



Con–Fusion:

The Uncertain Prospects of New York's
Unique Political Party System

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Former Governor Malcolm Wilson once told me that he had come to regret his sponsorship of the Wilson-Pakula Law when he was a young GOP Assemblyman. That’s the provision that blocks non-registrants in a party from seeking that party’s nomination for office without its permission. The shared goal of Democrats and Republicans in passing this law in 1947 was to keep Harlem Congressman Vito Marcantonio, of the by then communist controlled American Labor Party (ALP), from continuing to enter their primaries unbidden, ... and (embarrassingly!) winning them.

Though the law worked as intended against Marcantonio, it did not change New York’s petition requirements for an “independent” party’s access to the ballot. Nor did it alter the number of votes for governor (50,000—last increased ten years earlier, in 1937) that a party had to garner to achieve “official status,” which assured automatic inclusion on the ballot for its nominees for the ensuing four years. And it also left in place the possibility of a candidate being nominated by more than one party—cross endorsement, or fusion—with election outcomes determined by his or her total vote on all lines. That is, it kept the conditions that sustained New York’s near unique, multi-party system intact.

The persistence of fusion: Fusion candidacies have been a part of New York State politics since the late nineteenth century.¹ In 1947, when Wilson-Pakula was passed, there were 1,100,492 Republicans and 1,860,650 Democrats registered to vote in the state. (The actual Democratic advantage in adherents was likely smaller. New York did not have mandatory voter registration until 1965. Counties without registration or with partial registration were smaller, rural and more Republican.)² Though cross endorsement was a long established practice, and Republicans were outnumbered statewide, for state office—especially outside New York City—the GOP relied upon third party support far less frequently than did Democrats.

Perhaps this was because both official third parties during that time were on the left: first American Labor and later Liberal. In 1937 in New York City, the ALP did support Republicans Fiorello LaGuardia for Mayor and Tom Dewey for Manhattan District Attorney against Democratic machine candidates. But between 1916 when Charles Whitman was supported by the Prohibition Party, and 1974 when Malcolm Wilson was backed by the Conservatives, no Republican was cross endorsed for governor. (Both lost.)

Due to an extreme gerrymander embedded in the state constitution, the GOP controlled both legislative houses during most of the 20th century, without reliance on fusion. This was the case in 1947. In the Assembly, 10 of 117 Republicans and 13 of 33 Democrats were cross endorsed. In the Senate the numbers were 4 of 41 Republicans and 7 of 15 Democrats.

And of course, in 1947 the aforementioned Tom Dewey was in his second term as governor.

That is, the GOP ran the state in the year Wilson-Pakula passed. Yet the Democrats, not they, benefited the most from fusion. Instead of leaving the door open to cross endorsement, the Republicans could have tried to do away with the practice entirely without negative consequence for most of their sitting legislators. They probably did not do so for two reasons. One was that there were legal precedents in the way. The second was the continued reliance of some GOP members from New York City on the ALP for their electoral margins—usually of comfort, sometimes of victory.

Malcolm Wilson opined, with thirty or so years of 20/20 hindsight, that it was too bad the opportunity was missed. He very much came to dislike “the tail wagging the dog;” that is what he regarded as excessive influence by the smaller parties over major party nominations and programs.

Later, when he was Lieutenant Governor, Wilson also remembered, he tried to convince the legislature when it was in Republican hands to undo the damage he’d inadvertently done (or failed to avoid). But it was not possible. The Conservative Party, created in 1962, opened

up opportunities for cross endorsement from the right, making fusion available to far more Republicans. As time passed, more and more Assembly members and Senators were constrained by personal relationships and obligations arising as result of support they’d received from either the Liberal or the Conservative party (or both). And none was interested in provoking even token opposition at the polls from these quarters. This was the third parties’ insurance policy.

The players changed from time to time over the following half century—the Liberals disappeared, Working Families, Independence, and Green emerged—but systemically, New York third parties persisted in their power and influence, in both statewide and local contests. Until now. Maybe.

