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CONSTITUTIONALIZING DEMOCRATIC POLITICS

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Richard H. Pildes[1]

Bush v. Gore,[2] for all its uniqueness, is not an isolated event. It is best understood, instead, as the most dramatic crystallization of a deeper, more enduring pattern in the contemporary relationship between democratic politics and constitutional law. This pattern might be called the "constitutionalization of democracy." Over the last decade or so, powerful litigants -- the major political parties, incumbent officeholders, candidates for the Presidency -- have increasingly raced to the courts and sought to subject the fundamental structure of democratic processes and institutions to constitutional constraint. And they have succeeded: whether the issue is what kind of election primaries we are to have, or how we are to finance political campaigns, or how effective a role third parties and independent candidates will play, or whether disputed Presidential elections will be resolved through political processes (such as in Congress), constitutional law in the last decade has come to play a central -- often the dominant -- role. Constitutional law now sharply constrains the possibilities for experimentation with the forms of democratic politics; constitutional law now limits the structural changes through which disaffection with the current practices of

[1]Professor of Law, New York University School of Law. This is a substantially expanded and recast version of an essay that first appeared in 68 U. Chi. L. Rev. 695 (2001). I am grateful to a research paper written by Marie Gillen for information in Part I of this essay. I should also have expressed my debt in that earlier piece to Richard Parker, whose work long ago taught me to look at judicial decisions through the lens I employ here.

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

democratic politics can be given institutional expression.

That constitutional law plays *some* role in overseeing the structures and processes of democracy is not, in itself, a surprise. Since the Supreme Court first held in 1962 that claims involving "political rights" could be resolved in the courts,[3] constitutional law has regulated certain aspects of democratic politics. Representative institutions must be designed in accord with one person, one vote; the right of adult, resident, non-felon citizens to vote has achieved the status of a fundamental constitutional right; electoral structures cannot be designed to minimize or "dilute" the voting power of certain identifiable groups, such as racial minorities. But these foundational principles from the Court's initial foray into issues of democracy all rested, as I will show here, on a specific, relatively precise, and quite convincing set of functional justifications for why the Court had come to view constitutional oversight as necessary on selected, discrete issues. What *is* surprising over the last decade is that the Court now routinely deploys constitutional law to circumscribe the forms democracy can take in situations that bear no relationship to those that had originally justified constitutional intervention. As this essay will show, the Court now almost reflexively acts as if it were appropriate for constitutional law always to provide ready answers as to what makes democracy "best" -- without the Court asking any longer whether there are appropriate reasons that democratic politics itself is not the proper forum in which to address those questions.

[3]The fount of this jurisprudence is Baker v. Carr, 369 U.S. 186 (1962).

This judicial constitutionalization of democratic politics is, perhaps, the single most important development in constitutional law over the last decade. But this development has attracted little academic or popular notice. Instead, as Judge Richard Posner rightly observes, scholarship on constitutional law and the Supreme Court has remained obsessed for several decades with issues of individual rights and issues of equality.[4] Issues concerning the structures of democratic governance, by contrast, have met with indifference at best, disdain at worst -- as if sophisticated thinking has moved beyond formal politics to more "essential" issues of rights and equality.[5] But the kind of democracy we experience is not some pure

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[4]SEE RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 210 (2001) ("The leftward drift [of legal academics] has deflected professorial attention from the structural provisions of the Constitution (such as those regulating the election of the President) to the provisions that create individual rights against government, leaving the professoriat unprepared to address the issues thrown up by the Florida deadlock."). My co-authored casebooks are an effort to bring systematic study of the law of democracy to classrooms in law schools and elsewhere. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN, AND RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS (2d. ed. 2001) AND SAMUEL ISSACHAROFF, PAMELA S. KARLAN, AND RICHARD H. PILDES, WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE 2000 PRESIDENTIAL ELECTION (Rev. ed. 2001). One other casebook similarly focuses on structures of democratic governance. See DANIEL H. LOWENSTEIN AND RICHARD L. HASEN, ELECTION LAW -- CASES AND MATERIALS (2d. Ed. 2001). Ironically, while Posner's basic observation is important, Posner fails to recognize that an entire field of study -- the law of democracy -- has emerged in recent years.

[5]This point can be illustrated by considering the single most canonical yearly assessments of the Supreme Court's work product, which are the Harvard Law Review's annual Forewords to its Supreme Court issue each November. Professor Erwin Chemerinsky, for example, wrote that our age was one of "the vanishing Constitution. *See* Erwin Chemerinsky, *The Supreme Court, 1988 Term -- Foreword: The Vanishing Constitution*, 103 Harv. L. Rev. 43 (1989). More recently, Professor Mark Tushnet argued that we live with the "chastened aspirations" of a "new constitutional order" in which constitutional law plays an increasingly minor and reactive role. Mark Tushnet, *The Supreme Court, 1998 Term -- Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration,* 113 Harv. L. Rev. 29. 108 (1999). But if the Constitution has vanished, or our age is chastened, it has only been with respect to the issues of individual rights and equal protection that defined the Warren Court era and that have remained the pre-occupation of many constitutional scholars. Professor Amar's recent Foreword concerning the 1999 Term footnotes constitutional cases involving democracy but provides no analysis of them. See Akhil Reed Amar, *The Supreme Court, 1999 Term -- Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 89 n. 212 (2000). In my review of recent Forewords, the more familiar issues of federalism or individual rights appear again and again, yet there is almost no notice taken of this emerging jurisprudence of democracy. Professor Morton Horwitz's Foreword is a slight exception; in a provocative quantitative analysis of Supreme Court opinions, he notes that appeals to the words "democracy" and "democratic" as legitimating concepts began only in the 1940s and exploded in the 1970s, 1980s, and 1990s. Morton J. Horwitz, *The Supreme Court, 1992 Term -- Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 Harv. L. Rev. 30, 57 (1993). But Professor Horwitz did not develop this insight into a normative assessment of the Court's work, nor did he purport to analyze any of the specific legal issues in democratic politics that the Court actually confronted. The Forewords are exemplary, not

distillation of organic cultural and political forces. Democratic experience is a product more than is often realized, of the institutional frameworks and legal rules that structure current democratic arrangements. Nor can me move "beyond" formal democratic politics to some other, more essential domain. For politics and these other domains, be they culture, or economics, mutually influence each other. Many people, for example, are aware of the history of racial segregation and of *Plessy v. Ferguson*. Many fewer, however, understand the history of the massive disfranchisement of black citizens (and poor whites) in the South from 1890-1965 and the importance of *Giles v. Harris*.[6] Yet for the brief window of time in which Southern blacks could vote, interracial political coalitions emerged; much about political culture and law, as well as social relations, differed in the era in which formal politics was open to black citizens. Segregation would not have endured for so long had black citizens not been expelled in the South, throughout most of the 20th century, from democratic politics.

After *Bush v. Gore,* the structures, institutions, and groundrules of democracy -- and the role of constitutional law in assessing them -- can no longer be avoided. If nothing else, *Bush v. Gore* will shape the agenda of discussion on constitutional law and the Supreme Court for some time. But if we analyze the election decision in isolation from the emerging jurisprudence of democracy of which it is but one piece, we will miss what is least singular, and hence most likely lasting, about *Bush v. Gore* and the vision of

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peculiar, in what they reveal about the traditional focus of constitutional scholarship: constitutional scholarship has typically left to the background legal issues involving the constitutional structure of democratic processes.

[6]For the history of disfranchisement and the evidence of its absence from constitutional scholarship, see Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 Const. Comm. 295, 319 (2000) ("Even today, the canon of constitutional law barely touches upon issues of democratic governance, let alone giving those issues the systematic, sustained, and central attention they require.").

democracy it represents.

In this essay, I set the stage initially with a description of the broader political and cultural moment in which we seem to exist. I then turn to how the Supreme Court has responded to the challenges to existing democratic practices that this moment has spawned. My aim is first to chronicle this emerging jurisprudence of democracy, then to understand and explain what appears to be driving it. We will then be in a position to assess analytically what the relationship of constitutional law to democratic politics has become -- and what it ought to be.

