MORE CHOICES, MORE VOICES: A PRIMER ON FUSION

ADAM MORSE and J.J. GASS

VOTING RIGHTS & ELECTIONS SERIES

www.brennancenter.org

October 2006

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ACKNOWLEDGMENTS

This paper was prepared under the auspices of the Brennan Center's Democracy Program, with generous support from the Carnegie Corporation of New York and the JEHT Foundation. The statements made and views expressed in this publication are the responsibility solely of the Brennan Center.

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INTRODUCTION TO FUSION

Consider a typical partisan election in the United States. Democrat John Smith and Republican Jane Jones are the candidates in the general election. Perhaps one or two minor parties also have nominees on the ballot, but these candidates are not expected to poll above the single digits, let alone threaten the two major candidates. There might even be an independent candidate who has gathered enough petition signatures to earn a spot on the general election ballot; but again, he is not a serious contender. Over time, given the inability of the minor parties and independent candidates to win elections, their support dwindles. Voters who might agree with them ideologically do not see the point in "throwing away" their votes on candidates with no chance of winning. Eventually, such voters may simply stay home, unwilling either to support the major parties or to cast a futile vote.

This familiar dynamic may seem inevitable in a "first-past-the-post" or "plurality" system—where the candidate with the most votes wins, even if no candidate gets a majority of the votes cast—but it is not. Throughout the nineteenth century, third parties flourished in the United States; then as now, American elections featured single-member districts in which the candidate with a plurality of votes won and there were no prizes for parties that gained a significant minority of votes. What has changed is that the large majority of states have banned fusion, a common nineteenth-century practice that is unheard-of in most of the country today.

Fusion, also referred to as cross-endorsement or open ballot voting, is the practice of multiple political parties nominating the same candidate for the same office. In our hypothetical election between Mr. Smith and Ms. Jones, Mr. Smith might appear on the ballot as the nominee of not only the Democratic Party, but also of the Progressive Party and the Labor Party. Ms. Jones might be nominated by the Conservative Party and the Family Values Party as well as the Republican Party. And there may still be minor parties who nominate other candidates, as well as independent candidates who have petitioned onto the ballot without securing a party's nomination.

The candidate who receives more votes than any other still wins the election. The difference is that voters who support the policies of, for example, the Family Values Party may register that support by voting for the Family Values ticket without "throwing away" their votes on candidates with no realistic hope of winning. Imagine that Ms. Jones wins the election with 51% of the total vote, and 10%—or one-fifth or her total—comes from Family Values voters. Those voters will have sent her and the rest of the state a message that they could not have sent had they faced a choice between voting on the Republican line or voting for a "spoiler" Family Values nominee (thus handing the election to Mr. Smith, whose policies they find much more objectionable than Ms. Jones's).

In 43 states and the District of Columbia, this scenario cannot happen: a candidate may not accept the nomination of more than one party.

In the seven states that permit fusion—Connecticut, Delaware, Idaho, Mississippi, New York, South Carolina, and Vermont—a candidate may receive the nomination of more than one party. Fusion takes place only during the general election and does not affect the primary

process directly, although it may indirectly influence the parties' choices of which candidates to nominate. Typically, the major parties nominate different candidates, while minor parties may cross-endorse one of the major party candidates, fuse with other minor parties, or run a candidate without any cross-endorsements, depending on their own political judgments and principles.

Two variations on fusion exist. In New York, the state where open ballot voting has had the most significant impact on elections in recent history, the ballot lists a candidate multiple times, once per party, if the candidate received multiple nominations. This gives voters the choice of voting for Ms. Jones as a Republican or Ms. Jones as a Conservative or Family Values candidate. In other states, such as Mississippi and Vermont, candidates nominated by multiple parties appear only once, but with the names of all of the parties that nominated the candidate listed. When voting for Ms. Jones, voters cannot indicate which of the parties that nominated her they support. The New York system is greatly superior and is the focus of this paper.

New York ballots organize candidates by office and by party (a party-column ballot). In New York City and the City of Albany, the ballot lists the offices down the left-hand edge, with all of the candidates for an office organized together as a row, and lists the parties across the top of the ballot, with all the candidates from a single party together in one column. The columns and rows are reversed elsewhere in the state. If a candidate receives the nomination of multiple parties for the same office, the ballot lists the candidate once for each political party. When boards of elections tally the results of the election, they list separately the number of votes cast for each candidate under each party designation in addition to declaring a winner based on the total number of votes each candidate receives.

