

Election Law

*Carolina Academic Press
Law Advisory Board*



Gary J. Simson, Chairman
Dean, Mercer University School of Law

Raj Bhala
University of Kansas School of Law

Davison M. Douglas
Dean, William and Mary Law School

Paul Finkelman
Albany Law School

Robert M. Jarvis
*Shepard Broad Law Center
Nova Southeastern University*

Vincent R. Johnson
St. Mary's University School of Law

Peter Nicolas
University of Washington School of Law

Michael A. Olivas
University of Houston Law Center

Kenneth L. Port
William Mitchell College of Law

H. Jefferson Powell
Duke University School of Law

Michael P. Scharf
Case Western Reserve University School of Law

Peter M. Shane
*Michael E. Moritz College of Law
The Ohio State University*

Election Law

Cases and Materials

FIFTH EDITION

Daniel Hays Lowenstein

PROFESSOR OF LAW EMERITUS
UNIVERSITY OF CALIFORNIA, LOS ANGELES
SCHOOL OF LAW

Richard L. Hasen

CHANCELLOR'S PROFESSOR OF LAW AND POLITICAL SCIENCE
UC IRVINE SCHOOL OF LAW
IRVINE, CALIFORNIA

Daniel P. Tokaji

ROBERT M. DUNCAN/JONES DAY DESIGNATED PROFESSOR OF LAW
THE OHIO STATE UNIVERSITY
MICHAEL E. MORITZ COLLEGE OF LAW

CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2012
Daniel Hays Lowenstein
Richard L. Hasen
Daniel P. Tokaji
All Rights Reserved

ISBN: 9781611631784
LCCN: 2012940590

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

For
Sharon
Aaron and Jessie
Nathan
—D.H.L.

For
Lori
Deborah
Shana
Jared
—R.H.

For
Renuka
Aria
—D.T

To the memory of
our friend and colleague,
Gary Schwartz
—D.H.L. and R.H.

Summary of Contents

Chapter 1 • Introductory Readings	3
I. Factions and the Public Interest	3
II. Citizens and Representatives	11
III. Pluralism and Progressivism	14
Chapter 2 • The Right to Vote	25
I. A Brief History of the Right to Vote in the United States	26
II. Court Review of State Limitations on the Franchise	40
Chapter 3 • Representation and Districting	65
I. The Right to an Equally Weighted Vote	66
II. Voting, Representation, and “Special-Purpose” Elections	86
III. Districting Criteria	100
Chapter 4 • Partisan Gerrymandering and Political Competition	109
I. Defining and Identifying Gerrymanders	109
II. Gerrymandering and the Constitution	117
III. Incumbency and Competition	144
Chapter 5 • Minority Vote Dilution	165
I. Beyond the Right to Cast a Ballot	165
II. Applying Section 5	171
III. Applying Section 2	201
IV. Racial Gerrymandering	236
Chapter 6 • Election Administration	267
I. Equal Protection and the Counting of Votes	268
II. Voting Technology	293
III. Voter Identification	302
IV. Law and Participation	323
Chapter 7 • Ballot Propositions	341
I. Pros and Cons	342
II. Content Restrictions	362
III. Procedural Requirements and Judicial Review	391
IV. Financing Qualification Drives	403
Chapter 8 • Major Political Parties	413
I. The Party and the Political System	414

II. Obligations of Parties under the Constitution	431
III. Associational Rights of Parties	443
IV. Parties and Patronage	475
Chapter 9 • Third Parties and Independent Candidates	495
I. Ballot Access	498
II. Public Benefits	524
Chapter 10 • Campaigns	535
I. What We Know about American Political Campaigns	536
II. Regulating Campaign Speech	541
III. Judicial Elections	552
IV. The Intersection of Communications Law and Election Law	588
Chapter 11 • Bribery	599
I. Bribery of Candidates	600
II. The Elements of Bribery	607
Chapter 12 • The <i>Buckley</i> Framework	641
I. Introduction: Basic Facts and Figures about Campaign Financing in the U.S.	641
II. <i>Buckley v. Valeo</i> : The Foundation of American Campaign Finance Jurisprudence	643
III. Empirical Observations about, and Theoretical Justifications for, Campaign Finance Regulation	676
Chapter 13 • Spending Limits after <i>Buckley</i>	701
I. Corporate Spending Limits in Ballot Measure Campaigns	701
II. Limiting Spending by Corporations, Labor Unions, and Others in Candidate Elections	717
III. The <i>Citizens United</i> Revolution	735
Chapter 14 • Contribution Limits after <i>Buckley</i> (and <i>Citizens United</i>)	761
I. Campaign Contribution Limits in Ballot Measure Elections	761
II. When Are Contribution Limits Too Low?	768
III. Campaign Contributions and Political Parties	810
IV. The Emergence of Super PACs and Other Outside Groups	818
V. Contribution Bans and Other Limitations	826
Chapter 15 • Public Financing	831
I. Existing Public Financing Systems	833
II. Public Financing: Voluntary or Coercive?	849
III. Proposals for Further Reform	874
Chapter 16 • Campaign Finance Disclosure	883
Appendix	921

