

# THE MISGUIDED REJECTION OF FUSION VOTING BY STATE LEGISLATURES AND THE SUPREME COURT

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The American political system is no longer perceived as the gold standard that it once was.<sup>1</sup> And with good reason. “The United States ranks outside the top 20 countries in the Corruption Perception Index.”<sup>2</sup> “U.S. voter turnout trails most other developed countries.”<sup>3</sup> Congressional approval ratings are around 20%, “and polling shows that partisan animosity is at an all-time high.”<sup>4</sup> Beginning in the 1970’s, “the economy stopped working the way it had for all of our modern history—with steady generational increases in income and living standards.”<sup>5</sup> Since then, America has been plagued by unprecedented inequality and large portions of the population have done worse not better.<sup>6</sup> In the meantime, the Electoral College gives the decisive losers of the national popular vote effective control of the national government.<sup>7</sup>

Under these circumstances, many knowledgeable observers believe that moving toward a multiparty democracy would improve the quality of representation, “reduce partisan gridlock, lead to positive incremental change and increase . . . voter satisfaction.”<sup>8</sup> And there is no question that third parties can provide important public benefits. They bring substantially more variety to the country’s political landscape. Sometimes in American history third parties have brought neglected points of view to the forefront, articulating concerns that the major parties failed to address.<sup>9</sup> For example, third parties played an important role in bringing about the abolition of slavery and the establishment of women’s suffrage.<sup>10</sup> The Greenback Party and the Prohibition Party both raised issues that were otherwise ignored.<sup>11</sup> Third parties have also had a significant impact on European democracies as, for example, when the Green Party in Germany raised environmental issues that the social democrats and conservatives ignored.<sup>12</sup> If voters had more choices, it is likely that they would show up more often at the

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1. David Edward Burke, *Can America Break Free from the Two-Party Doom Loop?*, WASH. MONTHLY, Jan./Feb./Mar. 2020, at 50 (reviewing Lee Drutman, *BREAKING THE TWO-PARTY DOOM LOOP* (2020)).

2. *Id.*

3. *Id.*

4. *Id.*

5. Joel Rogers, *Two-Party System: Pull the Plug*, 52 ADMIN. L. REV. 743, 761 (2000).

6. *Id.* at 761–62.

7. Jedediah Britton-Purdy, *Normcore*, DISSENT, Summer 2018, <https://www.dissentmagazine.org/article/normcore-trump-resistance-books-crisis-of-democracy>.

8. Burke, *supra* note 1, at 51.

9. *Id.*

10. Elissa Berger, Note, *A Party that Won’t Spoil: Minor Parties, State Constitutions and Fusion Voting*, 70 BROOK. L. REV. 1381, 1386 (2005).

11. *The Greenback Movement*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Greenback-movement>; *Prohibition Party*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Prohibition-Party>.

12. *Green Party of Germany*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Green-Party-of-Germany>.

polls.<sup>13</sup> Also, additional viable parties might well push the major parties into being more responsive.<sup>14</sup>

However, third parties in the United States face many obstacles. “Virtually all . . . elections are decided by plurality voting . . . in single-member election districts.”<sup>15</sup> Such elections are winner take all, and they are not friendly to third parties which command the support of only a minority of voters.<sup>16</sup> And even voters inclined to support third party candidates often fear that by doing so they will “waste” their vote on a candidate with no chance of winning or, worse, “spoil” the result by taking needed votes away from their second most favored candidate and throwing it to the least favored.<sup>17</sup> This problem is known as Duverger’s Law, which states that a two-party duopoly possesses a natural equilibrium.<sup>18</sup> Thus, of about a “thousand minor parties formed in the United States since the 1840s, only ten have polled more than six percent of the Presidential vote.”<sup>19</sup> Few have elected candidates of their own or been important electoral players for more than a few election cycles, and then only during economic crises or war.<sup>20</sup> And if they raise issues that are attractive, such issues are usually co-opted by one of the major parties. “As the great historian, Richard Hofstadter [put it] . . . : ‘Third parties are like bees, once they have stung, they die.’”<sup>21</sup>

Consider in this regard the vote for Ralph Nader in his 2000 and 2004 presidential campaigns. In 2000, 2.8 million people voted for Nader.<sup>22</sup> These voters were clearly dissatisfied with the policies of the major parties and wanted to send a message. But in 2004, Nader received 2.4 million fewer votes, likely because voters feared wasting their votes or allowing Nader to spoil the election for the Democrats.<sup>23</sup> Thus, as it presently works, the two-party system diminishes the message of third parties and makes it difficult for them to sustain themselves. This distinctly disadvantages voters who are intent on seeking change.