The New Attack on Third Parties: Focus returned to the Wilson-Pakula law in 2013 when another Malcolm, Democratic State Senator Malcolm Smith, was caught attempting to bribe New York City Republican leaders to gain access to their ticket for the 2013 mayoral election. Smith went to jail. Thereafter, bills regularly introduced in the Assembly to block cross endorsement and elevate requirements for ballot access got some attention.³ But the law remained unchanged.

Democrats recaptured the governorship and won historically strong majorities in both legislative houses in 2018. To redeem a promise made to reformers during the election, with the assent of the leaders of both houses, the Governor tucked language establishing a Commission to develop a system to publically finance campaigns into the 2019 state budget bill. This approach was similar to that used just a year earlier, in 2018, when language was included in the budget to create a committee to give long-delayed consideration to the question of increased compensation for state elected officials.⁴ But this earlier committee was criticized, and later partly overruled in the courts, for going beyond its brief to consider the added question of limits on outside income for elected officials as a condition of receiving raises. Perhaps reflecting a lesson learned in the case of the campaign finance commission, the additional charge to also consider “rules and definitions governing: candidates’ eligibility for public financing; political party qualifications; ...

[and] ... multi-party candidate nominations and/or designations ... was explicitly specified in the law.”⁵

This “mission creep” for the Commission was widely seen as Governor Andrew Cuomo’s response to the *agita* generated for him by the Working Families Party’s (WFP) initial opposition to his reelection in 2018. The issues of campaign finance reform and third party role in elections were distinct, third party leaders argued in reaction. Authorizing a commission created to consider the former to also look into the later was political payback, they said. “The Public Financing Commission’s report makes clear that the Governor’s principle motivation was to weaken the Working Families Party. With the subtlety of a sledgehammer, the Governor and his allies tried to weaken New York’s progressives before he runs for office again,” said New York Working Families Party Director Bill Lipton.⁶

The Commission: The Commission had nine members: two each appointed by the governor, the Assembly Speaker and the Senate Majority Leader, one each appointed by the Senate and Assembly Minority Leaders⁷ and one appointed jointly by the Governor, the Speaker and the Majority Leader. Members were to preside on a rotating basis. A final report was required by December 1, 2019.

Understanding the governor’s appointment of Jay Jacobs to the Campaign Finance Commission is crucial for parsing the intent of the 2019 provision regarding the role of third parties in state politics. Jacobs, the state Democratic Party chair and long a critic of fusion, had just presided over a party executive committee vote in favor of banning cross endorsement.⁸ He became a leading force on the Commission. The rationale for the connection of the issues of campaign finance and fusion, he said, was the expense that arose because “... matching dollars ... must be made available to every candidate, no matter how many there are or what party line they run on.”⁹ Even though public aid would flow to candidates, not parties, Jacobs argued that there were “... enough examples of money flowing directly from candidates TO parties to sufficiently refute the contention” that the matters were unconnected.¹⁰

Implications for the GOP and the Conservative Party:

This action by the state Democratic hierarchy hints at a less discussed, highly important implication. In contrast to the balance between the major parties when Wilson-Pakula was adopted, in 2019 there were 6,494,496 enrolled Democrats and 2,835,238 enrolled Republicans in the state. New York has become dark blue. Republicans, not Democrats, are now the major party dependent on fusion, if they are to have any chance to win statewide. No Republican since Nelson Rockefeller, a half century ago, has won for governor without third party support. No Republican has won statewide at all since Governor George Pataki in 2002. One view is that elimination of fusion, possible if the Democrat dominated state government cohered on the question, would put another nail in the GOP coffin. Another is that liberation from Conservative Party litmus-test requirements upon which cross endorsement is conditioned—anti-abortion, pro-gun—is the only way that the GOP can begin to run candidates that can be competitive statewide in liberal New York.

Third parties—especially Working Families and Conservative—still maintain formidable links to state legislators. In the Assembly, 124 of the 150 members and, in the Senate, 60 of 63 were cross endorsed in 2018. (Interestingly the Assembly Speaker Carl Heastie, no fan of third parties, was not.) Yet these bonds to legislators, forged in election after election, are not the shield for protecting third parties interests that they once were. Why? Because the legislature itself is not what it once was in the policy making process.

