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## A Party That Won't Spoil: Minor Parties, State Constitutions and Fusion Voting

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# NOTES

## A Party That Won't Spoil

### MINOR PARTIES, STATE CONSTITUTIONS AND FUSION VOTING\*

#### I. INTRODUCTION

In the 2000 Presidential race 2,882,955 Americans cast their votes for Ralph Nader, the Green Party candidate.<sup>1</sup> When Republican George W. Bush won a narrow victory, many argued that Ralph Nader caused Democrat Al Gore's defeat.<sup>2</sup> Nader was deemed a "spoiler."<sup>3</sup> Democratic Party leaders were angry, and they made that anger public. For instance, according to one elected Democrat, Nader "divorced himself from the very ideals that made him a worthwhile political actor. He sold out his constituency."<sup>4</sup> The anger over the

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<sup>1</sup> See Federal Election Commission, *2000 Official Presidential General Election Results*, at [www.fec.gov/pubrec/2000presgeresults.htm](http://www.fec.gov/pubrec/2000presgeresults.htm) (last modified Dec. 2001).

<sup>2</sup> See, e.g., Sheila R. Cherry, *Nader Raids the Democrats*, INSIGHT, Dec. 4, 2000, at 24; James Dao, *Angry Democrats, Fearing Nader Cost Them the Presidential Race, Threaten to Retaliate*, N.Y. TIMES, Nov. 8, 2000, at B3; *The Spoiler*, PITTSBURGH POST-GAZETTE, Dec. 17, 2000, at A9. For the argument that, contrary to the conventional view, Buchanan had a greater impact on the election than Nader, see David Leonhardt, *Was Buchanan the Real Nader?*, N.Y. TIMES, Dec. 10, 2000, at 44.

<sup>3</sup> See, for example, the news articles listed *supra*, note 2. A "spoiler" is a candidate who has no chance of winning, but whose candidacy deprives another of success. See MERRIAM WEBSTER ONLINE DICTIONARY, at [www.m-w.com](http://www.m-w.com) (last visited May 15, 2005).

<sup>4</sup> See Peter DeMarco, *D.C. Dems Gore Nader for Crashing the Party*, N.Y. DAILY NEWS, Jan. 30, 2001, at 2 (quoting Rep. Robert Wexler). See also Michael Powell,

outcome of the 2000 race survived the four years between presidential elections.<sup>5</sup> In 2004, Ralph Nader was on the ballot for president once again, but this time, the Green Party did not endorse him.<sup>6</sup> Party members hoped to avoid new accusations of spoiling and thought another Nader candidacy would attract would-be Democratic-voters away from John Kerry.<sup>7</sup> Nader ran without the Green Party endorsement.<sup>8</sup> He received only 465,650 votes.<sup>9</sup>

In most American elections, only two candidates have a reasonable chance at victory. Minor parties are stuck in a cage twice locked: they must ask voters either to throw away their vote and have it not affect the outcome, or to vote and affect the outcome by “spoiling,” causing the victory of a candidate least preferred by the minor party constituency.<sup>10</sup> Since voting for a third party candidate casts an insignificant vote or worse (i.e., furthers the success of an opponent), third party voting often seems irrational. The authors of *Third Parties in America* put it this way:

To vote for a third party, citizens must repudiate much of what they have learned and grown to accept as appropriate political behavior, they must often endure ridicule and harassment from neighbors and friends, they must pay steep costs to gather information on more

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*Seared but Unwilted; Democrats See Red. But Green Party Faithful Say They Made Their Point*, WASH. POST, Dec. 27, 2000, at C1 (“Ask the Democrats about Nader and their rumblings devolve into a rain of invective.”).

<sup>5</sup> For instance, in the fall of 2004 S.L. Price wrote an Op-Ed for the New York Times that began, “As a rule, my friends hate Ralph Nader. The conservative ones consider him a publicity hound who has it in for corporate America, and the liberals blame him for putting George W. Bush in the White House.” S.L. Price, *Nader’s Reminders*, N.Y. TIMES, Oct. 30, 2004, at A19.

<sup>6</sup> In a blatant snub, the Green Party endorsed Texas attorney David Cobb. Cobb sought the Green Party nomination with a commitment to campaign in “safe states” only. See David Finkel, *Nader Plays Down Green Party Rebuff*, WASH. POST, June 28, 2004, at A6; Lisa Chamberlain, *The Dark Side of Ralph Nader*, SALON.COM, at [http://archive.salon.com/news/feature/2004/07/01/nader\\_jacobs/](http://archive.salon.com/news/feature/2004/07/01/nader_jacobs/) (July 1, 2004). Nader won spots on the ballots of more than 30 states. See Susannah Rosenblatt, *Nader is Still on the Radar in Key States*, L.A. TIMES, Oct. 31, 2004, at A35.

<sup>7</sup> See Dan Moffett, *Greener Pastures for Ex-Naderites*, PALM BEACH POST, July 4, 2004, at 2E; Norman Solomon, Editorial, *Nader Adrift*, BALT. SUN, July 1, 2004, at 15A.

<sup>8</sup> Nader ran as an independent candidate. In some states, he was able to get on the ballot line of a statewide minor party. See Michael Janofsky, *Nader Presses On*, N.Y. TIMES, Oct. 26, 2004, at G2.

<sup>9</sup> See Federal Election Commission, *Federal Elections 2004* (May 2005), at <http://www.fec.gov/pubrec/fe2004/federalelections2004.pdf>.

<sup>10</sup> See LISA JANE DISCH, *THE TYRANNY OF THE TWO-PARTY SYSTEM* 127-28 (2002).

obscure candidates, and they must accept that their candidate has no hope of winning.<sup>11</sup>

Nonetheless, people sometimes choose to vote on a minor party ballot line to send a message about their frustration with the two major parties and their candidates.<sup>12</sup> This is probably why 2.8 million people voted for Nader in 2000.<sup>13</sup> The risk of “spoiling” or “wasting votes,” however, makes it hard for minor parties and independent candidates to consistently secure voters’ support at the ballot box, even if voters remain committed to the party and candidate’s ideology.<sup>14</sup> This is probably why 2.4 million fewer voters chose to vote for Nader in 2004 than in 2000.<sup>15</sup>

If minor parties are allowed to endorse major party candidates, they could be effectively released from their political cage. Imagine a closely contested race between a Democrat (candidate X) and a Republican (candidate Y). A minor party, the Purple Party, endorses candidate X. The ballot has a column for each political party and in each column the name of that party’s nominee is printed. Candidate X, then, is listed twice. (See Appendix for a sample ballot.) Those who prefer candidate X to candidate Y can vote on either the Democratic or the Purple party ballot line for candidate X.

Let’s say the Purple Party platform strongly supports the right of same-sex couples to marry. A voter, who similarly supports gay marriage, hopes candidate X will win the election, but is frustrated with the way candidate X and the Democratic Party avoid the issue of same-sex marriage. Our hypothetical voter would be able to cast her vote for both the candidate she prefers *and* the political party she feels best represents her

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<sup>11</sup> See STEVEN J. ROSENSTONE ET AL., *THIRD PARTIES IN AMERICA* 3 (2d ed. 1996).

<sup>12</sup> *Id.* at 9.

<sup>13</sup> See, e.g., James Dao, *The 2000 Election: The Green Party*, N.Y. TIMES, Nov. 10, 2000, at A29 (quoting voters as saying “I voted for Nader because he was most aligned with my values” and “I voted my conscience”).

<sup>14</sup> See ROSENSTONE ET AL., *supra* note 11, at 81, 174-75 (explaining modern minor parties fielding their own candidates rarely last more than two election cycles).

<sup>15</sup> Television host Bill Maher, who voted for Nader in 2000, explained his switch in 2004 this way: “We all got a little reality slapped into us by George W. Bush . . . I see [voting for Nader] as a bratty thing to have done.” See Tom Shales, *Bill Maher: Back for More*, WASH. POST, Aug. 2, 2004, at C1. Former Nader supporter Ronnie Dugger changed his position after the 2000 election and described Nader’s second presidential candidacy as a mistake in strategy and harmful to the progressive values he and Nader share. See Ronnie Dugger, *Ralph, Don’t Run*, NATION MAG., Dec. 2, 2002, at 14.

views. This practice—voting for candidates that are endorsed by more than one political party—is known as fusion voting.

In a fusion voting system, a single candidate can be nominated to run on more than one party's ballot line.<sup>16</sup> All votes for that candidate are added together to determine whether the candidate wins a majority of votes, regardless of the ballot line on which the vote was cast. But each party's votes are also tallied separately, so the election results reflect each party's contribution to the candidate's electoral success. Minor parties are able to influence the outcome of elections even when they do not field a viable candidate of their own.<sup>17</sup> They can endorse a candidate who has a reasonable chance of victory, while also demonstrating that voters support their platform.<sup>18</sup> Likewise, voters are able to express their support for the party's principles, while avoiding the danger that their vote has been wasted in symbolic protest. As one pro-fusion party has boasted, fusion voting makes one vote count twice—first it sends a message about the issues the voter cares about and then it helps elect a candidate.<sup>19</sup>

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<sup>16</sup> The broadest definition of fusion voting would include ballot rules that allow more than one party to be listed as endorsing a single candidate, but only list a candidate once. Returning to our previous hypothetical, this would mean that candidate X would be listed under a column labeled Democrat and Purple Party, and candidate Y would be listed under a column labeled Republican. For the sake of this note, I use fusion voting to mean a system where each party would have its own ballot line. For an argument that any other kind of fusion voting scheme is unconstitutional, see Note, *Fusion Candidacies, Disaggregation, and Freedom of Association*, 109 HARV. L. REV. 1302 (1996).

<sup>17</sup> Of course, in a fusion voting system, minor parties could choose to run their own candidate if they felt so motivated. When fusion parties proliferated in America, minor parties often debated whether they should endorse a major party candidate or run an independent candidate. See DISCH, *supra* note 10, at 53-54. Generally, fielding a minor party candidate was a move of last resort. See ROSENSTONE ET AL., *supra* note 11, at 79. However, just the threat of not receiving a minor party endorsement kept major parties on their toes. Major party candidates would adopt parts of minor party platforms in order to secure the votes of minor party adherents. See DISCH, *supra* note 10, at 41.

<sup>18</sup> A party's strong showing at the polls could translate into influence on policy. Returning to our hypothetical candidate after Election Day illustrates this point. Imagine Candidate Y receives 48% of the vote, more votes than Candidate X receives on the Democrat ballot line. However, when all votes are tallied, Candidate X is elected with 52% of the vote—44% from the votes on the Democratic ballot line, and 8% of the votes from the Purple Party ballot line. (See Appendix for hypothetical election results.) Candidate X assumes her elected office knowing that she would not have won without the Purple Party's support. Since she is constantly thinking about the future of her political career, she looks to the Purple Party's platform and incorporates it into her policy agenda. For real world examples of this, see *infra* notes 79-82 and accompanying text.

<sup>19</sup> Working Families Party Campaign Literature (on file with the author).

Unfortunately for minor parties, fusion voting is illegal in most states.<sup>20</sup> And in spite of the burden anti-fusion laws place on minor parties' freedom of association, the U.S. Supreme Court has upheld state bans on fusion voting.<sup>21</sup> But when the Supreme Court closes a door, state constitutions may provide an open window.<sup>22</sup>

This Note argues that state anti-fusion laws violate the rights granted to political parties and voters under state constitutions. Part II of this Note describes the role of minor parties in American politics and briefly sketches the history of fusion voting in America. Part III summarizes the Supreme Court's approach to the rights of political parties and discusses *Twin Cities Area New Party v. Timmons*,<sup>23</sup> in which the Supreme Court upheld Minnesota's fusion ban. Part IV argues that state courts can strike down anti-fusion laws based on state constitutional rights.

