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# Cross-Endorsement by Political Parties: A “Very Pretty Jungle”?

Celia Curtis\*

Since its beginning, America’s political landscape has primarily been dominated by two parties.<sup>1</sup> The reasons for this are many and the phenomenon has been widely documented.<sup>2</sup> De-

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1. Two groups emerged from the reordering of government that followed the American Revolution: the Federalist Party, which won the first presidential election, and the Anti-Federalists. Dissatisfied with the direction in which the Federalists were heading, Thomas Jefferson organized the opposition into the Democratic-Republican party around 1792. The Democratic-Republicans remained dominant into the 1820s when the Federalist Party ceased to exist. Thereafter, two new parties emerged: Andrew Jackson’s followers formed the Democratic Party and Henry Clay’s followers adopted the name “Whigs” to indicate their disapproval of “King Andrew.” The Whigs were a force for six presidential election cycles (twice winning the Presidency), but were ultimately badly divided and by 1856, their followers had joined either the Democratic Party or the new Republican Party. WILLIAM B. HESSELTINE, *THIRD-PARTY MOVEMENTS IN THE UNITED STATES* 8-12 (1962). The Democrats and Republicans have endured as the two dominant parties. Of course, there have been many third parties in our history, among them the Equal Rights Party, the Loco-Foco Party, the Farmer-Labor Party, the Socialists, Women’s Righters, Greenbackers, Vegetarians, Free-Soilers, Populists, Communists, Anti-Masons, Prohibitionists, Workers, Constitutional Unionists, Antimonopolyites, Liberals, and Antirenters. *Id.* at 13. Added to this list are, among others, the more recent Independence, Conservative, Reform, Libertarian, Right to Life, Green, and Working Families Parties.

2. The most frequently cited reason for the two-party system is the “winner take all” nature of the American electoral system (as opposed to a representative system in which that percentage of voters who agreed with a certain party would translate into that percentage of representation by that party in government), which makes it especially difficult for a new, smaller party trying to build up support. *See id.* at 9. The tendency of two parties to emerge as dominant in a system that elects presidents and governors by a statewide plurality method, and which elects national and state legislators by a single member district plurality method, is referred to as “Duverger’s Law.” Howard A. Scarrow, *Duverger’s Law, Fusion, and the Decline of American “Third” Parties*, 39 W. POL. Q. 634, 634 (1986). Other reasons include the fact that the major parties represent a wide variety of voters from all economic and political spectrums who are held together by their willingness to compromise on issues, and the fact that even if elected, it is difficult for a third party to gain a foothold since power in Congress and the state legislatures is divided up by party membership totals.

spite this two-party system, third parties have influenced the dialogue of the two major parties significantly.<sup>3</sup> In rare cases, they have even successfully displaced a major party.<sup>4</sup> Eventually, however, and with few exceptions, third parties in America have come and gone; the state of equilibrium has consistently been that of two parties, which ultimately become more dominant by picking up the support of the various and fledgling third parties after or before their demise.<sup>5</sup>

One way in which third parties have maintained their vitality throughout history is through cross-endorsement, also known as fusion. Cross-endorsement is the process by which one political party endorses another party's candidate for the same office in the same election.<sup>6</sup> Votes on both (or in some cases three or four) lines are added together to get the total votes cast for that particular candidate.<sup>7</sup> Examples abound in which the addition of the minor party line has seemingly meant the difference between victory and defeat for the candidate. In the 1980 presidential election, the Conservative Party line provided the deciding votes for Ronald Reagan in New York;<sup>8</sup> the Liberal Party did the same for John Kennedy, enabling him to

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3. See *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979) (noting the "significant role that third parties have played in the political development of the Nation"); *Sweezy v. New Hampshire*, 354 U.S. 234, 251 (1957) ("History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted.").

4. This was much more a possibility in the nineteenth century, when the country was still feeling its way in terms of political parties. A third party simply became the new "major" party, as when the Republican Party replaced the Whigs. See HESSELTINE, *supra* note 1, at 11-12; JAMES L. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES* 92 (rev. ed. 1983).

5. For example, the Populist Party, which was formed in the late nineteenth century, impacted policy greatly, but was ultimately absorbed by the Democratic Party, which by then, was firmly entrenched as one of the two major parties. See SUNDQUIST, *supra* note 4, at 152-54.

6. See, e.g., William R. Kirschner, Note, *Fusion and the Associational Rights of Minor Political Parties*, 95 COLUM. L. REV. 683, 683 (1995).

7. Generally, the candidate's name appears separately on the different lines. This is called "disaggregation." See Note, *Fusion Candidacies, Disaggregation, and Freedom of Association*, 109 HARV. L. REV. 1302, 1309 (1996).

8. See, e.g., Marc Humbert, *Bush May Not Get Conservative Line*, ALBANY TIMES UNION, June 5, 1992, at A7 (noting that "the Reagan-Bush ticket collected more than 256,000 New York votes on the Conservative line, enough to hand them the state" in the 1980 Presidential election).

defeat Richard Nixon in the 1960 election.<sup>9</sup> Rudy Giuliani may not have prevailed over David Dinkins in the 1992 New York City mayoral race without the support of the Liberal Party.<sup>10</sup> Similarly, without the 328,605 votes received from the Conservative Party line, George Pataki may not have been victorious over Mario Cuomo in the 1994 New York State gubernatorial race.<sup>11</sup> Notably, the above examples all involve New York, which is often hailed as the epitome of a state that has healthy and competitive third parties. The reasons for this are twofold: first, New York is one of only seven states which currently allow cross-endorsement;<sup>12</sup> second, among the seven, cross-endorsement is utilized most frequently in New York because of the large number of voters who are unaffiliated with any party<sup>13</sup> and thus, more likely to vote on a minor party line. Does this ability to cross-endorse candidates really create a meaningful system of third parties? More specifically, does New York really have strong third parties?

This Note contends that cross-endorsement does not lead to strong third parties and that in New York's case, the tendency of third parties to use cross-endorsement almost exclusively (as opposed to choosing their own candidates) is inimical to their

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9. See, e.g., Warren Weaver, Jr., *Liberal Aid Here Won for Kennedy*, N.Y. TIMES, Dec. 13, 1960, at 22 (noting that without the Liberal Party's 406,167 votes for Kennedy, he may not have won New York State).

10. See Kirschner, *supra* note 6, at 683 (citing BD. OF ELECTIONS IN THE CITY OF N.Y., STATEMENT AND RETURN OF THE VOTES FOR THE OFFICE OF MAYOR OF THE CITY OF N.Y. 1 (1993)).

11. N.Y. STATE BD. OF ELECTIONS, VOTE CAST FOR GOVERNOR AND LIEUTENANT GOVERNOR BY PARTY OF CANDIDATES, NEW YORK STATE BY COUNTY – NOVEMBER 8, 1994, at 1 (1994), available at <http://www.elections.state.ny.us/NYSBOE/elections/1994/gov94.pdf>.

12. New York allows cross-endorsement pursuant to N.Y. ELEC. LAW §§ 6-120, 6-146 (McKinney 2007). The other states which allow cross-endorsement are Connecticut, Delaware, Mississippi, Idaho, South Carolina, and Vermont. See ADAM MORSE & J.J. GASS, BRENNAN CTR. FOR JUSTICE, MORE CHOICES, MORE VOICES: A PRIMER ON FUSION 1 (2006), available at [http://www.brennancenter.org/page/-/download\\_file\\_39345.pdf](http://www.brennancenter.org/page/-/download_file_39345.pdf).

13. The number of unaffiliated voters in New York is 20% of the total number of voters (compared to 49% and 25% for Democratic and Republican enrollment, respectively). See N.Y. STATE BD. OF ELECTIONS, NYS VOTER ENROLLMENT BY COUNTY, PARTY AFFILIATION AND STATUS, at 8 (2009), available at [http://www.elections.state.ny.us/NYSBOE/enrollment/county/county\\_apr09.pdf](http://www.elections.state.ny.us/NYSBOE/enrollment/county/county_apr09.pdf). The choices the unaffiliated voters make can determine the outcome in many areas of the state and in the state as a whole.

often stated goals of advancing diverse beliefs and offering distinct programmatic agendas and significant electoral competition.

Part I identifies what advocates of cross-endorsement see as its benefits. Part II tracks the historical background of cross-endorsement and the factors that led most states to ban the practice. Part III briefly examines the judicial evolution of the rights of minor third parties. This section will also discuss the Supreme Court's ruling on the constitutionality of cross-endorsement bans in *Timmons v. Twin Cities Area New Party*.<sup>14</sup> Finally, Part IV will assess the effect that cross-endorsement has had on politics in New York and will seek to show that third parties in the State, because of their dependence on cross-endorsement, function more as addenda to the major parties than as independent alternatives. The Note concludes by suggesting that if the New York Legislature were to join the majority of other states in the nation and enact a fusion ban, it would be harsh medicine initially, but would ultimately encourage the major parties to focus on their core ideals and would encourage third parties to act as true vehicles of choice by cultivating their own candidates and offering voters genuine alternatives.

