

1979

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Recommended Citation

Julius G. Getman, *The Process Is Part of the Problem*, 29 Case W. Res. L. Rev. 771 (1979)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol29/iss4/3>

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Foreword

The Process is Part of the Problem

AMERICANS REVERE ELECTIONS. We use them to select our political leaders, our judges, our labor union officials, the directors of our major institutions, and a multitude of other holders of high office. Among other things, elections determine whether employees are to be represented by a union and whether corporations should be merged; they're increasingly used to decide questions of public policy through initiatives and referendums. However, as the articles in this symposium suggest, the proliferation of elections may in fact be undesirable and may increase the need for regulation and accompanying costs so much that it undercuts the values which elections are thought to promote.

Elections have been favored because they are perceived to advance three important goals. First, they affirm our commitment to equality, popular control, and popular responsibility. Through elections ultimate power resides in the citizens, each of whom, regardless of wealth, counts the same. Second, elections provide occasions for public debate of significant issues. Through campaigns, ideas are articulated, transmitted, and evaluated. The records of incumbent officials are investigated, and issues of domestic and foreign policy are made subject to the people's choice. Third, our faith in elections is based on the assumption that through them sound, acceptable decisions are made. Competent officials are elected; wise policies are adopted; unions are installed

where they would be helpful; and major corporate decisions are made in accordance with economic efficiency.

Our democratic political ideology suggests that these various goals are complementary. Popular sovereignty requires officials to account for their performances in office and challengers to announce their programs in advance, which in turn leads to public debate. The debate permits the citizens to become informed so they can decide wisely. Sovereignty means that the voters are responsible for the decisions reached, which makes the decisions acceptable and encourages the voters to become informed.

Legal regulation of elections is aimed at furthering these goals and helping to keep them in balance. Regulation, however, is not the clear, uncomplicated answer its proponents would like it to be. A complex web of questions arises when election regulation is instigated; many of these questions are raised by the articles in this symposium.

For example, it is an important paradox of our political system that free and untrammelled debate is both necessary and dangerous to popular sovereignty. If public debate is not regulated, the wealthy can use their funds and the powerful can use their positions to exercise more potent electoral voices than can the average citizen. The powerful may be able to intimidate by threatening economic reprisals against those voting contrary to their interests. Incumbents may be able to use their offices to induce support by other officials and to dominate the media in ways not available to their challengers. The greater influence exercised by the wealthy and powerful over the outcomes of elections is then likely to disproportionately advance their interests when election results are implemented. It may, for instance, produce elected officials who are committed to the interests of the powerful rather than to the public good.

Recognition that the election process may be exploited by some has led to a major effort to develop laws which will protect the integrity of the process. But regulation which is effective against those to whom its limitations are directed without damaging the quality of public debate is difficult to achieve. The first amendment and its broad commitment to public dialogue requires that such regulation be limited and indirect. The result is complexity, and complexity is an ally of the powerful who have greater access to the political process in shaping legislation and who have available to them the most sophisticated legal advice.

Most of the articles in this symposium demonstrate the diffi-

culty of overcoming the advantages of wealth, power, and incumbency. Mr. Curtis' article points out that although the law formally limits an incumbent's ability to use the political process to further his political aims, in practice the law is largely ineffectual. Senator Hart's article discusses the constitutional and political problems involved in attempting to limit the power of corporations and wealthy interest groups, particularly after the Supreme Court's extension of first amendment guarantees to corporate political involvement.¹ The Note on governmental referendum advocacy indicates that the elimination of government from debate on public issues may actually endanger freedom of speech and informed decisionmaking. The Note on application of the respondeat superior doctrine to political campaigning, although it argues for making political candidates vicariously liable for injuries caused by campaign workers acting in their behalf, explains why the law has been loath to impose such liability for fear of stifling debate. Although several of these articles persuasively urge amendment of the law to limit the advantages of the influential, it is doubtful how successful such an approach can be given the constitutional limits and the ability of the subjects of such legislation to take advantage of limitations in the law. Despite our tradition of egalitarian rhetoric, the election process itself does not and cannot keep power from manifesting itself.²

Most significantly, the articles in this symposium raise the fundamental question whether our use of elections for so many purposes is wise. Neither official nor scholarly circles have yet responded to ideas which suggest that an overuse of the election process may ultimately and severely damage the various goals elections are designed to further.

1. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

2. In the regulation of nonpolitical elections, there is an additional recurring theme. To what extent is the political model appropriate? Are fewer, greater, or different protections needed? What constitutes a fair election? In his article on corporate vote buying, Professor Clark argues persuasively that the political model is inapplicable to vote buying in stockholder elections, and that wise decisions may result from permitting greater use of economic wealth to affect the outcomes of elections in an area where both egalitarianism and popular control are nonapplicable or of little force. In my own work on union representation elections, I have made a similar point about the grant of economic benefits during a union organizing campaign. My colleagues and I have urged that the Supreme Court reverse its decision in *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964), that use of economic power is likely to be perceived as a threat and therefore is inconsistent with free choice. We have argued that employees will not be coerced by such actions but will, in fact, have a greater range of choices in their decisionmaking. J. GETMAN, S. GOLDBERG, & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* 151-52 (1976).

It is possible that expanded use of elections may hinder, rather than facilitate, popular sovereignty. Popular sovereignty presupposes voters capable of understanding the issues and deciding in accordance with their own standards. Where so many elections are held, two factors crucial to informed popular choice may be missing: (1) voters, because of the sheer number of instances in which they are called upon to vote, may lack sufficient background or understanding to form their own positions on all or many of the issues; in an extreme situation voters may not even have a predisposition with regard to certain issues; (2) the independent news media, again because of the large number of instances where election coverage is required, may be unable to provide the information necessary for people to form opinions on the issues. Lack of sufficient media coverage would give a great advantage to those who have the independent ability to disseminate propaganda.

Second, it may be that the inevitable consequence of increased use of elections may be increased regulation of all elections. Increasing numbers of opportunities to influence will lead to increasing demands for regulation and control. But it is difficult to make the necessary distinctions among elections so that an effective pattern of regulation may develop; it is more tempting to provide blanket controls over all elections.

Third, regulation may exacerbate, rather than ameliorate, the conflicts among the various goals of the election system. When elections are regulated, certain interests are bound to suffer. In the political sphere, free debate would obviously be hindered by the extension of the respondeat superior doctrine to political campaigns. Regulating the political use of incumbency would limit the voters' ability to call upon their elected officials for redress of grievances and might interfere with relations among different branches of government. As Professor Clark notes, the regulation of vote purchases in corporate takeover situations may impede the making of wise choices in the interest of a distorted notion of fairness or a misplaced desire for informed choice.

While the degree of desirable interference in elections is speculative, the fact that increased use of elections has substantial costs seems obvious, and there is little data to suggest that more elections will serve our purposes well enough to justify the costs in-

volved. The danger is that overuse of elections may make an institution which has served us so well less effective.

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