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## CHAPTER 4

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# ELECTION LAW AND EMPIRICAL SOCIAL SCIENCE

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## I. INTRODUCTION

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SOCIAL scientists have been studying and writing about elections for nearly one hundred years. As early as 1929, Joseph Harris, a political scientist, published a report of his interviews with election officials and his canvas of state laws and processes to lay out a set of suggestions for running effective voter registration.<sup>1</sup> In 1948, survey researchers at the University of Michigan began canvassing a national sample of respondents every two years about their political views in an attempt to better understand whether and how American elections facilitated the implementation of public opinion into law. This survey project would later be renamed the American National Election Studies (ANES) in 1977 and continues to this day.<sup>2</sup> In the middle of the twentieth century, several economists introduced important theorems and proofs about the mechanics and role of American elections from the median voter theorem<sup>3</sup> to the rational voter theory<sup>4</sup> to a proof that no electoral system can accurately convert the ranked preferences of individual voters into coherent and public preferences<sup>5</sup> to a public choice theory account

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<sup>1</sup> Joseph P. Harris, *Registration of Voters in the United States* 65–88 (1929).

<sup>2</sup> “ANES History,” *Am. Nat’l Election Stud.*, <https://electionstudies.org/about-us/history/> (last visited Mar. 24, 2023).

<sup>3</sup> Duncan Black, *On the Rationale of Group Decision-Making*, 56 *J. Pol. Econ.* 23 (1948).

<sup>4</sup> Anthony Downs, *An Economic Theory of Democracy* (1957) (positing, among other things, that individuals will vote when the benefits of voting outweigh the costs).

<sup>5</sup> Kenneth Arrow, *Social Choice and Individual Values* (1951). Arrow’s argument is often referred to as “Arrow’s Impossibility Theorem.”

of political institutions such as bicameral legislatures, agencies, and special interests.<sup>6</sup> In the 1960s, two political scientists published an influential study of electoral responsiveness, highlighting the conditions when members of Congress listen to their constituents and when they do not.<sup>7</sup> At the same time, a separate team of political scientists released the seminal volume *The American Voter*, which provided the most detailed demographic breakdown of voters ever published, and explored the ways that these voters formed and expressed their political preferences.<sup>8</sup> During this same era, sociologists were also thinking about the relationship between partisan preferences and demographics. One prominent example is Leo Goodman who, in 1959, proposed an innovative regression model for estimating the voting preferences of different racial groups.<sup>9</sup>

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The study of election law as a formal discipline did not really develop until the 1980s and 1990s, when legal scholars began to write about election law issues in a sustained and systematic way. One of the primary features of this early scholarship was its attempt to distinguish election law from more conventional frameworks in constitutional law.<sup>10</sup> Up to that point, challenges to election laws that denied or abridged or diluted the right to vote were met by judges who generally applied a rights and equality framework: asking whether restrictions on voting *rights* were substantial or incidental, and asking whether election rules and regulations had an *unequal* impact on voters. The burgeoning election law literature in the late twentieth century recognized that the rights/equality framework of constitutional law was germane to questions about voting rights, campaign finance, election administration, and the like, but the literature also argued that the rights/equality framework was incomplete and insufficient. Early election law scholars argued that election law was as much about the organization of power—the *structure* of institutions and the political *process*—as it was about individual rights and notions of equality. Concerns about incumbent entrenchment,<sup>11</sup> the hydraulics of money in politics,<sup>12</sup> or the malleability of ballot initiatives<sup>13</sup> could not be properly addressed by asking whether the rights of individual voters had been abridged or whether voters had been treated unequally. Instead, some of these scholars encouraged courts to examine the extent of political competition, the relationship between campaign finance and governance, and the decision calculus of voters. Enter the research of empirical social scientists.

<sup>6</sup> James M. Buchanan & Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (1962).

<sup>7</sup> Warren E. Miller & Donald E. Stokes, *Constituency Influence in Congress*, 57 *Am. Pol. Sci. Rev.* 45 (1963).

<sup>8</sup> Angus Campbell et al., *The American Voter* (1960).

<sup>9</sup> Leo S. Goodman, *Some Alternatives to Ecological Correlation*, 64 *Am. J. Soc.* 610 (1959).

<sup>10</sup> See Heather K. Gerken, *What Election Law Has to Say to Constitutional Law*, 44 *Ind. L. Rev.* 7 (2010) (summarizing the early history and development of the field of election law).

<sup>11</sup> See, e.g., Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Political Process*, 50 *Stan. L. Rev.* 643 (1998).

<sup>12</sup> See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 *Tex. L. Rev.* 1705 (1999).

<sup>13</sup> Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 *UCLA L. Rev.* 936 (1983).

As Richard Hasen wrote in his Introduction to the 1999 Symposium “Election Law as Its Own Field of Study,” election law spawned from “very different parents, constitutional law and political science.”<sup>14</sup>

**C4P3** Election law remains unquestionably a conglomeration of law and social science, but the field has far from unified these elements. A stylized account of election law would place lawyers and legal scholars on one pedestal, steeped in the doctrinal intricacies of the political process but lacking a facility with the methods of social science and perhaps even scared of numbers. On a second pedestal sits empirical social scientists whose quantitative and qualitative research is motivated by the doctrinal fault lines of election law, but whose findings often suggest that legal problems can be solved with numbers rather than values.

**C4P4** This chapter discusses the gap between these two pedestals. The story of election law’s relationship with empirical social science is not entirely disjointed, but neither is it a major success story. For example, empirical social science has played a central role in the protection of minority voting rights but has been viewed more skeptically in cases dealing with voter fraud and partisan gerrymandering. The Supreme Court has been receptive to social science research in cases about voting technology and ballot design, but it has largely discounted this evidence in cases related to the regulation of Super PACs and the organization of primary elections. In other words, the record is mixed, with the caveat that lower courts have been more receptive to empirical social science than the Supreme Court. This is especially true in federal district courts whose job is largely a fact-finding one that requires them to engage with data and experts. State courts have also shown a willingness to engage with social science research, even in cases where federal courts have not—for example, in the partisan gerrymandering context. Political actors and advocacy organizations are also receptive to, and often commission, empirical social science research in the pursuit of more effective public policies and regulations.

**C4P5** Looking to the future, it will not be constructive for legal scholars and jurists to dismiss important research as “sociological gobbledygook”<sup>15</sup> just because it is imperfect and evolving. On the other hand, social scientists should refrain from overselling empirical findings as the crux of every jurisprudential puzzle, and instead be more responsive to the law by recognizing what questions courts are asking and what questions they are *not* asking. In addition, social scientists should also recognize that sometimes courts make judgments as a matter of law, meaning the doctrine is value based and will control, even when evidence suggests the court may have gotten the facts wrong. Indeed, data, methods, and findings might prove necessary in many cases, but they will

<sup>14</sup> Richard L. Hasen, Introduction, *Election Law at Puberty: Optimism and Words of Caution*, 32 *Loy. L.A. L. Rev.* 1095 (1999). *See also* Daniel H. Lowenstein, *Election Law as a Subject—A Subjective Account*, 32 *Loy. L.A. L. Rev.* 1199 (1999) (noting that election law “falls at junctures formed by other subjects, especially constitutional law in law schools and public law and American politics in political science departments.”) (internal quotations omitted).

