A Path to Multiparty Democracy

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Americans are sick of the two-party system. Yet, in almost every state, a crucial ballot-access restriction denies them any meaningful alternative. A century ago, state legislatures—controlled by the two major parties—passed laws that banned fusion voting, in which a candidate could appear on the ballot as the nominee of more than one party. Recently, minor parties have filed lawsuits in states around the country, alleging that anti-fusion laws violate state constitutional provisions that protect the rights of voters, parties, and candidates. This Article surveys the challenges and opportunities that these lawsuits present for state courts—and explains how they could set the United States on a path toward becoming a vibrant multiparty democracy.

Fusion lawsuits are testing state courts. Will these courts use judicial review to ensure an open electoral process and put into action the pro-democracy principle that animates state constitutions? Will they independently interpret state constitutional rights and freedoms, despite the United States Supreme Court having held in Timmons v. Twin Cities Area New Party *that the First Amendment does not protect fusion voting?*

In principle, state courts should pass these tests with flying colors. By barring candidates from accepting the nomination of more than one party, anti-fusion laws violate a range of state constitutional provisions: the grounding of government in popular sovereignty; the right to vote; the right to free, equal, and open elections; the right to assemble, consult for the common good, and instruct elected representatives; and the freedom of political association. Rather than adopting the deferential approach of Timmons*, state courts should rigorously and realistically review the true burdens of anti-fusion laws and the actual, partisan interests they serve.*

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By allowing state-level experiments with fusion, state courts could demonstrate how the Supreme Court erred in Timmons*. Permitting fusion to flourish in the states could set a path toward overturning* Timmons*—and making the entire United States a robust and thriving multiparty democracy.*

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I. INTRODUCTION

Americans are discontent with democracy—at least as we know it.[1] The two-party system is central to our complaints.[2] In recent polls, more than half of all Americans and about two-thirds of independents have expressed dissatisfaction with our two-party system and desire for more choices.[3] As the two-party system becomes increasingly polarized,[4] observers have warned that

[1] *See* PEW RSCH. CTR., AMERICANS' DISMAL VIEWS OF THE NATION'S POLITICS 5–6 (2023), https://www.pewresearch.org/wp-content/uploads/sites/20/2023/09/PP_2023.09.19_views-of-politics_REPORT.pdf [https://perma.cc/VKT2-XTMC] (reporting that 63% of Americans surveyed "express not too much or no confidence at all in the future of the U.S. political system" and that 65% "say they always or often feel exhausted when thinking about politics"); Jeffrey M. Jones, *Satisfaction with U.S. Democracy Edges Up from Record Low*, GALLUP (Jan. 22, 2025), https://news.gallup.com/poll/655220/satisfaction-democracy-edges-record-low.aspx [https://perma.cc/7K9P-6D6F] (reporting that "[m]ost Americans, 61%, remain dissatisfied with the way democracy is working in the U.S." and that levels of satisfaction remain only slightly higher than the record-low figure of 28% recorded in 2024). Satisfaction with democracy among Americans has been slipping for decades. *Id.*

[2] The Pew Research Center reports that as of 2023, two-thirds of Americans feel the statement "I often wish there were more political parties to choose from" describes their views extremely, very, or somewhat well, and 28% have unfavorable views of both major parties (a figure that has more than quadrupled since the mid-1990s). PEW RSCH. CTR., *supra* note 1, at 10–11.

[3] IPSOS, REUTERS/IPSOS JANUARY 2024 ELECTION SURVEY: TOPLINE AND METHODOLOGY 5 (2024), https://www.ipsos.com/sites/default/files/ct/news/documents/2024-01/Reuters%20Ipsos%20News%20Issue%20Poll%201%20January%202024%20Topline.pdf [https://perma.cc/D7BK-J35N] (finding that 60% of independent respondents and 52% of all respondents agree with the statement "I am not satisfied by the two-party system of American politics, and I want a third choice"); Mary Claire Evans, *Support for a Third Political Party in the U.S. Dips to 58%*, GALLUP (Oct. 1, 2024), https://news.gallup.com/poll/651278/support-third-political-party-dips.aspx [https://perma.cc/83UL-GFW6] (reporting that 58% of adults surveyed and 69% of independents "agree that a third major party is needed"). People who identify as independent are particularly prone to wanting more parties. Pew found in 2022 that 48% of independent and non-aligned respondents said that "wishing they had more parties to choose from describes their views extremely (29%) or very well (19%)." PEW RSCH. CTR., AS PARTISAN HOSTILITY GROWS, SIGNS OF FRUSTRATION WITH THE TWO-PARTY SYSTEM 31 (2022) [hereinafter AS PARTISAN HOSTILITY GROWS], https://www.pewresearch.org/wp-content/uploads/sites/20/2022/08/PP_2022.09.08_partisan-hostility_REPORT.pdf [https://perma.cc/5XMH-H3DD].

[4] Nathan J. Canen, Chad Kendall & Francesco Trebbi, *Political Parties as Drivers of U.S. Polarization: 1927-2018*, at 5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28296, 2020) ("[T]he U.S. Congress is currently in a period of unprecedented ideological polarization and of strong party discipline.").

the country could spiral into a "two-party doom loop"—resulting in political instability and possibly the breakdown of democracy itself.[5]

Indeed, as this Article goes to press, it appears that polarization may be fueling a democratic and constitutional crisis. In the first weeks of the second Trump Administration, President Trump and his billionaire backer Elon Musk took a wave of actions that flouted existing limits on executive power.[6] These triggered warnings of a constitutional crisis and a radical remaking of our constitutional order.[7] And while the Framers might have imagined Congress would respond to check a President's arrogation of power,[8] partisan polarization

[5] *See* LEE DRUTMAN, BREAKING THE TWO-PARTY DOOM LOOP: THE CASE FOR MULTIPARTY DEMOCRACY IN AMERICA 14 (2020). Research suggests that, once polarization rises to high levels, it is extremely difficult to defuse without some sort of systemic shock. *See* Jennifer McCoy, Benjamin Press, Murat Somer & Ozlem Tuncel, *Reducing Pernicious Polarization: A Comparative Historical Analysis of Depolarization*, CARNEGIE ENDOWMENT FOR INT'L PEACE (May 5, 2022), https://carnegieendowment.org/research/2022/05/reducing-pernicious-polarization-a-comparative-historical-analysis-of-depolarization [https://perma.cc/CP9B-FPFA]; *see also* Monty G. Marshall & Benjamin R. Cole, Societal-System Analytics and the Problem of Factionalism in Emerging (and Declining) Democracies 4 (paper prepared for the 2012 Joint Meeting of the International Studies and British International Studies Associations, Edinburgh, Scotland, June 22, 2012, rev. Aug. 2022), https://www.systemicpeace.org/vlibrary/SEHfactionalismMGMarshallBRColev1Aug2022.pdf [https://perma.cc/STQ7-RQTK] ("[T]he presence of factionalism presents a very high, risk factor for the onset of political instability . . . .").

[6] *See* Lisa Mascaro, *Trump and Musk's Dismantling of Government Is Shaking the Foundations of US Democracy*, AP, https://apnews.com/article/trump-musk-doge-congress-4e0c025629e8a0c758d13dc916ab4f43 [https://perma.cc/45YZ-KNXY] (Feb. 5, 2025) (describing unilateral actions to shutter agencies created by Congress and impound congressionally appropriated funds, and quoting a longtime advisor to conservative Republicans as describing these acts as "an erosion of our democracy").

[7] *See* Press Release, Am. Const. Soc'y, More than 950 Law Scholars Sound Alarm on Constitutional Crisis (Feb. 26, 2025), https://www.acslaw.org/press_release/more-than-950-law-scholars-sound-alarm-on-constitutional-crisis [https://perma.cc/VLB5-X2FD]; Bob Bauer & Jack Goldsmith, *The Trump Executive Orders as "Radical Constitutionalism*,*"* EXEC. FUNCTIONS (Feb. 3, 2025), https://executivefunctions.substack.com/p/the-trump-executive-orders-as-radical [https://perma.cc/YMC3-CPRY] (assessing the possibility that "the administration doesn't care about compliance with current law, might not care about what the Supreme Court thinks either, and is seeking to effectuate radical constitutional change"); Jonathan Chait, *The Constitutional Crisis Is Here*, ATLANTIC (Feb. 4, 2025), https://www.theatlantic.com/politics/archive/2025/02/trump-musk-congress-constitution/681568; Jamelle Bouie, *There Is No Going Back*, N.Y. TIMES (Feb. 5, 2025), https://www.nytimes.com/2025/02/05/opinion/trump-musk-federal-government.html (observing that "'[c]onstitutional crisis' does not even begin to capture the radicalism of what is unfolding in the federal bureaucracy and of what Congress's decision not to act may liquidate in terms of constitutional meaning").

[8] James Madison famously argued that each branch of the national government would possess a "will of its own" that would enable "[a]mbition . . . to counteract ambition." THE FEDERALIST NO. 51, at 321–22 (James Madison) (Harold C. Syrett ed., 1962).

seemed to motivate the decision of many congressional Republicans to simply shrug and go along.[9]

Our democratic system, driven by radical partisans possibly to the edge of breakdown, has too long left Americans with a range of bad options. Many of us have followed party elites down the path of polarization—and have learned to hate one another.[10] Some of us, disgusted, have chosen simply not to vote.[11] Others cast ballots for third-party candidates even though election rules typically render such votes wasted, even irrational.[12] Given our system, voting

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[9] Deirdre Walsh, *Republicans in Congress Mostly Shrug as Musk and DOGE Set Sights on Spending*, NPR (Feb. 5, 2025), https://www.npr.org/2025/02/05/nx-s1-5286426/congress-republicans-musk-doge-usaid [https://perma.cc/8434-SBXT] (reporting that Republican Senator Thom Tillis of North Carolina "did acknowledge that an executive branch move to turn off a federal agency 'runs afoul of the Constitution in the strictest sense.' But he argued that . . . . 'It's not uncommon for presidents to flex a little bit on where they can spend and where they can stop spending . . . . Nobody should bellyache about that.'"). Some observers warned of how polarization could undo the balance of powers essential to maintaining our constitutional and democratic system. *See, e.g.*, David M. Driesen, *Donald Trump and the Collapse of Checks and Balances*, 77 SMU L. REV. F. 199, 206 (2024) ("With the party largely purged of those who favor institutions over the cult of personality surrounding Trump, Republican members of Congress may very well line up to support Trump no matter how egregiously he violates democratic norms. Congress will largely cease to function as a check on presidential power because of partisan polarization."); *see also* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2312 (2006) ("The Framers had not anticipated the nature of the democratic competition that would emerge in government and in the electorate. Political competition and cooperation along relatively stable lines of policy and ideological disagreement quickly came to be channeled not through the branches of government, but rather through an institution the Framers could imagine only dimly but nevertheless despised: political parties. As competition between the legislative and executive branches was displaced by competition between two major parties, the machine that was supposed to go of itself stopped running.").

[10] Polling has documented how Americans who identify with and lean toward one party increasingly have negative views of members of the opposing party. *See* AS PARTISAN HOSTILITY GROWS, *supra* note 3, at 54–55.

[11] *See* Lee Drutman, William A. Galston & Tod Lindberg, *Spoiler Alert: Why Americans' Desires for a Third Party Are Unlikely to Come True*, *in* DYNAMICS OF AMERICAN DEMOCRACY: PARTISAN POLARIZATION, POLITICAL COMPETITION, AND GOVERNMENT PERFORMANCE 254, 274 (Eric M. Patashnik & Wendy J. Schiller eds., 2021) (noting that if nonvoters were a party, that party would have "outperformed Republicans and Democrats in every election for more than a century. . . . Consistently, between 40 and 50 percent of eligible adults have stayed home, while only between one-quarter and one-third of voters have supported Democrats or Republicans."). Nonvoters have many reasons for abstaining, but the top reasons are that they think their vote doesn't matter or they don't like the candidates. KNIGHT FOUND., THE 100 MILLION PROJECT: THE UNTOLD STORY OF AMERICAN NON-VOTERS 8 (2020), https://knightfoundation.org/wp-content/uploads/2020/02/The-100-Million-Project_KF_Report_2020.pdf [https://perma.cc/TT3W-H3EQ].

[12] Political scientist Gary Cox, in explaining why first-past-the-post, single-member districts will tend to produce a two-party system, flagged several factors, including that short-

third party is not without risk. Third-party candidates who receive significant support can act as "spoilers."[13] Before Robert F. Kennedy Jr. dropped out of the race, and as No Labels considered running a centrist candidate, some observers warned that "success" for such candidates could result in a contingent election and a constitutional crisis.[14]

How did we get to this point—and is there a better path forward? In part, American voters face a structural problem. Single-member districts with first-past-the-post elections will inevitably favor the dominance of two major parties.[15] This system dynamic is so powerful that political scientists have called it a law.[16] One alternative would be to adopt proportional representation.[17]

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term instrumental rationality tends to push voters to support one of the two front-runners rather than a third-party candidate. *See* GARY W. COX, MAKING VOTES COUNT: STRATEGIC COORDINATION IN THE WORLD'S ELECTORAL SYSTEMS 77 (1997).

[13] Ralph Nader's effect on the margin of victory in Florida is often cited, and debated, as perhaps the most important third-party "spoiler" candidate in the modern political era. *See, e.g.*, Thomas R. Hochschild Jr. & Michael Wallace, *Three's a Crowd? The Nader Vote in the 2000 Presidential Election in U.S. Metropolitan Areas*, 48 SOC. SCI. J. 575, 576 (2011) ("It is well-documented that had Nader not been in the race, Gore probably would have won the states of Florida and New Hampshire, either of which would have secured the presidency for Gore."); *cf.* Michael C. Herron & Jeffrey B. Lewis, *Did Ralph Nader Spoil Al Gore's Presidential Bid? A Ballot-Level Study of Green and Reform Party Voters in the 2000 Presidential Election*, 2 Q.J. POL. SCI. 205 (2007) (finding that Nader voters were more evenly split than often supposed, meaning they served as spoilers only because the Florida race was already extremely close). Robert F. Kennedy Jr. was a potential spoiler in the 2024 presidential election. *See* Elaine Kamarck & Elizabeth Smith, *Will Robert F. Kennedy Be a Spoiler in the Presidential Race?*, BROOKINGS (Apr. 15, 2024), https://www.brookings.edu/articles/will-robert-f-kennedy-be-a-spoiler-in-the-presidential-race [https://perma.cc/3N7D-4E2P].

[14] *See* Kamarck & Smith, *supra* note 13; UNITED TO PROTECT DEMOCRACY, THE RISK OF A CONTINGENT ELECTION: HIDDEN DANGERS IN THE 2024 RACE FOR THE WHITE HOUSE 3 (2023), https://unitedtoprotectdemocracy.org/contingentelection.pdf [https://perma.cc/F96W-BP3E] ("A contingent election could be triggered by any third party winning electors and preventing a majority in the Electoral College." (emphasis omitted)).

[15] Barry C. Burden, *Ballot Regulations and Multiparty Politics in the States*, 40 PS: POL. SCI. & POL. 669, 669 (2007).

[16] *See* William H. Riker, *The Two-Party System and Duverger's Law: An Essay on the History of Political Science*, 76 AM. POL. SCI. REV. 753, 754 (1982).

[17] *See, e.g.*, Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Why PR Suits a Racially Diverse Nation*, DEMOCRACY, https://democracyjournal.org/magazine/70/why-pr-suits-a-racially-diverse-nation [https://perma.cc/9GXT-6X6V]. Others see parties as the problem and would decrease their power through reforms such as ranked-choice voting or a top-two primary. *See, e.g.*, *Ranked Choice Voting*, FAIRVOTE, https://fairvote.org/our-reforms/ranked-choice-voting [https://perma.cc/7XJH-RRXA] (describing ranked-choice voting as "the fastest-growing voting reform in the nation"); RICHARD BARTON, UNITE AM. INST., CALIFORNIA'S TOP-TWO PRIMARY: THE EFFECTS ON ELECTORAL POLITICS AND GOVERNANCE 3–4 (2023). These reforms have gained traction around the country; ranked-choice voting has been adopted in more than fifty U.S. jurisdictions. *See* FAIRVOTE, RANKED CHOICE VOTING: A FAIRVOTE GUIDE 2 (2025), https://fairvote.app.box.com/s/srd6c8ldpii7j94o9vkdxldcac3yjd30.

Although some reformers have proposed such a move, it remains unclear how to get from here to there.[18]

It is possible, however, to give voters more viable choices even within the structure of single-member districts and plurality voting. With fusion voting, candidates may accept the nomination of more than one party and then appear on the ballot next to the name of each party.[19] This lets voters choose to vote for the candidate as the nominee of either party—a simple solution that reduces the problem of spoiled and wasted votes[20] while letting people make known their broad policy preferences to their elected representatives.[21]

Although little known today, fusion has a storied past. For much of American history, fusion was both legal and commonplace.[22] From the 1800s into the early twentieth century, it played an important part in how Americans elected their representatives and in relations between parties, candidates, and voters.[23] Minor parties backing fusion candidates played a significant role in American political life, from opposing slavery before the Civil War,[24] to forging a multiracial coalition opposed to white supremacy in the South during

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[18] *Cf.* DRUTMAN, *supra* note 5, at 9; Paul A. Diller, *Toward Fairer Representation in State Legislatures*, 33 STAN. L. & POL'Y REV. 135, 170 (2022) (advocating for a bill that would reform state legislatures through multimember districts and ranked-choice voting); SCOTT MAINWARING & LEE DRUTMAN, THE CASE FOR MULTIPARTY PRESIDENTIALISM IN THE US: WHY THE HOUSE SHOULD ADOPT PROPORTIONAL REPRESENTATION 6 (2023). Some have also argued that proportional representation, at least in Congress, is not a worthwhile goal. *See, e.g.*, Richard H. Pildes, *Skepticism About Proportional Representation for Congress*, 2024 U. ILL. L. REV. 1529, 1532.

[19] *See* Cyrena Kokolis, Chris Parr & Beau Tremitiere, *Fusion Voting, Explained*, PROTECT DEMOCRACY (Dec. 19, 2023), https://protectdemocracy.org/work/fusion-voting-explained [https://perma.cc/M3E7-PZKY].

[20] Nicholas Stephanopoulos has noted that if one values alignment between voters' preferences and the outcomes of elections, anti-fusion laws have "perverse" effects because "they outlaw a practice that has at least some capacity to avoid spoilers." NICHOLAS O. STEPHANOPOULOS, ALIGNING ELECTION LAW 164 (2024).

[21] *See, e.g.*, Lee Drutman, *The Case for Fusion Voting and a Multiparty Democracy in America*, NEW AM., https://www.newamerica.org/political-reform/reports/the-case-for-fusion-voting-and-a-multiparty-democracy-in-america [https://perma.cc/M9KK-ER5C] (Sept. 29, 2022); Oscar Pocasangre & Maresa Strano, *What We Know About Fusion Voting*, NEW AM., https://www.newamerica.org/political-reform/reports/what-we-know-about-fusion-voting [https://perma.cc/4FS7-EZVC] (July 16, 2024) ("The vote shares obtained from the minor party lines can inform major parties about the popularity of the platforms of minor parties [and] what direction voters want the party to move toward . . . .").

[22] Peter H. Argersinger, *"A Place on the Ballot": Fusion Politics and Antifusion Laws*, 85 AM. HIST. REV. 287, 288 (1980).

[23] *See id.* at 303 n.48 (describing the collapse of support for third parties after the enactment of anti-fusion laws in the early 1900s and describing a few short-lived examples of third parties that were "based on the appeal of a dominant personality"); *see also* ADAM SLEZ, THE MAKING OF THE POPULIST MOVEMENT: STATE, MARKET, AND PARTY ON THE WESTERN FRONTIER 13 (2020).

[24] *See* Corey M. Brooks & Beau C. Tremitiere, *Fusing to Combat Slavery: Third-Party Politics in the Pre-Civil War North*, 98 ST. JOHN'S L. REV. 339, 341–42 (2024).

Reconstruction,[25] to promoting monetary policies that could support farmers devastated by economic depression following the Panic of 1893.[26]

Where it exists today, most prominently in New York and Connecticut, fusion offers a vision of what a well-functioning multiparty democracy could look like in the United States.[27] It offers a way to deliver what so many Americans want: more and better choices than what the two major parties alone provide.[28] Rather than taking parties as the problem, fusion seeks to strengthen the party *system* in a way that allows parties to play a vital role in channeling voter preferences, building coalitions, and disciplining candidates.[29] Rather than

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[25] *See* Ronnie W. Faulkner & Jane Shaw Stroup, *Fusion Politics*, N.C. HIST. PROJECT, https://northcarolinahistory.org/encyclopedia/fusion-politics [https://perma.cc/PM5K-BVVJ].

[26] *See* SLEZ, *supra* note 23, at 12–13 (describing how the Populist Party used fusion to promote free-silver economic policy in the 1890s); *see also* Jeff Berryhill & Ian Gavigan, *Fusion Voting and a Case Study in Restrictive Two-Party Politics*, 76 RUTGERS U.L. REV. 913, 929 (2024).

[27] *See* Pocasangre & Strano, *supra* note 21, at 8.

[28] Although the 2024 presidential campaign ultimately narrowed to the standard choice between two major-party candidates, that is unlikely to signal an end to Americans' desire for more choices. A dynamic of "double haters"—voters dissatisfied with the candidates of both major parties—appeared to fuel the dynamics of the election. *See* Nate Cohn, *If Harris Is the Nominee, It Still Won't Be Easy to Beat Trump*, N.Y. TIMES, https://www.nytimes.com/2024/07/22/upshot/kamala-harris-polls-trump.html (July 23, 2024) (observing that double-hater voters were likely to decide the election). And some indications point to moderates and independents remaining eager for other options. Senator Joe Manchin, for example, commented that "I want the middle to have a voice . . . . We're not extreme left, we're not extreme right. I don't run my life that way. Why do I have to only have two choices of a party?" Andrew Howard, *Manchin Ends His Brief Flirtation with Presidential Bid*, POLITICO (July 22, 2024), https://www.politico.com/live-updates/2024/07/22/kamala-harris-campaign-biden-drop-out/joe-manchin-run-for-president-00170269. And frustration is not limited to septuagenarians from West Virginia. Surveys and anecdotal data alike suggest that Gen Z voters are particularly disaffected with the two major parties. *See A Political and Cultural Glimpse into America's Future: Generation Z's Views on Generational Change and the Challenges and Opportunities Ahead*, PUB. RELIGION RSCH. INST. (Jan. 22, 2024), https://www.prri.org/research/generation-zs-views-on-generational-change-and-the-challenges-and-opportunities-ahead-a-political-and-cultural-glimpse-into-americas-future/#page-section-0 [https://perma.cc/VY42-ULBE] (reporting that over half of Gen Z teens, the younger members of that generation, do not identify with a major party); Sam Mondros & Jillian D'Onfro, *'Which One Is Trump?' Gen Z on How They Voted—Or Why They Didn't*, S.F. STANDARD (Nov. 7, 2024), https://sfstandard.com/2024/11/07/gen-z-kamala-harris-2024-voting-berkeley-sf-state [https://perma.cc/LVP4-SRWC] (reporting on an eighteen-year-old Californian who voted for a socialist candidate as a protest against a two-party system).

