Now on the Ballot for Candidates for the Minnesota Supreme Court: "Calvin L. Brown (Republican-Democrat)"

The Story of *In re Day* (1904)

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The Last Fusion Candidate for Judicial Office
in the History of the State

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The Supreme Court Divides
After Issuing a Unanimous Ruling

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The Role of the Chief Justice and
the Influence of Justice Brown

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Speculation Abounds: Did an Ideal Carry the Day?

By

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Table of Contents

Introduction

The Republican State Convention, held in Minneapolis June 30-July 2, 1904, was the most tumultuous and divisive in the party's brief history. Robert C. Dunn, the State Auditor, and Loren W. Collins, a former Associate Justice of the Minnesota Supreme Court, fought for the party's gubernatorial endorsement. Through mastery of the credentials committee, Dunn prevailed but at a steep cost. Collins's forces were bitter in defeat and did not rally behind Dunn in the fall campaign.[1]

The acrimony of the Dunn—Collins contest infected the selection of candidates for the state supreme court. There were four seats on the ballot in November 1904: one justice was to be elected for a six year term beginning January 1, 1905, and three were to be elected for terms beginning January 1, 1906.[2] Calvin L. Brown, John A. Lovely, Charles L. Lewis and Wallace B. Douglas, all four Republican incumbents, sought the party's endorsement. But the status of incumbency carried little weight at this gathering. The *Minneapolis Journal* carried this account of the voting for the court candidates:

A LONG NIGHT SESSION

Convention Work Wasn't Completed
Till the Wee Sma' Hours.

> The republican state ticket was nominated at an evening session of the convention, beginning at 8:30 and not concluding until 1 o'clock in the morning. Many delegates went

[1] This was a strong Republican year, with President Theodore Roosevelt leading the ticket. In the contest for governor, however, Democrat John A. Johnson defeated Dunn, who was weakened by internal wounds. The final vote was:

> John A. Johnson (D).....147,922
> Robert C. Dunn (R).....140,130
> Charles W. Dorsett (Prohibition).....7,577
> Jay E. Nash (Public Ownership).....5,810
> A. W. M. Anderson (Socialist Labor).....2,293

1905 Blue Book, at 506-7.

[2] These odd start dates arose after the state constitution was amended in 1883 to reduce the length of terms of judges from seven years to six. For an attempt to explain how the amendment went into effect, see Douglas A., Hedin, "The Puzzle of the Elections of 1892, 1894, 1904 and 1910." (MLHP, 2010).

out on late trains, leaving a few from each county to cast their vote. The delegates were worn out, and the contests for minor places on the ticket lacked the zest that usually goes with such scrimmages.

The surprise of the evening was the nomination of Judge C. B. Elliott of Minneapolis for the supreme bench, displacing Justice John A. Lovely of Albert Lea. Judge Elliott had given up the Idea of being a candidate, had not opened headquarters or done any work during the convention session.

The situation favored him, however, and the Minneapolis attorneys, present in the hall, either as delegates or spectators, took hold and nominated him in a fifteen minute campaign. The Dunn delegations from the northern part of the state cut Lovely because his county had been for Collins, and threw their votes to Elliott. A number of delegations cut Judge Lewis in favor of Elliott, and Hennepin's 113, cast solid for Brown, Lewis and Elliott, was almost enough. On the first roll call Lovely had 740 to Elliott's 708, but it took the tellers a long while to make the footings, and while they were at it the Hennepin men were busy. They got the Morrison county delegation to change thirteen votes from Lovely to Elliott, Clearwater shifted seven the same way, and Douglas thirteen. Then Todd changed fourteen from Brown, who did not need them, to Elliott, and it was all over.

The Undoing of Douglas.

It had been discovered that the three old judges, Brown, Lewis and Lovely, hold over till 1906, While Judge Douglas' appointment only runs till after election, Jan, 1, 1905. So the first three had to be voted on together, and Douglas separately. When nominations were first made, Judges Jaggard, Elliott and Searle were all pitted against Douglas, but Geo. R. Smith changed just in time, and put Elliott into the race against the other three. He will not take office till Jan. 1, 1906. The final vote was:

Brown, 1,099,
Lewis, 974,
Lovely 717, and
Elliott, 739.

Judge W. B. Douglas had a hard competitor in Judge E. A. Jaggard of St. Paul, who had worked up a strong following over the state. He had, besides, the antagonism of the Dunn organisation and the merger influence, which held a grudge against him for his activity. The vote was:

Jaggard, 639,
Douglas, 277, and
Searle, 251.[3]

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[3] *Minneapolis Journal*, July 2, 1904, at 4. The "grudge" of some delegates over "the merger" refers to their disagreement with the strong opposition Governor Van Sant and Wallace Douglas, then Attorney General, took to the merger of Great Northern and Northern Pacific railroads into a new entity called the Northern Securities Company in 1901. The U. S. Supreme Court held that the merger violated the Sherman Act in *Northern Securities Co. v. U. S.*, 193 U. S.197 (1904). For a contemporary account of the state's opposition written before the Supreme Court's final ruling on March 14, 1904, see "The 'Merger' Cases" in Hiram F. Stevens, 2 *History of the Bench and Bar of Minnesota* 200-214 (1904).

The *St. Paul Globe* described in more detail the horse trading that went on even while the votes were being counted during the convention:

> Chairman Clapp ruled that it was necessary to take separate polls on the different positions, and ordered the roll call on the candidates for the positions beginning in 1906 first. As each county was allowed to vote for three candidates the polling was tedious, the ultimate nomination of Judge Elliott over Justice Lovely having been accomplished by inducing a couple of count[ies] to change their votes almost at the moment that the result was to be announced.
>
> Friends of Judge Elliott had added the columns showing the vote for Elliot and for Lovely, with the result that it was shown that Lovely was a winner by a small margin. There was at once some great hustling on the part of Hennepin county delegates, assisted by St. Louis county. At the time the vote stood 730 for Lovely and 719 for Elliott. Douglas county was induced to withdraw from Lovely 13 votes, giving Elliott 6 of the number and Lewis 7. This was not quite enough to accomplish the purpose, and Todd county responded to the plea that had been made by Hennepin county, and transferred the fourteen votes that it had given to Brown to Elliott, refusing to take the vote from Lovely, but in this manner defeating the man for whom the delegates voted.
>
> Counties Split Their Votes
>
> In this contest but few counties split their vote. Big Stone was the first to set the example, giving 1 of its 9 votes to Elliott, this vote being taken from Lewis, who received 8. Brown gave Lovely and Brown 12 each, Lewis 4 and Elliott 8. Lovely got but 1 from Cass, this being taken from Brown, who got 8 of the 9. Dakota county gave 13 to Lovely and Lewis, giving Elliott 5 and Brown 8. Fillmore gave Brown 15 and Elliott 5 of its 20 votes, the other two candidates receiving the full strength. Nicollet gave 6 to Lovely and 6 to Brown, and the full strength to the other two. Olmsted voted solidly for Lovely and Brown, and split at 8 and 8 for Lewis and Elliott. Redwood14 to Elliott and

Calvin Brown probably read this story in his chambers at the Capitol, as the Court was in session,[4] and later received first-hand accounts of the convention from delegates and friends. If he was pleased at being endorsed, he was dismayed by the raw vote swapping that led to the defeat of two colleagues. He expressed regret at the loss of John Lovely in a memorial service at the Supreme Court in April 1908 after the latter's death: "His elevation to this bench was a fitting tribute to his character and attainments, his retirement therefrom, not for unfitness or unfaithfulness to duty, an occasion of sincere regret to all his friends."[5] He was troubled that the merits of Justices Lovely and Douglas as jurists were not considered by convention delegates at all. Still, knowing that his election in November was assured, he accepted his party's nomination on August 5th.

At their convention in St. Paul at the end of August, the Democrats took a different path to selecting candidates for what they claimed would become a "non-partisan judiciary." A committee of representatives of the nine congressional districts was appointed and hours later recommended that the convention endorse Calvin Brown, John Lovely and Charles E. Otis, a former Ramsey County District Court Judge, for terms beginning January 1906. And they were dutifully endorsed. Despite their lofty rhetoric, vote counting was part of the Democrats' calculations. Pierce Butler, a leading St. Paul lawyer and a member of the nominating committee, had disgruntled Collins forces in mind when he predicted that the three nominees "will mean from 10,000 to 15,000 votes for Gov. Johnson."

Brown was not surprised by the Democratic nomination. A pre-convention article in the *St. Paul Globe* predicted that the party would

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> Brown, and gave Lovely 7 and Lewis 7. Sibley split its 12 votes between Elliott and Lewis and gave the full strength to the others. Wabasha gave 6 of its 13 to Elliott and 7 to Lewis, the full strength going to the other two. Yellow Medicine gave Lovely 4 and Lewis 8, the ether two candidates getting the full 12 votes. The vote results:
>
> Brown, 1,099.
> Lewis, 974.
> Elliott, 739.
> Lovely, 717.

St. Paul Globe, July 2, 1904, at 6.

[4] He wrote for the court in *City of Winona v. Jackson*, 92 Minn. 453 (July 1, 1904).

[5] Remarks of Calvin L. Brown in "John A. Lovely," in *Testimony: Remembering Minnesota's Supreme Court Justices* 176, 181 (Minn. Sup. Ct. Hist. Soc., 2008).

favor him because "his record has been alike satisfactory to the members of all parties." But the nomination placed him in a quandary because an "anti-fusion law" passed by the legislature in 1901 and 1903 barred a candidate of one political party from being listed on the ballot as the candidate of another.[6] Because the Republican party filed its certificate

[6] Laws 1901, c. 312, p. 524, provided:

> An act relating to the names of political parties on the official ballot.
>
> SECTION 1. That a political party which has heretofore or shall hereafter adopt a party name shall alone be entitled to the use of such name for the designation of its candidates on the official ballot, and no candidate nor party subsequently formed, shall be entitled to use or have printed on the official ballot as a party designation, any part of the name of a previously existing political party. And in no case shall the candidate of any political party be entitled to be designated upon the official ballot as the candidate of more than one political party, and shall be designated upon the official party ballot in accordance with the certificate of nomination first filed with the proper officers.
>
> SEC. 2. This act shall take effect and be in force from and after its passage.
> Approved April 13, 1901. (underlining added)

It was passed unanimously by the 32nd Legislature. Journal of the House of Representatives, April 11, 1901, at 1051 (yeas 81, nays 0). Journal of the Senate, April 11, 1901, at 1068 (yeas 37, nays 0).

1903 Laws, c. 174, at 265-66, provided:

> "An act to amend section 45 of chapter 4 of the Laws of Minnesota for 1893, as amended by chapter 136 of the Laws of Minnesota for 1895, relating to the regulation of elections."
>
> SECTION 1. That section 45 of chapter 4 of the laws of Minnesota for 1893, as amended by chapter 136 of the laws of 1895, be amended so as to read as follows:
>
> Sec. 45. The secretary of state and county auditors and city clerks shall respectively place upon the several ballots printed by them the name of each candidate for office who shall have been nominated as hereinbefore provided, and whose certificate of nomination has been presented within the time specified, and on payment of the fee prescribed by law, which shall be as follows:
>
> For each name tendered to be placed upon the white ballot, fifty dollars, to be received by the secretary of state and by him paid into the state treasury.
>
> For each name tendered to be placed on the red ballot, five dollars, to be received by the city clerk and by him paid into the city treasury; *provided*, however, that incorporated cities of three thousand inhabitants or less, only two dollars need be paid for each name tendered to be placed upon said red ballot.
>
> For each name tendered to be placed upon the blue ballot, ten dollars, to be received by the county auditor and by him paid into the county treasury.
>
> *Provided, however*, that no fee shall be required from any person who is a candidate for any office to which no compensation is authorized to be paid.
>
> *Provided, further*, that when any candidate is nominated for the same office by more than one political party, the name of the party by whom he was first nominated shall be given the first place following his name; and provided, further, that where the person whose name is to be placed upon the blue ballot is to be voted for in more than one county, as in case of members of congress, judges of district courts, etc., then the fee shall be twenty dollars, and shall be divided

of nomination of Brown with the Secretary of State first, the Democrats were barred from listing him as their nominee on the official ballot.

Before examining how Calvin Brown resolved this dilemma, it is necessary to explore a more fundamental matter: what were anti-fusion laws and why were they passed by the legislature at this time? Political historian Richard L. McCormick provides an overview of late nineteenth-century election reforms that the two major parties turned to their advantage, to save themselves:

> Before the 1890s parties had chosen their candidates, printed and distributed their tickets, and gotten out the vote pretty

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> among the several counties as nearly equal as may be, and the portion due each paid at the time and in the manner provided for single counties.
>
> SEC, 2. This act shall take effect and be in force from and after its passage.
>
> Approved April 10, 1903. (Underling added).

The vote in the House of Representatives was yeas 61, nays 5. Journal of the House of Representatives, April 7, 1903, at 1116. In the Senate, it passed yeas 38, nays 0. Journal of the Senate, April 10, 1902, at 714-15.

Laws 1903, c. 232, p. 337, provided:

> An act to amend chapter three hundred and twelve (312) of the General Laws of nineteen hundred and one (1901) of Minnesota, relating to the names of political parties on the official ballot.
>
> SECTION 1. That chapter three hundred and twelve (312) of the General Laws of Minnesota for the year nineteen hundred and one (1901), entitled "An act relating to the names of political parties on the official ballot," be and the same hereby is amended so as to read as follows:
>
> Section I. That a political party, which at the last preceding general election polled at least I per cent of the entire vote cast in the state (the same to be determined by the highest vote cast for its state candidates), and which has heretofore or shall hereafter adopt a party name, shall alone be entitled to the use of such name for the designation of its candidates on the official ballots at any and all elections held in this state, and no other candidate nor party shall be entitled to use or have printed on the official ballots as a party designation any part of only one the name of such a political party. And in no case shall the candidate of any political party be entitled to be designated upon the official ballot as the candidate of more than one political party, and shall be designated upon the official party ballot in accordance with the certificate of nomination first filed with the proper officers.
>
> SEC. 2. This act shall take effect and be in force from and after its passage.
>
> Approved April 14, 1903. (underlining added).

It passed both chambers easily. Journal of the House, March 4, 1903, at 497-98 (yeas 66, nays 12). Journal of the Senate, April 9, 1903, at 914 (yeas 34, nays 2).

> much as they chose. Then, beginning in the last years of the nineteenth century, laws passed in almost every state converted the parties from private into public organizations. Governments took over the task of printing the ballots, which now listed the candidates of every party, and of assuring that they were cast in secret. Ballot reform inevitably involved the state in the regulation of party nominations, and by the early 1900s the direct primary was sweeping the country. Corrupt-practices acts clamped down on many of the old techniques that the parties had once used to get their supporters to the polls, while voter registration laws curtailed the ease of voting. Other laws forbade corporate contributions to party campaigns limited election expenses and threw restrictions around the appointment of loyal partisans to public office. Together these measures encased the parties in the web of law and contributed to the decline of the hoopla and excitement, as well as of the high levels of voter participation, which had characterized nineteenth-century elections.
>
> In its details, however, the web of law was largely woven by the parties themselves. Placed on the defensive by the widespread dissatisfaction with party government and by the growth of third parties, the Democrats and Republicans had no choice but to accept restraints on their own actions. The determination to rein in the party organizations was real and widespread; often, it was indeed the common denominator of otherwise antagonistic interest groups and reform minded organizations. Recognizing the inevitability of change, major-party legislators set out to write rules that they could live with—and this they did. The new laws governing ballots and nominations curtailed the worst abuses of the past, but they also made independent and minor party candidacies more difficult to mount than before. [7]

Fusion resulted when multiple parties—usually a major and a minor—nominated a single candidate or endorsed one slate of candidates. How

[7] Richard L. McCormick, *The Party Period and Public Policy: American Politics from the Age of Jackson to the Progressive Er*a 179 (Oxford Univ. Press, 1986).

fusion politics emerged, grew and was suppressed, in part, by ballot laws is told by historian Peter H. Argersinger:

> Fusion, or the electoral support of a single set of candidates by two or more parties, constituted a significant feature of late nineteenth century politics, particularly in the Midwest and West, where full or partial fusion occurred in nearly every election. Such fusions customarily involved a temporary alliance between third parties and the weaker of the two major parties, usually the Democrats in the Midwest and West.
>
> Fusion was a particularly appropriate tactic given the period's political culture. Voter turnout was at a historic high, rigid party allegiance was standard, and straight-ticket voting was the norm. Partisanship was intense, rooted not only in shared values but in hatreds engendered by cultural and sectional conflict. Changes in party control resulted less from voter conversion than from differential rates of partisan turnout or from the effect of third parties Although the Republicans continued to win most elections, moreover, the era of Republican dominance had ended in the older Northwest by 1874 and had been considerably eroded in the states farther west by the 1880s, so that elections were bitterly contested campaigns in which neither major party consistently attracted a majority of the voters. Minor parties regularly captured a significant share of the popular vote and received at least 20 percent in one or more elections from 1874 to 1892 in one than half of the non-Southern states. Even where their share was smaller, it represented a critically important proportion of that electorate. Between 1878 and 1892 minor parties held the balance of power at least once in every state but Vermont, and from the mid-1880s they held that power in a majority of states in nearly every election, culminating in 1892 when neither major party secured a majority of the electorate in nearly three-quarters of the states. By offering additional votes in a closely divided electorate, fusion became a continuing objective not only of third party leaders seeking personal advancement or limited, tangible goals but

also of Democratic politicians interested in immediate partisan advantage. The tactic of fusion enabled Democrats to secure the votes of independents or disaffected Republicans who never considered voting directly for the Democracy they hated; it permitted such voters to register their discontent effectively without directly supporting a party that represented negative reference groups and rarely offered acceptable policy alternatives.

. . .

Given their vulnerability to fusion politics, Republicans continually sought to prevent cooperation among their opponents. Repeatedly, they pointed out the contradictions in the platforms of the different groups contemplating fusion and urged members of each to adhere to their own principles rather than to fuse with groups holding obviously different aims.

. . . .

The presidential election of 1888, with its widespread incidents of bribery, intimidation and fraudulent voting, provoked a reaction against the partisan excesses possible in the party-ballot system of voting and helped spur most states toward adopting the Australian ballot, long advocated by a number of disparate groups. This system did more than merely ensure secrecy for the voter. It also provided for an official ballot printed at public expense and distributed only by public election officers at the polling place. . . .

By providing for public rather than partisan control over the ballots and by featuring a blanket ballot, the Australian system opened to Republicans, given their dominance in state governments, the opportunity to use the power of the state to eliminate fusion politics and thereby alter political behavior. The Republicans' modifications of the Australian ballot were designed to take advantage of the attitudes and prejudices of their opponents and were based on a simple prohibition against listing a candidate's name more than once on the official ballot. This stipulation, Republicans believed would either split the potential fusion vote by causing each

> party to nominate separate candidates or undermine the efficacy of any fusion that did occur, for in this time of intense partisanship many Democrats would refuse to vote for a fusion candidate designated "Populist" and many Populists would feel equally reluctant to vote for a "Democrat." Related regulations could restrict straight-ticket voting by fusionists or even eliminate one of the fusing parties, antagonizing its partisans and causing them either to oppose the fusion arrangements or to drop out of the electorate altogether. Given the closely balanced elections of the late nineteenth century, the elimination of even a small faction of their political opponents because of ideology, partisanship, or social prejudice would help guarantee Republican ascendancy. Although, other ballot adjustments increased its effectiveness, this simple prohibition against double listing became the basic feature of what the Nebraska supreme court described as a Republican effort to use the Australian ballot as a "scheme to put the voters in a straight jacket."[8]

In Minnesota, as elsewhere in the Middle West, the Republican party was threatened by fusions of Democrats and minor parties. It tried to split these coalitions by pointing to the incompatibility of their platforms and also took creative, if irregular counter-measures, most notably in 1892, when Democrats replaced four of their nine presidential electors with candidates of the Populist or People's party. The ballot for the election that year was an "office-bloc ballot" on which candidates were listed under the name of the office sought followed by their party affiliations. By state law, presidential electors—that is, a party's candidates for the Electoral College—were to be listed on the ballot in the same fashion: the electors' name, his party or parties and the name of the presidential candidate he represented (unlike other states, Minnesota permitted an elector to be listed under every party that nominated him).[9] However,

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[8] Peter H. Argersinger, "A Place on the Ballot": Fusion Politics and Antifusion Laws," 85 *American Historical Review*, 287, 288-292 (April 1980) (citing sources).

[9] Id, at 291. 1891 Laws, c. 4, §34, at 39-40, provided:

> Section 34....When a president and vice president of the United States are to be elected, the presidential electors of each political party shall be grouped together and placed on the ballots in the order of priority in which the several political conventions nominating the said electors were held, and the name of each of such presidential elector shall be followed as in other cases with the name of the party he represents, and also with the surname of the presidential candidate he represents, printed in bold

instead of grouping the electors under their party labels—Republican (9), Democrat (5 straight Democrats) and People's (9, the sum of 4 People's-Democrat's and 5 straight People's)—Secretary of State Brown, a Republican, mixed the fusion four into the group of electors of the People's Party. The Democrats, seeing that such a ballot would confuse their voters, brought a mandamus action in Ramsey County District Court to compel the Secretary to redraft the ballot and place the four fusion candidates at the top of the People's party list (and immediately following their list) as required by law.[10] But the court dismissed the case on the ground that it lacked jurisdiction.[11] Professor Argersinger describes how the results of the election were changed by the ballot design:

> The election results validated that estimate of the importance of the ballot. The straight Democratic electors averaged 101,000 votes and the straight Populists 29,000, their combined total would have easily defeated the Republicans' 113,000. Yet the four fusion electors received only 110,000 votes, the drop of 20,000 that Democratic officials had predicted, which allowed the minority Republicans to sweep to complete victory. [12]

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type, and the groups of electors shall be separated from each other by a space at least an inch in width, and the words "vote for one only" omitted at the right.

[10] The case was brought under 1891 Laws, c. 4, §43, at 43, which provided :

> Section 43. Whenever it shall appear by affidavit presented to any judge of the supreme or district courts of the state that an error or omission has occurred in the printing of the name or description of any candidate on official ballots, or any other error has been committed in printing the ballots, or that the president or secretary of any caucus or convention have failed to properly make or file any certificate of nomination, or the name of any person has been wrongfully placed upon said ballots as a candidate, such judge shall immediately, by order, require the officer or person charged with the error or neglect to forthwith correct the error or perform his duty, or to show cause forthwith why such error should not be corrected or such duty performed. Failing to obey the order of such Judge shall be contempt.

[11] Professor Argersinger writes that the district court dismissed the case because the ballots had already been printed ("But, since the ballots were already printed, the court was confronted with a Republican *fait accompli,* the reversal of which would have required a postponement of the election itself, and accordingly the court judiciously ruled that it had no jurisdiction in the matter."). Argersinger, note 8, at 294 (citing the *Minneapolis Journal*). This is not correct. The Ramsey County District Court dismissed the Democrat's suit because decisions of the Minnesota Supreme Court deprived it of jurisdiction over disputes about the Secretary of State's configuration of the official ballot. The ruling of Judge Brill, which Judge Otis joined, is posted in the Appendix at 103-107.

[12] Argersinger, note 8, at 295 (citing sources). Newspaper accounts of the case, mostly from the *St. Paul Globe*, are posted in the Appendix, at 79-110. The disputed official ballot is posted at 85.

While this case is an example of how a fusion ticket could be defeated by reconfiguring the ballot, it also is of interest because two participants—Judges Brill and Otis—reappeared twelve years later when the Democrats again challenged the validity of the official ballot. And to that we now turn.

It took Calvin Brown a month to announce his decision to accept the Democrat's nomination. On September 24, he and John Lovely wrote separate letters to the Democrat chairman accepting the party's nominations. This was an easy decision for Lovely, as his only chance of remaining on the Court was to be elected in November. Brown's calculations were more complex. They began with a question he must have asked again and again: of what benefit was the Democratic nomination to him? As the Republican nominee he was guaranteed election. He was not strengthened by the Democratic nomination because the anti-fusion laws forbade him from being listed as its nominee—unless those laws were struck down by a court. Why then did he accept it? To hazard an answer, we must look more closely at the man Brown.

In the fall of 1904, he was fifty years old, a lifelong Republican, who had served seventeen years on the bench. He was respected for his modesty, patience, courtesy and fairness, among other virtues. He was appointed judge of the newly-formed Sixteenth Judicial District in March 1887, elected to a full term in 1888 without opposition and re-elected in 1894, again without opposition. In 1898, as a nominee of the Republican party, he was elected Associate Justice for a term beginning January 1900. But that judicial election was the bloodiest in the state's history; three incumbents, each a fusion candidate, were defeated, including the revered William Mitchell.[13] It may have deepened his antipathy toward

[13] The results of the election (a top three election) for Associate Justice on November 8, 1898, were:

John A. Lovely (R)…….129,268
Calvin L. Brown (R)…….107,523
Charles L. Lewis (R)……,……100,806
Thomas Canty (D & Pop, inc.)……99,002
William Mitchell (D & Pop, inc.)……89,527
Daniel Buck (D & Pop, inc.)…….78,441
S. Grant Harris (Mid. Road Pop)……7,020
Josiah H. Temple (Mid. Road Pop)……5,019
Edgar A. Twitchell (Mid. Road)……4,592

Douglas A. Hedin, "Results of Elections of Justices to the Minnesota Supreme Court, 1857-2016" 26-7 (MLHP, 2010-16).

the nearly complete control political parties and zealous factions within those parties had over the selections and elections of judges. If so, those thoughts were reinforced by his friendship with Chief Justice Charles M. Start, who loathed how judicial elections had become fierce political contests. From 1881 to 1906, Start won three elections to the district court and three to the Supreme Court, and only once, in 1894, faced token opposition.[14] Did Brown discuss the Democratic nomination with the Chief Justice before accepting it? Of course—how could he not?

We may assume that he approached the question of whether to accept the Democrat's nomination by first reading the anti-fusion laws and their titles—a process similar to the one he followed when deciding a court case. [15] Besides the Chief Justice, he conferred with Justice Lovely and a few others. From his own study and these discussions, he concluded that the laws were vulnerable under Article 4, Section 27, of the state constitution, holding that "No law shall embrace more than one subject, which shall be expressed in its title." At some point he must have reached out to Democratic lawyers to find out whether their party would challenge the validity of anti-fusion laws in court if he accepted its nomination and, learning that it would, wrote his acceptance letter in longhand—a process similar to the one he followed when writing an opinion in a court case.[16] Referring to a plank in the Democratic platform

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[14] Start was elected to the Third Judicial District Court in 1881 (with only a few dozen write-in votes cast against him), and re-elected in 1886 and 1892 without any opposition; in 1894 he was easily elected Chief Justice over two opponents, and re-elected in 1900 and 1906 without opposition.

His judicial service ended in 1912, when the first "nonpartisan" judicial election was held. He won the September 17th primary but faced stiff competition in the general election; he abruptly withdrew from the race, at which point Brown, with support from the bar and Start, was nominated by petition and narrowly elected Chief Justice in November. In his withdrawal letter, Start wrote that he had been assured that he would be reelected "without serious opposition. It is now evident that my acceptance of nomination would involve a campaign for election which I am unwilling to make." *Minneapolis Journal*, September 23, 1912, at 1 ("Judge Start Quits Race for Election; Brown to be Put Up"). See also Start's letter of September 21, 1912, to Judge Lorin Cray explaining his decision to withdraw and expressing support for Brown. It concluded, "Any efforts of the bar to make him chief justice will be very gratifying to me." Brown Family Papers, Box 1, MHS.

[15] Remarks of Bar Memorial Committee in "Proceedings in Memory of Chief Justice Calvin L. Brown" *in Testimony: Remembering Minnesota's Supreme Court Justices* 161, 162 (Minn. Sup. Ct. Hist. Soc., 2008)("The Chief Justice was essentially an original thinker, and in the performance of his judicial duties he first endeavored to arrive at what he felt should be the law and justice of the case under consideration. Following this, he studied precedents to test the correctness of his judgment, and when he found sufficient authority to support his own conclusions, he immediately and in longhand wrote his opinion, the first draft of which was generally so clear and simple as to need little or no revision.").

[16] His letter of acceptance was published in the *Globe* on September 25, 1904. The original, however, is missing or, at least, has not yet been located; it is not in the records of the Secretary of State, the Brown Family papers or the Frank A. Day papers at the Historical Society.

calling for laws to establish a non-partisan judiciary, he wrote, "Legislation looking to the removal of our judiciary from partisan politics would merit the hearty approval of all the people." Here he was a sort of Wilberforce, striving to free the judiciary from the yoke of party politics. He must have sensed the irony of the situation: he was instigating litigation between the two major political parties that might advance the movement for a non-partisan judiciary. His acceptance letter was the most important document in the case.

The Democrats did not delay. On September 29, Frank A. Day, chairman of the Democratic state central committee, filed a certificate of Brown's nomination with the Secretary of State. The next day, John W. Arctander, a prominent Minneapolis trial lawyer, and Henry C. Belden, a Republican and former judge of the Hennepin County District Court,[17] filed a five page petition in the Supreme Court contending that the law under which Secretary of State Hanson was preparing official ballots was unconstitutional, and that if the party's endorsement of Brown was omitted from the ballot, the "object of said endorsement and renomination, to-wit: of taking the first step toward the election of a non-partisan judiciary, will be frustrated."[18] That very day, Chief Justice

[17] Henry Clay Belden (1841-1915) was elected to the Hennepin County bench in November 1894, and served from January 1, 1895, to May 5, 1897, when he resigned to return to private practice.

[18] The petition is posted in the Appendix, at 56-61. Stat. c. 1, §48, at 11 (1894), provided:

> Whenever it shall appear by affidavit to any judge of the supreme court or district court of the county that an error or omission has occurred or is about to occur in the printing of the name of any candidate on official ballots, or that any error has been or is about to be committed in printing the ballots, or that the name of any person has been or is about to be wrongfully placed upon such ballots, or that any wrongful act has been performed or is about to be performed by any judge or clerk of the primary election, county auditor, canvassing board or member thereof, or by any person charged with a duty under this act, or that any neglect of duty by any of the persons aforesaid has occurred, or is about to occur, such judge shall by order require the officer or person or persons charged with the error, wrongful act or neglect to forthwith correct the error, desist from the wrongful act or perform the duty, and do as the court shall order or to show cause forthwith why such error should not be corrected, wrongful act desisted from, or such duty or order performed. Failing to obey the order of such judge shall be contempt.

In addition, Stat. c. 63, §4823, at 1275 (1894), granted power to issue a writ of mandamus to the Supreme Court

> General powers. The supreme court has power to issue writs of error, certiorari, mandamus, prohibition, quo warranto, and also all other writs and processes, not especially, provided for by law, to all courts of inferior jurisdiction, to corporations and to individuals, that are necessary to the furtherance of justice and the execution of the laws; and shall be always open for the issuance and return of all such writs and

Start issued an order to Secretary Hanson to appear in the Supreme Court on the morning of Wednesday, October 5th to show "cause" why the words "Republican-Democrat" should not be placed after Brown's name on the ballot "to indicate to and inform the electors using said ballots of the fact that said Calvin L. Brown has for said office been endorsed and nominated by both the Democratic and Republican party of said State."[19]

At this point the Republicans brought in heavy artillery to defend the anti-fusion laws. Attorney General Donahower, representing the Secretary of State, was in an awkward position because he had not been endorsed at the recent convention—he was, in political terminology, a "lame duck."[20] At the urging of party leaders, former Attorney General Henry W. Childs, who was in private practice, took command of the defense.[21] He filed the Secretary's Answer to the Democrats' petition at the Supreme Court on October 4th. [22]

Meanwhile, under an amendment to the constitution ratified in 1876, Governor Van Sant appointed three district court judges to replace the three justices who were disqualified from hearing the case because they were listed as candidates on the disputed ballot. Article 6, Section 3 provided:

> Whenever all or a majority of the judges of the supreme court shall for cause, be disqualified from sitting in any case in said court the governor, or, if he shall be interested in the result of such case, then the lieutenant governor, shall assign judges of the district court of the state, who shall sit in such case, in

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processes, and for the hearing and determination of the same, and all matters therein involved, subject to such regulations and conditions as the court may prescribe. Any judge of said court may order the issuance of any such writ or process, and prescribe as to the service and return of the same.

[19] The Chief Justice's "show cause" order is posted in the Appendix, at 63.