<sup>15</sup> Transcript of Oral Argument at 37–40, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161), 2017WL 4517131 (statement of Chief Justice John Roberts).

rarely be sufficient. Furthermore, judges are humans and, given the politics of judicial appointments and elections, more likely to be political animals than data scientists. Instead of criticizing judges for being hypocritical or narrow-minded, social scientists might consider new ways to help these same judges understand their research—both the premise of their methods and the limit of its reach.

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## II. ROLE OF EMPIRICAL SOCIAL SCIENCE IN ELECTION LAW

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There are several ways in which empirical social science interacts with election law. In some cases, social science has provided answers to important jurisprudential questions, often at the request of courts. In other cases, social science research has questioned the conclusions of judges, politicians, and legal scholars. This “myth busting” social science has sometimes even raised questions about the very inquiries that courts and scholars have raised in the first place. A few examples (which are hardly an exhaustive catalog) illustrate these different relationships.<sup>16</sup>

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### A. Answering Questions

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The most natural relationship between election law and empirical social science occurs in cases where courts have solicited empirical research to answer important jurisprudential questions. To be sure, when a court signals its intent to incorporate social science evidence in its decisions, the level of deference to this evidence varies greatly, and it is quite rare for empirical social science evidence to be dispositive of underlying legal questions. Instead, social science evidence is more typically invoked to inform the legal standards that form a court’s opinion. In any event, what links these cases together is the fact that courts and social scientists are in conversation with each other.

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#### 1. *Voting Rights Act*

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Consider the case of minority voting rights. Section 2 of the Voting Rights Act of 1965 (VRA) guarantees that the political system should be equally open to racial/ethnic minorities and white voters so that all voters have an equal opportunity to elect candidates of their choice. In 1986, the U.S. Supreme Court was asked to review a lower court’s decision holding that North Carolina had drawn new legislative districts in such a way that Black voters were “submerge[ed] as a voting minority” and thus had

<sup>16</sup> The organization of this section and its subheadings draws inspiration from Pamela S. Karlan, *Answering Questions, Questioning Answers, and the Roles of Empiricism in the Law of Democracy*, 65 *Stan. L. Rev.* 1269 (2013).

“less opportunity to participate in the political process and to elect candidates of their choice.”<sup>17</sup> The logic of the decision was that in multimember districts with at-large elections, “where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters.”<sup>18</sup> Relying on this logic, the U.S. Supreme Court held in *Thornburg v. Gingles* that in order for plaintiffs to successfully enforce Section 2 of the VRA, they must first show that they would potentially be able to elect candidates of their choice in single-member districts. This threshold inquiry adopted by the Court has two prongs. Plaintiffs must show that (1) the minority voters in question are sufficiently large in number and geographically compact so that a single-member district could be drawn around them, and (2) there is racially polarized voting, meaning that minority voters prefer different candidates than white voters.<sup>19</sup> If plaintiffs can make this showing to the satisfaction of a judge, then the case can proceed to a “totality of the circumstances” inquiry whereby plaintiffs may provide additional evidence that the election law or practice in question “interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives.”<sup>20</sup>

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The Supreme Court acknowledged that its threshold questions and its interpretation of the totality of circumstances should be predicated on empirical social science. In practice, social science has become foundational in VRA litigation as geographers present maps to satisfy the first *Gingles* prong; political scientists provide statistical analysis and public opinion polling to satisfy the second *Gingles* prong; and sociologists, historians, and other social scientists provide testimony about the social and historical conditions of the case. While judges retain the authority to determine whether this evidence satisfies legal standards, their determination is crucially informed by the empirical social science presented. Moreover, empirical social science has been useful to courts as they encounter new claims, such as challenges to voting rules that dilute the voting rights of *coalitions* of minority groups (where no single group is large enough to satisfy the first prong above), or whether multimember districts and/or ranked-choice voting can secure the same guarantee under Section 2 as single-member districts.<sup>21</sup> In short, VRA litigation provides a nice example of courts asking for social science evidence and social science scholars presenting that evidence. Individual judges in individual cases are not always convinced by the parties’ experts, but Section 2 cases provide a nice example of election law cases where the evidentiary framework is rooted in empirical social science.

<sup>17</sup> *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986).

<sup>18</sup> *Id.* at 48.

<sup>19</sup> More specifically, the Court articulated two subparts of the second *Gingles* prong: (1) that minority voters are cohesive in their political preferences and vote choices, and (2) that these choices are usually defeated due to white bloc voting.

<sup>20</sup> *Gingles*, 478 U.S. at 47.

<sup>21</sup> For a historical discussion of some of these issues, see Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. Rev. 1517 (2002).

C4S5 2. *Campaign Finance*

C4P10 A second case illustrates a slightly different relationship between election law and empirical social science. In *Nixon v. Shrink Missouri Government PAC*, the U.S. Supreme Court upheld the state of Missouri's campaign contribution limits.<sup>22</sup> Plaintiffs had argued that the contribution limits infringed on their free speech rights and, under a strict scrutiny analysis, were not narrowly tailored to preventing corruption because the state had provided no empirical evidence of political corruption or a risk of corruption. The Eighth Circuit had invalidated the contribution limits, agreeing with plaintiffs that a state cannot merely assert an interest in preventing corruption but must also present "some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place."<sup>23</sup> The Supreme Court reversed the Eighth Circuit and rejected the notion that "governments enacting contribution limits must demonstrate that the recited harms are real, not merely conjectural."<sup>24</sup> The Court wrote that "the quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."<sup>25</sup> According to the facts of the case, Missouri's justification for the law was not novel (having been recognized by the Supreme Court twenty-four years earlier in *Buckley v. Valeo*) and the majority assumed that the relationship between campaign contributions and corruption was quite plausible, writing "there is little reasons to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters."<sup>26</sup>

C4P11 As a more general matter, in response to the Court's statement that social science is germane to the disposition of campaign finance cases, several social scientists have focused their research on questions that speak to the core doctrinal fault lines of campaign finance—for example, scholarship about the historical evidence of the nature of corruption,<sup>27</sup> the relationship between contribution limits and incumbent protection,<sup>28</sup> the effect of out-of-state contributions on a candidate's position-taking and voting,<sup>29</sup> survey research on perceptions of corruption,<sup>30</sup> fundraising strategies and spending behaviors

<sup>22</sup> *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000), *rev'g* *Shrink Mo. Gov't PAC v. Adams*, 161 F.3d 519 (8th Cir. 1998).