States that permit fusion generally require that candidates consent to any nominations that they receive. In New York, a candidate for non-judicial office who seeks the nomination of a party that the candidate is not a member of must receive the permission of the party's executive committee. Some states also prohibit the major parties from fusing with each other, while permitting minor party fusion.

A SHORT HISTORY OF LAWS BANNING FUSION

Fusion was legal throughout the country until the late nineteenth century. Prior to the 1890s, elections used a literal ballot box. Citizens voted by dropping in a ballot listing the candidates they had chosen. These ballots were typically printed by political parties, enabling the parties' supporters to vote the straight party line, although occasionally voters would create their own ballots. Under this system, the state played no role in determining which organizations were political parties or who those organizations could nominate. If two parties wanted to fuse, each could list the same candidate on their ballot without any legal impediments. The ability to cross-endorse formed a key part of the political system that resulted in the vigorous third parties and highly competitive elections that characterized the late nineteenth century.

Beginning in 1888, the United States rapidly switched to the "Australian ballot": a government-printed ballot listing all eligible candidates, which voters filled out in the secrecy of a voting booth. While the principal reason for the change was to eliminate outright corruption, such as vote-buying and voter intimidation, the Australian ballot also gave the government

unprecedented control over the electoral process. The major political parties used that control to strengthen their positions at the cost of minority parties. Bans on fusion were one of the tools parties used to solidify their power.

In many northern states, the Republican Party controlled the government but could be threatened by a coalition of Democrats fused with Populists or other minor parties. As one Republican legislator said, "We don't propose to allow the Democrats to make allies of the Populists, Prohibitionists, or any other party, and get up combination tickets against us. We can whip them single-handed, but don't intend to fight all creation."[1] By prohibiting fusion, the party in power could maintain its control, even if a majority of the electorate would otherwise vote for a fusion ticket. This divide-and-conquer strategy forced voters to coalesce behind a single opposition party if they wanted to have any chance of unseating the incumbent party.

Bans on fusion eliminated third parties as a significant political force in most states and reduced overall competition in American elections. As later third-party movements, such as the Non-Partisan League and the Progressive Party, gained some electoral success, additional states moved to ban fusion. Third parties challenged some of the bans on fusion in court, but most were upheld, with the notable exception of New York's ban, which was struck down by the State's highest court.

Ultimately, forty-three states and the District of Columbia made fusion virtually impossible. A few of those states (California, Massachusetts, and New Hampshire) nominally permit fusion if a candidate wins election via write-in votes in a primary for a party of which the candidate is not a member, but that possibility is so remote as to be irrelevant for practical purposes. About half of the states permit open ballot voting for President, but without fusion for lower offices, the option is of limited interest. Only seven states continue to permit fusion for lower offices as well as President, although in some of those states the major parties have adopted rules prohibiting their candidates from accepting fusion nominations. In addition, some of those states have ballot access rules that make it difficult to organize a state-wide third party. New York is the only state in which fusion has played a consistently important role, although there have been occasional fusion tickets in other states.

REASONS TO LEGALIZE FUSION

I. Fusion Promotes Effective Third Parties.

States with fusion generally have stronger third parties than states that prohibit fusion. Laws banning fusion accomplished their goal of eliminating the role of minor parties in American elections. In an election without fusion, voters must, in most cases, choose between expressing their support for a minor party's agenda and participating in the actual choice between the major-party candidates who have a substantial chance of winning. In states with fusion, the ability to vote on a third-party line while still voting for a major-party candidate

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[1] Peter H. Argensinger, *'A Place on the Ballot': Fusion Politics and Antifusion Laws*, Amer. Historical Rev. Vol. 85, No. 2 (Apr. 1980), pp. 287-306, at 296 (quoting *Detroit Free Press*, January 5, 1893).

greatly reduces the pressure to avoid a "spoiler" vote. Because of fusion, New York currently has 3 significant minor parties (the Independence Party, the Conservative Party, and the Working Families Party). Another three minor parties lost their ballot status after the last gubernatorial election (the Right to Life Party, the Liberal Party, and the Green Party, which generally Does not fuse with major parties). No other state has as many parties that gain significant numbers of votes, and many have no third parties at all.