I. DEMOCRATIC CHALLENGES TO TRADITIONAL FORMS OF DEMOCRACY

We live in an era of disaffection and disinterest for the conventional forms of electoral politics. I mean this not as a matter of abstract opinions expressed in opinion surveys (though it is true there too[7]), but as a matter of actual political behavior. This disaffection is revealed through tangible, concrete forms of action. Significant popular effort to change some of the basic features of current democratic structures is increasingly common; efforts to abandon or transform the conventional two-party structure now take many

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[7]For example, the public opinion literature reports that the percent of Americans who said they trusted government "about always or most of the time" peaked at 70% in 1964 but has ranged between 20-40% since the Watergate era of the early 1970s. See Nathaniel Persily, *The Right To Be Counted*, 53 Stan. L. Rev. 1077, 1100 (2001); see also Seymour Martin Lipset and William Schneider, The Confidence Gap: Business, Labor, and Government in the Public Mind (1987).

forms; a general rejection of the long dominant two parties can be identified in several ways.

Take the dramatic rise in support for third-parties over the last three decades. Third parties stand little chance of actually winning elections in the United States; as political scientists have long appreciated, the first-past-the-post election system we use creates overwhelming incentives for voters to stay with one of the two dominant parties. In the hundred years from 1864-1964, only three presidential elections resulted in a minor party candidate receiving more than five percent of the vote. Yet since then, despite the enormous disincentives voters have to "waste votes" on third-party candidates, that five percent threshold has been eclipsed by George Wallace, then by John Anderson, and recently in two straight elections by Ross Perot. Perot's candidacy resulted in a third-party candidate receiving more than five percent of the vote in two consecutive elections for the first time in the long history of two-party competition between Democrats and Republicans: a remarkable 19 percent in 1992 (the largest third party popular vote since the Civil War other than Theodore Roosevelt's Bull Moose Party run in 1912) and eight percent in 1996.[8]

[8]See MARTIN P. WATTENBERG, THE DECLINE OF AMERICAN POLITICAL PARTIES, 1952-1996, at 233 (1998 ed). *See generally* Christian Collet, *Taking the Abnormal Route: Backgrounds, Beliefs, and Political Activities of Minor Party Candidates*, in MULTIPARTY POLITICS IN AMERICA, 103 (1997).

In the 2000 presidential election, two significant minor party presidential candidates achieved ballot status in nearly all fifty states.[9] While the Reform Party candidate, Pat Buchanan, was unable to overcome intra-party dissension, Ralph Nader, the Green Party candidate, gained enough support in key states to have likely deprived the Democratic candidate, Al Gore, of the Presidency.[10] At the non-presidential level, the 1996 election stood out as one of the most significant elections in the 20th century for minor parties. Almost six hundred minor party candidates ran for both houses of Congress, a figure almost three times the number of candidates who ran in the watershed 1968 election and nearly twice as many as in 1980. In total, two-thirds of all districts in 1996 featured at least one alternative candidate.[11] The 2000

[9]Pat Buchanan was on the ballot in all states but Florida, Michigan and D.C.; Ralph Nader qualified to be on the ballot in all states except Georgia, Idaho, Indiana, North Carolina, Oklahoma, South Dakota, and Wyoming. Additionally, less well-known third party candidates like Howard Philips (Constitution Party), John Hagelin (Reform/Independent), and James Harris (Socialist Workers) appear on a good percentage of state ballots. *See* Ballot Access News, November 16, 2000, at 4.

[10]In Florida, for example, Nader received 96,837 votes, around 180 times the number of votes that gave George Bush victory in Florida and hence the Presidency. Michael Powell, "Scared But Unwilted: Democrats See Red But Green Party Faithful Say They Made Their Point," Washington Post, C01 (Dec. 27, 2000).

[11]*See* Christian Collet & Martin P. Wattenberg, *Strategically Unambitious: Minor Party and Independent Candidates in the 1996 Congressional Elections*, *in* THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES___ (John C. Green and Daniel M. Shea eds. 1994) .

Congressional elections included 587 third party candidates from 31 different parties.[12] Since then there has also been the momentous disaffiliation of Vermont Senator James Jefford from the Republican Party and his embrace of the status of political independent.

[12] *The 2000 Election*, THE NEW YORK TIMES ON THE WEB (visited November 9, 2000) <http://www.nytimes.com/specials/election2000/states.html>.

Taken as a whole, this rise in third-party politics and independent candidacies is a telling search among significant numbers of voters for ways out of the existing two-party structure. Moreover, this current upsurge in minor party activity is particularly striking because, unlike other swells in third-party activity, this one has emerged at a time "filled by neither burning issues nor economic stagnation."[13] Traditionally, minor parties rise in eras of social or economic crisis; often minor parties are seen to be addressing, albeit narrowly, a single momentous issue that the major parties have been neglecting.[14] The Republican Party emerged on the eve of the Civil War around the issue of slavery and the territories.[15] Numerous minor parties, such as the Grangers, the Greenbackers, the Farmers' Alliance, and most importantly, the People's Party, flourished in response to post-war and Reconstruction turmoil during the turbulent years of the 1870s and 1880s. Roosevelt's Progressive Bull Moose Party split from the Republican Party over specific social issues and labor reform.[16] The Dixiecrat Party arose in protest over the Democratic Party platform on Civil Rights.[17] Yet while survey data had shown strong support for the two-party system from the 1940s until the early 1980s, that changed in the 1990s; for the first time, only a minority of voters thought the two parties were doing "an adequate job" and a majority thought there should "be a major third

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[13] SAMUEL J. ELDERSVELD, POLITICAL PARTIES IN AMERICAN SOCIETY 245 (1982) . For a summary of the history of third party politics in the United States, see STEVEN ROSENSTONE ET. AL., THIRD PARTIES IN AMERICA (Princeton University Press, 1996).

[14] *See* ELDERSVELD, id., at 387; V.O. KEY, POLITICS, PARTIES, AND PRESSURE GROUPS, 183-218 (4th ed. 1963).

[15] *See* SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE, 590-93 (1965).

[16] *See* KEY, *supra*, at 186-214.

[17] *See* MORISON, *supra*, at 1053.

party."[18] And if there is anything that might be said to characterize and unite the recent invigoration of third parties, it is not a specific issue, but simply disaffection with the dominant parties and the conventional processes of politics itself.

[18] Christian Collet, *Third Parties and the Two-Party System*, 60 Pub. Opinion Q. 431, 433 (1996).

Given the extreme disincentives to third-party voting and parties built into American electoral structures, this defection from the two major parties is striking. Other patterns of voting behavior similarly reveal widespread resistance to the long-standing conventional forms of partisan politics; the routinization of divided government is the most visible result of this transformation. Thus, split-ticket voting was relatively rare until the 1960s, but since then it has risen to the point where 20-25 percent of voters split their vote in national elections. A majority of voters now split their ballots for state and local elections.[19] Divided government, with different branches in different partisan hands, then follows; a dramatic rise in divided government has taken place over the last two decades or so, to the point at which it has become the standard form at both the national and state level. Thus, from Lincoln's Presidency until 1969, the same party held both houses of Congress and the Presidency between 70-80 percent of the time; since then, the figure has been around 20 percent.[20] Whatever the specific reasons for these results, we are living in an era in which voters want something different -- manifested in the examples of third parties and divided government -- out of democratic politics.

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[19]Aldrich, *supra*, at 267.

[20]These figures are taken from the 1998 edition of Wattenberg, supra, at 224.

The other unmistakable expression of demand for fundamental structural change is the flourishing of voter initiatives. The mid-1970s and since have witnessed "a tremendous upsurge in usage" of the voter initiatives in those states that permit this device.[21] Between 1977 and 1996, there was a 164 percent increase in use of the initiative compared to between 1941 and 1976.[22] Many of these direct democracy ventures seek to restructure the forms in which politics is practiced. Whether it is efforts to reform the campaign finance system, or to restructure the rules of participation in political primaries to increase choices for voters, or to impose term limits on national, state, and local officials, much of the rise in direct democracy can be traced to voter-initiated efforts to change the terms in which democratic politics is currently practiced. In California, for example, voters before 1980 faced an "institutional reform" initiative -- meaning one dealing with campaigns, elected officials, terms limits, elections, or reapportionment -- once every four years; since 1980, there have been six such initiatives every four years.[23] In some sense, of course, any voter-initiated act of direct democracy reflects dissatisfaction with how existing institutions are addressing certain issues. But what is most remarkable in recent years is how many direct democracy initiatives seek to restructure the forms of politics itself. Initiatives and referendum that seek to change the political process have passed at the highest rate in recent years of any category of voter-initiated legal change.[24]

[21]DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 22 (Larry J. Sabato et. al. eds. 2001).

