

## FUSION VOTING AND A CASE STUDY IN RESTRICTIVE TWO-PARTY POLITICS

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### ABSTRACT<sup>±</sup>

*There is growing recognition among scholars and advocates that a simple electoral rule change—allowing more than one political party to nominate the same candidate on the ballot—could mitigate some of the daunting challenges facing U.S. democracy. This practice, known as “fusion voting,” was once legal in every state, giving minor political parties a meaningful and influential option to build electoral coalitions with aligned major parties. State anti-fusion laws have always been constitutionally suspect, and they are facing renewed scrutiny in the courts today.*

*Prior constitutional litigation of anti-fusion laws has neglected two key considerations: the political context in which these laws were adopted and their real-world impact on political activity outside of the two major parties. The failure to adequately examine these issues has masked the invidious motivations for and burdensome effects of these restrictions. New Jersey courts are currently considering a constitutional challenge to their century-*

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*old anti-fusion laws, and this Article focuses on the Garden State as a case study, probing these pivotal issues. Not only should the New Jersey courts pay heed to these insights in the present case, but our analysis should serve as a replicable framework for scholars and advocates challenging anti-fusion laws elsewhere throughout the country.*

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## INTRODUCTION

Since the founding of the United States, the scope of the elective franchise has slowly, and not without significant social and political struggle, continued to expand. Over time, more Americans have fought to take part in the democratic process: first White men without property in the early nineteenth century,<sup>1</sup> then Black men in the 1870s,<sup>2</sup> followed by women in 1920,<sup>3</sup> Native Americans in 1924,<sup>4</sup> and finally younger

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1. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 29 (2000).

2. U.S. CONST. amend. XV.

3. U.S. CONST. amend. XIX.

4. Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (repealed 1972).

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voters in 1971.<sup>5</sup> Thanks to Jim Crow laws in the South and other forms of racist exclusion throughout the United States, the promise of Black suffrage remained illusory until passage of the Voting Rights Act in 1965,<sup>6</sup> and judicial retrenchment in recent years has again allowed states to erect discriminatory barriers to the ballot.<sup>7</sup> As Americans fight to end such practices, more people are eligible to—and, in practice, are able to—vote today than at any other point in our history. And some states and locales are further expanding the franchise by restoring the right to vote to people involved in the criminal legal system<sup>8</sup> or welcoming younger people and non-citizens into the electorate.<sup>9</sup>

Yet, in at least one important way, today's political system has actually *narrowed* avenues to democratic participation, rendering it in a major respect *less* responsive to eligible voters than in the nineteenth century. Despite overwhelming dissatisfaction with the two major parties and widespread interest in more electoral choice,<sup>10</sup> today's voters are all but helpless to challenge the duopolistic status quo.<sup>11</sup> Third-party campaigns rarely garner more than a tiny fraction of the vote—and when they do, they often backfire by aiding in the election of the candidate their voters liked least.<sup>12</sup> While some voters believe that the expressive value of a protest vote is worth the electoral cost, many others aligned with a

5. U.S. CONST. amend. XXVI.

6. Tracy Thomas, *Reclaiming the Long History of the "Irrelevant" Nineteenth Amendment for Gender Equality*, 105 MINN. L. REV. 2623, 2647 (2021).

7. See, e.g., Kaitlin Barnes, *On the Road Again: How Brnovich Steers States Toward Increased Voter Restrictions*, 81 MD. L. REV. 1265, 1266 (2022); Michael Kang, *The Post-Trump Rightward Lurch in Election Law*, 74 STAN. L. REV. ONLINE 55, 55 (2022); Quiana-Joy Ochiagha, *We Shall Overcome Some Day . . . But Not Today: Brnovich v. Democratic National Committee and the 21st Century Version of Jim Crow*, 49 S.U. L. REV. 463, 464 (2022); Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 714–15 (2014).

8. James E. Lauer, *Evaluating Congress's Constitutional Basis to Abolish Felony Disenfranchisement*, 98 WASH. L. REV. 253, 262–63 (2023).

9. See, e.g., Monet Gonnerman & Ryan Willett, Notes & Comments, *Noncitizen Voting: A Case Study of Oregon*, 25 LEWIS & CLARK L. REV. 361, 383–88 (2021); Joshua A. Douglas, *The Loch Ness Monster, Haggis, and a Lower Voting Age: What America Can Learn from Scotland*, 69 AM. U. L. REV. 1433, 1443–45 (2020).

10. PEW RESEARCH CENTER, AMERICANS' DISMAL VIEWS OF THE NATION'S POLITICS 5–6 (Sept. 19, 2023), [https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2023/09/PP\\_2023.09.19\\_views-of-politics\\_REPORT.pdf](https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2023/09/PP_2023.09.19_views-of-politics_REPORT.pdf); see also Nate Cohn, *Can the Race Really Be That Close? Yes, Biden and Trump Are Tied*, N.Y. TIMES (Aug. 1, 2023), <https://www.nytimes.com/2023/08/01/upshot/biden-trump-poll-2024.html>.

11. See generally MICAH L. SIFRY, SPOILING FOR A FIGHT: THIRD-PARTY POLITICS IN AMERICA 6 (2002); LEE DRUTMAN, NEW AMERICA, MORE PARTIES, BETTER PARTIES: THE CASE FOR PRO-PARTIES DEMOCRACY REFORM 23 (2023).

12. Geoffrey Skelley, *Why a Third-Party Candidate Might Help Trump – And Spoil the Election for Biden*, FIVETHIRTYEIGHT, (July 13, 2023, 6:00 AM), <https://fivethirtyeight.com/features/third-party-candidate-spoiler-trump-biden/>.

minor party on policy conclude otherwise and vote for the more closely aligned major-party candidate as a matter of practicality. Indeed, the potential for several high-profile third-party and independent tickets in the 2024 presidential race has generated substantial concern among some observers that splintering the vote between the left, center, and pro-democracy right would lead to the election of Donald Trump or another candidate hostile to democracy and the rule of law.<sup>13</sup>

Throughout the nineteenth century, voters who felt unrepresented by the two major parties had recourse in a powerful tool: minor parties would “cross-nominate” a major party candidate willing to support their key issues, and voters would use the minor-party ballot to convey that they supported the candidate specifically because of their alignment with that minor party.<sup>14</sup> Because two parties would “fuse” together in support of a single candidate, this process became known as “fusion voting.”<sup>15</sup>

With fusion, minor parties and their voters could operate independently of the major parties to exert constructive political influence. Indeed, it helped them to play a substantial role in federal, state, and local elections throughout the country. In the 1840s and 1850s, minor parties opposed to slavery used cross-nominations to elevate abolition into the political mainstream, amassing and then leveraging their collective power to found a new major party, the Republican Party.<sup>16</sup> Decades later, economically populist minor parties cross-nominated candidates to break the duopolistic antipathy toward working-class interests, setting the foundation for the transformative wave of labor, anti-monopoly, and regulatory reforms shortly thereafter.<sup>17</sup> In North Carolina, a cross-racial coalition used fusion to oust Jim Crow Democrats from power—the only time the feat was accomplished in the post-Reconstruction South.<sup>18</sup>

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13. Jonathan Weisman & Luke Broadwater, *With a Centrist Manifesto, No Labels Pushes Its Presidential Bid Forward*, N.Y. TIMES, <https://www.nytimes.com/2023/07/15/us/politics/no-labels-presidential-run.html> (July 20, 2023); Maggie Astor, *Cornel West, Progressive Scholar, Announces Third-Party Bid for President*, N.Y. TIMES (June 5, 2023), <https://www.nytimes.com/2023/06/05/us/politics/cornel-west-2024-candidate-president.html>.

14. Peter H. Argersinger, “A Place on the Ballot”: *Fusion Politics and Antifusion Laws*, 85 AM. HIST. REV. 287, 288–89 (1980).

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

16. Corey Brooks, *Fusing to End Slavery: Abolition and Third-Party Politics in the Pre-Civil War North* (forthcoming 2024) (on file with authors); COREY M. BROOKS, LIBERTY POWER: ANTISLAVERY THIRD PARTIES AND THE TRANSFORMATION OF AMERICAN POLITICS 2 (2016).

17. Argersinger, *supra* note 14, at 292.

18. See *generally* HELEN G. EDMONDS, THE NEGRO AND FUSION POLITICS IN NORTH CAROLINA: 1894–1901, at 3 (1951).

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Not everyone was enthusiastic about minor parties playing a meaningful role in politics and policymaking—namely, leaders of a major party trying to defeat a fusion alliance on the other side.<sup>19</sup> One Republican legislator from Michigan famously quipped: “We don’t propose to allow the Democrats to make allies of the Populists, Prohibitionists, or any other party, and get up combination tickets against us. We can whip them single-handed, but don’t intend to fight all creation.”<sup>20</sup> Starting in the 1890s, state lawmakers realized that they could spare themselves the inconvenience of competing with minor parties in the political arena; instead, they could enact new electoral laws that would themselves systematically weaken and undermine minor parties and amplify the existing major-party advantages.<sup>21</sup> State laws prohibiting cross-nominations and fusion voting were central to this strategy, which spread rapidly throughout the country.<sup>22</sup> By the time New Jersey adopted anti-fusion laws in 1921, cross-nominations remained lawful in a mere handful of states.<sup>23</sup>

A century later, the growing disconnect between the two major parties and much of the electorate has prompted renewed interest in the tradition of fusion voting among scholars and advocates.<sup>24</sup> Their attention is focused principally on the courts—in particular, state courts—as the constitutionality of state anti-fusion laws has always been disputed. In the early 1910s, the New York Court of Appeals rebuffed repeated attempts by the state legislature to enact anti-fusion restrictions after holding that such laws ran afoul of fundamental political rights guaranteed under the New York Constitution.<sup>25</sup> Shortly thereafter, a New Jersey court likewise suggested that anti-fusion laws would violate the New Jersey Constitution.<sup>26</sup> Other state courts concluded otherwise, upholding their anti-fusion laws by deferring to the legislature’s authority to regulate elections and ignoring the exclusionary legislative

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19. Argersinger, *supra* note 14, at 290.

20. *Id.* at 296.

21. *Id.* at 298.

22. *See id.*

23. *See id.*

24. In 2023, Stanford University and Princeton University each hosted conferences focused principally on fusion voting. *See More Parties, Better Parties: Building a Stronger Democracy in America*, STAN. CTR. ON DEMOCRACY, DEV. & RULE OF L. (Apr. 13–14, 2023), <https://lsi.stanford.edu/events/more-parties-better-parties-building-stronger-democracy-america>; *Fusion Voting – Restoring Real Choice at the Ballot*, PRINCETON SCH. OF PUB. & INT’L AFFS. (Nov. 15, 2023), <https://spia.princeton.edu/events/fusion-voting-restoring-real-choice-ballot>.

25. *In re Callahan*, 93 N.E. 262, 262 (N.Y. 1910); *Hopper v. Britt*, 96 N.E. 371, 374 (N.Y. 1911).

26. *In re City Clerk of Paterson*, 88 A. 694, 695–96 (N.J. 1913).

motivation.<sup>27</sup> Most of these decisions were rendered shortly after anti-fusion laws were adopted and therefore were unable to incorporate the long-term and systemic consequences of the then-new restrictions in the constitutional analysis.<sup>28</sup>

In the 1990s, a circuit split emerged as to whether the U.S. Constitution imposed a nationwide prohibition on anti-fusion laws.<sup>29</sup> The U.S. Supreme Court resolved the question in *Timmons v. Twin Cities Area New Party*. With no discussion of the purpose for or political context surrounding the Minnesota statute at issue, the majority held that anti-fusion laws do not violate federal law's freedom of association.<sup>30</sup> Justices Stevens and Ginsburg dissented—joined, in part, by Justice Souter—highlighting the anti-competitive motivations and exclusionary effects of the challenged laws.<sup>31</sup> Scholars, likewise, widely panned the majority ruling.<sup>32</sup>

In another era, a ruling on this federal constitutional question might have been the end of the matter. But in today's renaissance of state constitutionalism,<sup>33</sup> there is a possibility that—following the lead of the New York high court a century ago—state courts might conclude that anti-fusion laws' encroachment on electoral association, participation, and choice runs afoul of the fundamental rights guaranteed under their respective state constitutions.

In 2019, the Pennsylvania Supreme Court split over this very question. A four-justice majority held that the Pennsylvania anti-fusion laws did not violate the state constitution, and did so with little

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27. See Note, *The Constitutionality of Anti-Fusion and Party-Raiding Statutes*, 47 COLUM. L. REV. 1207, 1209–10 (1947).

28. See *id.* at 1211, 1213.

29. See generally *Swamp v. Kennedy*, 950 F.2d 383, 384 (7th Cir. 1991) (upholding Wisconsin's anti-fusion laws); *Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 200 (8th Cir. 1996) (holding that Minnesota's anti-fusion laws were unconstitutional).

30. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 369–70 (1997).

31. *Id.* at 370–82 (Stevens, J., dissenting).

32. See, e.g., Lynn Adelman, *The Misguided Rejection of Fusion Voting by State Legislatures and the Supreme Court*, 56 IDAHO L. REV. 107, 115–118 (2019); Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95, 121–25 (2003); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 683–87 (1998); 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, 337–41 (1997).

33. See, e.g., ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 1–11 (2nd ed. 2009); Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 859 (2021); JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 1–2 (2018).

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substantive discussion of the historical and political context in which the statutes were enacted or the ways in which the restrictions altered the state's political system.<sup>34</sup> Three dissenting justices concluded that the statutes were unconstitutional, drawing upon a practical understanding of fusion's historical role and the consequences for third-party activity in its absence.<sup>35</sup> But even the dissenting justices failed to rigorously examine the specific circumstances that gave rise to the prohibition of fusion in Pennsylvania, or the actual, long-term effects of the anti-fusion laws on the ability of Pennsylvania voters to participate in the political process outside of the two major parties.

Now, the New Jersey courts are wrestling with a similar question: do the Garden State's anti-fusion laws comply with the New Jersey Constitution?<sup>36</sup> The New Jersey Supreme Court has time and again interpreted the state constitution as providing stronger protections for political and other fundamental rights than afforded by the U.S. Constitution, and it very well may do so again here.<sup>37</sup> Ultimately, however, the decision will likely turn on the degree to which the court can properly situate the anti-fusion laws in their historical context—the political environment in which they were adopted, the motivating purpose behind their enactment, and the aggregate impact on the state's political system. Given the national media attention<sup>38</sup> and wide range of high-profile

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34. *Working Families Party v. Commonwealth*, 209 A.3d 270, 271–78, 286 (Pa. 2019).

35. *Id.* at 286–88 (Todd, J., concurring and dissenting); *id.* at 288–94 (Wecht, J., concurring and dissenting).

36. See generally Brief of Appellants, *In re Tom Malinowski*, No. A-3542-21T2 (N.J. Super. Ct. App. Div. 2022). The non-partisan non-profit Protect Democracy represents two voters in the appeal, and filings are posted on their website: <https://protectdemocracy.org/work/bringing-back-fusion-voting/#case-documents>. For a thoughtful analysis of the state constitutional issues raised by anti-fusion laws, see Jeffrey Mongiello, *Fusion Voting and the New Jersey Constitution: A Reaction to New Jersey's Partisan Political Culture*, 41 SETON HALL L. REV. 1111, 1111–15 (2011).

37. ROBERT F. WILLIAMS & RONALD K. CHEN, THE NEW JERSEY STATE CONSTITUTION 29, 52–54 (Lawrence Friedman ed., 3rd ed. 2023).

38. See, e.g., Blake Hounshell, *Does Fusion Voting Offer Americans a Way Out of the Partisan Morass?*, N.Y. TIMES (Nov. 21, 2022), <https://www.nytimes.com/2022/11/21/us/politics/fusion-voting-new-jersey.html>; Blake Hounshell, *New Jersey Centrists Seek to Legalize Their Dream: The Moderate Party*, N.Y. TIMES, <https://www.nytimes.com/2022/06/07/us/politics/new-jersey-moderate-party.html> (June 9, 2022); Jennifer Rubin, *Opinion, Could a New Political Party Defang Radical Politicians?*, WASH. POST (June 8, 2022, 7:45 AM), <https://www.washingtonpost.com/opinions/2022/06/08/tom-malinowski-moderate-party-new-jersey-can-it-defang-extremism/>.

amici,<sup>39</sup> this case has already inspired similar lawsuits elsewhere,<sup>40</sup> and its eventual disposition is likely to serve as a bellwether for future state constitutional challenges to anti-fusion laws.