[29] *See* COMM. ON POL. PARTIES, AM. POL. SCI. ASS'N, TOWARD A MORE RESPONSIBLE TWO-PARTY SYSTEM 90–91 (1950); AM. POL. SCI. ASS'N PRESIDENTIAL TASK FORCE ON POL. PARTIES, MORE THAN RED AND BLUE: POLITICAL PARTIES AND AMERICAN DEMOCRACY 33 (2023) [hereafter MORE THAN RED AND BLUE]; *see also* Tabatha Abu El-Haj & Didi Kuo, *Associational Party-Building: A Path to Rebuilding Democracy*, 122 COLUM. L. REV. F. 127, 133–34 (2022); Lee Drutman, *More Parties, Better Parties: The Case for Pro-Parties Democracy Reform*, NEW AM., https://www.newamerica.org/political-reform/reports/more-parties-better-parties [https://perma.cc/N3F8-LTMM] (July 3, 2023).

fomenting fragmentation, fusion incentivizes coalition-building between parties, and by opening a path for moderate third parties to emerge and gain power, it offers a plausible antidote to escalating polarization.[30]

There's just one problem: fusion remains illegal in nearly every state. This is arguably the result of its success. Precisely because fusion made possible a vibrant multiparty system that offered voters a range of choices through the 1800s, it posed a threat to the two major parties. So, beginning in the late 1800s and continuing through the 1920s, state legislatures dominated by those major parties acted to outlaw fusion.[31] Although proponents pitched anti-fusion laws as nonpartisan, good-government reforms, their motives and effects were plainly partisan.[32] These laws helped to eliminate minor parties as a viable threat to the Democratic and Republican parties and set American democracy on a new path.[33] Much to many voters' frustration, these laws still define the experience of elections for most Americans today.[34]

From time to time, reformers have tried to chart a path back to the multiparty democracy that fusion enabled. State legislators, unsurprisingly, have been unreceptive. Incumbents from the two major parties have little incentive to change laws that entrench their power.[35] In some states, citizen-initiated ballot

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[30] *See* Pocasangre & Strano, *supra* note 21, at 6–7 (explaining how fusion helps to create and sustain coalitions between parties while creating a potential pathway for moderate parties to counteract polarization).

[31] *See* Argersinger, *supra* note 22, at 301–03; SLEZ, *supra* note 23, at 227 ("[T]he success of the People's Party contributed to the subsequent decline in party competition by creating a target that could be readily suppressed using the same institutional tools that it helped to create. This is precisely what happened as anti-fusion laws became commonplace throughout the country.").

[32] *See* Adam Winkler, *Voters' Rights and Parties' Wrongs: Early Political Party Regulation in the State Courts, 1886–1915*, 100 COLUM. L. REV. 873, 894 (2000).

[33] On path dependence in politics, see Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 258 (2000). Political scientist Bernard Tamas, in a revisionist account, has contended that anti-fusion laws did not have much effect on the frequency of fusion candidacies or the strength of third parties. *See* Bernard Tamas, *Does Fusion Undermine American Third Parties? An Analysis of House Elections from 1870 to 2016*, 39 NEW POL. SCI. 609, 610–11 (2017). However, Tamas's account does not reckon with the fact that, as Peter Argersinger notes, "[f]usion occurred most often in local and state-legislative contests." Argersinger, *supra* note 22, at 296 (describing such dynamics in Michigan in the 1890s); *see also* Berryhill & Gavigan, *supra* note 26, at 926 (noting the particular strength of the fusion-practicing Populist Party in state and local elections).

[34] Argersinger, *supra* note 22, at 303 ("By preventing effective fusion, antifusion laws also brought an end to another major characteristic of late nineteenth-century politics—the importance and even existence of significant third parties.").

[35] *See* Marcus Kreuzer, *How Party Systems Form: Path Dependency and the Institutionalization of the Post-War German Party System*, 39 BRIT. J. POL. SCI. 669, 673 (2009).

measures could, at least in principle, offer an avenue for relegalizing fusion.[36] Yet, to date, initiatives have not provided a path back to electoral fusion, perhaps because the reform is difficult to explain to voters—particularly in the face of incumbents who use their control over the initiative process to frame issues in ways that stifle reform.[37] And so, for a century, anti-fusion laws have remained on the books.

Some reformers have looked instead to the courts. Fusion lawsuits have come in three waves. The first, soon after the laws' enactment, resulted in many state courts blessing fusion bans as constitutional.[38] A few states proved the exception to the rule.[39] In 1911, for example, New York's highest court struck down a newly enacted fusion ban.[40] Today, fusion voting plays a major role in New York state politics.[41] Minor parties use the practice to gain and maintain significant support, and they shape how coalitions emerge and policymaking happens in Albany.[42]

The 1990s saw a second wave of fusion lawsuits. Newly formed minor parties sought to nominate fusion candidates and, when denied, took their claims to federal court.[43] Cases brought by the Patriot Party in Pennsylvania, the Labor-Farm Party in Wisconsin, and the New Party in Minnesota led the Third,

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[36] Citizen-initiated ballot measures exist in one form or another in twenty-six states. *States with Initiative or Referendum*, BALLOTPEDIA, https://ballotpedia.org/States_with_initiative_or_referendum [https://perma.cc/AN9T-B5KH]. When it comes to addressing the scourge of partisan gerrymandering, such measures have had some success; at least fifteen states have created redistricting commissions either directly through a citizens' initiative or by a ballot measure that referred the topic to the legislature. *See Creation of Redistricting Commissions*, NAT'L CONF. OF STATE LEGISLATURES, https://ncsl.org/redistricting-and-census/creation-of-redistricting-commissions [https://perma.cc/94FN-J7NU] (Dec. 10, 2021).

[37] For example, proponents of independent redistricting commissions have made some progress by using voter initiatives, but they have faced increased opposition from organized opponents who have designed ballot language to undercut popular support. *See, e.g.*, Sam Levine, *Electoral Reform Was on the Ballot in Several States This Election. Why Did These Measures Fail?*, GUARDIAN (Nov. 15, 2024), https://www.theguardian.com/us-news/2024/nov/15/electoral-reform-ballot-measures [https://perma.cc/D8DR-6ZUN].

[38] *See, e.g.*, State v. Anderson, 76 N.W. 482, 487 (Wis. 1898).

[39] In addition to New York, California's supreme court struck down an anti-fusion law in *Murphy v. Curry*, 70 P. 461, 464 (Cal. 1902). In New Jersey, the state supreme court was also clear that anti-fusion laws violated the state's constitution. *See In re* City Clerk of Paterson, 88 A. 694, 695–96 (N.J. 1913).

[40] *See* Hopper v. Britt, 96 N.E. 371, 375 (N.Y. 1911).

[41] *See* Oscar Pocasangre, *Fusion Voting in New York and Connecticut*, NEW AM., https://www.newamerica.org/political-reform/reports/the-realistic-promise-of-multiparty-democracy-in-the-united-states/fusion-voting-in-new-york-and-connecticut-an-analysis-of-congressional-races-from-19762022-oscar-pocasangre [https://perma.cc/FPR5-P5FM] (Jan. 9, 2024).

[42] Molly Ball, *The Pugnacious, Relentless Progressive Party That Wants to Remake America*, ATLANTIC (Jan. 7, 2016), https://www.theatlantic.com/politics/archive/2016/01/working-families-party/422949.

[43] MICAH L. SIFRY, SPOILING FOR A FIGHT: THIRD-PARTY POLITICS IN AMERICA 11, 245 (2002).

Seventh, and Eighth Circuits to split on whether anti-fusion laws violated the First Amendment's protection for freedom of association.[44] In 1997, the U.S. Supreme Court upheld Minnesota's anti-fusion law in *Timmons v. Twin Cities Area New Party*.[45] Although the Court in *Timmons* was deeply divided, it seemed for a time that this could be the end of the road for relegalizing fusion via the courts.[46]

Meanwhile, political polarization kept getting worse. The *Timmons* majority had grounded its reasoning on the premise that a two-party system supports political stability.[47] Yet growing polarization and popular discontent rendered that assumption ever less plausible. The storming of the U.S. Capitol on January 6, 2021, would eventually underscore the threat that a polarized two-party system poses to democratic stability.[48]

A generation after *Timmons*, state courts have begun to hear a third wave of fusion lawsuits. In 2015, a candidate for the Pennsylvania General Assembly sought to accept the nomination of both the Democratic and Working Families parties.[49] This teed up a challenge to Pennsylvania's anti-fusion law. Four years later, the Pennsylvania Supreme Court held in a 4–3 decision that the law did not violate the state constitution.[50]

Despite ending in defeat, the Pennsylvania suit established a new model, which soon spread. In 2022, U.S. Representative Tom Malinowski, a Democratic incumbent, sought to accept the nomination of the New Jersey Moderate Party and appear in the general election as the candidate of both parties.[51] When the New Jersey secretary of state denied his petition, Malinowski, the Moderate Party, and voters filed suit in state court.[52] Although

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[44] *See* Patriot Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections, 95 F.3d 253, 256 (3d Cir. 1996); Swamp v. Kennedy, 950 F.2d 383, 384 (7th Cir. 1991); Twin Cities Area New Party v. McKenna, 73 F.3d 196, 200 (8th Cir. 1996).

[45] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 353–54 (1997).

[46] *See, e.g.*, Joel Rogers, *Two-Party System: Pull the Plug*, 52 ADMIN. L. REV. 743, 755 (2000) ("I take the political implication of *Timmons* to be that those looking to break the duopoly should probably not look to the present judiciary.").

[47] *Timmons*, 520 U.S. at 366–67.

[48] *See* NATHAN P. KALMOE & LILLIANA MASON, RADICAL AMERICAN PARTISANSHIP: MAPPING VIOLENT HOSTILITY, ITS CAUSES, AND THE CONSEQUENCES FOR DEMOCRACY 2 (2022).

[49] Jonathan Lai, *Why Can't a Candidate Have More than One Party's Nomination? Philly Democrat Challenges State Ban.*, PHILA. INQUIRER (Nov. 26, 2018), https://www.inquirer.com/philly/news/politics/pa-electoral-fusion-voting-case-chris-rabb-working-families-party-lawsuit-20181126.html.

[50] *See* Working Fams. Party v. Commonwealth, 209 A.3d 270, 286 (Pa. 2019).

[51] David Wildstein, *Newly-Formed Moderate Party Seeks Return to Fusion Voting, Files Petitions for Malinowski as Their NJ-7 Candidate*, N.J. GLOBE (June 7, 2022), https://newjerseyglobe.com/congress/newly-formed-moderate-party-seeks-return-to-fusion-voting-files-petitions-for-malinowski-as-their-nj-7-candiddate [https://perma.cc/7673-Q9ZS].

[52] Brief of Appellants, *supra* note *, at 1.

Malinowski lost his reelection bid,[53] the case was heard and decided by a state appeals court.[54] As this Article goes to press, a petition for certification is pending before the New Jersey Supreme Court.[55]

This latest wave of fusion lawsuits is building, largely thanks to organizing by new, politically moderate parties founded by conservatives committed to the rule of law. In 2024, the United Kansas party formed and cross-nominated a slate of candidates.[56] Denied a place on the ballot, it filed a suit alleging that Kansas's anti-fusion law violates the state constitution.[57] In Michigan, organizers have founded the Common Sense Party, which also plans to pursue fusion.[58] And plans are in the works to create fusion parties and file suits in other states as well.[59] Meanwhile, democracy-reform advocates are joining across partisan and ideological lines to propose fusion as a way to "save the country" from democratic breakdown.[60] In the summer of 2024, some 130

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[53] Tracey Tully & Lauren Hard, *Republican Tom Kean Jr. Defeats Rep. Tom Malinowski, a Democrat, in New Jersey*, N.Y. TIMES (Nov. 9, 2022), https://www.nytimes.com/2022/11/09/nyregion/tom-malinowski-tom-kean-nj.html.

[54] *In re* Malinowski, 332 A.3d 755, 759 (N.J. Super. Ct. App. Div. 2025), *petition for cert. filed*, Nos. A-3542-21T2, A-3543-21T2 (N.J. Apr. 4, 2025) (holding that New Jersey's anti-fusion law does not violate the state constitution).

[55] *See generally id.* (petition for certification on file with author).

[56] *About United Kansas*, UNITED KAN., https://unitedkansas.com/about [https://perma.cc/C4LT-AKGB]; Jack Curtis & Sally Cauble, *Here's How Fusion Voting Helps to Elevate Diverse Voices in Kansas*, TOPEKA CAP.-J. (Apr. 20, 2024), https://www.cjonline.com/story/opinion/columns/2024/04/20/heres-how-fusion-voting-helps-to-elevate-diverse-voices-in-kansas/73344832007.

[57] Tim Carpenter, *United Kansas Party Files Lawsuits to Challenge State Law Forbidding Multi-Party Nominations*, KAN. REFLECTOR (July 12, 2024), https://kansasreflector.com/2024/07/12/united-kansas-party-files-lawsuits-to-challenge-state-law-forbidding-multi-party-nominations [https://perma.cc/HH38-PXLD].

[58] Jon King, *Former Republicans Seek to Create New Centrist Party and Utilize Fusion Voting in Michigan*, MICH. ADVANCE (May 10, 2023), https://michiganadvance.com/2023/05/10/new-former-republicans-seek-to-create-new-centrist-party-and-utilize-fusion-voting [https://perma.cc/E8YC-JNRA].

[59] The *New York Post* has reported that a "campaign is underway to allow fusion voting in 10 other states" beyond New York. Carl Campanile, *New 'Moderate Party' Line in the Works in Scheme to Aid NY Democrats*, N.Y. POST (Mar. 12, 2023), https://nypost.com/2023/03/12/new-moderate-party-line-in-the-works-in-scheme-to-aid-ny-democrats [https://perma.cc/HPJ3-RYT3]. The Center for Ballot Freedom highlights litigation efforts underway in New Jersey and Michigan, with several other states in the works. *See Developments*, CTR. FOR BALLOT FREEDOM, https://centerforballotfreedom.org/developments [https://perma.cc/X6R8-G6RC].

[60] *See* Daniel Cantor & William Kristol, *What Is "Fusion Voting"? Just a Way to Save the Country, That's All*, NEW REPUBLIC (June 15, 2024), https://newrepublic.com/article/182739/fusion-voting-just-way-save-country-thats [https://perma.cc/D4X7-KTAB]; *see also* William A. Galston, *Fusion Voting Could Lower the Temperature*, WALL ST. J. (Oct. 3, 2023), https://www.wsj.com/opinion/fusion-voting-could-lower-the-temperature-politics-

scholars (including myself) signed on to an open letter calling for the legalization of fusion, noting both its deep roots in American political history and how it could address a "broad disaffection from partisan politics [that] is dangerous for democracy."[61]

This Article assesses the challenges and prospects of the current wave of fusion lawsuits. These cases invite scholars to pay greater attention to the role of state courts and state constitutions in shaping the law of democracy.[62] And they will reveal how willing state courts are to play their essential role in

elections-1d41b3b8; ANDY CRAIG, RAINEY CTR., FREE SPEECH ON THE BALLOT: THE CASE FOR FUSION 14, https://www.raineycenter.org/policy-brief/free-speech-on-the-ballot-the-case-for-fusion [https://perma.cc/K3P2-6SHJ] ("Fusion, in short, has a long record of being used to the advantage of Republicans. Conservatives have nothing to fear from letting parties speak freely on the ballot, and no reason to defend anti-fusion laws.").

[61] *See* Scholars for Re-Legalizing Fusion Voting, *Open Letter from Scholars in Support of Re-Legalizing Fusion Voting*, MEDIUM (July 11, 2024), https://medium.com/@scholarsforrelegalizingfusion/scholars-letter-in-support-of-re-legalizing-fusion-voting-72d405442720; *see also* Richard H. Pildes, *Political Reforms to Combat Extremism*, ABA TASK FORCE FOR AM. DEMOCRACY (May 6, 2024), https://www.americanbar.org/groups/public_interest/election_law/american-democracy/our-work/political-reforms-combat-extremism [https://perma.cc/2JYU-9WVD] (proposing fusion as one possible way to address extremism). Despite this widespread scholarly view that reviving fusion could improve American democracy, some leading experts, including Professors Rick Pildes and Ned Foley, have sounded notes of caution about the risk that certain multiparty reforms could in fact fuel fragmentation and extremism and about the chances that fusion would have the hoped-for effects. *See* Richard H. Pildes, *Democracies in the Age of Fragmentation*, 110 CALIF. L. REV. 2051, 2054 (2023) (observing that in European proportional-representation systems, "fracturing of power across new and smaller parties not only makes putting together effective governing coalitions more difficult—it also makes the political sphere more volatile. New parties pop up almost overnight and grab slices of power, including parties that style themselves as 'anti-parties'"); Pildes, *supra* note 18, at 1565 (critiquing a proposal for multimember districts and proportional representation in Congress because such a "system would inevitably make it easier for more ideologically extreme candidates to be elected"); Ned Foley, *Robust Third Parties Requires Electoral Reform*, ELECTION L. BLOG (Apr. 27, 2024), https://electionlawblog.org/?p=142774 [https://perma.cc/NZS2-9W8X] (stating "I'm dubious that fusion voting alone is enough" to facilitate a "truly robust role" for third parties); *see also* Steven Hill, *Steven Hill Responds to Lee Drutman: Fusion Yes, but More Study of Modern-Day Uses Needed*, DEMOCRACYSOS (June 20, 2023), https://democracysos.substack.com/p/steven-hill-responds-to-lee-drutman [https://perma.cc/UZS2-5ADL].

[62] Scholars have generally focused on the role of the U.S. Constitution, federal statutes, and federal courts in shaping American democracy. *See, e.g.*, Samuel Issacharoff & Richard H. Pildes, *Not by "Election Law" Alone*, 32 LOY. L.A. L. REV. 1173, 1173, 1183 (1999) (arguing for understanding the law of democracy by reference to more than just regulation of elections, but limiting expanded view to the U.S. Constitution and U.S. Supreme Court).

evenhandedly applying state constitutional principles in a manner that protects and promotes democracy.[63]

Part II analyzes three tests that fusion lawsuits present for state courts. The first is whether these courts will exercise judicial review and apply law to the facts or will, as in *Timmons*, abdicate that role in a context critical to ensuring a healthy democracy.[64] Although scholars have recently argued for restricting the scope of judicial review in many areas of the law, there remains a strong case that, as suggested by John Hart Ely, courts rather than the political branches should be entrusted to ensure an open democratic process that does not exclude minority voices.[65] The fusion lawsuits test the constitutionality of laws that strip a candidate of a political party's nomination and exclude that party–candidate relationship from the ballot—thereby depriving minor parties of a meaningful role in the electoral process and depriving voters of meaningful choices on the ballot. Courts abdicating their role in deciding such a crucial question would be a cure worse than the disease; it is unrealistic to think the problem could be solved through an open and competitive political process.[66]

Should state courts be willing to exercise judicial review, they will face a second test: whether and how to apply the broad commitment to majoritarian democracy that is woven into state constitutions.[67] In their recent work on the "democracy principle" that animates state constitutions, Professors Jessica Bulman-Pozen and Miriam Seifter have explained how these founding documents provide more substantive protections for popular sovereignty and majority rule than does the U.S. Constitution.[68] The fusion lawsuits will force state judges to decide whether laws designed to limit voters' choices and to entrench incumbents are consistent with this principle.

Finally, fusion lawsuits will test state courts' willingness to independently determine the meaning of their state constitutions. Almost five decades ago, Justice Brennan observed that state constitutions can provide broader protection of civil rights than the U.S. Constitution.[69] This sparked a long-running debate

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[63] Scholars have increasingly pointed to the importance of state courts and state constitutions in protecting democracy, as the U.S. Supreme Court has abdicated its role in ensuring open democratic processes. *See, e.g.*, James A. Gardner, Foreword, *Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 929–31 (2006); Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 199 MICH. L. REV. 859, 861 (2021); Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 91–92 (2014).

[64] *See infra* Part II.A.

[65] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

[66] Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 668 (1998).

[67] *See infra* Part II.B.

[68] Bulman-Pozen & Seifter, *supra* note 63, at 861; *see also* Douglas, *supra* note 63, at 91–92.

[69] William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502–03 (1977).

over how willing state judges actually are to exercise interpretive independence.[70] Many have argued that state courts are too willing to "lockstep"—interpreting a state constitutional provision in the same way that the U.S. Supreme Court has interpreted an analogous provision of the U.S. Constitution—no matter the differences in text, history, or structure of the provisions and the fact that federal decisions do not bind state courts.[71] The fusion lawsuits will reveal whether state courts will independently interpret democracy-related provisions in their state constitutions or if they will lockstep with *Timmons*.

How state courts meet these three tests will indicate their willingness to rise to a broader challenge. Nearly a century ago, Justice Brandeis proposed that states serve as laboratories of democratic experimentation.[72] Recent work has suggested that in a time when all politics is nationalized and polarized, states no longer play that role.[73] How state courts decide these fusion cases will indicate whether they themselves can act as judicial laboratories of democracy[74] and whether we live in a democracy—or a juristocracy—with rules dictated from the top down.[75]

Although it remains to be seen whether state courts will rise to these challenges, Part III argues that they should be able to pass each test with flying colors. There are two reasons for this. First, state constitutions have many provisions that protect and promote democratic participation and an open electoral process. Depending on the state, these include the guarantee of free

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[70] *See, e.g.*, ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 15 (2d ed. 2023); JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 77, 82 (2018).

[71] *See, e.g.*, Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1504 (2005).

[72] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[73] Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187, 2190 (2022); JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY 4–5 (2022); *cf.* DAVID PEPPER, LABORATORIES OF AUTOCRACY 8 (2021).

[74] *See* Gerald S. Dickinson, *Judicial Laboratories* 4 (Univ. of Pittsburgh Sch. of L., Working Paper No. 2024-19, 2024).

[75] On juristocracy generally, see RAN HIRSCHL, TOWARD JURISTOCRACY (2007) (comparing cases of judicial empowerment via the constitutionalization of politics in Canada, Israel, New Zealand, and South Africa). Recent critiques of juristocracy in the U.S. context take aim at the Supreme Court's use of judicial review to strike down statutes that represent the democratic will of the people. *See, e.g.*, Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1708 (2021). Here, juristocracy would come in the form of state supreme courts adopting the current U.S. Supreme Court majority's position that federal courts should refrain from policing the electoral process. *See* Rick Hasen, *"Politics as Markets" After 25 Years: Lowering Expectations About the Role of the Courts in U.S. Democracy*, ELECTION L. BLOG (Sept. 18, 2023), https://electionlaw blog.org/?p=138759 [https://perma.cc/9L5C-BJFU] ("The Court may not be prepared to generally police the political process . . . .").

and equal elections, the right to vote,[76] and the grounding of state government in popular sovereignty.[77] Because these provisions have no direct analogue in the U.S. Constitution, state courts will need to independently analyze their meaning and scope—which should dissuade judges from simply adopting the reasoning of *Timmons*. The right to equal protection, which does have an analogue in the U.S. Constitution, is also a plausible and powerful basis for striking down anti-fusion laws. And when it comes to the freedom of association, which was at issue in *Timmons*, state courts will need to reckon with the distinctive text, history, and structure of state constitutional provisions that protect the right to assemble, consult for the common good, and instruct elected representatives.[78] These guarantees, whether independently or taken together, support the conclusion that legislators may not turn popular sovereignty on its head by designing elections to entrench their rule, block meaningful competition, and prevent voters from expressing their opinions to their representatives.

