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Eugene J. McCarthy

John C. Armor

INTRODUCTION

ELECTION LAWS: A CASE OF DEADLY REFORM

EUGENE J. MCCARTHY AND JOHN C. ARMOR*

It is easy in the area of election law to lose sight of the forest for the trees. It is imperative we not make that mistake. As the United States Supreme Court has recognized, the freedom to vote (and to be a candidate) is the most basic right guaranteed by the Constitution, for without that freedom the protection of all others becomes illusory.

Before analyzing the various election "reform" laws concerning access to the ballot, media coverage, and public reporting and financing of elections, we must first examine the general framework of election laws. A public financing law, for instance, may have good internal design and methodology. But if the net effect of the law is to attack the freedom of candidates to run, and of voters to vote for them, then no amount of tinkering with details is justifiable or legitimate under the first amendment.

We cannot put a man on the moon using a horse and buggy, even if the horse is a thoroughbred and the buggy is the Deacon's one-horse shay. That is precisely the problem with many election laws, especially the federal laws, in the United States today. No law whose fundamental approach is unsound can be salvaged by revision or reform.

Nor is it by accident that the principal objective — open and competitive elections — has been honored in theory but buried in reality by modern laws and regulations. The net effect of all election laws today is to continue indefinitely the shared oligopoly

*Eugene J. McCarthy is a former United States Senator from Minnesota and a three-time candidate for President. John C. Armor is a constitutional lawyer who has represented the first amendment interests of George Wallace, Eugene McCarthy, John Anderson and numerous other candidates.

of the Republican and Democratic Parties over all major elective positions. Traditionally, control of the elective positions has resulted in control over the appointed positions, including the membership of the Federal Election Commission, the Federal Communications Commission, and various other agencies that rule over the destinies of politicians. It is the nature of any political party to seek as much power as it can, and having obtained it, to hold it as long as possible. Throughout American history every political party has remained true to these principles. In this, the present "major" parties are no different from the Republican-Democratic Party, the Federalists, and the Whigs, all of which elected presidents. Nor are they different from the Know-Nothings, the Populists, and the Grange, which did not succeed in electing presidents, but which did have substantial regional power, including control of some states.

Prior to 1900 the United States never had "the two party system." Although from 1789 to 1900 there were present in most elections two dominant parties, these major parties always faced competition from other parties that goaded, hounded, and sometimes defeated the dominant parties. Thus, for most of our history there have always been new political parties waiting in the wings to supersede any party that lost its mandate for existence.

It is novel in the 20th century, however, that the two presently dominant parties have jointly used the structure of elections to cut off their potential competition. Prior to 1888 there were absolutely no laws restricting the opportunities for new candidates and new parties to arise at the last minute and compete effectively in elections. Nor was there any widely held belief, similar to belief in the emperor's new clothes, that the national leadership must be chosen solely from the ranks of the existing political parties. It was not until after 1900 that ballot access restrictions were established in a majority of American states. Initially, however, the requirements were minimal. Most states allowed ballot access to a candidate if he obtained and filed as few as 500 signatures only four weeks before the general election. Moreover, candidates at that time faced no restrictions on media access or fund-raising. This was the pattern when Teddy Roosevelt bolted the Republican Party in 1912, and was able to get his new party on the ballot in every state except Oklahoma.

The joint response of the Republican and Democratic Parties to the Roosevelt insurgency was to steadily tighten the anticompetitive provisions of the election laws. The process was

much harder for LaFollette in 1924. It was harder still for Wallace in 1968. Not until 1976 and 1980 did it become possible for an independent to run for president. It was only five years ago that elections began to be more open and competitive. Significantly, the change did not come from legislatures, but from court decisions striking down laws that violated the first amendment rights of candidates and voters.

Had the present pattern of election laws applied throughout the nation's history, neither the Republican nor Democratic Parties would now exist. Instead, the nation's two main parties would be the first two: the Federalists and Anti-Federalists. Only one President, John Adams, would have been elected under his actual affiliation. All the rest would have had to seek accomodation with one of these parties to have any chance of winning. What would have been the national history had all political aspirations been forced through these two parties, or strangled aborning? Would the populist movement that created the Democratic Party have brought the muddy boots of Andy Jackson to the White House? Would the populist movement that created the Republican Party have put the brooding genius from Springfield in the presidency?

From beginning to end, every populist movement in our history has been born in opposition to the powers that be, including the dominant politicians of the day. The Democrats and Republicans are products of such movements. Today, they betray their heritage; more importantly, they betray the nation's heritage. The Democrats began as champions of the common man. Today they represent the interests of the leaders of a small number of unions and social organizations, which are not necessarily the interests of the members of those organizations. The Republicans also commenced their existence as champions of the common man. Today they represent the interests of the managers of the Fortune 500, which are not necessarily the interests of the owners or employees of those companies. The leaders of both parties consort today primarily with people who wear $400 suits and have six-figure salaries. Few of the politicians and their major supporters either know or understand the needs and hopes of the common man. Power does corrupt, and we have allowed these oligopolists to legislate and regulate to themselves a power that has steadily grown more absolute and more corrupting. Worse yet, organizations that claim to be civic-minded, such as Common Cause and the League of Women Voters, have assisted this effort. They have promoted

legislation and regulation to strengthen "the two-party system." Through lack of perspective they have bought a false bill of goods.

