illinois' willingness to go further than many States in extending the absentee voting privileges so as to include even those attending to election duties that has provided appellants with a basis for arguing that the provisions operate in an invidiously discriminatory fashion to deny them a more convenient method of exercising the franchise. Indeed, appellants' challenge seems to disclose not an arbitrary scheme or plan, but, rather, the very opposite—a consistent and laudable state policy of adding, over a 50-year period, groups to the absentee coverage as their existence comes to the attention of the legislature. That Illinois has not gone still further, as perhaps it might, should not render void its remedial legislation, which need not, as we have stated before, "strike at all evils at the same time." *Semler v. Dental Examiners*, 294 U.S. 608, 294 U.S. 610 (1935).

Accordingly, the judgment of the District Court is
Affirmed.

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

Syllabus

On December 8, 2000, the Florida Supreme Court ordered, *inter alia*, that manual recounts of ballots for the recent Presidential election were required in all Florida counties where so-called "undervotes" had not been subject to manual tabulation, and that the manual recounts should begin at once. Noting the closeness of the election, the court explained that, on the record before it, there could be no question that there were uncounted "legal votes"—*i.e.*, those in which there was a clear indication of the voter's intent-sufficient to place the results of the election in doubt. Petitioners, the Republican candidates for President and Vice President who had been certified as the winners in Florida, filed an emergency application for a stay of this mandate. On December 9, this Court granted the stay application, treated it as a petition for a writ of certiorari, and granted certiorari.

Held: Because it is evident that any recount seeking to meet 3 U.S.C. § 5's December 12 "safe-harbor" date would be unconstitutional under the Equal Protection Clause, the Florida Supreme Court's judgment ordering manual recounts is reversed. The Clause's requirements apply to the manner in which the voting franchise is exercised. Having once granted the right to vote on equal terms, Florida may not, by later arbitrary and disparate treatment, value one person's vote over that of another. See, *e.g.*, *Harper v. Virginia Bd. of Elections, 383* U.S. 663, 665. The recount mechanisms implemented in response to the state court's decision do not satisfy the minimum requirement for nonarbitrary treatment of voters. The record shows that the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another. In addition, the recounts in three counties were not limited to so-called undervotes but extended to all of the ballots. Furthermore, the actual process by which the votes were to be counted raises further concerns because the court's order did not specify who would recount the ballots. Where, as here, a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied. The State has not shown that its procedures include the necessary safeguards. Upon due consideration of the difficulties identified to this point, it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. The court below has said that the legislature intended the State's electors to participate fully in the federal electoral process, as provided in 3 U.S.C. § 5, which requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is here, but there is no recount procedure in place under the state court's order that comports with minimal constitutional standards.

772 So. 2d 1243, reversed and remanded.

[*] This case was argued on December 11, 2000 and decided on December 12, 2000.

PER CURIAM.

I

On December 8, 2000, the Supreme Court of Florida ordered that the Circuit Court of Leon County tabulate by hand 9,000 ballots in Miami-Dade County. It also ordered the inclusion in the certified vote totals of 215 votes identified in Palm Beach County and 168 votes identified in Miami-Dade County for Vice President Albert Gore, Jr., and Senator Joseph Lieberman, Democratic candidates for President and Vice President. The State Supreme Court noted that petitioner George W. Bush asserted that the net gain for Vice President Gore in Palm Beach County was 176 votes, and directed the Circuit Court to resolve that dispute on remand. *Gore v. Harris,* 772 So. 2d 1243, 1248, n. 6. The court further held that relief would require manual recounts in all Florida counties where so-called "undervotes" had not been subject to manual tabulation. The court ordered all manual recounts to begin at once. Governor Bush and Richard Cheney, Republican candidates for President and Vice President, filed an emergency application for a stay of this mandate. On December 9, we granted the application, treated the application as a petition for a writ of certiorari, and granted certiorari. *Post,* p. 1046.

The proceedings leading to the present controversy are discussed in some detail in our opinion in *Bush* v. *Palm Beach County Canvassing Bd., ante,* p. 70 *(per curiam) (Bush I).* On November 8, 2000, the day following the Presidential election, the Florida Division of Elections reported that petitioner Bush had received 2,909,135 votes, and respondent Gore had received 2,907,351 votes, a margin of 1,784 for Governor Bush. Because Governor Bush's margin of victory was less than "one-half of a percent ... of the votes cast," an automatic machine recount was conducted under § 102.141(4) of the Florida Election Code, the results of which showed Governor Bush still winning the race but by a diminished margin. Vice President Gore then sought manual recounts in Volusia, Palm Beach, Broward, and Miami-Dade Counties, pursuant to Florida's election protest provisions. Fla. Stat. Ann. § 102.166 (Supp. 2001). A dispute arose concerning the deadline for local county canvassing boards to submit their returns to the Secretary of State (Secretary). The Secretary declined to waive the November 14 deadline imposed by statute. §§ 102.111, 102.112. The Florida Supreme Court, however, set the deadline at November 26. We granted certiorari and vacated the Florida Supreme Court's decision, finding considerable uncertainty as to the grounds on which it was based. *Bush I, ante,* at 78. On December 11, the Florida Supreme Court issued a decision on remand reinstating that date. *Palm Beach County Canvassing Bd.* v. *Harris,* 772 So. 2d 1273, 1290.

On November 26, the Florida Elections Canvassing Commission certified the results of the election and declared Governor Bush the winner of Florida's 25 electoral votes. On November 27, Vice President Gore, pursuant to Florida's contest provisions, filed a complaint in Leon County Circuit Court contesting the certification. Fla. Stat. Ann. § 102.168 (Supp. 2001). He sought relief pursuant to § 102.168(3)(c), which provides that "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election" shall be grounds for a contest. The Circuit Court denied relief, stating that Vice President Gore failed to meet his burden of proof. He appealed to the First District Court of Appeal, which certified the matter to the Florida Supreme Court.

Accepting jurisdiction, the Florida Supreme Court affirmed in part and reversed in part. *Gore* v. *Harris*, 772 So. 2d 1243 (2000). The court held that the Circuit Court had been correct to reject Vice President Gore's challenge to the results certified in Nassau County and his challenge to the Palm Beach County Canvassing Board's determination that 3,300 ballots cast in that county were not, in the statutory phrase, "legal votes."

The Supreme Court held that Vice President Gore had satisfied his burden of proof under § 102.168(3)(c) with respect to his challenge to Miami-Dade County's failure to tabulate, by manual count, 9,000 ballots on which the machines had failed to detect a vote for President ("undervotes"). *Id.,* at 1256. Noting the closeness of the election, the court explained that "[o]n this record, there can be no question that there are legal votes within the 9,000 uncounted votes sufficient to place the results of this election in doubt." *Id.*, at 1261. A "legal vote," as determined by the Supreme Court, is "one in which there is a 'clear indication of the intent of the voter.'" *Id.*, at 1257. The court therefore ordered a hand recount of the 9,000 ballots in Miami-Dade County. Observing that the contest provisions vest broad discretion in the circuit judge to "provide any relief appropriate under such circumstances," § 102.168(8), the Supreme Court further held that the Circuit Court could order "the Supervisor of Elections and the Canvassing Boards, as well as the necessary public officials, in all counties that have not conducted a manual recount or tabulation of the undervotes ... to do so forthwith, said tabulation to take place in the individual counties where the ballots are located." *Id.*, at 1262.

The Supreme Court also determined that Palm Beach County and Miami-Dade County, in their earlier manual recounts, had identified a net gain of 215 and 168 legal votes, respectively, for Vice President Gore. *Id.,* at 1260. Rejecting the Circuit Court's conclusion that Palm Beach County lacked the authority to include the 215 net votes submitted past the November 26 deadline, the Supreme Court explained that the deadline was not intended to exclude votes identified after that date through ongoing manual recounts. As to Miami-Dade County, the court concluded that although the 168 votes identified were the result of a partial recount, they were "legal votes [that] could change the outcome of the election." *Ibid.* The Supreme Court therefore directed the Circuit Court to include those totals in the certified results, subject to resolution of the actual vote total from the Miami-Dade partial recount.

The petition presents the following questions: whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution and failing to comply with 3 U.S.C. § 5, and whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses. With respect to the equal protection question, we find a violation of the Equal Protection Clause.

II

A

The closeness of this election, and the multitude of legal challenges which have followed in its wake, have brought into sharp focus a common, if heretofore unnoticed, phenomenon. Nationwide statistics reveal that an estimated 2% of ballots cast do not register a vote for President for whatever reason, including deliberately choosing no candidate at all or some voter error, such as voting for

two candidates or insufficiently marking a ballot. See Ho, More Than 2M Ballots Uncounted, AP Online (Nov. 28, 2000); Kelley, Balloting Problems Not Rare But Only in a Very Close Election Do Mistakes and Mismarking Make a Difference, Omaha World-Herald (Nov. 15,2000). In certifying election results, the votes eligible for inclusion in the certification are the votes meeting the properly established legal requirements.

This case has shown that punchcard balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter. After the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting.

B

The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college. U.S. Const., Art. II, § 1. This is the source for the statement in *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), that the state legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by state legislatures in several States for many years after the framing of our Constitution. *Id.*, at 28-33. History has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors. When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors. See id., at 35 ("'[T]here is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated'") (quoting S. Rep. No. 35, 43d Cong., 1st Sess.).

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. See, *e. g., Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment"). It must be remembered that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims,* 377 U.S. 533, 555 (1964).

There is no difference between the two sides of the present controversy on these basic propositions. Respondents say that the very purpose of vindicating the right to vote justifies the recount procedures now at issue. The question before us, however, is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.

Much of the controversy seems to revolve around ballot cards designed to be perforated by a stylus but which, either through error or deliberate omission, have not been perforated with sufficient precision for a machine to register the perforations. In some cases a piece of the card—a chad—is hanging, say, by two corners. In other cases there is no separation at all, just an indentation.

The Florida Supreme Court has ordered that the intent of the voter be discerned from such ballots. For purposes of resolving the equal protection challenge, it is not necessary to decide whether the Florida Supreme Court had the authority under the legislative scheme for resolving election disputes to define what a legal vote is and to mandate a manual recount implementing that definition. The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right. Florida's basic command for the count of legally cast votes is to consider the "intent of the voter." 772 So. 2d, at 1262. This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.

The law does not refrain from searching for the intent of the actor in a multitude of circumstances; and in some cases the general command to ascertain intent is not susceptible to much further refinement. In this instance, however, the question is not whether to believe a witness but how to interpret the marks or holes or scratches on an inanimate object, a piece of cardboard or paper which, it is said, might not have registered as a vote during the machine count. The factfinder confronts a thing, not a person. The search for intent can be confined by specific rules designed to ensure uniform treatment.

The want of those rules here has led to unequal evaluation of ballots in various respects. See id., at 1267 (Wells, C. J., dissenting) ("Should a county canvassing board count or not count a 'dimpled chad' where the voter is able to successfully dislodge the chad in every other contest on that ballot? Here, the county canvassing boards disagree"). As seems to have been acknowledged at oral argument, the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.

The record provides some examples. A monitor in Miami-Dade County testified at trial that he observed that three members of the county canvassing board applied different standards in defining a legal vote. 3 Tr. 497, 499 (Dec. 3, 2000). And testimony at trial also revealed that at least one county changed its evaluative standards during the counting process. Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a *per se* rule, only to have a court order that the county consider dimpled chads legal. This is not a process with sufficient guarantees of equal treatment.

An early case in our one-person, one-vote jurisprudence arose when a State accorded arbitrary and disparate treatment to voters in its different counties. *Gray v. Sanders,* 372 U.S. 368 (1963). The Court found a constitutional violation. We relied on these principles in the context of the Presidential selection process in *Moore v. Ogilvie,* 394 U.S. 814 (1969), where we invalidated a

county-based procedure that diluted the influence of citizens in larger counties in the nominating process. There we observed that "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Id.,* at 819.

The State Supreme Court ratified this uneven treatment. It mandated that the recount totals from two counties, Miami-Dade and Palm Beach, be included in the certified total. The court also appeared to hold *sub silentio* that the recount totals from Broward County, which were not completed until after the original November 14 certification by the Secretary, were to be considered part of the new certified vote totals even though the county certification was not contested by Vice President Gore. Yet each of the counties used varying standards to determine what was a legal vote. Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties.

In addition, the recounts in these three counties were not limited to so-called undervotes but extended to all of the ballots. The distinction has real consequences. A manual recount of all ballots identifies not only those ballots which show no vote but also those which contain more than one, the so-called overvotes. Neither category will be counted by the machine. This is not a trivial concern. At oral argument, respondents estimated there are as many as 110,000 overvotes statewide. As a result, the citizen whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernible by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent. Furthermore, the citizen who marks two candidates, only one of which is discernible by the machine, will have his vote counted even though it should have been read as an invalid ballot. The State Supreme Court's inclusion of vote counts based on these variant standards exemplifies concerns with the remedial processes that were under way.

That brings the analysis to yet a further equal protection problem. The votes certified by the court included a partial total from one county, Miami-Dade. The Florida Supreme Court's decision thus gives no assurance that the recounts included in a final certification must be complete. Indeed, it is respondents' submission that it would be consistent with the rules of the recount procedures to include whatever partial counts are done by the time of final certification, and we interpret the Florida Supreme Court's decision to permit this. See 772 So. 2d, at 1261-1262, n. 21 (noting "practical difficulties" may control outcome of election, but certifying partial Miami-Dade total nonetheless). This accommodation no doubt results from the truncated contest period established by the Florida Supreme Court in *Palm Beach County Canvassing Bd. v. Harris,* at respondents' own urging. The press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees.

