Some initial questions on constitutional cases involving democratic politics before the deluge of *Bush v Gore*:¹

When judges see a "blanket" political primary, in which voters can pick and choose, office by office, which party's primary they want to vote in—the Republican primary for governor, the Democratic primary for Secretary of State, the Libertarian primary for treasurer—do judges see a crazyquilt process that threatens to undermine the integrity of political parties and democracy itself?² Or do judges view such novel political structures as stages in an ongoing trial-and-error process, a "progressive inclusion of the entire electorate in the process of selecting their public officials"³—starting with the early twentieth-century requirement that party candidates be selected through democratic election in the first place—in an effort, whether sensible or not, to encourage voter participation and to make government more responsive?

When judges confront "fusion candidacies"—in which major and minor parties are permitted jointly to endorse the same candidate—do judges see the specter of "the destabilizing effects of party splintering and excessive factionalism"⁴ Or do judges see a vibrant, robustly competitive political sphere, akin to the economic sphere, in which third parties, like competing producers, exert healthy pressure on major parties to take neglected ideas and interests into account?⁵

When judges review the exclusion of ballot-qualified candidates from publicly sponsored campaign debates, do they immediately spy

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¹ 121 S Ct 525 (2000) (per curiam).
² *California Democratic Party v Jones*, 120 S Ct 2402, 2410 (2000) ("[A] single election in which the party nominee is selected by nonparty members could be enough to destroy the party.").
³ *Id* at 2421 (Stevens dissenting).
⁵ *Id* at 381–82 (Stevens dissenting) (stating that "the entire electorate . . . will benefit from robust competition in ideas and governmental policies").
“the prospect of cacophony” and therefore easily defer to judgments of others as to which candidates should be included and excluded? Or instead of such potential disorder, do judges see sufficient value in more open debates as to demand clear, objective standards, specified in advance, before public authorities can make judgments about the inclusion and exclusion of potential candidates?

All these are recent, defining moments in the current Supreme Court’s confrontation with issues of democratic politics. In each, the Supreme Court was also divided—twice by 6-3, once by 7-2. But in each case, the five justices who effectively ended *Bush v Gore*, the lawsuit, and hence Bush v Gore, the campaign, were in the majority. In each case, the Court overturned a federal court of appeals, including an en banc court of appeals, that had analyzed the issues differently. Among the dissenting voices, the one constant, perhaps surprisingly, was that Justice Stevens was the chief spokesman and Justice Ginsburg his constant companion.

*Bush v Gore* is the most dramatic moment in a constitutionalization of the democratic process that has been afoot for nearly forty years, ever since *Baker v Carr* dramatically lowered the “political question” barrier to judicial oversight of politics. More recently, that constitutionalization has increased in pace, as issues like the status of political parties, the regulation of campaign finance, the role of race and partisanship in drawing election districts—and now, the counting of individual ballots—have been transformed into grist for the constitutional mill. As part of my own effort to explore this emerging constitutional law of democratic politics as a systematic whole, I want to assess *Bush v Gore* in this larger context. And I want to do so less in terms of doctrinal analysis (there will be time enough for that) or partisan politics (was the decision an act of political will or of legal judgment?) and more as a matter of what we might call judicial culture.

By judicial culture, I mean the empirical assumptions, historical interpretations, and normative ideals of democracy that seem to inform and influence the current constitutional law of democracy. Suffice it to say, when judges are as divided among themselves as in the cases I have described—within the Supreme Court as well as between that Court and the lower courts—it might be useful to assume that the formal sources of legal judgment are sufficiently open-textured as not to compel directly a uniquely determinate conclusion. At that point, the implicit understandings of democracy with which all judges neces-

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7 Id at 683–95 (Stevens dissenting).
8 369 US 186 (1962).
sarily work—whether American democracy is fragile or secure, whether it functioned better or worse at some (partially hypothesized) moment in the past, whether democracy means order and structure or chaos and tumult—have the greatest latitude to operate. Unlike *Bush v Gore*, the cases I describe have no obvious partisan consequences in terms of the fortunes of the Democratic or Republican Parties or their candidates. Yet it is of considerable moment, I believe, that certain justices consistently gravitate toward the same side of these cases—the five-member Bush majority that terminated the Florida recount on one side, Justices Stevens and Ginsburg on the other. Just as interesting is that Justice Souter, who occupied a sort of middle ground in *Bush v Gore*, is the justice sometimes in dissent, sometimes in the majority, in these signal cases. Whatever role analytical considerations and partisan politics might have played in *Bush v Gore*, there is another dimension—the cultural one—potentially at work. By looking for larger patterns in the Court’s recent democracy cases, I want to explore that cultural terrain.

I. IMAGES OF DEMOCRACY AND *BUSH V GORE*

At least two key moments, one concrete, the other envisioned, can be seen as tests of the *Bush v Gore* Court’s cultural vision of democratic politics. The former is the image of individual, elected, three-member county canvassing boards voting on individual ballots under diverse standards. I will say nothing about that here. For it is the envisioned moment, far more than the concrete one, that offered the most dramatic test of how the justices (how we all) imagine democracy. Judicial responses to this anticipated moment, I believe, get at the deepest and most essential foundations of not just *Bush v Gore*, but at the current Court’s jurisprudence of democratic politics more generally. That moment was the prospect of the result had the Court not terminated the election dispute near midnight on December twelfth. That hour, of course, was purportedly the final moment for Florida’s electoral votes to find a congressional “safe harbor,” according to the Electoral Count Act of 1887—although it should be noted, but appears not to have been, that from the time this 1887 Act was adopted, serious constitutional questions have existed as to whether Congress has any power at all to threaten state electors, particularly a single slate of electors, with loss of an immunity that Congress might have no power to violate in any event.

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10 For example, seven dissenting members of the House committee that reported the Act
Had seven justices agreed, not just that a recount had to be conducted under constitutionally-required standards, but also further agreed to a remand that permitted such a process, the specter would have arisen of the ultimate resolution emerging from a political struggle within Congress over a possibly competing slate of Florida electors. This was a prospect of course, not a certainty (perhaps the Florida Supreme Court, already divided four to three beforehand, would not have pushed to the next stage, or perhaps a constitutional statewide recount process would have confirmed the two rounds of machine counts and the contest would have dissolved). But the possibility was palpable: congressional resolution would certainly have loomed, much as Congress was the ultimate dispute resolver in the 1876 Hayes-Tilden election or in the internal civil war in Rhode Island that lay behind *Luther v Borden.* Congress, self-consciously deliberating in as nonpartisan a context as could be selected, a decade after Hayes-

Electoral Count Act, 49th Cong, 2d Sess, in 18 Cong Rec H 47 (Dec 8, 1886) (Rep Dibble).