<sup>23</sup> *Shrink Mo. Gov't PAC v. Adams*, 161 F.3d 519, 521 (8th Cir. 1998).

<sup>24</sup> *Nixon*, 528 U.S. at 392 (internal quotations omitted).

<sup>25</sup> *Id.* at 378.

<sup>26</sup> *Id.* at 395.

<sup>27</sup> See, e.g., Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* (2016).

<sup>28</sup> See, e.g., Thomas Stratmann, *Do Low Contribution Limits Insulate Incumbents from Competition?*, 9 *Election L.J.* 125 (2010).

<sup>29</sup> See, e.g., Brandice Canes-Wrone & Kenneth M. Miller, *Out-of-District Donors and Representation in the U.S. House*, 47 *Leg. Stud. Q.* 361 (2022).

<sup>30</sup> See, e.g., David M. Primo & Jeffrey D. Milyo, *Campaign Finance and American Democracy: What the Public Really Thinks and Why It Matters* (2020); Rebecca L. Brown & Andrew D. Martin, "Rhetoric and Reality": Testing the Harm of Campaign Spending, 90 *N.Y.U. L. Rev.* 1066 (2015); Douglas



of Super PACs,<sup>31</sup> the relationship between small donors and political polarization,<sup>32</sup> and the effects of disclosure on informed voting and voter turnout.<sup>33</sup> In practice, courts are somewhat idiosyncratic in the way they interpret this evidence, in part because the Supreme Court signaled in *Nixon v. Missouri Shrink* that empirical evidence is especially relevant when a state's asserted interest is novel or implausible, and most campaign finance regulations are predicated on well-established and accepted state interests.<sup>34</sup> The mixed reception of empirical evidence in campaign finance cases is also due to the fact that legal opinions in First Amendment cases are often driven by value judgments about the structure of government as much as by concerns about the effectiveness of any particular regulation.

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### 3. *Partisan Gerrymandering*

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Courts have long grappled with the question of how to rein in partisan gerrymandering. In several cases, the U.S. Supreme Court has acknowledged that some level of partisan gerrymandering is tolerable (perhaps even expected) because partisan affiliation is not a protected class and so winning coalitions have a relatively wide latitude when drawing districts. Between 1986 and 2019, the Supreme Court held that while *some* level of partisan gerrymandering might be tolerated, a redistricting plan that penalized the minority party too much would be unconstitutional.<sup>35</sup> How much is “too much?” Unfortunately, the Court did not say. In 2003, the Supreme Court considered the question whether Pennsylvania's congressional districts had been gerrymandered too much. A majority of the Court failed to coalesce around a legal standard or an empirical standard for distinguishing when the harm of gerrymandering was too much to tolerate. In his plurality opinion, Justice Kennedy wrote: “That no such standard has emerged in this case should not be taken to prove that none will emerge in the future.

M. Spencer & Alexander G. Theodoridis, “Appearance of Corruption”: Linking Public Opinion and Campaign Finance Reform, 19 *Election L.J.* 510 (2020); Nathaniel Persily & Kelli Lammie, Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law, 153 *U. Pa. L. Rev.* 119 (2004).

<sup>31</sup> See, e.g., Conor M. Dowling & Michael G. Miller, Super PAC! Money, Elections, and Voters After *Citizens United* (2014); Paul S. Herrnson, Jennifer A. Heerwig & Douglas M. Spencer, The Impact of Organizational Characteristics on Super PAC Financing, in *The State of the Parties, 2018: The Changing Role of Contemporary American Political Parties* (John C. Green, Daniel J. Coffey & David B. Cohen eds. 2018).

<sup>32</sup> See, e.g., Richard H. Pildes, Small-Donor-Based Campaign-Finance Reform and Political Polarization, 129 *Yale L.J. F.* 149 (2019); Raymond J. La Raja, Campaign Finance and Partisan Polarization in the United States Congress, 9 *Duke J. Const. L. & Pub. Pol'y* 223 (2014).

<sup>33</sup> See, e.g., Abby K. Wood, Christopher S. Elmendorf & Nicholas G. Napolio, Mind the (Participation) Gap: Vouchers, Voting, and Visibility, 50 *Am. Pol. Res.* 623 (2022). For an overview of the scholarship on campaign finance disclosure, see Abby K. Wood, Campaign Finance Disclosure, 14 *Ann. Rev. L. & Soc. Sci.* 11 (2018).

<sup>34</sup> These state interests include preventing corruption or the appearance of corruption, promoting informed voting, and the right to democratic self-governance.

<sup>35</sup> See, e.g., *Davis v. Bandemer*, 478 U.S. 109 (1986).

Where important rights are involved, the impossibility of full analytical satisfaction is reason to err on the side of caution.”<sup>36</sup>

C4P13

Social scientists were quick to respond to Kennedy’s plea for a new empirically driven standard. Two years after *Vieth*, the Supreme Court was asked to evaluate the congressional map in Texas against allegations that it was drawn to maximize partisan advantage (among other things). Four prominent political scientists submitted an amicus brief, arguing that the Court’s prior metrics were flawed because they relied on proxies for fairness whereas “social scientists do not use proxies to measure the existence and extent of partisan bias. Instead, they have defined a clear and appropriate standard for what constitutes partisan fairness. It is called the symmetry standard.”<sup>37</sup> The partisan symmetry standard (“the subject of scholarly work for at least three decades”<sup>38</sup>) asked whether the results of an election in gerrymandered districts would be different if the out-party had been in charge.<sup>39</sup> Thus, the question whether a state had gerrymandered “too much” would not look at the disparity between a party’s vote share and the number of seats it won but instead on the *asymmetrical disparity* between the parties’ political fortunes in hypothetical counterfactual elections. This method of partisan symmetry was discussed favorably in two separate opinions, with Justices Stevens and Souter citing directly to these scholars’ amicus brief. Justice Kennedy also cited to this brief and acknowledged the “utility [of partisan symmetry] in redistricting planning and litigation” but noted that “we are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.”<sup>40</sup>

C4P14

In 2015, Eric McGhee and Nicholas Stephanopoulos published an article outlining a new metric that eschewed hypothetical elections for actual election data.<sup>41</sup> This new metric, the “Efficiency Gap,” aggregated the total number of wasted votes for each party in a given election to identify the skew in a redistricting plan.<sup>42</sup> A federal court

<sup>36</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 311 (2004).

<sup>37</sup> Brief of Professors Gary King, Bernard Grofman, Andrew Gelman, and Jonathan Katz as Amici Curiae Supporting Neither Party, *LULAC v. Perry*, 548 U.S. 399 (2006) (No. 05-204), at \*4. See also Bernard Grofman & Gary King, The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after *LULAC v. Perry*, 6 Election L.J. 2 (2008) (defending partisan symmetry in the wake of *LULAC v. Perry*).

