same time, natural law may be a necessary (if typically unnoticed) premise for the possibility of any law, including constitutional law, that claims to exert moral authority.

MONEY, POLITICS AND LAW: A STUDY OF ELECTORAL CAMPAIGN FINANCE REFORM IN CANADA. By K.D. Ewing.[1] New York and Oxford: Oxford University Press/Clarendon Press. 1992. Pp. xvii, 254. Cloth, $59.00.

Frank J. Sorauf[2]

There are three nouns in Ewing's title, but only two of them merit the mention. His book is indeed about money and law. It is a traditional, legal-historical analysis of Canadian attempts to legislate about the funding of its political parties. But there is not much of Canadian politics in it, even the politics of reforming Canadian campaign finance.

After some stage-setting, the author launches early into a detailed history of attempts, both failed and successful, to legislate on campaign finance. The history culminates in a full chapter on the Election Expenses Act of 1974, the major definition of today's status quo in Canadian law. All this legal history consumes a quarter of the book's pages. There then follows an extensive review of the finances of the Progressive Conservative, Liberal and New Democratic parties, employing only data through 1984. (On the vintage of the data, more later.)

What may seem a random stroll through Canadian party finance does, however, have a purpose. Professor Ewing makes it very clear early on that this is to be an evaluation as well as a history. His highest desideratum for the regulation of campaign finance is equality of financial resources—*complete* equality. It is a standard that only systems of total public funding have a chance of meeting, and Canada's, with only partial public funding, inevitably fails. Not even the astounding and virtual equality of the parties' expenditures in the 1988 elections (PC, $7.9 million; L, $6.8 million; NDP, $7.1 million) satisfies Ewing. The three parties, he points out, had greater disparities in the sums they spent outside of the campaign.

The source of the problem is clear and simple. Canada has,

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like the United States, made the mistake of preferring political freedom to political equality in the voluntary private funding of its parties. And so we are quickly face to face with a fundamental constitutional issue. Canada's Charter of Rights and Freedoms, like the First Amendment to the U.S. Constitution, protects freedom of political speech and action, and that's the nub of the problem. It has made the achievement of equal electoral opportunity—defined as cash equality—more difficult because Canada has let stand an Alberta court's decision in 1984 invalidating the 1974 prohibition of group spending in elections—what we in the United States call "independent expenditures"—as a violation of the Charter.[3] Even worse, perhaps, all of this reflects the unhealthy influence of constitutional practice to the south, both for its inspiration of the Charter itself and for the precedent of *Buckley v. Valeo*,[4] on which the Alberta court relied in its decision on independent spending.

Indeed, Ewing observes that "the problems of campaign finance which have arisen in the United States are perhaps inevitable in a legal system which gives the last word on political questions to judges, given the bias of constitutional law towards political liberty rather than political equality." And in the book's concluding paragraph: "It is of course paradoxical that legislation designed to improve the quality of representative and accountable government should be frustrated by people who are neither representative nor accountable. . . . [I]f campaign finance goals of the type embodied in the 1974 Act are to succeed in Canada, the judges will be required to break free from the crippling consequence of *Buckley v. Valeo* and its progeny."

The conclusion is not new, and it is certainly defensible. The fundamental issue, however, is not as clear and simple as Ewing presents it here. Without knowing the full history—not just the legal history—of the 1974 legislation, I should be very surprised if, in this most political and partisan of all policy issues, the members of Parliament had only the burnishing of egalitarian democracy in mind. And therein is one of my major problems with Ewing's book: its lack of attention to the politics of reforming campaign finance. I don't like to criticize an author for writing a book he didn't set out to write, and Ewing clearly wanted to write a book in a mode quite apart from American (or British) political science. But I doubt that

3. The case is *National Citizens' Coalition Inc. v. Attorney General of Canada*, 32 Alta. L.R.2d 249 (Q.B.) (1984). The decision was never appealed, presumably because of an approaching election, and Canadian election administrators have chosen to observe the precedent throughout the entire nation.

4. 424 U.S. 1 (1976).

one can write usefully in Ewing's way about a subject as intensely political as this, a body of legislation in which every change is fraught with consequences for some party and some group of parliamentarians. We are, after all, dealing with the politics of representative democracy, the "politics of politics," if you will.