Use of the Budget Process: Classically in American government the legislature holds the purse strings. The New York constitution, for example, provides that “No money shall ever be paid out of the state treasury or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law.”¹¹ However, 20th century progressive reforms, adopted nationally and in most states, gives the power to initiate spending—to propose a budget—to the executive. In New York the state budget is not itself enacted; it is implemented through appropriation bills, proposed by the governor concomitant with the presentation of the budget. In addition to recommended amounts, these

appropriation bills include language specifying terms and conditions for the proposed spending. Additionally, the governor puts forward accompanying “language bills” (also called Article VII bills) to effect the budget.

The legislature may freely amend Article VII bills, or simply decline to pass them. But not appropriation bills. This is because the constitution says that it “... may not alter an appropriation bill submitted by the governor except to strike out or reduce items therein....”¹² The state’s high court, the Court of Appeals, ruled in the landmark case of *Pataki v. New York State Assembly*, et al., that this provision prohibits the legislature from altering the language in these bills.¹³

In recent years, the Andrew Cuomo administration has increasingly included substantive policy in appropriation bills, with language not susceptible to legislative change. The budget process has become a “big ugly” omnibus policy making exercise. Advocacy groups, include those that otherwise might object to the budget process being used in this opaque unintended way, instead spend their energy fighting to get their desired provisions in the budget.

In 2019 the legislature stole the march on the governor in enacting a number of electoral reforms in separate legislation. But agreement on Democratic reformers’ most important goal—the adoption of public campaign financing for state elections—was elusive. Thus the inclusion of the proposed Commission to address the matter in the language of an appropriation bill.

Linkage and Timing: President Richard Nixon and Henry Kissinger, his Secretary of State, were noted for the practice of “linkage” in foreign policy, making U.S. action in a policy area desired by a negotiating partner contingent on their action in another, seemingly unrelated action, desired by the U.S. Similarly, the adoption of campaign finance reform in New York, desired (promised) by progressive reformers, was linked to considering also the role of third parties in elections, not favored by many of them but desired by the governor and Assembly Speaker. Because this was done in the language of an appropriations bill, legislators who benefited from fusion and might ordinarily be induced

to protect the interests of third parties could not block it, or would not try to do so.

The law creating the Campaign Finance Commission provided for potential “modificat[ion] or abrogate[ion] of the commission’s recommendations by statute prior to December 22, 2019 that is; for a legislature veto of its actions within three weeks of the release of the Commission’s report. The timing was significant. The legislature, in recess during the week before the Christmas holiday, may be called into special session for a specific purpose by the Governor or upon petition of the leaders of both houses by two thirds of the membership of each.¹⁴ Given the origin of the Commission, neither was a practical prospect.

Moreover, the possibility of this veto actually being used was limited by the Commission’s early strategic choice to present the results of its work as “non-severable and ... as a single package.”¹⁵ This decision was reiterated in its final report: “It is the expressly stated intent of this Commission that each of the recommendations made in this report be interpreted as non-severable from any other recommendation, except for the one instance where explicitly provided for in the Recommendations section.”¹⁶

The rationale for this decision was the complexity and mutual dependency of the detailed elements of the campaign finance proposal. Governor Cuomo later said approvingly: “You can’t pull out one piece of the system and expect the system to work. They’re interconnected.”¹⁷ But no exception was made for the recommendations concerning fusion, which meant that those who favored the proposed plan for public campaign financing would have to accept changes in provisions concerning third parties. The Working Families Party was thus cut off from potential political allies in both the legislature and among activist organizations on the left.

In sum, the influence of third parties in the legislature and of the party’s allied with their political networks was undone by the manner in which the Commission process was structured.