<sup>38</sup> Brief of Gary King et al. as Amici Curiae Supporting Neither Party, *supra* note 37, at \*6.

<sup>39</sup> For example, if Democrats drew the lines in such a way that when they won 55 percent of the vote, they captured 70 percent of the seats, the authors argued that there would be no constitutional violation as long as Republicans would also capture 70 percent of seats if they won 55 percent of the vote.

<sup>40</sup> *LULAC v. Perry*, 548 U.S. 399, 420 (2006).

<sup>41</sup> Nicholas O. Stephanopoulos & Eric M. McGhee, Partisan Gerrymandering and the Efficiency Gap, 82 U. Chi. L. Rev. 831 (2015).

<sup>42</sup> Wasted votes are those that do not contribute to the winning candidate’s victory. The Efficiency Gap measures wasted votes as the sum of all votes for the winning candidate above 50 percent plus one vote, plus all votes for the losing candidate. By aggregating wasted votes, the Efficiency Gap metric captures the effects of both cracking and packing districts. Cracked districts are more competitive and so the number of wasted votes for the losing candidate is higher. Packed districts are safe and so the number of wasted votes for the winning candidate is higher. The Efficiency Gap metric aggregates across all districts



relied on the Efficiency Gap in 2016 to strike down a congressional redistricting plan in Wisconsin—the first federal court to strike down a map in more than thirty years.<sup>43</sup> In determining that the Wisconsin legislature had gerrymandered “too much,” the court compared the Efficiency Gap of the challenged map to the distribution of Efficiency Gap scores for all state legislative elections in single-member districts in the United States between 1972 and 2014 and found that the Wisconsin map was an outlier.

**C4P15** This evidence was ultimately abandoned in a later Supreme Court case, *Rucho v. Common Cause*.<sup>44</sup> Although four Justices endorsed the outlier analysis approach for answering the “too much” question, the five-Justice majority dismissed the approach as unmanageable, holding that the issue of partisan gerrymandering was too fraught and thus nonjusticiable in federal courts.<sup>45</sup>

**C4P16** While the cooperation of empirical social scientists and legal scholars proves insufficient to shape the law in federal court, the Efficiency Gap and the outlier method have proven manageable to state courts that have stepped in to fill the gap in some cases.<sup>46</sup>

#### **C4S7** 4. *Election Administration*

**C4P17** In the wake of the closely contested 2000 presidential election, the U.S. Supreme Court held that the recount in Florida could only proceed if the state adopted a uniform standard for recounting contested ballots. Because election administration is highly decentralized—with many decisions about voting technology, ballot design, and counting ballots made at the county and local level—voters in different jurisdictions had different odds as to whether their votes were counted. In *Bush v. Gore*, the Supreme

and reports whether one party has benefited from the mix of cracking and packing in a particular districting plan.

<sup>43</sup> Whitford v. Nichol, 218 F. Supp. 3d 837 (W.D. Wis. 2016).

<sup>44</sup> 139 S. Ct. 2484 (2019).

<sup>45</sup> Chief Justice Roberts wrote the majority opinion in *Rucho*. In an earlier case, Roberts referred to the Efficiency Gap and other empirical metrics as “sociological gobbledygook” that would confuse the public and undermine the legitimacy of the courts. See Transcript of Oral Argument at 40, Gill v. Whitford, 138 S. Ct. 1916 (No. 16-1161) (“the whole point is you’re taking these issues away from democracy and you’re throwing them into the courts pursuant to, and it may be simply my educational background, but [what] I can only describe as sociological gobbledygook.”). Earlier during the oral argument in that case, the Chief Justice also stated:

[If] you’re the intelligent man on the street and the court issues a decision, and let’s say, okay, the Democrats win, and that person will say: “Well, why did the Democrats win?” And the answer is going to be because EG was greater than 7 percent, where EG is the sigma of party X wasted votes minus the sigma of party Y wasted votes over the sigma of party X votes plus party Y votes. And the intelligent man on the street is going to say that’s a bunch of baloney. It must be because the Supreme Court preferred the Democrats over the Republicans. And that’s going to come out one case after another as these cases are brought in every state. And that is going to cause very serious harm to the status and integrity of the decisions of this court in the eyes of the country.

*Id.* at 37.

<sup>46</sup> For example, state courts in North Carolina, Maryland, New York, and Ohio have done this.

Court held that between-county disparities in voting, driven largely by the different voting technology in each county, violated the Equal Protection Clause of the U.S. Constitution.<sup>47</sup> The majority held that:

- C4P18** The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, but later arbitrary and disparate treatment, value one person's vote over that of another.<sup>48</sup>
- C4P19** As in the case of gerrymandering above, the Supreme Court offered little by way of a standard for determining when the value of one person's vote was arbitrarily valued over somebody else's.<sup>49</sup> Unlike the case of gerrymandering, however, state and federal courts have coalesced around a workable standard for evaluating disparate rates of ballot rejection by geography and race. In the immediate aftermath of the 2000 election, CalTech and MIT announced a collaborative project to assess the breakdowns in election administration during the 2000 election. The project's first report evaluated the disparate effects of voting technology on ballot rejection and relied on the "residual vote rate" metric, which captures the percentage of ballots that are uncounted, or that feature undervotes (when a voter fails to mark a choice or votes for fewer than the prescribed number of candidates) and/or an overvote (when a voter marks a choice for more than the prescribed number of candidates).<sup>50</sup> The authors of this report began to publish academic articles that relied on the residual vote rate,<sup>51</sup> and courts ultimately adopted this standard to determine whether certain voting technology unconstitutionally burdened the right to vote in violation of the Due Process Clause, and unconstitutionally treated different classes of voters differently in violation of the Equal Protection Clause.<sup>52</sup>
- C4P20** As the foregoing examples illustrate, the Supreme Court has sometimes nodded at the idea that empirical social science could be useful for answering important questions and empirical social scientists have responded by presenting evidence that targets these questions. In some cases, the Court has been very receptive to this evidence and in other cases the reception has been mixed. In every case, however, the Court has been in conversation with empirical social scientists. This symbiotic relationship does not exist across the board. Indeed, there are other examples where empirical social science has been used to confront or challenge legal decisions and reasoning.

<sup>47</sup> *Bush v. Gore*, 531 U.S. 98, 103 (2000).

<sup>48</sup> *Id.* at 104–05.

<sup>49</sup> *Id.* at 109 ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

<sup>50</sup> R. Michael Alvarez et al., *Voting: What Is, What Could Be*, CalTech/MIT Voting Technology Project (July 1, 2001), <https://vote.caltech.edu/reports/1>.