11 48 US (7 How) 1 (1849). Although the case is well known for its holding that "the guarantee of republican government" clause, US Const Art IV, § 4, is not justiciable, less well appreciated is that the context involved the state's declaration of martial law, competing governments claiming legitimate title to rule in Rhode Island, efforts at armed rebellion, convictions for treason, and possible national military intervention. The Dorr Rebellion also became an issue in the 1844 presidential elections. With all these political modes of recourse open and Supreme Court intervention closed, the historical record suggests that the conflict was well-resolved even absent Supreme Court intervention. For the leading histories of the Dorr Rebellion, see George M. Dennison, *The Dorr War: Republicanism on Trial, 1831-1861* (Kentucky 1976); Arthur May Mowry, *The Dorr War or The Constitutional Struggle in Rhode Island* (Preston & Rounds 1901). For the Supreme Court's role, see Carl B. Swisher, *5 History of the Supreme Court of the United States: The Taney Period 1836-64* 515–27 (MacMillan 1974).

12 See, for example, Counting of Electoral Votes, 49th Cong, 1st Sess, in 17 Cong Rec S 815 (Jan 21, 1886) (Sen Sherman):

[The proposed Electoral Count Act] comes before us again at the beginning of an administration, when no party advantage can be derived from our decision, when the Senate is clearly on one side in party politics and the House clearly is on the other; and now, if ever, this matter ought to be settled upon some basis of principle.
Tilden with no disputed election on the horizon, chose exactly this political solution for disputed presidential elections in the Electoral Count Act, specifically rejecting the alternative of United States Supreme Court resolution.\(^{13}\)

When a justice stares at this kind of political resolution of a disputed presidential election, does that justice see the specter of a "constitutional trainwreck?"\(^{14}\) A dangerous mechanism to be avoided at nearly all costs, a mechanism that conjures up images of disorder, turbulence, political instability, indeed, "crisis?"\(^{15}\) Does the very novelty of the Electoral Count Act process, one not invoked for over a hundred years, increase the judicial sense of a system racing to the brink, a race from which judicial rescue is desperately needed?\(^{16}\) Or does a jus-

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\(^{13}\) 3 USC § 15 (1994) provides the mechanism for a congressional resolution, with ultimate default rules, in the case of a state presenting competing slates of electors. In explaining and justifying this political method of resolution, Senator Sherman, one of the primary speakers in support of the proposed statute, asserted that the method of resolving a disputed presidential election was "a question that is more dangerous to the future of this country than probably any other." Counting of Electoral Votes, 17 Cong Rec at S 815 (cited in note 12). In justifying congressional, rather than Supreme Court, resolution, he went on to argue:

Another plan which has been proposed in the debates at different times, and I think also in the constitutional convention, was to allow questions of this kind to be certified at once to the Supreme Court for its decisions in case of a division between the two Houses. If the House should be one way and the Senate the other, then it was proposed to let the case be referred directly to the prompt and summary decision of the Supreme Court. But there is a feeling in this country that we ought not to mingle our great judicial tribunal with political questions, and therefore this proposition has not met with much favor. It would be a very grave fault indeed and a very serious objection to refer a political question in which the people of the country were aroused, about which their feelings were excited, to this great tribunal, which after all has to sit upon the life and property of all the people of the United States. It would tend to bring that court into public odium of one or the other of the two great parties. Therefore that plan may probably be rejected as an unwise provision. I believe, however, it is the provision made in other countries.

Id at S 817–18.

\(^{14}\) For the suggestion that the Supreme Court's decision "might well have averted chaos," Cass R. Sunstein, *Order Without Law*, 68 U Chi L Rev 757, 768 (2001); for the view that the Court's decision avoided a "trainwreck," see Richard A. Posner, *Bush v Gore: Prolegomenon to an Assessment*, 68 U Chi L Rev 719 (2001); for an effort to demonstrate that "[b]eyond that point of no return were the furies of civil commotion, chaos, and grave dangers—no longer imminent, but real," involving reports of the political actions that would have allegedly followed in Florida had the Supreme Court not acted, see Gary C. Leedes, *The Presidential Election Case: Remembering Safe Harbor Day*, 35 U Rich L Rev (forthcoming 2001).

\(^{15}\) For academic invocation of the language of "constitutional crisis" to describe the political rather than the judicial resolution of the disputed election, see Cass R. Sunstein, *Order Without Law*, 68 U Chi L Rev 757, 758 (2001); Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 S Ct Rev 1, 45 ("I cannot see the case for precipitating a political and constitutional crisis merely in order to fuss with a statistical tie that can never be untied.").

\(^{16}\) In a post *Bush v Gore* speech, Chief Justice William Rehnquist remarked on the temptation of the Court to view itself this way: as he put it, the argument in favor of the Supreme
tice see other disputed presidential elections of 1800 and 1876—elections freighted with profound substantive conflicts genuinely tearing the country apart, unlike in 2000—and yet elections in which political institutions adequately resolved the dispute. Were these earlier moments “constitutional trainwrecks” or, more to the point, would the constitutional order have been better off had they been resolved through Supreme Court decisions? A deep historical sensibility about the elections of 1800 or 1876 is not needed to ask such questions. For we can also ask whether the recent presidential impeachment process was a “constitutional trainwreck” or, again more to the point, whether the constitutional order would have been improved had the Supreme Court determined for the country what constituted “high Crimes and Misdemeanors” within the meaning of the Constitution?