Scholars have proposed a number of ways to strengthen third parties. Political scientist Lee Drutman and many others advocate that we implement ranked choice voting, a system in which voters rank their first, second and third choices and so on.<sup>24</sup> Votes for the lowest-performing candidates are redistributed to the second choice of that candidate’s voters, and this continues until one candidate reaches the requisite threshold and wins.<sup>25</sup> Ranked choice voting rewards candidates with broad appeal and leads to less divisive campaigns since candidates benefit from

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13. Berger, *supra* note 10, at 1386.

14. *Id.*

15. Rogers, *supra* note 5, at 746.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Rogers, *supra* note 5, at 747.

22. Berger, *supra* note 10, at 1383.

23. *Id.*

24. Burke, *supra* note 1, at 51.

25. *Id.*

being voters' second or third choices.<sup>26</sup> Several cities in the United States, including San Francisco and Minneapolis, employ ranked choice voting.<sup>27</sup>

A less powerful means of strengthening third parties is fusion voting, also known as cross-nomination, multiple-party nomination, or open-ballot voting. Fusion voting is an electoral strategy in which a major party and a third party agree to nominate the same candidate for the same office in the same election.<sup>28</sup> Fusion voting enables voters to contribute their votes to candidates running on third party tickets who, because they are also major party candidates, have a chance of winning. This enables third parties to share credit for their victories. It also enables third party voters to send strong messages to political parties, candidates and public officials, and to demand action on policy issues without fear that they will waste their vote or help elect a candidate who they oppose.<sup>29</sup> In a primary election under fusion voting, ballots are counted separately for each party, and the candidate with the most votes on each party's ballot line is that party's nominee. In a general election, the candidate's votes on each party's ballot are combined thus allowing a third party the opportunity to provide the votes that constitute the margin of victory if the race between the two major party candidates is close<sup>30</sup>—something that has occurred frequently in American history. Thus, fusion enables third parties to enter the political mainstream.

Unfortunately, fusion voting is unlawful in some 43 states and the District of Columbia.<sup>31</sup> In the late nineteenth and early twentieth centuries, most of these jurisdictions enacted laws prohibiting candidates for elected office from accepting the nomination of more than one party.<sup>32</sup> Before that, fusion was a prominent characteristic of U.S. politics and was particularly significant in the West and Midwest.<sup>33</sup> By fusing with one of the major parties, third parties were able to influence election results and thus public policy.<sup>34</sup> At that time, the process of voting was different. Prior to the 1890s, citizens voted by dropping a ballot listing the candidates they had chosen in an actual ballot box.<sup>35</sup> Typically, political parties printed the ballots which listed the party's slate of candidates, although sometimes voters would create their own ballots.<sup>36</sup> Under this system, the state did not participate in the determination of what groups constituted political parties or what

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26. *Id.*

27. *Id.*

28. STEVE COBBLE & SARAH SISKIND, FUSION: MULTIPLE PARTY NOMINATION IN THE UNITED STATES 1 (1993) (copy on file with author).

29. *Id.*

30. *Id.*

31. ADAM MORSE & J.J. GASS, BRENNAN CTR. FOR JUSTICE, MORE CHOICES, MORE VOICE: A PRIMER ON FUSION 1 (2006), <https://www.brennancenter.org/our-work/research-reports/more-choices-more-voices-primer-fusion>.

32. *Id.* at 2.

