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CORRUPTION, FREEDOM AND EQUALITY IN CAMPAIGN FINANCING

*Martin Shapiro**

We have actually come a very long way in the legal study of electoral matters. For all the disagreements between Stephen Gottlieb and Daniel Lowenstein in their contributions to this Symposium, both readily accept that we must go beyond argument about the fairness of the rules of the game, that changing the rules of the game affects who wins and that these substantive outcomes are as important as the intrinsic merits of the procedures.¹ These authors also agree that interest groups and political parties exist and must be taken into account.² This is also a substantial advance over analysis that treated elections solely in terms of individual, denatured voters. While Gottlieb tends toward the universal and Lowenstein the particular, both authors are quite prepared to use the actual state of current political affairs as the starting point for their analysis. This is different than an approach utilizing an abstracted model of the democratic electoral system as it might function in the syllogistic Republic of Pythagoras.

Because Gottlieb and Lowenstein begin by utilizing the reality of political affairs, they also begin from a set of very awkward facts that make campaign financing regulation³ difficult. Nonetheless, beginning from facts is an advance over what most judges and academic lawyers do.

The facts are these. Incumbents enjoy a substantial electoral

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1. See Gottlieb, *The Dilemma of Election Campaign Finance Reform*, 18 HOFSTRA L. REV. 213 (1989); Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301 (1989).

2. Gottlieb, *supra* note 1, at 221-24; Lowenstein, *supra* note 1, at 306-35.

3. It should be noted immediately that one point on which the authors diverge is not an insignificant verbal one. For Gottlieb, it is "regulation" or "legislation." Lowenstein utilizes the term "reform." Regulation is used in this Article because I view it as the less loaded word.

advantage over non-incumbents.⁴ There are some people with more money than other people. The Republican Party seems to have more attraction for people with more money and the Democratic for people with less.⁵ Nevertheless, very wealthy persons with a strong proclivity to donate heavily to political causes were in the past a mainstay of Democratic financing—particularly of liberal Democratic candidates.⁶

There is a second set of important facts upon which the two authors agree. Campaign contributions probably have some impact on the behavior of legislators, but it is extremely difficult to know how much.⁷ Political campaigns in contemporary America cannot be run without some money. Lastly, citizens are not completely attentive to politics or extremely knowledgeable about candidates or issues. As a consequence, the possibility of direct democracy is extremely limited in a nation inhabited by over two hundred million people, so that there must be some system of representation to mediate between the political preferences of the citizenry and the policy outputs of government.

Finally, at the level not of facts but of law and political morality, there is agreement that the first amendment has something to do with the abovementioned facts and that the value of equality is somehow implicated.⁸ Gottlieb also takes a market oriented capitalist system as a “baseline” value,⁹ and Lowenstein accepts the continued existence of such a system as a given even if he does not necessarily invest it with substantive value.

Because the authors agree on so much, they actually agree on one final point that covers an enormous share of the entire territory once thought to be in dispute. Lowenstein distinguishes between two situations; the situation in which one spends money in order to achieve the election of a candidate whose policy preferences one prefers, and the situation in which one uses a campaign contribution to alter a legislator’s behavior once in office from what it would have been in the absence of such a contribution and in the direction of the preferences of the contributor.¹⁰ Lowenstein recognizes that both

4. See Gottlieb, *supra* note 1, at 216-29; Lowenstein, *supra* note 1, at 350.

5. See Gottlieb, *supra* note 1, at 216-29.

6. See *id.*

7. See Gottlieb, *supra* note 1, at 279-86; Lowenstein, *supra* note 1, at 313-22.

8. See Gottlieb, *supra* note 1, at 238-41, 279-80; Lowenstein, *supra* note 1, at 339.

9. Gottlieb, *supra* note 1, at 286-92.

10. Lowenstein, *supra* note 1, at 308-13.

kinds of contribution exist.¹¹ He recognizes that contributions of the former kind are legitimate and indeed appears to believe that regulation of them, even equalizing regulations, would be a violation of the first amendment unjustified by a compelling state interest.¹² Gottlieb, of course, would agree that regulation of such contributions would be undesirable and unconstitutional.¹³

Despite the above agreements, these two authors have a major disagreement. In Lowenstein's view, the second kind of contribution is a unique political phenomenon labelled corruption.¹⁴ For Gottlieb, the second kind of contribution is just one of the wide array of citizen influences on the post-electoral behavior of representatives—an array of influences that is essential to a system of representative, as opposed to plebiscitary, democracy.¹⁵

Lowenstein appears unwilling to take up this disagreement at an analytical level, at least in his article included in this Symposium. Instead he operates as a cultural anthropologist and discovers that there is an anti-corruption norm in American society and that campaign financing legislation is an expression of that norm.¹⁶ The norm is legitimated by its existence and the statutes are legitimated by the norm.¹⁷ This approach is not entirely satisfactory from the standpoint of constitutional law. There is a cultural norm of racism in our society. Does the existence of such a norm give constitutional legitimacy to racist statutes? Such an argument would not appear terribly attractive or constitutional. Moreover, there is that old bromide of cultural anthropology. Is the best evidence of a norm profession or behavior? If there is an anti-corruption norm in American society, surely there is also a pro-corruption norm in the widespread proclivity of Americans to seek to influence the behavior of legislators by any means short of assassination.