Delegation of Legislative Authority: Then there is the question of the delegation of legislative authority in a representative system. The fundamental principle was clearly set out over three centuries ago by the political philosopher John Locke in his *Second Treatise of Civil Government* (1690): “The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others...” Following this standard, the New York constitution provides quite directly that “The legislative power of this state shall be vested in the senate and assembly.”¹⁸ It also details the law making process, and specifically provides that “... no law shall be enacted except by bill.”¹⁹

Nonetheless, the language creating the 2019 Campaign Finance Commission provides that “... [e]ach recommendation made to implement a determination pursuant to this act shall have the force of law, and shall supersede, where appropriate, inconsistent provisions of the election law...”²⁰ The Commission’s role is not exploratory or advisory, as is more commonly the case for temporary commissions. The legislature preserved for itself only a reactive, extra-constitutional veto-like role.

How do we recognize unacceptable delegation of legislative authority when we see it? After all, in complex modern government delegation is essential. The matter arises most frequently in discussions in the field of administrative law, regarding distinctions between what must be done by statute and what may be done by regulations created by the executive to effect legislative intention. The National Council of State Government sets out three alternative standards used in the states to guide legislative delegation:

- **The “strict standards and safeguards” category.** States in this category permit “delegation of legislative power only if the statute delegating the power provides definite standards or procedures” to which the recipient must adhere.
- **The “loose standards and safeguards” category.** States in this category view delegation as acceptable “if the delegating statute includes a general legislative statement of policy or a general rule to guide the recipient in exercising the delegated power.”

- **The “procedural safeguards” category.** States in this group “find delegations of legislative power to be acceptable so long as recipients of the power have adequate procedural safeguards in place.”²¹

According to one scholar, New York is among those states in which “statutory standards for administrative action set forth by the legislature must be relatively precise and specific.”²² The analogy is instructive, though not perfect. State agencies adopt regulations within the framework of an administrative procedures law, and then must implement these in an accountable manner. Like the legislative pay commission before it, the Commission wrote law and then ceased to exist. Regarding the delegation question, the potentially redeeming quality of the campaign finance commission process is that it preserved a potential final say for the legislature in response to the commission’s recommendations, a legislative veto. But given the practicalities previously detailed, is that enough to assure a court ruling that the degree of legislative delegation in this instance was not excessive?

TOTAL VOTE (by Party)

	2018	2016
	Governor	President
Democrat	3,424,416	4,379,783
Republican	2,207,602	2,572,141
Conservatives	253,624	292,392
Working Families	114,476	140,043
Greens	103,946	107,935
Libertarian	95,033	57,438
SAM	55,441	—
Independence	68,713	119,160

The Commission's Recommendations Regarding Third Parties

Forty-three states prohibit multi-party candidacies or require a candidate for office to be a member of the party that nominates him or her. Additionally, some of these states have “sore loser” statutes, blocking a person defeated in one party’s primary from running for the same office in the same election as the candidate of another party. Oregon and Vermont allow cross endorsement, but permit a candidate only a single ballot line, making the contribution of a cross endorsing party to a candidate’s vote totals immeasurable.

All of these approaches, either to block fusion or significantly diminish its actual or perceived political value, offered potential models for those in New York seeking change.²³ But legal precedent made these alternatives risky in the state. Early 20th century decisions of New York’s high court, the Court of Appeals, found unconstitutional legislative attempts to prevent cross endorsement or limit a candidate to a single ballot line.²⁴ In *Devane v. Toughney*, decided in 1973, the Court similarly invalidated a statute that required the “forced” combination of ballot lines when a person was a candidate of both an official party and an independent effort in a local election.²⁵

No doubt mindful of these precedents, the Commission avoided a direct attack on fusion. Its approach was to try to diminish the number of third parties, or perhaps eliminate them, by making gaining independent ballot access and achieving and retaining official party status more difficult. This allowed advocates of change to argue that they were doing nothing new or explicitly hostile to fusion or third parties. They were simply adjusting existing requirements to the growth of the state electorate, as had been done before.

Currently, a statewide independent candidacy requires 15,000 signatures with 100 of these from each of half of the state’s 27 Congressional Districts to gain ballot access. The Commission proposes to raise the number of required signatures to 45,000 or one percent of the total number of votes cast in the last election for the office of governor, whichever is less. (In 2018, once percent was 70,974.) Additionally, at least 500 signatures or 1% of

enrolled voters, whichever is less, would have to be from each of one-half of the congressional districts in the state. (This can be entirely achieved in New York City and its suburbs.)