In addition to these difficulties the actual process by which the votes were to be counted under the Florida Supreme Court's decision raises further concerns. That order did not specify who would recount the ballots. The county canvassing boards were forced to pull together ad hoc teams of judges from various Circuits who had no previous training in handling and interpreting ballots.

Furthermore, while others were permitted to observe, they were prohibited from objecting during the recount.

The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.

The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.

Given the Court's assessment that the recount process underway was probably being conducted in an unconstitutional manner, the Court stayed the order directing the recount so it could hear this case and render an expedited decision. The contest provision, as it was mandated by the State Supreme Court, is not well calculated to sustain the confidence that all citizens must have in the outcome of elections. The State has not shown that its procedures include the necessary safeguards. The problem, for instance, of the estimated 110,000 overvotes has not been addressed, although Chief Justice Wells called attention to the concern in his dissenting opinion. See 772 So. 2d, at 1264, n. 26.

Upon due consideration of the difficulties identified to this point, it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise. In addition, the Secretary has advised that the recount of only a portion of the ballots requires that the vote tabulation equipment be used to screen out undervotes, a function for which the machines were not designed. If a recount of overvotes were also required, perhaps even a second screening would be necessary. Use of the equipment for this purpose, and any new software developed for it, would have to be evaluated for accuracy by the Secretary, as required by Fla. Stat. Ann. § 101.015 (Supp. 2001).

The Supreme Court of Florida has said that the legislature intended the State's electors to "participat[e] fully in the federal electoral process," as provided in 3 U.S.C. § 5. 772 So. 2d, at 1289; see also *Palm Beach County Canvassing Bd. v. Harris,* 772 So. 2d 1220, 1237 (Fla. 2000). That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.

Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. See *post,* at 134 (SOUTER, J., dissenting); *post,* at 145-146 (BREYER, J., dissenting). The only disagreement is as to the remedy. Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, JUSTICE BREYER'S proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18—contemplates action in violation of the Florida Election Code, and hence could not be part of an "appropriate" order authorized by Fla. Stat. Ann. § 102.168(8) (Supp. 2001).

***

None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.

The judgment of the Supreme Court of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Pursuant to this Court's Rule 45.2, the Clerk is directed to issue the mandate in this case forthwith.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, concurring.

We join the *per curiam* opinion. We write separately because we believe there are additional grounds that require us to reverse the Florida Supreme Court's decision.

I

We deal here not with an ordinary election, but with an election for the President of the United States. In *Burroughs v. United States,* 290 U.S. 534, 545 (1934), we said:
"While presidential electors are not officers or agents of the federal government *(In re Green,* 134 U.S. 377, 379 [(1890)]), they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated."

Likewise, in *Anderson v. Celebrezze,* 460 U.S. 780, 794795 (1983) (footnote omitted), we said: "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation."

In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns. *Cf. Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938). Of course, in ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character. See U.S. Const., Art. IV; § 4. But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government. This is one of them. Article II, § 1, cl. 2, provides that "[e]ach State shall appoint, in such Manner as the *Legislature* thereof may direct," electors for President and Vice President. (Emphasis added.) Thus, the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.

In *McPherson v. Blacker,* 146 U.S. 1 (1892), we explained that Art. II, § 1, cl. 2, "convey[s] the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of appointment. 146 U.S., at 27. A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.

Title 3 U.S.C. § 5 informs our application of Art. II, § 1, cl. 2, to the Florida statutory scheme, which, as the Florida Supreme Court acknowledged, took that statute into account. Section 5 provides that the State's selection of electors "shall be conclusive, and shall govern in the counting of the electoral votes" if the electors are chosen under laws enacted prior to election day, and if the selection process is completed six days prior to the meeting of the electoral college. As we noted in *Bush v. Palm Beach County Canvassing Bd., ante,* at 78:
"Since § 5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the 'safe harbor' would counsel against any construction of the Election Code that Congress might deem to be a change in the law."

If we are to respect the legislature's Article II powers, therefore, we must ensure that postelection state-court actions do not frustrate the legislative desire to attain the "safe harbor" provided by § 5. In Florida, the legislature has chosen to hold statewide elections to appoint the State's 25 electors. Importantly, the legislature has delegated the authority to run the elections and to oversee election disputes to the Secretary of State (Secretary), Fla. Stat. Ann. § 97.012(1) (Supp. 2001), and to state circuit courts, §§ 102.168(1), 102.168(8). Isolated sections of the code may well admit of more than one interpretation, but the general coherence of the legislative scheme may not be altered by judicial interpretation so as to wholly change the statutorily provided apportionment of responsibility among these various bodies. In any election but a Presidential election, the Florida Supreme Court can give as little or as much deference to Florida's executives as it chooses, so far as Article II is concerned, and this Court will have no cause to question the court's actions. But, with respect to a Presidential election, the court must be both mindful of the legislature's role under Article II in choosing the manner of appointing electors and deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate.

In order to determine whether a state court has infringed upon the legislature's authority, we necessarily must examine the law of the State as it existed prior to the action of the court. Though we generally defer to state courts on the interpretation of state law—see, *e.g., Mullaney v. Wilbur,*

421 U.S. 684 (1975)—there are of course areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law.

For example, in *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958), it was argued that we were without jurisdiction because the petitioner had not pursued the correct appellate remedy in Alabama's state courts. Petitioner had sought a state-law writ of certiorari in the Alabama Supreme Court when a writ of mandamus, according to that court, was proper. We found this state-law ground inadequate to defeat our jurisdiction because we were "unable to reconcile the procedural holding of the Alabama Supreme Court" with prior Alabama precedent. *Id.,* at 456. The purported state-law ground was so novel, in our independent estimation, that "petitioner could not fairly be deemed to have been apprised of its existence." *Id.,* at 457.

Six years later we decided *Bouie v. City of Columbia,* 378 U.S. 347 (1964), in which the state court had held, contrary to precedent, that the state trespass law applied to black sit-in demonstrators who had consent to enter private property but were then asked to leave. Relying upon *NAACP*, we concluded that the South Carolina Supreme Court's interpretation of a state penal statute had impermissibly broadened the scope of that statute beyond what a fair reading provided, in violation of due process. See 378 U.S., at 361-362. What we would do in the present case is precisely parallel: 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 11.

This inquiry does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures.* To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II.

II

Acting pursuant to its constitutional grant of authority, the Florida Legislature has created a detailed, if not perfectly crafted, statutory scheme that provides for appointment of Presidential electors by direct election. Fla. Stat. Ann. § 103.011 (1992). Under the statute, "[v]otes cast for the actual candidates for President and Vice President shall be counted as votes cast for the presidential electors supporting such candidates." *Ibid.* The legislature has designated the Secretary as the "chief election officer," with the responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." Fla. Stat. Ann. § 97.012 (Supp. 2001). The state legislature has delegated to county canvassing boards the duties of administering elections. § 102.141. Those boards are responsible for providing results to the state Elections Canvassing Commission, comprising the Governor, the Secretary of State, and the Director of the Division of Elections. § 102.111. *Cf. Boardman v. Esteva,* 323 So. 2d 259, 268, n. 5 (1975) ("The election process ... is committed to the executive branch of government through duly designated officials all charged with specific duties .... [The] judgments [of these officials] are entitled to be regarded by the courts as presumptively correct ...").

After the election has taken place, the canvassing boards receive returns from precincts, count the votes, and in the event that a candidate was defeated by 0.5% or less, conduct a mandatory recount. Fla. Stat. Ann. § 102.141(4) (Supp. 2001). The county canvassing boards must file certified

election returns with the Department of State by 5 p.m. on the seventh day following the election. § 102.112(1). The Elections Canvassing Commission must then certify the results of the election. § 102.111(1).

The state legislature has also provided mechanisms both for protesting election returns and for contesting certified election results. Section 102.166 governs protests. Any protest must be filed prior to the certification of election results by the county canvassing board. § 102.166(4)(b). Once a protest has been filed, "[t]he county canvassing board may authorize a manual recount." § 102.166(4)(c). If a sample recount conducted pursuant to § 102.166(5) "indicates an error in the vote tabulation which could affect the outcome of the election," the county canvassing board is instructed to: "(a) Correct the error and recount the remaining precincts with the vote tabulation system; (b) Request the Department of State to verify the tabulation software; or (c) Manually recount all ballots," § 102.166(5). In the event a canvassing board chooses to conduct a manual recount of all ballots, § 102.166(7) prescribes procedures for such a recount.

Contests to the certification of an election, on the other hand, are controlled by § 102.168. The grounds for contesting an election include "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." § 102.168(3)(c). Any contest must be filed in the appropriate Florida circuit court, § 102.168(1), and the canvassing board or election board is the proper party defendant, § 102.168(4). Section 102.168(8) provides that "[t]he circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances." In Presidential elections, the contest period necessarily terminates on the date set by 3 U.S.C. § 5 for concluding the State's "final determination" of election controversies.

In its first decision, *Palm Beach Canvassing Bd. v. Harris*, 772 So. 2d 1220 (2000) *(Harris I*), the Florida Supreme Court extended the 7-day statutory certification deadline established by the legislature. This modification of the code, by lengthening the protest period, necessarily shortened the contest period for Presidential elections. Underlying the extension of the certification deadline and the shortchanging of the contest period was, presumably, the clear implication that certification was a matter of significance: The certified winner would enjoy presumptive validity, making a contest proceeding by the losing candidate an uphill battle. In its latest opinion, however, the court empties certification of virtually all legal consequence during the contest, and in doing so departs from the provisions enacted by the Florida Legislature.

The court determined that canvassing boards' decisions regarding whether to recount ballots past the certification deadline (even the certification deadline established by *Harris I*) are to be reviewed *de novo,* although the Election Code clearly vests discretion whether to recount in the boards, and sets strict deadlines subject to the Secretary's rejection of late tallies and monetary fines for tardiness. See Fla. Stat. Ann. § 102.112 (Supp. 2001). Moreover, the Florida court held that all late vote tallies arriving during the contest period should be automatically included in the certification regardless of the certification deadline (even the certification deadline established by *Harris I*), thus virtually eliminating both the deadline and the Secretary's discretion to disregard recounts that violate it.

Moreover, the court's interpretation of "legal vote," and hence its decision to order a contest-period recount, plainly departed from the legislative scheme. Florida statutory law cannot reasonably be thought to *require* the counting of improperly marked ballots. Each Florida precinct before election day provides instructions on how properly to cast a vote, Fla. Stat. Ann. § 101.46 (1992); each polling place on election day contains a working model of the voting machine it uses, Fla. Stat. Ann. § 101.5611 (Supp. 2001); and each voting booth contains a sample ballot, § 101.46. In precincts using punchcard ballots, voters are instructed to punch out the ballot cleanly:
"AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD." Instructions to Voters, quoted in Brief for Respondent Harris et al. 13, n. 5.

No reasonable person would call it "an error in the vote tabulation," Fla. Stat. Ann. § 102.166(5) (Supp. 2001), or a "rejection of ... legal votes," § 102.168(3)(c),4 when electronic or electromechanical equipment performs precisely in the manner designed, and fails to count those ballots that are not marked in the manner that these voting instructions explicitly and prominently specify. The scheme that the Florida Supreme Court's opinion attributes to the legislature is one in which machines are *required* to be "capable of correctly counting votes," § 101.5606(4), but which nonetheless regularly produces elections in which legal votes are predictably not tabulated, so that in close elections manual recounts are regularly required. This is of course absurd. The Secretary, who is authorized by law to issue binding interpretations of the Election Code, §§ 97.012,106.23, rejected this peculiar reading of the statutes. See DE 00-13 (opinion of the Division of Elections). The Florida Supreme Court, although it must defer to the Secretary's interpretations, see *Krivanek v. Take Back Tampa Political Committee, 625* So. 2d 840, 844 (Fla. 1993), rejected her reasonable interpretation and embraced the peculiar one. See *Palm Beach County Canvassing Bd. v. Harris,* 772 So. 2d 1273 (2000) *(Harris III).*

But as we indicated in our remand of the earlier case, in a Presidential election the clearly expressed intent of the legislature must prevail. And there is no basis for reading the Florida statutes as requiring the counting of improperly marked ballots, as an examination of the Florida Supreme Court's textual analysis shows. We will not parse that analysis here, except to note that the principal provision of the Election Code on which it relied, § 101.5614(5), was, as Chief Justice Wells pointed out in his dissent in *Gore* v. *Harris,* 772 So. 2d 1243, 1267 (2000) *(Harris II),* entirely irrelevant. The State's Attorney General (who was supporting the Gore challenge) confirmed in oral argument here that never before the present election had a manual recount been conducted on the basis of the contention that "undervotes" should have been examined to determine voter intent. Tr. of Oral Arg. in *Bush v. Palm Beach County Canvassing Bd.*, O. T. 2000, No. 00-836, pp. 39-40; cf. *Broward County Canvassing Board* v. *Hogan,* 607 So. 2d 508, 509 (Fla. Ct. App. 1992) (denial of recount for failure to count ballots with "hanging paper chads"). For the court to step away from this established practice, prescribed by the Secretary, the state official charged by the legislature with "responsibility to ... [o]btain and maintain uniformity in the application, operation, and interpretation of the election laws," § 97.012(1), was to depart from the legislative scheme.

III

The scope and nature of the remedy ordered by the Florida Supreme Court jeopardizes the "legislative wish" to take advantage of the safe harbor provided by 3 U.S.C. § 5. *Bush v. Palm Beach County Canvassing Bd., ante,* at 78 *(per curiam).* December 12, 2000, is the last date for a final determination of the Florida electors that will satisfy § 5. Yet in the late afternoon of December 8th—four days before this deadline—the Supreme Court of Florida ordered recounts of tens of thousands of so-called "undervotes" spread through 64 of the State's 67 counties. This was done in a search for elusive—perhaps delusive—certainty as to the exact count of 6 million votes. But no one claims that these ballots have not previously been tabulated; they were initially read by voting machines at the time of the election, and thereafter reread by virtue of Florida's automatic recount provision. No one claims there was any fraud in the election. The Supreme Court of Florida ordered this additional recount under the provision of the Election Code giving the circuit judge the authority to provide relief that is "appropriate under such circumstances." Fla. Stat. Ann. § 102.168(8) (Supp. 2001).