[22]Id. at 21.

[23]Shaun Bowler and Todd Donovan, *Proposition 198: Political Reform Via the Initiative Process*, in VOTING AT THE POLITICAL FAULT LINE: CALIFORNIA'S EXPERIMENT WITH THE BLANKET PRIMARY (Bruce E. Cain and Elisabeth R. Gerber eds., University of California Press, 2002).

[24]For the data, see ELISABETH R. GERBER, THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE

Some of the developments I have described, such as the rise of divided government, are symbols of contemporary disaffection with conventional democratic politics (I have left aside familiar concerns about declining voter turnout rates, given uncertainty about how to interpret what that decline means). Others developments seek to implement directly changes in the structures of American democracy. Challenges of these sorts therefore confront the legal system with concrete pressures for structural change. The rise in third party support, for example, has led to challenges to existing rules that make it especially difficult to mount such challenges. Voter initiatives have sought to diminish what voters perceive as the extreme partisanship of candidates; consistent with the declining attachment to the two major parties, California voters, for example, sought to open political primaries to all voters, of whatever party, in an effort to bring about more centrist candidates. Other voter initiatives have sought to force greater rotation of public offices through term limits.

The disaffection with conventional politics in our era, in other words, is expressed in a dramatic array of efforts to change the ground rules under which politics is practiced. The question, then, is what role, if any, the Supreme Court and constitutional law should play in responding to these efforts. Whatever one thinks of any particular measures, there is a more transcendent general question at stake to which this essay now turns: what should the relationship be between democratic politics itself and constitutional law

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PROMISE OF DIRECT LEGISLATION 118 (1999) (Twenty-three percent of initiatives and referendum dealing with "government and political process" pass).

when efforts are made to challenge the conventional forms of politics in which democracy has been practiced? To gain some purchase on that question, I will turn to an account of how the current Supreme Court has responded to these challenges. In doing so, I will approach *Bush v. Gore* obliquely, for the suggestion here is that the current Justices divide in recurring, yet perhaps surprising, ways in cases involving democracy. Once we can see the broad tapestry of the Court's democracy decisions, we will better be able to understand *Bush v. Gore* as well.

II. THE SUPREME COURT RESPONSE TO THE ERA OF DEMOCRATIC DISAFFECTION

A. PRIMARY ELECTIONS

Political parties in the United States are more heavily regulated than their counterparts in any other Western European democracy.[25] This has been true since the era, roughly between 1882 and World War I, in which legislation on myriad issues was enacted to shift control of party affairs from party leaders to the electorate.[26] This "democratizing" legislation imposed mandatory nominating procedures on parties, including the imposition of mandatory direct primary elections, first for delegates to nominating conventions, then for the choice of the candidates themselves. State laws also mandated the internal governance

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[25]The comparative perspective is developed in one of the leading contemporary studies of American parties, LEON EPSTEIN, POLITICAL PARTIES IN THE AMERICAN MOLD 156 (University of Wisconsin Press, 1986) (parties outside the United States are not "ordinarily subject to most of the other regulations imposed on the internal affairs of American parties.").

[26]For the history of these reforms, and the state judicial response to them, see the important article by Adam Winkler, *Voters' Rights and Parties' Wrongs: Early Political Party Regulation in the State Courts, 1886-1915*, 100 Colum. L. Rev. 873 (2000), on which I draw heavily.

structure of parties: central and county committees were required, for example, and state law specified the terms of election, office, and duties for such party members. Similarly, state laws regulated what could be required to become a party member; states typically required election day "oaths of affiliation" to establish party membership and barred parties from imposing more demanding requirements. In upholding New York's typical party-regulation laws, the Chief Judge of the prestigious New York Court of Appeals characterized such laws as designed to constrain the "not unnatural desire" of party majorities to "perpetuate their power" at the expense of ordinary voting members of the party whose "views were not congenial to the majority."[27] Chief Judge Parker went on to add that "the [regulatory] scheme is to permit the voters to construct the organization from the bottom upwards, instead of permitting leaders to construct it from the top downwards."[28]

[27]People ex rel. Coffey v. Democratic General Committee, 58 N.E. 124, 125-26 (N.Y. 1900).

[28]Id. at 126.

This history of the deep-rooted, extensive regulation of all phases of political party life affords perspective on current efforts to experiment with the structure of political parties. So too does the judicial response to this wave of regulation that created the modern American party structure. Not surprisingly, those who controlled the parties in the late 19th and early 20th centuries, and against whom this "democratizing" regulation was directed, vehemently resisted these efforts. Among other forms, that resistance was expressed through constitutional litigation in which representatives of the parties argued that these regulations violated the parties' freedom of association as well as state constitutional guarantees of "free and equal elections."[29] Party leaders also analogized parties to private corporations; as such, they argued that parties had associational rights insulating them from state regulation. Yet the state courts disagreed overwhelmingly. As the Wisconsin Supreme Court put it, state law had made parties "a state agency;" as the Missouri Supreme Court said, state regulation was justified "to prevent factional oppressions and outrages in politics, and to lift party management to a plane where it will assist, rather than hinder, the expression of the will of the people;"as the Nebraska court concluded, state law could determine conditions of party membership, for "the right to participate" in candidate nominations had been "taken from the party and placed in the control of the Legislature."[30] This elaborate regulatory structure that forms the modern American party, which has essentially remained in place throughout the 20th century, has led one

[29]Winkler, *supra*, at 878. For various historical reasons, this litigation was overwhelmingly in the state courts under state constitutional provisions.

[30]For the cases, see Winkler, *supra*, at 879, 880, 889.

of the leading scholars of parties to conclude that American law treats political parties, not as private associations, but more as "public utilities."[31]

[31]Epstein, *supra*, at 7.

Shift now to the present. In 1996, by a margin of 60% to 40%, with nearly identical support among Republican and Democratic voters, over 3 million voters in California replaced the State's "closed" political primaries with the "blanket primary." In a blanket primary, voters can choose, office by office, the political party in whose primary they want to vote -- the Republican primary for Governor, the Democratic primary for Attorney General, the Libertarian primary for Treasurer. This system contrasts most sharply with what are called "closed" primaries, which is what California had used before voters endorsed the to the blanket primary. In closed primaries, participation is limited to voters who have registered as members of that party a specified time in advance of the primary.[32] That California voters would want to abandon their closed primary is not a surprise: California now has roughly 1.5 million independent voters, who were excluded altogether from the closed primary system.[33] Nor is the blanket primary

[32]Primary election structures can crudely be classified as closed, open, or the kind of blanket primary California adopted. In a "closed" party primary, eligibility is limited to voters who have registered as members of that party a specified period of time in advance of the primary. Fifteen states employ closed primaries. In an "open primary," a registered voter may choose on election day in which party primary he or she prefers to vote, 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 more states permit participation to independents as well as party members; these are sometimes called "semi-open" or "semi-closed" primaries. After the California vote, four states would have used blanket or non-partisan primaries. 984 F. Supp. at 1291-92. According to purportedly reliable exit polls, 61 percent of Democrats, 57 percent of Republicans, and 69 percent of Independents supported the blanket primary in California's Proposition 198 contest. Id. at 1291.

[33]Bowler and Donovan, supra, at ___.

structure novel; Washington has used it since 1935, Alaska since 1947.[34]

[34]From 1960-66, Alaska temporarily shifted back to an open primary.

The structure of primaries is often critical to the nature of those who hold office. Once primaries are over, voters can often have little meaningful choice, particularly in one-party jurisdictions. Regulation of primaries is therefore often a focal point of reformers, and in upholding such regulations long ago, the Oregon Supreme Court colorfully put its rationale: "Once the stream is polluted at its source, access to its waters, however free, will not serve to purify it."[35] Supporters of blanket primaries argue that this is what has happened in states like California. Closed primaries are dominated by each party's most activist wings; as a result, general elections beome contests between two extremist candidates. By the time of the general election, moderate voters face a "polluted stream;" centrist candidates have been swept aside in the torrents of party zealotry. Advocates argued that replacing the closed primary with the blanket primary would increase voter turnout and participation; voters would have more choices, candidates closer to the median voter -- more moderate candidates -- would make it to the general election, and elected officials would then be more responsive to the state's median voter. Voters who turned out for the initiative contest apparently agreed.