Contents

Introduction to the Fifth Edition	xv
Introduction to the Fourth Edition	xvii
Introduction to the Third Edition	xix
Introduction to the Second Edition	xxi
Introduction to the First Edition	xxiii
Copyright Acknowledgments	xxvii
Chapter 1 • Introductory Readings	3
I. Factions and the Public Interest	3
James Madison, <i>THE FEDERALIST PAPERS</i> , NO. 10	4
II. Citizens and Representatives	11
Edmund Burke, <i>SPEECH TO THE ELECTORS OF BRISTOL</i>	11
III. Pluralism and Progressivism	14
Richard J. Ellis, <i>Pluralism</i>	14
Chapter 2 • The Right to Vote	25
I. A Brief History of the Right to Vote in the United States	26
A. The Extension of the Suffrage	26
1. The Attainment of White Male Suffrage	26
2. The Fifteenth Amendment and Its Betrayal	28
3. Votes for Women	32
4. The Reenfranchisement of African Americans in the South	34
5. Additional Extensions of the Franchise	36
6. New Battles	37
II. Court Review of State Limitations on the Franchise	40
<i>Harper v. Virginia State Board of Elections</i>	40
<i>Skaft v. Rorex</i>	47
<i>Kramer v. Union Free School District No. 15</i>	55
Chapter 3 • Representation and Districting	65
I. The Right to an Equally Weighted Vote	66
<i>Reynolds v. Sims</i>	67
<i>Lucas v. 44th General Assembly of Colorado</i>	69
<i>Avery v. Midland County</i>	78
II. Voting, Representation, and “Special-Purpose” Elections	86
<i>Salyer Land Co. v. Tulare Lake Basin Water Storage District</i>	86
III. Districting Criteria	100

Chapter 4 • Partisan Gerrymandering and Political Competition	109
I. Defining and Identifying Gerrymanders	109
II. Gerrymandering and the Constitution	117
<i>Vieth v. Jubelirer</i>	121
III. Incumbency and Competition	144
A. The Incumbency Advantage	145
B. Competitiveness in Election Law	154
<i>Miller v. Cunningham</i>	159
Chapter 5 • Minority Vote Dilution	165
I. Beyond the Right to Cast a Ballot	165
<i>Allen v. State Board of Elections</i>	166
II. Applying Section 5	171
<i>Beer v. United States</i>	171
<i>Georgia v. Ashcroft</i>	180
<i>Northwest Austin Municipal District Number One v. Holder</i>	190
III. Applying Section 2	201
<i>Thornburg v. Gingles</i>	203
<i>Holder v. Hall</i>	229
IV. Racial Gerrymandering	236
<i>Shaw v. Reno</i>	237
Post- <i>Shaw</i> Decisions	249
<i>League of United Latin American Citizens v. Perry</i>	258
Chapter 6 • Election Administration	267
I. Equal Protection and the Counting of Votes	268
<i>Bush v. Gore</i>	270
II. Voting Technology	293
<i>Wexler v. Anderson</i>	294
III. Voter Identification	302
<i>Crawford v. Marion County Election Board</i>	303
IV. Law and Participation	323
A. Empirical Research on Voter Turnout	324
B. Laws Affecting Participation	329
1. The Language Assistance Provisions of the Voting Rights Act	329
2. The National Voter Registration Act	331
3. The Help America Vote Act	333
4. Other Laws That Might Increase Participation	335
Chapter 7 • Ballot Propositions	341
I. Pros and Cons	342
Richard J. Ellis, DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA	342
II. Content Restrictions	362
<i>People's Advocate v. Superior Court</i>	362
The Single Subject Rule	378
<i>In re Advisory Opinion to the Attorney General</i>	378
The Separate Vote Requirement and Academic Criticisms of the Single Subject Rule	388

III. Procedural Requirements and Judicial Review	391
A. Strict Enforcement or Substantial Compliance?	394
B. Pre-Election Judicial Review	397
C. Hard Looks?	400
IV. Financing Qualification Drives	403
<i>Meyer v. Grant</i>	403
Chapter 8 • Major Political Parties	413
I. The Party and the Political System	414
Morris P. Fiorina, <i>The Decline of Collective Responsibility in American Politics</i>	417
II. Obligations of Parties under the Constitution	431
A. The Federal Interest in Regulating Party Primaries	432
B. The White Primary Cases and the State Action Doctrine	432
Daniel Hays Lowenstein, <i>Associational Rights of Major Political Parties: A Skeptical Inquiry</i>	435
C. The Constitution and the Party in the Legislature	440
<i>Ammond v. McGahn</i>	440
III. Associational Rights of Parties	443
A. Presidential Nominations	443
B. State Parties	454
1. Establishing the Right	454
<i>Tashjian v. Republican Party of Connecticut</i>	454
2. The Extent of the Right	465
IV. Parties and Patronage	475
<i>Elrod v. Burns</i>	478
Chapter 9 • Third Parties and Independent Candidates	495
I. Ballot Access	498
<i>Munro v. Socialist Workers Party</i>	500
<i>Timmons v. Twin Cities Area New Party</i>	514
II. Public Benefits	524
<i>Buckley v. Valeo</i>	524
Chapter 10 • Campaigns	535
I. What We Know about American Political Campaigns	536
II. Regulating Campaign Speech	541
<i>State of Washington v. 119 Vote No! Committee</i>	541
III. Judicial Elections	552
A. Why Judicial Elections?	552
B. Judicial Candidate Speech and Conduct Codes	557
<i>Republican Party of Minnesota v. White</i>	557
C. Judicial Elections and Campaign Money: Limits or Recusal?	574
<i>Caperton v. Massey</i>	575
IV. The Intersection of Communications Law and Election Law	588
<i>Radio-Television News Directors Association v. FCC</i>	588
Chapter 11 • Bribery	599
I. Bribery of Candidates	600

