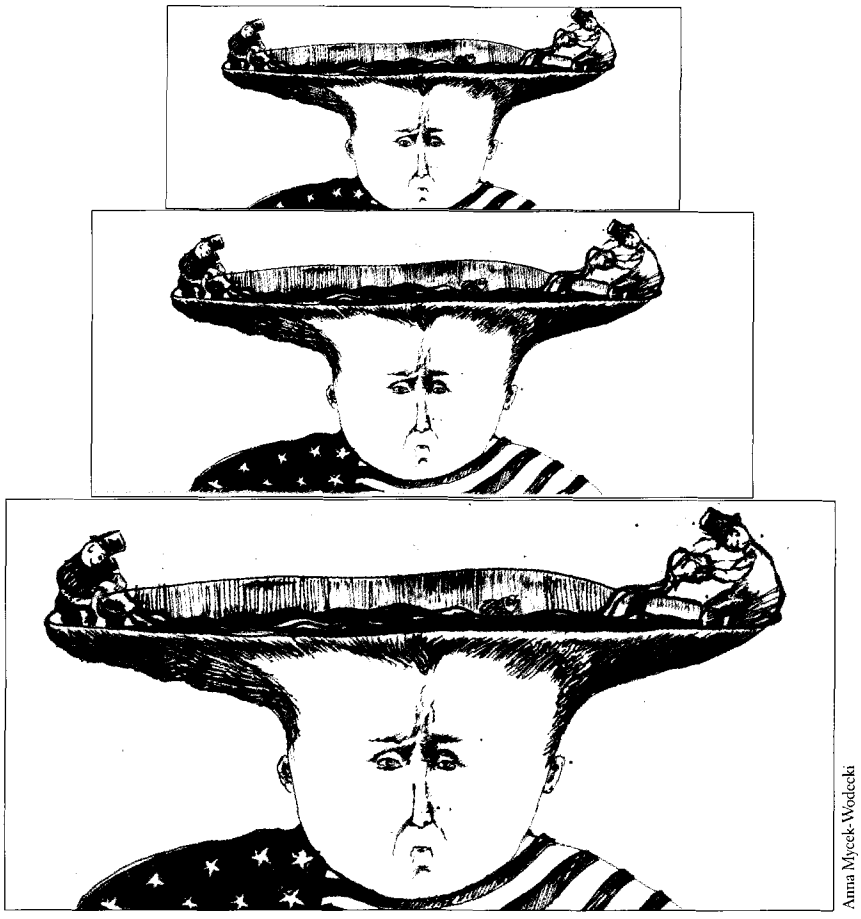
The Impotent American Voter

by Richard Winger



Anna Mycek-Wodecki

Our great-great-grandfathers, if they were American voters, enjoyed greater opportunity to change policy with their votes than we do today. It is a paradox that as the number of Americans permitted to vote has increased over the past century, the power of those votes has diminished. Many legislators and judges, in their hearts, do not really believe that the voters know best, and they have curtailed certain kinds of voting rights that Americans formerly exercised. The rights of American voters to organize new political parties, and to vote for candidates of their choice, are weaker today than they were 70 years ago.

Recently, voters in Canada, Russia, Japan, and Western and Central Europe created new political parties and either voted them into power or gave them the status of dominant opposition parties. What would happen if the voters of the United States created a new political party and tried to vote it into power? If the new political party were created during an even-numbered year, voters would learn that, in many states, it could not even get on the ballot, no matter how much popular support it had.

The Republican Party was founded on July 6, 1854. During the autumn 1854 elections, the Republican Party elected more members to the U.S. House, and more state governors, than any other party. That was how American voters of the 19th century told the government to change direction. The same is true today in most other nations, where the deadline for a new political party, or any political party, to qualify for the ballot is often only a month before the election. In South African elections this year, Chief Buthelezi's Inkatha Freedom Party qualified for the ballot less than a week before the election.

But in the United States, incredibly, some states require a new party to qualify for the ballot more than a year before an election. A new party that wishes to qualify for the November 1996 ballot in California and Ohio will be required to do so no later than mid-October 1995. If a new party had been organized on July 6 of this year, it would not have been able to get on the November 1994 ballot in Arizona, Arkansas, California, Georgia, Hawaii, Indiana, Kansas, Louisiana, Maine, Massachusetts, Mississippi, Montana, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, or Wyoming, even if it had the ability to find candidates and organize petition drives in a single week. That is because the legal deadline for qualifying for the ballot in those states precedes mid-July of an election year. So much for any group of voters who might have wanted to duplicate the successful founding of the Republican Party!