Second, state courts should conduct a more rigorous review of anti-fusion laws than the Supreme Court did in *Timmons*.[79] This review would accord with the democracy principle and align with calls for heightened scrutiny of election laws that further anticompetitive self-dealing by incumbents. It would also recognize that state supreme courts have no obligation to apply the "federalism discount" the U.S. Supreme Court often applies in its review of state laws.[80] Such a review would recognize the true burdens that anti-fusion laws create—not only for minor parties and for candidates but also for voters. Unlike the Court's approach in *Timmons*, it would compare the burdens currently placed on minor parties to the baseline that existed before fusion was banned, rather than taking the state of play after the enactment of anti-fusion laws as the new normal. It would also be realistic about the major parties' motives in passing anti-fusion laws and the partisan interests these laws continue to serve. Nor would it assume, as the majority did in *Timmons*, that a state has a valid interest in entrenching a two-party system.

Finally, Part IV suggests that by striking down anti-fusion laws, state courts could chart a path toward correcting the errors of *Timmons* and remedying the harms it has inflicted on law and politics. Allowing experiments with fusion voting to proceed in the states would help debunk arguments that fusion voting confuses voters, supports sham parties, or destabilizes democracy. State court decisions striking down anti-fusion laws would themselves demonstrate that the majority's reasoning in *Timmons* was not inevitable. A state-by-state return to

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[76] Douglas, *supra* note 63, at 93.

[77] *See* Bulman-Pozen & Seifter, *supra* note 63, at 870.

[78] Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1657–58 (2021); Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 544 (2009).

[79] *See infra* Part III.B.

[80] *See* SUTTON, *supra* note 70, at 17, 75.

fusion would lay the path toward someday overturning *Timmons*—and allowing all Americans to participate in a robust, stable, and thriving multiparty democracy.

II. JUDICIAL LABORATORIES OF DEMOCRACY

> It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.
>
> —Justice Brandeis, dissenting in *New State Ice Co. v. Liebmann*[81]

Ever since Justice Brandeis's statement nearly a century ago, the image of states as laboratories for policy experimentation has provided an animating theme for American federalism.[82] Courts, Brandeis argued, should not stymie state-level experiments but instead allow them to flourish.[83]

The timing of Brandeis's statement was ironic. He wrote at the tail end of a concerted, decades-long push by state legislatures to quash electoral fusion, which had historically flourished in the states.[84] From the late 1800s through the 1910s, states around the country adopted the secret ballot, which meant they would be in charge of producing ballots and regulating which candidates and parties would appear on them; as they did so, many banned fusion.[85] Rather than promote policy experimentation inspired by a range of political actors, the laws effectively ended the major role that minor parties had played in American politics from mid-1800s through the Progressive Era.[86]

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[81] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[82] *See generally* DAVID OSBORNE, LABORATORIES OF DEMOCRACY 1–17 (1988); Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1233–36 (1994) (categorizing "the 'laboratory' perspective" as one of several visions of federalism); DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 103 (1995) (observing that legislation at the state level is "essential to a continuing dialogue about the proper resolution of the clash of interests between individuals and groups"); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 398 (1997) (noting that "the spirit of state experimentation is one of creative response to immediate necessity"); Daniel P. Tokaji, *Laboratories of Election Reform*, 8 ELECTION L.J. 267, 275 (2009) (reviewing BRUCE E. CAIN, TODD DONOVAN & CAROLINE J. TOLBERT, DEMOCRACY IN THE STATES: EXPERIMENTS IN ELECTION REFORM (2008)).

[83] *See Liebmann*, 285 U.S. at 311 (Brandeis, J., dissenting) ("This Court has the power to prevent an experiment. . . . because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.").

[84] *See* Argersinger, *supra* note 22, at 298.

[85] *See id.* at 291, 298.

[86] *See id.* at 303; *see also* Brooks & Tremitiere, *supra* note 24, at 2–3.

When a first wave of fusion litigation came before state courts, those courts did little to promote Brandeis's vision. With few exceptions, state courts upheld fusion bans.[87] However, their method in doing so was deeply problematic: state courts applied a degree of deference to the legislature that is at odds with our modern notion of constitutional scrutiny, and partisan justices often blessed anti-fusion laws that lent a helping hand to their own party. (And, of course, unlike judges today, they could not know that anti-fusion laws would effectively push minor parties out of the political process for an entire century.)[88] Nevertheless, these decisions put the judicial seal of approval on the major parties' efforts to entrench themselves, helping lock in the two-party system that most Americans have come to take for granted as a defining feature of our democracy.

Today's fusion lawsuits are once again testing the vision of states—and of state courts—as laboratories of democracy.[89] As the question of fusion bans' constitutionality comes again before state supreme courts, will they reaffirm their decisions of a century ago or mimic the U.S. Supreme Court's decision in *Timmons*? Or will they decide the cases in a way that gives states a real role in democratic experimentation and honors state courts' commitment to interpreting the unique provisions of their state constitutions?

This is an open question. The states-as-laboratories vision is nearly a century old, but our federal system has often failed to live up to the vision. Scholars have documented how policies produced by state legislatures neither reflect the actual diversity of states' political, legal, and social conditions nor provide templates for a well-functioning, competitive democracy.[90] Some have observed a disturbing trend of states instead experimenting with policies that are profoundly *anti*democratic.[91]

This Part divides the broader question of whether state courts will realize their distinctive role in our laboratories of democracy into three discrete but related tests. The first is whether state courts will use their power of judicial review to apply law to facts and thereby protect the integrity of the political process. The second is whether they will understand anti-fusion laws to

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[87] Jeffrey Mongiello cites a number of cases where challenges to anti-fusion laws failed. Jeffrey Mongiello, *Fusion Voting and the New Jersey Constitution: A Reaction to New Jersey's Partisan Political Culture*, 41 SETON HALL L. REV. 1111, 1120 n.59 (2011).

[88] *See* Leslie Bell, *Constraints on the Electoral Success of Minor Political Parties in the United States*, 25 POL. STUD. 103, 106 (1977); *see also* Berryhill & Gavigan, *supra* note 26, at 953–54 (summarizing the dominance of the Republican and Democratic parties in New Jersey politics after the enactment of New Jersey's anti-fusion law).

[89] Professor Gerald Dickinson has recently explained how state courts can promote policy experimentation. *See* Gerald S. Dickinson, *The New Laboratories of Democracy*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 261, 267 (2023); *see also* Dickinson, *supra* note 74, at 4.

[90] Tyler & Gerken, *supra* note 73, at 2201–04.

[91] GRUMBACH, *supra* note 73, at 152; PEPPER, *supra* note 73, at 1–13; Darrell M. West, *Why Federalism Has Become Risky for American Democracy*, BROOKINGS (Sept. 23, 2022), https://www.brookings.edu/articles/why-federalism-has-become-risky-for-american-democracy [https://perma.cc/4SF6-UHQY].

implicate the state constitutional principle that provides for a robust majoritarian democracy. And the third is whether state courts will demonstrate independence as they interpret their state constitutions.

A. *Testing Judicial Review*

The notion that courts should act to ensure equitable access to the democratic process has become a credo of liberal constitutionalism in the four decades since John Hart Ely proposed his theory of representation-reinforcement.[92] The fusion lawsuits test Ely's thesis, as well as the recent contentions of Ely's critics who have argued that democracy would be better off if we recognize that courts cannot or should not play this role, and that we should leave things to the political branches.[93] When it comes to claims that anti-fusion laws violate state constitutions, the question is whether courts will be up to applying the law to the facts and thereby protecting the integrity and openness of the democratic process.

Critics from both the left and the right have suggested that relying on courts to define the scope of fundamental rights and protect the integrity of the political process is judicial supremacy and, ultimately, bad for democracy.[94] Some, seeking to disprove Ely's theory, have proposed that we instead trust the political branches to define substantive rights and determine the rules that shape elections and the dynamics of political controversy.[95]

The critics' arguments find grounding in skepticism about the neutrality of judges and courts. Ryan Doerfler and Samuel Moyn, perhaps the most vocal critics, suggest that Ely's thesis turns on the empirical conjecture that judges—even appointed, life-tenured federal judges—can prevent their ideology from coloring how they police the political process.[96] History, they contend, reveals that judges are just as ideological as political-branch actors, which inevitably

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[92] *See generally* ELY, *supra* note 65. For a critique of this theory, see Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. 769, 770, 777 (2022).

[93] *See* Doerfler & Moyn, *supra* note 92, at 775; Doerfler & Moyn, *supra* note 75, at 1740.

[94] Written Statement from Nikolas Bowie, Assistant Professor of L., Harvard L. Sch., to the Presidential Comm'n on the Sup. Ct. of the U.S., The Contemporary Debate over Supreme Court Reform: Origins and Perspectives (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf [https://perma.cc/QA37-LZ9W]; *see* CARSON HOLLOWAY, HERITAGE FOUND., AGAINST JUDICIAL SUPREMACY: THE FOUNDERS AND THE LIMITS ON THE COURTS 5 (2019).

[95] *See* Doerfler & Moyn, *supra* note 92, at 773.

[96] *See id.* at 769. "Ely's suggestion," Doerfler and Moyn write, "is that the self-interest of elected officials can be counterbalanced by judicial *lack* of interest, preventing excessive accumulation of power through the positioning of an unbiased coequal branch." *Id.* at 802.

shapes their interpretation of the rules that define our democracy.[97] While Doerfler and Moyn direct their skepticism at federal courts, one imagines it would apply equally, if not more so, to state courts. Many state judges are elected, often in an explicitly partisan process, so it would be surprising if ideology and self-interest did not influence how they decide cases.

Yet there are reasons to doubt the skeptics, especially in the context of a fusion lawsuit. First, this is precisely the type of scenario in which representation-reinforcement would suggest courts ought to apply the law to the facts and ensure an open political process. Anti-fusion laws are the result of majority factions legislating to entrench their own power by marginalizing minority voices in the political process.[98] This history is hard to deny.

Second, there is no reason, particularly in this context, to trust political branches to protect the integrity of the electoral process. Again, history provides a guide. In the century since most states banned fusion, no legislature has relegalized the practice.[99] Oregon is the near-exception that proves the rule. In 2010, it enacted a law that provided for dual-labeling, which allows a candidate to appear on a single ballot line as the nominee of more than one political party.[100] Yet this fails to distinguish the votes a candidate receives as the nominee of each party. As such, it represents "aggregated" fusion, as opposed to true "disaggregated" fusion that would actually disrupt the entrenchment of the two major parties.[101] Unsurprisingly, efforts to enact disaggregated fusion

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[97] *Id.* at 803 (concluding that "[i]deologically sympathetic courts . . . declined to intervene in cases in which elected officials erected barriers to political participation by their opponents"). In particular, Doerfler and Moyn point to the federal courts' record on partisan gerrymandering and campaign finance as evidence that it is fruitless to hope that judges could act as neutral arbiters to ensure the political process is democratic and open to all comers. *Id.* at 804–12.

[98] *See* Argersinger, *supra* note 22, at 303.

[99] Instead, the general trend has been toward further prohibition. *See, e.g.*, S.D. CODIFIED LAWS § 12-6-3.2 (1998); DEL. CODE ANN. tit. 15, § 3106 (West 2024); S.C. CODE ANN. § 7-11-10 (2024).

[100] *See* Relating to Elections, S.B. 326, 75th Legis. Assemb., 2009 Reg. Sess. (Or. 2009).

[101] *See* Joel Rogers & Maresa Strano, *More than Semantics: Distinguishing Dual Labeling from Traditional Fusion Voting*, BALLOT ACCESS NEWS (Sept. 16, 2023), https://ballot-access.org/2023/09/16/more-than-semantics-distinguishing-dual-labeling-from-traditional-fusion-voting [https://perma.cc/5Y7U-S8ME] (explaining why Oregon's current system is better thought of as "dual labeling" rather than fusion voting); *see also* Kokolis, Parr & Tremitiere, *supra* note 19 (explaining that in a system of "'disaggregated' fusion . . . a candidate receives two nominations, [and] each appears separately on the ballot, allowing voters to specify the party they support and providing a separate accounting for each party's subtotal within a candidate's overall vote sum," as opposed to states that "allow candidates to be nominated by more than one party, but the nominations are combined on the ballot in a way that prevents voters from specifying their preferred party" in a process "known as 'dual labeling' or 'aggregated' fusion").

have not gained traction.[102] Because the two major parties enacted anti-fusion laws precisely to entrench themselves, it would be naïve to expect that they would jeopardize their grip on power by unilaterally repealing those rules.[103]

This history points to a third reason to doubt whether the political branches can protect the political process. Polarized legislatures, populated by legislators who benefit from the marginalization of minor parties, have little incentive to respond to the popular desire for more parties—despite the fact that the popular will is clear. Polls indicate that over half of Americans would prefer a third-party option,[104] and in New Jersey, where fusion is currently before the courts, polls indicate that a majority of voters want to see fusion on the ballot.[105] And people who want more parties do not sort along partisan lines. Instead, they span the partisan and ideological spectra.[106] Some presumably would prefer a center-left or center-right party, while others might prefer options to the right of the Republican Party or to the left of the Democrats. It is unrealistic to expect that this ideologically diverse assortment of voters would coalesce into a single-issue bloc in opposition to ballot-access restrictions—and equally unrealistic to think that base voters from either major party would ever favor the repeal of anti-fusion laws. In sum, to accept the critics' proposition that courts should cede oversight of the political process to the political branches threatens a cure worse than the disease—particularly when what is at stake are the rules that define the structure of partisan competition.

Beyond the many reasons to doubt that the political branches could neutrally regulate the political process, there is also an important fact: when it comes to assessing the constitutionality of anti-fusion laws, courts repeatedly have proven themselves up to the task. In both federal and state courts, judges have applied

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[102] A bill to disaggregate fusion, introduced in the Oregon House of Representatives in 2023, garnered four sponsors, all Democrats; it received a hearing but died in committee. Relating to Political Parties, H.B. 3593, 82d Legis. Assemb., 2023 Reg. Sess. (Or. 2023); *see also Before the Or. Legis. Assemb., H. Comm. on Rules RE: Or. H.B. 3593*, 2023 Reg. Sess. (Or. 2023) (statement of Lauren E. Miller, Brennan Ctr. for Just.).

[103] *See* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 522 (1997) (noting that "not only do incumbents have something to gain by restricting outsider competition; they may have little to lose"); *see also* Issacharoff & Pildes, *supra* note 66, at 668.

[104] IPSOS, *supra* note 3, at 5.

[105] In one 2023 poll, 56% of New Jersey residents surveyed favored fusion. *See* Dan Cassino, *FDU Poll: Majority in New Jersey Support Fusion Ticket Laws*, FAIRLEIGH DICKINSON UNIV. (Feb. 16, 2023), https://www.fdu.edu/news/fdu-poll-majority-in-new-jersey-support-fusion-ticket-laws [https://perma.cc/LM7G-CS4F]. Another found that 58% of respondents supported the reinstatement of fusion voting. *See* Lee Drutman, *New Jersey Voters on Political Extremism, Political Parties, and Reforming the State's Electoral System*, NEW AM. (Nov. 22, 2022), https://www.newamerica.org/political-reform/briefs/new-jersey-voters-political-extremism-parties-and-electoral-system-reform [https://perma.cc/3EGJ-2LR8].

[106] The January 2024 Reuters/Ipsos poll suggested that similar proportions of Democrats (57%), Republicans (49%), and Independents (60%) agreed that they are dissatisfied by the two-party system and want a third choice. IPSOS, *supra* note 3, at 5.

the law to the facts of fusion bans. Federal judges, liberal and conservative alike, have concluded that such laws violate the constitution. Justices Stevens, Souter, and Ginsburg dissented in *Timmons*,[107] while Judges Ripple, Easterbrook, and Posner—all appointed by President Ronald Reagan—dissented from the Seventh Circuit's denial of en banc review when fusion came before the Seventh Circuit.[108] And when an anti-fusion law came before the Third Circuit, sitting en banc after *Timmons*, judges of varying ideological stripes—including then-Judge Samuel Alito—concluded it violated the Equal Protection Clause.[109]

State courts and judges have also proven themselves up to the task. When Pennsylvania's anti-fusion law came before the state's supreme court, three Democratic justices voted to strike it down, and judges from both parties joined the Republican justice who wrote for the majority.[110] Although Ely focused on judicial review by federal courts, his conclusion that courts should help ensure an open democratic process applies just as forcefully, if not more so, to state courts.[111] But simply agreeing to apply law to facts is only the initial test. For judges on a state supreme court, ruling on the constitutionality of anti-fusion laws will also test their ability to appreciate that state constitutions incorporate a commitment to popular sovereignty and majoritarian democracy.

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[107] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 370 (1997) (Stevens, J., dissenting).

[108] Swamp v. Kennedy, 950 F.2d 383, 388 (7th Cir. 1991) (Ripple, J., dissenting).

[109] In *Patriot Party of Allegheny County v. Allegheny County Department of Elections*, 95 F.3d 253 (3d Cir. 1996), Republican-appointed Judges Roth and Rosenn struck down an anti-fusion provision that applied to local races in Pennsylvania as violating freedom of association and equal protection. *Id.* at 253. The Third Circuit, sitting en banc after *Timmons*, reconsidered the case and affirmed on equal protection grounds. Reform Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections, 174 F.3d 305, 306–07 (3d Cir. 1999) (en banc). The majority opinion by Judge Roth was joined by then-Judge Samuel Alito and colleagues nominated by both Republicans (Chief Judge Becker and Judges Rosenn, Lewis, Mansmann, Nygaard, Scirica, and Stapleton) and Democrats (Judges Sloviter and Rendell). *Id.*

[110] *See* Working Fams. Party v. Commonwealth, 209 A.3d 270, 286 (Pa. 2019) (Todd, J., concurring and dissenting); *id.* at 288 (Wecht, J., concurring and dissenting). The majority opinion, written by Republican-affiliated Justice Mundy, was joined by Republican-affiliated Chief Justice Saylor and Democratic-affiliated Justices Baer and Dougherty. *Id.* at 270, 286.

[111] *See* Harper v. Hall (*Harper I*), 868 S.E.2d 499, 551 (N.C. 2022) (citing Ely's work to support the proposition that a state supreme court has "an even greater justification for judicial review of acts that restrict the democratic processes through which the 'political power' is channeled to the people's representatives, and which undermine the very democratic system" (citing ELY, *supra* note 65, at 103)). After the North Carolina Supreme Court changed to a Republican majority, it overruled *Harper I*. *See* Harper v. Hall (*Harper III*), 886 S.E.2d 393, 416 (N.C. 2023); *see also* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1918 (2001) ("The countermajoritarian objection . . . . lacks salience in the state court context, in which many judges are elected, enjoy broad common law lawmaking powers, and are subject to popular revision, reversal, and recall.").

B. *Testing the Democracy Principle*

State constitutions provide more protections for democracy than does the U.S. Constitution.[112] As the U.S. Supreme Court has progressively chipped away at protections provided by the U.S. Constitution and the Voting Rights Act, this difference has grown only more apparent.[113] As just one example, while the U.S. Constitution does not provide a positive right to vote, most state constitutions have multiple provisions designed to promote and protect the democratic process, and in particular voting and elections.[114]

Professors Bulman-Pozen and Seifter have described how these provisions collectively embody a "democracy principle" that animates state constitutionalism.[115] This principle, they explain, is a constitutional commitment—expressed in the text, history, and structure of state constitutions—to advancing popular sovereignty, majority rule, and political equality.[116] The principle offers a way to promote and protect democracy in the United States during a period when federal courts appear ever less committed to doing so.

Fusion lawsuits are testing what the democracy principle might mean in practice. Does the principle bar self-interested legislators from denying citizens the ability to vote for the candidates and parties of their choice? At least from reading the pro-democracy provisions of state constitutions, one might think it would. Beyond the positive right to vote,[117] most state constitutions also make explicit that sovereignty derives from the people themselves.[118] Dozens of state constitutions provide that elections shall be some combination of "free," "fair," and "equal."[119] And unlike the First Amendment, state constitutions typically provide that the people are free to assemble to consult for the common good and to instruct or make their opinions known to their elected representatives.[120] Beyond democracy-promoting provisions framed as rights, one could interpret

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[112] Bulman-Pozen & Seifter, *supra* note 63, at 859.

[113] *See, e.g.*, Rucho v. Common Cause, 588 U.S. 684, 684 (2019) (holding that federal courts will not review claims of partisan gerrymandering); Shelby Cnty. v. Holder, 570 U.S. 529, 530 (2013) (eliminating preclearance requirements under the Voting Rights Act of 1965); Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 687 (2021) (limiting challenges under § 2 of the Voting Rights Act).

[114] The U.S. Constitution, of course, provides that race and gender shall not be the basis of restrictions on the right to vote. U.S. CONST. amend. XV, § 1; *id.* amend. XIX. But it does not provide a positive right to vote. *See* RICHARD L. HASEN, A REAL RIGHT TO VOTE 6 (2024) (proposing an amendment that would establish a positive right to vote).

[115] Bulman-Pozen & Seifter, *supra* note 63, at 862.

[116] *Id.* at 859.

[117] *See id.* at 861; *see also* Douglas, *supra* note 63, at 101. Local laws also provide a right to vote. *See* Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1041 (2017).

[118] *See* Bulman-Pozen & Seifter, *supra* note 63, at 910–13.

[119] *Id.*

[120] Bowie, *supra* note 78, at 1657–58.

state constitutions as positioning the electorate itself as the primary branch of government.[121]

How might a court apply these provisions in practice? Bulman-Pozen and Seifter describe how the principle has applied in the context of partisan gerrymandering cases.[122] State supreme courts in Pennsylvania, Wisconsin, and Utah have struck down instances of partisan redistricting.[123] These cases, they suggest, stand as examples of how the principle can be applied in practice, and by extension, they might also offer a basis for courts to block legislatures from stripping executive-branch powers when an opposing party candidate wins the governorship or from overriding the results of popular referenda.[124] Even if all three branches should recognize and respect the democracy principle, these examples make clear that Bulman-Pozen and Seifter see courts as its primary interpreter and enforcer.[125]

Yet this is a lot to ask of judges—particularly state court judges who may be even more subject than their federal counterparts to the pressures of partisan politics. If, as Bulman-Pozen and Seifter suggest, the election of state judges further confirms a structural preference for democracy in state constitutions, it also points to a tension when state judges address cases involving elections and their outcomes.[126] When a state high court considers the constitutionality of partisan gerrymandering or post-election power-stripping, will the democracy principle inform the judges' decision, or will they consider what outcome favors their party—or, for that matter, their own reelection?