[20] Wallace Barton Douglas resigned as Attorney General on March 31, 1904, to accept appointment to the state supreme court; Governor Van Sant thereupon appointed William J. Donahower to fill the vacancy. At the state convention, Donahower lost the party's endorsement to Edward T. Young by a wide margin. *Minneapolis Journal*, July 2, 1904, at 3 ("Governorship choices seemed to have little to do with the attorney generalship, tho E. T. Young had the best of it in the division of the Dunn strength, and beside brought in the seventh district solid. His old legislative friends threw him votes from all over the state, and he defeated Attorney General Donahower easily, by a vote of 784 to 394.").

[21] Henry Warren Childs (1848-1906) served three terms as attorney general, January 1893 to January 1899. First elected in November 1892, he was re-elected in 1894 and 1896.

[22] The Secretary's Answer is posted in the Appendix, at 64-66.

place of such disqualified judges with all the powers and duties of judges of the supreme court. [23]

The governor must have received suggestions from General Donahower before making his selections (more intriguing but unknown is whether he also consulted the Chief Justice). He appointed Judge William A. Cant of Duluth, a Republican, to replace Charles Lewis, Hascal R. Brill of St. Paul, a Republican, to replace Calvin Brown and Frank C. Brooks of Minneapolis, a Democrat, to replace John Lovely.[24]

[23] Article 6, Section 3. Proposed by Laws 1876, c. 3, at 19-20; ratified November 7, 1876, by a vote of 41,069 to 6,063. This was the first time this amendment was put to use

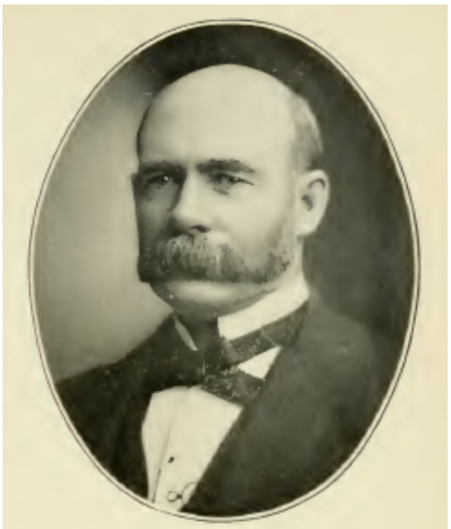
[24] The Governor's appointments are listed in the Minutes of the Minnesota Supreme Court, October 5, 1904, at 415. See Appendix at 70-71. Copies of the appointment have not been located at the MHS. The Governor's cover letters to the district court judges are posted in the Appendix at 67-69.

William A. Cant (1863-1933) had a long career in public service in Minnesota. He served one term in the state House of Representatives,1895-96; was elected Judge of the Eleventh Judicial District in 1896, and served from January 1897 to July 1923, when he was appointed Judge of U. S. District Court by President Harding. There he served until death on January 12, 1933.

Hascal R. Brill (1846-1922), served as Ramsey County Probate Judge in 1873-1875, when he was appointed to the Court of Common Pleas; after it was abolished in 1876, he served on the Second Judicial District Court until death on March 1, 1922.

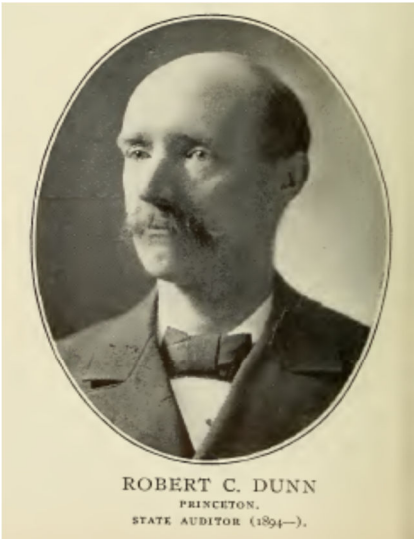
Frank. C. Brooks (1853-1917) was Judge in the Fourth Judicial District from January 1899 to January 1909, when he returned to private practice and formed a partnership with Robert Jamison, a former district court judge.

WILLIAM J. DONAHOWER
ST. PAUL.
ASSISTANT ATTORNEY GENERAL.

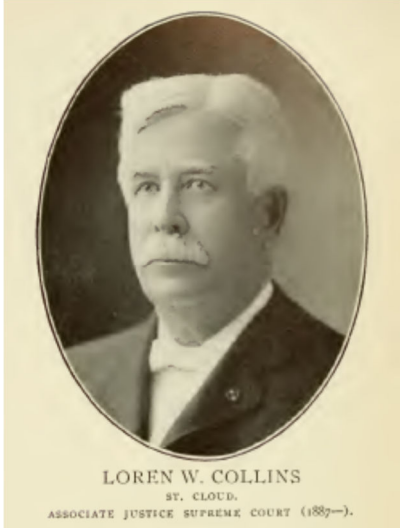


HENRY W. CHILDS
ST. PAUL.
CHILDS, EDGERTON & WICKWIRE, LAWYERS; ATTY. GEN. STATE OF MINNESOTA (1893-99).

PETER E. HANSON
LITCHFIELD.
SECRETARY OF STATE (1901—).

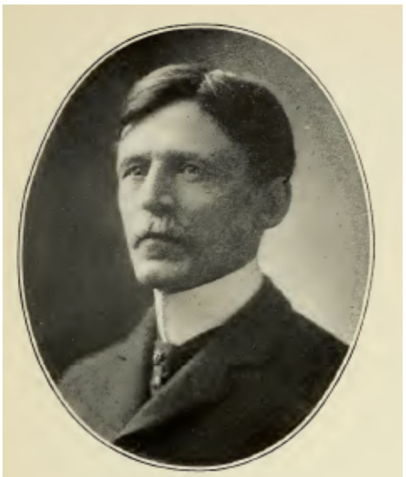


ROBERT C. DUNN
PRINCETON.
STATE AUDITOR (1894—).



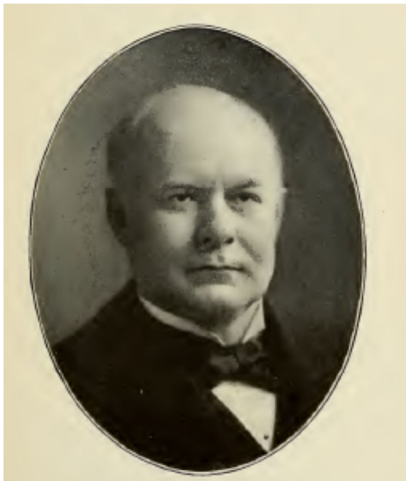
LOREN W. COLLINS
ST. CLOUD.
ASSOCIATE JUSTICE SUPREME COURT (1887—).

CALVIN L. BROWN
MORRIS.
ASSOCIATE JUSTICE SUPREME COURT (1899—).

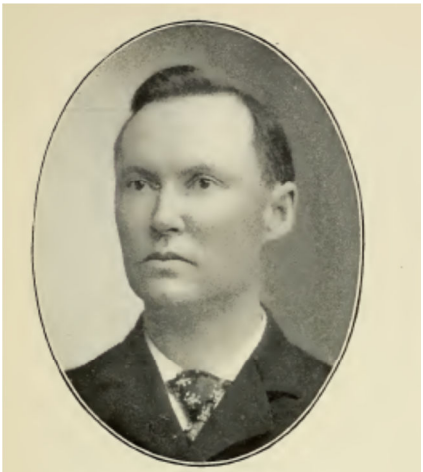


HASCAL R. BRILL
ST. PAUL.
JUDGE DIST. COURT 2D JUDICIAL DIST. (1876—).

CHARLES M. START
ROCHESTER.
CHIEF JUSTICE SUPREME COURT (1895—).

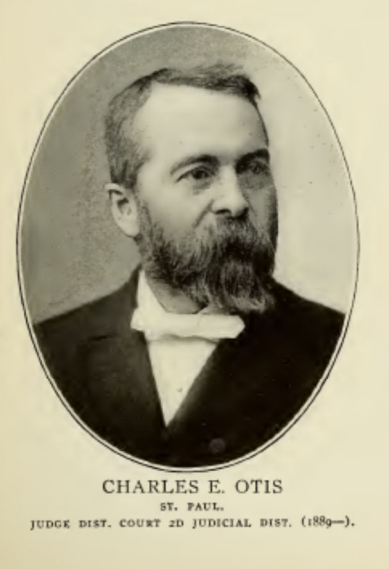


FRANK C. BROOKS
MINNEAPOLIS.
JUDGE DIST. COURT, 4TH JUDICIAL DIST. (1899—).

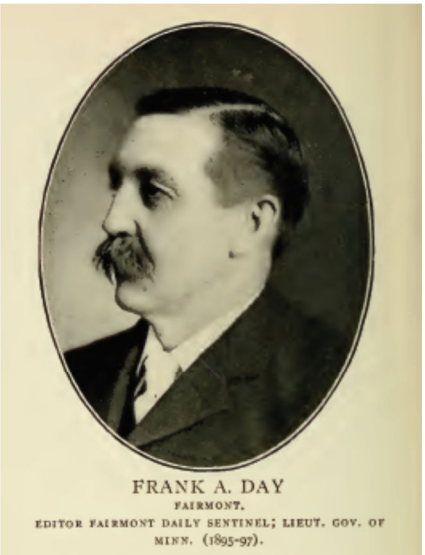


WILLIAM ALEXANDER CANT
DULUTH.
JUDGE DIST. COURT, 11TH JUDICIAL DIST. (1897—).

JOHN A. JOHNSON
ST. PETER.
EDITOR AND STATE SENATOR.



CHARLES E. OTIS
ST. PAUL.
JUDGE DIST. COURT 2D JUDICIAL DIST. (1889—).

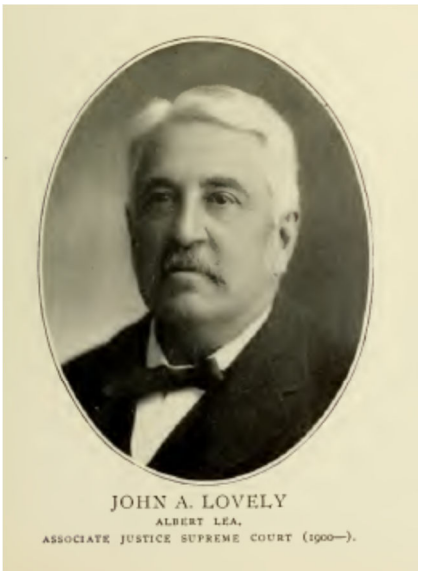


FRANK A. DAY
FAIRMONT.
EDITOR FAIRMONT DAILY SENTINEL; LIEUT. GOV. OF MINN. (1895-97).

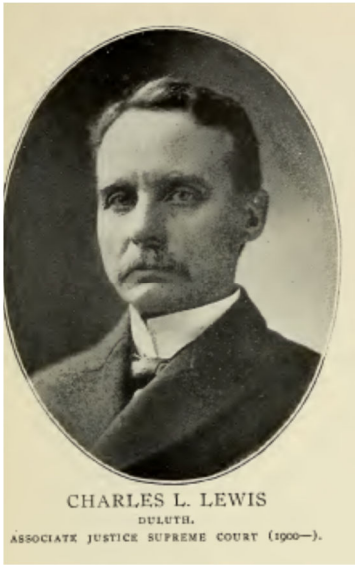
John W. Arctander

HENRY C. BELDEN.

WALLACE B. DOUGLAS
MOORHEAD.
ATTORNEY GENERAL (1899—).



JOHN A. LOVELY
ALBERT LEA.
ASSOCIATE JUSTICE SUPREME COURT (1900—).



CHARLES L. LEWIS
DULUTH.
ASSOCIATE JUSTICE SUPREME COURT (1900—).

EDWIN A. JAGGARD
ST. PAUL.
JUDGE DIST. COURT, 2D JUDICIAL DIST. (1899—).

CHARLES B. ELLIOTT
MINNEAPOLIS.
JUDGE DIST. COURT, 4TH JUDICIAL DIST. (1894—).

Because the hearing in the "Day Case," as the newspapers called it, was expedited, the lawyers did not have time to file briefs with the court.[25] The five member court heard oral arguments most of Wednesday, October 5.[26] Two days later, it issued a *per curium* order that the Secretary of State list Brown on the official ballot as the nominee of both major parties. It promised that "an opinion setting forth the grounds upon which we have based our conclusion will be filed in due time."[27]

The Democrats were euphoric. Frank Day crowed, "Our ticket is admirable in every way, but in having the seal of the highest state court's approval on the principle of a non-partisan judiciary we naturally expect that the result in November will justify our claim that not only has a principle been vindicated, but that the non-partisan judiciary idea will be indorsed by thousands of independent voters." In fact the ruling affected only Brown who, under the logic and rhetoric of the day, was considered a "non-partisan" candidate because he was backed by both major parties and, therefore, unopposed. It left the other candidates for the Court that year and in future elections still enmeshed in party politics. Seven candidates ran for seats on the Court in 1904. For a term beginning January 1905, Edwin Jaggard, who was designated the "Republican" nominee on the ballot, was opposed by O. M. Hall, a "Democrat." For terms beginning January 1906, three justices were to be elected (it was a "top three" election): Charles B. Elliott and Charles L. Lewis, were the "Republican" nominees, while John A. Lovely and Charles E. Otis, were labelled "Democrat." The fifth candidate, the "Republican-Democrat" nominee, was the last fusion candidate for judicial office to be listed on the official ballot in the history of the state.

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[25] The only documents in this case filed with the Clerk of the Supreme Court were (1) the Petition of Frank A. Day, (2) the Order to Show Cause of Chief Justice Start and (3) the Answer of Secretary Hanson. Carbon copies of these documents are in a box of Supreme Court Case Files at the MHS. They were typed on legal size paper and are unlike the printed briefs in appeals from district courts (it is evident that the Republicans used a better typewriter and better carbon paper than the Democrats). They are not included in the bound volumes of appellate briefs at the State Law Library. The location of the originals is not known. Copies (reduced) are posted in the Appendix, at 56-66.

[26] Sitting were the Chief Justice, the three district court judges and Associate Justice Wallace B. Douglas, who was omitted in newspaper reports of the hearing. The Court's minutes, however, note his presence. See Minutes of the Minnesota Supreme Court, October 5, 1904, at 415-6; posted in the Appendix, at 70-71.

[27] It is posted in the Appendix, at 72. A "per curium order" is issued by the Court rather than an individual judge. It is unsigned. Contemporary newspapers reported that it was drafted by the Chief Justice without dissent.

The actual results of the election on November 8 for Associate Justice show that Brown received little additional support from his dual endorsements:[28]

Candidate & Party	Votes
Calvin L. Brown (D & R, incumbent)……	174,888
Charles L. Lewis (R, inc.)……	167,776
Charles B. Elliott (R)……	165,256
John A. Lovely (D, inc.)……	96,097
Charles E. Otis (D)……	79,265

We can only imagine what the atmosphere in the Court was like when the justices returned to their chambers after this election. Justices Brown and Lewis were honored with another term. Wallace Douglas's ended on December 31, 1904. John Lovely served until October of the following year, when he resigned. All were in service when the special Court deliberated its final opinion in the *Day* case, expounding its reasons for its perfunctory order to the Secretary of State to alter the ballot. Newspapers expected a quick opinion but it did not arrive for almost three months.[29] To the consternation of the Chief Justice, the judges divided over the merits of the Democrat's constitutional challenge, and this placed his court in a very difficult position because, as ordered, the official ballot had been redesigned and used in the recent election. The Chief Justice had to hold a majority to avoid a terribly embarrassing and absurd result; he found allies in Judges Brooks and Brill, a Republican, to whom he shrewdly assigned to draft the majority opinion. Judge Cant wrote the dissent, which Justice Douglas joined. On Friday, December 30, the Court released the opinions. [30]

Some readers will compare them and conclude that the dissent got the better of the argument. Judge Brill quoted previous Court opinions, and

[28] Hedin, note 13, at 28-29.

[29] This is an unusually long delay. At this time, the Court's opinion typically was released within a month of oral argument. It is likely that the *Day* opinions were completed in November but not released until the day before the expiration of Justice Douglas's term on December 31. Whether this delay was at the behest of Justice Douglas or, more likely, the Chief Justice will never be known. By the end of the year, the case had been forgotten by all except by the bench and bar.

[30] The opinions are posted in the Appendix, at 72-78. The case is named *State ex rel. Frank A. Day v. Peter E. Hanson* in the official Minnesota Reports, Volume 93. I have used *In re Day*, as it is a shorter version of the caption used in the Supreme Court minutes and is used by the United States Supreme Court in *Timmons v. Twin Cities Area New Party*; see Appendix, at 129.

pointed to the legislature's apparent confusion when it passed a law on ballots on April 10, 1903, and another on the same subject four days later. Judge Cant, who had served one term in the state House, disregarded the disarray in the legislature and, instead, determined that the titles of the statutes encompassed their subject matter and so passed constitutional muster. But he was mute in October.

To understand this it may be helpful to employ an interpretative device used occasionally by Supreme Court watchers: look at what it did and less at what it said. The Court acted on October 7 and spoke twice on December 30. Why did it unanimously grant Frank Day's petition to strike down the anti-fusion law in October? One explanation is most plausible: at that moment all members of the special Court shared Calvin Brown's conviction that his designation on the official ballot as the candidate of the Democratic and Republican parties would help bring about "the removal of our judiciary from partisan politics." And so the Court acted—to further the ideal of a non-partisan judiciary.[31]

[31] Here is an "alternative history" to support this explanation: Suppose the Democrats had endorsed the Republican candidate for a lesser state office, say the state Railroad and Warehouse Commission. When Chairman Day presented this candidate's nomination to Secretary Hanson and demanded that he be identified as "Republican-Democrat" on the official ballot, the latter refused. Suppose the Democrats' lawyers then filed a petition for a writ of mandamus with the Supreme Court. Would the Chief Justice have granted it, thereby requiring the Governor to quickly enlist three district judges to hear the case on an expedited basis? Or would he have deflected the petition to a district court judge to hear it, as was the situation in 1892? The answer, to some, is obvious. What made the actual *Day* case important to the Chief Justice was, very simply, Justice Brown.

A variation of this explanation should be examined. Perhaps, when the judges met in conference after oral argument, Judge Cant and Justice Douglas expressed their doubts about the merits of Day's petition but the Chief Justice persuaded them to smother their views because the Court needed to present a united front in this politically-charged case. Almost three months later, their original views were disclosed to the public. This is an unlikely scenario for several reasons. The special court was under a tight deadline to act because the Secretary of State needed time to print the correct ballots; it did not have the benefit of briefs and without the luxury of time to research and debate, the judges quickly reached the consensus the Chief Justice wanted; and he wrote the *per curium* order released on October 7. The *Globe*, which seems to have had sources within the Court, reported that there was no dissent to that ruling, and expected a full opinion "by Monday" the 10th. It is reasonable to suppose that when Judge Brill circulated a draft of his opinion Judges Cant and Douglas saw how weak it was, and resolved that it was their duty to dissent. And so they did.

Finally, the Chief Justice knew that a new anti-fusion law would be reinserted in the Revised Statutes being prepared by the Revision Commission (whose members he had appointed) and which the new legislature, convening in January 1905, would enact. He knew there would be a hiatus of only a few weeks when no anti-fusion law was in force, but that absence would not affect the election of state-wide officials or legislators in November 1904 *or any election thereafter*. The October order affected one election for one seat on his Court. The minor disruption it caused, the Chief Justice reasoned, was worth the potential gain. See Epilogue, at 49-50.

The Story of *In re Day*, as Reported by Local Newspapers.

Chapter 1.
Justice Brown is nominated by the Democrats.

A. On August 25, 1904, the *St. Paul Globe* published an analysis of the forthcoming Democratic State Convention to be held in Minneapolis. The following is an excerpt from that article on the likelihood that John A. Johnson, a St. Peter newspaper publisher, would be the party's gubernatorial nominee, and possible candidates for the state supreme court:

> Sentiment is crystallizing in favor of the nomination of Johnson, with F. G. Winston, of Minneapolis, as his running mate, and with a non-partisan judiciary to complete the ticket. Talk of the possibility of John Lind accepting a. nomination for governor is said by Mr. Lind's closest friends to be outside the pale of the possible. [It] is said by Mr. Lind's closest friends not to emanate from responsible parties.
>
> With no slate and with no caucuses being held, it looks as though Judge Charles E. Otis, of St. Paul, and Congressman John Lind, of Minneapolis, Democrats, and Judge John A. Lovely, of Albert Lea, and Judge Calvin M. Brown, of Morris, Republicans, will be nominated by the Minneapolis convention.
>
> ### Strong Judicial Slate
>
> Judge Charles E. Otis, who is said to be the choice of Ramsey county Democrats for one of the places on the supreme bench, was for many years prior to 1902 an honored judge of the Ramsey county bench. At the close of the term of office he retired and did not seek re-election. He is said to be a sound lawyer and an ardent Democrat. Congressman Lind, who will probably be nominated for a place on the bench, could have had the nomination for governor for the asking. He declined and his declination was couched in terms that left no doubt as to his earnestness and the sincerity of his refusal to again become the candidate of his party for governor.
>
> Congressman Lind is regarded by lawyers as one of the ablest men in the Northwest and his nomination is counted to give strength to the

ticket. Judge Lovely, who was defeated for re-nomination by what many regarded at the time as the rankest kind of political chicanery in the Republican state convention, will probably be one of the nominees of the state convention.

He has a wide acquaintance throughout Southern Minnesota and his friends are said to be more than anxious to undo the work of the St. Paul convention by returning him to the bench. Judge Brown, of Morris, has been long on the bench and his record has been alike satisfactory to the members of all parties.

He will be indorsed, if present indications are not at fault, by the Minneapolis convention. Intermediate places on the ticket are in a number of instances undecided, but the convention is expected to exercise good judgment in the selection of men to fill the offices of treasurer, secretary of state, attorney general and members of the railroad and warehouse commission, of which there are two commissioners to be elected, this year.

B. On August 31, 1904, the St. Paul Globe published a long account of the Democratic State Convention held in St. Paul. This excerpt describes how the convention came to nominate Justice Brown:

Urges Non-Partisan Judiciary

Capt. Harries arraigned the Republican party of the state and nation for accumulating high taxes and the giving of unequal privileges to the few, and referring to the reference of Chairman Buck to the judiciary he took issue with him and continued:

We have a splendid galaxy of men from which to choose our candidates, but when we get through with our work today, whether we have selected a ticket entirely of Democrats or if we have taken the judiciary out of partisan politics, it is your duty to stand by and support it in its entirety. When we had a non-partisan bench every man was proud of it. Lawyers said the decisions were right because we had Mitchell and Gilfillan there. We haven't had such a bench since, because the Republican party injected partisan politics into the judiciary of this state.

. . .

The convention got into a parliamentary tangle over the motion of George P. Jones, of Jackson, to name a committee of one from each congressional district to report on a ticket for the judiciary.

F. F. Price, of Itasca, wanted to amend the motion to name the com-

mittee by judicial districts, and J. T. Byrnes, of Meeker, fought the whole proposal. He urged that the matter be left to the convention at large.

“It is not right or proper for judges to train up and down the state asking for nominations from a party not their own, and I am here to oppose it,” he said.

There were motions and counter motion but Orville Rinehart, of Hennepin, poured oil on the troubled waters by securing a postponement of the consideration of the judiciary nominations until after the noon recess.

. . .

Judiciary Committee Named

A committee of nine — one from each congressional district — was named on motion of Pierce Butler to report candidates for the judiciary, three whose terms of office shall commence Jan. 1, 1906, and one whose term shall begin Jan. 1, 1905. The motion was carried, with only a scattering opposition. Capt. Harries named the committee:

J. F. D. Meighen, Albert Lea. First district; T. J. Knox, Jackson, Second; Julius A. Coller, Shakopee, Third; Pierce Butler, St. Paul, Fourth; Orville Rinehart, Minneapolis, Fifth; J. D. Sullivan, St. Cloud, Sixth; L. A. Purse, Morris, Seventh; Fred L. Ryan, Duluth, Eighth; John L. Townley, Fergus Falls, Ninth.

. . .

At 6 o'clock the judiciary committee brought in its report, recommending that the convention nominate a non-partisan judiciary. The report was unanimous and was received with every mark of approval. The report recommended the nomination of Judge C. L. Brown, of Morris, and John A. Lovely, of Albert Lea (Republicans), to succeed themselves; the nomination of former District Judge Charles E. Otis, of Ramsey county, for the third place on the bench to become vacant in 1906, and for the nomination of John Lind, of Minneapolis, for the term beginning in January 1905. Pierce Butler said:

Lind and Otis Will Accept

Not unmindful of the work to perform, not unmindful of the dignity and character of men necessary to aspire to these offices, the committee recommends men who, from information, will mean from 10,000 to 15,000 votes for Gov. Johnson. Some question has been raised as to whether Judge Otis will accept the nomination. Judge Otis has said that he favors a nonpartisan judiciary, and if good nominations were made

he will accept a nomination. Three weeks ago at a conference in St. Paul of Democrats representing many counties John Lind said he would accept a nomination for the supreme bench if good nominations were made. Your committee feels that a good ticket has been named and that he will accept.

J. M. Hawthorne, of Ramsey county, said there were honest differences as to whether the judge elected for the term to succeed Judge Collins was to be elected for two years or six years. This being the case, he asked, why not give Mr. Lind the long term?

"That's not what is eating you, and you know it, Mr. Hawthorne," Butler retorted. "The delegation of which you are a member is unanimously in favor of giving Mr. Lind the place recommended for him on the ticket, and you know it."

Mr. Hawthorne made no response.

Byrnes, of Litchfield, moved to strike Lovely from the report. Senator Dart, also of Meeker seconded his motion. Ald. Bantz, of St. Paul, raised a point of order when the question had run the gamut of parliamentary attacks and the chair had been sustained the Byrnes amendment was put and lost overwhelmingly. The original report of the committee was carried with a rush, and the nominations were then put through without objection.

Chapter 2.
Justice Brown accepts the nominations of both parties.

A. On August 5, the *St. Paul Globe* reports that the Republican Party filed its certificate of candidates for state-wide offices with Secretary of State Peter Hanson:

> Republican State Candidates File—
> Calvin M. Brown, Charles B. Elliott, Minneapolis, and Charles L. Lewis, Duluth, candidates for the supreme court, and Ira B. Mills, Moorhead, candidate for railroad and warehouse commissioner, yesterday filed with the secretary of state certificates of Republican nomination.

B. Brown's acceptance of the Democratic nomination is reported in the *St. Paul Globe* on September 25:

IN THE FIELD OF POLITICS

LOVELY AND BROWN ACCEPT NOMINATIONS

Albert Lea Justice, in Letter of Acceptance, Criticises the Methods of the Delegates at the Republican State Convention—Judge Brown indorses Non-Partisan Judiciary Plank

Judge John A. Lovely and Judge Calvin M. Brown, Republicans, nominated by the state Democratic convention at Minneapolis for associate justices of the supreme court, yesterday mailed their acceptance of nomination to Frank A. Day, chairman of the Democratic state central committee. The letters of acceptance have been expected for some days.

The letter from Judge Lovely to the committee is an interesting document, for in it the Albert Lea jurist, a life-long Republican, relates the manner in which the count of delegates in the Republican state convention was juggled after the roll call had been made, but before the result was announced, and he was beaten out of the nomination. Judge Lovely declares that he was not in the convention which nominated Judge Elliott in his place, but he, by inference, accuses Judge Elliott of soliciting support. [“]I do not believe that the people of this state require such humiliation of their judicial servants," he says in his letter to the executive committee. He regards the unanimous and unsolicited nomination by the Democratic convention as an indorsement of his course on the bench, and embraces the nomination as an opportunity to vindicate his conduct on the bench. Judge Lovely's letter is as follows:

Judge Lovely's Letter

“I have the honor to acknowledge your notification of my nomination for associate justice of the supreme court by the convention of your party held at Minneapolis, Aug. 30.

“When the previous Republican convention met, and down to the time when my name was there presented as a candidate for indorsement, it was generally conceded that it would be tendered me. No one disputed this fact; it was taken for granted.

“By reason of the seating of the contesting Hennepin delegation, Judge Elliott became a candidate and received the support of 113 votes from his county. Through arrangements with other delegations opposition was arrayed against my nomination.

"I had received a majority of votes over Judge Elliott, when, through trades of less than 30 votes made after the roll call was ended and the balloting closed on the judicial nominations, I was defeated out of my rights.

"I did not attend the convention. During the time it was in progress the supreme court was in session and my duties required my presence there. I did not believe then, and I have not changed my opinion from subsequent results, that a judge who performs his duties is required to protect his character and honor by personally soliciting support. I do not believe the people of this state require such humiliation of their judicial servants.

"Your unanimous and unsolicited indorsement I regard as an approval of my course on the bench, and I appreciate the opportunity it affords me to vindicate my conduct as well as the duty it imposes upon me to fulfill the implied obligations I owe by reason of the position I hold.

"In the proper way in which nominations are made, I received a substantial majority in the Republican convention, but by the jugglery of votes, through which over 700 members of the convention were by the change of less than thirty, deprived of their right to express and have their wishes acted upon. I have been denied a certificate to enable me to present my claims to the voters of the state. This your nomination accords.

"Your resolutions favor a non-partisan judiciary, and in furtherance of your professions you have named two able men of the highest character and integrity, Judge Otis and Hon. O. M. Hall, members of your own party, and Justice Brown and myself, who, as is well known, are of the Republican faith, as candidates for the supreme court.

"Honest differences in political convictions are aside from the interpretation of the law or the scope of judicial action, for the right to justice belongs to all men of every faith, creed or color, and its claimants may demand and expect the protection of the just judge uninfluenced or controlled by political partisanship.

"The high character as citizens and sterling qualifications as lawyers, possessed by the men you have associated with me as candidates for the highest court of the state, must merit unqualified approval. It would be a high honor to aid these eminent men in the administration of justice, and if your course is approved by the suffrages of the people, the character of the court of which I am still a member, will be maintained.

"Believing that the people of this commonwealth appreciate the necessities of an independent judiciary and regard it as the best protection of liberty and right, it is my duty to accept your nomination."

Judge Brown Accepts

In accepting the nomination of the Democratic convention, Judge Brown calls attention to the plank in the Democratic platform calling for legislation which will result in a non-partisan judiciary, and gives it his indorsement. He accepts the Democratic nomination, though he has already filed as a Republican. Judge Brown is brief but clear. He says in his letter to Chairman Day:

"I have your communication informing me of my nomination by the Democratic state convention for associate justice of the supreme court, and calling attention to that part of your platform which calls for appropriate legislation on the subject of a non-partisan judiciary.

"I greatly appreciate the high compliment paid me by the nomination and accept it, though I have already filed as a Republican candidate.

"Legislation looking to the removal of our judiciary from partisan politics would merit the hearty approval of all the people."

Chapter 3.
The Democrats prepare a petition for a writ of mandamus.

A. On September 30, the *St. Paul Globe* reports that Frank Day, the Chairman of the Democratic State Central Committee, will file a mandamus action to compel the Secretary of State to list Justice Brown on the ballot as its nominee.

PREPARING TO MANDAMUS HANSON

Democratic Nomination
Justice Calvin Brown Presented

Preliminary to a test of the law prohibiting the designation of candidates on the state ballot as the nominee of more than one political party, Chairman Frank A. Day, of the Democratic state central committee, late yesterday afternoon presented the nomination certificate of Calvin M. Brown, of Morris, as the nominee for associate justice of the supreme court to the secretary of state.

The certificate was accepted by George F. Brown, chief clerk to Secretary Hanson, but it will probably await the return to the city of Secretary Hanson before a formal decision will be announced by the secretary, as to what he will do in the premises.

Chairman Day offered no filing fee, on the theory that Judge Brown had already paid a filing fee of $50 as the nominee of the Republican state convention, and that he could not be assessed twice.

In the event that the certificate is refused and Secretary Hanson declines to put Judge Brown's name on the ballot as the nominee of the Democratic as well as the Republican party, J. W. Arctander, of Minneapolis, who has been retained as counsel for the purpose by the Democratic committee, will institute proceedings before the supreme court in the form of an order to show cause, directed to Secretary Hanson, why he refuses to obey, the behest of the Democratic committee.

The certificate presented yesterday is attested by Capt. W. H. Harries, of Caledonia, chairman, and H. D. Tolmie, of Spring Valley, secretary, the Democratic state convention held at Minneapolis August 30.

