

The Party Line

Daniel H. Lowenstein and Richard L. Hasen

SHORTLY AFTER THE FINAL RESOLUTION of the Florida post-election controversy in 2000, Mary Ann Liebert, head of the publishing company that bears her name, conceived the idea of a new, peer-reviewed journal dedicated to election law and policy and to related empirical and analytical issues. We were honored to be designated as the first co-editors of what became *Election Law Journal* and was recently renamed *Election Law Journal: Rules, Politics, and Policy*.

Now, as we come to the end of our ninth volume, we are passing on the torch to a pair of worthy successors, Paul Gronke, Associate Professor of Political Science at Reed College, and Daniel Tokaji, Associate Professor at Moritz College of Law of The Ohio State University. It has been our custom at the end of each volume to extend thanks to the various people who have contributed to the success of *Election Law Journal (ELJ)*. Readers will understand that in this, our last issue, we wish to do so with increased emphasis.

As mentioned above, the idea for *ELJ* originated with Mary Ann Liebert. The journal's success has been attributable to our authors, our editorial board advisers, our peer-reviewers, our friends at Mary Ann Liebert, Inc., and our readers. We believe that, more than anything else, we have served as facilitators. During the life of *ELJ* our field has expanded steadily. Many of the leading figures in the field have recognized the benefits of this journal and through their efforts have assured its success.

Our gratitude to each and every member of each of the above groups is genuine and great, but there are a few individuals whose assistance has been so important that we should like to mention them by name. For most of the journal's history, our relations with the publisher have been as close to ideal as could reasonably be hoped for. Many good people on the publisher's staff deserve credit for that, but we want to single out Tim Basting, our first liaison, and Vicki Cohn, who has worked with us for

most of the journal's history. Bernadine Richey, who has worked with us on production with great patience and efficiency, also has been invaluable. Sam Hirsch served as Associate Editor for several years and was always available to help out on whatever task was at hand. Our friend Bruce Cain has given us so much good advice, not to mention his frequent services as author, book reviewer, and peer-reviewer, that he could have been listed on the masthead as honorary co-editor. We'd better stop here, because if we went on to name all the friends of the journal who have helped us, we'd consume the entire issue.

We are not sure whether it's especially appropriate or especially inappropriate, but for better or worse our last issue features several articles that originated at a festschrift held for one of us at the UCLA Law School in January 2010. Lowenstein, who was the subject of that festschrift, expresses his appreciation to Hasen and also to Lowenstein's UCLA colleague Adam Winkler (who briefly introduces the festschrift portion of this issue) and the aforementioned Bruce Cain for their generosity in organizing the festschrift.

The opening essay in the festschrift is Cain's in-depth study of Lowenstein's election-law scholarship. (If evidence of Cain's willingness to undertake thankless tasks is needed, this should suffice.) Cain discusses Lowenstein's political philosophy, his views on the proper role of courts in adjudicating election law disputes, the role of theory in election law, and the meaning of corruption. Cain finds remarkable consistency in Lowenstein's approach to law and politics over the years, and even expresses appreciation for his contributions to the field. Of course, readers who know that the strong Cain-Lowenstein friendship goes on hold when they enter the public arena will expect some sharp criticism, not to mention some fun-poking. They will not be disappointed.

The remaining festschrift contributions explore substantive problems in election law—from cam-

paign financing to the initiative process to redistricting to election administration—sometimes using Lowenstein’s scholarship as a frame of reference.

A number of *ELJ* articles over the years, including two symposia, have explored constitutional and policy questions relating to campaign finance disclosure. Richard Briffault’s festschrift contribution recognizes that the policy and, perhaps, constitutional analysis need to change with the advent of the Internet. Never before has routine campaign finance information about even very small contributions been so widely and easily accessible, raising questions as to both the privacy interests of small contributors and the public’s interest in having such information reported to government agencies and disseminated to the public. Briffault argues for a nuanced approach to these questions, recognizing that the privacy costs and potential chilling effects could be mitigated for small contributors by separating the reporting and public dissemination functions. He also questions whether, in the *Citizens United* era in which limits on spending are no longer constitutional, campaign finance disclosure laws are adequate to prevent corruption or the appearance of corruption.

Craig Burnett, Elizabeth Garrett, and Mathew McCubbins present a surprising and intriguing empirical result in a study of voter behavior in initiative elections. In the 1990s, several scholars presented evidence that voters aware of “cues” such as endorsements by relevant groups or individuals managed to vote “correctly” on initiatives in order to advance their apparent policy views about as well as people who had more information on the actual content and effects of the proposals. It was assumed in these studies that voters lacking both information on the merits and information on cues would be less successful in matching their votes with their policy views. Burnett, Garrett, and McCubbins appear to be the first to test that assumption and they have found that at least in the case of one California initiative, those who lacked both forms of information voted as successfully as those possessing either form of information. Further consideration of the implications of this finding and of whether it can be generalized will be in order. In the meantime, the authors put forth some suggestions on how to improve the information available to voters.

