PREFACE

The editors of the *Review of Law and Social Change* selected federal election law as the theme for our 1980 Colloquium because we believed the 1980 election would reflect to the greatest extent yet the effects of the Supreme Court's *Buckley v. Valeo** decision and of the Federal Election Campaign Act Amendments of 1976.** The unexpected landslide victories in the 1980 presidential and congressional elections, and the news media's general failure to examine the relationship between these victories and federal election laws, reaffirmed our belief that a careful examination of the new laws was necessary. Explanations of the 1980 election results in terms of a national swing to the right or a disenchantment with the status quo are too simplistic. More subtle, complex, but nonetheless dramatic forces were at work in the 1980 election. The purpose of the Colloquium was to explore and evaluate these forces, for more than any other election, the 1980 election witnessed the rise of political action committees, "negative spending," the emergence of the independent candidate, and the introduction of a plethora of laws having discriminatory effects upon candidates' access to the ballot, funding, and media.

Steven Uhlfelder, the Chairman of the American Bar Association Special Committee on Election Law and Voter Participation, discussed the evolution of the Federal Election Campaign Act and its amendments. The purpose of the legislation was to eliminate corruption of the political process by de-emphasizing the role of money. More recently, reforms have been proposed to limit the influence of political action committees (PACs). As Mr. Uhlfelder noted, however, any attempt to regulate PACs should be preceded by an examination of whether PAC influence is a cause or merely a symptom of current campaign finance ills.

Fred Wertheimer, President of Common Cause, noted that many of the problems with the presidential elections have been alleviated through public financing. He argued that increases in overall expenditures are necessary, however, not only to counter the effects of inflation but to provide equitable funding for third-party and independent candidates. He also advocated the extension of public financing to congressional elections. Such financing would help to reduce the importance of a candidate's personal wealth while it would strengthen the role of the party. More importantly, such new legislation, together with attempts to control the overall costs of campaigning through a variety of devices, would weaken the impact of special interest money on elections.

Charles Steele, General Counsel to the Federal Election Commission, stated that he believed the federal election laws have successfully solved

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* 424 U.S. 1 (1976).

** Pub. L. No. 94-283, 90 Stat. 475 (further amendments 1980) (codified as amended in scattered sections of 2, 26 U.S.C. (1976 & Supp IV 1980)).

many of the problems that prompted passage of the legislation in the first place. He noted, however, that traditional first amendment analysis is inadequate to resolve the issues arising in current election law debate, and specifically argues that campaign expenditures should not be equated with speech. Rather, the rights of organizations and the freedom of political association, instead of money per se, are at the heart of the election law controversy.

The freedom of political association was explored in a variety of contexts, for this right extends not only to the individual, but to organizations. Ronald Eastman, General Counsel to the Democratic National Committee, discussed the conflict between the right of the Democratic Party to formulate the rules by which its presidential candidates are selected, and the right of states to regulate their primary processes. Mr. Eastman went on to note that this confict raised a broader and perhaps more significant issue: who should the ultimate arbiter of these political questions be?

The adequacy of the primary system was examined by Mórris Udall, United States Congressman from Arizona, and Thomas Schwarz, author of *Public Financing of Elections: A Constitutional Division of the Wealth* and election law columnist for the *Legal Times of Washington.* Congressman Udall advocated shortening the overall period in which primaries can be held by restricting them to four days in four successive months. Such limitations, he argued, would encourage discussion of broad issues rather than parochial problems. Thomas Schwarz suggested that primaries be organized by region precisely because this permits an articulation of issues of regional concern. Moreover, this approach would further the goals of increased political participation, effective government, and accountability while reducing the overabundance of state primaries and the influence of the media.

While the proliferation of the primary has led to a lack of cohesion within the party, a potentially more ominous phenomenon is the expanding role of independent expenditures. The *Buckley v. Valeo* decision, by striking down limitations of independent expenditures, has enabled independent groups to spend freely so long as they are not "coordinated" with the campaign. The limitation on contributions has probably disproportionately benefited special interest groups, and the well organized professional PACs have arguably eclipsed the role of the independent contributor. Speaking on behalf of the right of independent groups to make such expenditures, Jan Baran, counsel to Americans For Change and to the National Republican Congressional Committee, remarked that attempts to limit or to regulate independent expenditures have been consistently struck down by courts following the *Buckley* mandate. He noted that the only possible means of regulating these expenditures would be to establish a broad standard which would define deliberate, active collaboration. David Ifshin, Visiting Lecturer of Law at Yale Law School and Co-Chairman of the American Bar Association's Committee on Elections of the Administrative Law Section,

suggested that the standard of "coordinated with the campaign" is already too broad. Individuals fear that their expenditures will be interpreted as having been authorized by the campaign, thereby constituting a violation of the election laws. The result, according to Mr. Ifshin, has been to chill grassroots activities. He also maintained that the unanticipated effect of federal expenditure regulations has been to restrain mainstream political organizations while permitting an unfettered flow of money to fringe groups.

Stewart Mott, a named plaintiff in *Buckley* and a philanthropist and political activist, reiterated the problems of the "coordination" limitation, but from the perspective of an individual spender. Mr. Mott noted that because of the confusing, complicated web of election laws, all of his political activity must now be supervised by attorneys and accountants. He ardently objects to the government's efforts to deprive voters of their individual differences as well as to limit their rights of association.

Xandra Kayden, a member of the Campaign Finance Study Group at the Institute of Politics at Harvard Univeristy and Assistant Professor of Poltical Science at Brandeis University, felt that from the perspective of an incumbent candidate, "coordination" standards are not strict enough. As a consultant to the Birch Bayh campaign, she noted that the small costs of infraction of these coordination rules were greatly outweighed by the benefits. She noted further that the emergence of the independent spender has a destructive impact on party structure, since single-issue campaigns inhibit the ability of the party to establish a broad base of support.