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[121] Joshua Douglas has suggested that such a structural interpretation counsels for skepticism, on separation-of-powers grounds, of laws that would render voter participation more difficult. Joshua A. Douglas, *The Power of the Electorate Under State Constitutions*, 76 FLA. L. REV. 1679, 1683–84 (2024). Such a structural account could offer an alternative to the way courts—especially the U.S. Supreme Court—have tended to limit the scope of democracy-promoting rights and the parties who can claim their protection. *See* James A. Gardner, *The Illiberalization of American Election Law: A Study in Democratic Deconsolidation*, 90 FORDHAM L. REV. 423, 428–31 (2021).

[122] *See* Bulman-Pozen & Seifter, *supra* note 63, at 910–13.

[123] *See* League of Women Voters v. Commonwealth, 178 A.3d 737, 801–04 (Pa. 2018); Clarke v. Wis. Elections Comm'n, 998 N.W.2d 370, 389 (Wis. 2023); League of Women Voters of Utah v. Utah State Legislature, 554 P.3d 872, 878–80 (Utah 2024). Bulman-Pozen and Seifter cite a North Carolina state court decision that struck down that state's partisan gerrymander. Bulman-Pozen & Seifter, *supra* note 63, at 910–12 (discussing Common Cause v. Lewis, 18-CVS-014001, 2019 WL 4569584 (N.C. Super. Ct. Sept. 3, 2019)). Although the North Carolina Supreme Court subsequently concluded that the gerrymander violated the state constitution in *Harper I*, 868 S.E.2d 499, 559 (N.C. 2022), it later overturned that decision after the court flipped to a Republican majority, *see Harper III*, 886 S.E.2d 393, 401 (N.C. 2023).

[124] Bulman-Pozen & Seifter, *supra* note 63, at 907–08, 927.

[125] *Id.* at 914 (acknowledging that "some actors will be unmoved by the principle" and that it is unlikely "legislators proposing an extreme gerrymander will suddenly see the constitutional light and stand down").

[126] *Id.* at 872–73.

The fusion lawsuits test how state courts will put the democracy principle into practice. Judges have been called to apply the principle in disputes that arise as the two major parties play hardball. This has forced judges—themselves partisans, whether implicitly or explicitly—to decide which hardball tactics violate a constitutional commitment to democracy. That poses a challenge for judges who have ascended to the bench either by election or by appointment in the context of a two-party system. The fusion lawsuits, which aim to soften the rigidity of that party system, pose an additional challenge because they will require these judges to decide whether a law that has helped define that system violates the state's constitutional commitment to democracy.

The easiest answer for a state judge—politically, at least—could be to uphold anti-fusion laws. And it might seem reassuring that the U.S. Supreme Court already came to the same conclusion in *Timmons*—at least if one ignores the fact that later cases have undermined its logic.[127] Importantly, however, the federal Constitution and state constitutions are distinct, and *Timmons* does not bind state courts. This brings us to the third test posed by the fusion lawsuits.

C. *Testing Judicial Federalism*

Fusion lawsuits test whether state courts are willing to think for themselves. Whether we understand judicial review as broadly intended to ensure state action does not violate fundamental rights or as more narrowly focused on ensuring open and fair political processes, there is no reason for state courts to arrive at the same conclusion as *Timmons*—and plenty of reasons they should not.[128] But this will require state courts to take their state constitutions seriously, to interpret them independently, and to recognize when the U.S. Supreme Court's analysis in a related area is so flawed as to not be worth following.

The modern era of judicial federalism arguably began with Justice Brennan's seminal article in 1977.[129] Over the nearly five decades since, state courts have recognized rights in several areas that the U.S. Supreme Court has declined to recognize in the federal constitution. Among others, these have included the right to adequate school funding[130] and criminal-procedure protections that exceed what the U.S. Supreme Court has held to be provided by the U.S. Constitution.[131]

The appetite for judicial federalism has sometimes spiked in the wake of particularly contested U.S. Supreme Court decisions. After *Kelo v. City of New*

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[127] *See infra* text accompanying notes 385–90

[128] *See* Robert F. Williams, *State Constitutional Fusion Voting Claims: Textbook New Judicial Federalism in New Jersey*, 75 RUTGERS U.L. REV. 1093, 1098 (2023).

[129] Brennan, *supra* note 69, at 489.

[130] *See, e.g.*, DeRolph v. State, 677 N.E.2d 733, 733 (Ohio 1997) (holding that Ohio's school-funding model violates the state constitution); William Penn Sch. Dist. v. Pa. Dep't of Educ., 294 A.3d 537, 537 (Pa. Commw. Ct. 2023) (same).

[131] Paul Marcus, *State Constitutional Protection for Defendants in Criminal Prosecutions*, 20 ARIZ. ST. L.J. 151, 153 (1988).

London, for example, the Ohio Supreme Court held that Ohio's constitution provided greater protections against eminent domain than the U.S. Supreme Court had found within the Fifth Amendment.[132] In recent years, as the U.S. Supreme Court has overruled the right to reproductive choice declared in *Roe v. Wade*[133] and has defined ever more expansive gun rights under the Second Amendment,[134] some state supreme courts have sought different approaches when interpreting their state constitutions.[135] This has led to renewed interest among scholars and even the general public in judicial federalism as a means to ensuring that state-level policies respond to the popular will,[136] even if legal advances grounded in state constitutions are often understood as second best to victories achieved via federal courts or popular referenda.[137]

Commentators have often noted a disconnect in how state courts have approached their unique role. At times, these courts have embraced their interpretive independence and their responsibility to have the last word on the meaning of state constitutional provisions.[138] At other times—particularly when federal courts have already opined on an ostensibly analogous provision—they have abdicated that responsibility and have opted to "lockstep" with the U.S.

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[132] *See* Kelo v. City of New London, 545 U.S. 469, 489 (2005); *cf.* City of Norwood v. Horney, 853 N.E.2d 1115, 1123 (Ohio 2006).

[133] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

[134] District of Columbia v. Heller, 554 U.S. 570, 635 (2008); McDonald v. City of Chicago, 561 U.S. 742, 750 (2010); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 2 (2022).

[135] *See, e.g.*, Allegheny Reprod. Health Ctr. v. Penn. Dep't of Hum. Servs., 309 A.3d 808, 917 (Pa. 2024) (holding that abortion restrictions are sex-based discrimination prohibited by the 1971 Equal Rights Amendment to the Pennsylvania constitution); Weems v. State, 529 P.3d 798, 809, 812 (Mont. 2023) (holding that a criminal law limiting access to abortion violated the state's constitutional protections for privacy and procreative autonomy); Hodes & Nauser, MDs, P.A. v. Kobach, 551 P.3d 37, 41 (Kan. 2024) (holding that a near-total ban on a common abortion method violated the right to personal autonomy protected by the Kansas constitution).

[136] In 2024, for example, the Brennan Center for Justice convened a conference on *The Promise and Limits of State Constitutions*. *See The Promise and Limits of State Constitutions*, BRENNAN CTR. FOR JUST. (Feb. 8, 2024), https://www.brennancenter.org/events/promise-and-limits-state-constitutions [https://perma.cc/6LEB-4KTA]. The year before, it launched a website covering events in state supreme courts. *See About the State Court Report*, STATE CT. REP., https://statecourtreport.org/about/state-court-report [https://perma.cc/9RDK-QL3E]; *see also* Eyal Press, *Can State Supreme Courts Preserve—or Expand—Rights?*, NEW YORKER (June 3, 2024), https://www.newyorker.com/magazine/2024/06/10/can-state-supreme-courts-preserve-or-expand-rights.

[137] Zachary Clopton, *Judges Won't Save Us. Pushing for Democratic Solutions Will.*, CHI. TRIB. (Aug. 25, 2022), https://www.chicagotribune.com/2022/08/24/zachary-clopton-judges-will-not-save-us-pushing-for-truly-democratic-solutions-will (arguing against responding to *Dobbs* by empowering state supreme courts, and instead advocating for paths that do not reinforce judicial supremacy, such as popular referenda). Winning in state supreme courts, as Dean Erwin Chemerinsky has noted, is the second-best option. Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1697 (2010).

[138] SUTTON, *supra* note 70, at 56.

Supreme Court's interpretation of the U.S. Constitution.[139] In light of how state and local policies have become increasingly driven by the priorities of highly polarized national political parties,[140] some have suggested that a similar dynamic could make politicized state courts reluctant to exercise their independence when interpreting state constitutions.[141]

When it comes to the law of democracy, state courts have both engaged in lockstepping and demonstrated interpretive independence. Cases involving partisan gerrymandering illustrate that either path is possible. When the U.S. Supreme Court confronted the question of partisan gerrymandering in *Vieth v. Jubelirer*, it splintered on whether such claims presented a political question.[142] This left lower federal courts facing a lack of guidance beyond a hopeful suggestion in Justice Kennedy's concurrence that a judicially manageable standard might someday emerge.[143] When advocates turned to state courts, they won a few victories: high courts in Pennsylvania and Florida struck down partisan gerrymanders as violating their state constitutions.[144] Beyond vindicating Kennedy's suggestion, these instances of judicial independence by state high courts could have helped the U.S. Supreme Court identify a workable standard.

Instead, shortly after Kennedy's retirement, the Court in *Rucho v. Common Cause* declared partisan gerrymandering to be a political question.[145] In justifying why federal courts should be out of the business of reviewing such claims, Chief Justice Roberts pointed to how some state courts had struck down

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[139] *See* Williams, *supra* note 71, at 1504; Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 356 (1984). Other scholars have noted a disconnect between how some proponents of judicial federalism would have the courts approach their interpretive roles and how state courts actually interpret their state constitutions. *See, e.g.*, James A. Gardner, *Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix*, 46 WM. & MARY L. REV. 1245, 1247–48 (2005).

[140] DANIEL J. HOPKINS, THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED 9 (2018); GRUMBACH, *supra* note 73, at 5.

[141] James A. Gardner, *New Challenges to Judicial Federalism*, 112 KY. L.J. 703, 703 (2023); *see also* James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics*, 29 J.L. & POL. 1, 11 (2013).

[142] Vieth v. Jubelirer, 541 U.S. 267, 267–69 (2004). Previously, the Court had held that federal courts could rule on the constitutionality of partisan gerrymandering, but it set a standard so high that no federal court subsequently struck down a redistricting plan on that basis. *See* Davis v. Bandemer, 478 U.S. 109, 109–11 (1986); *see* Whitney M. Eaton, *Where Do We Draw the Line? Partisan Gerrymandering and the State of Texas*, 40 U. RICH. L. REV. 1193, 1201 (2006) ("The twenty partisan gerrymandering cases that followed *Bandemer* resulted in the federal courts denying relief in each and every one.").

[143] *Vieth*, 541 U.S. at 311 (Kennedy, J., concurring) ("That no such standard has emerged in this case should not be taken to prove that none will emerge in the future.").

[144] League of Women Voters v. Commonwealth, 178 A.3d 737, 801–04 (Pa. 2018); League of Women Voters of Fla. v. Detzner, 172 So. 3d 363 (Fla. 2015).

[145] Rucho v. Common Cause, 588 U.S. 684, 684 (2019).

partisan gerrymanders.[146] After *Rucho*, however, state courts did not rise to the task that had been left to them. The North Carolina Supreme Court did strike down a partisan gerrymander,[147] but after the U.S. Supreme Court took up the case as a vehicle to rule on so-called independent state legislature theory,[148] it was remanded to a North Carolina Supreme Court now dominated by Republican justices.[149] The court soon held, in lockstep with *Rucho*, that partisan redistricting was a political question and overturned its prior decision.[150] Meanwhile, Ohio's supreme court, which had repeatedly struck down legislative maps after the 2020 Census, reversed course only after its chief justice retired and was replaced by a more conservative justice.[151] And New Hampshire's supreme court recently held partisan gerrymandering to be a political question, in lockstep with *Rucho*.[152]

Fusion lawsuits present a more promising context for judicial independence, in part because state and federal courts have repeatedly reached the merits of such claims.[153] And in contrast to partisan gerrymandering claims, fusion lawsuits simply ask courts to apply recognized constitutional rights and limit state action that infringes on those rights.

State courts across the country have repeatedly demonstrated independence when it comes to assessing the constitutionality of election regulations. Many have applied a higher standard of scrutiny than that of the federal courts.[154] The

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[146] *Id.* at 719 ("The States . . . are actively addressing the issue on a number of fronts.").

[147] *Harper I*, 868 S.E.2d 499, 559 (N.C. 2022).

[148] Moore v. Harper, 600 U.S. 1, 1 (2023).

[149] *See Harper III*, 886 S.E.2d 393, 393 (N.C. 2023).

[150] *Id.*

[151] Chief Justice Maureen O'Connor retired from the court in late 2022. Jo Ingles, *Ohio Supreme Court Chief Justice Maureen O'Connor Retires After Making History*, WOSU PUB. MEDIA (Dec. 30, 2022), https://www.wosu.org/2022-12-30/2022-year-in-review-ohio-supreme-court-chief-justice-maureen-oconnor-retires-after-making-history [https://perma.cc/P2VX-4EXS]. The following year, the court declined to consider objections to a new set of redistricting maps; it had previously struck down four sets of proposed maps. *See Timeline of Ohio's Gerrymandered Maps: How Ohio Politicians Defied Court Orders to Manipulate Legislative Districts*, BRENNAN CTR. FOR JUST. (July 18, 2024), https://www.brennancenter.org/our-work/research-reports/timeline-ohios-gerrymandered-maps-how-ohio-politicians-defied-court [https://perma.cc/UZ8C-89RE].

[152] Brown v. Sec'y of State, 313 A.3d 760, 763 (N.H. 2023).

[153] This was the case in *Timmons* and the federal cases that reached the Third, Seventh, and Eighth Circuits in the 1990s. *See* Patriot Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections, 95 F.3d 253, 256 (3d Cir. 1996); Swamp v. Kennedy, 950 F.2d 383, 383 (7th Cir. 1991); Twin Cities Area New Party v. McKenna, 73 F.3d 196, 197 (8th Cir. 1996); *see also* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 353–54 (1997). It was also the case in *Working Families Party v. Commonwealth*, 209 A.3d 270, 270 (Pa. 2019).

[154] For a fuller discussion of the federal *Anderson-Burdick* standard, see *infra* Part III.B.1. On standards applied by states, see Emily Lau, *Explainer: State Constitutional Standards for Adjudicating Challenges to Restrictive Voting Laws*, STATE DEMOCRACY

Alaska Supreme Court, for example, has cited the state constitution's right-to-vote provision as grounds for a more rigorous assessment of election regulations, reflecting "the principle that Alaska's constitution is more protective of rights and liberties than is the United States Constitution."[155] In Montana, the state's highest court has applied strict scrutiny to election regulations that implicate fundamental rights protected by the state constitution, such as the right to vote.[156] And courts in Kansas have likewise applied strict scrutiny when assessing whether a restriction violates the right to vote, which is protected by the state constitution.[157] Instances of judicial federalism in the review of election laws are by no means confined to progressive courts in liberal states.

The test is whether state courts will exhibit this degree of independence when reviewing the constitutionality of anti-fusion laws. The Pennsylvania Supreme Court's recent decision, upholding that state's law, indicates either path is possible. For its part, the majority lockstepped with the freedom-of-association analysis in *Timmons* and declined to hold that the state's anti-fusion law violated the guarantee of equal protection in either the federal Constitution or state constitution.[158] The dissenting justices demonstrated what judicial federalism would look like in this context. They would have parted with *Timmons* and held that the anti-fusion law violated both the Equal Protection Clause of the Fourteenth Amendment and the Pennsylvania constitution's free and equal elections clause.[159]

RSCH. INITIATIVE (Oct. 3, 2023), https://statedemocracy.law.wisc.edu/explainers/2023/explainer-state-constitutional-standards-for-adjudicating-challenges-to-restrictive-voting-laws [https://perma.cc/9223-XQG7].

[155] State v. Arctic Vill. Council, 495 P.3d 313, 321 (Alaska 2021) (internal quotation marks omitted) (quoting State v. Green Party of Alaska, 118 P.3d 1054, 1060 (Alaska 2005)); *see also* Kohlhaas v. State, 518 P.3d 1095, 1123 (Alaska 2022).

[156] *See* Driscoll v. Stapleton, 473 P.3d 386, 392 (2020) ("The most stringent level of scrutiny, and the one employed by the District Court, is strict scrutiny, used when a statute implicates a fundamental right found in the Montana Constitution's declaration of rights.").

[157] *See* League of Women Voters of Kan. v. Schwab, 525 P.3d 803, 822 (Kan. Ct. App. 2023) (evaluating a challenge to a signature-matching requirement and ballot-collection restrictions and concluding that "[t]he Kansas constitutional provisions are unique. The right to vote is a fundamental right. Strict scrutiny applies here"), *aff'd in part, rev'd in part*, 549 P.3d 363 (Kan. 2024).

[158] *Working Fams. Party*, 209 A.3d at 282–86. The Pennsylvania Supreme Court had previously held that the state constitution's equal protection clause should be interpreted as having the same scope as the federal Equal Protection Clause. *See* Kramer v. Workers' Comp. Appeal Bd. (Rite Aid Corp.), 883 A.2d 518, 532 (2005).

[159] *Working Fams. Party*, 209 A.3d at 286 (Todd, J., dissenting); *see id.* at 296–99, 304 (Wecht, J., dissenting). The dissenters' argument built on the state supreme court's decision that partisan gerrymandering prevented free and equal elections and on the Third Circuit's decision that a fusion ban specific to certain local elections violated the Equal Protection Clause of the Fourteenth Amendment. *See* League of Women Voters v. Commonwealth, 178 A.3d 737, 818 (Pa. 2018); Reform Party of Allegheny Cnty. v. Dep't of Elections, 174 F.3d 305, 318 (3d Cir. 1999).

Lockstepping, then, is not inevitable. The dissenting opinion in Pennsylvania's fusion case, together with decisions by courts reviewing election restrictions across the country, demonstrate that state courts can both exercise interpretive independence and ensure that election regulations do not violate rights and liberties protected by state constitutions. The current wave of fusion lawsuits will reveal whether state supreme courts are willing to come to their own conclusions about the meaning of their constitutions—and to reckon with the constitutionality of laws that have locked us into a duopoly so enduring it has come to seem almost natural.

III. RESTORING THE FREEDOM TO FUSE

Anti-fusion laws violate a range of rights and freedoms protected by state constitutions. This Part surveys these state constitutional provisions, explaining how they are implicated and why each, on its own, provides sufficient basis for striking a fusion ban. By holding that such laws conflict with these constitutional provisions, state courts can restore basic rights and freedom once enjoyed by—and now, too long denied to—candidates, parties, and voters.

To recognize how anti-fusion laws violate these rights and freedoms requires appreciating how fusion operates. Fusion turns on one of the most fundamental relationships in our democratic system: that between candidate and political party. Fusion takes place when a political party nominates a candidate, that candidate voluntarily accepts the party's nomination, and ballots present that party–candidate relation to voters as one choice among others.[160] This process, and the party–candidate relationship, is normally so commonplace as to be unremarkable. Given its centrality to our electoral process, courts have repeatedly held that both federal and state constitutions protect against its infringement.[161]

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[160] *See Fusion Voting*, NEW AM., https://www.newamerica.org/political-reform/research-areas/voting-electoral-and-local-reform/fusion-voting [https://perma.cc/GWF5-NF6K].

[161] *See, e.g.*, Tashjian v. Republican Party, 479 U.S. 208, 225 (1986) (closed primary system violates party's right to associate with individuals of its choosing); Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 224 (1989) (party has the right to select its own standard-bearer); Cal. Democratic Party v. Jones, 530 U.S. 567, 580 (2000) (blanket primary deprives parties of the "ability to perform the 'basic function' of choosing their own leaders"); State v. Green Party of Alaska, 118 P.3d 1054, 1064–65 (Alaska 2005) (Alaska's constitution protects parties' right to determine who may participate in choosing their candidates); State v. Alaska Democratic Party, 426 P.3d 901, 907–09 (Alaska 2018) (Alaska's constitution protects major party's associational right to choose its own nominees, including independents as candidates). However, the courts should go further and recognize the impact of electoral regulations on political parties' associational rights. *See* Tabatha Abu El-Haj, *Networking the Party: First Amendment Rights and the Pursuit of Responsive Party Government*, 118 COLUM. L. REV. 1225, 1231–34 (2018) (explaining the importance of political parties' associational networks and arguing for courts to extend the *Anderson-Burdick* framework to cases involving the associational rights of major parties).

An anti-fusion law denies the freedom of a candidate and a party to forge this relationship and present it on the ballot as an option for voters. The reason is entirely arbitrary: that the candidate in question has accepted the nomination of another party. Far from serving the interests of voters or the common good, such an abridgment of this basic political freedom only serves to protect the interests of incumbent major parties.

Subpart A, below, explains how, by denying the ability to forge a relationship central to our electoral process, anti-fusion laws violate multiple rights and freedoms protected by state constitutions. First, by putting the interests of incumbent major parties ahead of the will of the people, they violate the principle of popular sovereignty. As explained below, they also infringe on the right to vote and provisions that protect free, open, and equal elections. Because these provisions have no analogue in the U.S. Constitution, state courts will invariably have to provide their own interpretations.

Anti-fusion laws also implicate the right to equal protection of the law and the freedom of political association. These provisions do have potential analogues in the U.S. Constitution. But in the case of equal protection, the federal provision has already been the basis for finding that an anti-fusion law is unconstitutional.[162] And an analysis of the text, history, and structure of state assembly clauses suggests that state courts would be wrong simply to follow the flawed analysis of the federal constitutional right in *Timmons*. The democracy principle in state constitutions and state courts' distinctive role in our federal system both counsel for state courts exercising independence in interpreting the scope of these provisions.[163]

Subpart B explains why state courts should rigorously review the burdens that anti-fusion laws create and the interests that they allegedly serve, rather than adopting the standard of review that the U.S. Supreme Court applied in *Timmons*. Here, again, the democracy principle counsels for a more rigorous and exacting standard and aligns with the intuition that courts should be skeptical of laws that could be instances of anti-competitive self-dealing by partisan incumbents. A realistic review of anti-fusion laws would avoid repeating the errors committed by the majority in *Timmons*.

A. *State Constitutions and Robust Democracy*

Test cases have alleged that anti-fusion laws violate a range of rights protected by state constitutions.[164] For the most part, other than the right to

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[162] *See Reform Party of Allegheny Cnty.*, 174 F.3d at 318.

[163] *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 363 (1997) (freedom of association); *Reform Party of Allegheny Cnty.*, 174 F.3d at 318 (equal protection).

[164] *See, e.g.*, Murphy v. Curry, 70 P. 461, 464 (Cal. 1902) (right of political party to have nominee placed on the ballot); *In re* City Clerk of Paterson, 88 A. 694, 695–96 (N.J. 1913)

freedom of association and equal protection, these are rights and freedoms that have no analogue in the U.S. Constitution.[165] As such, state courts will inevitably be called to independently interpret the scope of these rights and freedoms. Because the U.S. Constitution includes no right to free and equal elections and no positive right to vote,[166] state courts interpreting state constitutions that feature such provisions will need to conduct their own analysis and reach their own conclusions.