Encouraging third parties, in turn, has several benefits. Third parties can bring new ideas and creativity to the political process. Throughout American history, third parties have arisen to bring neglected political ideas and agendas to the forefront, from the Republican Party's origins in the abolitionist movement, to the Greenback Party's economic agenda, to the Prohibition Party's anti-alcohol goals. Third parties have played a similar role in other democracies, as when the Green Party made a major campaign issue of environmental concerns that had been neglected by both social democratic and conservative parties in Europe. Third parties provide a way for voters to highlight priorities, issues, and proposed solutions that the major parties ignore. While ideas that originate in third parties are usually implemented only after one of the major parties adopts the idea, third parties still play a substantial role in encouraging that process: major-party candidates who receive a significant number of votes on a minor-party's ballot line know that they must respond to the policy concerns of that party's supporters. Even when the ideas are not new, voters can demonstrate their priorities and concerns by voting for a third party that emphasizes a specific set of issues.

II. Fusion Mobilizes Voters and Encourages Turnout.

Fusion can encourage voting by citizens who otherwise would not participate on Election Day. Many citizens, disillusioned with politics and the two major parties, choose not to vote at all. Third parties can mobilize some voters by offering a means of participating without compromising their minor party affiliation and by allowing voters to make a stronger statement than they may feel a major party vote offers. But many voters do not want to vote for a candidate with no real chance of winning. Fusion offers those voters the best of both worlds: they can cast a meaningful vote for a candidate with a credible chance of victory while still expressing their support for a third party's agenda.

The limited evidence that is available suggests that fusion increases the total turnout. When laws prohibiting fusion were first enacted, many Populist Party voters simply stopped participating at all—their party largely ceased to exist, and many voters who had been willing to fuse with the Democratic Party refused to vote for Democratic Party nominees without fusion. Evidence from New York also suggests that some citizens who cast votes on third-party lines would not participate at all without fusion. [2] In any event, politicians perceive fusion as mobilizing additional voters, as demonstrated by the occasional efforts by major-party politicians in New York to establish a third-party line in an effort to win close elections.

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[2] *See, e.g.*, Melissa R. Michelson & Scott J. Susin, *What's in a Name: The Power of Fusion Politics in a Local Election*, Polity, Vol. 36 (Jan. 2004), pp. 301-33.

Fusion also helps integrate voters into the political system and enhance the legitimacy of elections. When a plurality candidate wins an election, public confidence in the democratic process can be shaken. Perverse results become possible, where voters produce a conservative winner by splitting their votes between two progressive candidates, or vice versa. Fusion decreases the likelihood of plurality victories by encouraging voters who are further from the political center to express their views by voting on a third-party line for their preferred major-party candidate. Fusion is not a perfect solution for this problem because some third parties will choose to not fuse, but allowing fusion may still reduce the frequency of plurality victories.

III. Fusion Encourages the Major Parties to Differentiate Themselves.

Many political scientists believe that democracy functions best when the major parties offer meaningfully distinct choices, but that politicians generally seek to match their position to the median voter, resulting in a choice between two very similar options. Fusion provides a tool for non-median voters to encourage candidates to distinguish themselves from each other, making the choice between the major parties more meaningful. The best example of this is the traditional role of the New York Conservative Party in pressuring Republicans to move farther to the right. The Conservative Party vote can be essential in winning elections, especially statewide elections, and thus Republicans must move away from the center to ensure that they will receive the Conservative nomination. In 1970, James Buckley was actually elected to the U.S. Senate on the Conservative Party line, taking advantage of the fact that the Democratic Party and the Republican Party each nominated liberals. The message to future Republican candidates could not be clearer: even if they thought that the median New York voter was fairly liberal, they could not cater to that hypothetical median voter without potentially losing the Conservative vote that was often critical to victory. The Working Families Party may be playing a similar role on the left, although the picture is less clear, partly because of the shorter history of the Working Families Party.