It should have been incumbent on Lowenstein to demonstrate at some theoretical and empirical level that spending money on a candidate in order that he will love you is morally inferior to spending money on a candidate you love. It is precisely on this point that Gottlieb rests his argument. Lowenstein cannot discover a decisive dif-

11. *Id.*

12. *See id.*

13. *Cf. Gottlieb, supra* note 1, at 233-36.

14. *See generally Lowenstein, supra* note 1, at 306-22.

15. *See Gottlieb, supra* note 1, at 286-92.

16. *See Lowenstein, supra* note 1, at 338-41.

17. *See id.*

ference between the two. Telling the potential candidates and the continuing political parties "I will spend my money now on candidates who share my policy preferences" is not significantly different from telling office holders and their parties "I will spend my money in the future on candidates who share my policy preferences." It may well be "corruption" to say to a Senator, "If you vote yes on the bill tomorrow, I will put one hundred thousand dollars in your Swiss account the day after tomorrow." However, how does one classify the statement: "Remember that I gave one hundred thousand to your last reelection campaign and so vote for the bill tomorrow." This is not "corruption." It is an appeal to gratitude, which is hardly a surplus commodity in politics. In reality, the contributor is really saying that "because I actually gave money to your last campaign, you must take my threat not to give money to your next one as credible. And if you don't vote the way I want on the bill, I won't contribute to your next campaign but instead will contribute to someone who sees my way on the bill."

Lowenstein himself would recognize that giving your money to candidates who agree with you is appropriate. Thus, is it bad to tell individuals, including office holders, of your future actions? In this context, it appears that Lowenstein's definition of corruption boils down to making *credible* statements about future behavior rather than incredible ones because the past contribution really goes only to the credibility dimension of the threat. The threat itself exists whether or not you have contributed in the past, and the threat itself seems to be accepted by Lowenstein himself as an integral and legitimate part of representative democracy in a capitalist system. Could he possibly mean that spending your money is appropriate only if you don't tell anybody in advance how you are going to spend your money?

I don't believe that the "cultural norm of corruption" argument will work even for the minor pragmatic adjustments that Lowenstein counsels. This is because I do not believe the distinction Lowenstein seeks to draw between legitimate "electoral" contributions and illegitimate "legislative" contributions is a tenable one. Lowenstein's "legislative" contributions all either turn out to be appeals for gratitude (and that seems wildly improbable) or credible threats as to future, legitimate "electoral" contributions. If there is a clear cultural norm about corruption, it is probably confined to the straight contractual arrangement in which there is an agreement to exchange a legislative vote for a sum of money. Everything else boils down to,

“it’s my money and I’ll spend it on candidates I like.” As a consequence, we are back to the ultimate questions of freedom and equality in a capitalist democracy which Gottlieb seeks to firmly resolve in one direction and which, I believe, Lowenstein cannot successfully finesse by taking a cultural anthropology route.

Lowenstein has a second route carefully mapped in the latter portion of his article. He offers a package of financing proposals that attempts to level advantages to the Republican and Democratic parties, to incumbents and non-incumbents and to level “up” the differences between the rich and poor.¹⁸ Party and incumbent/non-incumbent leveling are designed to meet the objection that whenever you change the rules of the game you benefit some of the players over others. The leveling “up” is designed to meet first amendment objections to regulation that seek equality of political opportunity by depriving more favored participants of some of their opportunity.¹⁹ Such deprivations trigger the first amendment truism that the remedy for undesirable speech is more speech not repression.²⁰

Lowenstein’s financing proposals appear no more successful than his cultural finesse. The leveling up proposal still maintains, and even extends, the deprivations of speech contained in the current regulations.²¹ Those deprivations were justified by the majority in *Buckley v. Valeo*²² in ways that could only be persuasive to those who care a lot about equality and nothing about freedom. The notion that when the first dollar is contributed to a candidate or party an individual has exercised all the “speech” possible, and the rest is merely “associating” and not speaking, is strained and artificial in the context of a modern and large state where electronic communications is the norm. It is so strained that those who normally favor freedom of speech would have ridiculed it to death were most of them not Democrats confronted with limitations on what they conceived to be Republican speech. The notion that even freedom of association, in the McCarthy period a darling of the left, could be balanced away by the mere “appearance of corruption” on the other side of the scale would have been equally ludicrous if it had not appeared to the usual first amendment specialists that right wing

18. See Lowenstein, *supra* note 1, at 326-60.

19. See generally Fleischman & McCorkle, *Level-Up Rather Than Level-Down: Towards a New Theory of Campaign Finance Reform*, 1 J. L. & POL. 211 (1984).