This Article addresses a recurrent analytical flaw in the constitutional analysis of anti-fusion laws: a failure to consider both (i) the specific political context in the state at the time of adoption, and (ii) the systemic effects of the anti-fusion laws over time on the ability of like-minded voters to meaningfully collaborate in the political process outside of the two major parties. In assessing the burdens imposed by anti-fusion restrictions, federal and state courts have focused mostly on the immediate harms to individual voters, while ignoring the accumulated harm to collective political action. Additionally, in assessing the possible justifications for these laws, courts have often failed to appreciate the clear discriminatory intentions motivating the restrictions, instead crediting post-hoc rationalizations lacking both empirical and historical support.

Given the importance of the pending appeal in New Jersey, the Garden State is the best place to start to correct this jurisprudential misstep. This Article provides important and novel historical insights into the state's vibrant and contentious history of fusion, the circumstances surrounding its legislative abolition, and the enduring consequences of that action. Not only is this analysis essential for the pending case, but it provides an illustrative template for similar inquiries throughout the country, as voters elsewhere recognize that anti-fusion laws in their states are likewise on dubious constitutional footing.

This Article unfolds as follows: Parts I and II explore the experience of multi-party democracy that characterized the state's politics throughout much of the nineteenth century. They situate the New Jersey story within the broader national context, demonstrating how national political developments shaped strategies on the ground. Part I explores how, at a critical juncture in American politics, fusion facilitated dueling

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39. Amici in the New Jersey case include numerous prominent legal, history, and political science scholars, as well as organizations and former elected officials spanning the ideological spectrum, including the Brennan Center for Justice, the Cato Institute, the ACLU of New Jersey, former Republican Governor Christine Todd Whitman, former Democratic House Majority Leader Richard Gephardt, a bipartisan group of former House Representatives, and the New Jersey Libertarian Party. See Udi Ofer, *'Anti-Fusion Voting' Laws and the Problem with a Two-Party System*, N.J. L.J. (July 17, 2023, 9:00 AM), <https://www.law.com/njlawjournal/2023/07/17/anti-fusion-voting-laws-and-the-problem-of-a-two-party-system/>.

40. See Jon King, *Former Republicans Seek to Create New Centrist Party and Utilize Fusion Voting in Michigan*, MICH. ADV. (May 10, 2023, 6:00 PM), <https://michiganadvance.com/2023/05/10/new-former-republicans-seek-to-create-new-centrist-party-and-utilize-fusion-voting/>.



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efforts to steer the ship of state in a period of looming crisis. Both anti-slavery and anti-Republican Party efforts used fusion to unite fractious coalitions around broad political goals while balancing important intra-coalitional distinctions. Part II focuses on the new dynamics that emerged in the post-Reconstruction period. Despite the formal dominance of the Republicans and Democrats, whose big-tent coalitions tended to be led by small groups, third parties, and party factions, from populist-minded reformers to prohibition advocates and beyond, organized around specific political aims and proved to be potent actors. Through a variety of techniques, including both independent candidacies and fusion tickets with a major party, their voters could register political opinions and meaningfully shape the electoral process.

The second half of this Article explores both how conflict over political power in the Gilded Age's multi-party system led to strict limits on third-party and independent politics and the consequences of these changes over the intervening century. Part III demonstrates how and why a struggle over election and voting laws from the late 1880s through the early 1920s ultimately entrenched the power of the two major parties, eliminated fusion, and marginalized existing and potential third parties. Conflicts between progressive reformers within and sometimes outside of the Republican and Democratic parties animated two waves of reform that first expanded and then contracted third parties' access. The first wave, which crested in 1911, liberalized third-party ballot access and diluted the major parties' power by weakening their control over ballots. These reforms also narrowed, in some ways, ballot access to voters in the growing, immigrant-heavy cities and towns. In the late 1910s, the second wave of legislative conflict over electoral and voting laws followed. These new statutes severely narrowed third-party ballot access and banned fusion, a crucial tool that voters, party factions, and social movements had used for decades to influence politics. Part IV closes with a quantitative analysis of the impact of these legislative changes in New Jersey in the century since their adoption, demonstrating the elimination of constructive and competitive third-party and independent political activity in the state.

I. FRACTIOUS POLITICS AND FUSION BALLOTS ON THE EVE  
OF CIVIL WAR, 1854–1860

In the 1840s and 1850s, fusion emerged as a key feature of pitched battles over the future of politics and the party system in New Jersey and

throughout the United States.<sup>41</sup> The decades leading up to the Civil War were defined by the intensifying struggle over slavery, which shaped affairs and redefined party politics from national down to local politics. The Free Soil and Liberty Parties, each founded in opposition to slavery, emerged as key political players, through their strategic nomination of standalone and fusion tickets.

The decisive break came in 1854, when the Kansas-Nebraska Act ended the Missouri Compromise and broke the Whig Party, riven as it was by disagreement over slavery.<sup>42</sup> Thus ended the “Second Party System.”<sup>43</sup> Over the next few years, forces opposed to the Democratic Party, which dominated the South and held sway among the heavily immigrant cities of the urban north, organized feverishly to chart a path forward.<sup>44</sup> In 1854, some erstwhile Whigs and anti-slavery Democrats formed the Opposition Party for the midterm elections. In New Jersey, as in much of the North, the nativist, anti-Catholic North American or Know Nothing Party, lent the Oppositionists support, as well. The fusionist approach helped New Jersey’s Opposition Party secure big wins that year. In the Garden State, they captured four of the state’s five congressional seats, flipping three districts out of Democratic hands.<sup>45</sup>

Two years later, in the presidential and gubernatorial election year of 1856, fusion played an important role in efforts to cohere a meaningful alternative to the only surviving major party, though the anti-Democratic Party camp was wrought by tension and conflict. The anti-slavery Republican Party was emerging as a key player in northern politics with support from many former Whigs and Free Soilers, among others.<sup>46</sup> Meanwhile, xenophobic Know Nothings, anxious to combat immigrant Democrats in northern cities, sought to become the leading Protestant party.<sup>47</sup> Divided among themselves, Oppositionists nonetheless

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41. See BROOKS, *supra* note 16, at 1–13.

42. *Id.* at 189–94.

43. DAVID M. POTTER, *THE IMPENDING CRISIS: 1848–1861*, at 238 (Don E. Fehrenbacher ed., 1976); see also JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 868 (1988).

44. See POTTER, *supra* note 43, at 175–76.

45. *History, Art & Archives: People Search*, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/People/Search>. To access the relevant information: select “New Jersey” under the “choose state” drop down; then scroll down to “congress” on the left and select “34th (1855–1857)”; click “search”; then click each representative’s page to see political party. It is worth stressing that the New Jersey Legislature denied free Black men and women the right to vote in 1807. *No Racial Requirement: Free Voters of Color in New Jersey*, MUSEUM OF THE AM. REVOLUTION, <https://www.amrevmuseum.org/virtualexhibits/when-women-lost-the-vote-a-revolutionary-story/pages/no-racial-requirement-2> (last visited Apr. 13, 2024).

46. BROOKS, *supra* note 16, at 197–98.

47. *Id.*

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recognized that victory against their shared Democratic foes demanded a larger, if inevitably more unwieldy, coalition than the ones they could muster separately. In June 1856, their leaders convened to plan a shared strategy for the high-stakes election at the state level.<sup>48</sup> In the weeks that followed, both the Know Nothings and the Republicans agreed to back former Whig Congressman William Newell in the race for governor as well as the congressmen whose 1854 fusion races had flipped three Democratic seats. Newell appeared alongside the presidential candidate of each respective ballot; John Frémont for the Republicans and former President Millard Fillmore for the Know Nothings.<sup>49</sup>

The Oppositionists' fusion strategy paid dividends in November. Newell narrowly won with a three thousand vote margin and fifty-one percent of the vote, denying the Democrats the governorship for the first time in nearly a decade.<sup>50</sup> The coalition held, despite Democratic efforts to paint the partnership as one of convenience.<sup>51</sup> Congressional races were mostly positive for the anti-Democrat front; Oppositionists defended their seats in the First and Second Districts but lost the Third District contest to an anti-slavery Democrat, G.B. Adrain.<sup>52</sup>

In the presidential race, the consequences of a failure to unify a coalition were on display, too. James Buchanan, the Democratic candidate for president, carried the state with a plurality of forty-seven percent running nineteen points ahead of the Republican candidate, who received twenty-eight percent of the vote. The Know Nothings trailed with twenty-four percent.<sup>53</sup> Further, Democrats also held the state senate and assembly, expanding their lower-house margin thanks to successful gerrymandering in the 1856 legislative session.<sup>54</sup>

Four years later, in the 1860 presidential election, it was anti-Republicans who used fusion to cohere their own fractured camps. Lincoln's electors won only forty-eight percent of the vote, but the

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48. *Great Meeting at Trenton: Nomination of William A. Newell, for Governor of New Jersey—Fusion of Parties to Oppose the Administration*, N.Y. TIMES, June 6, 1856, at 3.

49. *Republicanism in New-Jersey: Fremont and Dayton Ratification Meeting In New-Brunswick*, N.Y. TIMES, July 12, 1856, at 4; Andrew Glass, *Know-Nothings Convene in Philadelphia, Feb. 18, 1856*, POLITICO, <https://www.politico.com/story/2017/02/know-nothings-convene-in-philadelphia-feb-18-1856-235091> (Feb. 18, 2017, 12:00 AM).

50. See Frank V. Sperduto, *William A. Newell, Class of 1836*, 29 J. RUTGERS U. LIBR., 74, 78 (2012).

51. For an example of Democratic criticism, see *The Opposition*, MONMOUTH DEMOCRAT, Oct. 2, 1856, at 2.

52. *The Election.*, WEST-JERSEY PIONEER, Nov. 8, 1856, at 2.

53. *Statistics: Elections, 1856*, AM. PRES. PROJECT, <https://www.presidency.ucsb.edu/statistics/elections/1856> (last visited Apr. 13, 2024).

54. RICHARD P. MCCORMICK, *THE HISTORY OF VOTING IN NEW JERSEY: A STUDY OF THE DEVELOPMENT OF ELECTION MACHINERY 1664–1911*, at 141 (1953).

Republicans carried four of the state's seven electoral votes; the anti-Republican fusion slate, which presented electors of each of the three fusing parties, dispersed anti-Republican votes to such a degree that only three electors for Democrat Stephen Douglas were sent to the Electoral College, where they cast one quarter of Douglas's total electoral votes.<sup>55</sup>

In the years leading up to the Civil War, fusion played important roles on both sides of the national political struggle as it took shape in the Garden State. It permitted New Jersey's anti-Democratic Party forces—which shared opposition to slavery but diverged on other major issues—to build bridges and navigate a high-stakes period of uncertainty. On the opposite side, fusion allowed the extremely fractured anti-Republican front of three parties to cohere a meaningful opposition to the party of “Free Soil, Free Labor, Free Men.”<sup>56</sup>

After a period of substantial multi-party activity, Lincoln's presidency and the Union's Civil War victory laid the foundation for Republican dominance in national politics. Political opposition was channeled principally through the Democratic Party, which had considerable success in New Jersey. Yet, as the end of Reconstruction gave way to the Gilded Age, the nation was roiled with substantial social and political conflict, and challenges to the political system and its two leading parties re-emerged. Fusion, again, was a central strategy as large numbers of voters felt left behind by the two major parties.

## II. MULTI-PARTY DEMOCRACY IN GILDED AGE NEW JERSEY, 1878–1896

In the Gilded Age, fusion took on new importance as a tool for political expression, association, and coordination. At the time, Republicans enjoyed nearly uninterrupted control over national politics, though Democrats remained competitive and powerful in New Jersey and some other places.<sup>57</sup> Fusion offered political organizations and social movements a pathway to challenge either of the two major parties, which were in the process of consolidating their coalitions and roles in U.S. politics.

The Republican Party, in particular, underwent post-Reconstruction changes that shaped how a variety of groups approached fusion, intraparty competition, and third-party experiments. On the one hand, GOP power rested on a cross-class coalition, whose roots dated to the

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55. *Nothing to Brag of, After All*, N.Y. TIMES, Nov. 16, 1860, at 4.

56. ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR*, at ix, 218 (2nd ed. 1995).

57. See Argersinger, *supra* note 14, at 289; MCCORMICK *supra* note 54, at 159–86.

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1850s.<sup>58</sup> Following the collapse of Reconstruction, industry and finance asserted leadership in the Republican coalition as the party's radical and progressive wing receded. Middle and working-class voters—as well as both White and Black voters—nonetheless found homes there.<sup>59</sup> The GOP advanced an economic and political agenda centered on rapid industrial growth and empowered by a coalition unified by the party's war and abolitionist *bona fides*. As Richard Benseel noted: “the Republican party . . . forged an effective political framework for economic development that turned back challenges” by focusing its sights on protecting domestic industry through tariffs, securing the international gold standard, and promoting open-ended economic development to expand opportunity for workers and industrialists alike.<sup>60</sup> The Republican project in this period certainly worked for many in its orbit. Indeed, it is remembered as a time of dramatic economic change, a truly *gilded* age for those who won under its terms.<sup>61</sup>

In much of the industrializing North and agrarian West, however, grassroots opposition to this agenda was pervasive, but no clear alternative emerged for those who disliked the party's turn. Many critics, skeptics, and outright enemies of the GOP—those who lost out whether in the workshops or on the farms that powered this political economic transformation—often sought out their own pathways for political power. They were leery of the Democrats, who remained tethered to a post-Confederacy southern base and significant outposts in New York and New Jersey. Numerous protest and reform movements thus coalesced around a range of third-party experiments. From the anti-monopolist Greenbacks of the 1870s–1880s to the agrarian radicals of the Populist Party (or People's Party) in the 1890s to the labor and agrarian militants of the Socialist Party of the 1900–1910s, a range of center-left and left-wing parties—which, at times, garnered formal support from farm and labor organizations—contested for power.<sup>62</sup> In some states and locales,

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58. For information on the Republican coalition and its roots in the 1850s, see FONER, *supra* note 56, at 202. For background on the Long Gilded Age, see LEON FINK, *THE LONG GILDED AGE: AMERICAN CAPITALISM AND THE LESSONS OF A NEW WORLD ORDER* 1, 12–13 (Andrew Wender Cohen et al. eds., 2015); JACKSON LEARS, *REBIRTH OF A NATION: THE MAKING OF MODERN AMERICA, 1877–1920*, at 32, 162 (2009). See *generally* NELL IRVIN PAINTER, *STANDING AT ARMAGEDDON: A GRASSROOTS HISTORY OF THE PROGRESSIVE ERA*, at ix (W.W. Norton & Co., Inc., 2008).

59. HEATHER COX RICHARDSON, *TO MAKE MEN FREE: A HISTORY OF THE REPUBLICAN PARTY* 60, 65 (2014).

60. RICHARD F. BENSEEL, *THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877–1900*, at xviii (2000).

61. *Id.* at xix–xx.

62. For a discussion on the Greenback Party, see MARK A. LAUSE, *THE CIVIL WAR'S LAST CAMPAIGN: JAMES B. WEAVER, THE GREENBACK-LABOR PARTY & THE POLITICS OF RACE*

the contradictions of the GOP's coalition could not hold and factions spun off into breakaway progressive parties, most famously with the Bull Moose and Progressive Party cleavages in the early twentieth century.<sup>63</sup> Not all third-party efforts of the Gilded Age were so cleanly identifiable with the left, most notably, those advocating for temperance.<sup>64</sup>

Working outside the Republican and Democratic folds, third parties frequently won substantial gains in state legislatures and even Congress. In 1878, for example, Greenbackers took nearly thirteen percent of the popular vote for the House of Representatives and seated more than a dozen congressmen.<sup>65</sup> The Populists enjoyed stunning results in the 1890s, surging into leadership roles across much of the Plains and West. *Subnationally*—that is to say, in state and local governments—the Populists showed particular strength, especially in the Plains and American West.<sup>66</sup> Eleven states elected governors on the Populist line, five with fusion support from Democrats and one in coalition with Republicans. Numerous state legislatures came under the party's control in the period, too.<sup>67</sup> Even when third parties lost, they often served as spoilers, handing victories to either the Republicans or Democrats in close elections where traditional parts of either party's coalition might be convinced to register their discontents, or perhaps their ambitions, by voting for a third party.<sup>68</sup>

Sometimes, come election season, third parties opted for the fusion approach, in which they joined with one of the two major parties to advance a candidate who could bridge the constituencies and goals of the smaller party with the coalition and interests of the larger one. Often, in the Gilded Age, various third parties fused with Democrats to great effect, despite their leeriness of the larger party. Fusion gave smaller parties the

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& SECTION, at iiv–vi (2001). On the Populists, see LAWRENCE GOODWYN, *THE POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA*, at vii–xxiv (1978); CHARLES POSTEL, *THE POPULIST VISION*, at vii–viii (2007). On the Socialists, see DAVID A. SHANNON, *THE SOCIALIST PARTY OF AMERICA: A HISTORY*, at ix–xi (1955).