B. On October 1, the *St. Paul Globe* reports the allegations of the Democrats' petition for a writ of mandamus:

SECRETARY OF STATE MUST SHOW CAUSE

Has to Explain Refusal to Place Justice Brown's Name on Ballot as Democrat

Frank A. Day, chairman of the Democratic state central committee, through his attorneys, J. W. Arctander and Henry C. Belden, of Minneapolis, yesterday sued out a writ of mandamus directed to Secretary of State Peter E. Hanson, by which he is summoned to show cause before the state supreme court, Oct. 5, why he refuses to place the name of Calvin L. Brown, of Morris, on the state ballot with the designation "Republican - Democrat" after his name.

The case will be presented on the part of the state by Attorney General W. J. Donahower, who has intimated that the question of jurisdiction of the court will not be raised.

Chief Justice Charles M. Start, of the supreme court, is the only member of that court who is not rendered ineligible to sit in the case, and Gov. Van Sant yesterday designated three district court judges to sit with him—Judge H. R. Brill, St. Paul; Judge F. C. Brooks, Minneapolis, and Judge P. E. Brown, Luverne.

Grounds for the Writ

The application for the writ recites the facts of Judge Brown's nomination by both conventions; that his nomination by the Democratic party was because of his ability and fairness, and in appreciation of the desirability of taking steps which might eventually lead to a nonpartisan nomination of the judiciary of the state, and especially of the members of the supreme court; that his nomination was made that his election might be unanimous and the office removed from the strife and contest of politics; that he has filed, as a Republican candidate; that, while accepting the Democratic filing, the secretary of state has refused to comply with the request that Judge Brown's name be followed on the official ballot by the word “Democrat.”

Contends Law Is Invalid

The petition declares that the law under which the secretary of state has acted is unconstitutional, in that it does not comply with the article of the constitution that no act embrace more than one subject; that it contravenes the provisions and guaranties of the bill of rights of the Minnesota constitution, and is against public policy; that the act does not contemplate preventing the election of a nonpartisan judiciary, or the indorsement by the two great parties of the state of the same candidate; and that it should not be extended to include something for which it was not intended by the legislature.

The petition recites that Judge Brown is anxious to go on the ballot with the nomination of both parties, and that unless he is given the official designations many voters will be misled and will not vote for him.

Chapter 4.
The Governor appoints three district court judges to serve on the Supreme Court.

A. The Minneapolis Journal reports the Governors' appointments on October 1:

> Next Wednesday the supreme court bench will have an unusual look. The mandamus action of the democratic state central committee against Secretary of State Hanson will be heard before a court consisting of Chief Justice Start, Justice W. B. Douglas, Judge Brill of St. Paul, Judge F. C. Brooks of Minneapolis, and Judge P. E. Brown of Luverne.
>
> The last three judges have been designated by Governor Van Sant to take part in the hearing of this case. Justice C. L. Brown, who is the bone of contention in the case, is barred from taking part, and so are Justices Lewis and Lovely, one being a candidate on the republican ticket, and the other on the democratic.
>
> The interest of the democratic committee in the case is very evident. Their nominees for the terms beginning in 1906, are Brown, Lovely and Otis. The republican nominees are Brown, Lewis and Elliott. Brown has already filed as a republican, and unless he is also recognized on the ballot as a democratic nominee, the democrats will have only two candidates. Democratic voters would then be likely to vote for Lewis or Elliott rather than Brown, and this would injure the chances of Lovely and Otis.
>
> What the democrats want is a unanimous vote of both parties for Brown, leaving the other two places to be fought out by the two republicans and two democrat nominees. The republicans nominated Brown first, and they want him for their "very own."

B. On October 4, the *St. Paul Globe* reports the Governor's selection of District Court Judge Cant to serve on the Special Supreme Court:

CANT IS SELECTED

Governor Names Jurist as
Special Judge

> Gov. Van Sant yesterday appointed Judge William A. Cant, of the St. Louis county district court, as one of the three district court judges to sit in the hearing on the mandamus proceeding wherein Secretary of State P. E. Hanson is ordered to show cause why he should not place the name of Judge Calvin L. Brown on the official ballot with the designation "Democrat," as well as "Republican," after his name. Judge Cant was named to succeed Judge P. E. Brown, of Luverne, who yesterday notified

the governor of his inability to serve. Judge Cant is a Republican in politics. Judge Brill, of St. Paul, is also a Republican, while Judge Brooks is a Democrat. These, with Chief Justice Start, also a Republican, constitute the bench which will pass on the merits of the question proposed by the Democratic state organization that the statutes have no constitutional authority for limiting to one party the partisan designation of candidates on the ticket.

C. *The Princeton Union* reports the appointments on October 6, 1904:

The writ of mandamus directed to the secretary of State to show cause before the State supreme court why the name of Calvin L. Brown should not appear on the State ballot with the words "Republican-Democrat" after the name, made it incumbent on the governor to appoint three district court judges to sit in the case with Chief Justice Start and Justice Douglas. The governor appointed Judge H. R. Brill of St. Paul, William A. Cant, Duluth, and F. C. Brooks of Minneapolis to act. Justice Brown was nominated by both the Republican and Democratic parties at the State conventions, but the secretary of State holds that under the provisions of the election law he is not authorized to make a designation for both of the political parties for the same candidate, while the Democratic State central committee contend that the secretary of State should make the designation for both parties.

Of the four candidates who have been nominated for justices of the supreme court three of them affect Justices Brown, Lovely and Lewis who are consequently disqualified from sitting in the case by the provisions of an amendment to the State constitution adopted in 1876 which provides that when all or a majority of the judges of the supreme court shall, from any cause, be disqualified from sitting in any case in said court, the governor shall assign judges of the district court to sit in place of the supreme court judges. If the governor should in any way be interested in the result of such case the lieutenant governor is authorized to, appoint the judges. The present case is one of those contingencies that arises sometimes very unexpectedly in the affairs of State and national government, and shows clearly that the author of the constitutional' amendment and the legislature that submitted it to the people anticipated just such contingencies. It is the first time that district court judges were, ever called upon to sit as justices of the supreme court.

Chapter 5.
The Supreme Court hears oral argument.

A. From the *St. Paul Globe* on October 5:

WILL HEAR IT TODAY

Mandamus of Secretary of State
Before Supreme Court

The mandamus proceeding by which the Democratic state central committee is making the effort to compel the secretary of state to put the name of Judge Calvin L. Brown on the official ballot with the designation of "Democrat" as well as "Republican" after his name, is due to come before the supreme court at 9:30 this morning for argument.

Henry C. Belden and J. W. Arctander of Minneapolis, appear for Frank A. Day, the petitioner, chairman of the Democratic state central committee, and Attorney General W. J. Donahower yesterday announced that former Attorney General H. W. Childs, of St. Paul, would represent the state at the argument.

It had been understood that the attorney general would present the state's side of the case and the announcement that Gen. Childs would appear was taken to mean that the Republican state central committee had suggested him as additional counsel for the state and that he had been given charge of the case by the attorney general.

Chief Justice C. M. Start and District Court Judges W. A. Cant, Duluth; H. R. Brill, St. Paul, and F. C Brooks, Minneapolis, will sit in the case.

B. From the evening *Minneapolis Journal* on October 5:

BROWN CASE ARGUED

Constitutionality of Anti-Fusion Law Attacked.

A respectable audience of attorneys, including Judge L. W. Collins, heard the proceedings in the supreme court today on the mandamus action brought by Frank A. Day, chairman of the democratic state committee, to compel the secretary of state to place Judge Calvin L. Brown on the ballot as a democratic candidate. The court was reinforced by three district judges, Brooks of Minneapolis, Brill of St. Paul and Cant of Duluth, who sat in the places of Justices Brown, Lewis and Lovely. Judge H. C. Belden of Minneapolis made the opening argument for the petitioner, followed by H. W. Childs for the secretary of state.

His talk was cut short by the noon recess, and resumed this afternoon.

John W. Arctander made the closing argument for the petition. The arguments hinge on the validity of the anti-fusion law of 1903, which prohibits candidates from going on the ballot as representatives of more than one party. Judge Belden contended that this was unconstitutional, being an abridgement of the right of citizens to vote for whom they please. He presented another alternative, however.

The 1903 law is a re-enactment of a similar law passed in 1901. A few days before the 1903 bill passed the legislature adopted another election law, which expressly provided the means whereby candidates should go on the ballot as representing more than one party. Judge Belden cited decisions to show that this act, intervening between the other two, had not been repealed and was still effective.

C. On October 6, the *Globe* recounts the oral argument in detail:

ARGUE DAY PETITION IN SUPREME COURT

Attorneys Seek Construction of Statute Touching Fusion on Judicial Ticket

Attorneys argued before the court nearly all Wednesday on the petition of Frank A. Day, chairman of the Democratic state committee, by which it is sought to secure the placing of the name of Calvin L. Brown, of Morris, on the official state ballot with the designation "Democrat" after his name as well as the word “Republican.”

Chief Justice C. M. Start and the three judges of the district court designated by the governor to sit in the case spent two hours in consultation, considering the questions of law involved in the issue presented, but no decision was announced at the conclusion of the conference.

The secretary of state had officially notified the court that a decision is desired not later than Oct. 8, and it is expected that a formal decision will be filed within a day or two.

There is no intimation of the forthcoming decision, but it is understood that the judges sitting in the case will communicate their views to Chief Justice Start and that the result of the majority view will be announced by the chief justice in time to guide the secretary of state in preparing the official ballot. Since there were four judges hearing the arguments,

three affirmative opinions are necessary to decide the questions raised by the petition presented to the court by the Democratic state central committee.

Brings Out New Point

The arguments brought out an entirely new point not raised in the original petition, and this is that the act which the Democratic state central committee declares unconstitutional has been repealed by subsequent legislation.

The provision of the election law under which the secretary of state refused to place the name of Judge Brown on the ballot with the designation "Democrat" after his name as well as the word "Republican" is squarely attacked by the Democrats as unconstitutional.

During the arguments yesterday Chief Justice Start, by a question addressed to J. W. Arctander, of counsel for the petitioner, opened an entirely new line of discussion, and this was to question the fact whether or not the law complained of has not been repealed.

Chapter 174, General Laws of 1903, amendatory of chapter 4, laws of 1893, as amended by chapter 36 of the laws of 1895, provides that when a candidate shall have been nominated for the same office by more than one political party, the name of the party by whom he was first nominated shall be given the first place following his name. It is contended that this act, by implication, repeals chapter 312, General Laws of 1903 (sic), which was the original act designed to protect the names of political parties. Chapter 232, General Laws of 1903, was approved April 14 of that year, four days later than the law which is now brought into question as repealing the whole subject, but it is contended that the law of 1901, having been repealed by implication, could not be revived by the enactment of the section of the primary election law which was amendatory thereof. This view is supported by supreme court decisions in the past, which have uniformly held that a law which has been repealed cannot be revived by another act amending the law itself.

Argue Unconstitutionally

John W. Arctander and Henry C. Belden, Minneapolis attorneys, appeared in support of the petition. Both attacked the anti-fusion legislation on the Minnesota statute books as unconstitutional, and Judge Belden severely condemned any legislative restriction which would prevent the judiciary from being placed on a non-partisan basis. He cited judicial partisan nominations in the recent primaries in Hennepin county as evidence that not always the best men are nominated by the great political parties for the judgeships.

H. W. Childs, former attorney general of Minnesota, appeared for the state, and argued against the granting of the Day petition. Chief Justice Start had caused a copy of the petition, when it was originally filed with the supreme court, to be served on the Republican state central committee, and it was understood that Gen. Childs in effect represented the Republican state organization before the supreme court.

He argued that political organizations are necessary to the existence of the republic itself, and the parties had the right to make reasonable restrictions as to where and how names were to appear on the official ballot. The great parties are opposed to each other in principle, he said, and could not well nominate the same candidates. An act which would prevent this and preserve party lines is not unconstitutional, and its provisions are not a violation of the bill of rights. No disfranchisement of the electors is possible, for there are blank spaces on the ballot with the opportunity for the elector to write in the name of his choice for office if it does not appear on the ballot, while the elector has the opportunity to exercise his choice in voting for either a Democrat or a Republican. He scouted the suggestion that subsequent legislation had destroyed the effect of the act complained of and declared that the title to the act was sufficiently comprehensive in character.

Chapter 6.
The Supreme Court rules.

A. From the front page of *Minneapolis Journal* on October 7:

JUSTICE BROWN'S NAME
GOES ON BOTH BALLOTS

Justice Calvin L. Brown will go on the state ballot as the candidate of both the republican and democratic parties for re-election as supreme court justice. The supreme court today granted the petition of Frank A. Day, chairman of the democratic state committee, and issued a writ of mandamus directing Secretary of State Hanson to place the words "republican democrat" after Justice Brown's name. Nothing but the order was filed today. The memorandum giving reasons for the decision will be filed.

B. The *St. Paul Globe*, a Democratic paper, carries an editorial and two articles on October 8. The editorial:

THE SUPREME COURT AND THE
BALLOT

Justice Calvin L. Brown will go on the state ballot as Republican-Democrat and the supreme court has established a rule of law which puts out of commission an unwise and vicious statute the object of which was to check the expression of the popular will. No other than the decision arrived at could be contemplated by any person not wholly under the domination of partisan influence.

The order of the supreme court will go far to bring about the removal of the judiciary from the domain of partisan politics. Under the statute as interpreted by the Republican secretary of state and by the advice of the attorney general, a bar was interposed to the establishment of a precedent the object of which was to permit the nomination of supreme court judges by both parties. The Democrats desired to show effectually that they were sincere in their desire to obliterate party lines by the nomination of an able and honest Republican for a place on the supreme bench. The Republicans had already placed him in nomination and Justice Brown had indicated his acceptance of the second nomination by the Democrats. The condition had arisen which put it squarely up to the state officials to say whether they would favor or oppose the movement for a non-partisan judiciary and they elected to stand by the reading of the statute. It may be that they acted according to their lights, but if their party had not been opposed to the idea of a non-partisan bench it is probable that the resort to the court would not have been necessary.

The Democracy of Minnesota is going to elect state officers this year, but if the organization had done nothing more than has been done to elevate the bench and remove the judicial nominations from the sphere of partisan politics it would have served the state well and laid the foundation for future success as the party of high principles.

C. This is the first article in the Globe on the October 8:

BROWN'S NAME GOES
ON BOTH BALLOTS

Supreme Court Sustains the
Contention of Democratic
State Committee

The supreme court has sustained the contention of the Democratic state committee that the secretary of state had no right to refuse to place on the official ballot the name of Judge Calvin L. Brown, of Morris, with the words “Republican-Democrat” after his name.

Chief Justice Start yesterday made a formal order in which Peter E. Hanson, secretary of state, is directed to place the name of Judge Brown on the ballots for the general election so as to indicate the names of the two political parties which have severally nominated him for the judgeship.

Secretary of State Hanson said yesterday that he would cheerfully comply with the request; that his refusal had been on the advice of the attorney general, and that the court's interpretation of the law was sufficient for him.

Formal Opinion on Monday

The order will be followed Monday by the formal opinion of the court setting forth the reasons which influenced the court in reaching the decision. It is understood that Chief Justice Start will write the opinion, and that there will be no dissenting opinion. It is not known whether the court makes the order on the ground that the section of the election law prohibiting dual party nominations to appear on the ballot is unconstitutional, or on the theory that the prohibitory section has been repealed by subsequent legislation. The opinion is awaited with considerable interest by attorneys, who have, independent of party, taken a deep interest in the determination of the question raised by the petition filed a week ago by Frank A. Day, chairman of the Democratic state central committee.

The news of the formal order compelling the secretary of state to place the name of Judge Brown on the official ballots with the dual designation of the parties after his name was received quietly at the Democratic state headquarters yesterday.

Decision Was Expected

"It is what we had reason to expect," said Chairman Day. "Our committee was advised by some of the best lawyers in both St. Paul and Minneapolis that we were clearly within our rights in asking for the writ of mandamus directed to the secretary of state to compel him to put the name of Judge Brown on the ticket with the words indicating that he is the nominee of the Democrats as well as the Republican party, following his name. Justice to Judge Brown demanded that the action be brought, for when a man is a candidate he naturally likes to receive the full vote of the parties nominating him. It will mean a good many thousand votes to

Judge Brown, and while he was in no danger of defeat he is entitled to have the voters know by the appearance of the official ballot that he is the nominee of both parties.

Vindicates a Principle

"Our committee has, in this decision, vindicated a principle and that is the principle of a non-partisan judiciary. Our ticket is admirable in every way, but in having the seal of the highest state court's approval on the principle of a non-partisan judiciary we naturally expect that the result in November will justify our claim that not only has a principle been vindicated, but that the non-partisan judiciary idea will be indorsed by thousands of independent voters."

Republican leaders refuse to discuss the effect of the decision. The decision will have the effect of causing the Minnesota statute revision commission to revise its election law compilation. The commission, which had completed the revision of the election statutes and properly classified them, will necessarily be guided by the supreme court in eliminating the "anti-fusion" election legislation now on the Minnesota statute books. No changes will be made by the commission until the formal opinion of the supreme court is filed in the Brown case.

D. This is the second article in the *Globe* on October 8:

VOTERS WOULD SAVE
THE SUPREME BENCH

Republicans Line Up With
Democrats in Demanding
Nonpartisan Judiciary

The movement in the direction of a non-partisan judiciary has assumed proportions that, it is believed, will result in the election of Judge John A. Lovely, Judge C. E. Otis and O. M. Hall, in addition to the election of Judge C. L. Brown, who has been nominated by both the Republican and Democratic conventions.

H. H. Dunn, a prominent lawyer of Albert Lear and a former state senator from Martin county; John G. Skinner, nominated by the Republicans for county attorney of Freeborn county, who has no opposition for election, and C. W. Foote, of Minneapolis, a leading Republican of Hennepin county and former resident of St. James, held a conference in St. Paul last night, at which the situation was discussed. All though Republicans, are enthusiastic friends of Judge John A. Lovely,

whose defeat when he had really been nominated by the Republican state convention, aroused such a storm of indignation all over the state. They discussed the situation as regards Judge Lovely and his associates on the state ticket, and agreed that indications point very strongly to the election of the entire non-partisan ticket.

Defeat of Lovely a Crime

"The defeat of Judge Lovely was a crime against the Republican party," Senator Dunn said. "He was fairly nominated when a lot of juggling Minneapolis ward politicians intervened and counted him out. The southern part of the state, irrespective of party affiliation, is up in arms over the treatment accorded Judge Lovely in the convention, and he will get the solid vote of the counties where he is best known. But aside from the methods employed to bring about his defeat, the idea of a non-partisan judiciary has taken deep root in Minnesota and, Judge Lovely and the men nominated with him at Minneapolis bid fair to sweep the state in November. The people do not want the judiciary tainted by partisan politics, and the only way to keep it undefiled is by keeping it out of politics."

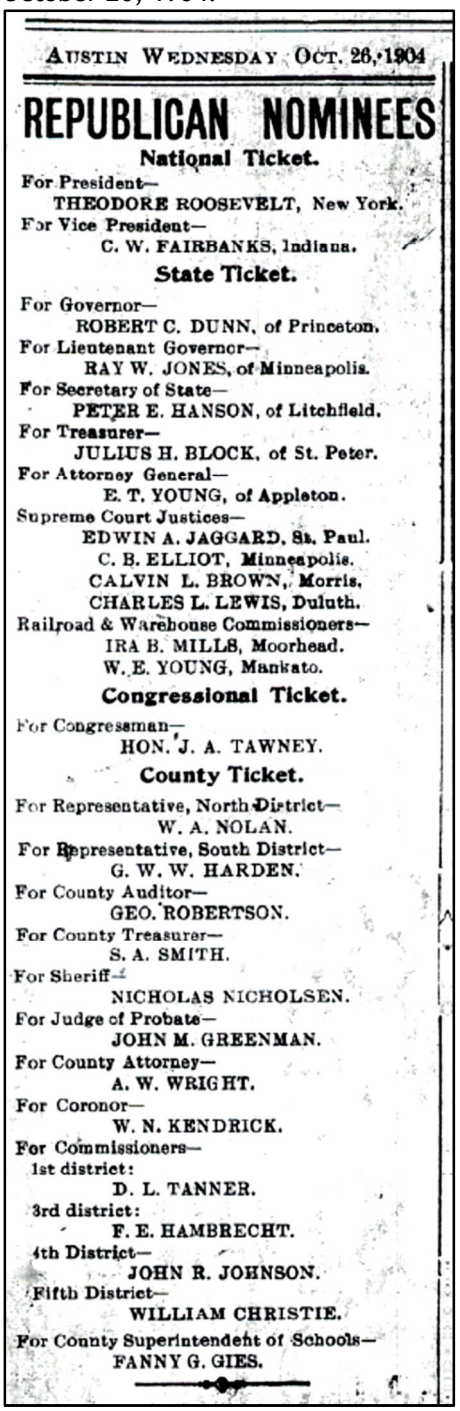
Want Non-Partisan Bench

A large number of Republican weekly papers, supporting the Republican state ticket, are out in the open in their advocacy of a non-partisan supreme bench, and the sentiment in that direction is growing steadily. From the point of legal ability, the men nominated at the Minneapolis convention compare favorably with the nominees of the Republican state convention, and indications are that they will be elected Nov. 8 and the judiciary effectively removed from partisan politics in Minnesota.

Chapter 7.

Both parties list Justice Brown as their candidate on their tickets published in newspaper throughout the state.

Mower County Transcript (Austin)
October 26, 1904.



AUSTIN WEDNESDAY OCT. 26, 1904

REPUBLICAN NOMINEES

National Ticket.

For President—
THEODORE ROOSEVELT, New York.
For Vice President—
C. W. FAIRBANKS, Indiana.

State Ticket.

For Governor—
ROBERT C. DUNN, of Princeton.
For Lieutenant Governor—
RAY W. JONES, of Minneapolis.
For Secretary of State—
PETER E. HANSON, of Litchfield.
For Treasurer—
JULIUS H. BLOCK, of St. Peter.
For Attorney General—
E. T. YOUNG, of Appleton.
Supreme Court Justices—
EDWIN A. JAGGARD, St. Paul.
C. B. ELLIOT, Minneapolis.
CALVIN L. BROWN, Morris.
CHARLES L. LEWIS, Duluth.
Railroad & Warehouse Commissioners—
IRA B. MILLS, Moorhead.
W. E. YOUNG, Mankato.

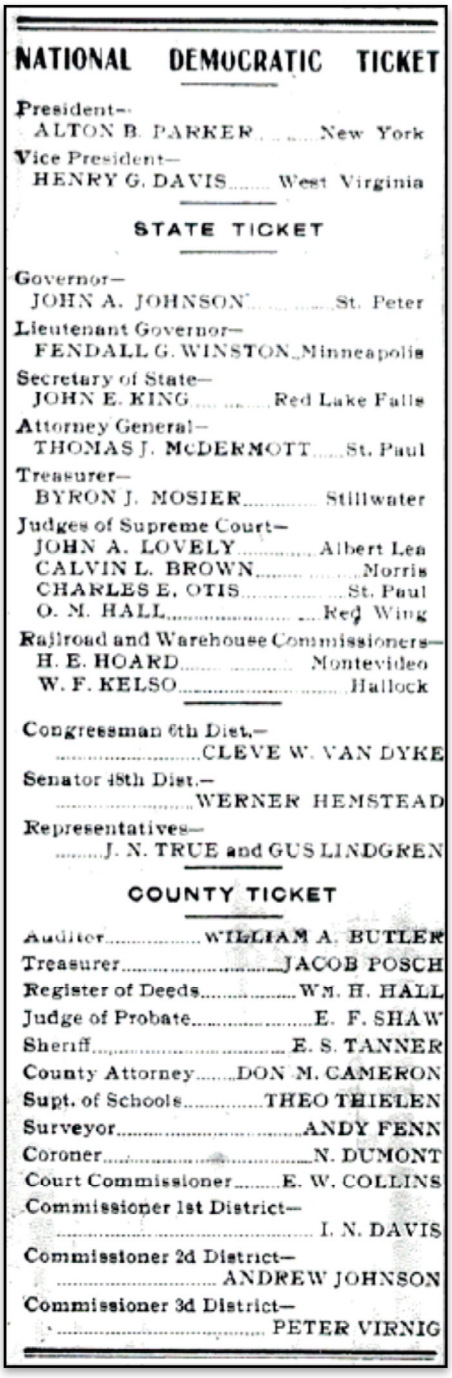
Congressional Ticket.

For Congressman—
HON. J. A. TAWNEY.

County Ticket.

For Representative, North District—
W. A. NOLAN.
For Representative, South District—
G. W. W. HARDEN.
For County Auditor—
GEO. ROBERTSON.
For County Treasurer—
S. A. SMITH.
For Sheriff—
NICHOLAS NICHOLSEN.
For Judge of Probate—
JOHN M. GREENMAN.
For County Attorney—
A. W. WRIGHT.
For Coronor—
W. N. KENDRICK.
For Commissioners—
1st district:
D. L. TANNER.
3rd district:
F. E. HAMBRECHT.
4th District—
JOHN R. JOHNSON.
Fifth District—
WILLIAM CHRISTIE.
For County Superintendent of Schools—
FANNY G. GIES.

Little Falls Herald (Morrison County)
October 14, 1904.



NATIONAL DEMOCRATIC TICKET

President—
ALTON B. PARKER ..... New York
Vice President—
HENRY G. DAVIS ..... West Virginia

STATE TICKET

Governor—
JOHN A. JOHNSON ..... St. Peter
Lieutenant Governor—
FENDALL G. WINSTON, Minneapolis
Secretary of State—
JOHN E. KING ..... Red Lake Falls
Attorney General—
THOMAS J. McDERMOTT ..... St. Paul
Treasurer—
BYRON J. MOSIER ..... Stillwater
Judges of Supreme Court—
JOHN A. LOVELY ..... Albert Lea
CALVIN L. BROWN ..... Morris
CHARLES E. OTIS ..... St. Paul
O. M. HALL ..... Red Wing
Railroad and Warehouse Commissioners—
H. E. HOARD ..... Montevideo
W. F. KELSO ..... Hallock

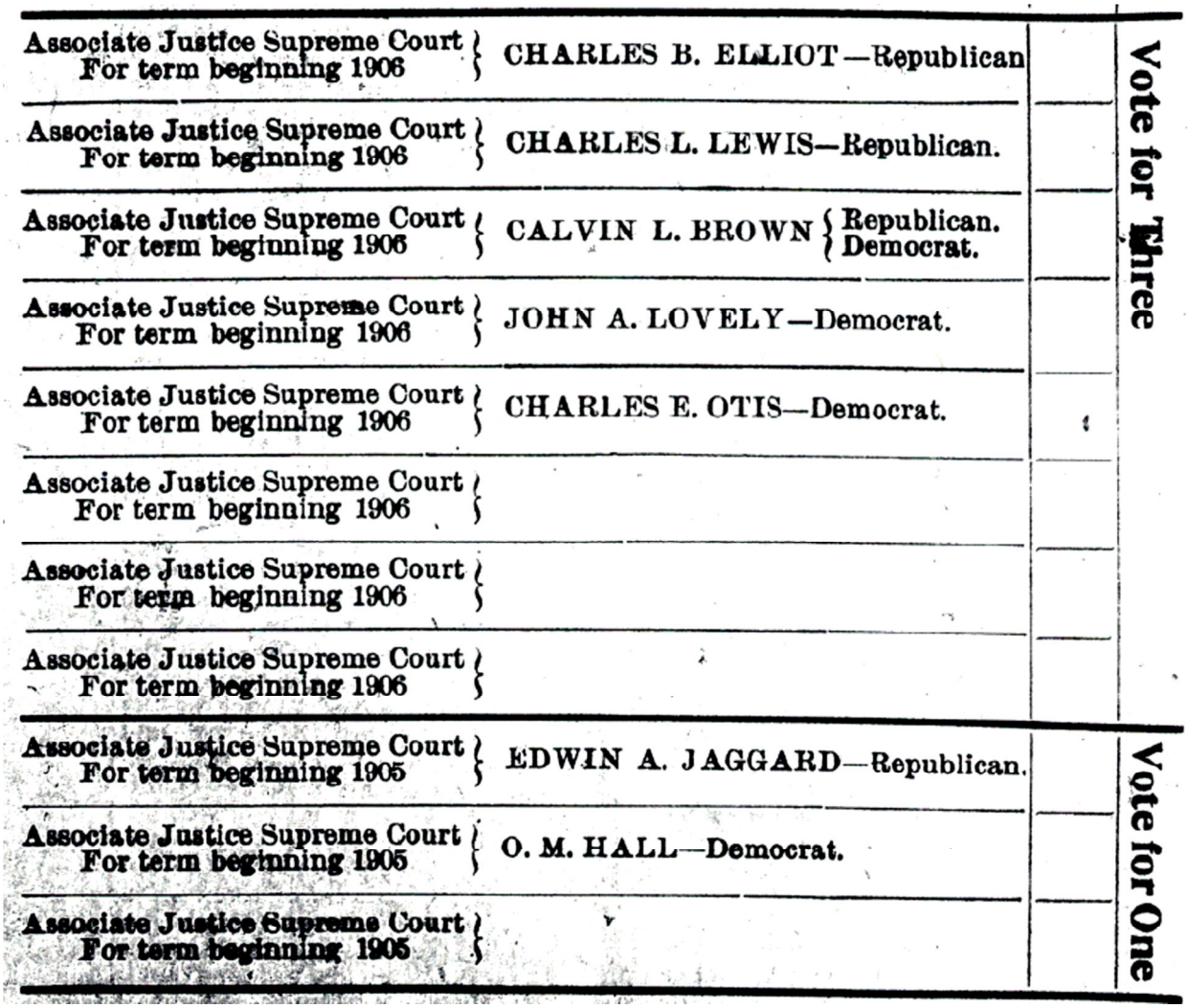
Congressman 6th Dist.—
..... CLEVE W. VAN DYKE
Senator 48th Dist.—
..... WERNER HEMSTEAD
Representatives—
..... J. N. TRUE and GUS LINDGREN

COUNTY TICKET

Auditor ..... WILLIAM A. BUTLER
Treasurer ..... JACOB POSCH
Register of Deeds ..... WM. H. HALL
Judge of Probate ..... E. F. SHAW
Sheriff ..... E. S. TANNER
County Attorney ..... DON M. CAMERON
Supt. of Schools ..... THEO THIELEN
Surveyor ..... ANDY FENN
Coroner ..... N. DUMONT
Court Commissioner ..... E. W. COLLINS
Commissioner 1st District—
..... I. N. DAVIS
Commissioner 2d District—
..... ANDREW JOHNSON
Commissioner 3d District—
..... PETER VIRNIG

Chapter 8

Excerpt from the sample ballot for the Supreme Court published in newspapers throughout the state before the election on November 8, 1904.



Associate Justice Supreme Court For term beginning 1906	CHARLES B. ELLIOT—Republican		Vote for Three
Associate Justice Supreme Court For term beginning 1906	CHARLES L. LEWIS—Republican.		
Associate Justice Supreme Court For term beginning 1906	CALVIN L. BROWN { Republican. Democrat.		
Associate Justice Supreme Court For term beginning 1906	JOHN A. LOVELY—Democrat.		
Associate Justice Supreme Court For term beginning 1906	CHARLES E. OTIS—Democrat.		
Associate Justice Supreme Court For term beginning 1906			
Associate Justice Supreme Court For term beginning 1906			
Associate Justice Supreme Court For term beginning 1906			
Associate Justice Supreme Court For term beginning 1905	EDWIN A. JAGGARD—Republican.		Vote for One
Associate Justice Supreme Court For term beginning 1905	O. M. HALL—Democrat.		
Associate Justice Supreme Court For term beginning 1905			

Chapter 9.

A divided Supreme Court releases its final opinions,
December 30, 1904.

A. From the *Minneapolis Journal* on December 30:

VIOLATED THE
CONSTITUTION

WHY SECRETARY DAY'S PETITION
WAS GRANTED.

Judge Brill Signs Supreme Court Memorandum
Explaining Decision Directing Labeling of Judge Brown
as a Democrat on Election Ballot—
Other Decisions Handed Down Today.

The supreme court today filed its formal decision in the petition of Frank A. Day, as chairman of the democratic state central committee, for an order directing the secretary of state to place the word “democrat" after the name of Justice Calvin L. Brown on the official state ballot. The order granting this petition was filed before election and the ballot was so printed. The reasons for the order are stated in the memorandum filed today.