	<i>People v. Hochberg</i>	600
II.	The Elements of Bribery	607
	A. Corrupt Intent	609
	B. Anything of Value	610
	<i>People ex rel. Dickinson v. Van de Carr</i>	611
	C. Intent to Influence	614
	<i>State v. Agan</i>	616
	<i>McCormick v. United States</i>	622
	<i>United States v. Sun-Diamond Growers of California</i>	628
	D. Official Act	635
	<i>State v. Bowling</i>	635
Chapter 12 • The Buckley Framework		641
I.	Introduction: Basic Facts and Figures about Campaign Financing in the U.S.	641
II.	<i>Buckley v. Valeo</i> : The Foundation of American Campaign Finance Jurisprudence	643
	<i>Buckley v. Valeo</i>	646
III.	Empirical Observations about, and Theoretical Justifications for, Campaign Finance Regulation	676
	A. Empirical Observations	676
	B. Preventing Corruption	680
	Daniel Hays Lowenstein, <i>On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted</i>	680
	C. Promoting Equality	686
	Edward B. Foley, <i>Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance</i>	686
Chapter 13 • Spending Limits after Buckley		701
I.	Corporate Spending Limits in Ballot Measure Campaigns	701
	<i>First National Bank of Boston v. Bellotti</i>	701
II.	Limiting Spending by Corporations, Labor Unions, and Others in Candidate Elections	717
	<i>Austin v. Michigan Chamber of Commerce</i>	722
III.	The <i>Citizens United</i> Revolution	735
	<i>Citizens United v. Federal Election Commission</i>	738
Chapter 14 • Contribution Limits after Buckley (and Citizens United)		761
I.	Campaign Contribution Limits in Ballot Measure Elections	761
II.	When Are Contribution Limits Too Low?	768
	<i>Nixon v. Shrink Missouri Government PAC</i>	769
	<i>Randall v. Sorrell</i>	792
III.	Campaign Contributions and Political Parties	810
IV.	The Emergence of Super PACs and Other Outside Groups	818
	<i>Spechnow.org v. Federal Election Commission</i>	820
V.	Contribution Bans and Other Limitations	826
	<i>Ognibene v. Parkes</i>	826

Chapter 15 • Public Financing	831
I. Existing Public Financing Systems	833
A. In the States	833
Kenneth Mayer, Timothy Werner, and Amanda Williams, <i>Do Public Funding Programs Enhance Electoral Competition?</i>	833
B. In Presidential Elections	845
II. Public Financing: Voluntary or Coercive?	849
<i>Arizona Free Enterprise Club's Freedom PAC v. Bennett</i>	851
III. Proposals for Further Reform	874
Chapter 16 • Campaign Finance Disclosure	883
<i>Buckley v. Valeo</i>	884
<i>McIntyre v. Ohio Elections Commission</i>	891
<i>Doe v. Reed</i>	908
Appendix	921
I. Election Law Research	921
II. Election Law Resources	922
III. Interdisciplinary Research	929
Table of Cases	931
Table of Authorities	943
Index	977

Introduction to the Fifth Edition

Readers of this book may well find nothing surprising about its existence. After all, Election Law is a course taught at many fine law schools and political science departments across the country. There are a growing number of competing casebooks, a quarterly journal dedicated to the field (*Election Law Journal*), and regular conferences and law review symposia dedicated to election law issues such as campaign finance, voting rights, redistricting, election administration, ballot measures and other topics.

But when the first edition of this book first appeared in 1995, written solely by Daniel Hays Lowenstein, it was the first modern casebook on the subject. Lowenstein was one of a handful of pioneers in the field, and his book helped define the range of topics which would come to fall under the “election law” category, the theoretical approaches which would be brought to bear on the subject matter, and the importance of empirical political science and political theory to a full examination of the questions raised in this book.¹ The book also spoke in Lowenstein’s idiosyncratic voice: a mixture of dry and self-deprecating humor, a healthy skepticism of courts and abstract legal theory, and unremitting grammatical correctness.

In the second edition, Lowenstein brought on Hasen as co-author, and in the fourth edition, they brought on Tokaji. This fifth edition, written by Hasen and Tokaji, marks the first edition of *Election Law—Cases and Materials* without Lowenstein’s writing, his meticulous editing, and his questioning of our assumptions and arguments. Frankly, it is intimidating for us to write this book without the benefit of Lowenstein’s insight and sharp eye. While we will do our best to maintain the quality of the writing and depth of analysis in the book, to keep its political balance, and to improve its scope and coverage, we will miss Lowenstein’s contributions.

One problem with any casebook as it works its way across multiple editions is the accretion of note material. There are always new developments, and the temptation is simply to add to the volume of what has already been written. Our sense, however, was that the book was becoming too unwieldy in this regard, and that students have become overwhelmed by the sheer volume of information contained in the note material. Our primary task in this edition has been to rework the note material to make it streamlined, relevant, and direct.

