



*The Only-Two-Party System:  
Why Third Parties Are  
Unconstitutional*



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LEX SCRIPTA LEGAL RESEARCH GROUP

HISTORY OF THE LAW. HISTORY THROUGH THE LAW™

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To Frustrated Supporters of Third Parties Across America



# Contents

|  |     |
|--|-----|
| Acknowledgments. . . . .   | ix  |
| Questions and Answers. . . . .   | 1   |
| The Unwritten Constitution of the United States and Political Parties<br>. . . . .               | 9   |
| The Presidency As A Source of the Only-Two-Party System. . . . .                                 | 38  |
| Single-Seat District Legislative Elections As A Source of the Only-<br>Two-Party System. . . . . | 69  |
| Third Parties as Single-Issue or Fringe Parties. . . . .   | 97  |
| Third Parties as Splinter Groups. . . . .  | 124 |
| Third Parties as Doctrinal Parties. . . . .  | 146 |
| The Appeal of a Third Party in the Only-Two-Party System. . . . .                                | 184 |
| Answers. . . . .   | 209 |
| Selected Bibliography. . . . .   | 214 |
| Index. . . . .   | 232 |



## Acknowledgments

I began to think along the lines developed in the following pages while sitting in an undergraduate history class at California State University Fullerton taught by Professor Samuel Y. Kupper. It was Professor Kupper who first told me that American third-parties had no room in which to operate under our Constitution. I have been thinking and reading about what he said off and on over the past thirty years, and decided that he is right and that I ought to share the results of my research. Special thanks to Professor Kupper for starting the ball rolling.

Thanks to my parents, my wife and children for their continued love and support.





## Chapter One

### Questions and Answers

**Politics**, *n.* A strife of interests masquerading as a contest of principles. The conduct of public affairs for private advantage.

Ambrose Bierce, *The Devil's Dictionary* (1911)

In the United States of America, third political parties are unconstitutional. By “unconstitutional,” I do not mean illegal or even extralegal. I mean incompatible with the governmental structure created by the Constitution of 1787, as amended and interpreted. By “third political parties,” I mean any group, however organized, which seeks to influence public policy primarily by nominating, campaigning for, and electing candidates to public office, especially to the Presidency and Congress, other than the two major parties, currently and since 1854 the Democratic Party and the Republican Party. This definition does not include any group which seeks to influence public policy by other means, such as circulating petitions, raising money, endorsing candidates nominated by one party or the other, bringing litigation, demonstrating, and so forth.

“Now, wait a minute,” I hear you say, “political parties are not mentioned in the Constitution at all, and the Freedom of Speech, Freedom of the Press, Freedom of Assembly, and Freedom to Petition Clauses of the First Amendment protect the right of all citizens to organize into political parties of the Left or the Right as they see fit, the Supreme Court even said so.<sup>1</sup> Also, the Framers were opposed to any sort of party, or ‘faction’ as they described it. James Madison, writing in *The Federalist* explicitly downplays any role for parties in the new United States.”<sup>2</sup>

Yes, that is all true. The actual text of the Constitution does not mention parties at all, and many of the Founding Fathers, not just Madison, disparaged political parties. However, as I explain in Chapter Two, there is an unwritten American constitution which parallels and supplements the document drafted in 1787 at Philadelphia. The Constitution of the United States, like all constitutions, is a set of ground

## Chapter One

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rules for society's continuing negotiation of its political and economic affairs. One of a constitution's most important aspects is to define who is to participate in these negotiations and how they are to do it. When a constitution does not explicitly define some of these important aspects, traditions, customs, precedents and past practices fill the gaps. These traditions and so forth make up an unwritten constitution which supplements its written counterpart. This unwritten constitution is made up of "venerable Supreme Court opinions, landmark congressional statutes, and iconic presidential proclamations,"<sup>3</sup> together with "textual silences, ... archaic assumptions,"<sup>4</sup> and the political traditions and customs of the American people. The unwritten parts of the United States Constitution make more than two political parties unconstitutional.

Third parties are unconstitutional because the structure of the government created by the Constitution, specifically the presidential system (as I will explain in Chapter Three) together with the apportionment of legislators in geographically-defined, single-seat constituencies at both the State and Federal levels (as I will explain in Chapter Four) and American political tradition does not allow any political party other than the two major parties — whether Democrats and Republicans, or Democratic-Republicans and Federalists — any space in which to function. This is why a third party has never elected its candidate to the Presidency, nor is one ever likely to do so. This is why third parties may occasionally elect a few members to Congress, but they are politically insignificant. Unlike minor parties in a parliamentary system, third parties in the United States cannot play the government off against the opposition by threatening to join or withdraw from a coalition if their demands are not met. The best third parties may hope for is to influence one major party or the other. This may happen from time to time, but it is not the purpose for which political parties are organized, which is to elect candidates.

