

# ANSWERING QUESTIONS, QUESTIONING ANSWERS, AND THE ROLES OF EMPIRICISM IN THE LAW OF DEMOCRACY

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## INTRODUCTION

The law of democracy is a field in which line-drawing is often really important. Sometimes, the lines are literal ones, as with redistricting.<sup>1</sup> Sometimes, the lines are theoretical or doctrinal, as with the much-maligned contribution/expenditure distinction in campaign finance law.<sup>2</sup> So there’s something striking about the fact that the field also blurs many lines that often seem impermeable—between legal scholars and social scientists, between the academy

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1. See Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541 (2004) (discussing conceptual and practical problems with the Court’s analysis of partisan line-drawing in the redistricting process).

2. See Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 747 (2007) (“Save for the notorious crack/powder distinction, it’s hard to think of a line that has been subjected to more withering criticism over the years than [*Buckley v. Valeo*’s] expenditure/contribution distinction.”).

and practice, between doctrine and empiricism, between normative and descriptive. “Always it is by bridges that we live,” the poet Philip Larkin wrote,<sup>3</sup> and those of us who toil in this particular corner of public law cross those bridges every day.

Those bridges are longstanding.<sup>4</sup> Among other precincts, they connect practice and the academy. For example, the National Science Foundation funded a leading empirical study of the effects of the Voting Rights Act that contains a series of state-level studies written jointly by the lawyers who litigated many of the most significant cases and a range of social scientists—among them historians, political scientists, and sociologists—many of whom participated in those cases as expert witnesses.<sup>5</sup> And despite charges that the gap between the academy and the profession has grown so deep that courts no longer read what professors write,<sup>6</sup> that accusation is untrue with respect to the law of democracy.<sup>7</sup>

These connections present an opportunity to reflect on a choice between two very different understandings of what it means to do empirical work. In recent years, some law professors have equated empirical scholarship with statistical analysis.<sup>8</sup> A large number of the papers presented at the Seventh Annual

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3. PHILIP LARKIN, *Bridge for the Living*, in COLLECTED POEMS 203, 204 (Anthony Thwaite ed., 1988).

4. The law of democracy as an “independent field of study” is relatively new. See Burt Neuborne, *Making the Law Safe for Democracy: A Review of “The Law of Democracy Etc.”*, 97 MICH. L. REV. 1578, 1580 (1999) (describing the emergence of the field); see also Symposium, *Election Law as Its Own Field of Study*, 32 LOY. L.A. L. REV. 1095 (1999). Even before the law of democracy emerged as a “unified field,” Neuborne, *supra*, at 1579, however, these connections existed.

5. Chandler Davidson & Bernard Grofman, *Introduction to QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990*, at 4 (Chandler Davidson & Bernard Grofman eds., 1994) [hereinafter QUIET REVOLUTION].

6. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 36 (1992) (observing that “too few” law professors are producing scholarship that has “direct utility for judges”).

7. For recent examples of the Supreme Court citing work by law professors in voting-related cases, see, for example, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009) (quoting Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 208 (2007)); *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (plurality opinion) (citing 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, 1539 (2002)); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 515 (2007) (Souter, J., dissenting) (quoting Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1707 (1999)); and *Vieth v. Jubelirer*, 541 U.S. 267, 279 (2004) (plurality opinion) (quoting SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 886 (rev. 2d ed. 2002)).

8. See, e.g., Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 820-21 (suggesting that it makes sense to restrict “empirical legal scholarship” to the “subset” of work focused on events in the real world “that uses statistical techniques and analyses” to produce “descriptions of or inferences to a larger sample or population as well as replication

Conference on Empirical Legal Studies (CELS) fit this definition. The two papers to which I refer later in this Essay do too,<sup>9</sup> although neither is a large-scale study: they each focus primarily on what happened in a single round of elections. But there is an alternative, more capacious definition of empirical work, interestingly enough offered by two scholars whose own work largely fits within the narrower frame. Lee Epstein and Gary King see empirical scholarship as work concerned with “evidence about the world based on observation or experience.”<sup>10</sup> In their view, “[t]hat evidence can be numerical (quantitative) or nonnumerical (qualitative); neither is any more ‘empirical’ than the other.”<sup>11</sup>

Is there a kind of empirical approach that law or legal training itself offers? Oliver Wendell Holmes famously wrote that “[t]he life of the law has not been logic: it has been experience.”<sup>12</sup> A central contribution that lawyers, both within and outside the academy, have brought to scholarship on the law of democracy has been precisely their professional experience and a qualitative sensibility derived from that experience—what Karl Llewellyn long ago called “situation sense.”<sup>13</sup> Scholars who litigated the doctrine in their cases and worked with social scientists as experts have then written about the doctrine, the evidence, and the theoretical issues that the doctrine and the evidence raise. The law of democracy has been genuinely interdisciplinary for my entire career, and one of the broader lessons we might draw from that history is that law is a distinct discipline with its own contributions to make. It would be a pity if legal scholarship, like much of contemporary political science, were to adopt the view that the only questions worth asking, and the only answers worth giving, are quantitative or based on models so highly stylized that they omit the messy but important lessons of experience.

Bruce Cain, one of the Framers of the field, long ago observed that “the mix of theory to empiricism varies in different types of election law cases as a

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by other scholars” because this “narrow definition” has “the advantage of focusing on one of the more visible and distinct types of empirical legal scholarship and sets it apart from its more traditional theoretical and doctrinal counterparts”); Gregory Mitchell, *Empirical Legal Scholarship as Scientific Dialogue*, 83 N.C. L. REV. 167, 167 (2004) (treating empirical legal scholarship as a scientific enterprise, rather than a form of humanistic inquiry).

9. See Miguel F.P. de Figueiredo et al., *When Do Voters Punish Corrupt Politicians? Experimental Evidence from Brazil* (CELS Version, Nov. 2012); Abby K. Wood & Douglas M. Spencer, *In the Shadows of Sunlight: The Effects of Transparency on State Political Campaigns* (CELS Version, Nov. 2012).

10. Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 2 (2002).

11. *Id.* (footnote omitted).