While fusion is not the only mechanism by which voters can require candidates to adhere to non-median policies, fusion allows for clear ballot cues that reduce the information costs involved. For example, voters for whom banning abortion is a critical issue know that the Right to Life Party nominee (whether a fusion candidate or not) shares their views. Without that cue on the ballot, those voters would have to use other means to find out where each candidate stood. In non-fusion states, ideological discipline may be enforced in major-party primaries, but voters must have some means of knowing, for example, which of the Republican primary candidates is "the" right-to-life candidate.

IV. Fusion May Allow Motivated Blocs of Voters to Influence High-Importance Issues.

Fusion gives blocs of voters a tool to get action on specific goals. The party leadership can strong-arm legislative votes by refusing to endorse legislators who do not vote the preferred way on issues that are important to the party. The party can concretely demonstrate through its prior electoral successes the political consequences of ignoring an issue that matters to the citizens who vote on that party's line. The Working Families Party claims that the 2004 increase in New York's state minimum wage was a result of its influence in the legislature. While fusion

parties are certainly not the only way voters can organize to pressure the legislature on specific issues, they provide one effective way of demonstrating electoral power.

ANSWERING OBJECTIONS TO FUSION

I. Fusion Does Not Promote Patronage.

Some people criticize fusion by arguing that it results in third parties that exist purely for the purpose of securing patronage appointments and policies to benefit special interests. In order to secure the support of a third party, politicians may appoint cronies of the third party's leadership to government positions or make policy concessions to attract the support of the special interests that control the party. Because government positions should be filled on the basis of merit and policies should be based on general welfare, the argument goes, fusion produces undesirable results.

The first step in responding to this argument is to distinguish two separate phenomena: (1) "spoils system" patronage, the appointment of government employees on the basis of political affiliations rather than competence; and (2) the appointment to policy-making positions of individuals based on their policy views. Groups of citizens uniting together to seek policy choices that they view as desirable is not a negative phenomenon. Showing popular political support for particular policies is the healthiest way of influencing government decision-making. If a third party can use fusion to influence the appointment of a policy-making official (*e.g.*, a member of the President's cabinet), that is a healthy part of the democratic process. The additional clout that fusion provides to these efforts is thus an advantage of fusion, not a liability.

Actual patronage appointments, where bureaucratic positions are awarded on the basis of party loyalty, can interfere with the efficient operation of government and produce inferior government services. There is little reason, however, to think that fusion increases the degree to which this takes place. Patronage appointments are a well-recognized problem, and a series of reforms, such as civil service systems, competitive examinations, and limitations on political activities by civil service employees, have been used to ameliorate the problems they can create. But to the extent that opportunities for patronage appointments still exist, politicians will use those opportunities for political advantage regardless of whether the state permits fusion. Allowing fusion may reallocate some of that patronage from a major party to a third party, but there is little reason to think that there will be more patronage positions in a system with fusion than in one without it. For example, critics point to New York's Liberal Party as a party that devolved into a bargaining mechanism for patronage. The Party retained its ballot line long after it ceased attempting to ameliorate or influence the policy positions of major party candidates. Rather, notoriously, it bargained for patronage for family members and associates of party leaders (and campaign contributions for the party). This was, to be sure, an unfortunate situation, but the Democratic and Republican Parties in New York have been dogged for decades by problems of patronage and corruption, with no assistance needed from a third party. Moreover, the political marketplace eventually dispatched the Liberal Party, losing its ballot line altogether. It was, in effect, supplanted by the Working Families Party, which functions as a genuine issue group.

II. Fusion Does Not Promote or Empower Fringe Groups.

Some critics of fusion have argued that fusion can give undue strength or influence to fringe or extremist groups with distasteful views. According to these critics, fringe political figures should not receive respect and influence with major politicians simply because the ballot line of their party draws a significant number of votes.

Ultimately, the strength of any third party relying on fusion depends on its ability to attract votes. A party that can attract a large number of votes deserves to be taken seriously in a democracy, and people who oppose a party's views or leadership should educate the electorate, rather than decrying the party's participation in elections as illegitimate. And to the extent that a minor party or its leadership is repugnant, candidates of major parties can and should refuse to accept the party's nomination, forcing it to stand on the strength of its own political support. But if voters choose to vote on a party's line, that party should have commensurate influence in our democracy.