This Subpart surveys the various protections that could be understood, separately or in combination, to protect a right to fusion. While these provisions are discussed independently, the best approach could be to understand their impact in a synthetic manner.[167] As Professors Bulman-Pozen and Seifter observe, "Even as the force of the right to vote is evident in isolation, the electoral context requires courts to read constitutional clauses together."[168] A synthetic reading of democracy-related state constitutional provisions would allow courts to further a fundamental purpose of their state constitutions: "to create and define the institutions whereby a representative democratic form of government may effectively function."[169]

Before proceeding, a caveat: this country has fifty-one constitutions, which Judge Jeffrey Sutton has aptly described as "51 imperfect solutions" to the problem of how to organize a republican form of government.[170] It is well beyond the scope of this Article to detail the jurisprudence related to each provision across fifty state constitutions. This Subpart flags illustrative

(right of suffrage); State *ex rel.* Runge v. Anderson, 76 N.W. 482, 487 (Wis. 1898) (Winslow, J., dissenting) (freedom of action and association of parties and their members); Working Fams. Party v. Commonwealth, 169 A.3d 1247, 1265–66 (Pa. Commw. Ct. 2017) (Equal Protection Clause of Fourteenth Amendment, free and equal elections, freedom of speech, freedom of association); Brief of Appellants, *supra* note *, at 1, 38 (popular sovereignty, right to vote, right to assemble and express opinions to elected representatives).

[165] For a general summary of democracy-related provisions that are distinctive to state constitutions, see Bulman-Pozen & Seifter, *supra* note 63, at 869–79.

[166] *Id.* at 861.

[167] Professor Reva Siegel has described how synthetic interpretation "endeavors to interpret one clause or provision in light of another—attending especially to relations among different parts of the Constitution as they are interpreted or amended over time." Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 966 (2002); *see also* Vicki C. Jackson, *Holistic Interpretation:* Fitzpatrick v. Bitzer *and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1284–85 (2001). This approach is particularly appropriate in interpreting state constitutions, which are more frequently amended than the U.S. Constitution and have, over time, added protections for democratic voice and participation through successive amendments. *Id.*

[168] Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1916 (2023).

[169] *Id.* at 1916 (citing State *ex rel.* Reynolds v. Zimmerman, 126 N.W.2d 551, 558 (Wis. 1964)).

[170] *See generally* SUTTON, *supra* note 70.

provisions and cases that explain how those provisions could be—and in some cases, already have been—understood to conflict with anti-fusion laws.

1. *Popular Sovereignty*

Forty-nine states—all but New York—include some commitment to popular sovereignty in their constitutions.[171] These come in various forms, with the most common declaring that "all political power is inherent in the people."[172] The provisions also often make clear that the purpose of government is to provide for the common good of the people, and it is founded upon the will of the people.[173] The tension with anti-fusion laws should be intuitive: if government is created to serve the will of the people and to promote the public good, then laws should not serve the will of incumbent political parties and whatever is best for them.

State constitutions make popular sovereignty explicit, but the U.S. Constitution has a similar commitment. "We the People" are the ultimate sovereign, and as James Madison observed, "[t]he genius of republican liberty seems to demand . . . not only that all power should be derived from the people, but that those intrusted [sic] with it should be kept in independence on the people."[174] A system founded on popular sovereignty, as the U.S. Supreme Court has observed, means that the people choose their representatives rather than vice versa. Quoting Alexander Hamilton, the Court has noted that "the true principle of a republic is, that the people should choose whom they please to govern them."[175] While this comment came in the context of redistricting, it is equally offensive to popular sovereignty that the two major parties would enact laws that limit whom we the people may choose as our representatives.

Hamilton's logic has informed how state judges view anti-fusion laws. While New York's constitution lacks an explicit commitment to popular sovereignty, a 1910 decision that struck down an anti-fusion law resonated with the notion that the people should choose their representatives.[176] The legislature,

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[171] Bulman-Pozen & Seifter, *supra* note 63, at 869.

[172] *Id.* at 869–70, 869 n.48 (citing twenty-one state constitutions with this exact language and nine more with slight variations).

[173] *Id.* at 870 (noting that twenty-three state constitutions have language similar to "[g]overnment is instituted for [the people's] protection, security, and benefit" and that eight more have provisions that declare "all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole" (alterations in original)).

[174] THE FEDERALIST NO. 37 (James Madison).

[175] Powell v. McCormack, 395 U.S. 486, 541 (1969) (quoting 2 ELLIOT'S DEBATES 257 (J. Elliot ed., 1876)); *see also* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 820 (2015) (quoting Powell v. McCormack, 395 U.S. 486, 540–41 (1969)).

[176] *See In re* Callahan, 93 N.E. 262, 264–65 (N.Y. 1910) (Gray, J., concurring).

wrote Judge Gray, "cannot deprive the electors of the right to vote for any person for a public office not disqualified under our laws."[177]

The ongoing fusion lawsuit in New Jersey has also invoked popular sovereignty.[178] In that case, the debates of the framers are instructive. The drafters of New Jersey's 1844 constitution understood sovereignty to derive from the people.[179] A leading delegate argued that a bill of rights offered the people a way to keep the legislature in check: "By adopting the declaration of rights, we will circumscribe the action of the legislature within its legitimate and proper sphere . . . ."[180] And when it established the power of judicial review, the New Jersey Supreme Court justified its role as a necessary defender of popular sovereignty:

> Among these principles, one of the most important in all our constitutions, is to prescribe and limit the objects of legislative power. The people are sovereign, they are supreme in power. The legislature act [sic] by delegated and circumscribed authority . . . . Now to say that the legislature can alter or change such a constitution, that they can do away that very principle which at the same time gives and limits their power, is in my view a perfect absurdity. . . . It is establishing despotism without limitation and without control.[181]

It is absurd to think that the people would willingly let the legislature decide whom they may elect as their representatives. Yet most Americans have lived and voted in a system defined by that absurdity for the past century.

These examples suggest two ways for a state court to understand the tension between popular sovereignty and anti-fusion laws. Such laws could be considered a direct violation of popular sovereignty and fall on that basis alone. Or popular sovereignty could be taken as a background principle by which to interpret other rights and freedoms. In that light, those provisions should be construed such that power continues to derive from the people—rather than from legislatures that forget to heed the will of the people.

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[177] *Id.* at 265.

[178] Brief of Appellants, *supra* note *, at 38.

[179] Delegate Schenck noted that "the popular will is the controlling power and the people maintain their sovereignty by the elective franchise," even as he admitted "[t]he necessity and advantage of resorting to the action of Representatives (elected by the people themselves) to exercise the powers of government." PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844, at 198 (N.J. Writers' Project ed., 1942).

[180] *Id.* at 170 (statement by James Zabriskie).

[181] State v. Parkhurst, 9 N.J.L. 427, 443 (N.J. 1802).

2. *The Right to Vote*

All fifty state constitutions grant the right to vote.[182] In all but Arizona's constitution, the right is explicit and affirmative.[183] The language varies in form, but Colorado's provision is typical: "Every citizen of the United States who has attained the age of eighteen years, has resided in this state . . . such time as may be prescribed by law, and has been duly registered as a voter if required by law shall be qualified to vote at all elections . . . ."[184]

To understand how anti-fusion laws violate the right to vote, it helps to look back to cases from New York. In the early 1900s, New York's highest court twice struck down anti-fusion laws as unconstitutional infringements of New Yorkers' fundamental right to vote.[185] Decades later, it reaffirmed these principles when it once again struck down a statute that would have barred fusion.[186] These decisions were crucial to New York remaining one of the handful of states where fusion remained part of the political process, while most of the country followed a path defined by partisan duopoly.

In *Matter of Callahan*, Chief Judge Cullen concluded that anti-fusion legislation denied the right to vote.[187] "[I]f the Legislature does grant to any convention, committee or body the right to make nominations," he reasoned, "it cannot limit the right of such convention, committee, or body to nominate as its candidate any person who is qualified for the office. The electors have the right to vote for whom they will for public office, and this right cannot be denied them by any legislation."[188]

The following year, the court again struck down an anti-fusion law in *Matter of Hopper v. Britt*.[189] This time, the statute required that any candidate receiving the nomination of more than one political party appear on the ballot in the column of only one party.[190] Chief Judge Cullen observed that this would favor some voters' rights over others and, as such, violated the state constitution.[191]

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[182] Douglas, *supra* note 63, at 101; Bulman-Pozen & Seifter, *supra* note 63, at 870.

[183] The Arizona Constitution provides that no one has a right to vote except those who meet age- and residency-based eligibility requirements. ARIZ. CONST. art. VII, § 2.

[184] COLO. CONST. art. VII, § 1. Professors Bulman-Pozen, Seifter, and Douglas have all tallied the full list of suffrage provisions. *See* Bulman-Pozen & Seifter, *supra* note 63, at 870–72 nn.55–58; *see also* Douglas, *supra* note 63, at 144–49.

[185] *In re* Callahan, 93 N.E. 262, 262 (N.Y. 1910); Hopper v. Britt, 96 N.E. 371, 373–74 (N.Y. 1911).

[186] *In re* Devane v. Touhey, 304 N.E.2d 229, 230 (N.Y. 1973) (noting that the legislature "cannot enact arbitrary exclusions from office" (citing *Callahan*, 93 N.E. at 262)).

[187] *Callahan*, 93 N.E. at 262.

[188] *Id.*

[189] *See Hopper*, 96 N.E. at 371.

[190] *Id.* at 371–72.

[191] *Id.* at 374 (concluding that "our position is that [a voter] is a single mark if other voters are given the right to express theirs by a single mark," and holding the provision to be unconstitutional "because they unnecessarily and substantially discriminate between electors in the opportunities and facilities afforded for voting for the candidates of their choice").

Hopper illustrates a synthetic approach. Chief Judge Cullen read together provisions of the constitution that provided a right to vote (article 2, section 1), provided for election by ballot (article 2, section 5), and prevented disenfranchisement except by law of the land or by judgment of one's peers (article 1, section 1).[192] Taken together with "the provision that certain officers shall be chosen by the electors," the Chief Judge concluded that these provisions "necessarily further imply that every elector shall have the right to cast his vote with equal facility to that afforded to other voters, or, to speak more accurately, without unnecessary discrimination against him as to the manner of casting his vote."[193] The law arranged the ballot such that some voters affiliated with one party organization could vote for a fusion candidate on a straight ticket, while others could not support the candidate by voting a straight ticket.[194] The court held that this violated the constitution, which "by providing that certain officers shall be chosen by the electors, does guarantee that each voter shall have the same facilities as any other voter in expressing his will at the ballot-box, so far as practicable."[195]

The *Hopper* court appreciated the real impact of anti-fusion laws at a time when these laws were sweeping the country. To properly understand that impact, the court distinguished between, on the one hand, well-intentioned reformers who advocated for the Australian secret ballot as a measure to promote the general welfare and, on the other hand, partisan legislators who sought to advance their factional interests. "Ever since the adoption of the present scheme there has been an attempt to provide a ballot in such form as to prevent the elector from voting in the way he wishes to vote," the court observed.[196] "In this constant effort it must be conceded that persons desirous of so-called ballot reform, and not political partisans, have been the most active, though by the present legislation the latter seem to have been more successful."[197] While its defenders justified the law as a means of preventing corruption, the court noted that "[i]t is not pretended . . . that the statute tends to prevent that evil, save in one way by making it more difficult to vote fusion or coalition tickets."[198] This realistic perspective was key to recognizing the constitutional violation. "[T]he otherwise plenary power granted to the legislature to prescribe the method of conducting elections," the court concluded, "cannot be so exercised as to disfranchise constitutionally qualified electors, and any system of election that unnecessarily prevents the elector from voting or from voting for the candidate of his choice violates the

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[192] *Id.* at 373.
[193] *Id.*
[194] *Id.* at 371–72.
[195] *See Hopper*, 96 N.E. at 373.
[196] *Id.* at 375.
[197] *Id.*
[198] *Id.*

Constitution."[199] For the second time in as many years, New York's highest court struck down an anti-fusion law as violating the fundamental rights of New Yorkers.

Hopper demonstrates how to combine a synthetic interpretation of a state constitution with realism about legislators' motives and the real-world effects of their actions. Recognizing the connection between different constitutional provisions helped the court identify the real impact of the anti-fusion law. Even if such a law did not completely disenfranchise the voters—who could still vote for *some* candidate—its intent and effect was to disenfranchise voters who would hope to support a candidate nominated by more than one party. This treated them differently than other voters, without reasonable justification.

These early decisions should serve as a reminder. Decades of distance may obscure the original purpose and effects of anti-fusion laws, allowing judges today to conveniently overlook their lasting burdens. This happened when Pennsylvania's anti-fusion law came before the state's commonwealth court. The Working Families Party argued that the court should apply strict scrutiny because the law burdened the right to vote.[200] Rather than adopting a realistic approach, the majority turned to formalism, concluding that the law's restrictions were "facially neutral; they prohibit both political parties and political bodies from fusing their candidate with another political organization's candidate."[201] Unlike New York's high court, which had recognized the burden on voters, the Pennsylvania Commonwealth Court concluded that "[t]he right to vote is not impacted. . . . [because] Citizens of the Commonwealth are free to cast their vote for their candidate of choice, by write-in or otherwise."[202]

Callahan and *Hopper* reinforce the point of anti-fusion laws: to place the privileges of incumbent parties and politicians over the rights of voters. The judges on the New York Court of Appeals recognized the law's partisan motivations. Although that is harder today, since the two-party system has come to be seen as almost natural, it should still be easy for state judges to recognize that these laws violate the fundamental right to vote—even if that violation is now so ingrained that we take it for granted.

3. *Free, Equal, and Open Elections*

Twenty-six state constitutions include clauses that commit the state to having elections that are "free," "free and equal," or "free and open."[203] As with

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[199] *Id.* at 373.

[200] Working Fams. Party v. Commonwealth, 169 A.3d 1247, 1257 (Pa. Commw. Ct. 2017), *aff'd*, 209 A.3d 270 (Pa. 2019).

[201] *Id.* at 1258.

[202] *Id.* at 1259. The Pennsylvania Supreme Court accepted the commonwealth court's decision without conducting its own analysis. Working Fams. Party v. Commonwealth, 209 A.3d 270, 283 (Pa. 2019).

[203] Bulman-Pozen & Seifter, *supra* note 63, at 871 & n.59 (collecting provisions).

the right to vote, these clauses can be applied either on their own or interpreted synthetically with other democracy-promoting and -protecting provisions.[204] Either way, they can and should be construed to conflict with anti-fusion laws.

These clauses have provided meaningful limitations that protect the political process. In many states, these protections predate the federal Constitution and derive from a similar protection in the 1689 English Bill of Rights.[205] In recent years, they have been used to constrain attempts to gerrymander the redistricting process.[206]

Applying the free elections clauses to the fusion context is, in principle, straightforward. The intent and effect of anti-fusion laws were to make elections less free, equal, and open by limiting the ability of third parties to effectively participate in elections and receive the support of voters. They also, of course, served to disenfranchise voters who would prefer to cast their vote in support of third parties. As state supreme courts have recognized, there is an intimate connection between efforts to impede the right to vote and the question of whether elections are free, open, and equal.[207]

Of course, what is intuitive in principle is not always so simple in practice. In hearing the Working Families Party's challenge to Pennsylvania's anti-fusion law, that state's supreme court held that—despite prior precedent that in effect had allowed major-party candidates but not minor-party candidates to fuse—there was no violation of the free and equal elections clause.[208] However, it arrived at this conclusion by construing the objective of that clause as pertaining

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[204] *See id.* at 911.

[205] *See* Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 ALA. L. REV. 221, 289 & n.475 (2021) (explaining how a provision in the 1689 English Bill of Rights requiring that "[a]ll elections ought to be free" led to similar provisions in the state constitutions of Georgia, Maryland, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Vermont, and Virginia (alteration in original)).

[206] *See* League of Women Voters v. Commonwealth, 178 A.3d 737, 818 (Pa. 2018) (striking down redistricting plan as partisan gerrymandering in violation of the Pennsylvania constitution's guarantee of "free and equal elections"); *Harper I*, 868 S.E.2d 499, 559 (N.C. 2022), *vacated*, 886 S.E.2d 393 (N.C. 2023) (striking down redistricting plan as partisan gerrymandering in violation of the North Carolina constitution's guarantee of "equal voting power," subsequently overturned by the North Carolina Supreme Court); *see also* Grisham v. Van Soelen, 539 P.3d 272, 282, 285 (N.M. 2023) (citing the free and open elections clause in New Mexico's constitution in holding partisan gerrymandering claims under the state constitution's equal protection clause to be judicially cognizable).

[207] *See, e.g.*, *Grisham*, 539 P.3d at 282 ("By its plain language, the [New Mexico constitution's freedom of elections clause] implicitly asserts the importance of 'the free exercise of the right of suffrage.'"); Gunaji v. Macias, 31 P.3d 1008, 1016 (N.M. 2001) ("[A]n election is only 'free and equal' if the ballot allows the voter to choose between the lawful candidates for that office . . . ."); *League of Women Voters*, 178 A.3d at 804.

[208] Working Fams. Party v. Commonwealth, 209 A.3d 270, 279–82 (Pa. 2019). The *Working Families Party* court recited the history of jurisprudence under the free and equal elections clause that had been included in *League of Women Voters*. *Id.* at 279–81.

simply to vote dilution.[209] This represented an arbitrary narrowing of the court's prior, more expansive interpretation.[210] Because the majority concluded that voters could "support and vote for the candidate of their choice" despite the ban on fusion, the guarantee of free and equal elections was not implicated.[211]

As Justice Wecht rightly observed, interpreting "free and equal" to mean only to "prevent dilution" misconstrued the court's precedent.[212] His dissent offed a more plausible, synthetic reading of the relevant rights: "[E]lections are free and equal, in part, when no (ostensibly *other*) 'constitutional right of the qualified elector is subverted or denied him . . . .'"[213] As discussed below, this led the dissenters to interpret the free and equal elections clause together with the Equal Protection Clause of the Fourteenth Amendment.[214] It also recognized that "the health of our state's elections depends in part upon the ability of new political parties to emerge, be heard, and gather members."[215] This required considering more than simply vote dilution because "the formation of parties and their access to the ballot must be understood to be among the 'aspects of the electoral process' to which the Free and Equal Election Clause's protections apply, and part and parcel of the 'power' to select one's preferred candidate."[216]

Anti-fusion laws rendered state elections less free and equal a century ago, and it would be foolish to imagine their effects are simply a thing of the past. As William Faulkner famously noted, "The past is never dead. It's not even past."[217] When it comes to anti-fusion laws' infringement of the guarantee of free, equal, and open elections, most Americans are still experiencing that lack of liberty to this day.

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[209] *Working Fams. Party*, 209 A.3d at 281–82.

[210] The *League of Women Voters* court had interpreted the language of the free and equal elections clause to reflect the framers' intent that "the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters" and "conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government." *League of Women Voters*, 178 A.3d at 804. The *Working Families Party* majority reduced the clause to one that only prevented vote dilution. *Working Fams. Party*, 209 A.3d at 281–82 (observing that "the overarching objective of [article I, section 5] of our constitution is to prevent dilution of an individual's vote by mandating that the power of his or her vote in the selection of representatives be equalized to the greatest degree possible with all other Pennsylvania citizens" (citation omitted)). Having done so, it concluded that "[v]iewed from this perspective, Appellants have not established that their votes were diluted by the ban against cross-nomination." *Id.*

[211] *Working Fams. Party*, 209 A.3d at 282.

[212] *Id.* at 297–99 (Wecht, J., concurring in part and dissenting in part).

[213] *Id.* at 299 (Pa. 2019) (quoting Winston v. Moore, 91 A. 520, 523 (Pa. 1914)).

[214] *See id.*

[215] *Id.* (citing Williams v. Rhodes, 393 U.S. 23, 31–32 (1968)).

[216] *Id.* (noting that the "decontextualized allusion to vote 'dilution'" ignored the "other concerns explicitly embraced" by the court in *League of Women Voters*).

[217] WILLIAM FAULKNER, REQUIEM FOR A NUN 33 (1959).

4. *Equal Protection*

Lawsuits in state courts have alleged that anti-fusion laws violate the equal protection of the laws. Unlike the claims above, this claim may be grounded either in the U.S. Constitution or, where a similar provision exists, in a state constitution.[218]

Anti-fusion laws offend the principle of equal protection not only for parties and candidates but also for voters. In each case, the fundamental rights of minor parties, their candidates, and their voters are burdened without substantial justification. Anti-fusion laws mean that major parties may nominate the candidate of their choice, but other parties may not exercise the same freedom—if they seek to nominate a major-party candidate, that candidate's name will not appear on the ballot alongside their party. Candidates are similarly burdened. While a major-party candidate can have the ballot accurately reflect that party's nomination, an anti-fusion law would bar another candidate, having received two nominations, from having their candidacy reflected on the ballot. Finally, anti-fusion laws compel minor-party voters to associate with one of the major parties. Because a nomination from a minor party does not appear on the ballot, voters are forced to vote for the candidate on the major-party line—effectively compelling them to support a party for which they do not want to vote and with which they would not want to associate.

Fusion proponents have had some success by claiming a violation of the federal Constitution. In 1996, before *Timmons*, the Third Circuit held that Pennsylvania's law prohibiting fusion in certain local elections violated the Equal Protection Clause of the Fourteenth Amendment.[219] After *Timmons*, which was decided on the basis of freedom of association, the Third Circuit convened en banc and reaffirmed the appellate panel's prior decision on equal protection grounds.[220]

The Third Circuit's analysis informed how state courts later considered the equal protection issue. When the Working Families Party (WFP) sued, it alleged the anti-fusion law violated the federal Equal Protection Clause.[221] The circumstances were somewhat different: the WFP suit involved a candidate for the state legislature, while the Third Circuit case had considered a fusion ban in

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[218] *See* Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1022 (2003); WILLIAMS & FRIEDMAN, *supra* note 70, at 241–55.

[219] Patriot Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections, 95 F.3d 253, 269 (3d Cir. 1996), *reh'g en banc denied*, 95 F.3d 253 (1996).

[220] Reform Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections, 174 F.3d 305, 318 (3d Cir. 1999).