12. O.W. HOLMES, JR., *THE COMMON LAW* 1 (1881).

13. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 60 (1960) (describing situation sense as involving an understanding of facts “in their context” that is “coupled with whatever the judge or court”—or, for our purposes, the lawyer or law professor—“brings and adds to the evidence, in the way of knowledge and experience and values to see with, and to judge with”); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 397 (1950) (originating the concept).

consequence of the specific constitutional and statutory framework in which the case is embedded.”<sup>14</sup> He pointed to key differences between “the voting/representation cases on the one hand, and the corruption/political association cases on the other.”<sup>15</sup> In the remainder of this Essay, I explore these two areas to show the complex relationship between legal and social scientific approaches to the law of democracy. In the representation cases, legal doctrine has asked a series of questions that social scientific methods are well positioned to answer. Legal scholarship also offers a powerful explanation of why the doctrine came to rely on quantifiable empirical propositions. By contrast, in the campaign finance cases, legal doctrine has offered a set of normative answers that social scientific methods may be well positioned to question. But in both areas, situation sense continues to play an important role in understanding the limits both of doctrine and of quantitative empiricism.

#### I. ONE PERSON, ONE VOTE, RACIAL VOTE DILUTION, AND EMPIRICAL ANSWERS TO JUDICIAL QUESTIONS

The Supreme Court began its foray into the political thicket of political representation by focusing on claims of “quantitative” vote dilution.<sup>16</sup> The Court’s imposition of one person, one vote in *Wesberry v. Sanders*<sup>17</sup> and *Reynolds v. Sims*<sup>18</sup> rendered nearly every state’s existing congressional and legislative apportionment unconstitutional.<sup>19</sup> And by requiring decennial revisitation of the allocation of political power, the requirement of equipopulous apportionment set in motion a series of intended and unintended consequences.

In one sense, *Wesberry* and *Reynolds* were profoundly normative decisions. They adopted a particular (and at the time highly contested) political theory. Justice Douglas could say that “[t]he conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—

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14. Bruce E. Cain, *Election Law as a Field: A Political Scientist’s Perspective*, 32 LOY. L.A. L. REV. 1105, 1106 (1999).

15. *Id.*

16. The quantitative/qualitative vote dilution distinction was first formulated in those terms in *Neveff v. Sides*, 571 F.2d 209 (5th Cir. 1978). “Quantitative” vote dilution cases are “based solely on a mathematical analysis” that shows that the votes of persons in one district are devalued relative to the votes of persons in a less populated district. *Id.* at 215. “Qualitative” vote dilution claims, by contrast, arise when, even though there is population equality across districts, “the election method impairs the political effectiveness of an identifiable subgroup of the electorate” and thus “‘the quality of representation’ the affected group receives is adversely affected.” Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 176 (1989) (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 142 (1971)).

17. 376 U.S. 1, 18 (1964).

18. 377 U.S. 533, 558 (1964).

19. *See id.* at 589 (Harlan, J., dissenting).

one person, one vote,”<sup>20</sup> but as a matter of historical practice, that was simply untrue.<sup>21</sup>

Criticizing that theory, Justice Potter Stewart derided one person, one vote as “the uncritical, simplistic, and heavy-handed application of sixth-grade arithmetic.”<sup>22</sup> Indeed, “there is nothing quite like the rigidly numerical standard of the one-person, one-vote cases anywhere else in constitutional law.”<sup>23</sup>

But as legal scholars long ago observed, the simplistic, quantitative character of the rule was in fact its attraction, once the realities of litigation are taken into account. As Martin Shapiro explained, “[n]o democratic theorist can state flatly and finally just how much of the ‘one man, one vote’ principle should be introduced into American politics. He can only make rough adjustments based on estimates of the political consequences.”<sup>24</sup> One person, one vote might be a naive and crude formulation of political equality, but it enabled the Court to avoid inserting itself too visibly and too repeatedly into the political process. One person, one vote thus served “the institutional needs of the Court.”<sup>25</sup>

When the Supreme Court turned to claims of “qualitative” vote dilution—in particular, claims by black voters in the South that electoral structures such as at-large elections unfairly excluded them from effective political participation—it again faced a “constitutional and historical imperative” to articulate “a judicially manageable standard.”<sup>26</sup> It took essentially a decade for the Court to identify one, and the one it adopted ultimately invoked quantitative social scientific methods. Initially, in *White v. Regester*, the Supreme Court announced a standard for liability that looked to whether “the political processes leading to nomination and election were not equally open to participation by the group in question [in] that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of

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20. *Gray v. Sanders*, 372 U.S. 368, 381 (1963); see also *Reynolds*, 377 U.S. at 558 (majority opinion) (quoting this language).

21. Justice Frankfurter and Justice Harlan offered lengthy empirical rebuttals to this proposition. See *Baker v. Carr*, 369 U.S. 186, 307-18 (1962) (Frankfurter, J., dissenting) (providing a survey of state practices at the time of the Framing and of the ratification of the Fourteenth Amendment); *Reynolds*, 377 U.S. at 603-10 (Harlan, J., dissenting) (same).

22. *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 750 (1964) (Stewart, J., dissenting).

23. Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667, 671 (2002).

24. MARTIN SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE* 244 (1964).

25. Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 248 (1968); cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 121 (1980) (stating, of one person, one vote, that “administrability is its long suit, and the more troublesome question is what else it has to recommend it”).

26. James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 32 (1982).

their choice.”<sup>27</sup> The Court then pointed to a series of essentially qualitative factors—such as a history of racial discrimination and a lack of responsiveness by elected officials to the minority community’s concerns—that supported a finding of liability in that case (which involved legislative districts in Texas). The Court recognized that that standard would demand an “intensely local appraisal of the design and impact” of the challenged election practices “in the light of past and present reality, political and otherwise.”<sup>28</sup> The Fifth Circuit distilled from the Supreme Court’s discussion what came to be known as the *White-Zimmer* factors.<sup>29</sup> These factors governed the adjudication of racial vote dilution cases until the Supreme Court’s decision in *City of Mobile v. Bolden*, which required plaintiffs to prove that the challenged election system had been adopted or maintained for a discriminatory purpose.<sup>30</sup> The discriminatory purpose requirement often demanded, as it did in *Bolden* itself on remand, large-scale qualitative empirical research by historians into the motivations for adopting or maintaining the challenged practices.<sup>31</sup>

Two years after *Bolden*, Congress amended section 2 of the Voting Rights Act of 1965 to institute a results test that looked at “the totality of the circumstances.”<sup>32</sup> The Senate Report accompanying the amendment embraced the *White-Zimmer* factors as the touchstone of a section 2 violation.<sup>33</sup> Because the statutory standard abandoned the requirement that plaintiffs show a discriminatory purpose, most racial vote dilution litigation after the 1982 amendments has proceeded under the statutory, rather than the constitutional, standard.<sup>34</sup>

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27. 412 U.S. 755, 766 (1973).

28. *Id.* at 769-70.