The court holds in a decision signed by Judge Brill of St Paul, who was one of the three judges of the district court called in to decide the case, that the statute prohibiting a candidate from receiving the nomination of more than one party is void.

It violates the provisions of section 27 of article 4 of the state constitution, which says: "No law shall embrace more than one subject, which shall be expressed in its title. The statute in question, chapter 312 of the laws of 1901, is entitled an act relating to the names of political parties on the official ballot." This does not cover the provisions of the statute which follow.

Epilogue

The anti-fusion law was quickly reinstated by the next legislature. As it happened, in 1901, the legislature authorized the Supreme Court to appoint a Commission to revise and recodify the state statutes.[32] It was completing its work in 1904 when the *Day* opinions were released; it promptly drafted and inserted an anti-fusion law in the Revised Code that passed the legislature on April 13, 1905. The new anti-fusion law, Stat. c. 6, §176, at 31 (1905), provided:

> Section 176. Party name—Use of on ballot—A political party which has adopted a party name, and whose state candidates, or any of them, polled at the preceding general election at least one per cent, of the vote cast, shall be entitled to the exclusive use of such name for the designation of its candidate on the official ballot, and no candidate of any other party shall be entitled to have printed thereon as a party designation any part of such name. Nor shall any person be named on the official, ballot as the candidate of more than one party, or of any party other than that whose certificate of his nomination was first properly filed.

[32] This is an excerpt from the Preface to the Revised Laws of 1905, in which the mission of "Revision Commission" is described:

> On March 24, 1904, the court appointed Mr. M. R. Tyler a member of the commission and designated Mr. Fish as chairman. The commission was unable to report within the prescribed time. By Laws 1903 c. 157 the time for filing the report was extended to December 1, 1904, and the commission was required to include in the revision all the general laws relating to taxation and all the general laws of the sessions of 1902 and 1903. The report of the commission was presented to the legislature January 16, 1905, in the form of a single legislative bill, without annotations. It passed both houses of the legislature, with amendments, April 13, 1905, and was approved by the governor April 18, 1905. While the commission was authorized to "codify" the general laws no attempt was made to write a new and complete code of laws. The following laws are not a new body of laws but a rearrangement and restatement of the previously existing general statutory laws of the state, with such amendments as the commission and legislature deemed advisable.

The package of Revised Laws passed the House by a vote of yeas 111, nays 2. Journal of the House of Representatives, April 13, 1905, at 1348. The vote in the Senate was yeas 54, nays 3. Journal of the Senate, April 13, 1905, at 1040.

An anti-fusion law has been part of the state election code ever since. It has been revised several times but its prohibition against the double listing of party endorsements for candidates remains intact.

In 1994, its constitutionality was again challenged when the Twin Cities New Party endorsed a candidate for the state legislature who had already been nominated by the Democratic-Farmer-Labor Party. After the Ramsey County election clerk refused to list both endorsements on the ballot, the New Party sued, alleging its rights under the First and Fourteenth Amendments to the Constitution were breached.[33] The case eventually reached the U. S. Supreme Court, which upheld the anti-fusion law in 1997. Chief Justice Rehnquist wrote for the majority. For the history of anti-fusion laws, he relied on Professor Argersinger's classic study; he found Minnesota's colorful political history of the 1920s and 1930s irresistible and devoted several long footnotes to the subject. *Timmons v. Twin Cities Area New Party*, 520 U. S. 351 (1997) is posted in the Appendix.

A non-partisan judiciary became reality in 1912, when the 37th legislature enacted laws that judicial candidates be listed without party designation on the ballots in primary and general elections.[34] This is the

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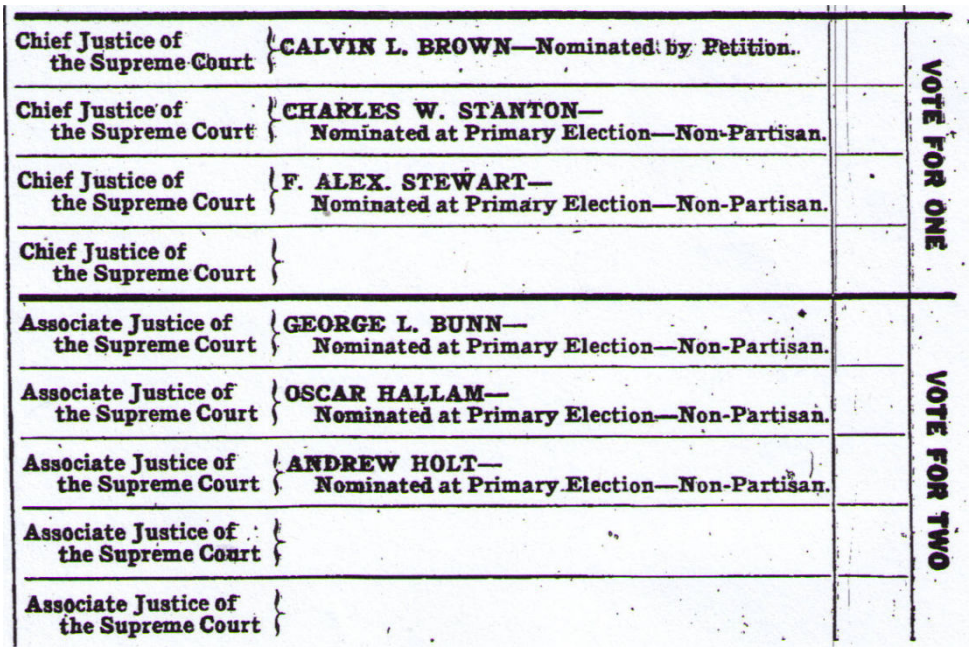
[33] Minnesota Stat. §§204B.04, subd. 2, and 204B.06, subd. 1(b) (1994), provided:

> 204B.04 CANDIDACY; PROHIBITIONS. Subdivision 1. Major party candidates. No individual shall be named on any ballot as the candidate of more than one major political party. No individual who has been certified by a canvassing board as the nominee of any major political party shall be named on any ballot as the candidate of any other major political party at the next ensuing general election.
>
> 2. Candidates seeking nomination by primary. No individual who seeks nomination for any partisan or nonpartisan office at a primary shall be nominated for the same office by nominating petition, except as otherwise provided for partisan offices in section 204D. 10, subdivision 2, and for nonpartisan offices in section 204B. 13, subdivision 4.
>
> 204B.06 FILING FOR PRIMARY; AFFIDAVIT OF CANDIDACY. Subdivision 1. Form of affidavit. An affidavit of candidacy shall state the name of the office sought and shall state that the candidate:
>
> (a) Is an eligible voter;
>
> (b) Has no other affidavit on file as a candidate for any office at the same primary or next ensuing general election;...

[34] 1912 Laws, Sp. Sess., c. 2, §2, at 4-5, provided in part:

> **Designation of meaning of political party — Non-partisan primary ballot for judiciary and other offices —...**

ballot used in the first non-partisan judicial election in November 1912:



Chief Justice of the Supreme Court	CALVIN L. BROWN—Nominated by Petition.	VOTE FOR ONE
Chief Justice of the Supreme Court	CHARLES W. STANTON— Nominated at Primary Election—Non-Partisan.	
Chief Justice of the Supreme Court	F. ALEX. STEWART— Nominated at Primary Election—Non-Partisan.	
Chief Justice of the Supreme Court		
Associate Justice of the Supreme Court	GEORGE L. BUNN— Nominated at Primary Election—Non-Partisan.	VOTE FOR TWO
Associate Justice of the Supreme Court	OSCAR HALLAM— Nominated at Primary Election—Non-Partisan.	
Associate Justice of the Supreme Court	ANDREW HOLT— Nominated at Primary Election—Non-Partisan.	
Associate Justice of the Supreme Court		
Associate Justice of the Supreme Court		

Sec. 2. That Section 182 of the Revised Laws of 1905, be and the same is hereby amended so as to read as follows:

Sec. 182....Candidates for office shall be chosen at such primary election by voters of the several political parties and not otherwise; provided, however, that the chief justice and the associate justices of the supreme court and judges of the district, probate and municipal courts and county superintendents of schools and municipal officers in cities of the first class, shall be nominated upon separate non-partisan ballots, as hereinafter provided. Provided, further, that all qualified and duly registered voters may participate in the choosing of candidates for city office as provided for in the city charter of cities having home rule charters; the names of all candidates for nomination for the offices of Chief Justice, Associate Justices of the Supreme Court, Judges of the District, Probate and Municipal Courts, County Superintendents of Schools and all municipal offices in cities of the first class shall be placed upon a separate primary ballot hereinafter designated as "Non-partisan primary ballot."

In this special session, the Legislature also enacted the following:

Designation of candidates nominated on non-partisan primary election ballot and those nominated by petition.—

Section 1. After the name of each candidate on the general election ballot nominated on the non-partisan ballot at the primary election shall be placed the words "nominated at primary election non-partisan." After the name of each candidate nominated by petition shall be placed the words "nominated by petition," and such other designation as may be now permitted by law, except that the words "non-partisan" shall not be placed after or to designate any candidate not dully nominated at a primary election on the non-partisan ballot.

1912 Laws, Sp. Sess., c. 12, §1, at 53-54 (effective June 19, 1912).

Appendix

The Anti-fusion laws of 1901 and 1903

A. Laws 1901, c. 312, p. 524, provided:

An act relating to the names of political parties
On the official ballot.

SECTION 1. That a political party which has heretofore or shall hereafter adopt a party name shall alone be entitled to the use of such name for the designation of its candidates on the official ballot, and no candidate nor party subsequently formed, shall be entitled to use or have printed on the official ballot as a party designation, any part of the name of a previously existing political party. And in no case shall the candidate of any political party be entitled to be designated upon the official ballot as the candidate of more than one political party, and shall be designated upon the official party ballot in accordance with the certificate of nomination first filed with the proper officers.

SEC. 2. This act shall take effect and be in force from and after its passage.

Approved April 13, 1901. (underlining added)

It was passed unanimously by the 32nd Legislature. Journal of the House of Representatives, April 11, 1901, at 1051 (yeas 81, nays 0). Journal of the Senate, April 11, 1901, at 1068 (yeas 37, nays 0).

B. 1903 Laws, c. 174, at 265-66, provided:

An act to amend section 45 of chapter 4 of the Laws of Minnesota for 1893, as amended by chapter 136 of the Laws of Minnesota for 1895, relating to the regulation of elections.

SECTION 1. That section 45 of chapter 4 of the laws of Minnesota for 1893, as amended by chapter 136 of the laws of 1895, be amended so as to read as follows:

Sec. 45. The secretary of state and county auditors and city clerks shall respectively place upon the several ballots printed by them the name of each candidate for office who shall have been nominated as hereinbefore provided, and whose certificate of nomination has been presented within the time specified, and on payment of the fee prescribed by law, which shall be as follows:

For each name tendered to be placed upon the white ballot, fifty dollars, to be received by the secretary of state and by him paid into the state treasury.

For each name tendered to be placed on the red ballot, five dollars, to be received by the city clerk and by him paid into the city treasury; *provided*, however, that incorporated cities of three thousand inhabitants or less, only two dollars need be paid for each name tendered to be placed upon said red ballot.

For each name tendered to be placed upon the blue ballot, ten dollars, to be received by the county auditor and by him paid into the county treasury.

Provided, however, that no fee shall be required from any person who is a candidate for any office to which no compensation is authorized to be paid.

Provided, further, that when any candidate is nominated for the same office by more than one political party, the name of the party by whom he was first nominated shall be given the first place following his name; and provided, further, that where the person whose name is to be placed upon the blue ballot is to be voted for in more than one county, as in case of members of congress, judges of district courts, etc., then the fee shall be twenty dollars, and shall be divided among the several counties as nearly equal as may be, and the portion due each paid at the time and in the manner provided for single counties.

SEC, 2. This act shall take effect and be in force from and after its passage.

Approved April 10, 1903. (Underling added).

The vote in the House of Representatives was yeas 61, nays 5. Journal of the House of Representatives, April 7, 1903, at 1116. In the Senate, it passed yeas 38, nays 0. Journal of the Senate, April 10, 1902, at 714-15.

C. Laws 1903, c. 232, p. 337, provided:

An act to amend chapter three hundred and twelve (312) of the General Laws of nineteen hundred and one (1901) of Minnesota, relating to the names of political parties on the official ballot.

SECTION 1. That chapter three hundred and twelve (312) of the General Laws of Minnesota for the year nineteen hundred and one (1901), entitled "An act relating to the names of political parties on the official ballot," be and the same hereby is amended so as to read as follows:

> Section I. That a political party, which at the last preceding general election polled at least I per cent of the entire vote cast in the state (the same to be determined by the highest vote cast for its state candidates), and which has heretofore or shall hereafter adopt a party name, shall alone be entitled to the use of such name for the designation of its candidates on the official ballots at any and all elections held in this state, and no other candidate nor party shall be entitled to use or have printed on the official ballots as a party designation any part of only one the name of such a political party. And in no case shall the candidate of any political party be entitled to be designated upon the official ballot as the candidate of more than one political party, and shall be designated upon the official party ballot in accordance with the certificate of nomination first filed with the proper officers.
>
> SEC. 2. This act shall take effect and be in force from and after its passage.
>
> Approved April 14, 1903. (underlining added).

It passed both chambers easily. Journal of the House, March 4, 1903, at 497-98 (yeas 66, nays 12). Journal of the Senate, April 9, 1903, at 914 (yeas 34, nays 2).

14221

In re. Petition of Frank A. Day.

Due service of the within order to show cause and petition admitted at St Paul Minn this 30th day of September A.D. 1904

P. E. Hanson, Secy of State
By J. J. Loman
Asst Secretary of State

by ________

~~Assistant Secy of State~~

S U P R E M E C O U R T,

STATE OF MINNESOTA.

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT

OF THE STATE OF MINNESOTA:--

Your petitioner, Frank A. Day, respectfully shows to the Court, that he is a duly qualified elector of the State of Minnesota, and the Chairman of the State Committee of the Democratic party of the State of Minnesota.

That on the 1st day of July 1904, the Republican party of the State of Minnesota, in State Convention duly assembled, nominated as its candidate for Associate Justice of the Supreme Court, one Calvin L. Brown, who was then and there and for four years last past and more had been one of the Associate Justices of said Court. That the course pursued by said Calvin L. Brown as such Associate Justice of said Supreme Court had been such as to meet the approval not only of the party to which he belonged, but also the approval of a great number of people in said State belonging to the Democrati party; and that a great number of persons belonging to said Democratic party of the State of Minnesota, appreciating the ability and fairness of said Calvin L. Brown in the discharge of his duties as such Associate Justice of the Supreme Court, and further appreciating the desirability of taking steps which might eventually lead to a non-partisan nomination of the judiciary of this State, and especially of the members of the Supreme Court of said State, induced the Democratic party in and for the State of Minnesota, on the 30th day of August,1904, in State Convention assembled, to endorse the nomination of said Calvin L.Brown for said office of Judge of the Supreme Court, and to re-nominate him for said office, as the candidate of said Democratic party for said office; and that said Calvin L. Brown was thereupon, and on said 30th day of August, 1904, duly nominated by the Democratic party in and for the State of Minnesota, in such State Convention duly assembled, to said office of Associate Justice of the Supreme Court, and that it was and is bona fide the intention of said Democratic party to so endorse the said nom-

ination by said Republican party of said Brown for said office of Associate Justice of the Supreme Court, and thereby make the election of said Calvin L. Brown for said office unanimous, and thereby remove said office from the strife and contention of politics.

That in order to so accomplish said purpose and in order to notify the Democratic electors of said State of the fact that said Brown is not only the candidate of the Republicans for said office, but also of the Democrats, it is necessary and proper that said Brown should on the official State ballot for the ensuing election be designated as the Democratic, as well as the Republican nominee for said office.

That on or about the 1st day of August 1904, a certificate of the nomination of said Calvin L. Brown for said office by the Republicam party of said State, was duly filed with the Hon. Peter E. Hanson, the Secretary of State of the State of Minnesota, he, the said Hanson as said Secretary of State, being then and there by law charged with the making up of the official State ballot for the ensuing election, and the fee of Fifty Dollars required by law to enable said Brown to have his name go on said ballot, was then and there duly paid to said Hanson as such Secretary of State.

That on the 29th day of September, 1904, another certificate in due form of law, certifying to said nomination of said Calvin L. Brown for said office by the Democratic party of the State of Minnesota in said convention duly assembled, and which said certificate in all matters duly conformed to the law and the requirements by law therefor, was duly filed with said Peter E.Hanson,as such Secretary of State of said State of Minnesota, and he, the said Hanson, as such Secretary of State, was then and there requested to cause to be printed on the official State ballots, after the name of said Calvin L. Brown,the words, "Republican-Democrat" for the purpose of indicating and showing to the electors of said State that said Brown was the candidate and nominee of said Democratic party, as well as of the Republican party, for said office. That said Hanson, as such Secretary of State, then and there, while receiving and filing said certificate of nomination by said Democratic party of said Brown for said office, then and there refused to so comply with said request and then and there absolutely refused and still refuses to place or cause to be placed opposite the name of said Calvin L. Brown, on said official State bal-

lot, the word "Democrat", or any other word than the word "Republica n", and then and there absolutely refused and still refuses in any way to indicate on said ballot that said Brown is a candidate of and has been nominated by the Democratic party for said office, as well as by the Republican party.

That said Secretary of State claims that he is prevented from complying with said request, and from designating in any way the nomination of said Brown by said Democratic party or by any other party than the Republican party, by the provisions of the last period of Sec.1 of Chapt.312 of the Gen. Laws of the State of Minnesota for the year 1901, as amended by Chapt. 232 of the Laws of 1903. That your petitioner is informed by his counsel and has good reason to believe and does believe, and charges the fact to be, that said Chapter 312 of said laws of 1901 and said chapter 232 of the laws of 1903, both are, as far as the last period of Sec.1 of each of said acts is concerned, null and void and of no force or effect whatsoever, and should and ought not prevent said Secretary of State from complying with said request or from designating upon the official ballot said Brown as the candidate of the Democratic party, as well as of the Republican party for the following reasons:

First, said act is unconstitutional in this: that it does not comply with the requirements of Sec. 27 of Article 4 of the Constitution of the State of Minnesota, in this: that said act embraces more than one subject, to-wit:

(First) Affirming the right of political parties, who have adopted and used a party name, to be protected in said use of said party name. (Second) Preventing fusion of two or more political parties, in denying the right of a person to become the candidate of more than one political party at an election, one of which said subjects, to-wit: said last named subject, embraced in said act, was and is not in any way expressed or even hinted at in the title of said act or law.

Second: That said act is unconstitutional in this: that the same contravenes the provisions and guarantees of Article 2 of the Bill of Rights of the Constitution of this State.

Third: That said act is null and void because it is unconstitutional and contrary to the spirit of the constitution of the State of Minnesota.

Fourth: That said act is null and void as being contrary to the public

policy of this State, for many years maintained inviolate.

Fifth: That said act, even if not open to these constitutional objections, did not contemplate preventing the election of a non-partisan judiciary, or the endorsement by the two great parties of the State of the same candidate for any office, whereby could be secured a unanimous and non-partisan election, and that therefore said act, which was intended simply to prevent fusion of two parties, in order thereby to defeat a third, is not applicable to the present condition of affairs, and should not be extended so as to prevent it what was never contemplated by the Legislature to be prevented by its provisions.

Fol 11. That said Calvin L. Brown has duly accepted both of said nominations and is desirous of having his name printed on said tickets as the candidate of both of said parties.

That unless an order be made by this Court ordering and directing the Secretary of State to designate on said official State ballot, after the name of said Brown, that he is the candidate of the Democratic party, as well as of the Republican party for said office of Associate Justice of the Supreme Court, a great number of Democratic voters of this State will be wholly kept in ignorance of said fact and will be thereby misled and induced not to vote for said Brown for said office, and the object of said endorsement and re-nomination, to-wit: of taking the first step toward the election of a Fol 12 non- partisan judiciary, will be fmx frustrated, and that your petitioner, said Democratic party and said Justice Brown have no sufficient and adequate remedy at law in said matter.

WHEREFORE your petitioner prays that an order issue out of this Court to said Peter E.Hanson, as such Secretary of State, ordering and directing him to place on the official State ballots for the ensuing election, after the name of Calvin L.Brown, as a candidate for the office of Associate Justice of the Supreme Court, the words "Republican-Democrat" or such other words as to the Court shall seem proper and just to indicate and inform the elector using said ballots, of the fact that said Brown has for said office been endorsed and re-nominated by the Democratic party, or to show cause before this Fol 13 Honorable Court, at such time and place as your honors shall fix, why he has

not done so, and why he should not be ordered and directed, by the proper order of this Court, to so correct said official State ballot. And your petitioner will ever pray.

Frank A Day
Petitioner

Jno W Arctander

Henry E Bellows

Attorneys for said Petitioner.

STATE OF MINNESOTA,:
ss
COUNTY OF RAMSEY.:

Frank A. Day, being first duly sworn, says that he is the petitioner herein mentioned; that he has signed the foregoing petition; that he knows the contents of the foregoing petition and that the same is true of his own knowledge, save and except as far as the allegations therein contained on allegation and belief are concerned, and as to those, that he verily believes the same true.

Frank A Day

Subscribed and sworn to before me this 30th day of September, A.D. 1904.

Jno W. Arctander
Notary Public, ~~Ramsey~~ Hennepin County, Minnesota.

14221

Original

In re Petition of Frank A. Day.

Order to show cause

FILED

OCT 4 1904

G. A. PIDGEON,
CLERK.

S U P R E M E C O U R T ,

State of Minnesota.

IN RE PETITION OF

FRANK A. DAY.

Upon reading the attached petition, it is hereby ORDERED, That Peter E. Hanson, Secretary of ~~the~~ State of the State of Minnesota, show cause, if any he have, before the Supreme Court in and for the State of Minnesota, at the Supreme Court room in the Capitol, in the City of St.Paul, Minn., on Wednesday, October 5th, 1904, at 9.30 A.M. or as soon thereafter as counsel can be heard, why an order should not be made by said Supreme Court, ordering and directing said Peter E. Hanson, as such Secretary of State, to cause to be printed on the official State ballots for the general election of the year 1904, after the name of Calvin L. Brown, a candidate for Associate Justice of the Supreme Court of said State, the words, "Republican-Democrat", or such other words as to the Court shall seem proper and just to indicate and inform the electors using said ballots of the fact that said Calvin L. Brown has for said office been endorsed and nominated by both the Democratic party and the Republican party of said State.

It is further ordered that a copy of this order, together with a copy of the attached petition, be forthwith served upon said Secretary of State, or in his absence from his office at the Capitol, on the Assistant Secretary of State, and that such service be in all things deemed a good and sufficient service of this order.

Dated September 30th 1904.

Chas M. Start

Chief Justice.

STATE OF MINNESOTA,

SUPREME COURT.

October Term, 1904.

In Re Petition of Frank A. Day.

Comes now Peter E. Hanson, the respondent named in the above entitled matter and proceedings, and answering the petition therein, and showing cause to your Honorable Court in response to the order made therein,

Informs your Honorable Court that he is now and at all the times named in said petition has been the duly elected, qualified and acting Secretary of State of this State; but that notwithstanding the character of his said office, he comes voluntarily into Court in response to said order and waives all question as to his immunity from the process and jurisdiction of your Honorable Court by virtue of his said office, and will abide by such judgment as the Court may render in said matter and proceeding.

Respondent further says that, saving that he disclaims any knowledge as to the purposes which actuated the Democratic party in nominating Calvin L. Brown for the office of Associate Justice of this Court, and denies that it is necessary for him to do any of the things which the said petitioner seeks by his said petition to have done in order to notify the Democratic electors or any other electors of this State of the fact that the said Brown is the candidate for said office of the Republican and Democratic parties respectively, he admits all the matters and things stated and alleged in said petition from the commencement thereof to and including the words "Laws of 1903" where the same appears in the seventh (7th) folio of said petition. As to all and several the

other matters and things stated and alleged in said petition, respondent denies the same.

Further showing cause, your respondent alleges that by an Act of the Legislature of this State entitled, "An Act relating to the names of political parties on the official ballot", approved April 13th, 1901, being General Laws 1901, Chapter 312, it is provided as follows:

> Section 1. That a political party which has heretofore or shall hereafter adopt a party name shall alone be entitled to the use of such name for the designation of its candidates on the official ballot, and no candidate nor party subsequently formed, shall be entitled to use or have printed on the official ballot as a party designation, any part of the name of a previously existing political party. And in no case shall the candidate of any political party be entitled to be designated upon the official ballot as the candidate of more than one political party, and shall be designated upon the official ballot in accordance with the certificate of nomination first filed with the proper officers.

That your respondent is advised by his counsel and verily believes that the said statute is a valid and subsisting law of this State and prohibits respondent from printing, or causing to be printed, after the name Calvin L. Brown, on the official state ballot the words "Republican-Democrat", or any other word or designation than the word "Republican".

WHEREFORE respondent prays judgment that said order to show cause be discharged and he hence dismissed.

P. E. Hadsell

W. J. Donahower,

Attorney General.

Childs, Edgerton & Wickwire,

Attorneys for Respondent.

STATE OF MINNESOTA,)
) SS.
COUNTY OF RAMSEY.)

Peter E. Hanson, being by me first duly sworn, says that he is the respondent named in the above entitled answer and knows the contents thereof; that the same is true except as to matters therein alleged upon information and belief and as to them he believes it to be true.

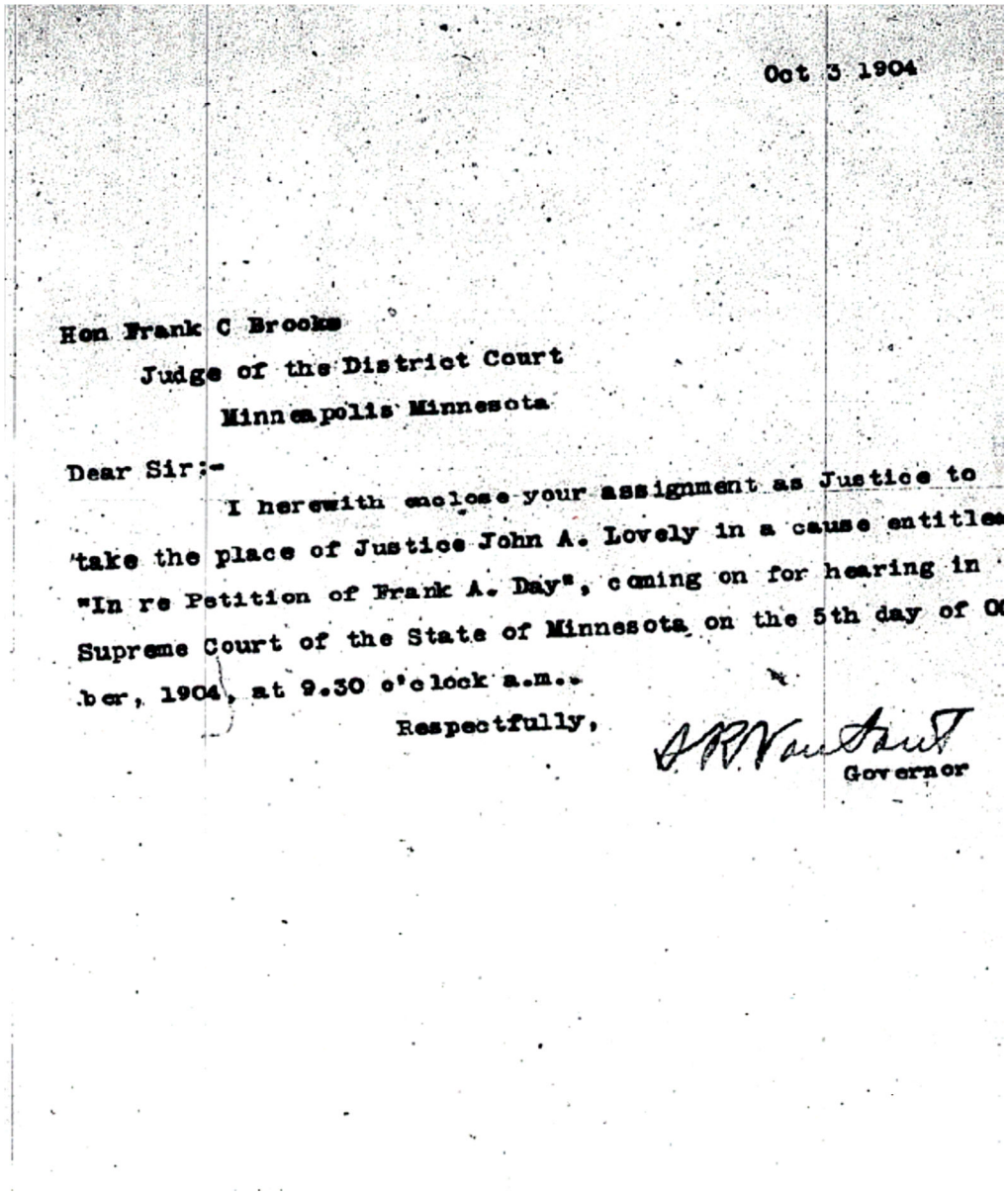
P. E. Hanson

Subscribed and sworn to before me
this 4th day of October, 1904.

J. L. Lamon

Notary Public,
Ramsey County, Minnesota.

Letters from Governor Van Sant to District Court Judges Brooks, Brill and Cant advising each that he will serve as a Special Judge on the Supreme Court to hear *In re Petition of Frank A. Day*.
The actual Assignments have not been located.



Oct 3 1904

Hon Frank C Brooks
Judge of the District Court
Minneapolis Minnesota

Dear Sir:-

I herewith enclose your assignment as Justice to take the place of Justice John A. Lovely in a cause entitled "In re Petition of Frank A. Day", coming on for hearing in Supreme Court of the State of Minnesota on the 5th day of October, 1904, at 9.30 o'clock a.m.

Respectfully,

A R Van Sant
Governor

Oct 3 1904

Hon Hascal R. Brill,
Judge of the District Court
St Paul Minnesota

Dear Sir:-

I herewith enclose your assignment as Justice to take the place of Justice Calvin L. Brown in a cause entitled "In re Petition of Frank A. Day", coming on for hearing in the Supreme Court of the State of Minnesota on the 5th day of October, 1904, at 9.30 o'clock a.m..

Respectfully,

A R VanSant
Governor

Oct 3 1904

Hon William A Cant
Judge of the District Court
Duluth Minnesota

Dear Sir:-

I herewith enclose your assignment as Justice to take the place of Justice Charles L. Lewis in a cause entitled "In re Petition of Frank A. Day", coming on for hearing in the Supreme Court of the State of Minnesota on the 5th day of October, 1904, at 9.30 o'clock a.m..

Respectfully,

A R VanSant

Governor

GOVERNOR: LETTERS SENT (LETTERPRESS)., 1889-1916.
MINNESOTA HISTORICAL SOCIETY. ST. PAUL, MINNESOTA 55101

STATE OF MINNESOTA, SUPREME COURT,

Second Day. General October Term, A. D. 1904

Wednesday Morning October 5th A. D. 1904, 9:30 o'clock.

Court convened pursuant to Adjournment, ~~all the Justices being present~~.

The following Communication was received read and filed:

"State of Minnesota, Executive Department.

It having been made to appear that there is now pending in the Supreme Court of the State of Minnesota a cause entitled, 'In re Petition of Frank A. Day', which said cause is set for hearing and argument on the fifth day of October, 1904, at the hour of 9:30 o'clock a.m., and,

It further having been made to appear that a majority of the Justices of said Supreme Court are disqualified from sitting in said cause, to-wit; Justice John A. Lovely, Justice Charles L. Lewis and Justice Calvin L. Brown.

Now Therefore, Pursuant to authority conferred by section 3, of Article 6, of the Constitution of said State, I have this day assigned, and do hereby assign, to sit in said case and to hear and determine the same, Hon. Frank C. Brooks, a duly qualified and elected Judge of the District Court of the Fourth Judicial District in said state in place of said Justice John A. Lovely; Hon. William A. Cant, a duly qualified and elected Judge of the District Court of the Eleventh Judicial District in said state in place of said Justice Charles L. Lewis; and Hon. Hascal R. Bull, a duly qualified and elected Judge of the District Court of the Second Judicial District in said state in place of said Justice Calvin L. Brown.

In Witness Whereof I have hereunto set my hand and caused the Great Seal of the State to be affixed at the Capitol in the City of St. Paul this third day of October A.D. 1904.