The Electoral Count Act sought to codify, modify, and regularize the limited past political practices for resolving disputed presidential elections. As an alternative to the images of instability, crisis, and disorder, would the justices see in this Act the genius of a democratic order, one that had filled a gap in its own original design by creating a rule-of-law process for resolving even one of the most incendiary issues any system can confront, the disputed choice of its chief executive? If the Electoral Count Act opts for congressional resolution of such disputes, does a justice see partisan politics as a politically representative and politically accountable means of resolution—a democratic system working out its own imperfections in a potentially self-correcting way? If political resolution of election disputes appears unseemly, it is, warts and all, the conventional remedy for the other elective national offices. The Constitution makes both the United States House and Senate “the Judge”—note the intriguing choice of words—“of the Elections, Returns, and Qualifications of its own members.” The same is true for many state legislatures. Moreover,
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according to the Supreme Court of a previous era, in a close Senate election states are free to conduct manual recounts, with the Senate then free to use or reject those recounted figures in forming its own independent judgment. 21 (Interestingly, the Senate has at times exercised this power by engaging in its own manual recounts—including selective recounts of only that small subset of ballots actually in dispute, as well as recounts that override state law in order to ensure that the “intent of the voter” has been honored. 22) But the Electoral College is not the kind of institution that could be made the judge of its own disputed elections, for the Electoral College has no continuous, institutional existence at all. Intentionally designed to be an evanescent body, which comes into being for a single and transitory function, immediately dissolves, and never meets collectively in a single place, the Electoral College simply could not play the same role the House and Senate do in resolving their own disputed elections. The long-standing 23 historical question has therefore been what alternative institution should play this role. In the Electoral Count Act, Congress chose the political process that might be thought of as the closest surrogate for disputed presidential elections to the constitutional structure for disputed House and Senate elections.

We must keep in mind—whether the justices did or not—that this political process, if not curtailed by the Court, would have taken place in a world in which the Court had already intervened to regulate the manner of the recount. That is, any recount totals presented to Congress would have resulted from a process overseen by the Supreme Court, one in which consistent, uniform, clearly specified vote-counting standards would have been required at the state level, including the revision of results from earlier recounts not completed under such constitutionally-required rules. We should also keep in mind—as the justices surely did—that any such process very likely would not have been completed by December 18, the day congres-

islature is vested in the applicable house, as each house, pursuant to s. 2, Art III of the State Constitution, is the sole judge of the qualifications, elections, and returns of its members.

21 Roudebush v Hartke, 405 US 15, 26 (1972) (finding that Art I, § 5 of the Constitution does not prohibit a state recount in a Senate election). Note that this full process required nearly two years after election day before Hartke, the Senate’s choice, was finally seated officially.


23 Congressional debate over the Electoral Count Act took note of the recurrent congressional efforts to create a mechanism for resolving disputed presidential elections. See, for example, Electoral Count Act, 18 Cong Rec at H 52 (cited in note 10) (“I will now remind the House that this question has been discussed since 1800. It has been discussed repeatedly. Repeatedly attempts have been made to legislate.”).
sionally assigned for the electors to vote. In envisioning this kind of political, not judicial, process as the dénouement, what exactly did the Court, self-consciously or viscerally imagine?

II. IMAGES OF DEMOCRACY BEFORE BUSH V GORE

A. In 1996, by a margin of 60 to 40 percent, with nearly identical support among Republican and Democratic voters, over three million voters in California replaced the state’s “closed” political primary with the “blanket primary.” In a blanket primary, voters can choose office by office in which party’s primary they want to vote. Washington has used blanket primaries since 1935, as has Alaska since 1947. Supporters of blanket primaries argue that they increase voter turnout and participation, partly by giving voters more choices, partly by enabling candidates closer to the median voter—more moderate candidates—to make it to the general election. The political parties, which believed this structure would weaken their control, chose not to attempt to make their case in the political process of the initiative contest, but pursued ex post constitutional litigation. Seven federal judges concluded blanket primaries were not constitutional, six federal judges concluded they were, and because all seven of the former were on the Supreme Court, the initiative was invalidated in California Democ-

24 Michael McConnell suggests that it would have been unconstitutional for Congress to have accepted Florida’s votes after this date, a suggestion I have not seen elsewhere. Michael W. McConnell, Two-and-a-Half Cheers for Bush v Gore, 68 U Chi L Rev 657, 676 n 93 (2001).

25 In a “closed” primary, eligibility is limited to voters who have registered as party members a specified period of time in advance of the primary. Fifteen states employ closed primaries. In an “open” primary, a registered voter may choose the party primary in which he or she prefers to vote on election day, whether or not the voter has registered previously as a member of that party; but the voter may vote only in that one party’s primaries on election day. Twenty-one states use this structure. In addition, eight states permit independents to participate in party primaries along with party members; these are sometimes called “semi-open” or “semi-closed” primaries. California would have been the fourth state to use either a blanket or nonpartisan primary. California Democratic Party v Jones, 984 F Supp 1288, 1291–92 (E D Cal 1997) (discussing different types of primaries and noting the number of states with each type), affd 169 F3d 646 (9th Cir 1999), revd 120 S Ct 2402 (2000).

26 See Wash Rev Code Ann § 29-18.200 (West 1993) (authorizing blanket primary); Alaska Stat §§ 15.05.010, 15.25.090 (Michie 2000) (making general election rules apply to primaries). From 1960–66, Alaska temporarily shifted back to an open primary. See O’Callaghan v Alaska, 914 P2d 1250, 1256, 1263 (Alaska 1996) (noting the history of Alaska’s blanket primary and upholding such primaries as constitutional). Louisiana also allowed a type of blanket primary, see La Rev Stat Ann § 18:401B (West 1979), but the Fifth Circuit found Louisiana’s primary system unconstitutional, see Love v Foster, 147 F3d 383, 386 (5th Cir 1998).

My concern here is not with which side is more convincing, as a matter of constitutional law or of policy, but with how different judges picture democracy when deciding such cases.

The district court put great weight on expert empirical evidence—the best expertise in political science testified at trial, but it was sharply divided—regarding the possible effects of blanket primaries on voter behavior and the strength of political parties. But at the same time, the imagery of the opinion celebrated “experiment[s] in democratic government” and viewed the blanket primary against that narrative background. As the district court told the story, “Proposition 198 is the latest development in a history of political reform measures that began in the Progressive Era.” Reading the opinion, one is struck by how much the district judge emphasized the significance of longstanding and widespread popular support for blanket primaries in California. And because “[t]he history of election law is one of change and adaptation as the States have responded to the play of different political forces and circumstances,” the district court expressed confidence in a future in which, whether the blanket primary turned out well or not, democratic politics would be self-correcting enough to respond.