Under existing law, official party status is obtained by gaining 50,000 votes for governor in the most recent gubernatorial election. (One of the attractions of cross endorsement for third parties is that it makes reaching this threshold quadrennially easier.) Official status guarantees a party automatic ballot access for all partisan elections in the state at every level of government for four years; this is the single resource essential to the viability of these parties. The Commission proposes to raise this threshold by 160%, to 130,000 or 2 % of the vote for governor, whichever is greater, and shorten the duration to two years by requiring parties to requalify for official status in presidential election years by reaching the same thresholds.²⁶ In 2018, the vote for governor totaled 7,097,362; 2% was 141,947. In 2016 the vote for president was 7,673,099; 2% was 153,462.

Consequences: In 2018 under current requirements, seven parties gained or retained official party status. If the Commission’s new standards were in place for this election, only three of these would have achieved that status for the next four years: Democrats, Republicans and Conservatives. One of the alleged strengths of New York’s 2+ party system is that provides voters with more choices. If the new commission ballot access standards were in place, none of the three parties that actually offered an alternative candidate to the two major parties in 2018—Greens, Libertarians, and SAM—would have continued as “official,” or gained official status. Moreover, third parties, required to achieve more votes to retain their ballot line, would have even greater incentives to cross endorse.

If the Commission’s presidential election year standard were operative in 2016, the same three parties—Democrats, Republicans and Conservatives—would have still met the threshold for ballot access. (Organized for the 2018 election, the Serve America Movement (SAM) filed just under 41,000 signatures to gain independent

ballot access, within hailing distance of the newly proposed 45,000 signature requirement.)

With both the Governor and the Assembly Speaker highly supportive of the outcome, and the absence of a severability clause, and progressive groups committed to public financing of campaigns, it is not surprising that the state legislature failed to act by the statutory deadline to undo the Commission’s new ballot access provisions for third parties. Litigation has ensued to block their implementation. But the path the Commission took, focused upon elevating ballot access requirements, was careful to minimize litigation risk. It remains possible that changes will be made during the 2020 legislative session, but there is still the Speaker’s view to contend with, and the Governor’s veto.

Cross endorsement, third party candidacies, the creation of additional parties to affect a single election outcome and all the related tactical maneuvering so familiar to aficionados of New York politics are not limited to statewide elections. All of this occurs regularly, with occasional effect on outcomes, in cities, counties, towns, and state legislative, congressional, and judicial elections. New York’s is a closed primary system. Registrants of even the most well-established third parties are thin on the ground in most parts of the state. Access to official ballot lines is therefore controlled by one or a few party leaders or is decided in primaries with very few eligible voters. There has been remarkably little consideration of the redistribution of local political influence and the potential effect on elections below the statewide level that will almost surely result from Commission’s changes in ballot access.

If they stay in force, as is likely, the commission’s election law changes will:

- **Elevate** the importance of intra-Democratic closed-primary politics in New York state, further excluding most non-Democratic voters from effective choice in many jurisdictions and statewide
- **Enhance** the importance of the Democratic party organization at the state and local levels in nominating politics, and those who control it

- **Require** the Working Families Party to focus far more on self-maintenance, diminishing its regular, continuing influence in state and local politics
- **Reinforce** Republican reliance on Conservative support, persistently pulling them away from the center and diminishing their statewide competitiveness.
- **Reduce** the number of continuing political parties contesting New York elections, diminishing the influence of their local as well as their statewide adherents and leaders
- **Diminish** the number of parties—Green, Libertarian—that regularly offer unique candidates for statewide office and therefore reduce the choices offered voters
- **Eliminate** or substantially diminish the creation of political parties to support specific candidacies
- **Make more difficult** (or perhaps eliminate) the tactical creation and sustaining of new one-time policy or candidate-based parties to influence elections or advance ideological or policy agendas
- **End or greatly diminish** the use of minor parties as a locus of “dirty tricks” in contesting and financing elections
- **Make leadership management** of party conferences in the state legislature easier by diminishing influence of cross-endorsing third parties on members’ policy choices

These are big changes in how politics and government work in New York. Good or bad? It’s very much a mixed bag. Ultimately where you stand depends upon where you sit.