There are fewer surprises in the next festschrift essay, in which Joshua Fougere, Stephen An-

solabehere, and Nathaniel Persily analyze survey data on the public’s views on various controversies surrounding redistricting. Unsurprisingly, the authors find that most Americans know very little about redistricting and therefore do not have opinions about it. The authors then slice and dice the opinion data for those respondents who actually have opinions on the topic. They find that respondents who are paying attention to redistricting hold what the authors regard as rational opinions. Winners are happier than losers, and voters generally desire a fair process achieved through methods muting the potential influence of partisanship in the line-drawing process. The authors conclude by briefly illustrating the strong relationship that opinion on redistricting has with opinions about politicians more generally.

Bernard Grofman’s festschrift contribution is a sequel to his 2006 *ELJ* article, “Operationalizing the Section 5 Retrogression Standard of the Voting Rights Act in the Light of *Georgia v. Ashcroft*: Social Science Perspectives on Minority Influence, Opportunity and Control.” The earlier piece set forth a general framework for social science evaluation of the question of “retrogression” under Section 5 of the Voting Rights Act according to the Supreme Court’s standard in *Georgia v. Ashcroft*. The current article applies that framework to the facts of the actual dispute over Georgia’s state Senate districts, considering the kind of expert testimony that could have been presented in the federal district court had the remanded case gone to trial. (It did not go to trial because it was mooted by another decision holding the Georgia plan a violation of the one person, one vote rule.) Though Congress partially reversed the *Georgia v. Ashcroft* standard in its 2006 Voting Rights Act amendments, Grofman argues that at least part of his test will be applicable under the relevant test for retrogression that should apply as we enter a new round of redistricting.

Gary Jacobson’s festschrift article begins by recalling Lowenstein’s 1989 suggestion that political parties should be the vehicles for distributing public funds to their candidates, presumably those in the most competitive races. Lowenstein had argued that party-based public financing would minimize conflicts of interest by making private money less important to congressional races and would strengthen party leadership, leading to more responsible political parties. Jacobson explains that although nothing like Lowenstein’s proposal ever be-

came law, congressional party leaders are now empowered quite as Lowenstein envisioned—albeit under a system in which whatever conflicts of interest are bred by privately financed elections remain as present as before. Tracing the rise of parties to decisions made by Congress, the Federal Election Commission, and the Supreme Court, Jacobson describes and explains the emergence of the Hill committees—the Democratic Congressional Campaign Committee, National Republican Congressional Committee, National Republican Senatorial Committee, and the Democratic Senatorial Campaign Committee—as major participants in financing congressional campaigns. Jacobson assesses their strategic efficiency and electoral effectiveness in the 2006 and 2008 elections and finds that, by and large, they have acted as Lowenstein had predicted by allocating funds efficiently to the most competitive races.

In criticizing aggressive judicial use of the single subject rule for initiatives in articles published in 1983 and 2002, Lowenstein argued that when judges are forced to make highly subjective decisions, it is hard for their reasoning not to be influenced by their belief systems, values, and ideologies. In their *festschrift* contribution, John Matsusaka and Richard Hasen find strong empirical support for Lowenstein's claim. They find that state appellate judges are more likely to uphold an initiative against a single subject challenge if their partisan affiliations suggest they would be sympathetic to the policy proposed by the initiative. More pertinently, they find that partisan affiliation is extremely important in states with aggressive enforcement of the single subject rule—the rate of upholding an initiative jumps from forty-one percent when a judge disagrees with the policy to eighty-three percent when he agrees—but not very important in states with restrained enforcement.

Finally, Daniel Tokaji seeks to reconcile two strands of Lowenstein's election law scholarship.

Writing about campaign financing, Lowenstein has seen conflict of interest as endemic to a system of private financing of elections. Writing about election administration, Lowenstein has suggested that courts should avoid most interference in election administration disputes. Tokaji argues that the conflict of interest identified by Lowenstein in the campaign finance arena is present as well in much election administration in the United States, especially when elections officials run in partisan election for office. He argues that a recognition of the conflict of interest problem should lead Lowenstein and others to be more welcoming of federal court intervention in election law disputes, at least in cases in which the decisions turn on discretionary decisions of election administrators.

Although Lowenstein has written on many aspects of election law, his scholarship has been almost entirely limited to the United States. It therefore helps to round out this issue that the only article that did not come from the *festschrift* discusses a recent important decision in Germany. The German Constitutional Court ruled that the use of touch-screen voting computers without some means of preserving a record of each individual vote violates the German Constitution. Greg Taylor provides a thorough analysis of the decision and gives some reasons why he believes it was correctly decided.

Finally, the issue contains book reviews by Matthew Baxter and Pradeep Chhibber, and Robert Mutch.

We close by again thanking our readers for your support during our nine years of editing the journal. As we prepare to join your ranks, we do so with great enthusiasm for the many improvements we believe will be introduced by our successors. Paul Gronke and Dan Tokaji have earned strong reputations for their work in the field. Our own personal respect for both of them gives us confidence in the future of the journal with which we have been privileged to be associated.

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