The seven justices on the Supreme Court who reversed—the Bush v Gore majority plus Justices Souter and Breyer—project a strikingly different image of the case. The Court consistently casts the active agent in the case as “the State,” an abstract entity, which is pitted against the “rights” of political parties. While the voters are present throughout the district court opinion, the Supreme Court majority makes bare legal reference to popular adoption of the blanket primary and none to the level, breadth, or history of popular support. The most dramatic instance occurs when the Court rejects any appeal to the democratic interest in enhancing voter participation: “The voter’s desire to participate does not become more weighty simply be-

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28 120 S Ct 2402, 2414 (2000).
29 California Democratic Party, 984 F Supp at 1303.
30 Id at 1301.
31 Id at 1303. The Court of Appeals panel unanimously adopted the district court's opinion. See California Democratic Party, 169 F3d at 647.
32 Contrast the opening lines, for example, of the Court’s opinion with the concurrence of Justice Kennedy. Compare California Democratic Party, 120 S Ct at 2405 (“This case presents the question whether the State of California may [adopt a blanket primary].”), with id at 2414 (Kennedy concurring) (“Proposition 198, the product of a statewide popular initiative, is a strong and recent expression of the will of California’s electorate.”). Justice Kennedy’s interesting concurrence, which cannot be explored here, is noteworthy because, in partial spirit with the dissenters and unlike the majority, he puts considerable stress (though not enough to change his vote) on an image of “a strong, participatory democratic process.” Id.
cause the State supports it." What is the separation between the state and the voters that is being imagined here in the context of a voter initiative? Moreover, the Court sees democratic politics and political organizations as fragile and potentially unstable entities that require judicial protection, for as the Court worries, a single election in a blanket primary "could be enough to destroy the party." Without strong, well-ordered political organizations, enforced by constitutional law that denies popular majorities the power to shape the electoral process in the service, benighted or not, of enhanced participation, the Court sees a threat to the stability of the democratic order. A vision further from that of democratic experimentalism and a self-correcting, adaptive democratic system is hard to imagine.

Contrast, now, Justice Stevens's dissent, which Justice Ginsburg joined. This opinion, like the district court's, makes "the people" and "citizens" and "the electorate" the actors behind the blanket primary, not "the State." At work in this case, for the dissent, are "competing visions of what makes democracy work," and for this very reason, "[t]hat choice belongs to the people." The image of a resilient democratic system, not a fragile one, reappears; states "should be free to experiment with reforms designed to make the democratic process more robust." Moreover, the value of voter participation is central in Justice Stevens's dissent; indeed, if that opinion gives one value priority in the justification of democracy over any other, it is the value of participation. Thus, Justice Stevens structures the case around the value of voter participation, and his dissent would make the entire structure of constitutional analysis turn on whether regulations of politics expand or constrict voter participation: regulations that broaden participation should not face the same close judicial scrutiny, and their further consequences are for politics itself to work out.

Though the various opinions confront each other with social-scientific facts and predictions, it seems unlikely that these facts—tentative and disputed as they were—in any way determined judicial judgment. Even if we somehow knew exactly how much blanket primaries would weaken political parties, change the governing behavior of public officials, and influence voter participation, how ought those effects be traded off against each other? Debates cast in empirical

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33 Id at 2413.
34 Id at 2410.
35 See, for example, id at 2421–22 (Stevens dissenting).
36 Id at 2421.
37 Id at 2422.
38 Id at 2416.
39 Id at 2419.
terms often masquerade for deeper, underlying disagreements about cultural assumptions and normative ideals.\textsuperscript{40} The rhetoric, imagery, and narrative interpretations infusing these opinions, and others involving democratic politics, are a window into those conceptions. Is American democracy fragile, so that relatively novel political structures require aggressive constitutional evaluation? Or is American democracy experimental and self-revising, so that such structures are to be celebrated, or at least judicially tolerated, as contemporary, popular manifestations of a healthy democratic impulse? Should such popular, direct participation in addressing these questions itself be a preeminent value, to be weighed heavily in any judicial judgment? Or is such participation legally irrelevant, so that all regulation of politics, whether emerging from state legislatures—or from voter initiatives to which the party-dominated state legislature is affirmatively hostile—should be conceived as the action of a singular, undifferentiated entity, “the State?” The cultural attitudes judges bring toward these kind of questions surely influence, if they do not completely dominate, how judges respond to empirical claims and open-ended precedents—which is why, perhaps, most justices end up consistently on the same side of these cases, despite differences in facts, partisan consequences, and precedents among the various cases involving democracy that have recently been before the Court.

For that reason, the way the Court responds to open primaries,\textsuperscript{41} a question it will find hard to avoid, will be particularly revealing. Blanket primaries may viscerally seem a bizarre novelty, in use in only a few places. But twenty-nine states use open primaries;\textsuperscript{42} many have done so since primary elections themselves were mandated early in the twentieth century.

Unless the American democratic system has been suffering throughout this entire period as a result, the historical experience with open primaries—perhaps the most telling “empirical fact” of all—would not seem to support invalidating open primaries. On the one hand then, the open primary might viscerally seem traditional, unthreatening, and consistent with the stability and strength of American democratic culture. For the Court to invalidate it would itself produce a massive and radical restructuring of a central feature of twentieth-century American democracy. On the other hand, there does not appear to be any meaningful distinction—for now, you will have to ac-

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\item[41] For the differences among types of primaries, see note 25.
\end{itemize}
cept my word on that— in legal principle or empirical fact for distinguishing the open from the blanket primary. The legal reasons the Court offers for invalidating blanket primaries appear equally applicable to open primaries. Thus, if the Court upholds open primaries, it will have to invoke largely formalistic distinctions; doing so would therefore signal it is the novelty of the blanket primary, and cultural attitudes among the justices toward such popularly-adopted innovations, not any deep-rooted matter of substantive legal principle or empirical fact, that divides the conventional open primary from the unconstitutional blanket primary. I will hazard only the following: faced with the choice between the principles of the blanket-primary case and the more familiar, longstanding conventional practice of the open primary, the seven-justice majority of *California Democratic Party v Jones* will splinter.

B.