[35]Ladd v. Holmes, 66 P. 714, 721 (Or. 1901).

I do not purport to know whether the effects of a blanket primary, short-term or long-term, are desirable. Along some dimensions, "democracy" might be enhanced; along others, it might be diminished; there might well be complex tradeoffs between different aims we think democracy ought to try to realize. Instead, the question this essay explores is what role, if any, *constitutional law* ought to play in addressing these questions. In addition, what does the way in which the Supreme Court *did* address that question tell us about how the current Court envisions democracy and the relationship between constitutional law and democratic processes when it comes to structuring democracy itself? Thirteen federal judges addressed the question whether blanket primaries are constitutional. Six judges concluded they were, seven judges concluded they were not. But because all seven judges who rejected the blanket primary were on the Supreme Court, the decision in *California Democratic Party v. Jones*[36] held the blanket primary an option that California voters simply did not have the constitutional power to choose.

In exploring this case and others, my aim is to tease out the cultural ideals about democracy that seem to inform the current Court's "democracy"cases. By cultural ideals, I mean the empirical assumptions, historical interpretations, and normative visions of democracy that seem to inform and influence the current constitutional law of democracy. Thus my focus is not on the analytical structure of the legal arguments in these cases. Nor is it whether, as a matter of public policy, one electoral form or another is likely to produce a

[36] 530 U.S. 567 (2000).

"better" democratic system. Instead, my concern is the role that democratic politics itself should be understood to have in addressing these kinds of questions -- and how judges, particularly Supreme Court Justices, approach that question. Let us examine, therefore, how different judges portray, describe, and imagine democracy when deciding such cases.

The District Court put great weight on expert empirical evidence -- exceptional expertise in political science was presented at trial, though the experts divided sharply -- 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 District Court's opinion celebrated "experiment[s] in democratic government"[37] and cast the blanket-primary issue 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."[38] 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

[37] 984 F. Supp. at 1303.

[38] 984 F. Supp. at 1301.

or not, democratic politics would be self-correcting enough to respond.[39]

[39] 984 F. Supp., at 1301. The Court of Appeals panel unanimously adopted the District Court's opinion. 169 F.3d 646 (Ninth Cir. 1999).

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 becomes pitted against the "rights" of political parties.[40] While the voters are active and 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 of this silence 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 because the State supports it."[41] What is the separation between the State and the voters in an initiative contest imagined in such a sentence? Moreover, the Court pictures 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."[42] 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 threats to the stability of the democratic order. A vision

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[40]Contrast the opening lines, for example, of the Court's opinion with the concurrence of Justice Kennedy. Compare 120 S.Ct. 2405 ("This case presents the question whether the State of California may [adopt a blanket primary]") with 120 S.Ct. 2414 (Kennedy, J., 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 on an image of "a strong, participatory democratic process --" but not enough to change the outcome.

[41]120 S. Ct. at 2413.

[42]120 S. Ct. at 2410.

further from that of democratic experimentalism and a self-correcting, adaptive democratic system is hard to imagine.

Contrast, now, Justice Stevens' dissent, which Justice Ginsburg joined. This opinion, like the District Court's, makes "the people" and "citizens" and "the electorate" the actor behind the blanket primary, not "the State."[43] 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."[44] As in the District Court's opinion, 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 . . . ."[45] Moreover, the value of voter participation is central in Justice Stevens' 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 *defines* the case as one about voter participation,[46] and his dissent would make the entire structure of constitutional analysis turn on whether regulations of politics expand or constrict voter participation: regulations that expand participation should not face the same close judicial scrutiny as regulations that contract participation. For Justice Stevens, once a new political structure can plausibly be justified as expanding participation, any further debate about its overall policy effects should be left to democratic processes to debate, not

[43] *See, e.g.,* 120 S. Ct. at 2416, 2422.

[44] 120 S. Ct. at 2421.

[45] Id. at 2422.

[46] Id. at 2416.

addressed and resolved by courts.

What determines how judges decide crucial cases involving democracy, such as this one, that will directly shape the kind of democratic politics we experience? 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 -- could have determined judicial judgment. Even if we somehow knew exactly how much blanket primaries would weaken political parties, change governing behavior, and affect voter participation, how ought those effects be traded off against each other? Debates cast in empirical terms often masquerade for deeper, underlying disagreements about cultural assumptions and normative ideals.[47] 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 pre-eminent 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, by contrast, or 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?"

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[47]A theme masterfully developed in Dan Kahan, *The Secret Ambition of Deterrence*, 113 Harv. L. Rev. 413 (1999).

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 it turns out that most Justices on the current Supreme Court end up consistently on the same side of these cases (as this essay will show), despite differences in facts, partisan consequences, and precedents among the various issues involving democracy that have recently been before the Court.

For that reason, the way the Court responds to open primaries[48] will be particularly revealing. This is a question the Court will now find hard to avoid, and its resolution will have dramatic effects on democratic politics -- especially in an era in which so many voters reject affiliating with any one party. Blanket primaries may seem a novelty, in use in only a few places, and precisely the kind of political innovation voters in a place like California, with their muscular initiative process, might choose. But 29 states use open primaries; many have done so since primary elections themselves were mandated early in the 20th century. Is it now to be unconstitutional for state to require parties to use open primaries, in which at least independents can choose to vote? Precisely because the open primary has been around for so long and in so many states, it is hard to believe that the American democratic system's health and stability is threatened by such electoral structures. 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

[48]For the differences among types of primaries, see *supra* note ___.

massive and radical restructuring of a central feature of 20th century American democracy. On the other hand, there does not appear to be any meaningful distinction[49] -- in legal principle or in empirical fact between the open and 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;[50] doing so would 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 now unconstitutional blanket primary.

The larger question is why should these issues be settled through constitutional law? Why should we have to speculate about whether the Court, having struck down blanket primaries, will now shift its appetite toward open primaries -- and whether any (essentially

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[49]Other scholars have reached similar views. See, e.g., Richard L. Hasen, *Do the Parties or the People Own the Electoral Process*, 149 U. Pa. L. Rev. 815, 830-31 (2000). In an open primary, the only act of "affiliation" with a party that is required is to ask for that party's ballot on election day -- compared to a closed primary in which the voter must be registered some period of time in advance as a party member. If the formality of asking for the party ballot is enough to distinguish open from blanket primaries, the distinction is hard to see as meaningful. See, e.g., Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 Colum. L. Rev. 274 (2001) ("The Court fastens on a factual difference between the blanket primary and open primaries, the fact that voters in an open primary are 'limited to one party's ballot,' without specifying the constitutional principle that informs why the 'right not to associate' is breached when voters are allowed to vary party affiliation moment by moment as they traverse the ballot, but not hour by hour as they temporarily 'join' a party for potentially adventitious reasons."). In addition, open primaries require 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 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 -- for which there is no convincing empirical support, as far as I am aware. Indeed, Professor Issacharoff argues that Court fails to explain convincingly why, if blanket primaries are unconstitutional, the very existence of state-mandated primaries is not itself also unconstitutional -- apart from the fact that mandated primaries began about a generation before the first mandatory blanket primary.

[50]*See supra* note ___.

artificial) distinctions can be found to save this common and longstanding political structure against the claim that it interferes with the "free associational" rights of political parties? For generations, democratic politics has been the arena in which disaffection with existing politics has expressed itself through experimentation with new structures through which to channel electoral competition. For generations, courts have stepped aside to permit these popular efforts, however healthy or misguided in particular instances. But there was no sense that courts had to "constitutionalize democratic politics" to save us from ourselves. Democratic politics itself was judicially viewed as resilient enough to permit this kind of trial-and-error pragmatism, without formalistic legal principles -- such as the associational rights of parties -- being obstacles to such experimentation.