63. See TIMOTHY SHENK, *REALIGNERS: PARTISAN HACKS, POLITICAL VISIONARIES, AND THE STRUGGLE TO RULE AMERICAN DEMOCRACY* 144–46 (2022).

64. See THOMAS R. PEGRAM, *BATTLING DEMON RUM: THE STRUGGLE FOR A DRY AMERICA, 1800–1933*, at 83–84 (1998).

65. GUIDE TO U.S. ELECTIONS 241, 1110–13 (Deborah Kalb ed., 7th ed. 2016).

66. *Id.* at 241.

67. GOODWYN, *supra* note 62, at 144.

68. For information on the Greenback Party, see GRETCHEN RITTER, *GOLDBUGS AND GREENBACKS: THE ANTIMONOPOLY TRADITION AND THE POLITICS OF FINANCE IN AMERICA* 31–34 (1997); RICHARD WHITE, *THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865–1896*, at 399, 404 (David M. Kennedy, ed., 2017). On Populists, see NOAM MAGGOR, *BRAHMIN CAPITALISM: FRONTIERS OF WEALTH AND POPULISM IN AMERICA'S FIRST GILDED AGE* (Harvard Univ. Press 2017); GOODWYN, *supra* note 62, at vii–xxiv; POSTEL, *supra* note 61, at vii–viii.

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opportunity to claim credit for victories where their votes brought a candidate over the finish line. Fusion voting also gave voters the chance to support a viable ticket while demonstrating their allegiance to the ideological or organizational priorities of a third party.<sup>69</sup> Further, in narrowly divided races, fusion could make or break the outcome. Unlike in most other nonnorthern states, Democrats were not relegated to a permanent minority in New Jersey. From 1869 until 1896, Democrats held the governor's mansion without interruption.<sup>70</sup> They also competed vigorously for state legislative and federal races, at times winning majorities on all fronts—save in the state senate, where county-based districts gave the rural Republican bloc seats way out of proportion to their share of statewide votes cast. In each of these contexts, fusion could hold the key in close races.

Under the highly competitive conditions of late-nineteenth and early-twentieth century New Jersey politics, even slight deviations—such as an unusually successful third-party candidacy or perhaps a fusion ticket—might threaten to upend a major party's carefully laid plans. In hard-fought congressional races of the era, for example, while no third-party candidate ever won office on his own, third-party candidacies and in particular *fusion* candidacies could make all the difference.

Take, as a case study, the results of the 1878 and 1880 congressional elections in the Garden State. At the time, the Greenback Party appeared ascendent in U.S. politics. It garnered substantial support throughout the country, especially supported by farmers and laborers who repudiated the Republicans' hard money policies and who yearned to democratize economic wealth and power. Given the overlap between unions and the Democratic Party in New York and North Jersey, the Greenbackers and Democrats in that area could work together in some cases.

The possibility and limits of fusion for both parties was on full display in 1878, when one of the three Democrats to win a congressional race—Hezekiah Smith from the Second Congressional District—did so thanks to Greenback fusion votes.<sup>71</sup> However, in the remaining four House races, where the Democrats and Greenbacks did not fuse and the Greenbacks ran a separate third-party challenger, the Democrats lost. Had they

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69. For the classic historical account of fusion in U.S. political history see Argersinger, *supra* note 14, at 287–306.

70. THE GOVERNORS OF NEW JERSEY: BIOGRAPHICAL ESSAYS 179–210 (Michael J. Birkner et al. eds., 2014).

71. Max Cohler, *The Legacy of Hezekiah Bradley Smith*, SOUTH JERSEY MAG. (Oct. 26, 2015), <https://www.southjersey.com/article/21081/The-Legacy-of-Hezekiah-Bradley-Smith#:~:text=In%201878%2C%20the%20highly%20popular,be%20a%20talented%20congressional%20representative>.

replicated the successful fusion example of the Second District, the parties might have achieved a near sweep. Of course, it is possible—even likely—that fusion did not occur across the board because, in most of these cases, the two parties could not agree on shared candidates or platforms. *Had* they been able to achieve broad alignment with the Greenbackers, however, such a fusion effort might have filled nearly the entire House delegation from a key northern state, with Democrats.<sup>72</sup>

Clearly, fusion, when manageable, could help one major party hold its own against another, even when, by itself, the former could not outcompete the latter. At the same time, it also illustrated the power third parties—and especially their voters—held by choosing *not* to fuse. Operating under a system in which fusion was an option, third parties and their voters could generate significant leverage. By choosing to fuse, they might birth new, coalitional majorities in which they (under ideal circumstances) held the balance of power. By choosing *not* to fuse, third parties could exercise discipline over their major party competitors, alternately threatening the ability of Democrats or Republicans to achieve even plurality victories.

The Greenback Party's relationship with Representative Smith also illustrated the limits on third-party partnerships with the major parties. Smith—who became engulfed in a bigamy controversy at the close of the 1878 campaign—quickly abandoned the Greenback cause and aligned with the mainstream members of the Democratic Party.<sup>73</sup> Disappointed, the Greenbacks in turn abandoned Smith and fielded their own candidate, Samuel A. Dobbins, on an independent line during Smith's re-election campaign in 1880; Dobbins captured just one percent while Smith lost to Republican challenger J. Hart Brewer.<sup>74</sup>

Still, despite the fleeting electoral presence of the Greenback Party—they largely faded from public life after 1884—their campaigns shaped the politics of the era in meaningful ways and their presence on the ballot forced the major parties to reckon with their demands. For instance, Republican leaders and candidates in New Jersey initially treated the Greenback call for a paper currency with derision. Yet, by the beginning of the campaign season, some Republicans started touting the party's historical commitment to the “greenback,” understanding that

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72. MICHAEL J. DUBIN, UNITED STATES CONGRESSIONAL ELECTIONS, 1788–1997: THE OFFICIAL RESULTS OF THE 1ST THROUGH THE 105TH CONGRESSES 245 (1998).

73. On Smith's bigamy controversy, see *Hezekiah's Two Wives. A Congressman's Predicament.*, N.Y. TIMES, Nov. 22, 1878, at 2; *One Wife Too Many.*, PIONEER, Nov. 28, 1878, at 2. On his relationship to the Greenbacks, see *Political Points.*, MONMOUTH INQUIRER, Sept. 23, 1880.

74. THOMAS F. FITZGERALD & LOUIS C. GOSSON, MANUAL OF THE LEGISLATURE OF NEW JERSEY, 1881, at 51 (1881).



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Greenbackers had mobilized popular energy on the matter.<sup>75</sup> This latter point demonstrates how third parties can shape politics despite their inability to mount victorious electoral campaigns, pressuring major parties to attend to grassroots causes in their efforts to build winning coalitions.

When a fusion alliance could not be negotiated, third-party candidates could and did spoil races. In 1879, for example, voters in Passaic County's First Legislative District—which included parts of Paterson—narrowly elected a Republican assembly candidate, with the twenty-three votes cast for the Greenback candidate exceeding the thirteen vote margin of victory.<sup>76</sup> Of course, it is impossible to know for certain that the Greenbackers could have fused with the Democrats there; perhaps their positions were too far apart on the issues core to each group's base. But given the fact that nearby fusion examples worked, it is evident that the Passaic Greenback challenger understood there was a chance to spoil and considered the risk worth it. Fusion, thus, could boost a major party candidate if sufficient common ground could be found with a minor party—while the minor party retained the ability to exert painful electoral punishment if not.

In the 1890s, a key example of fusion in New Jersey showcased how the practice could facilitate a moderating or conservatizing effect on the political process, in contrast to the more well-known practice of fusion practiced concurrently by Populists. The Populist Movement and its People's Party was strongest in agrarian sections of the United States, especially in the Plains and parts of the South. Sometimes, Populists ran on their own line; often they fused with sympathetic Democrats (in the Plains and West, mostly) and, occasionally, with Republicans (particularly in the Southeast, where the Democrats were opposed to multiracial politics).<sup>77</sup> In 1896, the party fused at the national level with the Democrats to support presidential candidate William Jennings Bryan, who unified both parties around the call for Free Silver, a loosening of monetary policy to relieve beleaguered and heavily indebted farmers.<sup>78</sup> New Jersey was by no means a hotbed of People's Party support, but a sudden burst of populist-inspired activity in the rural Fourth Congressional District threatened Republican incumbent Mahlon Pitney. The attorney and future U.S. Supreme Court Justice narrowly won his seat in this traditionally Democratic district during the 1894

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75. *One Wife Too Many*, *supra* note 73.

76. DUBIN, *supra* note 72, at 245.

77. Argersinger, *supra* note 14, at 292–97.

78. MICHAEL KAZIN, *A GODLY HERO: THE LIFE OF WILLIAM JENNINGS BRYAN* 64 (2006).

Republican landslide.<sup>79</sup> Two years later, calls for Free Silver appeared to motivate a significant section of the district's electorate. Free Silver advocates electrified crowds at the district's Farmers Picnic—while attendees were dismayed with Pitney's defense of the gold standard. Many in the crowd reportedly jeered the congressman's speech on the main stage.<sup>80</sup> One paper referred to Pitney's Fourth District as the "only sore spot . . . for sound money in New Jersey."<sup>81</sup>

Tapping into the Free Silver energy, the Democrats nominated Augustus Cutler, a former Representative from a neighboring district—conveniently nicknamed "Farmer Cutler"—to challenge Pitney.<sup>82</sup> But the Democrats were not unified. Indeed, Bryan's candidacy, which was critiqued by some Populists for succumbing to the two-party system, also opened a rift among Democrats, not all of whom agreed with what they saw as the populist drift of the party.<sup>83</sup> At the annual state convention, critics claimed that the "Gold" Democrats—those who agreed with Pitney and other "sound money" Republicans—were silenced and marginalized by Cutler in the course of platform deliberations.<sup>84</sup> The *Plainfield Courier-News* charged that the convention turned a cold shoulder to gold men.<sup>85</sup> Meanwhile, the *Jersey City News* reported that a "wild scene of disorder" erupted after Cutler gave a speech to the convention.<sup>86</sup> Disgruntled New Jersey Democrats renamed themselves "Sound Money Democrats" and broke from the party.<sup>87</sup> In doing so, they were not alone. Frustrated with the direction of the Democratic Party under Bryan's leadership, a conservative section of the party broke ranks and formed the National Democratic Party. Also called the Gold Democrats, the National Democratic Party ran its own slate in the 1896 election headed by presidential candidate John McAuley Palmer of Illinois.<sup>88</sup> New

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79. GUIDE TO U.S. ELECTIONS, *supra* note 65, at 1146.

80. *Silver Dangerous*, JERSEY CITY NEWS, Aug. 21, 1896, at 1.

81. *Jersey's One Blot. Sound Money Men Look with Apprehension on the Fourth District*, JERSEY CITY NEWS, Oct. 12, 1896, at 4.

82. *Cutler to Oppose Pitney. Fourth District Democrats Name Him for Congress*, JERSEY CITY NEWS, Sept. 16, 1896; *Among Our State Exchanges*, CAMDEN DAILY COURIER, Aug. 18, 1896.

83. KAZIN, *supra* note 78, at 64–65.

84. *See Swallowed the Ticket*, PLAINFIELD COURIER-NEWS, Sept. 10, 1896, at 1.

85. *Id.* Pitney's reference to the "Chicago Doctrine" was a criticism of the platform adopted by the Democratic Party at their national convention held in Chicago that summer. *New Jersey Bryanites*, CAMDEN DAILY COURIER, Sept. 9, 1896, at 1.

86. *Gloomy and Gusty: Dismalest of All Democratic Conventions Held at Trenton Today*, JERSEY CITY NEWS, Sept. 9, 1896, at 1.

87. *Electors Named.*, PATERSON EVENING NEWS, Sept. 22, 1896, at 1.

88. *John McAuley Palmer*, NAT'L GOVERNORS ASS'N, <https://www.nga.org/governor/john-mcauley-palmer/> (last visited Apr. 13, 2024).

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Jersey's Sound Money Democrats joined this effort, backing Palmer's candidacy.<sup>89</sup>

Given the dissension in the Democratic ranks, Pitney confronted the currency issue head-on. He defended what he called "common sense" principles, inveighed against Democrats' "Chicago Doctrine," and insisted that "money of value" was needed.<sup>90</sup> In mid-October, the Sound Money Democrats backed Pitney's campaign. In such a heavily Democratic district, the race was sure to be extremely close; newspapers noted both that a straight party vote would likely return the seat to the Democrats and that defections on the silver issue could tip the contest in Pitney's favor.<sup>91</sup> Instead of running their own candidate in the Fourth District as they had done throughout the Garden State, the Sound Money Democrats listed Pitney on their party's ticket.<sup>92</sup> With the support of a substantial breakaway section of the Democratic Party, Pitney's prospects soared.<sup>93</sup> Pitney ultimately prevailed with a surprisingly comfortable three thousand vote majority, a total that almost doubled the size of his victory from two years earlier.<sup>94</sup>

In the Gilded Age, parties across the spectrum embraced fusion to exercise influence. Democrats fused with Greenbacks in the 1870s and New Silver candidates in the 1890s; sometimes they partnered with Prohibition Party candidates, too, though the Prohibition and Temperance parties fused more frequently with Republicans from the 1890s onward. In at least one case, the Greenbacks and Prohibitionists fused together, displaying the flexibility temperance fighters embraced.<sup>95</sup> Splinter groups emerged within the Old Parties that pushed both Democrats and Republicans to work with "independent Democrats" and "independent Republicans" beginning in the 1890s and persisting into the early 1900s. Short-lived labor parties, such as the Socialist Labor Party, cropped up here and there. By the 1910s and early 1920s, as fusion, and third-party voting more generally, came under increasing assault, the most frequent cases of the practice were Republicans and Democrats fusing with their respective breakaway factions or "non-

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89. See PATERSON EVENING NEWS, *supra* note 87, at 1.

90. *A Common Sense Issue*, MADISON EAGLE, Oct. 16, 1896, at 4.

91. *Republic Nominations*, CAMDEN DAILY COURIER, Sept. 23, 1896, at 2.

92. See MADISON EAGLE, *supra* note 90, at 4.; *Nominations Filed: Pitney Endorsed by Gold Men*, JERSEY CITY NEWS, Oct. 15, 1896.

93. See *Republican Ticket: Everything Strongly Republican*, BRIDGETON PIONEER, Oct. 22, 1896; TRENTON EVENING TIMES, Oct. 15, 1896.

94. See THOMAS F. FITZGERALD, *MANUAL OF THE LEGISLATURE OF NEW JERSEY*, 1897, at 229 (1897).

95. See THOMAS F. FITZGERALD & LOUIS C. GOSSON, *MANUAL OF THE LEGISLATURE OF NEW JERSEY*, 1883, at 205 (1883).

partisan” groupings.<sup>96</sup> Each period of fusion followed a similar pattern: social movements from a range of ideological positions wielded fusion to assert more power than they might have had they remained fully within the bounds of a major party.

Attentive listeners to the winds of New Jersey’s late-nineteenth century political change might have noted whispers of the urban-rural polarization that would later play a much greater role in state politics. A surge of immigration, especially to communities like Jersey City, Newark, and Paterson, set the stage for Democrats to integrate newcomers into their party ranks. As Democrats built up strength among the multi-ethnic, multi-lingual, and heavily Catholic migrant communities concentrated in cities, Republicans prevailed in areas where voters tended to be native-born Protestants, largely in towns and rural areas. Despite these shifts, at the time, most would have been far more attentive to the driving theme of the period’s politics: fierce competition.

### III. BATTLES OVER REFORM IN NEW JERSEY’S ELECTION LAWS, 1889–1922

The politics of election law reforms in the Gilded Age and Progressive Era flowed from conflict and competition within the changing party structure and balance of power in the late-nineteenth and early-twentieth centuries.

Election law became a topic of intense focus beginning in the late 1880s, as anti-corruption reformers, elected officials, and later party leaders pushed for a secret, standardized, government-printed ballot, commonly known as the “Australian ballot.”<sup>97</sup> Around the country, the Australian Ballot was used not only to regularize voting but also to erect new barriers to voting; in some regions, these disproportionately affected Black voters and in others, immigrant voters.<sup>98</sup> Until the end of the nineteenth century, New Jersey law stipulated very little about how elections were to be conducted and political parties—both major and

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96. Data on fusion elections in New Jersey is drawn largely from published elections returns, such as the annual *Manual of the Legislature of New Jersey* and GUIDE TO U.S. ELECTIONS, *supra* note 65.