Surely when the Florida Legislature empowered the courts of the State to grant "appropriate" relief, it must have meant relief that would have become final by the cutoff date of 3 U.S.C. § 5. In light of the inevitable legal challenges and ensuing appeals to the Supreme Court of Florida and petitions for certiorari to this Court, the entire recounting process could not possibly be completed by that date. Whereas the majority in the Supreme Court of Florida stated its confidence that "the remaining undervotes in these counties can be [counted] within the required time frame," 772 So. 2d, at 1262, n. 22, it made no assertion that the seemingly inevitable appeals could be disposed of in that time. Although the Florida Supreme Court has on occasion taken over a year to resolve disputes over local elections, see, *e.* g., *Beckstrom v. Volusia County Canvassing Bd.,* 707 So. 2d 720 (1998) (resolving contest of sheriff's race 16 months after the election), it has heard and decided the appeals in the present case with great promptness. But the federal deadlines for the Presidential election simply do not permit even such a shortened process.

As the dissent noted:
"In [the four days remaining], all questionable ballots must be reviewed by the judicial officer appointed to discern the intent of the voter in a process open to the public. Fairness dictates that a provision be made for either party to object to how a particular ballot is counted. Additionally, this short time period must allow for judicial review. I respectfully submit this cannot be completed without taking Florida's presidential electors outside the safe harbor provision, creating the very real possibility of disenfranchising those nearly six million voters who are able to correctly cast their ballots on election day." 772 So. 2d, at 1269 (opinion of Wells, C. J.) (footnote omitted).

The other dissenters echoed this concern: "[T]he majority is departing from the essential requirements of the law by providing a remedy which is impossible to achieve and which will ultimately lead to chaos." *Id.,* at 1273 (Harding, J., dissenting, joined by Shaw, J.).

Given all these factors, and in light of the legislative intent identified by the Florida Supreme Court to bring Florida within the "safe harbor" provision of 3 U.S.C. § 5, the remedy prescribed by the Supreme Court of Florida cannot be deemed an "appropriate" one as of December 8. It significantly departed from the statutory framework in place on November 7, and authorized open-

ended further proceedings which could not be completed by December 12, thereby preventing a final determination by that date.

For these reasons, in addition to those given in the *per curiam* opinion, we would reverse.

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

The Constitution assigns to the States the primary responsibility for determining the manner of selecting the Presidential electors. See Art. II, § 1, cl. 2. When questions arise about the meaning of state laws, including election laws, it is our settled practice to accept the opinions of the highest courts of the States as providing the final answers. On rare occasions, however, either federal statutes or the Federal Constitution may require federal judicial intervention in state elections. This is not such an occasion.

The federal questions that ultimately emerged in this case are not substantial. Article II provides that "[e]ach *State* shall appoint, in such Manner as the Legislature *thereof* may direct, a Number of Electors." *Ibid.* (emphasis added). It does not create state legislatures out of whole cloth, but rather takes them as they come—as creatures born of, and constrained by, their state constitutions. Lest there be any doubt, we stated over 100 years ago in *McPherson v. Blacker*, 146 U.S. 1, 25 (1892), that "[w]hat is forbidden or required to be done by a State" in the Article II context "is forbidden or required of the legislative power under state constitutions as they exist." In the same vein, we also observed that "[t]he [State's] legislative power is the supreme authority except as limited by the constitution of the State." *Ibid.; cf. Smiley v. Holm*, 285 U.S. 355, 367 (1932). The legislative power in Florida is subject to judicial review pursuant to Article V of the Florida Constitution, and nothing in Article II of the Federal Constitution frees the state legislature from the constraints in the State Constitution that created it. Moreover, the Florida Legislature's own decision to employ a unitary code for all elections indicates that it intended the Florida Supreme Court to play the same role in Presidential elections that it has historically played in resolving electoral disputes. The Florida Supreme Court's exercise of appellate jurisdiction therefore was wholly consistent with, and indeed contemplated by, the grant of authority in Article II.

It hardly needs stating that Congress, pursuant to 3 U.S.C. § 5, did not impose any affirmative duties upon the States that their governmental branches could "violate." Rather, § 5 provides a safe harbor for States to select electors in contested elections "by judicial or other methods" established by laws prior to the election day. Section 5, like Article II, assumes the involvement of the state judiciary in interpreting state election laws and resolving election disputes under those laws. Neither § 5 nor Article II grants federal judges any special authority to substitute their views for those of the state judiciary on matters of state law.

Nor are petitioners correct in asserting that the failure of the Florida Supreme Court to specify in detail the precise manner in which the "intent of the voter," Fla. Stat. Ann. § 101.5614(5) (Supp. 2001), is to be determined rises to the level of a constitutional violation. We found such a violation when individual votes within the same State were weighted unequally, see, *e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), but we have never before called into question the substantive standard

by which a State determines that a vote has been legally cast. And there is no reason to think that the guidance provided to the factfinders, specifically the various canvassing boards, by the "intent of the voter" standard is any less sufficient—or will lead to results any less uniform—than, for example, the "beyond a reasonable doubt" standard employed every day by ordinary citizens in courtrooms across this country.

Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns. Those concerns are alleviated—if not eliminated—by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process. Of course, as a general matter, "[t]he interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. of Tex. v. Pinson*, *282* U.S. 499, 501 (1931) (Holmes, J.). If it were otherwise, Florida's decision to leave to each county the determination of what balloting system to employ—despite enormous differences in accuracy—might run afoul of equal protection. So, too, might the similar decisions of the vast majority of state legislatures to delegate to local authorities certain decisions with respect to voting systems and ballot design.

Even assuming that aspects of the remedial scheme might ultimately be found to violate the Equal Protection Clause, I could not subscribe to the majority's disposition of the case. As the majority explicitly holds, once a state legislature determines to select electors through a popular vote, the right to have one's vote counted is of constitutional stature. As the majority further acknowledges, Florida law holds that all ballots that reveal the intent of the voter constitute valid votes. Recognizing these principles, the majority nonetheless orders the termination of the contest proceeding before all such votes have been tabulated. Under their own reasoning, the appropriate course of action would be to remand to allow more specific procedures for implementing the legislature's uniform general standard to be established.

In the interest of finality, however, the majority effectively orders the disenfranchisement of an unknown number of voters whose ballots reveal their intent—and are therefore legal votes under state law—but were for some reason rejected by ballot-counting machines. It does so on the basis of the deadlines set forth in Title 3 of the United States Code. *Ante*, at 110. But, as I have already noted, those provisions merely provide rules of decision for Congress to follow when selecting among conflicting slates of electors. *Supra*, at 124. They do not prohibit a State from counting what the majority concedes to be legal votes until a bona fide winner is determined. Indeed, in 1960, Hawaii appointed two slates of electors and Congress chose to count the one appointed on January 4, 1961, well after the Title 3 deadlines. See Josephson & Ross, Repairing the Electoral College, 22 J. Legis. 145, 166, n. 154 (1996). Thus, nothing prevents the majority, even if it properly found an equal protection violation, from ordering relief appropriate to remedy that violation without depriving Florida voters of their right to have their votes counted. As the majority notes, "[a] desire for speed is not a general excuse for ignoring equal protection guarantees." *Ante,* at 108.

Finally, neither in this case, nor in its earlier opinion in *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (2000), did the Florida Supreme Court make any substantive change in Florida electoral law. Its decisions were rooted in long-established precedent and were consistent

with the relevant statutory provisions, taken as a whole. It did what courts do—It decided the case before it in light of the legislature's intent to leave no legally cast vote uncounted. In so doing, it relied on the sufficiency of the general "intent of the voter" standard articulated by the state legislature, coupled with a procedure for ultimate review by an impartial judge, to resolve the concern about disparate evaluations of contested ballots. If we assume—as I do—that the members of that court and the judges who would have carried out its mandate are impartial, its decision does not even raise a colorable federal question.

What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

I respectfully dissent.

JUSTICE SOUTER, with whom JUSTICE BREYER joins, and with whom JUSTICE STEVENS and JUSTICE GINSBURG join as to all but Part III, dissenting.

The Court should not have reviewed either *Bush v. Palm Beach County Canvassing Bd.*, *ante*, p. 70 (*per curiam*), or this case, and should not have stopped Florida's attempt to recount all undervote ballots, see *ante*, at 102, by issuing a stay of the Florida Supreme Court's orders during the period of this review, see *Bush* v. *Gore*, *post*, at 1046. If this Court had allowed the State to follow the course indicated by the opinions of its own Supreme Court, it is entirely possible that there would ultimately have been no issue requiring our review, and political tension could have worked itself out in the Congress following the procedure provided in 3 U.S.C. § 15. The case being before us, however, its resolution by the majority is another erroneous decision.

As will be clear, I am in substantial agreement with the dissenting opinions of JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER. I write separately only to say how straightforward the issues before us really are.

There are three issues: whether the State Supreme Court's interpretation of the statute providing for a contest of the state election results somehow violates 3 U.S.C. § 5; whether that court's construction of the state statutory provisions governing contests impermissibly changes a state law from what the State's legislature has provided, in violation of Article II, § 1, cl. 2, of the National Constitution; and whether the manner of interpreting markings on disputed ballots failing to cause machines to register votes for President (the undervote ballots) violates the equal protection or due process guaranteed by the Fourteenth Amendment. None of these issues is difficult to describe or to resolve.

I

The 3 U.S.C. § 5 issue is not serious. That provision sets certain conditions for treating a State's certification of Presidential electors as conclusive in the event that a dispute over recognizing those electors must be resolved in the Congress under 3 U.S.C. § 15. Conclusiveness requires selection under a legal scheme in place before the election, with results determined at least six days before the date set for casting electoral votes. But no State is required to conform to § 5 if it cannot do that (for whatever reason); the sanction for failing to satisfy the conditions of § 5 is simply loss of what has been called its "safe harbor." And even that determination is to be made, if made anywhere, in the Congress.

II

The second matter here goes to the State Supreme Court's interpretation of certain terms in the state statute governing election "contests," Fla. Stat. Ann. § 102.168 (Supp. 2001); there is no question here about the state court's interpretation of the related provisions dealing with the antecedent process of "protesting" particular vote counts, § 102.166, which was involved in the previous case, *Bush v. Palm Beach County Canvassing Bd.* The issue is whether the judgment of the State Supreme Court has displaced the state legislature's provisions for election contests: is the law as declared by the court different from the provisions made by the legislature, to which the National Constitution commits responsibility for determining how each State's Presidential electors are chosen? See U.S. Const., Art. II, § 1, cl. 2. Bush does not, of course, claim that any judicial act interpreting a statute of uncertain meaning is enough to displace the legislative provision and violate Article II; statutes require interpretation, which does not without more affect the legislative character of a statute within the meaning of the Constitution. Brief for Petitioner in *Bush v. Palm Beach County Canvass*ing Bd., O. T. 2000, No. 00-836, p. 48, n. 22. What Bush does argue, as I understand the contention, is that the interpretation of § 102.168 was so unreasonable as to transcend the accepted bounds of statutory interpretation, to the point of being a nonjudicial act and producing new law untethered to the legislative Act in question.

The starting point for evaluating the claim that the Florida Supreme Court's interpretation effectively rewrote § 102.168 must be the language of the provision on which Gore relies to show his right to raise this contest: that the previously certified result in Bush's favor was produced by "rejection of a number of legal votes sufficient to change or place in doubt the result of the election." Fla. Stat. Ann. § 102.168(3)(c) (Supp. 2001). None of the state court's interpretations is unreasonable to the point of displacing the legislative enactment quoted. As I will note below, other interpretations were of course possible, and some might have been better than those adopted by the Florida court's majority; the two dissents from the majority opinion of that court and various briefs submitted to us set out alternatives. But the majority view is in each instance within the bounds of reasonable interpretation, and the law as declared is consistent with Article II.

1. The statute does not define a "legal vote," the rejection of which may affect the election. The State Supreme Court was therefore required to define it, and in doing that the court looked to another election statute, § 101.5614(5), dealing with damaged or defective ballots, which contains a provision that no vote shall be disregarded "if there is a clear indication of the intent of the voter as determined by the canvassing board." The court read that objective of looking to the voter's

intent as indicating that the legislature probably meant "legal vote" to mean a vote recorded on a ballot indicating what the voter intended. *Gore v. Harris*, 772 So. 2d 1243, 1256-1257 (2000). It is perfectly true that the majority might have chosen a different reading. See, *e.g.*, Brief for Respondent Harris et al. 10 (defining "legal votes" as "votes properly executed in accordance with the instructions provided to all registered voters in advance of the election and in the polling places"). But even so, there is no constitutional violation in following the majority view; Article II is unconcerned with mere disagreements about interpretive merits.

2. The Florida court next interpreted "rejection" to determine what act in the counting process may be attacked in a contest. Again, the statute does not define the term. The court majority read the word to mean simply a failure to count. 772 So. 2d, at 1257. That reading is certainly within the bounds of common sense, given the objective to give effect to a voter's intent if that can be determined. A different reading, of course, is possible. The majority might have concluded that "rejection" should refer to machine malfunction, or that a ballot should not be treated as "reject[ed]" in the absence of wrongdoing by election officials, lest contests be so easy to claim that every election will end up in one. Cf. id., at 1266 (Wells, C. J., dissenting). There is, however, nothing nonjudicial in the Florida majority's more hospitable reading.

