

Election Law

Election Law

Cases and Materials

SIXTH 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

CHARLES W. EBERSOLD AND FLORENCE WHITCOMB EBERSOLD
PROFESSOR OF CONSTITUTIONAL LAW
THE OHIO STATE UNIVERSITY
MICHAEL E. MORITZ COLLEGE OF LAW

Nicholas Stephanopoulos

PROFESSOR OF LAW
UNIVERSITY OF CHICAGO LAW SCHOOL



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For
Sharon
Aaron, Jessie, and Asa
Nathan and Elham
—D.H.L.

For
Lori
Deborah
Shana
Jared
—R.H.

For
Renuka
Aria
Mohan
—D.T.

For
Ruth
—N.S.

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

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Introduction to the Sixth Edition

The Sixth Edition of this casebook appears twenty-two years after the first edition, written by Dan Lowenstein alone. When Lowenstein wrote, he was one of a half-dozen law professors in the country focusing on issues of election law and democracy. These days, the field has grown so large that there are many casebooks, other books, articles, and journals devoted to the subject. While that is good news for those who wish to study material at the intersection of law and politics, it reflects that election law has been the source of much controversy, not just in academia but in American politics and culture. The boom in interest coincided with the disputed 2000 election, and it does not appear to have dissipated. If anything, people have come to expect that judicial action will be front-and-center in electoral campaigns. This may not reflect well on the health of American democracy, but at least those who study the field will be able to understand the disputes.

The goals of this Sixth Edition of the casebook are the same as Lowenstein's ambition with the first: to shed more light than heat on a disputed subject; to give students and their instructors a fair presentation of the cases and scholarship in the key areas of election law; to bring in political science evidence with which to evaluate legislative and judicial interventions into democratic processes; and to do all of this in clear language. We have strived to live up to Lowenstein's example, although we acknowledge this book does not reflect his distinctive voice more evident in the earlier editions.

This edition of the casebook is written by Professors Hasen, Tokaji, and Nicholas Stephanopoulos of the University of Chicago Law School. Nick joins the book with scholarship in the finest tradition of Lowenstein's work: a tradition of critical thinking, deep case analysis, and empirical analysis.

As always, we welcome your comments on how we can improve on this book. No doubt the book is already greatly improved thanks to the generosity of earlier readers.

Acknowledgements

We thank Sara Sampson and Paul Gatz for their contribution of the updated Appendix on election law research. In addition to the acknowledgements contained in the introductions to the first five editions, we wish to add our thanks to the following able research assistants: Nassim Alisobhani, Andrew Ashbrook, Hayden Capace, Emily Cashell, Anika Kahn, Justin O'Neill, Elizabeth Sams, Sam Skubak, Tara

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RICK HASEN
Los Angeles, CA

DAN TOKAJI
Columbus, OH

NICHOLAS STEPHANOPOULOS
Chicago, IL

March 2017

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.

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.

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 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 acknowledgements 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.² 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

2. 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!).

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 electoral 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 Listserver, 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 Kovalski, 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.

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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 sub-disciplines, 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 example³) 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.

3. This case appears on page 1127 of the Sixth Edition.—Ebs.

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.

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 Schepard 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 (primarily in Chapter 7⁴), 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.

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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.

4. This chapter is now Chapter 8 in the sixth edition.—Eds.

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 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

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