29. *See* *Zimmer v. McKeithen*, 485 F.2d 1297, 1305-07 (5th Cir. 1973) (en banc) (laying out the four primary and four enhancing factors), *aff’d sub nom.* *E. Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976) (per curiam).

30. 446 U.S. 55, 61-65 (1980).

31. *See* *Bolden v. City of Mobile*, 542 F. Supp. 1050, 1056-68, 1074-77 (S.D. Ala. 1982); *see also* Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 23 (2007) (discussing how “on remand the plaintiffs hired three historians to trace the history of Mobile’s election system” by conducting “months of archival work”).

32. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973(b) (2011)).

33. S. REP. NO. 97-417, at 28 n.113 (1982).

34. Indeed, even in cases where the plaintiffs do demonstrate a racially discriminatory purpose, courts usually resolve the case under section 2 rather than under the equal protection clause. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428-29 (2006) (finding a violation of section 2 when the “threat” to an incumbent congressman from an “emergent Latino majority” was “the very reason[] that led [Texas] to redraw the district lines”); *Dillard v. Crenshaw Cnty.*, 640 F. Supp. 1347, 1355-61 (M.D. Ala. 1986) (finding that the use of at-large elections in several Alabama counties violated section 2 because the systems had been adopted and maintained for racially discriminatory purposes).

In *Thornburg v. Gingles*,<sup>35</sup> the Supreme Court imposed a new, three-pronged threshold test for claims of racial vote dilution under section 2. The test was derived essentially from a lengthy scholarly article written by Jim Blacksher and Larry Menefee,<sup>36</sup> who had been the respondents' counsel in *City of Mobile v. Bolden*. Blacksher and Menefee had proposed the following standard: the use of at-large or multimember elections would be unconstitutional when their use "permit[s] a bloc-voting majority, over a substantial period of time, consistently to defeat candidates . . . supported by a politically cohesive, geographically insular racial or ethnic minority group."<sup>37</sup> The Court lifted its test nearly verbatim: "Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group."<sup>38</sup> The three "*Gingles* factors," as they came to be known were, first, that the minority racial group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; second, that the racial group is "politically cohesive"; and third, that the white majority "votes sufficiently as a bloc" so as usually to defeat the minority group's candidate of choice.<sup>39</sup>

The second and third *Gingles* preconditions, taken together, announced a requirement that plaintiffs prove racially polarized voting. It was clear from the very outset that this proof would rest on quantitative empirical social science. In *Gingles*, the plaintiffs had relied on expert testimony from political scientist Bernard Grofman to establish the presence of racial bloc voting. Justice Brennan's opinion pointed to "two complementary methods of [statistical] analysis" that Grofman had used: "extreme case analysis and bivariate ecological regression analysis."<sup>40</sup> Actually, Grofman had used three approaches. In addition to the two statistical methods, he relied on what he colorfully called the "interocular test": did the evidence "jump[] up and hit[] you between the eyes"?<sup>41</sup>

In the aftermath of *Gingles*, plaintiffs used the Court's roadmap to bring a slew of section 2 cases throughout the South and Southwest.<sup>42</sup> These cases required lawyers to work closely with a range of academic experts. Historians,

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35. 478 U.S. 30 (1986).

36. See Blacksher & Menefee, *supra* note 26.

37. *Id.* at 50-51 (italics omitted).

38. *Gingles*, 478 U.S. at 48-49.

39. *Id.* at 50-51.

40. See *id.* at 52-53.

41. Joint Appendix at JA-129, *Gingles*, 478 U.S. 30 (No. 83-1968); see also Bernard Grofman, *What Happens After One Person-One Vote? Implications of the United States Experience for Canada*, in *DRAWING BOUNDARIES: LEGISLATURES, COURTS, AND ELECTORAL VALUES* 156, 165 (John C. Courtney et al. eds., 1991) ("[M]y own view, quite simply, is that the most powerful statistical test for partisan gerrymandering is (as it is in so many other areas) the interocular test, i.e., 'Does the evidence for gerrymandering leap up and hit you between the eyeballs?').

42. See *QUIET REVOLUTION*, *supra* note 5, at 38-298.

sociologists, and political scientists examined factors ranging from the history of discrimination within a particular jurisdiction to contemporary socioeconomic disparities to campaign appeals. Social scientists of various stripes performed statistical racial bloc voting analyses. Litigators therefore became sophisticated consumers of a wide range of empirical work. But they also brought to the enterprise a situation sense that helped to place some of the social scientific analysis in context.

For example, in *Gingles* itself, the three-judge district court had held that some of the empirical evidence of recent black electoral success was insufficient to show equal electoral opportunity because the very pendency of a lawsuit might skew election results by “work[ing] a one-time advantage for black candidates in the form of unusual organized political support by white leaders concerned to forestall single-member districting.”<sup>43</sup> This understanding of litigation as a relevant factor in racial bloc voting analysis has informed a series of cases since.<sup>44</sup>

From the start of its emergence as a distinctive field, legal scholarship about the law of democracy has reflected this interdisciplinary perspective. Several litigators—among them Lani Guinier, Sherrilyn Ifill, Sam Issacharoff, Brian Landsberg, Nate Persily, Michael Pitts, Dan Tokaji, and I—ultimately became law professors and produced a wide range of voting rights-related scholarship that fit within the broad Epstein-King conception of empirical work.<sup>45</sup> Still other litigators, although they remained full-time practitioners,

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43. *Gingles v. Edmisten*, 590 F. Supp. 345, 367 n.27 (E.D.N.C. 1984) (three-judge court), *aff'd in relevant part and rev'd in part sub nom.* *Thornburg v. Gingles*, 478 U.S. 30 (1986).

44. For a discussion of these cases and the differing approaches courts have taken to the question of litigation's effect on elections, see *Ruiz v. City of Santa Maria*, 160 F.3d 543, 556-57 (9th Cir. 1998) (per curiam).