### I. Benefits of Fusion for Major and Minor Parties

For a major party facing strong opposition, fusing with a minor party candidate offers an increased chance of winning elections through the addition of votes accumulated under a different banner. For the minor party, the ability to cross-endorse a major party candidate allows it not only to be involved in the election, but to play a significant role. Cross-endorsement enables minor party voters to vote for a winner on the line that best represents their own views, as opposed to throwing their votes away on their own separate candidate with no realistic hope of winning. The goal is that the fusion candidate, once elected, and other elected officials, will recognize that a portion of the candidate's votes came from the minor party group and will respond to its issues accordingly.<sup>15</sup> Cross-endorsement also

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14. 520 U.S. 351 (1997).

15. For example, in 2001, Bill Lindsay, a Democratic candidate for County Legislature in Suffolk County, New York, was endorsed by the Working Families Party ("WFP"). Working Families Party, How Fusion Build [sic] Progressive

overcomes the problem of “spoiling” the election, which can occur when voters split their votes between two similar candidates, ultimately helping to elect their third, least favorite candidate. Cross-endorsing candidates is beneficial for policy reasons as well, proponents say, since putting viable candidates on different lines increases public participation in the voting process.<sup>16</sup> Most important perhaps, advocates of cross-endorsement point out that a political party has a guarantee of the freedom of association under the First Amendment to identify those people who constitute the association and to select the standard bearer who best represents that party’s ideologies and preferences.<sup>17</sup>

## II. Historical Background of Cross-Endorsement

In the nineteenth century, cross-endorsement was widely practiced in the United States.<sup>18</sup> This is not necessarily because the electorate made a conscious decision that it was proper and good; it was because the process by which votes were cast in elections had encouraged it. Until the Australian, or secret-ballot system, was introduced at the turn of the century, election ballots were controlled by the parties themselves, without oversight by election officials or even the candidates.<sup>19</sup> Each party printed and distributed its own ballot or ballots and voters

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Power for Working People, <http://www.workingfamiliesparty.org/2008/09/how-fusion-build-progressive-power-for-working-people/> (Sept. 27, 2008). His margin of victory was slim, but it coincided with the number of votes recorded on the Working Families line. *Id.* Subsequently, a WFP bill supporting the “living wage” passed in the Republican-controlled County Legislature in Suffolk County, a first in the country. *Id.* See SUFFOLK COUNTY, N.Y., Local Law No. 12-2001 (codified as amended at ch. 234, art. I, § 234-7 (2009)). The feeling was that the Republicans who had been blocking the living wage bill had noticed the WFP’s role in the Lindsay victory and had changed course. See Working Families Party, *supra*.

16. It can be argued that those people who vote on the minor party line may have voted anyway. At any rate, this is an extremely difficult matter to prove because of the many variables that contribute to voter turnout or lack thereof. See Brief for Twelve University Professors and Center of a New Democracy as Amici Curiae Supporting Respondent at 12 n.1, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (No. 95-1608), 1996 WL 496827, at \*12 n.1 (acknowledging that New York’s electoral turnout had “slipped to echo the national average” despite the fact that fusion candidacies are permitted).

17. See *Timmons*, 520 U.S. at 374-77 (Stevens, J., dissenting).

18. Peter H. Argersinger, “A Place on the Ballot”: *Fusion Politics and Antifusion Laws*, 85 AM. HIST. REV. 287, 288 (1980).

19. *Id.* at 290.

would have no idea if they were voting for a candidate who also appeared as another party's choice, since they were only looking at their own "ballot strip."<sup>20</sup> Indeed, even a candidate who was unwilling to fuse with another party could find himself on that party's ballot.<sup>21</sup> The system was neither efficient nor private. Newspapers routinely included warnings in the days prior to the elections about "bogus" ballots—ballots that looked like the "party" ballot, but which had the names of candidates from a different party—being given to unsuspecting and inattentive voters.<sup>22</sup> Moreover, since different parties' ballots had unique colors and sizes and there was no booth for privacy, others could tell right away which party a voter was voting for simply by looking at the ballot in his hand.<sup>23</sup> Party members standing near polling places, peddling their candidates and pressuring voters, contributed to a system of party control of election ballots, which led to intimidation, bribery and ballot stuffing.<sup>24</sup>

The introduction of the Australian ballot was a reform-minded change, but it hurt third-party proliferation in a number of ways.<sup>25</sup> First, along with the Australian ballot came the first ballot-access laws, which required minor parties to submit nominating petitions signed by a certain percentage of the electorate.<sup>26</sup> These laws were supposedly passed to keep the ballots shorter<sup>27</sup> and were legitimized by the common belief in the Founding Father's caution about the dangers of factional-

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20. *Id.* The ballots were strips of paper that contained only the names of the candidates of that party. *Id.* The voter placed his ballot in the ballot box in some cases, without even marking it. *Id.*

21. *Id.*

22. John F. Reynolds & Richard L. McCormick, *Outlawing "Treachery": Split Tickets and Ballot Laws in New York and New Jersey, 1880-1910*, 72 J. AM. HIST. 835, 846 (1986).

23. Elissa Berger, Note, *A Party That Won't Spoil: Minor Parties, State Constitutions and Fusion Voting*, 70 BROOK. L. REV. 1381, 1387-88 (2005).

24. ELDON COBB EVANS, *A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES* 10-14 (1969).

25. Scarrow, *supra* note 2, at 637-38.

26. *Id.* The major parties did not have to overcome this obstacle since they would attain automatic ballot access due to the large number of votes received on their line in the previous election. *Id.* at 638.

27. STEVEN J. ROSENSTONE, ROY L. BEHR & EDWARD H. LAZARUS, *THIRD PARTIES IN AMERICA* 20 (2d ed. 1996); James Gray Pope, *Fusion, Timmons v. Twin Cities Area New Party, and the Future of Third Parties in the United States*, 50 RUTGERS L. REV. 473, 484 (1998).

ism.<sup>28</sup> The Australian ballot also exposed the plethora of cross-endorsements between parties because all candidates were now on one “blanket” ballot, generally listed separately under each party whose endorsement they had received.<sup>29</sup> In present times, this is seen as an advantage because it allows a voter to pick her candidate on the party line she prefers. However, at the turn of the century, when such a ballot was new in the states, the legislatures, mostly dominated by Republicans, passed laws prohibiting a candidate’s name from being listed more than once, again purportedly to keep the ballots shorter and more decipherable.<sup>30</sup> Depending on the type of ballot which was being used, these restrictions became a de facto ban on cross-endorsement between parties.<sup>31</sup> The rationale that allowing a candidate to list his name only once would lead to equitable elections and a more efficient ballot<sup>32</sup> was seen as “eminently fair”<sup>33</sup> in states which used the “Massachusetts ballot”<sup>34</sup>—one in which a candidate’s name was placed under a column heading for the office sought, followed by whichever party endorsements he had received.<sup>35</sup> However, in states which had the “party column” form of ballot—where the names of all the candidates of each party were grouped vertically under the party name, not the office sought—this necessarily prevented fusion.<sup>36</sup> The confusion that ensued at the time led one Republican editor to declare the situation to be a “very pretty jungle.”<sup>37</sup>

Whatever the reason, the requirement that a candidate’s name appear only once on the ballot either forced the parties that were planning to fuse to nominate separate candidates, thereby accumulating fewer votes each, or it forced the two par-

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28. See *Storer v. Brown*, 415 U.S. 724, 736 (1974); THE FEDERALIST No. 10 (James Madison).

29. Argersinger, *supra* note 18, at 291.

30. See Arthur C. Ludington, *American Ballot Law, 1888-1910*, EDUC. DEP’T BULL., Feb. 1, 1911, at 12-83 for a detailed account of the anti-fusion laws enacted by Republican legislatures in the 1890s.

31. Arthur Ludington, *Present Status of Ballot Laws in the United States*, 3 AM. POL. SCI. REV. 252, 258-59 (1909).

32. Argersinger, *supra* note 18, at 292.

33. Ludington, *supra* note 31, at 258.

34. *Id.*

35. *Id.*

36. *Id.* at 258-59.