97. MCCORMICK, *supra* note 54, at 159, 173–80.

98. J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910, at 8 (1974).

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minor—were responsible for producing and distributing ballots to voters, who would then return completed ballots to polling sites.<sup>99</sup>

On the anti-corruption side, the New Jersey Ballot Reform Association—in partnership with the Knights of Labor and other local organizations—led the efforts to implement ballot reform. Reformers were incensed by a series of blatant bribery campaigns that unfolded in the 1870s and 1880s. This cohort of reformers saw the Australian ballot and accompanying election changes, such as ballot envelopes and voting booths, as instruments to rein in the political influence of money and neutralize the malpractices of local party machines.<sup>100</sup> New Jersey party leaders grew frustrated with a lack of discipline within their organizations, incensed by the growing practice of split ticket voting. Especially in local elections, factions frequently broke away from the official party endorsements, sometimes crossing the aisle to back a member of the opposite party or a non-endorsed in-party alternative to the party's pick. Such "treachery" rankled leaders of both major parties who cried foul at a notable decline in straight-ticket voting.<sup>101</sup> Party leaders came to believe that a public ballot produced by the state and formal election procedures could assist them with reinscribing party discipline in the voting process.

By 1889, Democratic Governor Robert Green and both major political parties came out in favor of the Australian ballot, joining the wave of election reform sweeping the country centered on this idea.<sup>102</sup> Still, the legislature voted down the first effort to codify the Australian ballot, defeating a reform bill sponsored by Assemblyman Daniel M. Kane, founder of the New Jersey Ballot Reform Association, in both 1889 and 1890.<sup>103</sup> In place of the Kane Bill, the legislature adopted a compromise bill sponsored by Senator George T. Werts, which was signed by newly elected Governor Leon Abbett in 1890. The Werts Law resulted in the partial adoption of the Australian ballot, with the state producing separate party ballots (as opposed to a single, uniform ballot) that voters completed and then returned to the polls.<sup>104</sup>

As party leaders had hoped, the new system made split-ticket voting more difficult, requiring voters to affix a "paster" containing the name of

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99. JOHN F. REYNOLDS, *TESTING DEMOCRACY: ELECTORAL BEHAVIOR AND PROGRESSIVE REFORM IN NEW JERSEY, 1880–1920*, at 47 (1988); MCCORMICK, *supra* note 54, at 104.

100. REYNOLDS, *supra* note 99, at 59–63.

101. John F. Reynolds & Richard L. McCormick, *Outlawing "Treachery": Split Tickets and Ballot Laws in New York and New Jersey, 1880–1910*, 72 J. AM. HIST. 835, 838 (1986).

102. MCCORMICK, *supra* note 54, at 174–75.

103. *Id.* at 175.

104. *Id.* at 176–77.

their preferred candidate if it differed from what was printed on the party ballot.<sup>105</sup> Despite their initial support for the law, the Werts reforms created obstacles for third parties, requiring a party to capture five percent of the vote in order to get their ballot furnished by the state.<sup>106</sup> Describing the “ambiguous legacy” of the law, Historian John Reynolds writes, “[T]he electorate was encouraged to exercise its own judgment, but the law limited the voter’s choices once inside the voting booth.”<sup>107</sup>

Election reform efforts continued for the next several decades with the state legislature codifying several important new laws. In 1901, the Republican-led legislature passed the Meeker Act, which required that all elections for city, state, and national office must be conducted on the same ballot in the same election scheduled for the first Tuesday in November.<sup>108</sup>

Around the same time, reformers started pressing for direct primaries. Long-standing progressive Republican crusader George Record willed the first primary law through the state legislature in 1903, with a valuable assist from Governor Franklin Murphy, who beat back opposition from Republican county leaders and pressured Assembly members to come along.<sup>109</sup> The bill, first proposed by a 1902 Election Commission, established guidelines for delegate selection at party nominating conventions, set the date for primaries on the second Tuesday of September, allowed parties to require an oath from primary participants, and permitted county and municipal party committees to use direct primaries.<sup>110</sup>

In 1907, the legislature implemented further electoral reforms, extending the direct primary to all elected offices at the county and municipal level. The 1907 laws also allowed voters to cast ballots for U.S. Senate candidates in party primaries, though the results were not legally binding, as the state legislature still selected U.S. Senators.<sup>111</sup> And for the first time in New Jersey, following the surge of anti-fusion laws passed in dozens of states around the country, the legislature enacted restrictions that effectively prevented fusion.<sup>112</sup> Then, in 1909, Governor John Franklin Fort pressed the legislature into adopting a bill that required all

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105. *Id.* at 181–82.

106. REYNOLDS, *supra* note 99, at 65–66.

107. *Id.* at 69.

108. MCCORMICK, *supra* note 54, at 164 n.21.

109. *Id.* at 192–93.

110. *Id.* at 193–94.

111. *Id.* at 196.

112. 1907 N.J. Laws 697; see Argersinger, *supra* note 14, at 288–90.

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party committees to be elective, determined during the respective party primaries.<sup>113</sup> As historian Richard McCormick summarized:

By 1910 . . . primary elections under official regulations were being used to nominate directly candidates for all offices except the governor, Congressman, and presidential electors; to elect delegates to Congressional and state conventions; and to choose party committeemen. Within the brief period of six years the nominating process, which traditionally had been beyond state control, was made an integral part of the election process.<sup>114</sup>

This period of reform represented simultaneously a modernization of electioneering and a struggle over the power the two major parties would exert over the democratic process. As leading historians have noted, the 1890 ballot reforms were “adopted as a response to the untamed character of nineteenth-century elections and, like other election-law changes of the Progressive Era, [they] won support from groups having different, even contradictory, goals and expectations.”<sup>115</sup> The marriage of convenience that produced the public ballot and subsequent reforms, though, quickly dissolved under the pressures of intraparty divisions in the new century.

A. *Party Politics Drive Election Law Changes*

The process of legislative change that ultimately limited third-party ballot access was not simply a product of interparty competition—a focus of key earlier scholarship—but also of *intraparty* struggles in the early 1900s over ideological fractures in the major parties’ complex coalitions.<sup>116</sup> The Republican Party, in particular, looms large, since from the mid-1890s, the GOP surged forward in the Garden State. From 1896 until 1910, Republicans enjoyed nearly uninterrupted control over the governor’s mansion, both houses of the legislature, and the state’s congressional delegation.<sup>117</sup> Only in 1907 did Democrats control a statewide governmental entity, the Assembly.<sup>118</sup> GOP control may have marginalized the Democratic opposition, but it could not contain bubbling

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113. MCCORMICK, *supra* note 54, at 197.

114. *Id.* at 198.

115. Reynolds & McCormick, *supra* note 101, at 838.

116. Argersinger, *supra* note 14, at 303. Argersinger emphasized the role (and goals) of anti-fusion laws with regard to marginalizing third parties in this period. *Id.* at 304.

117. BRIAN GREENBERG, NEW JERSEY: A HISTORY OF THE GARDEN STATE 206 (Maxine N. Lurie & Richard Veit eds., 2012).

118. RANSOM E. NOBLE, JR., NEW JERSEY PROGRESSIVISM BEFORE WILSON 80 (1946).

tensions within the party itself. Intraparty competition in the early 1900s led to more than a decade of struggle over the future of the two-party system.<sup>119</sup>

In short, the GOP was divided between two rival camps. A powerful faction of the New Jersey Republican Party advanced corporate-friendly policies that minimized taxation and allowed major firms to evade federal regulation efforts through liberalized incorporation procedures. In a period of rapid, widespread industrialization, they turned the state into a haven for corporate headquarters and great fortunes.<sup>120</sup> Meanwhile, Republican reformers reacted to the indignities, social fractures, and corruption that attended industrialization—widespread urban poverty, women’s marginalization, and political cronyism—by calling for “a broad notion of citizenship and civic responsibility” and advocating a range of social, welfare, and clean government reforms.<sup>121</sup> This latter tendency took shape and expression in what became known as the “New Ideas” movement.

The New Ideas movement emerged in the early 1900s, as progressive Republicans Mark Fagan and George Record (from Jersey City) and State Senator Everett Colby (of Essex County) launched a public campaign against the political machines, their bosses, and the influence of corporate interests.<sup>122</sup> They advocated a progressive political vision dedicated to election reform, the regulation of public utilities, workers compensation and employers’ liability, and a host of other good governance measures.<sup>123</sup> Participants in the New Ideas orbit were committed to agitating, advising, and shaping policy both in the legislature and beyond. In their quest for reform, they often aligned with like-minded Democrats, particularly an emergent younger generation of reformers such as Joseph Tumulty of Jersey City, Harry V. Osborne of Newark, and James Blauvelt of Paterson.<sup>124</sup> For such activity, at least

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119. It is important to note that, while the Democrats were largely shut out of statewide and federal offices in the state during this period, in key cities, especially Jersey City, municipal Democratic machines actually expanded their role in structuring city and regional politics—with party operations doubling as brokers of resources and even the process of Americanization for a diversifying and growing urban population. This subject will reemerge later in this Article in the discussion of intra-party tensions and electoral reforms. *See infra*.

120. GREENBERG, *supra* note 117, at 205–06.

121. *Id.*; SHELTON STROMQUIST, REINVENTING “THE PEOPLE”: THE PROGRESSIVE MOVEMENT, THE CLASS PROBLEM, AND THE ORIGINS OF MODERN LIBERALISM, at viii (2006).

122. NOBLE, *supra* note 118, at 65–83.

123. *See id.* at 66–67; GREENBERG, *supra* note 117, at 207.

124. For background on the emergence of young, urban progressives in the Democratic Party, see John D. Buenker, *Urban, New-Stock Liberalism and Progressive Reform in New Jersey*, 87 N.J. HIST. 79 (1969).



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one historian likened their program to that of a third party.<sup>125</sup> Though spirited reformers, they charted a middle path between Republican leaders' conservatism and the revolutionary demands of more radical social movements.<sup>126</sup> New Ideas members would later play a critical role in shaping Wilson's reform program in 1911 and served as the nucleus for the Progressive Party in New Jersey from 1912 to 1914, both of which will be discussed in fuller detail below.

Such internecine conflicts were not unique to New Jersey, and events in the Garden State were not entirely outside national trends. Still, the stakes of intraparty conflict in New Jersey were highest for the Republican Party. The emergence of a new current in which a substantial minority of the GOP electorate swam threatened the party's leading section and its grip on its organization and, perhaps more consequently, its political standing in the state.<sup>127</sup>

One major area of collaboration among progressive reformers during this period was on the matter of election law. Reform advocates were part of a larger historical process of self-styled progressives seeking to rationalize and modernize the electoral system.<sup>128</sup> As noted above, such work began at the close of the nineteenth century and continued through the early-twentieth century.

Reform efforts reached their high tide under the leadership of Woodrow Wilson, who was elected governor in 1910.<sup>129</sup> Wilson—despite securing the Democratic nomination, thanks to the maneuvers of big-city bosses—quickly broke ranks with his party's political bosses and surrounded himself with a bipartisan cohort of young progressives.<sup>130</sup> Wilson also steered a reorganization of the New Jersey Democratic Party, elevating progressive reformers and critics of machine politics, while

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125. GREENBERG, *supra* note 117, at 209.

126. See Eugene M. Tobin, *The Progressive as Single Taxer: Mark Fagan and the Jersey City Experience, 1900–1917*, 33 AM. J. ECON. & SOCIO. 287, 288–89 (1974).

127. See GREENBERG, *supra* note 117, at 209.

128. *Id.* at 202–35.

129. During his campaign for governor in 1910, Wilson did make modest overtures to Black voters, but largely left the New Jersey Democratic Party's commitment to White supremacy unchallenged, perhaps recognizing that Black voters still overwhelmingly preferred the party of Lincoln during this period. Additionally, he did not include any provisions or protections for Black citizens in any of the reform programs his administration implemented. See Christine A. Lunardini, *Standing Firm: William Monroe Trotter's Meetings with Woodrow Wilson, 1913–1914*, 64 J. NEGRO HIST. 244, 244 (1979). Moreover, as contemporary scholars have emphasized in detail, Wilson himself was an ardent believer in White supremacy and a trafficker in anti-Black racism, both of which were visible through his policies and actions during his years in the White House. See JOHN M. COOPER, JR., *WOODROW WILSON: A BIOGRAPHY* 10–11 (Vintage Books 2011) (2009).

130. 1 ARTHUR S. LINK, *WILSON, THE ROAD TO THE WHITE HOUSE* 173–82 (1947).

neutralizing party bosses to a considerable degree.<sup>131</sup> These progressives shaped Wilson's policy program and convinced the governor to pursue a suite of electoral reforms that aimed to increase public administration of elections, crackdown on corruption, and encourage voter independence—limiting the influence of party bosses and their political machines.<sup>132</sup>

Wilson's electoral reforms consisted of three major pieces of legislation, all enacted in 1911: the Corrupt Practices Act, the Walsh Act, and the Geran Election Law. The Corrupt Practices Act placed limits on campaign contributions and regulated how funds could be used by candidates for office.<sup>133</sup> The Walsh Act permitted municipalities the ability to implement a non-partisan commission form of government.<sup>134</sup>

The Geran Law was the centerpiece of Wilson's election reform agenda.<sup>135</sup> Though initially introduced by Assemblyman Elmer Geran—a former student of Wilson's at Princeton—influential Senator George Record took the lead in crafting the final version of the law.<sup>136</sup> The law further solidified voter control of the primary process, stipulating that all elected officials and delegates to national conventions must be elected through a direct primary.<sup>137</sup> Drafted less than two years before the Seventeenth Amendment was ratified, the law stipulated that candidates for the state legislature must declare whether they support the senatorial candidate selected by the voters in the party primary.<sup>138</sup> The Geran Law also delivered on the full Australian ballot, replacing the state-sanctioned party ballot that had existed since 1890.<sup>139</sup> This change required voters to individually select their preferred candidates, rather than vote the party slate as printed on the party ballot. The bill introduced a number of mechanisms to guard against election malfeasance, such as requiring that members of the district election boards were chosen by the Civil Service Commission and having courts offer oversight of local election officials.<sup>140</sup> Lastly, the Geran Bill liberalized third parties' access to the ballot, while removing statutory limitations on fusion voting enacted several years earlier.<sup>141</sup>

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131. *Id.* at 277–79.

132. *Id.* at 137–45.

133. Corrupt Practices Act, ch. 188, 1911 N.J. Laws 329.

134. Walsh Act, ch. 221, 1911 N.J. Laws 462.

135. Arthur Ludington, *Election Laws: The New Geran Law in New Jersey*, 5 AM. POL. SCI. REV. 579, 579–80 (1911).

136. MCCORMICK, *supra* note 54 at 213.

137. Geran Law, ch. 183, 1911 N.J. Laws 276.

138. *Id.*

139. Ludington, *supra* note 135, at 584–85.

140. Geran Law, ch. 183, 1911 N.J. Laws 276.

141. *Id.*

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Wilson's signature election reforms encapsulated many of the tensions of good governance-focused Progressivism: it sought to dissolve the influence of big money and political machines on the political process even as it sought to remake the electorate according to reformers' ideas of good citizenship, ideas that threatened to exclude many of the state's increasingly-immigrant urban voters.<sup>142</sup> Towards the former, the Geran Law replaced the state-printed straight-ticket party ballots with a single ballot that listed the names of the respective candidates and their party affiliation for each position.<sup>143</sup> Consistent with the latter, the Geran Law narrowed many voters' access to the polls by reducing the pre-election registration window and by requiring voters who skipped one election to re-register for subsequent cycles.<sup>144</sup> These elements of the law provoked harsh opposition from Democratic Party bosses in Newark and Jersey City, who waged the most concerted campaign against the reform measures.<sup>145</sup> In fact, urban bosses and legislators beat back provisions that would have required voters to present immigration papers at polling locations and shortened polling hours. Democrats in urban centers worried that the elimination of the party ballot would imperil their ability to mobilize immigrant voters, a core constituency in their electoral coalition. In contrast, Senator Record convinced other Republican legislators to support the reforms without incident, persuading them that there existed a popular mandate for progressive change.<sup>146</sup> Such an approach positioned the GOP to claim partial credit for the bill's passage and deny Wilson's Democrats an issue to campaign on for the fall's legislative races.<sup>147</sup>

Governing with allies across the aisle and agitating across the state, progressive reformers threatened the status quo of New Jersey party politics, as they did across much of the country in the early twentieth century. In fact, Wilson's close relationship with Senator Record came under fire from Democratic insiders, who pressured the future president to abandon his erstwhile policy advisor shortly after he completed his election reform work.<sup>148</sup> As tensions heightened within the parties between reformist and traditional wings—what had been *internal* divides began to seem like lines along which the parties might someday cleave. In 1912, that's exactly what happened in the Republican Party.