<sup>51</sup> See, e.g., R. Michael Alvarez, Stephen Ansolabehere & Charles Stewart III, *Studying Elections: Data Quality and Pitfalls in Measuring of Effects of Voting Technologies*, 33 *Pol'y Stud. J.* 15 (2005); R. Michael Alvarez et al., *The Complexity of the California Recall Election*, 37 *Pol. Sci. & Pol.* 23 (2004).

<sup>52</sup> See, e.g., *Stewart v. Blackwell*, 356 F. Supp. 2d 791 (N.D. Ohio 2004).

## C4S8 B. Questioning Answers

C4P21 Court opinions are usually framed as providing answers to important legal questions. Because these answers have real-world consequences, judges sometimes speak to those consequences in their opinions. Political actors likewise issue proclamations and prognostications about the impacts of important decisions. Empirical social science research has sometimes raised questions about these claims. Two examples from the Supreme Court's campaign finance jurisprudence are illustrative.

### C4S9 1. *Foreign Corporate Political Activity*

C4P22 One week after the Supreme Court announced its decision in *Citizens United v. Federal Election Commission*, President Obama delivered his State of the Union address and criticized the majority opinion, arguing that it would “open the floodgates for special interests, including foreign corporations, to spend without limit in our elections.” President Obama continued, “I don’t think American elections should be bankrolled by America’s most powerful interests, or worse, by foreign entities.” As Congress roared its approval, Justice Samuel Alito, sitting in the second row, shook his head and said, “not true.” While Alito was responding to Obama’s mischaracterization of *Citizens United* as overturning one hundred years of precedent (thus suggesting the Court was not merely overturning its 1990 decision in *Austin v. Michigan Chamber of Commerce* but also the Tillman Act of 1907), social science has challenged some of Obama’s substantive critiques of the Supreme Court. For example, while studies have shown that *Citizens United* shifted the partisan balance in state legislatures,<sup>53</sup> entrenched incumbents,<sup>54</sup> and shaped policy outcomes<sup>55</sup> in ways that likely benefit the Republican Party, corporate political expenditures have not significantly increased,<sup>56</sup> the corporate political activity that has emerged has proved harmful to shareholders,<sup>57</sup> and foreign contributions and expenditures remains rare.<sup>58</sup> *Citizens United* remains a primary target of Democrats,

<sup>53</sup> Tilman Klumpp, Hugo M. Mialon & Michael A. Williams, *The Business of American Democracy: Citizens United, Independent Spending, and Elections*, 59 J.L. & Econ. 1 (2016); Nour Abdul-Razzak, Carlo Prato & Stephane Wolton, *After Citizens United: How Outside Spending Shapes American Democracy*, 67 Electoral Stud. 102190 (2020).

<sup>54</sup> Raymond J. La Raja & Brian F. Schaffner, *The Effects of Campaign Finance Spending Bans on Electoral Outcomes: Evidence from the States About the Potential Impact of Citizens United v. FEC*, 33 Electoral Stud. 102 (2014).

<sup>55</sup> Timothy Werner & John J. Coleman, *Citizens United, Independent Expenditures, and Agency Costs: Reexamining the Political Economy of State Antitakeover Statutes*, 31 J.L. Econ. & Org. 127 (2014); Timothy Werner, *The Sound, the Fury, and the Non-Event: Business Power and Market Reactions to the Citizens United Decision*, 39 Am. Pol. Res. 118, 123–27 (2011).

<sup>56</sup> Douglas M. Spencer & Abby K. Wood, *Citizens United, States Divided: An Empirical Analysis of Independent Political Spending*, 89 Ind. L.J. 315 (2014).

<sup>57</sup> John C. Coates, *Corporate Politics, Governance, and Value Before and After Citizens United*, 9 J. Empirical Legal Stud. 657 (2012).

<sup>58</sup> Douglas M. Spencer, *Corporations as Conduits: A Cautionary Note About Regulating Hypotheticals*, 47 Stetson L. Rev. 225 (2018) (noting that undisclosed political spending—where foreign spending could potentially be hiding—represents less than 5 percent of all political spending).

both rhetorically as a symbol of a “rigged political game”<sup>59</sup> and strategically as a justification to amend the U.S. Constitution.<sup>60</sup> And the opinion is worthy of attention as its central holding is rooted in the false notion that independent expenditures cannot corrupt candidates and the flawed assumption that the Federal Election Commission will mete out punishments if/when they do. Nevertheless, empirical social science has cast doubt on the specific allegation that *Citizens United* has opened the floodgates for foreign corporations to bankroll America’s elections.

## C4S10 2. *Joint Fundraising Committees*

C4P23 In *McCutcheon v. Federal Election Commission* (2014), the Supreme Court invalidated the federal law that limited the amount of money individuals could contribute to federal candidates in the aggregate. The Federal Election Campaign Act of 1971 established limits on contributions that could flow to individual candidates *and* limits on the amount of money that donors could spend in the aggregate. These limits were adjusted in the Bipartisan Campaign Reform Act of 2002 and tied to inflation. By 2014, an individual donor could give up to \$5,200 to a single federal candidate, and up to \$48,600 to all federal candidates combined (or the maximum contribution to approximately nine candidates). Both the individual limits and the aggregate limits were motivated by a desire to prevent corruption or the appearance of corruption. The individual limits were intended to prevent *quid pro quo* transactions and the aggregate limits were intended to prevent donors from circumventing the individual limits by giving a maximum contribution to a candidate and then giving money to other candidates, or perhaps to a political action committee that turns around and makes a contribution to the first candidate. In 2012, a wealthy donor from Alabama and the Republican National Committee filed a lawsuit in federal court challenging the aggregate limit as a violation of the First Amendment because it was a restriction of their First Amendment right to make political expenditures. The district court dismissed the complaint, arguing that contributions to parties and political action committees were more akin to contributions than expenditures because “the aggregate limits do not regulate money injected directly into the nation’s political discourse; the regulated money goes into a pool from which another entity draws to fund its advocacy.”<sup>61</sup> The Supreme Court reversed the lower court in a 5–4 decision, holding that “spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder’s official duties, does not give rise to *quid pro quo* corruption.”<sup>62</sup> The dissent pointed out how easy it would be for political parties to establish joint fundraising committees to facilitate

<sup>59</sup> Senator Elizabeth Warren, Floor Speech on the Influence of Money in Politics, U.S. Senate (Jan. 21, 2016), [https://www.warren.senate.gov/files/documents/2016-1-21\\_Warren\\_Floor\\_Speech\\_on\\_Money\\_in\\_Politics.pdf](https://www.warren.senate.gov/files/documents/2016-1-21_Warren_Floor_Speech_on_Money_in_Politics.pdf).