37. Argersinger, *supra* note 18, at 293 (quoting PORTLAND MORNING OREGONIAN, Oct. 27, 28, & 30, 1892).



ties to battle it out as to which line would have the name of the candidate.<sup>38</sup> This kept certain voters from voting for the fusion candidate due to partisan feelings (i.e., if two parties nominated a candidate and his name only appeared under one party's name, the other party's voters would sometimes withhold their votes).<sup>39</sup> Finally, the lines could be combined (i.e., the candidate could run on, for instance, the Democratic-Populist ticket), but this too could engender partisan feelings and would not yield the same number of votes as if the candidate's name appeared on separate lines.<sup>40</sup>

An example from the 1892 election illustrates the political advantage that was taken away from fusion candidacies in states which banned fusion. In that election, the Democrats were seeking the Populist vote in order to increase the electoral votes for their candidate, Grover Cleveland.<sup>41</sup> Democratic Party leaders in Oregon thus withdrew one of their four nominees for the Electoral College and replaced him with a Populist candidate, Nathan Pierce, who became a fusion candidate and who would presumably receive the votes of both Populists and Democrats.<sup>42</sup> In the meantime, however, the Oregon legislature, controlled by the Republicans, had passed an anti-fusion law, prohibiting the name of any candidate from appearing more than once on a ballot.<sup>43</sup> This meant that Pierce's name had to be listed as either a Populist or at best a Populist-Democrat, something the Republicans knew would be distasteful to both straight Populists and those with Populist-Republican leanings. The conflict arose so late in the campaign that, in the end, Democratic county clerks printed the ballot one way, with Pierce's

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38. *Id.* at 291-92.

39. *Id.*

40. *Id.* at 293. In Ohio's 1877 gubernatorial election, the idea of a combined Greenbacker-Democratic ticket was anathema to most Greenbackers, leading one to state that "men would as soon cut off their right hands almost as vote a Democratic ticket." R.C. McGrane, *Ohio and the Greenback Movement*, 11 *MISS. VALLEY HIST. REV.* 526, 535 (1925) (quoting *CINCINNATI ENQUIRER*, Aug. 22, 1877). In the 1879 election, the possibility of fusing with the Democrats again led to great disension within the party, with banners displayed at their convention declaring, "Traitors and office seekers favor coalition," "Honest men are true to their principles," and "Coalition means disorganization." *Id.* at 540.

41. Argersinger, *supra* note 18, at 292.

42. *Id.* at 293.

43. *Id.* at 297 n.25 (noting that the Oregon law was passed without apparent recognition of its significance).

name appearing separately under both the Populist and Democratic groupings and Republican county clerks printed it another, with Pierce's name appearing once, with the Populist nominees (although giving him both party designations).<sup>44</sup> In those counties in which Pierce's name was listed separately under Democratic and Populist groupings, virtually 100% of Populists voted for him and 92% of Democrats did the same. In those counties in which Pierce's name was listed only under the Populist banner, but with a Democratic designation as well, he received 91% of the Populist vote and 81% of the Democratic votes.<sup>45</sup> Without their own line, it seems, certain party loyalists were unwilling to vote for a candidate, even if their party had endorsed that candidate. This example allows for a rare calculation of the value of separate cross-endorsement listings, in terms of the number of votes it adds: with separate listings, the candidate received 9% more of the Populist vote and 11% more of the Democratic vote.

Notwithstanding possible political motives on the part of the Republicans, by the early 1900s, at least twenty-five state legislatures banned fusion.<sup>46</sup> In addition to straight bans, some states, notably Wyoming, added amendments requiring that the names of political parties not exceed one word, thereby preventing new fusion parties with double names.<sup>47</sup> In North Dakota, instead of adding such an amendment, the Republican Secretary of State declared that candidates of the new Independent-Democratic Party could not appear on the ballot in 1897 because the party had not received the necessary amount of votes—five percent—in the last election, even though they had not existed in the last election and therefore could not have possibly received any votes.<sup>48</sup> Subsequently, he did not allow the candidates to appear on either the Independent or the Democratic lines.<sup>49</sup> He ruled that when they had formed the new Independent-Democratic party, their individual parties had

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44. *Id.* at 293-94.

45. *Id.* at 294.

46. Scarrow, *supra* note 2, at 639.

47. Argersinger, *supra* note 18, at 304 n.50.

48. *Id.*

49. *Id.*

ceased to exist and they could not therefore regain a spot on the ballot.<sup>50</sup>

A. *Early Challenges to Anti-Fusion Laws in State Courts*

State courts, in deflecting some of the early challenges to the anti-fusion laws, utilized some of the same legal reasoning that was to come later on the Supreme Court level, such as the idea that anti-fusion laws do not hinder the “exercise of the right of suffrage”<sup>51</sup> since “when the voter goes to the quietude of his booth to vote, he has the absolute and unqualified right to vote for whom he pleases.”<sup>52</sup> In *State ex rel. Runge v. Anderson, City Clerk*, a Wisconsin candidate who had received two endorsements was able only to appear on one line because of the state’s anti-fusion statute.<sup>53</sup> The court responded negatively to his challenge to the law, saying, “We are unable to see anything in the present ballot law which passes beyond the bounds of reasonable regulation in view of the end sought - the right of all to vote in secrecy and upon the basis of political equality and purity.”<sup>54</sup> The court pointed out that a system with no barrier to securing representation on the ballot would result in a ballot of limitless size, complication and confusion, creating in some circumstances a right to vote that was so burdensome that “many would not feel able to bear it, and others would not care to do so.”<sup>55</sup> Moreover, while agreeing that the right of the individual to vote for his candidate *on a particular party line* was impacted negatively by the law, the court stated that the individual could still vote for his candidate and it is that right, after all, which is protected. “Mere party fealty and party sentiment, which influences men to desire to be known as members of a particular organization, are not the subjects of constitutional care,” the court asserted.<sup>56</sup> Finally, candidates should stand for the principles of the party that is nominating them, the court said.<sup>57</sup> When more than one party nominates a candidate, it

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50. *Id.*

51. *State ex rel. Dunn v. Coburn*, 168 S.W. 956, 959 (Mo. 1914).

52. *Id.*

53. 76 N.W. 482, 483 (Wis. 1898).

54. *Id.* at 486.

55. *Id.*

56. *Id.*

57. *Id.* at 487.

must be that at that time, the parties stand for the same platform of ideas. It should not be an issue, therefore, to have only one designation on the ballot.<sup>58</sup> The court concluded that “[t]he confusion and uncertainty that would arise . . . from the double printing of names, furnishes a strong reason for prohibiting it.”<sup>59</sup> Other early courts took a different tact, expressing moral outrage at the underlying motives of fusion candidacies:

To my mind there is no scheme so fraught with danger of fraud, deceit, dishonesty, corruption, and all similar attendant ills than what is known as the political fusion. It is fraudulent, because fraud is practiced upon the unsuspecting voter by a few political leaders. It is deceitful, because when a candidate of one political faith permits his name to be placed on a ticket under a caption indicating a different political faith, deceit is tolerated and practiced. True it is that the leaders in politics may know that he is not of the political faith indicated by the ticket upon which he permits his name to go, yet the unsuspecting masses are deceived. This is common knowledge.<sup>60</sup>

In pointing out that the anti-fusion law in question was passed to maintain the purity of elections, another court stated:

Certain evil practices had grown up by reason of placing the name of a candidate upon the same ballot more than once, and the general assembly attempted to prevent such practice by providing that the name of each candidate should appear on the ballot but once. . . . The subject is clearly within legislative discretion, and that body has the power to provide that the name of each candidate shall appear but once upon the official ballot, or it may permit the name to appear more than once.<sup>61</sup>

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58. *Id.*

59. *Id.*

60. *State ex rel. Dunn v. Coburn*, 168 S.W. 956, 957-58 (Mo. 1914).

61. *State ex rel. Bateman v. Bode*, 45 N.E. 195, 196-97 (Ohio 1896).

### III. Modern Jurisprudence Regarding Rights of Minor Political Parties

#### A. *Evolution of the Rights of Minor Political Parties*

The Elections Clause of the United States Constitution grants to the state legislatures the power to regulate the time, place and manner of elections.<sup>62</sup> The state legislatures exercise this power, in part, by restricting the candidates who may appear on their ballots. Generally, for a new party to gain access to the ballot, it must submit nominating petitions.<sup>63</sup> This is unlike the major or established third parties, which are automatically entitled to a line on the ballot if they poll the requisite number of votes on their line in the previous election.<sup>64</sup> The states regulate the petition process by delineating how many signatures are required, who can sign, who can circulate the petitions and when they can circulate.<sup>65</sup>

In the seminal case of *Williams v. Rhodes*,<sup>66</sup> the Court struck down a group of laws which, among many other hurdles,<sup>67</sup> required that political parties, in order to gain a place on the Ohio general election ballot, obtain fifteen percent of qualified voters' signatures and file by an excessively early deadline.<sup>68</sup> In contrast, those parties that already had a place on the ballot had a lesser burden, since to stay on the ballot, they were required only to receive ten percent of the vote in the previous gubernatorial election and were not required to obtain any signatures.<sup>69</sup> The Court assessed the totality of the restrictive Ohio election laws and concluded that:

Competition in ideas and governmental policies is at the core of our electoral process and of the First

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62. U.S. CONST. art. I, § 4, cl. 1.

63. Amber J. Juffer, Note, *Living in a Party World: Respecting the Role of Third Party and Independent Candidates in the Equal Protection Analysis of Ballot Access Cases*, 56 DRAKE L. REV. 217, 220-21 (2007).

64. *Id.*

65. *Id.* at 221.