20. See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting).

21. See Lowenstein, *supra* note 1, at 355-60.

22. 424 U.S. 1 (1976).

rather than left wing association would suffer.

In essence, Lowenstein deals with all this by treating the current statute as a sunk constitutional cost and pointing out that his proposed increments attack the appearance of corruption problem largely by giving out more public money rather than further limiting private speech (or private association if you prefer clinging to the bizarre distinction of *Buckley*).²³ Such an approach reduces substantially the total new damage to free speech which Lowenstein's "reform" package would impose, but it does relatively little to reduce the damage done by the existing statute.

The resort to public funding plus the proposal of a complex set of arrangements for its distribution, in order to avoid the disadvantaging of non-incumbents or the two major parties, most fundamentally raises the slippery slope argument. Lowenstein rightly and realistically acknowledges that when his proposed package runs through the actual mill of Washington politics, it will be battered by partisan and particularist pressures, most notably the desire of incumbents to preserve their seats.²⁴ If we insist on pursuing an ideal participatory equality while acknowledging that every move in this direction entails potential unfairness to some of the participants (thus requiring that every reform must be multiplex and fine tuned), we will gradually erect an enormous web of government regulation and thus government power. This web will have to be woven by some of the spiders. These spiders will inevitably conclude that while all spiders are equal, incumbent, major party and majority party spiders are more equal than non-incumbent, minor party and minority party spiders. Admittedly, if there is to be further reform, a time when one major party controls the Congress and the other the Presidency is a relatively good time. There is, however, never going to be a time when non-incumbents do the weaving, nor can we foresee a time when minor parties will have much say. If every change in the rules of the game, including every administrative and judicial interpretation of these changes, advantages some players over others, any set of existent practices may be better than arming the government with the power to make rules and fine tune them.

Ultimately then, we arrive at a renewed consciousness that our fondness for many negative constitutional rights, that is rights against government intervention, depends as much on our distrust of

23. See Lowenstein, *supra* note 1, at 360-64.

24. See *id.* at 363-64.

government as on our belief that unregulated processes of individual freedom yield perfect or even excellent results. Despite all the talk of the marketplace of ideas, few of us believe that those forms of speech most controlled by the real marketplace proffer sufficient, if any, good content. The more complex and countervailing a web of new regulations Lowenstein weaves, the more he opens vistas of elected governors tampering with the rules of their elections and determining just how much free speech certain individuals should have. In this area as in many others, the evils of free speech may be preferable to the evils of government regulation.

As a consequence, we return to the ultimate question which always haunts the spending regulation debate. The premise that the evils of free speech are preferable to the evils of government regulation of speech, begins with the tacit baseline that nearly every citizen is capable of speech. It recognizes that numerous socioeconomic and institutional factors actually distribute speech opportunities and effectiveness unequally among the citizens. We accept some of these inequalities as natural and inevitable, but the more they mount up the more uneasy we become. This uneasiness occurs whether we track the ultimate value of free speech to individual autonomy or democratic norms. When we note the grave disparities in wealth and single out an area of speech like campaign financing in which wealth plays a decisive role, it is tempting to carve out exceptions to the negative freedom of speech and to propose countervailing positive speech rights.

Gottlieb seeks to alleviate those temptations by a complex analysis of theories of democracy, representation and legislative behavior.²⁵ His sophistication in all these matters is, of course, much appreciated by political science readers like myself and may be instructive to many lawyers. Ultimately, however, I do not believe it carries us further along. As an empirical matter it is true, and probably inevitable, that there be great inequalities in political influence in any representative democracy. As a matter of logic and theory, it is true that no representative body under any electoral regime, or any set of internal decision making rules, can ever arrive at a set of policies exactly reflecting the totality of citizen preferences, even assuming perfect information and other assorted perfections. Of course, in the real world such perfections do not occur. It is also true that all these matters are so complex that unanticipated conse-

25. See Gottlieb, *supra* note 1.

quences abound whenever the rules are changed. It is true that no matter what we do, some people care about politics a great deal and some not at all, and we would not want to force all of them to care equally. The problem of perfect representation of preferences is insoluble, and that of representing the intensity of preferences even more insoluble.