## II. MINOR PARTIES AND FUSION VOTING

Increasingly, voters identify themselves as "independent" and voter registration information suggests Americans want more than the Democrats and Republicans have to offer.<sup>24</sup> Third parties would provide more variety in the political landscape if allowed to thrive.<sup>25</sup> Minor parties broaden

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<sup>20</sup> STEVE COBBLE & SARAH SISKIND, FUSION: MULTIPLE PARTY NOMINATION IN THE UNITED STATES 9-45 (Center for a New Democracy 1983), available at [http://www.nmef.org/cobble\\_siskind.htm](http://www.nmef.org/cobble_siskind.htm) (last visited Apr. 14, 2005) (describing each state's laws as they relate to fusion voting). Cobble and Siskind categorize twenty-five states as having statutes that explicitly prohibit fusion voting. They list another fifteen states and the District of Columbia that require candidates be members of the political party that has nominated them, thereby indirectly prohibiting fusion voting. See *id.* Since Cobble and Siskind published their research, Arkansas and Utah enacted anti-fusion laws, raising the count of states with direct bans on fusion to twenty-seven. See ARK. CODE ANN. § 7-7-204 (2004); UTAH CODE ANN. § 20A-9-201 (2)(a)(ii) (2004). See also Noel E. Oman, *One-Party-at-a-Time*, ARK. DEMOCRAT-GAZETTE, Feb. 12, 1997, at 4B; *Utah Attacks Fusion*, 13 BALLOT ACCESS NEWS 11 (Feb. 8, 1998), available at <http://www.ballot-access.org/1998/0208.html>.

<sup>21</sup> See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (upholding Minnesota's anti-fusion law). The Supreme Court recognized that anti-fusion laws imposed burdens on a minor party's First Amendment associational rights and that while these burdens were not severe, neither were they trivial. See *id.* at 363.

<sup>22</sup> See *infra* Part IV.A.

<sup>23</sup> See *Timmons*, 520 U.S. at 363.

<sup>24</sup> See *Over 25% of Voters Are Not Registered Dems or Reps*, 19 BALLOT ACCESS NEWS 10 (Feb. 1, 2004), available at <http://www.ballot-access.org/2004/0201.html>. See also MICAH L. SIFRY, SPOILING FOR A FIGHT: THIRD PARTY POLITICS IN AMERICA 49 (2002) (summarizing data from the Committee for the Study of the American Electorate, National Election Studies, and various state sources).

<sup>25</sup> See ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 114-41 (1957)

the debate; they raise issues that the major parties refuse to address.<sup>26</sup> The abolition of slavery and women's suffrage, for instance, first found homes in the platforms of minor parties.<sup>27</sup> With more choices at the ballot box, voter participation would likely increase.<sup>28</sup> And with more viable parties, resulting competition might make major parties more responsive and accountable to voters.<sup>29</sup>

Contemporary politics in the United States, however, is a game with only two teams: the Democrats and the Republicans.<sup>30</sup> Minor parties watch from the sidelines rather than play on the field. Candidates running solely on minor party ballot lines barely make a blip on election return charts unless they have extreme wealth or celebrity status.<sup>31</sup> Moreover, when non-major party candidates have the opportunity to impact an election, that impact is often considered destructive. On learning of Ralph Nader's intent to run in 2004, for example, progressive commentators predicted "mind-boggling irrelevance—but with a potential for catastrophic mischief."<sup>32</sup>

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(explaining that when there are only two political parties, their platforms tend to reflect the center of the political spectrum).

<sup>26</sup> See ROSENSTONE ET AL., *supra* note 11, at 221-23.

<sup>27</sup> See *id.* at 8; SIFRY, *supra* note 24, at 8.

<sup>28</sup> See SIFRY, *supra* note 24, at 53. Cf. Arend Lijphart, *Unequal Participation: Democracy's Unresolved Dilemma*, 91 AM. POL. SCI. REV. 1, 7 (1996) (suggesting multiple parties in a proportional representation system would increase voter turnout because it would give "voters more choices and . . . [eliminate] the problem of wasted votes").

<sup>29</sup> 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, 344 ("Without third parties to challenge the positions of the two major parties and their candidates, the major parties are likely to become (some would say, remain) complacent and unresponsive to social pressures and movements.").

<sup>30</sup> Disch notes Americans would never accept only two options as consumers, but they seem to accept such limited choices as voters. See DISCH, *supra* note 10, at 7. Hasen similarly suggests the absence of marketplace competition results in poor representation by the party duopoly. See Hasen, *supra* note 29, at 344. And Sifry quips, "For a country that prides itself as the heartland of free market capitalism, this lack of competition in the political arena is not just perverse. It is positively unhealthy." See SIFRY, *supra* note 24, at 7.

<sup>31</sup> Reform Party candidate Jesse Ventura became Minnesota Governor in 1998 because of his celebrity status and Minnesota's public financing laws. See DISCH, *supra* note 10, at 1-4; SIFRY, *supra* note 24, at 42. Similarly, presidential candidate Ross Perot was able to garner 19% of the popular vote because he was independently wealthy. See SIFRY, *supra* note 24, at 3. On the high cost of even getting an independent candidate on the ballot, let alone garnering votes, see Samuel Issacharoff, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 687 (1998).

<sup>32</sup> Harold Meyerson et al., *He's Back: Nader is running for president again.*

Minor parties have not always been in this predicament. They used to play a major role in American elections.<sup>33</sup> Up until the early 1900s, minor parties could endorse major party candidates<sup>34</sup> and the same candidate could appear more than once on the ballot.<sup>35</sup> Voters could vote for a candidate on the ballot line of whichever party appealed to them most. When votes were tallied, minor parties simultaneously helped elect candidates to office and demonstrated the parties' own popularity at the polls. Votes translated into power over elected officials who wanted to run for reelection with minor parties' endorsements.<sup>36</sup> Major parties, too, watched closely the votes that minor parties garnered. Key issues of vote-getting minor parties would be absorbed into major party platforms.<sup>37</sup> The ability of minor parties to "fuse" their endorsements with major parties' endorsements "[guaranteed] that dissenters' votes could be more than symbolic protest, that their leaders could gain office, and that their demands might be heard."<sup>38</sup>

The decline of fusion voting began when state governments took charge of elections. In the 19th century, political parties controlled the electoral process. Parties themselves used to be responsible for printing ballots listing their slate of candidates.<sup>39</sup> As voters went to the polls, party activists would pass out party tickets.<sup>40</sup> Casting a vote was as simple as dropping the ticket into the ballot box.<sup>41</sup> The simplicity of this process created opportunities for corruption. For example, without government regulation, voters could be tricked into casting their vote on what they thought was a

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*Four reasons why this is a big mistake*, AMERICAN PROSPECT ONLINE, Feb. 23, 2004, available at <http://www.prospect.org/webfeatures/2004/02/meyerson-h-02-23.html>.

<sup>33</sup> During the 19<sup>th</sup> Century, both the Democrats and Republicans were considered "major" parties but neither was a "majority" party. They won elections by forming coalitions with minor parties. See Peter H. Argersinger, *A Place on the Ballot: Fusion Politics and Antifusion Laws*, 85 AM. HIST. REV. 287, 288-89 (1980).

<sup>34</sup> *Id.* at 288-89.

<sup>35</sup> It might be more accurate to say that the same candidate could appear on more than one party's ballot—ballots were printed by political parties, not by the government. See *infra* note 39 and accompanying text.

<sup>36</sup> See ROSENSTONE ET AL., *supra* note 11, at 80 ("After several elections, either the conditions that originally precipitated the parties' formation disappeared, or one of the major parties took up the third parties' cause.")

<sup>37</sup> See *id.* at 8, 43-44.

<sup>38</sup> See Argersinger, *supra* note 33, at 288-89.

<sup>39</sup> See ROSENSTONE ET AL., *supra* note 11, at 19-20.

<sup>40</sup> See *id.*

<sup>41</sup> See *id.*; Argersinger, *supra* note 33, at 291. If a voter wanted to vote for candidates of different parties (ticket-splitting), he could write his preferred choice on any parties' ticket. See ROSENSTONE ET AL., *supra* note 11, at 20.

Republican ballot, but was actually a listing of Democratic candidates.<sup>42</sup> Moreover, different parties' ballots were different sizes and colors.<sup>43</sup> Onlookers could see by the ballot in voters' hands for whom they were voting.<sup>44</sup> The 1888 presidential campaign seemed particularly crooked.<sup>45</sup> It proved a catalyst for states to adopt the Australian system of secret ballot.<sup>46</sup>

Under the Australian ballot system, state governments started printing ballots.<sup>47</sup> State printed ballots protected the privacy of voters' choices—every ballot looked the same.<sup>48</sup> In addition, the new voting system eliminated the distribution of ballots that looked like the slate of one party but actually listed the candidates of another party.<sup>49</sup>

The new system brought the need for new rules. Procedures were required to decide which candidates' names would be printed on the ballot.<sup>50</sup> As part of the new laws, legislators delivered a near fatal blow to minor parties, enacting anti-fusion rules that prohibited multiple parties from endorsing the same candidate.<sup>51</sup>

While most of the Australian ballot laws were enacted to rid the electoral process of corruption, anti-fusion laws had a less noble motivation.<sup>52</sup> The electoral successes of fusion tickets threatened some lawmakers. Majority Republican legislatures were first to realize they could use the trend of ballot reform to remove a tool that often benefited their rivals.<sup>53</sup> In 1893, South

<sup>42</sup> See, e.g., *Daniel v. Simms*, 39 S.E. 690, 694 (W. Va. 1901) (decrying the vulnerability of the old system in which “[a] voter, coming upon the ground and desiring to vote the Democratic ticket, might have one of these fraudulent tickets placed in his hands, and, without examining it closely, deposit it, and thus be defrauded out of his vote as to that particular office in which he felt most deeply interested”).

<sup>43</sup> See ROSENSTONE ET AL., *supra* note 11, at 19-20.

<sup>44</sup> See *id.* at 19-20.

<sup>45</sup> See Argersinger, *supra* note 33, at 290-91.

<sup>46</sup> See *id.*

<sup>47</sup> See generally LIONEL E. FREDMAN, *THE AUSTRALIAN BALLOT: THE STORY OF AN AMERICAN REFORM* (1968).

<sup>48</sup> See Argersinger, *supra* note 33, at 290-91.

<sup>49</sup> See *id.*

<sup>50</sup> See ROSENSTONE ET AL., *supra* note 11, at 20.

<sup>51</sup> See Argersinger, *supra* note 33, at 291.

<sup>52</sup> See *id.* at 292 (“[T]he [anti-fusion] law . . . was intended to promote the dissolution of party ties while giving Republicans the residual benefits of them.”). In addition to anti-fusion laws, other mean-spirited laws were included in states' reform packages. It was during this time that legislators instituted poll taxes and literacy tests with the goal of disenfranchising African Americans. See Paul R. Petterson, *Partisan Autonomy or State Regulatory Authority? The Court as Mediator*, in *THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS* 113-14 (David K. Reyden ed., 2d ed. 2002).