Further, democracy exists at the political center, and to the extent the two major political parties—the center-left Democratic Party and the center-right Republican Party—occupy this space there is no room for a broad-based, centrist third party. One of the strengths of the Constitution is that it requires a broad consensus of opinion in order to advance any

legislative program; thus, regardless of the specific details of any given legislative program, American public policy is and will be very middle-of-the-road. In America, only the fringe remains unoccupied, and the fringe is by its nature excluded from the mainstream of policy making. Hence the title of this book, *The Only-Two-Party System*; it is not that there is no other political system in which two parties operate, it is that the United States political system is one in which only two parties have room to operate.

“Not so fast,” I hear you say, “there have been and still are third parties active in American politics. Don’t you know that Micah L. Sifry wrote,

The three volume *Encyclopedia of Third Parties in America*, published in 2000, has entries for 117 parties, covering almost every substantial national- and state-level effort from A to W, from the Afro-American Party of the 1960s to the Workingmen’s Party of the 1850s. This is out of a larger pool of perhaps 200 third parties that have formed and disappeared since the early 1800s. Today there are at least 38 third parties active at various levels of meaningful organization. Twenty exist in one state only. Thirteen others are primarily doctrinal sects or cults of personality with little hope of reaching pluralities, if not majorities, of voters.<sup>5</sup>

“Of the five remaining, Sifry states that ‘for all intents and purposes, the Reform Party died after the 2000 elections.’<sup>6</sup> Sifry continues, ‘That leaves four parties—the Greens, the Libertarians, the New Party, and the Labor Party—with serious aspirations of reaching the broader country. But it makes little sense to include the Labor Party in that number until it actually starts running candidates in elections.’<sup>7</sup> Sifry then adds three more parties which are limited to single-state organization—Minnesota’s Independence Party, Vermont’s Progressive Party, and New York’s Families Party—for a total of six parties ‘that have something to say to the rest of the country.’”<sup>8</sup>

Yes, that is true. Political parties of one sort or another are probably as old as politics. Two political parties existed in ancient

Greece and Rome. “In both cases,” A. James Reichley wrote, “political conflict between parties was held by later historians to have played a part in the downfall of democracy — contributing to the unpopularity of parties with the American Founders, many of whom closely studied antiquity.”<sup>9</sup> Two political parties developed in Great Britain during the later half of the seventeenth century. Those who supported the right of Prince James, Duke of York, a Catholic, to inherit the throne after the death of his brother, King Charles II, were called Tories, an Irish term for highwayman. Those who would have preferred a Protestant heir were called Whigs, a Scottish term for horse thief.<sup>10</sup> Prince James became king, as James II and VII, in 1685, but was overthrown in 1688 during the Glorious Revolution. The Tories and the Whigs continued to function as political factions or political parties thereafter. Members of the Conservative Party in the United Kingdom today are commonly referred to as Tories. The English Whig Party disappeared in the 1860s.

In the early modern era, political groupings were described as either a party or a faction. Although sometimes used synonymously, each word had a slightly different connotation. A “faction” was a personal alliance or clique that sought office and power for its members and supporters. A “party” was dedicated to some principal or interest. The distinction was often without a difference, and often depended on who was speaking about whom.<sup>11</sup> The Framers disapproved of both parties and factions because they “encouraged the very private ambition and corruption that republicans were supposed to be on guard against.”<sup>12</sup> The Framers, when they met in Philadelphia did not mean to set up a party system, but that is the unintended result of their handiwork.

Relatively quickly, the Framers divided into two parties and, joined by like-minded men, began to “manage the structures of the central government, establish informal connections between its separate agencies, and staff its offices. In short, the parties filled the gaps in the constitutional structure of national authority in a constitutional manner and thus performed a crucial constitutional function.”<sup>13</sup> Howell Cobb, a nineteenth-century Georgia politician, wrote that a party was

an association of men acting in concert with each other to carry out the great fundamental principles in the

administration of Government. It enables the people to declare their will in practical form. To break down party organization is a blow at the very corner-stone of our whole political system. It strikes at the fundamental principle of self-government, and seeks to paralyze the arm of the people by relieving their agents and representatives from all responsibility to them as the source from which all power emanates.<sup>14</sup>