33. COBBLE & SISKIND, *supra* note 28, at 2.

34. *Id.*

35. MORSE & GASS, *supra* note 31, at 2.

36. *Id.*

candidates they could nominate.<sup>37</sup> Parties that wished to fuse could lawfully list the same candidate on their ballots.<sup>38</sup> And, in fact, cross-endorsing was an important part of the system.<sup>39</sup>

Beginning in 1888, after a particularly corrupt presidential election, both the federal government and the states implemented the Australian ballot, a government-printed ballot listing the candidates.<sup>40</sup> Voters filled out these ballots by themselves in voting booths. Although the change was initiated primarily to eliminate such forms of corruption as voter intimidation and vote-buying, the new system also gave government unprecedented control over the electoral process.<sup>41</sup> And the political party that controlled a particular government banned fusion voting for the purpose of solidifying its own power.<sup>42</sup> Fusion bans were part of an extensive recasting of American electoral politics that included the Jim Crow system in the South, an elaborate set of rules to prevent African-Americans from voting, as well as a variety of mechanisms to push Northern immigrant and working class voters out of the electorate.<sup>43</sup>

This recasting accelerated after the election of 1896 in which the Republicans took control of state legislatures throughout the country.<sup>44</sup> In 1893, South Dakota enacted the first anti-fusion law, barring candidates from being listed more than once on a ballot.<sup>45</sup> In 1895, Ohio, Michigan, Wisconsin and Oregon passed similar laws, and eight more states followed suit in the next four years.<sup>46</sup> All of these statutes were enacted by legislatures controlled by Republicans who sought to prevent cooperation between Democrats and third parties.<sup>47</sup> The partisan purpose of these laws was lost on no one. One Michigan legislator publicly acknowledged that the Republicans were not interested in allowing “the Democrats to make allies of the Populists, Prohibitionists, or any other party, and get up combination tickets against us.”<sup>48</sup> One journalist called the anti-fusion law “the law providing for the extinction and effacement of all parties but the Democratic and Republican.”<sup>49</sup> And a Populist Party member said that it in effect “disfranchise[d] every citizen who . . . [is not] a member of the party in power . . . .”<sup>50</sup>

The partisan purpose behind the fusion bans obscured the fact that, as discussed, the case for permitting fusion voting was and is very strong. New York State, where fusion is alive and well, provides the best example. Because of fusion, six minor parties in New York have official party status which they obtained by

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37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*; see also S.J. Ackerman, *The Vote that Failed*, SMITHSONIAN MAGAZINE (Nov. 1998), <https://www.smithsonianmag.com/history/the-vote-that-failed-159427766/>.

41. MORSE & GASS, *supra* note 32, at 2–3.

42. *Id.* at 3.

43. Rogers, *supra* note 6, at 749.

44. *Id.*

45. Berger, *supra* note 11, at 1388–89.

46. *Id.* at 1389.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

securing 50,000 votes in gubernatorial elections.<sup>51</sup> Each of these parties has considerable influence on the issues on which they concentrate. The Working Families Party, for example, focuses on bread and butter issues like the minimum wage that are of particular interest to working class voters.<sup>52</sup> Unlike the Green Party, the Working Families Party does not put up protest candidates who have no chance of winning.<sup>53</sup> Rather, it cross-endorses Democratic candidates, bringing to them votes that they otherwise might not receive and sometimes providing the margin of victory.<sup>54</sup> As a result, the Working Families Party has developed considerable influence over Democratic officials and has been relatively successful in pulling Democrats to the left.<sup>55</sup> Its efforts led to New York's enactment in 2004 of a minimum wage law.<sup>56</sup> It brings new ideas and creativity to state politics, mobilizes voters, and stimulates turnout.

Fusion also brings other benefits such as, for example, contributing to integrating voters into the political system. It does this by decreasing the likelihood that a candidate with only a plurality but not a majority of votes will win.<sup>57</sup> This results from the fact that fusion encourages voters who are further from the political center to express their views by voting for a major party candidate on a third-party line.<sup>58</sup> Fusion also encourages major party candidates to distinguish themselves from each other and make the choice between them more meaningful. In 1970, for example, James Buckley was elected to the Senate from New York on a third party line.<sup>59</sup> Buckley, a conservative, took advantage of the fact that the Democratic and Republican Parties both nominated relatively liberal candidates.<sup>60</sup> The Republicans did this because they viewed the median New York voter as being somewhat liberal, and they made a strong effort to appeal to that voter.<sup>61</sup> Buckley's victory, however, made it clear to future Republican candidates that they could not

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51. *Ballot Access Requirements for Political Parties in New York*, BALLOTEDIA, [https://ballotpedia.org/Ballot\\_access\\_requirements\\_for\\_political\\_parties\\_in\\_New\\_York](https://ballotpedia.org/Ballot_access_requirements_for_political_parties_in_New_York) (last visited May 19, 2020).