Certainly, however, there is little comfort in how these outcomes were achieved. The state legislature is further diminished by the invention and repeated use of artful methods to bypass it. Legislative leaders seeking very much needed political system reforms, are complicit

in sacrificing the institutional interests of the bodies they head to achieve them. Public cynicism about representative democracy is encouraged, and trust in government further challenged, as it is again demonstrated that the way things work in Albany is not how the state’s highest law says that they are supposed to work.

I wish Malcolm Wilson was here, so I could ask him what he thinks.

Notes

- ¹ Peter H. Argersinger. “A Place on the Ballot”: Fusion Politics and Anti-Fusion Laws *The American Historical Review* Vol. 85, No. 2 (Apr., 1980), pp. 287-306.
- ² See Stephen Ansolabehere and David M. Konisky. “The Introduction of Voter Registration and Its Effect on Voter Turnout” *Political Analysis* Vol. 14, No. 1 (Winter 2006), pp. 88.
- ³ A00101 of 2013-14 (Gantt); A06955 of 2013-14 (Pretlow)
- ⁴ Chapter 59 Laws of 2018 Part HHH <https://nyscompensation.ny.gov/docs/CompensationCommitteeReport.pdf>
- ⁵ Article XXX Chapter 59, N.Y. Laws of 2019 §2.j
- ⁶ <https://www.nystateofpolitics.com/2019/12/the-odd-bedfellows-of-public-campaign-financing/>
- ⁷ Henry Berger, Mylan Denerstein, Kimberly Galvin, DeNora Getachew, Jay Jacobs, John Nonna, David Previte, Crystal Rodriguez, and Rosanna Vargas
- ⁸ <https://www.nystateofpolitics.com/category/jay-jacobs/>
- ⁹ Statement of Commissioner Jay S. Jacobs. Final Report p. 83.
- ¹⁰ <https://www.nystateofpolitics.com/category/jay-jacobs/>
- ¹¹ Article VII §7.
- ¹² Article VII §4.
- ¹³ *Pataki v. NY State Assembly*, 190 Misc. 2d 716 (2002)
- ¹⁴ NYS Constitution Article III §18.
- ¹⁵ Campaign Finance Reform Commission. Final Report. Summary of August 23, 2019 meeting. p.83.
- ¹⁶ Final Report, p. 15.
- ¹⁷ <https://www.nystateofpolitics.com/2019/12/cuomo-says-lawmakers-would-accomplish-nothing-if/>
- ¹⁸ Article III §1; Article IV §3..
- ¹⁹ See, in particular, Article III §13,14.
- ²⁰ Emphasis added by the author
- ²¹ <http://www.ncsl.org/research/about-state-legislatures/delegation-of-legislative-power.aspx> Last visited 12/9/2019
- ²² Edward H. Stiglitz, Cornell Law School, Ithaca, NY 14853, USA. Email: js2758@cornell.edu. “The Limits of Judicial Control and the Non-delegation Doctrine,” *Journal of Law, Economics & Organization*, (1 March 2018). <https://advance.lexis.com/api/document?collection=analytical-materials&cid=urn:contentItem:5RYH-3270-0227-V277-00000-00&context=1516831>.p. 11.
- ²³ See Gerald Benjamin and Michael Catalano. “New York State’s “Multi+” Party System” in Richard Davis. *Beyond Donkeys and Elephants: Minor Parties in Contemporary American Politics* (Lawrence: University of Kansas Press, forthcoming, 2020) pp. 155-156.
- ²⁴ Matter of Callahan 200 NY 59 (1910); Matter of Hopper 203 NY 144 (1911).
- ²⁵ 33 NY 2d 48 (1973)
- ²⁶ Totals exclude blank, void and scattered ballots





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