[221] *See Working Fams. Party*, 209 A.3d at 274. Like the constitutions of many other states, the Pennsylvania constitution does not have its own equal protection clause. *See* Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1196 (1985) ("Most state constitutions do not contain an 'equal protection' clause.").

certain local elections.[222] But a prior Pennsylvania Supreme Court decision, *Appeal of Magazzu*,[223] meant that WFP, as a "political body," was treated differently than major parties.[224] Major parties were free to cross-nominate candidates in the general election, but *Magazzu* held that political bodies could only do so if they successfully ran a write-in campaign in the major party's primary.[225]

This teed up an equal protection issue when the fusion lawsuit came before the Pennsylvania Commonwealth Court.[226] Although political bodies could only fuse via write-in campaigns, the majority opinion dismissed the notion that Pennsylvania law treated them differently than major parties and declined to apply strict scrutiny.[227] In dissent, Judge Cosgrove pointed out that *Magazzu* had "create[d] a distinctly exclusive political club with only the two major parties as members," which "cannot withstand constitutional muster even under the most relaxed standard."[228]

The debate when the case came before the Pennsylvania Supreme Court illustrates the stakes of interpretation. The majority adopted just as formalistic an approach to equal protection as it did to the free and equal elections clause issue discussed above.[229] Not only did it affirm the commonwealth court's conclusion that the anti-fusion law and *Magazzu* were facially neutral, but it also treated the two provisions as entirely independent.[230] On the one hand, the law was neutral (despite allowing parties to fuse, but not political bodies); on the other, elections were free and open because there was no vote dilution (despite having the effect of excluding fusion candidates and political bodies).[231]

The question of whether elections are free and equal cannot be separated from the question of whether some participants in those elections are denied their constitutional rights. Justice Wecht recognized this in his dissent: "[T]he Free and Equal Elections Clause incorporates and protects other constitutional

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[222] *Compare Working Fams. Party*, 209 A.3d at 271–72, *with Reform Party of Allegheny Cnty.*, 174 F.3d at 308 (considering a fusion ban for the election of a school director).

[223] *See generally* Appeal of Magazzu, 49 A.2d 411 (Pa. 1946).

[224] *See Working Fams. Party*, 209 A.3d at 294–96 (Wecht, J., concurring and dissenting) (explaining the different treatment of political bodies and major parties after *Magazzu*).

[225] *See Magazzu*, 49 A.2d at 411–12.

[226] *See* Working Fams. Party v. Commonwealth, 169 A.3d 1247, 1251 (Pa. Commw. Ct. 2017).

[227] *Id.* at 1259 (concluding that the statute was facially neutral because both political bodies could fuse, even if by different means, and if running a write-in campaign was harder, that was due to "factual circumstances . . . external to the statute").

[228] *Id.* at 1267–68 (Cosgrove, J., dissenting).

[229] *See Working Fams. Party*, 209 A.3d at 282–84. More recently, in reviewing a prohibition on abortion, the Pennsylvania Supreme Court held that the state constitution's Equal Rights Amendment provides greater protections than the federal Equal Protection Clause. *See* Allegheny Reprod. Health v. Dep't of Hum. Servs., 309 A.3d 808, 889 (Pa. 2024).

[230] *See Working Fams. Party*, 209 A.3d at 283.

[231] *Id.* at 281–82.

values naturally implicated by election regulations."[232] The anti-fusion law and *Magazzu* were themselves violations of equal treatment under the law and also were evidence that Pennsylvania's elections were not free and equal. To appreciate the violation of both provisions required a realistic approach that understood the law's practical effects. As Justice Wecht observed,

> [T]he regulatory approach adopted by the legislature has the well-documented effect of reducing voter access to alternative viewpoints, limiting voters' ability to tangibly support their chosen political party, and depressing voter enthusiasm and participation. *It is not enough to rely upon facial equality to justify overlooking practical impediments* that disproportionately affect smaller parties to the clear benefit of major parties, especially where the rationales offered in support of regulations that have such an effect are not more clearly tailored to, or effective in advancing, the stated goals.[233]

Many state constitutions do not have their own equal protection clauses.[234] But even for those that don't, courts have implied a principle of equal protection and allowed claims to proceed on that basis.[235] Where courts are willing to appreciate the practical effects of banning fusion, it will be easier for courts to recognize the application of those bans as a violation of the principle of equal protection.

5. *Freedom of Association*

In nearly every state where they are filed, fusion lawsuits will likely include a claim based on freedom of association. State courts will be tempted to treat this claim as functionally identical to the First Amendment freedom-of-association claim that the U.S. Supreme Court rejected in *Timmons*.[236] That would be a mistake. The textual grounding for the freedom of association in

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[232] *Id.* at 299 (Wecht, J., concurring and dissenting).

[233] *Id.* at 306–07 (emphasis added).

[234] At least fifteen state constitutions have equal protection clauses. *See* Shaman, *supra* note 218, at 1055 n.292.

[235] *See, e.g.*, Greenberg v. Kimmelman, 494 A.2d 294, 302 (N.J. 1985) ("Nowhere in [article 1, paragraph 1 of the New Jersey constitution, which is a grant of fundamental rights,] do the phrases 'equal protection' or 'due process' appear. Nonetheless, article 1, paragraph 1, like the [F]ourteenth [A]mendment, seeks to protect against injustice and against the unequal treatment of those who should be treated alike. To this extent, article 1 safeguards values like those encompassed by the principles of due process and equal protection.").

[236] In Pennsylvania, for example, both the state's commonwealth court and its supreme court were unpersuaded by the claim that the anti-fusion law violated the Working Families Party's freedom of association; both followed in lockstep with *Timmons*. *See* Working Fams. Party v. Commonwealth, 169 A.3d 1247, 1260–64 (Pa. Commw. Ct. 2017); *Working Fams. Party*, 209 A.3d at 284–86. In dissent, even Justice Wecht declined to counter the majority's logic, noting this was "not necessarily because I find these arguments unpersuasive" but instead because the free and equal elections clause and the Equal Protection Clause arguments provided sufficient grounds on their own. *Id.* at 305 n.28 (Wecht, J., dissenting).

state constitutions differs in important ways from the First Amendment.[237] So does the ratification history of the clauses protecting freedom of association.[238] And when one considers the purposes behind the dual enforcement of rights in our federal system, it becomes apparent why state courts should adopt a different approach than the U.S. Supreme Court did in *Timmons.*

First, the textual basis for the freedom of association is quite different when one compares state constitutional provisions with the federal Constitution. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[239] In most states, however, the relevant text is phrased as an affirmative grant.[240] Take, as one example, Massachusetts: "The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; [and] give instructions to their representatives . . . ."[241]

Apart from their phrasing as a right of the people rather than a restriction on the legislature, the forty-seven state assembly clauses also include a different set of rights than the federal Constitution.[242] The right of the people to assemble is commonly declared in conjunction with their right to "consult" for the common good and to "instruct" or "make known their opinions" to their elected

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[237] *See, e.g.*, Seth F. Kreimer, *The Pennsylvania Constitution's Protection of Free Expression*, 5 U. PA. J. CONST. L. 12, 22–23 (2002) (listing instances where an affirmative right to speech was recognized under the Pennsylvania constitution).

[238] *See generally* Bowie, *supra* note 78.

[239] U.S. CONST. amend. I. Although the majority in *Timmons* perfunctorily dismissed the notion that the ballot is a forum for speech, it is hardly clear that state courts would or should reach the same result when interpreting the speech provisions of their own state constitutions. *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 363 (1997) ("Ballots serve primarily to elect candidates, not as forums for political expression."). Professor Derek Muller has observed that treating the ballot as a nonpublic forum or a limited public forum would lead to very different analyses of the implications of anti-fusion laws for the freedom of speech. *See* Derek T. Muller, *Ballot Speech*, 58 ARIZ. L. REV. 693, 747–48 (2016) (explaining that, were the U.S. Supreme Court to adopt this logic, "it would likely lead to overturning *Timmons*"). And scholars of free expression have long observed that state constitutions have been interpreted as providing broader protections than the First Amendment. *See, e.g.*, Monrad G. Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620, 626–27 (1951); Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 710 (1983); Alicia Bannon, *The Right to Protest and State Constitutions*, STATE CT. REP. (May 15, 2024), https://statecourtreport.org/our-work/analysis-opinion/right-protest-and-state-constitutions [https://perma.cc/56HM-QP4V].

[240] *See, e.g.*, WIS. CONST. art. I, § 4 ("The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged."); N.J. CONST. art. I, para. 18 ("The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances.").

[241] MASS. CONST. art. XIX.

[242] *See generally* Bowie, *supra* note 78.

representatives.[243] Giving effect to these words is crucial to understanding the scope of the right to associate and to assemble; only by erasing or ignoring them entirely can the federal right construed in *Timmons* be understood as analogous to the rights protected by the state constitutions.[244]

Moreover, the ratification history of these state constitutional provisions is fundamentally different than that of the First Amendment. Here, the work of Nikolas Bowie on the text, history, and structure of state assembly clauses is illuminating.[245] Bowie's scholarship suggests that these clauses protected the right of the people to make known their opinions to their representatives both directly and indirectly. Massachusetts, with its history of town meetings where citizens would provide direct instructions to their representatives on matters of policy, provided the initial inspiration for the clauses.[246] But the first clauses to be adopted—in Pennsylvania and North Carolina, both in 1776—came in contexts lacking a tradition of town meetings.[247] In those settings, elections provided an essential means for citizens to instruct and make their opinions known to their representatives.[248] As Bowie explains, the purpose of these textually distinct provisions was not simply to protect expression, but to promote self-government by letting the people instruct and express their opinions to their elected representatives.[249]

The fact that many states ratified their assembly clause provisions during the decades when fusion was ubiquitous helps us understand the original meaning of that right and of freedom of association more broadly. Throughout the 1800s, fusion and the meaningful role it provided for minor parties were essential to how Americans consulted for the common good and instructed their representatives. Fusion enabled Americans to make known their opinions on slavery before the Civil War and on economic policy during the Progressive

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[243] Bowie provides a helpful analysis of textual patterns in the various clauses. *Id.* at 1732–33 nn.545–49. Fifteen state constitutions tie the right to assemble to the right to instruct. *Id.* at 1733 nn.545–46 & 548. Five states use the "make known their opinions " language. *Id.* at 1733–34, 1734 n.550.

[244] Having learned from this history, advocates for fusion have invoked state assembly clauses as a basis for striking down anti-fusion laws. *See, e.g.*, Brief of Appellants, *supra* note *, at 56, 73. Plaintiffs in the fusion lawsuit recently filed in Kansas have also invoked the assembly clause of that state's constitution. Carpenter, *supra* note 57.

[245] *See* Bowie, *supra* note 78, at 1727 (noting "only five [state clauses] followed the First Amendment's structure by coupling the right to assemble with a right of speech or of the press").

[246] *See id.* at 1663, 1727.

[247] *Id.* at 1732–33, 1733 n.545.

[248] This stands in contrast to how the U.S. Supreme Court has understood ballots as simply a vehicle for electing candidates rather than a forum for political expression. *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 363 (1997) (citing Burdick v. Takushi, 504 U.S. 428, 438 (1992)). Yet elections have always been a crucial venue for citizens to make their opinions known to their elected representatives.

[249] *See* Bowie, *supra* note 78, at 1727.

Era.[250] Cross-nomination gave voters the ability to express their preferences to cross-nominated candidates.[251] Although the original inspiration for a right to assemble may have come from colonial Massachusetts, fusion provided an essential part of the historical context in which other states drafted and ratified their own protections for assembly, consultation, and making opinions known to elected representatives.[252]

Still another reason for state courts to consider *Timmons* as less than helpful when interpreting their state constitutions comes from our federal structure, which provides for dual protection of rights by the federal Constitution and state constitutions. To properly interpret and apply state constitutional rights requires understanding their function in a federal system.[253] In that system, state constitutions—and, in particular, their bills of rights—have a fundamentally different purpose than does the U.S. Constitution.[254] As Jonathan Marshfield has explained, the framers of state constitutions were overwhelmingly preoccupied with protecting the people from domination by minority factions.[255] The framers of state constitutions worried that a few elected representatives in the legislature might create laws to benefit themselves rather than doing the work of the people.[256] This was a very different concern than that of the Framers of the U.S. Constitution and its Bill of Rights—who saw their task as entrenching protections that would later prevent domination by "majority faction."[257]

Seen through this functional lens, freedom of association and the rights to assemble, consult, and express opinions to representatives take on a different meaning. As Marshfield explains, judicial review might look "very different when a [state] court is constructing [a state constitution] designed to empower popular control over government than if it is constructing a deeply entrenched

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[250] *See* Brooks & Tremitiere, *supra* note 24, at 341; SLEZ, *supra* note 23, at 13.

[251] *See* Brooks & Tremitiere, *supra* note 24, at 353.

[252] Among the states that adopted assembly clauses during the decades when fusion was commonplace were California, Idaho, Illinois, Iowa, Kansas, Nevada, New Jersey, Oregon, Rhode Island, Texas, and West Virginia. *See* CAL. CONST. of 1849, art. I, § 10; IDAHO CONST. of 1889, art. I, § 10; ILL. CONST. of 1870, art. II, § 17; IOWA CONST. of 1846, art. I, § 20; KAN. CONST. of 1855, art. I, § 3; NEV. CONST. of 1864, art. I, § 10; N.J. CONST. of 1844, art. I, § 18; OR. CONST. of 1857, art. I, § 27; R.I. CONST. of 1842, art. I, § 21; TEX. CONST. of 1845, art. I, § 19; W. VA. CONST. of 1872, art. III, § 16.

[253] *See* James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1005 (2003) ("[I]ndividual rights granted in state constitutions serve the purpose not only of protecting individuals against tyrannical acts of state governments, but also against tyrannical acts of the national government."). *See generally* JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM (2005).

[254] *See* Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PA. L. REV. 853, 854 (2022).

[255] *Id.* at 858 & n.22.

[256] *Id.*

[257] *Id.* at 858 (citation omitted).

instrument" like the federal Constitution that is "designed to constrain or limit popular control over government."[258] Rather than limiting future abuses by popular majorities, the objective of state constitutions is to keep self-interested minorities that are composed of partisan incumbents from denying the popular will—in this case, for a range of forms of political association.[259] The *Timmons* Court constructed the First Amendment freedom of association by simply stipulating the purported state interests that justified anti-fusion laws rather than asking whether the legislators who passed those laws, or the executive officials later justifying them, were deferring to the popular will.

A functional approach also suggests that state courts should recognize their vital and distinctive role in a federal system defined by dual enforcement.[260] When, as in *Timmons*, federal courts have effectively endorsed partisan self-dealing by state legislators, it is all the more important for state courts to ensure that the will of the people of the state is reflected in the laws enacted by their legislators.[261]

B. *Rigorous and Realistic Review*

If a state court concludes that an anti-fusion law implicates one of the provisions discussed above, how would it determine if the law violates the state constitution? The key question here is less about the scope and substance of the right than the standard of review a court decides to apply. Again, the choice for state courts is whether to adopt the standard used by federal courts in ballot-access disputes or to conduct an independent analysis.

This Subpart first explains why state courts should conduct a more rigorous and realistic review of anti-fusion laws than most federal courts have. Doing so would recognize that a state constitution's prioritization of majoritarian democracy calls for a searching analysis of any law that threatens to undercut popular sovereignty—and a harder look than what federal courts have applied to potential violations of the U.S. Constitution.

There are a few ways to think about this higher standard of review. One is what Professors Bulman-Pozen and Seifter have described as democratic proportionality review, which recognizes state constitutions' unique commitment to protecting democracy.[262] This aligns with principles from other areas of law concerning how courts should review self-dealing and

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[258] *Id.* at 931.

[259] *Id.* ("[I]f state constitutional rights are instruments of popular control over government, courts might feel especially emboldened to actively monitor government on the people's behalf; working to effectuate the spirit and purpose of state constitutional rights to protect the people from government recalcitrance.").

[260] *See* James A. Gardner & Jim Rossi, *Dual Enforcement of Constitutional Norms*, *in* NEW FRONTIERS OF STATE CONSTITUTIONAL LAW 7–11 (James A. Gardner & Jim Rossi eds., 2010).

[261] James A. Gardner, *Active Judicial Governance*, 51 NEW ENG. L. REV. 547, 556 (2017).

[262] Bulman-Pozen & Seifter, *supra* note 168, at 1895.

anticompetitive behavior—in this case, by legislators. This Subpart first surveys these approaches, which all point in the same direction.

It then examines what should happen if state courts instead decide to adopt the approach that federal courts have used to analyze ballot-access restrictions. If done in good faith, this should not simply reproduce the outcome in *Timmons*. This is because the *Timmons* majority failed to appreciate the true burdens created by anti-fusion laws and the actual interests that they serve, as explained below. A quarter-century later, any clear-eyed analysis of those burdens and interests should recognize that anti-fusion laws, particularly when compared to the preenactment baseline, severely burden both parties and voters—and that entrenching a two-party duopoly has not promoted stability in our political system.

1. *Taking Scrutiny Seriously*

Because state supreme courts have the final say on the meaning of their state constitutions, they may independently determine the standard of review that courts apply to alleged rights violations. And in many cases, they have done so. One recent analysis found that when it comes to restrictive voting laws, the majority of the states have applied strict scrutiny—a higher standard than the prevailing approach under the *Anderson-Burdick* balancing approach used by federal courts.[263] This suggests lockstepping, while a possibility, is hardly inevitable. Across the country, state courts have recognized that their constitutions require something more than the federal courts' balancing approach.

Recent scholarship has explained why this higher standard does justice to state constitutional interpretation. Federal courts, Bulman-Pozen and Seifter have observed, generally conduct review by reference to "clause-bound interpretation" and rigid tiers of scrutiny, and they tend to have concerns about the counter-majoritarian difficulty that are less relevant in the context of elected judges and state-level majoritarian judicial systems.[264] While the U.S. Supreme Court will tend to apply a "federalism discount," deferring to the choices of state legislatures,[265] there is no need for state courts to do the same. Lockstepping, as Joshua Douglas has underscored, is inconsistent with not only state constitutional text and history but also principles of judicial federalism.[266]

What type of review is best tailored to the state constitutional context? Bulman-Pozen and Seifter have proposed that state courts should construct and enforce rights related to voting and democracy through what they call

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[263] *See* Lau, *supra* note 154.

[264] *See* Bulman-Pozen & Seifter, *supra* note 168, at 1881–82.

[265] *See* ROBERT WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 203 & n.199 (2d ed. 2023).

[266] Douglas, *supra* note 63, at 121–29.

"democratic proportionality review."[267] A court would first identify the right or rights at issue, then ask whether the state's infringing action pursues an acceptable purpose and uses means that are rational and minimally impair the right.[268] This approach would better fit the context of democracy at the state level than importing the federal balancing approach and its deferential stance toward the legislature.[269] Democratic proportionality review, by contrast, recognizes that "[s]tate constitutions . . . always distinguish the people themselves from their governments . . . [and] express skepticism of unrepresentative legislatures."[270] The case for searching judicial review is bolstered by the fact that state court judges are themselves elected.[271] Rather than being separate from the democratic process, judges are active participants in defining and defending constitutional democracy in the states.[272]

Democratic proportionality review aligns with the intuition that courts should take a hard look at laws that could be anticompetitive or instances of self-dealing. In one of the most influential election-law articles of the past generation, Samuel Issacharoff and Richard Pildes proposed that courts apply heightened scrutiny to laws that insulate incumbents from competition.[273] They critiqued *Timmons* as a missed opportunity to ensure competitive elections.[274] In a recent reflection on the legacy of Issacharoff and Pildes's article, Professor Rick Hasen noted that the U.S. Supreme Court has mostly declined to play that policing role.[275] Its abdication only reinforces the need for state courts to be rigorous in checking laws that reduce competition in state elections.

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[267] Bulman-Pozen & Seifter, *supra* note 168, at 1895, 1915.

[268] *Id.* at 1895. Similarly, Professor Douglas has argued in favor of primacy, or putting the interpretation of state constitutional provisions before federal analysis. Douglas, *supra* note 63, at 129–35.

[269] Bulman-Pozen and Seifter explain that rational basis review may be appropriate for federal laws but is less appropriate "in the states, where judges are generally elected statewide . . . and where legislatures are frequently the least representative branch of government because of districting, geographical clustering, and extreme gerrymandering." Bulman-Pozen & Seifter, *supra* note 168, at 1886.

[270] *Id.* at 1896.

[271] *See id.*

[272] Gardner, *supra* note 261, at 548.

[273] Issacharoff & Pildes, *supra* note 66, at 670 (calling for "heightened review for those decisions . . . of political engagement to the benefit of incumbent lawmakers"); Rick Hasen, *Coming Next Week to ELB: Symposium on the 25th Anniversary of Issacharoff and Pildes, "Politics as Markets,"* ELECTION L. BLOG (Sept. 4, 2023), https://electionlawblog.org/?p=138550 [https://perma.cc/HYJ7-2Q4R] (recognizing Issacharoff and Pildes's article as "[o]ne of the most important theoretical contributions to election law in the past generation").

[274] Issacharoff & Pildes, *supra* note 66, at 683–87.

[275] *See* Hasen, *supra* note 75.

Courts would likely reach a similar conclusion if they viewed elected representatives as fiduciaries with a duty to serve the public trust.[276] Professor Theodore Rave, for example, has suggested that we see partisan gerrymandering as self-dealing that violates legislators' duty of loyalty to the public.[277] History suggests that anti-fusion laws were themselves a way in which incumbent legislators worked to advance their own interests and entrench their partisan advantage rather than serve the public.[278] "If courts were to bear the role of supervising and enforcing the fiduciary duties of representatives," Professor Rave concludes, "the presence of a conflict of interest should trigger heightened scrutiny."[279]

The indeterminacy and instability of federal doctrine should also push state courts to think twice before adopting the standard of review that federal courts use to review ballot-access restrictions. In *Crawford v. Marion County Election Board*, the U.S. Supreme Court fractured, unable to achieve a majority in deciding how to apply *Anderson-Burdick*.[280] Since then, federal judges and legal scholars have derided the approach as irredeemably indeterminate. "[A]dvance understanding," Sixth Circuit Judge Readler has observed, "is not a virtue of *Anderson-Burdick* review."[281] Professor Ned Foley has described *Anderson-Burdick* as "such an imprecise instrument that it is easy for the balance to come out one way in the hands of one judge, yet come out in the exact opposite way in the hands of another."[282]

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[276] *See, e.g.*, D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 677 (2013); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1088–89 (2004).

[277] *See* Rave, *supra* note 276, at 715 ("When incumbent politicians manipulate the election laws [such as through redistricting] to entrench themselves, they too breach their fiduciary duty of loyalty."). Professor Rave sees no problem with substantive legislation that could aid incumbents' reelection; the issue is that "when incumbents legislate on the *processes* by which they are reelected, there is a risk that they will manipulate those processes to reduce the very competitive pressures that might otherwise justify deference." *Id.* at 716.

[278] Argersinger, *supra* note 22, at 288–90.

[279] Rave, *supra* note 276, at 720. Continuing the analogy to corporate-law fiduciary principles, Rave proposes "entire fairness review," in which "[c]ourts could put the burden on the legislature to show that, despite the conflict of interests, the [change to electoral procedures] was entirely 'fair.'" *Id.* at 725. Translating private-law principles to public-law contexts has received criticism. *See, e.g.*, Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1148–49 (2014). But democratic proportionality review is instinctually correct: heightened scrutiny is proper when incumbents redesign the democratic processes to entrench their advantage.

[280] *Compare* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 190–91 (2008) (plurality opinion), *with id.* at 205 (Scalia, J., concurring in judgment). Professor Foley has summarized the lines along which the plurality and dissenting justices split. Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836, 1848–49 (2013).