This edition also features some changes in coverage. Judicial elections now appear in the Campaigns chapter, but the chapter on incumbency is gone (with the material on the

1. A special “festschrift” issue of the *Election Law Journal* (Volume 9, Number 4, December 2010) considers Lowenstein’s considerable contributions to the field. Lowenstein and Hasen served as founding co-editors of *ELJ* from 2001–2010, and Tokaji now co-edits *ELJ* with Paul Gronke of Reed College.

competitiveness of elections moved into Chapter 4). Major changes in campaign finance doctrine, wrought by the Supreme Court's decision in *Citizens United v. FEC*, mandated a fundamental reworking of the material on campaign contribution and expenditure limits. New challenges to the constitutionality of the Voting Rights Act also led to changes in the material on minority voting rights. The dynamic nature of Election Administration in the last decade has led to substantial changes in this chapter as well.

A casebook is always a snapshot in time, especially in a field as dynamic as the field of election law. Each year we plan continued updates and supplements, and welcome your comments, questions, criticisms and concerns.

We have large shoes to fill, indeed, and hope we can live up to the example set by Dan Lowenstein.

Acknowledgments

We thank Sara Sampson for her generous contribution of the updated Appendix on election law research, and we hope our readers find it useful. In addition to the acknowledgments contained in the introductions to the first four editions, we wish to add our thanks to the following able research assistants: Nikki Trautman Baszynski, Jason Campbell, Denny Chan, Brian DeSantis, Joy Kim, Sean Morrison, Caitlin Murphy, Owen Wolfe, John-Paul Volk, and Inna Zazulevskaya. We also thank Andrew Campbell for faculty support. Finally, we thank David Adamany, Angela Ancheta, Frank Askin, Tom Brunell, Bob Cooper, Ed Mansfield, Alan Sager, Spencer Overton, James Sample, Kurt Schmoke, Roy Schotland, and Jim Sutton for suggestions on improving this edition.

Rick Hasen
Los Angeles, CA

Dan Tokaji
Columbus, OH
May 2012

Introduction to the Fourth Edition

We do not believe the federal prohibition on age discrimination in employment applies to casebook editors, but a few years ago our senior editor, Lowenstein, advised our then junior editor, Hasen, that there would be no need to research that question, because the Fourth Edition would be Lowenstein's last. It seemed prudent, then, to bring on a new editor, ready to serve as Lowenstein's replacement. Lowenstein and Hasen were extremely pleased when Daniel P. Tokaji of the Moritz College of Law at the Ohio State University agreed to take on the role. He joins us as co-editor of this Fourth Edition.

Lowenstein claims the privilege of adding a personal note in this and the following two paragraphs.¹ I began making election law my principal academic specialty in 1980, at which time I believe I was the only law professor in America to do so. Roy Schotland of Georgetown doubled the field the following year, and our number grew slowly through the 1980s. Around the beginning of the 1990s it began to grow faster, and that trend has continued to the present day. If you believe in straight-line extrapolation, in twenty years about 98 percent of American law professors will be specializing in election law.

From early on, I knew that a good casebook would be beneficial for the field, but I hoped someone else would produce one. Finally, more than a decade after I began teaching the subject, and prompted and encouraged by a number of friends, especially Bruce Cain, I set myself to the task. Had I known of its onerousness from the start, I probably would never have begun. But Keith Sipe and the entire staff at Carolina Academic Press made the project as easy for me as they could, and since the book has been in print I have been gratified by the encouragement and constructive criticism I have received from students and colleagues who have used the book.

A couple of years after the book first appeared, I had the great good fortune of being able to recruit Rick Hasen to join me as co-editor, first of the annual supplements and then of the Second and Third Editions. Those who have been using the book from the start do not need to be told how much Hasen's participation improved the book. Now good fortune has struck again, with the addition of Dan Tokaji. A part of me is in this book, and I cannot imagine a better set of hands within which to leave it than those belonging to Hasen and Tokaji. I believe it is a strength of the book that the co-editors disagree among ourselves on substantive issues but see eye to eye on pedagogy and what a casebook should be. We want this book to train lawyers who may practice in election law, but even more we want to provoke thought about the growing interactions between the legal and elec-

1. Hasen reserves the right of rebuttal to appear in the Introduction to the Fifth Edition of the book. He has much to say about how much Lowenstein is responsible for the creation of this field (and some of it is even printable in a family publication!).

toral systems. We want the book to have a distinctive and sometimes even idiosyncratic voice, but not to be a vehicle for proselytizing. We want conservatives and liberals, reformers and traditionalists, and Republicans and Democrats all to be comfortable with this book. Then again, at times we want them all to be uncomfortable.

With respect to the Fourth Edition, we are proud to have achieved at least one goal. The volume you are holding is thinner than its predecessor, by about 77 pages. This despite the fact that since the Third Edition the Voting Rights Act has been renewed and the Supreme Court has decided a number of significant election law cases in a variety of fields, including campaign finance, redistricting, political parties, and election administration. Aside from the addition of this new material, we have made other changes, including a significant revamping of the campaign finance chapters, expanded coverage of the political science literature on campaigns in Chapter 11, expanded coverage of election administration in Chapter 7, and addition of a new section in Chapter 8 (on ballot propositions), discussing the vexing question of how strictly election law ground rules should be enforced against participants.