45. For some representative works by other scholars who spent substantial parts of their careers working on voting rights cases, see LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994); SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (4th ed. 2012); BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT* (2007); Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385 (2010); Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 95-96 (1997); Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710 (2004); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1837 (1992) [hereinafter Issacharoff, *Polarized Voting*]; Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276 (1998); Persily, *supra* note 7; Michael J. Pitts, *Redistricting and Discriminatory Purpose*, 59 AM. U. L. REV. 1575, 1659 (2010); Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903 (2008); and Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006).



published significant scholarship, both empirical and theoretical.<sup>46</sup> A second and third generation of law of democracy scholars, many of them holding advanced degrees in relevant fields, engaged in a range of interdisciplinary work, some of it quantitative and some of it theoretical.<sup>47</sup> At the same time, many leading legal scholars without formal advanced training in other disciplines incorporated social science insights into their work.<sup>48</sup>

Doctrinal demands influenced social scientific work as well, among other things spurring political scientists to refine their statistical techniques. For example, bivariate ecological regressions of the kind in wide use at the time of *Gingles* quite often produced “impossible results”—estimates that more than one hundred percent of the black voters or less than zero percent of the white voters had voted for the minority community’s candidate of choice.<sup>49</sup> That problem inspired Gary King in his pathbreaking work on ecological infer-

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46. For some examples of important voting rights scholarship written by practicing lawyers, see, for example, LAUGHLIN McDONALD, *AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS* (2010); LAUGHLIN McDONALD, *A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA* (2003); FRANK R. PARKER, *BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965* (1990); James U. Blacksher, *Dred Scott’s Unwon Freedom: The Redistricting Cases as Badges of Slavery*, 39 *HOW. L.J.* 633 (1996); Blacksher & Menefee, *supra* note 26; Kristen Clarke, *The Obama Factor: The Impact of the 2008 Presidential Election on Future Voting Rights Act Litigation*, 3 *HARV. L. & POL’Y REV.* 59 (2009); Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 *VAND. L. REV.* 523, 525-42 (1973); and Edward Still, *Alternatives to Single-Member Districts*, in *MINORITY VOTE DILUTION* 249 (Chandler Davidson ed., 1984).

47. For only a few of the many recent examples, see, for example, Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 *CALIF. L. REV.* 1209, 1219-20 (2003); Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 *U. CHI. L. REV.* 1493, 1494 (2008); Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 *IND. L.J.* 1289, 1290 (2011); Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *The Politics of Preclearance*, 12 *MICH. J. RACE & L.* 513, 513 (2007); D. James Greiner, *Re-Solidifying Racial Bloc Voting: Empirics and Legal Doctrine in the Melting Pot*, 86 *IND. L.J.* 447, 448 (2011); and Michael S. Kang, *Race and Democratic Contestation*, 117 *YALE L.J.* 734, 734 (2008).

And of course more senior scholars with advanced training in other fields such as Richard L. Hasen and Daniel Hays Lowenstein, the coauthors, along with Daniel P. Tokaji, of *ELECTION LAW: CASES AND MATERIALS* (5th ed. 2012), remain productive (as well as, in Richard Hasen’s case, a major resource through his election law listserv).

48. This category includes scholars like Jim Gardner, Heather Gerken, Ellen Katz, Spencer Overton, and Richard Pildes. For examples of their voting rights-related work that engages empirical questions, see, for example, James A. Gardner, *Stop Me Before I Quantify Again: The Role of Political Science in the Study of Election Law*, 32 *LOY. L.A. L. REV.* 1141 (1999); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 *HARV. L. REV.* 1663 (2001); Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 *U. MICH. J.L. REFORM* 643 (2006); Spencer Overton, *Voter Identification*, 105 *MICH. L. REV.* 631 (2007); Pildes, *supra* note 7; and Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 *U. CHI. LEGAL F.* 241.

49. See GARY KING, *A SOLUTION TO THE ECOLOGICAL INFERENCE PROBLEM: RECONSTRUCTING INDIVIDUAL BEHAVIOR FROM AGGREGATE DATA* 16-17 & tbl.1.3 (1997).

ence,<sup>50</sup> which has influenced not only how racial bloc voting is proven in voting rights cases but also how scholars analyze data in other contexts. Still other scholars who participated as expert witnesses incorporated their litigation experiences into their scholarship.<sup>51</sup>

In short, the voting rights world reflects a complex blend of practical and academic, theoretical and empirical, and doctrinal and social scientific work within law schools, within the academy, and by the profession.

And as with scholarship about one person, one vote, legal scholarship again produced a body of work that placed the Court's quantitative turn in context. For example, Sam Issacharoff's article, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, offered a rationale for the Court's elevation of racial bloc voting to the linchpin of a section 2 claim; it located its explanation in the Court's attraction to a relatively objective, process-oriented approach to questions of political power.<sup>52</sup> Lani Guinier's work drew on political theory and case studies to explain what she saw as the cabining of potentially transformative ideas of political equality by a judicial focus on measurable election results.<sup>53</sup> And Sam Issacharoff, Rick Pildes, and I have tried to show how the Court's efforts to treat voting as an issue of individual rights rather than structural considerations have shaped the evolution of legal doctrine.<sup>54</sup> Put somewhat differently, legal scholars both identify questions in the law of democracy that need empirical answers and question how those answers fit into a broader understanding of the law of democracy. And they bring to that analysis a sensibility informed by their understanding of the promises, and limitations, of litigation as a mechanism for realizing constitutional values.

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50. *See id.* at 13-14.

51. For some examples, see J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* (1999); DANIEL MCCOOL ET AL., *NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE* (2007); Richard L. Engstrom et al., *Cumulative Voting as a Remedy for Minority Voter Dilution: The Case of Alamogordo, New Mexico*, 5 J.L. & POL. 469 (1989); and Richard L. Engstrom & Charles Barrilleaux, *Native Americans and Cumulative Voting: The Sisseton-Wahpeton Sioux*, 72 SOC. SCI. Q. 388 (1991).

52. Issacharoff, *Polarized Voting*, *supra* note 45, at 1871 (concluding, after discussing racial bloc voting and process theory, that "[t]he focus on voting patterns offers fairly dependable evidence of electoral process failures through the political exclusion of minorities while relieving the courts of the need to police the outcomes of what can then be certified as fairly constituted political bodies").

53. *See* LANI GUINIER, *LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE* 220-47 (2003); GUINIER, *supra* note 45, at 41-118.

54. This point permeates our casebook, ISSACHAROFF ET AL., *supra* note 45. For particular discussions, see, for example, Issacharoff & Karlan, *supra* note 1, at 575-78; Pamela S. Karlan, *Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78 UMKC L. REV. 875, 877-80 (2010); and Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 54 (2004).