[281] *See* Daunt v. Benson, 956 F.3d 396, 425 (6th Cir. 2020) (Readler, J., concurring in the judgment).

[282] Foley, *supra* note 280, at 1859.

The bell may soon toll for *Anderson-Burdick* balancing. Derek Muller predicts that the Supreme Court will overturn *Anderson-Burdick* within the next decade.[283] And Judge Readler has proposed that federal courts define a bright-line rule that could "turn[] on the application of historical understandings and foundational principles . . . [and] afford[] appropriate deference to a state's strong interest in self-governance."[284] Given the Supreme Court's recent critiques of balancing and fondness for tests rooted in history and tradition,[285] state courts that lockstep today could wind up tomorrow like Wile E. Coyote—out on their own, with nothing left to stand on.[286]

2. *True Burdens on Parties, Candidates, and Voters*

Despite these reasons to apply a heightened standard of review, some state courts could be tempted to adopt a standard that mimics *Anderson-Burdick*.[287] Under that analysis, a court would apply heightened scrutiny if it concludes there was a severe burden on associational rights.[288] If, as in *Timmons*, it determined that anti-fusion laws only modestly burden those rights, then it would apply only intermediate scrutiny.[289] In *Timmons*, that effectively resolved the claim that anti-fusion laws violated the First Amendment. Given that the burdens in question are, in fact, severe, the appropriate standard under an *Anderson-Burdick* approach would be heightened scrutiny.

It is increasingly apparent, twenty-five years after *Timmons*, that the Supreme Court majority erred in its balancing analysis. First, consider the burdens. The *Timmons* majority reasoned that the burdens on minor parties were not trivial, but they were also not severe—because, even without the ability to cross-nominate, minor parties could survive, endorse the candidates of their choice, and nominate anyone other than candidates of another party.[290] Minor

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[283] Derek Muller, *What Happens to Election Law After the Anderson-Burdick Framework Is (Probably) Overturned?*, ELECTION L. BLOG (Feb. 25, 2022), https://electionlawblog.org/?p=127766 [https://perma.cc/66P6-N7JL].

[284] *See Daunt*, 956 F.3d at 426 (Readler, J., concurring in the judgment).

[285] *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 22 (2022); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

[286] If the Court scraps *Anderson-Burdick* and takes Judge Readler's advice, that could entail either radical deference to state legislatures or a history-and-tradition test rooted in fiduciary principles. *See* Rave, *supra* note 276, at 708–11 (explaining how the Framers understood legislators' duty to the public in fiduciary terms).

[287] *See* Lau, *supra* note 154 (surveying the standards of review used by state courts in reviewing restrictive voting laws and how they compare to the *Anderson-Burdick* standard).

[288] *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992).

[289] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 363–64 (1997) (determining that the burdens, "though not trivial," were not severe, so state interests had to be only sufficiently weighty to justify the limitation).

[290] *See id.* at 361.

parties might not thrive in the absence of fusion, but as the majority saw it, that did not mean anti-fusion laws were unconstitutional.[291]

One can easily see, especially in retrospect, why the burdens of anti-fusion laws on minor parties were severe—and how the majority failed to recognize that fact. The majority misstated the relevant comparison. Rather than asking how laws that banned fusion had harmed minor parties, it took a no-fusion political system as the baseline.[292] From there, it reasoned:

- If, even with a fusion ban, minor parties can exist and do various things, they are not severely burdened.
- Minor parties can exist and do various things.
- Therefore, they are not severely burdened by not being able to practice fusion.[293]

This is the wrong comparison. It is akin to an abuser blocking their victim's smartphone from making calls and then gaslighting the victim by saying that they can still send emails.[294] The correct baseline is a fully functioning phone, not telling a victim they did not suffer harm because their phone is not entirely disabled. A deliberately misframed comparison such as this, in the context of constitutional analysis, is legal gaslighting.[295]

The appropriate comparison is between minor parties' position before and after the enactment of anti-fusion laws:

- If a party cannot name its preferred standard-bearer, it is severely burdened.
- Anti-fusion laws deprive minor parties of the ability to name their preferred standard-bearers.
- Therefore, anti-fusion laws severely burden minor parties.

This is akin to how the Court would later get the burden analysis correct in *California Democratic Party v. Jones*.[296] There, writing for the majority, Justice Scalia held a measure that deprives a party of its "basic function"—selecting its own candidates and leaders—creates a burden that is "both severe and unnecessary."[297]

In the fusion context, the history is telling. Before anti-fusion laws, cross-nomination allowed minor parties not only to name their own standard-bearers but also to play a significant role in American political life, from opposing

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[291] *Id.* at 361–62.

[292] *Id.* at 363 (summarizing the burdens on a minor party and its members by reference to what they could do *despite* Minnesota's anti-fusion law, rather than by comparison to what minor parties could do in the system that existed *before* fusion was banned).

[293] *Id.*

[294] *Cf.* Paige L. Sweet, *The Sociology of Gaslighting*, 84 AM. SOCIO. REV. 851, 863 (2019).

[295] *See* Alvin YH Cheung, *Legal Gaslighting*, 72 U. TORONTO L.J. 50, 51–54 (2022).

[296] *See generally* Cal. Democratic Party v. Jones, 530 U.S. 567 (2000).

[297] *Id.* at 581, 586. I am grateful here to Rick Pildes, who pointed out the profound tension between *Timmons* and *Jones*.

slavery[298] to promoting monetary policies that could support farmers devastated by economic depression.[299] The power to cross-nominate—and to withhold such nominations—created leverage, which minor parties used to significant effect.[300] In New York, minor parties still use that leverage.[301]

While the *Timmons* majority misrepresented the severity of the burdens placed on parties, it outright ignored the burdens anti-fusion laws place on candidates. Our electoral system rests on the bedrock principle that candidates may associate with the parties that nominate them as their standard-bearer in a particular election, given their shared values and policy aspirations. The ballot, in turn, presents this party–candidate association to voters, who are then free to make their decisions based on that information. Anti-fusion laws bar would-be fusion candidates from associating with the parties whose values they share and accepting the nominations that they receive. For this reason, such candidates are unable to fully represent their values and aspirations, via those associations, to voters.

Finally, the *Timmons* majority also ignored the burden anti-fusion laws create for voters. Here, again, the correct comparison is between the choice presented to voters when fusion was legal, and now, when it is not. And, again, history has important lessons:

> Two-party democracy looked very different to third-party voters in the final third of the nineteenth century. When antifusion laws were first introduced, one Michigan Populist vigorously protested that the legislation "practically disfranchises every citizen who does not happen to be a member of the party in power." He rightly predicted that, absent fusion, dissenters would be

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[298] *See* Brooks & Tremitiere, *supra* note 24, at 341.

[299] *See* SLEZ, *supra* note 23, at 12–13 (describing how the Populist Party used fusion to promote free-silver economic policy in the 1890s).

[300] *See, e.g.*, Brooks & Tremitiere, *supra* note 24, at 346 (explaining that fusion parties "exerted outsized influence on national politics in the 1840s and 1850s, forcing the slavery issue to the center of national political debate, unsettling the existing proslavery two-party system, and catalyzing the rise of the Republican Party").

[301] *See, e.g.*, Alyssa Katz, *The Power of Fusion Politics*, NATION (Sept. 12, 2005), https://www.thenation.com/article/archive/power-fusion-politics; Harold Meyerson, *The Working Families Party Brings Andrew Cuomo Back into the Fold*, WASH. POST (June 4, 2014), https://www.washingtonpost.com/opinions/harold-meyerson-the-working-families-party-brings-andrew-cuomo-back-into-the-fold/2014/06/04/437eb1b6-ec0e-11e3-93d2-edd4be1f5d9e_story.html; David Sirota, *If the Left Had a Tea Party…*, POLITICO (June 5, 2014), https://www.politico.com/magazine/story/2014/06/if-the-left-had-a-tea-party-107501; Benjamin R. Kantack, *Fusion and Electoral Performance in New York Congressional Elections*, 70 POL. RSCH. Q. 291, 291 (2017).

> "compelled to either lose their vote (as that expression is usually understood)" or else to join forces with the least objectionable major party.[302]

For observers today, more than a century removed from the world in which minor parties exerted real influence on American politics and policy, it may be hard to recognize the burden of not being able to vote for candidates on more than one party line. It takes effort to recognize that nearly all of us have been raised in a democracy deliberately structured to reduce our choices and our power as voters. But when we do, the trace of this burden becomes apparent in poll after poll, showing that Americans yearn for more viable choices than the two major parties provide.[303]

By looking to history and Americans' present discontent, courts can recognize the severe burden anti-fusion laws still create for both minor parties and voters. Under the *Anderson-Burdick* framework, that would require a state to demonstrate a compelling interest.

3. *Actual Interests at Stake*

Because the *Timmons* majority failed to recognize the true burden of anti-fusion laws, it determined that state interests need only be "'sufficiently weighty to justify the limitation' imposed on the party's rights."[304] Yet it is hard to see how anti-fusion laws would pass muster even if a state court were to both adopt an approach akin to *Anderson-Burdick* and, as in *Timmons*, apply only intermediate scrutiny.

This is because, in crucial respects, the *Timmons* majority largely erred in its assessment of the relevant state interests. The only thing it got right was that the alleged state interest in avoiding voter confusion was "paternalistic" and ought to play no role in the analysis.[305] But in concluding that two other interests—ballot integrity and political stability—were sufficiently weighty to justify Minnesota's anti-fusion law,[306] it did little to verify the validity of those

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[302] Lisa Disch, *What Fusion Politics Could Mean for Third Political Parties Today*, NEW AM. (Jan. 9, 2024), https://www.newamerica.org/political-reform/reports/the-realistic-promise-of-multiparty-democracy-in-the-united-states/what-fusion-politics-could-mean-for-third-political-parties-today-lisa-disch [https://perma.cc/57DK-Z25S] (quoting KALAMAZOO WKLY. TEL., March 20, 1895, as cited in Argersinger, *supra* note 22, at 304).

[303] *See, e.g.*, PEW RSCH. CTR., *supra* note 1; IPSOS, *supra* note 3.

[304] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 364 (1997) (quoting Norman v. Reed, 502 U.S. 279, 288–89 (1992)); *see also id.* at 363 (concluding that "the burdens Minnesota imposes on the party's First and Fourteenth Amendment associational rights—though not trivial—are not severe").

[305] *Id.* at 370 n.13.

[306] *Id.* at 369–70. The notion that anti-fusion laws could be justified by the state's interest in avoiding voter confusion had been discussed in the case below and in the Supreme Court

interests, noting that "elaborate, empirical verification of the weightiness of the State's asserted justifications" was not required.[307]

In its eagerness to defer to the legislature—and to the state's solicitor general, who asserted the state's ostensible regulatory interests[308]—the majority committed two crucial errors. First, it declined to consider whether the actual interests served by the anti-fusion law were those of the incumbent major parties rather than the people of the state. Second, it assumed that a two-party system promotes electoral stability. With the benefit of history, we can recognize these as fatal analytical flaws.

Ballot integrity is a valid interest that could have been achieved by less restrictive means. In *Timmons*, Minnesota asserted that its ban was meant to prevent "bogus minor parties" from using fusion to advance their interests through "ballot manipulation."[309] Yet when asked by the Court the obvious question—"[A]nd has this ever happened?"—the state's attorney pivoted to answer another question and offered no historical precedent.[310] In fact, the history of states like New York and Connecticut, where electoral fusion has been commonplace, indicates that such sham parties are a nonissue.[311] Moreover, the state could simply have raised ballot-access thresholds to prevent sham tactics.[312] Similarly, if the actual state interest was keeping minor parties from cross-nominating major-party candidates just to meet ballot-access requirements, then disaggregated fusion could differentiate how many votes each party received.[313]

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briefing in *Timmons*. *Id.* at 370 n.13. In dissent, Justice Stevens noted that concern was "meritless and severely underestimates the intelligence of the typical voter." *Id.* at 375–76 (Stevens, J., dissenting). The majority conceded that voter confusion "plays no part in our analysis." *Id.* at 370 n.13 (majority opinion).

[307] *Timmons*, 520 U.S. at 364 ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." (quoting Munro v. Socialist Workers Party, 479 U.S. 189, 195–96 (1986)).

[308] Transcript of Oral Argument at 6, *Timmons*, 520 U.S. 351 (No. 95-1608).

[309] *See id.* at 13.

[310] *See id.* at 14.

[311] *See* Pocasangre, *supra* note 41.

[312] The federal courts have generally been quite permissive when it comes to reviewing state laws that raise the threshold for third or minor parties to have a line on the ballot. *See, e.g.*, Libertarian Party of N.Y v. N.Y. State Bd. of Elections, 539 F. Supp. 3d 310, 320–21 (S.D.N.Y. 2021).

[313] As Rick Hasen has explained, the argument that anti-fusion laws are reasonable ballot-access restrictions that happen to favor a two-party system "quickly disappears upon understanding that the state could simply list candidates on the ballots once under each party and then count only the votes cast for the candidate under the minor party label to meet that minor party's ballot access requirements." Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 339. The takeaway is that regulations appear anything but "reasonable" when the alternative is as simple as disaggregated fusion. *See* Kokolis, Parr & Tremitiere, *supra* note 19.

By giving credence to the supposed interest in ballot integrity, the *Timmons* majority declined to examine the actual interests driving anti-fusion laws. As should be clear by now, these were not *state* interests but rather *partisan* interests—of the parties that controlled state legislatures when anti-fusion laws were passed and that still dominate state governments, thanks to the laws' enduring effects. Had the majority recognized that laws banning fusion were designed by partisan incumbents precisely to entrench their power and prevent competition, it would have had to confront the fact that anti-fusion laws do not simply support a two-party system but give "the two old, established parties a decided advantage over any new parties struggling for existence."[314] And, in acknowledging that fact, the Court would have had to acknowledge its departure from the precedent set by *Williams v. Rhodes*: that the Court would not abide election regulations that do not simply favor the two major parties but "in effect tend[] to give them a complete monopoly."[315]

Under the Court's precedent, and the reasoning of *Williams*, it is difficult to see how a state could invoke a valid interest in a rigid and exclusionary two-party system. "There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them," the Court noted in *Williams*, because "[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms."[316] Instead, the *Timmons* majority accepted that perpetuating a partisan duopoly could itself constitute a valid state interest.[317] And it did so effectively *sua sponte*; in its briefs, Minnesota had not asserted this ostensible interest, which arose only in response to a question at oral arguments.[318]

The majority's decision to accept a duopolistic party system as a valid state interest turned on the crucial—but entirely unsupported—assumption that it furthers a stable political system. Yet, rather than offer empirical support for the purported link between a two-party system and political stability, the majority

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[314] Williams v. Rhodes, 393 U.S. 23, 31 (1968). The *Williams* Court underscored that election rules could not constitutionally entrench a duopoly: "[T]he Ohio system does not merely favor a 'two-party system'; it favors two particular parties—the Republicans and the Democrats . . . . There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them." *Id.* at 32.

[315] *Id.*

[316] *Id.*

[317] *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 367 (1997) (noting that "the States' interest permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system").

[318] At oral arguments, counsel for the state responded to a question about the justification for a ballot restriction in a different case by noting that "[i]t had a justification of preserving the stability of the party system and the electoral system, and that's some of the justification for this statute." Transcript of Oral Argument, *supra* note 308, at 21. In dissent, Justice Souter noted that "Minnesota's statement of the 'important regulatory concerns advanced by the State's ban on ballot fusion' contains no reference whatsoever to the 'two party system,' nor even any explicit reference to 'political stability' generally." *Timmons*, 520 U.S. at 382 (Souter, J., dissenting) (citation omitted).

simply provided a string cite to conclusory statements in dissenting and concurring opinions from prior cases.[319]

The self-evident nature of this assumed link is an artifact of the historical moment when the Court confronted the question of fusion. In 1996, the two-party system might have seemed inherently stable. For decades, American electoral politics had been organized around what political scientist Lee Drutman has described as a "hidden four-party system."[320] Through compromises and temporary coalitions worked out between the four factions of the two major parties, post-war American politics experienced a period of relative stability.[321] Given these circumstances, it is unsurprising that the Justices in the *Timmons* majority would see the two party-system—to which they owed their lifetime appointments—as linked to stability.

The quarter century since *Timmons* has undercut that proposition. Starting around 1996, the hidden four-party system began to sort into two increasingly polarized parties.[322] This process of sorting and polarization has not increased political stability. "Most of the common wisdom," explained a recent American Political Science Association task force, "tells us that the contemporary Democratic and Republican parties are so polarized and incompatible that their differences prevent legislative action, fuel zero-sum thinking, and even provoke violence."[323] Rather than tamping down conflict, our current two-party system means that "American democracy is at higher risk. Partisans increasingly view their opponents as an existential threat to the American way of life."[324] After January 6, the encomium in *Timmons* to the two-party system reads as strikingly naïve. It is hard to see a valid state interest in laws that entrench a party system that stokes polarization to levels that threaten democracy itself.

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Timmons does not bind how state courts interpret their state constitutions. And it does not have much to teach state courts. Aside from being ill-suited to the state constitutional context, the indeterminate standard that the *Timmons* Court applied may not endure. Moreover, the Court misapplied that standard, misapprehending both the burdens that anti-fusion laws create and the interests they supposedly serve. In deciding the fusion lawsuits to come, state courts would be better off charting their own paths—especially because *Timmons* itself may someday meet its demise.

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[319] *See Timmons*, 520 U.S. at 367.

[320] *See* DRUTMAN, *supra* note 5, at 3.

[321] *Id.* at 85–87 (describing how the nominal two-party system in fact was composed of four parties: liberal and conservative Democrats and liberal and conservative Republicans).

[322] *Id.*

[323] David Lublin & Lilliana Mason, *Introduction*, *in* MORE THAN RED AND BLUE, *supra* note 29, at 23.

[324] *Id.*

IV. TRANSCENDING *TIMMONS*

Is *Timmons* forever? Today, it might be hard to imagine the U.S. Supreme Court overturning its blessing of anti-fusion laws. Yet the Court has not shied from overruling precedent it finds to be in error.[325] And *Timmons* is as clearly erroneous now as it was on the day it was decided.

This Part explains why *Timmons* could eventually be overruled. Justices routinely disclaim that they are swayed by developments in politics and policy.[326] Even so, on a wide range of issues, the Court routinely takes its cue from trends in the states.[327] This means that, rather than following the U.S. Supreme Court, state courts can lead. Striking down anti-fusion laws as contrary to state constitutions would demonstrate that the reasoning and outcome of *Timmons* were not inevitable. Experiments with fusion in the states would also demonstrate that legalizing the practice would not be destabilizing—instead, it would contribute to our democracy's health.

State experiments with fusion would also raise the question of whether *Timmons* is a precedent worth respecting and reaffirming. When we consider the factors that the Court has applied to decide whether to stand by its own precedent, *Timmons* appears to be on thin ice.

A. *Experimenting with Multiparty Democracy*

By striking down anti-fusion laws, state courts would open a path for the U.S. Supreme Court to revisit *Timmons*. These decisions would have two main effects. First, they would enable state-level experiments with fusion that could demonstrate the practice does not destabilize our political system. Second, they would stand as examples of legal reasoning that other courts could learn from and build on.

If anti-fusion laws fall, democratic experimentation would bloom. Because moderate parties are driving the ongoing wave of fusion lawsuits,[328] this would mean, most immediately, that state-level party systems would allow independent voters to support center-right or center-left fusion tickets. Based on

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[325] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 268 (2022); Janus v. AFSCME, 585 U.S. 878, 916–17 (2018).

[326] *See* Trump v. United States, 603 U.S. 593, 641 (2024).

[327] *See, e.g.*, Adam M. Samaha, *Is* Bruen *Constitutional? On the Methodology That Saved Most Gun Licensing*, 98 N.Y.U. L. REV. 1928, 1935–36 (2023) (describing how Justices have measured the contemporary popularity of gun licensing through the number and types of state laws concerning gun licensing); Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards*,*"* 57 UCLA L. REV. 365, 370–400 (2009) (citing cases in which Justices have conducted "nose-counting" in issues involving civil liberties).

[328] *See, e.g.*, David Wildstein, *Moderate Party Will Ask N.J. Supreme Court to Lift Ban on Fusion Voting*, N.J. GLOBE (July 20, 2022), https://newjerseyglobe.com/campaigns/moderate-party-will-ask-n-j-supreme-court-to-lift-ban-on-fusion-voting [https://perma.cc/Q4BE-TW4G]; Carpenter, *supra* note 57.

New York State's experience,[329] it would likely also mean the creation of viable minor parties on both the right and the left. The Republican and Democratic parties would likely remain the two major parties. But voters would have more choices because candidates could accept the nomination and appear on the ballot of more than one party.

The sky would not fall. Existing ballot-access rules are stringent enough to deter any mischief-making by sham parties.[330] States could of course still set a threshold for the number of nominations any one candidate could accept, as Oregon does.[331] Rather than democratic breakdown, the result would likely be a party system that does a better job of giving voters the range of choices they desire, communicating those desires to elected officials, and deescalating polarization. The practical effect would be to debunk the baseless assumptions on which *Timmons* was grounded and undercut the notion that states have a valid interest in preserving a two-party duopoly.

Decisions striking down anti-fusion laws would also have a second important impact. Their legal reasoning would demonstrate how good-faith analysis can lead to the conclusion that the anti-fusion laws that *Timmons* blessed do in fact violate constitutional rights and freedoms. As in other domains where state courts have changed how the U.S. Supreme Court interprets the federal Constitution, these decisions would erode any lingering sense that *Timmons* was inevitable or necessarily correct.[332] By demonstrating that fusion does not cause instability and showing how anti-fusion laws violate constitutional rights, state courts would help chart a path for the U.S. Supreme Court to someday reconsider its decision in *Timmons*.[333]

B. *A Poor Candidate for Stare Decisis*

In its recent cases overruling prior decisions, the Supreme Court has had ample opportunity to elaborate on when cases do or don't merit deference as precedent. The factors that the Court will consider in its stare decisis analysis

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[329] *See* Pocasangre, *supra* note 41, at 21.

[330] *See* Pocasangre & Strano, *supra* note 21, at 8; *see also* Thomas Stratmann, *Ballot Access Restrictions and Candidate Entry in Elections*, 21 EUR. J. POL. ECON. 59, 60 (2005).

[331] Oregon balances freedom of association with the interest in managing the quantity of information that appears on the ballot by permitting a candidate to select up to three parties by which she has been nominated to be printed alongside her name. *See* ELECTIONS DIV., OR. SEC'Y OF STATE, STATE CANDIDATE MANUAL 6 (2024), https://sos.oregon.gov/elections/Documents/statecandidates.pdf [https://perma.cc/R2QJ-VT9E].

[332] *See, e.g.*, SUTTON, *supra* note 70, at 47–62. *See generally* Jennifer Bowie & Elisha Carol Savchak, *State Court Influence on US Supreme Court Opinions*, 10 J.L. & CTS. 139 (2022).