Those who are deeply learned in logic will have deduced that if the size of the book has been reduced and significant amounts of new material have been added, then some material must have been cut. We hope that the cuts make the book more streamlined and usable. But if you are an instructor who is regretting the loss of some of your favorite cases, take consolation in the fact that the same is true of some of ours.

Acknowledgments

Another addition is the Appendix on election law research, written by Sarah Sampson, of the Georgetown Law Library. We thank Ms. Sampson for her generous contribution and we hope our readers find it useful. In addition to the acknowledgements contained in the introductions to the first three editions, we wish to add our thanks to the following able research assistants: Alex Chen, Danielle De Smeth, Amanda Dittmar, Melissa Eakin, Natalie Heaton, John Khosravi, Ben Kington, Hal Melom, Jonathan Miles, Kristine Noyes, and Damion Robinson.

Introduction to the Third Edition

The first edition of this book was published in 1995 and the second edition in 2001. The Voting Rights Act is scheduled to come up for renewal in 2007, and we supposed that would be a good year if a third edition was warranted by sufficient interest in the book.

But as admirers of Scottish poetry are well aware, plans of mice and men, however well-laid, are apt to go agley, and the same applies to the plans of casebook authors. In 2002, Congress passed the Bipartisan Campaign Reform Act, the most important revision of federal election campaign law since 1974, and in December, 2003, the Supreme Court upheld most of the BCRA's provisions in *McConnell v. Federal Election Commission*. In addition, there have been important developments in redistricting law since our second edition, especially the Supreme Court's revisiting the question of partisan gerrymandering in *Vieth v. Jubelirer*. We reluctantly concluded that to attempt to deal with these developments in supplements would be too cumbersome.

This third edition is not a comprehensive revision. Indeed, if it were software we would probably call it Version 2.1. We have thoroughly revised the later chapters on campaign finance and made significant revisions to the redistricting chapters. Some other chapters, such as the one on ballot measures, have also been overhauled. But many chapters are virtually unchanged. We still intend to prepare a more thorough revision in 2007, and will welcome comments and suggestions by students, instructors, and others who use the book.

In the Introduction to the second edition, we mentioned two then-new resources in our field. One was the Election-Law Listserv, a forum for exchange of information and debate on developments in election law. If you'd like to subscribe, you may do so at <http://department-lists.uci.edu/mailman/listinfo/law-election>. The other was the inauguration of the quarterly *Election Law Journal*, published by Mary Ann Liebert, Inc., and edited by the two of us, assisted by attorney Sam Hirsch and an outstanding Editorial Advisory Board. As this is written, ELJ is completing its third volume. For information, visit <http://www.liebertpub.com/elj/>. Or flip through some copies in your local law library. If the *Election Law Journal* is not there, the librarian will no doubt appreciate being advised of this deficiency.

Election law has not been immune to the recent "blogging" phenomenon. One blog that is perhaps occasionally eccentric but always well-informed is owned and operated by Rick Hasen, who recused himself from participation in this paragraph. Hasen imaginatively entitled his blog "Election Law." Visit him at <http://electionlawblog.org>.

Other blogs of interest include Robert Bauer's blog on campaign finance issues <http://moresoftmoneyhardlaw.com>, Ed Still's "Votelaw" blog <http://www.votelaw>.

com/blog>, and Dan Tokaji's blog on voting technology issues <<http://equalvote.blogspot.com>>. These and other election law resources are linked on the right side of the "Election Law" blog.

Acknowledgments

To our cumulative list of acknowledgments we add the name of Richard Ellis, a political scientist who, having been good enough to write an essay on pluralism for our first chapter, which we carry over from the second edition, for this edition has— together with his publisher, the University Press of Kansas—kindly permitted us to reprint a chapter from his book on initiatives. In addition we thank the students who have assisted us on the supplements since the second edition or worked directly on the third edition: Landon Bailey, Peter Bartle, Justin Bowen, Grant Davis Denny, Nicole Drey, Amber Star Healy, Michael Kovaleski, Tamara McCrossen, Matt Richardson, Eugene Rome, and Jesse Saivar.

Daniel Hays Lowenstein
Richard L. Hasen
Los Angeles
June 2004

Introduction to the Second Edition

The introduction to the first edition of this book (reprinted below) stated that “election law has not been a subject in the university.” Much has changed in the last six years. Election law is a course that now is taught in a large number of universities, is the subject of regular symposia in law reviews and, with the controversy over the 2000 presidential election, had its fifteen minutes as a subject of popular interest as well.

Those readers who have a strong interest in the field should note two developments. First, in January 1996, the election-law “listserver” was born. A listserver is an e-mail system by which any member of the group can post a message that is simultaneously delivered to all other members of the group. The election-law listserver is devoted to discussion of current developments in election law as well as related research and pedagogical issues. If you would like further information, point your web browser to <<http://department-lists.uci.edu/mailman/listinfo/law-election>>.

Second, the editors of this casebook have agreed to serve as editors of a new quarterly, peer-reviewed scholarly publication, the *Election Law Journal*. More information about the journal is available at <www.liebertpub.com/elj>.