Gottlieb tells us all of this at length and also tells us that the system of partially pluralist, partly majoritarian, partly instructed, partly Burkean, partly prospective voting and partly retrospective voting we employ works fairly well.²⁶ If I am correct that Lowenstein cannot maintain his distinction between electoral and legislative contributions, then all the things that Gottlieb tells us help us to understand why Lowenstein is wrong in labeling much of campaign financing "corrupt." Even after we have followed Gottlieb's maze, we still do not know why citizens with a lot of money should be advantaged in running the maze over poorer citizens. Even if Gottlieb's assertion is true that unregulated political spending increases the democratic rationality of the political process as a whole and, therefore, in some sense for everyone, the disadvantage of the poor remain. In all of Gottlieb's exhaustive analysis, the problem of rich and poor is largely confined to a single footnote.²⁷

There is no reason here to unpack the whole Nozickian rationale as to why we should accept existing property endowments as the baseline for determining just social and legal policies for the future.²⁸ Even those who are persuaded that traditional property rights and economic liberties have a sound ethical basis and a magnificent economic efficiency defense, are unlikely to claim that the unevenly distributed dollars that result should be the basic unit of demand in elections as well as in the economy. Political representation is not just another service to be purchased in the regular market for goods and services. Gottlieb's magisterial acceptance of the current distribution of wealth as the "baseline" for political representation is not likely to prove morally persuasive to many readers.

Gottlieb is quite successful in showing that equality is something of a will-o'-the-wisp in a modern, industrialized representative democracy. That is not the same as getting us to love political ine-

26. See Gottlieb, *supra* note 1, at 238-78.

27. See Gottlieb, *supra* note 1, at 226 n. 63.

28. See generally R. NOZICK, ANARCHY, STATE AND UTOPIA (1974). Those interested in such an exercise may see one in Richard Epstein's work on takings. See generally R. EPSTEIN, TAKINGS (1985).

quality. Lowenstein's attempt to brand the observed inequalities "corruption" is essentially a rhetorical device designed to label what we have as bad and thus in need of "reform," without fully facing up to the complexities which Gottlieb addresses. By calling various inequalities corruption we can ignore the risks to freedom that are endemic in the pursuit of equality.

Ultimately the Gottlieb/Lowenstein confrontation presents the classic first amendment problem. In the body of free speech as it lives among us we can identify many pathologies, from pornography to the excessive political influence of the rich. We are persuaded that the world would be a better place if the pathologies were excised. The question is how much we trust the surgeon. With distaste and even anguish, we decide to endure certain pathologies because we do not wish to sharpen the knives of the governors. Of course, the more we hate the pathology, the greater risk we will take. Gottlieb seeks to show us that meat axe reforms do not really excise the pathology but only change the disease manifestation, favoring incumbents over non-incumbents and Republicans over Democrats.²⁹ Lowenstein counters with a set of scalpels that will cut more finely, getting rid of some of the evil without further contributing to it.³⁰ The difficulty remains that those designing and using the new knives will be persons whose skill and disinterest are hardly above reproach.

Americans enjoy an ambivalent relationship with freedom of speech. They believe in it for the good guys but not for the bad guys. There was a time when the bad guys were the left and the hated danger was "subversion." Today the bad guys are on the right and the danger is "corruption." The game is always one in which, "on balance" some fine tuned limitations on speech are justifiable in the name of some important social value. Liberals were dismayed when the Supreme Court "balanced" Dennis and Barenblatt into prison.³¹ Yet, almost the entire first amendment literature produced by liberal academics in the past twenty years has been a literature of regulation, not freedom—a literature that balances away speech rights. It consists of an endless and sophisticated attack on naive libertarianism. Its basic strategy is to treat freedom of speech not as an end in itself, but an instrumental value, instrumental either to democracy or community. If speech is instrumental, then it invariably follows that

29. See Gottlieb, *supra* note 1, at 216-28.

30. See Lowenstein, *supra* note 1, at 360-64.

31. See *Barenblatt v. United States*, 360 U.S. 109 (1959); *Dennis v. United States*, 341 U.S. 494 (1951).

whatever limitations on speech contribute to democracy or community are justifiable and indeed desirable. Lowenstein provides a standard example. The speech of the rich is to be limited because it is, after all, not free speech but democracy in which we are interested. Gottlieb's response is only that despite the fact it is democracy which concerns us, limitations on campaign financing do more harm to democracy than good.

In such distinguished academic company, I would not dare to suggest that freedom of speech ought to remain unregulated, but I would suggest that a very particular danger arises from giving elected governors an increasingly fine tuned control over the rules that determine the outcomes of elections.