<sup>60</sup> Press Release, Congressman Adam Schiff, Congressman Schiff Introduces Constitutional Amendment to Overturn *Citizens United* (Mar. 24, 2022), <https://schiff.house.gov/news/press-releases/congressman-schiff-introduces-constitutional-amendment-to-overturn-citizens-united>.

<sup>61</sup> *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012), *rev’d* 572 U.S. 185 (2014).

<sup>62</sup> 572 U.S. 185, 208 (2014).

circumvention in the absence of aggregate limits. Chief Justice Roberts, writing for the majority, held that the proliferation of joint fundraising committees was possible, but seemed unlikely. The proper answer, according to Roberts, was that “this sort of speculation cannot justify the substantial intrusion on First Amendment rights at issue in this case.”<sup>63</sup>

**C4P24** Empirical evidence has challenged the Court’s answer in *McCutcheon*. In the years leading up to *McCutcheon*, the number of joint fundraising committees (JFCs) had grown significantly. In 2004, 167 JFCs raised \$110 million. In 2008, 238 JFCs raised \$510 million and in 2012, 452 JFCs raised \$1.1 billion.<sup>64</sup> By 2020, 882 JFCs had raised \$2.6 billion, including several “jumbo JFCs.”

**C4P25** As these two examples illustrate, judges and political actors sometimes misunderstand the impacts of important cases. This is particularly true in the context of campaign finance, driven largely by the fact that the Supreme Court held in *Buckley v. Valeo* (1976) that contributions to candidates are conceptually distinguishable from expenditures made on behalf of candidates, such that the latter cannot be regulated. Social science research has shown that contributions and expenditures are not as distinguishable as the Court suggested in *Buckley* and reiterated in both *Citizens United* and *McCutcheon*. Even if there was a robust and effective firewall separating campaigns from independent expenditure-only groups (commonly referred to as Super PACs), research has shown how campaigns and Super PACs benefit each other. For example, Super PACs are able to raise money on the name recognition of candidates and candidates are able to substitute Super PAC spending for their own, even though the Super PACs spending is legally required to be independent. How? When a Super PAC expressly advocates for the defeat of one’s opponent, or runs issue ads that complements one’s campaign, or spends money on get-out-the-vote campaigns, then candidates don’t have to. Because campaigns are almost 100 percent liquid, to the extent that Super PAC expenditures benefit a campaign in some way (setting aside concerns about coordination), the value of these expenditures acts as a substitute; campaigns now have more money in their accounts for other expenses.

## **C4S11** C. Questioning Questions

**C4P26** Underlying judicial opinions that announce a legal rule or standard are certain assumptions about which social science scholarship has raised questions. Three examples are illustrative and raise an important question: if a court’s holding is grounded in a particular understanding of the world or on a particular empirical assumption that turns out to be false or to change over time, how should the court’s holding be interpreted going forward?

<sup>63</sup> *Id.* at 218.

<sup>64</sup> “Joint Fundraising Committees,” Open Secrets, <https://www.opensecrets.org/jfc/> (last visited Jan. 20, 2023).

C4S12 1. *Voter Turnout*

C4P27 A growing number of legal challenges allege that certain election laws and practices infringe on the right to vote.<sup>65</sup> Some of the most prominent examples involve voter ID laws, but challenges have also been raised in response to changes in absentee ballot rules, early voting periods, mail-in voting procedures, and rules related to assisting voters with their ballots. To evaluate these claims, courts typically estimate the effect of the challenged laws on turnout. Relying on turnout as a metric for voter suppression might be intuitive, but it is incomplete. Turnout is not the only measure of a law's harmful effect on voters. Consider a rule that prohibits anybody from voting if they are wearing a hat. It might prove difficult to measure the effect of this rule using turnout statistics, even though the prohibition is admittedly problematic. Consider a separate rule that prohibits anyone from voting unless they voted in the most recent presidential election. The overall effect on turnout would likely be negligible and yet more than eighty million eligible voters would be formally disenfranchised.<sup>66</sup> By recognizing that turnout is an incomplete measure of vote suppression, legal scholars and judges might broaden the scope of their inquiry into burdens that might not be reflected in raw turnout numbers. Indeed, voting is just one way to participate in the political process. Even more, as Emily Rong Zhang has written: "understanding an election law's suppressive effects solely through turnout evidence ignores burdens that voters take on to comply with onerous laws, as well as mounting barriers that further discourage disaffected individuals from voting."<sup>67</sup>

C4S13 2. *Contribution Limits and Incumbency*

C4P28 In 1997, the state of Vermont enacted a law that lowered its campaign contribution limits for state office. Under the new law, an individual could contribute no more than \$200 to a single candidate for the state house of representatives in a given election, no more than \$300 to a single candidate for the state senate, and no more than \$400 to a single candidate for statewide office. Political parties were also subject to these same contribution limits, which were the lowest in the country at the time and were not indexed for inflation. These contribution limits were challenged in federal court as a violation of the First Amendment. Although the contribution limits were upheld by a federal district court and a panel of judges on the Second Circuit, the U.S. Supreme Court held that Vermont's contribution limits violated the First Amendment because they were too low.<sup>68</sup> In particular the Court worried that "contribution limits that are too low

<sup>65</sup> See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

<sup>66</sup> I thank Justin Levitt for these examples. See @\_justinlevitt\_ Twitter (Apr. 4, 2021), [https://twitter.com/\\_justinlevitt\\_/status/1378776175774851081](https://twitter.com/_justinlevitt_/status/1378776175774851081). In the 2020 presidential election, 160 million people voted out of a pool of 240 eligible voters. See 2020 November General Election Turnout Rates, U.S. Elections Project, <https://www.electproject.org/2020g>.

<sup>67</sup> Emily Rong Zhang, *Questioning Questions in the Law of Democracy: What the Debate over Voter ID Laws' Effects Teaches Us About Asking the Right Questions*, 69 *UCLA L. Rev.* 1028 (2022–2023).