Early qualifying deadlines for new parties are fairly recent de-

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velopments in American history. Senator Robert La Follette was nominated for President in Cleveland by the new Progressive Party on July 6, 1924. According to the *New York Times* of July 12, 1924, which surveyed the ballot access restrictions that La Follette faced, in no state had the petition deadline passed. In 30 of the 48 states, the petition deadline was not until October 1924. No state required more than 12,000 signatures, and in all 48 states put together, approximately 50,000 signatures were required. La Follette ended up on the ballot of all states except one, Louisiana (where only 1,000 signatures were needed to get on the ballot, but where the signers could not be registered members of the Democratic or Republican parties, which was too much of a hurdle for La Follette). In November, La Follette carried one state in the electoral college and polled 17 percent of the popular vote.

By contrast, a new party formed for the 1994 election needed to collect 3,501,629 valid signatures if it wanted to run a full slate of candidates for all federal and state offices. A party in Russia needs only 100,000 signatures to get on the ballot for *all* offices; a party in South Africa needs a mere 10,000. In Great Britain and Canada, no petitions are required; instead, candidates of all parties qualify by paying a filing fee.

It is true that Ross Perot got on the ballot in all 50 states in 1992. He needed 805,759 valid signatures to do the job, and he did it. But what few people know is that many states have made it easier for a third party or independent *presidential* candidate to get on the ballot than for third party or independent candidates for *other offices*. For instance, in Florida in 1992, a third party or independent presidential candidate needed 60,312 signatures, but a third party or independent candidate for any statewide office needed 180,936.

In Georgia in 1992, a third party needed 26,955 valid signatures to get on the ballot for statewide office, but 134,770 additional signatures were needed to qualify a full slate of candidates for the U.S. House of Representatives, another 200,000 (approximately) signatures to get all legislative candidates on the ballot, and still another 700,000 (approximately) to get its candidates for county office on the ballot. The Georgia law requires a separate petition for each third party or independent candidate for district or county office. The petitions are not needed for parties that polled at least 20 percent of the vote in the entire nation for President in the last election or for parties that polled at least 20 percent of the vote for Georgia governor.

Meanwhile, Republican and Democratic candidates in Florida and Georgia are not required to submit any signatures to get themselves on their own party's primary ballots, as long as they are willing to pay filing fees. New party candidates in both states must pay the same filing fees as well as submit the signatures detailed above.

The result of ballot access restrictions is that no party, other than the two major parties, has been able to put candidates for the U.S. House of Representatives on the ballot in even *half* of the districts since 1920, when the Socialist Party did it for the last time. It has therefore been theoretically impossible for the voters to elect any party to power in the House, other than the Democrats and Republicans, during most of our lifetimes.

Because the Democrats and Republicans themselves do not contest all important elections, restrictions on third party ballot access also mean that the voters frequently have no choice whatsoever on their ballot. Each year, either the Democrats or the Republicans fail to run any candidate for one-third of all state legislative races. This means that in one-third of all districts, the voter is faced with only one candidate on the ballot for state legislature. In Arkansas, where the ballot access laws are so tough that no third party has qualified since 1970, 75 percent of state legislators are usually elected with *no* opponent on the November ballot.

Why do these restrictions exist? The U.S. Supreme Court, which upheld restrictive ballot access laws in Georgia in 1971, in California and Texas in 1974, and in Washington State in 1986, says that they are needed to avoid "voter confusion" and to preserve "stability." In an opinion on June 7, 1994, the U.S. Court of Appeals, 10th circuit, upheld an early Kansas petition deadline on the grounds that the state has an interest in "voter education." In another opinion on July 14, 1994, the U.S. Court of Appeals, 9th circuit, upheld a Washington State deadline of July 5 on grounds of . . . administrative convenience for elections officials! These are just polite ways of saying that the courts do not trust the voters to choose wisely, if they have meaningful choices other than voting Democratic or Republican.

Some might argue that the two-party system is useful and that ballot access restrictions are therefore helpful. This ignores American history, which teaches that a two-party system works better when the people are freely permitted to organize new political parties.

"Two-party system" is a political science term, describing a system in which two political parties are naturally bigger than all other parties. Such systems invariably exist when a nation elects its officials on a "winner-take-all" basis rather than with proportional representation. If a nation does not use proportional representation, a two-party system comes into existence, even when the government does not discriminate for or against any political parties or impose barriers to the formation of new parties.

