Hofstra Law Review

Volume 18 | Issue 2 Article 6

1989

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In this campaign finance Symposium, Stephen Gottlieb and Daniel Lowenstein present the latest of their important contributions[1] to the debate about what is almost certainly the most pressing first amendment issue of our time—the ability of the state apparatus to control the structure of elections whose main ostensible purpose is, of course, to select those who will become officials of the state apparatus.[2] This contribution will be limited,[3] raising questions in response to each of their thought-provoking essays, rather than engag-

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1. 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. This language may put off some who would prefer language like "the ability of the public" to "the ability of the state apparatus" and who would prefer "who will become public officials" to "who will become officials of the state apparatus." No language, of course, is truly neutral in its connotations. I reject the former language because it presupposes far too easily that "the public" genuinely controls legislative decisions about electoral structures and that the persons elected view themselves as true "public" servants.

"The public" is clearly a reified entity; there is no "public" that decides or elects. There are constellations of groups that purport to act in the name of "the public" and thus seize the legitimacy that comes today through reference to that notion. *See, e.g.*, E. MORGAN, INVENTING THE PEOPLE (1988) (exploring these concepts in detail). Contemporary "public choice" theory joins classical Marxism in its skepticism of the ability of state officials to serve some abstract "public interest." *See* J. DIGGINS, THE LOST SOUL OF AMERICAN POLITICS 96-97 (1984).

The term "state apparatus" may go too far in the other direction insofar as it serves to suggest that there is nothing special about the state, in terms of theoretical analysis or political legitimacy, as opposed to any other organizational apparatus. This should underscore the extent to which the debate about campaign finance is about nothing less than the nature and legitimacy of the modern state.

3. My prior contribution to the electoral regulation and first amendment debate consists of a fairly short review of Elizabeth Drew's book, *Politics and Money*. *See* Levinson, *Regulating Campaign Activity: The New Road to Contradiction*, 83 MICH. L. REV. 939 (1985) (reviewing E. DREW, POLITICS & MONEY: THE NEW ROAD TO CORRUPTION (1983)). Professor Lowenstein pays me the compliment of attacking my viewpoints expressed in that book review on several occasions. *See* Lowenstein, *supra* note 1, at 301 n.3, 346 n.199.

ing in a full-scale analysis of the issues involved. The essays of Gottlieb and Lowenstein are significantly different in style and argument. I find each frustrating, though for different reasons.

I. DANIEL LOWENSTEIN AND THE POLITICS OF "INTEREST"

Here, as in all of his writings, Lowenstein makes a number of important arguments very well. He persuades me that some comments I have previously made[4] might have been too glib. Over the last five years, I have become more willing to countenance arguments that the way we fund elections has deleteriously affected the nature of democracy within the United States.[5] I read Professor Lowenstein's article with a significant degree of sympathy. Yet, if I have become agnostic—rather than militantly atheistic—regarding the issue of regulating campaign finance, Lowenstein's arguments do not move me any further toward conversion to the status of a genuine believer.

In particular, I remain unpersuaded by any analysis that expresses justified worry about the impact of money on the behavior of public officials and, at the same time, wholly ignores the power of the media[6] to influence these same public officials in part through the media's ability to structure public consciousness. Almost a decade ago my colleague, L.A. Powe, queried why Congress should be able to limit the ability to influence the outcomes of elections of everyone, except those fortunate enough to be owners of mass media.[7] One would have thought that in the ensuing years supporters of cam-

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4. Levinson, *supra* note 3.

5. I write these words in early October, 1989, shortly after the House of Representatives voted for a scandalous reduction in the tax rate applied to capital gains. I cannot believe sixty-four Democrats would have voted for this bill—thereby presenting a gift principally to the well-off—if they were not so dependent on campaign contributions from that sector of the population which is most likely to benefit from the bill. I expect Republicans to vote for the interests of the rich. The fact that approximately one-quarter of the Democrats followed that vote calls out for an explanation. *See* Reich, *Have the Democrats Lost their Soul? Yes: Blame Election Funds*, N.Y. Times, Oct. 12, 1989, at 21, col. 1.