3. The same is true about the court majority's understanding of the phrase "votes sufficient to change or place in doubt" the result of the election in Florida. The court held that if the uncounted ballots were so numerous that it was reasonably possible that they contained enough "legal" votes to swing the election, this contest would be authorized by the statute. While the majority might have thought (as the trial judge did) that a probability, not a possibility, should be necessary to justify a contest, that reading is not required by the statute's text, which says nothing about probability. Whatever people of good will and good sense may argue about the merits of the Florida court's reading, there is no warrant for saying that it transcends the limits of reasonable statutory interpretation to the point of supplanting the statute enacted by the "legislature" within the meaning of Article II.

In sum, the interpretations by the Florida court raise no substantial question under Article II. That court engaged in permissible construction in determining that Gore had instituted a contest authorized by the state statute, and it proceeded to direct the trial judge to deal with that contest in the exercise of the discretionary powers generously conferred by Fla. Stat. Ann. § 102.168(8) (Supp. 2001), to "fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances." As JUSTICE GINSBURG has persuasively explained in her own dissenting opinion, our customary respect for state interpretations of state law counsels against rejection of the Florida court's determinations in this case.

III

It is only on the third issue before us that there is a meritorious argument for relief, as this Court's *per curiam* opinion recognizes. It is an issue that might well have been dealt with adequately by the Florida courts if the state proceedings had not been interrupted, and if not disposed of at the state level it could have been considered by the Congress in any electoral vote dispute. But because

the course of state proceedings has been interrupted, time is short, and the issue is before us, I think it sensible for the Court to address it.

Petitioners have raised an equal protection claim (or, alternatively, a due process claim, see generally *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982)), in the charge that unjustifiably disparate standards are applied in different electoral jurisdictions to otherwise identical facts. It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on. But evidence in the record here suggests that a different order of disparity obtains under rules for determining a voter's intent that have been applied (and could continue to be applied) to identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics (such as "hanging" or "dimpled" chads). See, *e.* g., Tr. 238-242 (Dec. 2-3, 2000) (testimony of Palm Beach County Canvassing Board Chairman Judge Charles Burton describing varying standards applied to imperfectly punched ballots in Palm Beach County during precertification manual recount); id., at 497-500 (similarly describing varying standards applied in Miami-Dade County); Tr. of Hearing 8-10 (Dec. 8, 2000) (soliciting from county canvassing boards proposed protocols for determining voters' intent but declining to provide a precise, uniform standard). I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary.

In deciding what to do about this, we should take account of the fact that electoral votes are due to be cast in six days. I would therefore remand the case to the courts of Florida with instructions to establish uniform standards for evaluating the several types of ballots that have prompted differing treatments, to be applied within and among counties when passing on such identical ballots in any further recounting (or successive recounting) that the courts might order.

Unlike the majority, I see no warrant for this Court to assume that Florida could not possibly comply with this requirement before the date set for the meeting of electors, December 18. Although one of the dissenting justices of the State Supreme Court estimated that disparate standards potentially affected 170,000 votes, *Gore v. Harris*, 772 So. 2d, at 1272-1273, the number at issue is significantly smaller. The 170,000 figure apparently represents all uncounted votes, both undervotes (those for which no Presidential choice was recorded by a machine) and overvotes (those rejected because of votes for more than one candidate). Tr. of Oral Arg. 61-62. But as JUSTICE BREYER has pointed out, no showing has been made of legal overvotes uncounted, and counsel for Gore made an uncontradicted representation to the Court that the statewide total of undervotes is about 60,000. *Id.*, at 62. To recount these manually would be a tall order, but before this Court stayed the effort to do that the courts of Florida were ready to do their best to get that job done. There is no justification for denying the State the opportunity to try to count all disputed ballots now.

I respectfully dissent.

JUSTICE GINSBURG, with whom JUSTICE STEVENS joins, and with whom JUSTICE SOUTER and JUSTICE BREYER join as to Part I, dissenting.

I

THE CHIEF JUSTICE acknowledges that provisions of Florida's Election Code "may well admit of more than one interpretation." *Ante,* at 114 (concurring opinion). But instead of respecting the state high court's province to say what the State's Election Code means, THE CHIEF JUSTICE maintains that Florida's Supreme Court has veered so far from the ordinary practice of judicial review that what it did cannot properly be called judging. My colleagues have offered a reasonable construction of Florida's law. Their construction coincides with the view of one of Florida's seven Supreme Court justices. *Gore v. Harris,* 772 So. 2d 1243, 1264-1270 (Fla. 2000) (Wells, C. J., dissenting); *Palm Beach County Canvassing Bd. v. Harris,* 772 So. 2d 1273, 1291-1292 (Fla. 2000) (on remand) (confirming, 6 to 1, the construction of Florida law advanced in *Gore).* I might join THE CHIEF JUSTICE were it my commission to interpret Florida law. But disagreement with the Florida court's interpretation of its own State's law does not warrant the conclusion that the justices of that court have legislated. There is no cause here to believe that the members of Florida's high court have done less than "their mortal best to discharge their oath of office," *Sumner v. Mata,* 449 U.S. 539, 549 (1981), and no cause to upset their reasoned interpretation of Florida law.

This Court more than occasionally affirms statutory, and even constitutional, interpretations with which it disagrees. For example, when reviewing challenges to administrative agencies' interpretations of laws they implement, we defer to the agencies unless their interpretation violates "the unambiguously expressed intent of Congress." *Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). We do so in the face of the declaration in Article I of the United States Constitution that "All legislative Powers herein granted shall be vested in a Congress of the United States." Surely the Constitution does not call upon us to pay more respect to a federal administrative agency's construction of federal law than to a state high court's interpretation of its own State's law. And not uncommonly, we let stand state-court interpretations of *federal* law with which we might disagree. Notably, in the habeas context, the Court adheres to the view that "there is 'no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to [federal law] than his neighbor in the state courthouse.'" *Stone v. Powell,* 428 U.S. 465, 494, n. 35 (1976) (quoting Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 509 (1963)); see *O'Dell v. Netherland,* 521 U.S. 151, 156 (1997) ("[T]he *Teague* doctrine validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.") (citing *Butler v. McKellar,* 494 U.S. 407, 414 (1990)); O'Connor, Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge, 22 Wm. & Mary L. Rev. 801, 813 (1981) ("There is no reason to assume that state court judges cannot and will not provide a 'hospitable forum' in litigating federal constitutional questions.").

No doubt there are cases in which the proper application of federal law may hinge on interpretations of state law. Unavoidably, this Court must sometimes examine state law in order to protect federal rights. But we have dealt with such cases ever mindful of the full measure of respect we owe to interpretations of state law by a State's highest court. In the Contract Clause case,

General Motors Corp. v. Romein, 503 U.S. 181 (1992), for example, we said that although "ultimately we are bound to decide for ourselves whether a contract was made," the Court "accord[s] respectful consideration and great weight to the views of the State's highest court." *Id.,* at 187 (citing *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95, 100 (1938)). And in *Central Union Telephone Co. v. Edwardsville,* 269 U.S. 190 (1925), we upheld the Illinois Supreme Court's interpretation of a state waiver rule, even though that interpretation resulted in the forfeiture of federal constitutional rights. Refusing to supplant Illinois law with a federal definition of waiver, we explained that the state court's declaration "should bind us unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it." *Id.,* at 195.

In deferring to state courts on matters of state law, we appropriately recognize that this Court acts as an "'outside[r]' lacking the common exposure to local law which comes from sitting in the jurisdiction." *Lehman Brothers v. Schein,* 416 U.S. 386, 391 (1974). That recognition has sometimes prompted us to resolve doubts about the meaning of state law by certifying issues to a State's highest court, even when federal rights are at stake. Cf. *Arizonans for Official English v. Arizona,* 520 U.S. 43, 79 (1997) ("Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court."). Notwithstanding our authority to decide issues of state law underlying federal claims, we have used the certification device to afford state high courts an opportunity to inform us on matters of their own State's law because such restraint "helps build a cooperative judicial federalism." *Lehman Brothers,* 416 U.S., at 391.

Just last Term, in *Fiore v. White,* 528 U.S. 23 (1999), we took advantage of Pennsylvania's certification procedure. In that case, a state prisoner brought a federal habeas action claiming that the State had failed to prove an essential element of his charged offense in violation of the Due Process Clause. *Id.,* at 25-26. Instead of resolving the state-law question on which the federal claim depended, we certified the question to the Pennsylvania Supreme Court for that court to "help determine the proper state-law predicate for our determination of the federal constitutional questions raised." *Id.,* at 29; *id.,* at 28 (asking the Pennsylvania Supreme Court whether its recent interpretation of the statute under which Fiore was convicted "was always the statute's meaning, even at the time of Fiore's trial"). THE CHIEF JUSTICE's willingness to *reverse* the Florida Supreme Court's interpretation of Florida law in this case is at least in tension with our reluctance in *Fiore* even to interpret Pennsylvania law before seeking instruction from the Pennsylvania Supreme Court. I would have thought the "cautious approach" we counsel when federal courts address matters of state law, *Arizonans,* 520 U.S., at 77, and our commitment to "build[ing] cooperative judicial federalism," *Lehman Brothers,* 416 U.S., at 391, demanded greater restraint.

Rarely has this Court rejected outright an interpretation of state law by a state high court. *Fairfax's Devisee v. Hunter's Lessee,* 7 Cranch 603 (1813), *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958), and *Bouie v. City of Columbia,* 378 U.S. 347 (1964), cited by THE CHIEF JUSTICE, are three such rare instances. See *ante,* at 114-115, and n. 1. But those cases are embedded in historical contexts hardly comparable to the situation here. *Fairfax's Devisee,* which held that the Virginia Court of Appeals had misconstrued its own forfeiture laws to deprive a British subject of lands secured to him by federal treaties, occurred amidst vociferous States' rights attacks on the Marshall Court. G. Gunther & K. Sullivan, Constitutional Law 61-62 (13th ed. 1997). The Virginia

court refused to obey this Court's *Fairfax's Devisee* mandate to enter judgment for the British subject's successor in interest. That refusal led to the Court's pathmarking decision in *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816). *Patterson*, a case decided three months after *Cooper v. Aaron*, 358 U.S. 1 (1958), in the face of Southern resistance to the civil rights movement, held that the Alabama Supreme Court had irregularly applied its own procedural rules to deny review of a contempt order against the NAACP arising from its refusal to disclose membership lists. We said that "our jurisdiction is not defeated if the nonfederal ground relied on by the state court is 'without any fair or substantial support.'" 357 U.S., at 455 (quoting *Ward v. Board of Commr's of Love Cty.*, 253 U.S. 17, 22 (1920)). *Bouie*, stemming from a lunch counter "sit-in" at the height of the civil rights movement, held that the South Carolina Supreme Court's construction of its trespass laws—criminalizing conduct not covered by the text of an otherwise clear statute—was "unforeseeable" and thus violated due process when applied retroactively to the petitioners. 378 U.S., at 350, 354.

THE CHIEF JUSTICE'S casual citation of these cases might lead one to believe they are part of a larger collection of cases in which we said that the Constitution impelled us to train a skeptical eye on a state court's portrayal of state law. But one would be hard pressed, I think, to find additional cases that fit the mold. As JUSTICE BREYER convincingly explains, see *post*, at 149-152 (dissenting opinion), this case involves nothing close to the kind of recalcitrance by a state high court that warrants extraordinary action by this Court. The Florida Supreme Court concluded that counting every legal vote was the overriding concern of the Florida Legislature when it enacted the State's Election Code. The court surely should not be bracketed with state high courts of the Jim Crow South.

THE CHIEF JUSTICE says that Article II, by providing that state legislatures shall direct the manner of appointing electors, authorizes federal superintendence over the relationship between state courts and state legislatures, and licenses a departure from the usual deference we give to state-court interpretations of state law. *Ante*, at 115 (concurring opinion) ("To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article 11."). The Framers of our Constitution, however, understood that in a republican government, the judiciary would construe the legislature's enactments. See U.S. Const., Art. III; The Federalist No. 78 (A. Hamilton). In light of the constitutional guarantee to States of a "Republican Form of Government," U.S. Const., Art. IV, § 4, Article II can hardly be read to invite this Court to disrupt a State's republican regime. Yet THE CHIEF JUSTICE today would reach out to do just that. By holding that Article II requires our revision of a state court's construction of state laws in order to protect one organ of the State from another, THE CHIEF JUSTICE contradicts the basic principle that a State may organize itself as it sees fit. See, *e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."). Article II does not call for the scrutiny undertaken by this Court.

The extraordinary setting of this case has obscured the ordinary principle that dictates its proper resolution: Federal courts defer to a state high court's interpretations of the State's own law. This

principle reflects the core of federalism, on which all agree. "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *Saenz v. Roe,* 526 U.S. 489, 504, n. 17 (1999) (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (KENNEDY, J., concurring)). THE CHIEF JUSTICE'S solicitude for the Florida Legislature comes at the expense of the more fundamental solicitude we owe to the legislature's sovereign. U.S. Const., Art. II, § 1, cl. 2 ("Each *State* shall appoint, in such Manner as the Legislature *thereof* may direct," the electors for President and Vice President (emphasis added)); *ante,* at 123-124 (STEVENS, J., dissenting). Were the other Members of this Court as mindful as they generally are of our system of dual sovereignty, they would affirm the judgment of the Florida Supreme Court.

II

I agree with JUSTICE STEVENS that petitioners have not presented a substantial equal protection claim. Ideally, perfection would be the appropriate standard for judging the recount. But we live in an imperfect world, one in which thousands of votes have not been counted. I cannot agree that the recount adopted by the Florida court, flawed as it may be, would yield a result any less fair or precise than the certification that preceded that recount. See, *e. g., McDonald v. Board of Election Comm'rs of Chicago,* 394 U.S. 802, 809 (1969) (even in the context of the right to vote, the State is permitted to reform "one step at a time") (citing *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 489 (1955)).