If there were some defect in the political process itself to which the Court could point in justifying a role for constitutional law in cases such as this, that would be a different matter; if one party, for example, had temporary control over the legislature and adopted laws whose aim and effect was to substantially weaken competitor parties, constitutional doctrines might well be appropriately deployed to curb such manipulations.[51] But that, ironically, was the opposite of the situation in the recent California blanket-primary case. There was no legislative majority that had captured the California legislature and enacted anti-competitive election laws to stifle other parties. As noted above, it was the voters who imposed this

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[51]That was precisely the situation in the one case before *Jones* in which the Court had held unconstitutional a state's effort to impose a primary structure; in Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986), the Democratic-dominated legislature had refused to change state law to permit the Republican Party to allow independents to vote in Republican Party primaries.

primary system *over* the objection of the political parties; and a majority of voters in each of the dominant parties had apparently voted for the change. Even more significantly, the parties themselves refused to make their case in the democratic arena itself against these primaries; the parties spent virtually nothing to fight the issues out in the initiative contest itself.[52] Instead, they sat out the democratic forum, then rushed immediately to the courts and to constitutional litigation to have the voters' preferred primary structure overturned. Nothing could better exemplify the contrast between how these issues of democracy had long been addressed and the current Supreme Court's routine "constitutionalization" of struggles over the forms of democracy.

B. THIRD PARTIES

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[52]Richard L. Hasen, *Parties Take the Initiative*, 100 Colum. L. Rev. 731, 745-751, 747 (2000) ("Republicans spent $48,899 opposing the measure; Democrats spent a mere $4,630.").

Almost the exact inverse situation was presented to the Court in another recent case involving the essential structures of democratic politics. This time it was relatively weak, minor parties who sought constitutional assistance; this time, it was the two major parties, through their control over state legislation, that had erected barriers to keep the minor parties from competing as effectively as they otherwise could for votes. This is precisely the kind of case likely to arise in an era characterized by disaffection from the major parties and the search for different forms of politics, such as third parties. The New Party, formed in 1992, is a national party that seeks to build from the local level up and claims to have won 300 of its first 400 local races. One of the New Party's central devices for building up its electoral competitiveness was to use "fusion" candidacies, but Minnesota law made such candidacies illegal. In *Timmons v. Twin Cities Area New Party,*[53] the question was what set of assumptions about democracy, and what theoretical understandings about the relationship between constitutional law and democratic politics, would the Court would bring to efforts of emerging organizations, like The New Party, to enhance the competitiveness of American democracy.

"Fusion" politics flourished in the late 19th century.[54] 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

[53]520 U.S. 351 (1997).

[54]The classic treatment is Peter H. Argersinger, *"A Place on the Ballot": Fusion Politics and the Antifusion Laws*, 85 Am. Hist. Rev. 287, 288 (1980). For greater context on the legal questions discussed here, see Samuel Issacharoff and Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643, 683-88 (1998).

choose either party line in voting for the candidate. The ability to form fusion candidacies was critical to the existence of a vibrant third-party politics that existed in late 19th century America, with parties like the Populists, Greenbackers, Laborites, Prohibitionists, and others successfully challenging the two major parties. In 1878, for example, the Greenback-Labor Party won fourteen congressional seats. In 1892, the Populists won about ten percent of the popular votes in the presidential election; by 1898, the Populists held twenty-five seats in the House and six (of ninety) in the Senate.

Deep structural features of the American system, of course, make it unlikely that third parties will displace a major party; not since the 1850s has this happened at the national level. One should not, therefore, romanticize the extent to which new parties in America are likely to displace one of the two major parties. But cross-endorsement does enable third parties potentially to influence the positions that the two major parties adopt. Cross-endorsement also gives 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 included as of right on the ballot in subsequent elections, rather than having to devote scarce resources to signature gathering. Yet if fusion is banned, 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 who has a realistic chance of winning.

Fusion had played a significant role in making possible the era of robust multi-party

politics in late 19th century America. Precisely for this reason, many state legislatures (controlled by the major party most likely to be hurt by fusion candidacies) banned fusion candidacies at the turn of the 20th century. These bans applied even when both a minor and a major party voluntarily endorsed fusion candidates; anti-fusion laws banned such candidacies regardless of the preferences of all the political parties involved.[55] These fusion bans (along with similar laws) devastated third parties. In particular, they were passed in state after state where the Populist Party threat was great, and the laws played a role in ending the Populist Party -- the last important minor party to sustain a working national, state, and local organization over several election cycles.[56]

With the attempted re-emergence of third parties today, these fusion bans were finally challenged in the Supreme Court in *Timmons.* Again, as in *Jones*, a divided Supreme Court (this time 6-3) reversed an unanimous Court of Appeals.[57] Again, what I want to call attention

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[55] Argersinger, *supra*, at 288-290, 303-304.

[56] D. MAZMANIAN, THIRD PARTIES IN PRESIDENTIAL ELECTIONS 115-135 (1974); Argersinger, *supra*, at 304; S. ROSENSTONE, *supra*, at 75 (on the significance of the Populist Party).

[57] A different Court of Appeals in a 2-1 decision had upheld another state's fusion ban, Swamp v. Kennedy, 950 F.2d 383 (7th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992), with Judges Easterbrook, Posner, and Ripple dissenting from the en banc court's refusal to review the case. 950 F. 2d 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

to here 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.

status quo.").

To the lower federal court, the Eighth Circuit, fusion candidacies invigorate the democratic process. While Minnesota 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."[58] For empirical debates about the effects of fusion, the Court of Appeals turned to historical experience and interpreted that experience 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."[59] Like lower court judges in California, the Eighth Circuit also envisioned self-correcting internal mechanisms in democratic politics itself if fusion made for bad politics; major parties could simply refuse to consent to fusion.[60]

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[58]Twin Cities Area New Party v. McKenna, 73 F.3d 196, 199 (Eighth Cir. 1996).

[59]Id. at 199.

[60]Id. at 199.

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.[61] The word "stable" (and variations of it) appears a remarkable 10 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."[62] 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."[63] 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.[64] 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

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[61]*See, e.g.*, 520 U.S. at 366 ("States have a strong interest in the stability of their political systems.").

[62]502 U.S. at 367.

[63]Id. at 358.

[64]520 U.S. at 364.

system."[65]

[65] Id. at 366. For the demonstration that the Court has never previously invoked just 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 Sup. Ct. Rev. 331.

Once again, Justice Stevens led the dissent, joined by Justice Ginsburg. In contrast, his unifying metaphor is "robust competition," not political stability. Indeed, he calls this concern the "central theme" of the Court's democracy jurisprudence: "that the entire electorate, which necessarily includes the members of the major parties, will benefit from robust competition in ideas and governmental policies" is, in his view, the idea "at the core of our electoral process."[66] Were empirical facts relevant? Then Justice Stevens viewed historical experience as showing that the majority's fears for stability were "fantastical."[67] Fusion, in fact, was "the best marriage"[68] of the virtues of minor parties with the level of political stability democracy required; fusion offered a means by which major parties would 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 -- also dissented, but in a 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.[69] If it were, he would not be prepared to reject the majority's constitutional enshrinement of that system, as a necessary means toward political

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[66]520 U.S., at 382 (Stevens, J., dissenting) (quotation omitted).

[67]Id. at 375 n.3

[68]Id. at 380-81.

[69]520 U.S. at 384 (Souter, J., dissenting). Ironically, Justice Souter cites a 1992 New York Times essay by Professor Theodore J. Lowi, which asserts that 1992 will be historically 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 THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES 45 (John C. Green and Daniel M. Shea eds. 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 such as state electoral laws that protect the established parties from rivals and by public subsidies and so-called campaign reform.").

stability. But for Justice Souter, the State had simply not yet argued this point adequately enough to permit judgment.[70]

What explains decisions like *Timmons*? What accounts for the bases on which the Justices divide, or on which the current Supreme Court divides from lower federal courts, here as in the blanket-primary case? Is the debate over fusion an empirical debate, in any meaningful sense; are judges dividing over what "the evidence" shows? If history is one source of such evidence, when different judges look back to historical moments at which fusion flourished, how do those judges interpret that past? Do they see a time of political instability, excessive factionalism, campaign disorder, and party splintering? Or 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 the internal logic of doctrinal analysis do so? 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 tumult, are to democracy.