By the Governor,

A. R. Van Sant

P. E. Hanson,

Secretary of State

(Seal)

Thereupon the Court convened, present:

Hon. Charles M. Start, Chief Justice

Hon. Wallace B. Douglas, Associate Justice

Hon. Frank C. Brooks,

Hon. William A. Cant,

Hon. Hascal R. Bull,

all of whom sat and heard the following entitled causes.

—Continued—

Continued

STATE OF MINNESOTA, SUPREME COURT,

Day. General Term, A. D. 19

Morning A. D. 19 , 9:30 o'clock.

Court convened pursuant to Adjournment, all the Justices being present.

In re petition of Frank A. Day. — vs — 14221

222

The matter came on to be heard this day upon an order to show Cause issued herein. Thereupon the same was argued by Counsel, submitted to the Court for decision and taken under advisement.

Pursuant to the recommendation of the State Board of Examiners in Law, It is Ordered that O. Harold Griggs be and he is hereby declared to be admitted as an attorney and Counsellor at Law in all the Courts of this state, he having first filed his oath of office in the office of the Clerk of this Court.

Addison E. Lamoreaux came into court this day and presenting his diploma from the Law Department of the University of Minnesota and showing to the satisfaction of the Court that he is a citizen of the United States, a resident and citizen of the State of Minnesota more than twenty one years of age and of good moral character It is Ordered that said Addison E. Lamoreaux be and he hereby is admitted to practice as an Attorney and Counsellor at Law in all the Courts of this state, he having first taken the oath of office in open Court and signed the roll of Attorneys of this Court.

Ordered that this Court stand adjourned until tomorrow Thursday morning October 6th 1904 at 9:30 AM

A true record,
Attest: C.A. Pidgeon
Clerk

STATE ex rel. FRANK A. DAY v. PETER E. HANSON. *

October 7, 1904.

Nos. 14,221—(222).

Official Ballot.—Party Name.

The last provision of section 1, c. 312, p. 524, Laws 1901, re-enacted in chapter 232, p. 337, Laws 1903, violates the provisions of section 27, art. 4, of the constitution of this state, and is void.

On the petition of Frank A. Day an order was issued from the Supreme court requiring the respondent, as secretary of state, to show [179] cause why a writ of mandamus should not issue requiring him to place upon the official state ballot, after the name of Calvin L Brown as candidate for justice of the supreme court, the word "Democrat" in addition to the word "Republican," so as to indicate the names of the two political parties which had nominated him for such office Writ granted.

John W. Arctander and *Henry C. Belden*, for petitioner.
W. J. Donahower, Attorney General, and *Childs, Edgerton & Wick* for respondent.

PER CURIAM.**

This matter was heard upon an order requiring the secretary of state Hon. Peter B. Hanson, to show cause why he should not place after the name of Calvin L. Brown, a candidate for Associate Justice of this court, the words "Republican-Democrat" on the official state ballots for the next general election, so as to indicate the names of the two political parties which have severally nominated him for such office.

We have reached the conclusion that the petitioner is entitled to the relief prayed for. An opinion setting forth the grounds upon which we base our conclusion will be filed in due time. It is therefore ordered that the respondent, Peter B. Hanson, as secretary of state, place after the name of Calvin L. Brown on the state official ballots for the next general election the words "Republican-Democrat."

On December 30, 1904, the following opinion was filed:

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* Reported in 100 N. W. 1124; 102 N. W. 209.

**Brown, Lovely and Lewis, JJ., having been candidates for re-election, did not sit in this matter. Hon. Hascal R. Brill, judge of the second district, Hon. Frank C. Brooks, judge of the fourth district, and Hon. W. A. Cant, judge of the eleventh district, were assigned by the governor to sit with Start, C. J., and Douglas, J., as judges of this court, pro hac vice, and the matter was heard and determined by the court thus constituted.

BRILL, Special Judge.

The facts appearing from the petition and return are as follows: On July 1, 1904, the Republican Party of the state, in convention assembled, nominated Calvin L. Brown for the office of associate justice of this court, to be voted for at the then ensuing election. Upon August 1, 1904, a certificate of said nomination was duly filed with the secretary of state, and the fee required by law was paid. Upon August 30, 1904, the Democratic Party of the state, in convention duly [180] assembled, also nominated Justice Brown for the same office, and upon September 29, 1904, a certificate of this nomination, in due form, was also filed with the secretary of state, who was requested to cause to be printed on the official state ballot, after the name of said candidate, the word "Democrat," in addition to the word "Republican." The secretary of state refused to have indicated on the ballot the fact that said Brown was a candidate of the Democratic Party. He based his refusal upon the last provision of section 1 of chapter 312, p. 524, Laws 1901, and chapter 232, p. 337, Laws 1903.

It is claimed by the petitioner that this provision is invalid under section 27, art. 4, of the constitution of the state, which provides, “No law shall embrace more than one subject, which shall be expressed in its title," and for other reasons not necessary at this time to mention.

It is provided by section 33, c. 4, p 25, Laws 1893, that the secretary of any convention nominating a candidate for office shall immediately deliver a certificate of nomination to the officer charged with the printing of the ballots. Chapter 136, p. 287, Laws 1895, provided that, when any candidate was nominated for the same office by more than one political party, the name of the party by which he was first nominated should be given the first place following his name. This law remained in force until 1901, when chapter 312, p. 524, Laws 1901, was enacted, the title of which is “An act relating to the names political parties on the official ballot.” This act is in the following terms:

> Section 1. That a political party which has heretofore hereafter or shall adopt a party name shall alone be entitled to of such name for the designation of its candidates on the official ballot, and no candidate nor party subsequently formed, shall be entitled to use or have printed on the official ballot as designation, any part of the name of a previously existing political party. And in no case shall the candidate of any party be entitled to be designated upon the official ballot as the candidate of more than one political party, and shall be designated upon the official party ballot in accordance with certificate of nomination first filed with the proper officers.

In 1903 (Laws 1903, p. 265, c. 174) an amendment to chapter 136, p. 287, Laws 1895, was adopted, which amendment included in terms [181] the provision from the law of 1895 above referred to. Upon April 14, 1903, four days thereafter, the legislature amended chapter 312, p. 524, Laws 1901, so as to define a political party, and in so

doing the original chapter 312 was re-enacted. Laws 1903, p. 337, c. 232. The title of this act of April 14, "An act to amend chapter three hundred and twelve (312) of the General Laws of nineteen hundred and one (1901) of Minnesota, relating to the names of political parties on the official ballot," does not enlarge or change the title of the original act, and, if the provision in question of the original act was unconstitutional, the same provision in the amendatory act is also unconstitutional.

Does the last clause of the act of 1901 violate the constitutional provision above quoted? The purpose of the constitutional provision has been so often and so recently declared by this court that it is not necessary to repeat it here. In the construction of the title to an act, with reference to the constitutional provision, the rule is: "The title to a statute, if it be expressed in general terms, is sufficient, if it is not a cloak for legislating upon dissimilar matters, and the subjects embraced in the enacting clause are naturally connected with the subject expressed in the title. General titles to statutes should be liberally construed in a common-sense-way, but if the title to a statute be a restrictive one, carving out for consideration a part, only, of a general subject, legislation under such title must be confined within the same limits. All provisions of an act outside of such limits are unconstitutional, even though such provisions might have been included in the act under a broader title." Watkins v. Bigelow, infra, page 210.

The title to the act in question is not general, but to a degree restrictive. It does not embrace the subject of elections generally, nor does it refer to the right of political parties to make nominations, nor to rights of individual candidates. The subject expressed relates to the rights of parties to the use of party names upon the official ballot. In construing an act with reference to the constitutional provision, its substance should be considered, rather than its letter; and in determining the constitutionality of the act in question here it is necessary to consider the purpose and effect of the act. The act was undoubtedly passed in view of the attempts which had been made to use political party names by parties not entitled to them. It was designed to protect political parties in the use of their party names. [182]

As determined in Davidson v. Hanson, 87 Minn. 211, 91 N.W. 92 N.W. 94: "The purpose of this statute is unambiguous. It was unquestionably enacted to prohibit political parties from interfering with titles previously adopted by other political organizations." And it was aptly designated by the court in that case, "the party name protection act." The first provision of the act effectuates its design and purpose, but the second provision of the act goes much further. The meaning and effect of this provision, not the possible or incidental effect, is that the candidate of one political party shall not be the candidate of any other party, that one political party shall not nominate any person nominated by another party. It is, in substance and effect, an anti-fusion act. In substance and effect it is entirely distinct from and independent of the other provision. The subjects are as independent of each other as if provided for in separate acts. State v. Kinsella 14 Minn. 395 (524).

Prior to this act, political parties exercised their undoubted common right to

nominate any qualified person, and frequently the candidate of one party was nominated by another party. Chapter 136, p. 287, Laws, 1895, recognized this right and practice, and provided, by necessary implication, that the fact of such nomination by different parties could be indicated on the official ballot The act of 1901 makes no mention of the law of 1895. The law of 1895 was re-enacted in 1903, only four days prior to the re-enactment of the law of 1901. The situation fairly, raises an inference that the legislators acted unadvisedly in the enactment of the provision in question, and that they were not informed of the subject of the provision by the title of the act.

We hold that this provision violates the mandate of section 27, article, 4, of the constitution, and is invalid.

CANT, Special Judge, and DOUGLAS, J. (dissenting).

In this proceeding the last provision of chapter 312, p; 524, Laws 1901, re-enacted in chapter 232, p. 337, Laws 1903, is said to be invalid as being in violation of section 27 of article 4 of the state constitution. That section provides that "no law shall embrace more than one subject, which shall be expressed in its title." Said chapter 312 bears the following title: "An act relating to the names of political parties on the official ballot." So far as here material, the act reads as follows: [183]

> And in no case shall the candidate of any political party be entitled to be designated upon the official ballot as the candidate of more than one political party, and shall be designated upon the official party ballot in accordance with the certificate of nomination first filed with the proper officers.

The title above set forth is said to be restrictive. That expression is a comparative one, and is helpful only when such fact is borne in mind. Almost every title is in a sense general, and in a sense restrictive. The title in question is restrictive as applied to the general subject of elections, but is general as respects everything which fairly relates to the names of political parties on the official ballot.

Certain well-established rules are applicable in this case: "Every statute duly passed by the state legislature is presumably valid, and this presumption is conclusive unless it affirmatively appears to be in conflict with some provision of the federal or state constitution; and, In order to justify a court in pronouncing it invalid, because of its violation of some clause of the state constitution, its repugnancy therewith must be so ‘clear, plain, and palpable' as to leave no reasonable doubt or hesitation upon the judicial mind." Curryer v. Merrill, 25 Minn. 1, 4.

Section 27 of article 4 of our state constitution, is to be liberally construed, so as not unnecessarily to embarrass or restrict legislative action. State v. Kinsella, 14 Minn. 396 (524); Winters v. City of Duluth, 82 Minn. 127, 131, 132, 84 N.W. 788.

“All that is required is that the act should not include legislation so incongruous that it could not by any fair intendment be considered germane to one general subject." Johnson v. Harrison, 47 Minn. 575, 78, 50 N.W. 924.

"The title to a statute is sufficient, within the constitutional limitation that no law shall embrace more than one subject, which shall be expressed in its title, if it is not a cloak for legislating upon dissimilar matters, and the subjects embraced in the enacting clause are naturally connected with the subject expressed in the title." Winters v. City of Duluth, supra. The expression, "if it is not a cloak for legislating, upon dissimilar matters," quoted above from the Winters case, must, we think be understood as a reference to the evil to be avoided, and not as a statement of the test to be applied. [184]

The test always is: Are the various provisions of the statute fairly germane to the subject expressed in the title? Such is the rule expressly laid down in the language quoted from Johnson v. Harrison, supra, and it is clearly recognized and acted upon in the Winters case, 82 Minn. 132, where the various provisions of the act there under consideration are held constitutional for the reason that "they are naturally connected with and suggested by the subject of the act as expressed in its title." So, in the last analysis are all the authorities. It is matter foreign to the title that is condemned. No case, we think, will be found holding an act unconstitutional by reason of the incongruity of its parts, where the different provisions thereof are each fairly germane to the title of the act. The incongruity between the different provisions of an act cannot be serious if all are germane to one general subject. If they are so germane, all stand upon an equal footing, even though they look in somewhat different directions.

The following rule, also, going much further than is necessary here, was established at an early date in this state, and has since been frequently approved: "Neither is it important that all the various objects of an act be expressly stated in its title, nor that the act itself indicates objects other than that so mentioned, provided they are not at variance with the one so expressed, but are consonant therewith." State v. Cassidy, 22 Minn. 324; State v. Madson, 43 Minn. 438, 440, 45 N.W. 856; State v. Board of Control, 85 Minn. 165, 171, 88 N. W. 533

The act here in question contains but two clauses. The second, hereinbefore set forth, is said to be the offending member. The only question is whether its provisions are germane to the title of the act. If they are, the clause is valid. The question is not which of the two clauses is most clearly' foreshadowed by the title, nor whether the ideas which they respectively emphasize are widely divergent, or whether they closely approach each other. They are not required to be identical either in expression or in thought; they are required to be germane to the title. This is the measure of the scope which they may take. If each is germane to that title, there is no authority for saving the one and destroying the other.

Does the clause here in question fairly relate to the general subject-matter of the title of the act? That subject is, "The names of political parties on the official ballot." [185]

It is not, we think, as viewed by the majority, "The rights of parties to the use of party names upon the official ballot." This is unwarrantably restricting the title and confining its aspect to the first clause of the act. Nor is the subject restricted to the use of party names upon the official ballot in connection with the names of candidates thereon. This would be confining its aspect to the second clause of the act

According to its language, it relates generally to "the names of political parties upon the official ballot," and its objects and purposes are as broad as that language implies. The only place on the official ballot where the names of political parties can or do appear is in connection with the names of candidates. The law provides that on the official ballot, following the name of each candidate, and on the same line therewith, shall appear “the party designation or politics of the candidate." Laws 1901, p. 115, c. 109. The clause here under consideration, stated conversely, in effect provides that on such ballot the name of one political party only shall follow the names of the respective candidates It declares that, as to the names of political parties on the official ballot, the law shall be that one only shall appear in connection with and following the name of each candidate. Is it possible that this clause does not relate to "the names of political parties on the official ballot"? If it alone constituted the body of the act, that its provisions were germane to the title would never be questioned.

Reconstructing and treating the two clauses of the act together, every essential feature, so far as here material, is embraced in the following language 'No part of a name previously adopted by any political party shall be used on the official ballot by any other party or person, and when used on such ballot in connection with the names of candidates of the party adopting the same, it shall be so used to the exclusion of every other party designation" So expressed, it is plain that the constitutional provision here invoked could have no application.

It is said that the first clause of the act is a party name protection act, and that the second clause is an anti-fusion act. Each, in a measure, embodies the features ascribed to it, though not those alone; but many acts of the legislature will thus submit to be charted and labeled without yielding to the charge of being in violation of the constitutional provision here involved. [186]

The second clause, however, does not prevent the nomination by different parties of the same candidate. It declines to recognize such double nominations on the official ballot; but with such forceful agencies remaining to proclaim the nominations as the sample ballot, the daily and weekly press, the public speaker, it is going a great length to say that the clause prevents a double nomination.

In any proposed legislation of the character here involved, three interests are to be considered—that of the political party, that of the candidate, and that of the voters. The voters have a right to know the political principles for which each of the various candidates stand. The legislature has a right to provide for their being advised thereof without the confusion of a double designation. It did so in this case. In so doing, it weighed the rights of parties, of candidates, and of individual voters, and it dignified these rights of the individual voters, and subordinated the rights of parties and of candidates thereto. This object was attained by a clause prohibiting the use of more than one party name in connection with the name of the candidate upon any official ballot. Irrespective of the name which might be given to such clause—and a variety might apply—it was, we think, entirely appropriate to the title of the act.

In our opinion without either approving or condemning the policy of the act, chapter 312, p. 524, Laws 1901, was a valid exercise of the legislative will, and the writ prayed for should have been denied. ▪

Litigation over the Place of the Democratic and People's Parties' Slate of Presidential Electors on the Official Ballot in October 1892

In the Matter of Brown, Secretary of State
Ramsey County District Court
Second Judicial District
October 1892

As reported in the St. Paul Globe and Minneapolis Tribune

In 1892, the Democratic and the People's parties formed an unusual fusion ticket by nominating the same four presidential electors. They asked Secretary of State Frederick Brown to place this group at the head of the list of People's party's candidates on the official ballot. There the fusion four would come right after—and be seen by voters as almost a continuation of—the Democratic list. Seeing an opportunity to minimize the chance of success of the fusion ticket, Brown scattered the four names among the People's party's other electoral candidates. The Democrats promptly brought a mandamus action, claiming that the Secretary's proposed ballot would confuse the voters and violated the state law on placement of candidates' names on ballots. The litigation was covered by the *St. Paul Globe* in three issues, and they follow.

The *Globe* was an organ for the Democrats or "the Democracy" as the party liked to be called at this time. Its three front page stories were slanted, the headlines strident and alarmist. A long article on Sunday, October 16th, introduced the ballot controversy to the public. It quoted the entire affidavit of Lewis Baker, Chairman of the Democratic State Central Committee. It also reproduced the ballot prepared by the Secretary of State and the "correct" ballot proposed by the Democrats. The article ended with the complete text of Judge Hascal Brill's order setting the date of a hearing on the Democrat's suit for Monday the 17th. At some point Brill told the lawyers that only the question of jurisdiction would be the subject of that hearing.

Sometime after issuing the order, Brill, a Republican, asked Charles E. Otis, a fellow judge on the Ramsey County District Court and a Democrat

to hear the case with him. This was permitted under a state law authorizing multi-judge panels in district court cases.[35] Brill saw that any ruling in this politically charged case would be more palatable to the public if it was by two judges, each with different a political affiliation.

On Tuesday, October 18th, the *Globe* carried a long article on the hearing before Judges Brill and Otis the previous day. The article is important to understand this particular case and also because there are not many detailed accounts of oral arguments in district court cases at this time (the lawyers did not have time to file written memoranda). It quotes portions of fine-tuned arguments of the three lawyers for the Democrats, Charles Flandrau, Christopher D. O'Brien and Ambrose Tighe, who likely prepared them beforehand and gave copies to the *Globe* reporter to reprint. In contrast Attorney General Moses Clapp, a Republican, appears as a hesitant defender of the Secretary of State. This was the first election in which the Australian ballot was used, and the lawyers kept contrasting it with the former system in which the political parties themselves controlled the form of the ballot. As the hearing wound down, the lawyers engaged in a colloquy among themselves, indicating that it was far more informal than the strict, by-the-clock hearings held in later decades.

The newspaper reporter omitted the lawyers' analyses of decisions of the state supreme court forbidding judicial oversight of the executive branch, probably because they were highly technical and would not be understood by the average reader. Those decisions, however, were fatal to the Democrats. On the 19th, the *Globe* reported the judges' decision to dismiss the case on the ground that they lacked jurisdiction. The ruling was the product of an extreme separation-of-powers doctrine prevalent at the time. The *Minneapolis Tribune's* report of the proceedings concludes this section.

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[35] Stat. c. 64, §4452, at 153 (1891), authorized multi-judge panels in the Second Judicial District:

> SEC. 4452. Act in joint session - Process.— The said judges, or any number of them, may act in joint session, for the trial or determination of any matter before the court, including the trial of jury cases; and when so acting, the judge senior in office, or, if neither be senior in office, the judge senior in age, shall preside, and the decision of the majority shall be the decision of the court. If, however, only two of the said judges are so acting, and there is a division of opinion, the opinion of tile presiding judge shall prevail. Process may be tested in the name of any one of the said judges.

Excerpts from the *Globe*, October 16, 1892:

ST. PAUL SUNDAY GLOBE
October 16, 1892

. . . .

AN APPEAL FROM A PARTISAN ACT

To the Free Voters of Minnesota, the Democratic Party
Submits Its Position on the Official
Electoral Ballot.

Its Effort to Secure an Intelligently Arranged Ballot
Thwarted by a Partisan Secretary of State
Under Orders.

Who Defiantly Refuses to Group the Democratic Electors
Together as the Ballot Law Plainly Directs.

The Court Issues Its Mandamus to the Guilty Officer, Citing
Him to Appear Before It and Show Cause.

A Forcibly Worded Statement Which Clearly Shows the
Strength of the Democratic Position
in the Matter.

Law, Justice and a Free and Intelligent Ballot All Demand
That This Recreant Officer Be Taught His Duty.

To the Public:
At the convention of the Minnesota Democracy, held at Minneapolis on the 3d day of August, 1892, the party nominated a full ticket of presidential electors, consisting of the following nine men: Robert A. Smith, Benjamin F. Nelson, D. N. Jones, William Quinn, Martin Shea, D. R. P. Hibbs, A. L. Sackett, James T. Barron and John C. Oswald. About a month later the names of these candidates, along with those selected by the convention for the other offices, were sent by the state central committee to the secretary of state to be printed on the official ballots prescribed by the election law now in force, and which are to be used by the voters of this

state at the coming election. On the 10th of October four of the party's nominees for presidential electors declined to serve for one reason or another, and at a meeting of the state central committee then called, William Meighen. A. L. Stromberg, James Dillon and A. H. Halloway, who had previously been nominated by the People's party for the same offices, were chosen to fill the vacancies thus created. These substitutions were at once reported to the secretary of state in proper shape, with the request that a corresponding change be made in the official ballots.

On the 11th of October the representatives of the respective political parties having tickets before the people met at the secretary of state's office, and the order of arrangement on the official ballots was decided by lot for candidates to whom this portion of the law applies. At the same time the secretary of state prepared a specimen ballot for public information, exhibited it for inspection, and filed it where it might be seen by inquirers. On this ballot he placed at the top in a group the list of nine Republican presidential electors, writing in front of each name the words "presidential elector," and after each name the words "Republican-Harrison." Next he placed in a group the list of nine Prohibition presidential electors, writing after each name the words "Prohibition-Bidwell." Third, he placed the five Democratic presidential electors, who had been nominated at the Minneapolis convention, and who had not declined, writing after each name the words "Democrat-Cleveland." Then, after an interval, he placed in a group the list of nine People's party presidential electors, writing after each name, the words “People's party-Weaver," and in the case of the four electors who had also been nominated by the Democracy, the additional words, “Cleveland-Democrat.”

Now it happened that, when the officers of the People's party's convention had transmitted to the secretary of state the record of its nominations, they had quite arbitrarily arranged the list of presidential electors in an order which if followed on the official ballots, would not bring the names of the four electors who had been indorsed by the Democracy

together, but would scatter them through the nine at irregular intervals. This seemed so well calculated to cause confusion at the polls that the secretary of the Democratic party and the secretary of the People's party called the attention of the secretary of state to the fact, and requested him to rectify it. For this purpose they, asked that he should group at the head of the list of the electors of the People's party the names of those who had also been nominated by the Democracy. Had this suggestion been complied with this part of the official ballot would have read as follows:

A Correct Ballot.

Presidential Elector	Robert A. Smith	Democrat Cleveland
Presidential Elector	Ben. F. Nelson	Democrat Cleveland
Presidential Elector	David N. Jones	Democrat Cleveland
Presidential Elector	William Quinn	Democrat Cleveland
Presidential Elector	Martin Shea	Democrat Cleveland
Presidential Elector	Wm. Meighen	People's Weaver Democrat Cleveland
Presidential Elector	A. L. Stromberg	People's Weaver Democrat Cleveland
Presidential Elector.	James Dillon	People's Weaver Democrat Cleveland
Presidential Elector	A. H. Holloway	People's Weaver Democrat Cleveland
Presidential Elector	H. W. Norton	People's Weaver
Presidential Elector	Peter McGrath	People's Weaver
Presidential Elector	Ole H. Thoen	People's Weaver
Presidential Elector	E. F. Clark	People's Weaver
Presidential Elector	C. E. M. Brown	People's Weaver

> The advantages of this arrangement, on the score of intelligibility, over the method decided on by the secretary of state, as has already been outlined and is hereinafter illustrated, were so great that unless there were some legal difficulty in the way, it would have been expected that he would have adopted it without criticism or dispute. But, on the contrary, he positively refused to do so. What reasons he had were not disclosed, but presumably he was acting under advice in the interest of somebody, and the somebody was not the people of Minnesota. The interests of the people of Minnesota could be best subserved by a course which would facilitate the honest expression of their will at the polls, and to mix up and confuse the names of the electors on the ballot, so that the illiterate would be obstructed in their desire to vote the Democratic ticket if they had any such desire bore all the marks of a partisan Republican trick.
>
> . . .
>
> After such reflection as the urgency of the matter and the limited time at their disposal for the purpose permitted, the party's counsel [Charles E. Flandrau, C. D. O'Brien and Ambrose Tighe] directed that an affidavit be drawn up setting out in full detail the facts in the case. This was done, and the affidavit duly sworn to by Mr. [Lewis] Baker, the chairman of the state central committee. Yesterday morning we presented the same to Hon. Hascal R. Brill, judge of the district court of Ramsey county, and, after an explanatory argument, he signed an order in the form prescribed by section 43 of the law as above quoted. The affidavit and the order are as follows:
>
> . . . .

[MLHP: There were five exhibits to Chairman Baker's affidavit. The fifth exhibit was the ballot prepared by Secretary of State Brown, which the Democrats claimed would confuse voters. A copy of the disputed ballot was published in the Globe]

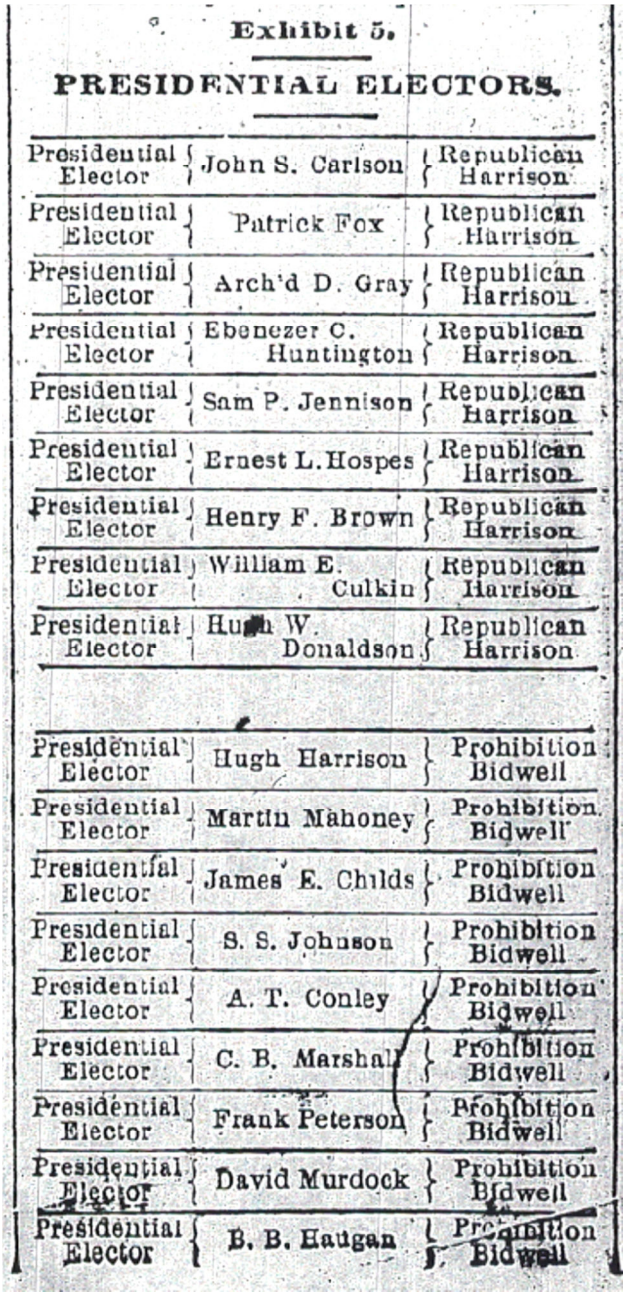
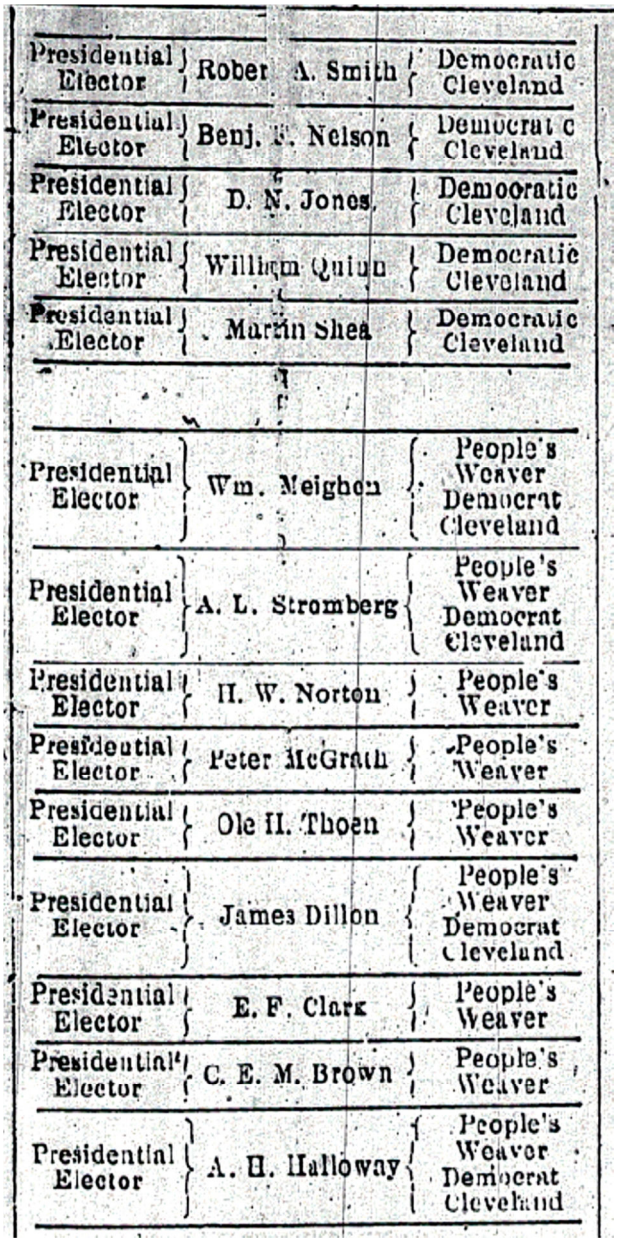


Exhibit 5.

PRESIDENTIAL ELECTORS.

Presidential Elector	John S. Carlson	Republican Harrison
Presidential Elector	Patrick Fox	Republican Harrison
Presidential Elector	Arch'd D. Gray	Republican Harrison
Presidential Elector	Ebenezer C. Huntington	Republican Harrison
Presidential Elector	Sam P. Jennison	Republican Harrison
Presidential Elector	Ernest L. Hospes	Republican Harrison
Presidential Elector	Henry F. Brown	Republican Harrison
Presidential Elector	William E. Culkin	Republican Harrison
Presidential Elector	Hugh W. Donaldson	Republican Harrison
Presidential Elector	Hugh Harrison	Prohibition Bidwell
Presidential Elector	Martin Mahoney	Prohibition Bidwell
Presidential Elector	James E. Childs	Prohibition Bidwell
Presidential Elector	S. S. Johnson	Prohibition Bidwell
Presidential Elector	A. T. Conley	Prohibition Bidwell
Presidential Elector	C. B. Marshall	Prohibition Bidwell
Presidential Elector	Frank Peterson	Prohibition Bidwell
Presidential Elector	David Murdock	Prohibition Bidwell
Presidential Elector	B. B. Haugan	Prohibition Bidwell



Presidential Elector	Rober A. Smith	Democratic Cleveland
Presidential Elector	Benj. S. Nelson	Democratic Cleveland
Presidential Elector	D. N. Jones	Democratic Cleveland
Presidential Elector	William Quinn	Democratic Cleveland
Presidential Elector	Martin Shea	Democratic Cleveland
Presidential Elector	Wm. Meighen	People's Weaver Democrat Cleveland
Presidential Elector	A. L. Stromberg	People's Weaver Democrat Cleveland
Presidential Elector	H. W. Norton	People's Weaver
Presidential Elector	Peter McGrath	People's Weaver
Presidential Elector	Ole H. Thoen	People's Weaver
Presidential Elector	James Dillon	People's Weaver Democrat Cleveland
Presidential Elector	E. F. Clark	People's Weaver
Presidential Elector	C. E. M. Brown	People's Weaver
Presidential Elector	A. H. Halloway	People's Weaver Democrat Cleveland

On the basis of Chairman Baker's affidavit, Ramsey County District Court Judge Brill issued a writ of mandamus to the Secretary of State. The *Globe* reprinted the Judge's order to conclude the article on October 16th:

Judge Brill's Mandamus.