## II. CAMPAIGN FINANCE, POLITICAL CORRUPTION, AND EMPIRICAL QUESTIONS TO JUDICIAL ANSWERS

In contrast to the representation cases, where some ideal of equality underpins the doctrine,<sup>55</sup> when it comes to political spending the Supreme Court has squarely, and in recent years with increasing vehemence, “rejected the premise that the Government has an interest ‘in equalizing the relative ability of individuals and groups to influence the outcome of elections.’”<sup>56</sup> Instead, the Court has identified only two rationales for regulating political spending. First, spending can be limited when the limit is narrowly tailored to prevent “corruption or the appearance of corruption.”<sup>57</sup> Second, disclosures about political spending can be required in order to serve “a governmental interest in providing the electorate with information about the sources of election-related spending.”<sup>58</sup>

Although they therefore focus on different goals, political representation and campaign finance regulation are similar in how they both turn on a question that is simultaneously strongly empirical and deeply normative: in what ways does the regime under discussion deviate from some ideal?<sup>59</sup> In the representation cases, this point is captured by the centrality of the idea of “dilution.” In the campaign finance cases, it is captured by the centrality of the idea of “corruption.” Empirical work can begin to measure dilution or corruption—or answer the question whether a particular legal rule effectively combats dilution or corruption—only once normative work has defined a baseline against which dilution or corruption can be measured. As Justice Scalia observed during the

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55. The Court’s decision in *Baker v. Carr*, 369 U.S. 186, 237 (1962), to rest the justiciability of apportionment challenges on the Equal Protection Clause—as opposed to, say, the more structural language of the Republican Form of Government Clause of Article IV, Section 4—led legal arguments, and the social scientific discussions they spurred, to adopt some form of equality as the appropriate baseline. See Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 114 (2000) (tracing the consequences of this choice).

56. *Citizens United v. FEC*, 558 U.S. 310, 350 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (per curiam)); see also, e.g., *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825 (2011) (“We have repeatedly rejected the argument that the government has a compelling state interest in ‘leveling the playing field’ that can justify undue burdens on political speech.”); *Davis v. FEC*, 554 U.S. 724, 742 (2008) (“Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, Art. I, § 2, and it is a dangerous business for Congress to use the election laws to influence the voters’ choices.”).

57. *Citizens United*, 558 U.S. at 357.

58. *Id.* at 367 (alteration and internal quotation marks omitted).

59. This point is developed at greater length in Issacharoff & Karlan, *supra* note 7, at 1717-34.

oral argument of my first case before the Supreme Court, “You don’t know what watered beer is unless you know what beer is, right?”<sup>60</sup>

The law has reached at least some understanding of what counts as “dilution.” Quantitative malapportionment claims are easy: they start from a baseline of equipopulosity among districts. There can be strong disagreement about what the population to be measured is—is it residents, citizens, or something else?—and about how large a population deviation is permissible, and in the service of what ends, but there is a shared understanding of what it means to talk about a deviation. Qualitative vote dilution claims are a bit trickier. On the one hand, they turn to an important degree on some intuition about seat/vote ratios: within the constraints imposed by geography, the racial vote dilution cases reflect a sense that a group of a particular size should be electing its preferred candidates at a level that bears some relationship to its overall presence in the electorate. On the other hand, the law is uncomfortable with too mechanical a proportionality requirement and thus has struggled with how to decide when a group’s claim that its power has been unfairly diminished is “a mere euphemism for political defeat at the polls.”<sup>61</sup> Still, there is at least a rough sense of what dilution means and how it relates to ideals of equality.

But what counts as “corruption or the appearance of corruption”? One might think the answer would depend on “some notion of what a ‘pure’ or ‘clean’ or ‘accurate’ process would produce.”<sup>62</sup> But beyond the obvious—that there is something troubling about outright quid pro quo dealmaking, even if it does not fall within the technical definition of criminal bribery statutes—there is little consensus about what qualifies.<sup>63</sup> The Supreme Court’s decision in *Citizens United v. FEC*<sup>64</sup> illustrates this point. There, the Court held that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”<sup>65</sup> Its explanation in one sense sounds empirical:

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60. Transcript of Oral Argument at 8, *Chisom v. Roemer*, 501 U.S. 380 (1991) (No. 90-757).

61. *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971); see 42 U.S.C. § 1973(b) (2011) (simultaneously providing that the “extent to which members of a protected class have been elected to office” is a relevant factor in deciding whether there is illegal vote dilution while cautioning that nothing in the Voting Rights Act “establishes a right to have members of a protected class elected in numbers equal to their proportion in the population”).

62. Issacharoff & Karlan, *supra* note 7, at 1718.

63. See Cain, *supra* note 14, at 1114-16; Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111. For a recent example of an extraordinarily capacious definition of corruption, see generally LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011). For a review suggesting that Lessig’s definition of corruption swallows up a set of concerns that have historically been treated as separate, see Richard L. Hasen, *Fixing Washington*, 126 HARV. L. REV. 550 (2012) (book review).

64. 558 U.S. 310 (2010).

65. *Id.* at 357.

The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse “to take part in democratic governance” because of additional political speech made by a corporation or any other speaker.<sup>66</sup>

Those statements in *Citizens United* are phrased as statements of fact, or predictions. But as I have explained elsewhere, “the Court’s decision in *Citizens United* reflected a philosophical, rather than an empirical, position on money’s effect on politics.”<sup>67</sup> It will be interesting to see whether and how scholars can subject those assertions to empirical testing. Does a huge influx of money into the political system change either voter turnout or citizens’ views of the legitimacy of the system? Precisely because the political ecosystem is so complex, this may be a fertile area for experimental empirical work. In the meantime, one contribution that conventional legal scholarship can make is to focus attention on the Court’s attempt to characterize deeply contested normative questions as straightforward issues of fact.

And when it comes to disclosure provisions, the Court has long recognized at least two distinct theories for how disclosure produces a better political process. First, disclosures about the sources of a candidate’s financial support—whether that support takes the form of contributions or independent expenditures—might provide cues to voters that enable them to make more intelligent decisions. In general, as Elizabeth Garrett explains, “the position of a group with known preferences on an issue can serve as an effective shortcut for ordinary voters”,<sup>68</sup> that function can be magnified when the support takes a financial form, since knowing the amount can “allow[] voters a sense of how important the election of a particular candidate is” to a particular spender.<sup>69</sup> Voters can infer that the interests supporting the candidate are “the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.”<sup>70</sup> Second, requiring disclosure can serve the anticorruption rationale “by exposing large contributions and expenditures to the light of publicity.”<sup>71</sup> The Court pointed to how “[a] public armed with information about a candidate’s most generous supporters is better able to detect

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66. *Id.* at 360 (citation and some internal quotation marks omitted) (quoting *McConnell v. FEC*, 540 U.S. 93, 144 (2003)).

67. Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 35 (2012).

68. Elizabeth Garrett, *The Future of Campaign Finance Reform Laws in the Courts and in Congress*, 27 OKLA. CITY U. L. REV. 665, 679 (2002).