52. See Berger, *supra* note 10, at 1392.

53. *Id.*; Howie Hawkins, *The Contradictions of Cross-Endorsements in the Governor's Race*, GREEN PARTY US (May 10, 2018), [https://www.gp.org/cross\\_endorsements](https://www.gp.org/cross_endorsements) (Green Party).

54. Celia Curtis, *Cross-Endorsement by Political Parties: A "Very Pretty Jungle"?*, 29 PACE L. REV. 765, 768 n.15 (2009).

55. Molly Ball, *The Pugnacious, Relentless Progressive Party That Wants to Remake America*, ATLANTIC (Jan. 7, 2016), <https://www.theatlantic.com/politics/archive/2016/01/working-families-party/422949/>; Anna Orsoo, *What's the Working Families Party, and How's it Different From Regular Democrats?*, PHILADELPHIA INQUIRER (Nov. 6, 2019), <https://www.inquirer.com/news/philadelphia-working-families-party-explained-progressives-democrats-elections-20191106.html>; Mark Pazniokas, *The Working Families, Pushing Democrats to the Left*, CONN. MIRROR (Feb. 11, 2018), <https://ctmirror.org/2018/02/11/the-working-families-pushing-democrats-from-the-left/>.

56. Berger, *supra* note 10, at 1292.

57. MORSE & GASS, *supra* note 31, at 5.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

cater to the median voter without potentially losing the conservative vote, and that such vote might make the difference between victory and defeat.<sup>62</sup>

Fusion has been criticized, but the criticisms are not well founded. Some critics have argued that fusion results in third parties that exist solely to secure patronage appointments for party leaders or their cronies.<sup>63</sup> Patronage, however, is a longstanding problem, and there is little reason to think that fusion makes it worse. Stronger third parties may result in the reallocation of some patronage from a major party to a third party, but it is highly unlikely that it adds patronage positions.<sup>64</sup> Further, third parties that exist primarily to secure patronage tend not to last long. The Liberal Party in New York is a good example.<sup>65</sup> It gave up on trying to influence policy and used its ballot line solely to bargain with the major parties for patronage and campaign contributions.<sup>66</sup> As a result, it lost support and ultimately its ballot line and was replaced by the Working Families Party, a genuine policy-oriented party.<sup>67</sup>

Others have argued that by aiding third parties, fusion helps extremist groups.<sup>68</sup> The strength of third parties, however, depends on their ability to attract votes, and in a democracy, if they can do this, they deserve to be taken seriously.<sup>69</sup> The answer to an extremist third party is not to ban it, but to defeat it at the polls and for major party candidates to refuse to accept its nomination. In any case, the main cause of political party extremism in the United States is not fusion, but partisan gerrymandering, which the Supreme Court unfortunately has now authorized.<sup>70</sup> Critics have also asserted that fusion would diminish the identity of third parties.<sup>71</sup> This, however, is an extremely weak argument because under fusion third parties choose whether or not to endorse a major party candidate. They need not be protected from themselves.

Finally, some anti-fusionists contend that the present two-party duopoly works well, and that fusion would undermine it.<sup>72</sup> But the two-party duopoly is far from ideal. It tends to marginalize important viewpoints and, in some regions of the country, intersecting with local political attitudes, it produces one-party states.<sup>73</sup> In such states, fusion could perform the positive function of reducing and dispersing the power of the party in power.<sup>74</sup> In any case, fusion would not weaken, much less undermine, the two-party system. As long as we have single member districts and plurality elections, the two-party duopoly will remain. Fusion would actually strengthen the two-party system by enabling third parties to contribute more than

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62. *Id.*

63. MORSE & GASS, *supra* note 31, at 6.

64. *Id.* at 5.

65. *Id.* at 6.

66. *Id.*

67. *Id.*

68. *Id.* at 7.

69. MORSE & GASS, *supra* note 31, at 7.

70. *Id.* See *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

71. MORSE & GASS, *supra* note 31, at 7.

72. *Id.* at 8.

73. *Id.*

74. *Id.*

they do now.<sup>75</sup> Essentially, state legislatures should pay attention to the positive role fusion plays in New York and legalize fusion voting.