[70] 520 U.S. at 384.

C. ACCESS TO PUBLIC CAMPAIGN FORUMS

Consider one final example, before we turn to *Bush v. Gore*, of the current Court's approach to assessing the practices of democracy. The case centers on the following question: How specific must the legal norms be that regulate various aspects of democracy -- voting and the counting of votes, for example, or getting one's name on the ballot as a candidate, or gaining access to participation in publicly-sponsored candidate debates?

Procedural judgments of this sort depend upon evaluations of the particular aspect of democracy at stake. Those judgments can depend on views of how a decision one way or the other will affect the values justifying the particular feature of democracy; on how much a requirement of greater specificity will compromise countervailing values (and by how much); and similar considerations. 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. An alternative 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*.[71]

In another signal case for the law of democracy, the Supreme Court recently confronted the process by which public television stations are constitutionally permitted to make judgments about which ballot-qualified candidates to include and exclude in publicly-sponsored candidate debates. In Arkansas, the state-owned public television station 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 policy, the station excluded him based, 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 a central question was not whether this particular judgment was legitimately based; 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.

[71]Along with whether Equal Protection requires statewide uniformity in the substantive issue of what counts as a legal vote.

Again, we have a challenge, typical of our times, to conventional modes of politics. This time the challenge came to the Court in the form of a ballot-qualified independent candidate seeking to participate in debates. The outcome in the case might also, by now, be familiar. In *Arkansas Educational Television Comm'n v. Forbes*, a divided Supreme Court, the *Bush v. Gore* majority plus Justice Breyer, reversed a unanimous Court of Appeals.[72] 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.

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[72] 523 U.S. 666 (1998)

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 the Court majority's vision: public broadcasters would be faced with "the prospect of cacophony, on the one hand" if Forbes' First Amendment claim were accepted; or, on the other hand, if confronted with the senseless and chaotic prospect of too many candidates in a debate, public broadcasters would likely withdraw from the role of sponsoring debates at all. The striking image is that of "cacophony," about which we might ask several 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 primary.[73] Yet at stake in *Forbes* was whether a third candidate, qualified to be on the ballot, would be permitted into the public debate.

[73]Jamin B. Raskin, *The Debate Gerrymander*, 77 Tex. L. Rev. 1943, 1973 (1999). Of course, early primaries might be viewed differently than general election debates, but the Court's opinion relies not at all on these kind of distinctions.

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 competing cultural images. Those other procedural possibilities, rather than any profound difference of principle, are what the dissenters 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 specificity in advance, through objective, 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.[74] 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.[75]Thus, it seems more an exaggerated fear of the *image* of disordered, chaotic debates, rather than meaningful factual evidence, that leads the Court to worry that requiring procedural protections for access will cause public stations to flee the debate-sponsoring role.

How must pre-established specificity judges demand, of course, depends in part on how valued the particularly activity is. Here, too, what divided federal judges so evenly might

[74]Id. at 684.

[75]*See* Brief of Amicus Curiae Commission on Presidential Debates in Support of Petitioner, Arkansas Educational Television Commission v Forbes, No 96-779 (filed May 30, 1997) (available on Lexis at 1996 US Briefs 779). *See also* 11 CFR Sec. 110.13© (2000); New York City Admin Code Sec. 3-709.5 (1999); Commission on Presidential Debates, Nonpartisan Candidate Selection Criteria for 2000 General Election Debate Participation, available online at <http://www.debates.org/pages/candsel.html> (visited Apr 10, 2001). Even once pre-established,

well have been whether multi-candidate debate itself was viewed as a benefit or as a cost to "democracy." Thus, Justice Stevens emphasized that a third candidate who was not likely to win might nonetheless change electoral outcomes by taking votes from a dominant party candidate; in this sense, 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."[76] For Justice Stevens, the power to affect electoral 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,"[77] would not consider an independent candidate's outcome-determinative effects on elections a *cost* to democracy, rather than a self-evident benefit.

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objective criteria are specified, those criteria might of course be challenged substantively.

[76] Id. at 685.

[77] 502 U.S. at 367.

Because many aspects of elections implicate constitutional values -- the vote, access to the ballot, participation in public debates -- legal issues will inevitably arise concerning the levels of specificity required of electoral 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 judges will confront repeatedly. That empirical facts could in themselves resolve these issues seems unlikely; does Jessie Ventura's victory in Minnesota, made possible partly by his third-party participation in debates, enhance or threaten appropriate democratic politics?[78] 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 explanation I mean to suggest here. If we are to recognize and understanding the emerging constitutional law of democracy, it is necessary, I believe, to see the central role that these cultural assumptions play.

III. *BUSH V. GORE*: CONSTITUTIONALISM'S APOTHEOSIS

[78]For discussion of the crucial role that less restrictive electoral laws and debate practices played in enabling Ventura's success, see Richard H. Pildes, *A Theory of Political Competition*, 85 U. Va. L. Rev. 1605, 1617-18 (1999).

Bush v. Gore can now be seen to exemplify, not narrow interests uniquely tied to the 2000 presidential election (or not just such interests alone), but a broader, recurrent approach in the current Supreme Court to cases involving democracy. Whether this will make the decision less troubling -- or more -- I leave to the reader. But in two respects, *Bush v. Gore* expresses characteristic practices and assumptions of the current Court. First, *Bush v. Gore* represents the ready invocation of constitutional law to supplant or replace democratic arenas for determining the essential structures of the most fundamental political processes. *Bush v. Gore* is in the same spirit as *California Democratic Party v. Jones*, only more so: *Bush v. Gore* reflects constitutionalism's ultimate transcendence of democratic politics. Resolution of a disputed presidential election is the most political, the most incendiary issue that the American electoral system can confront. In no earlier era would it have even seemed imaginable that constitutional law and Supreme Court adjudication would be the final mechanism for such a resolution. Indeed, over a hundred years ago, Congress created a congressional mechanism for resolving disputed presidential elections -- and recoiled in bipartisan horror at the prospect of the Supreme Court resolving such disputes. In the Electoral Count Act of 1887, much discussed during the 2000 election but not ultimately employed, Congress adopted a mechanism for congressional resolution, with ultimate default rules, for ending disputed presidential contests. In explaining the deliberative choice of a political mode for resolving such disputes, Senator Sherman, a leading supporter the statute, asserted that the proper means to resolve a disputed Presidential election was "a question that is more dangerous to the future of this country than probably any other."[79] In justifying congressional rather than Supreme Court resolution, he went on to argue:

[79] 17 Cong. Rec. 815 (1886) (Sen. Sherman).

> 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 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, that it is the provision made in other countries.[80]

Yet in an era in which it has become routine for the Court to conclude that constitutional law should determine the basic institutional arrangements of democracy, it was no great leap for the Court to conclude that presidential election contests, too, could appropriately be resolved through Supreme Court decision.

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[80] 17 Cong. Rec. 817-18 (1886)(Sen. Sherman).

The second way in which *Bush v. Gore* is characteristic of the emerging law of democracy lies in the reasons, assumptions, and visions of democracy upon which the Court seemingly relied. These reasons and assumptions reflect those that the Court has come routinely to invoke in other cases involving democratic politics. Both these points -- the fact that the Court has constitutionalized aspects of democracy and the apparent reasons the Court has done so -- have general implications for the future of the law of democracy. I will elaborate briefly on each.

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I mean the first point in a more minimal way than do many critics of *Bush v. Gore*. These critics make a superficially similar, but more sweeping, point. Many argue (including some dissenting Justices) that the Supreme Court should not have gotten involved, in any way, in the 2000 election dispute.[81] On this view, the legal issues should have been left to the Florida courts; if further consideration were appropriate, the place for that would have been Congress when it played its constitutionally-specified role of receiving Florida's electoral vote count. Perhaps. But once the State courts become involved in a presidential election dispute, it becomes more difficult to conclude that there should be no role at all, even a limited oversight role, for the United States Supreme Court. Should a rational structuring of the federal-state judicial relationship preclude all federal court oversight, in any form, of how state courts resolve

[81]This was the consistent position taken throughout the dispute by Jeff Rosen's writings in THE NEW REPUBLIC. See Bush v. Gore, 531 U.S. 98, ___ (2000) (Souter, J., dissenting, joined by Justices Breyer, Stevens, and Ginsburg) ("The Court should not have reviewed either *Bush v. Palm Beach County Canvassing Bd.I,* or this case . . . .).

determinative legal issues in presidential elections? I am skeptical of such a position.[82]

There is certainly room to dispute how the Court should exercise its role of constitutional oversight of state-court decisions in national-election disputes. But the view that the Court has no constitutional authority, in principle, to oversee state judicial decisions, even ones purporting to interpret state law, is hard to square with the constitutional structure and with the constitutional status of the right to vote itself.