Changes in the Second Edition

Although instructors who have used the first edition will find much here left intact, the book does make some significant changes. Some chapters were added simply to keep up with issues that have arisen in the last six years, such as the explosion of soft money and issue advocacy (see Chapter 18). Other chapters were added to expand coverage of the book, such as in the area of campaigns (Chapter 11) and campaign finance disclosure (Chapter 21). Of course, no book on election law in 2001 would be complete without a discussion of the 2000 presidential election controversy. Chapter 3 and Part III of Chapter 4 tackle issues related to the Florida recount. Finally, we have dropped some cases and added others as appropriate. Users of the second edition who wish to copy portions of deleted material from the first edition for classroom use have permission to do so.

Acknowledgments

We appreciate the helpful comments and suggestions from a number of our colleagues including Heather Gerken, Craig Holman, Antoinette Sedillo Lopez, Lance Olson, Nathaniel Persily, Melissa Saunders, Roy Schotland, David Schultz, Eugene Volokh, and Adam Winkler. The book would not have been possible without the generous support of our deans, David Burcham of Loyola Law School and Jonathan Varat of UCLA.

We gratefully acknowledge the research assistance of Michael Sweet, who helped with the 1996 supplement, Susan Bang and Mark Burnstein (1997), Beth Correia and Matthew Gorman (1998), Julie Caron Remer and Timothy Tozer (1999), and Greg Grossman (2000). We also thank Sofya Bendersky, Meghan Crowley, Caroline Djang, and Denise Waller for help on the second edition. The staffs of the Loyola and UCLA law libraries have been tremendously helpful to us as well.

We also thank Karen Mathews, Ann Palmer, Thelma Wong Terre and the faculty support staffs at Loyola and UCLA for exemplary administrative support, Tim Heindl for computer support, and the folks at Carolina Academic Press for putting it all together.

Hasen thanks his wife Lori Klein for judicious advice, patience, love, and support, especially when preparing the book seemed like caring for an additional child.

Since the first edition of this book was published, Lowenstein's sons, Aaron and Nathan, have (unexpectedly) grown up, and both are working in political jobs — Aaron for a city council member in New York City, Nathan as a redistricting analyst in California. Though they apparently have failed to learn from the error of their father's ways, their conscientiousness and sense of high purpose entitles them to be added to the list of family members mentioned in the previous introduction, from whom Lowenstein has received guidance.

Daniel Hays Lowenstein
Richard L. Hasen
Los Angeles
June 2001

Introduction to the First Edition

This book is based on the proposition that elections are important and that the structure and rules that govern them deserve the attention of citizens in general and of scholars and legal professionals in particular.

As the American university is constituted, election law falls at junctures formed by other subjects. This has not been an advantage, because junctures—these junctures, at least—have been peripheries. Most legal scholars who have considered election law issues have done so in pursuance of a different subject, most commonly constitutional law. In political science, election law falls at the juncture of two subdisciplines, American politics and public law. Most political scientists who specialize in American politics have no particular interest in law. Most political scientists who specialize in public law have no particular interest in electoral politics.

So election law has not been a subject in the university. But the confrontation of electoral politics and legal regulation has been pervasive and consequential in the past three or four decades. That election law has not been a subject is the university's loss and the university's failure.

Election law *has* been a growing subject in courtrooms, legislative chambers and political headquarters. One consequence has been increased work for lawyers. To prepare for such work is one good reason for law students to study election law. This book attempts to assist students in that preparation, but not in what might be termed a nuts-and-bolts fashion. There are some nuts and some bolts in this book (certainly the former!), but they are not presented exhaustively or systematically. Lawyers who need technical information about the Federal Election Campaign Act or the Voting Rights Act can find it easily enough. Indeed, details learned in law school are likely to have changed by the time the student is ready to apply them.

What distinguishes an outstanding legal professional from an ordinary one in the field of election law is the ability to understand the details of legal regulations as they affect and at least aspire to benefit the democratic political system. The sometimes mindless actions of election authorities (see *Barker v. Wisconsin Ethics Board* in Chapter 13 for one example¹) provide evidence that not all lawyers practicing election law have an adequate sense of their mission or the ability to carry it out. One goal of this book is to provide stimuli to law students that may help them develop this sense and this ability.

The broader purposes of the book go beyond professional preparation. Study of and debate over democratic institutions are activities that enrich our lives as citizens and that enhance our ability to serve the society in which we live.

1. This case has been demoted to a note case on page 907 in the fifth edition.

The book is interdisciplinary. Not because of a general belief in interdisciplinary studies, but because study of a subject at the juncture of other subjects must be interdisciplinary.

More concretely, the book assumes that lawyers and political scientists have much to learn from each other about election law. The lawyers, judges, and legal scholars who believe they have proved a point because they have shown that a given cause *could* have a given effect are neither imaginary nor extinct. Neither are the political scientists who conclude their rigorous empirical studies with casual and sometimes foolish assertions of their normative or policy implications.

Lawyers can benefit from exposure to the empiricism of political science. Political scientists can benefit from more focused attention on the legal questions to which their empirical studies may be relevant. Legal questions, after all, are normative questions of a particularly concrete and immediate nature.

Conventions Used in This Book

In the interest of saving the publisher's space and the reader's time, most of the materials reprinted in this book have been significantly edited. Insertions are indicated with brackets. Deletions are indicated with brackets or ellipses. However, footnotes have been deleted and citations have been deleted or altered without signalling. Sometimes, formatting of the original sources has been revised. For example, I do not follow the Supreme Court's practice of surrounding indented quotes with quotation marks. For purposes of serious research, the reader should consult the original sources.