<sup>68</sup> *Randall v. Sorrell*, 548 U.S. 230 (2006).



can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.”<sup>69</sup> In other words, the Court viewed Vermont’s contribution limits as a kind of incumbent protection. The logic of the Court was that lower contribution limits require candidates to appeal to more donors, and incumbents have an advantage in mobilizing more donors because of their name recognition and their established field operations, and that by raising more money, incumbents would wage more effective campaigns and win more often. Two empirical assumptions are implicit in the Court’s logic: (1) incumbents will be more effective at reaching a larger audience, and (2) more money necessarily translates into more effective political campaigns. Neither of these two empirical assumptions is obvious. For example, it is quite possible that incumbents will be more effective at mobilizing a larger donor pool. Incumbents often have more name recognition, evidence that they can win the election (having already done so in the past), and perhaps a legislative record that is popular. On the other hand, it is quite possible that incumbents will be more effective at mobilizing a *richer* donor pool (which is effective when contribution limits are high) instead of a *larger* donor pool (as required when contribution limits are low). Indeed, a state might consider lowering contribution limits precisely to reward grass-roots candidates over wealthy, well-connected ones. This shift would hardly reduce democratic accountability. With respect to effective campaigns, it is possible that candidates with more money run more effective campaigns. Indeed, campaigning is not free. Advertisements, travel, and field operations require money. On the other hand, it is possible that a campaign war chest is not a precise proxy for effective campaigning. Some candidates (incumbent and challenger alike) might be telegenic and therefore most effective on expensive advertising media like TV and radio. Other candidates (incumbent and challenger alike) might be more effective on social media where political advertising is cheap or even free. Likewise, incumbents and challengers may have different motivations for raising money. Some may hope to build a war chest for future races, some may want to raise money in order to leverage power over others, and some may want to raise money to get famous regardless of an election’s outcome. All of this speaks to individual candidate choices and complicates the Court’s more structural logic in *Randall*.

C4P29

What has social science shown with respect to these competing hypotheses? More specifically, are the empirical assumptions at the foundation of *Randall v. Sorrell* borne out in the real world? In particular, do we see higher incumbency rates in states with lower contribution limits (what the *Randall* court identified as the primary risk factor of a First Amendment violation)? Do we see more challengers in states with higher contribution limits? The answer is no.<sup>70</sup> In fact, there is very little correlation between a state’s contribution limit and its incumbency reelection rate, even when controlling for

<sup>69</sup> *Id.* at 248–49 (2006) (internal quotations and citations omitted).

<sup>70</sup> See, e.g., Thomas Stratmann, Do Low Contribution Limits Insulate Incumbents from Competition?, 9 Election L.J. 125 (2010).

important anti-incumbency features such as term limits and independent redistricting commissions.

**C4S14** 3. *The Cost of Campaigning*

**C4P30** In *Buckley v. Valeo*, the Supreme Court opined on the value of money for promoting political speech, writing that:

**C4P31** A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.<sup>71</sup>

**C4P32** The Court's argument that less money *necessarily* reduces the quantity of expression in political campaigns might have been true in 1976, but it is almost certainly false today. It is possible that candidates with less money will promote fewer ideas or reach fewer people than candidates with more money. But it is not necessarily the case that candidates with smaller bank accounts will be less effective. In fact, the Supreme Court recognized that its holding was predicated on the means of communication in the 1970s, writing that "the electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech." The advent of the internet and rise of social media has changed this calculation. In 1995, Eugene Volokh laid out the implications of this "cheap speech," noting that candidates would be able to speak more directly to voters with less money, and that the potential to target people would lead candidates to "avoid alienating [voters] with shallower commercials." Volokh concluded that "the demassification of the mass media will substantially change the way both products and politicians are advertised. To the extent advertising is important to political campaigns, these changes ought to be considered."<sup>72</sup> It is not altogether clear whether America's cheap speech has been democracy enhancing. But it has dramatically increased the diversity of information and lowered the cost of obtaining this information in a way that challenges the continued reliance on *Buckley's* holding that expenditure limits *necessarily* limit the quantity and quality of political speech.

**C4P33** In considering these three examples, how should the Court's opinions be viewed going forward? More broadly, to the extent that judicial opinions are rooted in certain assumptions about the world—from the behavior of donors, candidates, and incumbents to the institutional arrangements for enforcement to reliance on vote suppression (turnout) as a proxy for voter suppression—empirical findings that these assumptions are misplaced or incomplete might spur new challenges and open the door

<sup>71</sup> *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

<sup>72</sup> Eugene Volokh, *Cheap Speech and What It Will Do*, 104 Yale L.J. 1805, 1843 (1995).

for the Supreme Court to overturn its own precedent on the issue.<sup>73</sup> To date, the Court has not entertained invitations to revisit *Crawford v. Marion County* or *Randall v. Sorrell* or *Buckley v. Valeo*, despite empirical social science that has raised questions about the questions the Court is asking in the first place.

C4S15

### III. THE PROMISE AND PERIL OF THINKING LIKE A SOCIAL SCIENTIST

C4P34

In 2017, Chief Justice Roberts infamously disparaged the core empirical evidence that a lower court had used to strike down a partisan gerrymander, referring to it as “sociological gobbledygook” during oral argument in *Rucho v. Common Cause*. To be sure, the metric that Roberts criticized was not a perfect metric, nor had it ever been presented as such. Political scientists and mathematicians had also criticized the metric for its inability to diagnose every gerrymander under every condition. Feeling inadequate and unqualified to judge the merits of a contested quantitative metric, Justice Roberts opted for a dismissive pejorative. (Justice Breyer echoed a similar criticism later during the oral argument.) This posture toward social science by America’s preeminent jurists and legal scholars—whether borne of genuine social science illiteracy, faux intellectual humility, or even open hostility toward expert analysis—was unfortunate and unnecessary. Few quantitative or qualitative metrics are perfect, but that does not mean they should be ignored or scorned. Instead, legal scholars, lawyers, and judges ought to debate the relevance of empirical analyses, warts and all, to the legal questions at hand. To that end, lawyers and judges will need to engage more deeply with empirical social science research, keep an eye out for methodological *limits* of this research, and consider the implications of those limits for the law. Consider the examples in the next sections.

C4S16

#### A. Racially Polarized Voting Analysis

C4P35

A core inquiry under the VRA is whether there is evidence of racially polarized voting. Because voting is a private act, it is impossible to know for certain how individuals cast their ballots. How is it possible, then, to estimate the preferences of white or minority voters when their individual identity is not known? Exit polls and surveys are one way to match the demographic characteristics of a voter with his or her vote choice, but these surveys do not exist for most elections (state legislative, county commission, city council, school board, etc.); nor do reliable surveys of federal elections exist in most

<sup>73</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (explaining that the Court will revisit its precedent when, inter alia, “facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.”).

states prior to 2003. The typical VRA lawsuit features experts who compare pooled demographic data from the census to pooled voting data at the precinct level. This analysis suffers from the ecological inference fallacy, which cautions against labeling individuals based on aggregated group data. In some cases, the method of comparison presumes that individuals who live in racially integrated precincts have identical preferences to individuals who live in highly segregated precincts. In all cases, the underlying geography is accepted at face value, and any history of redlining or discriminatory zoning is baked into the model unquestioned. These are not minor flaws<sup>74</sup> but they need not be fatal. Courts currently rely on these data as a threshold diagnostic, and require additional witness testimony and/or survey data to corroborate the diagnosis before they consider liability under the VRA. The limitations of the data and methods yield limitations in their application.