Nor, I should add, is it useful to deal with the funding of Canadian parties without dealing with the funding of parliamentary candidates. The candidates, in fact, spent just about as much as their three parties in the 1988 election, and they got considerably more public funding money than the parties did. We are dealing with a single, closely interrelated system of campaign finance, and one cannot effectively deal with only a carefully limited part of it.

Even on the legal/constitutional level, the argument is too restricted, too partial. I too have been critical of the Supreme Court's decision in *Buckley*,[5] but as mistaken as the Court was, in my judgment, I do not conclude that there is some irreconcilable and inevitable conflict between constitutionally rooted liberty and the goals of political equality. My quarrel with the Court's decision in *Buckley* is not over its holding that political spending was political speech and thus deserving of First Amendment protection. It is that the Court in *Buckley* also limited the legislative interest in regulating campaign finance to preventing "corruption and the appearance of corruption," thereby ignoring its long-held view that legislatures might act to insure the integrity of the electoral processes. As the Court's experience in reconciling the right to a fair jury trial with freedom of the press shows, it is not without a history of accommodating conflicting constitutional imperatives.

Beyond these substantive matters, the book is caught in a bizarre time warp that requires some explaining. Readers will be astounded to see that the main body of a book published in 1992 refers to no data after 1984. Not only are annual data on party funding missing beyond that year, but there is no mention of the election campaign of 1988! In the chapter on the pernicious influence from across the border, U.S. PACdom is described as if the National Conservative PAC (Nick-PAC) was still a leading PAC; in truth it shouted its last big hurrah in 1984. There is even a quaint reference to what "would be" the spending levels in House campaigns in the 1986 elections.

Suddenly in the last chapter, which carries the conventional but inappropriate title of "Conclusion," we have a grand updating of the data of the previous seven chapters and, perforce, some of

5. Frank J. Sorauf, *Caught in a Political Thicket: The Supreme Court and Campaign Finance*, 3 Const. Comm. 97 (1986).

their conclusions as well! The data of the 1988 election campaign finally appear, although all of the annual data series end with 1988. It is only here that we finally learn that the three major parties achieved virtual equality in their campaign spending in the 1988 campaign. So, incredible as it seems, in the span of less than 250 pages we have both the first edition of a book *and* its revision. That such a pastiche should bear the seal of one of the world's most distinguished scholarly publishers is, I am afraid, a sign of how distressing things are in parts of the book publishing business.

But there is more: a second dose of time warp. Ewing's book appeared *after* a Royal Commission on Electoral Reform and Party Financing reported in 1991 on the agenda of his book and on much more. Ewing only mentions that the Commission was appointed in 1989 and then dismisses its coming report:

> At the time of writing, it is not known what the Commission is likely to recommend by way of change, but in a sense this is not essential, it being sufficient simply to identify the problems and the range of options available. For it does not follow that the Commission's recommendations . . . would be appropriate for adoption by other jurisdictions which were otherwise minded to embrace the principles of 1974.

I'm not sure what that last sentence means, but I think I get the drift of the general sentiment about Royal Commissions. There is, in any event, no more about the Commission.

One can only speculate about what went on in Oxford or London to produce such an untimely outcome. Obviously, the major portion of the manuscript sat somewhere too long without revision before publication, but why then no effort to update it systematically before publication? And with final production obviously delayed, why not a few more months' delay to include the work of the Royal Commission? The result in a volatile, fast moving subject such as campaign finance is to make the book "passé on arrival."