In an ideal two-party system, the two major parties are fairly evenly balanced, so that when the governing party falters or becomes corrupt, or its ideas fail, there is a preexisting political party strong enough to oust it. In a good two-party system, voter turnout is high, because a relatively small share of the vote can tip the balance between the two major parties, and a voter senses that his or her vote is important.

In the United States, the two-party system worked far better in the period 1870-1900 than it does today. During that period, control of the U.S. House of Representatives alternated between the two major parties, on the average, every four years. Furthermore, the swing was sometimes staggering: the House went Republican in 1888 by a margin of 166 to 159, but in 1890 the Democrats won it by 235 to 88. Also, the Republicans won it in 1880 by 147 to 135, but in 1882 it was Democratic by 197 to 118. There was no need for term limits. According to the U.S. Census Bureau, voter turnout was never better than in that period of our nation's history. The percentage of voters who were able to vote and who did vote never dipped below 75 percent in the period 1876-1892.

There were absolutely no government barriers back then to people organizing new parties, and they did so frequently. Third parties, particularly parties representing farmers, were strong in that period. Except in 1888, third parties won some seats in the House in every election during that period, peaking with 40 members in 1896.

Compare that period with elections today. Our voter

turnout has never been worse. Only 50 percent of the eligible voters cast a ballot in the presidential election in 1988. Turnout in the 1992 presidential primaries was the worst ever for presidential primaries. The November 1992 election brought a reprieve, up to 55 percent, but primaries and elections since then have slumped to new turnout lows. Furthermore, the same party, the Democratic Party, has enjoyed uninterrupted control of the House of Representatives for over 40 years, the longest period of one-party rule of either branch of Congress in the nation's history.

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It should be obvious, then, that creating barriers to the entry of new political parties does not help the two-party system. There is no reason for such barriers, except to stifle competition. And now Congress is about to take another step to discourage new parties. The federal campaign spending bill passed by the Senate last year creates a discriminatory formula for distributing public campaign funds. Any Democratic or Republican candidate for the U.S. Senate will be eligible for a public campaign subsidy of up to 20 times as much money as the candidate raises privately, if he or she has an opponent who does not abide by voluntary spending limits. But any third party or independent candidate in the same position could never receive a subsidy even as large as the amount of money he or she had raised privately.

As an example of how this could work, imagine that Independent Vermont Congressman Bernie Sanders were running as an Independent for the Senate. Even though Sanders might have raised $800,000 and the Democrat in the race might have raised only $60,000, if the Republican in the race had raised $1,620,000 (thus exceeding the voluntary spending cap of $1,200,000), the Democrat in the race would receive $800,000 from the U.S. Treasury, whereas Sanders would receive only $420,000.

A Senate employee who worked on this bill was asked what principle supported the idea that public funding should be dependent on a candidate's party, rather than on his or her level of support. He answered, "That's just Senator Ford's philosophy" (referring to Wendell Ford, senator from Kentucky, an architect of the bill).

In 1990 the United States signed the Document of the Copenhagen Meeting on Human Rights, pledging itself (along with the other signatory nations, mostly Europeans) to "respect the right of citizens to seek political or public office, without discrimination," and to "respect the right of individuals and groups to establish, in full freedom, their own political parties or other political organizations and provide such political parties and organizations with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law." American policy, however, is very different. It pays only lip service to the idea that voters should be free to establish new political parties and that the government should not discriminate against new parties, and the mass media refuse to discuss this discrepancy.

American voters have recently lost voting power in other ways as well. Almost half of the states provide for initiatives to amend state laws, a means by which voters can bypass state legislatures and enact law changes on their own. Initiatives have existed in parts of the United States since the turn of the century, and laws enacted by initiative are subject to judicial review by the courts, just as any law enacted by a state legislature is also subject to judicial review.

But just in the last year, two state supreme courts have invalidated state initiatives on a new basis: not that the laws passed by the voters were unconstitutional, but that the petitions which got them on the ballot did not have enough signatures! The first instance was on September 30, 1993, when the Florida Supreme Court invalidated a Tampa city initiative, which had been passed almost a year earlier, on the grounds that some of the people who had signed the initiative petition were on the "inactive" portion of the voter registration rolls. The court ruled that "inactive" voters (those who had not voted in the preceding two years but had voted in the preceding five years) were not eligible to sign initiative petitions, meaning the initiative did not have enough valid signatures of registered voters and was invalid (the initiative repealed a gay rights ordinance). The second decision occurred on May 13, 1994, when the Nebraska Supreme Court ruled that the term-limits measure that had passed in 1992 also lacked sufficient signatures on its petition. The court ruled that the voters had (unconsciously) voted to change the number of signatures needed for an initiative back in 1990. That 1990 constitutional amendment, put on the ballot by the legislature, had ostensibly done nothing but require that only registered voters could sign initiative petitions. But, surprise, the court ruled that the 1990 amendment also changed the number of signatures from 10 percent of the last vote cast for governor to 10 percent of the number of registered voters . . . even though another portion of the state constitution continued to say explicitly that the requirement was 10 percent of the last vote cast!