To the extent that American politics currently suffers from major parties being pulled to the extremes, a far greater impetus is the role of electoral redistricting. Gerrymandered districts, engineered precisely to blunt partisan challenge or electoral accountability, mean that primary elections often determine who wins the general election. Ideologically motivated activists from a party's own base wield disproportionate influence under this system. Such a system has a far more deleterious impact than fusion could.

III. Fusion Does Not Threaten the Political Identity of Third Parties.

Some people and organizations, such as the Green Party, have opposed fusion by arguing that it undermines the political identity of third parties. Under this view, the ban on fusion in most states has helped third parties present a truly distinct voice, and third parties that cross-endorse major-party candidates risk becoming mere adjuncts to one of the major parties. In essence, this argument supports protecting third parties from themselves: in states with fusion, third parties are not forced to cross-endorse other parties' candidates, but simply have the option of doing so.

As a factual matter, the argument that third parties do better without fusion is hard to support. Prior to the bans on fusion in the late nineteenth century, many vigorous third parties competed throughout the United States. While a few third parties have enjoyed minor electoral success and some durability since then without fusion, the state that has experienced the most sustained and most influential third party activity has been New York, the only state where fusion is a regular feature of the political landscape. While other electoral systems, such as those using instant runoff voting instead of the traditional plurality election system, might help third parties more than fusion, it is hard to argue that the states with a ban on fusion have a vibrant multiparty system that merits protection.

More to the point, any third party that believes it is better off nominating its own candidates remains free to do so in states with legal fusion. The Green Party has generally refused to fuse in New York, choosing to run its own candidates instead. It has sometimes qualified for official party status, and sometimes attracted an insufficient number of votes to

retain its status. But the party's members remain free to continue to refuse to cross-nominate. Other parties, such as the Conservative Party and the Right to Life Party, have generally fused with the Republican Party but refused to in specific elections where they felt that the Republican nominee was inconsistent with their values and would dilute their messages. That remains their prerogative, and it is indeed their most powerful tool for encouraging the Republican Party to remain attentive to their policy preferences (a tool they would not have if fusion were banned).

IV. Fusion Does Not Threaten the Two-Party System.

Some critics worry that fusion would undermine the two-party system. This concern may have motivated the Supreme Court's decision in *Timmons v. Twin City Area New Party*, 520 U.S. 351 (1997), which held that bans on fusion do not violate the First Amendment. These arguments rely on two premises: the American two-party system is important, valuable, and worth protecting; and fusion would undermine the two-party system and create a chaotic multiparty system. Neither premise is sound.

The two-party duopoly is not inherently positive. The duopoly tends to marginalize viewpoints that do not fit comfortably in a left-right binary system. When a national two-party system intersects with regional variations in political beliefs, one-party states are an almost inevitable result, and several states currently have at best weak two-party competition that reduces the role of general election voters to rubber-stamping the dominant party's nominees. For all the reasons described above in support of fusion, reducing the strength of the major party's lock on political power can be a positive change.

In any event, fusion would not eliminate the two-party system. The primary factor contributing to the two-party system is the use of single-member districts with first-past-the-post, plurality winners. As long as that system remains in place, the mechanics of voting will create strong pressure for no more than two major candidates to compete in a general election, maintaining the essential effect of the two-party system. While third parties play a more effective and influential role with fusion, two major parties continue to dominate the political landscape. In New York, the minor fusion parties play an important and valuable role in structuring elections, but elections overwhelmingly remain a contest between a Democrat and a Republican. Similarly, during the nineteenth century, there were never more than two major parties for any sustained period of time, although there were occasional shifts in *which* two parties were the major parties (such as when the Republican Party emerged to replace the Whigs). Fusion can improve our democracy by increasing the role of third parties, but it will not change the fact that the system is biased towards providing a choice between only two major candidates with a realistic chance of winning.

CONCLUSION

Fusion is not a panacea, but it does improve elections. When fusion was widespread, it contributed to a variety of salutary goals, including mobilizing voters, providing expression for underrepresented views, and improving competition. In New York, it continues to improve elections. Other states should learn from the positive example and legalize fusion.

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