Of course, the only-two-party system “has never been left to accomplish its wonders alone. It has been supplemented by primary laws, nomination laws, campaign-finance laws, and electoral rules that are heavily biased against the formation and maintenance of anything other than the two-party system.”<sup>15</sup> While the two major parties are performing their constitutional functions, the minor parties have “been ... raising new issues and compelling the major parties to come to terms with them. That is, minor parties enunciate ideological alternatives; demonstrate the electoral popularity of the issues they raise; and, ultimately, see these issues appropriated by the major parties.”<sup>16</sup>

Narrow single-issue, or fringe parties such as the Greenback Party or the Populist Party of the late nineteenth century (as I will explain in Chapter Five) or factions of one of the two major parties such as the Progressive Party of Theodore Roosevelt in 1912 or the American Independent Party of George Wallace in 1968 (as I will explain in Chapter Six) have appeared from time to time. There have been a few independent candidates, such as H. Ross Perot, also. There are a few doctrinal parties (as I will explain in Chapter Seven) but these parties have placed themselves outside the political mainstream and have no political space in which to operate. Third parties may have some influence in bringing certain issues to the attention of the major parties, or occasionally taking just enough votes from one major-party candidate to ensure the election of the other, but this is their limit. They may elect a few members of Congress, but these Senators or Representatives are essentially captives of the two major parties. They may vote for or against any bills introduced in Congress, they may even introduce a bill or two into Congress, but, unlike the junior partners of a parliamentary

## Chapter One

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coalition, cannot demand their priorities be taken seriously.

“So what of it?,” I hear you ask. “What’s wrong with only two parties?”

Generally, nothing. Democracy exists at the political center and to the extent the two major political parties who occupy this space are willing to negotiate and compromise their differences in the interests of the “public good” and “getting things done,” two parties work well. Unfortunately, as the Democrats and Republicans push farther to the extremes, and are less and less willing to negotiate and compromise, democracy is put at risk (as I will explain in Chapter Eight). Further, under even the best circumstances, the two-party system leaves about half of Americans unrepresented in Congress or the state legislatures.

“What do you propose we Americans ought to do about it?,” you ask.

Absent a general constitutional revision, which is unlikely and probably undesirable, there is very little we can do. We can increase representation and allow for a greater diversity of opinions by apportioning House delegations and Electoral College votes by the percentages of votes received, but this will not solve the problem so long as the President remains independent of Congress. Even the President’s election through a nationwide popular vote would not solve the problem; indeed, it would likely make it worse. A third party working through the Electoral College system could compound the problem by throwing every presidential election into the House of Representatives to be decided by a corrupt bargain. Or, a third party might replace one of the current two parties. This last scenario has happened before, and is the most likely to happen again. In the end, there is simply no place in the American body politic for more than two parties (as I will explain in Chapter Nine).

## Notes

<sup>1</sup>. *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (Holding that freedom to associate as political party constitutes a “fundamental” right).

## Questions and Answers

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2. Publius [James Madison], "Number 10," *The Federalist* in vol. 43 of *Great Books of the Western World*, Robert M. Hutchins, ed. in chief, (Chicago: Encyclopedia Britannica, 1952) 53.
3. Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* (New York: Basic Books, 2012) ix.
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6. Sifry, *Spoiling for a Fight*, 279.
7. *Ibid.*, 279-280.
8. *Ibid.*, 280.
9. A. James Reichley, *The Life of the Parties: A History of American Political Parties* (Lanham, Md.: Rowman & Littlefield Publishers, 2000) 18.
10. *Ibid.*, 19.
11. Jackson T. Main, "The Antifederalist Party," in Arthur M. Schlesinger, ed., *History of U.S. Political Parties* (New York: Chelsea House Publishers, 1973) 1: 135-136.
12. Lynn Hudson Parsons, *The Birth of Modern Politics: Andrew Jackson, John Quincy Adams, and the Election of 1828* (New York: Oxford University Press, 2009) 12.
13. William N. Chambers, "Parties and Nation-Building In America," in Winfred E.A. Bernhard, ed., *Political Parties in American History* (New York: G.P. Putnam's Sons, 1973) 1: 16.
14. Arthur M. Schlesinger, "Introduction," in Schlesinger, *History of U.S. Political Parties*, 1: xxxvii.
15. Theodore J. Lowi and Joseph Romance, *A Republic of Parties? Debating the Two-Party System* (Lanham, Md.: Rowman & Littlefield Publishers, 1998) 4.

## Chapter One

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<sup>16.</sup> Paul Kleppner, “The Greenback and Prohibition Parties,” in Schlesinger, *History of U.S. Political Parties*, 2: 1550.