<sup>53</sup> See Brief for the Respondent at 7, *Timmons*, 520 U.S. 351 (No. 95-1608);

Dakota lawmakers enacted the first anti-fusion law, preventing a candidate from being listed more than once on a ballot.<sup>54</sup> Oregon, Wisconsin, Michigan, and Ohio passed analogous laws in 1895.<sup>55</sup> By 1899, eight more states had passed anti-fusion laws.<sup>56</sup> All were passed by majority Republican legislatures, whose members wanted to prevent the cooperation between Democrats and minor parties.<sup>57</sup> A Michigan lawmaker forthrightly declared, “We don’t propose to allow the Democrats to make allies of the Populists, Prohibitionists, or any other party, and get up combination tickets against us. We can whip them single-handed, but don’t intend to fight all creation.”<sup>58</sup>

Legislators were rarely so blunt. Most defended anti-fusion laws as good-government reform.<sup>59</sup> But the actual motivation for these laws was not lost on one journalist, who renamed the anti-fusion law “the law providing for the extinction and effacement of all parties but the Democratic and Republican.”<sup>60</sup> Nor was the partisan motivation lost on Democratic or minor party members.<sup>61</sup> A Populist Party member declared that the anti-fusion law “practically disfranchises every citizen who does not happen to be a member of the party in power . . . . They are thus compelled to either lose their vote . . . or else to unite in one organization. It would mean that there could only be two parties at one time.”<sup>62</sup> Without fusion, what once was an effective way to express a voter’s ideology now became a wasted gesture—a throwaway vote. Unsurprisingly, voters stopped voting for minor parties,

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ROSENSTONE ET AL., *supra* note 11, at 48-80; Argersinger, *supra* note 33, at 289-90. Fusion voting was most common in the Midwest and West where Republicans more often were in control of the state legislatures. *See* Argersinger, *supra* note 33, at 289-90. Several eastern states did not immediately pass anti-fusion laws because the major parties were strong enough to prevent support for minor parties without legislating against them. *See* ROSENSTONE ET AL., *supra* note 11, at 20 n.5 (noting the following states’ history of fusion: Maryland, Massachusetts, Pennsylvania, Rhode Island, and Connecticut). Except for Connecticut, each of these states has since enacted anti-fusion laws. *See* COBBLE & SISKIND, *supra* note 20, at 8.

<sup>54</sup> *See* Argersinger, *supra* note 33, at 297.

<sup>55</sup> *See id.* at 298-301.

<sup>56</sup> *See id.* at 302 (listing the following states as having enacted anti-fusion laws: California, Indiana, Illinois, Iowa, Nebraska, North Dakota, Pennsylvania, Wisconsin and Wyoming).

<sup>57</sup> *See id.* at 302-03.

<sup>58</sup> *See* Argersinger, *supra* note 33, at 296 (quoting DETROIT FREE PRESS, Feb. 1, Jan. 5, 1893).

<sup>59</sup> *See id.* at 292.

<sup>60</sup> *See id.* at 304.

<sup>61</sup> *See id.* at 302; DISCH, *supra* note 10, at 52.

<sup>62</sup> *See* Argersinger, *supra* note 33, at 304 (quoting KALAMAZOO WEEKLY TELEGRAPH, Mar. 20, 1895).

and the parties were forced to the sidelines of American politics.<sup>63</sup>

Today, anti-fusion laws exist in all but eight states.<sup>64</sup> In the states that allow fusion voting, seven have laws or party rules that make it difficult, if not impossible to establish a statewide fusion party.<sup>65</sup> For instance, Connecticut laws allow a candidate to be endorsed by more than one official political party in a given election,<sup>66</sup> but to become an official political party, with the ability to endorse candidates in all Connecticut elections, the party must run an independent candidate in a gubernatorial race and win 20% of the vote.<sup>67</sup> New parties, without official status, cannot endorse candidates already nominated by existing parties.<sup>68</sup> Winning 20% of the vote in a statewide election with an independent candidate is difficult. More importantly, it is unlikely a pro-fusion party would want

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<sup>63</sup> See Brief of Amici Curiae of Twelve University Professors and Center For A New Democracy In Support of Respondent Twin Cities Area New Party, *Timmons*, 520 U.S. 351 (No. 95-1608); ROSENSTONE ET AL., *supra* note 11, at 149.

<sup>64</sup> The eight states are Connecticut, Delaware, Idaho, Mississippi, New York, South Carolina, South Dakota, and Vermont. See *supra* note 20 and accompanying text.

<sup>65</sup> See COBBLE & SISKIND, *supra* note 20, at 10-45 (describing major party rules and election laws that may make fusion voting difficult in states that do not have anti-fusion laws).

<sup>66</sup> See CONN. GEN. STAT. § 9-453t (2003) (“Nothing in this section shall be construed to prohibit any candidate from appearing on the ballot as the nominee of two or more major or minor parties for the same office.”).

<sup>67</sup> Parties retain official status across the entire state when they win 20% of the vote for governor or have registered 20% of voters. See CONN. GEN. STAT. § 9-372(5) (2003) (“Major party’ means (A) a political party or organization whose candidate for Governor at the last-preceding election for Governor received, under the designation of that political party or organization, at least twenty per cent of the whole number of votes cast for all candidates for Governor, or (B) a political party having, at the last-preceding election for Governor, a number of enrolled members on the active registry list equal to at least twenty per cent of the total number of enrolled members of all political parties on the active registry list in the state”); Parties who win 1% of the vote in a given election only have party status in that district, for that office. See CONN. GEN. STAT. § 9-372(6) (“Minor party’ means a political party or organization which is not a major party and whose candidate for the office in question received at the last-preceding regular election for such office, under the designation of that political party or organization, at least one per cent of the whole number of votes cast for all candidates for such office at such election.”).

<sup>68</sup> See CONN. GEN. STAT. § 9-453t (2003) (“[T]he nomination of a candidate by a major or minor party under this chapter, for any office shall disqualify such candidate from appearing on the ballot by nominating petition for the same office.”). If a party does not have official status, it must nominate its candidate through the petitioning process, thereby precluding the nomination of a candidate supported by an official political party. See CONN. GEN. STAT. § 9-379 (2003) (“No name of any candidate shall be printed on any official ballot at any election except the name of a candidate nominated by a major or minor party unless a nominating petition for such candidate is approved by the Secretary of the State as provided in sections 9-453a to 9-453p, inclusive.”).

to risk spoiling in its election debut.<sup>69</sup> Therefore, establishing a fusion party through a statewide election in Connecticut is almost impossible.<sup>70</sup>

New York is the only state in the nation where fusion voting has remained a common practice.<sup>71</sup> As a result, minor parties have thrived.<sup>72</sup> Currently, three minor parties have official party status in New York state.<sup>73</sup> In one recent election, minor parties captured more than 20% of the total vote.<sup>74</sup> In New York's local, statewide and federal elections, minor parties' vote totals have tipped major party candidates to victory. Rudolph Giuliani, for example, became mayor of New York City only because the votes he won on the Liberal Party ballot line were added to the votes he won on the Republican Party ballot line.<sup>75</sup> George Pataki was able to secure the governorship only by adding the votes cast on the Conservative Party line to the votes cast on the Republican Party line.<sup>76</sup> Similarly, New York's Electoral College votes have been determined by minor party votes: neither Franklin D. Roosevelt, John F. Kennedy nor Ronald Reagan would have

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<sup>69</sup> See Lee Foster, *3rd Party Planting Roots in State*, HARTFORD COURANT, Oct. 6, 2004, at B1 (reporting that one Working Families Party candidate dropped out "to avoid stealing votes" from the Democratic candidate in a closely contested state senate race).

<sup>70</sup> However, a new party that has won 1% of the vote for an independent candidate in a non-statewide election is able to "fuse" endorsements with other parties the next time that local office is up for election. Winning 1% of the vote in a local election is more achievable and strategically less problematic than winning 20% of the vote in a statewide election. Activists in Connecticut are running independent candidates in local races, and have achieved official party status in at least 66 districts. See SIFRY, *supra* note 24, at 297; Gail Ellen Daly, *Working Families Happy With Results*, CHRONICLE (Willimantic, Conn.) (Nov. 5 2004), available at <http://www.ct-workingfamilies.org/WCPleased.html> (last visited May 15, 2005).

<sup>71</sup> See SIFRY, *supra* note 24, at 228-89.

<sup>72</sup> See Brief of the Conservative Party of New York and Liberal Party of New York as Amici Curie in Support of Respondent at 13, *Timmons* (No. 95-1608).

<sup>73</sup> See NEW YORK STATE BOARD OF ELECTIONS, *Running for Office*, at [http://www.elections.state.ny.us/portal/page?\\_pageid=153,42096,153\\_53318:153\\_53330&\\_dad=portal&\\_schema=PORTAL](http://www.elections.state.ny.us/portal/page?_pageid=153,42096,153_53318:153_53330&_dad=portal&_schema=PORTAL) (last visited Apr. 14, 2005) ("The current political parties are the Republican, Democratic, Independence, Conservative, and Working Families parties."). For official party status, minor parties must win 50,000 votes each gubernatorial election. See N.Y. ELEC. LAW § 1-104 (McKinney 2005). In 2002, the Independence Party, the Conservative Party and the Working Families Party met and surpassed that threshold. See Erik Kris, *Some Minor Parties Lost Automatic Ballot Status*, POST-STANDARD (Syracuse), Nov. 7, 2002, at A14.

<sup>74</sup> The minor party vote in three recent statewide elections are as follows: in 2004 U.S. Presidential race, 5%; 2004 U.S. Senate race, 9%; 2002 Gubernatorial race, 22%. Elections results are available from the New York State Board of Elections at [www.elections.state.ny.us](http://www.elections.state.ny.us).

<sup>75</sup> See SIFRY, *supra* note 24, at 228-29.

<sup>76</sup> See *id.*

carried New York by the votes cast on major party lines alone.<sup>77</sup> Each of them needed the votes that were cast on the minor party lines to win New York.

New York's minor parties do not only influence the outcome of specific elections; their success at the polls also leads to influence over politicians in office.<sup>78</sup> The Conservative Party, for example, pressures Republican legislators to oppose abortion and gay rights with threats of running independent challengers against Republican incumbents.<sup>79</sup> The Working Families Party has also linked its possession of a ballot line to policy gains. For instance, a few months after the Working Families Party helped elect a Democrat to the Suffolk County legislature, the county enacted a living wage law, a legislative priority for the Working Families Party.<sup>80</sup> The Working Families Party believes that members of the county legislature saw the decisive part the minor party played in the election and thought of their own upcoming reelections when passing the living wage bill.<sup>81</sup> Highlighting the importance of fusion voting in this legislative victory, Daniel Cantor, executive director of the Working Families Party had this to say:

The ability to clearly demonstrate a minor party's electoral strength via the fusion vote was absolutely essential to winning the living wage in Suffolk. In fact, it's no overstatement to suggest that the 210 votes we got on our line that proved the "margin of victory" in one legislative race resulted in 4,000 low-wage workers getting an increase in salary of nearly \$2,000 per year. That's the power of fusion.<sup>82</sup>

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<sup>77</sup> See *id.* at 229.

<sup>78</sup> See DANIEL A. MAZMANIAN, *THIRD PARTIES IN PRESIDENTIAL ELECTIONS* 130-32 (1974) (describing the impact fusion parties have had on the direction of New York policy).

<sup>79</sup> Richard Perz-Pena, *Despite Size Conservative Party is a Force to Reckon With*, N.Y. TIMES, Dec. 13, 1999, at B1.

<sup>80</sup> See, e.g., Emi Endo, *Working Families Party is Working For Influence*, NEWSDAY, July 19, 2001, at A33; Amy Waldman, *New Party is Courting Liberal Constituencies*, N.Y. TIMES, Nov. 1, 1998, at 44.