“Fusion” politics flourished in the late nineteenth century. Fusion candidacies entail joint nomination by two parties—typically a minor party and one of the two major parties—of the same candidate. The candidate appears on the ballot under both party lines; voters can choose either party line in voting for the candidate. The ability to form fusion candidacies was critical to the existence of active third party politics in the late nineteenth century, which included the Populists, Greenbackers, and other third parties. Deep structural features of the American system make it unlikely that third parties will displace a major party—it has not happened nationally since the pre-Civil War era—but cross-endorsement enables third parties potentially to influ-

43 Other scholars have reached similar views. See, for example, Richard L. Hasen, *Do the Parties or the People Own the Electoral Process?*, 149 U Pa L Rev 815, 830 n 60 (2001). In an open primary, the only act of party “affiliation” that is required is to ask for that party’s ballot on election day; in a closed primary, the voter must be registered a defined period of time in advance as a party member. If the mere formality of asking for the party ballot is enough to distinguish open from blanket primaries, the distinction is hard to see as meaningful. See, for example, Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 Colum L Rev 274 (2001). In addition, open primaries permit a voter to vote only in one party’s primary for all offices that particular election day; if there is a meaningful distinction here from blanket primaries, it would have to be that the power to pick and choose among party primaries for various offices leads, as an empirical matter, to greater rates of actual, undesirable (unconstitutional) cross-over voting. No convincing empirical data support this conclusion, as far as I am aware.

44 See note 43.

ence the positions that the two major parties adopt, as well as to afford organizational expression to dissenting voices within the major parties. Most importantly, stringent ballot-access rules in the United States require parties to achieve a fairly high level of support to be automatically included on the ballot in subsequent elections, rather than having to devote scarce resources to signature gathering. Yet if fusion is not permitted, voters who would otherwise support a third party decline to do so because such a vote seems wasted; with fusion, voters can support both the party of their choice and a major party candidate with a serious chance of winning.

Precisely because fusion challenged the conventional two-party structure, many state legislatures banned the practice at the turn of the twentieth century, even when voluntary between major and minor party. In response to the nascent re-emergence of third parties today, these fusion bans were challenged in litigation that culminated in *Timmons v Twin Cities Area New Party.* Again, a divided Supreme Court, six to three, reversed a unanimous court of appeals. Again, there are no obvious partisan consequences to the issue between the two major parties; a ban on fusion does not clearly advantage either the Democratic or Republican party in their mutual competition. Here too, of greatest present interest is not the analytical structure of the formal First Amendment analysis, but the dramatically different cultural images of democracy that inform the views of different judges and that might provide a cultural prism through which *Bush v Gore* can be refracted.

To the Eighth Circuit, fusion candidacies invigorate the democratic process. While the state argued that protecting the integrity of elections justified its ban on fusion, the court of appeals conjured up just the opposite imagery: "consensual multiple party nomination may invigorate [democracy] by fostering more competition, participation, and representation in American politics. As James Madison observed, when the variety and number of political parties increases, the chance for oppression, factionalism, and nonskeptical acceptance of ideas decreases." For empirical debates about the effects of fusion, the court of appeals turned to historical experience and interpreted that experi-

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46 Argersinger, 85 Am Hist Rev at 288–90, 303–04 (cited in note 45).
48 A different court of appeals in a 2-1 decision had upheld another state's fusion ban, see *Swamp v Kennedy,* 950 F2d 383 (7th Cir 1991), with Judges Easterbrook, Posner, and Ripple dissenting from the en banc court's refusal to review the case, see id at 388, 389 ("A state's interest in political stability does not give it the right to frustrate freely made political alliances simply to protect artificially the political status quo.").
49 *Twin Cities Area New Party v McKenna,* 73 F3d 196, 199 (8th Cir 1996).
ence this way: "History shows that minor parties have played a significant role in the electoral system where multiple party nomination is legal, but have no meaningful influence where multiple party nomination is banned." Like lower court judges in California, the Eighth Circuit also envisioned self-correcting internal mechanisms within democratic politics itself if fusion made for bad politics; major parties could simply refuse to consent to fusion.

Now consider how democracy appeared to the decisive Supreme Court—this time, the *Bush v Gore* majority plus Justice Breyer. The central image in this opinion is not that of invigorated democracy through "political competition," but that of a system whose crucial "political stability" is easily threatened. The word "stable" (and variations of it) appears a remarkable ten times in the brief majority opinion. The central fact about fusion candidacies is the risk to political stability they are pictured to pose; thus, states must surely be able to "temper the destabilizing effects of party splintering and excessive factionalism." Far from seeing Federalist 10 as supporting fusion candidacies, the Supreme Court sees such candidacies as the very embodiment of the factionalism Madison sought to avoid. Where the court of appeals saw the historically significant role of minor parties in American democracy, the Supreme Court worried about "campaign-related disorder." Rather than looking at historical experience to assess whether fusion candidacies had actually generated these concerns, or at contemporary empirical facts from states that permit fusion, like New York, the Court majority did not require "empirical verification of the weightiness of the State’s asserted justifications" for banning fusion candidacies. Indeed, because the risk of political instability was so high, the Court expressly concluded, for the first time in its history, that the states’ interest in political stability justified electoral regulations that "favor the traditional two-party system."

Once again, Justice Stevens led the dissent, joined by Justice Ginsburg. In contrast, his unifying metaphor is "robust competition."

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50 Id.
51 Id.
52 See, for example, *Timmons*, 520 US at 366 ("States also have a strong interest in the stability of their political systems").
53 Id at 351, 353, 355, 364, 366, 367, 368, 370.
54 Id at 367.
55 Id at 358.
56 Id at 364.
57 Id at 367. For the demonstration that the Court has never previously invoked such a justification, see Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 S Ct Rev 331.
not political stability. Indeed, he calls this concern the "central theme" of the Court's democracy jurisprudence: "the entire electorate, which necessarily includes the members of the major parties, will benefit from robust competition in ideas and governmental policies" and this principle, Justice Stevens asserts, is "the core of our electoral process." To the extent that the dispute between the Court and Justice Stevens was over the "empirical facts" about the effects of fusion, Justice Stevens viewed historical experience as showing that the majority's fears for stability were "fantastical." Fusion, in fact, is "the best marriage" of the virtues of minor parties with the level of political stability democracy requires; fusion offers a means by which major parties will be responsive to the view of minor party adherents, without actually threatening to divide a legislature. Interestingly, Justice Souter—who, with Justice Breyer, moves across the voting line in the quadrology of cases I consider in this Essay—as also dissented, but in a far more equivocal way. Writing in the double negative, he thought "it may not be unreasonable to infer that the two-party system is in some jeopardy" today. If it were, he would not be prepared to reject the majority's constitutional enshrinement of that system as a necessary means toward political stability. But for Justice Souter, the state had simply not yet argued this point adequately enough to permit judgment.