A recent Associated Press-NBC News poll showed how the election laws frustrate the public will at the national level. The poll asked people to state their partisan preferences. Twenty-eight percent chose Republican, thirty-one percent Democratic, two percent other parties, and three percent not sure. But the largest group was thirty-six percent independent. In the various polls of 1980, independents were roughly tied with Democrats and ahead of all others. Now independents have a significant lead.

If the popular attitudes were proportionally reflected in elective offices, independents would hold one-third to one-half of all positions. They do hold about half of the 500,000 elective positions nationwide, but almost all are in the some 80,000 local governments. Among the 587 major officers in the United States (Governor, Congressman, Senator, President and Vice President), there is only one independent, Senator Harry Byrd, Jr., of Virginia. It is at the level of major state and national offices that anticompetitive election laws have their greatest impact.

Like a dam on a river, the state and federal laws have prevented the tide of public opinion from expressing itself for more than a generation. The significance of the AP-NBC poll is that the public preference for independents is still growing. Eventually, it will crest over the dam and take a majority of the nation's highest offices.

The effect of the Republican/Democratic oligopoly can be seen in the continuing decline in voter participation. It is evidenced in the most common reason given for not voting — that it makes no difference who wins. And it can be seen in the steady decline in the caliber of candidates in primary and general elections. As we all recognize, a contest between two mediocre baseball teams can be evenly matched. It can be a hard-fought, interesting, see-saw battle to the final out, but the winner is nonetheless mediocre. From an entertainment standpoint, the election of 1976 provided everything we could ask for. Yet, the purpose of elections is not amusement of the populace, *circi* to go with *panum,* but the selection of those who will govern us. We can survive occasional elections that produce mediocre results. A case in point is Warren G. Harding. But we cannot survive permanent and institutional mediocrity — an election process deliberately designed to avoid serious competition, thereby avoiding many of the critical issues as well.

Above all else, this is the greatest danger which may result

from present election laws. These laws say, in effect, that the only changes which the voters may seriously consider are those which are acceptable to one portion or another of the political establishment. These enactments abridge the public's right to create new parties and new candidacies, which has been the major source of innovation and creativity in national policies. This must change. Either the doors must be opened by a more objective evaluation of our elective system, or eventually the system will fail.

The overriding question which must be asked with respect to these state or national election laws is whether they contribute to, or inhibit, the kind of open and competitive elections which the nation has historically enjoyed. This question must be asked not only of proposed changes in election laws and regulations, but also of existing laws. In examining any aspect of these laws, we must ask ourselves whether this part only contributes as a life-support system for major parties whose alpha waves are flat. We must determine whether the present major parties exist in their present form only because of grandfather clauses in the law that give them preferred status in ballot access, media time, and public funding. We must decide whether protection has made them lackadaisical. If the answers to these questions are yes, we can see from our history that the cure for moribund politics is a healthy dose of competition. Then our approach should not be to tinker with existing laws, but to strike them down wholesale by both judicial and legislative means. We must substitute for present laws others that respect our tradition of freedom and competition in elections.

Thus far, the only real progress has been in judicial review of the constitutionality of existing laws. Far more often than not, the courts have struck down portions of election laws that infringe on the first amendment rights of voters and candidates. These decisions have been based, expressly or implicitly, on the ultimate sovereignty of the people, which is the basis of the Constitution and of the Declaration of Independence before it. Unfortunately, few experts in election law have adopted this approach, and it has hardly been adhered to by the people themselves through the election of candidates who are not committed to the maintenance of the oligopoly.

The political stables, like the Augean ones, must be regularly flushed out, or the task of cleaning them becomes Herculean. The most salutary public service that this special issue of the *North Dakota Law Review* can perform is not just to inform lawyers about the current state of election laws, but to encourage lawyers, who

have a special status and obligation concerning the legal framework of society, to ask these fundamental questions and to pursue the answers wherever they may lead. If enough people pursue these questions, with enough insight and courage, perhaps this time it will be lawbooks rather than tea that are dumped into Boston Harbor. Fortunately, the Constitution allows us to take that step not in disguise in the dark of night, but in public and in our own names. The leaders of such an effort must be those who know the most, and care the most, not just about the question of who will win any particular election contest, but about the more relevant and significant inquiry of the long-range structure of American elections. Many such people will follow the references, and find and read this special issue of the *North Dakota Law Review*. How many will approach the overriding questions, and find their own answers to them, remains to be seen.[1]

1. The best single source that demonstrates the traditional flexibility of American elections, and the effects of such open competition prior to 1900, is PETERSEN, A STATISTICAL HISTORY OF THE AMERICAN PRESIDENTIAL ELECTIONS (1968). As a parenthetical note, basic research should be the beginning point for all who seek election reform. For more than a century, and with growing vehemence recently, various national leaders have decried and attacked the Electoral College as a means of choosing a President. As the statistical history shows, the College was not always a winner-take-all process. It is within the present power of every state to establish district elections for the College, which would automatically produce proportional results. Historically, many states have done this. To do it again requires no amendment of the Constitution. This historical analysis demonstrates the hypocisy of many present "reformers," who say they want change, but for private reasons do not attempt the available changes which can accomplish the goal.