<sup>81</sup> See WORKING FAMILIES PARTY, *Fusion Voting—Our (Not So) Secret Weapon*, at <http://www.workingfamiliesparty.org/fusion.html> (last visited Apr. 14, 2005) ("Every member of the Republican controlled County Legislature noticed the WFP's role in the Lindsay victory. They were soon up for reelection and realized the importance of appealing to our voters. So, they decided to pass the [living wage] bill."); See also Michael Tomasky, *Inside Agitators*, N.Y. MAG., Mar. 4, 2002 ("The 210 votes William Lindsay got on the WFP line provided his margin of victory. For a small party, that means leverage, which the WFP converted into the passage of living-wage legislation in Suffolk.")

<sup>82</sup> E-mail from Daniel Cantor, Executive Director, Working Families Party, to author (Dec. 15, 2004) (on file with author).

Inspired by the successes of minor parties in New York, a few pragmatic idealists began thinking about how to export the New York model to other states in the late 1980s.<sup>83</sup> Joel Rogers, a political science professor at the University of Wisconsin, and Daniel Cantor, then a political organizer in New York, believed that American democracy would be improved if minor parties had a stronger voice in politics.<sup>84</sup> They recognized, however, the political irrelevancy of modern minor parties. The solution was simple: fusion.<sup>85</sup> The solution to state anti-fusion laws was also simple: sue.<sup>86</sup>

Joel Rogers and Daniel Cantor spent the next few years building the “New Party,” a progressive political party that they hoped would win a ballot line by challenging the constitutionality of anti-fusion laws.<sup>87</sup> The New Party’s strategy was to build a grassroots, membership base while planning litigation.<sup>88</sup> The party’s motto was fitting: “Start Small. Think Big.”<sup>89</sup> They were confident that their day in court would result in victory. They were wrong.<sup>90</sup>

### III. THE FEDERAL CONSTITUTION AND ANTI-FUSION LAWS

The New Party sought to challenge anti-fusion laws on First Amendment grounds. The First Amendment of the federal Constitution can be construed to protect fusion voting in two ways. First, voting might be seen as expression of political views, and thus protected by the right to freedom of expression. Fusion voting is a means by which voters and parties can critique the major parties’ position on issues and

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<sup>83</sup> See SIFRY, *supra* note 24, at 228-31.

<sup>84</sup> See *id.* at 229-30. According to a 1999 memorandum, Cantor and Rogers believed that the major parties offered progressives “a ‘devil’s bargain’ . . . in which support is generally exchanged for frustration” but “that the history of third party alternatives seems even more grim.” Creating a new political party with the power to endorse major party candidates would “give voice to [progressives’] political aspiration in ways that matter in conventional electoral arenas.” See Memorandum from Dan Cantor & Joel Rogers, *Party Time*, 7, 8, 12 (May 1990) (on file with author).

<sup>85</sup> See Cantor & Rogers, *Party Time*, *supra* note 84, at 10-11.

<sup>86</sup> See Memorandum from Dan Cantor & Joel Rogers, *Sue!*, 1-2 (May 1990) (on file with author).

<sup>87</sup> See SIFRY, *supra* note 24, at 231-32.

<sup>88</sup> See *id.* at 230-31; Cantor & Rogers, *Party Time*, *supra* note 84.

<sup>89</sup> A different phrase captures the New Party’s grassroots message: “It’s about people. It’s about democracy. It’s about time.” See New Party paraphernalia (on file with the author).

<sup>90</sup> They were at least part wrong. They had some initial success, but the Supreme Court ruled against their challenge to anti-fusion laws in *Timmons*. See *infra* notes 123-35 and accompanying text.

anti-fusion laws limit this expression. Second, activities of political parties are activities of individuals associating with each other for a common purpose, and as such might be protected by the right to freedom of association to achieve expressive goals. Preventing a minor party from endorsing a major party candidate could be seen as interfering with the party's core functions. This section will summarize the federal jurisprudence on these two claims, and then discuss *Timmons v. Twin Cities Area New Party*,<sup>91</sup> in which the U.S. Supreme Court ruled against the New Party's constitutional challenge to anti-fusion laws.

Checking a box, pulling a lever, punching out a chad, or touching a screen in the ballot booth is a statement of belief as well as a declaration of preference.<sup>92</sup> The U.S. Constitution protects the right to participate in elections as part of the Equal Protection clause of the Fourteenth Amendment,<sup>93</sup> but voting may also be understood to be protected by the right to freedom of expression as guaranteed in the First Amendment.<sup>94</sup> An election marks the temporary end of a political debate and casting a vote is the "official expression of [a voter's] judgment on issues of public policy."<sup>95</sup> Denying the ability of multiple political parties to endorse a single candidate denies voters the opportunity of using the ballot to communicate their opinions effectively on their government's course of action.

Although this argument may be philosophically compelling, the Supreme Court rejected the concept of ballot based expression in *Burdick v. Takushi*.<sup>96</sup> In that case, the Court considered whether a state could prohibit voters from writing in names of preferred candidates who did not appear on the printed ballot.<sup>97</sup> Several lower federal courts had previously

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<sup>91</sup> 520 U.S. 351 (1997).

<sup>92</sup> See generally Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330 (1993) (arguing that the right to vote should be protected because of the expressive function voting serves).

<sup>93</sup> See, e.g., *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (holding a resident of a school board district who did not own property and did not have children in the public schools could not be excluded from school board elections). The federal Constitution explicitly prohibits certain denials of the right to vote in the Fifteenth, Nineteenth, Twenty-fourth and Twenty-sixth Amendments. See generally DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, *ELECTION LAW: CASES AND MATERIALS* 71 (3d ed. 2004).

<sup>94</sup> See Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 256.

<sup>95</sup> *Id.*

<sup>96</sup> 504 U.S. 428 (1992).

<sup>97</sup> *Id.*

concluded that write-in votes were a form of political expression and therefore protected by the First Amendment.<sup>98</sup> In *Burdick*, the Supreme Court dismissed this view, declaring that “the function of the election process is ‘to winnow out and finally reject all but the chosen candidates,’ not to provide a means of giving vent to ‘short-range political goals, pique, or personal quarrel[s].’”<sup>99</sup> The Court concluded that treating voting as an act of expression would “undermine the ability of States to operate elections fairly and efficiently.”<sup>100</sup> Given Supreme Court precedent, the New Party rested its argument against anti-fusion laws on parties’ freedom of association rights, rather than on individuals’ expressive rights.<sup>101</sup>

The Supreme Court first formally announced that the constitution protected associational rights in 1958.<sup>102</sup> In *NAACP v. Alabama ex rel. Patterson*, a unanimous Court held that Alabama could not require the NAACP to provide its membership list to the state Attorney General because to do so would offend the NAACP’s right of association.<sup>103</sup> The Court based the right of association in the right of expression, declaring that protecting effective advocacy requires protecting the right of individuals to act collectively.<sup>104</sup> In *Roberts v. United States Jaycees*, the Court further explained that the right to associate was an extension of other First Amendment freedoms.<sup>105</sup> The Court said the “freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.”<sup>106</sup> Associations formed

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<sup>98</sup> See *Dixon v. Maryland State Admin. Bd.*, 878 F.2d 776 (4th Cir. 1989); *Paul v. Indiana Election Bd.*, 743 F. Supp. 616 (S.D. Ind. 1990); *Burdick v. Takushi*, 737 F. Supp. 582 (D. Haw. 1990).

<sup>99</sup> *Burdick*, 504 U.S. at 438 (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1972)).

<sup>100</sup> *Id.*

<sup>101</sup> The New Party did argue that the ballot serves an expressive function, but it made the argument from the perspective of a party, not an individual voter. See Brief for the Respondent at 25, *Timmons*, 520 U.S. 351 (No. 95-1608) (“[T]he fusion ban interferes with the message sent to voters by the party, in the voting booth, that it has nominated a particular candidate, and it does so despite the fact that the State otherwise uses its ballot system for precisely this purpose.”).

<sup>102</sup> *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

<sup>103</sup> See *id.* at 462-63.

<sup>104</sup> See *id.* at 460-61.

<sup>105</sup> See *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

<sup>106</sup> *Id.* at 622.

with the purpose of engaging in activity protected by the First Amendment have been termed “expressive associations.”<sup>107</sup>

The rights of political parties as expressive associations can run headlong into state regulations of elections.<sup>108</sup> The U.S. Constitution charges state governments with regulating federal elections,<sup>109</sup> and the Court has implied that states have a duty to ensure all elections are fair and honest.<sup>110</sup> Therefore, when faced with a law that infringes on the rights of political parties, the Court will balance the interest of the state in regulating elections against the burden on the party’s rights of association.<sup>111</sup> The “rigorousness of [the Court’s] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.”<sup>112</sup> Only regulations that severely burden those rights must be narrowly tailored to further a compelling state interest. A state can justify less serious infringements on associational freedom by showing a regulation furthered important interests.<sup>113</sup>

Prior to *Timmons*, the Supreme Court had applied this balancing test and struck down several state laws involving major parties’ associational rights. The Court had held that states cannot require parties to use a closed primary system,<sup>114</sup>

<sup>107</sup> See Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1487 (2001).

<sup>108</sup> For a discussion of how political parties fit within the expressive association framework, see *id.* The First Amendment applies to state action by way of the Due Process clause of the Fourteenth Amendment. The first case to recognize that First Amendment rights are incorporated into the Due Process clause of the Fourteenth Amendment was *Gitlow v. New York*, 268 U.S. 652 (1925).

<sup>109</sup> U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. art. I, § 4, cl. 1.

<sup>110</sup> See *Storer v. Brown*, 415 U.S. 724, 730 (1974) (“[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”); *Bullock v. Carter*, 405 U.S. 134, 145 (1972) (“[A] State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies.”).

<sup>111</sup> The balancing test was articulated in *Anderson v. Celebrezze*:

[The Court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiffs’ rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

*Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

<sup>112</sup> *Burdick*, 504 U.S. at 434.

<sup>113</sup> *Id.*

<sup>114</sup> *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1996). A closed

prohibit parties from endorsing candidates in primary elections<sup>115</sup> or compel parties to accept state delegates to a national convention who were not selected according to party rules.<sup>116</sup> In these decisions, the Court established that the right of association meant “not only that an individual voter has the right to associate with the political party of her choice, but also that a political party has a right to identify the people who constitute the association, and to select a standard bearer who best represents the party’s ideologies and preferences.”<sup>117</sup>

The cases decided in the decades before *Timmons* also suggested that limiting ballot access for independent candidates might be especially hard for states to justify.<sup>118</sup> One of the earliest cases about a minor party candidate proved to contain the strongest language. In *Williams v. Rhodes*, the Court considered an Ohio law that required a party to gather signatures from 10% of Ohio voters in order to secure a space on the ballot.<sup>119</sup> The Court struck the law because “[n]ew parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past.”<sup>120</sup> The Court dismissed the state’s argument that this law was justified out of protection for the two-party system:

[T]he Ohio system does not merely favor a “two-party system”; it favors two particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly. There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.<sup>121</sup>

New Party members’ analysis of this precedent left them feeling optimistic. Insofar as anti-fusion laws prevented

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primary would mean only party members would be allowed to vote in the party primary. *See id.* at 215.

<sup>115</sup> *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223-24 (1989).

<sup>116</sup> *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981); *Cousins v. Wigoda*, 419 U.S. 477 (1975).

<sup>117</sup> *Eu*, 489 U.S. at 224 (internal citations and internal quotation marks omitted).