69. *Id.* at 680.

70. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam).

71. *Id.*

any post-election special favors that may be given in return.”<sup>72</sup> But an alternative mechanism might be that, rather than disclosure deterring elected officials from giving post-election special favors, it deters supporters from providing the funds in the first place.

To the extent that disclosure operates in this last fashion, it imposes a cost: it deters actors from engaging in constitutionally protected political activity. As I have explained elsewhere, absent disclosure, “[i]nformation providers might be more likely to provide what we might call ‘first order information’—arguments about policy issues or candidates, for example,” but the public will have less of “what we might call ‘second order information’—the cues that a speaker’s identity provides to his listener that enable the listener to gauge the quality of the information.”<sup>73</sup> Determining whether that tradeoff occurs, and its magnitude, are empirical questions that will depend, among other things, on the disclosure regime at issue. Deciding how to balance the competing values is, of course, a normative question.

Two of the papers at CELS begin the process of trying to answer these complex questions about corruption, disclosure regimes, and the potential relationship between the two. The papers raise interesting substantive questions about how we should think about designing legal policies. They also illustrate the importance of transparency not just in the law of democracy, but in empirical legal studies as well. And they each show how situation sense can inform quantitative empirical projects.

The paper presented by Miguel F.P. de Figueiredo and his colleagues<sup>74</sup> illustrates one challenge of doing empirical work on corruption. The authors are admirably transparent about their method: an ingenious field experiment conducted during a mayoral runoff election in São Paulo, Brazil. Both candidates had been included on a “Dirty List” published by the Brazilian Magistrates Association that catalogued politicians “who had convictions involving impropriety while in government office.”<sup>75</sup> The experimenters randomly provided voters either with no information at all or with a flier informing them that one or the other of the two candidates was on the Dirty List (and briefly for what reason the candidate had been included). They then looked to see whether that intervention affected the candidate’s share of the vote or turnout among the candidates’ supporters. They also conducted a post-election survey experiment to see whether one candidate’s supporters were more likely than the other’s to be influenced by information about official improprieties.

The paper carefully explains the research design, including checks the authors included to explore voter awareness of the issues prior to the experiment.

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72. *Id.*

73. Pamela S. Karlan, *The “Ambiguous Giving Out”: The Complicated Roles of Disclosure and Anonymity in Political Activity*, 27 J.L. & POL. 655, 657 (2012).

74. Figueiredo et al., *supra* note 9.

75. *Id.* at 3.

They helpfully provide a translated copy of the fliers themselves, so that readers can see exactly what information voters received.

But there remains a hidden, or at least underexplored, assumption. Because the authors rely on the Dirty List, they never confront directly whether their paper can actually answer the question its title poses: “When Do Voters Punish Corrupt Politicians?” For it to do so, the politicians must *be* corrupt, but to my mind, there is a real question whether that characterization properly fits the behavior of both of the candidates the paper includes. The alleged behavior of one of the two candidates—Gilberto Kassab—fits comfortably within a consensus understanding of corruption. He was convicted of having participated in a scheme to use public funds to purchase newspaper advertisements defending his “personal interests.”<sup>76</sup> But the issue is more complex with respect to the second candidate, Marta Suplicy. Suplicy was convicted on what the authors call “more serious charges”: namely, steering an R\$2 million no-bid contract for educating schoolteachers to an advocacy NGO she had founded and on whose board she had previously served.<sup>77</sup> Leaving aside the fact that her conviction was still on appeal at the time of the election, it is unclear to me that the authors correctly equated her “impropriety” with “corruption.” Nothing about their account suggests that Suplicy benefited in a personal financial way from flouting government contracting restrictions. Nor is there any suggestion that she gave the contract to the NGO as a reward for any financial support of her political candidacy. Some observers might view her conduct as a conflict of interest rather than as corrupt.

Given the focus of the paper, its authors might respond that it is essentially irrelevant whether Kassab or Suplicy *actually* was corrupt; their paper concerns an experiment about what happens when voters are *told* that a candidate is corrupt. So their experiment could presumably be replicated using any election without regard to whether the candidates had or had not been charged with or convicted of anything, as long as the voters who were being studied were unaware of the actual state of affairs. But the existence of disagreement about what counts as “corruption” may well pervade the public, as well as the academy. If, for example, voters who were given the experiment’s fliers did not view the short descriptions of the accusations as indicating “corruption”—and as far as I can tell, that word appeared nowhere on the fliers<sup>78</sup>—then the experiment does not necessarily answer the question in the paper’s title.

But let us suppose that the paper does measure voters’ response to a disclosure about corruption. The experimental results suggest that voters do not

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76. *Id.* at 10. I leave aside, as the authors did, the fact that the conviction was overturned on appeal; the truth or falsity of the allegations is irrelevant to the experiment except to the extent that the experimental subjects were aware of those facts, and the paper explains why there is little reason to think they were.

77. *Id.*

78. *See id.* at 15 fig.1.

respond with anything like the reaction that the most enthusiastic supporters of disclosure regimes might anticipate: while Suplicy's voters "perceive[d] her more negatively, on average" if they learned of her placement on the Dirty List, "[w]hen Kassab voters learn[ed] about their candidate's placement on the Dirty List, their evaluation of their candidate [was] essentially unchanged."<sup>79</sup> Nor did turnout for candidates change dramatically based on the information provided. Both results are interesting and worth further study. But there is a possibility that the dampened response may be due to a feature of the Brazilian system that does not carry over to ours. Brazil has mandatory voting, enforced by a small fine that, until paid, bars the nonvoter from various government benefits.<sup>80</sup> So a supporter who learns that the candidate he initially preferred is corrupt does not have the costless option simply to stay home. And in a runoff election, therefore, a voter's most realistic choices are to spoil his ballot or cast it for a candidate he does not like. But if Figueiredo's results do bear on U.S. politics, they should at least raise questions about whether disclosure regimes perform the function their proponents claim for them. After all, if even disclosure of corruption itself does not disadvantage a candidate, one might wonder whether disclosure of a candidate's sources of campaign funds would cause voters to respond by withdrawing their electoral support. And absent such an electoral effect, the anticorruption deterrent effect of disclosure seems less plausible.

The appendix to the Figueiredo paper discussing legal and ethical concerns with the experiment illustrates a different issue with empirical studies. The authors explain that they felt comfortable conducting the field experiment only because "both candidates had corruption convictions," the election involved a two-candidate runoff so that there could be no "effects on the vote shares of other candidates that could affect the outcome of the election," and polls showed that Kassab's lead over Suplicy was sufficiently large that even if every voter who received the experimental fliers changed his or her vote, the election outcome would have been the same.<sup>81</sup> In short, they suggest that field experiments like this can only be conducted under a rare confluence of circumstances.