Notwithstanding the benefits to the electoral system of fusion voting, since the turn of the 20th century it has been largely moribund except in New York.<sup>76</sup> Moreover, fusion voting has sustained a powerful additional blow. In the late 1980s and early 1990s, roughly a century after most states outlawed fusion, progressive activists led by University of Wisconsin political science professor Joel Rogers, his wife attorney Sarah Siskind, and New York organizer Dan Cantor, who later became executive director of the Working Families Party, began to explore the possibility of a constitutional challenge to anti-fusion laws.<sup>77</sup> They created a new political party, appropriately named the New Party, that they hoped to develop both as a progressive force and a vehicle for their constitutional challenge.<sup>78</sup> They believed that a multi-party system would provide Americans with more responsive government, but that a legal challenge to single member districts or to plurality voting or both was unlikely to succeed.<sup>79</sup> Thus, they developed a strong legal argument against anti-fusion laws. Their argument was based on the right of free expression as provided in the First and Fourteenth Amendments.<sup>80</sup>

The argument that voting is an expression of belief as well as a choice of a candidate is a compelling one but, unfortunately, in *Burdick v. Takushi* the Supreme Court held that states could prohibit voters from writing in candidates not listed on the ballot and rejected lower court decisions supporting the concept of ballot-based expression.<sup>81</sup> Although *Burdick* has been much criticized,<sup>82</sup> it compelled the New Party to rely on the right to freely associate rather than on the right to freedom of expression.<sup>83</sup> The Court had previously held that the right to associate was derivative of the First Amendment rights to speak and worship and petition for the redress of grievances.<sup>84</sup> Rogers and his colleagues' goal was to definitively establish as fundamental associational freedoms the right of political parties and their members to decide what candidates to support and what political strategies to employ, and the right of third parties to participate in a system that did not invidiously discriminate against them.<sup>85</sup> They argued that anti-fusion laws burdened the first right by prohibiting qualified parties from nominating consenting qualified

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75. *Id.*

76. *Id.* at 3.

77. Berger, *supra* note 10, at 1393.

78. *Id.*

79. Rogers, *supra* note 6, at 746, (legal challenge). *Id.* at 765–66 (responsive government).

80. Berger, *supra* note 10, at 1393–94.

81. *Id.*; *Burdick v. Takushi*, 504 U.S. 428 (1992).

82. See, e.g., Jeanne M. Kaiser, *Constitutional Law—First Amendment—No Constitutional Right to Vote for Donald Duck: The Supreme Court Upholds the Constitutionality of Write-in Voting Bans in Burdick v. Takushi*, 15 W. NEW ENG. L. REV. 129 (1993).

83. Berger, *supra* note 10, at 1395.

84. *Id.*; see *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

85. Berger, *supra* note 10, at 1397–98.

candidates and to strengthen themselves through cross-endorsement.<sup>86</sup> They further argued that anti-fusion laws violated the second right because their sole purpose was to drive third parties like the New Party out of the system, an assertion that none of their opponents contested.<sup>87</sup>

Prior to *Timmons v. Twin Cities Area New Party*,<sup>88</sup> the case in which the New Party's challenge reached the Supreme Court, the Court had struck down a number of state laws involving political parties' association rights. The Court had previously decided, for example, that states could not require political parties to accept delegates not selected pursuant to party rules and could not bar parties from endorsing candidates in primaries or require them to nominate candidates through the use of a closed primary.<sup>89</sup> And in a case involving a minor party, *Williams v. Rhodes*, the Supreme Court included language very supportive of the New Party's position.<sup>90</sup> The *Williams* Court held unconstitutional an Ohio statute requiring parties to obtain signatures of ten percent of the voters as a condition of being listed on the ballot and stated that "new 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>91</sup> And it went on to reject Ohio's defense of the law based on 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>92</sup>

Although *Williams* was a decision of the Warren Court, a Court more concerned about encouraging broad citizen participation in politics as well the problem of political monopolies than the Rehnquist Court which would decide *Timmons*, it gave the New Party organizers reason to be hopeful.<sup>93</sup>

Their first lawsuit, *Swamp v. Kennedy*, arose out of Wisconsin's refusal to permit the Labor-Farm Party to name Douglas LaFollette, who had already been named the Democratic candidate, as its candidate for Secretary of State even though LaFollette consented to the second nomination.<sup>94</sup> The suit failed, but three highly respected conservative judges, Judges Ripple, Posner, and Easterbrook, dissented from the Seventh Circuit's refusal to rehear the case en banc, writing that:

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86. Brief for the Respondent at 12, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (No. 96-1608).