A more limited critique, then, of the Court's intervention would start with an acceptance that Supreme Court oversight of state courts in national elections is, at least in principle, justified. Instead, the criticism of *Bush v. Gore* would then be, not that the Court was wrong to intervene at all, but that its substantive basis for resolving the contest were wrong. That substantive basis rested on the procedural and substantive protections the constitutional right to vote ought to require during manual recounts of a disputed election contest. The substantive violation of equality, according to the Court, was that different counties in Florida were free to use different standards as to what counted as a legal vote, even though the contest involved a statewide election. Ballots marked identically might be a legal vote in Palm Beach County but

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[82]Drawing on how federal courts have handled oversight of previous election disputes, including for state office, I have argued elsewhere that there is a justifiable, limited federal constitutional role in ensuring that state courts do not change election rules in the middle of an election dispute under the guise of merely interpreting those laws. But I also argue that this federal oversight role should be circumscribed by the need to find particular factors present to justify the dramatic conclusion that a state court has improperly changed the rules in the middle of the game, and that the evidence to support such a conclusion in Bush v. Gore is thinner than in other cases in which federal courts have found state courts unconstitutionally to have created "new law" while resolving election disputes. Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 Florida State University Law Review 691 (2002).

not in Broward County. Critics of the Court's equal protection holding have tended to focus primarily on this purported defect. One form this criticism takes is the argument that, if different counties are permitted to use different voting technologies, which have different levels of effectiveness in recognizing and tabulating "votes," why is the equal protection clause then violated if different counties choose different substantive rule as to what makes for a legal vote? But even if one accepts this criticism, this is a response that fails to engage the Court's procedural objections to the way Florida's recount was conducted. And ultimately, these procedural objections seem to me the ones critics of the Court must engage, for these procedural concerns are the strongest basis for the equal protection (or due process) principles that inform *Bush v. Gore*. County officials possessed vague, essentially standardless discretion to decide what standard to adopt in determining whether a ballot contained a valid vote. The concern is that such open-ended discretion, particularly in the hands of partisan, elected officials, would enable them to engage in partisan discrimination against the opposing party's candidate; indeed, with so much at stake, it would be easy to imagine that the manipulation of the counting process toward partisan ends could occur both intentionally and even de facto if not consciously intended. If there are no clear, relatively objective standards specified in advance as to what counts as a valid vote, proving that this discrimination has taken place can be difficult, even if it does occur. As in other areas of constitutional law where the Court adopts prophylactic rules because it is difficult to prove in individual cases whether constitutional violations are taking place, so too with the right to vote: to prevent partisan officials from acting on the obvious temptation to adopt rules or counting practices in the middle of an election dispute that will favor their own partisan purposes, constitutional law might require that the rules be specified in advance in clear enough form to prevent partisan officials from exercising standardless discretion at all.

Florida law did, of course, require that the determination be made based on "the intent of the voter," but if there are constitutional concerns when vote counting is manipulated for partisan purposes, then that "intent of the voter" command might not, in and of itself, provide a clear enough rule, specified in advance, as to what would appropriately manifest that intent. Had Florida law or prior administrative practice filled in the "intent of the voter" standard in advance of the disputed election -- or perhaps even if the Florida Supreme Court had given more determinate content to that standard at an early stage of the dispute -- perhaps that ought to be sufficient to satisfy the procedural requirements surrounding the constitutional right to vote. In theory, judges would be available to oversee the recount process at the last stage. But if county boards were engaging in partisan manipulation in either the standards they adopted or the way they applied those standards to specific ballots, any possibility that judges would have been able to re-visit that count to bring uniformity and consistency to it, under the exceptional time pressures involved, seems speculative at best. That is not to say that the Court was right in its procedural equal protection concerns; I cannot do justice to that debate here. But I do want to suggest that these are serious concerns, not to be dismissed lightly. That is what Justices Breyer and Souter, along with five other Justices, concluded. And the prospect of partisan officials, free to adopt and apply different and highly subjective standards in a context in which everyone knew (or thought they knew) which way those standards would cut on an issue in which all were intensely interested did, at the least, send a chill down my equal protection bones.

But it matters not, for present purposes, whether we think the Court right or wrong about how it resolved the equal protection issue. For the point of this essay would hold even if the Court were right on that question; even conceding that, *Bush v. Gore* would still exemplify an extraordinarily aggressive constitutionalization of struggles long considered, appropriately, best left to political rather than judicial

processes. The central question the election dispute poses would still remain, even if the Court's equal protection principles are accepted. That question is what the relationship should be between constitutional law and courts, on the one hand, and politics and legislative institutions, on the other. And here the Court bypassed the obvious answer -- even assuming the Court should have intervened, and even assuming its equal protection analysis was correct. The Court could have gone so far as to specify the processes and rules required for a constitutional recount; doing so would have fully protected the constitutional right to vote. But even having gone this far, the Court could then -- as it likely would have in an ordinary case -- sent the case back to have that constitutional recount process carried out under the supervision of Florida judicial and executive officials. We do not know what would have followed ensued. It might soon have become apparent that a recount under the constitutional standards the Court had laid out in *Bush v. Gore* could not be completed by the day the Electoral College was to meet (Dec. 18th); if so, it is plausible that the Florida Supreme Court, already divided 4-3 about whether to permit further counting *before* the Supreme Court's decision in *Bush v. Gore*, would itself then have terminated the counting. But if not (if a constitutional recount were completed before Dec.18th or if one were permitted to go after that date) Congress would, ultimately then have resolved the election when it met in January to count the electoral votes –and Congress would have decided, as well, whether it has power to accept votes after the Electoral College has met. We must keep in mind -- whether the Justices did or not -- that Congress would have faced these issues not in a vacuum, but in a post-*Bush v. Gore* world that the Court itself would have helped to structure. That is, any recount totals presented to Congress would have resulted from a recent process overseen by Supreme Court standards, one in which consistent, uniform, clearly specified vote-counting standards would have been required.

The choice, then, need not have been an all-or-nothing one between constitutional law and democratic politics. Had the Court been concerned to preserve as much space as possible for democratic politics, except where strong constitutional reasons justified a judicial role, solutions were at hand that would have respected a role for both constitutionalism and democracy. These solutions were also legally well-supported; as most scholars have suggested, the most widely criticized part of *Bush v. Gore* is the Court's reason for declining to send the case back to the Florida courts regarding what Florida law required in the wake of *Bush v. Gore*. The Court could have specified the constitutionally-required process for a recount; yet the ultimate decision about what to do with the vote totals and ballots could also have been left to the United States Congress, the institution most widely accountable democratically for any choice about how to resolve the election. But instead the Court specified the constitutional process for a recount, then in the same moment terminated that process altogether (and on the basis of reasons that the strongest defenders of *Bush v. Gore* find hard to credit[83]). Constitutional law overwhelmed any role for democratic politics; the Supreme Court displaced Congress entirely from the process. The contest did become an all-or-nothing one between constitutional law and democratic politics. Not surprisingly, in light of the larger pattern of the current Court's cases, constitutional law dominated. The question, now, is why.

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[83]Professor Michael McConnel for example, defends the substantive finding in *Bush v. Gore* that the recount process violated the Constitution, but believes the Court's failure to allow the process to continue in the Florida courts was not legally correct. Michael W. McConnell, TWO-AND-A-HALF CHEERS FOR *BUSH V. GORE* & THE SUPREME COURT 98, 117 (Cass. R. Sunstein and Richard A. Epstein eds. 2001) (University of Chicago Press)

How does one get at the deeper explanations, reasons, and assumptions that might motivate judicial decisions in particular cases, especially a case as freighted as *Bush v. Gore*? Not surprisingly, given the press of time, the decision itself is brief and unrevealing. If one believes that the formal legal reasons expressed do not exhaust the considerations that might have been at work in a case of this magnitude, how can one gain insight into what those other considerations might have been?