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142. REYNOLDS, *supra* note 99, at 137–67.

143. *Id.* at 154–55. For an example of the Geran ballot, see 1911 N.J. Laws 316.

144. Geran Law, ch. 183 § 23, 1911 N.J. Laws 276, 288.

145. LINK, *supra* note 130, at 239–77.

146. *Id.*

147. *Id.* at 257–58.

148. *Id.* at 240–41, 246.

At the national level, former president Theodore Roosevelt had grown frustrated by the conservative policies of his chosen successor, William Howard Taft, and—fueled by the mounting disenchantment among progressive reformers within the Republican fold—waged an aggressive campaign to recapture the presidency in 1912.<sup>149</sup> Upon failing to secure the Republican nomination at their annual convention, Roosevelt took the unconventional route of waging a third-party candidacy, establishing the Progressive Party for the purposes of his campaign.<sup>150</sup> Roosevelt's Bull Moose Party, as it was often called, was joined by a host of reformers and captured twenty-seven percent of the national vote, while carrying six states.<sup>151</sup> Roosevelt carried a third of the vote in New Jersey.<sup>152</sup> In the process, Roosevelt's ploy split the Republican coalition that cycle, with Taft securing the lowest vote total of any incumbent president in American history.<sup>153</sup> New Jersey Governor Woodrow Wilson capitalized on Republican dissension, winning New Jersey and forty-one other states while breezing to an Electoral College victory despite winning just under forty-two percent of the vote.<sup>154</sup>

With the birth of a new third party, New Jersey Progressives found a vehicle through which to carry their political project on new terrain and in ways that disrupted Garden State politics in profound ways. Despite their legal right to fuse with a major party, the Progressive Party instead fielded a host of candidates for the state legislature races in 1912.<sup>155</sup> Mirroring the pattern that unfolded in the presidential contest, the bulk of Progressive Party voters had broken from the Republican Party orbit, proving disastrous for the latter's fortunes in November. The ticket-splitting fueled a decisive Democratic triumph in the Assembly, where they won fifty-two of sixty seats, while also allowing them to capture the majority in the Senate.<sup>156</sup> The GOP performed just as poorly in the year's congressional races, as they prevailed in just one of the twelve U.S. House

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149. JAMES CHACE, 1912: WILSON, ROOSEVELT, TAFT, & DEBS—THE ELECTION THAT CHANGED THE COUNTRY 17–18, 39 (Simon & Schuster 2005) (2004).

150. *Id.* at 3.

151. Joseph Postell, *The Election of 1912*, BILL OF RIGHTS INST., <https://billofrightsinstitute.org/essays/the-election-of-1912> (last visited Apr. 13, 2024).

152. *Statistics: Elections, 1912*, AM. PRES. PROJECT, <https://www.presidency.ucsb.edu/statistics/elections/1912> (last visited Apr. 13, 2024).

153. *United States Presidential Election of 1912*, ENCYC. BRITANNICA, <https://www.britannica.com/event/United-States-presidential-election-of-1912> (last visited Apr. 13, 2024).

154. *Statistics: Elections, 1912*, *supra* note 152. Of note, Socialist Party candidate Eugene Debs captured six percent of the national vote in 1912. *Id.*

155. THOMAS F. FITZGERALD, MANUAL OF THE LEGISLATURE OF NEW JERSEY, 1913, at 641–45 (1913) [hereinafter 1913 LEGISLATURE MANUAL].

156. *Id.* at 153, 365.

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contests in the state.<sup>157</sup> The Progressives and the Republicans did fuse in Democratic-leaning Hudson County, in contests in the Eighth and Twelfth Districts.<sup>158</sup> Neither candidate carried more than thirty-five percent though, as Democratic incumbents coasted to victory.<sup>159</sup> However, indicative of the dissension within the Republican ranks, a conservative candidate running under the Independent Republican banner, notched just over eight percent in the Eighth District race.<sup>160</sup> All told, the presence of Progressive Party candidates on the ballot in 1912 spelled doom for the Republican Party, while also failing to deliver a single electoral victory for the Bull Moose Party in the state.

*B. The Tides Turn on Progressive Reform*

From about 1905 to 1916, New Jersey Progressives had secured a strong foothold in state politics and exercised significant influence in shaping the future of the party system. As discussed earlier, they implemented a series of reforms that professionalized the electoral process, while encouraging voter independence and carving out a meaningful role for minor parties in contributing to New Jersey's political life. These moves curtailed the power of party bosses and their political machines and took steps towards diminishing the influence of business elites. In the course of this work, the progressive movement had significantly disrupted the balance of power within the major parties, most consequently in the GOP.

Shortly after their disastrous 1912 election, Republican standard bearers embarked on a strategy to regain power in the state. A central component of this strategy involved bringing Progressive Party voters back into their fold. Despite bursting on the scene with Roosevelt's candidacy in 1912, where his presidential campaign snagged thirty-three percent of the vote statewide and seven congressional candidates polled greater than nineteen percent, the Progressive Party's fortunes were flagging by mid-decade.<sup>161</sup> Everett Colby, the Progressive gubernatorial candidate captured just eleven percent of the vote in the 1913 contest, while only one of their congressional candidates registered more than seven percent in the 1914 midterms.<sup>162</sup> Moreover, the Progressive Party

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157. *Id.* at 642–44.

158. *Id.* at 643–44.

159. *Id.*

160. DUBIN, *supra* note 72, at 385–90.

161. See 1913 LEGISLATURE MANUAL, *supra* note 155, at 641–44.

162. THOMAS F. FITZGERALD, MANUAL OF THE LEGISLATURE OF NEW JERSEY, 1914, at 127 [hereinafter 1914 LEGISLATURE MANUAL]; THOMAS F. FITZGERALD, MANUAL OF THE LEGISLATURE OF NEW JERSEY, 1915 [hereinafter 1915 LEGISLATURE MANUAL].

had yet to win any seats in the legislature, nor any significant elections throughout the state.

Republicans capitalized on the dipping enthusiasm for the Progressive Party and the retreat of the Progressive movement more broadly, finding a way past the fractures in their party at the 1914 midterms.<sup>163</sup> Additionally, the GOP benefitted from a more favorable national environment, as the Democrat's sagging popularity resulted in President Wilson's party losing sixty-one seats in the House, with the New Jersey GOP flipping seven seats.<sup>164</sup> The Republicans also recaptured both chambers of the state legislature, despite Progressives running dozens of losing candidates in Assembly and Senate races.<sup>165</sup> Even still, the Progressives' separate campaigns likely cost the Republicans several more seats. One Republican challenger for the Assembly in Bergen County finished just ninety votes behind the Democratic winner, while three Progressive candidates captured over 1,700 votes each.<sup>166</sup> In Warren County, the Democratic challenger squeaked by a Republican competitor by a margin of just over 400 votes, while a Progressive candidate notched 418 votes in the contest.<sup>167</sup>

Progressives did fuse with Republicans in Assembly races in Hudson, Monmouth, and Middlesex Counties, though Democrats prevailed in each of these Democratic strongholds.<sup>168</sup> In turn, Progressives fused with the Democrats in Ocean County and Passaic County, likewise in unsuccessful bids for the Assembly.<sup>169</sup> In Passaic County, a separate Progressive slate ran candidates as well, suggesting lingering splinters among Passaic Progressives that first emerged during the 1913 mayoral race.<sup>170</sup> Progressives in Essex County fractured as well, with a

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163. On the decline of the Progressive movement, see MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920*, at xvi (2005). For results of the 1914 New Jersey midterm election, see 1914 LEGISLATURE MANUAL, *supra* note 160, at 613.

164. DUBIN, *supra* note 72, at 385–407.

165. 1915 LEGISLATURE MANUAL, *supra* note 162, at 147.

166. *Id.* at 502–04.

167. *Id.* at 605–07.

168. *Id.* at 567–79, 587, 591.

169. *Id.* at 594, 598.

170. *Id.* at 594–98. In 1913, a faction within the Progressive Party in Paterson—aligned with former state senator and Progressive gubernatorial candidate Everett Colby—attempted to fuse with the Republicans during the primary contest for mayor, backing the GOP nominee Robert Fordyce. See *City Clerk Takes Fordyce Off Ticket*, PATERSON EVENING NEWS, Sept. 5, 1913, at 1; *Colby's Fight for Fordyce*, PATERSON EVENING NEWS, Sept. 6, 1913, at 1. A separate faction—aligned with State Senator Harry Osborne—opposed the maneuver, insisting that the Progressives back their own candidate, James Blauvelt. See *Courts Decide for Fordyce*, PATERSON EVENING NEWS, Sept. 9, 1913, at 1. After a tense primary that included a legal fight after the Paterson clerk refused to authorize Fordyce's

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Progressive-Roosevelt faction running candidates along with an Independent Progressive-Democrat slate in 1914 and 1915.<sup>171</sup>

Progressive performances in legislative races eroded further in 1915, as the party ran fewer candidates and captured a smaller share of the vote in races they did enter.<sup>172</sup> The Progressives' increasingly dismal performances point to a missed opportunity. Though the party owed its beginning to the singular popularity of former President Roosevelt, a weak foundation from which to build, the Progressive movement in the Garden State did possess considerable resources and experience from which to cohere a durable party structure. Moreover, unlike many states around the country that moved to eliminate fusion voting and diminish third-party viability, the Geran Law codified fusion and established pathways to political participation for third parties. Recognizing their inability to win any seats outright, the Progressives could have made more consistent and strategic use of fusion to bolster preferred candidates and wield political power on both sides of the aisle. Ultimately, the Progressives engaged in questionable strategic decisions and struggled to contain fractures within their ranks. These, combined with the shifting political winds by mid-decade, left the Progressives on the verge of collapse and incapable of softening the widening polarization in New Jersey politics.

Efforts at rapprochement within the Republican Party were strengthened significantly by Roosevelt's re-entry into the GOP and his endorsement of the Party's 1916 presidential nominee, Charles Evans Hughes.<sup>173</sup> Republican restoration was further solidified through the nomination of Walter Edge for New Jersey governor that same year. Though Edge's political career began in the New Ideas orbit and he worked with Wilson during his time in the Senate in crafting an employers' liability law, he secured the nomination in a close primary contest by campaigning in the moderate lane.<sup>174</sup> With a Moderate at the top of the ticket and no Progressive Party candidate on the ballot, Edge and the Republicans comfortably regained the state's top job; successfully

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presence in the Progressive primary, Blauvelt and the Osborne faction prevailed. *City Clerk Takes Fordyce Off Ticket*, *supra*. However, they finished a distant fourth, behind the Socialist Party candidate Gordon Demarest. *See Demarest, Hester, Heath, Hennessy Carry Own Towns*, EVENING RECORD, Nov. 5, 1913, at 1–2.

171. 1915 LEGISLATURE MANUAL, *supra* note 162, at 546.

172. *See generally* THOMAS F. FITZGERALD, MANUAL OF THE LEGISLATURE OF NEW JERSEY, 1916.

173. EDMUND MORRIS, COLONEL ROOSEVELT 450–54 (Random House, Inc. 2011) (2010).

174. THE GOVERNORS OF NEW JERSEY, *supra* note 70, at 243–46. On Edge's work with Wilson crafting an employers' liability bill, see LINK, *supra* note 130, at 263–64.

bridging the progressive insurgent versus party standard-bearer chasm that had previously torn apart the party.<sup>175</sup>

Republican standard bearers also sought to neutralize the influence of New Ideas voices within their ranks. Their reasons were twofold: first, to restore the favorable regulatory and tax environment for major firms by repealing Wilsonian reforms and second, to extinguish any alternative centers of political power outside of the core party leadership, as had happened in 1912. Towards these ends, the Republican legislature embarked on a new phase of election legislation, targeting key elements of the Geran Law. Beginning around 1915 and crescendoing over the next several years, this countermove climaxed with a series of bills from 1920 to 1922 that transformed the state into a permanent two-party duopoly. The Republican-led, bipartisan legislation enshrined the two-party system into New Jersey's state election law and placed clear limits on ballot access for third parties.

The legislative record, published documents, and newspaper reports vividly explain how this second cycle of legislative wrangling took shape and how it pitted ideas about the relationship between political parties and democracy against one another. Ultimately, proponents of the political duopoly prevailed, but the course they took to victory clarifies the democratic downsides of the reforms they secured.

### C. *The Duopoly Takes Root*

At the opening of New Jersey's 1916 legislative session, Senator Barton B. Hutchinson, a leading Mercer County Republican, introduced "Joint Resolution No. 1." The proposal called for a statewide Commission on Election Reform, whose role was "to revise, simplify, arrange, and consolidate the primary and election laws of [the] State."<sup>176</sup> Over the next two months, both chambers of the Republican-dominated legislature adopted Hutchinson's proposal and sent it to the governor's desk.<sup>177</sup> Democratic Governor James Fiedler opposed the measure, but he was in a weak position to assert his disagreement as the Republicans possessed a veto-proof majority in the legislature.<sup>178</sup> But its proponents were undeterred and promptly overrode Fiedler's veto; they swiftly appointed two of the three members of the Commission, both Republicans. Fiedler appointed the body's sole Democrat.<sup>179</sup> The wheels were in motion.

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175. THE GOVERNORS OF NEW JERSEY, *supra* note 70, at 244–46.

176. S. 72, 140th Sess., at 39–40 (N.J. 1916).

177. *See id.* at 39–40, 461.

178. *See id.*

179. *Id.* at 460.



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As noted above, Republican Walter Edge prevailed in the 1916 gubernatorial contest and assumed office in 1917. Upon taking office, he made election law a keystone of his agenda, but did so in a spirit of compromise, much like he campaigned. In his January budget address, the Governor focused on simplifying the voting process.<sup>180</sup> Edge argued that the Geran ballot, with its blanket format as opposed to separate party tickets, had sowed confusion among voters and contributed to depressed turnout—something even defenders of the law acknowledged.<sup>181</sup> Further, he noted, the increased bureaucracy of individual registration and other election regulations that were extended into small and mid-sized towns under the 1911 reforms seemed to have suppressed voter interest.<sup>182</sup> But Edge was not a conservative militant, either; nowhere in his address did the new Governor mention limiting ballot access for third parties or independent candidates.<sup>183</sup>

Months later, the legislature's three-member Commission on Election Reform, led by political appointees of both major parties, released its report—which buried mention of limiting third-party and independent candidate ballot access—and helped set off a fresh batch of legislative wrangling.<sup>184</sup> In the Senate, Conservatives quickly turned the report's recommendations into a draft bill, which sailed through the body after little debate. Critics seized on the proposal as a threat to ballot access for candidates other than the two major parties, but only a single senator voted against the measure.<sup>185</sup>

About this senator, Carlton B. Pierce from Union County, fumed:

[I]t has frequently been necessary to form citizens' organizations and make independent nominations to thwart the combination of political bosses. If this bill were to become a law the people would often be at the mercy of the political bosses controlling both party nominations and the people would have no chance of making independent nominations.<sup>186</sup>

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180. For Edge's address, including his ideas on election law, see THOMAS F. FITZGERALD, *MANUAL OF THE LEGISLATURE OF NEW JERSEY*, 1917, at 621–37.

181. Edge's critiques were duly noted. See REYNOLDS, *supra* note 99 at 154–55. Woodrow Wilson rather famously exited his voting booth frustrated after casting his ballot in 1911, the first election following the law's implementation. Wilson remained in the booth for nearly five minutes, confused by the large and unwieldy ballot. *Id.*

182. *Id.*

183. N.J. GEN. ASSEMB. 141, MINUTES OF VOTES AND PROCEEDINGS 65–66 (1917).

184. N.J. COMM'N ON REVISION OF THE PRIMARY AND ELECTION LAWS, REPORT, at 5 (1917).

185. See S. 73, 141st Sess., at 674 (N.J. 1917).

186. *A Dangerous, Though Remote, Possibility*, DAILY REC., Mar. 29, 1917, at 4.

He went on to insist that the “bill is clearly designed to perpetuate machine rule and to make independent nominations difficult by declaring that independent nominations must be filed by the end of August instead of permitting them to be filed after the regular party primaries.”<sup>187</sup> In the Assembly, the proposal did not advance beyond a second reading, but it laid the foundation for measures to follow.