87. *Id.* at 32.

88. 520 U.S. 351 (1997).

89. *Democratic Party of the U.S. v. Wis. ex rel. LaFollette*, 450 U.S. 107 (1981).

90. *Williams v. Rhodes*, 393 U.S. 23 (1968).

91. *Id.* at 32.

92. *Id.*

93. Berger, *supra* note 10, at 1397–98; see Rebecca E. Zeitlow, *The Judicial Restraint of the Warren Court (And Why it Matters)*, 69 OHIO ST. L.J. 255 (2008) (discussing the difference in approach between the Warren and Rehnquist courts on protecting the rights of belonging).

94. *Swamp v. Kennedy*, 950 F.2d 383, 384 (7th Cir. 1991).



The Supreme Court has recognized that the right of a party to nominate a candidate of its choice is a vital aspect of the party's role in our political structure. The ability to choose the same person as another party is an important aspect of that right. It allows a party to form significant political alliances. When a minor party nominates a candidate also nominated by a major party, it does not necessarily "leech onto" the larger party for support. Rather it may—and often does—offer the voters a very real and important choice and sends an important message to the candidate. If a person standing as the candidate of a major party prevails only because of the votes cast for him or her as the candidate of a minor party, an important message has been sent by the voters to both the candidate and to the major party.... A state's interest in political stability does not give it the right to frustrate freely made political alliances simply to protect artificially the political status quo.<sup>95</sup>

Subsequently, Rogers and his colleagues challenged Minnesota's anti-fusion law. A candidate for the legislature wanted to run with endorsements both from a major party, the Democratic-Farm-Labor Party, and the New Party.<sup>96</sup> Pursuant to its anti-fusion law, Minnesota denied the New Party's nomination petition and defended the law mainly on the ground that its interest in avoiding voter confusion outweighed the burden on the New Party's associational freedoms.<sup>97</sup> This justification, and others put forward by Minnesota, were extremely weak, and the Eighth Circuit had little difficulty in ruling in favor of the New Party.<sup>98</sup> Unfortunately, in a six to three decision, the Supreme Court reversed,<sup>99</sup> and did so on a ground that Minnesota had not even asserted, a ground that at oral argument Justice Scalia prompted Minnesota's counsel to rely on, namely, that states had a constitutional right to protect the major parties, the Republicans and Democrats, from competition.<sup>100</sup> The Rehnquist Court declared that the Republican-Democrat duopoly brought about stability, that the state had an interest in protecting stability, and that it could therefore enact laws protecting the two major parties.<sup>101</sup>

In a shallow and unsatisfying opinion, Chief Justice Rehnquist did not take the time to actually explain how the two-party system encouraged stability or how fusion threatened it.<sup>102</sup> Rather, he and his colleagues, including Justice Breyer, merely assumed that accommodating the interest of a minor party would threaten the system. As Professor Rick Hasen put it, the Court did not carefully examine the

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95. *Id.* at 388–89 (Ripple, J. dissenting) (citations omitted).

96. *Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 197 (8th Cir. 1996).

97. *Id.* at 199.

98. *Id.* at 200.

99. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 370 (1997).

100. *Id.* at 367. Transcript of Oral Argument at 25–26, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (No. 95-1608).

101. *Timmons*, 520 U.S. at 369–70.

102. *Id.* at 377–78 (Stevens, J., dissenting).

premise that the two-party duopoly was worthy of protection nor, even if it was, whether Supreme Court protection was necessary.<sup>103</sup> Without saying so, Rehnquist's opinion overruled Williams as well as another Supreme Court decision, *Anderson v. Celebrezze*,<sup>104</sup> that relied on Williams. In dissent, Justice Stevens, joined by Justice Ginsburg, persuasively argued that the stability rationale relied on by the majority was entirely speculative.<sup>105</sup> To the contrary, he explained that:

[T]he fusion candidacy is the best marriage of the virtues of the minor party challenge to entrenched viewpoints and the political stability that the two-party system provides. The fusion candidacy does not threaten to divide the legislature and create significant risks of factionalism, which is the principal risk proponents of the two-party system point to. But it does provide a means by which voters with viewpoints not adequately represented by the platforms of the two major parties can indicate to a particular candidate that—in addition to his support for the major party views—he should be responsive to the views of the minor party whose support for him was demonstrated where political parties demonstrate support—on the ballot.<sup>106</sup>