On reading the foregoing affidavit of Lewis Baker, dated Oct. 14, 1892, it is, on motion of Charles E. Flandrau, C. D. O'Brien and Ambrose Tighe, attorneys for said Lewis Baker,

Ordered, That Frederick P. Brown, secretary of state of Minnesota, shall forthwith correct the error in the printing of the ballots for presidential electors to be held Nov. 8, 1892, which is referred to and set forth in full in the said affidavit, and shall print on said ballots after an interval at least an inch in width following the name of the last elector nominated by the Prohibition party the names of the nine presidential electors nominated by the Democratic party, to wit: Robert A. Smith, Benjamin F. Nelson, D. N. Jones, William Quinn, Martin Shea, William Meighen, A. L. Stromberg, James Dillon and A. H. Halloway, grouped together, and after each of said names the words Democratic-Cleveland, as by section 34 of chapter 4, of the General Laws of the State of Minnesota for 1891, required, or shall print on said ballots the names of the following presidential electors nominated by the Democratic party grouped together, to-wit: Robert A. Smith, Benjamin F. Nelson, D. N. Jones, William Quinn, Martin Shea, and after each of said names the words Democratic-Cleveland, and following them at an interval of least an inch in width, the names of the following presidential electors nominated by the Democratic party and in the following order, to wit: William Meighen, A. L. Stromberg, James Dillon and A. H. Holloway, and after each of said last enumerated names the words People's party—Weaver, Democratic-Cleveland, as part of the group of presidential electors nominated by the People's party and preceding the rest of the presidential electors nominated by said People's party.

Or show cause before me at my chambers in the court house, in the city of St. Paul, Ramsey county, Minnesota, Monday, the 17th day of October, 1892, at 10 o'clock a. m., why such error should not be corrected and said ballots printed as heretofore required.

Let a copy of this order and said affidavit be forthwith served on the said Frederick P. Brown, secretary of state of Minnesota.

HASCAL R. BRILL,
Judge District Court.

Dated at St. Paul, Minn., Oct. 15, 1892.

Oral argument before Judges Brill and Otis took place on Monday, October 17, and was reported in the *St. Paul Daily Globe* on October 18:

COURTS TO TELL

Whether We Are at the Mercy
of Secretary of State Brown.

The Mandamus Case Argued
on a Question of Jurisdiction.

Is There a Recourse for the
People Against an Official's Error?

Difference Between Others
Decided and the Case
Now at Bar.

Elaborate Arguments by Able
Attorneys on the Points
Involved.

The Court Promises to Announce
Its Decision This Morning.

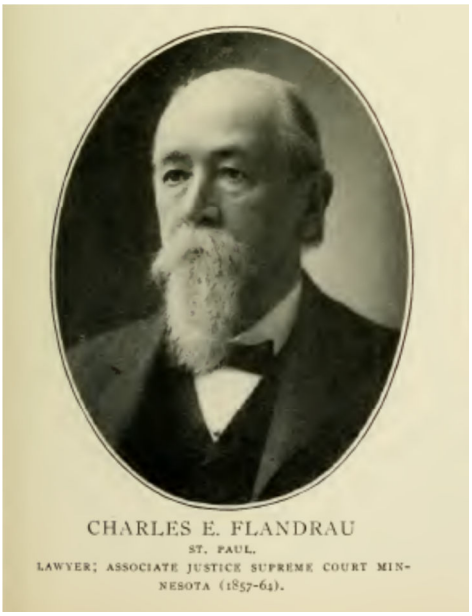
The mandamus proceedings against the secretary of state to compel him to properly arrange the official ballot for presidential electors came on in the district court yesterday, Judge Brill requesting Judge Otis to sit with him in the consideration of the case. The relator, the Democratic state central committee, was represented by Judge Flaudrau, C. D. O'Brien and Ambrose Tighe. Secretary of State Brown appeared, accompanied by Attorney General Clapp in the capacity of attorney. The latter filed an answer for the secretary, stating that it was hastily prepared, and he might wish to add to it later. This return simply sets up that Secretary Brown on the 8th day of October received certificates of nomination for the electors nominated by the People's party July 13. According to section 37 of the election law the nominations were accompanied by a petition containing the names of 2,000 citizens. No other certificate of

nomination for the People's party electors had been filed, and in making up the official ticket the secretary had simply followed the provisions of the law in placing then names on the ballots in the order in which the certificates were filed.

Judge Brill suggested that the question of jurisdiction of the court arose, and asked the attorney general what he had to offer on that point, the latter replying that the secretary of state had been advised to waive that point. The attorneys for the other side, however, desired its discussion, holding that the court had jurisdiction, and that otherwise the secretary might omit any candidate or set of candidates from the ticket and there would be no redress for the aggrieved party.

Judge Flandrau's Address.

We brought this proceeding, if your honors please, in the public interest, because we were apprehensive that if this error, as we claim it to be, was not corrected it might result possibly in a controversy as to the admission of the vote of the state—its being counted when the general returns are made up. I have no doubt that the Republicans hope and expect to carry the state, and the Democrats entertain the same views, and we want it corrected if it can be, entirely in the interest of the state's vote being counted without any controversy or trouble which might arise over it. And we think that perhaps what is said about it may influence the secretary of state (no doubt his desire is to do his duty), if he thinks he has committed an error in placing those names upon the ballot as he has to correct it. He certainly has the power.



CHARLES E. FLANDRAU
ST. PAUL.
LAWYER; ASSOCIATE JUSTICE SUPREME COURT MINNESOTA (1857-64).

Upon the question of jurisdiction, we have, if your honors please, looked at all these cases that have been decided by the supreme court, and I am frank to say that each successive case seems to have been directed at the last one, to fill a gap and cut off this jurisdiction, if there was anything left. The last case is stronger than any of the rest of them. Now, knowing that, and feeling the embarrassment that we labor under, that these decisions are against us on the question generally of jurisdiction in reference to the judiciary interfering with the executive department, we say then that this particular question is distinguishable entirely from those cases in this: Now, take article 1, section 2 of the constitution. Section 2 reads: "Rights and Privileges of Citizens — No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." Now; there is a constitutional provision on the subject of voting, of the exercise of the franchise, and it provides distinctly that no citizen of this state shall be deprived of that right except by the judgment of his peers, in accordance with law. Now, article 7, section 1 of the constitution provides who shall exercise that right: "Every male person of the age of twenty-one years or upwards belonging, to either of the following classes, who shall have resided in the United States one year, and in this state for four months next preceding any election, shall be entitled to vote at such election in the election district where he resides," etc. Now, there, the constitution particularizes the qualifications, confers the right, says who shall exercise it, and then, to clinch it, says he shall not be deprived of that right except by due process of law or I the judgment of his peers.

The constitution also provides what the duties of the secretary of state are, land they shall be such as prescribed by law. Article 5, section 50, amended, says: They shall be such duties as are described by law. Article 1, section 8, which is entitled "Bill of Rights," says that every person is entitled to a certain remedy in law for ail injuries or wrongs which he may receive in his person, property or character.

We have then, as I said before, first, the constitution, prescribing the qualifications of the voter and conferring the right upon him; next, a provision saying that he shall not be deprived of it; and third, a provision saying that he shall have a speedy remedy for any wrongs that he may suffer. Now, this law is a peculiar one. This law is solely upon the subject of the exercise of the franchise. It is entitled, "An Act Regulating Elections," and was passed recently, at the last session, and prescribes nothing else than how that constitutional right shall be exercised. It confers a certain duty upon the secretary of state, and at the same time couples the judiciary with it, with that very duty. It says he shall make up his ballot in a certain way, and you shall see that he does make it up in that way. So that it is a joint conferring of the power upon the secretary of state and the judiciary; the executive, is merely the hand to do it and the judiciary is the head that directs that hand and sees that it is done correctly.

What Might Happen.

Suppose, by way of illustration and argument (not implying that he would, in fact, do anything of the kind), he should distinctly say, "I will not put the Republican electoral college the ticket at all: I will leave it off," and the court, upon an application being made to it should see that he ought to have put it on, that there had been an error in the makeup of the ticket, yet should refuse to remedy it, he could then directly, by virtue of that law, under the peculiar construction that the court is asked here to put upon it, actually disfranchise an entire class of voters and vitiate the whole state election. We claim that, by reason of this peculiar method of grouping, this very result will be produced; there can be no question that the grouping of these presidential electors upon the ticket in the manner in which the secretary has done it will necessarily disfranchise ten or twenty thousand voters in this state. Therefore it is only a question of degree. The offense or error is nearly as great (it is only a question of degree) as if he had refused to put them on at all; because, if he puts them on in a manner that embarrasses the ticket, and may and probably will result in disfranchising the party, it is no greater error

than if he should attempt to say directly it shall not vote for its presidential electors because he will not put them on at all.

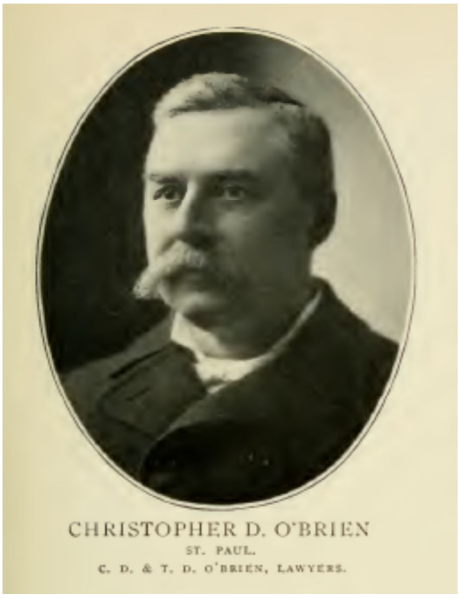
Therefore we say this is entirely a different question from any question that has ever been raised under any of those decisions. The constitution operates directly upon the franchise. This act is passed, in pursuance of the constitution, to regulate the method of exercising that franchise. This act simply says, as a part of the machinery, that the secretary of state shall make up the white ticket, in conjunction with the judiciary, who shall supervise and see that it is done correctly. It seems to me, your honors, that that is entirely a distinct question from any question that has ever been raised by any of these cases (Minnesota decisions). They all relate to printing and a variety of things that have nothing to do with the constitution. Therefore we claim that we distinguish this from any of these cases that have been decided by the supreme court.

MR. O'BRIEN'S ARGUMENT.

Reasons Why the Court Should Express Its Views.

C. D. O'Brien addressed the court at the conclusion of Judge Flandrau's remarks, taking the ground that this application does not come within the constitutional prohibition. The matters in which the supreme court has spoken were matters in which the acts to be done were confined either to the executive officer, by virtue of his office, or were subsequently placed upon him; but the act was to be done by him, and by him alone, and within the purview of his discretion, as well as of his immediate act. It can well be said that it is the true policy of the law to repose much confidence in an executive officer (there can be no doubt of that), and such were the decisions of the supreme court. They said that no proceeding in the nature of coercion or control could be used against an executive officer; but they spoke in reference to the law as it then existed, and as Judge Flandrau has well said, where a joint duty is imposed upon an executive officer and the

judiciary or a judicial officer, as in this case, they shall under those circumstances not be heard to say that the old line of decisions as to the immunity of the executive officer from the control of the judiciary shall also apply, it having, in this particular instance, the effect of depriving the judiciary of the opportunity to perform its duty.


CHRISTOPHER D. O'BRIEN
ST. PAUL.
C. D. & T. D. O'BRIEN, LAWYERS.

Now, it seems to me, when the policy of the state of Minnesota withdrew from the individual elector the right to make his own ticket; when it withdrew from the individual elector the right to select his own ticket in the form and shape that he wanted it himself, in the exercise of his elective franchise, and proposed to put in his hands, instead of that, an official ballot, prepared by other persons; and when it went a step further, and put the preparation of that official ballot within the control of a special officer, whether he be an executive officer or not, as in this case he happens to be, it seems to me it was well thought of that in the very act providing for that proceeding, a tribunal should be created or referred to, or another and additional judgment should be called in to supervise what

Might Perchance Be an Error

or a party in the making up of the ticket, because not only public but private rights are involved in it, and because, while in this case we are met by what is termed a constitutional prohibition, yet, as to all the county officers of this state, as to how the county auditor and the other officers who are not executive officers of the state perform their duties, there is no question about the ample rights that are intended. And so I say that this is a joint power, and it was only conferred upon the secretary of state to the extent that the judiciary might,

in a proper case, being called upon, express its opinion or advice.

Now, I am free to say that it would be a violation of the rules laid down by the supreme court if this court should undertake by mandamus to order the secretary to do that act. I am free to say that there is some crudeness perhaps in the legislation; but l am not prepared to assent, and I deny that the decisions of the supreme court in this case operate as a bar to prevent your honors giving your opinion, or to prevent the judicial department giving its opinion to the executive officer as to what his acts should be. If the secretary of state refused to carry out that opinion, if he refused to correct a manifest error,

What the Result Would Be,

what consequences would attach to him, becomes a question. But to say that this statute is to be emasculated by closing the mouth of the judiciary upon a question where the statute says the judge must speak, and that we have a right to ask him to speak upon, it seems to me is going entirely beyond the limit of the doctrine that the executive cannot be controlled by a judicial officer, each department being independent. Therefore, I think, the view taken by Judge Flaudrau, and by my colleague here, is entirely correct.

Now, there is this to be said in relation to this matter. It is a serious question. The voice of any citizen, in a petition to the court, must be listened to with respect. The voice of any citizen in appealing to a public servant, no matter how high the office, must be listened to with respect. The matter which we are considering here is not a personal matter. Today the political party with which we at present affiliate—and I think the three particular counsel here do not stand in any immediate danger of suddenly changing their views—does not happen to be in power in this state. The Australian ballot system is rapidly sweeping through the United States, and is already established in the Northwest, and there are some Democratic states where it is in force; and if we sanction this method of procedure, or an improper method of procedure,

other states throughout the republic might make this an excuse and bring about an application of forces which would not only affect the counting of a vote but the very casting of it.

Electors Should Be Grouped.

The averments of the petition in this matter are based upon the provision of the law which says that these electors shall be grouped together. The reasons for it are obvious, and it is not necessary for me to argue them. It is unquestioned that the law so far as its expression is concerned, has been violated, and why? It makes no difference who does this thing, the question is a public question, and an important one, this approaching election. The official ticket, according to the evidence laid before the court, does not group the nine Democratic electors. Why? Why doesn't it group them? Do you find the answer in this return? The return shows that in making the several groups of presidential electors, said secretary followed in each ease the order in which the names appear upon the certificate of nomination, and that in arranging the order in which the names of the candidates for presidential electors of the People's party were to be placed he simply followed the order in which the same appear in the certificate of nomination. Wherefore respondent asks that these proceedings be dismissed. There you have the entire thing.

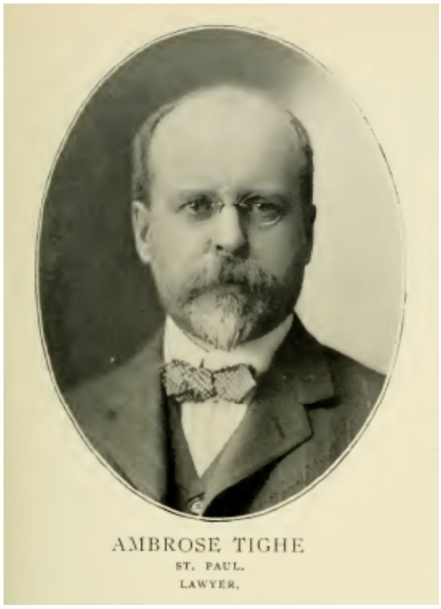
Now, if the position of the respondent here is that he is above and beyond the law, and that is sustained by the supreme court of the state of Minnesota, that is all right. At considerable and interesting length, Mr. O'Brien argued that the important phase of the case was to show whether, when a wrong was shown, as in a case like this, there was any remedy. It is a question whether a state officer is beyond the reach of the law. It was repugnant, he said, to the proper construction of the statute to say that the legislature deliberately put the printing and the formulation and issuance of the state ballot into hands where no authority remained on

earth to control it. He is then entirely without the pale of the law. I do not think that can be the construction.

IMPORTANT OMISSION.

Ambrose Tighe Calls Attention to a Provision for Court Interference.

There is a provision for three kinds of ballots, your honor will remember, the white ballots for state officers, the red ballots for city or municipal officers, and the blue ballots for county officers. In the preparation of the white ballots, the only provision of the law conferring this power of pre-paring the same on the secretary of state is in the following words: "The plain white ballots shall be printed by the secretary of state." Then the next provision is: "The ballots tinted blue shall be printed by the county auditor, and the ballots printed red shall be printed by the city clerk or recorder." The provisions which follow in reference to the arrangement of the names on the ballots provide that this duty shall be performed by the officer charged with the preparing of such ballots, referring indirectly to the secretary of state, the county auditor and the city clerk, according to the character and color of the ballots. Then section 43, under which these proceedings were instituted, reads: "Whenever it shall appear, by affidavit presented to any judge of the supreme court or district court"—not to the supreme court or district court, but to any judge of the supreme court or district court of the state—"that an error or omission has occurred in the printing of the name or description of any candidate on official ballots, or any other error has been committed in printing the ballots, such judge shall immediately, by order, require the officer or person charged with the error or neglect to forthwith correct


AMBROSE TIGHE
ST. PAUL.
LAWYER.

the error and perform his duty or show cause forthwith" not why he should not correct the error or perform his duty, but "why such error should not be corrected and such duty be performed. Failing to obey the order of such judge shall be contempt." Now, if the decisions of the supreme court in reference to the interference of the judiciary with executive officers govern in the application of this section 43, then the section provides that the court may compel the officer charged with the preparation of the red ballots, and the officer charged with the preparation of the blue ballots to do his duty, but it fails to provide that the court may compel the officer charged with the preparation of the white ballots,

The Most Important

used at the election, to correct an error or perform a duty which he has failed to perform. Now, if the construction contended for by my colleagues is given to this statute, viz., that the judges who may be selected by the aggrieved party, or by any party who cares to call his attention to it, shall have joint power with the officer named in the preceding sections, in the preparation of these ballots, then this section can be applied so that it will be in force in reference to all the ballots which are provided for in the act. And it seems to me it is important to give it a construction which will enable it to have vitality throughout the whole matters which are covered by the law.

Mr. Flandrau— l would like to say here that I refrained wholly, in my remarks upon the matter, from touching upon the merits of the case, and if we go into that I should like to say a little more.

The Court—Have you (Mr. Clapp) any suggestions to make?

Mr. Clapp—Why, having waived this question I do not care to present any argument. If the court desires to hear such suggestions as occur to me, I will make them.

Mr. O'Brien— We should like, as electors and citizens of this state, to request that the attorney general, now being

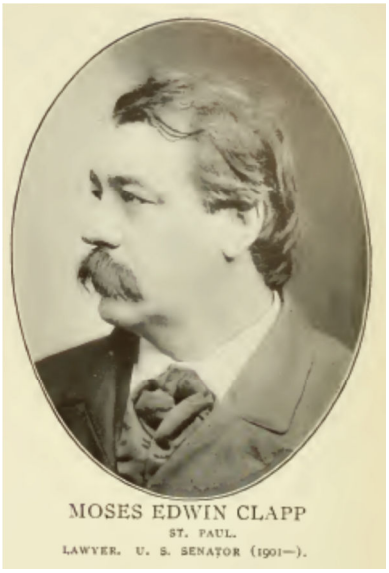
present, would express his views to the Court upon this subject.

The Court— l do not know as we have any request to make in regard to it, but the attorney general may offer any suggestion he wishes.

STICKS TO THE TEXT.

Gen. Clapp's Views Given — Interesting Running Discussion.

Attorney General Clapp then made a brief address. He said the secretary had prepared the names in the order filed, and he (Clapp) did not believe the legislature intended to give the courts jurisdiction over executive officers. He saw no difference between this case and those already cited. He admitted that cases might arise where an injury might be done, for which there was no remedy by law, but this was simply a misfortune. A man having a claim against a county has a remedy. A man having a claim against the state has none. But in the wisdom of the past it has been decided (and it has met with the common approval of the people) that upon whatever theory they have a mind to place it the character of the executive office, the character of the incumbent of that office is such that the remedy does not lie as against his error or omission, which does lie in the case of the error or omission of an inferior officer. That is simply a condition that attaches to our form of government, and has no more bearing here than it has in the discussion of any other matter that may become the subject of action by an inferior officer or by an executive officer. It is the settled policy of this state.



MOSES EDWIN CLAPP
ST. PAUL.
LAWYER. U. S. SENATOR (1901—).

I submit this, as I said before, as suggestion, not as an argument put forth as an advocate in the cause of his client; for if this court is of the opinion that it cares to entertain jurisdiction Mr. Brown will cheerfully acquiesce in the judgment of the court and its decision.

Mr. Flandrau—If your honors please, the answer that the attorney general makes to our position that this is conferred jointly, or apparently so, upon the secretary of state and the judicial department of the government to fix up this ballot and see that it is right, one having the right to correct the errors of the other; that that, as he says, is based upon the condition of things which existed at the time of the passage of the act and must be construed to have been so intended, that it did not reach the secretary of state, but only reached the inferior officers, and as to this series of decisions which have been made by the supreme court placing an immunity upon the executive officer. Now, it seems to me, if your honors, please, exactly the contrary. They make no distinction in the language at all. In regard to this section 43, which refers to the whole business that has been previously provided, in regard to these three classes of tickets: "Whenever it shall appear by affidavit presented to any judge of the supreme court or district courts of the state that an error or omission has occurred in the printing of the name or description of any candidate on official ballots, or any other error has been committed in printing the ballots, or that the president or secretary of any caucus or convention has failed to properly make or file any certificate of nomination, or that the name of any person has been wrongfully placed upon said ballots as a candidate," particularly the county; congressional and legislative are otherwise provided for. It seems to me it admits of a better and fairer construction to say that the legislature, in passing this act, had in view that very idea that the counsel suggests, that lame condition of the law where you could not reach the executive, and that it intended by its language here to reach it— to cover it all. It seems to me that we are to suppose that they understood and know that the secretary of state was accustomed, ordinarily, from these decisions, to escape coercion by the judiciary, and in order to

avoid that difficulty they massed the whole thing. They did not say anything about the "said ticket," "county ticket" or anything of that kind, but "whenever it shall appear by affidavit presented to any judge of the supreme or district courts that an error or omission has occurred in the printing of the name or description of any candidate on official ballots, or any other error has been commuted." The legislation is so broad that it seems to contemplate that they intended to include—

Could Correct Their Own Errors.

Mr. O'Brien (to Mr. Flandrau)—reason is that, before this, people could correct their own errors.

Mr. Flandrau— Of course, before this change was made all we had to do was to nominate an officer at a convention and that was the end of it— he was before the people—and when it came to voting he could make his own ballot; everybody could furnish Ins own ballot, or write his own ballot, or have them partly written and partly printed; there was no restriction to the voter in that respect. Now they take it all out of his hands. They say you cannot vote unless you vote this ballot, or it is the only ballot that will go into the ballot box.

Mr. Clapp— l think, judge, if you will read that law, you will see the error of that position.

Mr. Flandrau— No ballot can go into the ballot box at the booth except this one.

Mr. Clapp— Yes, but you can vote without voting for the men that that are on a particular ballot.

Mr. Flandrau— Oh, yes. I don't claim you cannot vote except for men on one ticket, but you cannot vote any other ballot than that furnished by these officers.

Mr. Clapp—Oh, you have to vote on one ballot, yes.

Mr. Flaudrau—Of course the right of franchise and the exercise of it is guaranteed by the constitution; the peculiar methods of proceeding in the exercise of that right are subject to the law. There is no doubt about that; they can regulate that. But when they may undertake to regulate it as they have done here, and have taken away from the citizen (as part of this regulation) the privilege he had of making up his own ballot, and confer it upon somebody else, it seems to me that section 43 here, in the broad, comprehensive language of its meaning means to include the secretary of state as well as anybody else, from the fact that they knew if they do not make it general in that respect, thoroughly so, that this question might be raised in reference to it. And it seems to me, your honors, that it is very plain that the whole thing is entirely different from anything that has ever been presented to the consideration of the judiciary before: it is a supplemental act here to carry out and confer and regulate certain rights, inalienable rights that are conferred by the constitution.

Proposition Conceded.

Mr. O'Brien— lf the court will permit me, the position of the attorney general entirely disposes of this question of jurisdiction. The attorney general of the state comes here, and while expressing his doubts as to the jurisdiction of this matter he says to the court that if it does assume jurisdiction its decision will be implicitly obeyed by the secretary of state. Now, that concedes two or three propositions. It concedes the jurisdiction, if the court is of the opinion that it has it, which will be followed; and it concedes that the present form of that ticket is erroneous. And the position of the executive officer of the state, in that way, it seems to me, is conclusive on the question of jurisdiction, and the attorney general cannot imperil a question of this kind by saying that an order will be obeyed from a tribunal without jurisdiction.

Mr. Flandrau— As to the position of the attorney general on the question that the law was supposed to have been passed with reference to the existing state of judicial decisions, it

can be most conclusively shown that that is not the correct position.

The Court— Well, that question is not before us now.

Mr. Flaudrau— That is the reason I refrained from making any remarks upon it.

The Court— The question, of course, of jurisdiction is first to be considered. We do not desire to hear counsel of any other point until we have determined that question. We will consider the matter during the day, and I think will be able to announce a decision tomorrow morning at 10 o'clock.

Mr. O'Brien—In your honor's chambers, or in the court room?

The Court— l think in Court Room No. 1. I shall probably be holding court tomorrow morning.

Mr. Tighe's Point.

Mr. Tighe— Before your honors adjourn this hearing I should like to suggest one point that has not been raised; it will only take an instant; and that is, the section which prescribes the duty of the secretary of state. It says that the duties of said executive officers shall each hereafter be prescribed by law, giving them such powers as are prescribed by law. Now, in the decision in which this question was raised before the supreme court of this state, in each case a distinct duty was conferred upon the secretary of state or the other executive officer.

Mr. O'Brien—By the constitution.

Mr. Tighe— And there was no limitation in the law on the method of his performing the same, but either on account of his failure to perform it, or the method in which he did perform it, proceedings in the nature of a mandamus were brought against him, and the supreme court held that there was no jurisdiction. Now, in this case there is this difference: that the duties and powers which are conferred upon the secretary of state by the section giving him the duty of

printing the ballots is limited in the same law by the supervisory power on the part of the judge to whom application is made in case of an error having been committed; therefore the powers which are conferred upon the secretary of state by this law are not the power to prepare the ballots, but the power to prepare the ballots subject to the supervision of the judge to whom the aggrieved party may apply for a remedy. That seems to me to be an important distinction which has not been drawn by anyone who has yet spoken on the question.

Mr. Flandrau—Except as far as we claim it is joint.

Mr. Clapp—Yes. That was all gone over. Now, if the court should decide that it has jurisdiction, would the question be heard tomorrow?

The Court—I see no reason why it cannot be.

Mr. Flaudrau— It ought not to take very long to discuss that placing of the ticket.

The *Globe* reported the court's ruling on Wednesday, October 19th:

HE'S BEYOND ALL LAW

The Secretary of State Can
Do Just About as He
May Please.

And the People May Grin and
Bear It From This Time On.

The Courts Hold They Have
No Jurisdiction in the Matter.

No Decision as to the Extent of the Wrong He Has Done.

There is no legal remedy for wrong in this state. The courts have so decided. A partisan secretary of state, himself a candidate for re-election, may act at the dictation of the Republican committee and purposely blunder and confuse an official ballot, and the law can offer no redress.

The natural presumption is that Secretary of State Brown arranged the electoral ballot at the orders of his political masters in such a manner as to make it confusing and misleading; and yet there is no remedy at law. The only wonder is that he did not entirely omit the Democratic electors. Mr. Brown is a candidate for re-election; suppose, for example, he should omit the name of his opponent for secretary of state. The law has no remedy. He might be impeached after the election, but that would be too late.

In the mandamus case brought by the Democratic committee to compel Brown to correct the ballot, Judge Brill yesterday rendered his decision, dismissing the case. He holds that the court has no jurisdiction, and on that ground alone discharged the order. He does not decide that the secretary of state is not in the wrong, nor that the ticket is not a piece of bungling work, but decides simply that the court has no jurisdiction. No matter how great might be the wrong of the secretary of state, he is beyond the power of the court. The decision of Judge Brill, in which Judge Otis concurs is as follows:

The Decision.

The secretary of state is charged, by the provisions of chapter 1 of the General Laws of 1891, known as the Australian ballot law, with certain duties in the preparation of ballots to be used at the state election. It is provided by section 43 of the law, as follows:

"Whenever it shall appear, by affidavit presented to any judge of the supreme or district courts of the state, that an error or omission has occurred in the printing of the name or description of any candidate on official ballots, or any other error has been committed in printing the ballots," etc. Such judge shall immediately, by order, require the officer or person charged with the error or neglect to forthwith correct the error and perform his duty, or to show cause forthwith why such error should not be corrected or such duty performed. Failing to obey the order of such judge, shall be contempt."

An affidavit of Lewis Baker was presented to me charging that the secretary of state, in preparing the ballots for presidential electors, was not arranging the names in accordance with the provisions of the law, and an order to show cause was issued in accordance with section 43. At the time of issuing the order I expressed doubts as to the jurisdiction of the court in the premises in view of certain decisions of the supreme court of this state, but was assured by counsel that they believed the point could be overcome upon argument.

HON. HASCAL R. BRILL,

DISTRICT JUDGE, SECOND JUDICIAL DISTRICT.

If there is any question settled definitely and clearly in the jurisprudence of this state it is that an executive officer of the state is not subject to the control or interference of the judiciary in the performance of his official duties. This has been held over and over again in

beginning with Chamberlain vs. Sibley in the 4th Minn., page 312. and ending with State vs. Braden, in the 40th Minn. page 174, and this has been held in proceedings against the governor, proceedings against the state treasurer, proceedings against the state auditor, and proceedings against the secretary of state, and the rule has been applied as well where the duty was imposed by law as where it was directly fixed by the constitution, and as well where the duty might have been cast upon any other officer or person as where it was a duty necessarily appertaining to the office.

By the constitution of the state the government is divided into three departments—legislative, executive and judicial. The powers and duties of each are distinctly defined. Neither of the departments can exercise any of the powers of the other not expressly provided for. This not only prevents an assumption by either department of powers not properly belonging to it, but also prohibits the imposition by one of any duty upon either of the others not within the scope of its jurisdiction, and it is the duty of each to abstain from and prevent encroachment upon the other.

It was said in the argument that the application of this doctrine might result in the failure of justice; that a citizen having a right might be remediless if an executive officer failed to do his duty. That argument applied with equal force in all the cases we have referred to. It is an argument not open to us to consider. The difficulty, if there is any, is inherent in our system of government. There cannot be three independent departments of government and either be under the control of the other. The advantages arising from the separation of the functions of the government and their independence were supposed by the founders of the government, and are supposed by the people, to more than counterbalance any disadvantage necessarily inhering in such an arrangement.

No Distinction.

An attempt has been made to distinguish this case from the cases referred to. We are unable to find any distinction. The duties placed upon the secretary of state regarding the preparation of the ballot by the law of 1891 are official: he is acting as secretary of state, and not as an individual.

It is said the law has cast the duty jointly upon the judge and the secretary. The legislature has no right to call upon the judge to perform a ministerial duty, and it has not attempted to do so. The judge is not required to do anything toward preparing the ballot or having it printed. The duty is cast upon other officers, and if they do their duty the judge is not called upon at all. In case they fail to do their duly, section 43 provides a summary judicial proceeding by which they are to be compelled to do their duty in the premises.

HON. CHAS. E. OTIS.

There is no joint action by the executive officer and the judge any more than in any other case where a party performs a certain act because compelled to do so by mandate of the court. The fact that the word “judge" is used in the law instead of "court" is of no significance. All through the statutes of the state a similar use of terms is made in prescribing judicial action. The duty imposed is judicial in its nature; the judge acts in his judicial character. The action taken is a judicial action.