6. The power of the media flows from the economic resources prerequisite to ownership. *Cf.* Powe, *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243, 244 n.1 (stating that "[a]lthough there are no Supreme Court cases to prove it, Presidents—from George Washington on—were hounded and bothered not by puny anonymities but by people who knew how to use whatever form of mass communication was at hand.").

7. *See id.* at 267-68 (asserting that the problem of "drowning out" opposing viewpoints by television media could be remedied by federal regulations; however, regulating newspapers in such a manner was constitutionally prohibited); *see also* Tushnet, *Corporations and Free Speech*, in THE POLITICS OF LAW 253 (D. Kairys ed. 1982) (discussing the role of media and corporations in the marketplace of ideas).

paign finance limitations and supporters of an unfettered press might have attempted to answer Powe's query, but this has not occurred. It may be true that my reference to the disproportionate role played by celebrities[8] is "overdrawn or of little practical significance,"[9] but, I do not think that is the case with television networks, major newspapers and other forms of mass media. The potential for conflicts of interests at the heart of Lowenstein's analysis[10] is also present when a candidate confronts the owners and editors of major newspapers on issues and when such a candidate beseeches the same owners and editors to support to his or her campaign. There are many ways "to tempt men and women to stray not only from their ethical responsibilities but from their own highest interests . . . ."[11] The offer of cash is only one of them. I do not expect Professor Lowenstein, or anyone else, to present a fully " 'coherent and consistent theory' "[12] of politics or even of the first amendment, but I do expect more than he offers. This expectation comes *not* from a desire for intellectual elegance for its own sake, but because the role of mass media is of "systemic significance."[13]

I should, of course, discuss the paper and proposal that Lowenstein did write, rather than criticize him for not writing a quite different paper. In reviewing the solution Lowenstein proffers to solve some of the problems presented by financing congressional elections, I note that he is placing extraordinary confidence in congressional leadership for the proper distribution of campaign funds.[14] I do not have that same confidence for two different reasons.

The first reason is purely political and concerns the wisdom of Lowenstein's proposal as a matter of public policy. I severely doubt the political wisdom of placing so much raw power in the hand of relatively few men (and I use the gender term advisedly) who currently head, or seem likely in the near future to head, the respective political parties in Congress. Still, it is possible that further reflection would lead me to believe that Lowenstein can answer this objection. However, that resolution only brings up the second reason for a lack of confidence in Lowenstein's proposal—the sheer implausibility of

8. Levinson, *supra* note 3, at 948-50.

9. Lowenstein, *supra* note 1, at 301 n.3.

10. *See id.* at 322-29 (discussing the campaign finance question as a conflicts of interests problem).

11. *Id.* at 302.

12. *Id.* at 302.

13. *Id.* at 301 n.3.

14. *See id.* at 351-55 (utilizing congressional leadership in Lowenstein's proposals).

its adoption. Given the extraordinary fragmentation that, for better and almost certainly for worse, characterizes our party system, I find it next to inconceivable that Congress might vote for a scheme that would instantly transfer significant power from back-bench legislators to senior congressional leaders.

To offer such reservations about Lowenstein's analysis is by no means to "refute" it. However, by his own admission, Lowenstein's article is far more an elaborate and richly worked-out policy proposal than an attempt to present a " 'coherent and consistent theory' " of the First Amendment.[15] A full response to Lowenstein's analysis would require far more immersion in the specific literature cited. I merely register these caveats.

II. The Abstracted Libertarianism of Stephen Gottlieb

I am in a strange position regarding Professor Gottlieb's long and learned article expressing "The Dilemma of Election Campaign Finance Reform."[16] On one hand I tend to agree with its libertarian thrust and its suspicion about the constitutionality of most, if not all, of suggested campaign finance "reforms."[17] On the other hand, I am disturbed at the tone of the article which seems unnecessarily and implausibly complacent, and unwilling to recognize the possible legitimacy of concerns expressed by many thoughtful observers regarding the realties and consequences of contemporary electoral financing.[18] There are moments when Gottlieb seems to doubt that *any* state-imposed changes on the current electoral regime would pass constitutional muster.[19] At other times, Gottlieb appears to doubt that *any* change would be desirable as a matter of political theory—regardless of constitutionality.[20] To the extent that there are imperfections, all of them, at least as expressed by Gottlieb, seem to be those regulations we now tolerate, such as contribution limits, rather than the consequences of the lack of regulation, such as those

15. *See id.* at 301-02 n. 3.