## C4S17 **B. Money and Politics**

C4P36 The social science literature on money in politics consistently shows that legislator preferences are very similar to the preferences of their donors. This same literature varies considerably with respect to the causal arrow: are legislators' voting preferences dictated by their donors, or do donors choose to support candidates with whom they already agree? It is very difficult, if not impossible for social science to definitively answer the question whether money buys votes since donors are understandably hesitant to randomly give money to candidates, and disclosure laws currently prevent analysts from observing millions of dollars in transactions. However, there are some very nice field experiments that show how candidates can essentially increase their support with expansive get-out-the-vote (GOTV) and persuasion campaigns. Of course, it is not corruption for a candidate to buy votes with a rich GOTV or persuasion campaign, but knowing that money is really valuable to candidates for these purposes implies that rational candidates might do shady things if necessary to get the money. In other words, where data and methods prevent a direct analysis, they can sometimes provide evidence of indirect effects and/or help elucidate incentive structures that might be relevant to a judicial inquiry.

## C4S18 **C. Roll Call Votes and Ideology**

C4P37 A substantial political science literature measures the representativeness of America's government (and the ideological and distributional implications of various policy proposals) using roll call votes to generate ideology scores for individual legislators.

<sup>74</sup> See Christopher S. Elmendorf, Kevin M. Quinn & Marissa J. Abrajano, *Racially Polarized Voting*, 83 U. Chi. L. Rev. 587, 645–72 (2016).

The methodology for generating these ideal points has important limits. First, roll call votes represent the last step of a complex and strategic process, while some of the most important decisions about a bill are made during the legislative drafting process and the agenda setting protocol.<sup>75</sup> Second, because ideal points are an aggregative measure of roll call votes, it takes time for young legislators to build a record of voting sufficient to generate reliable ideal points. Without a long voting record, some first- and second-term legislators with the most extreme or polarizing politics will appear as moderate before they have a chance to actually vote and develop a record that matches their rhetoric.<sup>76</sup>

**C4P38** With these caveats in mind, this methodology can be quite powerful. The same mechanics for generating ideal points for legislators can be replicated for individuals using survey data on policy issues. Once voters and legislators are mapped into one “common space,” researchers can perform some very nice analysis. For example, at a very basic level, we can observe the extent to which representatives are aligned with their constituents<sup>77</sup> as well as the potential effects of electoral reform efforts. For example, several efforts are currently afoot to incentivize campaigns that are funded by many small donors as opposed to a few wealthy donors. Supporters of these reforms (e.g., publicly financed elections, lowering contribution limits, vouchers, and matching programs) claim that the wealthy who have historically financed campaigns are not representative of the underlying population, and that small donors will push candidates to more moderate positions. Social science research has shown that the opposite is true and that small donors are more polarized than large donors.<sup>78</sup> At the same time, research has shown that small dollars benefit non-white non-male candidates.<sup>79</sup> In other words, roll call data can prove useful to illustrate the heterogeneous effects of reforms: negative consequences might be offset by countervailing salutary effects. In the case of campaign donors, for example, reforms might be both democratizing *and* polarization (or vice versa).

**C4P39** There is an old adage that the first-year curriculum at American law schools aims to train students how to “think like a lawyer.” As the preceding examples suggest, there is value for lawyers to “think like a social scientist.” And this value is not limited to

<sup>75</sup> See Joshua D. Clinton, Using Roll Call Estimates to Test Models of Politics, 15 Ann. Rev. Pol. Sci. 79 (2012) (discussing the limits associated with this selection effect).

<sup>76</sup> See Jeffrey B. Lewis, Why Is Alexandria Ocasio-Cortez Estimated to Be a Moderate by NOMINATE?, Voteview.com (Jan. 20, 2022), [https://voteview.com/articles/ocasio\\_cortez](https://voteview.com/articles/ocasio_cortez) (describing the relationship between number of roll call votes and their accuracy).

<sup>77</sup> See, e.g., Chris Tausanovitch & Christopher Warshaw, Measuring Constituent Policy Preferences in Congress, State Legislatures, and Cities, 75 J. Pol. 330 (2013); David E. Broockman & Christopher Skovron, Bias in Perceptions of Public Opinion Among Political Elites, 112 Am. Pol. Sci. Rev. 542 (2018).

<sup>78</sup> See, e.g., La Raja, *supra* note 32; Pildes, *supra* note 32; Tyler Culberson, Michael P. McDonald & Suzanne M. Robbins, Small Donors in Congressional Elections, 47 Am. Pol. Res. 970 (2019).

<sup>79</sup> Jacob M. Grumbach & Alexander Sahn, Race and Representation in Campaign Finance, 114 Am. Pol. Sci. Rev. 206 (2020); Abhay P. Aneja, Jacob M. Grumbach & Abby K. Wood, Financial Inclusion in Politics, 97 N.Y.U. L. Rev. 566 (2022).

refuting or sharpening doctrinal inquiries and frameworks. Thinking like a social scientist requires creativity in working with limited data, careful choices when measuring outcomes, and deep thinking about causal mechanisms, all of which are likely to be generative of new ideas that will promote election law in productive ways and contribute to its legitimacy.

C4P40 There are limits to thinking like a social scientist, of course. Empirical social science largely answers positive questions, thus providing a foundation for understanding the current state of affairs and potential counterfactuals. Social science can also, though far less frequently, shed valuable light on interpretative questions (i.e., understanding what the law *means*).<sup>80</sup> On the other hand, social science is far more limited when it comes to normative questions. This is especially true for deep normative questions about public values and the consideration of trade-offs among them. In practice, legal decision-making often involves positive, interpretative, and normative analysis. To maximize the symbiosis of election law and empirical social science, legal scholars should be more open to the value of social science in the first and second categories while social scientists would do well to recognize the limits of their work in the second and third categories.

C4S19

## IV. CONCLUSION

C4P41

From its inception, the modern field of election law has been shaped in important ways by empirical social science. The role that social science has played depends on the particular inquiry and the source of legal authority—social science is often more integral to statutory challenges than to constitutional ones, although there are plenty of exceptions. In general, election law's relationship to social science has been cordial yet cautious. While some courts have voiced a full-throated defense of empirical research, other courts have expressed skepticism, channeling Justice Oliver Wendell Holmes's dissent in *Lochner* that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."<sup>81</sup> If social scientists operate under the adage "I believe it when I see it," then these skeptical judges are more likely to declare "I will see it only after I believe it."<sup>82</sup> The impact of empirical social science on the future of election law will thus depend as much on the circumstances of its invocation as it will on innovative research design or cutting-edge statistical models.

<sup>80</sup> This is especially true when the law is predicated on standards instead of rules. Indeed, when courts adopt bright-line legal rules, they are signaling that future decisions may be made independent of any social science.

<sup>81</sup> *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

<sup>82</sup> I attribute this turn of phrase to Heather Gerken, who made a similar argument at a festschrift in honor of Dan Lowenstein in 2010.



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