Even if there were an equal protection violation, I would agree with JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER that the Court's concern about the December 12 date, *ante,* at 110-111, is misplaced. Time is short in part because of the Court's entry of a stay on December 9, several hours after an able circuit judge in Leon County had begun to superintend the recount process. More fundamentally, the Court's reluctance to let the recount go forward—despite its suggestion that "[t]he search for intent can be confined by specific rules designed to ensure uniform treatment," *ante,* at 106—ultimately turns on its own judgment about the practical realities of implementing a recount, not the judgment of those much closer to the process.

Equally important, as JUSTICE BREYER explains, *post,* at 155 (dissenting opinion), the December 12 date for bringing Florida's electoral votes into 3 U.S.C. § 5's safe harbor lacks the significance the Court assigns it. Were that date to pass, Florida would still be entitled to deliver electoral votes Congress *must* count unless both Houses find that the votes "ha[d] not been ... regularly given." 3 U.S.C. § 15. The statute identifies other significant dates. See, *e.g.*, § 7 (specifying December 18 as the date electors "shall meet and give their votes"); § 12 (specifying "the fourth Wednesday in December"—this year, December 27—as the date on which Congress, if it has not received a State's electoral votes, shall request the state secretary of state to send a certified return immediately). But none of these dates has ultimate significance in light of Congress' detailed provisions for determining, on "the sixth day of January," the validity of electoral votes. § 15.

The Court assumes that time will not permit "orderly judicial review of any disputed matters that might arise." *Ante,* at 110. But no one has doubted the good faith and diligence with which Florida

election officials, attorneys for all sides of this controversy, and the courts of law have performed their duties. Notably, the Florida Supreme Court has produced two substantial opinions within 29 hours of oral argument. In sum, the Court's conclusion that a constitutionally adequate recount is impractical is a prophecy the Court's own judgment will not allow to be tested. Such an untested prophecy should not decide the Presidency of the United States.

I dissent.

JUSTICE BREYER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join except as to Part I-A-1 and with whom JUSTICE SOUTER joins as to Part I, dissenting.

The Court was wrong to take this case. It was wrong to grant a stay. It should now vacate that stay and permit the Florida Supreme Court to decide whether the recount should resume.

I

The political implications of this case for the country are momentous. But the federal legal questions presented, with one exception, are insubstantial.

A

1

The majority raises three equal protection problems with the Florida Supreme Court's recount order: first, the failure to include overvotes in the manual recount; second, the fact that *all* ballots, rather than simply the undervotes, were recounted in some, but not all, counties; and third, the absence of a uniform, specific standard to guide the recounts. As far as the first issue is concerned, petitioners presented no evidence, to this Court or to any Florida court, that a manual recount of overvotes would identify additional legal votes. The same is true of the second, and, in addition, the majority's reasoning would seem to invalidate any state provision for a manual recount of individual counties in a statewide election.

The majority's third concern does implicate principles of fundamental fairness. The majority concludes that the Equal Protection Clause requires that a manual recount be governed not only by the uniform general standard of the "clear intent of the voter," but also by uniform subsidiary standards (for example, a uniform determination whether indented, but not perforated, "undervotes" should count). The opinion points out that the Florida Supreme Court ordered the inclusion of Broward County's undercounted "legal votes" even though those votes included ballots that were not perforated but simply "dimpled," while newly recounted ballots from other counties will likely include only votes determined to be "legal" on the basis of a stricter standard. In light of our previous remand, the Florida Supreme Court may have been reluctant to adopt a more specific standard than that provided for by the legislature for fear of exceeding its authority under Article II. However, since the use of different standards could favor one or the other of the candidates, since time was, and is, too short to permit the lower courts to iron out significant differences through ordinary judicial review, and since the relevant distinction was embodied in the order of the State's highest court, I agree that, in these very special circumstances, basic

principles of fairness should have counseled the adoption of a uniform standard to address the problem. In light of the majority's disposition, I need not decide whether, or the extent to which, as a remedial matter, the Constitution would place limits upon the content of the uniform standard.

2

Nonetheless, there is no justification for the majority's remedy, which is simply to reverse the lower court and halt the recount entirely. An appropriate remedy would be, instead, to remand this case with instructions that, even at this late date, would permit the Florida Supreme Court to require recounting *all* undercounted votes in Florida, including those from Broward, Volusia, Palm Beach, and Miami-Dade Counties, whether or not previously recounted prior to the end of the protest period, and to do so in accordance with a single uniform standard.

The majority justifies stopping the recount entirely on the ground that there is no more time. In particular, the majority relies on the lack of time for the Secretary of State (Secretary) to review and approve equipment needed to separate undervotes. But the majority reaches this conclusion in the absence of *any* record evidence that the recount could not have been completed in the time allowed by the Florida Supreme Court. The majority finds facts outside of the record on matters that state courts are in a far better position to address. Of course, it is too late for any such recount to take place by December 12, the date by which election disputes must be decided if a State is to take advantage of the safe harbor provisions of 3 U.S.C. § 5. Whether there is time to conduct a recount prior to December 18, when the electors are scheduled to meet, is a matter for the state courts to determine. And whether, under Florida law, Florida could or could not take further action is obviously a matter for Florida courts, not this Court, to decide. See *ante,* at 111 (*per curiam*).

By halting the manual recount, and thus ensuring that the uncounted legal votes will not be counted under any standard, this Court crafts a remedy out of proportion to the asserted harm. And that remedy harms the very fairness interests the Court is attempting to protect. The manual recount would itself redress a problem of unequal treatment of ballots. As JUSTICE STEVENS points out, see *ante,* at 126, and n. 4 (dissenting opinion), the ballots of voters in counties that use punchcard systems are more likely to be disqualified than those in counties using optical-scanning systems. According to recent news reports, variations in the undervote rate are even more pronounced. See Fessenden, No-Vote Rates Higher in Punch Card Count, N.Y. Times, Dec. 1, 2000, p. A29 (reporting that 0.3% of ballots cast in 30 Florida counties using optical-scanning systems registered no Presidential vote, in comparison to 1.53% in the 15 counties using Votomatic punchcard ballots). Thus, in a system that allows counties to use different types of voting systems, voters already arrive at the polls with an unequal chance that their votes will be counted. I do not see how the fact that this results from counties' selection of different voting machines rather than a court order makes the outcome any more fair. Nor do I understand why the Florida Supreme Court's recount order, which helps to redress this inequity, must be entirely prohibited based on a deficiency that could easily be remedied.

B

The remainder of petitioners' claims, which are the focus of THE CHIEF JUSTICE'S concurrence, raise no significant federal questions. I cannot agree that THE CHIEF JUSTICE'S unusual review

of state law in this case, see *ante,* at 135-143 (GINSBURG, J., dissenting), is justified by reference either to Art. II, § 1, or to 3 U.S.C. § 5. Moreover, even were such review proper, the conclusion that the Florida Supreme Court's decision contravenes federal law is untenable.

While conceding that, in most cases, "comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law," the concurrence relies on some combination of Art. II, § 1, and 3 U.S.C. § 5 to justify its conclusion that this case is one of the few in which we may lay that fundamental principle aside. *Ante,* at 112 (opinion of REHNQUIST, C. J.). The concurrence's primary foundation for this conclusion rests on an appeal to plain text: Art. II, § l's grant of the power to appoint Presidential electors to the state "Legislature." *Ibid.* But neither the text of Article II itself nor the only case the concurrence cites that interprets Article II, McPherson v. Blac*ker,* 146 U.S. 1 (1892), leads to the conclusion that Article II grants unlimited power to the legislature, devoid of any state constitutional limitations, to select the manner of appointing electors. See id., at 41 (specifically referring to state constitutional provision in upholding state law regarding selection of electors). Nor, as JUSTICE STEVENS points out, have we interpreted the federal constitutional provision most analogous to Art. II, § 1—Art. I, § 4—in the strained manner put forth in the concurrence. *Ante,* at 123, and n. 1 (dissenting opinion).

The concurrence's treatment of § 5 as "inform[ing]" its interpretation of Article II, § 1, cl. 2, *ante,* at 113 (opinion of REHNQUIST, C. J.), is no more convincing. THE CHIEF JUSTICE contends that our opinion in *Bush v. Palm Beach County Canvassing Bd., ante,* p. 70 (*per curiam*) (*Bush 1*), in which we stated that "a legislative wish to take advantage of [§ 5] would counsel against" a construction of Florida law that Congress might deem to be a change in law, *ante,* at 78, now means that *this* Court "must ensure that postelection state-court actions do not frustrate the legislative desire to attain the 'safe harbor' provided by § 5." *Ante,* at 113. However, § 5 is part of the rules that govern Congress' recognition of slates of electors. Nowhere in *Bush I* did we establish that *this* Court had the authority to enforce § 5. Nor did we suggest that the permissive "counsel against" could be transformed into the mandatory "must ensure." And nowhere did we intimate, as the concurrence does here, that a state-court decision that threatens the safe harbor provision of § 5 does so in violation of Article II. The concurrence's logic turns the presumption that legislatures would wish to take advantage of § 5's "safe harbor" provision into a mandate that trumps other statutory provisions and overrides the intent that the legislature did express.

But, in any event, the concurrence, having conducted its review, now reaches the wrong conclusion. It says 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." *Ante,* at 115 (opinion of REHNQUIST, C. J.). But what precisely is the distortion? Apparently, it has three elements. First, the Florida court, in its earlier opinion, changed the election certification date from November 14 to November 26. Second, the Florida court ordered a manual recount of "undercounted" ballots that could not have been fully completed by the December 12 "safe harbor" deadline. Third, the Florida court, in the opinion now under review, failed to give adequate deference to the determinations of canvassing boards and the Secretary.

To characterize the first element as a "distortion," however, requires the concurrence to second-guess the way in which the state court resolved a plain conflict in the language of different statutes. Compare Fla. Stat. Ann. § 102.166 (Supp. 2001) (foreseeing manual recounts during the protest

period) with § 102.111 (setting what is arguably too short a deadline for manual recounts to be conducted); compare § 102.112(1) (stating that the Secretary "may" ignore late returns) with § 102.111(1) (stating that the Secretary "shall" ignore late returns). In any event, that issue no longer has any practical importance and cannot justify the reversal of the different Florida court decision before us now.

To characterize the second element as a "distortion" requires the concurrence to overlook the fact that the inability of the Florida courts to conduct the recount on time is, in significant part, a problem of the Court's own making. The Florida Supreme Court thought that the recount could be completed on time, and, within hours, the Florida Circuit Court was moving in an orderly fashion to meet the deadline. This Court improvidently entered a stay. As a result, we will never know whether the recount could have been completed.

Nor can one characterize the third element as "impermissibl[e] distort[ion]" once one understands that there are two sides to the opinion's argument that the Florida Supreme Court "virtually eliminat[ed] the Secretary's discretion." *Ante,* at 115, 118 (REHNQUIST, C. J., concurring). The Florida statute in question was amended in 1999 to provide that the "grounds for contesting an election" include the "rejection of a number of legal votes sufficient to ... place in doubt the result of the election." Fla. Stat. Ann. §§ 102.168(3), (3)(c) (Supp. 2001). And the parties have argued about the proper meaning of the statute's term "legal vote." The Secretary has claimed that a "legal vote" is a vote "properly executed in accordance with the instructions provided to all registered voters." Brief for Respondent Harris et al. 10. On that interpretation, punchcard ballots for which the machines cannot register a vote are not "legal" votes. *Id.,* at 14. The Florida Supreme Court did not accept her definition. But it had a reason. Its reason was that a different provision of Florida election laws (a provision that addresses damaged or defective ballots) says that no vote shall be disregarded "if there is a clear indication of the intent of the voter as determined by the canvassing board" (adding that ballots should not be counted "if it is impossible to determine the elector's choice"). Fla. Stat. Ann. § 101.5614(5) (Supp. 2001). Given this statutory language, certain roughly analogous judicial precedent, *e.g., Darby v. State ex rel. McCollough,* 75 So. 411 (Fla. 1917) (*per curiam*), and somewhat similar determinations by courts throughout the Nation, see cases cited *infra,* at 152, the Florida Supreme Court concluded that the term "legal vote" means a vote recorded on a ballot that clearly reflects what the voter intended. *Gore v. Harris,* 772 So. 2d 1243, 1254 (2000). That conclusion differs from the conclusion of the Secretary. But nothing in Florida law requires the Florida Supreme Court to accept as determinative the Secretary's view on such a matter. Nor can one say that the court's ultimate determination is so unreasonable as to amount to a constitutionally "impermissible distort[ion]" of Florida law.

The Florida Supreme Court, applying this definition, decided, on the basis of the record, that respondents had shown that the ballots undercounted by the voting machines contained enough "legal votes" to place "the result[s]" of the election "in doubt." Since only a few hundred votes separated the candidates, and since the "undercounted" ballots numbered tens of thousands, it is difficult to see how anyone could find this conclusion unreasonable-however strict the standard used to measure the voter's "clear intent." Nor did this conclusion "strip" canvassing boards of their discretion. The boards retain their traditional discretionary authority during the protest period. And during the contest period, as the court stated, "the Canvassing Board's actions [during the protest period] may constitute evidence that a ballot does or does not qualify as a legal vote." *Id.,*

at 1260. Whether a local county canvassing board's discretionary judgment during the protest period not to conduct a manual recount will be set aside during a contest period depends upon whether a candidate provides additional evidence that the rejected votes contain enough "legal votes" to place the outcome of the race in doubt. To limit the local canvassing board's discretion in this way is not to eliminate that discretion. At the least, one could reasonably so believe.