<sup>118</sup> *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (holding Ohio’s filing deadline for petitions were too early); *Bullock*, 405 U.S. at 134 (holding Texas’ filing fees were excessive); *Williams v. Rhodes*, 393 U.S. 23 (1968) (holding Ohio’s requirement for petitions signatures were too high).

<sup>119</sup> *Williams*, 393 U.S. at 23.

<sup>120</sup> *Id.* at 32.

<sup>121</sup> *Id.*

parties from endorsing the candidate of the party's choosing simply because another party had already nominated that candidate, they seemed vulnerable to First Amendment challenges. Given the particular burden anti-fusion laws placed on minor parties, the laws would seem especially difficult for a state to justify. In the words of Professor Theodore Lowi, the case "look[ed] like a constitutional no-brainer."<sup>122</sup>

The first federal court challenge to anti-fusion laws took place in the Western District of Wisconsin.<sup>123</sup> There, the district court upheld Wisconsin's ban on fusion voting, and the Seventh Circuit affirmed.<sup>124</sup> Several years later, a district court in Minnesota also upheld an anti-fusion voting law, but this decision was reversed by the Eighth Circuit.<sup>125</sup> The Supreme Court then reversed the Eighth Circuit in *Timmons v. Twin Cities Area New Party*.<sup>126</sup>

*Timmons* considered the right of the New Party to nominate a candidate for Minnesota State Representative previously nominated by the Democratic-Farmer-Labor Party.<sup>127</sup> The candidate, Andy Dawkins, wanted to run with the endorsements of both the Democratic-Farmer-Labor Party and the New Party.<sup>128</sup> The Democratic-Farmer-Labor Party raised no objection to the New Party's endorsement.<sup>129</sup> When the New Party attempted to file the petition to nominate Dawkins, county officials refused to accept the nomination<sup>130</sup> because Minnesota's anti-fusion laws prevent a candidate from being twice nominated.<sup>131</sup>

<sup>122</sup> Theodore J. Lowi, Editorial, *Supreme Court Should Ban Fusion Tickets*, PLAIN DEALER, Dec. 31, 1996, at 9B.

<sup>123</sup> *Swamp v. Kennedy*, 950 F.2d 383 (7th Cir. 1991).

<sup>124</sup> *See id.*

<sup>125</sup> *See Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 200 (8th Cir. 1996).

<sup>126</sup> *Timmons*, 520 U.S. at 370.

<sup>127</sup> *See id.* at 354. In Minnesota the two major parties are the Democratic-Farmer-Labor Party and the Republican Party. *Id.* at 354 n.2.

<sup>128</sup> *Id.* at 354.

<sup>129</sup> *Id.*

<sup>130</sup> *Twin Cities Area New Party v. McKenna*, 863 F. Supp. 988, 990 (D. Minn. 1994).

<sup>131</sup> Minnesota statute provides:

- (1) Major party candidates. No individual shall be named on any ballot as the candidate of more than one major political party. No individual who has been certified by a canvassing board as the nominee of any major political party shall be named on any ballot as the candidate of any other major political party at the next ensuing general election.
- (2) Candidates seeking nomination by primary. No individual who seeks nomination for any partisan or nonpartisan office at a primary shall be nominated for the same office by nominating petition, except as otherwise

The New Party filed a complaint in district court alleging a violation of the party's associational rights as guaranteed by the First and Fourteenth Amendments.<sup>132</sup> The court granted summary judgment in favor of Minnesota, rejecting the minor party's claim that the state's anti-fusion law was unconstitutional.<sup>133</sup> The Court of Appeals reversed that decision, finding that the fusion ban created a severe burden on minor parties' associational rights and that the state could have enacted a more narrowly tailored law to achieve its goals.<sup>134</sup> The Supreme Court granted certiorari and, in a 6-3 decision, reversed the Court of Appeals.<sup>135</sup>

The New Party argued that the anti-fusion law severely burdened its associational rights because it prohibited the party from nominating its preferred candidate.<sup>136</sup> It claimed that "[n]othing is more fundamental to a party than the choice of candidates to represent it in electoral competition. Nothing is more important to a party's ability to mobilize its supporters around candidates than its ability to identify those candidates, on the ballot, as its own."<sup>137</sup>

The Supreme Court's majority opinion, authored by Chief Justice Rehnquist, recognized that political parties are guaranteed associational rights under the First Amendment. Those rights, however, could be limited by state laws reasonably regulating parties, elections and ballots.<sup>138</sup> To determine if the New Party's rights were violated, the Court engaged in a balancing test, "weigh[ing] the 'character and magnitude' of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider[ing] the extent to which the State's concerns make the burden necessary."<sup>139</sup>

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provided for partisan offices in section 204D.10, subdivision 2, and for nonpartisan offices in section 204B.13, subdivision 4.

MINN. STAT. § 204B.04 (2004).

<sup>132</sup> See *Twin Cities Area New Party*, 863 F. Supp. at 988. The First Amendment applies to state action through the Fourteenth Amendment Due Process clause. See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.")

<sup>133</sup> See *id.* at 994.

<sup>134</sup> See *Twin Cities Area New Party*, 73 F.3d at 200.

<sup>135</sup> *Timmons*, 520 U.S. at 356.

<sup>136</sup> Brief for the Respondent at 12, *Timmons*, 520 U.S. 351 (No. 95-1608).

<sup>137</sup> *Id.*

<sup>138</sup> See *Timmons*, 520 U.S. at 357-58.

<sup>139</sup> See *id.* at 358.

The Supreme Court conceded that fusion bans interfere with minor parties' associational rights, but the Court did not find the burden to be severe.<sup>140</sup> To be sure, the Minnesota statute would prevent the New Party from having its preferred candidate listed on the ballot, but it would not prohibit the party from campaigning and supporting a candidate.<sup>141</sup> Even if the ballot restriction limited the party's ability to send a message to voters and to its preferred candidate, the Court was not convinced that a party had a right to use the ballot to send a message to voters.<sup>142</sup> The Court explained, "[b]allots serve primarily to elect candidates, not as forums for political expression."<sup>143</sup> Adhering to *Burdick*, the Court declined to acknowledge any constitutional protection for the expressive value of voting.<sup>144</sup>

Finding that the anti-fusion law did not severely burden minor parties, the Court held that the state did not need to survive strict scrutiny analysis in order to be valid. The state articulated four reasons to justify the law: avoiding voter confusion, promoting candidate competition, preventing electoral distortions and ballot manipulations, and discouraging party splintering and unrestrained factionalism.<sup>145</sup> After declaring these justifications sufficient to support Minnesota's law, the Court introduced an additional reason to justify the ban on fusion, one that had not been raised by the state. For the first time, the Court declared that a state's interest in the stability of its political structure allowed it to enact legislation promoting the two-party system.<sup>146</sup>

Building on previous cases that acknowledged a state's interest in the stability of its government,<sup>147</sup> the majority said that to achieve that goal, state laws could favor the two-party system.<sup>148</sup> Although this was a new approach to election law for the Court, the opinion devoted relatively little space to the exploration of how fusion threatened the two-party system or how the two-party system encouraged stability.<sup>149</sup> With

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<sup>140</sup> See *id.* at 363.

<sup>141</sup> See *id.* at 358-59.

<sup>142</sup> *Id.*

<sup>143</sup> *Timmons*, 520 U.S. at 363 (citing *Burdick*, 504 U.S. at 438).

<sup>144</sup> See *id.* See also *supra* notes 92-100 and accompanying text.

<sup>145</sup> See *Timmons*, 520 U.S. at 364.

<sup>146</sup> See *id.* at 367.

<sup>147</sup> *Eu*, 489 U.S. at 226; *Storer*, 415 U.S. at 736.

<sup>148</sup> *Timmons*, 520 U.S. at 367-68.

<sup>149</sup> See *id.*

references to James Madison's fear of factions, the decision declared that states are permitted to enact laws that favor the two-party system in order to "temper the destabilizing effects of party-splintering and excessive factionalism."<sup>150</sup>

The majority's unsolicited defense of the two-party system was contrary to the Court's past political party jurisprudence. In *Williams*, the Court had implied that protecting the major parties would not sufficiently justify infringement on a minor party's associational rights.<sup>151</sup> At oral arguments for *Timmons*, it is no wonder that counsel and courtroom observers were surprised by Justice Scalia's questioning on the protection of the two-party system.<sup>152</sup> When it looked like counsel for Minnesota was not willing to admit anti-fusion laws were intended to protect the major parties, Justice Scalia interjected: "Well, you wouldn't concede the major point, would you, that there is something wrong about the state establishing its electoral machinery . . . to facilitate and encourage a two-party system . . . ?"<sup>153</sup> Justice Scalia proceeded to guide counsel to argue that states should be able to choose whether and in what way they will protect the major parties, a point which, admittedly, counsel had not planned to assert.<sup>154</sup>

In dissent, Justices Stevens, Ginsburg, and Souter argued that the Court should not have considered this justification, since the state had never raised it.<sup>155</sup> Justice Stevens, joined by Justice Ginsburg, suggested that the protection of the two-party system was the "true basis" for the majority's decision against the New Party and argued that even if the state had properly raised this justification, it would have been insufficient.<sup>156</sup> In their view, the risks of government instability resulting from fusion voting were speculative, and

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<sup>150</sup> See *id.* at 368 (citing THE FEDERALIST NO. 10 (James Madison)). Associations have great power and if not checked, Madison thought, associations could destroy popular government by implementing policies in opposition to the will and benefit of the majority. Indirect elections of the senate, the Electoral College and the tripartite nature of the federal government were designed to shield against the dangers of factions. See THE FEDERALIST NO. 10 (James Madison). See also *infra* note 229 and accompanying text.

<sup>151</sup> *Williams*, 393 U.S. at 23.

<sup>152</sup> See SIFRY, *supra* note 24, at 297.

<sup>153</sup> Transcript of oral argument at 25-26, *Timmons*, 520 U.S. 351, No. 95-1608, 1996 WL 709359 (U.S. Oral. Arg. Dec. 4, 1996).

<sup>154</sup> See *id.* at 26-29.

<sup>155</sup> *Timmons*, 520 U.S. at 377-78 (Stevens, J., dissenting) (Justice Ginsburg joining, Justice Souter joining in part).

<sup>156</sup> See *id.*

the burden created by anti-fusion laws demanded a greater demonstration of threat.<sup>157</sup> Unlike Justice Stevens, Justice Souter believed that anti-fusion laws might be justified based on a state interest of protecting the two-party system.<sup>158</sup> To satisfy constitutional scrutiny, however, Justice Souter would have had the state demonstrate that fusion voting would, in fact, threaten the two-party system and that the disintegration of the two-party system would risk state instability. As the state had failed to do this, Justice Souter would not have upheld the law.<sup>159</sup>

The New Party's day in court came and went, and a revival of fusion voting now seemed permanently buried in America's electoral graveyard. State constitutions, however, have the ability to revive constitutional issues that the Supreme Court has killed.

#### IV. CHALLENGING ANTI-FUSION LAWS BASED ON STATE CONSTITUTIONS

##### A. *Protecting Rights through State Constitutions*

State constitutions are wholly independent documents; they are not drafted to echo the federal Constitution.<sup>160</sup> In fact, many state constitutions were written and ratified prior to the federal Constitution.<sup>161</sup> Framers of the federal Constitution decided to have the Bill of Rights apply only to the federal government because they believed that state constitutions sufficiently protected citizens from state governments.<sup>162</sup> Even those state constitutions that were written after the adoption of the federal Bill of Rights borrowed from the language of the existing state constitutions more than from the federal Constitution.<sup>163</sup> This history leads many scholars and jurists to agree with Justice William Brennan's conclusion that "the decisions of the [Supreme] Court are not, and should not be,

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<sup>157</sup> *See id.*

<sup>158</sup> *See id.* at 383 (Souter, J., dissenting).