Is the debate over fusion an empirical debate, in any meaningful sense? If we look back to historical moments at which fusion flourished, how do we interpret that past? Was it a time of political instability, excessive factionalism, campaign disorder, and party splintering? Or was it a time of vibrant democracy, robust competition, more responsive government (to those eligible to vote), and more engaged democracy? If the choice about fusion cannot be determined by empirical inquiry, can it be determined by the internal logic of doctrinal

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58 Timmons, 520 US at 382 (Stevens dissenting).
59 Id at 375 n 3.
60 Id at 380.
61 Id at 384 (Souter dissenting). Ironically, Justice Souter cites a 1992 New York Times essay by Professor Theodore J. Lowi, which asserts that 1992 will historically be viewed "as the beginning of the end of America's two-party system," although Lowi celebrates this purported fact precisely because he believes demise of the two-party system will enhance, not threaten, American democracy. See Theodore J. Lowi, Toward a Responsible Three-Party System, in Daniel M. Shea and John C. Green, eds, The State of the Parties: The Changing Role of Contemporary American Parties 45 (Rowman & Littlefield 1994) ("One of the best kept secrets in American politics is that the two-party system has long been brain-dead—kept alive by support systems like state electoral laws that protect the established parties from rivals and by public subsidies and so-called campaign reform."").
62 Timmons, 520 US at 384 (Souter dissenting).
analysis? Does the First Amendment protect the right of voters and parties to the seemingly expanded choice fusion facilitates? But surely political stability is a value against which constitutional doctrines must be assessed? If neither facts nor doctrine compel a particular constitutional judgment, and if partisan political stakes point in no particular direction, yet federal judges divide so evenly over questions like this, what explains those differences? Perhaps, the suggestion is here, it is different cultural assumptions about how important order and stability, as opposed to competition and fluidity, are to democracy.

C.

How specific must the legal norms be that regulate aspects of democracy? Procedural judgments of this sort depend upon evaluations of the particular aspect of democracy at stake; how the values justifying that aspect will be affected; and whether potentially countervailing values will be compromised (and by how much), should greater or lesser degrees of specificity be required. In addition, the specificity of a legal norm can be generated through two alternative sources. The most obvious is the relevant legal text itself; in theory, a norm can always be made more specific if the enacting body is willing or required to provide greater determinate content ex ante as to how that norm is to be applied in a range of contexts, at least to the extent those contexts are foreseeable. A second source through which legal norms can potentially gain sufficient precision and specificity is through institutional structures and processes that give post-enactment content to a more general norm in the process of applying it. "Intent of the voter" is a statutory norm, for example, that could be assessed against questions of this sort, questions which, with respect to the vote, are now grounded on the Equal Protection Clause in the wake of Bush v Gore.63

In another recent, signal case for the law of democracy, the Supreme Court confronted the process by which public television stations are constitutionally permitted to make judgments about which ballot-qualified candidates to include in publicly sponsored candidate debates. In Arkansas, the state-owned public television broadcaster sponsored congressional debates; in one of the state's four congressional districts, an independent candidate had qualified for the ballot. But the station refused to permit him to join the Democratic and Republican candidates in the debate. Lacking a previously established

63 Along with the question whether equal protection requires statewide uniformity in the substantive issue of what counts as a legal vote.
policy, the station excluded him based, it argued, on its conclusion that he was not "a serious candidate." A jury found that he had not been excluded because of his political views. But the central question was not whether this particular judgment was substantively appropriate; the question was whether government actors had to make such judgments in advance, through more clearly specified norms, that would protect against potentially inconsistent or biased judgments if the norms were left ex ante at a high level of generality and specified only at the moment that specific decisions were being made. "Not a serious candidate," in other words, is a legal norm that can be assessed against constitutionally-mandated procedural standards, such as whether the criteria for access to public debates must be specified in advance rather than developed ad hoc on a case-by-case basis.

By now you can no doubt nearly complete the story yourself: in *Arkansas Educational Television Commission v Forbes,* a divided Supreme Court, the *Bush v Gore* majority plus Justice Breyer, reversed a unanimous court of appeals. Justice Stevens penned the dissent, joined again by Justice Ginsburg, and, less equivocally this time, by Justice Souter. As in the previous two cases, no distinctly mainstream partisan stakes seem apparent in the issue; neither the Republicans nor the Democrats appear likely to benefit systematically from broad or narrow rules of candidate inclusion and exclusion.

What images of democracy form the backdrop for judges in such procedural disputes about how specific legal norms must be? Do multiple-candidate debates raise the prospect of robust, competitive exchange or the threat of disorder, tumult, and confusion? Here is how the Court majority pictured the choice: public broadcasters would be faced with "the prospect of cacophony, on the one hand" if Forbes's First Amendment claim were accepted; or, on the other hand, when confronted with such a senseless and chaotic prospect, public broadcasters might well withdraw from the role of sponsoring debates at all. The striking image is that of "cacophony," about which we can first ask some preliminary questions. Is cacophony itself a factual or normative matter? We can all agree that, at some point, too many speakers can frustrate the point of a debate. But is a six-candidate debate "cacophonous?" In the 1992 Democratic presidential primary, six candidates debated in early debates; so too in the 1988 Republican

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65 Id at 683.
66 Id at 681.
primary. Yet at stake in *Forbes* was whether a third candidate, qualified to be on the ballot, would be permitted into the public debate.

But more interesting than when exactly a debate becomes mere noise is the way the *image* of cacophony seems to have obscured from the Court other legal possibilities, as well as other competing cultural images. Those other procedural possibilities, rather than any profound difference of principle, are what the dissents emphasized. Thus, the dissents did not require public debate sponsors to open debates to all candidates, nor even to all ballot-qualified candidates. Instead, the dissent would have required greater procedural regularity in advance, through specific, pre-established criteria, of the bases for candidate inclusion—rather than what the dissent called the "ad hoc" and "standardless character of the decision to exclude" that was actually made.8 Indeed, several debate-sponsoring entities, such as the Commission on Presidential Debates, filed briefs arguing that they had developed precisely such pre-established, transparent, objective allocative criteria and thereby managed to avoid cacophony, or withdrawal from debate sponsorship, while ensuring consistent and uniform treatment.9 Particularly in light of this experience, it seems that a fear of this image of disordered, chaotic debates, rather than meaningful factual evidence, led the Court to worry that requiring procedural protections for access would cause public stations to flee the debate-sponsoring role.