One method is to situate a particular case in a pattern of decisions, decisions that themselves are more revealing and self-consciously articulate. By looking at the images, metaphors, and rhetoric that emerge in these decisions, it can become possible to obtain glimpses of the worldviews that inform the Court's decisions. That is what I have tried to do here. In case after case, a majority of the current Court -- the five Justices who voted to end the election litigation, joined at times by Justices Breyer and Souter – has worried about the "stability" of American democracy and the risk of "excessive fragmentation" of American politics. Where other judges have seen competitive practices that ensure a robust and vital democratic system, the current Court has seen threats to orderly democratic processes. The suggestion here is that it is these kind of concerns, assumptions, beliefs, values played a central role -- perhaps the central role -- in *Bush v. Gore*. When the Court stared at other institutions that might have settled the election, particularly Congress, it did not see a healthy democratic mechanism for political struggle and stable resolution. Instead the Court saw the specter of disorder, constitutional "crisis," and dangerous instability.

This fear that democratic institutions would be unable to ensure 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, a haste suggested by its choice to hear the election litigation the first time, in *Bush v Palm Beach County Canvassing Board*,[84] followed by its conclusion that no substantive issue of law was yet ready to be decided at that point. The Court's stay order, too, is indicative of a perceived need to intervene to establish order and control even before the moment of final decision. Whatever the true reasons for these actions, individually and as a whole, the Court's actions seem to manifest anxiety about the capacity of other institutions, including political ones such as Congress, to avoid unleashing what the Court might well have perceived as "the furies of civil commotion, chaos, and grave dangers."[85]

[84] 121 S. Ct. 510 (2000).

[85] These are the terms in which defense of the Court's decisions are cast in Gary C. Leedes, *The Presidential Election Case: Remembering Safe Harbor Day*, 35 U. Rich. L. Rev. 237 (2001).

Another method of getting at the assumptions about democracy behind *Bush v. Gore*, and therefore, possibly behind the current Court's other democracy cases, is to look at the justifications that others have offered for the decision. And here, we owe a debt of gratitude to Judge Richard Posner, the leading academic defender of the decision. Freed from the conventions that hamstring judicial opinions, and with his usual relish for exposing cant, Judge Posner has put before us his candid, realist's account of why *Bush v. Gore* was right. He nods towards a possible legal foundation for the decision, based on Art.II of the Constitution (and rejects all other legal arguments for *Bush v. Gore*), but he hardly hides his own view that this legal argument plays little role in his endorsement. As Posner forthrightly admits, "there was sufficient play in the legal joints to enable either side to write a professionally respectable opinion justifying its preferred outcome."[86] Acknowledging, therefore, that the legal argument is hardly compelling, Judge Posner goes on to say the decision is one whose most convincing justification is pragmatic.[87] Pragmatic in what sense? In that the failure of the Court to intervene "might have precipitated a constitutional crisis"[88] -- a crisis that, in Posner's view, would "place *Bush v. Gore* with the Emancipation Proclamation and *Korematsu*"[89] as cases in which the relevant constitutional text "could be stretched"[90] to "enable a national crisis to be averted by constitutional means."[91] (Posner does not think that "the crisis" over election 2000

[86]Richard A. Posner, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 180 (2001).

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[88]Id. at 152.

[89]The Supreme Court decision permitting the United States military to inter Japanese-American residents and citizens during World War II. Korematsu v. United States, 323 U.S. 214 (1944).

[90]Posner, at 188.

[91]Posner, at 188.

was as ominous as the Civil War, only that it was ominous enough)..

In defending *Bush v. Gore*, Posner articulates precisely the cultural assumptions that I see running throughout the Court's recent cases involving the relationship between constitutional law and democratic politics. Posner, too, sees opposing visions of democracy -- and the need for the Court to police democracy -- as the decisive consideration in *Bush v. Gore*. As he says, "[o]n one side [his side] was a preference for order -- for an orderly transition, an orderly succession, an avoidance of protracted partisan wrangling, or an awkward interrgenum, and of a diminished Presidency."[92] The opposing side, which would involve congressional resolution of the election, Posner characterizes and disparages as "a preference for a more populist, perhaps even carnivalesque, but certainly less orderly and legalistic conception of American democracy. . . . '[93] Those more charitably disposed toward this approach might simply call it a preference for democratic practices, period.

IV. LAW, ORDER AND DEMOCRACY

The structures and groundrules through which American democracy is constituted will continue to come under pressure in the coming years. Whether through third party challenges, uses of the voter initiative, efforts to impose structural changes like term limits, regulation of campaign financing, or other

[92]Id. at 256.

[93]Id.

vehicles, efforts to criticize and revise conventional modes of politics seem likely to continue. Whether one agrees with any measure in particular, the larger issue is how much latitude courts will give democratic arenas to confront and respond to these challenges. What role should constitutional law play in constraining the ongoing self-revision of democratic processes?

To argue that constitutional law should play no role would be historically naive. Experience has shown that a central pathology of democratic institutions is the tendency of those who currently hold power to use the law to entrench their power more permanently. There is an important role for constitutional law to play in ensuring that existing officeholders not use their political power to insulate themselves from political competition. That is the lesson on which much of modern constitutional law and theory has been built. From the rise of the one-vote one-person doctrine, in response to generations of legislative malapportionment,[94] to John Hart Ely's famous statement in *Democracy and Distrust* that the Supreme Court's quintessential role is to ensure that the channels for political change remain open, modern constitutional law has properly recognized circumstances that justify constitutional oversight of democratic politics.

But the current Court now constrains democratic options routinely, almost reflexively, in circumstances that bear no relationship to those that had previous justified a more focused, discrete role for constitutional law. Indeed, the Court has turned this previous understanding of the boundary between

[94]The starting point for this doctrine is Baker v. Carr, 369 U.S. 186 (1962).

democracy and constitutional law on its head in two ways. First, the Court has created constitutional constraints on democratic processes when there is no risk that political insiders are manipulating democratic structures to perpetuate their own power. To the contrary, it is often dominant political insiders who run to the Court these days to seek protection against change. The blanket-primary case, *Jones,* illustrates this phenomenon. This transformation is what I call the all-too-ready "constitutionalization of democratic politics." Second, the reasons the Court appears to be constitutionalizing democracy themselves invert the justifications for constitutional oversight of politics. Before, the Court had acted to keep the channels of political change open, in the face of the temptations insiders faced to use legislative power to insulate themselves from competition. But now, it is robust political competition itself that the Court perceives to be the problem. To hear the Court, or its defenders like Judge Posner tell it, American democracy is fragile, on the brink of fragmentation and disarray, in danger of getting out of hand, and hence in need of judicially-imposed order to ensure sufficient political stability.

The election decision is over. But the cultural assumptions about democracy that lie behind it will shape how the Court responds to the coming challenges to existing forms of democratic politics. 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. The stark opposition, of course, is false: democracy requires a mix of both order (law, structure, and constraint) and openness (politics, fluidity, and receptivity to novel forms). But whatever the analytical truth about the necessity of both order and openness to democracy,

different actors will perceive the greatest threat to come from one direction rather than the other. The current Supreme Court consistently now acts as if the greatest threat is that democracy will become too unstructured, too excessive. The Court believes constitutional law is necessary to help save us from that prospect. *Bush v. Gore* is only the most dramatic crystallization of that current judicial perception, but it is a perception that controls the Court's approach to much of the current jurisprudence of democracy.

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?

The current Court decidedly shows, in Judge Posner's words, "a preference for order." At the same time, we live in an era of significant disaffection with the existing order of politics. In response, the Court has invalidated experiments with new forms of democracy while refusing to require that the system be open to emerging sources of challenge. The Court has done so not because political insiders are manipulating the rules of democracy for self-interested reasons. The Court has done so because it believes, or fears, or assumes that American democracy requires judicial constraint to ensure that stability and order are maintained. Given the resilience and endurance of American democracy, including its capacity for self-revision and correction, is that fear the right stance to stake? Should democracy be constitutionalized to this extent?