Governor Edge, in leading as a Moderate, folded in elements of progressive reform in his policy formulations that sometimes put him at odds with Conservatives in the Republican-controlled state legislature. One such clash erupted when Edge supported a successful bill strengthening Wilson’s Corrupt Practices Act, which placed limits on campaign spending.<sup>188</sup> The bill aimed to diminish the influence of wealthy financiers, such as those associated with the Public Service Corporation—an influential political body funded by and composed of conservative business leaders.<sup>189</sup> Such maneuvers irked the GOP’s conservative wing, whose members were scheming to neutralize the progressive currents in state politics.

In 1919, the Bureau of Research for the New Jersey Chamber of Commerce published a lengthy report outlining its preferred course for election reform. The report captured the attention and admiration of Assembly Speaker Arthur Pierson, who worked closely with the Chamber.<sup>190</sup> However, when the legislature passed a bill predicated on the Chamber’s report, Edge vetoed the measure.<sup>191</sup> But Edge was on his way out, having been elected to the U.S. Senate in 1918, as the state constitution barred him from seeking a second term in Trenton.<sup>192</sup> In March 1919, before vacating the governorship, he stipulated that the substance of Pierson’s election bill needed to be studied for a year before implementation, effectively punting the matter to his successor, and of more consequence, the Republican-dominated legislature.<sup>193</sup>

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187. *Id.*

188. *Governor Signs Election Bill*, ASBURY PARK EVENING PRESS, Mar. 4, 1918, at 2; *Edge Signs Corrupt Practices Bill Today*, DAILY HOME NEWS, Mar. 4, 1918, at 1; *Gov. Edge Approves Corrupt Practices Act with Comment*, EVENING REC., AND BERGEN COUNTY HERALD, Mar. 4, 1918, at 1.

189. See *infra* notes 201–03 and accompanying text.

190. *New Election Law for Jersey*, N.Y. TIMES, Feb. 19, 1919, at 3.

191. *Election Law Muddling*, NEWARK EVENING NEWS, Mar. 15, 1920, at 8.

192. THOMAS F. FITZGERALD, MANUAL OF THE LEGISLATURE OF NEW JERSEY, 1920, at 21–22, 63 [hereinafter 1920 LEGISLATURE MANUAL].

193. See *Election Law Muddling*, *supra* note 191, at 8.

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*D. The Geographic Realignment of New Jersey Politics and the Political Duopoly*

Governor Edge delayed but did not—or, perhaps, could not—prevent the further intensification of the push to unwind the Wilsonian election reforms. Indeed, the 1919 gubernatorial contest represented a turning point in the state's two-party dynamic and with it, the politics of New Jersey election law. The GOP maintained legislative preeminence, but the Democrats proved resurgent in the statewide governor's contest.<sup>194</sup> Republicans elected solid legislative majorities grounded in their disproportionately well-represented bases in rural areas, while immigrant-heavy cities turned out big for the statewide Democratic ticket.<sup>195</sup> As each major party coalesced around geographically distinct centers of power, which allowed the Democrats to be competitive in non-presidential cycles, both organizations pivoted to more ambitious electoral law changes.

The 1919 Democratic primary for governor marked the opening stages of Hudson County political boss Frank Hague's capture of the state party apparatus and the reconstitution of machine rule in the Democratic Party. Elected mayor of Jersey City in 1917—thanks in part to a Wilson-era reform that allowed municipalities to adopt commission-based governing structures—Hague backed Hudson County State Senator and former Comptroller of the Treasury Edward I. Edwards.<sup>196</sup> Hague successfully marshaled the voters in his county, the state's second most populous, behind Edwards, where he comfortably prevailed in the primary.<sup>197</sup> On the Republican side, State Comptroller Newton A.K. Bugbee triumphed in a bruising, crowded primary where three different candidates notched over twenty percent.<sup>198</sup> The Democratic Edwards prevailed in the general election, crusading against Prohibition with promises to keep New Jersey “as ‘wet’ as the Atlantic Ocean.”<sup>199</sup> He racked up large margins in dense urban areas, securing victory despite winning just five of the twenty-one counties statewide.<sup>200</sup>

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194. Warren E. Stickle, *The Applejack Campaign of 1919: “As ‘Wet’ as the Atlantic Ocean”*, in A NEW JERSEY ANTHOLOGY 324, 335 (Maxine N. Lurie ed., Rutgers Univ. Press 2nd ed. 2010) (1994).

195. *Id.*

196. *Id.* at 326.

197. RICHARD J. CONNORS, A CYCLE OF POWER: THE CAREER OF JERSEY CITY MAYOR FRANK HAGUE 49 (1971).

198. Stickle, *supra* note 194, at 330.

199. *Id.* at 333, 337 n.28.

200. *See id.* at 335; CONNORS, *supra* note 197, at 49.

The election accelerated the polarization of New Jersey politics along urban versus rural lines, with populous urban centers increasingly casting ballots for Democratic candidates and rural voters opting for the GOP. This pattern of vote distribution favored the GOP in the Senate, where each of the state's twenty-one counties held its own seat. In 1920, this translated into Cape May County, with just 19,460 residents, and Essex County, with just over 650,000 residents, each sending a single senator to Trenton.<sup>201</sup> As a result, the Republicans would hold onto the Senate until 1966.<sup>202</sup> The distribution of representatives in the state assembly were not quite as favorable for the GOP, but distributional advantages still favored them, with the GOP dominating the lower chamber until the late 1950s, only ceding control temporarily in 1932 and 1937.<sup>203</sup>

By shepherding Edwards to victory, Hague anchored himself at the helm of the state party for the next several decades. Delivering votes through patronage, favor, and strong-armed tactics, Hague's preferred candidate occupied the governor's mansion for several of the next fifteen years.<sup>204</sup> In fact, Democratic nominees captured the governorship in six of the eight contests from 1919 through 1940.<sup>205</sup> Therefore, despite being uncompetitive in the race to control the state legislature, securing the state's executive branch allowed the Democrats to wield power through control of state agencies and allowed them to shape the state justice system through the appointment of preferred judges and prosecutors. But in order to preserve this strength in statewide contests, the Democrats were reliant upon mobilizing their urban, immigrant base, which gradually made them less enthusiastic about preserving the Geran Law.

*E. The Pierson Law and the Assault on Progressive Reform, 1920–1922*

At the beginning of the 1920 legislative session, Republican Assembly Speaker Arthur Pierson introduced his act to regulate elections,

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201. BUREAU OF THE CENSUS, FOURTEENTH CENSUS OF THE UNITED STATES: 1920, POPULATION: NEW JERSEY 6, <https://www2.census.gov/library/publications/decennial/1920/bulletins/demographics/population-nj-number-of-inhabitants.pdf>.

202. HELEN M. KUSHNER, NEW JERSEY SPOTLIGHT ON GOVERNMENT 377 (1978). In 1966, the legislature expanded the Senate from twenty-one to forty members while retaining the county-based seats. A 1972 New Jersey Supreme Court ruling required election from single-member districts that crossed county lines. For an overview of this history, see *Historical Information*, N.J. LEGIS., <https://www.njleg.state.nj.us/historical-info> (last visited Apr. 13, 2024).

203. KUSHNER, *supra* note 202, at 377.

204. See CONNORS, *supra* note 197, at 49.

205. *New Jersey Governors, 1776–present*, CTR. AM. GOVERNOR, <https://governors.rutgers.edu/new-jersey-governors-1776-present/> (last visited Apr. 13, 2024).

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renewing his assault on the reforms of the 1911 Election Law. The Pierson Election Law, as it would come to be known, reserved prominent ballot columns for the candidates of the two recognized parties. It placed additional barriers to minor party recognition by requiring ten percent of all votes cast in state assembly elections and forced all candidates other than those nominated by recognized parties to place their names in a peripheral column on the ballot designated “nomination by petition.”<sup>206</sup> The Republicans held a larger majority in the Assembly than they did in 1919 when the measure failed as a result of Governor Edge’s veto.<sup>207</sup> With the strength to override another veto, this time from Governor Edwards, the bill passed, gaining some Democratic support.<sup>208</sup>

As Governor Edwards’ veto suggests, satisfaction with the new law was far from total and bipartisan criticisms emerged. Edwards criticized the bill’s move to return control of county election boards to the parties.<sup>209</sup> He also argued that the new ballot required by the law, which made it easier to cast a vote for a straight-party ticket, eroded independent voting.<sup>210</sup> Republican Senator William Runyon—who served as acting governor in 1919 after Edge moved onto the U.S. Senate and finished second in the GOP’s 1919 primary—opposed the law, strenuously insisting that its provisions diminished independent voting in the state.<sup>211</sup>

The *Jersey Journal*, a progressive Republican paper, forcefully attacked Pierson’s motivations for introducing the law, characterizing the Speaker as a “very capable and experienced representative of machine politics” familiar with “work[ing] in cahoots” with Democratic bosses like James Nugent from Newark.<sup>212</sup> The *Jersey Journal* later charged that Pierson was doing the bidding of the Public Service Corporation in delivering the “partial mutilation of the Geran act by a return to the party column system of voting” and a “return to the old system of boss controlled conventions.”<sup>213</sup> As evidence of Pierson’s fealty to conservative politicians and business elites, the *Jersey Journal* noted that the heads of the conservative Public Service Corporation once

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206. *New Parties Must Poll 10 Percent of Vote*, ASBURY PARK EVENING PRESS, May 7, 1920, at 2.

207. Compare THOMAS F. FITZGERALD, MANUAL OF THE LEGISLATURE OF NEW JERSEY, 1919, at 540, with 1920 LEGISLATURE MANUAL, *supra* note 192, at 532.

208. *N.J. Sunday Bill Held in Senate*, ASBURY PARK EVENING PRESS, Apr. 12, 1920, at 1.

209. S. 76, 144th Sess., at 993 (N.J. 1920).

210. *Id.* at 992–93.

211. *Sees Runyon as Big Factor*, PLAINFIELD COURIER-NEWS, May 4, 1920, at 12.

212. *Pierson’s New Election Bill*, JERSEY J., Sept. 1, 1920, at 14.

213. *Verdon Asks the Assemblyman to Repay Kean*, JERSEY J., Nov. 12, 1920, at 1.

referred to Pierson as “the greatest Assemblyman that ever was—for the Public Service Corporation.”<sup>214</sup>

The independent *Newark Evening News*—the largest circulation paper in the state—decried the law in similarly forceful terms. In a series of editorials published at the beginning of 1920, the paper referred to the law as “thoroughly bad,” reckless legislation, and its eventual passage a product of being “bowed to the bosses.”<sup>215</sup> The *Evening News* also attacked Pierson in the process, lamenting that he chose to “continue to father [this] misshapen child.”<sup>216</sup> The paper charged that he simply performed the wishes of the Chamber of Commerce and mischaracterized the consequences of his proposed legislation.<sup>217</sup> In a particularly pointed remark, the paper opined, “[w]e are sorry that Mr. Pierson stands for such legislation—sorry for him.”<sup>218</sup> Meanwhile, the *Plainfield-Courier News* denounced the bill because it was “intended to be discriminatory in favor of Republican and Democratic organizations” and “turned over the [election] machinery to the absolute control of the Republicans and the Democratic organizations.”<sup>219</sup> Others echoed this claim, insisting that the Pierson-inspired ballot unfairly advantaged candidates from the two major parties and “handicap[ped] . . . independent nominees.”<sup>220</sup> Later, the *Newark-Evening News* modified its criticism of the bill, insisting that the new law encouraged fraudulent voting activity.<sup>221</sup>

When the legislature reconvened for the 1921 session—following the GOP electoral landslide of 1920, where the party won fifty-nine of the sixty seats in the Assembly<sup>222</sup>—Republican representatives revisited the election code once more, and critics greeted the fresh round of amendments with renewed denunciations. The *Perth Amboy Evening News* declared on its front page: “Another Blow Struck at Independent Voting,” following the introduction of a new bill that January.<sup>223</sup> Others

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214. *Has Verdon Gone Crazy?* JERSEY J., Nov. 16, 1920, at 16.

215. *Bowed to the Bosses*, NEWARK EVENING NEWS, Apr. 30, 1920; see also *Thoroughly Bad*, NEWARK EVENING NEWS, Mar. 27, 1920, at 8.

216. *Thoroughly Bad*, *supra* note 215, at 8.

217. *Id.*

218. *What Mr. Pierson Stands For*, NEWARK EVENING NEWS, Apr. 5, 1920, at 8.

219. *Opinion of the Press: Temporary Tinkering with Election Law*, PLAINFIELD COURIER-NEWS, Aug. 31, 1920, at 8.

220. *Didn't Make All Voters Vote Straight Ticket*, NEWARK EVENING NEWS, Dec. 2, 1920, at 8.

221. *Pierson Election Law Aid to Ballot Frauds*, NEWARK EVENING NEWS, Oct. 16, 1920, at 8; *Cut Elections' Cost, But Safeguard Ballot*, NEWARK EVENING NEWS, Nov. 18, 1920, at 8.

222. David Wildstein, *New Jersey Liked Ike, but Warren Harding Set the Record*, N.J. GLOBE (Feb. 21, 2022, 12:09 AM), <https://newjerseyglobe.com/presidential-election/new-jersey-liked-ike-but-warren-harding-set-the-record-4/>.

223. *Election Law Is Again Hit*, PERTH AMBOY EVENING NEWS, Jan. 18, 1921, at 1.

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criticized the bill for its size and concomitant confusing provisions. The *Penns Grove Record* declared the bill “so voluminous are so many changes that it is extremely difficult to reach an intelligent analysis.”<sup>224</sup> Emphasizing the absurdity of the situation, the *Record* quipped “[someday] its exact provisions may become familiar to the voters of this state.”<sup>225</sup> This charge echoed the message delivered by Governor Edwards in his veto just a year before, where he emphasized the “two hundred and thirty-three printed pages” of the bill.<sup>226</sup>

In this round of modifications to the Pierson Law, lawmakers fired their opening salvo against fusion voting in an attempt to further marginalize minor parties and any centers of political power outside of major party control. One revision barred candidates from engaging in a petition nomination if they had already accepted a primary nomination from another party.<sup>227</sup> Another prohibited candidates from accepting a petition nomination if they had already accepted either a primary or petition nomination.<sup>228</sup> An earlier proposal—eventually defeated—aimed to require that all voters who signed petitions in favor of independent candidates gaining ballot access were then required to vote for the candidate.<sup>229</sup> Such a stipulation was an obvious attempt to discourage voters from signing ballot access petitions for independent candidates. In looking at both the anti-fusion provisions enacted and the petition requirements that failed, it became clear that Republican legislators were committed to wielding state election law to strengthen the two-party system.

At the beginning of the 1922 legislative session, Pierson once more compelled the legislature to modify his election law.<sup>230</sup> During this round, lawmakers struck a fatal blow against fusion voting in New Jersey, barring parties from nominating a candidate who had already received another nomination. The amendment stated specifically that “[t]he name of any candidate shall appear but once upon the ballot for the same office.”<sup>231</sup> Critics again treated the round of revisions with derision. Under a headline reading: “More Election Law Tinkering,” the *Atlantic City Daily Press* referred to the election law as one of Pierson’s “hobbies” and wryly remarked that “if [he] stays in the [l]egislature long enough . . .

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224. *Names Jersey Service Board*, PENNS GROVE RECORD, Mar. 18, 1921, at 6.

225. *Id.*

226. S. 76, 144th Sess., at 992 (N.J. 1920).

227. 1921 N.J. Laws 551.

228. *Id.* at 551–52.

229. *Women and the Election Bill*, JERSEY J., Feb. 4, 1921, at 16.

230. *See Pierson Would Again Revise Election Law*, TRENTON EVENING TIMES, Jan. 17, 1922, at 11.

231. 1922 N.J. Laws 446–47.

we shall finally see the perfect election law enacted.”<sup>232</sup> The *Newark Evening News* renewed its criticisms of the effort, condemning the waste involved with the process, along with emphasizing how experts enlisted to support the law had “done their best to guarantee failure of independent movements.”<sup>233</sup>

Though Pierson’s several rounds of election legislation were steered by conservative Republicans, Democratic lawmakers relented in opposition to their efforts. For nearly a decade, the state Democratic Party had defended and sought to protect the tenets of Wilson’s election reforms. As late as 1918, New Jersey Democrats reserved a plank on their platform calling for the full defense of the 1911 Geran Act.<sup>234</sup> And though Edwards forcefully vetoed the Pierson Law in 1920,<sup>235</sup> by the time the law was passed, Democrats had dropped the plank in their platform defending the Geran Law in 1919 and beyond.<sup>236</sup> Additionally, as noted above, some Democratic lawmakers in the state legislature voted in favor of Pierson’s election overhaul, reflecting long standing suspicion of progressive reforms within sections of the Democratic Party.