The statute goes on to provide the Florida circuit judge with authority to "fashion such orders as he or she deems necessary to ensure that each allegation ... is *investigated, examined, or checked,* ... and to provide any relief appropriate." Fla. Stat. Ann. § 102.168(8) (Supp. 2001) (emphasis added). The Florida Supreme Court did just that. One might reasonably disagree with the Florida Supreme Court's interpretation of these, or other, words in the statute. But I do not see how one could call its plain language interpretation of a 1999 statutory change so misguided as no longer to qualify as judicial interpretation or as a usurpation of the authority of the state legislature. Indeed, other state courts have interpreted roughly similar state statutes in similar ways. See, *e.g., In re Election of U.S. Representative for Second Congressional Dist.,* 231 Conn. 602, 621, 653 A. 2d 79, 90-91 (1994) ("Whatever the process used to vote and to count votes, differences in technology should not furnish a basis for disregarding the bedrock principle that the purpose of the voting process is to ascertain the intent of the voters"); *Brown v. Carr,* 130 W. Va. 455, 460, 43 S. E. 2d 401, 404-405 (1947) ("[W]hether a ballot shall be counted ... depends on the intent of the voter .... Courts decry any resort to technical rules in reaching a conclusion as to the intent of the voter").

I repeat, where is the "impermissible" distortion?

II

Despite the reminder that this case involves "an election for the President of the United States," *ante,* at 112 (REHNQUIST, C. J., concurring), no preeminent legal concern, or practical concern related to legal questions, required this Court to hear this case, let alone to issue a stay that stopped Florida's recount process in its tracks. With one exception, petitioners' claims do not ask us to vindicate a constitutional provision designed to protect a basic human right. See, *e.g., Brown v. Board of Education,* 347 U.S. 483 (1954). Petitioners invoke fundamental fairness, namely, the need for procedural fairness, including finality. But with the one "equal protection" exception, they rely upon law that focuses, not upon that basic need, but upon the constitutional allocation of power. Respondents invoke a competing fundamental consideration—the need to determine the voter's true intent. But they look to state law, not to federal constitutional law, to protect that interest. Neither side claims electoral fraud, dishonesty, or the like. And the more fundamental equal protection claim might have been left to the state court to resolve if and when it was discovered to have mattered. It could still be resolved through a remand conditioned upon issuance of a uniform standard; it does not require reversing the Florida Supreme Court.

Of course, the selection of the President is of fundamental national importance. But that importance is political, not legal. And this Court should resist the temptation unnecessarily to resolve tangential legal disputes, where doing so threatens to determine the outcome of the election.

The Constitution and federal statutes themselves make clear that restraint is appropriate. They set forth a roadmap of how to resolve disputes about electors, even after an election as close as this one. That roadmap foresees resolution of electoral disputes by *state* courts. See 3 U.S.C. § 5 (providing that, where a "State shall have provided, by laws enacted prior to [election day], for its final determination of any controversy or contest concerning the appointment of ... electors ... by *judicial* or other methods," the subsequently chosen electors enter a safe harbor free from congressional challenge). But it nowhere provides for involvement by the United States Supreme Court.

To the contrary, the Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes. A federal statute, the Electoral Count Act, enacted after the close 1876 Hayes-Tilden Presidential election, specifies that, after States have tried to resolve disputes (through "judicial" or other means), Congress is the body primarily authorized to resolve remaining disputes. See Electoral Count Act of 1887, 24 Stat. 373, 3 U.S. C. §§ 5, 6, and 15.

The legislative history of the Act makes clear its intent to commit the power to resolve such disputes to Congress, rather than the courts:
"The two Houses are, by the Constitution, authorized to make the count of electoral votes. They can only count legal votes, and in doing so must determine, from the best evidence to be had, what are legal votes ....
"The power to determine rests with the two houses, and there is no other constitutional tribunal." H. R. Rep. No. 1638, 49th Cong., 1st Sess., 2 (1886) (report submitted by Rep. Caldwell, Select Committee on the Election of President and Vice-President).

The Member of Congress who introduced the Act added:
"The power to judge of the legality of the votes is a necessary consequent of the power to count. The existence of this power is of absolute necessity to the preservation of the Government. The interests of all the States in their relations to each other in the Federal Union demand that the ultimate tribunal to decide upon the election of President should be a constituent body, in which the States in their federal relationships and the people in their sovereign capacity should be represented." 18 Congo Rec. 30 (1886) (remarks of Rep. Caldwell).
"Under the Constitution who else could decide? Who is nearer to the State in determining a question of vital importance to the whole union of States than the constituent body upon whom the Constitution has devolved the duty to count the vote?" *Id.*, at 31.

The Act goes on to set out rules for the congressional determination of disputes about those votes. If, for example, a State submits a single slate of electors, Congress must count those votes unless both Houses agree that the votes "have not been ... regularly given." 3 U.S.C. § 15. If, as occurred in 1876, a State submits two slates of electors, then Congress must determine whether a slate has entered the safe harbor of § 5, in which case its votes will have "conclusive" effect. *Ibid.* If, as also occurred in 1876, there is controversy about "which of two or more of such State authorities ... is the lawful tribunal" authorized to appoint electors, then each House shall determine separately which votes are "supported by the decision of such State so authorized by its law." *Ibid.* If the two Houses of Congress agree, the votes they have approved will be counted. If they disagree, then "the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted." *Ibid.*

Given this detailed, comprehensive scheme for counting electoral votes, there is no reason to believe that federal law either foresees or requires resolution of such a political issue by this Court. Nor, for that matter, is there any reason to think that the Constitution's Framers would have reached a different conclusion. Madison, at least, believed that allowing the judiciary to choose the Presidential electors "was out of the question." Madison, July 25, 1787 (reprinted in 5 Elliot's Debates on the Federal Constitution 363 (2d ed. 1876)).

The decision by both the Constitution's Framers and the 1886 Congress to minimize this Court's role in resolving close federal Presidential elections is as wise as it is clear. However awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people's will far more accurately than does an unelected Court. And the people's will is what elections are about.

Moreover, Congress was fully aware of the danger that would arise should it ask judges, unarmed with appropriate legal standards, to resolve a hotly contested Presidential election contest. Just after the 1876 Presidential election, Florida, South Carolina, and Louisiana each sent two slates of electors to Washington. Without these States, Tilden, the Democrat, had 184 electoral votes, one short of the number required to win the Presidency. With those States, Hayes, his Republican opponent, would have had 185. In order to choose between the two slates of electors, Congress decided to appoint an electoral commission composed of five Senators, five Representatives, and five Supreme Court Justices. Initially the Commission was to be evenly divided between Republicans and Democrats, with Justice David Davis, an Independent, to possess the decisive vote. However, when at the last minute the Illinois Legislature elected Justice Davis to the United States Senate, the final position on the Commission was filled by Supreme Court Justice Joseph P. Bradley.

The Commission divided along partisan lines, and the responsibility to cast the deciding vote fell to Justice Bradley. He decided to accept the votes of the Republican electors, and thereby awarded the Presidency to Hayes.

Justice Bradley immediately became the subject of vociferous attacks. Bradley was accused of accepting bribes, of being captured by railroad interests, and of an eleventh-hour change in position after a night in which his house "was surrounded by the carriages" of Republican partisans and railroad officials. C. Woodward, Reunion and Reaction 159-160 (1966). Many years later, Professor Bickel concluded that Bradley was honest and impartial. He thought that "'the great question' for Bradley was, in fact, whether Congress was entitled to go behind election returns or had to accept them as certified by state authorities," an "issue of principle." The Least Dangerous Branch 185 (1962). Nonetheless, Bickel points out, the legal question upon which Justice Bradley's decision turned was not very important in the contemporaneous political context. He says that "in the circumstances the issue of principle was trivial, it was overwhelmed by all that hung in the balance, and it should not have been decisive." *Ibid.*

For present purposes, the relevance of this history lies in the fact that the participation in the work of the electoral commission by five Justices, including Justice Bradley, did not lend that process legitimacy. Nor did it assure the public that the process had worked fairly, guided by the law.

Rather, it simply embroiled Members of the Court in partisan conflict, thereby undermining respect for the judicial process. And the Congress that later enacted the Electoral Count Act knew it.

This history may help to explain why I think it not only legally wrong, but also most unfortunate, for the Court simply to have terminated the Florida recount. Those who caution judicial restraint in resolving political disputes have described the quintessential case for that restraint as a case marked, among other things, by the "strangeness of the issue," its "intractability to principled resolution," its "sheer momentousness, ... which tends to unbalance judicial judgment," and "the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from." *Id.*, at 184. Those characteristics mark this case.

At the same time, as I have said, the Court is not acting to vindicate a fundamental constitutional principle, such as the need to protect a basic human liberty. No other strong reason to act is present. Congressional statutes tend to obviate the need. And, above all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself. That confidence is a public treasure. It has been built slowly over many years, some of which were marked by a Civil War and the tragedy of segregation. It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself. We run no risk of returning to the days when a President (responding to this Court's efforts to protect the Cherokee Indians) might have said, "John Marshall has made his decision; now let him enforce it!" D. Loth, Chief Justice John Marshall and The Growth of the American Republic 365 (1948). But we do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation.

I fear that in order to bring this agonizingly long election process to a definitive conclusion, we have not adequately attended to that necessary "check upon our own exercise of power," "our own sense of self-restraint." *United States v. Butler*, 297 U.S. 1, 79 (1936) (Stone, J., dissenting). Justice Brandeis once said of the Court, "The most important thing we do is not doing." Bickel, *supra*, at 71. What it does today, the Court should have left undone. I would repair the damage as best we now can, by permitting the Florida recount to continue under uniform standards.

I respectfully dissent.

Planned Parenthood of Southeast Pennsylvania v. Casey, 505 U.S. 833 (1992)

Syllabus

At issue are five provisions of the Pennsylvania Abortion Control Act of 1982: § 3205, which requires that a woman seeking an abortion give her informed consent prior to the procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed; § 3206, which mandates the informed consent of one parent for a minor to obtain an abortion, but provides a judicial bypass procedure; § 3209, which commands that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband; § 3203, which defines a "medical emergency" that will excuse compliance with the foregoing requirements; and §§ 3207(b), 3214(a), and 3214(f), which impose certain reporting requirements on facilities providing abortion services. Before any of the provisions took effect, the petitioners, five abortion clinics and a physician representing himself and a class of doctors who provide abortion services, brought this suit seeking a declaratory judgment that each of the provisions was unconstitutional on its face, as well as injunctive relief. The District Court held all the provisions unconstitutional and permanently enjoined their enforcement. The Court of Appeals affirmed in part and reversed in part, striking down the husband notification provision but upholding the others.

Held: The judgment in No. 91-902 is affirmed; the judgment in No. 91-744 is affirmed in part and reversed in part, and the case is remanded.

947 F.2d 682: No. 91-902, affirmed; No. 91-744, affirmed in part, reversed in part, and remanded.

JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER delivered the opinion of the Court with respect to Parts I, II, and III, concluding that consideration of the fundamental constitutional question resolved by *Roe v. Wade*, 410 U.S. 113, principles of institutional integrity, and the rule of *stare decisis* require that *Roe*'s essential holding be retained and reaffirmed as to each of its three parts: (1) a recognition of a woman's right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State, whose previability interests are not strong enough to support an abortion prohibition or the imposition of substantial obstacles to the woman's effective right to elect the procedure; (2) a confirmation of the State's power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering a woman's life or health; and (3) the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

(a) A reexamination of the principles that define the woman's rights and the State's authority regarding abortions is required by the doubt this Court's subsequent decisions have cast upon the meaning and reach of *Roe*'s central holding, by the fact that THE CHIEF JUSTICE would overrule *Roe*, and by the necessity that state and federal courts and legislatures have adequate guidance on the subject…

(c) Application of the doctrine of *stare decisis* confirms that *Roe*'s essential holding should be reaffirmed. In reexamining that holding, the Court's judgment is informed by a series of prudential

and pragmatic considerations designed to test the consistency of overruling the holding with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling.

(d) Although *Roe* has engendered opposition, it has in no sense proven unworkable, representing as it does a simple limitation beyond which a state law is unenforceable.

(e) The *Roe* rule's limitation on state power could not be repudiated without serious inequity to people who, for two decades of economic and social developments, have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain costs of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.

(f) No evolution of legal principle has left *Roe*'s central rule a doctrinal anachronism discounted by society. If *Roe* is placed among the cases exemplified by *Griswold, supra*, it is clearly in no jeopardy, since subsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the liberty recognized in such cases. Similarly, if *Roe* is seen as stating a rule of personal autonomy and bodily integrity, akin to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection, this Court's post-*Roe* decisions accord with *Roe*'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims. See, *e. g.*, *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278. Finally, if *Roe* is classified as *sui generis*, there clearly has been no erosion of its central determination. It was expressly reaffirmed in *Akron v. Akron Center for Reproductive Health, Inc., 462* U.S. 416 (*Akron I*), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747; and, in *Webster v. Reproductive Health Services*, 492 U.S. 490, a majority either voted to reaffirm or declined to address the constitutional validity of *Roe*'s central holding. pp. 857-859.

(g) No change in *Roe*'s factual underpinning has left its central holding obsolete, and none supports an argument for its overruling. Although subsequent maternal health care advances allow for later abortions safe to the pregnant woman, and post-*Roe* neonatal care developments have advanced viability to a point somewhat earlier, these facts go only to the scheme of time limits on the realization of competing interests. Thus, any later divergences from the factual premises of *Roe* have no bearing on the validity of its central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on when viability occurs. Whenever it may occur, its attainment will continue to serve as the critical fact.