66. 393 U.S. 23 (1968).

67. *See id.* at 36-37.

68. Specifically, the law required the party to obtain fifteen percent of the number of ballots cast in the last gubernatorial election. *Id.* at 24-25. At the time, forty-two states required third parties to obtain signatures of only one percent or less of the electorate in order to gain a place on the ballot. *Id.* at 33 n.9.

69. *Id.* at 25-26.

Amendment freedoms. 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>70</sup>

The Ohio laws made it “virtually impossible” for other parties, new or old, to achieve a position on the ballot.<sup>71</sup> Basing its decision on the Equal Protection Clause, the Court declared that the burden on voting and associational rights constituted “invidious discrimination.”<sup>72</sup> The Court employed a strict scrutiny analysis in their strongly worded decision, but it is important to note that the ballot-access laws at issue were quite extreme. The freedom of association protected by the First and Fourteenth Amendments does include partisan political organizations,<sup>73</sup> but certain state-imposed restrictions or requirements are perfectly acceptable to the Court when they are reasonable, nondiscriminatory, and when there are valid governmental interests to be protected.<sup>74</sup> If the courts do not deem the offending laws as “operat[ing] to freeze the political status quo,”<sup>75</sup> their scrutiny will be less stringent than if it is clear that the objective of the laws is to “suffocate the right of association, the promotion of political ideas and programs of political action.”<sup>76</sup>

### B. *The Constitutionality of Fusion Bans*

Unlike overly burdensome signature requirements or excessively early deadlines for submission of petitions, when a fu-

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70. *Id.* at 32.

71. *Id.* at 24.

72. *Id.* at 34.

73. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986).

74. *See, e.g., Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (where state law required nominating petition with signatures of five percent of the electorate, “[t]here is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization’s candidate on the ballot – the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election”).

75. *Id.* at 438.

76. *Williams v. Rhodes*, 393 U.S. 23, 39 (1968).

sion candidacy is denied<sup>77</sup> due to a fusion ban, the candidate is not denied access to the ballot. The candidate, however, is denied more than one line on the ballot. It was the denial of this second line that caused the New Party of Minnesota to challenge the constitutionality of Minnesota's fusion ban in 1994. The effort culminated in *Timmons v. Twin Cities Area New Party*.<sup>78</sup> The Court found that the burdens imposed by Minnesota's anti-fusion laws on a party's associational rights were justified by the state interests of ballot integrity and political stability.<sup>79</sup> In addition, the Court stated that the minor party's right to associate still exists under the anti-fusion law because members may still vote for the candidate of their choice.<sup>80</sup> An analysis of the facts and procedural history of the case delineates the arguments on both sides of the fusion debate as it played out in the 1990s.

Minnesota State Representative Andy Dawkins was running unopposed in the Minnesota Democratic-Farmer-Labor ("DFL") Party's<sup>81</sup> primary in April 1994. During the same month, the New Party endorsed Dawkins as their candidate for the same office in the general election to be held in November. As expected, election officials in Minnesota refused to accept the New Party's nominating petition because fusion candidacies were prohibited in Minnesota.<sup>82</sup> The New Party filed suit in district court, asserting that the Minnesota law violated the party's associational rights under the First and Fourteenth Amendments.<sup>83</sup> The district court granted summary judgment

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77. I.e., when election officials decline to accept nominating petitions for the candidate's placement on a second ballot line.

78. 520 U.S. 351 (1997).

79. *Id.* at 369-70.

80. *Id.* at 369.

81. The DFL party started out as the Farmer-Labor party. See *Timmons*, 520 U.S. at 361 n.9. It elected many of its own candidates without fusing with a major party. *Id.* It ultimately declined in importance and merged with a major party—the Democratic Party—a common path for even the most successful third parties. *Id.*

82. Minnesota's law reads: "No individual who seeks nomination for any partisan or nonpartisan office at a primary shall be nominated for the same office by nominating petition." MINN. STAT. § 204B.04 (2008). The New Party used the Dawkins nomination as a test case in order to have fusion bans ruled unconstitutional, once and for all. See Pope, *supra* note 27, at 474-75.

83. *Twin Cities Area New Party v. McKenna*, 863 F. Supp. 988 (D. Minn. 1994).

for the election-official defendants, stating that it did not see the case as one denying the New Party access to the ballot, which would have called for strict scrutiny review of the challenged law.<sup>84</sup> Rather, it saw the case as one in which the New Party was not willing to find a candidate who had not already been nominated by another party.<sup>85</sup> Furthermore, the court stated that issues such as choosing candidates are largely “matters of policy best left to the deliberative bodies themselves.”<sup>86</sup>

The Court of Appeals for the Eighth Circuit reversed the lower court, causing a circuit split.<sup>87</sup> The court stated that the ban burdened the New Party’s right to select a standard bearer and its right to broaden the base of participation in its activities because it forced its members to “either cast their votes for candidates with no realistic chance of winning, defect from their party and vote for a major party candidate who does, or decline to vote at all.”<sup>88</sup> The court also found that the ban was broader than necessary for the state’s goals of maintaining party harmony (simple ballot instructions could cure major party splintering, the court said), voter clarity, and a stable political system.<sup>89</sup>

The Supreme Court reversed the Court of Appeals, holding that fusion bans do not violate the First or Fourteenth Amendments.<sup>90</sup> The Court weighed the burden of the law on those it affects against the interests the state has to justify the burden.<sup>91</sup> While the New Party was entitled to select its own candidate, the Court stated that just because “a particular individual may not appear on the ballot as a particular party’s candidate does not severely burden that party’s associational rights.”<sup>92</sup> The ban did not stop the New Party from endorsing the candi-

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84. *Id.* at 994. The court stated that even if the statute was reviewed under stricter scrutiny, it would still “pass muster.” *Id.*

85. *Id.*

86. *Id.*

87. *Twin Cities Area New Party v. McKenna*, 73 F.3d 196 (8th Cir. 1996). *See also* *Swamp v. Kennedy*, 950 F.2d 383 (7th Cir. 1991) (anti-fusion law did not burden associational rights of third party and even if it did, the state’s interests justified the burden).

88. *Twin Cities*, 73 F.3d at 199.

89. *Id.*

90. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 370-71 (1997).

91. *Id.*

92. *Id.* at 359.



date, even though he could not appear on the ballot under its name.<sup>93</sup> The party was therefore able to associate freely for the advancement of its shared goals, and its members were also free to vote for whomever they wished, including Dawkins.<sup>94</sup> The Court, noting the New Party's argument that without fusion, third parties cannot thrive, stated that just because fusion may be beneficial does not mean that Minnesota must permit it.<sup>95</sup> Notable is the difference between the attitude of the Court, which specifically declined to judge the policy behind the fusion ban, and that of the court in *Anderson*, which seemed to indicate its approval of the ban.

The New Party also argued that the Minnesota ban shut off the possibility of sending a message to a candidate "because, with fusion, a candidate who wins an election on the basis of two parties' votes will likely know more—if the parties' votes are counted separately—about the particular wishes and ideals of his constituency."<sup>96</sup> The Court responded that the party has no *right* to use the ballot in this way and that "[b]allots serve primarily to elect candidates, not as forums for political expression."<sup>97</sup> In fact, using the ballot as a forum for political expression, the Court noted, was a way of exploiting fusion:

[M]embers of a major party could decide that a powerful way of "sending a message" via the ballot would be for various factions of that party to nominate the major party's candidate as the candidate for the newly-formed "No New Taxes," "Conserve Our Environment," and "Stop Crime Now" parties. In response, an opposing major party would likely instruct its factions to nominate that party's candidate as the "Fiscal Responsibility," "Healthy Planet," and "Safe Streets" parties' candidate.<sup>98</sup>

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93. *Id.* at 360.

94. *See id.* at 361 ("The New Party remains free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen.").

95. *Id.* at 362.

96. *Id.*

97. *Id.* at 363. *See also* *Burdick v. Takushi*, 504 U.S. 428, 439 (1992) ("[T]he State is within its rights to reserve [t]he general election ballot . . . for major struggles . . . [and] not a forum for continuing intraparty feuds." (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974))).

98. *Timmons*, 520 U.S. at 365.

Such political manipulation undermines the ballot by “transforming it from a means of choosing candidates to a billboard for political advertising.”<sup>99</sup>

The Court disagreed with the Court of Appeals’s conclusion that a ban on cross-endorsements needed to be narrowly tailored to serve compelling state interests.<sup>100</sup> The burden the ban imposed was not trivial, the Court said, but it was not severe enough to warrant such strict scrutiny.<sup>101</sup> The state interests of avoiding voter confusion and overcrowded ballots justified the ban.<sup>102</sup> Ultimately, the Court stated that it was not expressing any policy-based views regarding fusion in general; it was merely stating that the Constitution does not *require* any state to permit it.<sup>103</sup>

### C. *Fusion: Savior or Destroyer of Third Parties?*

Perhaps because cross-endorsement is now permitted in so few states, the harsh language employed by the early courts regarding the ills of having a candidate’s name on two party lines has virtually disappeared. Instead, many present-day commentators assign responsibility for the “decline” of third parties to the fusion bans throughout the country.<sup>104</sup> However, the burden of petition requirements and other ballot-access laws which impose, for example, unrealistic filing deadlines and fees for minor third parties overshadows any inability to appear more than once on a ballot.<sup>105</sup> Third-party candidates must use a much higher proportion of their resources to obtain ballot access than major party candidates and when they do “manage to cir-

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99. *Id.*

100. *Id.*

101. *Id.* at 363-64.