<sup>159</sup> *Timmons*, 520 U.S. at 384 (Souter, J., dissenting).

<sup>160</sup> *See* JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES* § 1-3(a) (3d ed. 2000).

<sup>161</sup> *See id.*

<sup>162</sup> Paul Finkelman & Stephen E. Gottlieb, *Introduction to TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS* 5 (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

<sup>163</sup> *See* FRIESEN, *supra* note 160, § 5-2.

dispositive of questions regarding rights guaranteed by counterpart provisions of state law.”<sup>164</sup>

Although state courts are free to interpret their constitutions without reference to the Supreme Court’s interpretation of the federal Constitution, many courts look to the Supreme Court for guidance.<sup>165</sup> Especially in the area of civil rights, Supreme Court decisions have influenced the scope of state constitutional protection for individual rights.<sup>166</sup> There are exceptions. Some provisions of state constitutions are unique to the states and do not have federal counterparts.<sup>167</sup> State courts are left to understand the meaning of constitutional guarantees to public education, for instance, without direction from the Supreme Court.<sup>168</sup> Furthermore, for the first hundred and fifty years of Supreme Court jurisprudence, state governments were not limited by the federal Bill of Rights.<sup>169</sup> Courts intent on curbing abusive state action relied on their state, not federal, constitution.<sup>170</sup>

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<sup>164</sup> William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977). Supreme Court decisions similarly acknowledge the independent nature of state constitutions. See, e.g., *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (“[A state may] adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.”). See generally Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951 (1982); Margaret H. Marshall, “Wise Parents Do Not Hesitate to Learn From Their Children”: *Interpreting State Constitutions In An Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633 (2004); Robert F. Williams, *The Third State of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211 (2003).

<sup>165</sup> See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 48 (1998).

<sup>166</sup> See *id.*

<sup>167</sup> See FRIESEN, *supra* note 160, § 1-3(b).

<sup>168</sup> See, e.g., N.Y. CONST. art. XI § 1; *Bd. Of Educ. v. Nyquist*, 439 N.E. 2d 359, 368-69 (1982) (interpreting the constitutional requirement of “free and common schools” to mean the legislature must provide a “sound basic” public education). Almost every state constitution guarantees its citizens an education, whereas the federal Constitution does not provide a right to an education. See Peter Enrich, *Leaving Equality Behind: New Directs in School Finance Reform*, 48 VAND. L. REV. 101, 105 (1995). In the wake of the Supreme Court’s decision in *San Antonio v. Rodriguez*, 411 U.S. 1 (1973), that disparities in education financing do not violate the U.S. Constitution, numerous state courts held that their own constitutions require greater equity in school financing. See *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 814 (Ariz. 1994) (listing cases).

<sup>169</sup> The Supreme Court did not apply the First Amendment to the action of state governments until 1925. See *supra* note 108.

<sup>170</sup> For example, in 1859, Wisconsin declared that government appointed counsel for indigent defendants was part of the right to fair trial guaranteed by the state constitution. See *Carpenter v. Dane County*, 9 Wis. 274 (1859). More than a century later, the U.S. Supreme Court took a similar position. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). See generally Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951 (1982).

Over the last several decades, state courts have revived a practice of independent interpretations of their constitutions, finding greater protections for individual rights than those provided by the federal Constitution.<sup>171</sup> Even state constitutional provisions that mirror language in the federal Constitution have been interpreted as more expansive than the federal Constitution.<sup>172</sup> For instance, after the U.S. Supreme Court upheld a state's sodomy law in *Bowers v. Hardwick* against a right to privacy challenge,<sup>173</sup> the Georgia court struck down its state's sodomy law based on the Georgia constitution's right to privacy.<sup>174</sup>

This Note explores state constitutional law generally as it applies to fusion voting, but each state's constitution deserves its own analysis. That being said, there are shared characteristics of state constitutional law that make anti-fusion laws vulnerable to state constitutional challenges even though a federal challenge failed. First, there is an absence of federalism concerns when state courts are interpreting state constitutions.<sup>175</sup> This means state courts may adopt a less deferential approach in analyzing state legislatures' justifications for anti-fusion laws. Second, the history of state constitutional development reflects dedication to broad and diverse political participation.<sup>176</sup> This conception of politics may mean minor political parties receive more protection under state constitutions than under the federal Constitution. Finally, several state courts have articulated a broader interpretation of freedom of expression than the Supreme Court has found in the federal Constitution.<sup>177</sup> This means state

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<sup>171</sup> See Ken Gormley, *The Silver Anniversary of New Judicial Federalism*, 66 ALB. L. REV. 797 (2003).

<sup>172</sup> The Maryland courts, for example, have "emphasized that, simply because a Maryland constitutional provision is *in pari materia* with a federal one or has a federal counterpart, does *not* mean that the provision will *always* be interpreted or applied in the same manner as its federal counterpart." *Dua v. Comcast Cable of Maryland, Inc.*, 805 A.2d 1061, 1071 (Md. 2002).

<sup>173</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>174</sup> *Powell v. State*, 510 S.E.2d 18 (Ga. 1998). The Georgia Court relied on language of the state constitution that is almost identical to the Due Process clause of the Fourteenth Amendment in the federal Constitution. *Id.* at 21. Compare U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.") with GA. CONST. art. I, § 1, para. 1 ("No person shall be deprived of life, liberty, or property except by due process of law.").

<sup>175</sup> See *infra* Part IV.B.

<sup>176</sup> See *infra* Part IV.C.

<sup>177</sup> See *infra* Part IV.D.

courts may adopt a more protective approach to rights of associations and the value of voting.

### B. *The Strength of State Court Judicial Review*

In *Timmons*, as in other election law cases, the Supreme Court balanced a state's role as regulator with a party's rights of association. Acceptance of state justifications in this balancing act are in keeping with a general reluctance of federal courts to interfere with the way a state "defines itself as a sovereign."<sup>178</sup> State courts, for obvious reasons, need not be concerned about disrespecting the sovereignty of their own state. Without federalism concerns, deference to the political branches need not be as extreme as it is in the federal courts.<sup>179</sup> This is particularly true when state courts face claims from a minority of the population, who by their very numbers will never have control of the legislature.

Some state constitutions explicitly authorize judicial review of state legislation.<sup>180</sup> While federal courts rely on precedent to support their powers of judicial review, they are cautious in exercising that power, especially when asked to invalidate legislative actions.<sup>181</sup> State courts, however, have

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<sup>178</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (regarding state decisions on the qualification of elected officers).

<sup>179</sup> For an argument that state courts should employ strict scrutiny in the field of constitutional economic rights, see Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999).

<sup>180</sup> See Burt Neuborne, *State Constitutions and Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 900 (1988). For example, the Georgia Constitution provides "Legislative acts in violation of this Constitution or the Constitution of the United States are void, and the judiciary shall so declare them." GA. CONST. art. I, § 2, para. 5. The judiciary articles of other states' constitutions similarly declare the power of judicial review, although often less explicitly or with limitations. See, e.g., ARIZ. CONST. art. 6, § 2 ("The Supreme Court . . . shall not declare any law unconstitutional except when sitting in banc."); LA. CONST. art. V, § 5, para. D ("In addition to other appeals provided by this constitution, a case shall be appealable to the supreme court if a law or ordinance has been declared unconstitutional."); NEB. CONST. art. V, § 2 ("The judges of the Supreme Court, sitting without division, shall hear and determine all cases involving the constitutionality of a statute."); UTAH CONST. art. VIII, § 2 ("The court shall not declare any law unconstitutional under this constitution or the Constitution of the United States, except on the concurrence of a majority of all justices of the Supreme Court."); VA. CONST. § 1, para. 2 ("[T]he Supreme Court shall, by virtue of this Constitution, have appellate jurisdiction in cases involving the constitutionality of a law under this Constitution or the Constitution of the United States and in cases involving the life or liberty of any person.").

<sup>181</sup> See Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990's*, 5 WM. & MARY BILL RTS. J. 427, 440 (1997) ("The [Supreme] Court is most deferential to legislative enactments that can claim the broadest democratic pedigree."). See generally William G. Ross, *The Resilience of*

enhanced legitimacy in reviewing legislation because they act according to explicit state constitutional provisions.<sup>182</sup> In addition, many state court judges are elected, so their role in reviewing legislative action is less subject to charges of anti-majoritarianism.<sup>183</sup> In fact, when states amended their constitutions to allow for the popular election of judges, they simultaneously limited the power granted to the legislature, intending that judges should help “make public policy.”<sup>184</sup> Therefore, when reviewing anti-fusion laws, state courts carry with them more than just substantive law to find the laws invalid. They are also, perhaps more importantly, draped with a cloak of legitimacy.

The *Timmons* opinion allows states broad power to enact laws that protect the major parties. State courts interpreting state constitutions in response to a challenge to anti-fusion laws would be more critical of the state’s justification than the Supreme Court was in *Timmons*. If state courts accept that there is a constitutionally permissible interest in protecting the two-party system, a more rigorous analysis would likely strike down anti-fusion laws because there is a striking lack of evidence to support the claim that fusion destroys the two-party system. Rather, New York’s experience suggests fusion voting creates a “modified two-party system,” where minor parties play an important role but do not replace the major parties.<sup>185</sup>

Perhaps more importantly, there is a lack of evidence to show that stable democracy requires limiting the number of major parties to two. State constitutions protect broad participation in electoral government,<sup>186</sup> and courts scrutinizing the justification of anti-fusion laws should find the state’s protection of major parties suspect and inconsistent with state constitutional conceptions of popular sovereignty.

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*Marbury v. Madison: Why Judicial Review Has Survived So Many Attacks*, 38 WAKE FOREST L. REV. 733 (2003) (describing the challenges to federal court review of state legislation).

<sup>182</sup> Neuborne, *supra* note 180, at 900.

<sup>183</sup> See TARR, *supra* note 165, at 174-75 (suggesting that the election of state judges may explain why the legitimacy of state courts is less questioned than that of the U.S. Supreme Court).

<sup>184</sup> See *id.* at 122.

<sup>185</sup> MAZMANIAN, *supra* note 78, at 115 (“New York State has a highly competitive party system with two major contenders and third party contestants that are able to sustain themselves over time.”).

<sup>186</sup> See discussion *infra* Part IV.C.

### C. *Political Participation Protected in State Constitutions*

Compared to the federal Constitution, state constitutions are extremely specific regarding their dedication to political participation. The first article of many state constitutions is a declaration of commitment to popular sovereignty.<sup>187</sup> For instance, Article I, section I of the Washington constitution announces, “All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.”<sup>188</sup>

In addition, many state constitutions explicitly provide for the right to vote.<sup>189</sup> This is dramatically different than the federal Constitution, which may prohibit discriminatory denial of the right to vote, but “does not confer the right of suffrage upon any one.”<sup>190</sup> State constitutions typically have language similar to the Pennsylvania constitution: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”<sup>191</sup> The right to vote has been one of the state constitutional rights most frequently expanded by amendment.<sup>192</sup> States have similarly demonstrated their

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<sup>187</sup> See Tarr, *supra* note 165, at 11-12. See, e.g., N.H. Const. art. I (“All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.”); N.J. CONST. art. I (“All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.”); WIS. CONST. art. I, § 1 (“All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.”).