16. *See* Gottlieb, *supra* note 1.

17. *See id.* at 216-17, 279-80.

18. I find myself with some of the same feelings I often have when I discuss "the adversary system" in my professional responsibility course. Many students believe that this rather inchoate term refers to *exactly* the system in existence in Texas on that date, and that *any* proposal for change is viewed *not* as a relatively minor modification of what will remain "the adversary system," but rather a proposal to junk entirely the "adversary system" and replace it with some presumably totalitarian alternative.

19. *See* Gottlieb, *supra* note 1, at 228.

20. *See id.* at 298-99.

outlined by Professor Lowenstein.

Although I have argued that much "reform" is properly viewed as unconstitutional,[21] the tone of Gottlieb's article made me wish to tack in the opposite direction and argue that the reform is constitutional. It is simply too complacent about the glories of a relatively unregulated campaign-contribution market, and I want to resist his blandishments.

There can be no doubt that Professor Gottlieb's argument rests on a remarkable faith in the marketplace.[22] There are at least two problems worth mentioning. The first problem relates to the reification of the term "the market economy."[23] We are not told the precise contours of "the market economy" and why we should accept it as "defin[ing] a baseline."[24] Even if "the market economy is treated as a public interest worth protecting,"[25] does this mean that the present constellation of campaign regulation is precisely the right mix so that all deviations therefrom (at least in the direction of greater regulation) are unconstitutional? According to Gottlieb, "[t]he market system appears to provide a justification for economic inequalities sufficiently compelling that they need not be dismantled to satisfy the requirements of democratic political processes."[26] However, regulation does not entail dismantling unless a great many thoroughly libertarian assumptions that only a particular version of nineteenth century *laissez-faire* is a "genuine" market economy or system can be smuggled in.

As Cass Sunstein and my colleague, Jack Balkin, have pointed out, we have been through all of this at least once before in regards to arguments that the legitimacy of a mildly redistributive welfare state grew out of political developments in the early twentieth century.[27] As a political matter, we accepted a redistributive welfare

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21. *See* Levinson, *supra* note 3, at 954-48.

22. In fairness to Professor Gottlieb, he does distance himself from "any *a priori* preference for a market solution to democratic problems or any general faith in [the] fairness" of market outcomes. Gottlieb, *supra* note 1, at 227 n.63. Nonetheless, he continues to endorse "the market system . . . as a compelling governmental interest." *Id.*

23. *See id.* at 226 n. 63, 232-34; *see also supra* note 19 (discussing the reification of "the adversary system," a similar term).

24. Gottlieb, *supra* note 1, at 226 n.63.

25. *Id.*

26. *Id.* at 297.

27. *See* Balkin, Some Realism About Pluralism: Deconstructive Approaches to the First Amendment (forthcoming in the April 1990 issue of the Duke Law Journal); Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 877 (1987) (discussing Lochner v. New York, 198 U.S. 45 (1905), which involved a regulation enacted by the state "prohibiting employers from per-

state out of a desire to tame the ravages of a market economy.[28] This development required, to the great dismay of constitutional conservatives, that the Supreme Court and ultimately our general legal culture dismiss what had theretofore been altogether plausible arguments based on traditional readings of the contract clause or of the notion of "freedom of contract" that had been deemed, for at least two generations, part of the "liberty" protected by a strong notion of due process.[29] The question is whether we are now undergoing an analogous process in taming what are widely thought to be the ravages of an unregulated political economy.[30]

Gottlieb is correct that the dominant strand of American political and constitutional culture justifies some kind of market economy—and its attendant inequalities.[31] The key question is what particular justifications are proferred for these inequalities. The answer lies in the proposition that more goods are produced efficiently with the incentives of profits and the disincentives of losses. Many argue, moreover, that the maintenance of some kind of private-property system linked to a market structure is instrumental to maintaining a requisite degree of political liberty.[32] This argument was made by many of our eighteenth century "republican" forbears.[33] However, many of them were also vigorous critics of the commercial, consumption-oriented and egoistic society that they saw developing on the

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mitting or requiring bakers to work for more than sixty hours in one week.").