102. *Id.* at 369-70.

103. *Id.* at 370.

104. *E.g.*, Argersinger, *supra* note 18; Scarrow, *supra* note 2; Berger, *supra* note 23.

105. *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780 (1983) (Ohio statute requiring Independent candidate for President to file statement of candidacy and nominating petition in March in order to appear on general election ballot in November placed unconstitutional burden on voting and associational rights of supporters); Bullock v. Carter, 405 U.S. 134 (1972) (Texas primary election filing fee system, under which payment of filing fee was absolute prerequisite to the candidate’s participation in the primary election, and which did not provide for write-in or other alternative means of obtaining a position on primary ballots, violated equal protection).

culate a petition and receive the required number of signatures, those signatures can be challenged and the candidate will then have to go through a court battle, which can be very costly, regardless of the outcome.”<sup>106</sup> It is no wonder that the most successful third-party candidates are ones with the most private wealth.<sup>107</sup>

Furthermore, referring to the “decline” of third parties presupposes a strength that is less true in reality than in theory. Even before fusion bans were imposed at the end of the nineteenth century, the motives behind those flourishing fusion candidacies were not always pure and the results were not always positive for the third parties.

Fusion plans were generally undertaken . . . to promote the needs of the major party and were generally initiated or avoided according to the calculations of its politicians rather than those of the leaders of the evanescent third parties. Thus, the Republicans sometimes arranged fusions in the South but retreated whenever their participation in such a campaign might work against the Democratic divisiveness they sought to exploit.<sup>108</sup>

Fusion candidacies generally involved passing alliances and were only undertaken when party leaders saw a genuine strategic advantage.<sup>109</sup> The system led to strange coalitions, with for example, the Greenback Party, in 1884, choosing to fuse in each state with whichever party was in the minority.<sup>110</sup> Fusion did bring about “quick results,” but it also “weakened attachment of voters to a new political group that lacked tradition, organization, experience, newspapers, patronage, and financial support.”<sup>111</sup> This demonstration of political malleability in the form of fusion ultimately led to the Greenback Party’s demise.

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106. Juffer, *supra* note 63, at 246.

107. For example, Ross Perot, who ran for President in 1996, spent \$12 million to just get on the ballot in every state. *Id.*

108. Argersinger, *supra* note 18, at 288.

109. *Id.*

110. *Id.* See also SUNDQUIST, *supra* note 4, at 114-115.

111. SUNDQUIST, *supra* note 4, at 114.

## IV. Cross-Endorsement in New York

A. *Early Efforts to Ban Cross-Endorsement*

Fusion has always had a place in New York,<sup>112</sup> despite a few early efforts to ban it. The first law banning cross-endorsement passed in 1896<sup>113</sup> but was overturned in *In re Callahan*<sup>114</sup> as an unconstitutional and arbitrary exclusion from candidacy for office.<sup>115</sup> In 1908, another anti-fusion law, which passed in both houses, was vetoed by Governor Hughes.<sup>116</sup> “[A]s long as we retain the present form of ballot with its party columns, it would be a grave injustice to prohibit a candidate’s name from appearing in more than one column,” he said, adding that the state should “abolish the party column” type of ballot.<sup>117</sup> Other laws were enacted in 1911<sup>118</sup> and 1931,<sup>119</sup> but both were declared unconstitutional.<sup>120</sup> The only lasting limitation to fusion

112. The first fusion gubernatorial election was held in New York in 1854, in which the major party Whig candidate was supported in a fusion candidacy by eleven other political parties, among them the “Strong-Minded Women” Party, the “Anti-Rent” Party and the “Negro” Party. Scarrow, *supra* note 2, at 635.

113. Law of May 27, 1896, ch. 909, § 66 (repealed 1911) (“[I]t shall not be lawful for any committee of such party . . . to fill vacancies, to nominate, or to substitute the name of, a candidate of another party . . .”). See also Note, *The Constitutionality of Anti-Fusion and Party-Raiding Statutes*, 47 COLUM. L. REV. 1207, 1211 n.30 (1947).

114. 93 N.E. 262 (N.Y. 1910).

115. See *id.* at 262-63.

116. Ludington, *supra* note 31, at 259.

117. *Id.*

118. 1911 N.Y. Laws ch. 891, § 58 (repealed 1911) (“The name of the candidate shall not appear more than once on the ballot as a candidate for the same public office or party position.”).

119. Law of 1930, ch. 17, § 249 (as amended by 1931 N.Y. Laws ch. 270) (repealed 1931) (“When a person has been nominated for an office by one political party and has also been nominated for that office by one or more independent bodies, unless said independent body or bodies shall have nominated candidates for more than fifty per cent of the offices to be filled, his name shall appear only in the row or column containing generally the names of candidates for other offices nominated by such party, and the name and emblem of such party and of each of such independent bodies shall appear in connection with his name.”).

120. The 1911 law, overturned by the New York Court of Appeals in *Hopper v. Britt*, 96 N.E. 371 (N.Y. 1911) did not ban fusion *per se*, but allowed a candidate’s name to appear only once on the ballot, on the line of the party which appeared first on the ballot. *Hopper*, 96 N.E. at 372. If a second (smaller) party cross-endorsed a candidate, his name would not appear in that party’s column. *Id.* Instead, the ballot would direct the voter to the column of the first party with the words “See Column,” followed by a blank space to fill in. *Id.* The court stated that “[t]he change from the old system [did] not diminish the size of the ballot, nor [did]

candidacies in New York came in 1947 with the passage of the so-called Wilson-Pakula law,<sup>121</sup> which prevents a member of one party from running for the nomination of another party without the approval of the second party.<sup>122</sup> Section 6-120 of the New York Election Law provides that except in New York City, “[t]he members of the party committee representing the political subdivision of the office for which a designation or nomination is to be made . . . may, by a majority vote . . . authorize the designation or nomination of a person as candidate for any office who is not enrolled as a member of such party as provided in this section.”<sup>123</sup> In the litigation that followed the enactment of “Wilson-Pakula,” and which contested its validity, the statute prevailed.<sup>124</sup> The courts were convinced that the statute was not arbitrary and unreasonable because of the state’s interests in protecting the integrity of political parties, as well as in preventing party-raiding, whereby a candidate, not in sympathy with the principles of the party, would run on that party’s line so as to capture and control it.<sup>125</sup>

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it decrease the printing on it[,] . . . [nor did it] tend to make voting easier for the elector, or [] avoid confusion on his part . . .” *Id.* at 374. On the contrary, the law unnecessarily discriminated against certain voters. *Id.* at 373. The Court of Appeals, in *Crane v. Voorhis*, 178 N.E. 169 (N.Y. 1931) overturned the 1931 law. In that case, space was left blank for a nominee for district attorney, and the emblem of the cross-endorsing party was placed next to the nominee’s name on the line of the other (major) party which had nominated him. *Crane*, 178 N.E. at 169. In invalidating the law, the court said, “All voters within reasonable regulation must have the same opportunity or else they are disenfranchised within the spirit and meaning of the Constitution.” *Id.* at 170-71. *See also* Note, *supra* note 113, at 1211-12 (discussing the invalidation of both laws).

121. So named for its authors, State Senators Malcolm Wilson and Irwin Pakula. *Martin v. Alvarez*, No. 05-15985 (N.Y. Sup. Ct. Aug. 19, 2005) (order granting petition to invalidate designating petitions of town council candidates), available at [http://decisions.courts.state.ny.us/fcas/fcas\\_docs/2005aug/51001598520051sciv.pdf](http://decisions.courts.state.ny.us/fcas/fcas_docs/2005aug/51001598520051sciv.pdf). *See id.* for a discussion of the legislative history and intent of the Wilson-Pakula Law, now Election Law § 6-120(3).

122. N.Y. ELEC. LAW § 6-120(3) (McKinney 2007). *See Ingersoll v. Curran*, 74 N.E.2d 465, 465 (N.Y. 1947) (upholding the constitutionality of the Wilson-Pakula Act).

123. N.Y. ELEC. LAW § 6-120(3).

124. *See Werbel v. Gernstein*, 78 N.Y.S.2d 440 (Sup. Ct. 1948), *aff’d*, 78 N.Y.2d 926 (App. Div. 1948); *Ingersoll v. Curran*, 70 N.Y.S.2d 435 (Sup. Ct. 1947), *aff’d*, 74 N.E.2d 465 (N.Y. 1947); *Ingersoll v. Heffernan*, 71 N.Y.S.2d 687 (Sup. Ct. 1947), *aff’d*, 74 N.E.2d 466 (N.Y. 1947).