As things turned out, in fact, the Royal Commission brought out an extremely able and useful report. It is in four volumes, and its title is *Reforming Electoral Democracy*.[6] Even though it was published the year before Ewing's study, it employs data from 1990 that the Ewing book does not. Furthermore, since the Commission was advised by many of Canada's scholarly experts on the subject, the report reflects a depth of background and analysis one doesn't

6. Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy* (Minister of Supply and Services Canada, 1991).

often see in official reports. I should perhaps say here that the quality of the report came as no surprise to me, since I had appeared at the "symposium" the Commission held on American campaign finance and had been impressed by the seriousness and ability both of the Commissioners and of their staff and advisors. The Commission also commissioned—if one can use that verb—a series of studies and monographs that appear in twenty-three additional volumes. I have not seen them, but the list of authors is a distinguished one, most from Canada but some from the United States. The first volume is given over entirely to a single study by W.T. Stanbury entitled "Money in Politics: Financing Federal Parties and Candidates in Canada." Both the title and the reputation of the author suggest that it is a worthy overview of the subject. Finally, for the *very* serious reader, the first volume of the four-volume report (*Reforming Electoral Democracy*) contains a twenty-nine page bibliography on Canadian electoral politics and campaign finance.

The choice is not difficult. Even if one is not inclined to tackle a four-volume report—not to mention another twenty-three volumes of detailed background studies—one can browse very profitably through the first two volumes of *Reforming Electoral Democracy* for the chapters on campaign finance and its reform.[7] Despite the burden of officialdom, the prose is by and large lucid. If the reader is prepared to do a little dipping and skipping, there is more to be learned here about Canadian campaign finance than in *Money, Politics, and Law*.

The comparison between the two authorities is worth pursuing, moreover, on the central constitutional conflict. The Royal Commission, interestingly, came down not far from Ewing's position on the tussle between political equality in campaign funding and the Charter's protection of individual liberty. While Ewing's guiding value in the tension is equality, the Commission opted for "fairness," a value conspicuously less easy to define but one that embraces a good dose of equality in the Commission's reckoning. The dramatic increase in independent spending in the 1988 campaign was the catalytic event. The greatest share of group money went into the public debate over the proposed trade agreement with the United States. The free trade groups supporting the position of the governing Progressive Conservatives greatly outspent the opponents supporting the positions of the Liberals and the New Democratic

7. The first two volumes of the final report contain the background, statements of the issues and specific recommendations. Volume Three contains the texts of legislation proposed to carry out the recommendations; Volume Four is given over largely to summaries of the testimony the Commission heard at the hearings and symposia it held.

Party. So, what to do about independent spending in light of that 1984 decision in Alberta?

The Commission shared many of Ewing's concerns, but it adopted a far more pragmatic and constructive strategy in dealing with them. In 1986, in fact, the Canadian Supreme Court in the *Oakes* case addressed conditions under which it would concede parliamentary authority to limit the rights and freedoms protected by the Charter.[8] Both Ewing and the Commission discuss the case, and both discuss Chief Justice Dickson's three tests of constitutionality: the legislation must be rationally connected to achieve the stated objective, it must impair as little as possible the freedom in question and its effects in limiting a right must be proportional to the objective being sought. But their responses to the tests differ. Ewing discusses them as applied in the case at hand, but the Commission uses them as guidelines for justifying its recommendations.[9]

And those recommendations? That "election expenses incurred by any group or individual independently from registered parties and candidates not exceed $1000."[10] Its rationale is a lawyerly argument directed at the principles of *Oakes*, which is to say it is directed at the need to place carefully fashioned limits on the freedom to spend money in elections in order to realize "an equality of opportunity for citizens to exercise their rights to freedom of expression, as well as their democratic rights to vote and to stand as a candidate, in a meaningful way during the election."[11] Should the U.S. Supreme Court ever decide to reconsider its ruling in *Buckley v. Valeo*, it would profit greatly from reading all of chapter six ("Fairness in the Electoral Process") in the first volume of the Commission report.

Quite candidly, I am hard-pressed to think of an audience for the Ewing book. Even though it offers a good account of the legal history of Canadian reform effort, it is seriously flawed in a number of significant ways. It will tell generalists little that the Royal Commission will not tell them more authoritatively and more fully, and it is hard to see that it will have much to say to experts. Whether the problems with it were in the writing or the publishing of it is a question for the author and the publisher to sort out. For the reader it only matters that the resulting book is too little, too late.

8. *R. v. Oakes*, 1 S.C.R. 103 (1986).
9. 1 *Reforming Electoral Democracy* at 354-56 (cited in note 6).
10. Id. at 356.
11. Id. at 354.