Regardless of the arguments about the number of signatures, once an initiative passes, it clearly can be said to have had voter support. Since the entire purpose of a petition is to show voter support in advance of an election, once the election has been held there is no longer any mystery about whether the idea has voter support; questions about how much support the petition had are no longer relevant. Yes, review an initiative after the election for its constitutionality, if challenged, but do not try to fault the petition; it is irrelevant.

If you doubt this, imagine someone trying to get a law (that had been passed by a legislature) thrown out after it had been signed into law, on the grounds that it did not get enough votes

. . . in committee. Once such a bill reaches the floor and is passed by both houses of a legislature and signed by the governor, no one would argue that, because it should not have reached the floor of one of the legislative chambers, it was invalid. A legislative committee, like an initiative petition, is a screening procedure, and if the "committee of the whole" (i.e., the legislative body as a whole, or the whole body of voters) approves an idea, details about the screening process are no longer relevant. But courts can get away with invalidating initiatives in this manner because they really do not believe in the initiative procedure.

A final indication that voters are losing clout is that they recently lost the right to cast a write-in vote. On June 8, 1992, the U.S. Supreme Court in *Burdick* v. *Takushi* ruled that the state may prevent a voter from voting for someone who meets the constitutional qualifications to hold the office yet whose name is not on the ballot. Never before had the Court upheld a restriction on the voter's freedom of choice. The case was from Hawaii, one of five states that bans all write-in space on ballots.

There is no good reason to ban write-in votes. If the voters elect someone by write-in vote who does not meet the constitutional requirements to hold a particular office, such a person will not be sworn in to that position. However, in practice, voters never elect anyone by write-in vote who is ineligible to hold the office. But voters *do* frequently elect write-in candidates. Write-in candidates were elected to Congress in 1930, 1954, 1958, 1980, and 1982; and hundreds of write-in candidates have been elected to state legislatures, most recently in Nebraska (1988), Virginia (1989), and Rhode Island (1990). A write-in candidate was almost elected to the Colorado legislature in 1992. Write-ins are useful when the voters learn something unsavory about the candidates on the ballot and it is too late for anyone else to qualify for the election. Write-ins are especially important in state legislative elections, because so many (over 25 percent) of them inevitably have only one candidate listed on the ballot.

Back in the period 1890-1940, almost half the state supreme courts ruled, or stated in *dicta*, that write-ins had to be permitted or the election would not be free. Only two state supreme courts said the opposite. Until the *Burdick* case, *no* federal court had ever ruled that write-ins could be banned. But when the U.S. Supreme Court said that it is constitutional to ban write-in votes, the decision received so little notice that the *New York Times* did not even run a separate article about the decision. Instead, it mentioned it at the end of an article that was mainly describing another of the day's Supreme Court opinions.

There are groups working to protect and expand the initiative and to relax ballot access restrictions. Barbara Vincent (P.O. Box 11351, Memphis, TN 38111, 901-327-6824) heads up a national campaign to increase the number of states with initiative provisions, and the Coalition for Free & Open Elections (P.O. Box 20263, New York, NY 10011) works on the ballot access problem. The erosion of the electorate's power can be reversed, if enough people become aware of the problem.

The Widower

by Bradley Omanson

It may have been only the consequence
of age or grief (or of something worse,
something he'd never admit to himself)
that he heard her again, heard the scrabble
of mice on loosely piled-up plates
as the clatter of dishes being stacked
on a cupboard shelf. Later that night,
forgetting he'd put on the kettle himself,
he waited for its insistent shrill
to summon her from her sewing, and when
it persisted, shrugged it off as only
wind in the wires alongside the house.
He sat in his chair in the upstairs room
and listened to hear her foot on the step,
then he pulled a blanket up to his chin
and slumbered by fits and starts. In the kitchen,
the curtains, saturated with steam,
adhered to the window and slowly froze.