But the more distinctive the elections in which field experiments can be conducted, the harder it is to be confident that the results are portable to other contexts. This is where situation sense reenters the picture. I hesitate to offer too detailed an analysis here, since one of the central points of my own work has been the need to understand the complex ecosystem in which politics takes place,<sup>82</sup> and everything I know about politics in São Paulo, I learned from this very interesting paper. But I know from experience working on U.S. cases that

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79. *Id.* at 30.

80. *See id.* at 11.

81. *Id.* app. I at 34.

82. *See* ISSACHAROFF ET AL., *supra* note 45; Issacharoff & Karlan, *supra* note 7, at 1732-34.



involved runoff elections<sup>83</sup> that they raise distinctive issues. For example, roughly a third of the voters in the São Paulo election did not initially support either of the candidates who made the runoff.<sup>84</sup> Moreover, as Figueiredo and his colleagues note, one of the two candidates was affiliated with a party that had “a long history of emphasizing transparency in government,”<sup>85</sup> and, not surprisingly, negative information about that candidate’s integrity had a greater impact than similar information about her opponent, whose party had “developed a brand as a party whose candidates may rob, but ‘get things done.’”<sup>86</sup> It is precisely because the authors combined a qualitative understanding of São Paulo’s politics with an empirical experiment designed around a series of statistical techniques that they deliberately kept their conclusion modest:

As we found in São Paulo, the existence of information effects can depend on highly contextual factors associated with particular candidates, parties, and the distribution of preferences in the electorate. . . . As we have documented, the relationship between information and accountability is by no means a simple one.<sup>87</sup>

A second Conference paper, Abby Wood and Douglas Spencer’s *In the Shadows of Sunlight: The Effects of Transparency on State Political Campaigns*, also seeks to answer the question whether citizens will behave differently in the face of information disclosures.<sup>88</sup> This time, however, the paper focuses on the behavior of donors, rather than voters, and uses aggregate data rather than a field experiment. The Wood and Spencer paper is more directly tied to assessing the effects of *Citizens United*. The basic outline of their argument goes something like this: The Supreme Court’s decision in *Citizens United* had the effect of rendering unconstitutional twenty-four states’ bans on corporate independent expenditures in state elections.<sup>89</sup> The lifting of this ban will increase political spending by corporations and unions. Disclosure rules might mitigate this effect in at least two ways. First, disclosure rules might affect actors’ willingness to participate. Required disclosure might deter political spend-

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83. See *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990) (three-judge court), *appeal dismissed*, 498 U.S. 1129 (1991); *Whitfield v. Democratic Party*, 686 F. Supp. 1365 (E.D. Ark. 1988), *aff’d by an equally divided court*, 902 F.2d 15 (8th Cir. 1990) (en banc).

84. See Figueiredo et al., *supra* note 9, at 10-11.

85. *Id.* at 27.

86. *Id.* at 32.

87. *Id.* at 33.

88. Wood & Spencer, *supra* note 9. A third CELS paper, Cheryl Boudreau et al., *Lost in Space? Heuristics, Spatial Voting, and Polling-Place Information in Low-Saliency Elections* (CELS Version, Nov. 2012), also focuses on the relationship between voters and information, but space constraints preclude me from addressing it in detail.

89. *Citizens United* had itself concerned only a federal law banning the expenditure of general corporate or union treasury funds on electioneering communications in federal elections, but the Court’s decision two years later in *American Tradition Partnership, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam), striking down Montana’s ban on corporate independent expenditures, confirmed the breadth of the Court’s categorical rule.

ing. Second, even if disclosure rules do not change the amount of money that flows into the system, they might change the tenor of the speech it purchases.

Wood and Spencer use a variety of existing data sources to try to get a handle on those questions. Their analysis leads them to the following empirical claims: *Citizens United* caused a significant increase in state-level independent expenditures. With respect to disclosure rules, Wood and Spencer suggest that such rules may “inhibit political actors and their supporters from running attack ads.”<sup>90</sup> They claim also that when states have strengthened their campaign contribution disclosure regimes, this change has “dampen[ed] contribution activity,” but it has done so more among smaller donors than among larger ones.<sup>91</sup> This, they suggest, raises the question whether disclosure regimes should be changed so as not to deter small donors whose spending poses little danger of corruption.

In one sense, Wood and Spencer recognize that political spending is a complex process. That recognition underlies their suggestion that by “mitigat[ing] the effects of laws that make it easier to spend in elections,”<sup>92</sup> disclosure rules can function as a potential substitute in some respects for outright spending bans. In this sense, disclosure laws can play an “instrumental role” in “reducing the amount of money in politics.”<sup>93</sup>

In another sense, however, Wood and Spencer may be oversimplifying the political spending ecosystem. Consider first their claim that “the [*Citizens United*] opinion led to spending increases on the order of 100%” in the states that had previously banned corporate independent expenditures.<sup>94</sup> They illustrate this point with what looks like two trend lines depicting a difference-in-difference analysis of the amount of independent expenditures between states that never banned corporate independent expenditures and states that had such bans prior to *Citizens United*. Two related reactions immediately leap out. The fact that according to their data independent expenditures *decreased* rather significantly between 2006 and 2010 in the control group of states requires some explanation in light of the dramatic increase in national political spending. What Wood and Spencer may be observing is what Sam Issacharoff and I long ago called the “hydraulic principle”<sup>95</sup>: money being displaced, rather than eliminated. At the federal level, close to three-quarters of outside-group spending on political advertisements in 2010 “came from sources that were prohibited from spending money in 2006.”<sup>96</sup> This raises the question whether what Wood

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90. Wood & Spencer, *supra* note 9, at 16.

91. *Id.* at 25.

92. *Id.* at 2.

93. *Id.* at 5.

94. *Id.* at 8.

95. See Issacharoff & Karlan, *supra* note 7, at 1708-18.

96. Spencer MacColl, *Citizens United Decision Profoundly Affects Political Landscape*, OPENSECRETS BLOG (May 5, 2011), <http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html>. For more recent data,

and Spencer are seeing is a change in the *amount* or the *form* of money being spent. In addition, they are relying of necessity on data from only two election cycles. Two cycles at best only weakly constitute a trend. One can always connect two straight points with a line, as Wood and Spencer do in Figure 1 of their paper,<sup>97</sup> but that doesn't mean that the line continues past those points. It seems terribly unlikely that independent expenditures will continue to fall in the control group states unless some other form of political spending is replacing them.