[333] If it did, the Court would likely take notice of states' movements in the direction of legalizing fusion. *See* Bowie & Savchak, *supra* note 332, at 143.

have varied.[334] But the general conclusion, restated consistently since 1991 and most recently in *Loper Bright Enterprises v. Raimondo*, is that "[*s*]*tare decisis* is not an 'inexorable command.'"[335]

Dobbs v. Jackson Women's Health Organization offers the most elaborated statement of the Court's contemporary approach to stare decisis.[336] There, the majority observed that stare decisis "is at its weakest when [the Court] interpret[s] the Constitution."[337] This is because "when it comes to the interpretation of the Constitution . . . we place a high value on having the matter 'settled right.'"[338] If the Court errs, the consequences endure: "when one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake."[339]

Prior to *Dobbs*, the Court's approach was defined by four stare decisis factors laid out in *Planned Parenthood of Southeastern Pennsylvania v. Casey*: workability, reliance, changes to related law that left the rule an "abandoned doctrine," and changes to facts that robbed the old rule of justification.[340] *Dobbs* changed this, though perhaps not as much as the *Dobbs* dissenters claimed. In *Dobbs*, the majority opinion described a five-part test: "the nature of [the precedents'] error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."[341]

Ultimately, there can be no super-precedent about precedent. If five Justices want to state a new rule for why cases should be overruled, they can. So, rather than assume *Dobbs* will forever be the rule, this Subpart explains why *Timmons* would be an unlikely candidate for stare decisis based on the factors identified by both *Casey* and *Dobbs*.

Nature of the Error. The *Dobbs* Court was comfortable overturning precedent because it reasoned that the precedent was "'egregiously wrong' on the day it was decided."[342] *Timmons* checks this box. As discussed above, *Timmons* misstated the burdens placed on parties and voters, and it proceeded

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[334] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992); Janus v. AFSCME, 585 U.S. 878, 916–17 (2018); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 268 (2022).

[335] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 407 (2024) (internal quotation marks omitted) (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)); *see also Dobbs*, 597 U.S. at 218 (citing Pearson v. Callahan, 555 U.S. 223, 233 (2009)).

[336] Most recently, the Court overruled *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), by reference to many of the same stare decisis factors discussed in *Dobbs*, although it did not cite *Dobbs* itself. *See Loper Bright Enters.*, 603 U.S. at 407.

[337] *Dobbs*, 597 U.S. at 264 (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997)).

[338] *Id.*

[339] *Id.*

[340] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992).

[341] *Dobbs*, 597 U.S. at 268.

[342] *Id.* (quoting Ramos v. Louisiana, 590 U.S. 83, 122 (2020) (Kavanaugh, J., concurring in part)).

from flawed assumptions—not only that the two-party system produced political stability but also that, absent anti-fusion laws, that system would crumble.[343]

The *Dobbs* majority also insisted that an error must *really* matter and not simply "concern some arcane corner of the law of little importance to the American people."[344] Compared to the topic of abortion, fusion might at first seem like small potatoes. Yet the structure of our party system was front of mind for the Founders. As John Adams wrote in 1780, "There is nothing I dread So much, as a Division of the Republick into two great Parties, each arranged under its Leader, and concerting Measures in opposition to each other. This, in my humble Apprehension is to be dreaded as the greatest political Evil, under our Constitution."[345] And when James Madison warned of "the violence of faction," he proposed that extending the size of the republic would help provide "the greater security afforded by a greater variety of parties."[346]

Whether our Constitution requires a preference for two parties—and for the Democratic and Republican parties in particular—defines our political system, and the choices that Americans are free to make when they vote. Over the past century, Americans have generally come to accept Justice Holmes's vision of "the theory of our Constitution," in which "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[347] The Supreme Court itself has understood the vital importance of political parties' freedom to associate in just these terms:

> By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, *such restrictions threaten to reduce diversity and competition in the marketplace of ideas*. Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream."[348]

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[343] As Hasen has pointed out, it is difficult to envision the end of the two-party duopoly without eliminating plurality voting or single-member districts. Hasen, *supra* note 313, at 370–71.

[344] *Dobbs*, 597 U.S. at 268.

[345] Letter from John Adams to Jonathan Jackson (Oct. 2, 1780), https://founders.archives.gov/documents/Adams/06-10-02-0113 [https://perma.cc/AZ8N-XKY6].

[346] *See* THE FEDERALIST NO. 10, at 129, 135 (James Madison) (Benjamin F. Wright ed., 1961); *see also* Daniel Stid, *A Madisonian Party System*, NAT'L AFFS. (2023), https://nationalaffairs.com/publications/detail/a-madisonian-party-system (advocating a conservative vision of a decentralized party system that is "intertwined with, and well suited for, our diverse society and constitutional arrangements").

[347] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[348] Anderson v. Celebrezze, 460 U.S. 780, 794 (1983) (emphasis added).

The logic of *Timmons*—that legislatures controlled by the two major parties can constitutionally restrict electoral competition[349]—directly conflicts with this fundamental, long-standing theory of American democracy as a process of sifting and choosing between competing ideas. And as surveys revealing deep discontent with the two-party system demonstrate, Americans are quite frustrated by a democracy designed to deprive them of more meaningful choices.[350]

Finally, *Dobbs* considered the effect of precedent on democracy. In the past, the majority noted, the "Court has previously overruled decisions that wrongly removed an issue from the people and the democratic process."[351] An interpretation of the Constitution, correct or incorrect, can preempt legislative action: "Those on the losing side" of a decision "could no longer seek to persuade their elected representatives to adopt policies consistent with their views."[352] *Dobbs*'s rhetoric of democracy, critics have argued, rings hollow because it turns the question over to state legislatures that the Court itself has allowed incumbent parties to gerrymander.[353] A similar critique applies to *Timmons*. While in principle the Court's decision allows voters to push for relegalizing fusion, in effect it blessed the two major parties' choice to insulate themselves from competition—both at the time anti-fusion laws were passed and on an ongoing basis—and ignore the popular desire for more options.[354] Whatever one's view of *Dobbs* on the merits, it is hard to disagree with the majority's sentiment that "it is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken."[355]

Quality of Reasoning. In *Dobbs*, the Court treated a precedent's reasoning as a factor distinct from whether the error was egregious. *Roe v. Wade*, the majority contended, "failed to ground its decision in text, history, or precedent," "relied on an erroneous historical narrative," and "devoted great attention to and presumably relied on matters that have no bearing on the meaning of the Constitution."[356]

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[349] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 369–70 (1997).

[350] *See supra* text accompanying notes 2–3.

[351] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 269 (2022).

[352] *Id.*

[353] *See* Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 729, 763 (2024).

[354] While the *Dobbs* Court claimed to be protecting democracy by returning decision-making to (thoroughly gerrymandered and nonrepresentative) state legislatures, overturning *Timmons* would recognize that judges, as Ely long ago argued, should be skeptical of legislatures' ability to shape electoral processes that protect minority voices. *See generally* ELY, *supra* note 65.

[355] *Dobbs*, 597 U.S. at 269 (quoting Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 787 (White, J., dissenting)).

[356] *Id.* at 270.

The same is true of *Timmons*. The balancing test used to determine when restrictions on political association go too far does not, of course, come from the text of the Constitution—and it has no historical roots in how the Framers of the First Amendment thought about regulating political parties. Instead, it derived from precedent,[357] just as *Roe* had extended modern substantive due process precedent.[358] Yet, as discussed below, *Timmons* also broke from prior precedent.

For the *Dobbs* majority, the quality of reasoning also related to the quality of historical analysis. *Roe* presented "a lengthy survey of history" but did not merit respect as precedent because "much of its discussion was irrelevant, and the Court made no effort to explain why it was included."[359] Similarly, the *Timmons* majority used history only when it served its ends—such as digressing on Minnesota's Democratic Farmer Labor Party to show that minor parties could exist in the absence of fusion.[360] Meanwhile, it erased the history of how fusion had shaped politics before its prohibition, and that history would have revealed the partisan interests that motivated anti-fusion laws in Minnesota and across the country.

The *Dobbs* majority also considered scholarly opinion of a precedent's reasoning. "[A]cademic commentators," the *Dobbs* majority noted, "including those who agreed with the decision as a matter of policy, were unsparing in their criticism" of *Roe*'s "exceedingly weak" reasoning.[361] If the Court now accords weight to scholarly assessments of an opinion's worth, then *Timmons* would not fare well. Scholars repeatedly critiqued the decision's sloppy and confused reasoning.[362] And at least one sitting federal district judge has weighed in,

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[357] Anderson v. Celebrezze, 460 U.S. 780, 789 (1983); Burdick v. Takushi, 504 U.S. 428, 434 (1992).

[358] *See* Roe v. Wade, 410 U.S. 113, 129 (1973) (citing Griswold v. Connecticut, 381 U.S. 479 (1965) and Eisenstadt v. Baird, 405 U.S. 438 (1972)).

[359] *Dobbs*, 597 U.S. at 271–72.

[360] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 361 n.9 (1997) (recounting the history of the party system in Minnesota between World War I and World War II).

[361] *Dobbs*, 597 U.S. at 278.

[362] *See, e.g.*, Hasen, *supra* note 313, at 333 ("[E]ven if the two-party system is a valuable institution, the Supreme Court need not uphold laws like those at issue in *Timmons* in order to preserve the two-party system."); Issacharoff & Pildes, *supra* note 66, at 668 ("[T]he Court systematically misunderstands this paradox by focusing on the articulation of a purported 'state interest' that actually licenses the worst kind of anticompetitive practice."); Terry Smith, *A Black Party?* Timmons*, Black Backlash and the Endangered Two-Party Paradigm*, 48 DUKE L.J. 1, 17 (1998) ("Ignoring the largely partisan genesis of anti-fusion laws, the Court uncritically accepted Minnesota's reasons for forbidding fusion politics and even supplied reasons of its own."); SIFRY, *supra* note 43, at 251 ("Tossing aside past rulings where the [C]ourt had rejected attempts by the existing major parties to artificially prevent others from effectively competing with them, the Rehnquist decision conjured this state interest from whole cloth."); Rogers, *supra* note 46, at 752 (criticizing an "extreme and

noting that "Chief Justice Rehnquist did not actually explain how the two-party system encouraged stability or how fusion threatened it."[363]

Workability. According to both *Casey* and *Dobbs*, the rule announced by a precedent must be "workable." As the *Dobbs* majority put it, the question is "whether [the rule] can be understood and applied in a consistent and predictable manner."[364] The *Dobbs* majority critiqued the workability of *Casey* itself by casting a skeptical eye on its method of balancing burdens against regulatory interests: "Problems begin with the very concept of an 'undue burden.'"[365]

Here, we can understand the *Timmons* rule at two levels of generality. At its most specific, the rule is narrow and quite workable: the First Amendment freedom of political association does not extend to fusion.[366] This rule—however poorly reasoned—could generate a predictable result for any future claim that anti-fusion laws violate the First Amendment.

At a higher level of generality, the rule's workability completely falls apart. *Timmons* could be invoked to justify any number of absurd restrictions on political participation and competition—based on a speculative parade of horribles that lacks evidentiary basis and in fact contradicts extensive real-world experience. If anti-fusion laws serve a supposed state interest in preserving a two-party system and preventing democratic destabilization, then presumably measures that render it effectively impossible for independent candidates to appear on the ballot would do the same—or even measures that choke off contributions to minor parties. Of course, the asserted state interests need not even be limited to those endorsed in *Timmons*. The logic of that decision empowers a federal judge simply to assume a state interest—even one that the state party did not actually assert.[367] This pull-an-interest-out-of-the-hat method endorsed by *Timmons* adds arbitrariness to the already-indeterminate project of means–ends balancing. As one commentator observed, *Timmons* "reflects the Court's continuing inability to articulate intelligible standards for assessing

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confused . . . departure from precedent"); Joseph Fishkin, *What Is a Political Party?*, *in* THE OXFORD HANDBOOK OF AMERICAN ELECTION LAW 425, 438 (Eugene D. Mazo ed., 2024) (critiquing *Timmons* for missing "most of the dynamics of intraparty contestation"); *cf.* David Schleicher, *"Politics as Markets" Reconsidered: Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections*, 14 SUP. CT. ECON. REV. 163, 201 (2006).

[363] Lynn Adelman, *The Misguided Rejection of Fusion Voting by State Legislatures and the Supreme Court*, 56 IDAHO L. REV. 107, 115 (2020). Judge Lynn Adelman also underscores that "*Timmons* reflected the Rehnquist Court's general antipathy to outsiders including minor political parties, and its inability to articulate intelligible standards for assessing infringements on parties' associational rights." *Id.* at 116.

[364] *Dobbs*, 597 U.S. at 280–81.

[365] *Id.* at 281.

[366] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 369–70 (1997).

[367] *See id.* at 377–78 (Stevens, J., dissenting).

infringements on political parties' associational rights."[368] As noted above, critiques of the balancing test applied in *Timmons* have only mounted.[369]

***Inconsistency with and Effect on Other Doctrine*.** The Court in *Casey* and *Dobbs* considered, in different ways, how a precedent fits—or clashes—with related areas of law. *Casey* asked whether a precedent had become an "abandoned" doctrinal outlier.[370] The *Dobbs* majority asked whether a precedent has "led to the distortion of many important but unrelated legal doctrines."[371] In this regard, *Timmons* abruptly departed from prior precedent concerning rights to political speech and association, and it has remained jarringly out of step with later decisions.

Timmons broke with precedent concerning the rights of parties.[372] It silently repudiated *Williams v. Rhodes*, in which the Court had struck down ballot-access requirements that would have cemented a Democratic–Republican duopoly.[373] The *Williams* Court concluded that our Constitution cannot abide a "system [that] does not merely favor a 'two-party system' [but] favors two particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly."[374] *Timmons* effectively overruled that conclusion, *sub silentio*.[375]

Williams had formed the basis for a line of precedent concerning the associational rights of parties. *Anderson v. Celebrezze* built on *Williams* by defending a new or minor party's right to be free from the two major parties using their duopoly to deliberately impose burdens that fall more heavily on those new or minor parties.[376] "A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment," the *Anderson* Court concluded.[377] "It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties."[378] And the Court came to this conclusion based on a historical appreciation of how new and small parties have enriched our democratic system.[379]

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[368] Smith, *supra* note 362, at 19.

[369] *See supra* notes 281–82 and accompanying text.

[370] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992).

[371] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 286 (2022).

[372] *See* Adelman, *supra* note 363, at 116 ("*Timmons* is also difficult to square with precedent, not only with *Williams* and *Celebrezze*, but also *Tashjian v. Republican Party of Connecticut*.").

[373] Williams v. Rhodes, 393 U.S. 23, 31–34 (1968).

[374] *Id.* at 32.

[375] *See* Rogers, *supra* note 46, at 752 ("In *Timmons*, in effect if not in word, the Court overturned *Williams v. Rhodes* as well as *Anderson*." (footnote omitted)).

[376] Anderson v. Celebrezze, 460 U.S. 780, 787 (1983).

[377] *Id.* at 793.

[378] *Id.* at 794.

[379] *Id.*

The Court continued to protect the associational rights of both major and minor parties. In *Tashjian v. Republican Party of Connecticut*, the Court vindicated a political party's right to set the procedures by which its nominees were chosen, striking down a Connecticut law that would have limited voting in a party primary to only registered members of the party.[380] In *Norman v. Reed*, it struck down signature requirements that served to deny ballot access to a new party.[381] And in *Eu v. San Francisco County Democratic Central Committee*, the Court held that a party's right to choose its own standard-bearer is a core associational right, and it demanded that the state substantiate how its interest in political stability actually connected to regulations that would limit that right.[382]

For decades following its foundational statement in *Williams*, the Court vindicated a system of fair—or at least not abusively unfair—partisan competition. States could, of course, regulate matters related to parties' access to the ballot, but they could not do so in ways that effectively locked out minor parties.[383] *Timmons* represented an abrupt and inexplicable break from this line of precedent.[384]

The Court's approach to political speech and association in cases that came after *Timmons* also took a different tack. For example, in *California Democratic Party v. Jones*, the Court held that depriving a political party of the right to choose its standard-bearer was a severe infringement on the right to association, and it struck down California's Proposition 198.[385] Justice Scalia, writing for the majority, concluded that the burden a blanket primary places on the right of political association "is both severe and unnecessary."[386] *Timmons* is hard to square with the principle that forcing voters to vote under a major-party label in order to support their favored candidate represents impermissible compelled political association.[387]

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[380] *See* Tashjian v. Republican Party of Conn., 479 U.S. 208, 225 (1986).

[381] *See* Norman v. Reed, 502 U.S. 279, 293–94 (1992).

[382] Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 226–29 (1989).

[383] *See* Rogers, *supra* note 46, at 752 (noting that the post-*Williams* Court "treated with near contempt efforts by members of the present duopoly simply to reproduce themselves").

[384] For this reason, the relatively few defenders of *Timmons* generally have not tried to justify its holding as a legally correct outcome in terms of precedent and instead have maintained its correctness in terms of principles external to the law. *See, e.g.*, Schleicher, *supra* note 362, at 199 (arguing that the *Timmons* holding is the correct way to regulate a "natural monopoly"); 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, 501 (1998) (contending that, as a policy matter, the Court correctly prevented third parties from remaining marginal and encouraged them to compete to become a major party).

[385] *See* Cal. Democratic Party v. Jones, 530 U.S. 567, 586 (2000).

[386] *Id.*

[387] Not all post-*Timmons* cases have been so protective of parties' associational rights. *See, e.g.*, Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 444 (2008)

In *Citizens United v. Federal Election Commission*, the Court would also break with the approach it had taken in *Timmons* concerning how the state may manage the effects of factions.[388] Justice Kennedy, citing *Federalist No. 10*, observed that "[f]actions will necessarily form in our Republic, but the remedy of 'destroying the liberty' of some factions is 'worse than the disease.'"[389] While Chief Justice Rehnquist had also cited *Federalist No. 10* in *Timmons*, he did so on the way to concluding that Madison would have endorsed state laws that destroyed their liberty.[390]

Changed Circumstances. In *Casey*, the Court stated that it would assess "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant . . . justification."[391] Circumstances have undeniably changed since *Timmons*: partisan polarization has escalated sharply, fueling political instability.

The Court has noticed. Although justices typically deny that political consequences factor into their discussions, recent cases demonstrate a keen awareness of polarization and its risks. At oral argument in *Trump v. Anderson*, Chief Justice Roberts recognized that allowing the states to disqualify candidates could initiate a cycle of partisan tit-for-tat disqualifications.[392] And in *Trump v. United States*, the majority concluded that the President must be immune from criminal prosecution to avoid "a cycle of factional strife."[393] If the Court were to extend its apparent concern for polarization to the consequences of its precedents concerning ballot access, that would counsel against reaffirming *Timmons*.

Reliance. The *Dobbs* majority sought to distinguish between two types of reliance interests. One, which it described as the "traditional" reliance interests discussed in *Casey*, involve situations "where advance planning of great precision is most obviously a necessity."[394] It described the other as "concrete reliance interests, like those that develop in 'cases involving property and contract rights.'"[395]

(holding that a blanket-primary system, allowing a candidate to affiliate with the party of her or his choice, did not violate a party's associational right to choose which candidates to endorse).

[388] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 354–55 (2010).

[389] *Id.* (quoting THE FEDERALIST No. 10, at 130 (James Madison) (Benjamin F. Wright ed., 1961)).

[390] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 368 (1997).

[391] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) (discussing prudential and pragmatic considerations that bear on the question of whether to overrule a prior decision). The *Dobbs* Court dispensed with this factor. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 268 (2022).

[392] Transcript of Oral Argument at 85–86, Trump v. Anderson, 601 U.S. 100 (No. 23-719) ("[A] goodly number of states will say, whoever the Democratic candidate is, you're off the ballot, and others for the Republican candidate, you're off the ballot.").

[393] *See* Trump v. United States, 603 U.S. 593, 640 (2024).

[394] *Dobbs*, 597 U.S. at 287 (quoting *Casey*, 505 U.S. at 856).

[395] *Id.* (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)).

It is unclear what—if any—party might be said to have relied on *Timmons* in either sense. In *Timmons*, the Court simply reaffirmed the status quo that had prevailed for decades, not only in Minnesota but across much of the country.[396] More than relying on the decision itself, the Democratic and Republican parties relied on this prior historical practice, which the *Timmons* Court effectively endorsed. As such, one cannot plausibly say that the major parties have a valid reliance interest in the Court standing by *Timmons*.[397] Indeed, even if *Timmons* were to fall tomorrow, plurality-winner, single-member districts would still favor a two-party system.[398] The fact that the major parties' interests would continue to be substantially protected by this basic feature of our electoral system underscores how little they might be said to have relied on *Timmons* itself.

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For now, *Timmons* remains precedent for federal courts, even if it ought to mean little for state courts. Yet, should the issue of fusion come back before the U.S. Supreme Court, there is little reason to think *Timmons* is the sort of precedent that merits upholding.

And changing circumstances may return the fusion issue to the Court. The cases pending before state courts in New Jersey and Kansas—and soon, likely elsewhere—could provide the point of departure for a path that prompts state-level experiments with fusion and eventually leads back to the U.S. Supreme Court. The path back to a vibrant multiparty democracy will begin in the states, but it may not end there.

V. CONCLUSION

American democracy faces a crisis of hyperpolarization. State courts have a unique opportunity to address this crisis. By striking down laws that ban fusion

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[396] *See* Argersinger, *supra* note 22, at 303, 306.

[397] To the extent the major parties claim a reliance interest in *Timmons*, it would certainly not be "concrete" as defined by *Dobbs*: they have no property or contract right to their dominant positions as incumbents. Nor do they require "advance planning of great precision," because they could simply adjust their strategies if *Timmons* were overruled. *Dobbs*, 597 U.S. at 287 (quoting *Casey*, 505 U.S. at 856). *Timmons* did help insulate these incumbents from minor-party competition, further entrenching their increasingly unpopular duopoly. In 1994, only 6% of Americans had unfavorable views of both major parties. *See* AS PARTISAN HOSTILITY GROWS, *supra* note 3, at 9. By 2022, that figure had risen to 27% for the general population and 44% for independents. *See id.* That same year, nearly half of eighteen- to forty-nine-year-olds said they often wished they had more parties to choose from. *See id.* at 8. But there is no justifiable reason the Court should view a denial of popular sovereignty as a valid reliance interest.

[398] *See, e.g.*, Hasen, *supra* note 313, at 371 (concluding that "there appears little to suggest that the pressures and incentives that lead almost all state and federal elected officials to affiliate with the Democrats or the Republicans would change in the presence of fusion").

voting, they can open a pathway to a stable and functioning multiparty democracy. This will require an openness to a reform that might seem out of left field, but it is in fact well tested and historically proven. It will also require the courage to proceed with an independent constitutional analysis, unswayed by assertions that the questions presented have already been asked and answered by *Timmons*. By recognizing a right to fusion provided by their state constitutions, state court judges can help ensure the stability of American democracy, now and in the future. This is no small task—but with independence and respect for their constitutions, state courts can lead the way to a thriving multiparty democracy in America.