28. *Cf.* Sunstein, *supra* note 27, at 881-83 (arguing that the intervention of the Supreme Court to redistribute wealth in *Lochner*, 198 U.S. at 45, was a recognition of the inequitability of use of the free market as a baseline for measure of the constitutionality of political interference into previously private matters).

29. *See, e.g.*, West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (upholding a minimum wage law directed at women).

30. *See* Fiss, *Why the State?*, 100 HARV. L. REV. 781, 788 (1987) (stating that "[t]he market may be splendid for some purposes, but not . . . for producing the kind of debate that constantly renews the capacity of a people for self-determination."); Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1419-13 (1986) (stating that "[t]he market—even one that operates smoothly and efficiently—does not assure that all relevant views will be heard, but only those advocated by the rich, by those who can borrow from others, or by those who can put together a product that will attract sufficient advertisers or subscribers to sustain the enterprise."). *But see* Powe, *Scholarship and Markets*, 56 GEO. WASH. L. REV. 172, 186 (1987) (arguing that Fiss' conception of a regulated marketplace of ideas has no constitutional basis and its essentially a case of "the tail wagging the dog.").

31. *See* Gottlieb, *supra* note 1, at 286-90; *see also id.* at 296-98 (stating that "[t]he market system appears to provide a justification for economic inequalities which are sufficiently compelling that they need not be dismantled . . . .").

32. *See generally* M. FRIEDMAN, CAPITALISM AND FREEDOM (1982).

33. *See* J. DIGGINS, *supra* note 2, at 97.

horizon.[34] Alexander Hamilton was more the exception than the rule in his joyful acceptance of the prospect of political dominance by the wealthy.[35] More often, the wealthy were distrusted and much thought was given to constructing institutional mechanisms to limit their influence. Almost no one believed that there should be no bounds to what winning or losing could mean.[36]

An important modern statement of this perspective can be found in Michael Walzer's *Spheres of Justice*.[37] Walzer discusses various "spheres" of society and argues that our culture distinguishes among these spheres on the basis of the appropriateness of monetary resources controlling the distribution of goods found within each sphere.[38] For example, we might adopt a principle of allocating non-subsistence food by financial resources in order to provide, among other reasons, incentives for persons to work harder in order to eat steak instead of equally nutritious beans and yogurt. Similar arguments might be made for vacationing in exotic places and wearing designer clothes. However, Walzer attacks any facile reliance on market mechanisms of distribution of such commodities as health and educational services.[39] I have criticized Walzer for his failure to address the problem of campaign finance in view of the difficulties it poses for his general theory,[40] but I have little trouble accepting the general distinctions among goods and services. Gottlieb argues tendentiously when he suggests that support of a market economy for some purposes logically entails acceptance of its dominance in all aspects of society.[41] One must demonstrate, rather than assert, that what are relatively modest changes in the way we finance elections would truly diminish the freedoms we enjoy in American society.

Gottlieb is correct in saying that "limitations on campaign fi-

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34. The most dramatic example is provided by John Adams who detested the nascent capitalists found on Boston's State Street and joined in the widespread suspicion of the implications for republican governance of a "commercial" sensibility. *See id.* at 349. As pithily summarized by John Patrick Diggins, "Adams suspected the rule of money and the temptations of affluence." *See id.* at 55.

35. *See id.* at 339 (noting that "[t]he framers wisely distrusted the pretensions to altruism and benevolence of all classes, and thus Adams and Madison placed checks on Hamilton's 'rich, well-born, and able.' ").

36. *See* J. DIGGINS, *supra* note 2, at 334-46.

37. M. WALZER, SPHERES OF JUSTICE (1983). Among other arguments, Walzer suggests that capitalists will become tyrants if not opposed by government. *See id.* at 316-18.

38. *See id.* at 119-22.

39. *See id.*

40. *See* Levinson, *supra* note 3, at 946.

