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## 'Anti-Fusion Voting' Laws and the Problem With a Two-Party System

By Udi Ofer | July 17, 2023 at 09:00 AM

What do former Gov. Christine Todd Whitman, five former members of Congress (two Republicans and three Democrats), the ACLU of New Jersey, the Brennan Center, the Cato Institute, the Rainey Center, and the Libertarian Party of New Jersey, along with a top Democratic election lawyer and a former Bush administration legal counsel all have in common?

At first glance, one might say, nothing at all. In fact, this unusual group—along with top scholars from Princeton, Rutgers and elsewhere—are on the same side of a question that will likely soon be before the New Jersey Supreme Court: whether the state's century-old laws preventing political parties from cross-nominating candidates on the ballot violate the New Jersey Constitution. These “anti-fusion voting” laws are being challenged by a group of disaffected Republican and independent voters and the New Jersey Moderate Party. All New Jerseyans who worry about growing polarization in America should be paying close attention.

At issue is the Moderate Party's desire to use its ballot line to nominate its preferred candidates; they're a sensible group and want to put their support behind candidates who actually can win, not protest candidates who could spoil the race. Yet, when such candidates also secure the nomination of the Democratic or Republican Party, the anti-fusion laws keep the Moderate Party's nomination off the ballot. In effect, the two political parties have a monopoly over voter choice. Hence, the legal challenge by the Moderate Party.

The amici that have been filed in support of the suit show that there's something going on here that's more than just a strange-bedfellow convergence of interests and potentially a gust of fresh air into our stalemated political debate. The diversity and breadth of attention points to the importance of the case and its potential to address barriers that have led to the growing dysfunction of America's two-party system.

Start with the bipartisan brief from former House Majority Leader Richard Gephardt (D-MO) and several other former members of Congress who represented the vanishing middle of the political spectrum. They lead with a point central to the case: anti-fusion laws artificially smother

the collective voice of moderate voters, a pivotal group in American politics. Without the ability to cross-nominate candidates, a minor party like the New Jersey Moderate is left with Hobson's choice: to nominate stand-alone candidates who cannot win, while risking "spoiling" the election by siphoning votes away from major party candidates. Meanwhile, without a constructive way for the center of the electorate to express their preferences, polarization between the two major parties threatens the stability of our democracy.

Fusion voting offers a voice for voters whose views are not represented in American politics. The Cato Institute and the Rainey Center, two think tanks that tilt toward the libertarian right, joined by Gov. Whitman, zero in on how New Jersey's anti-fusion laws improperly constrain individual and collective political expression. Noting the importance of the "free market exchange of political ideas and viewpoints," these groups emphasize how party affiliation and candidate nominations are central to political expression. "The right to associate with others for the common advancement of political beliefs and ideas is a fundamental one," the New Jersey Supreme Court held in *Friedland v. State*, 149 N.J. Super. 483 (1977) 374 A.2d 60, and the brief points to several examples where the court struck down or interpreted laws because they limited voters' or parties' associational rights.

Similar points are made by Princeton University scholar Nolan McCarty, writing alongside Seth Masket and Hans Noel, two distinguished political scientists who specialize in the role of parties in American society. They emphasize how much the New Jersey Constitution offers broad protections for individuals' associational and expressive rights, and zero in on why denying smaller parties the ability to nominate any candidate of their choice—including cross-nominating major party candidates—is so debilitating to freedom of association and expression.

A group of historians point out in their amicus that fusion voting was the norm in American politics for much of the 19th century. They explain that minor parties long-served as viable political forces representing policy perspectives and social movements that were not accommodated by the dominant political parties. In particular, they highlight how abolitionist minor parties in the 1840s and 1850s and minor parties promoting economic populism at the end of the century each used fusion to successfully advance their goals. Anti-fusion voting laws came as a backlash to the successes of these social movements.

In her amicus, the prominent legal scholar Tabatha Abu El-Haj tackles the U.S. Supreme Court's 1997 *Timmons v. Twin Cities Area New Party* (520 U.S. 351) ruling, which upheld Minnesota's ban on fusion voting on a federal constitutional challenge. She makes two key points. First, that the *Timmons* majority failed to recognize "a minor party's strong association interests in nominating its own standard bearer," treating parties simply as vehicles for political speech and ignoring how they are "primarily mechanisms for organizing political activity." Second, she hammers at the majority's claim that anti-fusion laws may be justified by the state's interest in shoring up the two-party system because of the political stability that system supposedly creates. "That finding," she writes, "was simply wrong."

The New Jersey Libertarian Party sets forth a compelling argument as to why “the historical background of fusion voting, the clear political motivation for anti-fusion laws, and the extremely adverse effect those laws have had on minor parties argue powerfully for their invalidation.” This is “a matter of principle” to the Libertarian Party, which “believes that the First Amendment guarantees individuals the right to organize, identify, associate, and vote for minor parties and that minor parties should be free to nominate any qualified candidate of their choosing, even if that candidate is nominated by another political party.”

The ACLU of New Jersey weighs in with an amicus co-authored by two of the state’s leading legal scholars, Bob Williams, the longtime director of the Center for State Constitutional Studies at Rutgers, and Ronald Chen, the recent co-dean of Rutgers Law School and a former New Jersey public advocate. Their brief argues that not only was the U.S. Supreme Court wrong in its Timmons decision, but “New Jersey courts have long recognized that the right to vote encompasses not just the right to mark a ballot, but the right to freely choose for whom to vote and to make one’s choice meaningful and effective.”

The Brennan Center for Justice delves deeply into the history and intent of a unique provision in the New Jersey Constitution guaranteeing voters’ the right to assemble and “make opinions known to their representatives.” In the Brennan Center’s view, “the Assembly Clause not only operates independently from speech, press, and petition rights, but it also reflects a specific interest in protecting those who gather together for reasons of political participation and representative government, including those who wish to convey their preferences by supporting minor parties.”

Our legal tradition is premised upon equal opportunity for political participation, respect for groups of like-minded citizens working together to advance their shared goals, and a conviction that the government has no business telling us what to believe or whom to support. These foundational principles are under strain today, as many in the New Jersey electorate want more meaningful choices at the ballot but the anti-fusion laws force them to support the two major parties or throw away their vote on a third-party protest candidate. Together, these amici provide a solid foundation for the New Jersey Supreme Court to consider the constitutionality of these restrictions.

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