Counsel also attempt to find an argument in the fact that this proceeding is not precisely the same as the proceedings in the cases where the principle alluded to has been announced. But there is no essential difference between this proceeding and the others. This is in the nature of mandamus. It is made summary because delay would in most cases render it

ineffectual. Besides, in none of the cases did the decision turn upon the nature of the particular proceeding; the cases were decided upon the broad principle that executive officers in the performance of official duties are not subject to the control of the judiciary.

Must Be Dismissed.

The secretary of state has appeared in this matter and expressed his willingness to proceed to a hearing on the merits and abide the final judgment of the court, but we have deemed it our duty to raise the question of jurisdiction ourselves. And upon this point we cannot do better than to read from the case of The County Treasurer vs. Pike in the Twentieth Minnesota, 366—a similar case— where the supreme court says: "The exemption of the secretary of state from coercion by the courts is not a personal privilege of the incumbent of the office, created for his benefit, and to be asserted or waived at his pleasure. An executive officer cannot surrender the defenses which, not for his but for the public good, the constitution has placed around his office. Still less can his consent authorize this court to transgress the constitutional limitation of its powers, and assume a jurisdiction which, by the fundamental law, it is expressly forbidden to exercise."

We are, therefore, of the opinion that we have not power to proceed in this matter. Whether section 43 was intended to apply only to county and city officers or includes state officers as well, it is not necessary to determine—in either event it has no force in this proceeding. We shall hardly be expected to consider the argument that if this section is unconstitutional as to state officers the whole action must fall.

The order to show cause will be discharged.

On Wednesday, October 19, the morning *Minneapolis Tribune*, a Republican organ, reported the lawyers' responses after they heard Judge Brill read his order dismissing the petition:

A CLEAN KNOCK OUT

The Democratic Kickers
Thrown Out of Court.

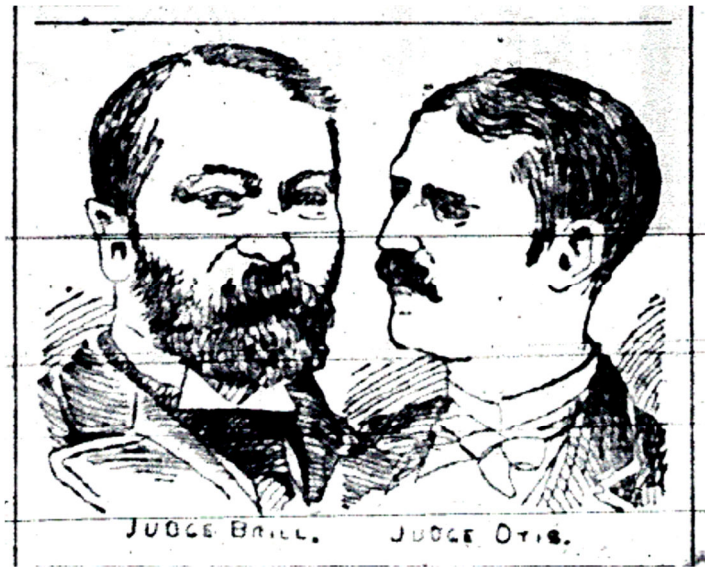
THE MANDAMUS IS A BAD
THING TO FOOL WITH.

It kicks backward on Slight Provocation—
The Woe of the Democratic Committee—
They Admit That They Tried to Make a
Cat's Paw Out of the Court—
The Decision of the Judges in Full.

St. Paul, October 18 – [Special] – The court has no jurisdiction in the matter. This was the decision of Judge Brill, of the Ramsey County District Court, yesterday morning in the mandamus proceedings brought by Chairman Baker, of the Democratic state central committee, against Secretary of State Brown, on the order to show cause why the latter should not readjust the names of electors on the official state ballot, so that the names of the four Populist electors endorsed by the Democrats should occupy a position at the head of the Populist list, instead of being scattered.

The second day of the famous mandamus proceedings of the democratic state central committee against Secretary of State Brown requiring him to print the ballots just as they dictated with reference to the grouping of the fusion electors opened yesterday with a large attendance. As before, judges Brill and Otis occupied the bench, while the concourse of attorneys sat side-by-side with the indicted persons awaiting arraignment. The concurrent opinion was read at length by Judge Brill, who decided that, in favor of the power vested in the executive office by section 43 of the statute, the court had no right to

proceed and the action to show cause was therefore discharged.



The group, consisting of Chairman Baker, Judge Flandrau, Chris O'Brien and the one and only and celebrated Ambrose Tighe, did not make any demonstration, but drew a deep sigh and reached for their hats. Despite the inference that the matter would not be allowed to rest if decided adversely, not a word was said.

"What next?" echoed Chris O'Brien. "Why, register and vote the straight Democratic cat ticket, of course. There is no remedy and all we can do is to take our medicine and elect a Democratic Secretary of State, so that we can square this thing."

Judge Flandreau smiled and nodded at this, saying:

"That is about all there is to be done."

Chairman Lewis Baker declined to express any opinion pleading that he was not in the habit of being interviewed.

"What they wanted, said Secretary Brown, was something which is not done in any other state in the union. The practice invariably is to place electors according to the conventions. If

they think they can elect the Democratic Secretary of State, let them."

Atty.-Gen. Clapp reiterated his belief that under the law the other side had no case in the court had no jurisdiction.

It is not generally thought that anything further will be or can be done.

Mr. Tighe said to the Tribune representative, in so many words, that the Democrats had accomplished all that they had expected. This was that the attention in the state had been called to the matter and the attention of the voter directed emphatically to the ticket and the Democratic position thereon. It was a comment that, if this was the only object of the agitation, that the learned attorneys in the case put themselves in a very peculiar position. They were on record as staking their reputations on an issue, and supporting it with arguments before an important judicial tribunal. To men up trees it looks like trifling with the courts and it certainly trifling with the public, which had been informed, with a great waste of headlines, and with false dispatches sent all over the land, that a great wrong it been committed. When it is all over, then counsel should be above so low political tricks, cooly acknowledge that they all they were after was to advertise the right way of voting for the Democratic candidates. A prominent St. Paul Democrat, who was once a candidate for governor, said it was just about on par with the management of the whole campaign by "Grandpa Baker."

United States Supreme Court

MICHELE L.TIMMONS, ACTING DIRECTOR, RAMSEY COUNTY DEPARTMENT OF PROPERTY RECORDS AND REVENUE, et al.

v.

TWIN CITIES AREA NEW PARTY

520 U. S. 351

No. 95-1608

Argued: December 4, 1996 Decided: April 28, 1997

Most States ban multiple party, or "fusion," candidacies for elected office. Minnesota's laws prohibit an individual from appearing on the ballot as the candidate of more than one party. When respondent, a chapter of the national New Party, chose as its candidate for state representative an individual who was already the candidate of another political party, local election officials refused to accept the New Party's nominating petition. The Party filed suit against petitioners, Minnesota election officials, contending that the State's antifusion laws violated its associational rights under the First and Fourteenth Amendments. The District Court granted petitioners summary judgment, but the Court of Appeals reversed, finding that the fusion ban was unconstitutional because it severely burdened the Party's associational rights and was not narrowly tailored to advance Minnesota's valid interests in avoiding intraparty discord and party splintering, maintaining a stable political system, and avoiding voter confusion.

Held: Minnesota's fusion ban does not violate the First and Fourteenth Amendments. Pp. 3-19.

(a) While the First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas, Colorado Republican Federal Campaign Comm. v. Federal Election Comm., 518 U. S. ___, ___, States may enact reasonable regulations of parties, elections, and ballots to reduce election and campaign related disorder, Burdick v. Takushi, 504 U.S. 428, 433 . When deciding whether a state election law violates Firstand Fourteenth Amendment associational rights, this Court must weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Id., at 434. Regulations imposing severe burdens must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger

less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. Ibid. No bright line separates permissible election related regulation from unconstitutional infringements on First Amendment freedoms. Storer v. Brown, 415 U.S. 724, 730 . Pp. 3-7.

(b) Minnesota's fusion ban does not severely burden the New Party's associational rights. The State's laws do not restrict the ability of the Party and its members to endorse, support, or vote for anyone they like or directly limit the Party's access to the ballot. The Party's preferred candidate will still appear on the ballot, although as another party's candidate. The laws are also silent on parties' internal structure, governance, and policy making. Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214 , and Tashjian v. Republican Party of Conn., 479 U.S. 208 , distinguished. Instead, these provisions reduce the universe of potential candidates who may appear on the ballot as the Party's nominee and limit, slightly, the Party's ability to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate. However, ballots are designed primarily to elect candidates, not to serve as fora for political expression. See Burdick, supra, at 438. Pp. 7-12.

(c) Because Minnesota's fusion ban does not impose a severe burden on the New Party's rights, the State is required to show, not that the ban was narrowly tailored to serve compelling state interests, but that the State's asserted regulatory interests are "sufficiently weighty to justify the limitation" on the Party's rights. Norman v. Reed, 502 U.S. 279, 288 -289. Elaborate, empirical verification of weightiness is not required. See Munro v. Socialist Workers Party, 479 U.S. 189, 195 -196. Here, the burden is justified by "correspondingly weighty" valid state interests in ballot integrity and political stability. States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials. E.g., Bullock v. Carter, 405 U.S. 134, 145 . Minnesota fears that a candidate or party could easily exploit fusion as a way of associating his or its name with popular slogans and catchphrases, transforming the ballot from a means of choosing candidates to a billboard for political advertising. It is also concerned that fusion might enable minor parties, by nominating a major party's candidate, to bootstrap their way to major party status in the next election and circumvent the State's nominating petition requirement for minor parties, which is designed to ensure that only bona fide minor and third parties are granted access to the ballot. The State's strong interest in the stability of its political systems, see, e.g., Eu, supra, at 226, does not permit it to completely insulate the two party system from minor parties' or independent candidates' competition and influence, e.g., Anderson v. Celebrezze, 460 U.S. 780, 802 , and is not a paternalistic license for States to protect political parties from the consequences of their own internal disagreements, e.g., Eu, supra, at 227. However, it does permit the State to enact reasonable election regulations that may, in practice, favor the traditional two party system. Minnesota's fusion ban is far less burdensome than a California law, upheld in Storer, 415 U.S., at 728 , that denied ballot positions to any independent candidate affiliated with a party at any time during the year preceding the primary election, and it is justified by

similarly weighty state interests. The Court expresses no view on the Party's policy based arguments concerning the wisdom of fusion. Pp. 12-19.

73 F. 3d 196, reversed.

Rehnquist, C. J., delivered the opinion of the Court, in which O'Connor, Scalia, Kennedy, Thomas, and Breyer, JJ., joined. Stevens, J., filed a dissenting opinion, in which Ginsburg, J., joined, and in Parts I and II of which Souter, J., joined. Souter, J., filed a dissenting opinion.

Most States prohibit multiple party, or "fusion," candidacies for elected office. [1] The Minnesota laws challenged in this case prohibit a candidate from appearing on the ballot as the candidate of more than one party. Minn. Stat. §§204B.06, subd. 1(b) and 204B.04, subd. 2 (1994). We hold that such a prohibition does not violate the First and Fourteenth Amendments to the United States Constitution.

Respondent is a chartered chapter of the national New Party. Petitioners are Minnesota election officials. In April 1994, Minnesota State Representative Andy Dawkins was running unopposed in the Minnesota Democratic Farmer Labor Party's (DFL) primary. [2] That same month, New Party members chose Dawkins as their candidate for the same office in the November 1994 general election. Neither Dawkins nor the DFL objected, and Dawkins signed the required affidavit of candidacy for the New Party. Minn. Stat. §204B.06 (1994). Minnesota, however, prohibits fusion candidacies. [3] Because Dawkins had already filed as a candidate for the DFL's nomination, local election officials refused to accept the New Party's nominating petition. [4]

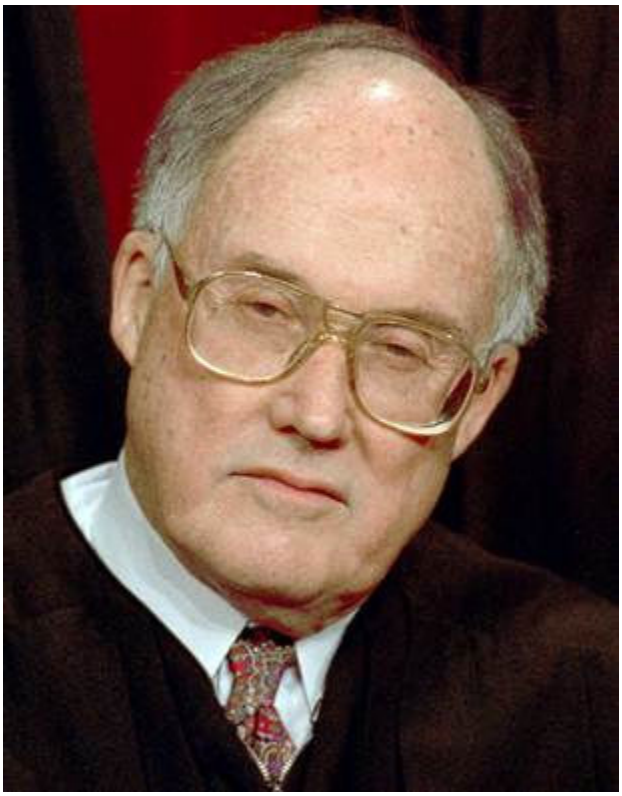
The New Party filed suit in United States District Court, contending that Minnesota's antifusion laws violated the Party's associational rights under the First and Fourteenth Amendments. The District Court granted summary judgment for the state defendants, concluding that Minnesota's fusion ban was "a valid and non discriminatory regulation of the election process", and noting that "issues concerning the mechanics of choosing candidates . . . are, in large part, matters of policy best left to the deliberative bodies themselves." Twin Cities Area New Party v. McKenna, 863 F. Supp.988, 994 (D. Minn. 1994).

The Court of Appeals reversed. Twin Cities Area New Party v. McKenna, 73 F. 3d 196, 198 (CA8 1996). First, the court determined that Minnesota's fusion ban "unquestionably" and "severe[ly]" burdened the New Party's "freedom to select a standard bearer who best represents the party's ideologies and preferences" and its right to "broaden the base of public participation in and support for [its] activities." Ibid. (citations and internal quotation marks omitted). The court then decided that Minnesota's absolute ban on multiple party nominations was "broader than necessary to serve the State's asserted interests" in avoiding intraparty discord and party splintering, maintaining a stable political system, and avoiding voter confusion, and that the State's remaining concerns about multiple party nomination were "simply unjustified in this case." Id.,

at 199-200. The court noted, however, that the Court of Appeals for the Seventh Circuit had upheld Wisconsin's similar fusion ban in Swamp v. Kennedy, 950 F. 2d 383, 386 (1991) (fusion ban did not burden associational rights and, even if it did, the State's interests justified the burden), cert. denied, 505 U.S. 1204 (1992). Nonetheless, the court concluded that Minnesota's fusion ban provisions, Minn. Stat. §§204B.06, subd. 1(b) and 204B.04, subd. 2 (1994), were unconstitutional because they severely burdened the New Party's associational rights and were not narrowly tailored to advance Minnesota's valid interests. We granted certiorari, 517 U. S. ___ (1996), and now reverse.

Fusion was a regular feature of Gilded Age American politics. Particularly in the West and Midwest, candidates of issue oriented parties like the Grangers, Independents, Greenbackers, and Populists often succeeded through fusion with the Democrats, and vice versa. Republicans, for their part, sometimes arranged fusion candidacies in the South, as part of a general strategy of encouraging and exploiting divisions within the dominant Democratic Party. See generally Argersinger, "A Place at the Table": Fusion Politics and Antifusion Laws, 85 Amer. Hist. Rev. 287, 288-290 (1980).

Fusion was common in part because political parties, rather than local or state governments, printed and distributed their own ballots. These ballots contained only



the names of a particular party's candidates, and so a voter could drop his party's ticket in the ballot box without even knowing that his party's candidates were supported by other parties as well. But after the 1888 presidential election, which was widely regarded as having been plagued by fraud, many States moved to the "Australian ballot system." Under that system, an official ballot, containing the names of all the candidates legally nominated by all the parties, was printed at public expense and distributed by public officials at polling places. Id., at 290-292; Burdick v. Takushi, 504 U.S. 428, 446 -447 (1992) (Kennedy, J., dissenting) (States' move to the Australian ballot system was a "progressive reform to reduce fraudulent election practices"). By 1896, use of the Australian ballot was widespread. During the same period, many States enacted other election related reforms, including bans on fusion candidacies. See Argersinger, supra, at 288, 295-298. Minnesota banned fusion in 1901. [5] This trend has continued and, in this century, fusion has become the exception, not the rule. Today, multiple party candidacies are permitted in just a few States, [6] and fusion plays a significant role only in New York. [7]

The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas. Colorado Republican Federal Campaign Comm. v. Federal Election Comm., 518 U. S. ___, ___ (1996) (slip op., at 9) ("The independent expression of a political party's views is `core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees"); Norman v. Reed, 502 U.S. 279, 288 (1992) ("[C]onstitutional right of citizens to create and develop new political parties. . . . advances the constitutional interest of like minded voters to gather in pursuit of common political ends"); Tashjian v. Republican Party of Conn., 479 U.S. 208, 214 (1986). As a result, political parties' government, structure, and activities enjoy constitutional protection. Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214, 230 (1989) (noting political party's "discretion in how to organize itself, conduct its affairs, and select its leaders"); Tashjian, supra, at 224 (Constitution protects a party's "determination . . . of the structure which best allows it to pursue its political goals").

On the other hand, it is also clear that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election and campaign related disorder. Burdick, supra, at 433 ("`[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process'") (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)); Tashjian, supra, at 217 (The Constitution grants States "broad power to prescribe the `Time, Places and Manner of holding Elections for Senators and Representatives,' Art. I, §4, cl. 1, which power is matched by state control over the election process for state offices").

When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the "`character and magnitude'" of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Burdick, supra, at 434 (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)). Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "`important regulatory interests'" will usually be enough to justify "`reasonable, nondiscriminatory restrictions.'" Burdick, supra, at 434 (quoting Anderson, supra, at 788); Norman, supra, at 288-289 (requiring "corresponding interest sufficiently weighty to justify the limitation"). No bright line separates permissible election related regulation from unconstitutional infringements on First Amendment freedoms. Storer, supra, at 730 ("[N]o litmus paper test . . . separat[es] those restrictions that are valid from those that are invidious . . . . The rule is not self executing and is no substitute for the hard judgments that must be made").

The New Party's claim that it has a right to select its own candidate is uncontroversial, so far as it goes. See, e.g., Cousins v. Wigoda, 419 U.S. 477 (1975) (Party, not State, has right to decide who will be State's delegates at party convention). That is,

the New Party, and not someone else, has the right to select the New Party's "standard bearer." It does not follow, though, that a party is absolutely entitled to have its nominee appear on the ballot as that party's candidate. A particular candidate might be ineligible for office, [8] unwilling to serve, or, as here, another party's candidate. That a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's association rights. See Burdick, 504 U.S., at 440 , n. 10 ("It seems to us that limiting the choice of candidates to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable"); Anderson, 460 U.S., at 792 , n. 12 ("Although a disaffiliation provision may preclude . . . voters from supporting a particular ineligible candidate, they remain free to support and promote other candidates who satisfy the State's disaffiliation requirements"); id., at 793, n. 15.

The New Party relies on Eu v. San Francisco County Democratic Central Comm., supra, and Tashjian v. Republican Party of Conn., supra. In Eu, we struck down California election provisions that prohibited political parties from endorsing candidates in party primaries and regulated parties' internal affairs and structure. And in Tashjian, we held that Connecticut's closed primary statute, which required voters in a party primary to be registered party members, interfered with a party's associational rights by limiting "the group of registered voters whom the Party may invite to participate in the basic function of selecting the Party's candidates." 479 U.S., at 215 -216 (internal quotation marks and citations omitted). But while Tashjian and Eu involved regulation of political parties' internal affairs and core associational activities, Minnesota's fusion ban does not. The ban, which applies to major and minor parties alike, simply precludes one party's candidate from appearing on the ballot, as that party's candidate, if already nominated by another party. Respondent is free to try to convince Representative Dawkins to be the New Party's, not the DFL's, candidate. See Swamp, 950 F. 2d, at 385 ("[A] party may nominate any candidate that the party can convince to be its candidate"). Whether the Party still wants to endorse a candidate who, because of the fusion ban, will not appear on the ballot as the Party's candidate, is up to the Party.

The Court of Appeals also held that Minnesota's laws "keep the New Party from developing consensual political alliances and thus broadening the base of public participation in and support for its activities." McKenna, 73 F. 3d, at 199. The burden on the Party was, the court held, severe because "[h]istory shows that minor parties have played a significant role in the electoral system where multiple party nomination is legal, but have no meaningful influence where multiple party nomination is banned." Ibid. In the view of the Court of Appeals, Minnesota's fusion ban forces members of the new party to make a "no win choice" between voting for "candidates with no realistic chance of winning, defect[ing] from their party and vot[ing] for a major party candidate who does, or declin[ing] to vote at all." Ibid.

But Minnesota has not directly precluded minor political parties from developing and organizing. Cf. Norman, 502 U.S., at 289 (statute "foreclose[d] the development of

any political party lacking the resources to run a statewide campaign"). Nor has Minnesota excluded a particular group of citizens, or a political party, from participation in the election process. Cf. Anderson, supra, at 792-793 (filing deadline "places a particular burden on an identifiable segment of Ohio's independent minded voters"); Bullock v. Carter, 405 U.S. 134 (1972) (striking down Texas statute requiring candidates to pay filing fees as a condition to having their names placed on primary election ballots). The New Party remains free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen. Cf. Eu, 489 U.S., at 223 (California law curtailed right to "[f]ree discussion about candidates for public office"); Colorado Republican Federal Campaign Comm'n, 518 U. S., at ___ (slip op., at 8) (restrictions on party's spending impair its ability to "engage in direct political advocacy").

The Court of Appeals emphasized its belief that, without fusion based alliances, minor parties cannot thrive. This is a predictive judgment which is by no means self evident. [9] But, more importantly, the supposed benefits of fusion to minor parties does not require that Minnesota permit it. See Tashjian, supra, at 222 (refusing to weigh merits of closed and open primaries). Many features of our political system--e.g., single member districts, "first past the post" elections, and the high costs of campaigning--make it difficult for third parties to succeed in American politics. Burnham Declaration, App. 12-13. But the Constitution does not require States to permit fusion any more than it requires them to move to proportional representation elections or public financing of campaigns. See Mobile v. Bolden, 446 U.S. 55, 75 (1980) (plurality opinion) ("Whatever appeal the dissenting opinion's view may have as a matter of political theory, it is not the law").

The New Party contends that the fusion ban burdens its "right . . . to communicate its choice of nominees on the ballot on terms equal to those offered other parties, and the right of the party's supporters and other voters to receive that information," and insists that communication on the ballot of a party's candidate choice is a "critical source of information for the great majority of voters . . . who . . . rely upon party `labels' as a voting guide." Brief for Respondent 22-23.

It is true that Minnesota's fusion ban prevents the New Party from using the ballot to communicate to the public that it supports a particular candidate who is already another party's candidate. In addition, the ban shuts off one possible avenue a party might use to send a message to its preferred candidate because, with fusion, a candidate who wins an election on the basis of two parties' votes will likely know more--if the parties' votes are counted separately--about the particular wishes and ideals of his constituency. We are unpersuaded, however, by the Party's contention that it has a right to use the ballot itself to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate. Ballots serve primarily to elect candidates, not as fora for political expression. See Burdick, 504 U.S., at 438 ; id., at 445 (Kennedy, J., dissenting). Like all parties in Minnesota, the New Party is able to use the ballot to communicate information about itself and its candidate to the voters, so long as that candidate is not already

someone else's candidate. The Party retains great latitude in its ability to communicate ideas to voters and candidates through its participation in the campaign, and Party members may campaign for, endorse, and vote for their preferred candidate even if he is listed on the ballot as another party's candidate. See Anderson, 460 U.S., at 788 ("[A]n election campaign is an effective platform for the expression of views on the issues of the day"); Illinois Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 186 (1979) ("[A]n election campaign is a means of disseminating ideas").

In sum, Minnesota's laws do not restrict the ability of the New Party and its members to endorse, support, or vote for anyone they like. The laws do not directly limit the Party's access to the ballot. They are silent on parties' internal structure, governance, and policy making. Instead, these provisions reduce the universe of potential candidates who may appear on the ballot as the Party's nominee only by ruling out those few individuals who both have already agreed to be another party's candidate and also, if forced to choose, themselves prefer that other party. They also limit, slightly, the Party's ability to send a message to the voters and to its preferred candidates. We conclude that the burdens Minnesota imposes on the Party's First and Fourteenth Amendment associational rights--though not trivial--are not severe.

The Court of Appeals determined that Minnesota's fusion ban imposed "severe" burdens on the New Party's associational rights, and so it required the State to show that the ban was narrowly tailored to serve compelling state interests. McKenna, 73 F. 3d, at 198. We disagree; given the burdens imposed, the bar is not so high. Instead, the State's asserted regulatory interests need only be "sufficiently weighty to justify the limitation" imposed on the Party's rights. Norman, 502 U.S., at 288 -289; Burdick, supra, at 434 (quoting Anderson, supra, at 788). Nor do we require elaborate, empirical verification of the weightiness of the State's asserted justifications. See Munro v. Socialist Workers Party, 479 U.S. 189, 195 -196 (1986) ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights").

The Court of Appeals acknowledged Minnesota's interests in avoiding voter confusion and overcrowded ballots, preventing party splintering and disruptions of the two party system, and being able to clearly identify the election winner. McKenna, supra, at 199-200. Similarly, the Seventh Circuit, in Swamp, noted Wisconsin's "compelling" interests in avoiding voter confusion, preserving the integrity of the election process, and maintaining a stable political system. Id., at 386; cf. id., at 387-388 (Fairchild, J., concurring) (State has a compelling interest in "maintaining the distinct identity of parties"). Minnesota argues here that its fusion ban is justified by its interests in avoiding voter confusion, promoting candidate competition (by reserving limited ballot space for opposing candidates), preventing electoral distortions and ballot manipulations, and discouraging party splintering and "unrestrained factionalism." Brief for Petitioners 41-50.

States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials. Bullock, 405 U.S., at 145 (State may prevent "frivolous or fraudulent candidacies") (citing Jenness v. Fortson, 403 U.S. 431, 442 (1971)); Eu, 489 U.S., at 231 ; Norman, supra, at 290 (States have an interest in preventing "misrepresentation"); Rosario v. Rockefeller, 410 U.S. 752, 761 (1973). Petitioners contend that a candidate or party could easily exploit fusion as a way of associating his or its name with popular slogans and catchphrases. For example, members of a major party could decide that a powerful way of "sending a message" via the ballot would be for various factions of that party to nominate the major party's candidate as the candidate for the newly formed "No New Taxes," "Conserve Our Environment," and "Stop Crime Now" parties. In response, an opposing major party would likely instruct its factions to nominate that party's candidate as the "Fiscal Responsibility," "Healthy Planet," and "Safe Streets" parties' candidate.

Whether or not the putative "fusion" candidates' names appeared on one or four ballot lines, such maneuvering would undermine the ballot's purpose by transforming it from a means of choosing candidates to a billboard for political advertising. The New Party responds to this concern, ironically enough, by insisting that the State could avoid such manipulation by adopting more demanding ballot access standards rather than prohibiting multiple party nomination. Brief for Respondent, 38. However, as we stated above, because the burdens the fusion ban imposes on the Party's associational rights are not severe, the State need not narrowly tailor the means it chooses to promote ballot integrity. The Constitution does not require that Minnesota compromise the policy choices embodied in its ballot access requirements to accommodate the New Party's fusion strategy. See Minn. Stat. §204B.08, subd. 3 (1994) (signature requirements for nominating petitions); Rosario, supra, at 761-762 (New York's time limitation for enrollment in a political party was part of an overall scheme aimed at the preservation of the integrity of the State's electoral process).

Relatedly, petitioners urge that permitting fusion would undercut Minnesota's ballot access regime by allowing minor parties to capitalize on the popularity of another party's candidate, rather than on their own appeal to the voters, in order to secure access to the ballot. Brief for Petitioners 45-46. That is, voters who might not sign a minor party's nominating petition based on the party's own views and candidates might do so if they viewed the minor party as just another way of nominating the same person nominated by one of the major parties. Thus, Minnesota fears that fusion would enable minor parties, by nominating a major party's candidate, to bootstrap their way to major party status in the next election and circumvent the State's nominating petition requirement for minor parties. See Minn. Stat. §§200.02, subd. 7 (defining "major party") and §204D.13 (describing ballot order for major and other parties). The State surely has a valid interest in making sure that minor and third parties who are granted access to the ballot are bona fide and actually supported, on their own merits, by those who have provided the statutorily required petition or ballot support. Anderson, 460 U.S., at 788 , n. 9; Storer, 415 U.S., at 733 , 746.

States also have a strong interest in the stability of their political systems. [10] Eu, supra, at 226; Storer, supra, at 736. This interest does not permit a State to completely insulate the two party system from minor parties' or independent candidates' competition and influence, Anderson, supra, at 802; Williams v. Rhodes, 393 U.S. 23 (1968), nor is it a paternalistic license for States to protect political parties from the consequences of their own internal disagreements. Eu, supra, at 227; Tashjian, 479 U.S., at 224 . That said, the States' interest permits them to enact reasonable election regulations that may, in practice, favor the traditional two party system, see Burnham Declaration, App. 12 (American politics has been, for the most part, organized around two parties since the time of Andrew Jackson), and that temper the destabilizing effects of party splintering and excessive factionalism. The Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two party system. See Rutan v. Republican Party of Ill., 497 U.S. 62, 107 (1990) (Scalia, J., dissenting) ("The stabilizing effects of such a [two party] system are obvious"); Davis v. Bandemer, 478 U.S. 109, 144 -145(1986) (O'Connor, J., concurring) ("There can be little doubt that the emergence of a strong and stable two party system in this country has contributed enormously to sound and effective government"); Branti v. Finkel, 445 U.S. 507, 532 (1980) (Powell, J., dissenting) ("Broad based political parties supply an essential coherence and flexibility to the American political scene"). And while an interest in securing the perceived benefits of a stable two party system will not justify unreasonably exclusionary restrictions, see Williams, supra, at 31-32, States need not remove all of the many hurdles third parties face in the American political arena today.

In Storer we upheld a California statute that denied ballot positions to independent candidates who had voted in the immediately preceding primary elections or had a registered party affiliation at any time during the year before the same primary elections. 415 U.S., at 728 . [11] After surveying the relevant case law, we "ha[d] no hesitation in sustaining" the party disaffiliation provisions. Id., at 733. We recognized that the provisions were part of a "general state policy aimed at maintaining the integrity of . . . the ballot," and noted that the provision did not discriminate against independent candidates. Id., at 734. We concluded that while a "State need not take the course California has, . . . California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government. See The Federalist, No. 10 (Madison). It appears obvious to us that the one year disaffiliation provision furthers the State's interest in the stability of its political system." Id., at 736; see also Lippitt v. Cipollone, 404 U.S. 1032 (1972) (affirming, without opinion, district court decision upholding statute banning party primary candidacies of those who had voted in another party's primary within last four years). [12]

Our decision in Burdick v. Takushi, supra, is also relevant. There, we upheld Hawaii's ban on write in voting against a claim that the ban unreasonably infringed on citizens' First and Fourteenth Amendment rights. In so holding, we rejected the petitioner's argument that the ban "deprive[d] him of the opportunity to cast a meaningful ballot," emphasizing that the function of elections is to elect candidates and that "we

have repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activit[ies] at the polls." 504 U.S., at 437 -438.

Minnesota's fusion ban is far less burdensome than the disaffiliation rule upheld in Storer, and is justified by similarly weighty state interests. By reading Storer as dealing only with "sore loser candidates," the dissent, in our view, fails to appreciate the case's teaching. Post, at 8 (Stevens, J., dissenting). Under the California disaffiliation statute at issue in Storer, any person affiliated with a party at any time during the year leading up to the primary election was absolutely precluded from appearing on the ballot as an independent or as the candidate of another party. Minnesota's fusion ban is not nearly so restrictive; the challenged provisions say nothing about the previous party affiliation of would be candidates but only require that, in order to appear on the ballot, a candidate not be the nominee of more than one party. California's disaffiliation rule limited the field of candidates by thousands; Minnesota's precludes only a handful who freely choose to be so limited. It is also worth noting that while California's disaffiliation statute absolutely banned many candidacies, Minnesota's fusion ban only prohibits a candidate from being named twice.