As urban-rural polarization intensified, straight-ticket voting served the Democrats’ interests by making it easier for immigrant voters with limited English-reading skills to vote the party’s slate.<sup>237</sup> And for urban bosses like Hague, successfully mobilizing these voters in large numbers was crucial for building large vote margins in population centers of the state. In fact, during the third period of revision for the law in 1922, lawmakers repealed a provision that had outlawed the use of hired vehicles for the purposes of transporting voters to polling locations, a major victory for machine operatives.<sup>238</sup> Such factors, combined with a conservative ascent in the GOP, might suggest why the Democratic Party abandoned its defense of the Geran reforms.

While the election of 1919 indicated that a path to executive power existed for the Democrats during a period of Republican ascent in the state, the events of 1922 confirmed it. That November, Hague’s preferred gubernatorial candidate, circuit court judge George Silzer, triumphed

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232. *More Election Law Tinkering*, ATL. CITY DAILY PRESS, Jan. 23, 1922, at 10.

233. *Expensive Election Law Changes Not Worth While*, NEWARK EVENING NEWS, Feb. 20, 1922, at 8.

234. THOMAS F. FITZGERALD, *MANUAL OF THE LEGISLATURE OF NEW JERSEY*, 1918, at 273.

235. *Sample Ballot Draws on History, Politics and Literature for Candidates*, PLAINFIELD COURIER-NEWS, May 12, 1920, at 2.

236. See 1920 LEGISLATURE MANUAL, *supra* note 192.

237. See REYNOLDS, *supra* note 99, at 137–67.

238. *An Election Proposal That Should Be Explained*, NEWARK EVENING NEWS, Feb. 16, 1922, at 78.



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over Republican William Runyon.<sup>239</sup> Moreover, the Democrat Silzer won by a larger margin than his predecessor did in 1919, capturing a majority with fifty-two percent of the vote.<sup>240</sup> Edwards, ineligible to seek another term as governor, instead successfully ran for U.S. Senate, securing the nomination with Hague's support once again.<sup>241</sup>

Hague cemented his standing atop the Democratic Party that year. Within the state leadership, Hague sponsored the new chairman and secured the vice-chairmanship for Jersey City social worker Mary Norton.<sup>242</sup> Norton would become the first Democratic woman elected to the U.S. House of Representatives in 1924.<sup>243</sup> To cap it off, Hague was elected as the state's national committeeman that year as well, a position he would hold for the next several decades.<sup>244</sup> For Hague, who commanded unrivaled control of the party, election laws that favored machine politics, facilitated simple party-line votes, and marginalized any nascent political interests seeking to disrupt his firm grip on power, served his—and his GOP competitors'—interests quite well. Thus, as the party bases grew more polarized along rural and urban lines, the bridge building dimension of fusion voting—specifically how it could be used to forge an electoral majority from disparate voting blocs in pursuit of a common goal—simply became less necessary or desirable for the respective party leaders.

#### IV. A CENTURY OF STATE-SANCTIONED EXCLUSION OF POLITICAL COMPETITION AND DIVERSITY

As the preceding sections make plain, there is little doubt that New Jersey's political leaders sought to consolidate power within the two major parties and minimize the relevance and influence of minor parties through the statutory prohibition on cross-nominations and other changes to state election law in the early 1920s. Casual observers of New Jersey politics over the subsequent century surely would have noticed the dominance of the Democratic and Republican parties and the seeming absence of meaningful minor party activity. A quantitative analysis of election data over this time period confirms this lay observation: since

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239. CONNORS, *supra* note 197, at 50–51.

240. JOHN P. DULLARD, *MANUAL OF THE LEGISLATURE OF NEW JERSEY*, 1923, at 497.

241. CONNORS, *supra* note 197, at 51.

242. *Id.* at 51–52.

243. *Mary Teresa Norton*, N.J. WOMEN'S HIST., <https://njwomenshistory.org/biographies/mary-teresa-norton/> (last visited Apr. 13, 2024).

244. CONNORS, *supra* note 197, at 52.

the early 1920s, New Jersey has exhibited a “unique hostility to minor parties.”<sup>245</sup>

One striking data point is that the Democratic and Republican Parties are currently, and have been since the early 1920s, the only political parties to receive official recognition and automatic ballot placement in New Jersey.<sup>246</sup> In other states, the Green Party, the Libertarian Party, the Reform Party, and other minor parties have routinely met the standards for official recognition.<sup>247</sup> But in New Jersey, every minor party effort has fallen short, ensuring that only the two major parties enjoy state-sponsored benefits afforded to recognized parties.<sup>248</sup> These include, but are not limited to: a state-funded primary election; preferential position and a dedicated party column on the general election ballot; the creation of state, county, and municipal party committees to support party nominees; higher limits on campaign finance contributions; and membership, or an equal share of members, on certain boards and government entities.<sup>249</sup> Instead, all minor parties must gather signatures and submit a new petition for every candidate they nominate, with each nomination appearing on the general election ballot in an ad hoc position.<sup>250</sup>

Unsurprisingly, independent and minor party candidates have failed to win any federal and state elections over the past century—with a single exception.<sup>251</sup> An independent candidate, Anthony Imperiale, won a seat in the New Jersey Assembly in 1971 and the New Jersey Senate in 1973.<sup>252</sup> In other words, minor party and efforts have been successful

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245. Brief for Appellants at 16, *In re Tom Malinowski*, No. A-3542-21T2 (N.J. Super. Ct. App. Div. 2022).

246. *Id.*

247. See *id.* app. at 185a.

248. See N.J. STAT. ANN. § 19:1-1 (West 2019).

249. See N.J. STAT. ANN. §§ 19:5-1, 19:45-1, 19:14-6, 19:5-2-6; N.J. ADMIN. CODE § 19:25-11.2 (2020); N.J. STAT. ANN. §§ 19:6-3, 52:13H-4 (West 2019).

250. See N.J. STAT. ANN. §§ 19:13-1, 19:13-5 (West 2019).

251. For state assembly and senate election results, see Stephen Ansolabehere et al., *State Legislative Historical Elections*, HARV. DATAVERSE (Feb. 8, 2017), <https://doi.org/10.7910/DVN/LEMNXZ>; see also Carl Klarner, *State Legislative Election Returns: 1967–2016*, HARV. DATAVERSE (Sept. 27, 2018), <https://doi.org/10.7910/DVN/3WZFK9>. We supplemented any gaps in these records with the New Jersey Secretary of State Elections Results Archive, Fitzgerald’s *Manuals of the Legislature of New Jersey*, and local newspaper archives. For multi-member state legislative elections through 1953, the records do not always distinguish between votes cast for multiple candidates running on a joint ticket in the same district. As a result, these records likely overestimate the competitiveness of independent and minor party candidates by aggregating multiple candidates’ vote totals into a single sum.

252. See Klarner, *supra* note 251; see also *Imperiale’s Senate Race: Challenge to Both Parties*, N.Y. TIMES, Nov. 2, 1973, at 86. Regardless of one’s feelings about the two major parties, Imperiale’s legacy is not one to celebrate. He was described in contemporary media

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in less than 0.06% of federal and state elections over this span.<sup>253</sup> In contrast, candidates nominated by minor parties have won thousands of votes in several races in New York, Connecticut, and other states permitting fusion voting in recent decades.<sup>254</sup> And even in other states where cross-nominations are prohibited, minor party and independent candidates manage to win federal and state races with some frequency: today, two U.S. Senators were elected as independents, and sitting legislators in at least six states won without the backing of either major party.<sup>255</sup>

Yet, Imperiale was not just an outlier by winning in New Jersey—he was unique in registering as more than a rounding error. Since the early 1920s, the average vote share for a minor party or independent candidate has been 1.36%.<sup>256</sup> Even combining the total support received by all minor party and independent candidates in a given election, the aggregate vote share has been consistently small, as illustrated in Figures 1 through 4 below. Indeed, the vote share for minor party and independent candidates never topped ten percent in statewide elections for governor or U.S. Senate, while that threshold was exceeded in just nine U.S. House elections and forty Assembly elections.<sup>257</sup> The minor party and independent vote share exceeded thirty percent only five times,

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coverage as a “law and order militant” and a “white vigilante,” and he was rightly shunned by most colleagues on both sides of the aisle. *See, e.g., Imperiale Says Cops Need Help*, COURIER-POST, Nov. 11, 1968, at 7; *Gun-Toting Candidate Livens Up Dull Election*, COURIER-POST, Oct. 30, 1971, at 25; *Imperiale in Assembly: Blacks Ask Parties to Bypass White*, COURIER-POST, Nov. 8, 1971, at 9; *An Uneasy Balance*, COURIER-POST, Nov. 9, 1971, at 14; *Imperiale: ‘No White Sheets’*, COURIER-POST, Dec. 4, 1971, at 38.

253. *See supra* note 251 (explaining how we arrived at these numbers).

254. *See, e.g., Archived Election Results*, N.Y. STATE BD. ELECTIONS, <https://results.elections.ny.gov/> (last visited Apr. 13, 2024); *see State of Connecticut Elections Database*, CONN. OFFICE SEC’Y OF STATE, <https://electionhistory.ct.gov/eng/> (last visited Apr. 13, 2024).

255. *Current Independent and Minor Party Federal and State Officeholders*, BALLOTPEDIA,

[https://ballotpedia.org/Current\\_independent\\_and\\_minor\\_party\\_federal\\_and\\_state\\_officeholders](https://ballotpedia.org/Current_independent_and_minor_party_federal_and_state_officeholders) (last visited Apr. 13, 2024); *see also* Jeremy Herb, *Sinema Leaving the Democratic Party and Registering as an Independent*, CNN, <https://www.cnn.com/2022/12/09/politics/kyrsten-sinema-leaves-democratic-party/index.html> (Dec. 9, 2022, 5:05 PM) (explaining that Kyrsten Sinema, though elected as a Democratic U.S. Senator from Arizona, became the third independent U.S. Senator by switching her party affiliation following her victory in 2018).

256. *See infra* Figures 1–4. These figures are calculated using gubernatorial and federal election returns from 1920–2022 and state legislative returns from 1957–2020. Most of the highest performing candidates were incumbents who had previously won elections with a major party nomination but lost major party support in their bid for re-election or advancement to a new office.

257. *See infra* Figure 1.

all assembly races.<sup>258</sup> Put otherwise, the minor party and independent vote share has been remotely competitive in less than 0.2% of all federal, gubernatorial, and state assembly races over the past century.<sup>259</sup>

Notably, the other most successful effort was in 1923, when a municipal reform group convinced local Democrats to refrain from running their own ticket and instead support the reform candidates in a creative effort to reprise the type of fusion coalition just recently outlawed.<sup>260</sup> While ultimately unsuccessful—the Republican opponent won by a few percentage points—this maneuver illustrates the ongoing interest in and potential for cross-party collaboration, especially among local leaders less beholden to the whims of machine politics.

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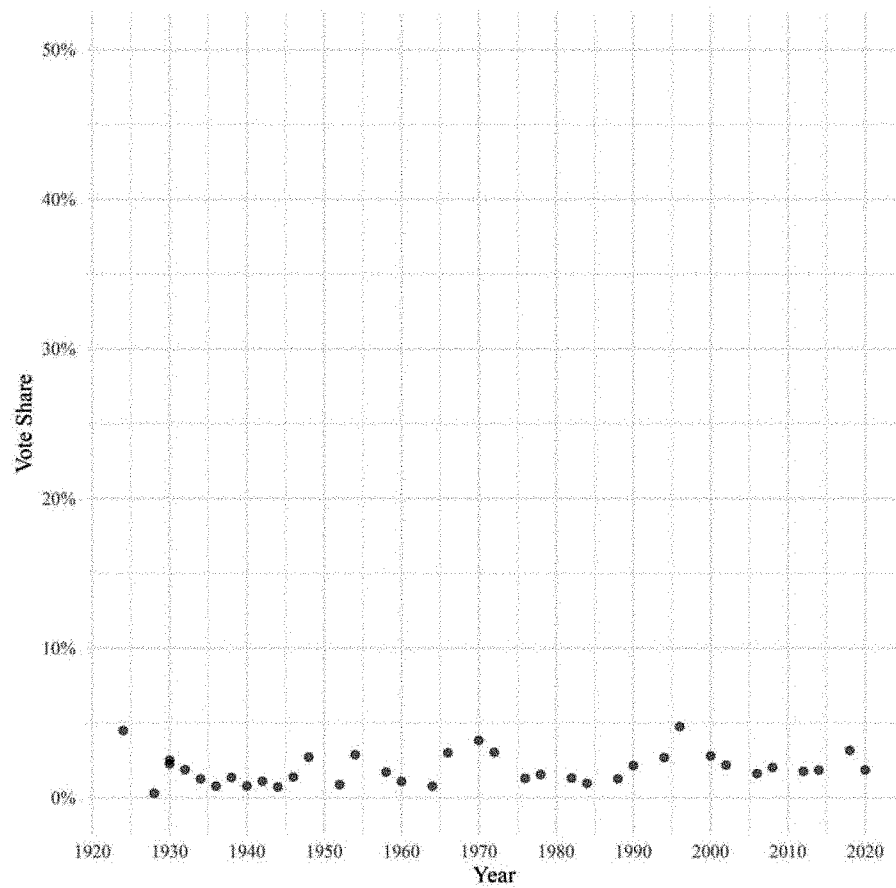
258. See *infra* Figure 4.

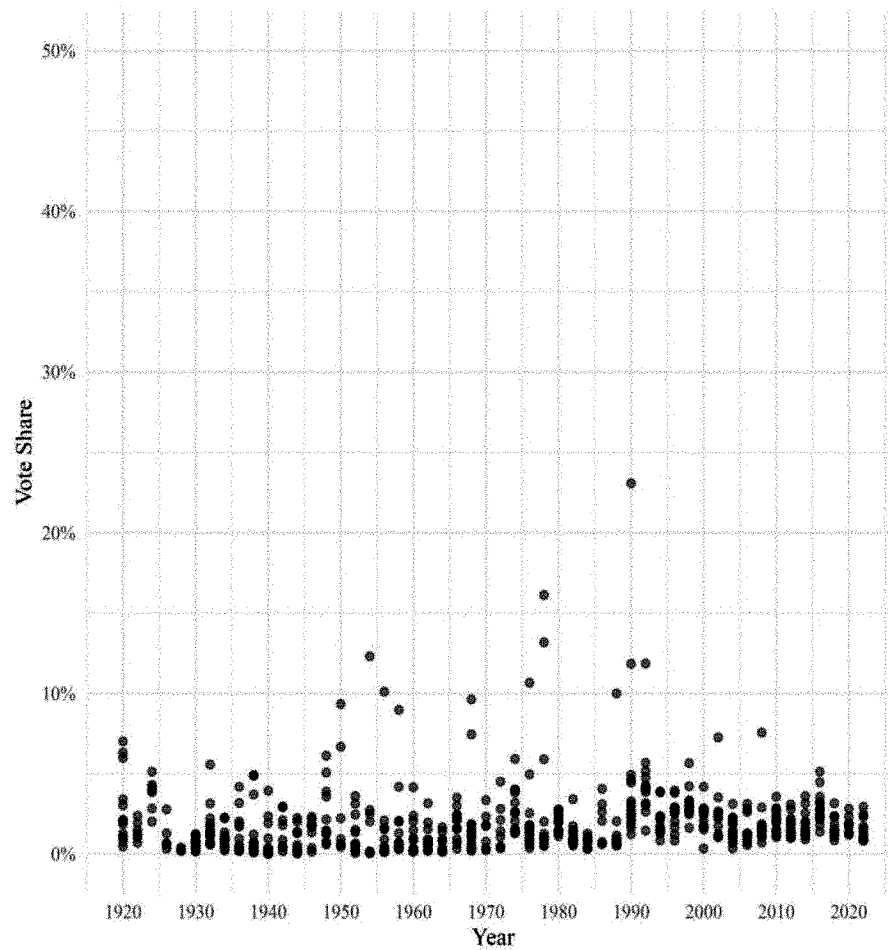
259. See *infra* Figures 1–4.