(h) A comparison between *Roe* and two decisional lines of comparable significance—the line identified with *Lochner v. New York*, 198 U.S. 45, and the line that began with *Plessy v. Ferguson*, 163 U.S. 537—confirms the result reached here. Those lines were overruled-by, respectively, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, and *Brown v. Board of Education*, 347 U.S. 483—on the basis of facts, or an understanding of facts, changed from those which furnished the claimed

justifications for the earlier constitutional resolutions. The overruling decisions were comprehensible to the Nation, and defensible, as the Court's responses to changed circumstances. In contrast, because neither the factual underpinnings of *Roe*'s central holding nor this Court's understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining *Roe* with any justification beyond a present doctrinal disposition to come out differently from the *Roe* Court. That is an inadequate basis for overruling a prior case.

(i) Overruling *Roe*'s central holding would not only reach an unjustifiable result under *stare decisis* principles, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. Where the Court acts to resolve the sort of unique, intensely divisive controversy reflected in *Roe*, its decision has a dimension not present in normal cases and is entitled to rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. Only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. Moreover, the country's loss of confidence in the Judiciary would be underscored by condemnation for the Court's failure to keep faith with those who support the decision at a cost to themselves. A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy and to the Nation's commitment to the rule of law…

JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III…

I

Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, *Roe v. Wade*, 410 U.S. 113 (1973), that definition of liberty is still questioned. Joining the respondents as *amicus curiae*, the United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe*. See Brief for Respondents 104-117; Brief for United States as *Amicus Curiae* 8.

At issue in these cases are five provisions of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989. 18 Pa. Cons. Stat. §§ 3203-3220 (1990). Relevant portions of the Act are set forth in the Appendix. *Infra*, at 902. The Act requires that a woman seeking an abortion give her informed consent prior to the abortion procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed. § 3205. For a minor to obtain an abortion, the Act requires the informed consent of one of her parents, but provides for a judicial bypass option if the minor does not wish to or cannot obtain a parent's consent. § 3206. Another provision of the Act requires that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion. § 3209. The Act exempts compliance with these three requirements in the event of a "medical emergency," which is defined in § 3203 of the Act. See §§ 3203, 3205(a), 3206(a), 3209(c). In addition to the above provisions regulating the performance of abortions, the Act

imposes certain reporting requirements on facilities that provide abortion services. §§ 3207(b), 3214(a), 3214(f).

Before any of these provisions took effect, the petitioners, who are five abortion clinics and one physician representing himself as well as a class of physicians who provide abortion services, brought this suit seeking declaratory and injunctive relief. Each provision was challenged as unconstitutional on its face. The District Court entered a preliminary injunction against the enforcement of the regulations, and, after a 3-day bench trial, held all the provisions at issue here unconstitutional, entering a permanent injunction against Pennsylvania's enforcement of them. 744 F. Supp. 1323 (ED Pa. 1990). The Court of Appeals for the Third Circuit affirmed in part and reversed in part, upholding all of the regulations except for the husband notification requirement. 947 F.2d 682 (1991). We granted certiorari. 502 U.S. 1056 (1992).

The Court of Appeals found it necessary to follow an elaborate course of reasoning even to identify the first premise to use to determine whether the statute enacted by Pennsylvania meets constitutional standards. See 947 F. 2d, at 687-698. And at oral argument in this Court, the attorney for the parties challenging the statute took the position that none of the enactments can be upheld without overruling *Roe v. Wade.* Tr. of Oral Arg. 5-6. We disagree with that analysis; but we acknowledge that our decisions after *Roe* cast doubt upon the meaning and reach of its holding. Further, THE CHIEF JUSTICE admits that he would overrule the central holding of *Roe* and adopt the rational relationship test as the sole criterion of constitutionality. See *post*, at 944, 966. State and federal courts as well as legislatures throughout the Union must have guidance as they seek to address this subject in conformance with the Constitution. Given these premises, we find it imperative to review once more the principles that define the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion procedures.

After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.

It must be stated at the outset and with clarity that *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each…

While we appreciate the weight of the arguments made on behalf of the State in the cases before us, arguments which in their ultimate formulation conclude that *Roe* should be overruled, the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis.* We turn now to that doctrine.

III

A

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, The Nature of the Judicial Process 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. See Powell, Stare Decisis and Judicial Restraint, 1991 Journal of Supreme Court History 13, 16. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.

Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of *stare decisis* is not an "inexorable command," and certainly it is not such in every constitutional case, see *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-411 (1932) (Brandeis, J., dissenting). See also *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (SOUTER, J., joined by KENNEDY, J., concurring); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability, *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965); whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, *e. g.*, *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924); whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, see *Patterson v. McLean Credit Union*, 491 U.S. 164, 173-174 (1989); or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification, *e. g.*, Burnet, supra, at 412 (Brandeis, J., dissenting).

So in this case we may enquire whether *Roe*'s central rule has been found unworkable; whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left *Roe*'s central rule a doctrinal anachronism discounted by society; and whether *Roe*'s premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.

1

Although *Roe* has engendered opposition, it has in no sense proven "unworkable," see *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546 (1985), representing as it does a simple limitation beyond which a state law is unenforceable. While *Roe* has, of course, required judicial assessment of state laws affecting the exercise of the choice guaranteed against government infringement, and although the need for such review will remain as a consequence of today's decision, the required determinations fall within judicial competence.

2

The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application. Since the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context, see *Payne v. Tennessee, supra,* at 828, where advance planning of great precision is most obviously a necessity, it is no cause for surprise that some would find no reliance worthy of consideration in support of *Roe*.

While neither respondents nor their *amici* in so many words deny that the abortion right invites some reliance prior to its actual exercise, one can readily imagine an argument stressing the dissimilarity of this case to one involving property or contract. Abortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the failure of conventional birth control, and except on the assumption that no intercourse would have occurred but for *Roe*'s holding, such behavior may appear to justify no reliance claim. Even if reliance could be claimed on that unrealistic assumption, the argument might run, any reliance interest would be *de minimis.* This argument would be premised on the hypothesis that reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.

To eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. See, *e. g.*, R. Petchesky, Abortion and Woman's Choice 109, 133, n. 7 (rev. ed. 1990). The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.

3

No evolution of legal principle has left *Roe*'s doctrinal footings weaker than they were in 1973. No development of constitutional law since the case was decided has implicitly or explicitly left *Roe* behind as a mere survivor of obsolete constitutional thinking.

It will be recognized, of course, that *Roe* stands at an intersection of two lines of decisions, but in whichever doctrinal category one reads the case, the result for present purposes will be the same. The *Roe* Court itself placed its holding in the succession of cases most prominently exemplified by *Griswold v. Connecticut*, 381 U.S. 479 (1965). See *Roe*, 410 U.S., at 152-153. When it is so seen, *Roe* is clearly in no jeopardy, since subsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the scope of recognized protection accorded to the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child. See, *e.g., Carey v. Population Services International*, 431 U.S. 678 (1977); *Moore v. East Cleveland*, 431 U.S. 494 (1977).

Roe, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection. If so, our cases since *Roe* accord with *Roe*'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims. *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278 (1990); cf., *e.g., Riggins v. Nevada*, 504 U.S. 127, 135 (1992); *Washington v. Harper*, 494 U.S. 210 (1990); see also, *e.g., Rochin v. California*, 342 U.S. 165 (1952); *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905).

Finally, one could classify *Roe* as *sui generis*. If the case is so viewed, then there clearly has been no erosion of its central determination. The original holding resting on the concurrence of seven Members of the Court in 1973 was expressly affirmed by a majority of six in 1983, see *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 *(Akron I)*, and by a majority of five in 1986, see *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, expressing adherence to the constitutional ruling despite legislative efforts in some States to test its limits. More recently, in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), although two of the present authors questioned the trimester framework in a way consistent with our judgment today, see *id.*, at 518 (REHNQUIST, C. J., joined by WHITE and KENNEDY, JJ.); *id.*, at 529 (O'CONNOR, J., concurring in part and concurring in judgment), a majority of the Court either decided to reaffirm or declined to address the constitutional validity of the central holding of *Roe*. See *Webster*, 492 U.S., at 521 (REHNQUIST, C. J., joined by WHITE and KENNEDY, JJ.); *id.*, at 525-526 (O'CONNOR, J., concurring in part and concurring in judgment); *id.*, at 537, 553 (BLACKMUN, J., joined by Brennan and Marshall, JJ., concurring in part and dissenting in part); *id.*, at 561-563 (STEVENS, J., concurring in part and dissenting in part).

Nor will courts building upon *Roe* be likely to hand down erroneous decisions as a consequence. Even on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman's liberty. The latter aspect of the decision fits comfortably within the framework of the Court's prior decisions, including *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Griswold, supra*; *Loving v. Virginia*, 388 U.S. 1 (1967); and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the holdings of which are "not a series of isolated points," but mark a "rational continuum." *Poe v. Ullman*, 367 U.S., at 543 (Harlan, J., dissenting). As we described in *Carey v. Population Services International, supra*, the liberty which encompasses those decisions "includes 'the interest in independence in making certain kinds of important decisions.' While the outer limits of this aspect of [protected liberty] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education.'" 431 U.S., at 684-685 (citations omitted).

The soundness of this prong of the *Roe* analysis is apparent from a consideration of the alternative. If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example. Yet *Roe* has been sensibly relied upon to counter any such suggestions. *E.g., Arnold v. Board of Education of Escambia County, Ala.*, 880 F.2d 305, 311 (CA11 1989)

(relying upon *Roe* and concluding that government officials violate the Constitution by coercing a minor to have an abortion); *Avery v. County of Burke*, 660 F.2d 111, 115 (CA4 1981) (county agency inducing teenage girl to undergo unwanted sterilization on the basis of misrepresentation that she had sickle cell trait); see also *In re Quinlan*, 70 N. J. 10, 355 A. 2d 647 (relying on *Roe* in finding a right to terminate medical treatment), cert. denied *sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976)). In any event, because *Roe*'s scope is confined by the fact of its concern with postconception potential life, a concern otherwise likely to be implicated only by some forms of contraception protected independently under *Griswold* and later cases, any error in *Roe* is unlikely to have serious ramifications in future cases.

4

We have seen how time has overtaken some of *Roe*'s factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973, see *Akron I*, *supra*, at 429, n. 11, and advances in neonatal care have advanced viability to a point somewhat earlier. Compare *Roe*, 410 U.S., at 160, with *Webster*, *supra*, at 515-516 (opinion of REHNQUIST, C. J.); see *Akron I*, 462 U.S., at 457, and n. 5 (O'CONNOR, J., dissenting). But these facts go only to the scheme of time limits on the realization of competing interests, and the divergences from the factual premises of 1973 have no bearing on the validity of *Roe*'s central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future. Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided; which is to say that no change in *Roe*'s factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.

5

The sum of the precedential enquiry to this point shows *Roe*'s underpinnings unweakened in any way affecting its central holding. While it has engendered disapproval, it has not been unworkable. An entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left *Roe*'s central holding a doctrinal remnant; *Roe* portends no developments at odds with other precedent for the analysis of personal liberty; and no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips. Within the bounds of normal *stare decisis* analysis, then, and subject to the considerations on which it customarily turns, the stronger argument is for affirming *Roe*'s central holding, with whatever degree of personal reluctance any of us may have, not for overruling it.

B

In a less significant case, *stare decisis* analysis could, and would, stop at the point we have reached. But the sustained and widespread debate *Roe* has provoked calls for some comparison between

that case and others of comparable dimension that have responded to national controversies and taken on the impress of the controversies addressed. Only two such decisional lines from the past century present themselves for examination, and in each instance the result reached by the Court accorded with the principles we apply today.

The first example is that line of cases identified with *Lochner v. New York*, 198 U.S. 45 (1905), which imposed substantive limitations on legislation limiting economic autonomy in favor of health and welfare regulation, adopting, in Justice Holmes's view, the theory of laissez-faire. *Id.*, at 75 (dissenting opinion). The *Lochner* decisions were exemplified by *Adkins v. Children's Hospital of District of Columbia*, 261 U.S. 525 (1923), in which this Court held it to be an infringement of constitutionally protected liberty of contract to require the employers of adult women to satisfy minimum wage standards. Fourteen years later, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), signaled the demise of *Lochner* by overruling *Adkins*. In the meantime, the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare. See *West Coast Hotel Co., supra*, at 399. As Justice Jackson wrote of the constitutional crisis of 1937 shortly before he came on the bench: "The older world of *laissez faire* was recognized everywhere outside the Court to be dead." The Struggle for Judicial Supremacy 85 (1941). The facts upon which the earlier case had premised a constitutional resolution of social controversy had proven to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle that *West Coast Hotel* announced. Of course, it was true that the Court lost something by its misperception, or its lack of prescience, and the Court-packing crisis only magnified the loss; but the clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law.

The second comparison that 20th century history invites is with the cases employing the separate-but-equal rule for applying the Fourteenth Amendment's equal protection guarantee. They began with *Plessy v. Ferguson*, 163 U.S. 537 (1896), holding that legislatively mandated racial segregation in public transportation works no denial of equal protection, rejecting the argument that racial separation enforced by the legal machinery of American society treats the black race as inferior. The *Plessy* Court considered "the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.*, at 551. Whether, as a matter of historical fact, the Justices in the *Plessy* majority believed this or not, see *id.*, at 557, 562 (Harlan, J., dissenting), this understanding of the implication of segregation was the stated justification for the Court's opinion. But this understanding of the facts and the rule it was stated to justify were repudiated in *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*). As one commentator observed, the question before the Court in *Brown* was "whether discrimination inheres in that segregation which is imposed by law in the twentieth century in certain specific states in the American Union. And that question has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid." Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 227 (1960).