125. *See, e.g., Curran*, 70 N.Y.S.2d at 438-40 (noting that the State Legislature’s purpose in preventing political party raids is justifiable and does not contravene the State’s Constitution).

## B. *Third Parties and the Use of Cross-Endorsement in New York*

New York election law defines the term “party” as “any political organization which at the last preceding election for governor polled at least fifty thousand votes for its candidate for governor.”<sup>126</sup> Parties that earn 50,000 votes or more in an election earn a place on the election ballot for the next four years, with placement inversely proportional to number of votes received (i.e., the first row on the ballot is held by the party which received the most votes in the previous election cycle).<sup>127</sup> Because of the places that the third parties in New York hold on the ballot and the feverishness with which their endorsements are sought by major party candidates, New York is often touted as a state where fusion candidacies have led to hardy third parties and more vigorous open debate on issues.<sup>128</sup> But, is this what is really occurring? Or do the third parties simply piggyback on the major parties in order to maintain their spot on the ballot and create patronage opportunities and other political payback? A look at the historically and current prominent third parties in New York is instructive.

### 1. The Liberal Party

The Liberal Party, “an offshoot to the American Labor Party,” reigned as an important and influential third party for fifty-eight years.<sup>129</sup> Its sudden downfall illustrates the false nature of the strength that can come to a third party in New York when it relies almost exclusively on cross-endorsement. In each of the fifteen presidential elections between 1944 and 2000, the Liberal Party had a nominee on the ballot, but in fourteen of those elections, the candidate was also the Democratic Party

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126. N.Y. ELEC. LAW § 1-104(3) (McKinney 2007).

127. *Id.* § 7-116(1).

128. *See, e.g.*, Berger, *supra* note 23, at 1391 (“As a result [of fusion], minor parties have thrived.”); Kirschner, *supra* note 6, at 684 (“The resulting exposure and prestige [from the ability to cross-endorse candidates] has, in turn, helped [third parties] to develop their organizations and improve the chances of their own candidates.”). *See also* Brief for Twelve University Professors, *supra* note 16, at 12, 1996 WL 496827, at \*12.

129. Robert J. Spitzer, *Third Parties in New York*, in GOVERNING NEW YORK STATE 73, 75 (Robert F. Pecorella & Jeffrey M. Stonecash eds., 5th ed. 2006). *See generally id.* for a concise history of the American Labor Party.

candidate.<sup>130</sup> While the Party sometimes endorsed the Republican candidate, it rarely, if ever, put forward its own candidate for office, despite having the political machinery to do so.<sup>131</sup> In 2002, the Liberal Party chose Andrew Cuomo, a Democrat, as their gubernatorial candidate.<sup>132</sup> When he dropped out of the race just before the Democratic primary, the party lost any chance of winning the 50,000 votes necessary to remain on the ballot during the next four years.<sup>133</sup> The post-mortem on the Liberal Party, as reflected in a New York Times editorial, was that it was always its plan to:

1) Cross-endorse the Democratic candidate for governor, thus earning at least 50,000 spillover votes from New Yorkers who liked to think of themselves as very liberal indeed. 2) Spend the next four years cross-endorsing other candidates for everything from United States senator to City Council member. 3) Collect payments from grateful officeholders in the form of patronage jobs and campaign contributions.<sup>134</sup>

## 2. The Conservative Party

The Conservative Party began because of dissatisfaction with the Republican Party when it was dominated by Nelson Rockefeller during the 1960s and 1970s.<sup>135</sup> The Conservatives wished to counter what they believed was a Republican Party that had grown to be too liberal.<sup>136</sup> In 1970, the Conservative Party elected one of its own, James Buckley, to the U.S. Senate

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130. See John E. Vargo, *End of the Line for the New York Liberal Party?*, LIBERAL PARTY, [www.liberalparty.org/vargoarticlep1.html](http://www.liberalparty.org/vargoarticlep1.html) (last visited Aug. 10, 2009).

131. The Liberal Party nominated Franklin Roosevelt, Jr. for governor in 1966, instead of cross-endorsing Democrat Frank O'Connor, who ultimately lost to Republican Nelson Rockefeller. See Spitzer, *supra* note 129, at 82. Mayor John Lindsay, who was defeated in the Republican primary in 1969, received the Liberal Party line in the general election and won, defeating both the Republican and Democratic candidates. See *id.* at 81, 87. Incumbent U.S. Senator Jacob Javits, who lost the Republican primary to Alphonse D'Amato in 1980, was also given the Liberal Party nomination. See *id.* at 82. He ultimately lost to D'Amato. See *id.*

132. See *id.* at 84.

133. See Joyce Purnick, *Liberal Party: Missteps Risk its Ballot Line*, N.Y. TIMES, Sept. 26, 2002, at B1.

134. Editorial, *An Election Day Ballot Trap*, N.Y. TIMES, Nov. 5, 2006, §14 (WC), at 15.

135. See Spitzer, *supra* note 129, at 75-76.

136. See The Conservative Party of New York State, *A Short History of the Conservative Party* (Jan. 5, 2008), <http://www.cpnys.org/history/history.html>.

in a three-way race;<sup>137</sup> generally, however, the party has endorsed major party candidates through cross-endorsement.<sup>138</sup> Unlike the Liberal Party, whose views were seen as “flexible,”<sup>139</sup> the Conservative Party has refused to compromise on issues important to it, often hurting the major party to which it most relates, the Republican Party. In the 2006 gubernatorial election, for example, when the Republicans were choosing their candidate, the Conservative Party made it clear that they would not support the front-runner, William Weld, because he supported abortion rights and gay rights.<sup>140</sup> Many thought that Weld had a much better chance of defeating the Democratic candidate, Eliot Spitzer, than did John Faso, a little-known pro-life Republican State Assemblyman whom the Conservatives supported.<sup>141</sup> Republican Party county leaders, however, worried about losing the Conservative votes they traditionally counted on, endorsed Faso at their respective conventions and thus, he received the Republican nomination.<sup>142</sup> In Faso’s case, it can be said that the Conservative Party did function as a true third party—John Faso was arguably *their* candidate whom the Republicans agreed to run. Although the Conservative Party’s insistence on Faso virtually guaranteed that the Democratic Party would prevail, the Conservatives nonetheless stuck to their principles. Of course, the Republican Party may still have lost the governorship had they run the more well-known Weld.<sup>143</sup> Regardless, in this example, the significance of the third party was that it forced the major party to get in line with *its* philosophy.

### 3. The Independence Party

The Independence Party has had a few incarnations. Their current place on the ballot in New York is due to the candidacy

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137. See Spitzer, *supra* note 129, at 81-82.

138. See *id.* at 79-80.

139. Purnick, *supra* note 133.

140. Patrick Healy, *In Weld’s Bid, G.O.P. Risks Losing Conservative Allies*, N.Y. TIMES, Feb. 9, 2006, at B1.

141. Patrick Healy & Jennifer Medina, *G.O.P. Hopes to Block Candidate as Extreme*, N.Y. TIMES, May 18, 2006, at B1.

142. Patrick Healy, *G.O.P. Supports Faso, Not Weld, for Governor*, N.Y. TIMES, June 2, 2006, at A1.

143. After all, Spitzer received 66% of the total votes. See N.Y. STATE Bd. OF ELECTIONS, GOVERNOR ELECTION RETURNS NOV. 7, 2006, at 1 (2006), available at [http://www.elections.state.ny.us/NYSBOE/elections/2006/general/2006\\_gov.pdf](http://www.elections.state.ny.us/NYSBOE/elections/2006/general/2006_gov.pdf).



of Tom Golisano, who ran for governor in 1994.<sup>144</sup> Golisano spent millions of his own money on the campaign,<sup>145</sup> and the result was enough votes on the Independence line to earn the Party a place on the ballot in state elections.<sup>146</sup> The Independence Party stuck with Golisano, endorsing him in the next two gubernatorial races.<sup>147</sup> In 1998, Golisano received more votes on his only line—the Independence line—than George Pataki did on the Conservative line—his second line—which thus bumped the Independence Party into the third position on the ballot for the ensuing election.<sup>148</sup>

#### 4. The Working Families Party

The Working Families Party was started in 1998 by a coalition of labor and community groups who were looking to advance liberal issues and to stop what it perceived to be a rightward shift on the part of the Democratic Party at the time.<sup>149</sup> It received its line on the ballot when it backed the New York City Council speaker at the time, Peter Vallone, for governor and received the requisite number of votes to warrant a place on the ballot.<sup>150</sup> The Working Families Party cross-endorsed Eliot Spitzer in the 2006 New York gubernatorial elec-

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144. Spitzer, *supra* note 129, at 76-77.