How much pre-established specificity judges demand, of course, depends in part on how valued the particular activity is. Here, too, what divided federal judges so evenly might well have been whether multicandidate debate itself was viewed as a benefit or as a cost to "democracy." Thus, Justice Stevens emphasized that a third party candidate who was not likely to win might nonetheless change electoral outcomes by taking votes from a dominant party candidate; even if Forbes himself were properly characterized as "not a serious candidate," excluding him from the debate "may have determined the outcome of the election."10 For Justice Stevens, the power to affect elec-

70 *Arkansas Educational Television*, 523 US at 685.
toral outcomes self-evidently makes a candidate's participation a benefit to democracy. But while the Court's opinion says nothing about that issue, one wonders whether a group of justices who, in Timmons, expressed fear of the "destabilizing effects of party splintering and excessive factionalism," would consider an independent candidate's outcome-determinative effects on elections a cost to democracy rather than a self-evident benefit.

Because many aspects of elections implicate constitutional values—the vote, access to the ballot, participation in public debates, access to other public fora—legal issues inevitably will arise concerning the levels of specificity required of regulation. Whether that specificity must be provided in advance through a formal legal text, whether it can be generated through institutional processes, or whether it is required at all are questions that judges will confront repeatedly. That empirical facts could in themselves resolve these issues seems unlikely; does Jesse Ventura's victory in Minnesota, made possible partly by his third party participation in debates, enhance or threaten appropriate democratic politics? That narrow partisan concerns could explain or motivate results in cases like Forbes seems equally implausible. That constitutional doctrine is itself specific enough to determine the level of specificity required of state actors in Forbes is also challenged by the divisions, again, among a large group of federal judges. That cultural assumptions and images of ideal democracy play a significant role in explaining differences in cases like Forbes—assumptions and images not falsifiable as facts, nor provable through internal legal analysis—is the alternative I mean to raise here for understanding the emerging constitutional law of democracy.

III. BUSH v GORE REVISITED

The cases selected in this Essay are defining moments in the recent law of democracy. In more conventional legal-analytic terms, much could be said to argue for the coherence of the majority opinions, or of the dissents, or perhaps of certain decisions but not others. After all, they arise in different contexts; they place the Court in different postures. In some, the Court upholds state laws, in others, it finds them unconstitutional. I have said nothing here about those possible distinctions. Yet it is striking that across these defining cases, the

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71 Timmons, 520 US at 367.
five-justice majority in *Bush v Gore* is also consistently together, though also noteworthy that it is joined consistently by Justice Breyer; that the two strongest dissenters in *Bush v Gore*, Justices Stevens and Ginsburg, are always in dissent; and that Justice Souter, between these two poles in *Bush v Gore*, also moves back and forth, majority to dissent, in this overall map of cases. Four cases do not a social-scientific sample make, but they nonetheless suggest an intriguing cultural pattern.

Whether democracy requires order, stability, and channeled, constrained forms of engagement, or whether it requires and even celebrates relatively wide-open competition that may appear tumultuous, partisan, or worse, has long been a struggle in democratic thought and practice (indeed, historically it was one of the defining set of oppositions in arguments about the desirability of democracy itself). Of course, the answer is that democracy requires a mix of both order (law, structure, and constraint) and openness (politics, fluidity, and receptivity to novel forms). But people, including judges and political actors, regularly seem to group themselves into characteristic and recurring patterns of response to new challenges that arise. These patterned responses suggest that it is something beyond law, or facts, or narrow partisan politics in particular cases, that determine outcomes; it is, perhaps, cultural assumptions and historical interpretations, conscious or not, that inform or even determine these judgments. Whatever the analytical truth about the necessity of both order and openness to democracy, the cultural question is, from which direction do particular actors, such as judges, tend to perceive the greatest threat. Is the democratic order fragile and potentially destabilized easily? Or is the democratic order threatened by undue rigidity, in need of more robust competition and challenge? Does democratic politics contain within itself sufficient resources to be self-correcting? Or must legal institutions carefully oversee political processes to ensure their continued vitality?

*Bush v Gore* can be assessed legally, politically, or as I prefer to here, culturally. I cannot purport to separate the contributing role each of these dimensions might have played in the decision, particularly when *Bush v Gore* is analyzed as an isolated single event. But when we examine the decision in the full tapestry of the Supreme Court's emerging and increasingly active role in the constitutionalization of democratic politics—a role initiated forty years ago in *Baker v Carr*—we can see images, metaphors, and assumptions about democracy that consistently recur. These images of the relationship of law and order—constitutional law and judicially-structured order—to democracy are
aspects of a broader jurisprudential culture. They emerge most reveal-
ingly in cases in which the partisan political consequences are non-
existent, or certainly not obvious. Nor do the divisions in these cases
map onto conventional, political characterizations of the justices, in
the narrow sense of partisan political orientation; Justice Breyer, for
example, consistently joins the five-member *Bush v Gore* majority. Yet
nonetheless, they do divide in these nonpartisan cases in much the
same way they did in *Bush v Gore*.

The suggestion here is that, whatever role law and conventional
politics might be debated to have played in *Bush v Gore*, a cultural
dimension must be considered as well. Because this cultural orienta-
tion toward democracy transcends law and narrow partisan politics,
and because it itself is not determined by "facts," but leads facts to be
understood in particular ways, this cultural dimension plays a power-
ful role in judicial responses to cases involving democratic politics.
When the Court envisioned a political resolution of Bush v Gore, the
election, how much was it moved by a cultural view, not a narrowly
partisan preference, that "democracy" required judicially-ensured or-
der, stability, and certainty, rather than judicial acceptance of the "cri-
sis" that partisan political resolution might be feared by some to have
entailed? If the Court were so moved—by the country's perceived
need for what Frank Michelman calls "judicial salvation"—*Bush v
Gore* would be of a piece with the current Court's general vision of
democratic politics and the role of constitutional law. That general vi-
sion transcends the election, and it transcends narrow partisan inter-
pretations, for it is a vision that Justice Breyer seems generally to em-
brace, if not in the specific context of *Bush v Gore*. I cannot offer any
sophisticated account here for why Justice Breyer seems to share this
disposition, nor for why Justice Stevens resists it so strenuously. But
perhaps for one who believes in the authoritative role of expertise in
policymaking, as Justice Breyer does, it is not such a far leap to be-
lieve that democracy also requires the expertise of judges, through

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73 Again, as throughout, I mean the partisan consequences to the Republican and Demo-
 cratic Parties, as third parties and independent candidates are consistently disadvantaged by these
decisions.