The Court in *Brown* addressed these facts of life by observing that whatever may have been the understanding in *Plessy*'s time of the power of segregation to stigmatize those who were segregated with a "badge of inferiority," it was clear by 1954 that legally sanctioned segregation had just such an effect, to the point that racially separate public educational facilities were deemed inherently unequal. 347 U.S., at 494-495. Society's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896. While we think *Plessy* was wrong the day it was decided, see *Plessy*, *supra*, at 552-564 (Harlan, J., dissenting), we must also recognize that the *Plessy* Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required.

West Coast Hotel and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. Each case was comprehensible as the Court's response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive. As the decisions were thus comprehensible they were also defensible, not merely as the victories of one doctrinal school over another by dint of numbers (victories though they were), but as applications of constitutional principle to facts as they had not been seen by the Court before. In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty.

Because the cases before us present no such occasion it could be seen as no such response. Because neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973. To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided. See, *e.g.*, *Mitchell v. W T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve"); *Mapp v. Ohio*, 367 U.S. 643, 677 (1961) (Harlan, J., dissenting).

C

The examination of the conditions justifying the repudiation of *Adkins* by *West Coast Hotel* and *Plessy* by *Brown* is enough to suggest the terrible price that would have been paid if the Court had not overruled as it did. In the present cases, however, as our analysis to this point makes clear, the terrible price would be paid for overruling. Our analysis would not be complete, however, without explaining why overruling *Roe*'s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. To understand why this would be so it is necessary to understand the source of this Court's authority, the

conditions necessary for its preservation, and its relationship to the country's understanding of itself as a constitutional Republic.

The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.

The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.

The need for principled action to be perceived as such is implicated to some degree whenever this, or any other appellate court, overrules a prior case. This is not to say, of course, that this Court cannot give a perfectly satisfactory explanation in most cases. People understand that some of the Constitution's language is hard to fathom and that the Court's Justices are sometimes able to perceive significant facts or to understand principles of law that eluded their predecessors and that justify departures from existing decisions. However upsetting it may be to those most directly affected when one judicially derived rule replaces another, the country can accept some correction of error without necessarily questioning the legitimacy of the Court.

In two circumstances, however, the Court would almost certainly fail to receive the benefit of the doubt in overruling prior cases. There is, first, a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong. There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.

That first circumstance can be described as hypothetical; the second is to the point here and now. Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its

decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe.* But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. Some of those efforts may be mere unprincipled emotional reactions; others may proceed from principles worthy of profound respect. But whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question. Cf. *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) (*Brown II*) ("[I]t should go without saying that the vitality of thee] constitutional principles [announced in *Brown I*,] cannot be allowed to yield simply because of disagreement with them").

The country's loss of confidence in the Judiciary would be underscored by an equally certain and equally reasonable condemnation for another failing in overruling unnecessarily and under pressure. Some cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or to force its reversal. The price may be criticism or ostracism, or it may be violence. An extra price will be paid by those who themselves disapprove of the decision's results when viewed outside of constitutional terms, but who nevertheless struggle to accept it, because they respect the rule of law. To all those who will be so tested by following, the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing. The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete. From the obligation of this promise this Court cannot and should not assume any exemption when duty requires it to decide a case in conformance with the Constitution. A willing breach of it would be nothing less than a breach of faith, and no Court that broke its faith with the people could sensibly expect credit for principle in the decision by which it did that.

It is true that diminished legitimacy may be restored, but only slowly. Unlike the political branches, a Court thus weakened could not seek to regain its position with a new mandate from the voters, and even if the Court could somehow go to the polls, the loss of its principled character could not be retrieved by the casting of so many votes. Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.

The Court's duty in the present cases is clear. In 1973, it confronted the already-divisive issue of governmental power to limit personal choice to undergo abortion, for which it provided a new resolution based on the due process guaranteed by the Fourteenth Amendment. Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today…

Foster v. Love, 522 U.S. 67 (1997)

Syllabus

The Elections Clause of the Constitution, Art. I, § 4, cl. 1, invests the States with responsibility for the mechanics of congressional elections, see *Storer v. Brown*, 415 U.S. 724, 730, but grants Congress "the power to override state regulations" by establishing uniform rules for federal elections, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-833. One such congressional rule sets the date of the biennial election for the offices of United States Senator, 2 U.S.C. § 1, and Representative, § 7, and mandates holding all congressional and Presidential elections on a single November day, 2 U.S.C. §§ 1,7; 3 U.S.C. § 1. Since 1978, Louisiana has held in October of a federal election year an "open primary" for congressional offices, in which all candidates, regardless of party, appear on the same ballot and all voters are entitled to vote. If a candidate for a given office receives a majority at the open primary, the candidate "is elected" and no further act is done on federal election day to fill that office. Since this system went into effect, over 80% of the State's contested congressional elections have ended as a matter of law with the open primary. Respondents, Louisiana voters, challenged this primary as a violation of federal law. Finding no conflict between the state and federal statutes, the District Court granted summary judgment to petitioners, the State's Governor and secretary of state. The Fifth Circuit reversed.

Held: Louisiana's statute conflicts with federal law to the extent that it is applied to select a congressional candidate in October.

(a) The issue here is a narrow one turning entirely on the meaning of the state and federal statutes. There is no colorable argument that § 7 goes beyond the ample limits of the Elections Clause's grant of authority to Congress. In speaking of "the election" of a Senator or Representative, the federal statutes plainly refer to the combined actions of voters and officials meant to make the final selection of an officeholder; and by establishing "the day" on which these actions must take place, the statutes simply regulate the time of the election, a matter on which the Constitution explicitly gives Congress the final say.

(b) A contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day, with no act in law or in fact to take place on the date chosen by Congress, clearly violates § 7. Louisiana's claim that its system concerns only the manner, not the time, of an election is at odds with the State's statute, which addresses timing quite as obviously as § 7 does. A federal election takes place in Louisiana before federal election day whenever a candidate gets a majority in the open primary.

(c) This Court's judgment is buttressed by the fact that Louisiana's open primary has tended to foster both evils identified by Congress as reasons for passing the federal statute: the distortion of the voting process when the results of an early federal election in one State can influence later voting in other States, and the burden on citizens forced to turn out on two different election days to make final selections of federal officers in Presidential election years.

90 F.3d 1026, affirmed.

JUSTICE SOUTER delivered the opinion of the Court.

Under 2 U.S.C. §§ 1 and 7, the Tuesday after the first Monday in November in an even-numbered year "is established" as the date for federal congressional elections. Louisiana's "open primary" statute provides an opportunity to fill the offices of United States Senator and Representative during the previous month, without any action to be taken on federal election day. The issue before us is whether such an ostensible election runs afoul of the federal statute. We hold that it does.

I

The Elections Clause of the Constitution, Art. I, § 4, cl. 1, provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." The Clause is a default provision; it invests the States with responsibility for the mechanics of congressional elections, see *Storer v. Brown*, 415 U.S. 724, 730 (1974), but only so far as Congress declines to preempt state legislative choices, see *Roudebush v. Hartke,* 405 U.S. 15, 24 (1972) ("Unless Congress acts, Art. I, § 4, empowers the States to regulate"). Thus it is well settled that the Elections Clause grants Congress "the power to override state regulations" by establishing uniform rules for federal elections, binding on the States. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-833 (1995). "[T]he regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative." *Ex parte Siebold, 100* U.S. 371, 384 (1880).

One congressional rule adopted under the Elections Clause (and its counterpart for the Executive Branch, Art. II, § 1, cl. 3) sets the date of the biennial election for federal offices. See 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1. Title 2 U.S.C. § 7 was originally enacted in 1872, and now provides that "[t]he Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter." This provision, along with 2 U.S.C. § 1 (setting the same rule for electing Senators under the Seventeenth Amendment) and 3 U.S.C. § 1 (doing the same for selecting Presidential electors), mandates holding all elections for Congress and the Presidency on a single day throughout the Union.

In 1975, Louisiana adopted a new statutory scheme for electing United States Senators and Representatives. In October of a federal election year, the State holds what is popularly known as an "open primary" for congressional offices, La. Rev. Stat. Ann. § 18:402(B)(1) (West Supp. 1997), in which all candidates, regardless of party, appear on the same ballot, and all voters, with like disregard of party, are entitled to vote, § 18:401(B) (West 1979). If no candidate for a given office receives a majority, the State holds a run-off (dubbed a "general election") between the top two votegetters the following month on federal election day. § 18:481 (West 1979). But if one such candidate does get a majority in October, that candidate "is elected," § 18:511(A) (West Supp. 1997), and no further act is done on federal election day to fill the office in question. Since this system went into effect in 1978, over 80% of the contested congressional elections in Louisiana have ended as a matter of law with the open primary.

Respondents are Louisiana voters who sued petitioners, the State's Governor and secretary of state, challenging the open primary as a violation of federal law. The District Court granted summary judgment to petitioners, finding no conflict between the state and federal statutes, whereas a divided panel of the Fifth Circuit reversed, concluding that Louisiana's system squarely "conflicts with the federal statutes that establish a uniform federal election day." 90 F.3d 1026, 1031 (1996). We granted certiorari, 520 U.S. 1114 (1997), and now affirm.

II

The Fifth Circuit's conception of the issue here as a narrow one turning entirely on the meaning of the state and federal statutes is exactly right. For all of petitioners' invocations of state sovereignty, there is no colorable argument that § 7 goes beyond the ample limits of the Elections Clause's grant of authority to Congress. When the federal statutes speak of "the election" of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make a final selection of an officeholder (subject only to the possibility of a later run-off, see 2 U.S.C. § 8).3 See N. Webster, An American Dictionary of the English Language 433 (C. Goodrich & N. Porter eds. 1869) (defining "election" as "[t]he act of choosing a person to fill an office"). By establishing a particular day as "the day" on which these actions must take place, the statutes simply regulate the time of the election, a matter on which the Constitution explicitly gives Congress the final say.

While true that there is room for argument about just what may constitute the final act of selection within the meaning of the law, our decision does not turn on any nicety in isolating precisely what acts a State must cause to be done on federal election day (and not before it) in order to satisfy the statute. Without paring the term "election" in § 7 down to the definitional bone, it is enough to resolve this case to say that a contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day, with no act in law or in fact to take place on the date chosen by Congress, clearly violates § 7.

Petitioners try to save the Louisiana system by arguing that, because Louisiana law provides for a "general election" on federal election day in those unusual instances when one is needed, the open primary system concerns only the "manner" of electing federal officials, not the "time" at which the elections will take place. Petitioners say that "[a]lthough Congress is authorized by the Constitution to alter or change the time, place and manner the States have chosen to conduct federal elections[,] in enacting 2 U.S.C. §§ 1 and 7, Congress sought only to alter the time in which elections were conducted, not their manner. Conversely, the open elections system [changed only the manner by which Louisiana chooses its federal officers; it] did not change the timing of the general election for Congress." Brief for Petitioners 21.

Even if the distinction mattered here, the State's attempt to draw this time-manner line is merely wordplay, and wordplay just as much at odds with the Louisiana statute as that law is at odds with § 7. The State's provision for an October election addresses timing quite as obviously as § 7 does. State law straightforwardly provides that "[a] candidate who receives a majority of the votes cast for an office in a primary election is elected." La. Rev. Stat. Ann. § 18:511(A) (West Supp. 1997). Because the candidate said to be "elected" has been selected by the voters from among all eligible officeseekers, there is no reason to suspect that the Louisiana Legislature intended some eccentric

meaning for the phrase "is elected." After a declaration that a candidate received a majority in the open primary, state law requires no further act by anyone to seal the election; the election has already occurred. Thus, contrary to petitioners' imaginative characterization of the state statute, the open primary does purport to affect the timing of federal elections: a federal election takes place prior to federal election day whenever a candidate gets a majority in the open primary. As the attorney general of Louisiana conceded at oral argument, "Louisiana's system certainly allows for the election of a candidate in October, as opposed to actually electing on Federal Election Day." Tr. of Oral Arg. 6.

III

While the conclusion that Louisiana's open primary system conflicts with 2 U.S.C. § 7 does not depend on discerning the intent behind the federal statute, our judgment is buttressed by an appreciation of Congress's object "to remedy more than one evil arising from the election of members of Congress occurring at different times in the different States." *Ex parte Yarbrough*, 110 U.S. 651, 661 (1884). As the sponsor of the original bill put it, Congress was concerned both with the distortion of the voting process threatened when the results of an early federal election in one State can influence later voting in other States, and with the burden on citizens forced to turn out on two different election days to make final selections of federal officers in Presidential election years:

"Unless we do fix some time at which, as a rule, Representatives shall be elected, it will be in the power of each State to fix upon a different day, and we may have a canvass going on all over the Union at different times. It gives some States undue advantage .... I can remember, in 1840, when the news from Pennsylvania and other States that held their elections prior to the presidential election settled the presidential election as effectually as it was afterward done .... I agree ... that Indiana, Ohio, and Pennsylvania, by voting in October, have an influence. But what I contend is that that is an undue advantage, that it is a wrong, and that it is a wrong also to the people of those States, that once in four years they shall be put to the trouble of having a double election." Congo Globe, 42d Cong., 2d Sess., 141 (1871) (remarks of Rep. Butler).

See also *Busbee v. Smith*, 549 F. Supp. 494, 524 (DC 1982) (recounting the purposes of § 7), aff'd, 459 U.S. 1166 (1983). The Louisiana open primary has tended to foster both evils, having had the effect of conclusively electing more than 80% of the State's Senators and Representatives before the election day elsewhere, and, in Presidential election years, having forced voters to turn out for two potentially conclusive federal elections.

IV

When Louisiana's statute is applied to select from among congressional candidates in October, it conflicts with federal law and to that extent is void. The judgment below is affirmed.

It is so ordered.