145. See David Firestone, *Perot Backs Golisano as a Shaker-Up in His Own Image*, N.Y. TIMES, Nov. 6, 1994, at 52.

146. See N.Y. STATE BD. OF ELECTIONS, *supra* note 11, at 1 (showing Golisano's vote total of 217,490).

147. See N.Y. STATE BD. OF ELECTIONS, GOVERNOR ELECTION RETURNS NOV. 3, 1998, at 1 (1998), available at <http://www.elections.state.ny.us/NYSBOE/elections/1998/GOVWEB.pdf> (showing Golisano on the Independence line); N.Y. STATE BD. OF ELECTIONS, GOVERNOR ELECTION RETURNS NOV. 5, 2002, at 1 (2002), available at [http://www.elections.state.ny.us/NYSBOE/elections/2002/general/2002\\_gov.pdf](http://www.elections.state.ny.us/NYSBOE/elections/2002/general/2002_gov.pdf) (same).

148. Golisano received 364,056 votes (Independence line) and Pataki received 348,727 (Conservative line). See N.Y. STATE BD. OF ELECTIONS, GOVERNOR ELECTION RETURNS NOV. 3, 1998, *supra* note 147, at 1.

149. Abby Goodnough, *Unions and Local Groups Join to Form a New Political Party*, N.Y. TIMES, July 7, 1998, at B6.

150. *Id.* See N.Y. STATE BD. OF ELECTIONS, GOVERNOR ELECTION RETURNS NOV. 3, 1998, *supra* note 147, at 1 (identifying 51,325 votes received by Peter Vallone on the Working Families ballot line). See also Robert J. McCarthy, *Crowded State Election Ballot Adds 2 More Parties*, THE BUFFALO NEWS, Dec. 14, 1998, at B1.

tion, earning more than 155,000 votes on their line and ensuring a more prominent place on the ballot.<sup>151</sup>

Currently, the Independence, Conservative, and Working Families parties are the three primary third parties in New York and fusion is firmly rooted in their cultures. Voter enrollment statistics show that along with the 5.9 million registered Democrats and the 2.9 million registered Republicans, there are also 2.4 million unaffiliated voters, who, because they are not registered with a party, are less predictable than the major party registered voters in regard to their choices at the polls.<sup>152</sup> It is those voters, in addition to the roughly 600,000 third-party registered voters, that candidates must work to win over. Arguably, it is easier to do this by offering voters another party line, which may downplay any aversion a voter may have to either a “Democrat” or “Republican” label. Depending on the county, obtaining cross-endorsements from the minor political parties is a part of the political process that cannot be ignored by a candidate. In fact, in certain counties in New York where the enrollment numbers between the two major parties are quite disparate, third-party endorsements can be the only chance a candidate has. For example, in Westchester County, a Republican currently has a very difficult time getting elected without a second or third minor-party cross-endorsement because the Democrats have nearly 125,000 more registered voters than the Republicans.<sup>153</sup> As one political operative put it, “Let’s face it – going in, you take every weapon you can get.”<sup>154</sup>

### C. *Cross-Endorsement in New York’s 2006 and 2008 Elections*

The last two election cycles in New York State illustrate that third parties rarely, if ever, run their own candidates. In

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151. See N.Y. STATE BD. OF ELECTIONS, *supra* note 143, at 1 (identifying 155,184 votes received by Eliot Spitzer on the Working Families ballot line).

152. N.Y. STATE BD. OF ELECTIONS, *supra* note 13, at 8.

153. As of April 1, 2009, registered Democrats in Westchester County numbered 272,862 while Republicans numbered 149,272. *Id.* There are 132,236 unaffiliated voters and 32,917 total third-party registered voters in this county, including Independence, Conservative, Working Families, Green, Libertarian and Socialist Workers. *Id.*

154. Julia C. Mead, *Gauging the Swing Vote in Suffolk Races*, N.Y. TIMES, Oct. 19, 2003, at LI7 (quoting Michael Dawidziak, political strategist).

2006, there were no non-fusion third-party candidates for governor,<sup>155</sup> comptroller<sup>156</sup> or attorney general.<sup>157</sup> In addition, no non-fusion third-party candidate ran for the United States Senate.<sup>158</sup> The Independence and Working Families Parties cross-endorsed candidates from the major parties in every House of Representatives race that year, and the Conservative Party ran its own candidate in only three of twenty-nine races.<sup>159</sup> In the State Senate elections, the three third parties put up their own candidates in only eight of sixty-two races.<sup>160</sup> In three of those races, in which the Conservative Party ran their own candidate, there was no Republican candidate.<sup>161</sup> In the State Assembly races that year, the third parties put up their own candidate in only thirteen percent of the races.<sup>162</sup>

The 2008 election cycle sported similar results. Third parties cross-endorsed major-party candidates in all but seven of the twenty-nine Congressional races.<sup>163</sup> They also cross-endorsed all but six of the major-party candidates in the sixty-two State Senate races,<sup>164</sup> and put up their own candidates in

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155. N.Y. STATE BD. OF ELECTIONS, *supra* note 143, at 1.

156. N.Y. STATE BD. OF ELECTIONS, COMPTROLLER ELECTION RETURNS NOV. 7, 2006, at 1 (2006), *available at* [http://www.elections.state.ny.us/NYSBOE/elections/2006/general/2006\\_comp.pdf](http://www.elections.state.ny.us/NYSBOE/elections/2006/general/2006_comp.pdf).

157. N.Y. STATE BD. OF ELECTIONS, ATTORNEY GENERAL ELECTION RETURNS NOV. 7, 2006, at 1 (2006), *available at* [http://www.elections.state.ny.us/NYSBOE/elections/2006/general/2006\\_ag.pdf](http://www.elections.state.ny.us/NYSBOE/elections/2006/general/2006_ag.pdf).

158. N.Y. STATE BD. OF ELECTIONS, US SENATE ELECTION RETURNS NOV. 7, 2006, at 1 (2006), *available at* [http://www.elections.state.ny.us/NYSBOE/elections/2006/general/2006\\_ussen.pdf](http://www.elections.state.ny.us/NYSBOE/elections/2006/general/2006_ussen.pdf).

159. N.Y. STATE BD. OF ELECTIONS, CONGRESSIONAL VOTE – NOV. 7, 2006, at 1-5 (2006), *available at* [http://www.elections.state.ny.us/NYSBOE/elections/2006/general/2006\\_cong.pdf](http://www.elections.state.ny.us/NYSBOE/elections/2006/general/2006_cong.pdf).

160. N.Y. STATE BD. OF ELECTIONS, SENATE VOTE – NOV. 7, 2006, at 1-8 (2006), *available at* [http://www.elections.state.ny.us/NYSBOE/elections/2006/general/2006\\_sen.pdf](http://www.elections.state.ny.us/NYSBOE/elections/2006/general/2006_sen.pdf).

161. *Id.* at 3-4. The 20th, 27th, and 33rd Senate Districts had no Republican candidate. *Id.*

162. *See generally* N.Y. STATE BD. OF ELECTIONS, ASSEMBLY – VOTE – NOV. 7, 2006 (2006), *available at* [http://www.elections.state.ny.us/NYSBOE/elections/2006/general/2006\\_assem.pdf](http://www.elections.state.ny.us/NYSBOE/elections/2006/general/2006_assem.pdf).

163. N.Y. STATE BD. OF ELECTIONS, REP. IN CONGRESS ELECTION RETURNS NOV. 4, 2008, at 1-10 (2008), *available at* <http://www.elections.state.ny.us/NYSBOE/elections/2008/General/USCongress08.pdf>.

164. N.Y. STATE BD. OF ELECTIONS, SENATE ELECTION RETURNS NOV. 4, 2008, at 1-16 (2008), *available at* <http://www.elections.state.ny.us/NYSBOE/elections/2008/General/NYSenate08.pdf>. In one race in which the Working Families Party had their own candidate, the Democrats did not run a candidate. *Id.* at 12.

only eleven percent of the one hundred fifty State Assembly races.<sup>165</sup>

Third parties in New York seem to *only* cross-endorse, even on the local level. However, contrary to what fusion advocates say, this ability to cross-endorse has not created meaningful third parties in New York. When a party does not offer its own candidates, voters do not truly know what values the party embraces, and thus, may end up as pawns in political power-seeking deals. In general, voters rightfully think that their parties stand for the core principles that their name reflects, but in the case of third parties in New York, oftentimes, or over time, that commitment to principle is replaced by a simple need to endorse the candidate who will earn at least 50,000 votes and ensure another four years of involvement in the election process, and the accompanying spoils of success.