As Professor Terry Smith explains, *Timmons* reflected the Rehnquist Court's general antipathy to outsiders including minor political parties, and its inability to articulate intelligible standards for assessing infringements on parties' associational rights.<sup>107</sup> In this respect, as Smith points out, *Timmons* is also difficult to square with precedent, not only with *Williams* and *Celebrezze*, but also *Tashjian v. Republican Party of Connecticut*.<sup>108</sup> In *Tashjian*, the Court upheld the Connecticut Republican Party's attack on a closed-primary law which prohibited independent voters from participating in major party primaries.<sup>109</sup> The Court rejected Connecticut's assertion that its closed-primary law furthered its interest in fostering a strong two-party system, stating:

The [Republican] Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution. "And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational."<sup>110</sup>

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103. 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, 332 (1997).

104. *Anderson v. Celebrezze*, 460 U.S. 780, 787–806 (1983).

105. *Timmons*, 520 U.S. at 370–71 (Stevens, J., dissenting).

106. *Id.* at 380–81.

107. Terry Smith, *A Black Party? Timmons, Black Backlash and the Endangered Two-Party Paradigm*, 48 DUKE L.J. 1, 7–8 (1998).

108. *Id.* at 19.

109. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 210–11 (1986).

110. *Id.* at 224 (quoting *Democratic Party of U.S. v. Wis. ex rel. LaFollette*, 450 U.S. 107, 123–24 (1981)).

The Court's receptivity to the mantra of two-party stability seemed colored by the position of the party seeking to defeat the argument. In *Tashjian*, an entrenched elite interest, the Connecticut Republican Party, successfully sought to define its own associational rights.<sup>111</sup> In *Timmons*, the New Party, an outsider entity, sought to do the same,<sup>112</sup> but for reasons which are difficult to reconcile with *Tashjian*, its efforts were deemed politically destabilizing to Minnesota.

It is also valuable to compare *Timmons* to *Abrams v. Johnson*, a redistricting case decided at about the same time, in which the Court struck down a Georgia law creating two new majority-minority congressional districts on the ground that the redistricting process was impermissibly infected by race.<sup>113</sup> "[I]n both cases the Court denied a disfavored political minority . . . access to the two-party system on the erroneous assumption that [accommodating its] interests would harm the political process."<sup>114</sup> Further, the effect of both cases was not only to harm political minorities but also racial minorities.<sup>115</sup> Clearly uncomfortable with racial claims of insufficient access to the two-party system, the *Abrams* Court emphasized that redistricting should be colorblind.<sup>116</sup> And the *Timmons* Court did not give weight to the racial dimension of the New Party, the fact that African-Americans constituted 40% both of the Party's membership and its national executive committee.<sup>117</sup> The New Party had made a special effort to recruit African-Americans and to promote policies attractive to them.<sup>118</sup> *Abrams* limited direct black participation in the two party system, and *Timmons* limited black participation via the vehicle of a third party.

In sum, the Court's handling of anti-fusion laws is problematic. As Joel Rogers put it, if the Supreme Court perceives something as mild as fusion as a threat to our political system, sufficient to outweigh powerful First Amendment interests, we are in serious trouble.<sup>119</sup> Further, the likelihood that any governmental institution will look favorably on fusion anytime soon is slim. Legislatures are not likely to overcome their own partisan interests, and the Supreme Court is unlikely to modify the decision it made in *Timmons*. One commentator argues that state supreme courts could pick up the slack by taking a more favorable approach to fusion under state constitutions.<sup>120</sup> This could happen, but it is also unlikely. Nevertheless, nothing is forever and, in these dark times, it is essential to keep good ideas like fusion voting alive.

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111. *See id.* at 228–29.

112. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 353–55 (1997).

113. *Abrams v. Johnson*, 521 U.S. 74, 77–79 (1997).

114. Smith, *supra* note 107, at 5.

115. *Id.* at 6.

116. *Abrams*, 521 U.S. at 100.

117. Smith, *supra* note 107, at 21.

118. *Id.* at 21–22.

119. Rogers, *supra* note 5, at 755.

120. Berger, *supra* note 10, at 1404.