Footnotes that are signalled with a number are from the original work and retain the numbers that they have in the original. Footnotes signalled with a letter are mine.

Opinions differ on the extent to which law school casebooks should contain references to the scholarly literature. The interdisciplinary nature of this book has persuaded me that heavy annotations are appropriate. Very few readers of this book—whether instructors, students, or general readers—will have a strong background on all the subjects presented. The references are intended to facilitate further reading on matters of interest and to provide a head start on research projects. They are not intended to be intimidating, and I hope they will not have that effect.

Although the references are extensive, they are not remotely exhaustive. In most cases they should be sufficient to get you into the literature that interests you.

Acknowledgments

This book was conceived more than a decade ago over breakfast with Andy Shepard at a long-since defunct restaurant in Westwood. Andy and I decided that there ought to be an election law textbook and that we should compile it. Shortly thereafter, circumstances enticed Andy into other enterprises, a misfortune for which there is some consolation in the thought that election law's loss has been family law's gain. This would have been a better book if Andy had been able to stay with it. Only a few of his words remain (pri-

marily in Chapter 7²), but I like to believe that some traces of Andy's energy, enthusiasm, and incisiveness have continued to animate the project.

Steve Ansolabehere, Bruce Cain, Morgan Kousser, and Ray Wolfinger read portions of the manuscript of this book and gave me helpful suggestions.

Aside from judicial decisions, this book draws primarily on academic materials. Nevertheless, I hope there are some politics in the book. If so, and if the politics make any sense, it is only because my activities in and around politics have allowed me to be associated with people of extraordinary talent and understanding. This group has included Howard Berman, Michael Berman, Jerry Brown, Carl D'Agostino, Doug Faigin, Jean-Marc Hamel, Pierre-Marc Johnson, André Larocque, Tom Quinn, Tony Quinn, Keiko Shimabukuro, Jonathan Steinberg, Bob Stern, and Henry Waxman.

I have been equally fortunate in academic associates. Marlene Nicholson and John Shockley deserve very special mention. Through their participation in the Law and the Political Process Study Group, as well as through their writings, they have done as much as anyone to earn recognition for election law as an academic subject in its own right. Others who have been particularly consistent sources of stimulation and support include David Adamany, Steve Ansolabehere, Bruce Cain, Mike Fitts, Steve Gottlieb, Bernie Grofman, Morgan Kousser, Jerry López, Mark Rush, Gary Schwartz, Steve Shiffrin, and, recently, three of my younger colleagues, George Brown, Dan Bussel and Eugene Volokh.

I thank Deans Bill Warren and Susan Prager individually for the tangible and intangible assistance they have provided and also as surrogates for the entire UCLA Law School Faculty. One could not hope for a more supportive group of colleagues. Similarly, I should like to express my appreciation to Joel Aberbach, Kathy Bawn, Shanto Iyengar, and John Petrocik for their friendship and assistance, but also as representatives of their colleagues in the very strong UCLA Political Science Department.

Many groups of UCLA students have struggled with these materials in versions even cruder than the present published version. Each group has helped me understand the subject better. Particular mention should be made of the many able research assistants who have worked with me. Those who worked most directly on this book were Don Deyo, Todd Schwartz, Michael Sweet, and Stacy Weinstein.

There is no need to thank Myra Saunders and the UCLA Law Library staff. Their invariable helpfulness and friendliness, and the miraculously speedy retrievals that they produce upon demand are things we have learned to take for granted at the law school.

But I do need to thank the clerical assistants who have worked with me over the years. Karen Mathews played this role down the home stretch, and she was almost too good to be true.

Keith Sipe, Mayapriya Long, Andrew Wilson, and the other folks at Carolina Academic Press are patience incarnate.

Although I have not attempted to conceal my own views on the subjects treated in this book, I have tried to assure that the book is not a brief for those or any other views. But I hope the book is animated by a respect for truth and a regard for the public good. My

2. This chapter is now Chapter 8 in the fifth edition. —Eds.

parents taught me this aspiration, and their teaching has been reinforced by the example set by my wife, my sister and a gaggle of cousins, aunts, uncles, and in-laws.

Everyone I have mentioned has left a mark on this book.

Daniel Hays Lowenstein
Los Angeles
May, 1995

Copyright Acknowledgments

We gratefully acknowledge the permission granted by authors, publishers, and organizations to reprint portions of the following copyrighted materials.

Bowman, C., *We Don't Want Anybody Anybody Sent: The Death of Patronage Hiring in Chicago*. Reprinted by special permission of Northwestern University School of Law, *NORTHWESTERN UNIVERSITY LAW REVIEW*, Volume 86, Issue #1, pp. 77–78 (approximate), (1991).

Briffault, R., *Distrust of Democracy*. Published originally in 63 *TEXAS LAW REVIEW* 1347 (1985). Copyright © 1985 by the Texas Law Review Association. Reprinted by permission.

Charlow, R., *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 *CORNELL LAW REVIEW* 527 (1994). Reprinted by permission.

CQ Press, *Illustration: North Carolina — Districts Established February 6, 1992*; in *CONGRESSIONAL DISTRICTS IN THE 1990S: A PORTRAIT OF AMERICA* (1993). Reprinted by permission.

Ellis, R., *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA* 26–43 (2002). Copyright 2002 by the University Press of Kansas. All Rights Reserved. Reprinted with permission.