#### D. *Disadvantages of Cross-Endorsement*

Cross-endorsement limits choices for voters by taking lines that could go to a more diverse offering of candidates and handing them over to the entrenched major-party candidate. Cross-endorsement also “invites the development of longer and more complex ballots.”<sup>166</sup> In one local election, the complexity of the ballot led one reporter to write, “[t]he . . . elections appear to be so intricate that you need a scorecard to tell who is running and for which party.”<sup>167</sup> It is also potentially confusing for voters when a candidate is endorsed by different parties with no seeming relationship between or among them. The petitioners in *Timmons* noted that in the course of his career, for example, New York City Mayor Fiorello LaGuardia<sup>168</sup> ran under roughly

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165. See generally N.Y. STATE BD. OF ELECTIONS, ASSEMBLY ELECTION RETURNS NOV. 4, 2008 (2008), available at <http://www.elections.state.ny.us/NYSBOE/elections/2008/General/NYSAssembly08.pdf>.

166. Brief for the Petitioners at 42, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (No. 95-1608), 1996 WL 435927, at \*42.

167. Stephen E. Lipken, *Harrison Elections Intricate; Voters Need to Know “Score”*, HARRISON HERALD, Sept. 2007, at 3.

168. LaGuardia was Mayor of New York City from 1934-1945. See generally THOMAS KESSNER, *FIORIELLO H. LA GUARDIA* (1989).

nine different party labels.<sup>169</sup> In the 1941 campaign alone, his name appeared on four party lines.<sup>170</sup>

Cross-endorsement can compromise the major-party candidate. On the one hand, it is very difficult to turn down any endorsement because it could potentially amount to turning down votes. As the co-chairman of the Working Families Party put it, “[T]he line has so much power that no one feels they can walk away.”<sup>171</sup> This puts the candidate in an untenable situation: he cannot turn down the endorsement because the third party may then endorse another candidate. On the other hand, if he accepts the endorsement and wins, there will presumably be an expected payoff if the party delivers votes. In addition, to earn the endorsement, the major-party candidate may alter his views or adopt a view which he would not have otherwise espoused. Later, when he runs for another, perhaps higher office, his previous stance, which he had adopted so as to earn the votes of the minor party, can create a backlash as he seeks to hold the banner of the major party. The major party may not agree with the position he took in the prior election, and indeed, the candidate may not agree with it either. Unfortunately, the candidate must stand by his former words, and may end up spending valuable campaign time either backpedaling or finessing his position. Either way, that type of political behavior, brought on by the fusion candidacy, is wasteful for voters, who must spend the time deciphering which of their candidate’s positions are “real” and which are a matter of political expediency. Unfortunately, many New York elected officials feel beholden to the third parties because they perceive that it was those “extra” votes which made the difference for them. It is thus unlikely that this system will change.<sup>172</sup>

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169. Brief for the Petitioners, *supra* note 166, at 43, 1996 WL 435927, at \*43.

170. *Id.* (citing G. Theodore Mitau, *Judicial Determination of Political Party Organizational Autonomy: Some Recent Developments in the Law of Parties (1936-1957)*, 42 MINN. L. REV. 245, 256 (1957-1958)).

171. Michael Slackman, *Labor-Backed Third Party Emerges as Statewide Force*, N.Y. TIMES, Nov. 7, 2004, at N46.

172. Spitzer, *supra* note 129, at 81, analyzes the 1996 New York elections, in which, similar to the 2006 and 2008 elections, a majority of candidates were cross-endorsed. In the House races, twenty-six out of thirty-one candidates were cross-endorsed. In the New York State Senate races, fifty-two out of sixty-one were cross-endorsed, with an average endorsement of 2.5 lines for each candidate. In the Assembly, 120 nominees out of 150 received more than one endorsement, with

E. *Should New York Ban Fusion?*

No one can argue that there is a benefit to having third parties. The American electorate has developed “complex associational preferences within the political marketplace;”<sup>173</sup> third parties help sustain those preferences by encouraging increased access to political discourse, dissent, and the support of new ideas. The abolition of slavery and women’s suffrage, for instance, first found homes in the platforms of minor parties.<sup>174</sup> However, third parties that simply endorse the major-party candidate are pretenders to the throne of alternative ideas. The New Party in Minnesota, for instance,

did not seek to enrich political discussion by nominating its own candidate to present its own political viewpoint to the public. Instead, the New Party sought to offer as its candidate a very popular political figure who was already on the ballot as the candidate of another, established party. This would have done nothing to enhance the choice of candidates available to voters. Nor does it in reality present additional ideas to the voters. It can hardly be said that Rep. Dawkins would meaningfully represent one set of positions to the voters as the candidate of the DFL party and a different set of positions to the voters as the candidate of the New Party.<sup>175</sup>

Third parties that simply endorse another party’s candidates amount solely to stepped-up interest groups. There is a quid pro quo for the votes they deliver simply because those votes are registered on a ballot line and the third party can therefore claim ownership of them. However, there are other ways to push for change in Albany or Washington—it need not

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an average of 2.3 lines. The third parties, however, provided the winning edge in only three per cent of the races. Note that this does not take into account the fact that some or all of the third-party voters may have voted on the major-party line and thus, the three per cent could be an overstatement.

173. Lowell J. Schiller, *Imposing Necessary Boundaries on Judicial Discretion in Ballot Access Cases: Clingman v. Beaver*, 125 S. Ct. 2029 (2005), 29 HARV. J.L. & PUB. POL’Y 331, 338 (2005).

174. See, e.g., Berger, *supra* note 23, at 1386.

175. Brief for the Petitioners, *supra* note 166, at 20, 1996 WL 435927, at \*20.

be via a line on the ballot.<sup>176</sup> This idea was recognized in *Burdick v. Takushi*,<sup>177</sup> in which the Court stated that the ballot's purpose is to elect public officials, not serve an expressive function.<sup>178</sup> Perhaps more important, while there is no doubt that the freedom of association implicit in the First and Fourteenth Amendments extends to political parties,<sup>179</sup> this right is not simply for the sake of advancing political parties per se; it is for the notion that political parties are a vehicle through which individuals can exercise their First Amendment right to associate for the advancement of shared beliefs. There is nothing in the Supreme Court's jurisprudence which provides that the First Amendment protects such an expansive interpretation of the freedom of association.<sup>180</sup>

Over the past ten years, the Democratic Party has solidified its dominance in New York State. Between 1999 and 2009, its registered voter enrollment increased by 867,369, while Republican Party enrollment decreased by 121,674.<sup>181</sup> With the Democrats in control of both the State Senate and the Assembly, it is feasible that they could choose to pass anti-fusion legislation, as was done by the Republican Party during the late nineteenth century throughout most of the rest of the country. The reasoning would be the same: as the dominant party, they do not need the extra votes of the third-party line and thus, banning fusion candidacies could limit the Republicans to those voters willing to vote on the Republican line. If the New York legislature did enact an anti-fusion law, it is clear that depending on how they fashioned it, their action would be secure from constitutional attack.<sup>182</sup> Also clear is the fact that such a change in the law

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176. A New York Times editorial called the cross-endorsement system "a permission slip to sell lines on the New York ballot to the highest bidders." Editorial, *supra* note 134.

177. 504 U.S. 428 (1992).

178. *Id.* at 438.

179. Tashjian, 479 U.S. at 214. *See also* *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989).

180. *See* Brief for the Petitioners, *supra* note 166, at 14-15, 1996 WL 435927, at \*14-15.

181. N.Y. STATE BD. OF ELECTIONS, *supra* note 13, at 8; N.Y. STATE BD. OF ELECTIONS, TOTAL STATEWIDE ENROLLMENT, at 2 (1999), available at [http://www.elections.state.ny.us/NYSBOE/enrollment/county/county\\_apr99.pdf](http://www.elections.state.ny.us/NYSBOE/enrollment/county/county_apr99.pdf).

182. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 369-70 (1997) (upholding the validity of Minnesota's anti-fusion law).

would be a shock to the third-party system as it currently functions in New York. What is less certain, but probable, is that it would force the weaker major party to focus on its foundational beliefs and not stray too far from those beliefs in order to please minor parties whose motives are often questionable.<sup>183</sup> Similarly, it would force third parties to develop their own candidates as opposed to spending their time calculating which major-party candidate can offer them the best chance of ballot preservation, by way of 50,000 votes every four years. Only in this manner can third parties offer voters a true alternative choice, or at least, a more honest dialogue.

## V. Conclusion

The First Amendment protects political parties because political parties act as a conduit through which constitutional values, namely the right to associate, are served.

The value of political parties, particularly minor ones, does not lie simply in their existence; it is in the contribution they make to the marketplace of ideas. It is a diverse field of candidates that enriches political discourse and fulfills First Amendment aspirations; while cross-endorsing another party's candidate certainly acts as a bootstrap for the minor party, it in fact takes away from a potentially more diverse slate of candidates in any given election. In addition, cross-endorsement can and does act as an invitation to political patronage. Allowing a candidate to appear on only one line instead of multiple lines is not only constitutional, but sensible: it is less confusing, it keeps candidates true to their ideals, and it promotes actual competition by reserving ballot space for true alternative candidates.

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183. Alternatively, it could force that party to rethink and adjust some of its positions so as to welcome more voters into the fold.