A similar question arises with respect to Wood and Spencer's analysis of the effect of disclosure laws on the level of negative attack ads. Here, too, Wood and Spencer offer a difference-in-difference analysis of the proportion of ads that are attack ads with the treatment being the adoption of a more stringent disclosure regime. You might assume from the detailed methodology discussion that Wood and Spencer were working with a lot of data. To the contrary: they are writing about two gubernatorial election cycles in four states, one of which changed its disclosure regime. Wood and Spencer's data suggest that the three control states (whose disclosure laws did not change during the relevant time period) differ vastly from one another: "Utah, which had no attack ads in either period, is driving the effect for the controls. Attack ads in Delaware drop even more drastically than they do in Missouri [the treatment state], and the trend in Vermont is parallel, but lower than, the trend in Missouri."<sup>98</sup> They devote a page to what they term "state-level qualitative stories,"<sup>99</sup> but for anyone who has spent time dealing with the politics of different states in a more fine-grained way, Wood and Spencer's results seem at best loosely tied to the hypothesis they offer. The differences among the states seem to dwarf the difference in pre- and post-treatment Missouri. Moreover, situation sense suggests that it may be important to understand *why* Missouri switched its disclosure regime. If the switch itself reflects an underlying reaction against the tenor of pre-switch politics, then it may be hard to ascribe the post-switch tenor of politics to the change.

Finally, with respect to Wood and Spencer's suggestion that disclosure laws are more likely to dampen participation by relatively small donors than larger ones, legal experience raises questions about the causal mechanism. Several years ago, during the time period covered by Wood and Spencer's study, I spoke at a Yale Law School reunion event. In talking about campaign contributions, I asked for a volunteer from the audience. Using his name and hometown, I projected onto a screen, for hundreds of alumni to see, the page from OpenSecrets.org detailing his contributions to candidates for federal

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see Ctr. for Responsive Politics, OPENSECRETS, <http://www.opensecrets.org> (last visited June 6, 2013).

97. Wood & Spencer, *supra* note 9, at 9 fig.1.

98. *Id.* at 16.

99. *Id.* at 18.

office. There was an audible gasp in this room filled with well-heeled, highly educated, legally sophisticated citizens as alumni grabbed their Blackberries to copy down the website.

It takes time for the awareness of changes in legal rules that do not govern primary activity to filter down to the rules' targets. Here, even more so than with Wood and Spencer's other findings, the speed of the observed change should lead people with a situation sense about institutions and legal rules to wonder why they're seeing what they're seeing. The fact that they see a larger change in smaller donors, who seem intuitively less likely than big political spenders to follow changes in disclosure regimes, warrants further thought. That's not to say that there have not been real changes in both legal regimes and actors' behavior with respect to political spending over the past decade. There have been. But it is simply to point out that the causal relationships may be much more complex than the tools can capture. And the very fact that there are these kinds of ambiguities in even a very thoughtful empirical paper like Wood and Spencer's should caution against the kind of sweeping empirical claims that underlie cases like *Citizens United*.

#### CONCLUSION

In thinking about the relationship between the two Conference papers this Essay examines, I was reminded of one of my favorite empirical papers, Alan Gerber's *Social Pressure and Voter Turnout*.<sup>100</sup> That paper reports on a large-scale field experiment in which 80,000 voters across Michigan were sent post-cards prior to a primary election. One group was sent a simple reminder that voting is a civic duty; a second group was sent a mailing that announced that a researcher was keeping tabs on their turnout; a third group received mailings containing a record of their household's turnout; and a final group received a mailing revealing both the voter's own turnout history and the turnout of his neighbors.<sup>101</sup> The experiment found that "[e]xposing a person's voting record to his or her neighbors turns out to be an order of magnitude more effective than conventional pieces of partisan or nonpartisan direct mail" at getting voters to turn out.<sup>102</sup>

The "surveillance effect"<sup>103</sup> has obvious implications for the issues Wood and Spencer are trying to resolve. Perhaps experimental studies of the effect of various disclosure rules would produce more generalizable insights. Would voters who received information on their neighbors' political contributions be more likely to contribute, or less? Would the manner in which information is

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100. Alan S. Gerber et al., *Social Pressure and Voter Turnout: Evidence from a Large-Scale Field Experiment*, 102 AM. POL. SCI. REV. 33 (2008).

101. *Id.* at 33-34.

102. *Id.* at 34.

103. *Id.* at 40.

revealed influence its behavioral effects? Would there be differences, as there were in Figueiredo's experiment, in how different groups react to similar disclosures? In a related vein, would it be possible to devise an experiment for examining the effect on voter turnout as well as political spending? Experiments seem a potentially more promising way to answer these questions. And the answers to those questions might lead us to question the answers the Supreme Court has given to questions of campaign finance reform.

There clearly is an important role for empirical work on the law of democracy. It helps litigators to develop and judges to adjudicate cases across a range of areas. It helps policymakers to assess the effectiveness of different regulatory approaches. And it provides a vantage point from which to critique the work of theorists and doctrinalists, just as theoretical and doctrinal work provides a point from which to shape empirical work.

But the long history of truly interdisciplinary collaboration both within and outside the academy suggests that law schools are not the only, or necessarily even the primary, place for doing this work. To be sure, legal scholars working in the law of democracy benefit greatly from work done by people who have their feet firmly planted outside the law—in computer science, history, political science, political theory, psychology, sociology, and an astonishing range of other disciplines.<sup>104</sup> But legal scholars also benefit from being able to draw upon intradisciplinary insights—for example, by understanding the procedural aspects of different structures for resolving representation claims or by seeing the relationship between the criminal justice system and disenfranchisement. And instead of falling prey to what Jim Gardner refers to as “a sort of economic equation envy,”<sup>105</sup> legal scholars should recognize the value that a legal situation sense can bring to identifying how practical and institutional concerns shape the answers that courts give to questions about the law of democracy and the questions those answers raise.

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104. For example, I coauthored an article involving an empirical study of voting among residents of long-term care facilities where my coauthors included professors of medicine, psychiatry, neurology, law, and public health. See Jason H.T. Karlawish et al., *Identifying the Barriers and Challenges to Voting by Residents in Nursing Homes and Assisted Living Settings*, 20 J. AGING & SOC. POL'Y 65 (2008).

105. Gardner, *supra* note 48, at 1146.