Eule, J., *Judicial Review of Direct Democracy*. Reprinted by permission of The Yale Law Journal Company and Fred B. Rothman & Company from the *YALE LAW JOURNAL*, Vol. 99, No. 7 (1990), pages 1503–1590.

Fiorina, M., *The Decline of Collective Responsibility in American Politics*. *DAEDALUS*, Vol. 109 (1980), American Academy of Arts & Sciences. Reprinted by permission.

Fiss, O., *Free Speech and Social Structure*, 71 *IOWA LAW REVIEW* 1405 (1986). Reprinted by permission.

Foley, E., *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 *COLUMBIA LAW REVIEW* 1204 (1994). Reprinted by permission.

Grofman, B., et al., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* (1992). Copyright © Cambridge University Press 1992. Reprinted with the permission of Cambridge University Press.

Guinier, L., *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*. Published originally in 71 *TEXAS LAW REVIEW* 1589 (1993). Copyright © 1993 by the Texas Law Review Association. Reprinted by permission.

Jacobson, G., *Enough is Too Much: Money and Competition in House Elections*; from *ELECTIONS IN AMERICA*, Allen & Unwin (1987). Reprinted by permission.

- Lindgren, J., *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 *UNIVERSITY OF PENNSYLVANIA LAW REVIEW* 1695 (1993). Copyright © 1993 by the Trustees of the University of Pennsylvania. Reprinted by permission.
- Lowenstein, D., *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*. Originally published in the *Capital University Law Review*, 21 *CAPITAL UNIVERSITY LAW REVIEW* 381 (1992). Reprinted by permission.
- Lowenstein, D., *Associational Rights of Major Political Parties: A Skeptical Inquiry*. Published originally in 71 *TEXAS LAW REVIEW* 1741 (1993). Copyright © 1993 by the Texas Law Review Association. Reprinted by permission.
- Lowenstein, D., *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 *HOFSTRA LAW REVIEW* 301 (1989). Reprinted by permission.
- Lowenstein, D., *The First Amendment and Paid Initiative Petition Circulators: A Dissenting View*. Copyright © 1989 by University of California, Hastings College of the Law. Reprinted from *HASTINGS CONSTITUTIONAL LAW QUARTERLY*, Vol. 17, No. 1, pp. 184–87, 199–200, by permission.
- Lowenstein, D. & Steinberg, J., *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?* Originally published in 33 *UCLA LAW REVIEW* 1. Copyright © 1985, The Regents of the University of California. All Rights Reserved.
- Mayer, K., Werner, T., & Williams, A., *Do Public Funding Programs Enhance Electoral Competition?* in *THE MARKETPLACE OF DEMOCRACY* 245–67 (Michael P. McDonald and John Samples eds. 2006). Copyright 2006 Brookings Institution Press. Reprinted with permission.
- Mayhew, D., *CONGRESS: THE ELECTORAL CONNECTION* (1974). Copyright © 1974 Yale University Press. Excerpts are reprinted by permission.
- Nicholson, M., *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act of 1974*, 1977 *WISCONSIN LAW REVIEW* 323 (1977). Reprinted by permission.
- Nicholson, M., *The Supreme Court's Meandering Path in Campaign Finance Regulation and What it Portends for Future Reform*, 3 *JOURNAL OF LAW AND POLITICS* 509 (1987). Reprinted by permission.
- Pildes, R. and R. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 *MICHIGAN LAW REVIEW* 483 (1993). Reprinted by permission.
- Polsby, D., *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 *SUPREME COURT REVIEW* 1. Copyright © 1977 by the University of Chicago. All Rights Reserved. Reprinted by permission.
- Polsby, D., *Ugly: An Inquiry Into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 *MICHIGAN LAW REVIEW* 652 (1993). Reprinted by permission.
- Powe, Jr., L., *Mass Speech and the Newer First Amendment*, 1982 *SUPREME COURT REVIEW* 243. Copyright © 1983 by the University of Chicago. All Rights Reserved. Reprinted by permission.
- Rossiter, C. (ed.), *The Federalist #10 (Madison)*, *THE FEDERALIST PAPERS*, NAL/Dutton (1961), pp. 77–84.
- Schattschneider, E., excerpt from *PARTY GOVERNMENT*, copyright © 1942 and renewed 1969 by E.E. Schattschneider. Reprinted by permission of Holt, Rinehart and Winston, Inc.

- Stanley, H.W & Richard G. Niemi, VITAL STATISTICS ON AMERICAN POLITICS 2011–2012, Fig. 1-2, Copyright © 2011 by CQ Press, an Imprint of SAGE Publications Inc.
- Strauss, D., Corruption, Equality, and Campaign Finance Reform. This article originally appeared at 94 COLUMBIA LAW REVIEW 1369 (1994). Reprinted by permission.
- Swain, C., BLACK FACES, BLACK INTERESTS (1993). Reprinted by permission of the publishers from BLACK FACES, BLACK INTERESTS: THE REPRESENTATIONS OF AFRICAN AMERICANS IN CONGRESS, Cambridge, Mass.: Harvard University Press, Copyright © 1993 by the President and Fellows of Harvard College. All Rights Reserved.
- Thompson, D., Mediated Corruption: The Case of the Keating Five, 87 AMERICAN POLITICAL SCIENCE REVIEW 369 (1993). Reprinted by permission.