<sup>188</sup> WASH. CONST. art. I, § 1.

<sup>189</sup> See James A. Gardner, *A Post-Vieth Strategy For Litigating Partisan Gerrymandering Claims*, ELECTION L.J. 643, 648 nn.37, 38 (summarizing states’ provisions on elections).

<sup>190</sup> See *Minor v. Happersett*, 88 U.S. 162, 178 (1874).

<sup>191</sup> PENN. CONST. art I, § 5. See also, e.g., IND. CONST. art. II, § 1 (“All elections shall be free and equal.”); S.D. CONST. art. VI, sec. 19 (“Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”); TENN. CONST. art. I, § 5 (“That elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon a conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction.”).

<sup>192</sup> See TARR, *supra* note 165, at 105-08. There is a major exception to this trend of broadening the right to vote through constitutional revisions: In many southern states constitutional amendments were used to disenfranchise African Americans during the end of the Nineteenth Century. See *id.* at 107.

commitment to popular sovereignty by amending their constitutions to create procedures for referendum, initiative, and recall elections.<sup>193</sup>

Constitutional amendments expanding the voting population and permitting direct democracy were adopted in response to fears of government corruption.<sup>194</sup> Drafters believed that the “main threats to rights, both collective and individual, were despotic officials and those seeking special privileges, rather than the people as a whole.”<sup>195</sup> Thus, state constitutions reflect cynicism of the motives of government officials and they aim to prevent manipulation of the electoral system that protects the power of the few.<sup>196</sup> Like Madison’s fear of factions, drafters of state constitutions worried that minorities could impede the will of the majority.<sup>197</sup> In contrast to Madison, however, the minorities the state constitutional drafters worried about were the ones elected to positions of power, not the ones advocating for political change.<sup>198</sup>

When parties first began challenging election regulations, state courts were concerned with the rights of voters, not parties.<sup>199</sup> Decisions from the late 1800s and early 1900s expressed distress over corruption by party leaders and party bosses.<sup>200</sup> Judges believed manipulative political parties hampered political participation.<sup>201</sup> For some judges, distrust of political parties was an argument in favor of fusion voting, since “[p]olitical fusions among minority parties often serve as a check upon arrogant majority parties, or rather political

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<sup>193</sup> JAMES QUAYLE DEALEY, GROWTH OF AMERICAN STATE CONSTITUTIONS 147-49, 169-71, 215-18 (1972).

<sup>194</sup> See TARR, *supra* note 165, at 170 (“[T]he initiative does provide a mechanism for circumventing the power of political elites within state government, just as its early proponents had expected.”); Gardner, *supra* note 189, at 649 (“Progressives . . . sought to reform state and local government by creating institutions of direct democracy, such as the initiative, referendum, and recall election, which would allow ordinary voters to thwart plans by incumbent power-holders to serve their own interests and to assure their own continuation in office.”).

<sup>195</sup> TARR, *supra* note 165, at 78. More recently, this logic has motivated constitutional amendments providing for term limits for elected offices. See *id.* at 170, 172.

<sup>196</sup> Cf. Gardner, *supra* note 189, at 649-50 (arguing that state constitutions’ focus on electoral responsiveness suggests partisan gerrymandering claims may be advanced under state constitutions).

<sup>197</sup> See *supra* note 150.

<sup>198</sup> See TARR, *supra* note 165, at 78, 100, 150-51.

<sup>199</sup> See Adam Winkler, *Voters’ Rights and Parties’ Wrongs: Early Political Party Regulation in the State Courts, 1886-1915*, 100 COLUM. L. REV. 873, 892 (2000).

<sup>200</sup> See *id.* at 890.

<sup>201</sup> See *id.* at 875.

parties whose thorough organization has enabled them to repeatedly elect officers that are dishonest and corrupt.”<sup>202</sup> Most judges facing early cases on fusion voting, however, did not consider the impact anti-fusion laws had on minor parties.<sup>203</sup> Professor Adam Winkler notes that in an era of genuine party competition it is “easy to understand how the courts overlooked the duopoly-enhancing nature of many turn-of-the-century reforms.”<sup>204</sup>

History now shows that anti-fusion laws were enacted to protect the political parties in power and they succeeded far better than they could have hoped.<sup>205</sup> In *Timmons*, the Supreme Court was willing to allow states to purposefully favor two major parties, but state constitutions would not provide that leeway. State constitutions are drafted to prevent laws that are enacted to protect the privileges of the elected. Unless current legislators can defend anti-fusion laws with less partisan motives than those of the past, this manipulation of the electoral scheme should not only fail to justify such laws, it should result in their invalidity.

#### D. *Freedom of Expression Protected in State Constitutions*

Like the federal Constitution, state constitutions contain specific provisions protecting freedom of speech and assembly.<sup>206</sup> In the resurgence of state constitutional law of the last twenty-five years, freedom of expression has been one of the most watched areas.<sup>207</sup> Several courts have held that their

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<sup>202</sup> *State ex rel. Dunn v. Coburn*, 168 S.W. 956, 964 (Mo. 1914) (Brown, J., dissenting).

<sup>203</sup> Early court challenges to anti-fusion voting laws were generally brought as claims under state constitutional rights to vote by ballot, and rights of free and equal elections. *See, e.g.*, *Dunn*, 168 S.W. at 964; *State ex rel. Runge v. Anderson*, 76 N.W. 482 (Wis. 1898); *State ex rel. Bateman v. Bode*, 45 N.E. 195 (Ohio 1896); *State ex rel. Sturdevant v. Allen*, 62 N.W. 35 (Neb. 1895). This note explores modern challenges to anti-fusion laws based on freedom of expression and association, but even future challenges based on the right to vote are not precluded by these cases. The value of competition in the electoral arena may play a different role in challenges to anti-fusion laws brought today, as opposed to ones brought a century ago since the context of elections has changed dramatically. *Cf. Winkler, Voters' Rights and Parties' Wrongs*, *supra* note 199, at 892-95 (describing party competition at the turn of the century).

<sup>204</sup> *See Winkler, Voters' Rights and Parties' Wrongs*, *supra* note 199, at 892.

<sup>205</sup> *See Argersinger*, *supra* note 33, at 288.

<sup>206</sup> *See Robert Force, State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125 (1969) (listing the states with freedom of speech, freedom of assembly and other Bill of Rights' provisions in their constitutions).

<sup>207</sup> *See, e.g.*, Stanley H. Friedelbaum, *Expressive Liberties in the State Courts: Their Permissible Reach and Sanctioned Restraints*, 67 ALB. L. REV. 655 (2004); Seth F. Kreimer, *The Pennsylvania Constitution's Protection of Free Expression*, 5 U. PA. J.

state constitutions provide a broader right to free expression than the federal Constitution.<sup>208</sup> This suggests state protections for expression may cover a broader range of activities than the First Amendment, specifically, the activities of voting and association.

The earliest state constitutions were drafted during the American Revolutionary war.<sup>209</sup> Almost all included guarantees of freedom of speech.<sup>210</sup> This is hardly surprising given the resentment towards British attempts to limit expression in the colonies.<sup>211</sup> Freedom of expression was seen as having “a direct relationship to freedom from government oppression.”<sup>212</sup> State courts have relied on this history in finding state constitutional law protects a wide range of expressive activities.<sup>213</sup> Of course, some states drafted constitutions after the adoption of the federal Bill of Rights.<sup>214</sup> But those states borrowed the broad language of older state constitutions in protecting free speech, instead of copying the federal Constitution.<sup>215</sup>

Forty-one state constitutions protect the right of expression with affirmative avowals of the right to speak.<sup>216</sup>

CONST. L. 12 (2002); Todd F. Simon, *Independent But Inadequate: State Constitutions and Protection of Freedom of Expression*, 33 U. KAN. L. REV. 305 (1985).

<sup>208</sup> See, e.g., *People v. Ford*, 773 P.2d 1059, 1066 (Colo. 1989) (“[O]ur constitution extends broader protection to freedom of expression than does the first amendment to the United States Constitution.”). See also *infra* notes 213, 226 and accompanying text.

<sup>209</sup> See TARR, *supra* note 165, at 61 (providing a table of states constitutions and the date of their adoption).

<sup>210</sup> See Margaret A. Blanchard, *Filling the Void: Speech and Press in State Courts prior to Gitlow in THE FIRST AMENDMENT RECONSIDERED: NEW PERSPECTIVES ON THE MEANING OF FREEDOM OF SPEECH AND PRESS* 17 (Bill F. Chamberlin & Charlene J. Brown eds., 1982).

<sup>211</sup> See *id.* at 21.

<sup>212</sup> See *id.*

<sup>213</sup> For example, in Pennsylvania, the highest court has paid special attention to the history of the Pennsylvania’s founder, William Penn, in analyzing the text of its constitution:

[Since] William Penn[] was prosecuted in England for the “crime” of preaching to an unlawful assembly and persecuted by the court for daring to proclaim his right to a trial by an uncoerced jury . . . [i]t is small wonder . . . the rights of freedom of speech, assembly, and petition have been guaranteed since the first Pennsylvania Constitution, not simply as restrictions on the powers of government, as found in the Federal Constitution, but as inherent and “invaluable” rights of man.

*Commonwealth v. Tate*, 432 A.2d 1382, 1388 (Pa. 1981).

<sup>214</sup> See TARR, *supra* note 165, at 61.

<sup>215</sup> See FRIESEN, *supra* note 160, § 5-2. Today, every state provides for the rights of speech in their constitution. See Force, *supra* note 206, at 125.

<sup>216</sup> For a listing of state free speech and press provisions, see FRIESEN, *supra* note 160, at app. 5 and Note, *Private Abridgement of Speech and the State Constitutions*, 90 YALE L.J. 165, 180-81 n.79 (1980).

Kansas' constitution provides, "The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects."<sup>217</sup> Similarly, the Michigan constitution says, "Every person may freely speak, write, express and publish his views on all subjects."<sup>218</sup> These provisions are typical.<sup>219</sup>

Forty-six states have provisions guaranteeing the right to assembly<sup>220</sup> and these provisions are often expressed as positive declarations as well. Using Kansas and Michigan as examples once again, Kansas' constitution provides, "The people have the right to assemble, in a peaceable manner, to consult for their common good, to instruct their representatives, and to petition the government, or any department thereof, for the redress of grievances."<sup>221</sup> The language of the Michigan constitution is nearly identical.<sup>222</sup>

Although these provisions of state constitutions protect a right similar to the First Amendment of the federal Constitution, their distinct language implies they deserve a distinct analysis.<sup>223</sup> Most state constitutional provisions are in sharp contrast to the federal Constitution, which simply declares that "Congress shall make no law" restraining expressive rights,<sup>224</sup> and does not provide a positive guarantee. The affirmative nature of the state provisions illustrates the spirit in which they were enacted, celebrating the fundamental rights of state citizens of which freedom of speech was a priority.<sup>225</sup> Relying on this, some states have found that under

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<sup>217</sup> KAN. CONST. Bill of Rights § 11.

<sup>218</sup> MICH. CONST. art. I § 5.

<sup>219</sup> See FRIESEN, *supra* note 160, at app. 5.

<sup>220</sup> See Force, *supra* note 206, at 139.

<sup>221</sup> KAN. CONST. Bill of Rights § 3.

<sup>222</sup> See MICH. CONST. art. I § 5 ("The people have a right to peaceably to assemble, to consult of the common good, to instruct their representatives and petition the government for redress of grievance.").