74 John Yoo, for example, praises the Court's decision precisely because it "restored stabil-
ity to the political system." John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U Chi L Rev
775, 776 (2001).

75 For the view that *Bush v Gore* does reflect "a larger distrust of politics," see Elizabeth
Vote: Bush, Gore & the Supreme Court* (Chicago forthcoming 2001).

76 See, for example, Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk
constitutional law, to ensure order and stability.  

And perhaps for Justice Stevens, it is familiarity with the hurlyburly of Chicago politics that reassures him that out of the chaos of democracy itself, sufficient order, stability, and resolution will be generated.

The fear that democratic institutions would be unable to secure their own stability, and the perceived need for constitutionally-imposed order, would be consistent with each of the Court's interventions into the election. The Court acted with surprising alacrity to assert control over the dispute, an alacrity suggested by its choice to hear Bush v Palm Beach County Canvassing Board, followed by its conclusion that no substantive issue of law was yet ready to be decided at that point (a decision that was minimalist only in the most technical, formal sense, for all actors subsequently behaved as if the Court had actually decided that Article II of the Constitution or the Electoral Count Act would be violated were state courts to rely on the state constitution or make "new law"). The stay order, too, was an assertion of the power to establish order and control even before the moment of final decision. Whatever the various possible reasons for these actions, individually and as a whole, they are consistent with the manifestation of considerable anxiety about the capacity of other institutions, including political ones such as Congress, to avoid unleashing "the furies of civil commotion, chaos, and grave dangers"—precisely the terms in which the defense of the Court is now being cast. To the extent that what might be called this "cultural conservatism" toward democracy underlies Bush v Gore, and the current Court's jurisprudence of politics more generally, it is a cultural disposition more pervasive than one confined to the current Court. In closing, I want to suggest a way of understanding these powerful, competing visions of democracy in a broader historical context.

Two great foundational crises confronted American democracy in the twentieth century. The first was the challenge to the economic order posed by the worldwide Depression of the 1920s and 1930s. If capitalism were to endure, how should the economic system be structured so as to avoid the recurrence of a similar catastrophe? The second was the challenge to the democratic order posed by the rise of

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78 For a fascinating analysis of Justice Stevens's distinct approach to cases of democratic politics, see Pamela S. Karlan, Cousins' Kin: Justice Stevens and Voting Rights, 27 Rutgers L J 521 (1996).
79 121 S Ct 510 (2000).
80 For endorsement of this decision as an act of judicial minimalism, see Cass R. Sunstein, Order Without Law, 68 U Chi L Rev 757 (2001).
fascism and totalitarianism in formerly democratic Europe. If democracy were to endure, how should the political order be structured so as to avoid similar moral nightmares here? In both contexts, the initial diagnosis and remedy were strikingly similar. The Great Depression had been caused, in the classic phrase, by “ruinous competition,” by a disordered, tumultuous economic system that lacked structure, order, and stability.82 Thus, the early New Deal sought to constrain competition through cartel-like legislation, such as the National Industrial Recovery Act, that would bring the necessary regularity, order, and stability to the economic system. Post-World War II democratic thought, in a way that might be seen as analogous, similarly located the causes of totalitarianism in an overly competitive, overly chaotic and fragmented political system.83 To ensure “political stability” and avoid “ruinous competition,” American democracy required regular organizations, a highly ordered two-party system, a style of politics that was channeled and contained, lest too much politics undermine democracy itself. Perhaps it also required, or came to be seen as requiring, an active judicial role to ensure that too much democratically-adopted re-structuring did not undermine the stability of democracy itself.

In the economic realm, we came to abandon the post-Depression view that aggressive state “rationalization” was necessary to ensure stability and order; competition, seeming disorder, and tumult came to be seen as signs of vigor and robustness, not paths to ruination. Yet in the political realm, we cling much more tenaciously to the fear that too much politics, or too competitive a political system, will bring instability, fragmentation, and disorder. By we, I mean the institutional structures of democracy with which we live, the legal framework of national democratic practices, and the dispositions of judges and many others towards novel or revived forms of democratic practice—

82 For a summary of early New Deal beliefs that the economic order required state “rationalization,” see Alan Brinkley, The End of Reform 34–39 (Knopf 1995).

83 This is the theme in the book still considered “the political masterpiece of the postwar era,” Richard H. Pells, The Liberal Mind in a Conservative Age: American Intellectuals in the 1940s and 1950s 83–84 (Harper & Row 1985), which is Hannah Arendt’s The Origins of Totalitarianism (Harcourt 1951). For variations on this fixation with the need for order and constrained political competition, see Daniel Bell, The End of Ideology: On the Exhaustion of Political Ideas in the Fifties 94–95 (Free Press 1960); Seymour Martin Lipset, Political Man: The Social Bases of Politics 74–75 (Doubleday 1960) (“Inherent in all democratic systems is the constant threat that the group conflicts which are democracy’s lifeblood may solidify to the point where they threaten to disintegrate the society. Hence conditions which serve to moderate the intensity of partisan battle are among the key requisites of democratic government.”). The sociologist David Riesman diagnosed this 1950s intellectual sensibility: “[intellectual elites of this era] are frightened by the ideal of a pluralistic, somewhat disorderly, and highly competitive society. . . .” David Riesman, Individualism Reconsidered and Other Essays 423–24 (Free Press 1954).
blanket primaries, fusion candidacies, multiparty and multicandidate competition, and, perhaps, political resolution of disputed presidential elections. Given the strength and endurance of American democracy, including its capacity for self-revision and correction, is that fear the appropriate stance to take?