We conclude that the burdens Minnesota's fusion ban imposes on the New Party's associational rights are justified by "correspondingly weighty" valid state interests in ballot integrity and political stability. [13] In deciding that Minnesota's fusion ban does not unconstitutionally burden the New Party's First and Fourteenth Amendment rights, we express no views on the New Party's policy based arguments concerning the wisdom of fusion. It may well be that, as support for new political parties increases, these arguments will carry the day in some States' legislatures. But the Constitution does not require Minnesota, and the approximately 40 other States that do not permit fusion, to allow it. The judgment of the Court of Appeals is reversed.
It is so ordered.

Justice Stevens , with whom Justice Ginsburg joins.

In Minnesota, the Twin Cities Area New Party (Party), is a recognized minor political party entitled by state law to have the names of its candidates for public office appear on the state ballots. In April, 1994, Andy Dawkins was qualified to be a candidate for election to the Minnesota Legislature as the representative of House District 65A. With Dawkins's consent, the Party nominated him as its candidate for that office. In my opinion the Party and its members had a constitutional right to have their candidate's name appear on the ballot despite the fact that he was also the nominee of another party.

The Court's conclusion that the Minnesota statute prohibiting multiple party candidacies is constitutional rests on three dubious premises: (1) that the statute imposes only a minor burden on the Party's right to choose and to support the candidate of its choice; (2) that the statute significantly serves the State's asserted interests in avoiding ballot manipulation and factionalism; and (3) that, in any event, the interest in preserving the two party system justifies the imposition of the burden

at issue in this case. I disagree with each of these premises.

The members of a recognized political party unquestionably have a constitutional right to select their nominees for public office and to communicate the identity of their nominees to the voting public. Both the right to choose and the right to advise voters of that choice are entitled to the highest respect.

The Minnesota statutes place a significant burden on both of those rights. The Court's recital of burdens that the statute does not inflict on the Party, ante, at 11-12, does nothing to minimize the severity of the burdens that it does impose. The fact that the Party may nominate its second choice surely does not diminish the significance of a restriction that denies it the right to have the name of its first choice appear on the ballot. Nor does the point that it may use some of its limited resources to publicize the fact that its first choice is the nominee of some other party provide an adequate substitute for the message that is conveyed to every person who actually votes when a party's nominees appear on the ballot.

As to the first point, the State contends that the fusion ban in fact limits by only a few candidates the range of individuals a party may nominate, and that the burden is therefore quite small. But the number of candidates removed from the Party's reach cannot be the determinative factor. The ban leaves the Party free to nominate any eligible candidate except the particular " `standard bearer who best represents the party's ideologies and preferences.' " Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214, 224 (1989).

The Party could perhaps choose to expend its resources supporting a candidate who was not in fact the best representative of its members' views. But a party's choice of a candidate is the most effective way in which that party can communicate to the voters what the party represents and, thereby, attract voter interest and support. [14] Political parties "exist to advance their members' shared political beliefs," and "in the context of particular elections, candidates are necessary to make the party's message known and effective, and vice versa." Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n, 518 U. S. ___, ___ (1996) (slip op., at 4) (Kennedy, J., dissenting). See also Anderson v. Celebrezze, 460 U.S. 780, 821 (1983) (Rehnquist, J., dissenting) ("Political parties have, or at least hope to have, a continuing existence, representing particular philosophies. Each party has an interest in finding the best candidate to advance its philosophy in each election").

The State next argues that--instead of nominating a second choice candidate--the Party could remove itself from the ballot altogether, and publicly endorse the candidate of another party. But the right to be on the election ballot is precisely what separates a political party from any other interest group. [15] The Court relies on the fact that the New Party remains free "to spread its message to all who will listen," ante, at 9, through fora other than the ballot. Given the limited resources available to most minor parties, and the less than universal interest in the messages of third parties, it is apparent that the Party's message will, in this manner, reach a much smaller audience than that composed of all voters who can read the ballot in the polling booth.

The majority rejects as unimportant the limits that the fusion ban may impose on the Party's ability to express its political views, ante, at 10-11, relying on our decision in Burdick v. Takushi, 504 U.S. 428, 445 (1992), in which we noted that "the purpose of casting, counting, and recording votes is to elect public officials, not to serve as a general forum for political expression." But in Burdick we concluded simply that an individual voter's interest in expressing his disapproval of the single candidate running for office in a particular election did not require the State to finance and provide a mechanism for tabulating write in votes. Our conclusion that the ballot is not principally a forum for the individual expression of political sentiment through the casting of a vote does not justify the conclusion that the ballot serves no expressive purpose for the parties who place candidates on the ballot. Indeed, the long recognized right to choose a " `standard bearer who best represents the party's ideologies and preferences,' " Eu, 489 U.S., at 224 , is inescapably an expressive right. "To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." Tashjian v. Republican Party of Conn., 479 U.S. 208, 220 (1986).

In this case, and presumably in most cases, the burden of a statute of this kind is imposed upon the members of a minor party, but its potential impact is much broader. Popular candidates like Andy Dawkins sometimes receive nationwide recognition. Fiorello LaGuardia, Earl Warren, Ronald Reagan, and Franklin D. Roosevelt, are names that come readily to mind as candidates whose reputations and political careers were enhanced because they appeared on election ballots as fusion candidates. See Note, Fusion and the Associational Rights of Minor Parties, 95 Colum. L. Rev. 683, 683 (1995). A statute that denied a political party the right to nominate any of those individuals for high office simply because he had already been nominated by another party would, in my opinion, place an intolerable burden on political expression and association.

Minnesota argues that the statutory restriction on the New Party's right to nominate the candidate of its choice is justified by the State's interests in avoiding voter confusion, preventing ballot clutter and manipulation, encouraging candidate competition, and minimizing intraparty factionalism. None of these rationales can

support the fusion ban because the State has failed to explain how the ban actually serves the asserted interests.

I believe that the law significantly abridges First Amendment freedoms and that the State therefore must shoulder a correspondingly heavy burden of justification if the law is to survive judicial scrutiny. But even accepting the majority's view that the burdens imposed by the law are not weighty, the State's asserted interests must at least bear some plausible relationship to the burdens it places on political parties. See Anderson, 460 U. S., at ___. Although the Court today suggests that the State does not have to support its asserted justifications for the fusion ban with evidence that they have any empirical validity, ante, at 12, we have previously required more than a bare assertion that some particular state interest is served by a burdensome election requirement. See, e.g., Eu, 489 U.S., at 226 (rejecting California's argument that the State's endorsement ban protected political stability because the State "never adequately explain[ed] how banning parties from endorsing or opposing primary candidates advances that interest"); Anderson, 460 U.S., at 789 (evaluating a State's interests, we examine "the extent to which those interests make it necessary to burden the plaintiff's rights"); Norman v. Reed, 502 U.S. 279, 288 -289 (1992) ("corresponding interest" must be "sufficiently weighty to justify the limitation"). [16]

While the State describes some imaginative theoretical sources of voter confusion that could result from fusion candidacies, in my judgment the argument that the burden on First Amendment interests is justified by this concern is meritless and severely underestimates the intelligence of the typical voter. [17] We have noted more than once that "[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." Eu, 489 U.S., at 228 ; Tashjian, 479 U.S., at 221 ; Anderson, 460 U.S., at 798 .

The State's concern about ballot manipulation, readily accepted by the majority, is similarly farfetched. The possibility that members of the major parties will begin to create dozens of minor parties with detailed, issue oriented titles for the sole purpose of nominating candidates under those titles, see ante, at 13, is entirely hypothetical. The majority dismisses out of hand the Party's argument that the risk of this type of ballot manipulation and crowding is more easily averted by maintaining reasonably stringent requirements for the creation of minor parties. Ante, at 13-14. In fact, though, the Party's point merely illustrates the idea that a State can place some kinds--but not every kind--of limitation on the abilities of small parties to thrive. If the State wants to make it more difficult for any group to achieve the legal status of being a political party, it can do so within reason and still not run up against the First Amendment. "The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates." Anderson, 460 U.S., at 788 -789, n. 9. See also Jenness v. Fortson, 403 U.S. 431, 442 (1971). But once the State has established a

standard for achieving party status, forbidding an acknowledged party from putting on the ballot its chosen candidate clearly frustrates core associational rights. [18]

The State argues that the fusion ban promotes political stability by preventing intraparty factionalism and party raiding. States do certainly have an interest in maintaining a stable political system. Eu, 489 U.S., at 226. But the State has not convincingly articulated how the fusion ban will prevent the factionalism it fears. Unlike the law at issue in Storer v. Brown, 415 U.S. 724 (1974), for example, this law would not prevent sore loser candidates from defecting with a disaffected segment of a major party and running as an opposition candidate for a newly formed minor party. Nor does this law, like those aimed at requiring parties to show a modicum of support in order to secure a place on the election ballot, prevent the formation of numerous small parties. Indeed, the activity banned by Minnesota's law is the formation of coalitions, not the division and dissension of "splintered parties and unrestrained factionalism," Id., at 736.

As for the State's argument that the fusion ban encourages candidate competition, this claim treats-candidates" as fungible goods, ignoring entirely each party's interest in nominating not just any candidate, but the candidate who best represents the party's views. Minnesota's fusion ban simply cannot be justified with reference to this or any of the above mentioned rationales. I turn, therefore, to what appears to be the true basis for the Court's holding--the interest in preserving the two party system.

Before addressing the merits of preserving the two party system as a justification for Minnesota's fusion ban, I should note that, in my view, it is impermissible for the Court to consider this rationale. Minnesota did not argue in its briefs that the preservation of the two party system supported the fusion ban, and indeed, when pressed at oral argument on the matter, the State expressly rejected this rationale. Tr. of Oral Arg. 26. Our opinions have been explicit in their willingness to consider only the particular interests put forward by a State to support laws that impose any sort of burden on First Amendment rights. See Anderson, 460 U.S., at 789 (the Court will "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule"); id. at 817 (Rehnquist, J., dissenting) (state laws that burden First Amendment rights are upheld when they are " `tied to a particularized legitimate purpose,' ") (quoting Rosario v. Rockefeller, 410 U.S. 752, 762 (1973)); Burdick,, 504 U.S., at 434 .

Even if the State had put forward this interest to support its laws, it would not be sufficient to justify the fusion ban. In most States, perhaps in all, there are two and only two major political parties. It is not surprising, therefore, that most States have enacted election laws that impose burdens on the development and growth of third parties. The law at issue in this case is undeniably such a law. The fact that the law was both intended to disadvantage minor parties and has had that effect is a matter that should weigh against, rather than in favor of, its constitutionality. [19]

Our jurisprudence in this area reflects a certain tension: on the one hand, we have been clear that political stability is an important state interest and that incidental burdens on the formation of minor parties are reasonable to protect that interest, see Storer, 415 U.S., at 736 ; on the other, we have struck down state elections laws specifically because they give "the two old, established parties a decided advantage over any new parties struggling for existence," Williams v. Rhodes, 393 U.S. 23, 31 (1968). [20] Between these boundaries, we have acknowledged that there is "no litmus paper test for separating those restrictions that are valid from those that are invidious . . . The rule is not self executing and is no substitute for the hard judgments that must be made." Storer, 415 U.S., at 730 .

Nothing in the Constitution prohibits the States from maintaining single member districts with winner take all voting arrangements. And these elements of an election system do make it significantly more difficult for third parties to thrive. But these laws are different in two respects from the fusion bans at issue here. First, the method by which they hamper third party development is not one that impinges on the associational rights of those third parties; minor parties remain free to nominate candidates of their choice, and to rally support for those candidates. The small parties' relatively limited likelihood of ultimate success on election day does not deprive them of the right to try. Second, the establishment of single member districts correlates directly with the States' interests in political stability. Systems of proportional representation, for example, may tend toward factionalism and fragile coalitions that diminish legislative effectiveness. In the context of fusion candidacies, the risks to political stability are extremely attenuated. [21] Of course, the reason minor parties so ardently support fusion politics is because it allows the parties to build up a greater base of support, as potential minor party members realize that a vote for the smaller party candidate is not necessarily a "wasted" vote. Eventually, a minor party might gather sufficient strength that--were its members so inclined--it could successfully run a candidate not endorsed by any major party, and legislative coalition building will be made more difficult by the presence of third party legislators. But the risks to political stability in that scenario are speculative at best. [22]

In some respects, the fusion candidacy is the best marriage of the virtues of the minor party challenge to entrenched viewpoints [23] and the political stability that the two party system provides. The fusion candidacy does not threaten to divide the legislature and create significant risks of factionalism, which is the principal risk proponents of the two party system point to. But it does provide a means by which voters with viewpoints not adequately represented by the platforms of the two major parties can indicate to a particular candidate that--in addition to his support for the major party views--he should be responsive to the views of the minor party whose support for him was demonstrated where political parties demonstrate support--on the ballot.

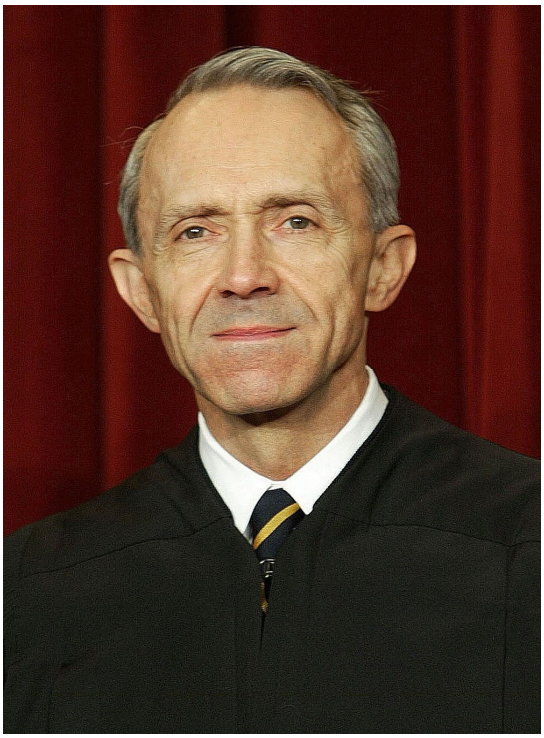
The strength of the two party system--and of each of its major components--is the product of the power of the ideas, the traditions, the candidates, and the voters that

constitute the parties. [24] It demeans the strength of the two party system to assume that the major parties need to rely on laws that discriminate against independent voters and minor parties in order to preserve their positions of power. [25] Indeed, it is a central theme of our jurisprudence that the entire electorate, which necessarily includes the members of the major parties, will benefit from robust competition in ideas and governmental policies that " `is at the core of our electoral process and of the First Amendment freedoms.' " See Anderson, 460 U.S., at 802 .

In my opinion legislation that would otherwise be unconstitutional because it burdens First Amendment interests and discriminates against minor political parties cannot survive simply because it benefits the two major parties. Accordingly, I respectfully dissent.

Justice Souter, dissenting.

I join parts I and II of Justice Stevens's dissent, agreeing as I do that none of the concerns advanced by the State suffices to justify the burden of the challenged statutes on petitioners' First Amendment interests. I also agree with Justice Stevens's view, set out in the first paragraph of Part III, that the State does not assert the interest in preserving "the traditional two party system" upon which the majority repeatedly relies in upholding Minnesota's statutes, see, e.g., ante, at 15 ("The Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two party system"). Actually, Minnesota's statement of the "important regulatory concerns advanced by the State's ban on ballot fusion," Brief for Petitioners 40, contains no reference whatsoever to the "two party system," nor even any explicit reference to "political stability" generally. See id., at 40-50.



To be sure, the State does assert its intention to prevent "party splintering," id., at 46-50, which may not be separable in the abstract from a desire to preserve political stability. [26] But in fact the State has less comprehensive concerns; the primary dangers posed by what it calls "major party splintering and factionalism," id., at 47, are said to be those of "turn[ing] the general election ballot into a forum for venting intraparty squabbles," ibid., and reducing elections to "a thinly disguised ballot issue campaign," id., at 49. Nowhere does the State even intimate that the splintering it wishes to avert might cause or hasten the demise of the two party system. In these circumstances, neither the State's point

about "splintering," nor its tentative reference to "political stability" at oral argument, n. 1, supra, may fairly be assimilated to the interest posited by the Court of preserving the "two party system." Accordingly, because I agree with Justice Stevens, ante, at 9, that our election cases restrict our consideration to "the precise interests put forward by the State as justifications for the burden imposed by its rule," Anderson v. Celebrezze, 460 U.S. 780, 789 (1983), [27] I would judge the challenged statutes only on the interests the State has raised in their defense and would hold them unconstitutional.

I am, however, unwilling to go the further distance of considering and rejecting the majority's "preservation of the two party system" rationale. For while Minnesota has made no such argument before us, I cannot discount the possibility of a forceful one. There is considerable consensus that party loyalty among American voters has declined significantly in the past four decades, see, e.g., W. Crotty, American Parties in Decline 26-34 (2d ed. 1984); Jensen, The Last Party System: Decay of Consensus, 1932-1980, in The Evolution of American Electoral Systems 219-225, (P. Kleppner et al. eds. 1981), and that the overall influence of the parties in the political process has decreased considerably, see, e.g., Cutler, Party Government Under the American Constitution, 134 U. Penn. L. Rev. 25 (1987); Sundquist, Party Decay and the Capacity to Govern, in The Future of American Political Parties: The Challenge of Governance 42-69 (J. Fleishman ed. 1982). In the wake of such studies, it may not be unreasonable to infer that the two party system is in some jeopardy. See, e.g., Lowi, N. Y. Times Aug. 23, 1992, Magazine, p. 28 ("[H]istorians will undoubtably focus on 1992 as the beginning of the end of America's two party system").

Surely the majority is right that States "have a strong interest in the stability of their political systems," ante, at 15, that is, in preserving a political system capable of governing effectively. If it could be shown that the disappearance of the two party system would undermine that interest, and that permitting fusion candidacies poses a substantial threat to the two party scheme, there might well be a sufficient predicate for recognizing the constitutionality of the state action presented by this case. Right now, however, no State has attempted even to make this argument, and I would therefore leave its consideration for another day.

Endnotes

[Footnotes were used in the original opinions.
Here they have been rearranged as Endnotes by the MLHP]

Note 1. "Fusion," also called "cross filing" or "multiple party nomination," is "the electoral support of a single set of candidates by two or more parties." Argersinger, "A Place on the Ballot": Fusion Politics and Antifusion Laws, 85 Amer. Hist. Rev. 287, 288 (1980); see also Twin Cities Area New Party v. McKenna, 73 F. 3d 196, 197-198 (CA8 1996) (Fusion is "the nomination by more than one political party of the same candidate for the same office in the same general election").

Note 2. The DFL is the product of a 1944 merger between Minnesota's Farmer Labor

Party and the Democratic Party, and is a "major party" under Minnesota law. Minn. Stat. §200.02, subd. 7(a) (1994) (major parties are parties that have won five percent of a statewide vote and therefore participate in the state primary elections).

Note 3. State law provides: "No individual who seeks nomination for any partisan or nonpartisan office at a primary shall be nominated for the same office by nominating petition, . . . " §204B.04, subd. 2. Minnesota law further requires that "[a]n affidavit of candidacy shall state the name of the office sought and shall state that the candidate: . . . (b) Has no other affidavit on file as a candidate for any office at the same primary or next ensuing general election." §204B.06, subd. 1(b).

Note 4. Because the New Party is a "minor party" under Minnesota law, it does not hold a primary election but must instead file a nominating petition with the signatures of 500 eligible voters, or 10 percent of the total number of voters in the preceding state or county general election, whichever is less. §§204B.03, 204B.07-204B.08.

Note 5. See Act of Apr. 13, 1901, ch. 312, 1902 Minn. Laws 524. The Minnesota Supreme Court struck down the ban in In re Day, 93 Minn. 178, 182, 102 N.W. 209, 211 (1904), because the title of the enacting bill did not reflect the bill's content. The ban was reenacted in 1905. 1905 Minn. Rev. Laws, ch. 6, §176, 27, 31. Minnesota enacted a revised election code, which includes the fusion related provisions involved in this case, in 1981. Act of Apr. 14, 1981, ch. 29, Art. 4, §6, 1981 Minn. Laws 73.

Note 6. Burnham Declaration, App. 15. ("Practice of [multiple party nomination] in the 20th century has, of course, been much more limited. This owes chiefly to the fact that most state legislatures . . . outlawed the practice"); McKenna, 73 F. 3d, at 198 ("[M]ultiple party nomination is prohibited today, either directly or indirectly, in about forty states and the District of Columbia . . . "); S. Cobble & S. Siskind, Fusion: Multiple Party Nomination in the United States 8 (1993) (summarizing States' fusion laws).

Note 7. See N. Y. Elec. Law §§6-120, 6-146(1) (McKinney 1978 and Supp. 1996). Since 1936, when fusion was last relegalized in New York, several minor parties, including the Liberal, Conservative, American Labor, and Right to Life Parties, have been active and influential in New York politics. See Burnham Declaration, App. 15-16; Cobble & Siskind, supra n. 6, at 3-4.

Note 8. See, e.g., Minn. Stat. §204B.06, subd 1(c) (1994) (candidates must be 21 years of age or more upon assuming office and must have maintained residence in the district from which they seek election for 30 days before the general election).

Note 9. Between the First and Second World Wars, for example, various radical, agrarian, and labor oriented parties thrived, without fusion, in the Midwest. See generally R. Vallely, Radicalism in the States (1989). One of these parties, Minnesota's Farmer Labor Party, displaced the Democratic Party as the Republicans' primary

opponent in Minnesota during the 1930's. As one historian has noted: "The Minnesota Farmer Labor Party elected its candidates to the governorship on four occasions, to the U. S. Senate in five elections, and to the U. S. House in twenty five campaigns . . . . Never less than Minnesota's second strongest party, in 1936 Farmer Laborites dominated state politics. . . . The Farmer Labor Party was a success despite its independence of America's two dominant national parties and despite the sometimes bold anticapitalist rhetoric of its platforms." J. Haynes, Dubious Alliance 9 (1984). It appears that factionalism within the Farmer Labor Party, the popular successes of New Deal programs and ideology, and the gradual movement of political power from the States to the national government contributed to the Party's decline. See generally, Haynes, supra; Vallely, supra; M. Gieske, Minnesota Farmer Laborism: The Third Party Alternative (1979). Eventually, a much weakened Farmer Labor Party merged with the Democrats, forming what is now Minnesota's Democratic Farmer Labor Party, in 1944. Vallely, supra, at 156.

Note 10. The dissents state that we may not consider "what appears to be the true basis for [our] holding--the interest in preserving the two party system," post, at 9 (Stevens, J., dissenting), because Minnesota did not defend this interest in its briefs and "expressly rejected" it at oral argument, ibid; see also post, at 1-2 (Souter, J., dissenting). In fact, at oral argument, the State contended that it has an interest in the stability of its political system and that, even if certain election related regulations, such as those requiring single member districts, tend to work to the advantage of the traditional two party system, the "States do have a permissible choice . . . there, as long as they don't go so far as to close the door to minor part[ies]." Tr. of Oral Arg. 27; see also Brief for Petitioners 46-47 (discussing State's interest in avoiding "splintered parties and unrestrained factionalism") (citing Storer, 415 U.S., at 736). We agree.

Note 11. A similar provision applied to party candidates, and imposed a "flat disqualification upon any candidate seeking to run in a party primary if he has been `registered as affiliated with a political party other than that political party the nomination of which he seeks within 12 months immediately prior to the filing of the declaration.' " Another provision stated that "no person may file nomination papers for a party nomination and an independent nomination for the same office . . . . " Storer, 415 U.S., at 733 .

Note 12. The dissent insists that New York's experience with fusion politics undermines Minnesota's contention that its fusion ban promotes political stability. Post, at 7 n. 4, 13-14 n. 12 (Stevens, J., dissenting). California's experiment with cross filing, on the other hand, provides some justification for Minnesota's concerns. In 1946, for example, Earl Warren was the nominee of both major parties, and was therefore able to run unopposed in California's general election. It appears to be widely accepted that California's cross filing system stifled electoral competition and undermined the role of distinctive political parties. See B. Hyink, et al., Politics and Government in California 76 (12th ed. 1989) (California's cross filing law "undermined party responsibility and cohesiveness"); D. Mazmanian, Third Parties in Presidential

Elections 134 (1974) (cross filing "diminish[ed] the role of political parties and work[ed] against the efforts of minority factions to gain recognition and a hearing in the electoral arena").

Note 13. The dissent rejects the argument that Minnesota's fusion ban serves its alleged paternalistic interest in "avoiding voter confusion." Post, at 1, 7 (Stevens, J., dissenting) ("[T]his concern is meritless and severely underestimates the intelligence of the typical voter"). Although this supposed interest was discussed below, 73 F. 3d, at 199-200, and in the parties' briefs before this Court, Brief for Petitioners 41-44; Brief for Respondent 34-39, it plays no part in our analysis today.

ENDNOTES IN DISSENTS

[MLHP: The footnotes in the original dissents started anew, i.e., 1, 2, 3 .... Here they continue in sequence from the Endnotes of the majority opinion]

Note 14. The burden on the Party's right to nominate its first choice candidate, by limiting the Party's ability to convey through its nominee what the Party represents, risks impinging on another core element of any political party's associational rights--the right to "broaden the base of public participation in and support for its activities." Tashjian v. Republican Party of Conn., 479 U.S. 208, 214 (1986). The Court of Appeals relied substantially on this right in concluding that the fusion ban impermissibly burdened the New Party, but its focus was somewhat different. See Twin Cities Area New Party v. McKenna, 73 F. 3d 196, 199 (CA8 1996). A fusion ban burdens the right of a minor party to broaden its base of support because of the political reality that the dominance of the major parties frequently makes a vote for a minor party or independent candidate a "wasted" vote. When minor parties can nominate a candidate also nominated by a major party, they are able to present their members with an opportunity to cast a vote for a candidate who will actually be elected. Although this aspect of a party's effort to broaden support is distinct from the ability to nominate the candidate who best represents the party's views, it is important to note that the party's right to broaden the base of its support is burdened in both ways by the fusion ban.

Note 15. We have recognized that "[t]here is no evidence that an endorsement issued by an official party organization carries more weight than one issued by a newspaper or a labor union." Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214, 228 , n. 18 (1989). Given this reality, I cannot agree with the majority's implicit equation of the right to endorse with the right to nominate.

Note 16. In any event, the parade of horribles that the majority appears to believe might visit Minnesota should fusion candidacies be allowed is fantastical, given the evidence from New York's experience with fusion. See Brief for Conservative Party of New York et al. as Amici Curiae 20-25. Thus, the evidence that actually is available diminishes, rather than strengthens, Minnesota's claims. The majority asserts, ante, at

17, n. 12, that California's cross filing system, in place during the first half of this century, provides a compelling counter example. But cross filing, which "allowed candidates to file in the primary of any or all parties without specifying party affiliation," D. Mazmanian, Third Parties in Presidential Elections 132-133 (1974) (hereinafter Mazmanian), is simply not the same as fusion politics, and the problems suffered in California do not provide empirical support for Minnesota's position.

Note 17. See Brief for Petitioners 41-43; see also ante, at 13.

Note 18. A second "ballot manipulation" argument accepted by the majority is that minor parties will attempt to "capitalize on the popularity of another party's candidate, rather than on their own appeal to the voters, in order to secure access to the ballot." Ante, at 14. What the majority appears unwilling to accept is that Andy Dawkins was the New Party's chosen candidate. The Party was not trying to capitalize on his status as someone else's candidate, but to identify him as their own choice.

Note 19. Indeed, "[a] burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment." Anderson v. Celebrezze, 460 U.S. 780, 793 -794, (1983). I do not think it is irrelevant that when antifusion laws were passed by States all over the Nation in the latter part of the 1800's, these laws, characterized by the majority as "reforms" ante, at 4, were passed by "the parties in power in state legislatures . . . to squelch the threat posed by the opposition's combined voting force." McKenna, 73 F. 3d, at 198. See Argersinger, "A Place on the Ballot": Fusion Politics and Antifusion Laws, 85 Am. Hist. Rev. 287, 302-306 (1980). Although the State is not required now to justify its laws with exclusive reference to the original purpose behind their passage, Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 70 - 71 (1983), this history does provide some indication of the kind of burden the States themselves believed they were imposing on the smaller parties' effective association.

Note 20. In Anderson the State argued that its interest in political stability justified the early filing deadline for presidential candidates at issue in the case. We recognized that the "asserted interest in political stability amounts to a desire to protect existing political parties from competition," and rejected that interest. 460 U.S., at 801- 802.

Note 21. Even in a system that allows fusion, a candidate for election must assemble majority support, so the State's concern cannot logically be about risks to political stability in the particular election in which the fusion candidate is running.

Note 22. In fact, Minnesota's expressed concern that fusion candidacies would stifle political diversity because minor parties would not put additional names on the ballot seems directly contradictory to the majority's imposed interest in the stable two party system. The tension between the Court's rationale for its decision and the State's actually articulated interests is one of the reasons I do not believe the Court can legitimately consider interests not relied on by the State, especially in a context

where the burden imposed and the interest justifying it must have some relationship.

Note 23. "[A]s an outlet for frustration, often as a creative force and a sort of conscience, as an ideological governor to keep major parties from speeding off into an abyss of mindlessness, and even just as a technique for strengthening a group's bargaining position for the future, the minor party would have to be invented if it did not come into existence regularly enough." A. Bickel, Reform and Continuity 80 (1971); see also S. Rosenstone, R. Behr, & E. Lazarus, Third Parties in America: Citizen Response to Major Party Failure 4-9 (1984).

Note 24. The Court of Appeals recognized that fusion politics could have an important role in preserving this value when it struck down the fusion ban. "[R]ather than jeopardizing the integrity of the election system, consensual multiple party nomination may invigorate it by fostering more competition, participation, and representation in American politics." McKenna, 73 F. 3d, at 199.

Note 25. The experience in New York with fusion politics provides considerable evidence that neither political stability nor the ultimate strength of the two major parties is truly risked by the existence of successful minor parties. More generally, "the presence of one or even two significant third parties has not led to a proliferation of parties, nor to the destruction of basic democratic institutions." Mazmanian 69; see also The Supreme Court, 1982 Term--Independent Candidates and Minority Parties, 97 Harv. L. Rev. 1, 162 (1983) ("American political stability does not depend on a two party oligopoly. . . . [H]istorical experience in this country demonstrate[s] that minor parties and independent candidacies are compatible with long term political stability. Moreover, there is no reason to believe that eliminating restrictions on political minorities would change the basic structure of the two party system in this country").

Note 26. Indeed, at oral argument, the State did hesitantly suggest that it "does have an interest, a generalized interest in preserving, in a sense, political stability . . . ." Tr. of Oral Arg. 26.

Note 27. See also Edenfield v. Fane, 507 U.S. 761, 768 (1993) (explaining that the mid level scrutiny that applies in commercial speech cases, which is similar to what we apply here, [u]nlike rational basis review . . . does not permit us to supplant the precise interests put forward by the State with other suppositions").

Afterword

Early in this paper I speculated about Calvin Brown's thinking, motives, and even meetings that led to his acceptance of the Democrat's nomination. There are three reasons why I think these conjectures have some basis in fact. First there is the timeline of events as reported in the newspapers. The second and third are aspects of his character. By the autumn of 1904 he had served thirteen years on the trial bench, four on the appellate court. He was cautious, took his time making decisions and was not taken by surprise by reactions to events he set in motion. He also had confidence in his own judgment. He knew exactly what would happen after he accepted the Democrat's nomination. He was not shocked by Frank Day's suit or the Supreme Court's October 7 order. Nor would he be surprised by a question that lingers over this case: Was the most important character in this story the Chief Justice?

Acknowledgments

This article could not have been researched without access to the archival collections of the Minnesota Historical Society. I am indebted to librarians for assistance in retrieving records of the Minnesota Supreme Court. There are, regrettably, many documents I was not able to find—the certificates of nominations of the parties filed with the Secretary of State, the actual appointments of the District Court Judges by the Governor, Justice Brown's letter accepting the Democrat's nomination, among others. If located, they will be added to the Appendix.

Credits

The photograph of John W. Arctander on page 22 is from *Progressive Men of Minnesota* (1897) and that of Judge Henry C. Belden, also on that page, is from Hugh J. McGrath & William Stoddard, *History of the Great Northwest and Its Men of Progress* (1901). All other photographs of the judges, lawyers and state officials on pages 19-23 are from *Men of Minnesota* (1902).

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