<sup>223</sup> See Kevin Francis O'Neill, *The Road Not Taken: State Constitutions as an Alternative Source of Protection for Reproductive Rights*, 11 N.Y.L. SCH. J. HUM. RTS. 1, 31 (1993) ("If a court were interpreting contractual terms, would it conclude, as readily as some courts have, that these clauses are coextensive?").

<sup>224</sup> The First Amendment in the federal Constitution reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

<sup>225</sup> See Todd F. Simon, *Independent but Inadequate: State Constitutions and Protections of Freedom of Expression*, 33 U. KAN. L. REV. 305, 310 (1985) ("Freedom of the press was considered the right of greatest importance, at least initially, and assuring freedom of expression was a primary concern of settlers in new states.").

their constitutions infringements of the rights of speech can occur when there is no state action.<sup>226</sup> In New Jersey, for instance, state courts have relied on the affirmative nature of the free speech provision to hold that the state constitution provides a right to distribute political leaflets in shopping centers even though the federal Constitution would not provide that right.<sup>227</sup>

A broad right to freedom of expression is valuable in challenging anti-fusion laws for two reasons. First, freedom of association is an offshoot of freedom of expression, so the scope of protection for speech is indicative of the protection associations will be given. Second, voting is an expressive act. Freedom of expression in the federal Constitution does not protect the act of voting,<sup>228</sup> but freedom of expression in state constitutions should.

### 1. Broad Right of Expression Protects Associations

The rights of political parties are in essence the rights of voters who have collectivized in order to engage in more efficient expression. Since state constitutional language and history suggest broader protection for expression than the federal Constitution, state constitutions should be construed to provide greater protection for associational rights of political parties.

Although political parties did not exist at the time the federal Constitution was drafted, its framers sought to guard against the danger of “factions,” which James Madison defined as groups of citizens “united and actuated by some common impulse of passion, or of interest.”<sup>229</sup> The Supreme Court, therefore, was understandably slow in developing a freedom of association doctrine to protect the very group activity Madison

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<sup>226</sup> N.J. Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 771 (N.J. 1993) (“[T]he State right of free speech is protected not only from abridgement by government, but also from unreasonably restrictive and oppressive conduct by private entities.”).

<sup>227</sup> See *id.* at 770-71.

<sup>228</sup> See *supra* notes 92-100 and accompanying text.

<sup>229</sup> THE FEDERALIST NO. 10 (James Madison). Similarly, of the Democratic-Republican societies forming in 1794, George Washington said, “All combinations and associations, under whatever plausible character, with the real design to direct, control, counteract or awe the regular deliberation and action of the constituted authorities are . . . of fatal tendency.” ROBERT J. BRESLER, FREEDOM OF ASSOCIATION 23 (2004) (quoting President George Washington, Farewell Address to the People of the United States (Sept. 17, 1796), in INDEP. CHRON., Sept. 26, 1796).

feared.<sup>230</sup> State courts, however, were quicker to recognize the democratic value and necessity of associations.<sup>231</sup> Half a century before the Supreme Court said there was constitutional protection for associations, state courts had recognized that political parties are protected under fundamental rights of speech and assembly.<sup>232</sup> The highest court of California wrote in 1900,

No one, it would seem, can be so thoughtless as not to realize that government by the people is a progressive institution, which seeks to give expression and effect to the wisest and best ideas of its members. . . . [E]lectors . . . may freely assemble, organize themselves into a political party, and use all legitimate means to carry their principles of government into active operation through the suffrages of their fellows. Such a right is fundamental.<sup>233</sup>

Similarly the Wisconsin Supreme court declared in 1910 that “[t]he right of members of a political party to freely assemble, deliberate and act, to promote the interest of such party, is a right guaranteed by the Constitution, state and national. Freedom to do those things, reasonably appropriate to the effective maintenance of party organization, cannot be abridged.”<sup>234</sup> While acknowledging constitutional protections for political parties, state courts also allowed state legislatures to regulate them. Political parties, these courts recognized, are more than private associations. They are part of the machinery of democracy.<sup>235</sup> State courts upheld Australian ballot laws and other reforms, not because they rejected the constitutional rights of parties, but rather because they believed electoral regulations would increase voter choice and opportunity.<sup>236</sup> These courts sustained regulations that they thought would protect the rights of voters to participate effectively in party organizations.<sup>237</sup>

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<sup>230</sup> See BRESLER, *supra* note 229, at 25, 32.

<sup>231</sup> The fact that state courts considered the rights of political parties before the U.S. Supreme Court is likely a result of the historical development of the incorporation doctrine. It was not until 1925 that the Supreme Court applied the First Amendment to state action. See *supra* note 108.

<sup>232</sup> See Winkler, *Voters' Rights and Parties' Wrongs*, *supra* note 199, at 874.

<sup>233</sup> See *Britton v. Bd. of Election Comm'rs. of San Francisco*, 61 P. 1115, 1117 (Ca. 1900).

<sup>234</sup> See, e.g., *State ex rel. Van Alstine v. Frear*, 125 N.W. 961, 976-77 (Wis. 1910).

<sup>235</sup> See Winkler, *Voters' Rights and Parties' Wrongs*, *supra* note 199, at 881-82.

<sup>236</sup> See *id.* at 884 (“Protecting and preserving the ability of voters to make effective use of electoral opportunities free from the corrupting influence of party leaders led most state courts to uphold laws restricting ballot access.”).

<sup>237</sup> See *People ex rel. Coffey v. Democratic Gen. Comm.*, 58 N.E. 124, 125-26

Today, anti-fusion laws limit voter choice rather than ensure it. By preventing parties and their supporters from nominating their selected candidates, anti-fusion laws run afoul of a long tradition of state protection for voter participation as expressed through political parties.

## 2. Broad Right of Expression Protects the Act of Voting

In addition to association as a derivative right of freedom of speech, freedom of expression on its own might prohibit anti-fusion laws. As discussed above, voting may be considered an expressive act.<sup>238</sup> Using the facts of *Timmons* as an example, New Party members wanted to vote for Andy Dawkins on the New Party ballot line to express a message that they felt would not be expressed by voting for him on the Democratic-Farmer-Labor ballot line, namely, that the Democratic Party was too centrist.<sup>239</sup> That the medium for this voter communiqué would be the ballot does not change its essential expressive nature.

The majority of the U.S. Supreme Court in *Timmons* rejected the link between voting and expression. State courts, however, are free to take another approach. No trend of protection for the expressive nature of voting has yet emerged in state courts, but there are promising harbingers. Several states have found state constitutional protection for write-in votes, for instance.<sup>240</sup> Recently, the Utah Supreme Court described the constitutional right to vote for a ballot initiative as important because it “encourages political dialogue” as well as “allows the general populace to have substantive and meaningful participation in enacting legislation.”<sup>241</sup> Oregon’s Judge Landau has gone further in acknowledging the ballot as a place of expression. In *Freedom Socialist Party v. Bradbury*,

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(N.Y. 1900) (upholding a statute that the court believed was intended to “permit the voters to construct the organization from the bottom upwards, instead of permitting [party] leaders to construct it from the top downwards”). See Winkler, *Voters’ Rights and Parties’ Wrongs*, *supra* note 199, at 880 (quoting this and other cases from the period).

<sup>238</sup> See *supra* notes 92-95 and accompanying text.

<sup>239</sup> See DISCH, *supra* note 10, at 17-18.

<sup>240</sup> See *Littlejohn v. People ex rel. Desch*, 121 P. 159 (Colo. 1912); *Smith v. Smathers*, 372 SO. 2d 427 (Fla. 1979); *Thompson v. Wilson*, 155 S.E.2d 401 (Ga. 1967). Even though these cases have protected write-in votes under the right to vote, and not under freedom of expression, they suggest state constitutions differ in their understanding of the value of voting from the federal Constitution. See *supra* notes 92-100 and accompanying text.

<sup>241</sup> *Gallivan v. Walker*, 54 P.3d 1069, 1081 (2002).

the Oregon Court of Appeals considered the constitutionality of a statute preventing the Freedom Socialist Party from using their party name on the ballot because the Socialist party already had been given an exclusive right to the use of its name and the word “socialist.”<sup>242</sup> In a concurring opinion, Judge Landau found the statute limited the ability of a political party to communicate its message to the public, and this was a violation the Oregon constitutional right to free speech.<sup>243</sup>

State constitutions value voting more than the federal Constitution.<sup>244</sup> Moreover, they offer more protection for expressive activities. Therefore, state courts should understand voting as an act of expression. Fusion voting is especially motivated by an urge to express one’s political views. As recognized by Justice Stevens, fusion allows voters to indicate views they feel are not sufficiently represented by the major parties, while still allowing them to vote for the candidate they hope will win the election.<sup>245</sup> Fusion voting, then, should receive constitutional protection as part of states’ protection of expression.

## V. CONCLUSION

Legislators enacted anti-fusion laws in order to ensure their reelections, not as part of a noble defense of government stability. In *Timmons*, the Supreme Court declared states have the right to enact such laws to protect the two-party system. State courts interpreting state constitutions should treat challenges to anti-fusion laws differently. Drafters of state constitutions were dedicated to expansive political participation and were cynical of elected power. Sustaining laws that have the purpose of limiting the viability of minor parties reduces voter choice and shields established politicians from challenges. Anti-fusion laws, then, are incompatible with the goals of state constitutions. Moreover, protection of the two-party system is an especially weak defense for these laws in

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<sup>242</sup> *Freedom Socialist Party v. Bradbury*, 48 P.3d 199, 200 (Or. Ct. App. 2002). The majority found the statute unconstitutional under the federal Constitution’s First Amendment and never addressed whether there was a state constitutional violation, noting that parties did not raise a state constitutional issue on appeal. *See id.* at 201 n.2.

<sup>243</sup> *See id.* at 208 (Landau, J., concurring) (“[T]he statute prohibits a political party from using specified words in communicating a message to members of the voting public.”).

<sup>244</sup> *See supra* Part IV.C.

<sup>245</sup> *Timmons*, 520 U.S. at 381 (Stevens, J., dissenting).

states that value free expression. Anti-fusion laws infringe upon the rights of voters to express their political beliefs and the rights of parties and their adherents to associate.

Many voters are unhappy with their choices on Election Day but anti-fusion laws allow them no satisfying options. They can “hold their nose” and vote for the candidate they believe is the lesser of two evils<sup>246</sup> or they can cast a vote that is unlikely to translate into actual political power. A revival of fusion voting would solve this dilemma, but after the *Timmons* opinion was issued, a revival of fusion voting appeared unlikely. Examining state constitutions reveals a different future—anti-fusion laws are not as unassailable as they may seem. State courts have the ability, authority and obligation to invalidate anti-fusion laws and thereby liberate voters and parties alike.

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<sup>246</sup> See Press Release, Repentant Nader Voter Pac, Former Nader Voters Offering their Compatriots Nose Clips, So They “Hold Your Nose and Vote” for Kerry (Aug. 10, 2004), at <http://www.repentantnadervoter.com/mediacenter/holdyournose.htm>.

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Appendix:

**HYPOTHETICAL BALLOT IN A FUSION VOTING SYSTEM**

<b>BALLOT</b>			
<i>Make your selection by filling in one of the circles.</i>			
<i>Party</i>	Democrat	Republican	Purple
<i>Candidate for Office</i>	Candidate X <input type="radio"/>	Candidate Y <input type="radio"/>	Candidate X <input type="radio"/>

**HYPOTHETICAL ELECTIONS RESULTS**

Votes for Candidate Y as Republican .....48%  
 Votes for Candidate X as Democrat.....44%  
 Votes for Candidate X as Purple.....8%

***Candidate X is declared the winner with 52% of the vote.***