41. *See* Gottlieb, *supra* note 1, at 286-90.

nance require more justification than popular approval. It is necessary to ascertain that they do not damage popular control."[42] However, Gottlieb's notion of ascertainment is bereft of empirical reference. One consequence of Gottlieb's argumentative approach is that the reader might be lead to believe that the existing status quo is not only *consistent with* an acceptable theory of democratic decision making (which may be true), but also a *necessary condition* for decision making to be called "democratic" (which is surely implausible). Would Gottlieb seriously argue that Canada, the United Kingdom, Sweden, Norway, West Germany and Israel (to take some non-random examples), cannot be described as sufficiently "democratic" because all have adopted electoral-regulation schemes significantly different from our laissez-faire process? If I am correct that Gottlieb would not describe each and every one of these countries as inferior to the United States in its commitment to electoral democracy, then perhaps he should rethink the extent of his opposition to most suggested changes in the present scheme of electoral regulation. At the very least, a comparative dimension would deepen his analysis and serve as a valuable corrective to the classic ethnocentrism that characterizes these, as well as many other debates in the United States.

There is at least one occasion when Gottlieb undercuts his overall argument by virtue of a specific example within the United States. Consider Gottlieb's professed optimism in the jury system.[43] The conclusion that "juries generally reach the correct conclusions,"[44] cuts against Gottlieb's general libertarianism inasmuch as the process by which juries get information is controlled in ways that would clearly violate the first amendment if generalized beyond the jury forum. Imagine, for example, a public official empowered to decide if certain arguments were irrelevant,[45] prejudicial[46] or merely cumulative,[47] not to mention having to qualify as an expert witness.[48] Gottlieb's esteem for the jury similarly contradicts his statement that "restrictions on information makes matters worse, to the extent that rationality is possible."[49]

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42. *Id.* at 251-52.
43. *Id.* at 266.
44. *Id.*
45. *See* FED. R. EVID. 401.
46. *See* FED. R. EVID. 403.
47. *See id.*
48. *See* FED. R. EVID. 702.
49. Gottlieb, *supra* note 1, at 270; *see also id.* at 272 (pronouncing a "restricted envi-

The last thing I want to do is argue from the example of information flow to the jury to any general theory of electoral information flow. But at the very least, the example should make us aware of some of the limits of purely "principled," formal argument. Gottlieb tries to maintain a preserve for old-fashioned formalism in an era where almost all constitutional law has become a balancing process.[50] As hard as it is to admit, I no longer find first amendment formalism more persuasive than formalism drawn from other, less favored, clauses.

The principal focus of Gottlieb's analysis is limitation on the amounts of campaign contributions and spending.[51] There is one important collateral issue that Gottlieb leaves almost undiscussed: compelled disclosure of campaign contributors. "[T]he justification of the first amendment is, in relevant part, that it helps to inform popular government."[52] I agree with this statement. But why would not disclosure mechanisms then be especially justifiable as means of maximizing relevant information? Does the electorate need information only about a limited range of views and the justifications thereof, or might information that a candidate is receiving a great deal of financial support from particular contributors with significant stakes in particular political outcomes be immensely valuable to the electorate? At the very least, it is highly paternalistic to suggest that a public desiring such information really does not need it and would be better off without it.

Although I believe that *Buckley v. Valeo*[53] is a truly terrible decision insofar as it upheld compelled disclosure of contributions over $100 and record-keeping of contributions over $10,[54] I have no problems with compelled disclosure of contributions over, say, $1000. The reason for objecting to compelled disclosure is the possibility of retaliation against a vulnerable person for supporting an unpopular candidate or position. I find it hard to imagine that anyone who can afford a $1000 contribution is going to be particularly vulnerable. In any event, the electorate is entitled to know who are the substantial supporters of candidates for public office. I don't know whether Got-

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ronment less rational than an unrestricted one.")

50. *See generally* Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (expressing distinct unhappiness with this trend).

51. *See generally* Gottlieb, *supra* note 1.

52. *Id.* at 247.

53. 424 U.S. 1 (1976).

54. *See id.* at 62.

tlieb would accept such disclosure.

III. Conclusion

Anyone writing within the genre of comments will necessarily concentrate on the weaknesses of the analyses rather than on its strengths; I have certainly done that here. However, I am certain that the articles by Professors Lowenstein and Gottlieb have much to teach any careful reader. I am also confident that Professors Lowenstein and Gottlieb will continue to play important roles in the presumably unending debates over the propriety of changes in the way we finance our political campaigns. That being said, I am not confident that these particular articles have moved the debate very far forward.