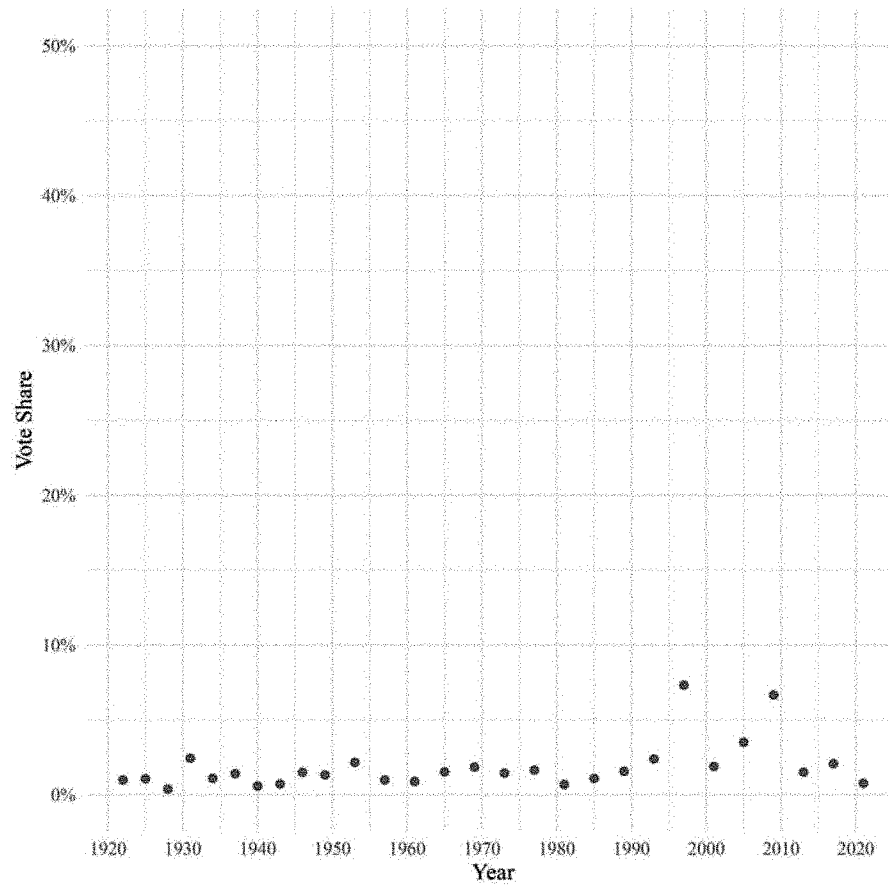
260. See generally *Commission Form Group Organizes; King is Chairman*, COURIER-POST, Dec. 15, 1922, at 1; see also *The Fusion Movement Against the Republican Party*, MORNING POST, Sept. 10, 1923, at 6; *Behind the “Non-Partisan” Mask*, MORNING POST, Sept. 22, 1923, at 6; *Is There Any Future for Fusion?*, MORNING POST, Nov. 10, 1923, at 6; *The Responsibility of the Non-Partisan League*, COURIER-POST, Nov. 13, 1923, at 6. The other notable performances included: two anti-corruption candidates seeking to reform the Hudson County Democratic machine in 1971, and a former Newark council member and local ward leader running against the Democratic standard-bearers in 2007. See Peter R. Weiss, *Marotta Makes Bid for Insurgent Dems*, JERSEY J., July 7, 1971, at 1; *Kireger Mum on Running in Fall*, JERSEY J., Aug. 16, 1971, at 1, 5; *Meehan-Musto Bout Ahead?*, JERSEY J., Aug. 23, 1971, at 1; *State Voting in the Spotlight this Year*, ASBURY PARK PRESS, Aug. 23, 1971, at 1, 6; *Democratic Party’s Future at Stake, Says Conaghan*, BAYONNE FACTS, Oct. 20, 1971, at 13; *Save Hudson Dems Warn Ted Kennedy to Keep out*, JERSEY J., Oct. 19, 1971, at 2; Peter Weiss, *Reformers Top 1971 News*, JERSEY J., Dec. 28, 1971, at 1, 6; *DeFino Says He’ll Remain as Mayor*, JERSEY J., Apr. 29, 1972, at 8; Max Pizarro, *DiVincenzo Inevitably Part of the Struggle*, OBSERVER (Sept. 18, 2007, 7:05 PM.) <https://observer.com/2007/09/divincenzo-inevitably-part-of-the-struggle/>.

### Aggregate Vote Shares for Minor Party and Independent Candidates

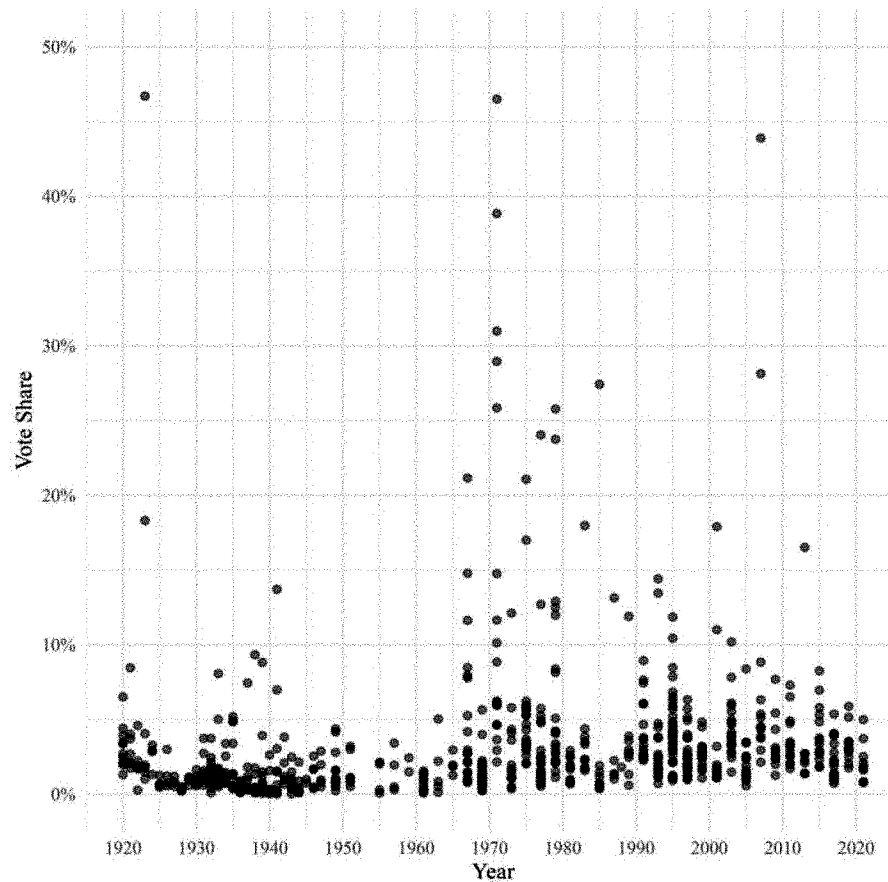
Figure 1: U.S. Senate Elections



**Figure 2: U.S. House Elections**

**Figure 3: Gubernatorial Elections**

### Figure 4: Assembly Elections



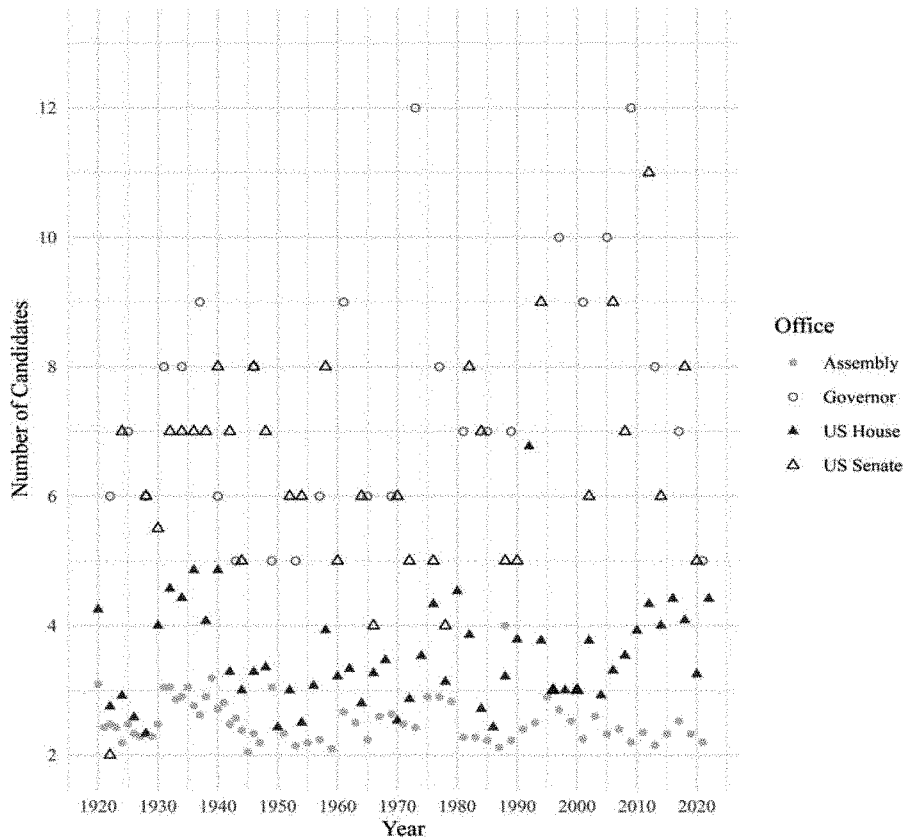
Note: Percentages reported combine the vote totals of all non-major party candidates in a given race. These percentages are only reported for election years and races in which at least one minor party or independent candidate was present.



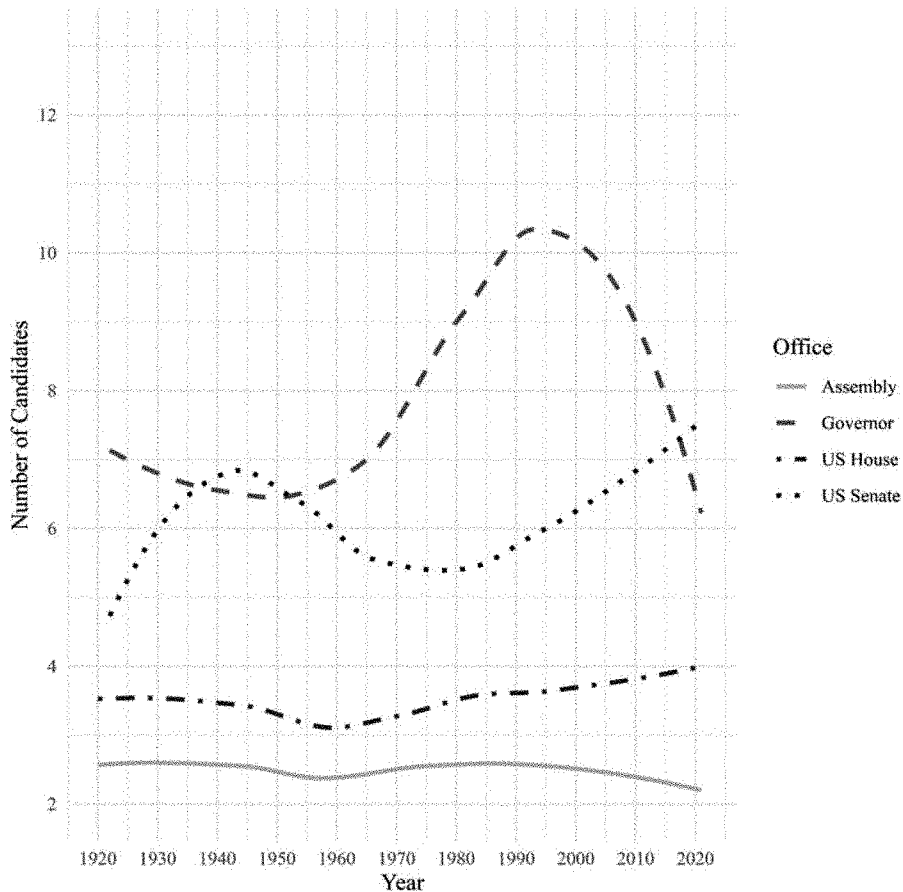
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When only the same two parties are competitive over the course of a century, one potential silver lining could be a simplified voter experience: if only two parties have a plausible chance of winning, it would stand to reason that few other options would clutter the ballot. Yet, in New Jersey, the opposite has been true: there are often an abundance of non-competitive candidates, even though none have a plausible chance of winning. Figure 5 below illustrates the surprising number of candidates on the ballot in federal and state races over the past century. Figure 6 uses the same data but highlights the trend line over time.

**Figure 5: Number of Candidates on the Ballot Per Election**



**Figure 6: Number of Candidates on the Ballot Per Election – Trend Lines**



Note: For U.S. Senate and gubernatorial elections, the data reflects the actual number of candidates on the ballot in a given election. For congressional and state assembly elections, the data reflects the average number of candidates on the ballot per seat during the given election cycle. The outlier of nineteen candidates in the 1993 gubernatorial election is omitted from the chart for visual ease, but that number is reflected in the gubernatorial trend line.

This phenomenon is likely explained, at least in part, by two interrelated factors. First, it is relatively easy in New Jersey for a

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candidate to place their name on the general election ballot—as few as fifty signatures can be sufficient to qualify in a legislative race, while 800 signatures are enough in statewide elections.<sup>261</sup> Thus, individuals without meaningful public support, including but not limited to the backing of minor party institutions, can nonetheless get on the ballot. Second, the absence of any serious avenues for constructive dissent might encourage individual candidates to file in order to register their displeasure with and opposition to the leading candidates and parties. If one or several minor parties were instead viewed as legitimate and effective checks on the dominant political order, some, if not many, of these individuals might be more inclined to combine their collective energy into that institutional context, in lieu of quixotic, solitary candidacies.

In the aggregate, the relatively high number of additional candidacies on the ballot likely has the perverse effect of further insulating the major parties from serious electoral competition. Voters seeking to use their ballot to protest the major parties distribute their votes inefficiently across a number of alternative candidates, increasing the chances that no individual challenger will accrue a substantial sum. And the mere presence of a large number of non-competitive candidates on the ballot likely undermines, in the eyes of the electorate, the perceived credibility of *all* non-major-party candidates, even if backed by a legitimate minor party institution. Ballots crowded with non-competitive candidates may therefore further advantage the two dominant parties in New Jersey.

## CONCLUSION

Today, wide swaths of the electorate despair at the lack of bipartisan compromise to address our most pressing policy challenges. Voters likewise increasingly lament the lack of meaningful choice beyond the two main parties when they cast their ballots. As laid bare in this Article, historical scrutiny unveils a striking irony: contemporary barriers to meaningful minor party development and participation arise from bipartisan accord a century ago. In New Jersey, each side had diverging incentives for closing the political system and outlawing fusion voting, though both were compelled by political expedience, not sound policy. Democrats welcomed changes to the ballot promoting straight ticket voting, given their reliance on immigrant voters with limited English-reading skills in urban centers. Reeling from the progressive defection

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261. N.J. STAT. ANN. § 19:13-5 (West 2011).

inspired by Roosevelt, Republicans sought to foreclose clear paths for dissenting factions in the party to form their own (even if potentially aligned) centers of electoral power. The result being: a total absence of meaningful minor party activity in the intervening century despite, consistently across time, large numbers of New Jersey voters wishing to disassociate from the two major parties.<sup>262</sup>

It is easy to think of the U.S. political system as a singular, national phenomenon. And to be sure, political trends in the United States might be more nationalized today than at any point in our history. Yet, each state retains enormous discretion to set the rules and bounds of their elections, in ways that can promote pluralism and inclusivity or entrench existing power structures. Each state has its own unique history leading up to the present day, and the electoral institutions that shape outcomes and dictate what is and is not politically possible. Yet in every constitutional challenge to anti-fusion laws decided to date, the courts lacked a robust historical accounting of: (i) the political context in which the state's restrictions were adopted, and (ii) the systemic and longitudinal effects of those restrictions. It is therefore unsurprising that judicial rulings on this topic have time and again discounted the true motivations behind these restrictions or their substantial impact on political participation. But history need not repeat itself: if the real causes and consequences of anti-fusion restrictions are centered in the constitutional analysis, it is difficult to imagine them surviving scrutiny by the New Jersey courts. Such a decision would remedy the state's long-standing "unique hostility to minor parties," and by extension, all of the voters who want to meaningfully participate in the political process—but not under the thumb of the two major parties.

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262. See N.J. DEP'T OF STATE, DIVISION OF ELECTIONS, STATEWIDE VOTER REGISTRATION STATISTICS ARCHIVE, <https://www.nj.gov/state/elections/election-information-svrs.shtml> (displaying records demonstrating that a plurality—and in some years, a majority—of New Jersey voters typically register as "unaffiliated" instead of registering as a member with either major party).