The inequities which exist as a function of our current election laws are perhaps most clearly perceived in the context of the independent and minority party candidates. To these candidates, access has been the key word and the key problem: access to ballots, access to money, and access to media. George Frampton, Jr., co-author of *Stonewall: The Real Story of the Watergate Prosecution* and coordinator of John Anderson's ballot access litigation, spoke of the Anderson campaign's litigation strategy and their ultimate success in getting Anderson onto the ballots in all fifty-one jurisdictions. He emphasized the deliberate avoidance of both constitutional arguments and the Supreme Court itself, given the Supreme Court's tendency to uphold restrictive ballot access laws on the basis of a state's "interest in political stability." Mr. Frampton concluded with the observation that the campaign's fundamental problem was actually not the ballot access issue but the drain imposed on the campaign as a result of all the litigation spawned by the election laws.

Chris Hocker, National Coordinator of Ed Clark's campaign, pointed out several problems unique to third-party campaigns. One major obstacle faced by third parties is the maintenance of public support upon which both ballot status and the vitality of the post-election organization depend. The costs of compliance with the federal election laws are staggering to third parties, and disclosure requirements can have a particularly chilling effect

on supporters of third-party candidates. Moreover, Mr. Hocker noted that the federal matching fund scheme and the equal time provisions of the Federal Communications Act have a disproportionately detrimental effect upon third parties: the total effect is a virtual guarantee of a two-party monopoly. He advocated the abolition of a system which permits the government to determine the legitimacy of political ideas and forms of expression.

The huge amount of litigation generated by the federal election law scheme has produced procedural, as well as substantive, problems of law. David Ifshin's paper highlighted procedural obstacles and the need for expedited review in the context of three challenges brought in the 1980 election. He noted that the delays in adjudicating one's rights under the federal election laws can have a particularly devastating effect because timing is such a crucial factor in campaigns.

Harriet Hentges, Executive Director of the League of Women Voters Education Fund, related the struggles with the Federal Election Commission which the League underwent before being able to obtain funding for the presidential debates. She asserted that the Commission had overreached its mandate to control election funding abuses under the Federal Election Campaign Act and recommended that the Commission seek less to simply regulate and more to encourage informative, nonpartisan projects like the League debates.

The panel discussions explored these and other issues in greater depth, and provided the opportunity for dialogue among the scholars, authorities, and audience. Paul Chevigny, Professor of Law at New York University, moderated the Effects Panel. Carol Mast Beach, an attorney and research assistant with John Anderson's National Unity campaign, spoke of the problems the Anderson campaign confronted regarding the use of artists' contributions to raise funds. Ms. Kayden predicted that the Republican Party's effective exploitation of direct mail solicitation and single-issue campaigning will stimulate the Democratic Party to counterorganize in response. She questioned whether the ideologues or the professionals will obtain ultimate control of the parties and noted that negative spending, single-issue campaigns, and controls on independent groups are the important problems underlying campaign finance, and not money itself. Mr. Frampton emphasized the need for up-front funding for independent candidates, and discussed how and when such funding should be provided. Mr. Steele questioned whether voters should have an absolute right to give money in support of their beliefs. Mr. Mott answered this in the affirmative, arguing that such a right would increase political participation. He rejected the notion that regulation is the remedy for any corrupting influence that money may have. One audience participant noted the web of "catch-22's" faced by debate sponsors and independent candidates: to appear viable, one must gain access to the debates, but to gain access to the debates, one must appear viable. The panel concluded with the question of who should decide questions of access and on what basis.

The Remedies Panel was moderated by Norman Redlich, Dean of the New York University School of Law. Discussion proceeded on the premise that an election law scheme must exist, and that contributions, but not expenditures, could be regulated without infringing upon constitutional rights. Mr. Schwarz advocated an overall limitation for the election itself, rather than individual limitations on each candidate, noting that we have substituted one evil, individual contributions, for another, individual and special interest expenditures. Mr. Ifshin framed the question as: What is the evil to be cured and what is the compelling government interest underlying proposals for reforms? He emphasized that independent expenditures are a constitutional right, and not a "loophole." Mr. Eastman viewed the coordination provision as the loophole, and asked how the contribution limits could be altered to eliminate the loophole. Mr. Wertheimer advocated retention of contribution limits, and believed that expenditures by the Republican Party, not independent expenditures, were the decisive factor in the 1980 elections. He asserted that as the parties' expenditures increase, the role of independent expenditures will be diminished. Jan Baran agreed with this prediction, and added that the elimination of contribution limits will not eliminate independent activity, which is here to stay. Mr. Hocker advocated drastic alterations in disclosure requirements because of their inhibiting effects, and rejected the notion of "free" media time based on prior performance of candidates. Mr. Uhlfelder asserted that repeal of the equal-time provisions would lead stations to provide greater media access to candidates. One audience participant suggested the adoption of "approval voting" to allow voters as many votes as there are candidates to avoid the type of vote splitting which resulted in New York Senator D'Amato's victory. Another audience participant noted the practical problems that overregulation and the coordination prohibition have caused for political organizing. The panel ended with the question posed at the commencement of both panels and the Colloquium itself: are we better off now under the election law scheme than we were before it was implemented? While there was no consensus on the answer to this question, the participants generally agreed that too little money, rather than too much money, is the key remaining problem with current election laws.

CHERYL WEISBARD

PART ONE

The Presidential Nomination System